Dated: April 27, 2021
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:
Brian Scott Hendren
Debtor

Case No. 20-24194
Chapter 13

OPINION AND ORDER REGARDING MOTION TO DETERMINE POST-PETITION FEES, EXPENSES AND CHARGES UNDER RULE 3002.1

This matter is before the Court on the Motion to Determine Post-Petition Fees, Expenses and Charges Under Rule 3002.1(c) and 3002.1(e) ("Motion") [DE 49] filed by Debtor Brian Scott Hendren ("Debtor"). Debtor's Motion is in response to the Notice of Post-Petition Mortgage Fees, Expenses and Charges (the "Notice") [DE 48] filed by Trustmark National Bank ("Trustmark" or "Creditor") requesting a total of $720.60 in post-petition attorneys' fees. After argument, the Court took the matter under advisement.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). Accordingly, the Court has both the statutory and constitutional authority to hear and determine these proceedings subject to the statutory appellate provisions of 28 U.S.C. § 158(a)(1) and Part VIII ("Bankruptcy Appeals") of the Federal Rules of Bankruptcy Procedure. This memorandum of decision constitutes the Court's findings of fact and conclusions of law under FED. R. CIV. P. 52, made applicable to this contested matter by FED. R. BANKR. P. 9014 and 7052. Regardless of whether or not specifically referred to in this decision, the Court has examined the docket, the prior bankruptcy docket (Case No. 18-26265), submitted materials, including the attachments to the Notice, considered statements of counsel, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the Court grants Debtor's Motion to limit the fees set forth in the Creditor's Rule 3002.1 Notice to $350.00. This is the amount required by the underlying loan documents and applicable nonbankruptcy law to cure a default or maintain payments in accordance with 11 U.S.C. § 1322(b)(5). The Court denies Creditor's request for additional fees incurred in defending against the Motion.

DISCUSSION OF BACKGROUND FACTS AND INFORMATION AND PROCEDURAL HISTORY OF THIS CASE

Debtor filed a Chapter 13 petition on August 26, 2020 and filed his proposed plan the same day. [DE 1]. Creditor objected to Debtor's proposed plan on September 8, 2020 [DE 18]. Debtor's Chapter 13 plan was confirmed on December 16, 2020. [DE 36]. Creditor is the holder of a Note secured by a deed of trust on Debtor's residence located at 2971 Woodland Ash Cove, Arlington, TN 38002. [*See* Claim No. 7-2]. The confirmed Chapter 13 plan provides that Debtor will pay Creditor an arrearage in the amount of $7,789.72. [DE 36]. Debtor's confirmed plan provides that the plan shall pay, monthly, the allowed claim for such arrearages over the course of Debtor's

sixty-month plan. [*Id.*]. In addition, the plan provides that the plan shall pay, monthly, all post-petition mortgage payments beginning with the October 2020 payment.[1] [*Id.*].

On September 3, 2020, Creditor filed a Proof of Claim asserting a secured claim in the amount of $99,880.57, which included an arrearage in the amount of $7,789.72. [Claim No. 7-1]. On January 4, 2021, Creditor filed an Amended Proof of Claim asserting a secured claim in the amount of $99,880.57, which included an arrearage in the amount of $6,973.01.[2] [Claim No. 7-2]. On January 4, 2021, Creditor also filed its Notice [DE 48] which included an itemized breakdown of attorneys' fees incurred between September 1, 2020 and December 16, 2020 in the amount of $720.60. [*Id*.]

Debtor filed his Motion seeking the Court to (1) determine that the payments of said fees, expenses, and, or other charges are not required to be paid by either the underlying agreement or applicable non-bankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) and to prohibit mortgagee from collecting same against the Debtor or against the collateral; (2) alternatively, seeking to modify the plan to provide for payment of any recoverable amounts, to pay said amounts along with the arrears claim and to prohibit mortgagee from collecting said amounts in any way that is inconsistent with this order, including but not limited to, through any adjustment in the amount of the ongoing mortgage payment; (3) to determine what charges, if any, are recoverable by mortgagee against the Debtor or against the collateral to resolve this Motion. Creditor responded that it attempted to mitigate damages by offering a $400 flat fee

[1] The only difference between the confirmed plan and the initial proposed plan is as follows:

Proposed plan	Confirmed plan
On-going monthly payment of $800.92 commencing November, 2020	On-going monthly payment of $816.71 commencing October, 2020
Arrearage amount of $7,066.76	Arrearage amount of $7,789.15

[2] Since the Chapter 13 trustee pays mortgage claims based on the mortgage lender's proof of claim, the plan arrearage is adjusted from $7,789.15 to $6,973.01.

instead of actual time incurred; however, Debtor's counsel would only allow a $200.00 fee based on the reasoning that there were no court appearances made by Creditor's counsel. When negotiations failed, the Creditor withdrew his $400 flat fee offer and sought all actual attorney time incurred as set forth in the Notice and Creditor now seeks additional fees for time incurred responding to the Motion.

LAW AND ANALYSIS

Pursuant to FED. R. BANKR. P. 3002.1, creditors are required to provide Chapter 13 debtors with timely notice of any post-petition charges or payment changes. Rule 3002.1 "applies in a chapter 13 case to claims (1) that are secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments." FED. R. BANKR. P. 3002.1(a). Subsection (c) of the Rule provides:

> The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

FED. R. BANKR. P. 3002.1(c). Rule 3002.1(d) specifies that the notice shall be prepared using the appropriate Official Form and filed as a supplement to the creditor's proof of claim. Upon receipt of the notice, a debtor or trustee may file a motion requesting that, after notice and hearing, the Court determine whether payment of the fee, expense, or charge is required by the underlying agreement and applicable non-bankruptcy law. FED. R. BANKR. P. 3002.1(e).

The Creditor is charged with giving adequate descriptions for the contractual charges. "Unlike a standard proof of claim, a notice filed under Rule 3002.1 does not constitute *prima facie* evidence as to the validity or amount of the claimed charges. Without the benefit of this

presumption, the notice is more susceptible to challenge." *Winnecour v. First Commonwealth Bank (In re Susanek),* No. 12-23545-GLT, 2014 WL 4960885, at *2 (Bankr. W.D. Pa. Sept. 30, 2014) (citing FED. R. BANKR. P. 3002.1(d)); *see also In re England*, 586 B.R. 795 (Bankr. M.D. Ala. 2018); *In re Lighty*, 513 B.R. 489 (Bankr. D.S.C. 2014); *Trudelle v. PHH Mortgage Corp., (In re Trudelle)*, No. 16-60382-EJC, 2017 WL 4411004 (Bankr. S.D. Ga. Sept. 29, 2017); *In re Polly*, No. 15-31834(1)(13), 2016 WL 3004439 (Bankr. W.D. Ky. May 17, 2016); *In re Hale*, No. 14-04337-HB, 2015 WL 1263255 (Bankr. D.S.C. March 16, 2015).

a. Whether payment of the fees is required by the underlying agreement to cure a default or maintain payments

First, with respect to whether payment of the fees at issue is required by the parties' loan documents to cure a default, the Court must examine the Note and Security Agreement (and modification thereto) along with the Deed of Trust. The loan modification supplements the Note and Security Agreement, and does not, on its own, provide for attorney's fees. [Claim No. 7-2, pp. 15-18]. The Note and Security Agreement, however, provide in Section 6.C (Payment of Costs and Expenses) that

> If Lender has required immediate payment in full, as described above [in the default provision], Lender may require Borrower to pay costs and expenses including reasonable and customary attorney's fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

[Claim 7-2, Note and Security Agreement, Section 6.C]. The Note and Security Agreement's default provision provides:

> If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by the regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest....

[Claim 7-2, Note and Security Agreement, Section 6.B].

Therefore, the Creditor is required to exercise its right to accelerate the Debtor's debt before it is entitled to be reimbursed for the costs and expenses of enforcing the Note. Creditor has adduced no evidence to establish that it provided Debtor with notice of acceleration. Thus, according to the language of the Note and Security Agreement, Creditor is not entitled to recover the fees it paid or promised to pay to Clifton E. Darnell, Esq. ("Mr. Darnell") for services in this case. Because Creditor may not recover under the Note and Security Agreement, this Court must examine the Deed of Trust to determine whether it contains a provision that authorizes Creditor to recover fees and costs for Mr. Darnell's services in connection with this case.

The Deed of Trust provides in Paragraph 7 that

> If Borrower fails to [pay all governmental or municipal charges, fines and impositions] or the payments required by Paragraph 2 [of the Deed of Trust], or fails to perform any other covenants and agreements contained in [the Deed of Trust], or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy…), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2.
>
> Any amounts disbursed by Lender under this Paragraph shall become an additional debt of Borrower and be secured by [the Deed of Trust]…

[Claim 7-2, Deed of Trust, ¶7]. The Court finds that the Deed of Trust provides for the payment of all amounts required to bring Debtor's account current which includes the attorneys' fees paid in order to protect the Creditor's rights in the Property. [Claim 7-2, Deed of Trust, ¶7]. Therefore, these fees should be paid in order to cure any default in addition to being paid as a requirement to maintain payments as required under 11 U.S.C. § 1322(b)(5).

b. Whether payment of the fees is required by applicable nonbankruptcy law to cure a default

The second question for the Court is whether payment of the fees at issue is required by applicable nonbankruptcy law to cure a default.[3] In Tennessee, as in most jurisdictions in the United States, the general rule is that "attorneys' fees are not recoverable, absent a statute or contract specifically providing for such recovery." *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336, 338 (Tenn. 1985)(citation omitted); *House v. Estate of Edmondson*, 245 S.W.3d 372, 377 (Tenn. 2008); *see also Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc*., 566 S.W.3d 671, 705 (Tenn. 2019)(citations omitted); *Pinney v. Tarpley*, 686 S.W.2d 574, 581 (Tenn. Ct. App. 1984). Since the Deed of Trust provides for recovery of fees in this case, the trial court must determine whether the fees charged were reasonable, actual and necessary. The Court[4] considers the following six factors:

i. The nature, extent and difficulty of the legal services rendered;
ii. the time and labor necessarily devoted to the case;
iii. the professional standing of counsel,
iv. the contingency of compensation,
v. the fee customarily charged in the locality for similar legal services, and
vi. the beneficial results obtained.

Lexon Ins. Co. v. Windhaven Shores, Inc., 601 S.W.3d 332, 342 (Tenn. Ct. App. 2019) (quoting *Kline v. Eyrich*, 69 S.W.3d 197, 209 n.11 (Tenn. 2002)). Although similar, the Court also considers those factors set forth in Rule 1.5 of the Tennessee Rules of Professional Conduct. *See id.*; *see also* Tenn. Sup. Ct. R. 8, RPC 1.5. Though consideration should be given

[3] "Upon a debtor filing a motion to determine mortgage fees, expenses, and charges pursuant to § 1322(e), the Court must look to the underlying agreement and applicable nonbankruptcy law to determine if the amounts are permissible. The 'reasonableness standard' applied under § 506(b) challenges does not apply to postpetition fees, expenses, and charges necessary to cure a default as § 1322(e) explicitly excepts § 506(b) from consideration. Instead, the underlying agreement and applicable nonbankruptcy law are determinative. Fed. R. Bankr. P. 3002.1(e)." *In re England*, 586 B.R. 795, 799 (Bankr. M.D. Ala. 2018)

[4] The Court rearranged the order of the six factors set out in *Lexon* to be consistent with the order this Court discusses each factor herein.

to all six criteria in establishing reasonable attorney's fees, none of these six factors is controlling. Only factors (i), (ii), (v) and (vi) appear relevant here.

i. Nature, extent and difficulty of the legal services rendered

With respect to the nature, extent and difficulty of the legal services rendered, Mr. Darnell stated that the work his firm performed included: (1) a failed attempt to negotiate strict compliance language and two year bar in the order resolving Creditor's objection to plan, (2) a "great deal of time corresponding" with Debtor's counsel (some of which Mr. Darnell characterized as failed attempts because his emails were not always received by Debtor's counsel for one reason or another) and (3) correspondence with his client regarding payment information readily available on the Chapter 13 trustee website (Mr. Darnell noted that his client relies heavily on counsel to communicate administrative information because it does not have access to the Chapter 13 trustee website). It appears to the Court that the majority of the time was spent on negotiations relating to the attorney's fees dispute, and the failed attempt to negotiate strict compliance language with a two-year bar. While Mr. Darnell characterized the Debtor's prior case as a disaster and was high maintenance, this Court does not believe this characterization based on the information provided by the Chapter 13 trustee's office during the hearing. Furthermore, when comparing the objection filed in the above-styled case with the objection to confirmation of the plan in Case No. 18-26265, the Court notes that only two paragraphs were added to the Objection filed in this case (specifically, paragraphs 4 and 5). [Case No. 20-24194, DE 18; Case No. 18-26265, DE 15]. Similarly, the Consent Order entered in both case filings contain substantially similar language with the exception of two paragraphs. [Case No. 20-24194, DE 35; Case No. 18-26265, DE 20]. Additionally, when the prior case objection was resolved (by consent), the parties agreed to an award of post-petition attorney's fees and expenses in the amount of

> $400.00 for the necessity of responding to this bankruptcy action, objecting to the plan and otherwise protecting its security interests in this Federal Court proceeding as provided for in the deed of trust contract between the parties. Also included in the mortgage arrearage amount are attorney fees and expenses incurred in the co-borrower/co-debtor's separated Chapter 7 bankruptcy case (Kristen Nicole Hendren 18-25845-JDL-7) whereby Creditor filed a motion for relief from stay and abandonment. Creditor shall be allowed to file its proof of claim for its total amount of mortgage arrearage.

Case No. 18-26265, DE 20 at ¶3; *see also* Case No. 20-24194 Claim No. 7-2, at p. 8 (flat fee of $400 charged in prior bankruptcy case). It appears more work went into the resolution of the order in the prior case than in the above-styled case before the Court. Therefore, this factor does not weigh in favor of the reasonableness of the fees noticed in this case.

ii. Time and labor necessarily devoted to the case

The time and labor spent by Creditor's counsel in the above-styled bankruptcy was discussed in connection with the previous factor. The total fee here is excessive in light of the services provided (i.e. the time spent on several administrative tasks and negotiating fee amount reflect unnecessary work). This factor does not weigh in favor of the reasonableness of the fees noticed in this case.

iii. The professional standing of counsel

No questions have been raised regarding the professional standing of counsel for the Creditor. Furthermore, counsel for the Creditor is experienced in handling bankruptcy matters and frequently appears in Bankruptcy Court. This factor weighs in favor of the reasonableness of the fees.

iv. The contingency of compensation

The contingency of compensation is not a factor in the case before the Court, as there has been no indication that the work the Creditor's counsel was done on a contingency fee basis.

v. Fee customarily charged in the locality for similar legal services

With the respect to the fee customarily charged in this locality for the legal services rendered, the Court notes that the Bankruptcy Court liaison committee determined several years ago that $500 was a reasonable charge for plan confirmation issues. Furthermore, while not controlling, the fact that $550 is the Fannie Mae allowable fee reimbursement for servicers for "Objection to Plan" is also evidence as to customary fees charged. Under Fannie Mae guidelines the maximum fee of $550 includes "legal services generally required in connection with the prosecution of an Objection to a Chapter 12 or 13 Plan, including communications with the servicer, legal research, preparation and filing of objection papers, negotiations with debtor's counsel and trustee, attendance at up to two hearings, and preparing a stipulation or order. This fee covers all Objections to the original Plan and up to two amended Plans, regardless of the number of Objections required, the number of debtors involved, or the number of [] mortgage loans involved."[5]

This Court notes that the Creditor never attended any confirmation hearing, and the Objection filed was reasonably simple given it was substantially similar to the objection filed in the prior Bankruptcy proceeding (Case No. 18-26265). Therefore, this factor does not weigh in favor of the reasonableness of the fees.

vi. Beneficial results obtained

As far as the Court is aware, the confirmed plan treats the rights of the Creditor in a manner consistent with applicable law and properly treats its claim. While this factor weighs in favor of the reasonableness of the fees, the Court notes that the initial proposed plan arrearage amount of

[5] *See* https://servicing-guide.fanniemae.com/THE-SERVICING-GUIDE/SVC-Guide-Exhibits/1211808151/Allowable-Bankruptcy-Attorney-Fees-Exhibit-09-11-2019.htm

$7,066.76 is actually more than the amended proof of claim arrearage of $6,973.01. [Claim No. 7-2]. However, Creditor was able to negotiate its ongoing monthly payments to begin in October instead of November.

After careful consideration of these six factors, the Court concludes Creditor has failed to demonstrate that $720.60 of post-petition fees and expenses incurred were reasonable, necessary or allowable under the underlying agreement or applicable law and allowable under Fed. R. Bankr. P. 3002.1(e). The Court concludes that $350.00 is a reasonable fee for the work performed in this case which breaks down to two (2) hours of time at Mr. Darnell's hourly rate of $175 per hour.

CONCLUSION

In conclusion, because there is little evidence that the legal services were difficult or extensive, and considering that the charges do not sufficiently align with customary maximum charges, and because the Creditor's objection to plan had minimal beneficial outcome, the Court grants Debtor's Motion to limit the fees set forth in the Creditor's Rule 3002.1 Notice to $350.00. This is the amount required by the underlying loan documents and applicable nonbankruptcy law to cure a default or maintain payments in accordance with 11 U.S.C. § 1322(b)(5). The Court denies Creditor's request for additional fees incurred in defending against the Motion.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following interested persons:

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