

**IN THE UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION**

<b>IN RE:</b>	§	
	§	
<b>ENRE, L.P.,</b>	§	<b>CASE NO. 02-21354-C-11</b>
	§	
<b>Debtor</b>	§	
	§	

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**MEMORANDUM OPINION AND ORDER ON MOTION FOR PAYMENT OF  
CLAIMS FOR ATTORNEY’S FEES AND COSTS  
ON AN UNSECURED BASIS**

On this day came on for consideration the Motion for Payment of Claims for Attorney’s Fees and Costs on an Unsecured Basis filed by Bridgeport Tank Trucks, Inc., West Fork Tank Trucks, Inc., Baker Hughes Oilfield Operations, Inc., Baker Petrolite Corporation, and Newpark Drilling Fluids, L.P. (collectively the “Claimants”). The Court, having heard the evidence and arguments of counsel, finds as follows:

**BACKGROUND**

The Debtor, EnRe, L.P. (“EnRe”) filed its Chapter 11 Bankruptcy petition on July 23, 2002. The Claimants filed timely proofs of claims. The amount of each party’s claim was stipulated to. Each Claimant’s proof of claim included an amount and the words, “plus applicable interest, attorney’s fees and expenses.” The court confirmed the Fourth Amended and Modified J-W Plan of Reorganization (the “Plan”) on December 12, 2003. Under the Plan, a Lien Agent was appointed to review the mineral lien claims filed by the Claimants and other creditors. The Lien Agent recommended that the M&M Lien Claimants’ claims for attorneys fees and expenses under 11 U.S.C. §506(b) should be disallowed. This Court agreed with the Lien Agent and entered an order on September 1, 2004, ruling that “recovery for attorney’s fees and costs pursuant to 11 U.S.C. §506(b) is

denied as the lien giving rise to the M&M Claims is nonconsensual.” Claimants (other than Newpark Drilling Fluids, L.C.) appealed the September 1, 2004, order. The United States District Court affirmed this court’s decision and the appellants appealed to the Fifth Circuit Court of Appeals. On July 25, 2006, the Fifth Circuit Court of Appeals issued its opinion affirming the District Court and this court. *Matter of EnRe LP*, 457 F.3d 493 (5<sup>th</sup> Cir. 2006). No further appeal was taken and the Fifth Circuit’s decision is final.

Claimants then filed (or in some instances, re-urged) their motions seeking alternative allowance of their claims for post-petition attorney’s fees and costs as part of their unsecured claims. Claimants raised the same argument in their appeal to the United States District Court. The District Court refused to address the claim because issues raised for the first time on appeal are not considered. Claimants now ask this court to address the issue. Prior to their appeal of this court’s September 1, 2004, order, Claimants never asserted entitlement to attorneys fees and expenses on an unsecured basis.

## **DISCUSSION**

The court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157, 1334, and 11 U.S.C. §502.

### **1. UNDER THE LAW OF THE CASE DOCTRINE, THE ISSUE IS WAIVED.**

The Fifth Circuit Court of Appeals held as follows:

In the alternative, Appellant Baker Hughes Incorporated seeks to recover fees under 11 U.S.C. § 502. This issue is waived, as all parties stipulated that “the only remaining legal issue [is] the proper interpretation and application of 11 U.S.C. 506(b).” Accordingly, we review the decisions of the bankruptcy and district courts addressing section 506(b) only.

--- *Matter of EnRe, supra.* at 494, fn. 1.

Both the Fifth Circuit Court of Appeals and the District Court have now ruled that Claimants waived their section 502 claim for post petition attorney's fees and expenses by failing to raise it previously. The Court finds that the law of this case precludes recovery of post petition attorney's fees and expenses on an unsecured basis.

## **2. CLAIMANTS CLAIMS ARE BARRED UNDER THE DOCTRINE OF *RES JUDICATA***

The Plan addressed Claimants' claims for post petition attorney's fees and costs under 11 U.S.C. §506(b), but was silent as to any recovery under 11 U.S.C. §502. The Plan is a final, non-appealable order. Relitigation of the matter is barred by *res judicata* or claim preclusion. Claim preclusion has four elements: (i) the parties in a later action must be identical to or in privity with the parties in a prior action. (ii) the judgment in the prior action must have been rendered by a court of competent jurisdiction, (iii) the prior action must have concluded with a judgment on the merits, and (iv) the same claim or cause of action must be involved in both disputes. *Eubanks v. Federal Deposit Ins. Corp.*, 977 F.2d 166, 169 (5<sup>th</sup> Cir. 1992). "This four-part test has been applied in the bankruptcy context to an order confirming a plan of reorganization." *Id.* A bankruptcy court's order confirming a plan of reorganization has long been given preclusive effect. *Id.* at 170.

The court finds that all four elements of *res judicata* are met in this case. The Claimants were all parties to the plan of reorganization and could have raised their argument for post petition fees under section 502 at confirmation. This court had jurisdiction over confirmation as a matter arising under title 11. 28 U.S.C. §157(b). As noted above, an order of confirmation is a judgment on the merits. *Id.* Finally, the Claimant's seek recovery of the same fees and expense which the Lien Agent and this

court disallowed under 11 U.S.C. §506(b) and therefore involve the same claim or cause of action dealt with in the Plan. The test in this regard is transactional, and the question is whether the claim now asserted “arose out of the same transaction that was the subject of” the Order confirming the Plan. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1054 (5<sup>th</sup> Cir. 1987). The two actions are based on the same nucleus of operative facts. *Eubanks v. F.D.I.C.*, *supra* at 171. The claims addressed in the Plan arose out of credit transactions between the debtor and the Claimants. The same claims are at issue now, only dependent on a different legal theory. Accordingly, all elements of *res judicata* are met.

### **3. THE CONFIRMED PLAN PRECLUDES THE RELIEF SOUGHT**

Claimants contend that the Plan provides for inclusion of post-petition and post-confirmation legal fees in their allowed unsecured claim. The plan automatically treats, as unsecured, the unsecured or undersecured portion of claims erroneously asserted as secured claims. In other words, if a putative secured claim of the type filed by Claimants turns out, in reality, to be either unsecured or undersecured, then the resulting “deficiency claim” is automatically treated and dealt with as the unsecured claim that it really is. A “deficiency claim,” however, is an unsecured claim for a “deficiency amount,” which (simplistically speaking) is limited to the amount by which an allowed secured claim exceeds the value of the collateral. The attorney’s fees and costs now sought by Claimants are not allowed secured claims having been denied by the court—and affirmed by the Fifth Circuit—as unavailable under §506(b). Thus, those fees and costs by definition do not trickle down the waterfall into Class 11 for treatment as allowed unsecured claims.

#### 4. POST-PETITION ATTORNEYS' FEES AND COSTS ARE NOT ALLOWED AS PART OF UNSECURED CLAIMS

Alternatively, if Claimants' claims for post-petition attorney's fees are properly before the Court, the Court finds that they should be disallowed as a matter of law. The majority view is that unsecured claims are not entitled to post-petition attorneys' fees,<sup>1</sup> and the Plan does not expressly adopt the minority view on this issue.

Not only is the weight of authority adverse to the position asserted by Claimants, so, too, are the better reasoned authorities on the issue, the leading one of which is *In re Pride Companies, L.P.*, 285 B.R. 366 (Bankr. N.D. Tex. 2002). As *Pride* instructs, four reasons are generally advanced for the majority view that the Bankruptcy Code prohibits allowance of post-petition attorneys' fees to unsecured creditors. *See* 285 B.R. at 372-373. As have most courts both before and after *Pride*, this court holds that the arguments set forth in *Pride*, which are discussed below, are persuasive and compelling. *See e.g., FINOVA Group*, 304 B.R. 630, 637 (D. Del. 2004); *Global Industrial Technologies Services co. v. Tanglewood Investments, Inc. (In re Global Industrial Technologies, Inc.)*, 327 B.R. 230, 239 (Bankr. N.D.Pa. 2005).

First, “[s]ection 506(b) is the only Code provision authorizing recovery of attorneys' fees by a creditor.” *Pride, supra*, at 372. Under the legal maxim of *expression*

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<sup>1</sup> “A majority of courts have held that ...an unsecured creditor is not entitled to collect post-petition attorneys' fees...” *In re New Power Company*, 313 B.R. 496, 506 (Bankr. N.D. Ga. 2004). Indeed, “the strong majority” of courts ruling on the issue has held that such claims cannot be made. *In re Marietta Farms, Inc.*, 2004 U.S. Bankr. LEXIS 1773, at \* 3 (Bankr. D. Kan. November 15, 2004). *See also, e.g., Global Industrial Technologies Services Co. v. Tanglewood Investments, Inc. (In re Global Industrial Technologies, Inc.)*, 327 B.R. 230, 239 (Bankr. W.D. Pa. 2005) (Agreeing with the majority of courts that unsecured creditors may not include post-petition attorneys' fees in their claims, finding the majority view more persuasive, and disallowing portions of claims.). *See also, In re 900 Corp.*, 327 B.R. 585, 600 (Bankr. N.D. Tex. 2005) (Stating that unsecured creditor may not recover post-petition attorneys' fees from the estate even where provided for by agreement.).

*unius exclusion alterius*—meaning the expression of one is the exclusion of another—by permitting the allowance of certain attorneys’ fees, costs, and charges in §506(b), Congress necessarily denied recovery thereof in any other context. Accordingly, “[a]s only oversecured creditors are allowed to recover their [attorneys’] fees [costs and other charges] under section 506(b), statutory construction and logic compel the conclusion that unsecured creditors may not recover post-petition attorneys’ fees.” *Id. See also, Global Industrial Technologies Services Co. v. J.P. Morgan Trust Co., N.A. (In re Global Industrial Technologies, Inc.)*, 344 B.R. 382 (Bankr. W.D. Pa. 2006); *Global Industrial Technologies Services Co. v. Tanglewood Investments, Inc. (In re Global Industrial Technologies, Inc.)*, *supra*. At 239-40.

Second, unsecured creditors’ claims are calculated as of the petition date of the bankruptcy filing. *See* 11 U.S.C. § 502(b) (Providing that the bankruptcy court “shall determine the amount of...[a] claim as of the date of the filing of the petition...”). Attorneys’ fees and costs incurred after that date, *i.e.*, post-petition, by definition cannot be part of a creditor’s unsecured claim at the time the petition is filed. *Pride, supra*, at 373. In other words, “[i]s axiomatic that, as of the petition date, post-petition attorneys’ fees have not been incurred.” *Global Industrial Technologies, supra*, at 240. Put another way, “[p]ost-petition attorneys’ fees...are elements of damages that arise and can only be calculated after the bankruptcy filing, and so are not part of the claim required by §502(b) to be calculated as of the date of the bankruptcy filing.” *In re UAL Corp.*, 346 B.R. 783, 789 (Bankr. N.D. Ill. 2006).

Third, under the Claimants’ position, certain general unsecured creditors would be treated better than others. “Allowing one unsecured creditor to recover its attorneys’ fees

from the same pool of funds that is dedicated to other unsecured creditors may be perceived to unjustly enrich one creditor at the expense of others.” *Pride, supra*, at 376. At the least, this result would be bad bankruptcy policy: “[i]t is not equitable to deplete everyone’s ‘pot’ only because of an asserted right granted by a contract. After all, bankruptcy routinely alters creditor’s rights, and this is simply a situation where the policy of ratable distribution and equitable treatment of the varying interests in bankruptcy should override any asserted rights by unsecured creditors to recover attorneys’ fees.” *Id.* at 374. From the perspective of the unsecured creditors in this case, the funds available for distribution to general unsecured creditors should be distributed ratably on the basis of the underlying debt, rather than skewed in favor of some creditors by inclusion of claims for post-petition attorneys’ fees and costs. Under the reading of the Plan urged by Claimants, the unsecured creditors agreed to do what is facially inimical to their interests, an illogical argument.<sup>2</sup>

Finally, courts have found that the decision in *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365 (1988), applies to disallow post-petition attorneys’ fees except as provided in section 506(b). In *Timbers*, the Court held that post-petition interest is not allowable under §506(b) to undersecured creditors. “Because §506(b) clearly prohibits an unsecured creditor from recovering post-petition interest, and since that section also includes attorney’s fees, the majority of courts have concluded that the Supreme Court’s *Timbers* opinion, by implication, also prohibits the recovery by unsecured creditors of post-petition attorney’s fees.” *In re Marietta Farms*,

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<sup>2</sup> As explained in *Global Industries Technologies*, “[i]s inequitable to allow certain unsecured creditors to recover post-petition attorneys’ fees at the expense of similarly situated claimants. To allow one group of unsecured creditors to recover more than their pre-petition debt unfairly discriminates against others because it reduces the pool of assets available to all unsecured creditors pro rata.” 327 B.R. at 240.

*Inc.*, 2004 WL 3019360 at \*4, 53 C.B.C.2d 72 (Bankr.D.Kan, 2004) *See also Pride, supra*, at 372-73, and cases cited therein. *Accord Global Industrial Technologies, supra*, at 240 (“Because §506(b) expressly provides for the allowance of both post-petition interest and fees, the majority of courts...has applied this reasoning to restrict the allowance of post-petition fees to oversecured creditors only.”)

Again, there is a minority position on this issue. *See e.g., In re New Power Company, supra*, at 506-510. Claimants rely upon *New Power* in rebuttal to the arguments in support of the majority position set forth above. In *New Power*, however, “a key fact...[was] that...[there] was a solvent estate, where all creditors were going to receive 100% of their claim, plus interest.” *In re Maretta Farms, Inc., supra*, at \*6-7. Rejecting *New Power’s* rationale and holding in a case in which there was not a solvent estate, the court “[f]ound] the majority position to be far more persuasive, and reject[ed] the holding of the minority position.” *Id.* at \* 7. Moreover, courts that followed *New Power’s* holding, *i.e.*, that unsecured creditors may be entitled to allowance of post-petition attorneys’ fees, emphasize that such recoveries are available only in extraordinary (if not unique) circumstances. *See, e.g., In re Fast*, 318 B.R. 183 (Bankr. D. Colo. 2004) (emphasizing that the estate was solvent). While *In re Fast* post-dates the plan in this case (as does *New Power*), there is no apparent reason why the unsecured creditors would voluntarily agree to cede funds to some of their ranks by having the plan provide for post-petition attorneys’ fees on some, but not all, unsecured claims. The unsecured creditors will not receive 100% of their claims in this case, and it is inconceivable to suggest that they agreed in the Plan to be taxed with further reductions by allowance to some of their number of post-petition attorneys’ fees and costs.

Accordingly, if the issue of post petition attorneys' fees is properly before the court, Claimants' claims for such fees should be denied as against the weight of authority.


Further, the court notes that Claimants' position creates a paradox not readily apparent to non-bankruptcy practitioners. Under claimants' theory there is no finite ending to the calculation of post petition attorneys' fees. The calculation process cannot end at confirmation because Claimants seek post-confirmation fees and the claims objection process is not completed. If the calculation is made at distribution, Claimants may incur additional attorneys' fees reviewing the distribution process. The Plan Agent is left with the possibility of never being able to calculate the claim properly.

#### **CONCLUSION**

For the reasons stated above, the court finds that the Motion for Payment of Claims for Attorney's Fees and Costs on an Unsecured Basis should be denied.

It is therefore ORDERED that the Motion for Payment of Claims for Attorney's Fees and Costs on an Unsecured Basis is hereby DENIED.

At Corpus Christi, Texas this 24<sup>th</sup> day of January, 2007

  
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RICHARD S. SCHMIDT  
United States Bankruptcy Judge