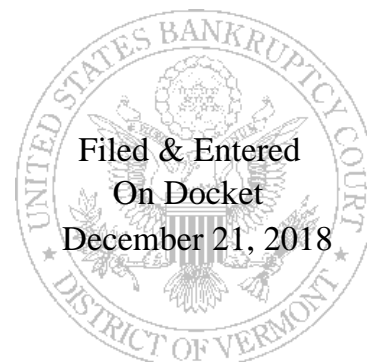


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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:

**Robert Simpson
and Tay Simpson,
Debtors.**

**Chapter 12
Case # 17-10442**

ORDER

**SUSTAINING, IN PART, DEBTOR'S OBJECTION TO THE ATTORNEYS' FEES AND EXPENSES
SOUGHT IN WELLS FARGO'S PROOF OF CLAIM,
AND FIXING AMOUNT OF WELLS FARGO'S ALLOWED CLAIM**

In light of the complex and extensive litigation in this case, as well as the voluminous filings related to the Debtors' objection to the claim of Wells Fargo Financial Leasing, Inc. ("WF"), the Court begins by setting out the procedural and substantive history pertinent to this contested matter.

On July 6, 2018, WF filed a second amended proof of claim in the amount of \$1,750,965, which states \$113,536.00 of that sum was for attorneys' fees and \$2,429.50 was for legal expenses, but does not include any information about how the legal fees and expenses were calculated or what they encompass (claim # 7-3, "WF's Claim"). On August 10, 2018, the Debtors filed an objection to WF's Claim, which asks the Court "to disallow Wells Fargo's claim for attorneys' fees and expenses unless and until an amended proof of claim is filed with enough specificity to support such claim" (doc. # 163, the "Debtors' Objection"). The Debtors articulate seven grounds for their Objection:

- (1) WF has not explained the basis for the attorneys' fees and expenses it seeks to collect from the Debtors, or the changes it made in the most recently amended proof of claim;
- (2) WF failed to attach invoices or a spreadsheet itemizing the services rendered, the identity or number of attorneys who worked on this matter, a schedule of fees and charges, or the actual time spent;
- (3) WF failed to file an application for the allowance of attorneys' fees in the case;
- (4) the amount of legal fees WF seeks is unreasonable because it equates to \$12,555 per month;
- (5) VACC did analogous work in this case and claims attorneys' fees of \$62,334.53, or about half of the amount WF seeks, which further calls into question the reasonableness of WF's Claim;

- (6) WF's lack of supporting documentation makes it impossible for the Court to determine whether the attorneys' fees WF seeks are reasonable, citing In re Fibermark, 349 B.R. 385 (Bankr. D. Vt. 2006); and
- (7) WF's Claim fails to deduct from the amount the Debtors' attorney paid (as a sanction) (\$1,147.83).

On September 7, 2018, WF filed a Response to the Objection, defending its right to collect all legal fees and expenses included in WF's Claim (doc. # 168, the "WF Response"). In addressing the several grounds of the Debtors' Objection, the Response says, first, the reason for the change in the amount due in WF's most recent amended proof of claim was "simply to correct a computation error." The Response also argues this Court's approval of its fees is not required because the Debtors owe these fees pursuant to the loan documents the Debtors signed when they took out the instant loans and gave the instant mortgage, and are independent of the bankruptcy court fee approval process, and therefore, compliance with Fibermark is not required. Although it did not answer directly the Debtors' fourth or fifth bases for the Objection, WF emphasized the legal fees were reasonable and necessary to protect WF's interests, highlighting that in this case WF needed its attorneys to obtain relief from stay, respond to the Debtors' appeals, and address the deficiencies in the Debtors' chapter 12 plan. With regard to the last basis for objecting, WF stated it did not need to reduce the amount of fees it sought due to the sanction payment, because WF's Claim "does not include the fees requested in WF's Motion for Sanctions" (doc. # 168, pp. 1, 5).

On September 21, 2018, the Court held a hearing on the Debtors' Objection and the WF Response, at which the Court ruled WF must demonstrate the fees are reasonable in order for them to be allowed as part of WF's Claim, directed WF to file a supplement to its Response, specifically ordered WF to file a more detailed breakdown of the fees WF seeks and the services its attorneys rendered, by October 5, 2018, so the Court could determine whether the legal fees and expenses in question are reasonable and fix the amount of WF's allowed secured claim in this case. The Court set a response deadline of October 12, 2018, and set a continued hearing for October 19, 2018.

On October 4, 2018, WF filed the affidavit of Alexandra E. Edelman, of Primmer Piper Eggleston & Cramer ("WF's Attorneys") as its supplement, with copies of the invoices WF's Attorneys sent to WF for professional services rendered in this case, and legal expenses incurred, during the period of September 21, 2017 through June 21, 2018, attached (doc. # 174, "WF's Supplement"). The gravamen of WF's position in that filing is, once again, that "all fees and expenses set forth in the WF Claim are reasonable and necessary for the protection and enforcement of WF's liens on the Debtors' property."

This Court reaches a different conclusion both as to the amount due, based on these invoices, and whether all legal fees WF seeks are reasonable. WF's Claim states attorneys' fees total \$113,536 and

expenses total \$2,429.50. Based on this Court's review of the invoices attached to WF's Supplement, and its addition of the entries set out therein, the Court concludes the attorneys' fees itemized on those invoices actually total \$110,624.50¹ and the expenses are actually \$3,429.50.²

On October 12, 2018, the Debtors filed a very detailed Response to WF's Supplement, in which they argue WF's Supplement fails to include the level and nature of detail required by In re Fibermark, 349 B.R. 385 (Bankr. D. Vt. 2006), the seminal case in this jurisdiction for demonstrating reasonableness of legal fees (doc. # 175, the "Debtors' Supplemental Response"). They also assert the sum of the itemized entries do not add up to the amount sought in WF's Claim. Based on these alleged deficiencies, the Debtors argue WF's allowed claim should reflect reductions in the following amounts:

- (A) the difference between the amount of Attorneys' Fees shown in WF's Claim and the sum of the individual entries within the invoices attached to WF's Supplement (a difference of \$2,911.50);
- (B) billing entries which lump services or tasks (totaling \$62,211);
- (C) fees for general or administrative services (totaling \$10,615);
- (D) fees for WF's adversary proceeding against VACC (the "VACC AP") (totaling \$9,346.50); and
- (E) excessive time spent on a motion for relief from stay, and the title work related to that motion (which the Debtors assert should be capped at \$3,000 and \$800, respectively);

which are more specifically delineated in the corresponding exhibits A-E, attached to the Debtors' Supplement. The Debtors also criticize WF's Attorneys' billing for travel time, which appears to be billed at the full hourly rate, though they declare they cannot specify a reduction amount for that category of alleged over-billing due to the lack of detail, and lumping of entries, in WF's Supplement.

On October 17, 2018, the Court entered an Order establishing a schedule for the filing of additional documents related to the Debtors' Objection to WF's Claim (doc. # 177), in which it made the following findings:

THE COURT FINDS [the Debtor's arguments] are all valid points and the Court cannot resolve the Debtors' Objection without further information from Wells Fargo responding to each of them.

IT FURTHER FINDS that, although this is a chapter 12 case, and therefore one in which the U.S. Trustee would not – as a matter of course – express a

¹ Each of the nine invoices attached to WF's Supplement (doc. # 174) includes a tabulation of "Total fees for this matter." For seven of those invoices, the "Total fees" figure matches the tabulation of the time entries. But, for two of the invoices, ## 159376 and 168008, the "Total fees" figure does not equal the sum of the fees for the time entries. It appears this is because several entries on those two invoices were redacted and the "Total fees" number was not adjusted to reflect those redactions:

<u>invoice date</u>	<u>listed "Total fees"</u>	<u>actual sum of individual entries</u>
Oct. 9, 2017	\$5,429	\$3,313
July 10, 2018	\$12,227.50	\$5,609

² WF's Claim states WF incurred expenses of \$2,429.50, but this appears to be a typographical error as the invoices attached to WF's Supplement (doc. # 174) show total expenses of \$3,429.50. The Court adopts the latter number as the true representation of the expenses WF seeks in its proof of claim.

position with respect to attorney fee applications, the fees Wells Fargo seeks here are no different from the fees a large mortgage creditor would seek in the context of a chapter 11 case, in which the U.S. trustee would typically take a position with respect to the reasonableness and allowance of a creditor's attorneys' fees. The U.S. trustee has substantial expertise on this topic and the Court would find a statement of the U.S. trustee in this matter to be both appropriate and helpful.

Doc. # 177, p. 2. Based on those findings, the Court requested the chapter 12 trustee and the United States trustee file a statement of position with respect to the WF's Supplement and the Debtors' Supplemental Response, or a statement explaining why they were not taking a position on these filings. It set a continued a hearing on the Debtors' Objection and the related filings for November 28, 2018.

On November 1, 2018, WF filed a Response to the Debtors' Supplemental Response (doc. # 181, "WF's Supplemental Reply"), in which it argues,

- (A) WF's Supplement demonstrates the legal fees it seeks were for necessary legal services, and its timesheets contain sufficient detail to satisfy the requirements of In re Fibermark;
- (B) the standards set out in the U.S. Trustee Guidelines and this Court's Local Rule, with respect to the filing of fee applications, should not be applied here since this is not the application of a professional performing services on behalf of the bankruptcy estate, stressing that the basis for allowance of the fees it seeks is the contract between the parties which clearly permits WF to recoup the fees and expenses it incurs to protect its interest in the collateral;
- (C) the amount of fees WF itemizes in its invoices is actually \$104 more than the total set out in its claim and therefore it consents to a reduction of \$104 from the invoice amount;
- (D) the tasks the Debtors describe as "administrative" do not fall within the definition of that term in In re Fibermark, and are substantive legal tasks that should be allowed in full; and
- (E) none of the fees WF seeks are "excessive," in light of the complexity of the legal services performed, the long history between the parties, and the extensive factual background that was required in each pleading.

On November 9, 2018, the chapter 12 trustee (the "Trustee") filed a statement of position with respect to WF's Attorneys' fees (doc. # 186), in which he describes the issue before the Court as "whether the billing rate applied to this case was [WF's Attorneys'] *customary billing rate* and the *amount* of time" (doc. # 186, p. 1) (emphasis original). He also disputes WF's position that the level of detail WF has provided in support of the legal fees in question is adequate, and argues WF has failed to sustain its burden of proof as to the reasonableness of its legal fees. He particularly takes issue with WF's purported justification for the 35 hours its attorneys spent on a relief from stay motion, pointing out that WF filed this motion, arguing lack of feasibility, even before the Debtors filed their plan. He underscores that the Debtors' plan was confirmed, the Debtors are currently in full compliance with the requirements of that confirmed plan, and during the less than 6-month period since confirmation of the plan the Debtors have made payments to the trustee in excess of \$885,000 from which he has distributed over \$205,000 to WF.

The Trustee concludes this series of events proves the Debtors' plan was in fact feasible. In concluding, the Trustee maintains WF has failed to comply with the fee allowance requirements of In re STN Enterprises, Inc., 70 B.R. 823 (Bankr. D. Vt. 1987) and In re Fibermark, 349 B.R. 385, 396 (Bankr. D. Vt. 2006), and asks the Court to deny a portion of the fees WF seeks to collect from the Debtors.

On December 10, 2018, the U.S. trustee filed a statement with respect to WF Attorneys' fees, in which he opines neither the UST Fee Guidelines,³ nor 11 U.S.C. § 330, nor Vermont Local Bankruptcy Rule 2016-1 apply to the analysis of the fees WF seeks through its proof of claim, though he acknowledges all of these authorities, "by analogy, may be instructive" (doc. # 188, p. 11). On the merits of the fee request, the U.S. trustee (i) disagrees with the Debtors' characterization that all entries on the Debtors' Ex. C constitute administrative tasks, (ii) recommends a 5-10% reduction for tasks that appear to be excessively billed (such as the motion for relief from stay), and (iii) observes that in similar cases where lumped billing entries impair assessment of reasonableness, the U.S. trustee has asked the court to disallow 5-10% of the fees allocable to the lumped entries.

The contested matter before this Court requires a determination of the reasonableness of post-petition legal fees WF seeks to have paid by the Debtors' estate. This Court considers the U.S. Trustee Fee Guidelines, Local Rules governing fee applications, and § 330 of the Bankruptcy Code as essential touchstones whenever a party seeks to impose professional fees on a bankruptcy estate. As the Bankruptcy Court for the District of Massachusetts observed:

While § 330 does not expressly apply to third party counsel, such as a secured lender's counsel, the cases have consistently held that it does apply. The rationale is substantially the same whether one is dealing with a functionary of the Bankruptcy Court or counsel for a secured creditor; namely, that someone other than the secured lender is going to bear the cost, i.e., the estate and the unsecured creditors. When dealing with other people's money, there is apt to be less regard for exercising the same scrutiny of charges that one might render when dealing purely with one's own expenses.

In re Erewhon, Inc., 21 B.R. 79, 81 (Bankr. D. Mass. 1982) (internal citation omitted); see also In re Continental Vending Machine Corp., 543 F.2d 986, 994 (2d Cir. 1976) (cautioning that, in dealing with a clause in a mortgage providing for the payment of attorneys' fees, "a rule of reason must be observed, in order to avoid such clauses becoming a tool for wasteful diversion of an estate at the hands of secured creditors who, knowing that the estate must foot the bills, fail to exercise restraint in enforcement expenses.") While adherence to the U.S. Trustee's Fee Guidelines is not mandated by the Bankruptcy Code or Rules in this context, this Court joins the many other bankruptcy courts that have relied upon

³U.S. DEP'T OF JUSTICE, FEE GUIDELINES, APPENDIX A - GUIDELINES FOR REVIEWING APPLICATIONS FOR COMPENSATION, (May 17, 1996), <http://www.justice.gov/ust/fee-guidelines>.

them, as the starting point, when evaluating the reasonableness of a secured creditor's fees. See, e.g., In re Amigo PAT Tex., LLC, 579 B.R. 779, 786 (Bankr. S.D. Tex. 2017) (assessing the reasonableness of secured creditor's attorneys' fees within the framework of the U.S. Trustee's Fee Guidelines). This Court applies a rule of reason in its claim allowance process, working forward from that starting point.

Having considered all the filings related to the legal fees and expenses WF seeks in its amended proof of claim, and taking into account

- (f) the Court's duty to determine, in the context of the claims allowance process, if WF's Attorneys' fees are reasonable, by reference to the lodestar factors and all the circumstances of the case;
- (g) the fact that WF's Attorneys may not have anticipated their billings for the subject work would be subject to court review;
- (h) both the significant expertise of WF's Attorneys as experienced creditor's rights attorneys who regularly appear in this Court, on the one hand, and their decision not to amend their timesheets to correct the arithmetic errors and reduce the number and size of lumped entries, on the other; and
- (i) the many complex and competing equities of this case, and especially the long history of litigation between the parties, the aggressively negotiated settlement agreement the parties reached prior to the filing of this case, and the Debtors' challenge to WF's enforcement of that agreement in this case;

THE COURT FINDS WF's Attorneys' fees are generally reasonable, under the lodestar approach, but certain components of WF's Attorneys' fees must be disallowed due to a lack of reasonableness.

THE COURT FURTHER FINDS as follows, with respect to each of the seven categories of the Debtors' Objection:

- (1) The total amount of attorneys' fees sought: Although WF's Attorneys acknowledged an addition error in its Amended Proof of Claim (# 7-3, see doc. # 181, p. 5), the scope of the adjustment was incorrect: the total Attorneys' Fees, as reflected in the invoices attached to WF's Supplement, was actually \$110,624.50, not \$113,640, as claimed by WF's Attorneys, see supra n. 1.
- (2) The fees allocable to lumped entries: WF's Attorneys' lumping of services and tasks into single entries has made it much more difficult to assess the reasonableness of the fees WF seeks and therefore fees set out in lumped entries (totaling \$62,211) shall be reduced by 10%, or \$6,221.
- (3) The fees alleged to be for administrative tasks: All services which the Debtors identify as administrative, non-legal tasks (on Ex. C to doc. # 175) are actually legal in nature and compensable, and therefore, no reduction in allowed legal fees is warranted on this basis.
- (4) Fees for the VACC AP: WF has failed to show why the VACC AP was necessary or why the Debtors should be held responsible for the fees generated in that proceeding, and therefore, all fees associated exclusively with this litigation, totaling \$3,580,⁴ will be disallowed.

⁴ Ex. D of Debtors' Response to Affidavit (doc. # 175) calculated the total WF Attorneys' Fees related to the VACC AP as \$9,346.50. The Debtors, however, also listed many of these same billed tasks as examples of lumped entries, which it tabulated in Ex. B of that document. To avoid double-counting entries, the Court is not including in this category any of the entries the Debtors included as part of the lumped entries compilation. This results in the Court limiting the VACC AP fees to those which (i) describe or refer to this AP, and (ii) are not characterized as lumped entries. The Court calculates this figure to be \$3,580. While this represents a significantly smaller reduction in the allowed fees than would occur if the Court disallowed the full

- (5) Fees for excessive time: The Court is persuaded by the parties' arguments that the time WF's Attorneys spent on the motion for relief from stay and the title work related to that motion (in the amount of \$9,564 and \$4,480, respectively⁵) is excessive. But, the drastic reduction the Debtors seek, of approximately 68% (to \$3,000) and 82% (to \$800), respectively, for the work in those two categories of professional services is not warranted. Rather, taking into account both the time records, the complexities and history of this case, and the ultimate outcome in the case, the Court determines it is appropriate to reduce the fees for the relief from stay motion and title work by 40%; i.e., reductions of \$3,825.60 for the relief from stay motion and \$1,792.00 for the title work.
- (6) Full billing for travel time: The Debtors have not shown cause to disallow fees based on WF's Attorneys' failure to bill travel time at one-half their usual rate; for example, nothing in the record indicates that such a billing protocol was part of the agreement between WF and the Debtors.
- (7) Deduction for fees paid by the Debtors' attorney: It is clear from WF's Attorneys' invoices, filed as WF's Supplement (doc. # 174), that WF has redacted all three of the entries for which WF's Attorneys sought an award of sanctions to be imposed upon Debtors' attorney, see doc. # 139, and excluded all such fees from its request, in toto. Though the Court only awarded WF's Attorneys \$1,147.83, or one-third, of the fees it sought in WF's motion for sanctions, see doc. # 160, WF has eliminated all of the fees listed within those three time entries in its proof of claim. See doc. # 168, ¶¶ 12, 17. Thus, no reduction is warranted on this basis of the Debtors' Objection.⁶


Based on the foregoing findings and rationale, IT IS HEREBY ORDERED the Debtors' Objection is sustained, in part.

IT IS FURTHER ORDERED that WF's Claim for attorneys' fees, for the period of September 21, 2017 through June 21, 2018, is disallowed to the extent of \$15,418.60.

IT IS FURTHER ORDERED WF's Attorneys' fees are allowed in the reduced amount of \$95,205.90, and WF's legal expenses are allowed in the amount of \$3,429.50.⁷

IT IS FURTHER ORDERED that WF's claim (#7-3) is allowed in the total amount of \$1,733,635.40.

December 21, 2018
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge

\$9,346.50 WF's Attorneys billed for this matter, it is impossible for the Court to discern what portion of the lumped entries is allocable to any one of the components of each such entry, and has determined this approach to the VACC AP, combined with the across-the-board 10% reduction for all lumped entries is the fairest approach.

⁵ Ex. E of Debtors' Response to Affidavit (doc. # 175) calculated the total WF Attorneys' Fees related to the motion for relief from stay, and the title work for that motion, as \$12,151.50 and \$7,700 respectively. The Debtors, however, also listed many of these same billed tasks as examples of lumped entries, which it tabulated in Ex. B of that document. For this reason, the Court disallows 40% of only those WF Attorney's Fees (i) related to the motion for relief from stay, and the accompanying title work, that (ii) are not also characterized as lumped entries. The Court calculates these figures to be \$9,564 for the relief from stay motion and \$4,480 for the title work.

⁶ An argument can be made for restoring those fees which WF sought as part of its motion for sanctions that the Debtors' attorney was not required to pay. However, WF redacted them – thereby suggesting it was no longer seeking them – and taking into account the impact the lumped entries had on computing reasonableness of WF's Attorneys' fees, the Court concludes it is most just to exclude them from allowance.

⁷ See supra n. 2.