

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re) Case No. 19-13374-B-7
)
KENNETH RAY HUDSON,)
)
Debtor.)
)
_____)
MICHELLE BROWN) Adv. Proceeding No. 19-1128-B
) DCN: GEG-2
Plaintiff,)
)
v.)
)
KENNETH RAY HUDSON,)
)
Defendant.)
_____)

RULING ON MOTION FOR SUMMARY JUDGMENT

Before: René Lastreto II, Bankruptcy Judge

Glen E. Gates, GATES LAW GROUP, Fresno, CA, for Michelle Brown,
Plaintiff.

Ahren A. Tiller, BLC Law Center, APC, San Diego, CA, for Kenneth
Hudson, Defendant.

RENÉ LASTRETO II, Bankruptcy Judge:

INTRODUCTION

Michelle Brown ("Plaintiff") moves for summary judgment
that the debts owed to her by Debtor Kenneth Ray Hudson

1 ("Defendant") are non-dischargeable under 11 U.S.C. § 523(a)(2).¹
2 Under the issue preclusion doctrine, Plaintiff seeks judgment
3 (1) determining that Defendant owes Plaintiff the judgment sum
4 of \$47,041.18; (2) determining that the debt owed by Defendant
5 is non-dischargeable in his chapter 7 bankruptcy case;
6 (3) awarding costs and fees, including attorney fees; and
7 (4) for such other and further relief as deemed just and proper.
8 Doc. #108.

9 Defendant timely opposed on the basis that the record fails
10 to establish or allocate damages for fraud versus Plaintiff's
11 other dischargeable causes of action, and therefore the motion
12 should be denied. Doc. #124. Alternatively, if the court must
13 enter a judgment against Defendant due to issue preclusion,
14 Defendant argues that Plaintiff is not entitled to additional
15 attorney fees under Cal. Civ. Code ("C.C.C.") § 1717 because
16 these proceedings are not "on a contract." *Id.*

17 Plaintiff replied asserting that Defendant provided no
18 evidence and ignores the state trial court's thorough judgment
19 as to the third cause of action for fraud, and thus under issue
20 preclusion, the motion should be granted.

21 This Motion for Summary Judgment was filed on 42 days'
22 notice as required by LBR 7056-1 and in conformance with Rule
23 7056 and Civil Rule 56. This matter was originally scheduled to
24 be heard on May 26, 2021. Doc. #130. The court required
25 additional briefing on the issue of recoverability of attorney
26

27 ¹ Unless otherwise indicated, references to "LBR" will be to the Local
28 Rules of Practice for the United States Bankruptcy Court, Eastern District of
California; "Rule" will be to the Federal Rules of Bankruptcy Procedure;
"Civil Rule" will be to the Federal Rules of Civil Procedure; and all chapter
and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 fees and ordered the parties to simultaneously submit, file, and
2 serve briefs not later than June 16, 2021. *Id.*

3 Both parties timely filed supplemental briefs on June 16,
4 2021. Docs. #135; #137.

5 This motion will be GRANTED as to Plaintiff's
6 § 523(a)(2)(A) cause of action, including attorney fees as
7 awarded in the underlying judgment. Further, the motion will be
8 GRANTED as to additional attorney fees incurred while
9 prosecuting this action.

10 11 BACKGROUND

12 Kern Bluff Resources, LLC ("KBR") was formed by Defendant
13 in 2011 to invest in and own real estate, including mineral,
14 oil, and gas resources. Doc. #102. Plaintiff was then counsel
15 for Defendant and KBR. While representing Defendant and KBR,
16 Plaintiff acquired 2 million shares of KBR units and a 4.1667%
17 interest in mineral rights. Doc. #125, ¶¶ 1-5.

18 In 2014, a dispute arose. Plaintiff resigned as counsel for
19 KBR. Defendant sued Plaintiff in Kern County on April 11, 2014,
20 Case No. S-1500-CV-281744. Four months later, after mediation,
21 the parties stipulated to resolve the Kern County litigation.
22 *Id.*, ¶¶ 15-16. All parties signed a final, binding settlement
23 agreement on October 14, 2014 ("Settlement Agreement"). *Id.*,
24 ¶ 21. The Settlement Agreement provided that Defendant,
25 individually and as trustee of the Hudson Family Trust, the
26 Hudson Family Trust, and KBR would pay Plaintiff \$10,000 on or
27 before December 31, 2014. In return, Plaintiff would release all
28

1 claims and transfer Plaintiff's mineral rights and 1.1 million
2 KBR units to Defendant. *Id.*, ¶¶ 24-24.

3 Plaintiff performed the Settlement Agreement and delivered
4 a signed and notarized transfer and reconveyance of membership
5 interest and mineral rights in favor of Defendant. After the
6 transfer of 1.1 million KBR units to Defendant, Plaintiff was
7 left with 900,000 remaining KBR units. *Id.*, ¶ 24. On November
8 11, 2014, Plaintiff quitclaimed her 4.1667% interest in mineral
9 rights to Defendant. *Id.*, ¶ 26. Defendant dismissed the Kern
10 County action with prejudice on December 1, 2014, causing the
11 state court to lose jurisdiction to enforce the settlement
12 pursuant to Cal. Civ. Proc. ("C.C.P.") Code § 664.6. *Ibid.*

13 On December 18, 2014, Plaintiff sought assurances that the
14 \$10,000 payment would be made on or before December 31, 2014.
15 *Id.*, ¶ 27. On January 5, 2015, Defendant's attorney in the state
16 court action responded, "My client is working on it. By the end
17 of the month (sooner if a capital event happens first). She is
18 first on the list."² *Id.*, ¶ 28; Doc. #115, Ex. 45.

19 On or about July 31, 2015, Citadel Corporation, Inc., a
20 third party and publicly traded oil and gas company, closed
21 escrow and purchased KBR's assets for a purchase price of \$2
22
23
24

25 ² The parties dispute whether Defendant had intention to pay the \$10,000
26 at this time. Doc. #125, ¶ 29. Plaintiff claims that Defendant did not intend
27 to pay the \$10,000, evidenced by his recording of the reconveyance to the
28 mineral rights on November 11, 2014, allegedly in violation of the Settlement
Agreement, *Id.*, ¶ 31. Defendant claims these statements are false, that KBR
owed the debt and he intended KBR to pay Plaintiff, but there was not any
money available. Defendant contends he did not personally owe Plaintiff
anything. *Id.*, ¶¶ 30-31; Doc. #126, ¶ 14.

1 million as well as 6 million shares in Citadel, and KBR retained
2 an overriding royalty.³ Doc. #125, ¶ 33.

3 In September 2015, after learning escrow closed on the
4 Citadel sale, Plaintiff demanded payment of the \$10,000 and
5 delivery of the promised documents in the Settlement Agreement.⁴
6 *Id.*, ¶ 34.

7 July 29, 2016, Plaintiff learned that Defendant, his wife,
8 and his son had been removed from KBR's management by Order of
9 the Court in a consolidated action in San Diego County Superior
10 Court, Case No. 37-2015-00014099 ("Consolidated Investor
11 Action"), which was brought by investors and KBR's new
12 management against Defendant, his wife, and son. *Id.*, ¶ 35; see
13 also Doc. #115, Ex. 48. The court found, "There is a sufficient
14 showing of a likelihood of prevailing on the claim of breach of
15 fiduciary duty." *Id.*, at 2. Defendant testified under oath at
16 his deposition taken in the Consolidated Investor Action that
17 the value of the mineral rights was never determined. Doc. #125,
18 ¶ 40.

19 Not having received the consideration under the Settlement
20 Agreement, Plaintiff filed an action for breach of contract,
21 common counts, and fraud in the San Diego Superior Court Case
22 No. 37-2017-00037943-CL-CO-CTL ("San Diego Action") against
23

24 ³ Defendant claims that Plaintiff was listed on the accounts payable
25 list included in the sale of KBR assets to Citadel Corporation. Doc. #126,
26 ¶ 16. Plaintiff claims that she was not notified of the sale. Doc. #110,
27 ¶ 22.

28 ⁴ Plaintiff claims that the new KBR board and accountant notified
investors they were having difficulty reconciling the members' respective
ownership interest in KBR and tracing missing funds from the sale of KBR
assets to Citadel as a result of Defendant's mismanagement of KBR. Doc. #125,
¶ 36. Defendant insists that the sale documents identify where every dollar
went. Doc. #125, ¶ 17.

1 Defendant, individually and as trustee of the Hudson Family
2 Trust, the Hudson Family Trust, and KBR. *Id.*, ¶ 41 on October
3 12, 2017. The complaint sought rescission of a portion of the
4 settlement agreement requiring transfer of 1.1 million KBR
5 membership units as well as the transfer of the 4.1667% of
6 mineral rights in the Kern Bluff oil field in exchange for the
7 promise to pay \$10,000 and full disclosure of KBR's books and
8 records. *Id.*, ¶ 42; Doc. #117, RJN-1. Plaintiff requested the
9 sum of \$8,813.21 as and for restitution and damages for
10 royalties that were received by Defendant because of his alleged
11 fraud against Plaintiff.⁵ *Ibid.*; Doc. #125, ¶ 43.

12 Plaintiff sought rescission of the portion of the
13 Settlement Agreement based on Defendant's false promise to pay
14 Plaintiff \$10,000 and produce books and records of KBR. *Id.*,
15 ¶ 45. Provisions including mutual waiver and release were
16 retained. *Ibid.* Plaintiff also sought an award of punitive
17 damages, but this count was dismissed on April 27, 2018.
18 Doc. #126, Ex. C.

19 Defendant was personally served with Plaintiff's summons
20 and complaint on January 23, 2018. Doc. #125, ¶ 46. Defendant
21 did not respond to the complaint and his default was entered on
22 April 27, 2018. Doc. #110. On May 30, 2018, Defendant appeared
23 *ex parte* in the San Diego Action and requested the court set
24 aside the default. Doc. #125, ¶ 47. The court denied the
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26
27 ⁵ Plaintiff contends that the \$8,813.21 was attributable to royalty
28 payments due Plaintiff but received by Defendant between 2015 and 2018.
Doc. #125, ¶ 44. Defendant insists this is not possible, and that if
Plaintiff were owed royalty of .04%, then less than \$500 would be owed
plaintiff for that period of time. Doc. #125, ¶ 21.

1 request, instructed Defendant to file a noticed motion, with an
2 answer, and retain legal counsel. *Ibid.*

3 Defendant's motion to set aside the default was heard on
4 July 11, 2018. *Id.*, ¶ 48. Defendant appeared and was permitted
5 to present testimony and evidence in support of his motion to
6 set aside the entry of Default. *Ibid.* Defendant did not file an
7 answer and the motion was denied. *Ibid.* In denying the motion,
8 the court found that "[t]he neglect exhibited by [Defendant] in
9 this circumstance was of the inexcusable variety. He was fully
10 aware he had been sued and simply failed to do what the summons
11 clearly requires: to file a responsive pleading within 30 days."
12 *Ibid.*

13 Plaintiff's application for Default Judgment (prove up) was
14 heard November 9, 2018. *Id.*, ¶ 49. The court advised it had read
15 everything, including all 87 Exhibits, the Plaintiff's
16 declaration, the declarations of Andrew Servais, Jeffrey
17 Coleman, and Sharonrose Cannistraci. *Ibid.* At the conclusion of
18 the hearing, the court ruled that Defendant's promise to pay
19 \$10,000 was a false promise made without any intention to
20 perform, that Plaintiff relied on Defendant's false promise to
21 her detriment and that the false promise was a substantial
22 factor in causing Plaintiff's harm including the loss of mineral
23 rights, the KBR units and royalties on the mineral rights, and
24 violation of her right to inspect KBR books and records. *Ibid.*;
25 Doc. #117, RJN-2. The court's judgment was based on Plaintiff's
26 testimony, other evidence, and written declaration. *Ibid.*

27 The court specifically found that Defendant's false
28 promises were made to induce Plaintiff to sign the mediated

1 agreement and the final October 15, 2014 Settlement Agreement.
2 The agreements included Plaintiff's executed promise to sell,
3 transfer and reconvey Plaintiff's 1.1 million KBR membership
4 units, and to sign a mineral, gas, and oil quitclaim deed giving
5 up Plaintiff's interests in the mineral rights. *Ibid.* The court
6 found that the transfer and reconveyance of the KBR units and
7 mineral rights from Plaintiff to Defendant was induced by
8 Defendant's false promise and made without Defendant intending
9 to pay for the units, mineral rights, or produce the promised
10 KBR books and records. *Ibid.*

11 The court granted partial rescission of the October 15,
12 2014 Settlement Agreement and rescinded Paragraphs 1(a) through
13 1(c) regarding the sale and reconveyance of the transactions of
14 the membership units and mineral rights, and left the mutual
15 waiver and other terms and conditions intact and ordered
16 restitution of the consideration Plaintiff paid Defendant in
17 connection with the Settlement Agreement, specifically,
18 reconveyance of the mineral rights, revocation of the sale of
19 membership and restoration of Plaintiff's 1.1 million KBR
20 membership units. *Ibid.*

21 Plaintiff separately settled her claims against KBR's new
22 managing member on May 13, 2018. Doc. #126, Ex. A.

23 On February 8, 2019, Plaintiff's noticed motion for
24 attorney's fees and costs following entry of the Default
25 Judgment was heard. Doc. #125, ¶ 53. Among the evidence
26 considered by the court was the declaration of Sharonrose
27 Cannistraci, one of Plaintiff's attorneys. Doc. #118, RJN-5. Ms.
28 Cannistraci assisted in drafting the Settlement Agreement, which

1 included the KBR Membership Operating Agreement ("Operating
2 Agreement") as an exhibit by reference. Per the Operating
3 Agreement, Ms. Cannistraci testified that her fees were covered
4 under Paragraph 13.18, an attorney fee clause for recovery by
5 the prevailing party in an action on dispute among KBR members.
6 Doc. #114, Ex. 39, at 39, ¶ 13.18. The court found Plaintiff was
7 the prevailing party, and the attorney fees requested were fair
8 and reasonable taking into consideration the high burden of
9 proof required to establish fraud. *Ibid.* The court awarded
10 attorney fees in the amount of \$34,000 and costs that were added
11 to the Original Judgment and filed as the Amended Judgment.
12 Doc. #117, RJN-2.

13 March 29, 2019, Defendant and his spouse, Elaine Greco
14 Hudson, appeared in court for an examination. Doc. #125, ¶ 54.
15 Defendant advised that he was not bound by the judgment because
16 he had transferred his mineral rights to a revocable trust he
17 held with his spouse. Defendant also admitted, and his spouse
18 concurred, that Defendant had the power to execute a quitclaim
19 transferring the mineral rights to Plaintiff. *Ibid.* Defendant
20 executed the quitclaim deeds at the examination.⁶ *Id.*, ¶ 55.

21 A few days later on April 2, 2019, Ms. Greco left a voice
22 message for Plaintiff advising she would not quitclaim the
23 interest in the mineral rights unless Plaintiff released her
24 claims. *Id.*, ¶ 56. The next day, Defendant emailed Jeffrey

25
26 ⁶ Plaintiff contends that Defendant's wife, Elaine Hudson, left the
27 court before Plaintiff could obtain her signature on the quitclaim deed and
28 she did not return. Doc. #125, ¶ 55. Defendant declares that his wife did
return to court but was not required to sign anything because the mineral
rights belonged solely to him. Doc. #126, ¶ 22. Defendant states that he was
entitled to remove the mineral rights from the family trust per the trust
agreement. *Ibid.*

1 Coleman, attorney for Citadel Exploration and instructed him,
2 "Until the issue of the quitclaim is resolved please continue to
3 pay our royalty check to Ken and Elaine Family Trust . . ."
4 *Ibid.* Citadel then refused to pay Plaintiff any royalty
5 payments. *Ibid.*

6 At the May 5, 2019 hearing on the motion to add Ms. Greco
7 as an alter-ego judgment debtor, the state court was notified of
8 Defendant's bankruptcy filing. *Id.*, ¶ 58. Defendant's chapter 13
9 proceeding was dismissed by the bankruptcy court on July 23,
10 2019. *Id.*, ¶ 59. Plaintiff reset the hearing on the motion to
11 add Ms. Greco as co-debtor for August 7, 2019, but at the
12 hearing the state court was notified of Defendant's chapter 7
13 filing. *Ibid.*

14 15 DISCUSSION

16 I.

17 Civil Rule 56 applies in adversary proceedings. Rule 7056.
18 The moving party has the burden of demonstrating that there is
19 the "absence of a genuine issue of material fact." *Celotex Corp.*
20 *v. Catrett*, 477 U.S. 317, 323 (1986); Civil Rule 56(c). A
21 "genuine issue" exists where "based on the evidence presented, a
22 fair-minded jury could return a verdict in favor of a non-moving
23 party on the issue in question." *In re Tills*, 419 B.R. 444, 449
24 (Bankr. S.D. Cal. 2009). An issue is genuine if there is a
25 sufficient evidentiary basis on which a reasonable fact finder
26 could find for the nonmoving party and a dispute is "material"
27 only if it could affect the outcome of the case under the
28

1 governing law. *Barboza v. New Form, Inc. (In re Barboza)*, 545
2 F.3d 702, 707 (9th Cir. 2008).

3 The court must view all the evidence in a summary judgment
4 motion in the light most favorable to the nonmoving party. *Id.*,
5 citing *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F. 3d 1148,
6 1154 (9th Cir. 2001); *Matsushita Elec. Indus. Co. v. Zenith*
7 *Radio Corp.*, 475 U.S. 574, 587 (1986). A court generally cannot
8 grant summary judgment based on its assessment of the
9 credibility of the evidence presented. *Barboza*, 545 F.3d at 707
10 quoting *Agosto v. INS*, 436 U.S. 748, 756 (1978). "At the summary
11 judgment stage, the judge's function is not to weigh the
12 evidence and determine the truth of the matter but to determine
13 whether there is a genuine issue for trial." *Anderson v. Liberty*
14 *Lobby, Inc.*, 477 U.S. 242, 249 (1986).

15 To survive a motion for summary judgment, the non-moving
16 party must show specific facts that demonstrate a genuine issue
17 of material fact remains for trial. *Celotex Corp.*, 477 U.S. at
18 324. The non-moving party cannot rest upon mere allegations or
19 denials in the pleadings. *Anderson*, 477 U.S. at 248.

20
21 A.

22 Plaintiff contends here that the San Diego state court
23 judgment conclusively requires the bankruptcy court to determine
24 that Defendant's debt to Plaintiff is non-dischargeable under
25 the issue preclusion doctrine (collateral estoppel) and 11
26 U.S.C. § 523(a)(2)(A) (money obtained by false pretenses, false
27 representations, or actual fraud). Doc. #112. Plaintiff argues
28 that there is no genuine issue of material fact that collateral

1 estoppel and issue preclusion apply to the San Diego state court
2 judgment. On this basis, Plaintiff asks that the judgment be
3 given a preclusive effect on these proceedings.

4 Defendant does not dispute that the state court entered a
5 judgment for \$47,041.18 and attached findings of fact that would
6 support a finding of fraud under California law, but insists
7 that nothing in the record establishes the \$47,041.18 judgment
8 was entered as result of Plaintiff's third cause of action for
9 fraud, rather than the two causes of action for breach of
10 contract or common counts. Doc. #124.

11 Defendant argues there are remaining factual claims in
12 Plaintiff's motion that are clearly disputed factual issues,
13 which cannot be determined by a motion for summary judgment.
14 These factual issues include whether Defendant had intent to
15 deceive and whether Defendant had the power to pay Plaintiff,
16 since he was no longer the CEO of KBR when the alleged non-
17 payment occurred.

18 19 II.

20 Collateral estoppel is applicable to proceedings brought
21 under § 523(a) for exception of discharge. *Grogan v. Garner*, 498
22 U.S. 279, 284 n.11 (1991). Under 28 U.S.C. § 1738, the
23 preclusive effect of a state court judgment is determined by the
24 law of the state in which the judgment was issued. *Gayden v.*
25 *Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995);
26 *see also Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S.
27 373, 380 (1985). "Collateral estoppel precludes re-litigation of
28 issues argued and decided in prior proceedings." *Lucido v.*

1 *Superior Court*, 51 Cal. 3d 335, 341 (1990). Issue preclusion
2 applies if five "threshold requirements" are met:

- 3 (1) The judgment is final;
- 4 (2) The issues are identical;
- 5 (3) The proceeding was actually litigated;
- 6 (4) The issues were necessarily decided in favor of the
former proceeding; and
- 7 (5) The parties are the same or are in privity.

8 *Id.*, at 1225; see also *Harmon v. Kobrin (In re Harmon)*, 250 F.3d
9 1240, 1245 (9th Cir. 2001). State law collateral estoppel
10 principals apply. *Ibid.* The party asserting issue preclusion has
11 the burden of proving a record sufficient to reveal the
12 controlling facts and pinpoint the exact issues litigated in the
13 prior action. *In re Lambert*, 233 F. App'x 598, 599 (9th Cir.
14 2007).

15 In California, a default judgment is given issue preclusive
16 effect if the defendant had actual knowledge of the litigation
17 and had an opportunity to participate and the issues were
18 actually litigated. *In re Kaut*, 596 B.R. 698, 703 (Bankr. E.D.
19 Cal. 2019); *Cal-Micro Inc. v. Cantrell*, 329 F.3d 119 (9th Cir.
20 2003).

21 Even after the five threshold factors are met, application
22 of issue preclusion is discretionary. *Lopez v. Emerg. Serv.*
23 *Restoration, Inc. (In re Lopez)*, 367 B.R. 99, 103, 107-08
24 (B.A.P. 9th Cir. 2007). In exercising that discretion, this
25 court needs to consider the circumstances of the particular case
26 and whether application of the doctrine is fair and consistent
27 with the policies underlying it. *Baldwin v. Kilpatrick (In re*
28 *Baldwin)*, 249 F.3d 912, 919-20 (9th Cir. 2001).

1 A.

2 Plaintiff argues that collateral estoppel applies. Doc.
3 #124. The state court judgment is final and binding. Defendant's
4 opportunity to appeal has lapsed. Plaintiff insists the issues
5 in the state court action are identical to the issues in
6 Plaintiff's § 523(a)(2)(A) action. The issues were actually
7 litigated because they were raised in the pleadings and
8 submitted for determination prior to the entry of judgment on
9 November 9, 2018. The issues were decided in the proceeding and
10 the parties are the same as in the state court judgment.

11 Defendant disputes each prong except the fifth of the
12 collateral estoppel test but provides little evidence for those
13 contentions. Doc. #124.

14 The court finds that the principals of collateral estoppel
15 apply in this case as set forth below.

16
17 1.

18 The San Diego County Superior Court issued a judgment by
19 default on November 9, 2018. Doc. #117, RJN-2. This judgment was
20 amended on February 8, 2019. *Ibid.* The amended judgment is
21 final, binding, and on the merits.

22
23 2.

24 The issues decided in the state court proceeding are
25 identical to the elements of § 523(a)(2)(A).

26 11 U.S.C. § 523(a)(2)(A) excepts from discharge "any debt
27 . . . for money, property, services, or an extension, renewal, or
28 refinance of credit, to the extent obtained by . . . false

1 pretenses, a false representation, or actual fraud[.]” To
2 establish that a fraud judgment is non-dischargeable under
3 § 523(a)(2)(A) based on collateral estoppel, the following
4 statutory elements must be met:

5 (1) misrepresentation, fraudulent omission or
6 deceptive conduct by the debtor; (2) knowledge of the
7 falsity or deceptiveness of his statement or conduct;
8 (3) an intent to deceive; (4) justifiable reliance by
9 the creditor on the debtor’s statement or conduct; and
10 (5) damage to the creditor proximately caused by its
11 reliance on the debtor’s statement or conduct.

12 *In re Harmon*, 250 F.3d at 1246. The court may rely on a
13 preclusive effect of an existing state court judgment to grant
14 summary judgment. *Plyam v. Precision Dev., LLC (In re Plyam)*,
15 530 B.R. 456, 462 (B.A.P. 9th Cir. 2015). “A promise made
16 without any intention of performing it constitutes fraud.” *Union*
17 *Flower Mkt., Ltd. v. S. Cal. Flower Mkt., Inc.*, 10 Cal. 2d 671,
18 676 (1938).

19 “Promissory fraud” is a subspecies of the action for
20 fraud and deceit. A promise to do something
21 necessarily implies the intention to perform; hence,
22 where a promise is made without such intention, there
23 is an implied misrepresentation of fact that may be
24 actionable fraud.

25 *Lazar v. Superior Court*, 12 Cal. 4th 631 (1996) citing *Union*
26 *Flower Mkt.*, 10 Cal. 2d at 675.

27 The elements of § 523(a)(2)(A) “mirror the elements of
28 common law fraud” and match those for actual fraud under
29 California law. *Tobin v. Sans Souci Ltd. Pshp. (In re Tobin)*,
30 258 B.R. 199 (B.A.P. 9th Cir. 2001) (internal citations omitted)
31 quoting *Youngie v. Gonya (In re Younie)*, 211 B.R. 367, 373-74
32 (B.A.P. 9th Cir. 1997), *aff’d*, 163 F.3d 609 (9th Cir. 1998).

1 a.

2 Plaintiff contends that all of elements for fraud under
3 California law are present here. The state court found that:

- 4 (1) Defendant, individually and as trustee of the Hudson
5 Family Trust, the Hudson Family Trust, and KBR, deceived
6 and defrauded Plaintiff to enter into and rely on the
7 Settlement Agreement. The false promise included the
8 unconditional promise to pay \$10,000 to Plaintiff by
9 December 31, 2015 in exchange for Plaintiff's conveyance
10 of mineral rights and KBR units, as well as the promise
11 to allow Plaintiff to inspect KBR books and records under
12 the control of Defendant.
- 13 (2) Defendant did not intend to perform the false promises at
14 the time the promises were made and therefore had
15 knowledge of the falsity. The state court noted that
16 Defendant had never performed either promise to date.
- 17 (3) Defendant made the false promises with intent to induce
18 Plaintiff to sign over her mineral rights and KBR units,
19 which she did. The court found that the promises were
20 meant to induce the transfer of the KBR units and mineral
21 rights and such transfer would not have occurred but for
22 Defendant's false promise.
- 23 (4) Plaintiff justifiably relied on Defendant's false
24 promises to her detriment. Plaintiff partially performed
25 by conveying her mineral interests and KBR units to
26 Defendant.
- 27 (5) The court found that the promises were a substantial
28 factor in causing Plaintiff's harm, including the loss of
mineral rights, KBR units, and royalties from her mineral
rights.

23 Doc. #117, RJN-2. The court based its decision to partially
24 rescind the Settlement Agreement and transfer and conveyance of
25 Plaintiff's interests on Defendant's false promise. The decision
26 to rescind resulted in the retransfer and reconveyance of the
27 mineral rights and the KBR units.

1 The state court found that Plaintiff would suffer serious
2 harm unless the court granted the rescission and cancellation of
3 the mineral, gas, and oil quitclaim deed and the reconveyance of
4 the units.

5
6 b.

7 Defendant argues that the state court's findings do not
8 specify that the entire judgment was for the fraud count as
9 opposed to breach of contract or other counts. Defendant argues
10 that the state court's judgment is without preclusive effect as
11 to § 523(a)(2)(A) because it does not include any express
12 findings of fact or conclusion that relates to the \$47,041.18
13 amended judgment, as opposed to the other dischargeable counts
14 for breach of contract or common counts. Doc. #124. Nothing in
15 the state court's findings of fact and conclusions of law
16 identify the basis on which it determined the amount owed, or
17 that facts alleged in the fraud claim were the cause of the
18 \$47,041.18 damages awarded, says Defendant. The order does not
19 cite a specific finding that all of the elements of the fraud
20 claim asserted by Plaintiff in the complaint were the cause of
21 the damages awarded in the judgment. On this basis, Defendant
22 argues that the judgment does not set forth a clear record for
23 the judgment to have a preclusive effect that the fraud claim
24 was necessarily decided by the state court.

25 In response, Plaintiff contends the state court judgment
26 specifies express findings of fact that the judgment for fraud
27 was based solely on the third cause of action in the complaint.
28 Doc. #127. The judgment was found specifically against Defendant

1 individually, and other defendants. The rescission was specified
2 and set forth with particularity, based on fraud of the
3 Defendant, and that as a result of that fraud the requirements
4 of the underlying agreement were null and void and had no force
5 or effect. The state court does not mention the other two causes
6 of action because it did not award any damages or make any
7 findings on the breach of contract or common counts. The damages
8 awarded in the San Diego Action rest on the third cause of
9 action for rescission and restitution as result of Defendant's
10 fraud.

11
12 c.

13 This court disagrees with Defendant's assertion that the
14 state court judgment does not provide express findings of fact
15 that the judgment amount was based on the third case of action
16 for fraud in the complaint. If the state court made a breach of
17 contract finding, it would have been inconsistent with the
18 rescission and restitution remedies based on fraud.

19 The state court found that Defendant (1) made false
20 promises with no intention to perform; (2) had knowledge of the
21 falsity and deceptiveness of the statement and conduct at the
22 time the statements were made; (3) made the statements to induce
23 Plaintiff to enter into the Settlement Agreement and willfully
24 failed to perform; (4) Plaintiff was deceived by Defendant's
25 promises and justifiably relied on his statements and conduct;
26 and (5) Plaintiff suffered damage as result of the fraud. This
27 is sufficient to show that the issues litigated in state court
28

1 for false promise without intent to perform are the same as
2 those for § 523(a)(2)(A).

3
4 3.

5 The issues were "actually" litigated in the state court
6 proceeding. *Newsom v. Moore (In re Moore)*, 186 B.R. 962, 971
7 (1985) ("[A]n issue is actually litigated when it is properly
8 raised in the pleadings, or otherwise, and is submitted for
9 determination, and is determined, noting that a determination
10 may be based on a failure of proof.").

11 There is no dispute the fraud claim was properly raised in
12 the pleadings in the San Diego Action.

13 Plaintiff argues that the San Diego Superior Court found
14 the issue to be making a promise without intent to perform and
15 was actually litigated.

16 Defendant does not dispute that he was personally served
17 with Plaintiff's summons and complaint on January 23, 2018.
18 Doc. #125, ¶ 46. Defendant appeared *ex parte* in San Diego and
19 requested the court to set aside his default prior to the entry
20 of final judgment. *Id.*, ¶ 47. The court denied that request and
21 instructed Defendant to retain counsel and file a noticed motion
22 with an answer. *Ibid.*

23 Defendant's motion to set aside the default was heard on
24 July 11, 2018, where he appeared and was permitted to present
25 testimony and evidence in support of his motion to set aside the
26 entry of default. *Id.*, ¶ 48. Defendant did not file an answer
27 and his motion was denied because "[t]he neglect exhibited by
28 [Defendant] in this circumstance was of the inexcusable variety.

1 He was fully aware he had been sued and simply failed to do what
2 the summons clearly required: to file a responsive pleading
3 within 30 days." *Ibid.*

4
5 4.

6 This court finds that the issues in the state court
7 proceeding were necessarily decided. The state court proceeding
8 was finalized on the merits. Defendant appeared and was heard in
9 his attempt to set aside the entry of default judgment. *Ibid.*
10 The court issued a final judgment with findings of fact
11 specifically tailored to Plaintiff's fraud complaint. *Ibid.*

12
13 5.

14 The parties before this court are the same parties from the
15 state court litigation. The party against whom issue preclusion
16 is sought to be enforced is the same as in the underlying state
17 court litigation. Defendant does not dispute this contention.
18 Doc. #124.

19
20 B.

21 Defendant argues that because he disputed the facts in
22 response to the statement of undisputed facts, there is a
23 dispute and thus there are triable material issues of fact. But
24 Defendant fails to provide any supporting evidence that the
25 denials to Plaintiff's statement of undisputed facts warrant
26 denial of this motion. Doc. #125. Some facts are in dispute, but
27 Defendant concedes that (1) the state court litigation occurred;
28 (2) he was properly served, (3) he appeared and prosecuted a

1 motion to set aside the default, which was denied; (4) the state
2 court issued a final judgment against him. That Defendant now
3 disputes some facts is not relevant since the court has reviewed
4 the state court record.

5 Defendant points to other factual issues warranting denial
6 of this motion, such as whether Defendant had an intent to
7 deceive or whether he had the power to pay Plaintiff, as he was
8 no longer the CEO of KBR. Doc. #124. Despite his denial, the
9 state court explicitly found that he had an intent to deceive
10 Plaintiff to induce her into signing over her mineral rights and
11 KBR units. Defendant is no longer the CEO of KBR. He was removed
12 from management prior to the filing of the San Diego Action.
13 Throughout the entire San Diego Action, Defendant was not the
14 CEO and did not have the power to authorize payment from KBR to
15 Plaintiff. The state court disagreed with what Defendant now
16 claims are material factual disputes.

17 And even though the state court action was a default
18 judgment, Defendant still appeared seeking to set aside the
19 default. He was instructed to file an answer. He did not.

20 Defendant has failed to support his contention that
21 collateral estoppel should not apply here. The state court's
22 judgment is clear and Defendant's disputed facts, even when
23 viewed in the light most favorable to him, do not negate the
24 effect of the state court's findings of fact. LBR 7056-1(b)
25 provides:

26 Any party opposing a motion for summary judgment or
27 partial summary judgment shall reproduce the itemized
28 facts in the Statement of Undisputed Facts and admit
those facts which are undisputed and deny those facts

which are disputed, including with each such denial a citation to the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other document relied upon in support of that denial.

Defendant's denials are not supported by facts. Viewing the evidence in the light most favorable to Defendant still does not negate the San Diego Superior Court's judgment and findings of fact in favor of Plaintiff.

C.

"Even when the five threshold criteria for issue preclusion are met, a bankruptcy court must conduct an 'inquiry into whether imposition of issue preclusion in the particular setting would be fair and consistent with sound public policy' before applying issue preclusion." *Delannoy v. Woodlan Colonial, L.P.* (*In re Delannoy*), 615 B.R. 572, 582 (B.A.P. 9th Cir. 2020 (quoting *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 824-25 (B.A.P. 9th Cir. 2006), *aff'd* 506 F.3d 956 (9th Cir. 2007))). "Three fundamental policies should be considered: 'preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.'" *Delannoy*, 615 B.R. at 582 (quoting *Lucido v. Superior Court*, 51 Cal.3d at 343); see also *Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez)*, 367 B.R. 99, 103 (B.A.P. 9th Cir. 2007).

///

/ / /

/ / /

1. 1.

2 The first inquiry is into the integrity of the judicial
3 system and whether application of collateral estoppel would
4 create the possibility of inconsistent verdicts. *Baldwin*, 249
5 F.3d at 920 citing *Lucido*, 51 Cal.3d at 343-44. Here, as in
6 *Baldwin*, "the state court was fully capable of adjudicating the
7 issue subsequently presented to the bankruptcy court[.]" *Ibid*.
8 "[R]elitigation in bankruptcy court of the issue decided by the
9 state court would conflict with the principle of federalism that
10 underlies the Full Faith and Credit Act" and "the public's
11 confidence in the state judicial system would be undermined[.]"
12 *Ibid*. citing *Marrese*, 470 U.S. at 380.

13 Moreover, Defendant was adequately served the summons and
14 complaint in the San Diego Action. Defendant appeared *ex parte*
15 before the San Diego court seeking to turn over the previous
16 default judgment. He was instructed to file a noticed motion,
17 file an answer, and retain counsel. Later, his motion was denied
18 because he had not filed an answer as instructed. The state
19 court described his neglect as of "the inexcusable variety"
20 because he knew he was being sued and did nothing. Defendant was
21 given multiple opportunities to defend the action before the
22 final judgment was entered. Defendant attempts to re-litigate
23 the merits of the state court action here, which, if allowed and
24 if successful, could compromise the integrity of the judicial
25 system *vis-à-vis* inconsistent verdicts. This factor weighs in
26 favor of application of collateral estoppel.

27 ///

28 ///

1 2.

2 Second, we consider whether application of collateral
3 estoppel would promote judicial economy. *Lucido*, 51 Cal.3d at
4 350.

5 The record on this motion is over 500 pages. The San Diego
6 Superior Court considered 87 exhibits prior to issuing its
7 judgment. Doc. #125, ¶ 49. The state court copiously expended
8 judicial resources in rendering its verdict, including
9 adjudication of Defendant's motion to set aside the default
10 judgment. Re-litigating in bankruptcy court these issues that
11 have already been fully and finally determined in state court
12 favors application of issue preclusion here. *See Baldwin*, 249
13 F.3d at 920 ("Relying on the state court's determination allows
14 the bankruptcy court to conserve judicial resources.").

15
16 3.

17 Lastly, we consider whether application of collateral
18 estoppel will protect the parties from vexatious litigation.
19 *Ibid*. Defendant had a full and fair opportunity to litigate this
20 claim before the state court. Defendant was properly served the
21 summons and complaint and had notice of the lawsuit. Defendant
22 appeared before the court on at least two occasions seeking to
23 set aside the default judgment. He was unsuccessful. Defendant
24 forfeited his right to defend himself without adequate
25 justification. "The neglect exhibited by Defendant in this
26 circumstance was of the inexcusable variety." Doc. #125, ¶ 48.

27 Plaintiff already successfully prosecuted her state court
28 lawsuit years ago. It would be unfair to now require her to re-

1 litigate those same claims years later. *See Baldwin*, 249 F.3d at
2 920 ("It would be unfair to [creditor] to require him to
3 relitigate before the bankruptcy court what was properly decided
4 by the state court.").

5
6 D.

7 Plaintiff's motion for summary judgment will be GRANTED as
8 to the preclusive effect of the state court judgment.

9 The San Diego County Superior Court's amended judgment
10 awarding \$8,813.21 in damages, \$997.26 in pre-judgment interest,
11 \$34,000.00 in attorney fees, and \$3,230.71 in costs for a total
12 of \$47,041.18 will be deemed non-dischargeable pursuant to 11
13 U.S.C. § 523(a)(2)(A).

14
15 III.

16 Next, we turn to the issue of whether Plaintiff is entitled
17 to recover additional fees in prosecuting this non-
18 dischargeability action. California law permits recovery fees
19 under certain circumstances. While there is no general right to
20 attorney fees, bankruptcy courts may award fees in § 523 actions
21 when authorized by state law. *Travelers Cas. & Sur. Co. of Am.*
22 *v. PG&E*, 549 U.S. 443, 451-52 (2007) ("[T]he 'basic federal
23 rule' in bankruptcy is that state law governs the substance of
24 claims."); *see also Cohen v. de la Cruz*, 523 U.S. 213, 223
25 (1998) ("In short, the text of § 523(a)(2)(A) . . . encompasses
26 any liability arising from money, property, etc., that is
27 fraudulently obtained, including treble damages, attorney's
28

1 fees, and other relief that may exceed the value obtained by the
2 debtor.").

3 In non-dischargeability actions, the question for awarding
4 attorney fees is "whether creditor plaintiff would be entitled
5 to fees in state court for establishing those elements of the
6 claim which the bankruptcy court finds support a conclusion of
7 nondischargeability." *Kilborn v. Haun (In re Haun)*, 396 B.R.
8 522, 528 (Bankr. D. Idaho 2008).

9 California law offers two primary avenues for the recovery
10 of attorney fees by a prevailing party:

- 11 1. C.C.C. § 1717; and
- 12 2. C.C.P. §§ 685.040 and 1021.

13
14 A.

15 C.C.C. § 1717 allows a party to recover attorney fees
16 incurred in the litigation of a contract claim. *Redwood*
17 *Theaters, Inc. v. Davison (In re Davison)*, 289 B.R. 716, 722
18 (B.A.P. 9th Cir. 2003) (C.C.C. § 1717 provides for attorney's
19 fees in an "action on a contract") citing *Santisas v. Goodin*, 17
20 Cal. 4th 599, 615 (1998). For C.C.C. § 1717 to apply, (1) the
21 action in which the fees are incurred must be an action "on a
22 contract"; (2) the contract must contain a provision stating
23 that attorney's fees incurred to enforce the contract shall be
24 awarded either to one of the parties or to the prevailing party;
25 and (3) the party seeking fees must be the party who "prevailed
26 on the contract" meaning "the party who recovered a greater
27 relief in the action on the contract." C.C.C. § 1717(b)(1); see
28 also *Penrod v. AmeriCredit Fin. Servs. (In re Penrod)*, 802 F.3d

1 1084, 1087-88 (9th Cir. 2015) (“[A]n action is ‘on a contract’
2 when a party seeks to enforce, or avoid enforcement of, the
3 provisions of the contract.”); *cf. Bos. V. Bd. Of Trs.*, 818 F.3d
4 486, 489 (9th Cir. 2015) (“[W]e have previously held that a
5 nondischargeability action is ‘on a contract’ within section
6 1717 if ‘the bankruptcy court needed to determine the
7 enforceability of the . . . agreement to determine
8 dischargeability.”).

9 Plaintiff has the burden of showing that this action is
10 (1) an “action on a contract” and (2) this contract has a
11 prevailing party attorney’s fee provision which is the basis of
12 the fraud claim in order for her to recover her attorney fees
13 incurred prosecuting this adversary proceeding. In determining
14 whether the proceeding was an action on a contract, courts may
15 look beyond the parties’ pleadings. *Sea Win, Inc. v. Tran (In re*
16 *Tran)*, 301 B.R. 576, 584 (Bankr. S.D. Cal. 2003).

17 Whether this is an action on a contract turns on whether
18 the Settlement Agreement played an integral role in the non-
19 dischargeability action. *Heritage Ford v. Baroff (In re Baroff)*,
20 105 F.3d 439, 442 (9th Cir. 1997) (non-dischargeability action
21 “was an action on the contract because the document containing
22 the attorney’s fee clause . . . played an integral role in the
23 proceedings.”).

24
25 1.

26 Plaintiff contends that she is entitled to further attorney
27 fees for bringing this adversary proceeding. Doc. #135. In the
28 San Diego Action, Plaintiff argued that she had incurred fees of

1 \$34,000.00 and that this amount sought was reasonable under the
2 circumstances under C.C.C. § 1717 and Paragraph 13.18 of the
3 Operating Agreement. The Superior Court awarded \$34,000 to
4 Plaintiff for the enforcement of the contract as reasonable
5 attorney fees permitted under the contractual provisions of the
6 KBR Operating Agreement Section 13.18, which covered the amount
7 of time, effort, and energy in bringing the request to enter the
8 default and the prove up hearing.

9 Plaintiff cites to *Cohen*, wherein the Supreme Court
10 concluded under 11 U.S.C. § 523(a)(2)(A) that any liability
11 arising from money or property that is fraudulently obtained,
12 including treble damages, and any other relief that may exceed
13 the value of what was received by the debtor. *Id.*, citing *Cohen*,
14 523 U.S. at 223. Here, Plaintiff argues that *Cohen* prevents
15 discharge of all liability out of Defendant's conduct because
16 she is able to recover fees outside of the bankruptcy court
17 under state or federal law.

18 Plaintiff emphasizes the impact of the attorney fee
19 provision in a contract under C.C.C. § 1717, which provides for
20 attorney fees in contracts incurred to enforce the contract to
21 be awarded to the prevailing party. The attorney fee provision
22 at issue is broad enough to encompass a tort claim, Plaintiff
23 insists. Doc. #135, citing *Santisas v. Goodin*, 17 Cal. 4th at
24 615, 622-23.

25
26 2.

27 Meanwhile, Defendant argues that Plaintiff is not entitled
28 to any additional fees under C.C.C. § 1717. Although the

1 contract's terms could arguably be construed as broad enough to
2 include tort claims as fraud, Defendant contends that these fees
3 can only be awarded to a prevailing party in an "action on the
4 contract." C.C.C. § 1717(a); *Seyed Shahram Hosseini v. Key Bank*
5 *N.A. (In re Seyed Shahram Hosseini)*, 504 B.R. 558, 567 n.13
6 (B.A.P. 9th Cir. 2014) ("[C.C.C.] § 1717 is to be narrowly
7 applied and is available to a party only if the dispute involves
8 litigation of a contract claim.") citing *Santisas*, 17 Cal. 4th
9 at 599. Thus, Defendant insists that attorney fees are only
10 recoverable on a breach of contract claim, not a fraud claim.

11 Defendant cites Plaintiff's admission on the record that
12 there is no legal or factual basis to award additional attorney
13 fees for prosecuting the non-dischargeability action. The basis
14 of Plaintiff's claim is that Defendant fraudulently
15 misrepresented that he would pay \$10,000 to Plaintiff in
16 exchange for her 900,000 KBR units pursuant to the Settlement
17 Agreement. Since the Settlement Agreement contains no provision
18 for attorney fees, Defendant insists that Plaintiff is not
19 entitled to any additional fees.

20 Although the San Diego Superior Court's judgment is based
21 on the subject Settlement Agreement, there is no basis under
22 C.C.C. § 1717 to award attorney fees for prosecuting this action
23 because the Settlement Agreement was not an integral part in
24 this non-dischargeability proceeding. Defendant urges the court
25 to focus its analysis on the attorney fees provision in the
26 Settlement Agreement, which is governed by California law and
27 the only basis on which Plaintiff could be awarded fees. If the
28 scope of that provision is broad enough to encompass a state

court action that has the same elements as a § 523(a)(2)(A) claim for common law fraud, then Plaintiff is entitled to fees. Doc. #124 citing *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1083 (9th Cir. 2000).

However, since the Settlement Agreement is not an integral part of this litigation, then the action is not on a contract and Plaintiff is not entitled to fees under C.C.C. § 1717. Plaintiff's state court fraud judgment was based on a false promise to perform the actions contained in the Settlement Agreement. Defendant claims the handwritten agreement and the Settlement Agreement calling for Plaintiff to transfer her KBR units in exchange for dismissal of the litigation and \$10,000 is the sole and only basis in the record for the fraud judgment. And since the Settlement Agreement contained no prevailing party attorney's fee provision, Plaintiff has failed to meet her burden of establishing that this adversary proceeding is based on a contract that has a prevailing party's attorney fee provision. Defendant therefore asserts that the request for attorney fees to prosecute this adversary proceeding should be denied.

3.

The court agrees with Defendant that C.C.C. § 1717 does not provide an avenue for Plaintiff's recovery of attorney fees. Because the document containing the attorney fee clause did not play an integral role in this adversary proceeding and this court did not adjudicate the validity of the Settlement Agreement, instead applying the principles of collateral

1 estoppel and issue preclusion, the fees for prosecuting the
2 action were not "on a contract" for the purposes of C.C.C.
3 § 1717. But Plaintiff is not without recourse.

4
5 B.

6 The second option for attorney fees lies in both C.C.P.
7 §§ 685.040 and 1021. Both provide for recovery of attorney fees
8 as allowable costs under C.C.P. §§ 1032 and 1033.5. C.C.P.
9 § 1021 provides:

10 Except as attorney's fees are specifically provided
11 for by statute, the measure and mode of compensation
12 of attorneys and counsels at law is left to the
13 agreement, express or implied, of the parties; but to
parties to actions or proceedings are entitled to
their costs, as hereinafter provided.

14 C.C.P. § 1021 permits attorney fees by agreement between the
15 parties and does not limit recovery of fees to actions on the
16 contract. *Davison*, 289 B.R. at 724, citing *3250 Wilshire*
17 *Boulevard Bldg. v. W.R. Grace & Co.*, 990 F.2d 487, 489 (9th Cir.
18 1993). Attorney fees for fraud claims may be recovered if the
19 contract for which the fraud judgment is based so provides for
20 the prevailing party to be awarded their attorney fees.

21 "[S]ection 1021 allows 'the parties to agree that the prevailing
22 party in litigation may recover attorney fees, whether the
23 litigation sounds in contract or in tort.'" *Maynard v. BTI*
24 *Group, Inc.*, 216 Cal. App. 4th 984, 991 (2013) quoting *Miske v.*
25 *Coxeter*, 204 Cal. App. 4th 1249, 1259 (2012).

26 If there is an attorney fee provision in the underlying
27 agreement of the parties, the court must examine the language of
28 the agreement to determine whether an award of fees is

1 warranted. *Davison*, 289 B.R. at 724, citing 3250 *Wilshire*
2 *Boulevard Bldg. v. W. R. Grace & Co.*, 990 F.2d 487, 489 (9th
3 Cir. 1993); *In re KLAUSE*, 181 B.R. 487, 500 (Bankr. C.D. Cal.
4 1995).

5 Meanwhile, C.C.P. § 685.040 provides:

6 The judgment creditor is entitled to the reasonable
7 and necessary costs of enforcing a judgment.
8 Attorney's fees incurred in enforcing a judgment are
9 not included in costs collectible under this title
10 unless otherwise provided by law. Attorney's fees
11 incurred in enforcing a judgment are included as costs
12 collectible under this title if the underlying
judgment includes an award of attorney's fees to the
judgment creditor pursuant to subparagraph (A) of
paragraph (10) of subdivision (a) of Section 1033.5.

13 C.C.P. § 685.040. C.C.P. § 1033.5(a)(10) permits attorney fees
14 when authorized by contract, statute, or law.

15 [T]here are two requirements before a motion for an
16 award of post-judgment attorney fees may be awarded as
17 costs: (1) the fees must have been incurred to
18 "enforce" a judgment; and (2) the underlying judgment
19 had to include an award for attorney fees pursuant to
20 [C.C.P. § 1033.5(a)(10)(A)], which provides that
attorney fees may be awarded when authorized by
contract.

21 *Jaffe v. Pacelli*, 165 Cal. App. 4th 927, 935 (2008) (quoting
22 *Berti v. Santa Barbara Beach Props.*, 145 Cal. App. 4th 70, 77
23 (2006)).

24 "CCP § 685.040 addresses the 'problem unique to a claim for
25 post-judgment fees in actions based on contract.'" *Tinajero v.*
26 *Zavala (In re Tinajero)*, 2020 Bankr. LEXIS 2157, at *13 (B.A.P.
27 9th Cir. Aug. 4, 2020) (quoting *Jaffe*, 165 Cal. App. 4th at 934;
28 *Berti*, 145 Cal. App. 4th at 77). C.C.P. § 685.040 entitles a

1 judgment creditor to post-judgment attorney fees incurred in
2 enforcing a judgment "if the underlying judgment includes an
3 award of attorney's fees to the judgment creditor pursuant to
4 subparagraph (A) of paragraph (10) of subdivision (a) of Section
5 1033.5." C.C.P. § 685.040. C.C.P. § 1033.5(a)(10)(A) allows
6 attorney fees as "costs" for the purposes of C.C.P. § 1032.
7 Thus, post-judgment fees under § 685.040 is "not based on
8 survival of the contract but is instead based on the award of
9 attorney fees and costs in the trial judgment." *Jaffe*, 165 Cal.
10 App. 4th at 935. Actions taken in bankruptcy proceedings may
11 qualify as enforcement proceedings subject to C.C.P. § 685.040.
12 *Jaffe*, 165 Cal. App. 4th at 938; *Chinese Yellow Pages Co. v.*
13 *Chinese Overseas Mktg. Serv. Corp.*, 170 Cal. App. 4th 868, 888
14 (2008).

15
16 1.

17 Defendant acknowledges that the terms of the contract could
18 potentially be construed to include fraud, but states that the
19 contract explicitly references C.C.C. § 1717, which would still
20 require litigation of the contract. Doc. #124. Defendant does
21 not reference C.C.P. § 685.040, but does acknowledge C.C.P.
22 § 1021. Doc. #137. However, Defendant focuses his argument on
23 C.C.C. § 1717.

24 In his supplemental briefing, Defendant cites to *Fobian v.*
25 *Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153
26 (9th Cir. 1991), whereby the Ninth Circuit refused to award
27 attorney fees despite an express contractual provision because
28 the substantive litigation raised federal bankruptcy law issues

1 rather than "basic contract enforcement questions." *Id.* at 1153.
2 On this basis, the Ninth Circuit held that the creditor could
3 not recover attorney fees under the contract absent bad faith or
4 harassment. *Id.*, citing *Johnson v. Righetti (In re Johnson)*, 756
5 F.2d 738, 740-41 (9th Cir. 1985) (Ninth Circuit refused to award
6 attorney fees under California law and a contractual provision,
7 because the underlying stay litigation raised federal statutory
8 issues rather than issues relating to the contract).

9 However, reliance on *Fobian* is misplaced. The U.S. Supreme
10 Court effectively overruled *Fobian*, stating that "[t]he *Fobian*
11 rule finds no support in the Bankruptcy Code, either in § 502 or
12 elsewhere." *Travelers*, 549 U.S. 443 (concluding that the Court
13 of Appeals erred applying the *Fobian* rule to disallow a claim
14 based on the fact that the fees were incurred litigating issues
15 of bankruptcy law); see also *Penrod*, 802 F.3d at 1089 ("The
16 Supreme Court squarely rejected that [*Fobian*] view in
17 *Travelers*.").

18 Nonetheless, Defendant implies that Plaintiff cannot
19 recover fees incurred while prosecuting this non-
20 dischargeability action because federal statutory issues rather
21 than contractual issues predominate. Defendant reiterates his
22 argument that the Settlement Agreement contained no attorney fee
23 provision before reasserting Plaintiff's counsel's admission at
24 the hearing by stating, ". . . I don't have anything, or cannot
25 see anything at this junction [sic] that would grant further
26 attorney's fees on top of what the court ordered." Doc. #131.
27 Defendant concludes that additional fees pursuant to C.C.C.
28 § 1717 are unavailable.

2.

Plaintiff claims that she is not limited to C.C.C. § 1717 and may recover fees under C.C.P. § 1032(a)(4), which allows as allowable costs to include attorney fees when authorized by any of the following: (a) contract; (b) statute; (c) law. Doc. #135. While Plaintiff does not specifically mention C.C.P. § 1021, she cites authority relying on C.C.P. §§ 1021, 1032 and 1033.5 together. Plaintiff further contends that C.C.P. § 685.040 is applicable.

Plaintiff cites the Settlement Agreement, which included the KBR Membership Operating Agreement as "Exhibit 1" for the purposes of characterizing Plaintiff as an "Economic Interest Holder."⁷ See Docs. #6, Ex. 1, ¶ 1a; #114, Ex. 39. The Operating Agreement provided in Paragraph 13.18:

Attorney Fees. In the event that *any dispute* between the Company and the Members of among the Members should result in litigation or arbitration, the prevailing party in such dispute shall be entitled to recover from the other party all reasonable fees, costs, and expenses of enforcing any right of the prevailing party, including without limitation, reasonable attorneys' fees and expenses, all of which shall be deemed to have accrued upon the commencement of such action and shall be paid whether or not such action is prosecuted to judgment. Any judgment or order entered in such action shall contain a specific provision providing for the recovery of attorney fees and costs incurred in enforcing such judgment and an

⁷ Exhibit A to the Operating Agreement defines an "Economic Interest Holder" as "a Person who holds only an Economic Interest in the Company. An Economic Interest Holder shall include an owner of Economic Interest Units to the extent of the ownership of such Economic Interest. Wherever reference is made to a Member in the Membership Operating Agreement such reference shall also be deemed to apply to Economic Interest Holders, except for rights and obligations, such as the right to vote and the right to information concerning the financial condition of the Company, which are exclusive to Members." *Membership Operating Agreement*, Doc. #114, Ex. A to Ex. 39, at 33.

1 award of prejudgment interest from the date of the
2 breach at the maximum rate of interest allowed by law.
3 For the purposes of this Section 13.18: (a) attorney
4 fees shall include, without limitation, fees incurred
5 in the following: (1) post judgment motions; (2)
6 contempt proceedings; (3) garnishment, levy, and
7 debtor and third party examinations; (4) discovery;
8 and (5) bankruptcy litigation; and (b) prevailing
9 party shall mean the party who is determined in the
10 proceeding to have prevailed or who prevails by
11 dismissal, default or otherwise.

12 Doc. #114, Ex. 39, at 39, ¶ 13.18.

13 Defendant was a signatory to the October 15, 2014
14 Settlement Agreement and was KBR's controlling owner and
15 operating member. Doc. #6, Ex. 1. The Settlement Agreement was
16 filed in the San Diego Action and the San Diego Superior Court
17 used it as a basis for its decision finding that the settlement
18 was procured by fraud and Plaintiff's reliance in the agreement
19 resulted in damages. Doc. #117, RJN-2.

20 Since the San Diego Superior Court applied California law,
21 which allows the prevailing party to recover attorney fees in
22 litigation in connection with or arising from the agreement,
23 Plaintiff argues that she is entitled to reasonable attorney
24 fees. Doc. #135, citing *Maynard v. BTI Group, Inc.*, 216 Cal.
25 App. 4th 984 (finding that the parties entered into an attorney
26 fee agreement under C.C.P. § 1021 that provided the prevailing
27 party a right to recover costs in any action or proceeding under
28 C.C.P. § 1032(a)(4), which included attorney fees under C.C.P.
29 § 1033.5(a)(10)).

30 The KBR Operating Agreement Section 13.18 provides for all
31 disputes arising between the parties and specifically included a

1 provision for bankruptcy litigation. The parties contracted for
2 the provision, which was in the Operating Agreement and
3 incorporated by reference into the Settlement Agreement.
4 Doc. #114, Ex. 39, at 1, ¶ 1.

5 The Settlement Agreement also contains provisions for
6 final integration and severability. The final integration
7 provision provides:

8 The full form Agreement *and exhibits referred to*
9 *herein*, constitute the entire final and binding
10 understanding between the parties hereto with respect
11 to the matters set forth herein and supersedes the
12 Stipulation for Settlement dated August 13, 2014. No
13 other statement or representation, written or oral,
14 express or implied, has been received or relied upon
15 in entering into the settlement, and that *all prior*
16 *discussions, statements and negotiations made or which*
17 *have occurred prior to the date of this Agreement*
18 *shall be deemed merged into this Agreement and the*
19 *documents referred to herein*, and shall not be used
20 for any other purpose whatsoever. Each of the
21 recitals, titles and headings used in this Agreement
22 shall be interpreted and construed as part of the
23 Agreement and not as a mere recital.

19 *Id.*, at 4, ¶ 9a (emphasis added). Per the final integration
20 clause, the Operating Agreement attached as Exhibit 1 is
21 integrated and deemed merged into the final Settlement
22 Agreement.

23 To incorporate another document into a contract in
24 California: (1) the reference must be clear and unequivocal;
25 (2) the reference must be called to the attention of the other
26 party, and he must consent thereto; (3) the terms of the
27 incorporated document must be known or easily available to the
28 contracting parties. *Shaw v. Regents of Univ. of Cal.*, 58 Cal.

1 App. 4th 44, 54 (1997). But the contract does not need to recite
2 that it incorporates another document, so long as it guides the
3 reader to the incorporated document. *Id.* The reference to the
4 previous agreement here was clearly stated in the Settlement
5 Agreement. The reference was called to both parties' attention
6 in Paragraph 1 and elsewhere. Both parties signed the Settlement
7 Agreement which contained a final integration clause. The
8 previous agreement involved the parties and the parties signed
9 that as well. There was no mystery between the parties what the
10 settlement agreement referenced and incorporated.

11 Although Defendant has argued that the Settlement Agreement
12 contained no attorney fee provision, there have been no
13 contentions that the Operating Agreement was not incorporated
14 into the Settlement Agreement by reference. Sharonrose
15 Cannistraci consulted in the drafting of the Settlement
16 Agreement that incorporated the Operating Agreement by
17 reference. Doc. #118, RJN-5. Ms. Cannistraci declared that her
18 attorney fees were covered under Paragraph 13.18 for recovery by
19 the prevailing party in an action on dispute among KBR members.
20 *Cf.* Doc. #114, Ex. 39, at 39, ¶ 13.18. The San Diego Superior
21 Court subsequently awarded attorney fees. Though the court did
22 not specify the basis upon which it awarded fees, it considered
23 Plaintiff's written declarations, testimony, and other evidence
24 in issuing its judgment, which included the declaration of Ms.
25 Cannistraci. Doc. #117, RJN-2. Therefore, Paragraph 13.18 of the
26 Operating Agreement was incorporated by reference into the
27 Settlement Agreement, which the court used to award Plaintiff's
28 attorney fees.

1 The San Diego Superior Court rescinded Plaintiff's
2 obligations under Paragraph 1(a) through (c) under the
3 Settlement Agreement, but this did not affect incorporation of
4 the Operating Agreement by reference in Paragraph 1. Doc. #117,
5 RJN-2. The Settlement Agreement also contained a severability
6 clause, which provides:

7 Severability. In the event that any provision of this
8 Agreement should be held to be void, voidable or
9 unenforceable, the remaining portions hereof shall
remain in full force and effect.

10 *Id.*, at 5, ¶ 13. Per the severability clause, the remaining
11 portions of the agreement shall remain in full force and effect.

12 This case arises out of a contract that incorporates as an
13 exhibit an attorney fees provisions that references contract and
14 other disputes. Defendant signed the agreement and falsely
15 promised to comply with the terms of the agreement when he had
16 no intention of doing so. The provision in 13.18 is intertwined
17 with the settlement agreement, so recovery of attorney fees is
18 available under C.C.P. § 1021.

19 Although Defendant argues that this is not a
20 dischargeability action based on a contract for which attorney
21 fees are to be awarded, Plaintiff asserts that she would be
22 entitled and was entitled in the state court action for the
23 attorney fees. Paragraph 13.18 broadly encompasses the nature of
24 the dispute here as between members of KBR.

25 Further, Plaintiff cites to *Phillips v. Gilman (In re*
26 *Gilman)*, 603 B.R. 437 (B.A.P. 9th Cir. 2019). In *Phillips*, the
27 court reviewed whether a successfully prosecuted adversary
28 proceeding to deny a debtor's discharge warranted an award of

1 attorney fees. *Id.*, at 440. The court examined C.C.P. § 685.040,
2 as well as C.C.P. § 108(c), and noted that recovery of post-
3 judgment attorney fees is available based on the California
4 Enforcement of Judgments Act, C.C.P. §§ 685.040, 685.080. *Id.*,
5 at 441, citing *Carnes v. Zamani*, 488 F.3d 1057, 1060 (9th Cir.
6 2007) (finding that post-judgment attorney fees under C.C.P.
7 § 685.040 must comply with the timeliness requirements of C.C.P.
8 § 685.080).

9 Plaintiff argues that C.C.P. § 685.040 allows her to be
10 reimbursed her costs of enforcing the judgment because the
11 underlying judgment includes an award of attorney's fees under
12 C.C.P. § 1033.5(a)(10), which permits attorney fees to be
13 allowable costs under C.C.P. § 1032. Plaintiff again offers to
14 further move for reasonable fees under Rule 7054(b)(2)(A).

15 Plaintiff also maintains that she should receive attorney
16 fees on a policy basis because Defendant would receive a "free
17 ride" in the bankruptcy court trying to discharge that which is
18 non-dischargeable. The only way the attorney fees could be
19 deemed non-dischargeable are through the enforcement efforts by
20 Plaintiff. There would be no recourse for Plaintiff seeking to
21 disallow a non-dischargeable debt otherwise. Forgoing attorney
22 fees in this instance would give Defendant a "free ride" for his
23 wrongful conduct. The state court was not going to condone
24 Defendant's conduct without payment to Plaintiff for asserting
25 her rights against Defendant, and the bankruptcy court should do
26 no less since the state court has made the requisite findings
27 and orders.

Thus, Plaintiff argues that she is entitled to recover fees outside of the bankruptcy under state or federal law. The only question is how much. Plaintiff requests a hearing as to the amount of attorney fees she is entitled under Rule 7054(b)(2)(A).

3.

Based on this record, Plaintiff is entitled to attorney fees under C.C.P. §§ 685.040, 1021, 1032, 1033.5. The state court awarded attorney fees under the Settlement Agreement, which incorporates the KBR Operating Agreement by reference in the final integration clause. The Operating Agreement, meanwhile, broadly awards "reasonable fees, costs, and expenses" to "the prevailing party" in "any dispute between the Company and the Members" that results in litigation or arbitration, including "reasonable attorneys' fees and expenses." Doc. #114, Ex. 39, at 39, ¶ 13.18. Attorney fees specifically includes fees incurred in bankruptcy proceedings and the prevailing party is defined as "the party who is determined in the proceeding to have prevailed or who prevails by dismissal, default or otherwise." *Ibid.*

The San Diego Superior Court did not include a specific provision in its ruling regarding attorney fees. However, the Superior Court did state that the basis for their award of attorney fees was the Settlement Agreement. From there, the Operating Agreement is incorporated by reference, which includes the requisite basis for an award of attorney fees.

1 The court finds that that Plaintiff is entitled to attorney
2 fees under C.C.P. § 1021. As with C.C.P. § 1021, C.C.P. §
3 685.040 allows attorney fees as costs for judgment creditors
4 under C.C.P. §§ 1032, 1033.5. The fraud judgment is based on the
5 Settlement Agreement. The Settlement Agreement incorporates the
6 Operating Agreement by reference. The Operating Agreement
7 provides for fees, costs, and expenses, with fees specifically
8 defined to include those incurred during bankruptcy litigation.
9 Accordingly, Plaintiff is entitled to fees under C.C.P.
10 § 685.040. The amounts of those fees will be determined later by
11 noticed motion.

12 13 CONCLUSION

14 Plaintiff's motion for summary judgment will be GRANTED as
15 to the preclusive effect of the state court judgment.

16 The San Diego County Superior Court's amended judgment
17 dated February 8, 2019, awarding \$8,813.21 in damages, \$997.26
18 in pre-judgment interest, \$34,000.00 in attorney fees, and
19 \$3,230.71 in costs for a total of \$47,041.18, will be deemed
20 non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) under the
21 doctrine of issue preclusion.

22 Further, the motion will be GRANTED as to additional
23 attorney fees in prosecuting this adversary proceeding.
24 Plaintiff is entitled to attorney fees under C.C.P. §§ 685.040,
25 1021, 1032(a)(4), and 1033.5(a)(10)(A) under the KBR Operating
26 Agreement, which is incorporated into the Settlement Agreement
27 by reference and was the basis upon which the San Diego Superior
28 Court awarded attorney fees to Plaintiff. As noted above, the

1 specific amounts of those fees and their reasonableness is yet
2 to be determined; the court will determine the amount of
3 attorney fees after a duly noticed hearing. Plaintiff is
4 directed to seasonably file a motion and set for hearing her
5 request for attorney fees with supporting evidence, including
6 copies of her counsel's time records.

7 Plaintiff to prepare the order granting this motion and a
8 separate judgment. The judgment may later be amended to include
9 any allowed attorney's fees following a further hearing on
10 reasonableness of fees.

11 Dated: July 9, 2021

By the Court

12 /s/ René Lastreto II

13 René Lastreto II, Judge
14 United States Bankruptcy Court
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