

SIGNED.



Dated: July 24, 2008

James M. Marlar
JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:) Chapter 7
MORTGAGE NOTES, INC.,) No. 2:07-bk-03071-JMM
MEMORANDUM DECISION (RE: SIR
MORTGAGE'S MOTION TO COMPEL
Debtor.) PAYMENT)

Before the court is secured creditor Sir Mortgage & Finance of Arizona, Inc.'s ("Sir") motion to compel the Bankruptcy Trustee to pay a portion of a property's sale proceeds to it, as an oversecured creditor (Dkt. #391). The court has considered the entire administrative file, including the moving papers, its exhibits, all pleadings relating thereto, and the various affidavits and other submissions. Having considered the law and arguments of the parties as well, the court now rules.

FACTS

1. The Debtor filed a voluntary chapter 11 petition on June 29, 2007.
2. Unable to confirm a reorganization plan, the Debtor converted to a chapter 7 liquidation proceeding on November 8, 2007.
3. Upon conversion, Dale Ulrich was appointed Bankruptcy Trustee.¹

¹ Mr. Ulrich had also been the chapter 11 trustee.

1 4. Thereafter, Mr. Ulrich began the process of sorting through the Debtor's many
2 real estate properties, selling what he felt had equity, or abandoning or releasing to foreclosure those
3 parcels with little or no value to the estates.

4 5. One of the parcels which the Bankruptcy Trustee sold was a parcel of land upon
5 which Sir was the beneficiary under a first position deed of trust.

6 6. The Bankruptcy Trustee obtained court approval to sell the subject parcel on
7 January 31, 2008 (amended order of February 15, 2008; Dkts. #213 and #235). The purchase price
8 was \$185,000. The purchasers were the Terceros.

9 7. On or about March 14, 2008, the sale closed, and the title company disbursed
10 to Sir, as a secured creditor, its outstanding principal of \$112,982.58, and its contract rate of interest
11 of \$9,404.40.²

12 8. The Bankruptcy Trustee has held back, and opposes as unreasonable,
13 additional sums claimed by Sir, consisting of:

14		
15	Title fees:	\$814.50
16	Sir Mortgage fees:	1,675.00
17	Foreclosure/attorneys' fees:	1,326.56
18	Bankruptcy attorneys' fees:	12,551.00
19	Bankruptcy attorneys' costs:	<u>362.70</u>
20	Total:	\$16,729.76

21 9. The entire amount of \$16,729.76 is what is in dispute in the instant controversy,
22 and the subject of Sir's motion to compel payment. Sir claims that it is entitled to such sums as part
23 of its oversecured claim, while the Bankruptcy Trustee insists that only \$5,000 thereof is
24 reasonable.³

25
26 ² This figure may have been slightly higher due to accrued per diem interest, but in
27 any event, Sir has received its outstanding principal and interest, and the components are not an
issue.

28 ³ The Bankruptcy Trustee, at oral argument on July 17, 2008, conceded that \$5,000
was reasonable.

1 **LEGAL ISSUES**

2
3 As an oversecured creditor, Sir maintains that it should be reimbursed for its title fees,
4 internal fees, foreclosure or attorneys' fees, and bankruptcy attorneys' fees, as noted above in para. 8,
5 Facts. This court must determine reasonableness, as mandated by 11 U.S.C. § 506(b).

6 In order to do so, the court must break down each segment of the requested fees, and
7 examine them separately. It must also analyze the various components of the fee request, based on
8 the context of what was happening in the case at the times the expenses were incurred.

9
10 **DISCUSSION**

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12 **A. The Promissory Note and Deed of Trust**

13
14 On January 10, 2006, the Debtor borrowed \$113,000 from Sir. The note called for
15 an annual interest rate of 11.75%, payable interest only for twelve (12) months, at which time the
16 entire balance was due and payable. The note also carried a default interest rate of 24% per annum.⁴

17 A "Fee Schedule," attached to the promissory note, and signed by the Debtor's
18 president, also agreed to pay Sir certain other internally-generated fees related to an event of default,
19 such as collection notices, and various "processing" or "monitoring" fees.

20
21 **B. Sir's Fees**

22
23 It is several of these latter types of fees which Sir now seeks to collect from the sale
24 proceeds. As noted, these fees are internally-generated, and do not represent actual out-of-pocket
25 expenses to Sir.

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27
28 ⁴ Sir agreed to waive the default rate, however, and, as noted above, has been paid its contract rate of interest.

1 Sir is the Beneficiary under the deed of trust executed by Mortgage Notes, Inc., as
2 Trustor. An outside company, Grand Canyon Title Agency, Inc. ("Grand Canyon Title") was the
3 Trustee, whose responsibility consisted of receiving payments from the Trustor (Debtor), and
4 remitting them to Sir, the Beneficiary. As Trustee under the deed of trust, it was also Grand Canyon
5 Title's responsibility to process foreclosure upon default. ARIZ. REV. STAT. § 33-801 *et seq.*

6 Nothing in the submitted record reflects that Sir's internal "expenses," charged to the
7 Debtor, were reasonable. Most of those types of expenses were exactly what the Trustee (Grand
8 Canyon Title) was required to do by statute and agreement. What this means, as a matter of law,
9 is that Sir is attempting to charge to the Debtor twice for the same "service." This is, at bottom,
10 therefore an unreasonable charge.

11 Sir's internally-generated fees of \$1,675 will therefore be disallowed, as unreasonable
12 and unnecessary.

13
14 **C. Foreclosure and/or Attorneys' Fees**

15
16 Grand Canyon Title, upon the Debtor's default, hired attorney Richard J. Rubin to
17 process and conduct the trustee's sale. Mr. Rubin's fees and costs totaled \$1,326.56, and were made
18 up of:

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20
21
22
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24

Recording:	\$75.00
Certified mail:	76.56
Photocopies:	15.00
Trustee's sale report:	560.00
Trustee's fees:	<u>600.00</u>
Total:	\$1,326.56

25 These sums are not truly "attorneys' fees," nor were they billed as such. Mr. Rubin was, in all
26 probability and as is customary, substituted in as the Trustee. In that event, a foreclosure trustee
27 is entitled to a \$600 maximum fee. ARIZ. REV. STAT. § 33-813(B)(4). The \$600 noted above is for
28 such a trustee's fee, and this is allowed by statute. The other out-of-pocket costs are customary and

1 reasonable in the case of recording and mailing certified copies, also required by statute as
2 conditions to a proper deed of trust sale. *See* ARIZ. REV. STAT. § 33-813(B)(2)(a), (b) and (c). The
3 bring-down report (costing \$560) advises a trustee of all recorded instruments, so that he/she knows
4 to whom to send advice of the proposed sale. It, too, is a necessary and reasonable cost of a trustee
5 under a deed of trust.

6 The Bankruptcy Trustee has not suggested any plausible reason why these statutory
7 fees are unreasonable, nor does he adequately explain why he feels that they are not legitimate out-
8 of-pocket costs incurred by Sir in the enforcement of its deed of trust.

9 Thus, the fees entitled "foreclosure attorneys' fees" will be allowed in the amount of
10 \$1,326.56. The Bankruptcy Trustee's objection thereto will be overruled.

11
12 **D. Title Company Fees**

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14 These fees were charged to Sir by Grand Canyon Title, as part of its servicing
15 contract. They were itemized on Exhibit C to Sir's motion as:

16	Statement fees:	\$100.00
17	Service fees:	139.50
18	Accrued payor fee:	500.00
19	Close-out fees:	<u>75.00</u>
20	Total:	\$814.50

21
22 All but the unexplained \$500 "accrued payor fee" are reasonable and customary. That \$500 charge,
23 being too vague, will be disallowed.

24 A fee of \$314.50 will be allowed for these services.

1 **F. Bankruptcy Attorneys' Fees**

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3 Sir's bankruptcy attorneys seek \$12,551 for their services, to date, and costs, in
4 assisting Sir through the Debtor's bankruptcy odyssey. In order to judge the reasonableness of these
5 fees, it is necessary to review the entire case in the context of how events unfolded chronologically
6 and then assess counsel's involvement at each stage of those events.

7 Thus, the fee request of Sir for its attorneys' fees must be evaluated in that light.

8
9 **June 29 - September 27, 2007**

10
11 The Debtor filed its chapter 11 case on June 29, 2007. In the three-month period
12 following the filing, the Debtor was busy with routine matters, preparing and filing employment
13 applications, schedules, statement of financial affairs; dealing with various creditors and their
14 attorneys; attending and reporting at the court's case management status hearing; working with the
15 court-appointed Bankruptcy Trustee (Dale Ulrich) and his attorney (Terry Dake) in educating them
16 to the nature of the Debtor's business; and dealing with the Bankruptcy Trustee's motion to convert
17 the case to a chapter 7 proceeding. The court denied the motion to convert, without prejudice, on
18 September 13, 2007, but ordered a plan to be filed by November 7, 2007. In addition, the U.S.
19 Trustee held its § 341 meeting of creditors, and the Bankruptcy Trustee began the process of
20 obtaining realtor employment and claims deadline orders.

21 During this initial phase of the Debtor's case, Sir made no appearance, and had not yet
22 retained bankruptcy counsel. Thus, Sir is requesting no fees for this period.

23
24 **September 28 - October 31, 2007**

25
26 Over the next month (34 days) of case activity, the Debtor and/or the Bankruptcy
27 Trustee began fighting a "two-front war." On the one hand, the Debtor was preparing, and then
28 filing, a plan of reorganization (October 17, 2007) and amendments to schedules. At the same time,

1 the Bankruptcy Trustee and Debtor were receiving stay relief motions from three creditors (First
2 American Title, Southwest Fiduciary, Inc. (Bombaci Trust) and Legend Land, LLC,) which they had
3 to analyze and to which they were required to respond.

4 During this same period, creditors also began filing objections to the reorganization
5 plan (O'Sick, Meyers, Linder Revocable Trust and Maricopa County).

6 On September 28, 2007, Sir's attorneys became involved. The Sir promissory note
7 had been in default for some period of time by this date, so it was only natural that Sir, now notified
8 of the bankruptcy case, would seek legal assistance. Between September 28 and October 31, 2007,
9 Sir's attorneys reviewed the case; reviewed the plan and disclosure statement; communicated with
10 the client; developed a strategy for dealing with Sir's issues; prepared a proof of claim;⁵and in
11 conjunction with the client's concerns, began preparation of an objection to the plan.

12 During this period, for these services, Sir's attorneys spent 2.8 hours, and charged Sir
13 \$780. For the work performed and required, the court finds that Sir's attorneys' fees for this period
14 were reasonable, and were necessary to protect Sir's interests.

15 16 A Digression - The Debtor's Plan

17
18 In the Debtor's plan (Dkt. #73), the Debtor listed 47 classes of creditors. Sir was listed
19 as the sole Class 33 creditor, and its shorthand abbreviation was "SMF." On page 16 of the plan,
20 Sir's treatment was that it would be paid upon a sale of the property. This treatment related to
21 property located at 10412 S. 205th Avenue, Phoenix, Arizona.

22 Under the plan, certain properties were to be sold within 90 days after confirmation,
23 some within 180 days thereafter, and some within 270 days thereafter. Any property not sold would
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27 ⁵ Sir's Claim No. 104 was filed on October 31, 2007, as a secured claim for
28 \$134,240.31. Sir's note maturity date had been extended from April 13, 2007 to October 13,
2007, by a letter agreement dated April 19, 2007 (*see* Ex. C to Proof of Claim). However, the
Debtor must have defaulted in the interim, requiring Mr. Rubin's assistance in beginning
foreclosure.

1 be subject to foreclosure. (See Ex. A and Ex. B to the Plan.) The Sir property fell into the six-
2 month sale period (Ex. B to the Plan).

3
4 **November 1 - 30, 2007**

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6 During the month of November, the Debtor faced a host of additional plan objections,
7 filed by creditors the Don Family Trust, the Vandenburgs, Margarelli Living Trust, Legend Land,
8 the Parkers, Southwest Fiduciary, CSI Mortgage, Wolter, Blue Sky Holdings, Sir Mortgage and
9 even the chapter 11 Bankruptcy Trustee.

10 Overwhelmed by the opposition to its plan, the Debtor withdrew it and converted the
11 case to liquidation under chapter 7. An order was entered approving the conversion, on
12 November 8, 2007.

13 It then fell to the Bankruptcy Trustee to sell the Debtor's assets, sort out the various
14 lien and other claims of interest against the estate's property, recover transferred assets and attempt
15 to swiftly make a silk purse out of the disparate bundle of rights that made up the Debtor's estate.

16 Included in the Trustee's responsibilities, upon conversion, was the effort necessary
17 to hire competent real estate professionals, fend off stay relief proceedings in properties with
18 perceived equity; negotiate with secured creditors, counsel and potential buyers; and analyze all
19 manner of legal documents.

20 As for Sir's attorneys' involvement during the month, they were active in reviewing
21 the Debtor's plan and objecting to it (Dkt. #111) and getting its own stay relief motion on file
22 (Dkt. #124, filed November 9, 2007). This latter event was precipitated not only by the Debtor's
23 outstanding payment default, but was also complicated by the Debtor's transfer of the subject liened
24 property to MNI Properties, an affiliate of the Debtor's principals. The stay relief motion also noted
25 a default in the Debtor's obligation to pay real estate taxes, a lack of adequate protection and an
26 assertion that no insurance existed for the property.

1 On November 23, 2007, the Bankruptcy Trustee filed an objection to Sir's stay relief
2 motion, asserting that equity existed in the property, and that if properly marketed and sold, that the
3 estate could realize value for creditors (Dkt. #138).

4 During November, Sir's attorneys logged 7.4 hours on protecting and monitoring
5 matters of interest to Sir, at a sum of \$3,385.

6 After a review of the events of the month of November, the court concludes that the
7 efforts of Sir's attorneys were necessary and consistent with what needed to be accomplished at the
8 time, and that the time spent and amount sought were both reasonable.

9 The sum of \$3,385 will be allowed for Sir's attorneys' fees for that month.

10
11 **December 1 - 31, 2007**

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13 In December, Sir's attorneys logged 2.8 hours, at a fee of \$840. In that time period,
14 the attorneys began discussions with the Bankruptcy Trustee about how best to deal with Sir's
15 discrete parcel of real estate.

16 The Bankruptcy Trustee continued with his efforts to hire professionals; refine his
17 approach to various pieces of property; enter into stipulations to temporarily retain and preserve land
18 with perceived value and release others without; and obtain compromises where required.

19 After considering all relevant evidence for the month of December, 2007, the court
20 finds and concludes that Sir's attorneys' efforts were reasonable, and that the fee for that month, in
21 the amount of \$840, was earned.

22
23 **January 1 - 31, 2008**

24
25 The new year dawned with Sir's attorneys spending 8.4 hours at \$2,930 during
26 January. The attorneys and the Bankruptcy Trustee were hopeful that a sale might be on the horizon
27 which would be for enough to pay Sir's debt and provide some leftover excess for the estate. The
28 parties discussed modifications to the stay, whether the default interest was appropriate if Sir were

1 to be otherwise compensated for its out-of-pocket costs, and the details of a forthcoming sale motion
2 and its impact upon Sir's payoff.

3 The Bankruptcy Trustee's and Sir's counsel spent a great deal of time wrestling with
4 the sale details and the handling of hoped-for payment from the pending escrow.

5 For his part, the Bankruptcy Trustee proceeded to conclude a complicated settlement
6 that involved not only Sir's parcel, but additional parcels and liens in which other creditors had an
7 interest. The Bankruptcy Trustee juggled each creditor's interest against the estate's, in a successful
8 effort to wring some value out of the estate's interwoven assets. Ultimately, he produced a
9 settlement with all those entities, which the court approved on January 31, 2008 (Dkt. #213).

10 Cautious about the outcome, Sir objected to portions of the sale which it felt could
11 delay its payment (Dkt. #198).

12 In the meantime, the Bankruptcy Trustee was continuing to battle the hydra-headed
13 monster, negotiating and selling properties; appointing realtors; filing applications and orders; and
14 holding onto properties against which stay relief motions had been filed.

15 Because the Sir issues had turned somewhat sour by now, with the Bankruptcy Trustee
16 beginning to question Sir's costs and need for certain services, and Sir becoming anxious about
17 when, and with what restrictions, it would be paid, things became a bit more frustrating for both
18 sides.

19 On balance, however, the court appreciates and understands both the Bankruptcy
20 Trustee's motivations and Sir's single-minded objective to obtain payment. These types of issues
21 are not unusual in a bankruptcy case of this type, and the court cannot, in good conscience, take
22 issue with Sir's attorneys' handling of matters. In hindsight, perhaps both parties might have cooled
23 a bit, but at the time, the services appeared to be a proper reaction to unfolding events.

24 Therefore, for this month, the court concludes that Sir's attorneys' time and expense
25 of \$2,930 was reasonable.

1 **February 1 - 29, 2008**

2
3 During February, Sir's attorneys were pressing the Bankruptcy Trustee to
4 simultaneously attempt to close the sale of its secured property, and also to grant stay relief (by
5 stipulation), as a backup in the event the sale failed to materialize.

6 Meanwhile, the Bankruptcy Trustee was, as usual, juggling many balls. As for the Sir
7 secured property, he was dealing with the details of that closing, but at the same time, angling for
8 more time (hence his delay in stipulating to Sir's stay relief) to sell the property to someone else if
9 the anticipated Tercero sale did not close.

10 On other fronts, the Bankruptcy Trustee was attempting to close other sales, jockeying
11 with and around other stay relief requests, and dealing with the assortment of details necessary to
12 squeeze a few more dollars out of the Debtor's estate. The Bankruptcy Trustee's job was a delicate
13 balancing act.

14 During this month, Sir's attorneys spent 3.2 hours in their client's case, translating into
15 \$693 in expense to Sir.

16 The legal tension between the Bankruptcy Trustee's desire to maximize the return on
17 an asset (and sometimes in dealing with foot-dragging buyers), and a secured creditor's desire to be
18 paid as soon as possible is, in the bankruptcy world, just the nature of the beast.

19 In all respects, though, both sides' positions are understandable. As for Sir's fee
20 charges, they are reasonable for this period in the amount of \$693, because they are consistent with
21 the client's need for information and action.

22
23 **March 1 - 14, 2008**

24
25 In March, a "collision" of sorts occurred between Sir and the Bankruptcy Trustee.
26 Somewhere in mid-March, the long-anticipated sale of the Sir secured property occurred. This
27
28

1 closing resulted in Sir obtaining all of its principal and contract interest. But the Bankruptcy Trustee
2 then took the position that all of Sir's requested fees and costs were excessive.⁶

3 At that time (March 12, 2008), the Bankruptcy Trustee believed that Sir's requested
4 fees of \$13,033.40 were unreasonable. They were:

5		
6	Sir fees:	\$1,675.00
7	Foreclosure/attorneys' fees:	1,326.06
8	Bankruptcy attorneys' fees:	9,217.84
9	Statement fees (Grand Canyon Title):	100.00
10	Service fees (Grand Canyon Title):	139.50
11	Accrued payor fees (Grand Canyon Title):	500.00
12		
13	Closing fees (Grand Canyon Title):	75.00
14	Total:	\$13,033.40

15 Up to the time of closing, which occurred on or about March 14, Sir's attorneys were
16 busy detailing and explaining their client's payoff request, and attempting to provide the Bankruptcy
17 Trustee with convincing argument and authority as to their entitlement to it. From March 1-14, the
18 attorneys spent 2.5 hours (or \$693) toward this effort. This amount was reasonable.

19 Thus, adding up all the reasonable figures for Sir's counsel since its engagement on
20 September 28, 2007, through March 13, 2008, its approved fees were \$9,321. But Sir's attorneys,
21 now were requesting less, \$9,217.84, according to the Bankruptcy Trustee's March 12, 2008 letter
22 (Ex. 4 to Sir Motion to Compel Payment).
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28 ⁶ It is evident that the Bankruptcy Trustee offered a compromise of these sums to Sir, but that Sir was offended, and considered such a request "extortionate." *See, e.g.*, Gust Rosenfeld time entry of March 18, 2008.

1 The Bankruptcy Trustee was correct in thus opposing Sir's internal fees of \$1,675, and
2 title company fees of \$500, but should have paid Sir's requested fees and costs of \$9,217.84 at that
3 time.

4
5 **March 15 - 31, 2008**

6
7 For the rest of the month of March, then, it is apparent that the parties were at
8 loggerheads over how much of these fees Sir was entitled to. Sir's attorneys attempted to persuade
9 the Bankruptcy Trustee of the merits of its position, to no avail. That effort cost another \$1,749, and
10 5.5 hours. This amount is reasonable and will be allowed.

11
12 **April 1 - June 12, 2008**

13
14 The rest of the time spent by Sir, in the months leading up to the filing of the instant
15 motion, were spent in a last-gasp effort to persuade the Bankruptcy Trustee, and then when that
16 effort failed, to prepare and file the instant motion.

17 From April 1 to June 12, 2008, Sir's attorneys spent 8.6 hours, at a cost of \$1,622.

18 The court has difficulty only with the portion of the instant motion that was assigned
19 to a paralegal. That person spent 7.7 hours on the task of preparing Sir's payment motion, at a cost
20 of \$1,325. It would appear that, if the attorneys who had worked on the entire case to that point had
21 prepared the motion (from the various computerized time entries), the effort could have been
22 accomplished in three (3) hours or less. At \$330 per hour, the fee for this aspect of the case would
23 be \$990. Thus, only that figure will be allowed for this phase of the case. The Ninth Circuit has
24 noted that it is an acceptable expense for time spent preparing and defending fee applications, and
25 that such amounts are compensable. *In re NuCorp.*, 764 F.2d 655 (9th Cir. 1985).

26 The law firm's out-of-pocket costs of \$362.70 will also be allowed as reasonable.

1 CONCLUSION

2
3 As in most things legal, both sides, at times, had meritorious positions concerning the
4 many facets of this complex matter. Ultimately, as to the attorneys' fees request, the determination
5 of reasonableness requires the court to exercise its discretion and best judgment. Thus, in the court's
6 view, Sir is entitled to the following amounts:

7

8	Foreclosure/attorneys' fees:	1,326.56
9	Title fees (Grand Canyon Title):	314.50
10	Bankruptcy attorneys' fees:	
11	• 09/28 to 10/31/2007	780.00
12	• 11/01 to 11/30/2007	3,385.00
13	• 12/01 to 12/30/2007	840.00
14	• 01/01 to 01/30/2008	2,930.00
15	• 02/01 to 02/29/2008	693.00
16	• 03/01 to 03/14/2008	693.00
17	• 03/15 to 03/31/2008	1,749.00
18	• 04/01 to 06/12/2008	990.00
19	Bankruptcy attorneys' costs:	<u>362.70</u>
20	Total:	\$14,063.76

21 Once the Bankruptcy Trustee pays this sum, the issues concerning Sir's fees and costs will be
22 concluded.

23 A separate order will be entered. FED. R. BANKR. P. 9021. This will be the court's
24 final order. Any appeal thereof must occur within ten days after entry on the docket. FED. R.
25 BANKR. P. 8002.

26 DATED AND SIGNED ABOVE.
27
28

1 COPIES served as indicated below
2 on the date signed above:

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27
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SIGNATURE