IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
	§	
AMIGO PAT TEXAS, LLC,	§	**Case No. 17-32169**
	§	
Debtor.	§	**Chapter 11**
	§	

ORDER GRANTING IN PART AND DENYING IN PART PEOPLE UNITED EQUIPMENT FINANCE CORP.'S MOTION FOR ALLOWANCE AND PAYMENT OF POST-PETITION INTEREST, LATE CHARGES, PREPAYMENT PREMIUM, AND ATTORNEYS' FEES AND COSTS
[Doc. No. 115]

I. Introduction

On August 8, 2017, People's United Equipment Finance Corp. ("PUEFC") filed a Motion for Allowance and Payment of Post-Petition Interest, Late Charges, Prepayment Premium, and Attorneys' Fees and Costs (the "Motion"). [Doc. No. 115]. In its Motion, PUEFC requests post-petition interest, late charges, a prepayment premium, and attorneys' fees and costs. On September 11, 2017, Amigo PAT Texas, LLC (the "Debtor") filed a response objecting to the Motion, [Doc. No. 121], and on September 21, 2017, PUEFC filed a reply to the Debtor's response, [Doc. No. 126]. On October 5, 2017, PUEFC filed a supplement to the Motion, requesting additional attorneys' fees and expenses that were incurred after the Motion was filed. [Doc. No. 135]. On October 11, 2017, the Court held a hearing (the "Hearing") on the Motion, listened to testimony, admitted certain exhibits, and heard oral arguments from counsel. The Court then took this matter under advisement.

For the reasons discussed herein, the Court concludes that: (1) PUEFC's request for post-petition interest will be granted; (2) PUEFC's request for late charges will be denied; (3) PUEFC has not satisfied its burden in showing that the prepayment premium is reasonable; therefore,

PUEFC's request for the prepayment premium will be denied; and (4) PUEFC's request for attorney's fees and costs will be granted in part and denied in part.

II. Post-Petition Interest

As an oversecured creditor, PUEFC is seeking post-petition interest pursuant to 11 U.S.C. § 506(b). PUEFC seeks post-petition interest at the non-default rate, and the Debtor does not object. Under the circumstances, the Court grants PUEFC's request for post-petition interest in the amount of $7,547.83.

III. Late Charges

PUEFC will not be awarded late charges pursuant to § 506(b) because the promissory note entered into between the Debtor and PUEFC (the "Note") does not provide for late charges after acceleration of the Note. In relevant part, the Note provides:

> Maker shall also pay to Holder on demand, on each installment not fully paid prior to the fifth day (or such longer period as required by law) after its due date, a late charge equal to the maximum percentage of such overdue installment legally permitted as a late charge, not to exceed five percent (5%); and after maturity of the entire indebtedness (whether by acceleration or otherwise, and both before and after judgment), Maker shall pay, on demand, interest on the unpaid indebtedness (excluding accrued and unpaid interest and late charges) at the maximum lawful daily rate, but not to exceed 0.0666% per day, until paid in full.

PUEFC's Ex. 1 [Doc No. 140–1, p. 2 of 4]. The plain language of the Note does not require a late charge after acceleration. Here, the Note was accelerated on March 31, 2017—which was actually one week prior to the filing of the Debtor's petition. Yet, the Motion requests late charges that PUEFC asserts have accrued post-petition: "No payments have been made since the Petition Date and the total post-petition contractual late charges as of the Closing total $2,135.00." Because acceleration occurred pre-petition, under the very terms of the Note (as set forth above), no late charges are allowed. *4 B's Realty 1530 CR39, LLC v. Toscano*, 818 F. Supp. 2d 654, 663 (E.D.N.Y. 2011) ("By contrast, where the language of the note provides for

late charges on payments after default as a form of covering the expense of collecting the debt, but does not indicate that the late charges continue to accrue after acceleration, courts have stopped the calculation of late fees at the date of acceleration[.]"); *In re Mkt. Ctr. E. Retail Prop., Inc.*, 433 B.R. 335, 366 (Bankr. D.N.M. 2010) ("[C]reditors are usually denied late fees after acceleration or maturity"). Accordingly, the late charges of $2,135.00 requested by PUEFC are denied in their entirety.

IV. Prepayment Premium

PUEFC has failed to meet its burden in proving that the prepayment premium is reasonable pursuant to § 506(b); thus, the prepayment premium of $29,050.05 will be disallowed in its entirety.

Most courts that have considered whether a creditor is entitled to a prepayment premium analyze the issue under both relevant state law and under 11 U.S.C. § 506(b). *See, e.g.*, *In re AE Hotel Venture*, 321 B.R. 209, 217 (Bankr. N.D. Ill. 2005) (noting that for a creditor to receive prepayment premium, premium must be enforceable under state law and must also satisfy § 50b(b)); *In re Duralite Truck Body & Container Corp.*, 153 B.R. 708, 711–15 (Bankr. D. Md. 1993) (undertaking analysis of state law and § 506(b) when determining whether prepayment premium is allowed); *Noonan v. Fremont Fin.* (*In re Lappin Elec. Co.*), 245 B.R. 326, 329 (Bankr. E.D. Wis. 2000) (same); *In re Kroh Bros. Dev. Co.*, 88 B.R. 997, 1001 (Bankr. W.D. Mo. 1988) (same); *In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. 823, 827–28 (Bankr. E.D. La. 2001) (recognizing that when determining whether to award prepayment fees, courts have looked to federal and state law). The ultimate burden in proving the claim rests with the creditor. *Ca. State Bd. of Equalization v. Official Unsecured Creditors' Comm.* (*Matter of Fid. Holding Co., Ltd.*, 837 F.2d 696, 698 (5th Cir. 1988).

A. Enforcement under Texas Law

First, the prepayment premium must be allowed under state law. Here, "[prepayment] penalties are explicitly authorized by Texas statute and are valid 'whether payable in the event of voluntary prepayment, involuntary prepayment, acceleration of maturity, or other cause that involves premature termination of the loan.'" *AMK 2000-A, L.L.C. v. Maliek*, 411 F. App'x 703, 706 (5th Cir. 2011) (citing TEX. FIN. CODE ANN. § 306.005 (West 2017)). *See also Parker Plaza W. Partners v. UNUM Pension & Ins. Co.*, 941 F.2d 349, 356 (5th Cir. 1991) ("hold[ing] that Texas public policy is not violated solely because a prepayment premium results from lender acceleration"). Thus, the prepayment premium is valid under Texas law.

B. Application of 11 U.S.C. § 506(b)

Second, for a court to allow a prepayment premium under § 506(b), the prepayment premium must be both "provided for under the agreement" and "reasonable." *See* 11 U.S.C. § 506(b) (an oversecured creditor "shall be allowed . . . interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement.").[1]

1. "Provided for under the agreement"

Here, the Note states:

> Upon nonpayment when due of any amount owning hereunder, or if default occurs under any other obligation of Maker to Holder . . . Holder may, at its option, without notice or demand, accelerate the maturity of the accrued and unpaid indebtedness then outstanding under this Note with any corresponding prepayment premium as set forth below, and declare same to be at once due and payable whereupon it shall be and become immediately due and payable.
>
> . . .
>
> "Maker agrees that in the event of any prepayment of any of Maker's indebtedness for borrowed money now or hereafter owing to Holder . . . whether

[1] A prepayment premium is a type of "charge" contemplated in § 506(b). *The Atrium View, LLC v. E. Savings Bank, FSB (In re Atrium View, LLC)*, 2008 WL 5378293, at *2 (M.D. Pa. Dec. 24, 2008).

> voluntary or involuntary, Maker shall simultaneously pay a prepayment premium equal to the sum of (1) two tenths percent (0.2%) of the principal amount then being prepaid multiplied by the number of calendar months between the date of such prepayment and the scheduled final maturity date of the indebtedness being prepaid, plus (b) three percent (3%) of the principal amount of the indebtedness then being prepaid, but not more than the maximum amount permitted by law.

PUEFC's Ex. 1 [Doc No. 140–1, p. 2 of 4]. The prepayment premium is thus provided for under the Note.

2. *"Reasonable"*

When deciding whether a prepayment premium is "reasonable" under § 506(b), courts have examined a number of factors. These include: (1) whether the prepayment premium approximates actual damages;[2] (2) whether the creditor will receive the full amount of its principal and will receive interest in full at the contract rate;[3] (3) the amount of prepayment premium as a percentage of the principal loan amount;[4] and (4) the effect on junior creditors.[5] While not dispositive, the last factor—the effect on junior creditors—may be considered "especially significant." *See In re Yazoo Pipeline Co., L.P.*, No. 08-38121, 2009 WL 2857863 (Bankr. S.D. Tex. Aug. 31, 2009) (citing *Southland Corp. v. Toronto-Dominion (In re*

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[2] *See In re 400 Walnut Assocs., L.P.*, 461 B.R. 308, 322 (Bankr. E.D. Pa. 2011), *rev'd and remanded on other grounds,* 473 B.R. 603 (Bankr. E.D. Pa. 2012); *In re Duralite Truck Body & Container Corp.*, 153 B.R. 708, 713–15 (Bankr. D. Md. 1993); *In re Kroh Bros. Dev. Co.*, 88 B.R. 997, 1001 (Bankr. W.D. Mo. 1988); *In re Outdoor Sports Headquarters, Inc.*, 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993); *In re A.J. Lane & Co., Inc.*, 113 B.R. 821, 828 (Bankr. D. Mass. 1990); *The Atrium View, LLC*, 2008 WL 5378293, at *2.

[3] *In re Maywood, Inc.*, 210 B.R. 91, 94 (Bankr. N.D. Tex. 1997).

[4] *In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. 823 (Bankr. E.D. La. 2001); *Kroh Bros. Dev. Co.*, 88 B.R. at 1002; *Noonan v. Fremont Fin. (In re Lappin Elec. Co.),* 245 B.R. 326, 330–31 (Bankr. E.D. Wis. 2000); *Outdoor Sports Headquarters, Inc.*, 161 B.R. at 425.

[5] *See Maywood, Inc.*, 210 B.R. at 94; *Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 832; *Outdoor Sports Headquarters, Inc.*, 161 B.R. at 425; *Sachs Elec. Co. v. Bridge Info. Sys., Inc., (In re Bridge Info. Sys., Inc.)*, 288 B.R. 556, 564 (Bankr. E.D. Mo. 2002).

Southland), 160 F.3d 1054, 1060 (5th Cir. 1998)).[6] *See also Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 832.

i. *Whether prepayment premium approximates actual damages*

To be reasonable, the prepayment premium must effectively estimate actual damages. *Duralite Truck Body & Container Corp.*, 153 B.R. at 714. "[A]ctual damages are measured by the difference between the market rate of interest at the time of prepayment and the contract rate for the duration of the loan, discounted to present value." *Id. See also In re Outdoor Sports Headquarters, Inc.*, 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993); *The Atrium View, LLC v. E. Savings Bank, FSB (In re Atrium View, LLC)*, 2008 WL 5378293, at *3 (M.D. Pa. Dec. 24, 2008).

Here, the prepayment formula is not reasonable because (1) it does not effectively estimate actual damages, as it does not consider market interest rates, *see Duralite Truck Body & Container Corp.*, 153 B.R. at 714–15 (prepayment premium presumed a loss as it did not "reflect actual changes in market interest" and thus did not effectively estimate actual damages); and (2) part "(b)" of the formula "tacks on an additional [3]% of the prepaid principal." *Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 829 (finding an additional one percent to be unreasonable).

Aside from the fact that the prepayment formula does not effectively estimate actual damages, PUEFC does not even claim that it suffered any damages as a result of the Note's acceleration. Although Robert Bonsignore ("Bonsignore"), Vice President and Associate

[6] Although the court in *Yazoo Pipeline* was not considering the reasonableness of a prepayment penalty, this Court nonetheless finds the *Yazoo Pipeline* court's discussion of balancing the equities under § 506(b) applicable to this case. In *Yazoo Pipeline*, the issue was whether the oversecured creditor was entitled to interest at the default rate or the non-default rate; and one of the factors that the court considered was the impact on junior creditors if the oversecured creditor was awarded interest at the default rate. This Court sees no reason why this same analysis should not apply in determining whether a prepayment penalty is reasonable.

General Counsel at PUEFC, testified at the Hearing, Bonsignore gave no testimony concerning any damages PUEFC has allegedly suffered as a result of the Note's acceleration. As it is the creditor's burden to prove its claim, that PUEFC offered no evidence of its alleged damages weighs heavily against allowing the prepayment premium. *See Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 832 (creditor failed to meet its burden of proving the amount of its proof of claim when it did not introduce any evidence of actual damages and its representative was unable to articulate the damages incurred as a result of the early payoff of the loan); *In re 400 Walnut Assocs., L.P.*, 461 B.R. 308, 322 (Bankr. E.D. Pa. 2011), *rev'd and remanded on other grounds,* 473 B.R. 603 (Bankr. E.D. Pa. 2012) (creditor's lone witness offered no evidence in support of creditor's claim that it suffered a loss as a result of debtor's default); *In re Maywood, Inc.*, 210 B.R. 91, 94 (Bankr. N.D. Tex. 1997) (finding prepayment premium is not reasonable under § 506(b) when creditor offered no evidence of any damages); *Kroh Bros. Dev. Co.*, 88 B.R. at 1001 (same).

Thus, because (1) the prepayment premium formula does not approximate actual damages and (2) PUEFC has offered no evidence of any damages—nor claimed that it was damaged by the Note's acceleration—these factors weigh against allowing the prepayment premium.

ii. *Whether the creditor will receive the full amount of its principal and will receive interest in full at the contract rate*

A court may also consider the amount of principal and interest the creditor is receiving. *Maywood, Inc.*, 210 B.R. at 94. Here, PUEFC is receiving the full amount of its principal. PUEFC is also receiving the full amount of the post-petition interest it has requested. This factor therefore weighs against allowing the prepayment premium.

iii. *The amount of prepayment premium as a percentage of the principal loan amount*

Courts also consider the amount of prepayment premium as a percentage of the principal loan amount when deciding whether the prepayment premium is reasonable under § 506(b). *See, e.g.*, *Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 832 (prepayment premium unreasonable when it was approximately 18% of the principal amount of the loan); *Kroh Bros. Dev. Co.*, 88 B.R. at 1002 (prepayment premium disallowed when it was 25% of the principal loan amount); *Lappin Elec. Co.*, 245 B.R. at 330–31 (prepayment premium allowed when it was 6.9% of the principal).

Here, the prepayment amount of $29,050.05 sought by PUEFC is a relatively small percentage—approximately 4.9%—of the principal loan amount of $589,500.00. This factor therefore weighs in favor of allowing the prepayment premium.

iv. *Effect on junior creditors*

Whether junior creditors will be harmed if PUEFC is awarded the prepayment premium is "especially significant." *See Yazoo Pipeline Co., L.P.*, 2009 WL 2857863, at *3 (citing *Southland*, 160 F.3d at 1060); *Maywood, Inc.*, 210 B.R. at 94; *Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 832; *Sachs Elec. Co. v. Bridge Info. Sys., Inc., (In re Bridge Info. Sys., Inc.)*, 288 B.R. 556, 564 (Bankr. E.D. Mo. 2002). At the Hearing, Charles McDaniel ("McDaniel") the Debtor's owner, testified that the estimated distribution to unsecured creditors will be "probably around forty percent." [Tape Recording, Oct. 11, 2017, Hearing at 12:17:38–12:17:50 P.M.]. Thus, there is no question that unsecured creditors will not receive a one-hundred percent distribution. Under these circumstances, every dollar that goes to PUEFC is a dollar that will not go to unsecured creditors. Stated differently, every dollar that goes to PUEFC constitutes further harm to unsecured creditors. Such a result favors the disallowance of the prepayment premium.

In sum, three of the four factors weigh against awarding the prepayment premium. Moreover, the fourth factor, which is "especially significant," disfavors granting the premium. Under all of these circumstances, this Court disallows the prepayment premium.

V. Attorneys' Fees and Costs

At the Hearing, Michael Ridulfo ("Ridulfo"), an attorney at Kane Russell Coleman Logan PC, the law firm PUEFC retained to represent it in this case (the "Law Firm"), gave testimony in support of PUEFC's request for recovery of its attorneys' fees and expenses. PUEFC seeks reimbursement of $14,705.00 in fees and $245.21 in expenses for the Law Firm's work in this matter. The Debtor argues that awarding fees in excess of $2,000.00 would be unreasonable.

Pursuant to Federal Bankruptcy Rule 2016, an applicant seeking compensation must introduce detailed, substantiated time records. A court may deny a fee application, in its entirety, if time records are inadequate to prove up the services performed. *In re Am. Int'l Refinery, Inc.*, 676 F.3d 455, 465–66 (5th Cir. 2012); *I.G. Petroleum, L.L.C. v. Fenasci* (*In re W. Delta Oil Co.)*, 432 F.3d 347, 355 (5th Cir. 2005); *In re DiLieto*, 468 B.R. 510, 528 (Bankr. D. Conn. 2012); *In re Digerati Techs., Inc.*, No. 13-33264-H4-11, 2015 WL 152886, at *4 (Bankr. S.D. Tex. Jan. 12, 2015). Time entries that do not provide sufficient detail to determine whether the services described are compensable may be disallowed due to vagueness. *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995). Additionally, lumped entries prevent a court from accurately determining how many hours were reasonably billed. *See In re 900 Corp.*, 327 B.R. 585, 598 (Bankr. N.D. Tex. 2005) ("When time entries are vague or lumped together, such that the Court cannot determine how much time was spent on particular services, then the Applicant has not met its burden to show that its fees are reasonable."); *In re Saunders*, 124 B.R. 234, 237

n.1 (Bankr. W.D. Tex. 1991) ("In order for the court to determine whether time spent on an activity was reasonable, multiple services cannot be 'lumped' together under one time entry."). Indeed, lumping activities on fee statements violate the U.S. Trustee's Fee Guidelines,[7] and this Court has repeatedly made it known in prior opinions over the past several years that it adheres to these Guidelines and expects the practicing bar to follow them. *See, e.g.*, *Digerati Techs., Inc.*, 537 B.R. at 334; *In re Ritchey*, 512 B.R. 847, 870–72, (Bankr. S.D. Tex. 2014); *In re Jack Kline Co.*, 440 B.R. 712, 752–53 (Bankr. S.D. Tex. 2010); *In re Energy Partners, Ltd.*, 422 B.R. 68, 89 (Bankr. S.D. Tex. 2009). Here, as described below, certain entries of the Law Firm's timesheets are vague and include "lumped" entries.

First, on May 25, 2017, Ridulfo billed 0.2 hours for the following time entry: "teleconference with counsel for Debtor." This time entry is vague, as it does not identify the subject matter of the teleconference. The Court therefore reduces the fee request for this portion of the entry from $85.00 to $0.00.

Second, on May 30, 2017, Ridulfo billed 6.0 hours for the following time entry: "Prepare for and attend hearing on Motion to Sell/Motion to Reject." This lumped entry does not clarify what amount of time Ridulfo spent preparing for the hearing versus the amount of time he actually spent attending the hearing. Because of this lumping, the Court reduces the fee request for this entry from $2,550.00 to $0.00.

[7] U.S. Dep't of Justice, Guidelines for Reviewing Applications for Compensation (Fee Guidelines), Appendix A, Justice.Gov (Dec. 1, 2017), http://www.justice.gov/ust/fee-guidelines. The U.S. Trustee Guidelines expressly state that: "Time entries should be kept contemporaneously with the services rendered in time periods of tenths of an hour. Services should be noted in detail and not combined or "lumped" together, with each service showing a separate time entry; however, tasks performed in a project which total a de minimus amount of time can be combined or lumped together if they do not exceed .5 hours on a daily aggregate."

Third, on August 8, 2017, Ridulfo billed 0.1 hours for the following time entry: "E-mails to/from Aaron Power." This time entry is vague, as it does not identify the subject matter of the e-mails. The Court therefore reduces the fee request for this entry from $42.50 to $0.00.

Fourth, and similar to the above, on September 14, 2017, Ridulfo billed 0.1 hours for the following time entry: "E-mails to/from Rob Bonsignore." Again, this time entry is vague because it does not identify the subject matter of the e-mails. The Court therefore reduces the fee request for this entry from $42.50 to $0.00.

Finally, on September 15, 2017, Ridulfo billed 0.2 hours for "telephone conference with and e-mail to Aaron Power." Because this time entry is vague—once again, it does not identify the subject matter of the communications—the Court reduces the fee request for this portion of the entry from $85.00 to $0.00.

Aside from the above-referenced entries, the Court finds, based upon its review of the timesheets and Ridulfo's testimony at the Hearing, that all of the other services rendered by Ridulfo and Angela Offerman, another attorney at the Law Firm, were reasonable and necessary; and that therefore the fees associated with these entries should be approved in full. Counsel for the Debtor argued that at least some of Ridulfo's time at the courthouse should not be charged against the estate because he essentially was a spectator at one of the hearings held in this case and did not really participate. The Court rejects this argument. The mere fact that Ridulfo did not participate does not mean that he did not need to be in the courtroom observing the proceedings. By attending, he was able to observe what was said and what was done, and therefore he was able to develop a strategy for representing his client zealously, as he is required to do. The Court finds that his "silent" appearance nevertheless constitutes reasonable and necessary services rendered to protect PUEFC's interests.

This Court also finds that the expenses of $245.21 incurred by the Law Firm were reasonable and necessary and that they should be approved in full. These expenses primarily include such necessary items as photocopying charges, postage, long distance telephone calls, and court house parking fees. The Court finds that all such expenses constitute part of providing necessary legal services to any client, and the Court approves these expenses in their entirety.

In sum, the Court finds that $2,805.00 of the requested fees must be denied, but that the remaining requested fees (amounting to $11,900.00), and all of the requested expenses, should be approved.

VI. Conclusion

For the reasons set forth above, this Court grants the Motion in part and denies it in part. It is therefore:

ORDERED that PUEFC's request for post-petition interest in the amount of $7,547.83 is allowed; and it is further

ORDERED that PUEFC's request for late charges in the amount of $2,135.00 is disallowed; and it is further

ORDERED that PUEFC's request for the prepayment premium in the amount of $29,050.05 is disallowed;

ORDERED that PUEFC's request for the reimbursement of fees is allowed in part and disallowed in part, with the allowed amount to be in the amount of $11,900.00 and the disallowed amount to be in the amount of $2,805.00; and it is further

ORDERED that PUEFC's request for reimbursement of expenses in the amount of $245.21 is allowed; and it is further

ORDERED that the Debtor is jointly and severally liable to PUEFC in the aggregate amount of $19,693.04, representing the sum of $11,900.00 in approved fees, $245.21 in approved expenses, and post-petition interest of $7,547.83; and it is further

ORDERED that the Debtor, no later than noon on December 22, 2017, shall deliver a cashier's check made payable to "People's United Equipment Finance Corp." in the amount of $19,693.04, with the check to be delivered to the Law Firm, to the attention of Michael Ridulfo, at the following address: 5051 Westheimer Road, 10th Floor, Houston, Texas 77056.

Signed on this 5th day of December, 2017.

Jeff Bohm
United States Bankruptcy Judge