Dated: December 16, 2021
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:
Ronda Regena Moses Case No. 21-21429
Debtor 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 Debtor's Motion Under Rule 3002.1(c) seeking a determination of post-petition fees, expenses and charges under 3002.1(e) ("Motion") [DE 42] . Debtor's Motion is in response to the Notice of Post-Petition Mortgage Fees, Expenses and Charges (the "Notice") [DE 41] filed by U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for First Franklin Mortgage Loan Trust 2007-3, Mortgage

Pass-Through Certificates, Series 2007-3 ("U.S. Bank" or "Creditor") requesting a total of $325.00 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. 7052 and 9014. Regardless of whether or not specifically referred to in this decision, the Court has examined the bankruptcy docket, the attachments to the Notice, considered statements of counsel, 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 $0.00.

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

Debtor filed a Chapter 13 petition on April 29, 2021 and filed her proposed plan the same day. [DE 1 and 2]. Creditor did not object to Debtor's proposed plan. Debtor's Chapter 13 plan was confirmed on July 7, 2021. [DE 29]. Creditor is the holder of a promissory note ("Note") secured by a deed of trust ("Deed of Trust") on Debtor's residence located at 4245 Elysian Drive, Memphis, TN 38128. [*See* Claim No. 8-1]. The Note and Deed of Trust were current at the time the bankruptcy petition was filed (and when the plan was confirmed). [DE 29 (Confirmed Plan); *see also* Claim No. 8-1, ¶9].

On June 21, 2021, Creditor filed a Proof of Claim asserting a secured claim in the amount of $50,469.64, which included an arrearage in the amount of $0.00. [Claim No. 8-1]. Approximately two months later, Creditor filed its Notice [DE 41] which included an "itemized"

(as defined on Official Form 410S2) breakdown of attorneys' fees incurred on June 21, 2021 in the amount of $325.00. [*Id.*] Similarly, Debtor's Chapter 13 Plan does not include any payments to Creditor (because there is no outstanding arrearage owed to Creditor). [DE 2 and 29].

Debtor filed her Motion asking 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." [DE 42 ¶¶ a,b,c]. Creditor responded that it was required to review the Debtor's Chapter 13 plan and required to file a proof of claim to determine the total amount to be paid to Creditor inside the plan. *See* DE 45, ¶4. What Creditor fails to acknowledge is that this work was wholly unnecessary since the mortgage was current.

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) (emphasis added). 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 at *3 (Bankr. S.D. Ga. Sept. 29, 2017)(citation omitted); *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, the Court must examine the Note along with the Deed of Trust. The Note, does not,

on its own, provide for attorney's fees. [Claim No. 8-1, pp. 8-10]. The Note, however, provides in Section 6.E (Payment of Note Holder's Costs and Expenses) that

> If the [Creditor] has required [Debtor] to pay immediately in full as described above [in the notice of default provision], the [Creditor] will have the right to be paid back by [Debtor] for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

[Claim 8-1, Note, Section 6.E]. The Note's notice of default provision provides:

> If [Debtor is] in default, the [Creditor] may send [Debtor] a written notice telling [Debtor] that if [Debtor] do[es] not pay the overdue amount by a certain date, the [Creditor] may require [Debtor] to pay immediately the full amount of Principal which has not been paid and all the interest that [Debtor] owe[s] on that amount. That date must be at least 30 days after the date on which the notice is mailed to [Debtor] or delivered by other means.

[Claim 8-1, Note, Section 6.C].

The Court is unaware of any notice of default sent to the Debtor. Creditor has adduced no evidence to establish that it provided Debtor with notice of default. Thus, according to the language of the Note, Creditor is not entitled to recover the fees it paid or promised to pay to bankruptcy counsel for services in this case. Because Creditor may not recover under the Note, this Court must examine the Deed of Trust to determine whether it contains a provision that authorizes Creditor to recover fees and costs for bankruptcy counsel's services in connection with this case.

The Deed of Trust provides in Paragraph 14 that

> [Creditor] may charge [Debtor] fees for services performed in connection with [Debtor]'s default, for the purpose of protecting [Creditor]'s interest in the Property and rights under this [Deed of Trust], including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this [Deed of Trust] to charge a specific fee to [Debtor] shall not be construed as a prohibition on the charging of such fee. [Creditor] may not charge fees that are expressly prohibited by this [Deed of Trust] or by Applicable Law.

[Claim 8-1, Deed of Trust, ¶14]. Again, Creditor adduced no evidence to establish that a default existed (or exists). However, the language contained in the Deed of Trust has broader language that provides that "[Creditor] may charge [Debtor] fees….for the purpose of protecting [Creditor]'s interest in the Property and rights under this [Deed of Trust]…." [*Id*.].

Creditor argued during the hearing that it had been charging a similar fee in other cases for years and likened the fee to a no-look fee similar to what Debtor's counsel charges to file a bankruptcy petition. What Counsel did not do is submit any evidence that the charge relating to the filing of the proof of claim was a necessary charge "for the purpose of protecting [Creditor]'s interest in the Property and rights under [the Deed of Trust]. [*Id*.]. While not argued, the Court does note that the filing of a proof of claim in most cases is an act to protect a creditor's interest, but this case involves a Note that was current at the time of filing and a Plan that does not provide for any payments to the Creditor. The proof of claim was actually wholly unnecessary in this case and does nothing to protect Creditor's interest in the Property and rights under the Deed of Trust. Stated another way, the payment of the fees at issue are not required by applicable nonbankruptcy law.[1]

CONCLUSION

In conclusion, because there is no evidence that the legal services were necessary to protect Creditor's interest in the Property and its rights under its Deed of Trust, the Court grants Debtor's Motion to limit the fees set forth in the Creditor's Rule 3002.1 Notice, and limits the fees to $0.00.

[1] "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. at 799.

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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