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2 UNITED STATES BANKRUPTCY COURT  
3 EASTERN DISTRICT OF CALIFORNIA  
4 MODESTO DIVISION  
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6 In re: )  
7 ) Case No. 03-94183-D-7  
8 FLOYD SHERWOOD HILL, )  
9 Debtor. )  
10 \_\_\_\_\_ )  
11 JOHN CULLINGTON, )  
12 Plaintiff, ) Adversary No. 03-9177-D  
13 v. )  
14 Submitted December 23, 2004  
15 FLOYD SHERWOOD HILL, )  
16 Defendant. )  
17 Re-Submitted May 3, 2005  
18 \_\_\_\_\_ )

16 SUPPLEMENTAL MEMORANDUM DECISION

17 The court issued its Memorandum Decision on March 29, 2005.  
18 In that Decision, the court addressed the dischargeability aspects  
19 of the adversary proceeding. It also found that a partial award of  
20 attorneys' fees was appropriate because the validity of the fee  
21 agreement between the parties had been litigated. In an order  
22 entered March 29, 2005, the court requested supplemental briefing  
23 from the parties including the submission of evidence as to the  
24 correct amount of the attorneys' fee award. Plaintiff John  
25 Cullington ("Plaintiff") timely filed his supplemental briefing on  
26 April 19, 2005, and Debtor Floyd Sherwood Hill ("Defendant")  
27 timely filed his supplemental briefing on May 3, 2005. This  
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1 Supplemental Memorandum deals solely with the amount of attorney's  
2 fees to be awarded.

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4 **Analysis**

5 As an initial matter, the court notes that the brief filed by  
6 Plaintiff is non-responsive as it dramatically exceeds the scope of  
7 what was requested in the court's March 29, 2005 order. Thus, to  
8 the extent that the Plaintiff's brief constitutes a motion for a  
9 new trial under Federal Rule of Bankruptcy Procedure 9023<sup>1</sup>  
10 incorporating Federal Rule of Civil Procedure 59(e) or a motion for  
11 relief from the order under Federal Rule of Bankruptcy Procedure  
12 9024 incorporating Federal Rule of Civil Procedure 60(b), the court  
13 declines to reach those issues. They are unripe as no judgment has  
14 yet been entered in this case. The court will therefore not  
15 address Plaintiff's request for pre-judgment interest, his request  
16 for fees incurred in the state court proceeding, his request for  
17 fees incurred to litigate the dischargeability action under 11  
18 U.S.C. § 523(a)(4), or his request that all of his fees incurred in  
19 this adversary proceeding be awarded.

20 Plaintiff requests that the court award him attorney's fees in  
21 the amount of \$16,564.95. That amount constitutes ninety percent  
22 (90%) of the fees incurred by Plaintiff in this court (\$18,405.50).

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<sup>1</sup> Unless otherwise noted, all statutory references are to the  
27 Bankruptcy Code, 11 U.S.C. §101 *et seq.*, and all "Rule" references are  
28 to the Federal Rules of Bankruptcy Procedure.

1 Defendant asserts that the correct figure is \$3,261.93<sup>2</sup>. He  
2 arrives at that amount by crediting Plaintiff with the full amount  
3 devoted to post-trial briefing but only crediting one-twelfth (one  
4 third of one fourth) of the remaining fees. The latter results  
5 from Defendant initially dividing the fees by four: the three  
6 causes of action and the waived request for punitive damages. That  
7 amount is then divided by three because Defendant asserts that only  
8 one-third of the trial time was devoted to litigating the validity  
9 of the contract.

10 The court does not adopt either method. Plaintiff's argument  
11 that ninety percent (90%) of his fees were devoted to resolving the  
12 issue of whether the Contract or the oral modification reduced to  
13 writing in the Memorandum of Understanding ("MOU") governed the  
14 second \$20,000 payment is not persuasive. The majority of the  
15 testimony in this case was devoted to the dischargeability issues.  
16 Most of the elements necessary to prove Plaintiff's case existed  
17 independently of the issue of which agreement governed. As noted  
18 in the March 29, 2005 memorandum decision, the Defendant stipulated  
19 to the existence of an agreement to hold the funds in trust. That  
20 stipulation evidenced knowledge of a requirement to do so and the  
21 fact that Defendant breached the acknowledged agreement, provided  
22 most of the evidence of intent. Those issues required little or no  
23 reference to the Contract and were largely independent of which  
24 agreement controlled. The court finds that Plaintiff devoted

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26 <sup>2</sup> The court notes that Defendant's figure includes post-trial  
27 costs. The court does not award costs other than those awarded in the  
28 March 29, 2005 memorandum decision because no request to tax costs has  
been made by Plaintiff.

1 approximately 25% of his time to proving which agreement governed.  
2 The court agrees with Defendant that full compensation for post-  
3 trial briefing, which focused principally on the attorney's fees  
4 issue, is appropriate.

5 However, the court is not persuaded by Defendant's argument  
6 that the percentage should be further reduced. Plaintiff was  
7 required to prove the issue of which agreement governed to defeat  
8 Defendant's arguments and to meet his burden of proving reliance  
9 and damage. The issue had to be proven whether Plaintiff had filed  
10 one cause of action or three. Therefore, an award of the full 25%  
11 attributable to the time devoted to litigating the validity of the  
12 underlying contract is appropriate.

### 13 Conclusion

14 For the foregoing reasons, the court awards Plaintiff  
15 attorney's fees in the amount of \$5,866.63. A judgment consistent  
16 with this decision and the March 29, 2005 memorandum decision will  
17 issue separately.

18 Dated:

19  
20 /s/ Thomas C. Holman  
THOMAS C. HOLMAN  
21 UNITED STATES BANKRUPTCY JUDGE  
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