SO ORDERED.

SIGNED this 22nd day of November, 2016.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
VILCOM REAL ESTATE DEVELOPMENT, LLC,	)	Case No. 14-81182
Debtor.	)	

ORDER GRANTING, IN PART, DENYING, IN PART, SECOND MOTION TO DISTRIBUTE PROCEEDS OF SALE; SUSTAINING, IN PART, OVERRULING, IN PART, OBJECTION TO CLAIM

This case came before the Court on October 26, 2016, upon: (1) the Second Motion to Distribute Proceeds of Sale of Real Property at 740 Gimghoul Road, Chapel Hill, North Carolina and for Post Petition Interest Fees and Costs Related to VRD Loan Agreements (the "Second Motion to Distribute Proceeds") [Doc. # 132], filed by UDX, LLC ("UDX"), and (2) the Objection to Claim and Response to Second Motion to Distribute Proceeds of Sale (the "Objection to Claim") [Doc. # 138], filed by Sara A. Conti, Chapter 7 Trustee (the "Trustee") for the estate of Vilcom Real Estate Development, LLC ("VRD" or the "Debtor"). At the hearing, John Northen appeared on behalf of the Trustee, who was also present. Robert Price appeared on behalf of the Bankruptcy Administrator. Seth Moore appeared for UDX. The Court received

testimony from the Trustee and from Scott Hall, president of UDX. At the conclusion of the hearing, the Court took the matters under advisement. After considering the Motion to Distribute Proceeds, the Objection to Claim, the statements of counsel, the testimony, the exhibits, and the record in this case, the Court finds that the Second Motion to Distribute Proceeds should be granted in part and denied in part, and the Objection to Claim should be overruled in part and sustained in part, for the reasons which follow.

FACTS

On September 12, 2007, Harrington Bank, FSB ("Harrington Bank") loaned the Debtor $3,500,000. Trial Ex. 1. The loan was secured by a senior lien on 740 Gimghoul Road, Chapel Hill, North Carolina (the "Gimghoul Property"). Trial Ex. 3. Harrington Bank charged the Debtor non-default interest on the loan at the variable market rate (then 8.260%), with a floor of 6% per annum. Trial Ex. 2. Payments were to be credited "first to any late charges; then to any unpaid interest; then to principal; and then to any unpaid collection costs." *Id.*

The parties extended the loan a number of times, with the last extension made effective as of December 17, 2013[1] (the "Loan Extension Agreement"; collectively, the Loan Extension Agreement and the original note, dated September 12, 2007, along with all extensions thereto and deed of trust shall be referred to as the "Loan Documents"). Trial Ex. 4. Under the Loan Extension Agreement, the Debtor agreed to make monthly payments of principal and interest (then 6%) on the debt in the amount of $21,180.39 on the 17th day of each month until paid in full. *See id.* The Debtor also agreed to pay "all expenses incurred by Lender . . . in connection

[1] As extended, the loan was due and payable on January 17, 2015.

with the [l]oan, including without limitation, . . . costs incurred by Lender in connection with . . . the enforcement of Lender's rights under the Loan Documents."[2] *Id.*

Upon an event of default, such as the Debtor's failure to make a payment when due, the Loan Documents provided that: (1) the default interest rate of 14% per annum, based on a year of 360 days, would apply, and (2) the bank could declare the entire unpaid principal balance and all accrued unpaid interest immediately due. *Id.* (noting that, "[u]pon default, the interest rate . . . shall be increased to 14.000% per annum"). If a payment was 15 or more days late, the bank could also charge a late fee of 4% of the regular monthly payment. *Id.*

On October 10, 2014, Bank of North Carolina ("BNC"), successor by merger to Harrington Bank, notified the Debtor that it had sold the Loan Documents to Southland National Insurance Corporation ("Southland National"). Trial Ex. 7. Ten days later, on October 20, 2014, the Debtor mailed a cashier's check in the amount of $42,360.78 to Southland National via overnight carrier. Trial Ex. 9 (evidencing the mailing). The check represented the Debtor's September 2014 and October 2014 monthly payments. Southland National received the check on the morning of October 21, 2014.

Before crediting the payments to the account, Southland National sold the Loan Documents to UDX. *See* Case No. 14-81182 [Doc. # 157] ¶ 2.c (outlining the facts as stipulated by the parties); Trial Ex. 10. Immediately after purchasing the Loan Documents, by letter dated October 21, 2014, UDX notified the Debtor of its untimely September and October payments, declared the entire indebtedness immediately due and payable, and explained that interest would accrue on the balance at the default rate until paid in full. Trial Ex. 11. UDX also sent a payoff

[2] The "Fees and Expenses" provision of the Loan Extension Agreement superseded the "Attorneys' fees; Expenses" provision of the original note/subsequent amendments thereto, which stated: "Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount," Trial Ex. 2. *See* Trial Ex. 4 ("To the extent of any conflict between the Loan Documents and this [Loan Extension] Agreement, this Agreement shall control.").

statement to the Debtor, indicating an outstanding balance of $3,388,162.88 as of October 23, 2014, with interest accruing at the rate of $1,317.11 per diem. Trial Ex. 12. This figure was comprised of a principle balance in the amount $3,318,447.75; non-default interest in the amount of $64,918.13[3]; default interest from October 21st to 23rd in the amount of $3,949.78; and a late fee for the September payment in the amount of $847.22.[4] Case No. 14-81182 [Doc. # 157] ¶ 2.g.

On October 24, 2014, three days after the sale of the Loan Documents to UDX, the Debtor and its affiliates, University Directories, LLC, Print Shop Management, LLC, Vilcom, LLC, Vilcom Interactive Media, LLC, and Vilcom Properties, LLC (the "University Directory Debtors"), filed for Chapter 11 bankruptcy protection. For purposes of administrative efficiency, the Court procedurally consolidated the cases under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure. Case No. 14-81184 [Doc. # 52] (the "Order for Joint Administration).[5]

While the cases were administratively consolidated, the Debtor sought to sell the Gimghoul Property[6] and transfer liens to proceeds. Case No. 14-81184 [Doc. #]. The Court allowed the motion under 11 U.S.C. § 363(f)(4).[7] Case No. 14-81184 [Doc. # 126]. Net sales proceeds of $4,413,096.68 were transferred to counsel for the University Directory Debtors, to be held in escrow pending further order of the Court. *Id.*

On April 15, 2015, several months after the sale of the Gimghoul Property, the University Directory Debtors requested substantive consolidation, Case No. 14-81184 [Doc. # 287] (the

[3] The Trustee did not contest this figure. Case No. 14-81182 [Doc. # 157] ¶ 2.g.
[4] Though it arguably could have charged the Debtor default interest from September 17, 2014, UDX did not choose to pursue this remedy. The Court makes no findings herein as to whether it indeed could have done so.
[5] The Court takes judicial notice of its files and records under Rule 201(b) of the Federal Rules of Evidence, which states that the Court may take notice of facts not subject to reasonable dispute.
[6] The Gimghoul Property was appraised in July 2014 at a value of $4,875,000. Case No. 14-81184 [Doc. # 83].
[7] At the time, the University Directory Debtors intended to commence an adversary proceeding against UDX, seeking actual and punitive damages and equitable subordination of the liens and claims held by UDX. Case No. 14-81184 [Doc. # 6]. UDX had not yet filed a proof of claim.

"Motion for Substantive Consolidation"). UDX filed an objection to this request. *See* Case No. 14-81184 [Doc. # 312] (the "Objection to Substantive Consolidation").[8] In its objection, UDX noted that there was no evidence that creditors dealt with the University Directory Debtors "as a single economic unit", that there was evidence the University Directory Debtors treated themselves as "separate and distinct economic entities[,]" and that Harrington Bank "obviously dealt separately with the [University Directory] Debtors." *Id.* ¶ 7. It further took the position that the affairs of the Debtors were not so entangled that consolidation would benefit all creditors, explaining:

> [e]ach debtor has separate assets, performs different business functions, entered into separate contracts with third parties, and filed its own schedules and monthly operating reports. Further, a significant number of creditors are unique to each debtor. Even if the Debtors' affairs were entangled, it is obvious . . . that substantive consolidation will not benefit all creditors. As just one example, the cash held in the VRD estate, which has no business operations of its own, would apparently be siphoned off to fund the operations of Print Shop, VIM, and UD, to the detriment of all creditors of VRD.

Id. ¶ 8. After a hearing on the Motion for Substantive Consolidation, the Court denied this request on May 7, 2015, Case No. 14-81184 [Doc. # 339].

Although the Court denied the Motion for Substantive Consolidation, it did allow, on an interim basis, the University Directory Debtors' Joint Motion for Authority to Use Cash Collateral. *E.g.*, Case No. 14-81184 [Doc. #'s 55, 96, 135, 183, 239, 342]. The Debtor provided adequate protection payments to UDX under the fourth, fifth, and sixth interim orders in the amounts of $500,000; $400,000; and $42,360.78, respectively.[9] These funds came directly from proceeds of the Gimghoul Property.[10]

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[8] In addition to purchasing the VRD debt, UDX also purchased four loans made to University Directories, LLC, by Harrington Bank. Case No. 14-81184 [Doc. #312].

[9] The fourth and fifth interim orders, Case No. 14-81184 [Doc. #'s 183 and 239], specifically directed "the Debtors . . . [to] make an adequate protection payment . . . to UDX, to be applied to the outstanding indebtedness owed by the Debtors to UDX, without prejudice to the Debtors' right to seek [certain relief from] UDX . . . and subject to possible repayment to the Debtors with interest." The sixth interim order merely directed UDX to apply the

On January 16, 2015, UDX filed a motion to distribute the remaining Gimghoul proceeds. Case No. 14-81184 [Doc. # 191] (the "First Motion to Distribute Proceeds"). The Debtor objected, Case No. 14-81184 [Doc. # 201] and requested the motion be designated a contested matter (the "Motion to Designate Contested Matter"), Case No. 14-81184 [Doc. # 202]. While the matters remained pending, UDX filed a claim against the Debtor in the amount of $3,388,162.88.

At the hearing on the First Motion to Distribute Proceeds and Motion to Designate Contested Matter, the Debtor offered to make an adequate protection payment of $2,100,000. The Court noted that an additional, limited distribution would be reasonable and directed the Debtor to distribute $2,100,000. Case No. 14-81184 [Doc. # 341].

On June 19, 2015, the Court converted the Debtor's case to Chapter 7. Case No. 14-81182 [Doc. # 93].[11] UDX then filed the Second Motion to Distribute Proceeds, requesting the remaining sales proceeds as compensation for: (1) the outstanding accelerated amount due and owing under the Loan Documents as of October 23, 2014, including all fees and interest; (2) post-petition interest at the default rate; and (3) post-petition attorneys' fees. While UDX noted in the Second Motion to Distribute Proceeds that it had received payments from the Debtor under the fourth, fifth, and sixth interim cash collateral orders in the procedurally consolidated case, it argued that those fees should not be credited toward payments under the Loan Documents. Instead, UDX asserted that the funds should be credited toward four notes it held against another of the University Directories Debtors, University Directories, LLC. In support of this assertion,

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prepetition bank check from VRD in the amount of $42,360.78, which it had not yet negotiated, as an additional adequate protection payment. Case No. 14-81184 [Doc. # 342].

[10] The Trustee stated this under oath at the October 26, 2016 hearing. She testified that it is her practice to keep a detailed accounting of secured creditors' accounts and to deduct payments from appropriate sources in all Chapter 7 cases. She further testified that the funds could have come from no other source in this case.

[11] On July 6, 2015, the Court set aside the Order for Joint Administration, effectively deconsolidating the University Directory Debtors' cases. Case No. 14-81184 [Doc. # 437].

UDX remarked that University Directories, LLC was the debtor which was in fact operating during the pendency of the consolidated proceeding.

In response to the Second Motion to Distribute Proceeds, the Trustee filed her Objection to Claim, disputing UDX's right to any pre-petition interest at the default rate; any late fee; any pre-petition attorneys' fees; post-petition interest at the default rate; and post-petition attorneys' fees. The Trustee, moreover, noted that the Debtor had made payments to UDX in the amount of $500,000 on January 15, 2015; $400,000 on March 24, 2015; $2,100,000 on May 15, 2015; and $42,360.78 on May 15, 2015. The Trustee argued that all such payments should be deducted from the claim.

The Court designated the Second Motion to Distribute Proceeds and Objection to Claim contested matters and issued a scheduling order directing UDX to provide a

> detailed, itemized statement of attorneys' fees, costs, or other charges which UDX contends accrued prior to [and after] the Petition Date and should be allowed by the Court with respect to the VRD Loan, with the same level of detail, as applicable, as would be required by the Amended Chapter 11 Fee Application Guidelines effective February 11, 2013.

Case No. 14-81182 [Doc. # 145]. The Court also ordered the parties to file final pre-trial disclosures by July 15, 2016. *Id.*

In their final pre-trial disclosures, the parties agreed that, as of the petition date, the outstanding principal balance under the Loan Documents was $3,318,447.75; the outstanding non-default interest was $64,918.13; the outstanding default interest was $3,949.78; and the outstanding late fee was $847.22. The parties also noted that the Debtor had made additional payments to UDX in the amounts of $450,000 on March 30, 2016 and $18,037.96 on April 30, 2016.

At the hearing on the Second Motion to Distribute Proceeds and Objection to Claim, UDX conceded that it could not recover pre-petition attorneys' fees under North Carolina law.[12] With respect to UDX's request for post-petition attorneys' fees, the Court received invoices for services performed by Anderson Jones, PLLC and Anderson Tobin, PLLC. *See* Trial Ex's 22 and 23. Anderson Jones, PLLC submitted invoices for services performed through August 31, 2016 and billed to UDX in the amount of $32,782.50 plus $2,007.37 in expenses. *See* Trial Ex.'s 22 and 23. Anderson Tobin, PLLC submitted invoices for services performed through August 23, 2016 and billed to Eli Global, LLC, in the amount of $533,519.50 plus $46,921.99 in expenses. *See* Trial Ex.'s 22 and 23.[13]

Only Seth Moore, an attorney with Anderson Tobin, appeared at the hearing on behalf of UDX. Mr. Moore presented the Court with the testimony of Scott Hall, the president of UDX. Mr. Hall testified that, to the best of his knowledge, UDX had never maintained a bank account. He stated that he had seen each of the bills from Anderson Tobin, PLLC, but that he had no idea who had paid the bills. He could not describe the relationship between Eli Global, LLC and UDX to the Court in any detail.

ANALYSIS

The remaining issues before the Court are: (1) whether UDX is entitled to pre-petition interest at the default rate from October 21, 2014; (2) whether UDX is entitled to a late fee in the amount of $847.22; (3) whether UDX is entitled to post-petition interest at the default rate; (4) how much should be credited to the debt for post-petition payments made by the Debtor; and (5)

[12] UDX failed to give the Debtor the required notice under N.C. Gen. Stat. § 6-21.2(5) of its intent to collect those fees. This failure precludes any recovery of the fees. *See McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 757, 522 S.E.2d 317, 320 (1999).

[13] These attorney fees and expenses encompass all six of the University Directory Debtors.

whether and to what extent attorneys' fees should be awarded to UDX for post-petition services. The Court will address each issue in turn.

1. Pre-Petition Interest

UDX first asserts that it is entitled to pre-petition interest at the default rate from October 21, 2014. The Trustee counters that because the loan was not in default on October 21, 2014, UDX is only entitled to interest at the non-default rate, then 6%. The Trustee's argument is unconvincing.

As this Court has previously explained, "a determination of whether pre-petition interest is allowable at the default rate is typically governed by the terms of the loan documents negotiated by the parties." *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 WL 1513123, at *4 (Bankr. M.D.N.C. June 22, 2005); *see also Georgia Capital, LLC v. Parker (In re Parker)*, No. 5:15-CV-25-F, 2015 WL 5553767, at *2 (E.D.N.C. Sept. 17, 2015) (clarifying that 11 U.S.C. § 502 governs the claims allowance process and does not allow for a general equitable analysis of a claim for pre-petition interest). In this case, the Loan Documents state that a failure "to make any payment when due under th[e] Note" constitutes an event of default. Trial Ex. 4. The Loan Documents further provide that upon an event of default, "the interest rate . . . shall be increased to 14.000% per annum." *Id.* No conditions precedent, such as notice, impede the imposition of the default interest rate. Moreover, the Loan Documents do not provide for any grace period within which late payments must be accepted.

The thrust of the Trustee's argument is that since the Debtor made the payments, albeit late, no default interest rate may be imposed. This argument finds no support in the Loan Documents. The payments were not timely made. Thus, the default interest rate applied. As such, UDX is entitled to pre-petition default interest in the amount of $3,949.78.

2. Late Fee

UDX next asserts that it is entitled to a pre-petition late fee in the amount of $847.22. As with UDX's request for pre-petition interest at the default rate, the contract language is controlling. *See* 11 U.S.C. § 502. The Loan Documents provide that "[i]f a payment is 15 days or more late, Borrower will be charged 4.000% of the regularly scheduled payment." At the hearing on the Second Motion to Distribute Proceeds and Objection to Claim, Mr. Moore represented to the Court that UDX was only requesting a late fee with respect to the September 2014 payment of $21,180.39. This payment was due on September 17, 2014. As such, UDX could automatically charge the Debtor a late fee if the September payment was not made before October 1, 2014. The September payment was mailed on October 21, 2014. Thus, UDX is entitled to the late fee of $847.22 as a part of its pre-petition claim.

3. Post-Petition Interest

UDX next contends that it is entitled to post-petition interest at the default rate. The allowance of post-petition interest is governed by 11 U.S.C. § 506(b), which states:

> [t]o the extent that an allowed secured claim is secured by property the value of which . . . 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.

Id. In *U.S. v. Ron Pair Enterprises Inc.*, 489 U.S. 235, 241 (1989), the Supreme Court found that while the recovery of fees, costs, and interests on a claim is limited under § 506 to those provided for in the agreement under which the claim arose, the recovery of interest on a claim is "unqualified." Courts have generally applied a presumption in favor of allowance of the contractual default rate, subject to rebuttal based on equitable considerations. *In re ACA Real Estate, LLC*, 418 B.R. 155, 159-60 (Bankr. M.D.N.C. 2009); *see also* Joao F. Magalhaes, *Re-*

examining § 506(b): Spotlight on Post-Petition Interest, 33 Feb. Am. Bankr. Inst. J. 20 (2014). Courts have awarded the default rate where:

> (1) the creditor faces a significant risk that the debt will not be paid;
> (2) the lower rate of interest payable pre-default is shown not to be the prevailing market rate;
> (3) the difference between the default and the pre-default rates . . . [is] reasonable; and
> (4) . . . the purpose of the higher interest rate is to compensate the creditor entitled to interest for losses sustained as a result of the fact that it was not paid at maturity . . . [rather than to] penalize the debtor.

Deep River Warehouse, No. 04-52749, 2005 WL 1513123, at *3. In addition to those factors enumerated above, courts have also considered whether the creditor engaged in obtrusive tactics that result in delay; whether the allowance of the default rate will harm junior creditors; and the default rate's relation to actual or projected loss in determining whether to award default interest. *In re Bate Land & Timber, LLC*, 541 B.R. 601, 613 (2015). Because it is generally equitable for an oversecured creditor to receive the benefits of its bargain, courts are particularly reluctant to equitably adjust the contract default rate when the Debtor is solvent or when there is little harm to junior creditors. *See, e.g.*, *Off'l Comm. of Unsecured Creditors v. Dow Corning Corp.* (*In re Dow Corning Corp.)*, 456 F.3d 668, 679 (6th Cir.2006), *cert. denied*, 549 U.S. 1317 (2007) (explaining that "in solvent debtor cases, rather than considering equitable principles, courts have generally confined themselves to determining and enforcing whatever pre-petition rights a given creditor has against the debtor"); *Southland Corp. v. Toronto–Dominion (In re Southland Corp.)*, 160 F.3d 1054, 1060 (5th Cir.1998) ("We find it especially significant-as did the bankruptcy court-that no junior creditors will be harmed if the Banks are awarded default interest.").

In this case, the Court is convinced that the contract default rate should not be disturbed. First, the parties do not dispute that UDX is oversecured. Second, the presumption in favor of allowance of the contractual default rate has not been sufficiently rebutted in this case. Several

months prior to the petition date, the Gimghoul Property was appraised for $4,875,000. The Gimghoul Property is a luxury asset in Chapel Hill, North Carolina. While UDX's debt as of the petition date fell well below this figure, UDX faced a not insignificant risk that the property would linger on the market, resulting in, at a minimum, a significant delay in repayment. While the rate of interest at the time of the petition was not the prevailing market rate—and instead the floor rate of 6%—when the original Loan Documents were signed, the rate of interest was in fact the prevailing market rate, 8.26%. That the parties agreed to a floor rate of 6% at the time of the contract, when the market rate was 8.26%, was not addressed by the Trustee and weighs against the theory that the default rate was originally intended to penalize the Debtor. Further, while the difference between the pre-default rate of 6% and the default rate of 14.00% is somewhat high, the Court does not find this spread inequitable under the facts of this case (indeed, the difference was even lower at the time of the original loan). Moreover, while UDX has certainly taken an active role in the case, it does not appear that UDX has attempted to delay its payment for the nefarious purpose of receiving additional interest. In addition, and of perhaps highest significance in this case, the only general unsecured creditors with filed claims are insiders. The balance of equities in this case rests in UDX's favor. Thus, the Court finds that UDX is entitled to post-petition interest at the contract default rate.

4. Post-Petition Payments

UDX next contends that the payments made by the Debtor under the fourth, fifth, and sixth interim cash collateral orders in the consolidated cases should not be applied to the outstanding debt in this case. The Court disagrees.

The University Directory Debtors' cases were never substantively consolidated, providing no grounds upon which to permanently aggregate collateral across debtors. Indeed, UDX objected

to substantive consolidation, because there was no evidence that the University Directory Debtors were treated or treated themselves as a single economic units. UDX further noted that there were a significant number of creditors unique to each debtor and that there was no evidence substantive consolidation would be beneficial for creditors. The same reasons which justified denial of the request for substantive consolidation justify a denial of UDX's argument.

The Court, moreover, notes that during the consolidated proceedings, the Court was free to fashion any appropriate form of adequate protection. *See* 11 U.S.C. § 361. Along with adequate protection payments, the fourth and fifth interim orders provided UDX with a continuing post-petition lien and security interest "in all property and categories of property of the Debtors in which and of the same priority as [it] held a similar, unavoidable lien as of the Petition Date, and the proceeds thereof, whether acquired pre-petition or post-petition . . . but only to the extent of cash collateral used, and . . . a lien upon the net sale proceeds derived from the Hilton Head and Gimghoul closings". Case No. 14-81184 [Doc. #'s 183 and 239]. The sixth interim order granted the same additional protections, with a further lien upon the net sale proceeds derived from the UD closings. Case No. 14-81184 [Doc. # 342].

At the hearing, the Trustee testified that proceeds from the Gimghoul Property were used to make the payments under the fourth, fifth, and sixth interim cash collateral orders. As such, these payments should be credited to UDX's secured claim.

5. Post-Petition Attorneys' Fees

Finally, UDX requests post-petition attorneys' fees under 11 U.S.C. § 506(b). The burden of proof under § 506 is on the applicant to demonstrate that (a) it "is oversecured; (b) the underlying agreement provides for such fees and costs; and (c) the fees and costs are reasonable and necessary." *In re McCormick*, 417 B.R. 372, 375 (Bankr. M.D.N.C. 2008). The parties all

agree that UDX is the holder of an oversecured claim in this case. The second and third prongs of the analysis are in dispute.

Attorney fee provisions are to be strictly construed. *See In re Gwyn*, 150 B.R. 150, 156 (Bankr. M.D.N.C. 1993); *In re Parker*, No. 12-03128-8-SWH, 2015 WL 5095948, at *3 (Bankr. E.D.N.C. Aug. 27, 2015). The Loan Documents in this case provided that the borrower would pay all expenses "incurred" by the "Lender". The Lender in this case is UDX, LLC. The law firm of Anderson Jones, PLLC filed a Notice of Appearance on behalf of UDX on 10/27/2014. Case No. 14-81182 [Doc. # 25]. The law firm of Anderson Tobin, PLLC filed Motions to Appear Pro Hoc Vice on 10/27/2014, Case No. 14-81182 [Doc. #'s 26 and 27] and orders were entered granting these requests on 10/28/2014, Case No. 14-81182 [Doc. #'s 33 and 34].

At the hearing, Scott Hall appeared on behalf of UDX. Mr. Hall testified that UDX was formed to purchase the Loan Documents from Southland. It has undertaken no other business transactions. UDX hired Anderson Tobin, PLLC, because the firm has enjoyed a long-term relationship with affiliated companies; UDX is familiar with the quality of its legal services.

None of the bills submitted by the law firm of Anderson Tobin, PLLC and filed with the Court were addressed to the Lender under the Loan Documents, UDX. Every bill was directed to Eli Global, LLC, c/o Greg Lindberg. At no time has Eli Global, LLC been the Lender under the Loan Documents. At the hearing, Mr. Hall stated that he had seen each bill but could not testify as to who had paid the bills. He could not recall what he had done with the bills after he reviewed them. To the best of his knowledge, UDX has never maintained a bank account.

The Court finds that in as much as the Loan Documents require that the fees be incurred by the Lender, and there is no evidence before the Court that any bill was submitted by the

attorneys to the Lender or evidence that the Lender paid the bills, the Movant has failed to carry its burden of proof with respect to the Anderson Tobin, PLLC bills.

Anderson Jones, PLLC did direct its bills to UDX. Even though there is no evidence of payment and no one from the law firm of Anderson Jones, PLLC appeared at the hearing, the Court finds that UDX as Lender incurred fees and expenses as a result of Anderson Jones PLLC's involvement in the case. Therefore, the Court must determine which fees and expenses can and should be reimbursed.[14]

As the Bankruptcy Administrator pointed out in his Response to Second Motion to Distribute Proceeds, Case No. 14-81182 [Doc. # 175], and Second Supplemental Opposition to Second Motion to Distribute Proceeds, Case No. 14-81182 [Doc. # 179], the time records submitted by Anderson Jones, PLLC reflect the time charged for work on all the University Directory Debtors' cases. They also include work related to the guarantor of the University Directory LLC loans and litigation in federal and state court that have no relevance to the Loan Documents. The Loan Documents in this case only provided for reimbursement of fees and costs incurred in connection with VRD's debt. Work on other matters is not compensable.

Of those fees and costs which are attributable to the Debtor in this case, the Court must determine those which should be reasonably born by the Debtor. To this end, the Court is to consider the twelve factors set forth in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978), as adopted from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (the "*Johnson* factors"):

[14] The Trustee argued that no post-petition attorneys' fees or expenses may be awarded, because UDX has yet to provide the appropriate notice of its intent to collect those sums under North Carolina law. This argument is unpersuasive. *See Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 851 n.8 (4th Cir. 1999) (explaining that the language of § 506(b), as opposed to the language of § 365, "indicate[s] clear congressional intent to displace state law to the extent that it might be contrary to the written agreement").

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to properly perform the legal services; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances of the engagement; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In re EBW Laser, Inc., Nos. 05-10220C-7G, 05-10221C-7G, 2012 WL 3490417, at *9 (Bankr. M.D.N.C. Aug. 14, 2012). In this case, in every instance in which the Court is able to identify services and expenses related to the Debtor and the Loan Documents, the Court will award such fees and expenses to UDX, finding they are reasonable under the *Johnson* factors. As outlined in the charts below, the Court finds that UDX should be allowed $1,041.08 in fees and $145.08 in expenses as compensation for services rendered by Anderson Jones, PLLC.[15]

[15] As the Bankruptcy Administrator suggested in his Response to Second Motion to Distribute Proceeds, for a time entry which relates to all six University Directory Debtors, the Court will allow one-sixth of the entry, as noted in the chart. When an entry relates to the Debtor and another of the University Directory Debtors, the Court will allow one-half of the entry.

COMPENSATION

Date	Professional	Time	Charge	Allowed
10/27/2014	LEP	6.5 hours	$1,137.50	$189.58 (1/6)
10/28/2014	LLW	1 hour	$95	$15.83 (1/6)
10/28/2014	LEP	7 hours	$1,225	$204.17 (1/6)
10/29/2014	LEP	1 hour	$175	$29.17 (1/6)
11/17/2014	LEP	2.50 hours	$437.50	$72.92 (1/6)
11/24/2014	LEP	2.60 hours	$455	$75.83 (1/6)
12/08/2014	LEP	1 hour	$175	$175 (ALL)
12/09/2014	LEP	.3 hours	$52.50	$52.50 (ALL)
12/10/2014	LLW	.2 hours	$19	$19 (ALL)
3/9/2015	LEP	.3 hours	$52.50	$8.75 (1/6)
5/7/2015	LEP	.5 hours	$87.50	$14.58 (1/6)
5/8/2015	LEP	.2 hours	$35	$35 (ALL)
5/27/2015	LEP	.10 hours	$17.50	$8.75 (1/2)
7/14/2015	LEP	1 hour	$175	$87.50 (1/2)
8/6/2015	LEP	.2 hours	$35	$5.83 (1/6)
9/15/2015	LEP	.10 hours	$17.50	$2.92 (1/6)
9/29/2015	LEP	.2 hours	$35	$5.83 (1/6)
11/30/2015	LEP	.10 hours	$17.50	$2.92 (1/6)
7/15/2016	LEP	.20 hours	$35	$35 (ALL)

EXPENSES

Date	Summary	Allowed
10/28/2014	Mileage-to/from court	$97.44
10/28/2014	Parking at bankruptcy court	$5.00
11/24/2014	Mileage-to/from court	$24.64
11/24/2014	Parking at bankruptcy court	$3.00
07/28/2015	Filing Fee- Motion to Convert	$15.00 (1/2)

CONCLUSION

For the reasons as stated above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

(1) the Second Motion to Distribute Proceeds of Sale is GRANTED IN PART AND DENIED IN PART; and

(2) the Objection to Claim is SUSTAINED IN PART AND OVERRULED IN PART; and

(3) UDX's claim is ALLOWED in an amount equal to the sum of its outstanding pre-petition principal and non-default interest balance of $3,383,365.88, plus :

a. pre-petition interest at the default rate from October 21 to October 23, 2014;

b. a pre-petition late fee in the amount of $847.22;

c. post-petition interest at the default rate through October 26, 2016[16];

[16] See *In re Bate Land*, 541 B.R. at 615 (explaining that, when warranted, "courts have tolled the running of interest in the name of equity" and finding that "it would be unfair for the debtor to be responsible for interest during periods of delay attributable to . . . the court's schedule"). Based on the unique circumstances of this case, including that the Trustee attempted to pay all outstanding sums owed under the Loan Documents as of April 30, 2016, the Court believes interest should only be awarded through the date of the hearing.

d. post-petition attorneys' fees in the amount of $1,041.08 and expenses in the amount of $145.08; and

(4) the Debtor is directed to remit the remaining funds due and owing to UDX from the Gimghoul Property proceeds, subtracting credits for the following payments:

a. $500,000 on January 15, 2015;

b. $400,000 on March 24, 2015;

c. $2,100,000 on May 15, 2015;

d. $42,360.78 on May 15, 2015;

e. $450,000 on March 30, 2016; and

f. $18,037.96 on April 30, 2016.

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SERVICE LIST

Sara A. Conti
P.O. Box 939
Carrboro, NC 27510

James Seth Moore
Anderson Tobin, PLLC
One Galleria Tower
13355 Noel Road, Suite 1900
Dallas, TX 75240

John A. Northen
P. O. Box 2208
Chapel Hill, NC 27514-2208

Lindsey Ellis Powell
Anderson Jones, PLLC
P.O. Box 20248
Raleigh, NC 27619

William P. Miller
Bankruptcy Administrator
101 South Edgeworth Street
Greensboro, NC 27401