

SIGNED.



Dated: June 25, 2007

*James M. Marlara*  
JAMES M. MARLAR  
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

In re: ) Chapter 13  
)  
10 JULIO C. MONTANO and MARIA G. ) No. 4:04-bk-02177 JMM  
11 VEGA-MONTANO, )  
) **MEMORANDUM DECISION RE:**  
12 ) **SECURED CREDITOR'S ATTORNEYS' FEES**  
\_\_\_\_\_ Debtors. )

A motion to determine the reasonableness of secured creditor Colleen Goltz' attorneys' fees and costs came on for hearing on March 12, 2007. The Debtors were represented by Wayne Mortensen; Colleen Goltz was represented by Nancy J. March; the chapter 13 Trustee, Dianne C. Kerns, was represented by Craig Morris. After hearing arguments, the court took the matter under advisement. Now, after consideration of the parties' legal positions, the documentary evidence presented, the entire chapter 13 administrative file, and the law, the court now renders its decision. A separate order will be entered pursuant to FED. R. BANKR. P. 9021.

**FACTS**

**I. Background and the Chapter 13 Case**

The facts of this case are neither complex nor novel. The Debtors were in financial difficulty, and had fallen behind in the house payments due to lienholders on such residential property. In order to

1 salvage the equity in their realty, and to work through their other debt, they filed for chapter 13 relief on  
2 May 4, 2004.

3 In summary, the Debtors listed secured debt against their home as:

4 1st Mortgage (Deed of Trust) to EMC Mortgage Corp.	\$59,513
5 2nd Mortgage (Deed of Trust) to Colleen Goltz	24,952

6 The Debtors listed the home's value as \$92,000. Each of these creditors was oversecured. In addition to  
7 these secured claims,<sup>1</sup> the Debtors listed unsecured debt of \$13,553, which they proposed to pay  
8 approximately 34% over the plan's duration (\$4,656.57).

9 The plan was designed as a 55-month plan. Under the plan's terms, the Debtors agreed to  
10 pay to the chapter 13 Trustee \$1,150 each month, which the Trustee would then distribute to creditors.

11 The pre-petition arrearage to EMC (first mortgage) was \$1,2000, and was to be paid out  
12 under the plan. No arrearage was noted for the Goltz debt (second mortgage). The Debtors then proposed  
13 to pay EMC directly, on an ongoing basis of \$604 per month. Ms. Goltz' treatment was (apparently) simply  
14 to continue to receive her regular payments under the plan. This was somewhat odd as her note had  
15 "ballooned" over a year earlier. The plan was vague and/or silent as to her treatment, but the lack of  
16 significant legal action, in the chapter 13 case, leads the court to the conclusion that some compromise had  
17 been reached.

18  
19 **2. The Goltz Claim**

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21 Ms. Goltz filed a claim on October 4, 2004. It reflected that the debt was calculated to be  
22 \$26,414.41 on the date of filing. This figure was broken down as follows:

23 Principal	\$24,952.70
24 Trustee's Fees	1,377.35
25 Interest to Filing Date	84.36

26  
27  
28 <sup>1</sup> The Debtors also listed a secured lien on a car which they proposed to pay as a secured claim for \$11,000 at a 10% interest rate, and treat \$8,282 as an unsecured claim.

1 Ms. Goltz had caused a trustee's sale to be commenced on or about August 8, 2004. Ms.  
2 Goltz' instructions to First American Title Company were to credit bid the property at \$40,234.11, which  
3 included large late fees of \$13,385, as well as default interest of \$274.48.

4 Apparently, in filing her claim against the estate, Ms. Goltz elected to waive the default and  
5 late fees, and thus intended to claim only for her principal and interest in the bankruptcy case.

6 The original promissory note between the Debtors and Ms. Goltz was dated May 20, 1998, and was  
7 for \$26,200. It called for payments of \$210.81 per month from July 1, 1998, for a period of five years,  
8 ending with a balloon payment due on June 1, 2003. Thus, although the debt had become due over a year  
9 earlier, it is not explained anywhere in this case why Ms. Goltz had not started her trustee's sale for 14  
10 months. The court assumes, once more, that the parties had reached some sort of interim compromise.

### 11 12 **3. Goltz Engagement and the Notice of Appearance**

13  
14 On July 22, 2004, two and one-half months after the case was filed, Ms. Goltz engaged an  
15 attorney to represent her interests. Counsel immediately drafted and filed a notice of appearance in the case,  
16 and charged Ms. Goltz 0.4 hours and \$51.50 for that service.

### 17 18 **4. Goltz Proof of Claim**

19  
20 Counsel's records reveal that counsel began compiling the information necessary to file the  
21 proof of claim, which occurred on October 4, 2004. For the claim process, investigation, and client  
22 communication, counsel's time slips reveal that paralegals and attorneys spent 7.6 hours, and charged  
23 \$577.50 to the client for this service.

### 24 25 **5. The Progress of the Debtors' Plan**

26  
27 A year passed before Ms. Goltz took any further action in court. During that time, between  
28 October, 2004, and October, 2005, the case appears to have progressed smoothly and routinely. The

1 Debtors were able to confirm their plan on February 15, 2005. As noted, the plan was not clear as to Ms.  
2 Goltz' treatment, but it must have involved some sort of interim payments.

3 However, by mid-October, 2005, the Debtors had fallen behind in their plan payments, with  
4 the last Trustee payment occurring in around June, 2005, prompting Ms. Goltz to file, on October 17, 2005,  
5 a motion to dismiss. Her grounds were well-taken, alleging a material default under the plan.

6 During the course of that year, various telephone conferences or other inquiries concerning  
7 the status of the case, made by secured creditor's counsel or paralegals between December 7, 2004, and  
8 September 21, 2005, totaled 3.3 hours, for which the client was billed \$582.

### 9 10 **6. Goltz' Motion to Dismiss**

11  
12 On October 17, 2005, Ms. Goltz made the strategic decision to move to dismiss the entire  
13 chapter 13 case, for lack of plan payments. For this effort, secured creditor's counsel's office spent 2.1 hours  
14 and charged the client \$336. The motion was not lengthy, but contained enough relevant facts and  
15 appropriate legal citations to properly frame the issue.

16 Just dealing, however, with the standard notice of the dismissal pleading took another 1.1  
17 hours, at a cost of \$102.

18 Then the attorney's file reflects that, on the date of the hearing, creditor's counsel spent 1.1  
19 hours, at a cost of \$268, talking to Debtors' counsel and attending the hearing on the motion to dismiss.

20 At the hearing, Debtors' counsel indicated that he felt that other options might present  
21 themselves and the matter was continued to January 9, 2006.

### 22 23 **7. The Debtors' Case Begins to Unravel as Creditors Request Stay Relief**

24  
25 The day after Ms. Goltz filed the motion to dismiss, the secured creditor holding the first lien  
26 on the property (successor to EMC) filed a motion for stay relief, seeking leave to foreclose. Ms. Goltz filed  
27  
28

1 a protective response thereto, setting forth the reasonable request that if stay relief were granted, that the  
2 court should do the same for her. For this phase of the case, Ms. Goltz' attorneys billed 1.4 hours, at a cost  
3 of \$216.

4 Confronted with the Goltz motion to dismiss, and the stay relief matter, the Debtors began  
5 to seek other creative ways to cure their defaults, and thereby save the property

6 The Debtors then asked for court approval to refinance the residence, which the court  
7 approved on January 11, 2006. Two days earlier, apparently satisfied that the Debtors were making  
8 progress, Ms. Goltz' counsel announced that the matters relating to her dismissal request had been resolved.

### 9 10 **8. The Motion to Sell**

11  
12 However, the Debtors must have been unsuccessful in finding feasible refinancing monies,  
13 and five months later, on June 7, 2006, they sought permission to sell their property in order to pay off the  
14 secured lienholders. That request was granted on July 17, 2006. The order, however, was not entered until  
15 three months later, on October 24, 2006.

16 The only pleading filed by Ms. Goltz, between October 27, 2005 and June 29, 2006 (eight  
17 months) was a brief "conditional" objection to sale, noting that, as an oversecured creditor (which was not  
18 contested), she was entitled to be paid in full (which was also not in dispute).

19 Between December 5, 2005, and July 17, 2006 (7 1/2 months), Ms. Goltz' attorneys and staff  
20 incurred 11.9 hours of work, totaling \$2,470. Half of these hours (5.9) related to figuring out the payoff on  
21 the debt, while the other half was focused on various conferences concerning details of either the refinancing  
22 or sale.

23 Thereafter, at some point after October 24, 2006, the sale closed and this dispute over the  
24 secured creditor's attorneys' fees surfaced.

1 **9. Post-Approval Activity and Closing**

2 Between the court's in-court approval of the sale on July 17, 2006, another six months or so  
3 passed before the approved sale finally occurred.

4 Again, during this period, little if any legal work was accomplished as Ms. Goltz' attorneys  
5 worked on nothing more, it would appear from the time slips, except attempting to derive the amount of the  
6 ever-elusive payoff. These efforts lasted six months and totaled 7.0 hours, for which the client was charged  
7 another \$1,392.

8  
9 **10. Debtors' Complete Plan and Are Discharged; Attorneys' Fees Challenged**

10  
11 The sale effectively ended the chapter 13 case. The Debtors paid off their plan, and received  
12 their discharges on April 5, 2007. Ms. Goltz' counsel charged another \$187.50 for "mop-up" work  
13 amounting to 0.9 hours. They then sought to be paid from the proceeds of the sale.

14 However, the Debtors challenged Ms. Goltz' claim for attorneys' fees of \$7,278, as being  
15 unreasonable, arguing in part that the Debtors' counsel had only charged \$2,706 for his work on the entire  
16 case.

17 The parties submitted the matter to this court on the record.

18  
19 **LEGAL DISCUSSION**

20  
21 The Bankruptcy Code, 11 U.S.C. § 506(b), requires a court to consider, when measuring the  
22 amount of a secured claim, what is a reasonable attorneys' fee. The statute provides:

23  
24 Sec. 506. Determination of secured status.

25 \*\*\*

26 (b) To the extent that an allowed secured claim is secured by property the  
27 value of which, after any recovery under subsection (c) of this section, is  
28 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.

1 More than almost any other proceeding in bankruptcy, a decision on an attorneys' fee request  
2 rests within the sound discretion of the trial judge. Courts, in looking at the reasonableness of an attorneys'  
3 fee claim in a bankruptcy proceeding, have stated that it is "inherently unreasonable" to incur fees that are  
4 not cost-justified either by the economics of the situation or as necessary to preserve the particular party's  
5 interest in light of the legal issues involved. *See, e.g., In re Wonder Corporation of America*, 72 B.R. 580,  
6 588 (Bankr. D. Conn. 1987); *In re Nicfur-Cruz Realty Corp.*, 50 B.R. 162, 169 (Bankr. S.D.N.Y. 1985).

7 In measuring reasonableness of fees, numerous judicial philosophies combine to assist a  
8 court. In addition to a judge's own experience, a court can draw upon the "lodestar" method (lawyer time  
9 multiplied by an hourly rate), application of the twelve *Johnson* factors,<sup>2</sup> and a host of other judicial  
10 comments upon the subject. *See, generally, In re Pettibone Corp.*, 74 B.R. 293 (Bankr. N.D. Ill. 1987).

11 A case, which is generally cited for setting forth "twelve rubics" for a trial court to consider,  
12 in its determination of what constitutes a reasonable fee, is *Johnson v. Georgia Highway Express, Inc.*, 488  
13 F.2d 714 (5th Cir. 1974). Those twelve factors, however, are not "self-actuating: simply to articulate those  
14 twelve factors ... does not itself conjure up a reasonable dollar figure in the mind of the district judge." *In*  
15 *re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bankr. Utah 1985) (quoting from *In re Casco Bay Lines*, 25  
16 B.R. at 754). As Judge Allen noted in *Jensen-Farley*:

17 In general, the statutory factors under Section 330 and the Johnson factors  
18 consist of three components: (1) the quantity factor, comprised of  
19 documented time at customary billing rates; (2) the quality factor, comprised  
20 of the competency of the representation, taking into account the novelty and  
21 difficulty of the issues presented, the skill required, the time constraints, and  
22 the personal qualifications of the applicant; and (3) the result factor,  
23 comprised of the actual results achieved in the case.

24 *Id.* at 587.

25 In the case of *In re Casco Bay Lines, Inc.*, 25 B.R. 747 (Bankr. 1st Cir. 1982), the Bankruptcy  
26 Appellate Panel for the First Circuit stated that a court's initial approach, in determining a reasonable fee,  
27 is to multiply the number of hours reasonably expended on the case by a reasonable hourly rate. This is  
28 known as the "lodestar fee setting approach." However, as the *Casco Bay Lines* court stated, it is the  
quality of representation and the results that are most significant in determining the amount of the fee:

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<sup>2</sup> *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5<sup>th</sup> Cir. 1974).

1 It is under the heading "quality of representation" that a bankruptcy court  
2 should particularly consider the results of the attorney's participation in the  
3 bankruptcy proceeding, and the benefit to the estate to see if circumstances  
4 warranted adjustment of the lodestar figure. Where an attorney's services  
5 have produced particularly exceptional benefits for the estates, an upward  
6 adjustment of the lodestar may be warranted to compensate for an hourly rate  
7 that turned out to be overly conservative. Similarly, if a high-priced attorney  
8 performs at a competent but undistinguished manner, a decrease in the hourly  
9 rate would be warranted.

10 *Id.* at 756.

11 The trial court has discretion in awarding what it considers to be a reasonable fee. A court's  
12 discretion "means a sound discretion ... exercised not arbitrarily or willfully, but with regard to what is right  
13 and equitable under the circumstances and the law, and directed by the reason and conscience of the judge  
14 to a just result." *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984) (review of bankruptcy approval of  
15 a compromise application).

16 The First Circuit said in *Boston and Maine Corp. v. Moore*, 776 F.2d 2, 9 (1st Cir. 1985):

17 To determine the number of hours "reasonably" spent, as well as in setting  
18 a "reasonable" hourly rate, a court must review the work to see whether  
19 "counsel substantially exceeded the bounds of reasonable effort," ... and  
20 should dis-allow hours that were "duplicative, unproductive, excessive, or  
21 otherwise unnecessary."

22 These general principles are applicable when a secured creditor seeks to charge its expenses  
23 against its debtor, and when it relies on its contract and § 506(b).

24 Here, Ms. Goltz, a fully-secured creditor in second lien position on the Debtors' principal  
25 residence, has claimed \$7,278 for fees associated with the protection of her interest. The Debtors dispute  
26 these amounts. This being the case, the court must determine if the fees and costs are reasonable, in order  
27 to be allowed as part of the creditor's secured claim. 11 U.S.C. § 506(a).

28 In *In re Masnorth Corp.*, 36 B.R. 335, 339 (Bankr. N.D. Ga. 1984), the Court bluntly noted:

While Midland [the secured creditor] is free to assert all bona fide claims  
before the Bankruptcy Court, Midland is not necessarily entitled to saddle the  
debtor with all the attorney's fees and expenses incurred so as to impede the  
debtor's ability to reorganize.

Ms. Goltz is a fully secured creditor whose delinquencies were cured and fully paid when the Debtors sold



1 the secured property. The sale provided ample funds for payment of the full amount of the debt, as well as  
 2 the claimed attorneys' fees and costs, these being subject to the determination of this court as to their  
 3 reasonableness.

4  
 5 **AN ANALYTICAL LOOK AT THE ATTORNEYS' FEES**

6  
 7 Considerations of fairness, results obtained, difficulties encountered, novelty of issues  
 8 presented, and time and experience of those involved must all be weighed.

9 Summarizing counsel's efforts for Ms. Goltz, the work product breaks down generally as:

<u>Services</u>	<u>Hours</u>	<u>Amount Sought</u>
1 Initial interview and filing notice of appearance	0.4	51.50
2 Preparation of proof of claim	7.6	577.50
3 Monitoring case progress through plan confirmation and beyond (October 2004 - October 2005)	3.3	582.00
4 Motion to dismiss: preparation of motion through hearing	4.3	706.00
5 Protecting Ms. Goltz from senior lienholder's § 362 motion	1.4	216.00
6 Calculations and conferences regarding note payoff amount and monitoring status of sale	18.9	3,862.00
7 Mop-up	0.9	187.50
<b>TOTALS</b>	36.8	6,182.50 <sup>3</sup>

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 23 The motion for fees, filed by Ms. Goltz, claimed 41.8 hours and \$7,278. Ms. Goltz also seeks  
 24 to be awarded certain costs:

Costs (out-of-pocket)	\$ 152.80
Trustee's fees	2,968.75

25  
 26  
 27  
 28 <sup>3</sup> As for the difference between this amount and the \$7,278 claimed, the court simply proportionately allocated it to the "unreasonable" portions. This, then, did not adversely affect the conclusions made.

1 These will be discussed separately.

2 In reviewing counsel's fee request, the court concludes that much of the work for Ms. Goltz  
3 seeks to charge the Debtors for legal work that was excessive, unremarkable, or non-productive.

4 The claim itself was for an oversecured debt, and the amount due was just under \$25,000.  
5 The fee now claimed increases that sum by almost 30%. This is excessive, especially when one considers  
6 that there was no time-consuming contested litigation in this matter.

7 The effort involved in a simple calculation of a payoff is unreasonably high. This should  
8 not have been a complex or time-consuming task, when one considers that the promissory note, attached  
9 to the proof of claim, gave the mathematical structure for this calculation. Thus, instead of the 18.9 hours  
10 claimed, the court will allow 2.0 hours for that task, which the court believes is generous. This includes  
11 monitoring the sale progress.

12 Similarly, the preparation of the proof of claim should not have taken over seven hours to  
13 prepare. The court will allow 1.5 hours for that routine task.

14 Finally, the decision and strategy related to filing a short motion to dismiss, based on  
15 undisputed plan payment defaults, should have consumed no more than 2.5 hours, through hearing.

16 All other claimed attorneys' fees items are reasonable.

17  
18 **GENERAL COMMENTS, FINDINGS, AND CONCLUSIONS**

19  
20 On balance, and looking at the case in its overall proportion, the court finds and concludes  
21 that the total creditor's bill, sought to be charged to the Debtor, is unreasonably high. This is not to say that  
22 the work was not done, but it appears to be excessive for the work that actually had to be done, and the time  
23 it should have taken to do it.

24 In this case, the court finds that the issues were neither complex nor novel. Indeed, they were  
25 quite routine. The court cannot accept that such efforts - for a secured creditor's single-minded purpose of  
26 either getting payments, or monitoring a refinance or sale which provided for its payoff, would cost almost  
27 \$7,278.00. Frankly, the issues and intensity of this case did not rise to such level. The creditor overworked  
28 the case beyond the boundaries of fairness.

1 The court appreciates the creditor's need for specialized bankruptcy assistance, and is  
 2 sensitive to it. However, considering the entire record in this matter, the court is left with the clear  
 3 impression that the time spent by the secured creditor's professionals was excessive. Translated into § 506  
 4 terms, then, the charges are not "reasonable." To the extent that a creditor wishes to expend such resources,  
 5 that is a business decision which it is free to make. However, a creditor may not run the engine at full  
 6 throttle and expect its borrower to pay the entire fuel bill. For these reasons, the total amount of the fee  
 7 award to Ms. Goltz, is determined to be \$2,081.81, which is made up of the following:<sup>4</sup>

	<u>Services</u>	<u>Hours</u>	<u>Amount Sought</u>
1	Initial interview and filing notice of appearance	0.4	51.50
2	Preparation of proof of claim	1.5	261.16
3	Monitoring case progress through plan confirmation and beyond (October 2004 - October 2005)	3.3	582.16
4	Motion to dismiss: preparation of motion through hearings	4.5	435.27
5	Protecting Ms. Goltz from senior lienholder's § 362 motion	1.4	216.00
6	Calculations and conferences regarding note payoff amount and monitoring status of sale	2.0	348.22
7	Mop-up	<u>0.9</u>	<u>187.50</u>
	<b>TOTALS</b>	12.0	2,081.81

21 Thus, for Ms. Goltz' attorneys' fees in this case, the court awards a reasonable fee of  
 22 \$2,081.81.

23 The court will also allow \$152.80 in Ms. Goltz' out-of-pocket costs.

24 Turning to the title company's claimed fee structure, the court finds it to also be unreasonably  
 25 high. It is filled with arbitrary and artificially-created "fees" which bear no reasonable relation to the work  
 26 involved for the service. For example, the following fees are puffed up beyond any recognition of what it  
 27 is (or should be) actually charged for such "services," as many of those charges are reasonably included in

28 <sup>4</sup> When the fee is adjusted, the court used the "blended rate" of \$174.11.

1 the \$600 "Trustee Fee" itself. Therefore, the court finds the following "Trustee Fees" to be unreasonable  
 2 and not compensable:

<u>Item</u>	<u>Amount</u>	<u>Comments</u>
Copies	75.00	No explanation of how many nor at what cost per unit
Doc Prep Fee	50.00	Included in the \$600 Trustee Fee
Postponement Fee	650.00	Too high, arbitrary, and included in \$600 Trustee Fee
Reconveyance Fee	75.00	Included in \$600 Trustee Fee
Reinstatement/Payoff Fee	50.00	Included in \$600 Trustee Fee
Service Fee	449.40	No explanation
Statement Fee	240.00	No explanation
TSG Fee	250.00	No explanation
<b>TOTAL</b>	<b>\$1,839.40</b>	

14 The cost for the title company's efforts will not be compensated beyond the reasonable sum of \$1,129.35.

**RULING**

18 Therefore, the amount claimed by Ms. Goltz, for § 506 expenses, shall be awarded to her in  
 19 the reasonable amounts of:

Attorneys' Fees	\$ 2,081.81
Costs	152.80
Trustee Expenses	<u>1,129.35</u>
<b>TOTAL</b>	<b>\$ 3,363.96</b>

24 A separate order must be entered that resolves this final issue. Counsel for the Debtors shall  
 25 lodge one within ten (10) days.

27 DATED AND SIGNED ABOVE.

1 COPIES served on the date signed above upon:

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SIGNED

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27  
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