SO ORDERED.

SIGNED this 6th day of February, 2018.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:	)	
	)	
Wiley Walter Shore and	)	Case No. 17-50459
Shelby Jean Matthews Shore,	)	
	)	
Debtors.	)	Chapter 12
	)	

ORDER SUSTAINING OBJECTIONS BY DEBTORS TO CLAIMS 6 and 7 OF CAROLINA FARM CREDIT, ACA

THIS MATTER came before the court for hearing on December 13, 2017 upon the Objections by Wiley Walter Shore and Shelby Jean Matthews Shore (the "Debtors") to Claims 6 and 7 of Carolina Farm Credit, ACA ("CFC"). Thomas W. Waldrep, Jr. and Francisco T. Morales, attorneys for the Debtors, and Daniel C. Bruton, attorney for CFC, appeared at the hearing. Robert E. Price, Jr., Assistant Bankruptcy Administrator, filed a response in support of the Debtors' objections and appeared at hearing. Kathryn L. Bringle, the Chapter 12 Trustee, also appeared and argued in support of the Debtors' objections. The court has considered the record and, for the reasons that follow, will sustain the Debtors' objections to claims 6 and 7 of CFC.

BACKGROUND FACTS

The relevant facts are not in dispute. The Debtors filed a petition for relief under Chapter 12 of the Bankruptcy Code on April 27, 2017. On August 4, 2017, CFC filed two claims in the

case. Claim 6 asserts a secured claim in the total amount of $1,257,726.58 under the terms of an original promissory note dated January 30, 2006, as subsequently modified. The promissory note was secured by a deed of trust recorded with the Register of Deeds, Yadkin County, in Book 768, Page 297. Of the total claim amount, $164,116.51 constitutes attorneys' fees, which CFC calculated as 15% of the principal and interest balance as of the petition date. Claim 7 states a secured claim in the total amount of $134,850.39 under the terms of a promissory note dated November 10, 2014 and deed of trust recorded with the Register of Deeds, Yadkin County, in Book 1140, Page 596. Of the total amount of Claim 7, $17,566.00 constitutes attorneys' fees, also calculated as 15% of the principal and interest balance as of the petition date.

CFC's promissory notes each contain the same attorneys' fee provision:

> If Association employs attorney(s) to collect the indebtedness evidenced by this note, or to enforce or preserve any right provided for herein or relating to any security for this note, or suit is filed hereon, or proceedings are had in bankruptcy or any other court whatsoever with respect thereto, then, in addition to any principal, interest or other charges as provided for herein, Association shall also recover all costs and expenses, including attorneys' fees and legal expenses reasonably incurred in connection herewith, including such costs and fees incurred on appeal. Such amounts shall become part of the indebtedness evidenced hereby and shall be immediately payable on demand, and shall, to the extent permitted by law, bear interest from the date incurred until paid at the rate provided herein.

Also, CFC's deeds of trust contain the following language:

> In the event of default, if the Lender employs counsel to collect the debt evidenced by any note secured hereby, or to enforce or protect any rights provided for herein, in any court or before any administrative body whatsoever, then in addition to any principal, interest, and other charges as provided for in any note secured hereby, Lender shall also recover all costs and expenses reasonably incurred by Lender, including reasonable attorneys' fees, which costs, expenses and attorneys' fees shall become part of the indebtedness secured hereunder, shall be immediately payable, and shall draw interest from the date Lender retains counsel until paid at the highest rate provided in any note or notes secured hereby.

Prior to the petition date, CFC sent the Debtors demand letters related to both Claim 6 and Claim 7. Each letter included notice pursuant to N.C. Gen. Stat § 6-21.2 that the provisions in the notes relative to the payment of attorneys' fees and collections costs would be enforced unless the Debtors paid the amount due within five days of the date of the letter.[1]

This court confirmed the Debtors' amended Chapter 12 plan (the "Plan") by order dated November 8, 2017.[2] The Plan modified the terms of the existing CFC indebtedness as stated in Claims 6 and 7, including both the date of maturity of the debt and payment terms. As to CFC's attorneys' fees, the Plan provides:

> The Debtors have objected to Claims 6 and 7 that claim 15% attorneys' fees in the total amount of $181,682.51 on the basis that only reasonable and actual attorneys' fees should be allowed. If the Debtors are successful in their existing claim objections, then Farm Credit has the right to file an application for attorneys' fees pursuant to Section 506(b) of the Bankruptcy Code, to which the Debtors have the right to object.

The Plan treatment of the third loan with CFC, the "Home Place Loan," as it is denominated in the Plan and evidenced by CFC Claim 8, is to maintain the existing terms.

DISCUSSION

The Bankruptcy Code provides that a creditor in a Chapter 12 bankruptcy case may file a proof of claim. 11 U.S.C. §§ 103(a), 501(a). "A proof of claim is the creditor's statement as to the amount and character of the claim." *Stancill v. Harford Sands Inc (In re Harford Sands Inc)*, 372 F.3d 637, 640 (4th Cir. 2004) (citing Fed. R. Bankr. P. 3001(a)). Section 502 of the Bankruptcy Code governs the allowance of claims that receive a distribution from the bankruptcy estate. Under 11 U.S.C. § 502(a) a properly filed proof of claim is deemed allowed

[1] N.C. Gen. Stat. § 6-21.2(5) provides that if a party pays the outstanding balance in full before the expiration of such five-day period, then the obligation to pay the attorneys' fees shall be void.

[2] CFC filed an objection to confirmation of Debtors' amended Chapter 12 Plan on September 27, 2017 but the objection was resolved prior to the confirmation hearing. The Chapter 12 Trustee also filed an objection to confirmation of the Debtors' amended Chapter 12 Plan, and that objection was withdrawn.

unless a party in interest objects. Section 502(b) sets the date of the filing of the petition as the determination date for the amount of the claim; § 502(b)(1)–(9) is a list of reasons for which a claim may be disallowed. When a claim is executed and filed in accordance with the Federal Rules of Bankruptcy Procedure, Rule 3001(f) provides that the proof of claim "shall constitute prima facie evidence of the validity and amount of the claim."

When 11 U.S.C. § 506(a) is applicable, an allowed claim of a creditor secured by a lien on property in which the estate has an interest is a secured claim to the extent of the value of such property. Section 506(b) provides for the claims of oversecured creditors to be allowed interest on the claim and "any reasonable fees, costs, or charges." 11 U.S.C. § 506(b). The Debtors and CFC have stipulated in this case that the value of the real property encumbered by CFC's liens is greater than the amount of the liens; CFC is therefore an oversecured creditor.[3]

The Debtors' Chapter 12 case brings the secured claims of CFC into the jurisdiction of the bankruptcy court; the Bankruptcy Code provisions regarding claims are juxtaposed with North Carolina law regarding reasonable attorneys' fees in collection of a debt. The provision in the North Carolina statutes relating to attorneys' fees in notes and other evidence of indebtedness is N.C. Gen. Stat. § 6-21.2:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding "balance" owing on said note, contract or other evidence of indebtedness.

[3] Paragraph 3 of the Response by CFC to Objection by Debtors to Claim Nos. 6 and 7 filed on October 31, 2017 states: "In conjunction with the confirmation of the Debtor[s'] Chapter 12 plan, the value of CFC's collateral was stipulated to be $1.7 million."

> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

"Outstanding balance" is defined in § 6-21.2(3) as the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt. N.C. Gen. Stat. § 6-21.2(3). Since the promissory notes and deeds of trust evidencing and securing the indebtedness to CFC do not provide for a specific percentage of the outstanding balance as attorneys' fees, CFC contends that N.C. Gen. Stat. § 6-21.2(2) is applicable.

The Debtors argue that the express language of CFC's notes and deeds of trust modifies the application of N.C. Gen. Stat. § 6-21.2 by using the words "reasonably incurred" in connection with the imposition of attorneys' fees and costs. However, courts have applied N.C. Gen. Stat. § 6-21.2(2) and the statutory 15% to attorneys' fees provisions in documents that incorporate the word "incurred" in connection with the imposition of attorneys' fees. In *Baker & Taylor, Inc. v. Griffin*, No. 3:12-cv-00553, 2015 WL 1307293, at *1 (W.D.N.C. Mar. 23, 2015), the guarantor of certain indebtedness agreed to pay "all costs, expenses, and fees, including reasonable attorney's fees, which may be incurred by Baker & Taylor in enforcing this personal guaranty…" The court determined that the statutory 15% attorneys' fee was appropriate. *Id*. at *2 (citing *Trull v. Central Carolina Bank & Trust*, 478 S.E.2d 39, 42 (N.C. Ct. App. 1996), *aff'd in part, review dismissed in part* 490 S.E.2d 238 (N.C. 1997) where the phrase "reasonable attorneys' fees incurred" was contained in the underlying writing). *Baker & Taylor* notes that *Trull* provides "substantial support to plaintiff's argument that the phrase 'which may be incurred' has no impact on the award of fees under North Carolina law." *Baker & Taylor*, 2015 WL 1307293, at *2. This court agrees with *Baker & Taylor*'s reading of *Trull* and finds that the

use of the phrase "reasonably incurred" in connection with the imposition of attorneys' fees in CFC's loan documents does not affect the applicability of N.C. Gen. Stat. § 6-21.2(2) to the portion of its claim relating to attorneys' fees.

And so the issue in this case is whether the court is mandated by N.C. Gen. Stat. § 6-21.2(2) to allow a total of $181,682.31 as attorneys' fees as part of CFC's secured claims, or may the court determine reasonable attorneys' fees based on a review of evidence such as affidavits and itemized time entries?

Cases that discuss N.C. Gen Stat. § 6-21.2(2) reflect that the law is unclear. In *Monsanto Co. v. Are-108 Alexander Road, LLC*, No. 1:10CV898, 2013 WL 3280265, at *1 (M.D.N.C. June 27, 2013) Judge Osteen described this issue as follows:

> Whether that statute mandates an award of 15% of the "outstanding balance" as attorneys' fees or whether it merely serves as a cap on such fees. *Compare Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc.*, 178 N.C. App. 535, 632 S.E.2d 192 (2006) (finding that the trial court did not abuse its discretion by awarding less than 15% of the award as attorneys' fees), *with Devereux Props., Inc. v. BBM&W, Inc.*, 114 N.C. App. 621, 442 S.E.2d 555 (1994) (holding that the trial court erred by awarding less than 15% of the outstanding balance as attorneys' fees) *and RC Assocs. V. Regency Ventures, Inc.*, 111 N.C. App. 367, 373, 432 S.E.2d 394, 397 (1993) ("[S]ubdivision (2) has predetermined that 15% is a reasonable amount in our case.")

Though the parties in *Monsanto* briefed the above issue as set forth by Judge Osteen, the case was resolved on other grounds. *Monsanto Co. v. ARE-108 Alexander Road, LLC*, No. 1:10CV898, 2014 WL 2815778, at *6 (M.D.N.C. June 23, 2014) ("[U]nder either interpretation of the statute, there is no 'outstanding balance' due under the current leasing agreement. Therefore, this court does not find it necessary to resolve this dispute."), *aff'd* 632 Fed. Appx. 733 (4th Cir. 2015).

Following *Monsanto*, Judge Auld acknowledged in a footnote that there is a question as to whether § 6-21.2(2) is a cap on or a mandate of such attorneys' fees and awarded attorneys'

fees of 15% of outstanding indebtedness. *TD Bank, N.A. v. Shree Dutt Sai, LLC*, No. 1:14-CV-852, 2015 WL 7302259, at *6 n.3 (M.D.N.C. Nov. 18, 2015) (citing *Monsanto* and *In re Dispute Over the Sum of $375,757.47*, 771 S.E.2d 800 (N.C. Ct. App. 2015)). In *In re Dispute Over the Sum of $375,757.47* the parties disagreed as to whether the creditor provided the required statutory notice of intent to collect attorneys' fees under N.C. Gen. Stat. § 6-21.2. The court of appeals affirmed, finding that notice was given and therefore "[t]he trial court properly awarded attorneys' fees in the amount of fifteen percent of the outstanding balance to HSBC . . . ." *Id*. at 808. There is no question that N.C. Gen Stat. § 6-21.2(2) allows, by its express language, a proper award by a trial court of attorneys' fees of 15% of outstanding indebtedness to a creditor where evidence of such indebtedness only specifies payment of reasonable attorneys' fees by the debtor; the provision states "reasonable attorneys' fees . . . shall be construed to mean fifteen percent (15%) . . . ." The use of the phrase "shall be construed to mean" could, however, mean either a cap or a mandate, as Judge Osteen noted in *Monsanto.*

In *Ergs II, LLC v. Lichtin*, No. 5:12-CV-431-FL, 2013 WL 12250339 (E.D.N.C. Aug. 22, 2013), Judge Flanagan denied a motion for summary judgment on attorneys' fees as a statutory 15% requirement. The loan documents specifically provided for the attorneys' fees to be based on the standard hourly rates "without regard to any statutory presumption." *Id*. at *4. But the court noted,

> The case law is mixed on whether a plaintiff must submit evidence of reasonableness in considering attorneys fees under N.C. Gen. Stat. § 6-21.2(2). Neither the Fourth Circuit nor the North Carolina Supreme Court have provided clear guidance on whether § 6-21.2(2) requires attorneys' fees at fifteen percent (15%), without resort to extrinsic evidence, or whether it serves as a statutory cap.
>
> The weight of recent cases in lower courts, however, supports looking at evidence of reasonableness when making an award under N.C. Gen. Stat. 6-21.2(2), up to a statutory cap of fifteen percent (15%).

Ergs II, 2013 WL 12250339, at *5. *Ergs II* relied on *Monsanto* for this proposition, as well as three other cases decided in the last 12 years. *Ergs II*, 2013 WL 12250339 at *5 (citing *Silverdeer St. John Equity Partners I LLC v. Kopelman*, No. 5:11-CV-95-JG, 2012 WL 4422811 (E.D.N.C. Sept. 24, 2012); *Telerent Leasing Corp. v. Boaziz*, 686 S.E.2d 520 (N.C. Ct. App. 2009); *Bombardier*, 632 S.E.2d 192)). These cases each considered N.C. Gen. Stat. 6-21.2(2) and determined that it provides a cap of 15% on attorneys' fees, but not a mandate.

In *Silverdeer*, the plaintiff moved for summary judgment on its claim against the defendant for breach of a guaranty agreement and, after concluding that there was no genuine issue of material fact as to the defendant's liability or the amount of the indebtedness, the court addressed the issue of the reasonableness of attorneys' fees. 2012 WL 4422811, at *4-5. The court found that though the amount "requested by plaintiff is well beneath the fifteen percent (15%) statutory ceiling, which some North Carolina courts have found to be presumptively reasonable, it is not an insignificant amount and deserves further scrutiny by the court." *Id*. at *7 (footnote and citation omitted). In its subsequent decision on the issue of attorneys' fees, the court reduced the amount of attorneys' fees and costs to $98,202.94 with a total judgment on the guaranty in the amount of $4,035,698.00, comprised of principal, accrued interest, late charges, and default interest until entry of the judgment, as well as the attorneys' fees and costs. *In re Silverdeer St. John Equity Partners I LLC v. Kopelman*, No. 5:11-CV-00095-JG, 2012 WL 5879752, at *3 (E.D.N.C. Nov. 21, 2012).

In *Telerent*, a lessor of electronic equipment brought an action against an individual owner of three limited liability companies who signed the leases as a co-lessee. 686 S.E.2d at 521. The individual lessee appealed the award of attorneys' fees as above the 15% limitation for reasonable attorneys' fees in N.C. Gen. Stat. § 6-21.2(2). The appellate court held that the trial

court did not err in the award of attorneys' fees, "[c]onsidering that the balance of the debt collected in both the current action and the Kansas bankruptcy proceeding was $724,315.67, the trial court's award of $92,208.76 was well below the statutory ceiling of fifteen percent." *Id.* at 524.

In *Bombardier*, the court of appeals affirmed an award of attorneys' fees upon a suit for damages under an indemnification provision in a sales agreement. 632 S.E.2d at 197. The defendant argued that the trial court's award was improper—both contrary to law and unsupported by evidence. *Id*. at 195. The appellate court cited N.C. Gen. Stat. § 6-21.2(2) as legal support for the award of attorneys' fees, and further found that, "[w]hen the trial court determines an award of attorney fees is appropriate under the statute, the amount of attorney fees awarded lies within the discretion of the trial court." *Id*. at 197. The court noted that the trial court had awarded fees of less than 15% of the indebtedness, and that attorney testimony, affidavits, and billing statements supported the amount. *Id*.[4]

The case most cited for the proposition that 15% is a mandate rather than a cap for attorneys' fees under N.C. Gen. Stat. § 6-21.2(2) is *Trull v. Central Carolina Bank & Trust*. In *Trull* the court stated succinctly:

> Plaintiff additionally argues that an award of attorneys' fees to CCB under these circumstances amounts to a windfall, in that the statutory 15% exceeds the actual attorneys' fees incurred by CCB. The promissory note at issue in this case provides for "reasonable attorneys' fees" and is therefore subject to the provisions in G.S. 6-21.2 subsection (2), not subsection (1). Under subsection (1) an award of attorneys' fees must be supported by evidence and findings of fact supporting the reasonableness of the award, however, subsection (2) has predetermined that

[4] The court also cited *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 319 S.E.2d 650 (N.C. Ct. App. 1984), a case that discussed whether N.C. Gen. Stat. § 6-21.2(1) or (2) applied to the note in question and determined that § 6-21.2(1) applied. In *Coastal Prod*., the court held that in the circumstances where a note provides for a certain percentage of the debt as attorneys' fees in collection, the trial court had the discretion to fix attorneys' fees within a permissible range of the percentage specified in the document, and evidence and findings of fact supporting the reasonableness of this award under § 6-21.2(1) were required. *Id.* at 655.

> 15% is a reasonable amount….In this case, the trial court did not err by calculating the fee awarded in accordance with the statutory mandate.

Id. at 44 (citations omitted).[5] Other North Carolina cases do not speak of a statutory mandate in connection with a determination of reasonable attorneys' fees under § 6-21.2(2) but of the statutory percentage as a predetermined amount or the award as a proper application of the statute for which extrinsic evidence of reasonableness is not necessary for the trial court to determine. *See Institution Food House, Inc. v. Circus Hall of Cream, Inc.*, 421 S.E.2d 370, 374 (N.C. Ct. App. 1991) (affirming the award of a 15% attorneys' fee without supporting affidavits, and stating that the trial court "had before it the pleadings, depositions, and interrogatories, enabling it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed."); *RC Associates*, 432 S.E.2d 394, 397 ("However, subdivision (2) has predetermined that 15% is a reasonable amount in our case."); *Southland Amusements and Vending, Inc. v. J.M. Rourk*, 545 S.E.2d 254, 259 (N.C. Ct. App. 2001) (reversing an award of attorneys' fees greater than 15% of the liquidated damages award and citing *RC Associates* for the holding that N.C. Gen. Stat. § 6-21.2(2) has predetermined that 15% is a reasonable amount); *D.P. Solutions, Inc. v. Xplore-Tech Services Private Ltd.*, No. COA12-925, 2013 WL 794007, at *3 (N.C. Ct. App. Mar. 5, 2013) ("N.C. Gen. Stat. § 6-21.2(2) 'has predetermined that 15% is a reasonable amount' . . . [and] the trial court properly awarded 15% of the balance due under the guarantee . . . ."); *In re Dispute Over the Sum of $375,757.47*, 771

[5] In *Nucor Corp. v. General Bearing Corp.*, 405 S.E.2d 776, 778 (N.C. Ct. App. 1991), *rev'd on other grounds*, 423 S.E.2d 747 (N.C. 1992), the appellate court also spoke of a statutory mandate of 15% of the outstanding balance for awarding attorneys' fees. In *Devereux Properties, Inc. v. BBM&W, Inc.*, 442 S.E.2d 555, 558 (N.C. Ct. App. 1994) *review denied* 448 S.E.2d 519 (N.C. 1994), the appellate court remanded the case back to the trial court in order to award 15% of the outstanding balance due as attorneys' fees rather than the actual attorneys' fees it awarded, which was less than 15% of the outstanding balance due under a lease and guaranty. *Trull*, *Nuco*r, and *Devereux* were decided over twenty years ago. This court has found no further North Carolina cases that are consistent with the *Devereux* ruling on attorneys' fees or that use the word "mandate" when describing the statutory percentage under N.C. Gen. Stat.§ 6-21.2(2).

S.E.2d at 808 ("The trial court properly awarded attorneys' fees in the amount of fifteen percent of the outstanding balance to HSBC as provided in the promissory note and deed of trust . . . .").

Federal courts in North Carolina have required attorneys' fee applications to be reviewed for reasonableness in the decisions of *Silverdeer* and *Ergs II*, but have also awarded 15% of the outstanding balance as attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.2(2) without any discussion of time entries reviewed. *See Spencer v. Hutchens*, No. 1:04CV1150, at 2 (M.D.N.C. Nov. 16, 2006) ("The North Carolina courts have applied this provision even in a situation where, as in this case, the fifteen percent amount will exceed actual attorneys' fees . . . ." (citing *Trull*, 478 S.E.2d at 44)); *Cartrette v. Farthing*, No. 4:08-CV-18-F, 2008 WL 5220211, at *2 (E.D.N.C. Dec. 12, 2008) ("Section 6-21.2 of the North Carolina General Statutes authorizes the award of attorneys' fees in cases of breach of contract where there is 'evidence of indebtedness,' and presumes 15% of the outstanding balance as the reasonable fee."); *Fifth Third Bank v. Mountain Chevrolet, Pontiac, GMC Truck, Inc.*, No. 1:08CV209, 2009 WL 10681941, at *2 (W.D.N.C. Apr. 13, 2009) ("The Court concludes that attorney fees in the amount of 15 percent of the principle [sic] amount due of $1,292,465.69, or the sum of $193,869.00 is reasonable."); *Baker & Taylor*, 2015 WL 1307293, at *2 ("Thus, Chapter 6-21.2(2) operates not as a sword, but as a shield for this debtor. North Carolina law is very clear that where the contract 'does not specify the fee percentage then it shall be construed to mean 15% of the outstanding balance owed . . . .'" (citing *Trull*, 478 S.E.2d at 44)); *T.D. Bank*, 2015 WL 7302259, at *5 ("Section 6-21.2(2) authorizes Plaintiff to recover 15% of the 'outstanding balance' due on the Notes when Plaintiff initiated this action.").

In a postpetition dischargeability action, the bankruptcy court in the Eastern District of North Carolina interpreted reasonable attorneys' fees due under the agreement in question in

accordance with § 6-21.2(2) and limited the attorneys' fee award to 15% of the outstanding balance due instead of the much greater figure based on time expended. *Memo Money Order Co. v. Davis (In re Davis)*, 371 B.R. 127, 138 (Bankr. E.D.N.C. 2007), *vacated on other grounds and remanded by Callaway v. Memo Money Order Co.*, 381 B.R. 650 (E.D.N.C. 2008). In *In re Pak-A-Sak Food Stores, Inc.*, No. 06-04078-8-JRL (Bankr. E.D.N.C. Jan. 9, 2008), the same court examined the provisions for attorneys' fees under both subsections (1) and (2) of N.C. Gen. Stat. § 6-21.2 for an oversecured creditor. The court found § 6-21.2(2) applicable, but since the creditor had requested attorneys' fees in amount less than 15% of the outstanding balance, the court concluded that it need not make a factual finding as to reasonableness. *Id*. at 7.

Also, in *In re Brier Creek Corporate Ctr. Assocs. Ltd. P'ship*, No. 12-01855-8-SWH, 2013 WL 211119, at *6 (Bankr. E.D.N.C. Jan. 18, 2013), the bankruptcy court found that the applicable provisions allowing attorneys' fees in the loan documents place the interpretation of such provisions under § 6-21.2(1). The court recognized that recent cases examining attorneys' fees provisions under the § 6-21.2(2) standard "suggest that strict application of the 15% calculation is not proper." *Id*. In *In re Ormond*, No. 12-05489-8-SWH, 2015 WL 1000218, at *6 (Bankr. E.D.N.C. Mar. 3, 2015), the bankruptcy court required the creditor seeking 15% as attorneys' fees under § 6-21.2(2) to submit an affidavit setting forth the time and billing records in connection with a foreclosure of the debtors' property. And in a recent North Carolina district court case where a plaintiff requested less than 15% of the total amount due under the promissory note as attorneys' fees, the court awarded the amount requested, holding that since "[T]he North Carolina statute 'has predetermined that 15% is a reasonable amount,' an amount less than that is also reasonable." *American First Federal, Inc. v. Zaria Properties, LLC*, No.

3:15-cv-00404-FDW-DSC, 2017 WL 2552985, at *5 (W.D.N.C. June 19, 2017) (citations omitted).

It is clear from *Ergs II*, decided in 2013, and *Monsanto*, decided in 2013 and 2014, that there is a question as to whether the attorneys' fees of 15% specified in N.C. Gen. Stat. § 6-21.2(2) is a mandate or a cap under North Carolina law. And since these decisions, the North Carolina Supreme Court has not addressed this issue. Although the Fourth Circuit has not addressed the issue, in *Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843 (4th Cir. 1999), a case involving a lessor's right to postpetition attorneys' fees and costs, the court observed:

> Section 6-21.2 of the North Carolina General Statutes provides the statutory authority for recovering attorneys' fees when permitted in a lease. The statute caps an award of attorneys' fees at fifteen percent of the outstanding balance owing on the instrument of indebtedness…and further requires that parties wishing to enforce the provisions of their attorneys' fee agreements give adequate notice.

Id. at 850 (citations omitted). Based on the very real question of whether a 15% attorneys' fee is mandated as part of CFC's prepetition claims or simply a cap, this court declines to recognize the aggregate fees of $181,682.51 without supporting documentation as the attorneys' fee component of CFC's claims 6 and 7 in the Debtors' case.

Alternatively, even if 15% attorneys' fees are a mandate under North Carolina law, the Debtors argue that CFC's claim for prepetition attorneys' fees are subject to a reasonableness review under § 506(b) of the Bankruptcy Code.[6] Courts disagree as to whether a secured creditor's prepetition claim for attorneys' fees is reviewable by a bankruptcy court under 11

[6] The Bankruptcy Administrator also argues for determination by the court as to the reasonableness of CFC's prepetition attorneys' fees under § 506(b). Brief in Support of Objection to Claim for Attorney Fees, Docket No. 112.

U.S.C. § 506(b).[7] *In re Steel Network*, No. 09-81230, 2011 WL 4002206, at *12 n.3 (Bankr. M.D.N.C. June 27. 2011) ("There is a split of authority regarding whether the reasonableness requirement under section 506(b) applies to fees that an oversecured creditor incurred pre-petition."). Section 506(b) provides as follows:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is 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 or State statute under which such claim arose.

11 U.S.C. § 506(b). Some courts hold that § 506(b)'s reasonableness standard applies to an oversecured creditor's claim for prepetition attorneys' fees. *Advocate Realty Invs., LLC v. Welzel (In re Welzel)*, 275 F.3d 1308 (11th Cir. 2001) (en banc). *See also Wells Fargo Bank, N.A. v. 804 Congress, L.L.C. (In re 804 Congress, L.L.C.)*, 756 F.3d 368 (5th Cir. 2014). Other courts hold that the § 506(b) standard should only be applied to postpetition claims. *In re Latshaw Drilling, LLC*, 481 B.R. 765, 795 (Bankr. N.D. Okla. 2012) (noting that § 506(b) authorizes reasonable postpetition attorneys' fees while prepetition fees arise under applicable state law, thus recoverable under § 502, but as both "employ a reasonableness standard, there is no need to belabor the distinction . . . ."); *In re Leatherland Corp.*, 302 B.R. 250, 258 (Bankr. N.D. Ohio 2003) (denying the allowance of a creditor's "success fee" as a prepetition fee under § 502(b) and noting that the purpose of § 506(b) is "to permit a creditor to collect certain post-petition additions from the collateral securing the claim only to the extent that it is oversecured.").

In this district, this issue was addressed by Judge Stocks in *In re Brown*, No. 98-13111C-13G (Bankr. M.D.N.C. Oct. 18, 1999) and Judge Bullock in *Centura Bank v. Brown (In re Brown)*, No. 1:99CV01077 (M.D.N.C. Aug. 15, 2000). In *Brown*, the bankruptcy court

[7] As a general rule, all claims are reviewable by the bankruptcy court. "[T]he allowance or disallowance of a claim in bankruptcy is a matter of federal law left to the bankruptcy court's exercise of its equitable powers." *Harford Sands*, 372 F.3d at 640 (citing *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396, 404 (4th Cir. 1992)).

reconsidered its prior order overruling the debtor's objection to the claim of an oversecured creditor *sua sponte*. The debtor was to cure the default under her residential mortgage through her Chapter 13 plan.[8] The oversecured creditor filed a proof of claim which included attorneys' fees in the amount of 15% of the outstanding balance for prepetition default. While the creditor argued that it was entitled to attorneys' fees of 15% of the balance due according to its promissory note under state law, without regard to the fees actually incurred, the bankruptcy court looked to the language of § 506(b) and determined that an oversecured creditor's claim for attorneys' fees is controlled by federal law under § 506(b), and not by state standards. *In re Brown*, No. 98-1311C-13G, at 6 (citing *Unsecured Creditors' Comm. v. Walter E. Heller & Co.*, 768 F.2d 580 (4th Cir. 1985)). In doing so, the court concluded:

> The attorneys' fees which [creditor] is entitled to receive from the debtor in this Chapter 13 case should be determined in accordance with the foregoing guidelines, rather than [creditor] receiving an arbitrary 15% of the debtor's entire mortgage balance pursuant to a rote calculation made without any consideration of the extent of the legal services actually performed by its attorneys, the amount of fees actually incurred by [creditor] or whether the fees actually incurred were reasonable and necessary.

Id. at 15-16. This decision was affirmed by the district court, which held that § 506(b) applies, contrary to the creditor's argument, to claims by an oversecured creditor for attorneys' fees incurred prepetition as well as postpetition. *Centura v. Brown*, No. 1:99CV01077 at 9. The court reasoned:

> Policy considerations also support the application of Section 506(b) to claims for pre-petition attorney's fees. In many cases, the strict enforcement of a percentage fee assessment will be disproportionate to the amount of fees actually incurred by the creditor. Not applying Section 506(b) to attorney's fees claims would provide

[8] In *Brown*, Judge Stocks noted that 11 U.S.C. § 1322 was amended, effective after the filing of the petition in that case, with the addition of subsection (e) which provides that the amount necessary to cure a default in a plan be determined in accordance with the underlying agreement and applicable non-bankruptcy law, notwithstanding section 506(b) of the Bankruptcy Code. There is a corresponding provision in Chapter 12 of the Bankruptcy Code. 11 U.S.C. § 1222(d). The Debtors' Plan does not provide for the curing of the default, but rather provides for the modification of CFC's indebtedness. Therefore, § 1222(d) is not applicable.

> many creditors with a windfall at the expense of other creditors or the equity interest holders, thereby undermining the fundamental purposes of the Bankruptcy Code. *See In re Andrews*, 80 F.3d 906, 909 (4th Cir. 1996) (stating that the two over-arching purposes of the Bankruptcy Code are to protect creditors and to allow a debtor to make a fresh start).

Id.[9] The court noted the issue presented in *Brown* was akin to that in *In re Welzel*, 243 B.R. 916 (S.D. Ga. 1999), where an oversecured creditor sought to collect a statutory percentage for prepetition attorneys' fees as part of its secured claim. In *Welzel*, the district court held that attorneys' fees that had vested prepetition under state law remained subject to the § 506(b) standard of reasonableness. Subsequently, the Eleventh Circuit, on rehearing en banc in *Welzel*, held "[W]e conclude, as did the district court and the panel, that Congress intended for contractually set attorney's fees in the oversecured creditor context to be governed by § 506(b), even if otherwise vested and enforceable under state laws . . . ." *In re Welzel*, 275 F.3d 1308, 1316 (11th Cir. 2001).[10]

It is the practice of the bankruptcy court in this district to follow the precedent of the district court in the Middle District of North Carolina. As such, bankruptcy courts in the Middle District have followed the practice of determining an award of prepetition and postpetition attorneys' fees together in a § 506(b) application in certain circumstances. *See In re Badgett*, No. 15-50146, 2015 WL 5330309, at *4-5 (Bankr. M.D.N.C. Aug. 31, 2015) (limiting attorneys' fees to 15% of the outstanding balance owed, which was the amount requested by oversecured creditor, and finding such amount reasonable under the Fourth Circuit's standard for

[9] The Chapter 12 Trustee echoed these concerns at the hearing on the Debtors' objections to claims, arguing that the bankruptcy court has to balance the rights of all creditors, including junior lienholders and unsecured creditors, not just in a particular case but as a matter of policy.

[10] The Eleventh Circuit, on rehearing en banc, also found that the remainder of the fees, determined to be unreasonable, are be treated as an unsecured claim. *Id*. at 1318. The analysis of *Welzel* in bifurcating the attorneys' fees component into allowed secured and unsecured claims of an oversecured creditor is still followed in the Eleventh Circuit. *See In re Coastal Realty Investments, Inc.*, No. 12-20564, 2014 WL 929612, at *13 (Bankr. S.D. Ga. Mar. 10, 2014).

reasonableness for attorneys' fees and § 506(b)); *In re Steel Network, Inc.*, 2011 WL 4002206, at *12 n.3 (noting the split in authority regarding whether the reasonableness requirement under § 506(b) applies to fees that an oversecured creditor incurred prepetition, but as the pre- and postpetition fees of this creditor were to be paid according to the confirmed plan under § 506(b), the issue was not presented in this case); *In re Pearson*, No. 00-10860 12, 2001 WL 1699657, at *3 (Bankr. M.D. Jan. 26, 2001) (allowing pre- and postpetition attorneys' fees of creditor pursuant to a § 506(b) application although creditor took the position that under North Carolina law reasonable attorneys' fee means 15% of principal and interest due, it filed its application for less than such amount).

CFC points to the Supreme Court decision in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007) as support for its position that its claim for 15% attorneys' fees vested under state law prior to the Debtors' filing of their petition, became part of CFC's allowable claim under § 502(a), and is not subject to a federal standard of review for reasonableness as component of a secured claim under § 506(b). In *Travelers*, the Supreme Court held that a creditor was not precluded from filing an *unsecured* claim for contractual attorneys' fees merely because the fees sought had been incurred in litigating issues of federal bankruptcy law. *Id.* at 456. As the Debtors argued at the hearing, *Travelers* does not address the issue of the reasonableness of attorneys' fees that are asserted as part of an oversecured creditor's claim. Indeed, this court has been unable to find any cases where the analysis in *Travelers* has been extended to restrict a bankruptcy court from determining the reasonableness of attorneys' fees that are claimed in conjunction with an oversecured creditor's claim. In light of the absence of case law, this court will follow the precedent of the district court and the practice of the bankruptcy courts in the Middle District of North Carolina and review all

attorneys' fees in oversecured creditors' claims for reasonableness under the Fourth Circuit standards.

Based upon the foregoing, the Objections by the Debtors to Claims 6 and 7 are sustained. CFC is hereby ordered to file its Application for Attorneys' Fees in connection with this case within 14 days of entry of this order.

END OF DOCUMENT

PARTIES TO BE SERVED

Wiley Walter Shore and Shelby Jean Matthews Shore
17-50459 C-12

Wiley and Shelby Jean Matthews Shore
2324 Shore Road
Yadkinville, NC 27055-5324

Thomas W. Waldrep, Jr.
101 S. Stratford Road
Suite 210
Winston-Salem, NC 27104

Daniel C. Bruton
Bell, Davis & Pitt, P.A.
P.O. Box 21029
Winston-Salem, NC 27120-1029

Carolina Farm Credit, ACA
Attn: Jon Almond
P.O. Box 1827
Statesville, NC 28687-1827

Kathryn L. Bringle
Chapter 12 Trustee
P.O. Box 2115
Winston-Salem, NC 27102-2115

Synchrony Bank
c/o PRA Receivables Management, LLC
P.O. Box 41021
Norfolk, VA 23541-1021

J. Michael Fields
Ward and Smith, PA
P.O. Box 8088
Greenville, NC 27835-8088

William P. Miller
101 South Edgeworth St.
Greensboro, NC 27401