

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

TELEPHONE (605) 224-0560
FAX (605) 224-9020

December 17, 2004

David D. Knoff, Esq.
Counsel for Areawide Business Council, Inc.
P.O. Box 37
Yankton, South Dakota 57078-0037

John S. Lovald, Esq.
Chapter 12 Trustee
P.O. Box 66
Pierre, South Dakota 57501

Subject: *In re John E. Uecker and Erdene M. Uecker*
Chapter 12; Bankr. No. 02-41062

Dear Counsel:

The matter before the Court is Areawide Business Council, Inc.'s ("Areawide") and Richard and Clara Kafka's ("Kafkas") MOTION TO APPROVE (APPLICATION FOR) ADMINISTRATIVE EXPENSE CLAIM (hereinafter referred to as "Areawide's request for payment of an administrative expense" or "Areawide's request"). This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and the accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, Areawide's request will be denied.

Summary. John E. Uecker and Erdene M. Uecker ("Debtors") filed for relief under chapter 12 of the bankruptcy code on September 18, 2002. Debtors filed their chapter 12 plan on March 24, 2003. In their plan, Debtors proposed, among other things, to pay their judgment creditors¹ \$27,465.00. Debtors arrived at this figure by subtracting the debt secured by a first mortgage held by Commercial State Bank (\$380,828.00), the debt secured by a second mortgage held by Farm Service Agency (\$76,215.00), and Debtors' homestead exemption (\$30,000.00) from the value of their real estate (\$514,508.00).

Areawide filed an objection to Debtors' plan on March 31, 2003. In its objection, Areawide questioned the value Debtors

¹ Debtors did not identify their "judgment creditors" in their plan or in their subsequent modified plans. However, based upon its review of Debtors' schedules and statement of financial affairs, the Court is satisfied that both Areawide and the Kafkas are among Debtors' judgment creditors.

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placed on their real estate. Areawide also stated that the Kafkas joined in its objection.

Pursuant to the Court's June 13, 2003 scheduling order, an evidentiary confirmation hearing was set for July 3, 2003, and the parties were directed to file, *inter alia*, any appraisals by June 27, 2003. According to Areawide's appraisal, which it filed on June 19, 2003, Debtors' real estate was worth \$710,000.00.

The confirmation hearing was held as scheduled. On August 25, 2003, the Court entered an order denying confirmation of Debtors' plan and directing Debtors to serve and file a modified plan. Debtors did so on November 10, 2003.

In their modified plan, Debtors proposed, among other things, to pay their judgment creditors \$100,465.00. Debtors arrived at this figure by subtracting the debt secured by the first mortgage held by Commercial State Bank (still \$380,828.00), the debt secured by the second mortgage held by Farm Service Agency (still \$76,215.00), and Debtors' homestead exemption (still \$30,000.00) from the value of their real estate (increased to \$587,808.00). Using Debtors' figures, the Court calculates the proposed payment to Debtors' judgment creditors should have been \$100,765.00.

On December 4, 2003, Areawide filed its request for payment of administrative expense. In its request, Areawide asked the Court to approve as an administrative expense the sum of \$2,086.00, representing the amount Areawide paid Gregg C. Hubner ("Hubner") to appraise Debtors' real estate and attend Debtors' confirmation hearing. In support of its request, Areawide argued that Hubner's appraisal "benefited [sic] the judgment creditors in that an agreement was reached between the debtors and creditors regarding the value of the land so that the judgment creditors are to receive monies not previously provided for in the debtors' plan."²

On December 11, 2003, Chapter 12 Trustee John S. Lovald ("Trustee Lovald") filed a response to Areawide's request. In his response, Trustee Lovald stated that he "join[ed] in [Areawide's] request . . . but only if the bill [were] paid, or reimbursed, from the payments paid to [him] for the benefit of [the judgment creditors]." On December 29, 2003, Haar Implement, Inc. also filed an objection to Areawide's request, in which it questioned the

² Presumably, Areawide was referring to Debtors' increasing the stated value of their real estate from \$514,508.00 (in their original plan) to \$587,808.00 (in their modified plan), which had the effect of increasing Debtors' proposed payment to their judgment creditors.

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benefit of, and the need for, Areawide's appraisal and suggested that if the appraisal benefitted Richard and Clara Kafka, they should be the ones to pay for it.³

Debtors filed a second modified plan on October 12, 2004. Therein, Debtors proposed, among other things, to pay their judgment creditors \$41,235.02. Debtors arrived at this figure by subtracting the debt secured by the mortgage held by Farm Service Agency (increased to \$97,464.98) and Debtors' homestead exemption (still \$30,000.00) from the value of their real estate (reduced to \$168,700.00).⁴ Areawide, joined by the Kafkas, filed an objection to Debtors' second modified plan on October 29, 2004, again questioning the value Debtors placed on their real estate.

Debtors' second modified plan and Areawide's request for payment of an administrative expense were heard November 10, 2004. Debtors' second modified plan was confirmed, with Debtors and Areawide to finalize the value of Debtors' real estate post-confirmation. Areawide's request was taken under advisement.

Discussion. Pursuant to 11 U.S.C. § 503(a), "[a]n entity may . . . file a request for payment of an administrative expense[.]" Section 503(b) provides a non-exclusive list of allowable administrative expenses. *United States Trustee v. Farm Credit Bank of Omaha (In re Peterson)*, 152 B.R. 612, 613-14 (D.S.D. 1993). However, it is to be "narrowly construed." *AgriProcessors, Inc. v. Iowa Quality Beef Supply Network, L.L.C. (In re Tama Beef Packing, Inc.)*, 290 B.R. 90, 96 (B.A.P. 8th Cir. 2003) (citation omitted).

Areawide has not identified the specific paragraph or subparagraph of § 503(b) under which it seeks reimbursement, leaving the Court to speculate as to the basis for its request. However, certain paragraphs and subparagraphs are clearly

³ By letter dated December 29, 2003, the Court advised Haar Implement that because it was a corporation, if it wished to be heard at the hearing on Areawide's request, it would need to be represented by counsel.

⁴ With Court approval, Debtors sold a portion of their real estate for the sum of \$553,956.00 and paid the debt secured by the first mortgage held by Commercial State Bank in full. While this clearly explains why the value of Debtors' real estate declined, the Court has not been able to reconcile Debtors' figures. However, the Court need not do so in deciding Areawide's request.

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inapposite.⁵ Only two, §§ 503(b)(1)(A) and 503(b)(3)(D), merit any discussion.

Pursuant to 11 U.S.C. § 503(b)(1)(A), an entity may recover "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case" as an administrative expense. In determining whether a claim is in fact an actual, necessary cost and expense of preserving the estate, "the court must consider whether (1) the expense arose from a transaction with the estate; and (2) whether it benefitted the estate in some demonstrable way." *AgriProcessors, Inc.* 290 B.R. at 96 (citation omitted).

[T]he majority implicitly recognizes the principle that § 503(b)(1) is strictly a priority provision. It does not create any liability of the estate to an entity, it only grants priority to liabilities that meet the criteria listed in § 503(b)(1). This is in contrast to the provisions of § 503(b)(2), (3), (4), and (5), which do, in fact, deal with the liabilities of entities other than the estate and, by their terms, create both a liability of the estate and a priority for that liability.

As a result, in order to claim a priority under § 503(b)(1), an entity must first show that there is some sort of liability running to it from the estate. Thus, to qualify for priority status, a debt must be incurred

⁵ Section 503(b)(1)(B) and (C) refer to taxes, fines, penalties, and reductions in tax credits. Section 503(b)(2) refers to compensation and expenses awarded under 11 U.S.C. § 330(a). Sections 503(b)(3)(A), (B), (C), (E) and (F) refer, in order, to the actual and necessary expenses incurred by: (1) a creditor that files an involuntary petition against the debtor; (2) a creditor that recovers, after Court approval, property transferred or concealed by the debtor; (3) a creditor that assists in a criminal prosecution connected to the case or to the business or property of the debtor; (4) a custodian superseded under 11 U.S.C. § 543; and (5) a member of an unsecured creditors committee. Section 503(b)(4) refers to compensation and reimbursement for professional services rendered and expenses incurred by an attorney or accountant on behalf an entity whose expense is allowable under § 503(b)(3). Section 503(b)(5) refers to compensation for services rendered by an indenture trustee in a chapter 9 or chapter 11 case. Finally, § 503(b)(6) refers fees and mileage payable under chapter 119 of title 28 (28 U.S.C. §§ 1821 *et seq.*). None of these sections has any bearing on the instant case.

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by the debtor in possession or the trustee.

. . . A party who incurs expenses is not entitled to their payment as a § 503(b)(1) administrative expenses.

Id. at 100 (Kressel, J., dissenting) (citations omitted).

In this case, nothing in the record suggests that the expense of Areawide's appraisal arose from anything other than a transaction between Areawide and its appraiser. Areawide has not shown, and indeed cannot show, that expense arose from a transaction with Debtors or their estate. Absent such a showing, Areawide cannot prevail under §503(b)(1)(A). *Id.* at 96 (citation omitted).

Pursuant to 11 U.S.C. § 503(b)(3)(D), a creditor may recover actual, necessary expenses incurred "in making a substantial contribution in a case under chapter 9 or chapter 11" as an administrative expense. However, "there is no provision in § 503 for the recovery of expenses incurred by a creditor in a bankruptcy case under Chapter 7, 12, or 13." *Peterson*, 152 B.R. at 614.

The Court is inclined to agree that Areawide has made a contribution, perhaps even a substantial contribution, in this case, at least from the perspective of some of Debtors' judgment creditors.⁶ However, there is simply no getting around the express language of that section limiting its applicability to chapter 9 and chapter 11 cases. *Id.* (citations omitted). Thus, Areawide cannot prevail under § 503(b)(3)(D), either.

⁶ The Court cannot say precisely how substantial a contribution Areawide may have made, because the record sheds no light on the question of how many judgment creditors would have received a distribution under Debtors' original plan and little light on the question of how many more would have received a distribution under Debtors' subsequent modified plans (although Areawide's attorney did concede at the November 10, 2004 confirmation hearing, which took place after Debtors' sale of a portion of their real estate, that only Areawide and the Kafkas would likely be affected by any upward adjustment in the value of Debtors' remaining real estate). The record also sheds little light on the question of how Debtors' unsecured creditors would ultimately have been affected by Debtors' modified plans (although Debtor John Uecker did testify at the November 10, 2004 confirmation hearing that unsecured creditors would likely be paid in full from the proceeds of the litigation described in both Debtors' original plan and their two modified plans).

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The Court recognizes that the list of allowable administrative expenses set forth in § 503(b) is not exhaustive. *Id.* However, the plain meaning of the statute and the Court's obligation to narrowly construe its provisions, *AgriProcessors, Inc.*, 290 B.R. at 96 (citation omitted), together preclude the Court's finding that the cost of Areawide's appraisal is recoverable from Debtors' estate as an administrative expense.

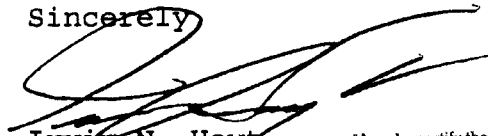
Certainly the list in § 503(b) is illustrative, but the language of the specifically enumerated provisions establishes that certain possible avenues for reimbursement are precluded by those that are included.

In re Blount, 276 B.R. 753, 764 (Bankr. M.D. La. 2002). See *Peterson*, 152 B.R. at 614.

Finally, even if the Court were to allow Areawide an administrative expense, the parties have not pointed the Court to, and the Court has not found, any authority that would support its limiting payment of that administrative expense in the manner suggested by Trustee Lovald in his response to Areawide's request. There is authority for surcharging a secured creditor's collateral for "the reasonable, necessary costs and expenses of preserving, or disposing of" that collateral. 11 U.S.C. § 506(c). However, Areawide has not requested relief under § 506(c). Moreover, even if it had, and even if § 506(c) would otherwise be applicable, only the trustee or the debtor-in-possession has standing under that section. See *White Front Feed & Seed v. State National Bank of Platteville (In re Ramaker)*, 117 B.R. 959, 966 (Bankr. N.D. Iowa 1990).

Accordingly, Areawide's request for payment of an administrative expense will be denied. The Court will enter an appropriate order.⁷

Sincerely

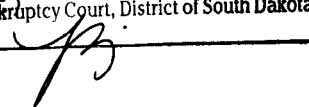

Irvin N. Hoyt
Bankruptcy Judge

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

INH:sh

cc: Haar Implement, Inc.
case file (docket original; serve parties in interest)

DEC 17 2004

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By 

⁷ Nothing in this letter decision or the accompanying order should be taken as prohibiting any judgment creditor who has benefitted or will benefit from Areawide's efforts from voluntarily contributing to the cost of Areawide's appraisal.

Bruce V. Anderson
Anderson Law Office, P.C.
PO Box 425
Wagner, SD 57380

Stephanie C. Bengford
Assistant U.S. Attorney
PO Box 5073
Sioux Falls, SD 57117-5073

Arnold Claeys (ELECTRONIC)
Farm Service Agency
200 4th Street SW, Room 308
Huron, SD 57350

Kenneth W. Cotton
PO Box 370
Wagner, SD 57380

Bruce J. Gering
Office of the U.S. Trustee
230 S Phillips Ave, Suite 502
Sioux Falls, SD 57104-6321

Vance RC Goldammer
PO Box 1728
Sioux Falls, SD 57101-1728

Haar Implement, Inc.
645 E. Hwy 46 & 50
Wagner, SD 57380

David D. Knoff
PO Box 37
Yankton, SD 57078-0037

John S. Lovald
Trustee
PO Box 66
Pierre, SD 57501

A. Thomas Pokela
PO Box 1102
Sioux Falls, SD 57101

Ray Porter Auction Service
28739 376th Ave.
Geddes, SD 57342

John E. and Erdene M. Uecker
39440 294th Street
Wagner, SD 57380