UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI
KANSAS CITY DIVISION

In Re:	§	**In Proceedings Under Chapter 11**
	§	
Farmland Industries, Inc., *et al.*,	§	**Case No. 02-50557-JWV**
	§	**Joint Administration**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO JOINT APPLICATION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO SECTION 503(b) OF THE BANKRUPTCY CODE

The Official Committee of Unsecured Creditors (the "Committee") of Farmland Industries, Inc., Farmland Foods, Inc., Farmland Transportation, Inc., Farmland Pipeline Company, and SFA, Inc. (collectively, the "Debtors"), files this Objection (the "Objection") to the Joint Application for Allowance and Payment of Administrative Expense Claim (the "Application") filed by River Barge Partners, L.P. ("River Barge") and The CIT Group/Equipment Financing, Inc. ("CIT"). In support of the Objection, the Committee would show as follows:

I.
BACKGROUND

A. Procedural Background.

1. On May 31, 2002 (the "Petition Date"), the Debtors filed separate voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Western District of Missouri, thereby commencing the above-styled cases.

2. The Debtors continue to operate their businesses and manage their assets as debtors-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108. No trustee or examiner has been appointed.

3. On June 3, 2002, pursuant to Section 1102(a)(1) of the Bankruptcy Code, the United States Trustee (the "U.S. Trustee") appointed the Committee to represent all non-bondholder unsecured creditors in these cases, including creditors at each of the five debtors that are a part of these bankruptcy proceedings. On that same day, the U.S. Trustee appointed an Official Committee of Bondholders (the "Bondholders Committee"). No other official committees have been appointed.

4. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

B. Factual Background.

5. Pinnacle Barge Company, LLC ("Pinnacle") is a limited liability corporation in which Farmland Industries, Inc. ("Farmland") owns a 50% interest. In 1997, Pinnacle entered various contracts relating to River Barge's charter (i.e., lease) of 100 hopper vessels (the "Vessels") to Pinnacle. In particular, Pinnacle is a party to a charter agreement (the "Charter") with River Barge, executed on January 24, 1997. Under the terms of the Charter, River Barge chartered the Vessels to Pinnacle for a period of approximately eighteen years in exchange for, among other things, a series of quarterly payments in advance. CIT financed River Barge's acquisition of the Vessels and holds mortgages on the Vessels.

6. Farmland, Pinnacle, River Barge and CIT are parties to a Novation Agreement (the "Novation Agreement") executed on January 24, 1997, which provides that, upon the occurrence of one or more specified events (the "Novation Events"), Farmland would be deemed to be bound by the terms of an automatically created "new charter" for the Vessels between River Barge and Farmland.

7. On August 16, 2002, River Barge, with the consent of CIT, filed a motion with the Court to lift the automatic stay in Farmland's case so that the Applicants could repossess the Vessels from Pinnacle. Neither Farmland nor the Committee objected to the Lift Stay Motion. On August 19, 2002, the Court entered an order granting the Lift Stay Motion. Pursuant to the order, Applicants repossessed the Vessels.

8. On January 17, 2003, River Barge and CIT (collectively, "Applicants") filed the Application seeking allowance and payment of a claim in excess of $18 million, plus interest, as an administrative expense pursuant to section 503(b)(1)(A) of the Bankruptcy Code. In the Application, Applicants assert that a Novation Event occurred when Pinnacle failed to pay the quarterly charter hire (i.e., rent) under the Charter, in the amount of $687,217.68, which came due on July 10, 2002 after the Petition Date. As a result of the occurrence of such Novation Event, Applicants contend that a "novation" occurred whereby Farmland, *as debtor-in-possession*, automatically became bound by the alleged "new charter." Applicants contend that Farmland's obligations under the alleged "new charter" are post-petition obligations entitled to administrative expense priority under section 507(a)(1) of the Bankruptcy Code. Applicants filed Suggestions in Support of Joint Application for Allowance and Payment of Administrative Expense Claim Pursuant to Section 503(b) of the Bankruptcy Code ("Applicants' Argument") in conjunction with the Application.

9. On January 27, 2003, Farmland filed an Objection to the Application.

II.
SUMMARY OF OBJECTION

10. The Applicants' claims, if any, should not be deemed administrative expenses as a matter of fact, as a matter of law and as a matter of public policy.

11. A basic analysis of the Applicants' assertions shows that they violate the plain meaning and underlying goals of numerous sections of the Bankruptcy Code, including sections 323, 362, 363, 365, 502, 503, 541, 1107 and 1108. The Applicants' motivation for distorting the purposes and procedures of the Bankruptcy Code appears to be a hope to confuse this Court so that the Applicants may significantly improve their chances of recovery in these cases. Rather than being treated as general unsecured creditors, the Applicants are seeking a full recovery by promoting fundamentally flawed arguments to classify their claims, if any, as administrative expenses. Approving such assertions would unjustly enrich the Applicants to the detriment of other general unsecured creditors represented by the Committee.

12. Furthermore, such approval would, in effect, retroactively authorize an act that was a violation of the automatic stay.

III.
ARGUMENT

A. Applicants' Claims, If Any, Are Not Administrative Expenses as a Matter of Fact.

13. Bankruptcy Code section 503 empowers the Bankruptcy Court to allow certain claims against Farmland's bankruptcy estate (the "Estate") to be classified as administrative expenses. 11 U.S.C. § 503. Since becoming part of the administrative expense class elevates a claim to first priority for payment under Bankruptcy Code section 507(a)(1), Congress included in Bankruptcy Code section 503(b) six general categories of claims to describe when bankruptcy courts should grant such favored status.

14. The Applicants justify their application using one of these six categories, Bankruptcy Code section 503(b)(1)(A). See Application ¶ 19. Section 503(b)(1)(A) states:

> (b) After notice and a hearing, there shall be allowed administrative expenses other than claims allowed under section 502(f) of this title, including—

> (1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

11 U.S.C. § 503(b)(1)(A).

1. Applicants Have the Burden to Prove Their Claims, If Any, Should be Deemed Administrative Expenses Under Section 503(b)(1)(A) of the Bankruptcy Code.

15. Since the lead-in phrase of Bankruptcy Code section 503(b) contains the words "[a]fter notice and a hearing," the evidentiary standards and presumptions for whether the Bankruptcy Court should grant the Applicants' request for payment of administrative expenses differ from the allowance of prepetition claims under Bankruptcy Code section 502. As detailed in the following explanation from Collier on Bankruptcy, Applicants have the burden to prove their claims, if any, should be deemed administrative expenses under Bankruptcy Code section 503(b)(1)(A):

> Under section 501 and 502(a), claims of prepetition creditors for which proper proofs of claim are filed are "deemed allowed, unless a party in interest objects." Under 502(b), if objection is made, "the court, after notice and a hearing" determines the amount of the claim and whether one of the grounds for disallowance enumerated in section 502(b) has been established. Pursuant to Bankruptcy Rule 3001(f), a properly filed and executed proof of claim constitutes "prima facie evidence of the validity and amount of the claim."
>
> In contrast, administrative expenses … are allowed only after notice and a hearing and are not "deemed allowed" but rather must be actually allowed by court order. Furthermore, requests for payment of administrative expenses are not entitled to the presumption of correctness that is accorded claims prepetition creditors assert through proofs of claim. The "notice and a hearing" standard of section 503(b) … generally requires specific approval of administrative expenses by court order as a condition to allowance.

> Many courts realize that they have an independent duty to scrutinize and rule on administrative expense applications....

4 Collier on Bankruptcy ¶ 503.04[1]. (Lawrence P. King ed., 15th ed. rev. 2001). See Williams v. IMC Mortgage Company (In re Williams), 246 B.R. 591, 594 (8th Cir. BAP 1999).

> Because priorities grant special rights to the holder of priority claims, priorities under the Code are to be narrowly construed. A party must fit clearly within the requirements of the priority statute to be accorded priority status. The party seeking to establish a priority claim bears the burden of proving that the party's claim qualifies for priority status.

4 Collier on Bankruptcy ¶ 507.01. (Lawrence P. King ed., 15th ed. rev.2001). See In re Lickman, 273 B.R. 691, 697 (Bankr.M.D.Fla.2002) (explaining "the allowance of an administrative expense claim reduces the funds available for other administrative claimants and creditors. The court is therefore required to construe strictly and narrowly 'the Bankruptcy Code provisions governing requests for priority payment of administrative expenses.'") (internal citations omitted); In re Tama Beef Packing, Inc., 283 B.R. 274, 276 (Bankr.N.D.Iowa 2002) (stating "priority statutes such as § 503(b) are strictly and narrowly construed"); In re Nationwise Automotive, Inc., 250 B.R. 900, 903 (Bankr.S.D.Ohio 2000); In re Patient Education Media, Inc., 221 B.R. 97, 101 (Bankr.S.D.N.Y.1998) (concluding "[b]ecause the priority elevates the payment of the administrative claim to the detriment of the unsecured creditors, see 11 U.S.C. § 507(a)(1), the language of section 503(b)(1)(A) must be narrowly construed to promote the bankruptcy goal of equality of distribution."); Woburn Associates v. Kahn (In re Hemingway Transport, Inc.), 954 F.2d 1, 5 (1st Cir.1992) (denying administrative expense request); In re Woodstock Associates I, Inc., 120 B.R. 436, 451 (Bankr.N.D.Ill.1990) ("The burden of proving entitlement to an administrative expense is on the claimant and the standard of proof is a preponderance of the evidence").

16. When scrutinizing administrative expense applications that seek justification under Bankruptcy Code section 503(b)(1)(A), courts have created tests, as described below, for determining whether a particular claim qualifies as an actual and necessary cost of preserving the bankruptcy estate. See, e.g., In re Sunarhauserman, Inc., 126 F.3d 811, 816 (6th Cir.1997); Woburn Associates v. Kahn (In re Hemingway Transport, Inc.), 954 F.2d 1, 5 (1st Cir.1992). Therefore, the Applicants have the burden of presenting evidence to pass these tests and, as shown in greater detail below, the Applicants have failed to satisfy this burden.

2. Applicants Fail to Meet Both Tests for Bankruptcy Code Section 503(b)(1)(A).

17. There are two tests in the Eighth Circuit for determining whether a debt qualifies as an actual and necessary cost of preserving the bankruptcy estate: (i) it must have arisen from a transaction with the estate and (ii) it must have benefited the estate in some demonstrable way. See, e.g., In re Tama Beef Packing, Inc., 283 B.R. 274, 276 (Bankr.N.D.Iowa 2002); Williams v. IMC Mortgage Company (In re Williams), 246 B.R. 591, 594 (8th Cir. BAP 1999) ("The law is well developed."); Reiter v. Fokkena (In re Wedemeier), 239 B.R. 794, 798 (8th Cir. BAP 1999).

18. As shown herein, the Applicants have failed to provide any evidence for the first test and failed to provide adequate evidence for the second test. As such, the Applicants have failed to pass both tests. Even if the Court finds the evidence presented by the Applicants for the second test to be adequate, the Applicants have not satisfied their burden of satisfying both tests.

a. Applicants Failed the First Test Since Their Claims, If Any, Did Not Arise From a Transaction with the Estate.

19. The Applicants failed to provide any evidence that the Estate entered into a transaction with either of them.

> The principle that an administrative expense can arise only from a transaction with the trustee (or debtor in possession) of the estate is derived from the reference in section 503(b)(1)(A) to the "estate."

> The earliest a bankruptcy estate exists is on the petition date. Accordingly, for a claim to be allowed as an administrative expense, goods or services must be delivered or provided pursuant to a postpetition transaction; *it is not enough that payment becomes due after the petition date if the transaction was entered into with the debtor prepetition*.

4 Collier on Bankruptcy ¶ 503.06[3][a]. (Lawrence P. King ed., 15th ed. rev. 2001) (emphasis added). See Williams v. IMC Mortgage Company (In re Williams), 246 B.R. 591, 594 (8th Cir. BAP 1999).

20. Bankruptcy Code section 541(a) states that the commencement of a bankruptcy case "creates an estate … comprised of … [certain] property, wherever located and by whomever held." 11 U.S.C. § 541(a). Such a bankruptcy estate is a new legal entity that is separate and distinct from the debtor. See In re Dow Corning Corporation, 270 B.R. 393, 398 (Bankr.E.D.Mich.2001) (explaining that "[t]he Debtor and the estate, however, are separate and distinct legal entities." and discussing the cases leading to a similar conclusion in In re Thompson Boat Co., 252 F.3d 852 (6th Cir.2001).).[1]

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[1] Dow Corning includes the following footnote that cites several cases leading to the conclusion in Thompson Boat that the debtor and the estate are separate and distinct legal entities:

> In this case, the Sixth Circuit "adopt[ed] ... as [its] own" the opinion of the district court. [In re Thompson Boat Co., 252 F.3d 852, 854 (6th Cir.2001)]. Itself adopting the view of the bankruptcy court, the district court noted "[t]he distinct nature of the two entities [the debtor and the bankruptcy estate]," and in the "context" of that case saw "no good reason to disturb the debtor/trustee dichotomy." Frank v. State of Michigan, 261 B.R. 909, 912 (E.D.Mich.1999), aff'd, 252 F.3d 852 (6th Cir.2001). See also In re Thompson Boat Co., Case No. 93-20546, A.P. No. 99-2002 (August 5, 1999, unpublished at pp. 2-3). See also, e.g., In re Durrett, 187 B.R. 413, 419 (Bankr.D.N.H.1995) ("[A]lthough the Court may agree that it is sometimes difficult to distinguish between the debtor-in- possession and the debtor, the Court still believes that the language of the Code validates the existence of the two as separate entities and will so hold."); In re Winom Tool & Die, Inc., 173 B.R. 613, 623 (Bankr.E.D.Mich.1994) ("[T]he very manner in which the bankruptcy estate is defined necessarily implies that the debtor retains a status separate from his or its status as debtor in possession."); id. at 622 (While the Supreme Court's decision in NLRB v. Bildisco & Bildisco, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984), "does imply that the debtor and debtor in possession are one and the same[,] ... the Court passed on the opportunity to render a definitive analysis ... [and] limit[ed] its 'same- entity' conclusion to the facts before it."); see generally 11

21. The Bankruptcy Code clearly states who controls the assets included in the bankruptcy estate defined by section 541 and how and when this authority may be utilized in sections 323, 363, 1107 and 1108. Since Bankruptcy Code section 1108 states "the trustee may operate the debtor's business," Bankruptcy Code section 323(a) states "[t]he trustee in a case under this title is the representative of the estate" and Bankruptcy Code section 1107 explains that "a debtor in possession shall have all the rights … and shall perform all the functions and duties … of a trustee," a debtor-in-possession may be the representative of the estate and operate the debtor's business. Under section 363 of the Bankruptcy Code, only the trustee (or the debtor-in-possession, as the case may be) may enter into transactions involving property of the estate.

22. Therefore, in a situation where the debtor-in-possession is managing the bankruptcy estate, entering into a contractual transaction with the bankruptcy estate would necessarily involve the consent of the debtor-in-possession to use its powers under Bankruptcy Code sections 323(a), 363, 1107 and/or 1108. The Bankruptcy Code does not include any provision for an outside party to enter into a transaction on behalf of the bankruptcy estate without the consent of the trustee or debtor-in-possession.

23. In this chapter 11 case, Farmland is managing its Estate as debtor-in-possession. As debtor-in-possession, Farmland never entered into any transaction whatsoever with either of the Applicants under Bankruptcy Code sections 323(a), 363, 1107, 1108 or any other section. Therefore, as a matter of fact, the Estate never entered into a postpetition transaction with the Applicants as required under the test for Bankruptcy Code section 503(b)(1)(A).

> U.S.C. § 323(a) ("The trustee in a [bankruptcy] case ... is the representative of the estate."); 11 U.S.C. § 1107(a) ("[A] debtor in possession shall have all the rights ... and powers, and shall perform all the functions and duties ... of a trustee ....").

In re Dow Corning Corporation, 270 B.R. 393, 399 n.3 (Bankr.E.D.Mich.2001).

24. The Applicants assert that (i) the Novation Agreement "provided that upon the occurrence of one or more specified events (the 'Novation Events'), and if requested by River Barge or CIT, Farmland automatically would be deemed bound by the terms of a new charter (the 'New Charter') for the Vessels between River Barge and Farmland" and (ii) "Farmland now is bound by the terms of the New Charter." See Application ¶ 9, 17. The logic of the Applicants' assertions requires the following necessary steps: Farmland entered into the Novation Agreement prepetition, a Novation Event occurred postpetition, one of the Applicants made a request postpetition, the alleged "new charter" was automatically created postpetition and Farmland became bound postpetition by the terms of the alleged "new charter."

25. This logic is fundamentally flawed because the Applicants ignore the dual identities of Farmland as both debtor and debtor-in-possession. Since the Applicants refer to Farmland as debtor (i.e., the entity that entered into the Novation Agreement) in the assertion in (i) above and they refer to Farmland as debtor-in-possession (i.e., the entity that is bound by the alleged New Charter) in the assertion in (ii) above, their logic fails because the entities must be the same – which they are not. As a matter of fact, it is impossible for Farmland, as debtor-in-possession, to have entered into the Novation Agreement because Farmland became debtor-in-possession upon the commencement of this chapter 11 case on May 31, 2002, which is almost four and a half years after the execution of the Novation Agreement. As described above, since only a trustee or debtor-in-possession can bind a bankruptcy estate to a postpetition transaction under Bankruptcy Code sections 323(a), 363, 1107 and/or 1108, Farmland's prepetition actions as debtor are prohibited from binding the Estate to a postpetition transaction. The Applicants offer no evidence – and, in fact, none exists – that Farmland, as debtor-in-possession, gave either

express or implied consent for (i) entering into any postpetition transaction with either of the Applicants or (ii) ratifying Farmland's prepetition actions as debtor.

26. In addition, as discussed in detail in subsection B of section III herein, Farmland's actions as debtor to enter into prepetition executory contracts cannot automatically create postpetition obligations or imply consent to the terms of prepetition contracts for Farmland, as debtor-in-possession, as a matter of law. See, e.g., In re Cincinnati Cordage and Paper Co., 271 B.R. 264 (Bankr.S.D.Ohio 2001) (stating "it is generally not possible to convert a pre-petition contract into an administrative expense claim" and denying administrative expense status to severance claims arising from prepetition agreements). Any obligations under the Novation Agreement and/or the alleged "new charter" that may have arisen postpetition for Farmland as debtor, not debtor-in-possession, cannot bind the Estate since Farmland, as debtor, has no legal authority to bind the Estate or manage the business of the Estate. To reiterate, "it is not enough that payment becomes due after the petition date if the transaction was entered into with the debtor prepetition." 4 Collier on Bankruptcy ¶ 503.06[3][a]. (Lawrence P. King ed., 15th ed. rev. 2001).

27. Furthermore, not only did Farmland, as debtor-in-possession, take no action to enter into a postpetition transaction with either of the Applicants, but Farmland, as debtor-in-possession, deliberately took specific actions to avoid any postpetition relationship with the Applicants:

- Farmland did not oppose the Applicants' motion for this Court to enter an order lifting the automatic stay, if it applied, so that the Applicants could repossess the Vessels from Pinnacle; and

- Farmland repeatedly expressed in written correspondence to the Applicants that it did not want to enter into any postpetition relationship with the Applicants.

28. Therefore, the Estate did not enter into any postpetition transaction with either of the Applicants and the Applicants have failed to satisfy their burden of proof for the first test for Bankruptcy Code section 503(b)(1)(A).

b. Applicants Failed the Second Test Since Their Claims, If Any, Did Not Benefit the Estate in Some Demonstrable Way.

29. Assuming, arguendo, that the alleged "new charter" came into existence postpetition and created a valid postpetition transaction for Farmland, as debtor-in-possession, the Applicants' assertions that Farmland received an actual benefit from the alleged "new charter" are inadequate for the purposes of establishing an administrative expense under Bankruptcy Code section 503(b)(1)(A). Bankruptcy Code section 503(b)(1)(A) is interpreted to require actual, tangible benefits to a bankruptcy estate and incidental, potential and indirect benefits are insufficient. See Williams v. IMC Mortgage Company (In re Williams), 246 B.R. 591, 594 (8th Cir. BAP 1999); Reiter v. Fokkena (In re Wedemeier), 239 B.R. 794, 798 (8th Cir. BAP 1999) (requiring a tangible benefit to the bankruptcy estate); In re Patient Education Media, Inc., 221 B.R. 97, 102 (Bankr.S.D.N.Y.1998) (explaining "[e]ven where the debtor-in-possession possesses the nondebtor's property, or has the option to use, no administrative expense liability will attach unless he actually uses it."); In the Matter of JAS Enterprises, Inc., 180 B.R. 210, 217 (Bankr.D.Neb.1995), aff'd 113 F.3d 1238 (8th Cir.1997)(unpublished table decision) (stating the "law makes clear that … expenses must provide tangible benefit to the bankruptcy estate; incidental benefit is not sufficient for an administrative expense."); In re Williams, 165 B.R. 840, 841 (Bankr.M.D.Tenn.1993) (concluding "[s]ervices that indirectly, incidentally, or tangentially benefit the estate do not qualify for the administrative expense priority."); In re Conroy, 144 B.R.

966, 969 (Bankr.W.D.Penn.1992) (explaining "[t]he benefit accruing to the estate must be actual, as opposed to potential, in order for the expenditure to qualify as an administrative expense.").

30. In this case, since there was no actual performance under the alleged "new charter," there were no actual, tangible benefits for the Estate. In addition, the Estate did not receive any actual, tangible benefits that may have arisen from the overall transaction involving the Charter, the Novation Agreement, the alleged "new charter" and other related documents. The Charter was between River Barge and Pinnacle, and Farmland was an incidental third party beneficiary. As such, the postpetition benefits, if any, for Farmland, as debtor-in-possession, from the Charter and the accompanying Novation Agreement would at best be indirect, incidental and intangible and are more likely nonexistent. In particular, (i) the potential first right to use the Vessels, (ii) the unlikely possibility of electing to operate the Vessels to generate revenue and (iii) whether the Vessels may have been built prepetition for Pinnacle to serve Farmland are clearly indirect, incidental and intangible with respect to the Estate.

31. "The key issue is whether the transaction was beneficial to the estate, not whether the creditor should be compensated for a loss it incurred during the case. Incidental benefit to the estate or extensive participation in the case, standing alone, is not a sufficient basis for administrative priority status." In re Tama Beef Packing, Inc., 283 B.R. 274, 276 (Bankr.N.D.Iowa 2002) (denying administrative expense request) (internal citations omitted). In this case, the Applicants include several incurred expenses that are merely a recitation of their losses with respect to the Vessels (the "Applicants' Losses").[2] The Applicants fail to assert why the Applicants' Losses created an actual benefit for the Estate.

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[2] The Applicants state:

> The basic elements of the administrative claim include (i) the $687,217 Charter Hire payment due in July 2002; (ii) interest on that payment at the rate called for under the Novation Agreement and the New Charter; (iii) an amount equal to the

32. "Creditors are presumed to act primarily in their own interests and not for the benefit of the estate as a whole, and the case law is clear that '[e]fforts undertaken by a creditor solely to further his own self-interest … will not be compensable, notwithstanding any incidental benefit accruing to the bankruptcy estate.'" In re Woodstock Associates I, Inc., 120 B.R. 436, 451 (Bankr.N.D.Ill.1990) (internal citations omitted). In this case, the Applicants' Losses clearly involve the Applicants' own self-interest to realize a return on their investment by preserving and remarketing the Vessels, notwithstanding any incidental benefit accruing to the Estate.

33. The Applicants assertions that "[e]ven absent an actual benefit to the estate … Farmland's obligations under the post-petition New Charter are administrative obligations of its chapter 11 estate" are meritless because the above case law has clearly established a "benefit" requirement for administrative expense requests of this type under Bankruptcy Code section 503(b)(1)(A). See Applicants' Argument p.25.

3. Applicants' Claims, If Any, Do Not Serve the General Purpose of Administrative Expenses Under Section 503 of the Bankruptcy Code.

34. In addition to not satisfying the specific tests for section 503(b)(1)(A) of the Bankruptcy Code, the Applicants' claims, if any, do not serve the general purpose of section 503(b)(1)(A). "[T]he main policy behind granting administrative expense priority only to 'actual, necessary' costs and expenses is to provide an incentive for creditors to continue or commence doing business with an insolvent entity." Williams v. IMC Mortgage Company (In re Williams), 246 B.R. 591, 594 (8th Cir. BAP 1999); In re Patient Education Media, Inc., 221 B.R.

> excess of the "Stipulated Loss Value" of the Barges over their "Fair Market Sales Value" as such values are determined in the New Charter; (iv) interest on said amount; (v) insurance premiums on the Barges, vessel storage charges, and lien claims of suppliers to the Barges, all recoverable under said agreements; and (vi) United States Coast Guard filing and documentation fees, vessel survey and appraisal charges, and the claimants' legal costs, all recoverable under said agreements.

See Applicants' Argument p.14.

97, 101 (Bankr.S.D.N.Y.1998); In re Sunarhauserman, Inc., 126 F.3d 811, 819 (6th Cir.1997) (noting that "the purpose of § 503 is to grant priority only to the claims of those entities who are induced to do business with the debtor *post-petition*.") (emphasis in original).

35. In this case, Farmland, as debtor-in-possession, does not want or intend to commence doing business with the Applicants. Therefore, there is no need or desire to provide any incentive for the Applicants to do business with Farmland.

36. By filing the Application, the Applicants are attempting to transform what was intended to be a benefit for bankruptcy estates into a burden. While Bankruptcy Code section 503(b)(1)(A) does benefit postpetition creditors, the clear intent was to create "win-win" scenarios where both the postpetition creditors and bankruptcy estates receive mutually beneficial outcomes, not "win-lose" scenarios where the postpetition creditors receive benefits at the expense of foisting undesired administrative expense burdens upon bankruptcy estates. See In re Conroy, 144 B.R. 966, 969 (Bankr.W.D.Penn.1992) (explaining "[i]n order for an expenditure to qualify as 'actual' and 'necessary,' it must benefit the estate as a whole, not just the creditor/claimant."); In re Woodstock Associates I, Inc., 120 B.R. 436, 451 (Bankr.N.D.Ill.1990); In re Jartran, Inc., 886 F.2d 859, 871 (7th Cir.1989). By trying to use section 503(b)(1)(A) of the Bankruptcy Code as a "back door" to force Farmland against its will to use the assets of the Estate to pay as an administrative expense the alleged damages from the alleged breach of the alleged "new charter," the Applicants distort the underlying policies of section 503(b)(1)(A).

4. Applicants' Claims, If Any, Do Not Fall Within a Special Category of Administrative Expenses Under Section 503 of the Bankruptcy Code.

37. The Applicants cite Reading Co. v. Brown, 391 U.S. 471, 88 S.Ct. 1759 (1968), Spunt v. Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.), 755 F.2d 200 (1st

Cir.1985) and the related line of cases for their assertion that their claims, if any, should be awarded administrative expense status without a discernable benefit to the Estate. See Applicants' Argument p.25-29. In summary, Reading awarded administrative expense status to the claims of the parties injured by a fire caused by the bankruptcy trustee's negligence. In particular, the Applicants focus on the language in Reading that "[h]ence the present petitioner did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law." Reading, 391 U.S. at 478, 88 S.Ct. at 1736.

38. The Applicants' assertion that Reading and Charlesbank Laundry create a broad exception to the plain meaning of Bankruptcy Code section 503(b)(1)(A) would be to create an exception that essentially swallows the rule and runs contrary to numerous other cases decided after Reading. Every creditor in a bankruptcy case could claim it had an insolvent business thrust upon it by operation of law and demand damages under prepetition contracts be paid as administrative expenses. To avoid this illogical outcome, a narrow interpretation of the special category created by the Reading and Charlesbank Laundry cases was decided in Woburn Associates v. Kahn (In re Hemingway Transport, Inc.), 954 F.2d 1, 6-7 (1st Cir.1992) (emphasis in original):

> Unlike losses sustained by creditors who enter into voluntary *prepetition* transactions with the debtor, the fire losses in Reading resulted from unilateral *postpetition* conduct on the part of the operating receiver …. [In Charlesbank Laundry, w]e have extended the Reading rationale to encompass *postpetition* fines occasioned by an operating chapter 11 debtor in possession's intentional disregard of a state court order enjoining local zoning ordinance violations…. We are aware of no authority that the Reading-Charlesbank exception encompasses a right to payment originating in a prepetition contract with the debtor.

A similarly narrow interpretation of the special category created by Reading was reached in In re Sunarhauserman, Inc., 126 F.3d 811, 817 (6th Cir.1997) (analyzing Reading in detail and

concluding "[W]e are not convinced that [claimant] can, on the facts of this case, take advantage of the Reading analysis…. Reading does not eliminate the requirement that a debt arise post-petition in order to be accorded administrative expense priority.").

39. In these cases, the Applicants stipulate that they voluntarily entered into prepetition transactions with Farmland. As such, the special category defined in Reading is inapplicable. The extension of this special category in Charlesbank Laundry is also inapplicable since the Farmland cases do not involve the intentional disregard of a state court order enjoining local zoning ordinance violations.

B. Applicants' Claims, If Any, Are Not Administrative Expenses as a Matter of Law.

40. Since Farmland has a right to reject the Novation Agreement under section 365(a) of the Bankruptcy Code, the Applicants' claims, if any, should not be deemed administrative expenses as a matter of law.

1. The Novation Agreement Is An Executory Contract That Became Property of Farmland's Bankruptcy Estate Under Section 541 of the Bankruptcy Code.

41. The bankruptcy estate created by Bankruptcy Code section 541 includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Property of the bankruptcy estate is broadly defined by section 541(a)(1) of the Bankruptcy Code. See United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 & n.9, 103 S.Ct. 2309, 2313-14 & n.9 (1983); Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 241 (3rd Cir.2001); Sosne v. Reinert & Duree (In re Just Brakes Corp. Sys., Inc.), 108 F.3d 881, 884 n.2 (8th Cir.), cert. denied, 522 U.S. 947, 118 S.Ct. 364 (1997). This broad definition "encompasses conditional, future, speculative, and equitable interests of the debtor." United States v. Transport Administrative Services, 260 F.3d 909, 913 (8th Cir.2001). Executory

contracts are included in this broad definition. See, e.g., In re Hutchins, 211 B.R. 325, 327 (Bankr.E.D.Ark.1997).

42. Therefore, in this chapter 11 case, the operation of Bankruptcy Code section 541 included in the Estate the rights of Farmland regarding the Novation Agreement, which was an executory contract. Under the so-called Countryman definition, to which the legislative history of Bankruptcy Code section 365 refers and which has been employed in the Eighth Circuit, an executory contract is one which performance remains due to some extent on both sides. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 347 (1977). See, e.g., In the Matter of JAS Enterprises, Inc., 180 B.R. 210, 215 (Bankr.D.Neb.1995), aff'd 113 F.3d 1238 (8th Cir.1997)(unpublished table decision); In re Hutchins, 211 B.R. 325, 327 (Bankr.E.D.Ark.1997). As discussed herein, the inclusion of the debtor's interests in an executory contract like the Novation Agreement in the Estate, however, does not bind Farmland, as debtor-in-possession, to its terms unless Farmland chooses to assume such an executory contract under section 365(a) of the Bankruptcy Code.

2. Farmland Has the Right to Reject Executory Contracts Under Section 365 of the Bankruptcy Code.

43. Bankruptcy Code section 365 authorizes the trustee (and, therefore, the debtor-in-possession pursuant to Bankruptcy Code section 1107 in a chapter 11 case) to assume or reject executory contracts. See, e.g., In the Matter of JAS Enterprises, Inc., 180 B.R. 210, 217 (Bankr.D.Neb.1995), aff'd 113 F.3d 1238 (8th Cir.1997)(unpublished table decision). Section 365(d)(2) provides in relevant part that "in a case under chapter … 11 … the trustee may assume or reject an executory contract … at any time before the confirmation of a plan." 11 U.S.C. § 365(d)(2). See, e.g., NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529, 104 S.Ct. 1188, 1198 (1984). Since the Bankruptcy Code does not impose a standard for assuming or rejecting

executory contracts, courts have widely used a "business judgment test" in assessing debtor-in-possessions' choices under Bankruptcy Code section 365(a). See, e.g., In re Food Barn Stores, Inc., 107 F.3d 558, 567 (8th Cir.1997) (noting "[w]here the trustee's request is not manifestly unreasonable or made in bad faith, the court should normally grant approval"); Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1309-11 (5th Cir.1985) ("[I]n § 365 cases … [i]t is well established that 'the question whether a [contract] should be rejected … is one of business judgment' … More exacting scrutiny would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially.") (internal citations omitted). "[U]ntil assumption or rejection, the pre-petition obligations due under the [contract] are in limbo." In re Family Snacks Incorporated, 249 B.R. 915 (Bankr.W.D.Mo.2000).

44. Assumption of an executory contract cannot be implied. See United Food & Commercial Workers Union, Local 211 v. Family Snacks, Inc. and Official Unsecured Creditors' Committee (In re Family Snacks, Inc.), 257 B.R. 884, 904 (8th Cir. BAP 2001) (finding "[a]s a threshold matter, we think the concept of implied assumption of an executory contract is fatally flawed" and "[i]mplied assumption has no place in the law of executory contracts.").

45. Therefore, in this case, Farmland, as debtor-in-possession, gained the right under Bankruptcy Code section 365(a) to assume or reject the Novation Agreement and its business judgment was not manifestly unreasonable or made in bad faith. Under Bankruptcy Code section 365(d)(2), Farmland possesses the right to make such a choice at the time it chooses pursuant to this Court's order.

C. Applicants' Claims, If Any, Should Not Be Deemed Administrative Expenses as a Matter of Public Policy.

46. In addition to being impermissible as a matter of fact and as a matter of law, the Applicants' claims, if any, violate the underlying public policies of the Bankruptcy Code, including (i) the efficient and equitable distribution of an insolvent debtor's remaining assets to its creditors and (ii) providing the debtor-in-possession with a "fresh start." See, e.g., Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233 (3rd Cir.2001) ("It is well-settled that [these] two overarching purposes, one equitable and the other rehabilitative, undergird the Bankruptcy Code in general….). As such, although the Eighth Circuit has deemed the six general categories of Bankruptcy Code section 503(b) to be non-exclusive, the Applicants' claims, if any, are not deserving of special treatment under section 503(b) as a matter of public policy. See Williams v. IMC Mortgage Company (In re Williams), 246 B.R. 591, 594 (8th Cir. BAP 1999) (explaining "in addition to considering the enumerated grounds for administrative expense status, the bankruptcy court has the authority to determine that additional kinds of claims may be administrative expenses.").

47. Saddling the Estate with an administrative expense of over $18 million for the Applicants would consume scarce resources that Farmland needs to make a fresh start. Rather than receiving a fresh start, the Estate's administrative expenses will significantly increase and its liquidity will significantly decrease for the sake of providing a full recovery windfall to the Applicants, who would probably receive a less-than-full recovery as general unsecured creditors if their claims qualified. In an insolvency situation like these cases, an increase in one party's recovery necessarily means a decrease in others' recoveries. Such an unjust enrichment of one general unsecured creditor to the detriment of the class of unsecured creditors is directly opposed to an efficient and equitable distribution.

48. Therefore, approving the Application would have the effect of creating a new "loophole" to the operation of the Bankruptcy Code whereby some creditors could contract around the overarching purposes undergirding the Bankruptcy Code. Altering the Bankruptcy Code in such a fundamental manner would be void against public policy.

D. Applicants May Have Violated the Automatic Stay Under Section 362 of the Bankruptcy Code By Filing the Application.

49. A bankruptcy estate is protected by the automatic stay created by section 362 of the Bankruptcy Code.

> A party may knowingly violate the stay, either in the erroneous belief that the party's action is permitted or in disregard of the stay…. A violation of the stay is punishable as contempt of court. Most courts will impose contempt sanctions for a knowing and willful violation of a court order, and the automatic stay is considered as equivalent to a court order. If the conduct is willful, even if based upon advice of counsel, contempt is an appropriate remedy.

4 Collier on Bankruptcy ¶ ¶ 362.11, 362.11[2]. (Lawrence P. King ed., 15th ed. rev. 2001).

50. In this case, the Applicants may have knowingly violated the automatic stay because filing the Application could be construed to have been (i) a prohibited act under Bankruptcy Code section 362(a)(6), which includes "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title" and/or (ii) a prohibited action or proceeding under Bankruptcy Code section 362(a)(1), which includes in relevant part "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor … to recover a claim against the debtor that arose before the commencement of the case under this title." A contingent right to payment that arose prepetition is a prepetition claim even if such right ultimately matures postpetition. See In re Nationwide Automotive, Inc., 250 B.R. 900 (Bankr.S.D.Ohio 2000) (quoting In re Sunarhauserman, Inc., 126 F.3d 811, 818 (6th Cir.1997):

"[T]he proper standard for determining [a] claim's administrative priority looks to when the acts giving rise to [the] liability took place, not when they accrued.").

51. This Court's order to lift the automatic stay in this matter with respect to the repossession of the Vessels did not also authorize the Applicants to file the Application. As such, the Applicants' Application was unauthorized. As discussed at length in subsections A, B and C of section III herein, the Application is merely an attempt by the Applicants to obtain recovery of prepetition general unsecured claims, if any, which is a direct violation of the automatic stay under section 362 of the Bankruptcy Code. Accordingly, Farmland is entitled to whatever equitable and legal relief is available to it under section 362 of the Bankruptcy Code.

WHEREFORE, for all of the foregoing reasons, the Committee respectfully requests the Court to (i) deny the Application in its entirety, (ii) award Farmland reimbursement of the fees and expenses incurred by Farmland and the Committee in opposing the Application and (iii) grant such other equitable and legal relief that would be fair and just under the circumstances herein to which Farmland and the Committee are entitled.

Respectfully submitted this 12th day of March, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Objection has been served by first class mail, postage pre-paid on those parties on the Master Service List not receiving electronic notice on this 13th day of March, 2003.

/s/ Christopher A. Artzer
Christopher A. Artzer