



U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 10, 2015

  
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

**In re:** §  
§  
NNN 3500 Maple 26, LLC, *et al*, § Case No. 13-30402-hdh11  
§ (Jointly Administered)  
§  
Debtors. §

**ORDER REGARDING (I) THE TRUST'S APPLICATION  
PURSUANT TO 11 U.S.C. § 506(b) FOR INTEREST, FEES, COSTS  
AND CHARGES AND (II) THE REORGANIZED DEBTORS'  
OBJECTION TO TRUST'S PREPETITION SECURED CLAIM**

This matter involves a fee application by an oversecured creditor in a bankruptcy case. As will be described in more detail below, the case was hard-fought between the jointly-administered debtors, the non-debtor tenants in common, and the lender. The lender ultimately prevailed in obtaining relief from the automatic stay, and foreclosed. The foreclosure sale produced excess proceeds, even after the lender was paid principal, accrued interest, prepayment penalties, expenses, pre-foreclosure attorneys' fees, and a \$50,000 cushion for future attorneys' fees it unilaterally reserved for itself.

The foreclosure sale paid the lender in full, and the lender released its deed of trust. Under Texas law, the lender was required to remit these excess funds to the borrowers (the tenants in common, including the debtors).<sup>1</sup> The Bankruptcy Code likewise required the lender to promptly turn over property of the estate to the debtors.<sup>2</sup> However, disputes regarding certain deposits were raised by both the buyer and the tenants in common after the foreclosure sale, and the lender chose to file an interpleader action to resolve all claims to the funds.

The parties claiming an interest to the excess proceeds mediated with another bankruptcy judge in this district. All parties except the lender settled. Instead, the lender held out for a complete release of all claims against it. In fact, its counsel sought such relief in the interpleader, which is relief beyond any possible result it could obtain in that proceeding.

Upon motion by the debtors, the Court ordered the lender to turn over the excess proceeds to the debtors. The lender first sought a modification of the turnover order, which was unsuccessful, and then took the matter to the district court and the court of appeals for a stay pending appeal, which was ultimately unsuccessful. The lender turned over the excess proceeds to the plan administrator as required by the Court. The underlying appeal of the Court's order is pending in the district court.

In conformance with existing law, the Court required the lender to file an application to have its fees reviewed and approved. It appears to the Court that the lender did not want to subject its fees to such consideration, but ultimately filed a fee application. Although paid in full at foreclosure, the lender has incurred and seeks approval of substantial post-foreclosure fees.

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<sup>1</sup> See *Conversion Props., L.L.C. v. Kessler*, 994 S.W.2d 810, 813 (Tex. App.—Dallas 1999, pet. denied).

<sup>2</sup> See 11 U.S.C. § 542.

As will be discussed in more detail below, the analysis of fees for the lender breaks down into the two parts of this bankruptcy case: the lender's efforts before and after foreclosure. With a few limited exceptions, the fees incurred before the foreclosure are reasonable. On the other hand, because most of the post-foreclosure litigation was unnecessary, the Court finds a significant portion of the fees incurred post-foreclosure to be unreasonable under Texas law, the loan documents, and the Bankruptcy Code, and therefore such portion of the fees will be disallowed.

## **I. Introduction**

Presented for the Court's consideration are the *Trust's Application Pursuant to 11 U.S.C. § 506(b) for Interest, Fees, Costs, and Charges* [Docket No. 1168] (the "Application") and the *Reorganized Debtors' Objection to Trust's Prepetition Secured Claim* [Docket No. 1218] (the "Claim Objection"). Both the Application and the Claim Objection concern the secured claim of the Trust.<sup>3</sup> Through the Application, the Trust requests payment for reasonable fees, costs, and charges incurred during the pendency of these bankruptcy cases pursuant to 11 U.S.C. § 506(b).<sup>4</sup> Through the Claim Objection, the Debtors<sup>5</sup> challenge the pre-petition attorneys' fees and other costs included in the Trust's proofs of claim. Therefore, the entirety of the Trust's claim (including both pre- and post-petition attorneys' fees) is before the Court for consideration. Pursuant to a

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<sup>3</sup> As used herein, the "Trust" refers to U.S. Bank National Association, as Trustee, successor-in-interest to Bank of America, N.A., as Trustee for the Registered Holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2006-C23, by and through CWC Capital Asset Management LLC, solely in its capacity as Special Servicer.

<sup>4</sup> The Application also seeks approval of interest. To the extent that the interest sought is the same as that described in the Secured Claim (defined below) and already paid to the Trust in full, there is no objection, and the Court finds that the Trust is entitled to these funds under the terms of the contract and the language of 11 U.S.C. § 506(b).

<sup>5</sup> As used herein, the "Debtors" refers to the debtors in the underlying, jointly-administered cases (collectively referred to as the "Case"), including NNN 3500 Maple 1, LLC, NNN 3500 Maple 2, LLC, NNN 3500 Maple 3, LLC, NNN 3500 Maple 4, LLC, NNN 3500 Maple 5, LLC, NNN 3500 Maple 6, LLC, NNN 3500 Maple 7, LLC, NNN 3500 Maple 10, LLC, NNN 3500 Maple 12, LLC, NNN 3500 Maple 13, LLC, NNN 3500 Maple 14, LLC, NNN 3500 Maple 15, LLC, NNN 3500 Maple 16, LLC, NNN 3500 Maple 17, LLC, NNN 3500 Maple 18, LLC, NNN 3500 Maple 20, LLC, NNN 3500 Maple 22, LLC, NNN 3500 Maple 23, LLC, NNN 3500 Maple 24, LLC, NNN 3500 Maple 26, LLC, NNN 3500 Maple 27, LLC, NNN 3500 Maple 28, LLC, NNN 3500 Maple 29, LLC, NNN 3500 Maple 30, LLC, NNN 3500 Maple 31, LLC, NNN 3500 Maple 32, LLC, and NNN 3500 Maple 34, LLC.

stipulation, the Trust and the Debtors narrowed the issues presented to the Court for resolution to the Trust's legal entitlement to reimbursement of the fees, costs, and/or charges of: (i) the Trust's counsel; (ii) appraisals not produced to the Debtors; and (iii) expert reports of SC&H Group, LLC and Christopher Davidson, CPA.<sup>6</sup> The Court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. §§ 157(b)(2)(A) & (O) and 1334.

On March 31, 2015, the Court held a hearing to consider the Application and the Claim Objection (the "Hearing").<sup>7</sup> With respect to its attorneys' fees, the Trust seeks fees and expenses billed by its counsel, Venable LLP ("Venable") and Perkins Coie LLP ("Perkins Coie"). Collectively, the Trust seeks \$2,548,871.23 in attorneys' fees and expenses incurred from November 18, 2011 through December 22, 2014 (the "Fees and Costs"). These Fees and Costs include \$2,233,312.41 to be paid to the Trust as reimbursement for amounts billed by Venable (\$2,089,002.00 in attorneys' fees and \$144,310.41 in expenses) and \$315,558.82 for amounts billed by Perkins Coie (\$299,640.50 in attorneys' fees and \$15,918.32 in expenses).

Having considered the Application, the Claim Objection, the filings of the parties, and the evidence and argument presented by the parties at the Hearing, the Court determines, for the reasons stated below, that the Trust is entitled to the Fees and Costs in the total amount of \$2,108,931.72. This represents \$1,870,967.40 attributable to Venable (\$1,740,474.50 in attorneys' fees and \$130,492.90 in expenses) as well as \$237,964.32 attributable to Perkins Coie (\$222,046.00 in attorneys' fees and \$15,918.32 in expenses). The Court also finds that the amounts

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<sup>6</sup> *Stipulation of Undisputed Facts and Admissibility of Exhibits for Hearing on (I) Trust's Application Pursuant to 11 U.S.C. § 506(b) for Interest, Costs and Charges; (II) Trust's Request for Payment of Administrative Expense Claim; and (III) Reorganized Debtors' Objection to Trust's Prepetition Secured Claim* [Docket No. 1238]. In the stipulation, the Trust and the Debtors agree as to the other components of the Trust's claim, including principal, interest, prepayment, default interest, late fees, property protection advances, administrative fees, and a credit to the borrower.

<sup>7</sup> At the Hearing, the Court also considered the Trust's *Request for Payment of Administrative Expense Claim* [Docket No. 902], which the Court will rule on by separate order.

requested by the Trust should not be reduced by amounts attributable to appraisals not produced to the Debtors and expert reports of SC&H Group, LLC and Christopher Davidson, CPA.

## **II. Factual Background**

The Debtors are each entities that together comprise 27 of the 33 tenants in common (the “TICs”) who shared ownership of an 18-story building located at 3500 Maple Avenue in Dallas, Texas (the “Property”). The TICs that are not debtors in the Case include NNN 3500 Maple, LLC (“TIC 0”), as well as NNN 3500 Maple 8, LLC, NNN 3500 Maple 9, LLC, NNN 3500 Maple 11 LLC, NNN 3500 Maple 25, LLC, and NNN 3500 Maple 35, LLC (other than TIC 0, the “Non-Debtor TICs”). An interest in the Property was the primary asset of each of the Debtors’ estates at the time each petition was filed.

### **A. The Trust’s Secured Claim**

Because of the ownership structure of the Property, the bankruptcy cases were—to be kind—complicated. On November 30, 2012, NNN 3500 Maple 26, LLC (individually, the “First Debtor”) filed the first bankruptcy petition (the “First Petition”) <sup>8</sup> in this Case. At that time, the Trust had a secured claim (the “Secured Claim” as evidenced by Proof of Claim No. 7) <sup>9</sup> based on a 2005 loan by Wachovia Bank, National Association to both TIC 0 and NNN 3500 Maple VF, LLC (the “Loan”) in the amount of \$47,000,000. The Property served as collateral for the Secured Claim. The terms of the Loan are set out in a Promissory Note dated December 27, 2005 (the

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<sup>8</sup> The First Petition was filed as case number 12-23718 in the United States Bankruptcy Court for the Central District of California, Santa Ana Division. That case was transferred to this Court on January 23, 2013.

<sup>9</sup> The Trust also filed proofs of claim in each of the other Debtors’ chapter 11 cases as follows: Case No. 13-34362, Claim No. 3, Case No. 13-34363, Claim No. 2; Case No. 13-34364, Claim No. 2; Case No. 13-34365, Claim No. 2; Case No. 13-34366, Claim No. 2; Case No. 13-34367, Claim No. 2; Case No. 13-34368, Claim No. 2; Case No. 13-34369, Claim No. 2; Case No. 13-34370, Claim No. 2; Case No. 13-34371, Claim No. 2; Case No. 13-34372, Claim No. 2; Case No. 13-34373, Claim No. 2; Case No. 13-34374, Claim No. 2; Case No. 13-34375, Claim No. 2; Case No. 13-34376, Claim No. 2; Case No. 13-34377, Claim No. 2; Case No. 13-34378, Claim No. 2; Case No. 13-34379, Claim No. 2; Case No. 13-34380, Claim No. 2; Claim No. 7; Case No. 13-34381, Claim No. 2; Case No. 13-34382, Claim No. 2; Case No. 13-34383, Claim No. 2; Case No. 13-34384, Claim No. 2; Case No. 13-34385, Claim No. 2; Case No. 13-34386, Claim No. 2; Case No. 13-34387, Claim No. 2 (collectively, the “Proofs of Claim”).

“Note”<sup>10</sup> and accompanied by a Deed of Trust, Security Agreement, and Fixture Filing (the “Deed of Trust”).<sup>11</sup> Pursuant to several assignments, a Tenant in Common Agreement, and other documents executed in the following months,<sup>12</sup> the Note became binding on the First Debtor and the other TICs. The Trust acquired the Note on March 22, 2012 pursuant to the *Omnibus Assignment*.<sup>13</sup>

**B. Relief from Stay Against the First Debtor after the First Petition**

On October 11, 2012, prior to the filing of the First Petition, the TICs failed to make the monthly debt service payment on the Loan and defaulted under the Note. On October 12, 2012, the Trust sent a notice of default to the TICs exercising its right to accelerate the Loan. On November 12, 2012, the Trust notified the TICs that it intended to foreclose on the Property, with a foreclosure sale scheduled for December 4, 2012.

The Trust’s efforts to foreclose were stayed by the filing of the First Petition. Once the bankruptcy was commenced and the case was transferred to this Court, the Trust then moved to have the automatic stay lifted so it could proceed with the foreclosure. The Trust argued to the Court that the First Debtor had no equity in the Property and that the building was not necessary to the First Debtor’s reorganization. In support of its argument, the Trust filed a proof of claim in that case showing that the Debtor owed over \$53.8 million on the Note, once various contractual interest, fees, and penalties were assessed. On May 20, 2013, pursuant to this Court’s *Order on Motion to Dismiss Case Pursuant to 11 U.S.C. § 1112(b) and Motion for Relief from the Automatic*

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<sup>10</sup> See Exhibit 1 to Proof of Claim No. 7.

<sup>11</sup> See Exhibit 2 to Proof of Claim No. 7.

<sup>12</sup> The documentation supporting the Secured Claim is attached to Proof of Claim No. 7.

<sup>13</sup> See Exhibit 13 to Proof of Claim No. 7.

*Stay* [Docket No. 162], the stay was lifted. The Trust then proceeded with foreclosure, notifying the TICs of the foreclosure sale to take place in September of 2013.

### **C. The Second Petition and the Trust's New Motion to Lift Stay**

On August 29, 2013, just prior to the date scheduled for foreclosure, a majority (but not all) of the other TICs each filed for bankruptcy (collectively, the "Second Petition"). The filing of this Second Petition resulted in the reapplication of the automatic stay to the Property, thus preventing the Trust's scheduled foreclosure.

The Trust filed another motion for relief from stay on October 24, 2013, repeating the argument—successful against the First Debtor—that there was no equity in the Property and that the Property was not necessary for reorganization. However, at a hearing on joint administration of the Debtors' cases held a month prior, Mr. Josiah M. Daniel, III ("Mr. Daniel"), speaking for the former owner<sup>14</sup> of the Property, suggested that there was "substantial interest" in the Property among potential bidders, making a liquidating plan possible.<sup>15</sup> Recalling that statement, the Court became less certain that there was no equity in the Property. In its *Order on Motions to Dismiss and for Relief from Stay* [Docket No. 395], the Court decided to condition relief from the automatic stay on whether a plan of reorganization was confirmed, believing that failure to confirm a plan would lend support to the Trust's argument.

### **D. Failure to Confirm a Plan**

During the confirmation process, several plans of reorganization were proposed. TIC 0, the Debtors, and two outside parties interested in acquiring the Property each emerged as separate, competing plan proponents. The Trust, however, did not file a plan of reorganization. Attempts

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<sup>14</sup> SPUS6 3500 Maple, LLC.

<sup>15</sup> Mr. Daniel also suggested that, if the Property were auctioned on that day, at least eight potential bidders would appear to place bids.

by the plan proponents, including Strategic Acquisition Partners, LLC (“SAP”), to negotiate a consensual plan with the Trust were unsuccessful. The Trust objected to each of the plans proposed and served discovery on creditors named in the plans whose claims might be used to cram down the Trust’s Secured Claim. The Trust eventually purchased the claim of Comm-Fit, L.P. (the “Comm-Fit Claim”). Ultimately, the Court did not confirm any of the plans to reorganize the Debtors, and the Trust filed another motion for relief from stay on the Property so it could finally foreclose.

**E. The Foreclosure Sale**

On April 14, 2014, the stay was lifted for the last time, and on May 6, 2014, the Property was auctioned off at a foreclosure sale (the “Foreclosure Sale”). The Property sold for \$64,200,000 (the “Proceeds”), much more than the amount of the Trust’s Secured Claim. Following the Foreclosure Sale, the Trust deducted \$54,580,280.95 from the Proceeds, in full satisfaction of its Secured Claim (the “Payment”). The Payment included amounts for principal and interest on the Note, default interest, repayment penalties, late fees, administrative fees, and attorneys’ fees and costs through the date of the Foreclosure Sale (including \$50,000 for fees not yet incurred).

**F. The MAT Agreement**

Near the time of the Foreclosure Sale, it was discovered that the Trust reached an agreement during the confirmation process with one of the plan proponents, Maple Avenue Tower, LLC (“MAT”), whereby MAT would purchase the Property if the Trust was the high bidder at the Foreclosure Sale (the “MAT Agreement”). Since the Trust would be certain to bid up to the full amount of its Secured Claim, the MAT Agreement effectively ensured that the Trust would be paid in full. With such an assurance, it seems unlikely to the Court that the Trust was motivated to permit anyone to confirm a plan.



The other plan proponents continued to try to work with the Trust throughout the confirmation period, basing their plans on the assumption that they might work out a plan of reorganization at a price for the Property that the Trust itself had repeatedly argued was less than its Secured Claim. Yet, the Trust's continuous rebuff of outreach efforts also caused concern among the plan proponents that a secret agreement was in the works. For this reason, SAP deposed the Trust's vice president, Kevin Thompson, shortly before the confirmation hearing. However, during the deposition, Mr. Thompson testified that there was no agreement with MAT. It was later discovered, however, that at that time, there was already an agreement in principle and a letter agreement in circulation contemplating a final agreement between the Trust and MAT. The Trust later argued that Mr. Thompson's testimony was accurate, since there was no signed, binding agreement at the time the statement was made.

#### **G. The Interpleader Action**

The concern over the MAT Agreement was mitigated for most of the parties by the successful sale of the Property at the Foreclosure Sale and the generation of cash proceeds for the Debtors' estates. Even after deducting the full amount of the Trust's Secured Claim from the Proceeds, the remaining proceeds totaled \$9,619,289.22 (the "Excess Sale Proceeds"). This was enough to pay all of the creditors in the Case in full, as well as return over \$7 million to the TICs.

However, disputes quickly arose. The purchaser of the Property at the Foreclosure Sale took issue with one of the scheduled deposits. The TICs argued over how to distribute the Excess Sale Proceeds. Perhaps in response,<sup>16</sup> the Trust filed adversary proceeding number 14-03068 (the "Interpleader Action") and moved to interplead the Excess Sale Proceeds. This Court noted at a

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<sup>16</sup> The Court says "perhaps," because it appears from the time entries that counsel for the Trust began working on filing an interpleader action almost eight days before the Foreclosure Sale, when it seemed unlikely there would be any Excess Sale Proceeds and thus no dispute.

hearing that an agreed order would be entered on this motion, but the Trust then withdrew its motion to interplead the Excess Sale Proceeds without depositing them into the Court registry. The Court ordered the parties in the Interpleader Action to mediation, and a settlement was reached at mediation between all parties to the Interpleader Action except for the Trust. It later became clear that the reason the Trust would not settle was because it was demanding a complete release from the other parties to the settlement, and such a release exceeded what was available to the Trust in the context of the Interpleader Action.

#### **H. Summary Judgment**

After settlement, the Debtors filed their *Debtors' Motion for Summary Judgment, or, in the Alternative, Motion to Disburse Funds* [Docket No. 43, Interpleader Action] (the "Debtors' MSJ"), requesting summary judgment or disbursement of the Excess Sale Proceeds, since the basis for the Interpleader Action was now moot and no legitimate dispute remained. The Trust responded with its own *Plaintiff's Motion for Summary Judgment* [Docket No. 46, Interpleader Action] (the "Trust's MSJ"), requesting a summary judgment that all parties had waived any argument that its Secured Claim, including attorneys' fees, was not owed or payable and that the Trust was now discharged from all claims against it. In the brief in support of the Trust's MSJ, the Trust also sought summary judgment on the issue of attorneys' fees for the work it had performed in the Interpleader Action, relying on precedent permitting reimbursement to parties who bring such actions. The Court granted the Debtors' MSJ rather than the Trust's MSJ, dismissing the Interpleader Action and ordering the Trust to turn over the Excess Sale Proceeds to a disbursing agent (as had been agreed upon by the parties at mediation). The Court also required the Trust to file an application under 11 U.S.C. § 506(b) in the underlying Case to retain any amounts it had withheld for "reasonable fees, costs, or charges provided for under the agreement or State statute

under which such claim arose (or to recover additional amounts from the Excess [Sale] Proceeds).”<sup>17</sup>

The Trust appealed this order and sought a stay pending appeal, which was denied by this Court, the District Court, and the Fifth Circuit Court of Appeals. The Trust then turned over the Excess Sale Proceeds to the disbursing agent as required by the Court’s orders and the Debtors’ confirmed plan, and filed the instant Application.

### **III. The Legal Standard for Analyzing the Fees and Costs**

11 U.S.C. § 506(b) allows an oversecured creditor interest on its claim and “any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.” Recovery of postpetition interest is unqualified. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Therefore, as a preliminary matter, the Trust’s request for interest, which was not objected to, is granted. Recovery of an oversecured creditor’s attorneys’ fees and expenses, however, is only allowed under Bankruptcy Code section 506(b) when they are reasonable and provided for in the agreement under which the claim arose. *Id.* These requirements apply to both pre-petition and post-petition attorneys’ fees and expenses. *See Wells Fargo Bank, N.A. v. 804 Congress, L.L.C. (In re 804 Congress, L.L.C.)*, 756 F.3d 368, 373 (5th Cir. 2014). The Trust has presented undisputed evidence that the terms of the Note and the Deed of Trust obligate the TICs, in the event of default, to pay for the costs of collection, including reasonable attorneys’ fees. *See Note*, § 2.5; *see also Deed of Trust*, § 5.4. Therefore, the Court will allow the Trust’s Fees and Costs under 11 U.S.C. § 506(b), to the extent that they are provided for in the agreement and found to be reasonable.

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<sup>17</sup> *Order Granting the Defendants’ Motion for Summary Judgment, or, in the Alternative, Motion to Disburse Funds* [Docket No. 70, Interpleader Action].

Federal law determines what is reasonable in connection with secured claims in bankruptcy.<sup>18</sup> *Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc. (In re Hudson Shipbuilders, Inc.)*, 794 F.2d 1051, 1056 (5th Cir. 1986). The purpose of the reasonableness requirement of section 506(b) is to ensure that a creditor “is not given a blank check to incur attorneys’ fees which will be reimbursed out of its collateral.” *In re 900 Corp.*, 327 B.R. 585, 593 (Bankr. N.D. Tex. 2005). The burden is on the oversecured creditor seeking fees under section 506(b) to show that its attorneys’ fees and expenses are reasonable. *Id.* at 595.

In assessing the fees requested, bankruptcy courts apply a two-step process, in which they 1) calculate a lodestar amount equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work and 2) adjust the lodestar upwards or downwards to reflect their consideration of the *First Colonial Factors*. *In re Pilgrim’s Pride Corp.*, 690 F.3d 650, 656 (5th Cir. 2012) (as revised). These factors include:

(1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or other circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The “undesirability” of the case; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases.

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<sup>18</sup> The Court notes that numerous courts in the Fifth Circuit have found the factors considered in assessing the reasonableness of fees under either Texas state law or Bankruptcy Code section 506(b) to be “virtually identical.” *See, e.g., In re Pan Am. Gen. Hosp., LLC*, 385 B.R. 855, 868-69 (Bankr. W.D. Tex. 2008); *In re 900 Corp.*, 327 B.R. 585, 594 (Bankr. N.D. Tex. 2005); *Gen. Elec. Capital Bus. Asset Funding Corp. v. S.A.S.E. Military Ltd.*, No. SA-03-CA-189RF, 2005 WL 839098 (W.D. Tex. April 12, 2005); *Campbell v. Hardradio*, No. 3:01-CV-2663-BF, 2003 U.S. Dist. LEXIS 23584, \*5 (N.D. Tex. Dec. 31, 2003). Like federal law, Texas law puts the burden on the secured creditor to demonstrate that its fees are reasonable. *Garcia v. Gomez*, 319 S.W.3d 638, 646 (Tex. 2010). Furthermore, the Supreme Court of Texas has recognized that a noteholder can be limited to reasonable attorneys’ fees notwithstanding a clause in the note obligating payment. *F.R. Hernandez Constr. & Supply Co. v. Nat’l Bank of Commerce of Brownsville*, 578 S.W.2d 675, 676-77 (Tex. 1979). While the parties have disagreed over whether a federal standard applies to both pre- and post-petition attorneys’ fees, the Court’s determinations of reasonableness in this Order are based on both the federal and the Texas standards.

*Id.* at 654 (citing *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1298-99 (5th Cir. 1977)). Bankruptcy courts must also be mindful that the novelty of the issues, the skill of counsel, the quality of representation, and the results obtained should only form the basis for an adjusted fee in rare and exceptional circumstances. *Id.* at 656.

The Fees and Costs, as a request for compensation by a creditor's counsel in a case under Chapter 11 of the Bankruptcy Code, are also subject to the *Guidelines for Compensation and Reimbursement of Professionals in Chapter 11 Cases*, Appendix F to the Local Bankruptcy Rules of the United States Bankruptcy Courts for the Northern District of Texas (effective September 10, 2010, revised April 1, 2012) (the "Local Guidelines"). The Local Guidelines govern the most significant issues related to applications for compensation and expense reimbursement, including the narrative portion of an application, time records, and expenses. However, according to the text of the Local Guidelines, application of the guidelines is left to the discretion of the bankruptcy courts and the guidelines are not intended to cover every situation.

#### **IV. Analysis of the Requested Fees and Costs**

The circumstances surrounding the Case are important to the determination of whether the Fees and Costs requested by the Trust are compensable under section 506(b). Though the sheer amount requested by the Trust is considerable, this is not, in itself, an indication of unreasonableness. The result of the Foreclosure Sale in the Case is uncommon, since it generated Proceeds sufficient to pay all creditors in full and return millions of dollars to the equity holders. Based on the scope of the representation, the amount of money at stake, and the disputes involved, the lodestar in this case is likely to be significant.

The Court next considers the *First Colonial* factors. Regarding the first of these factors—the time and labor required—the Court has some initial concerns. Counsel for the Trust spent

4,718.6 hours on the Case as of December 22, 2014. The blended billing rate for Perkins Coie exceeded \$500 per hour. Venable presented invoices for time attributable to eight different partners and at least 17 attorneys total, with partners and counsel billing the lion's share of hours. While the number of attorneys involved sounds excessive, the Case was more complicated than many others like it, involving 27 debtors, 5 non-debtor entities that had to be considered throughout the Case, several plan proponents, 14 plan versions, and—in the end—a successful foreclosure sale. Counsel for the Trust also explained at the Hearing that the number of attorneys that worked on this matter was driven in part by the several different areas of substantive law that this Case touched on and the fact that the Case was initially filed in California and then transferred to Texas.

However, these facts are more applicable to the second and third of the *First Colonial* factors. Essentially, Counsel for the Trust explained that the questions involved were often difficult and sometimes novel, and that greater skill was needed to perform the Trust's legal services than in other instances of secured lender representation. Certainly, these factors weigh in the Trust's favor.

But in order to show the "time and labor required," counsel for the Trust needed to submit time records in compliance with the Local Guidelines as a means of satisfying the Trust's burden. Some of the time records submitted are not in compliance. Venable's bill contains many entries describing time spent by attorneys engaged in conferences with one another or attending the same hearing, but lacking relevant explanation as to the issues involved or the necessity of more individuals' involvement. Both Venable and Perkins Coie engaged in "clumping," a violation of the Local Guidelines, performing separate tasks on a single day without disclosing the time spent for each task.

For these reasons, the Court has some concerns regarding the first of the *First Colonial* factors, while factors two and three weigh in the Trust's favor. The Court acknowledges the experience, reputation, and ability of the Trust's Counsel, and so factor nine also weighs in the Trust's favor. Factors four, five, six, seven, ten, and eleven are neutral, meriting no adjustment of the lodestar either way.

Turning next to factor eight, the Court must evaluate the results of the Case. Here, the Court draws a line between the pre-foreclosure time and the post-foreclosure time. Considering only the events prior to and including the Foreclosure Sale, the Court would be inclined to find that this factor weighed in the Trust's favor. Counsel for the Trust had engaged vigorously to lift the stay and protect the Trust's rights. The Trust finally sold the Property at the Foreclosure Sale. At the Foreclosure Sale, Proceeds were generated to pay everyone. The Court believes that most of the Trust's requested Fees and Costs through the time of the Foreclosure Sale were reasonable, and the ultimate result was a positive one.

But considering what occurred after the date of the Foreclosure Sale, the Court finds factor eight to weigh heavily against the Trust's Application. Just as there is no doubt that the ultimate bid price at the Foreclosure Sale benefitted just about everyone, there is also no doubt that what came afterward harmed just about everyone. After receiving the Proceeds from the Foreclosure Sale, paying its Secured Claim in full (plus a reserve of \$50,000 for attorneys' fees that had not even been incurred yet), and moving to interplead the Excess Sale Proceeds, the Trust then reversed course, withdrew its motion, refused to turn over property of the Debtors' estates and of the Non-Debtor TICs, and demanded a full release to which it was not entitled. What began as a simple adversary proceeding to interplead the Excess Sale Proceeds with the Court turned into something else entirely.

The Trust refused to turn over the Excess Sale Proceeds to the Debtors, the Non-Debtor TICs, or to anyone else, in an attempt to obtain a full release. It argued with the Court that it was not required to submit an application pursuant to section 506(b). When the Fifth Circuit came out with its opinion in *804 Congress* restating, in no uncertain terms, the requirement of an application, the Trust then tried to argue that this was a change in the law. The Trust ran up hundreds of thousands of dollars in litigation after filing the Interpleader Action, and likewise forced other parties in this Case to spend just as much. All of this was wholly unnecessary and patently unreasonable.

Therefore, the Court will consider the Fees and Costs in light of these two separate time periods: pre-Foreclosure Sale and post-Foreclosure Sale.

**A. The Pre-Foreclosure Sale Fees and Costs**

Turning to the portion of the Fees and Costs incurred by the Trust and sought for the period ending on May 6, 2014, the date of the Foreclosure Sale (the “Pre-Foreclosure Compensation Period”), the Court has identified six categories of fees, costs, and charges that are either not reasonable or are not provided for by the agreement underlying the Secured Claim. These categories include: i) the attorneys’ fees billed by Perkins Coie that predate the default by the TICs; ii) the attorneys’ fees billed by Venable during the Trust’s attempts to sell the Secured Claim (other than the MAT agreement); iii) the attorneys’ fees billed by Venable during the Trust’s acquisition of the Comm-Fit Claim; iv) the attorneys’ fees billed by Venable while negotiating the MAT Agreement to purchase the Property at foreclosure; v) the attorneys’ fees related to the Trust’s actions that this Court found to be in violation of the automatic stay; and vi) the attorneys’ fees billed by Venable related to Mr. Thompson’s misleading responses during his deposition.



### 1. Pre-Default Fees and Costs

The Trust seeks payment of a portion of the Fees and Costs billed by Perkins Coie for its acts prior to both the date of default by the TICs on October 11, 2012<sup>19</sup> and even prior to the Trust's acquisition of the Note on March 22, 2012. Before the Trust acquired the Note, Perkins Coie had already billed \$10,139.50 in attorneys' fees. Between that date and the time that the TICs defaulted, Perkins Coie billed another \$11,534.50.

The Debtors argue in the Claim Objection that neither the Note nor the Deed of Trust obligate the TICs to reimburse the Trust for attorneys' fees and costs prior to the occurrence of an event of default. The Trust points to broad indemnity language in the Deed of Trust, which it claims obligates the Debtors for any attorneys' fees and costs incurred by the Trust as Lender. *See* Deed of Trust, § 2.28. However, prior to acquiring the Note, the Trust was not the Lender.

As to section 2.28 of the Deed of Trust, the scope of the broad language is subject to the limits expressed in the opening sentence of Article II, which the document describes as "for the purposes of further securing the Debt and for the protection of the security." Prior to some need to protect the security of the Deed of Trust, any attorneys' fees and costs incurred would be outside the scope of Article II of the Deed of Trust. This conclusion is reinforced by the actions of the parties prior to the date of default. There was no evidence or testimony presented that the Trust submitted regular bills to the TICs for payment of its attorneys' fees, as would be expected under the Trust's interpretation of the language. The Trust likewise failed to present evidence in support of its interpretation of the provisions in the Note and Deed of Trust that it is entitled to reimbursement for the time entries dated prior to the date of default. The Court is thus of the opinion that these fees fail the first part of the section 506(b) test: they are not provided for in the

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<sup>19</sup> *See Declaration of Steven R. Smith*, p. 2, ¶ 5, Docket No. 1168-9.

agreement underlying the debt. For this reason, the Court finds that the attorneys' fees billed by Perkins Coie must be reduced in the amount of \$21,674.00.

## **2. Fees and Costs Related to Attempts to Sell the Secured Claim**

At the Hearing, the Trust essentially admitted that the billing entries related to its attempts to sell its interest in the Note were likely not compensable. However, the Trust argued, the \$3,209.50 in time billed for these attempts are more than subsumed by Venable's voluntary reduction. On both points, the Court agrees.

## **3. Fees and Costs Related to Attempts to Purchase Claims**

Considering the time entries related to the Trust's acquisition of the Comm-Fit Claim, the Court determines that these entries, amounting to \$2,145.50, are unreasonable and not compensable. The Trust argues that the Deed of Trust entitles it to sums incurred by the Trust to protect or enforce its Deed of Trust. It contends that its investigation of several unsecured claims and its investigation and purchase of the Comm-Fit Claim were necessary for the protection and enforcement of the Deed of Trust. With respect to the purchase of the Comm-Fit Claim, the Court disagrees. While it was perfectly reasonable for the Trust to investigate and challenge claims, the purchase of a claim was neither necessary to secure enforcement of its rights nor necessary to insure collection of the indebtedness. *See In re Delaney Family L.P.*, Case No. 02-46631, 2003 Bankr. LEXIS 1685, \*22 (Bankr. N.D. Tex. Dec. 11, 2003). As has been said by another court in this district facing similar facts, "[a] secured creditor is not justified in incurring excessive professional fees due to a lack of faith that the statutory scheme of the Bankruptcy Code will provide the full return to which that creditor is entitled." *Id.* at \*23. But again, the Court finds that the amount of these entries is entirely subsumed by Venable's voluntary reduction.

#### **4. Fees and Costs Associated with the MAT Agreement**

Also unreasonable and noncompensable are the entries related to the MAT Agreement. The Trust asserts that the MAT Agreement created a competitive auction at the Foreclosure Sale by legitimizing the sale and setting a floor for the bidding price at an amount that ensured all higher bids would result in monies for the Debtors' estates, but this characterization hardly withstands scrutiny. MAT was never obligated to bid at all, but rather would buy the Property from the Trust if the Trust's credit bid prevailed at the Foreclosure Sale. A stalking horse bidder requires a public bid, helping to "generate interest in the assets and create a sense of confidence in the value of the assets among prospective buyers who might assume that a willing buyer has conducted due diligence." *Reagan v. Wetzel (In re Reagan)*, 403 B.R. 614, 618 n.3 (B.A.P. 8th Cir. 2009). The MAT Agreement, in comparison, was negotiated in secret. When the vice president of the Trust, Mr. Thompson, was asked under oath by another party interested in purchasing the Property whether an agreement with MAT had been reached, he denied it. This not only created the false hopes mentioned before, but also drove up costs. The Court finds, however, that the \$48,470.00 in time billed by Venable for the MAT Agreement is subsumed by the firm's voluntary reduction.

#### **5. Fees and Costs Related to Violations of the Automatic Stay**

Likewise, the Trust argues that any amounts billed by Venable and attributable to actions by the Trust that were found to violate the automatic stay are subsumed by Venable's voluntary reduction. On February 28, 2013, the Court entered an order enforcing the automatic stay against the Trust for removing the manager of the Property. The Trust attributes \$12,659.50 to the time entries billed and related to acts the Court determined had violated the stay. The Court finds these billed entries to be unreasonable, but also agrees that they are entirely subsumed by the voluntary reduction.

## **6. Fees and Costs Related to the Thompson Deposition**

In addition to the time billed by Venable relating to the MAT Agreement, the Court finds the time entries related to Mr. Thompson's deposition unreasonable and noncompensable. As discussed above, Mr. Thompson's response to the question of whether there was an agreement with MAT may have technically been accurate, but it was certainly misleading and drove up costs in the case for the other parties, including the Debtors. The Court finds, however, that the \$4,541.00 billed by Venable in relation to Mr. Thompson's deposition is subsumed by the firm's voluntary reduction.

## **7. Other Objections to the Fees and Costs**

The Debtors raised a number of other objections to the Fees and Costs incurred during the Pre-Foreclosure Compensation Period, but none warrant an additional reduction in the requested Fees and Costs. Specifically, the Court overrules the objections to (1) time spent relating to the removal of the manager of the Property, other than those efforts that were found to violate the automatic stay, as such time related to the Trust attempting to enforce its rights under the Note and the Deed of Trust; (2) costs of appraisals that were not produced to the Debtors, as such costs related to enforcement of the Secured Claim and were permitted under the Deed of Trust; and (3) costs associated with SC&H Group, LLC and Christopher R. Davidson, CPA, as such costs related to enforcement of the Secured Claim and were permitted under the Deed of Trust.

Beyond having additional categories of objections, the Debtors also argued that the objections sustained above affected significantly more time entries than the Trust argued. To support their position, the Debtors provided the Court with a demonstrative aid at the Hearing. The Court did not find the Debtors' demonstrative aid to be entirely accurate because of, among other things, the double-counting of time entries across different objections. For the benefit of the

parties, the Court notes that as a result, the Court considered the Debtors' demonstrative aid, Exhibit 18 submitted by the Trust, and the arguments of counsel, but the Court ultimately conducted its own independent review of all time entries to determine which amounts of billed time related to which objections.

#### **8. Venable's Voluntary Reduction**

For the period beginning on October 31, 2012 through December 22, 2014, Venable reduced its bill by \$183,239.62, including write-offs of \$166,718.00 in attorneys' fees and \$16,521.62 in expenses. After accounting for \$71,025.50 in entries billed during the Pre-Foreclosure Compensation Period attributable to the categories identified above for Venable and found to be unreasonable and non-compensable, this leaves \$112,214.12 in additional time entries and expenses written off by Venable. The Court lauds this reduction as a showing of reasonable billing judgment, and finds that any additional reduction it might have applied to Venable's bill due to non-compliance with the Local Guidelines is fully subsumed by Venable's voluntary reduction.

#### **B. The Post-Foreclosure Sale Fees and Costs**

Considering the portions of the Fees and Costs incurred after the Foreclosure Sale, the Court first notes that, as a general matter, attorneys' fees and costs incurred by a secured creditor are not reimbursable from the estate after the loan is paid off and the lien is released. *See 900 Corp.*, 327 B.R. at 600-01. At the point that the Trust was "paid in full"—which by its own statement, it was—its lien was released and it ceased to be a secured creditor. *Id.* (citing *In re Pride Companies, L.P.*, 285 B.R. 366 (Bankr. N.D. Tex. 2002)). Since unsecured creditors are not entitled to attorneys' fees under section 506(b), the Court will make no award under this section for issues newly raised once a creditor is no longer oversecured. Even assuming that the Trust had

a legal entitlement, however, in the present Case, much of the post-foreclosure Fees and Costs are unreasonable. Notwithstanding this, the Trust is entitled to compensation for the matters identified below.

The Trust is entitled to compensation for time and expenses incurred while dealing with issues related to the Secured Claim, such as claim objections and matters involving the Trust during the post-foreclosure plan confirmation process. The Trust is also entitled to reasonable attorneys' fees for its efforts in preparing and filing the Interpleader Action and motion to interplead, as well as serving the claimants. *See James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 468 (5th Cir. 1971). Such entitlement only exists for a stakeholder when circumstances justifying interpleader exist. *See Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 23 (5th Cir. 1992). Here, the interpleader was justified, at least initially, by the circumstances of the disputes by both the purchaser of the Property and the TICs. The disputes justifying the Interpleader Action were resolved in mediation, however, soon after the Interpleader Action was filed.

Beyond filing the complaint, moving to interplead the Excess Sale Proceeds, and serving notice, the Trust is not entitled to attorneys' fees and costs related to the Interpleader Action. Additional attorneys' fees and costs in an interpleader action are available when the interpleader is a disinterested stakeholder and is not in substantial controversy with one of the claimants. *Rhoades v. Casey*, 196 F.3d 592, 603 (5th Cir. 1999). There is longstanding Fifth Circuit precedent that attorneys' fees and costs are generally available to an interpleader when a court determines that the interpleader is a mere disinterested stakeholder. *Murphy v. Traveler's Ins. Co.*, 534 F.2d 1155, 1164 (5th Cir. 1976). The Trust, however, has never been disinterested. The Interpleader Action was not a proper place for the Trust to enforce its rights, and the Trust attempted to use the Interpleader Action for the improper purposes of evading this Court's review of the Fees and Costs

and obtaining a general release covering causes of action unrelated to the Interpleader Action. Rather than taking a simple approach of submitting its fees for approval, the Trust chose a tortuous litigation strategy aimed at obtaining a full release of all claims against it. This litigation strategy was expensive and unnecessary, and therefore unreasonable. This applies equally to the Trust's appeals, as well as to fees, costs, and charges the Trust incurred after the Foreclosure Sale related to the borrower and guarantor litigation. The Court thus finds the following post-Foreclosure Sale attorneys' fees and expenses unreasonable and not compensable:

Billed by Venable:

- 1) \$248,101.00 related to the Interpleader Action, in excess of its time spent preparing, filing, serving, and providing notice of the Interpleader Action and of the motion to interplead the funds;
- 2) \$48,153.50 related to the appeal in the Interpleader Action;
- 3) \$52,273.00 related to the borrower and guarantor litigation;
- 4) \$13,817.51 in related expenses.

Billed by Perkins Coie:

- 1) \$24,284.00 related to the Interpleader Action;
- 2) \$19,478.50 related to the appeal in the Interpleader Action;
- 3) \$12,158.00 related to the borrower and guarantor litigation.

## **V. Conclusion**

In total, the Court reduces the portion of the Trust's Fees and Costs incurred after the Foreclosure Sale by \$418,265.51 (including \$348,527.50 in attorneys' fees and \$13,817.51 in expenses billed by Venable, and \$55,920.50 in attorneys' fees billed by Perkins Coie). Combining this with the Pre-Foreclosure Compensation Period reduction of Perkins Coie's bill in the amount of \$21,674.00, the Court hereby reduces the Fees and Costs, as either unreasonable or not provided

for in the agreement underlying the Trust's Secured Claim, in the total amount of \$439,939.51 (the "Disallowed Fees and Costs"). Conversely, the Court finds that the Fees and Costs are reasonable and provided for in the agreement underlying the Trust's Secured Claim, in the amount of \$2,108,931.72 (the "Allowed Fees and Costs").

The Court further notes that it does not agree with the Trust's position that the Disallowed Fees and Costs should be allowed as an unsecured claim. The Disallowed Fees and Costs are being disallowed because they were either unreasonable attorneys' fees or were not provided for under the agreements underlying the Secured Claim. Such infirmities would similarly result in disallowance of an unsecured claim for such amounts, so the Trust is not granted an unsecured claim for the Disallowed Fees and Costs.

**IT IS THEREFORE ORDERED** that other than with respect to the Disallowed Fees and Costs, the Application is **GRANTED** and the Secured Claim (including the Allowed Fees and Costs) is allowed; and it is further

**ORDERED** that in the event that the Trust has retained funds from the Proceeds in excess of those that it is entitled to under this Order, it shall return those funds to BMC Group, Inc., in its capacity as the Debtors' disbursing agent, within fourteen days of the entry of this Order.

### End of Order ###