

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

CASE NO. 94-21774

PENN YAN MOTORS, INC.,

Debtors.

DECISION & ORDER

**JOHN A. BELLUSCIO,
Chapter 7 Trustee,**

Plaintiffs,

V.

AP #96-2052

CHRYSLER CREDIT CORPORATION,

Defendants.

BACKGROUND

On August 23, 1994, Penn Yan Motors, Inc. ("Penn Yan") filed a voluntary petition in the Rochester office of the Western District initiating a Chapter 11 case. On the Schedules and Statements required to be filed by Section 521, Section 1106 and Rule 1007, Penn Yan indicated that: (1) it operated a car dealership in Penn Yan, New York; (2) its assets included: (a) accounts receivable of \$100,648.96; (b) vehicle inventory of \$114,000.00; (c) parts inventory of \$90,680.00; (d) office equipment and furnishings of \$15,000.00; and (e) business machinery and equipment of \$85,000.00; (3) it was indebted to Chrysler Credit Corporation ("Chrysler Credit") for the amounts due on a "Capitalization Loan" (\$26,249.83) and on a "Floor Plan Arrangement" (\$5,188.76); (4) Chrysler Credit had a security interest in collateral (the "Penn Yan Collateral") with a value of \$177,000.00; (5) it was indebted to Chrysler Motors Corp. ("Chrysler Motors") in an unknown

BK. 94-21774
AP. 96-2052

amount; (6) its President was Lynn Patterson; (7) it was indebted to Lynn Patterson's father, Leo L. Patterson (the "Landlord"), for an amount in excess of \$250,000.00, which represented unpaid August rent and a disputed amount due in connection with the purchase of the business assets from the Landlord; (8) it was further indebted to the Landlord on a disputed loan in the amount of \$140,000.00; (9) the law firm of Harter, Secrest & Emery, with a principal office in Rochester, New York, ("Harter, Secrest") had represented Chrysler Credit in a pre-bankruptcy workout.

On October 31, 1994, once it became clear that Penn Yan could not complete a negotiated sale of the business and its assets to a third-party purchaser, a Stipulation was entered into with the Landlord (the "Landlord Stipulation"), which was later approved by the Court. The Landlord Stipulation provided that Penn Yan and/or its Trustee-in-Bankruptcy could retain exclusive possession of the "parts" and "office" areas of the former business premises until December 1, 1994 in order to "permit the debtor/debtor-in-possession to adequately package the parts for return to Chrysler Credit, and to allow the Trustee to liquidate the equipment."

The Minute Report of an adjourned Section 341 Hearing conducted by the Office of the United States Trustee on January 12, 1995 indicated that the Debtor intended to liquidate its assets and disburse the proceeds pursuant to a liquidating plan to be filed within thirty to forty-five days.

On or about January 15, 1995, Penn Yan and Chrysler Credit, by its Branch Manager Mark Ingram ("Ingram"), entered into a stipulation (the "Chrysler Credit Stipulation") which provided that: (1) Penn Yan was indebted to Chrysler Credit, through November 30, 1994, in the amount of \$76,803.98 plus reasonable costs and expenses; (2) Penn Yan had ceased business operations when it entered into the Landlord Stipulation; (3) the Landlord had presented a written offer to purchase

BK. 94-21774
AP. 96-2052

Penn Yan's business equipment for \$14,000.00, an amount in excess of the appraised value; (4) Penn Yan was unable to maintain insurance on the business equipment, but Chrysler Credit had insurance to protect its interest in the equipment as a secured creditor; (5) Chrysler Credit approved the \$14,000.00 purchase price, provided it was distributed \$13,500.00 to Chrysler Credit and \$500.00 to the Office of the United States Trustee for unpaid quarterly fees; (6) upon the entry of an Order approving the Chrysler Credit Stipulation, the automatic stay was terminated and Chrysler Credit, as a secured creditor, was authorized to: (a) inventory, package and dispose of all of the inventory of Penn Yan, including parts, by first offering to return acceptable inventory to Chrysler Corporation, in accordance with the terms of a Sales and Services Agreement entered into between Penn Yan and Chrysler Corporation, and then disposing of any remaining inventory in a commercially reasonable manner; (b) demand, collect, receive and apply the proceeds of any and all accounts receivable and warranty or rebate claims Penn Yan might have with Chrysler Corporation; and (7) Chrysler Credit agreed to return to Penn Yan any parts that it could not return to Chrysler Corporation and which it otherwise elected not to liquidate. On February 17, 1995, an Order was entered which authorized the implementation of the Chrysler Credit Stipulation (the "Stay Termination Order").

On March 3, 1995, a Motion, signed by the attorneys for Penn Yan but served on all interested parties by Harter, Secrest, was filed. The Motion requested an Order authorizing the sale of Penn Yan's business equipment to the Landlord in accordance with the terms of the Chrysler Credit Stipulation. On April 7, 1995, an Order was entered approving the proposed sale.

On April 28, 1995, the attorneys for Penn Yan filed a copy of a letter to Ingram which: (1) forwarded to him a previously agreed upon check for \$13,250.00 from the proceeds of the sale of

BK. 94-21774
AP. 96-2052

the business equipment; and (2) requested that he provide the attorneys with a statement showing all payments made to Chrysler Credit since December 1, 1994, including the enclosed payment of \$13,250.00, and setting forth the current balance due from Penn Yan to Chrysler Credit. A copy of this letter was forwarded to Harter, Secrest.

On October 25, 1995, an Order converting the Penn Yan case to Chapter 7 was entered based upon an Application for Conversion filed by Penn Yan. The Application alleged that: (1) Penn Yan had remained in Chapter 11 after it ceased business operations in the Fall of 1994 in order to collect the surplus monies which it believed would be paid over to it by Chrysler Credit after it had liquidated all of the Penn Yan Collateral and paid itself the balance due from Penn Yan; (2) Penn Yan had anticipated that the liquidation of the Collateral and the payment of the anticipated surplus would have taken place by no later than the end of June 1995; (3) Penn Yan had anticipated that Chrysler Corporation would have paid Chrysler Credit approximately \$75,000.00 in consideration of the return of Penn Yan's usable inventory; and (4) Penn Yan and its attorneys had made repeated demands upon Chrysler Credit and Harter, Secrest for an accounting in connection with the liquidation of the Collateral, but no accounting and no payment of surplus had been received.¹

¹ A review of the time records submitted by the attorneys for Penn Yan as part of their applications for allowances of professional fees and disbursements confirmed that there were numerous attempts by those attorneys from July 1995 through October 1995 to obtain an accounting from Chrysler Credit for the proceeds of the returnable parts shipped back to Chrysler Corporation and any surplus after those proceeds had been applied to the balance due to Chrysler Credit. These time records indicated that: (1) the attorneys for Penn Yan and an attorney for Chrysler Credit at Harter, Secrest had a conversation on July 6, 1995, wherein the attorneys for Penn Yan were advised that the returnable parts had been shipped back to Chrysler Credit and that payment might be received within one month; (2) on July 19, 1995, an employee of Chrysler Credit indicated that he would send the attorneys for Penn Yan an inventory; (3) on August 3, 1995, the attorneys for Penn Yan forwarded a letter to the attorneys for Chrysler Credit regarding Penn Yan's reserve accounts; (4) on September 28, 1995, the

BK. 94-21774
AP. 96-2052

On October 31, 1995, John A. Belluscio (the "Trustee") was appointed as Trustee in the Penn Yan Chapter 7 case. A Minute Report of a Section 341 Hearing conducted by the Trustee on November 22, 1995 indicated that: (1) it was believed that there were surplus funds being held by Chrysler Credit; (2) there were two vehicle leases where the lease payments were being made directly to Chrysler Credit as a secured creditor; and (3) an accounting for parts returned to Chrysler Corporation had not been provided.

On March 19, 1996, the Trustee commenced an adversary proceeding against Chrysler Credit (the "Turnover Adversary Proceeding"). In his Original Complaint, the Trustee: (1) alleged that he had duly demanded that Chrysler Credit turn over the proceeds of the liquidation by Chrysler Credit, as a secured creditor, of the Penn Yan Collateral in the nature of equipment, parts, miscellaneous inventory and vehicles, but that it refused to do so; and (2) requested a turnover and a proper accounting.

On April 26, 1996, Chrysler Credit interposed an Answer to the Turnover Adversary Proceeding by a law firm located in Albany, New York which, as a Third Defense, indicated that the bankruptcy estate and Trustee were not entitled to the turnover of credits made to the dealer reserve account² until all financial obligations applicable to the account had been fulfilled.

attorneys for Penn Yan and Chrysler Credit had an additional telephone call where they discussed the dealer account status and attorneys for Penn Yan were promised an accounting within a week; and (5) on October 19, 1995, the attorneys for Penn Yan once again made telephone calls to the attorneys for Chrysler Credit to inquire about an accounting for the returned parts and the proceeds which Penn Yan anticipated would be paid to Chrysler Credit and Penn Yan.

² The Complaint made no specific reference to any credits to or amounts in any Dealer Reserve Account.

BK. 94-21774
AP. 96-2052

On July 10, 1996, after the Court had conducted a telephonic pre-trial conference on June 18, 1996, the Trustee served a first set of interrogatories and a request for the production of documents. Thereafter, on July 24, 1996, a Stipulation for the Amendment of the Trustee's Complaint was executed and thereafter filed on August 7, 1996. This Stipulation agreed that Chrysler Corporation would be added to the Turnover Adversary Proceeding as a named defendant.

In the Amended Complaint, the Trustee: (1) added to the list of the proceeds of the Penn Yan Collateral which he sought to have turned over: (a) accounts receivable from warranty work, rebate entitlements and hold backs on the sales of new vehicles; (b) lease proceeds; and (c) credits to the Penn Yan Dealer Reserve Account (the "Reserve Account") established by a March 15, 1990 Vehicle Financing and Repurchase Agreement (the "Repurchase Agreement"), when all underlying assigned retail installment contracts had been paid in full; (2) requested a detailed accounting for the liquidation of the Penn Yan Collateral by Chrysler Credit, along with a turnover to the Trustee of any surplus after the indebtedness to Chrysler Credit was satisfied,³ and a monthly accounting for the status of the Reserve Account.

On or about September 9, 1996, Chrysler Credit interposed an Answer to the First Amended Complaint, and on or about October 7, 1996, Chrysler Corporation interposed an Answer to the First Amended Complaint. These answers were essentially the same as Chrysler Credit's Answer to the Trustee's Original Complaint.

³ Although the Amended Complaint did not specifically request a turnover of the surplus, that was clearly what was sought.

BK. 94-21774
AP. 96-2052

On April 17, 1997, an Order was entered approving a Stipulation for Settlement of Contested Issues by and between Trustee and Chrysler Credit (the “Settlement Stipulation”) which provided that: (1) Chrysler Credit agreed to pay to the Trustee all amounts credited to the Penn Yan Reserve Account after all outstanding retail sales contracts purchased by Chrysler Credit from Penn Yan were fully paid, which was estimated to occur in July 1999; (2) as of October 31, 1996, there were credits to the Penn Yan Reserve Account of \$65,578.73; (3) Chrysler Credit agreed to provide the Trustee with copies of all monthly Reserve Account statements issued after October 1996; (4) Chrysler Credit was authorized to deduct \$2,500.00 from the balance of the Reserve Account for legal fees and expenses incurred by it in connection with the Turnover Adversary Proceeding, which was without prejudice to its right to seek an award of attorney fees and expenses from the Bankruptcy Court in accordance with Section 506(b) in an amount in excess of \$2,500.00, and the Trustee reserved his right to oppose any such application; and (5) pursuant to Chrysler Credit’s statement of November 8, 1995, it would credit the Reserve Account with \$4,468.02, the surplus due after the liquidation of the Penn Yan Collateral, and \$1,040.06 which resulted from a recalculation of expenses chargeable to Penn Yan in connection with the liquidation of the Collateral.

On June 7, 1999, Chrysler Credit filed a Motion pursuant to 11 U.S.C. § 506(b) for an Order approving the payment of the legal fees and expenses that it had incurred in connection with the Turnover Adversary Proceeding [the “506(b) Motion”]. The Motion alleged that: (1) Chrysler Credit had a security interest in all of Penn Yan’s assets, including credits to the Reserve Account; (2) in its Answer to the Original Complaint and the Amended Complaint in the Turnover Adversary Proceeding, Chrysler Credit had contested the Trustee’s entitlement to immediately be paid any

BK. 94-21774
AP. 96-2052

credits to the Reserve Account; (3) the 506(b) Motion had been brought as authorized by the provisions of the Settlement Stipulation; (4) Chrysler Credit had incurred legal fees and disbursements in connection with the Turnover Adversary Proceeding in the total amount of \$11,141.14, leaving an unreimbursed amount of \$8,641.14 after \$2,500.00 had been deducted from the Reserve Account in accordance with the provisions of the Settlement Stipulation; (5) it was anticipated that Chrysler Credit would incur an additional \$3,000.00 in legal fees and disbursements in connection with the final resolution of the 506(b) Motion; (6) as of October 30, 1996, there were credits to the Reserve Account of \$68,105.73; and (7) Chrysler Credit was entitled to recover the reasonable fees and disbursements it incurred as provided in Section 506(b),⁴ because pursuant to Section 6.0 of the Security Agreement and Master Credit Agreement, dated March 15, 1990, entered into between Chrysler Credit and Penn Yan (the "Security Agreement"), Penn Yan had agreed to pay all expenses and to reimburse Chrysler Credit for any expenditures, including reasonable attorney fees and legal expenses, in connection with Chrysler Credit's exercise of any of its rights and remedies under the Agreement.

⁴ Section 506(b) provides that:

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b) (1999).

BK. 94-21774
AP. 96-2052

On August 11, 1999, the Trustee interposed an Objection to the 506 Motion (the “Objection”) which asserted that: (1) because Chrysler Credit had no amounts due it under the Security Agreement at the time the Trustee commenced the Turnover Adversary Proceeding since the amounts due on the Capitalization Loan and the Floor Plan Arrangement had been paid, it had no allowed secured claim against the Penn Yan bankruptcy estate for which it could also recover reasonable fees and costs under Section 506(b); (2) not all of the services for which Chrysler Credit was seeking to recover were reasonable; (3) the services for which recovery was being requested, services to defend the Turnover Adversary Proceeding, were not incurred by Chrysler Credit in exercising its rights and remedies under the Security Agreement in the event of a default, because there was no default under that Agreement since all of the amounts due to Chrysler Credit on the Capitalization Loan and Floor Plan Arrangement had been paid; (4) the Repurchase Agreement, entered into between Penn Yan and Chrysler Credit that resulted in the establishment of the Reserve Account which the Trustee was attempting to have turned over in his Adversary Proceeding, did not specifically provide that Chrysler Credit could be reimbursed for any legal fees and costs in connection with the exercise of its rights and remedies under the Repurchase Agreement; (5) any services performed on behalf of Chrysler Corporation, rather than Chrysler Credit, could not be recovered under the Security Agreement which was only between Chrysler Credit and Penn Yan; and (6) in the detailed time records attached to the 506(b) Motion (the “Time Sheets”), many of the services for which an allowance was being sought were so lumped together that it was impossible to determine the specific times spent for specific services and thus the reasonableness of those services.

BK. 94-21774
AP. 96-2052

On August 16, 1999, Chrysler Credit interposed a “Response” to the Objection which alleged that: (1) the Security Agreement was entered into in connection with an Inventory Floor Plan Financing Agreement between Chrysler Credit and Penn Yan; (2) the Repurchase Agreement was entered into in connection with the agreement of Chrysler Credit to purchase from Penn Yan retail installment contracts entered into with customers who purchased vehicles from Penn Yan; (3) the Reserve Account was not an actual account, but was a ledger of credits and debits; (4) pursuant to the terms of the Repurchase Agreement, once a dealer such as Penn Yan ceased assigning new retail contracts to Chrysler Credit, Chrysler Credit had no obligation to make further advance payments from the Reserve Account until all of the contracts purchased by and assigned to Chrysler Credit had been fully paid;⁵ (5) once no further retail installment contracts were assigned to Chrysler Credit by a dealer, it is possible that, because of advance payments made to the dealer, the future collections or lack of collections on the existing retail installment contracts would result in a negative balance in the Reserve Account so that the dealer would owe amounts to Chrysler Credit; (6) it was necessary for Chrysler Credit to defend the Turnover Adversary Proceeding in order to insure that it would not incur any loss resulting from the early termination of the existing retail installment contracts; (7) Chrysler Credit believed that it was entitled to recover its legal fees and costs incurred in defending the Penn Yan Collateral, the credits in the Reserve Account, and the surplus proceeds of the liquidation of the other Penn Yan Collateral from a turnover, in order to insure that ultimately Chrysler Credit did not incur a loss if there was an early termination of the existing retail installment

⁵ The Trustee’s Amended Complaint specifically acknowledged this.

BK. 94-21774
AP. 96-2052

contracts; (8) under Section 506(b), Chrysler Credit was entitled to recover reasonable legal fees and disbursements incurred in connection with defending the Reserve Account and any surplus from the liquidation of the Penn Yan Collateral against an improper turnover claim by the Trustee; and (9) the Objection, to the extent that it asserted that certain services described on the time entries attached as an exhibit to the 506 Motion were not reasonable, was unfounded.

DISCUSSION

I. Case Law

From the decisions of the United States Court of Appeals for the Second Circuit in *In re Continental Vending Machine Corp.*, 543 F.2d 896 (2nd Cir. 1976) (“*Continental Vending*”), and *In re United Merchants and Manufacturers, Inc.*, 674 F.2d 134 (2nd Cir. 1982) (“*United Merchants*”), we know that: (1) the validity of a clause in a loan agreement providing for the recovery upon default of collection costs, including attorneys fees, is determined by state law (*United Merchants*); (2) allowing a claim under some collection costs provision merely effectuates the bargained-for terms of the loan agreements (*United Merchants*); (3) Section 506(b) permits an oversecured creditor to recover, to the extent of the value of its security, certain collection costs provided for in the agreements giving rise to its claim (*United Merchants*); (4) these recoverable collection costs, including reasonable attorneys fees, are for such services and expenses as are reasonably necessary to enforce a debtor’s obligations and to collect the amounts due on them (*Continental Vending*); (5) in determining what are reasonably necessary services and expenses a rule of reason must be observed in order to avoid such clauses becoming a tool for wasteful diversion

BK. 94-21774
AP. 96-2052

of an asset at the hands of secured creditors who, knowing that the estate must foot the bills, fail to exercise restraint in enforcement expenses (*Continental Vending*); (6) in allowing the recovery of reasonably necessary services and expenses, much is left to the discretion of the Bankruptcy Court (*Continental Vending*); and (7) the controlling inquiry is whether, considering all relevant factors, the secured creditor reasonably believed that the services employed were necessary to protect its interests in the collateral (*United Merchants*).

From Bankruptcy Court decisions within the Second Circuit, we also know that: (1) to substantiate a claim for reasonable attorneys fees under Section 506(b) a creditor must show that: (a) it is oversecured; (b) the applicable loan documents provide for the recovery of such attorneys fees; and (c) any claim for attorneys fees is reasonable, See *In re Mills*, 77 B.R. 413 (Bankr. S.D.N.Y. 1987); and (2) it is unreasonable to ask a debtor to reimburse attorneys fees incurred by a creditor that are not cost-justified either by the economics of the situation or necessary to the preservation of the creditor's interest in the collateral in light of the legal issues involved, See *In re Nic Fur-Cruz Realty Corp.*, 50 B.R. 162 (Bankr. S.D.N.Y. 1985).

II. Entitlement to Reasonable Attorney Fees - The Underlying Loan Documents

_____Chrysler Credit has asserted that even though there may have been no monies due under the Capitalization Loan or Floor Plan Arrangement at the time the Trustee commenced the Turnover Adversary Proceeding, the Security Agreement provides that all of the Penn Yan Collateral also secures any and all indebtedness that might be due to Chrysler Credit, including any deficiency due under the Repurchase Agreement which might occur as a result of the early termination or

BK. 94-21774
AP. 96-2052

uncollectability of some of the assigned retail installment contracts. Chrysler Credit has further asserted that an indebtedness by definition includes any and all obligations that may be due from Penn Yan to Chrysler Credit, including the obligation under the Security Agreement and the New York Uniform Commercial Code (the “UCC”) that Penn Yan must defend the collateral which secured any indebtedness or obligation due from it to Chrysler Credit.

Although it requires a somewhat long and sometimes difficult journey through the loan documents and the UCC, I will accept as correct Chrysler Credit’s technical position that it can recover the reasonable legal fees and expenses incurred which were necessary to defend the Penn Yan Collateral.⁶ This result would also be an equitable one based upon the facts and circumstances presented. The relevant provisions of the Repurchase Agreement make it clear that, once Penn Yan ceased its business operations, Chrysler Credit had no obligation to make any further advanced payments of credits to the Reserve Account until all of the underlying contracts had been fully paid, terminated or otherwise determined to be uncollectible. Therefore, the Trustee should not have commenced the Turnover Adversary Proceeding to the extent that it was for the purposes of obtaining the premature payment of any credits to the Reserve Account.⁷

⁶ After a factual hearing regarding the parties actual intent as to whether attorney fees and expenses would be recoverable to defend the Penn Yan Collateral under these circumstances pursuant the loan documents, which certainly could be found to be ambiguous on the issue, the Court might very well find that there was no such intent.

⁷ Although the Answer of Chrysler Credit in the Turnover Adversary Proceeding specifically mentioned credits to the Reserve Account, the Trustee’s Original Complaint did not appear to request a turnover of these credits.

BK. 94-21774
AP. 96-2052

However, for the purposes of granting an allowance under Section 506(b), services necessary to defend the Penn Yan Collateral do not include services performed by Chrysler Credit's attorneys in order to provide the Trustee with an accounting for any surplus that may have resulted from the liquidation, collection or disposition of the Penn Yan Collateral that did not consist of any credits to the Reserve Account. This is not a component of defending that Collateral. Pursuant to UCC Section 9-504(2)⁸, Chrysler Credit, as a secured party, was required to account to Penn Yan for any surplus after it had liquidated or otherwise disposed of the non-Reserve Account Collateral in a commercially reasonable manner. The history of this case makes it clear that, prior to the commencement of the Turnover Adversary Proceeding, Chrysler Credit never provided the kind of detailed accounting required by the UCC for the surplus that in fact resulted from its liquidations, notwithstanding the repeated requests for an accounting by Penn Yan and its representatives.

Furthermore, in this Court's view, services rendered in order to provide an accounting to the Trustee for the status of the credits and debits to the Reserve Account are also not services required or necessary to defend the Penn Yan Collateral. Penn Yan and its representatives were at all times entitled to a continuing accounting for the status of the Reserve Account from Chrysler Credit,

⁸ UCC Section 9-504(2) provides that :

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

Uniform Commercial Code § 9-504(2) (1999).

BK. 94-21774
AP. 96-2052

especially after Penn Yan had ceased business operations and was no longer entitled to receive any advanced payments of credits.

In addition, providing: (1) accountings for any surplus proceeds after the liquidation of the Penn Yan Collateral and for the status of any credits or debits to the Reserve Account; and (2) explanations as to the status of any uncompleted liquidations, which were not actually being performed by outside attorneys are not matters that require the assistance of attorneys, let alone outside attorneys. These accountings and explanations could and should have been provided by employees of Chrysler Credit. There could have been no reasonable expectation that any costs necessary to provide this accounting and long overdue liquidation information would be charged to Penn Yan under the facts and circumstances of the relationship between Penn Yan and Chrysler Credit throughout the periods in question. Providing these accountings and explanations is simply part of the cost of doing business for an entity such as Chrysler Credit. It may choose to have outside attorneys work on or provide this information, but it cannot reasonably expect to pass that cost on to a debtor.⁹

Therefore, the Court has not granted an allowance under Section 506(b) for these accounting-related services.

Since, as correctly pointed out by the Trustee, so many of the services set forth on the Time Sheets are batched and lumped together, Chrysler Credit bears the risk and the burden of the inability

⁹ From the pretrial conferences it conducted in connection with the Turnover Adversary Proceeding, the Court's recollection is that the Trustee's major concern was not the issue of the right to the immediate payment of credits to the Reserve Account, but was to obtain the above described accountings and the explanations regarding the liquidation of the Penn Yan Collateral.

BK. 94-21774
AP. 96-2052

of the Court to completely identify the specific amounts of time associated with these accounting and explanation services. The Court has made its best estimate of the time expended on these disallowed services, which is \$2,008.00.

III Reasonableness of Fees Requested

A. General

Having determined that Chrysler Credit's underlying loan agreements and Section 506(b) permit it to recover some attorney fees and expenses, those that were incurred to defend the Penn Yan Collateral from a turnover, and there being no dispute that Chrysler Credit is oversecured, the Court's inquiry turns to whether the nonaccounting-related services for which an allowance has been requested were: (1) reasonable; and (2) necessary to defend the Penn Yan Collateral from a turnover, or if they were not reasonably necessary, whether, under *United Merchants*, Chrysler Credit reasonably believed that they were necessary to protect its interests as an oversecured creditor.

B. Specific Services

I have reviewed each of the entries on the Time Sheets. I find that pursuant to Section 506(b), Penn Yan, as an oversecured creditor, is entitled to recover from the Reserve Account the total amount of \$5,667.00 for the services performed by its outside attorneys. This amount includes \$1,000.00 for services performed in connection with the Section 506(b) Motion. In arriving at this allowance, I have found certain services rendered by Chrysler Credit's outside attorneys to be unreasonable, unnecessary to defend the Penn Yan Collateral from a turnover, or both. These services include: (1) services and expenses related to changing attorneys from Harter, Secrest, which represented Chrysler Credit in the Penn Yan Chapter 11 case and when it was initially converted to

BK. 94-21774
AP. 96-2052

a Chapter 7 case; (2) services where the time expended was unreasonable compared to the results of the task required; (3) duplicated services; and (4) services which could and should have been performed by junior attorneys or by administrative staff as overhead rather than as reasonable attorney services. Once again, because so many of the services set forth on the Time Sheets are batched and lumped together, it has been difficult for the Court to completely identify the specific amounts of time associated with these unreasonable or unnecessary services. The Court has made its best estimate of the time expended on these disallowed services.

i. Services and Expenses Related to Changing Attorneys

Although Chrysler Credit is entitled to be represented by an attorney of its choice, it cannot reasonably expect that a borrower such as Penn Yan will pay for the increased costs incurred when Chrysler Credit elects to change attorneys in a bankruptcy case from a firm which had the expertise, background knowledge, prior involvement and proximity to the Court and the Trustee that would have resulted in that firm expending less time and incurring less expenses to defend the Penn Yan Collateral from a turnover. Representative of these disallowed services were telephone calls on April 23, 1996 and April 24, 1996 to Chrysler's former attorney, a July 16, 1996 review of file from former counsel, a July 18, 1996 review of previous correspondence from former attorney and February 19, 1997 travel to Rochester, and the related costs of airline tickets. The Court has made its best estimate of the time expended on these disallowed services and incurred costs, which is \$2,243.50.

BK. 94-21774
AP. 96-2052

ii. Excessive Time Spent

Although the hourly rates charged by the attorneys for Chrysler Credit for the actual reasonable and necessary legal services performed to defend the Penn Yan Collateral, rather than administrative services which will be discussed below, were reasonable, in this Court's experience, excessive time was spent by the attorneys on several tasks, especially in reviewing and preparing the very simple pleadings which were interposed in the Turnover Adversary Proceeding. These services include, but are not limited to, services on April 15, 1996 to review the Trustee's simple Original Complaint, services on April 23, 1996 to draft Chrysler Credit's initial Answer and Counterclaim, services on July 30, 1996 to draft responses to a request for the production of documents and interrogatories, and services on September 4, 1996 to draft an Answer and Counterclaims to the Amended Complaint, which Answer and Counterclaim was virtually identical to the original Answer and Counterclaim. The Court has made its best estimate of the time expended on these disallowed services, which is \$653.50.

iii. Duplicated Services

Although it is clear that the attorneys for Chrysler Credit did attempt to eliminate billing for duplicated services, the Court believes that some duplicated services were still included in Chrysler Credit's request for an allowance under Section 506(b). These duplicated services include services on April 24, 1996 to review a file and on May 13, 1996 to review correspondence.¹⁰

¹⁰ Although the amounts are not specifically stated, I have reduced the total compensation award by the amount of duplicated services and non-legal services.

iv. Non-legal Services

_____The request by Chrysler Credit for an allowance under Section 506(b) includes services performed by attorneys which, in this Court's experience, are normally performed and should be performed by administrative staff. These include tasks such as faxing, filing and mailing. In the Response to the Objection, the attorneys for Chrysler Credit asserted that Chrysler Credit required such services to be performed by attorneys. Once again, Chrysler Credit has complete freedom to make this business decision. However, it cannot reasonably expect that the cost of that business decision will be passed on to its borrowers, especially when a request for an allowance is made under Section 506(b).

Some of the services which the Court has disallowed as administrative rather than legal services, and certainly not required to defend the Penn Yan Collateral from a turnover, include, but are not limited to, services on September 9, 1996 to serve and file answers and on October 24, 1996 to calendar dates.

C. Overview

_____As this Court has stated on a number of occasions, and as required by the relevant case law, secured creditors who expect to have a Bankruptcy Court grant them an allowance so that the attorney fees and expenses which they have incurred as an oversecured creditor can be reimbursed, must: (1) continually focus on what services are truly necessary to protect their interest as a secured creditor in the collateral; (2) insure that the services they request and incur are cost justified by the economics of the situation or necessary to the preservation of their interests in the collateral in light of the legal issues involved; and (3) review in detail any applications for an allowance under Section

BK. 94-21774
AP. 96-2052

506(b) to insure that reimbursement is requested only for appropriate and allowable services and expenses.

In this case, Chrysler Credit has requested an allowance of in excess of \$14,000.00 where, in this Court's opinion, if it had timely provided all of the accountings and explanations that Penn Yan, its representatives and the Trustee requested and were entitled to, and simply included with its Answer, copies of the Security Agreement and the Repurchase Agreement with the relevant provisions highlighted, the Court could have resolved the entitlement of the Trustee to any credits in the Reserve Account at the initial pretrial conference conducted by the Court. Had that happened, the attorneys fees and expenses incurred by Chrysler Credit would have been significantly less than even those which have been allowed pursuant to Section 506(b) in this Decision & Order.

CONCLUSION

Pursuant to Section 506(b), Chrysler Credit is entitled to recover \$5,667.00 as reasonable attorney fees and \$537.14 as reasonable expenses incurred as an oversecured creditor, which includes the \$2,500.00 previously received by it in connection with the Settlement Stipulation.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: October 28, 1999