

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
ERIKSEN INVESTMENTS,) CASE NO. BK90-80920
)
) DEBTOR) CH. 11
) Filing No. 474, 478,
) 479, 480, 481, 482

MEMORANDUM

Aggregate Production Associates, Inc., has filed an application for fees and expenses pursuant to 11 U.S.C. § 506(b). Included in the application are attorney fees and out-of-pocket expenses incurred by the attorneys in the amount of \$113,635.77; professional accounting services from a certified public accounting firm in the amount of \$15,605.05; late charges on the underlying promissory note in the amount of \$21,907.02; accounting services from Graham Enterprises in the amount of \$15,634.00.

Objections have been filed by the debtor, the trustees of related cases and a creditor, Employer's Mutual Insurance Company.

Hearing was held on September 18, 1992. At said hearing, the moving party presented affidavit evidence in support of the application.

This application arises from a claim filed by Aggregate Production Associates, Inc. (Aggregate) based upon a claim originally held by CIT Group/Equipment Financing, Inc. (CIT). The CIT claim was listed in the original schedules as undisputed and oversecured. CIT did not file a claim.

The collateral for the claim was an asphalt paving production plant located in Omaha, Nebraska. That plant was used by this debtor and related debtors in the asphalt paving business. Although there were several related cases filed at approximately the same time, CIT had a claim only in this case.

CIT participated in the case from the beginning, approximately June 1 of 1990 through the end of February, 1991. It engaged in motion for relief from automatic stay litigation and other litigation concerning its rights. On or about March 1,

1991, CIT sold its interest in the claim to Aggregate for \$382,559.62. There is insufficient evidence before the Court for it to determine the actual amount of the CIT claim on the date of the assignment to Aggregate. For example, there is evidence presented by affidavit of Donald Graham that the claim purchase price included \$337,610.00 of principal owed by this debtor to CIT plus \$25,167.55 accrued interest owed by this debtor to CIT plus attorney fees of Dixon & Dixon, P.C., counsel for CIT in the amount of \$19,782.07.

The Court could assume that the principal and accrued interest as of March 1, 1991, were in the amounts alleged by Mr. Graham. However, Aggregate does not base its claim solely upon the principal and accrued interest figure noted above. It includes the Dixon & Dixon attorney fees of \$19,782.07 as part of its claim.

Aggregate received \$69,000.00 in adequate protection payments and, on its books, has applied the \$69,000.00 to accrued interest as of March 1, 1991; to the Dixon fees; to the Hancock & Dana, P.C., (CPA firm) fee; and to a portion of the Graham Enterprises, Inc., fees.

There is an issue raised by the objections concerning the actual amount of the claim of Aggregate. There has been no claims litigation and the claim has not been allowed in any amount. For confirmation purposes, Aggregate was permitted to credit bid at a sale of the plant in the amount of approximately \$397,000.00. However, that is irrelevant with regard to the actual amount of the allowed claim and the amount of Section 506(b) fees and expenses. This Court cannot determine the appropriate amount of Section 506(b) fees and expenses without initially making a determination of the allowed claim, without such fees and expenses, and then making a determination of the equity cushion between the sale price of the collateral and the allowed claim. The reason the Court cannot make such a determination is that there is a question in the mind of this judge whether the Dixon fees are allowable as part of the Aggregate claim. The Dixon fees were incurred on behalf of CIT. CIT did not file any request for allowance of those fees under Section 506(b). There has been no hearing on the reasonableness of the fees. Simply because Aggregate paid a gross amount of approximately \$382,000.00 for CIT's rights does not necessarily mean that the Aggregate claim is \$382,000.00. Aggregate's claim can only be derived from the allowable claim of CIT. The agreement between CIT and Aggregate does not break down the purchase price. It is only the statement of Mr. Graham with regard to the breakdown that permits the Court to even speculate about the amount of the attorney fees of the Dixon firm. There

is no evidence which would permit the Court to determine the reasonableness of those fees.

In addition to determining the allowed claim, it must eventually be determined how the adequate protection payments should be applied. Adequate protection was granted to CIT, after a trial, based upon the Court's determination from the evidence presented at the trial that the asphalt plant would decline in value at approximately \$4,800.00 per month, thereby, at some point, rendering the CIT claim undersecured or at least endangering the "adequate protection" of the equity cushion held by CIT on the petition date. It is arguable, at least, that adequate protection payments awarded under such a determination should be applied to accrued interest and principal, rather than to accrued interest and expenses incurred, but not yet allowed. Therefore, no determination of this application shall be made and it shall be considered deferred.

The debtor and the creditors who have participated in this hearing through the objection process are granted forty-five days to file specific objections to the claim of Aggregate. Since this is a confirmed liquidating plan, there is no debtor-in-possession or trustee to file the objection. Therefore, all parties in interest have a right to do so. If objections are timely filed, a preliminary pretrial statement shall be required. Issues that the parties may consider, in addition to those which they will raise on their own in the formal objection, are those which have been touched upon in the objections to the Section 506(b) fees and expenses. Those include, but are not limited to, the allowability of the Dixon fees as part of the Aggregate claim, and the reasonableness of any of the expenses incurred, including attorney fees and accounting fees since it appears on the face of the attorney fee application that this creditor purchased the claim for the sole purpose of liquidating the asset through sale via a confirmed liquidating plan, and purchase, at any price, of the asset.

This judge has done a detailed review of the attorney fee application and it is clear that most of the actions taken by the attorneys on behalf of Aggregate were not for the purpose of preserving the security or protecting an interest in a claim. Instead, they were directed at obtaining possession of the asphalt plant for use by Aggregate in its business. Such conclusion is reached by a simple review of the first few days of work listed on the attorney fee application. Even prior to the purchase of the claim, the attorneys were working on a disclosure statement and plan of liquidation. That same spirit appears throughout the fee application.

Therefore, not only factual but legal issues concerning the above two matters will be a significant part of the hearing on the allowance of the claim. A cursory review of case law permits this Court to tentatively conclude that it has the power to deny all fees and expenses if they are not reasonably incurred to protect the interest of a true creditor. However, such a conclusion is tentative only and the parties will be permitted to present the efforts of their research on that issue.

In conclusion, a ruling on the application is deferred pending further claims litigation.

Clerk shall give immediate notice to all parties participating in the hearing, all parties objecting, and the U.S. Trustee.

DATED: October 27, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies to:

Robert Bothe, Attorney, One Central Park Plaza, Suite 1100,
Omaha, NE 68102
D.C. Bradford, Attorney, 1850 First National Center, 1620 Dodge
Street, Omaha, NE 68102-1505
Thomas Stalnaker, Attorney, P.O. Box 24268, Omaha, NE 68124
James Stumpf, Attorney, Regency One Building, Suite 101, 10050
Regency Cir., Omaha, NE 68114-3721
John W. Iliff, Attorney, 800 Commercial Federal Tower, 2120 S.
72nd Street, Omaha, NE 68124-2323