

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

**Chief Bankruptcy Judge**

**Sacramento, California**

**March 3, 2022 at 11:00 a.m.**

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1. [11-34464-E-7](#) **STUART SMITS** **CONTINUED ORDER TO APPEAR FOR**  
[11-2636](#) **CAE-1 Aristides Tzikas** **EXAMINATION (STUART LANSING**  
**BARDIS V. SMITS** **SMITS)**  
**ADVERSARY PROCEEDING CLOSED:** **1-13-22 [90]**  
**09/19/2012**

**The Examination of Stuart Lansing Smits, the Judgment Debtor, is XXXXXXX**

On January 13, 2022, Plaintiff Elias D. Bardis filed an Application and Order for Appearance for Examination of Judgment Debtor, Stuart Lansing Smits. Dckt. 90. Plaintiff seeks to examine Debtor for purposes of obtaining information to aid in enforcement of a money judgment against Debtor. *Id.* The court granted this application and Debtor was been ordered to appear for examination on February 10, 2022 at 11:00 a.m.

On January 27, 2022, Parties filed a stipulation to continue the examination to March 3, 2022 at 11:00 am due to Defendant's Counsel having a prior conflict. Dckt. 91.

The present examination is a judgment debtor exam, pursuant to California Code of Civil Procedure § 708.110, which provides in pertinent part:

§ 708.110. Examination of judgment debtor

(a) The judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information to aid in enforcement of the money judgment.

The proper court for conducting an examination of a judgment debtor is specified in California Code of Civil Procedure § 708.160, which provides in pertinent part:

§ 708.160. Proper court for examination; Examination outside county where judgment entered

**March 10, 2022 at 11:00 a.m.**

(a) Except as otherwise provided in this section, the **proper court for examination** of a person under this article is **the court in which the money judgment is entered**.

(b) A person sought to be examined **may not be required to attend an examination before a court located outside the county in which the person** resides or has a place of business unless the distance from the person's place of residence or place of business to the place of examination is less than 150 miles.

(c) If a person sought to be examined does not reside or have a place of business in the county where the judgment is entered, the superior court in the county where the person resides or has a place of business is a proper court for examination of the person.

(d) If the judgment creditor seeks an examination of a person before a court other than the court in which the judgment is entered, the judgment creditor shall file an application that shall include all of the following:

(1) An abstract of judgment in the form prescribed by Section 674.

(2) An affidavit in support of the application stating the place of residence or place of business of the person sought to be examined.

(3) Any necessary affidavit or showing for the examination as required by Section 708.110 or 708.120.

(4) The filing fee for a motion as provided in subdivision (a) of Section 70617 of the Government Code.

The judgment for which the examination is to be taken is identified as the judgment in this Adversary Proceeding. Application and Order, Dckt. 90.

The judgment in this Adversary Proceeding was entered on September 19, 2012. Dckt. 57. The Judgment consists of the following:

1. The sum of \$786,166.91 owed by Defendant to Plaintiff is found to be nondischargeable under 11 U.S.C. § 523(a)(19)(A)(I), and Plaintiff is hereby granted judgment against Defendant in the sum of \$786,166.91.
2. The Plaintiff shall recover interest from the Defendant on this Judgment, at the federal statutory rate under 28 U.S.C. Section 1961 of .19% per annum from the date of the entry of this Judgment until paid in full.
3. Plaintiff shall be entitled to future costs and attorneys' fees associated with enforcement/collection of this judgment.

No other relief was granted.

At the examination, **XXXXXXXXXXXXXXXXXX**

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order for Judgment Debtor Examination issued by the court having been presented to the court and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Examination of Stuart Lansing Smits is  
**XXXXXXXXXXXXXXXXXX**

**APPEARANCE OF SHEILA GROPPER NELSON,  
COUNSEL FOR DEFENDANT  
REQUIRED FOR MARCH 3, 2022 HEARING**

**TELEPHONIC APPEARANCE PERMITTED FOR THIS HEARING**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff on February 2, 2022. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Review of Clerk's Denial of Costs has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Review of Clerk's Denial of Costs and Award of Prevailing Party Attorney's Fees is denied.**

Joseph H. Akins, Jr., Defendant, requests for the court to review the Clerk's denial of \$275,500.00 as an item of costs and award Defendant attorney fees in the amount of \$275,000.00. Defendant argues Mr. Akins Jr. is a prevailing party and entitled to attorney fees as costs pursuant to Eastern District Local Rules 292, 11 U.S.C. § 523(d). Further the conduct by Plaintiff and his attorneys of record support an award of fees as costs pursuant to Federal Rules of Civil Procedure 54(d); Rule 54,

## STATUTORY BASIS FOR ATTORNEY'S FEES

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank. P. 7054(b)(1)*. Attorney's fees and costs, if any shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014. Furthermore, a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. *Fed. R. Civ. P. 54(d)(2)(A)*; *Fed R. Bankr. P. 7054*.

A claim for attorney's fees must be made by motion pursuant to Federal Rules of Civil Procedure 54(d)(2)(A). Defendant lodged with the court a Bill of Costs. Dckt. 273. In the Bill of Costs there is an amount for \$275,500.00 in the section of "Other Cost." This presumptively is a cost associated with attorney fees. However, filing a Bill of Cost with the court is improper pursuant to Federal Rules of Civil Procedure 54(d)(2)(A). In order for attorney fees to be awarded the party requesting attorney fees must file a separate motion. Thus, the Clerk's denial of costs is correct in this matter.

### Improper Placing of Attorney's Fees in Costs Bill

Curiously, Defendant's counsel highlights for the court an improper Costs Bill filed by counsel in this Adversary Proceeding. By that improper costs bill, Defendant's counsel asserts that she has granted upon the Clerk of the Court the legal authority to award attorney's fees, and that Defendant's Counsel has vacated Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054 as it applies to awarding attorney's fees in adversary proceedings.

Looking at the Costs Bill, for "Other Costs" there is a \$275,000 line item. Dckt. 275 at 1. This line item expressly states that these "Other Costs" are itemized on the reverse. *Id.* However, the only "Other Costs" itemized on the back are three items totaling \$569.46 – well short of the "Other Costs" stated (under penalty of perjury and subject to the Federal Rule of Bankruptcy Procedure 9011 certifications) on the Bill of Costs as "Costs" to be recovered. *Id.* at 2.

The Clerk of the Bankruptcy Court correctly allowed \$5,250.21 of costs that were identified and properly did not allow the \$275,000 in secret, unidentified, and hidden additional amounts Defendant sought to "pocket" as costs.

The United States Supreme Court in Federal Rule of Bankruptcy Procedure 7054 (which is a Rule and not a mere "suggestion") that for costs other than attorney's fees:

(1) Costs **other than attorney's fees**. The **court may allow costs** to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk

on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

Fed. R. Bankr. P. 7054(b)(1) [emphasis added]. The allowance of costs pursuant to Federal Rule of Bankruptcy Procedure 7054 is discussed in Collier on Bankruptcy, which includes (emphasis added):

Subdivision (d)(1) of Federal Rule of Civil Procedure 54 contains provisions with respect to costs other than attorney's fees and, although ultimately leaving the question of these costs to the discretion of the court, provides that the court "should" allow costs to the prevailing party unless a court order, a federal statute or a Civil Rule otherwise directs. This subdivision of the rule is not incorporated by Bankruptcy Rule 7054. Rather, **Rule 7054 contains its own subdivision with respect to the matter of costs. Bankruptcy Rule 7054(b) makes the award of costs discretionary** and provides that the court **"may" allow costs** except when a statute or Civil Rule otherwise provides. The **language of Bankruptcy Rule 7054(b) is more permissive than that of Rule 54(d)**, which states that costs "should" be allowed. Thus, there is no presumption created in favor of awarding costs under Bankruptcy Rule 7054(b).

...

"Costs may be defined as an allowance which the law awards to the prevailing party against the losing party as an incident of the judgment to reimburse a party for certain expenses which that party has incurred in the maintenance of the action." The reimbursement is usually only partial. Costs may be taxed against a non-prevailing party only and may not be taxed against counsel for a party.

**Section 1920 of title 28 lists six categories of items taxable as costs:**

- (1) fees of the clerk and marshal;
- (2) fees for a printed or electronically recorded transcript necessarily obtained for use in the case;
- (3) fees and disbursements for printing and witnesses;
- (4) fees for exemplification and the costs of copies necessarily obtained;
- (5) docket fees under 28 U.S.C. § 1923; and
- (6) compensation of court-appointed experts, interpreters, and special interpretation services. The costs of deposition transcripts are often awarded, either under 28 U.S.C. § 1920 as a "printed or electronically recorded transcript," by local rule, or under the general equitable power of the court. However, word processing expenses incurred in generating legal papers are not taxable as "printing" costs.

10 Collier on Bankruptcy P 7054.05 (16th 2021) [emphasis added and second paragraph reformatted by court to make numbered items more easily readable]. Conspicuously absent from the above statutorily defined costs are "attorney's fees."

In this Motion seeking the court to review the Clerk of the Court not awarding attorney's fees as costs, Defendant states the legal basis and right to such attorney's fees as costs as follows:

Said motion is brought on the grounds that Mr. Akins Jr as the prevailing party is entitled to attorney fees as costs pursuant to Eastern District Local Rules 292, 11 USC §523(d), and that the conduct by Plaintiff and his attorneys of record support an award of fees as costs pursuant to FRCP 54(d); Rule 54 FRBP Rule 7054; and that the Court has the authority to award attorney fees to the prevailing party pursuant to its inherent powers pursuant to 11 USC §105(a) to protect the integrity of the judicial process, that a timely bill of costs was filed with the Court and served on the losing plaintiff herein, and that no timely objection was filed with the clerk pursuant to the local rules. (EDLR 292[c] & 292(f)(11)).

This basis for the Clerk not properly giving Defendant attorney's fees as costs appears to begin with the premise that, "well, I stuck in the pleading, no one objected, so court, close your eyes and just sign whatever I put in front of you." As we know from *United Student Aid Funds, Inc. v. Espinosa*, 553 F. 3d 1193 (2010), the Supreme Court has clearly stated that while a federal judge is dependent on the parties as to the evidence provided (the judge does not conduct his or her independent factual investigation), it is incumbent on the federal judge to correctly apply the correct law, and not merely "gift" a party something because no opposition was filed. Federal Court is not a "let's see how much we can get away with outside the law" process.

Citation is made to Local District Court Rule 292, which (thought not stated in the Motion) is incorporated into the Local Bankruptcy Rules applicable in this court - Local Bankruptcy Rule 1001-1(c). Interestingly, in Local Bankruptcy Rule 1001-1(c), right after the incorporation of Rule 292, there is incorporation of the separate District Court Local Rule for awards of attorneys fees (which follows the incorporation of the District Court Local Rule for disciplinary proceedings against attorneys):

The following Local Rules of Practice of the United States District Court for the Eastern District of California apply in all bankruptcy cases and proceedings: . . . 184 (Disciplinary Proceedings Against Attorneys), 292 (Costs), and 293 (Awards of Attorneys' Fees).

L.B.R. 1001-1(c). Having expressly cited Local District Rule 292, Defendant and Defendant's counsel demonstrating that they had actual knowledge of the Rule when filing the costs will with \$275,000 of undocumented "Other Costs" that they now disclose are attorney's fees. With respect to costs recoverable thereunder, Local District Court Rule 292(h) expressly provides:

(f) Items Taxable. Items taxable as costs include the following:

(1) Clerk's fees (28 U.S.C. §§ 1914, 1920(1));

(2) Marshal's fees and fees for service by a person other than the Marshal under Fed. R. Civ. P. 4 to the extent they do not exceed the amount allowable for the same service by the Marshal (28 U.S.C. §§ 1920(1), 1921);

(3) Court reporter's fees (28 U.S.C. § 1920(2));

- (4) Docket fees (28 U.S.C. §§ 1920(5), 1923);
- (5) Fees for exemplification and copies of papers necessarily obtained for use in the action (28 U.S.C. § 1920(4));
- (6) Fees to masters, receivers, and commissioners (Fed. R. Civ. P. 53(a));
- (7) Premiums on undertaking bonds or security required by law or by order of the Court or necessarily incurred by a party to secure a right accorded in the action;
- (8) Per diem, mileage and subsistence for witnesses (28 U.S.C. § 1821);
- (9) Compensation of Court-appointed experts, compensation for interpreters, and salaries, fees, expenses, and costs of special interpretation services (28 U.S.C. §§ 1828, 1920(6));
- (10) Costs on appeal taxable in the District Court pursuant to Fed. R. App. P. 39(e); and
- (11) Other items allowed by any statute or rule or by the Court in the interest of justice.

No provision is made for giving attorney's fees as costs is made in this Local Rule of the District Court.

The Motion does state that a statutory basis for attorney's fees asserted in 11 U.S.C. § 523(d), which states:

- (d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Thus, Congress has provided a statutory basis for the court – the Judge – upon determining that “[t]he position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.” Thus, Congress requires the judge to make two determinations - first that the creditor's position was not substantially justified and then second, that special circumstances do not exist that would make the award unjust. This further shows that Defendant and counsel cannot “sneak” unidentified attorney's fees into a costs bill and generic, unspecified “Other Costs.”

The Clerk of the Court could not allow Defendant attorney's fees as costs, the Clerk of the court followed the law as enacted by Congress, and the Federal Rules (not suggestions) of Civil Procedure and Federal Rules (not suggestions) of Bankruptcy Procedure as enacted by the United States Supreme Court.

The Clerk of the Court not including the undisclosed, unidentified attorney's fees hidden in



the costs bill is not an adjudication by the court disallowing attorney's fees.

### **Motion for Attorney's Fees**

On January 14, 2022, Defendant filed a Motion for Attorney's Fees as permitted pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054. The Statutory basis for the fees is 11 U.S.C. § 523(d). Additionally, Defendant seeks to have the court "sanction" Plaintiff to "protect the integrity of the judicial process" exercising the court's inherent powers pursuant to 11 U.S.C. § 105(a). Motion for Attorney's Fees, p. 2:4-5; dckt. 260.

The court will address whether the award of fees for Defendant in this Adversary Proceeding is proper in ruling on the Motion for Allowance of Attorney's Fees filed by Defendant. Dckt. 260; DCN: RLF-20.

The court issued an Order for Supplemental Pleadings regarding Motion For Attorney's Fees in this Adversary Proceeding on February 3, 2022. Dckt. 292. The Order states Defendant did not state grounds with particularity the grounds for such fees in that Motion and orders Defendant to file supplemental pleadings on or before February 14, 2022. Additionally, the hearing on the Motion for Attorney's Fees is continued from March 3, 2022, to 11:00 a.m. on March 17, 2022.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Review of Clerk's Denial of Costs and Award of Prevailing Party Attorney's Fees filed by Joseph H. Akins, Jr., Defendant, in this Adversary Proceeding and prevailing party on appeal having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.

**IT IS ORDERED** that the Motion is denied without prejudice, Defendant having filed a separate Motion for Allowance of Attorney's Fees pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054. The prior Costs Bill issued by the Clerk of the Court properly did not include the \$275,000 of unidentified, not documented, nonspecific, not itemized "Other Costs," which have now been identified as attorney's fees sought to be awarded and not costs. The Clerk of the Court not including the unidentified, not documented, nonspecific, not itemized attorney's fees listed as "Other Costs" of \$275,000 is not an adjudication of whether such fees may be properly be awarded, the authority for awarding such fees being that of the court, which will be done pursuant to the Motion for Attorney's Fees (DCN:RLF-20).

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on January 18, 2022. By the court's calculation, 44 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Prevailing Party Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

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| <b>The hearing on the Motion for Prevailing Party Fees is continued to xxxxxxxxx.</b> |
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Attorneys for Plaintiff, Cindy Lee Hill and Michael J. Harrington, ("Movants") filed this Motion seeking prevailing party fees in the amount of \$448,640.00, citing California Labor Code §§ 218.5, 226, 1194(a), 1194.3, and California Code of Civil Procedure §§ 1021.5, 685.040, 685.080 as the statutory basis for Plaintiff being awarded attorney's fees as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.. Additionally, Movants are seeking costs in the amount of \$1,422.82. <sup>FN.1.</sup>

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FN. 1. The Plaintiff, as the prevailing party, does not seek the award of attorney's fee pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054. Rather, Plaintiff's attorneys (who are not the prevailing party) seek to assert an independent, personal right to personally recover from Defendants attorney's fees.

In District Court Local Rule 293, which is incorporated into the Local Bankruptcy Rule 1001-1, the moving party must be the "prevailing party." ED Cal Local Rule 293)b)(1), (2). The Movants are

not prevailing parties. Looking at the various state statutory provisions, they provide for the “prevailing party” to be awarded attorneys. These provisions include (emphasis added):

Cal Labor Code § 281.5(a): “[t]he court shall award reasonable attorney’s fees and costs **to the prevailing party** if any party to the action requests attorney’s fees and costs upon the initiation of the action.”

Cal Labor Code § 226(e)(1): “(1) An employee suffering injury . . . is entitled to an award of costs and reasonable attorney’s fees.”

Cal Labor Code § 1194(a): “[a]ny employee receiving less than the legal minium wage or legal overtime compensation . . . is entitled to recover in a civil action . . . reasonable attorney’s fees, and costs of suit.”

Cal Labor Code § 1194.3: “An employee may recover attorney’s fees and costs incurred to enforce a court judgment for unpaid wages due pursuant to this code.”

None give the attorney for an employee an independent right to be paid attorney’s fees by the losing party, bypassing the real prevailing party in the litigation.

The fourteen day period for the prevailing party Plaintiff to seek the award of attorney’s fees expired on January 17, 2022, the fourteenth day after the January 3, 2022 docketing of the judgment in this Adversary Proceeding. The prevailing party Plaintiff has not filed a motion for award of attorney’s fees.

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Movants further request the total amount of \$450,062.75 to be consider nondischargeable under 11 U.S.C. § 523(a)(6) and request authority to amend the state court judgment to include those fees and costs and interest from entry of judgment.

Movants state with particularity (FED. R. BANKR. P. 9011) the following grounds in support of the Motion:

1. Movants have represented Creditor throughout the bankruptcy case.
2. Movant Hill’s contingency rate is \$550.00 per hour and Movant Harrington’s rate is \$600.00 per hour.
3. The present application is for fees incurred after the fees included in the state court application:
  - a. From February 19, 2019 to present for Movant Hill.
  - b. From Debtor’s Petition was filed (April 28, 2019) to present for Movant Harrington.
4. The adversary proceeding was commenced on December 22, 2019.

5. On January 3, 2022, the court entered judgment finding the underlying cost for enforcing the judgment was nondischargeable pursuant to 11 U.S.C. § 523(a)(6).
6. Movant Harrington has billed 466.58 hours and Movant Hill has billed 306.8 hours for the following activities:
  - a. Negotiations to resolve the dispute between the dismissal and new filing.
  - b. Preparation of State Court application for fees.
  - c. Review of the new bankruptcy case.
  - d. Preparing applications for discovery for plan objections and prior to filing of Creditor's adversary.
  - e. Reviewing and opposing Debtor's Motion to Extend Stay.
  - f. Filing a Motion for Determination of the Effect of the Stay and for Relief from Stay to pursue the attorney's fee award.
  - g. Filing an emergency request to halt Debtor's closure of their businesses, conversion to a Chapter 11 and discussions with Chapter 7 Trustee.
  - h. Preparing and filing the Adversary Action, prosecuting the Adversary Action, and Trial Preparation.
  - i. Meeting with Trustee to facilitate collections for the estate.
  - j. Reviewing various motions in the underlying bankruptcy case.

Movants filed a Memorandum of Points and Authorities (Dckt. 87), Declarations of Movant Hill (Dckt. 88), Creditor (Dckt. 89), and Movant Harrington (Dckt. 92), Exhibits of Movants' Billing Statements (Dckt. 90), and Request for Judicial Notice of various State and Bankruptcy Court documents (Dckt. 91) in support of this Motion.

### **Defendants' Opposition**

Defendants filed an opposition on February 17, 2022 (Dckt. 108) stating:

1. The Motion is based on services not applicable to the trial.
2. The Motion seeks unreasonable fees because the billing is both for the bankruptcy counsel and the civil counsel, who was a witness at trial.
3. The trial concluded in less than twenty hours, and therefore, 773.20

hours is not reasonable for time billed by Movants.

4. In Movants' task billing report (Dckt. 90), Movants hours for "ADV" equal 224.7 hours and ADV FEE equals 19.8 hours.
5. Movants billable rate is not reasonable as Defendant's Counsel's approved rate is \$450.00 for litigation and Counsel has had more than twenty years of bankruptcy experience.
6. Movants are "double billing."
7. The billing statements include sums included in Amended Proof of Claim 3-5 for 160.1 hours from August 27, 2018 through February 14, 2019.

### **Movants' Response**

On February 24, 2022, Movants filed a response stating:

1. Defendants provide no declarations or third party evidence that the hourly rates are not reasonable. Movants have 36 and 33 years of practice, while Defendants' Counsel has 20 years of experience. Therefore, the fees requested are within the prevailing rates.
2. Defendants provide no support that Movants are only entitled to fees regarding this adversary.
3. The application is for fees incurred from February 19, 2019 to present for Movant Hill and after Debtor's petition to present for Movant Harrington. None of this was included in the state court motion in June 2019.
4. Movant Harrington was not only a witness, but also "second chair" in the case.
5. Defendants' tactics increased the amount of attorney time needed to collect the debt owed to Creditor and therefore the fees requested are not disproportionately high.
6. Movants' time records are adequate as provided in the extensive billing entries in the exhibits to the motion.
7. Defendants have failed to provide evidence to contradict the evidence filed by Movants regarding lodestar.

### **STATUTORY BASIS FOR ATTORNEY'S FEES**

The court may allow costs to the prevailing party except when a statute of the United States

or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank P.* 7054(b)(1). Federal Rules of Civil Procedure Rule 54(d)(2)(A)-(C) and (E) applies in adversary proceedings, except for the reference in Rule 54(d)(2)(C) to Rule 78. *Fed. R. Bank P.* 7054(b)(2)(A).

Federal Rules of Civil Procedure 54(d)(2)(B)(ii) governs motions for attorney's fees. *Collier on Bankruptcy* discusses the requirements for prevailing party attorney's fees:

Civil Rule 54(d)(2)(B)(ii) requires the motion to specify the judgment, as well as any statute, rule, or other grounds that would entitle the movant to the award. This conforms to the standard in the United States, known as the 'American Rule' that individual attorney's fees are, without a statute, contract, or special circumstances stating otherwise, the responsibility of the litigants who hire those attorneys.

10 *Collier on Bankruptcy* P 7054.06 (16th 2021).

A plaintiff must be a prevailing party to recover attorney's fees. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. *Id.* Moreover, a prevailing party need not achieve all of the relief claimed, but merely some of the benefit the parties sought in bringing the suit. *Park, ex rel. Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1035 (9<sup>th</sup> Cir. 2006). Additionally, this generous formulation brings the plaintiff only across the statutory threshold and remains for the district court to determine what fee is "reasonable." *Hensley*, 461 U.S. at 433.

In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9<sup>th</sup> Cir. 1996), amended, 108 F.3d 981 (9<sup>th</sup> Cir. 1997). Additionally, California courts use the lodestar method. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1133-36 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977).

"The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An attorney's fee award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9<sup>th</sup> Cir. 1988).

The lodestar method may be adjusted based on factors including "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." *Ketchum*, 24 Cal. 4th at 1132.

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9<sup>th</sup> Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*,

987 F.2d 1392, 1398 (9<sup>th</sup> Cir. 1992). Having this discretion is appropriate “in view of the [court’s] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.” *Hensley*, 461 U.S. at 437.

A trial court can reduce attorney’s fees when a plaintiff achieves limited success. *Save Our Uniquely Rural Cmty. Env’t v. Cty. of San Bernardino*, 235 Cal. App. 4th 1179, 1185 (2015). “Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.” *Hensley v. Eckerhart*, 461 U.S. at 440. Where a plaintiff achieved limited success, the district court awards fees that are reasonable to the results obtained. *Id.* The *Hensley* court adopted the following which California courts follow:

Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney’s fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

*Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S. Ct. 1933, 1943 (1983); *See also Chavez v. City of Los Angeles*, 47 Cal. 4th 970, 989 (2010) (“If a plaintiff has prevailed on some claims but not others, fees are not awarded for time spent litigating claims unrelated to the successful claims, and the trial court ‘should award only that amount of fees that is reasonable in relation to the results obtained.’” (quoting *Hensley* 461 U.S. at 440)). Therefore, if plaintiff fails on one claim that is completely distinct from any claims plaintiff prevailed on, the hours expended should be excluded from the final fees awarded. Additionally, if plaintiff achieved limited success on a claim, the district court shall award only a reasonable amount of fees for the time expended.

## **REVIEW OF TASK BILLING ANALYSIS**

Attorney Hill provides her task billing analysis as part of Exhibit 2 (Dckt. 90). This Adversary Proceeding was commenced on December 22, 2019. Based on the court’s initial review of this task billing analysis, the court notes the following:

### **A. Task - Negotiations**

1. There are 11.0 hours of time billed in this category. The legal services were provided during the time period February 15, 2019 through April 2, 2019; which is a period from ten months to eight months before this Adversary Proceeding was commenced.
2. These tasks appear to relate to activities taken in the Defendant-Debtor’s bankruptcy case, not in the prosecution of this Adversary Proceeding.

### **B. Task - Discovery**

1. There are 10.7 hours billed for this category. Discovery Tasks are for a period from March 13, 2019 through July 24, 2019; which is for a period from nine months to five months before this Adversary Proceeding was commenced.
2. These appear to pre-Adversary Proceeding discovery which was conducted in the bankruptcy case of Defendant-Debtor. It appears that these tasks include either mailing or e-filing documents, which clerical services are sought to be billed at experienced attorney fee rates.

C. Task - Fee Application

1. There are 6.8 hours billed for this category. The Fee Application legal services are for the period February 27, 2019 through April 26, 2019; which is for a period from ten months to eight months before this Adversary Proceeding was commenced.
2. It is not clear whether this is “fee application work” being done in the bankruptcy case or some other proceeding, neither of which are this Adversary Proceeding.

D. Task - Administration

1. There are 52.25 hours billed for this category. The Fee Application legal services are for the period from April 2019 through January 12, 2022; which is for a period from ten months before this Adversary Proceeding was commenced and then continuing for twenty-four months after the Adversary proceeding was filed.
2. It is clear that most of the legal services relate to litigation in the bankruptcy case itself, not this Adversary Proceeding. These tasks include:
  - a. Extension of 11 U.S.C. § 727 objection to discharge deadline.
  - b. Opposition to Motion to Sell Property in the bankruptcy case.
  - c. Motion to Abandon.
  - d. Motion to Withdraw.
  - e. Motion to Retain Jurisdiction over probate funds.

As such experienced attorneys know, various motions and proceeding in a bankruptcy case are separate Contested Matters (Fed. R. Bank. P. 9014, 9013) themselves, in which prevailing parties for the Contested Matters may request the award of attorney’s fees and costs as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054, which are incorporated into the Contested Matter practice in Federal Rule of Bankruptcy Procedure 9014(c).



E. Task - Debtor's Motion to Extend Stay

1. There are 14.8 hours billed for this category. The Fee Application legal services are for the period from May 8, 2019 through June 13, 2019; which is for a period from ten months before to six months before this Adversary Proceeding was commenced.
2. These fees relate to a Contested Matter in the Bankruptcy Case filed by Debtor.

F. Task - Objection to Plan

1. There are 8.0 hours billed for this category. The Fee Application legal services are for the period from May 10, 2019 through July 2, 2019; which is for a period from ten months before to five months before this Adversary Proceeding was commenced.
2. These fees relate to a Contested Matter in the Bankruptcy Case filed by Debtor.

G. Task - Relief From Stay

1. There are 3.6 hours billed for this category. The Fee Application legal services are for the period from June 5, 2019 through June 25, 2019; which is for a period six months before this Adversary Proceeding was commenced.
2. These fees relate to a Contested Matter in the Bankruptcy Case filed by Debtor.

H. Task - Motion to Convert

1. There are 12.4 hours billed for this category. The Fee Application legal services are for the period from June 19, 2019 through August 13, 2019; which is for a period from six months before to four months before this Adversary Proceeding was commenced.
2. These fees relate to a Contested Matter in the Bankruptcy Case filed by Debtor.

I. Task - Adversary Proceeding

1. There are 168.3 hours billed for this category. The Fee Application legal services are for the period from December 17, 2019 through January 3, 2022 (there appearing to be a clerical error in the year for the last entry).
2. The hours for these services total 168.3, which when multiplied by the contingent fee hourly rate of \$550 totals \$92,565.00 in fees. This represents

54.8% of the total fees of \$168,740.

J. Task - Adversary Fee Application

1. There are 10.55 hours billed for this category. The Fee Application legal services are for the period December 23, 2021, through January 14, 2022.
2. These fees relate to the post-judgment Motion for fees and costs in this Adversary Proceeding requested pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

K. Task - Objection to Claim

1. There are 10.6 hours billed for this category. The Fee Application legal services are for the period from November 19, 2019 through December 8, 2021; which is for a period one month before to twenty-four months after this Adversary Proceeding was commenced.
2. These fees relate to a Contested Matter in the Bankruptcy Case filed by Debtor.

Attorney Harrington provides his task billing analysis as part of Exhibit 1 (Dckt. 90). This Adversary Proceeding was commenced on December 22, 2019. Based on the court's initial review of this task billing analysis, the court notes the following:

A. Task - Administration

1. There are 174 hours of time billed in this category. The legal services were provided during the time period August 5, 2019 through January 16, 2022; which is a period from five months before and thirteen months after this Adversary Proceeding was commenced.
2. The vast majority of these tasks appear to relate to the Defendant-Debtor's bankruptcy case and Contested Matters litigated therein, not this Adversary Proceeding.

B. Task - Adversary Proceeding

1. There are 234 hours of time billed in this category. The legal services were provided during the time period December 20, 2019 through January 16, 2022, 2019; which is a period from five months before and thirteen months after this Adversary Proceeding was commenced.
2. The hours for these services total 234, which when multiplied by the continent fee hourly rate of \$600 totals \$140,400 in fees. This represents 50.1% of the total fees of \$279,900.

C. Task - Adversary Proceeding Fees

1. There are 19.8 hours of time billed in this category. The legal services were provided during the time period December 22, 2021 through January 18, 2022.
2. For preparation of a prevailing party fee application, this represents fees of \$11,880.

D. Task - Claim Objection

1. There are 12.8 hours of time billed in this category. The legal services were provided during the time period November 10, 2021 through December 10, 2021.

E. Task - Conversion of Bankruptcy Case

1. There are 1.4 hours of time billed in this category. The Fee Application legal services are for the period from August 7, 2019 through September 10, 2021; which is for a period five months to four months before this Adversary Proceeding was commenced.
2. These fees relate to a Contested Matter in the Bankruptcy Case filed by Debtor.

F. Task - Discovery

1. There are 23.6 hours of time billed in this category. The Fee Application legal services are for the period from August 27, 2019 through January 15, 2020; which is for a period five months before thirteen months after this Adversary Proceeding was commenced.
2. These fees relate to the Bankruptcy Case filed by Debtor.

It appears that around half of the legal fees sought to be awarded as prevailing party attorney's fees in this Adversary Proceeding are for litigation outside of this Adversary Proceeding. Motion and authorities do not state a basis for this court awarding prevailing party attorney's fees in this Adversary Proceeding for attorney's fees not relating to this Adversary Proceeding.

The counsel can address in the supplemental pleadings the legal basis for such request for this court to authorize award attorney's fees and costs pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054 for legal work done in the bankruptcy case, multiple contested matters, and other non-Adversary Proceeding proceedings, and how it is based on a good faith belief after research that existing law, or extension or modification of existing law.

## **DISCUSSION**

Here, Movants argue they are entitled to attorney's fees under California Labor Code §§ 218.5, 226, 1194(a), 1194.3 and California Code of Civil Procedure §§ 1021.5, 685.040, 685.080. These

statutory provisions allow for fee shifting in favor of the prevailing party on a claim for unpaid wages.

Upon review of Movants' application, Movant Hill is requesting all fees from February 19, 2019 to present and Movant Harrington is requesting all fees from when Debtor's Petition was filed (April 28, 2019) to present. Movants' Motion requests fees for the following: Negotiations to resolve the dispute between the previous Chapter 13 dismissal and new Chapter 7 filing; preparing a State Court application for fees; reviewing the new bankruptcy case; preparing applications for discovery for plan objections; reviewing and opposing Debtor's Motion to Extend Stay; filing a Motion for Determination of the Effect of the Stay and for Relief from Stay to pursue the attorney's fee award; filing an emergency request to halt Debtor's closure of their businesses, conversion to a Chapter 11 and discussions with Chapter 7 Trustee; preparing and filing the Adversary Action, prosecuting the Adversary Action, and Trial Preparation; meeting with Trustee to facilitate collections for the estate; and reviewing various motions in the underlying bankruptcy case. Further, Movants' task billing analysis evidences fees for the following categories: Negotiations, Discovery, Fees Application, Administration, Motion to Extend Stay, Objection to Plan, Relief from Stay, Motion to Convert, Adversary, Objection to Claim, and Adversary Fee Application. Task Billing Reports, Exhibits 1 and 2, Dckt. 90.

Movants provide the court with a dump of evidence, most of which goes well beyond the scope of this adversary proceeding. In fact, some fees requested do not even arise from matters in this court, as evidenced by Movants' request for fees arising from preparing a state court application for fees. Movants are grossly misguided by law governing prevailing party's attorney's fees under Federal Rules of Civil Procedure 54 as incorporated into Federal Rules of Bankruptcy Procedure 7054. Movants believe they are entitled to everything under the sun, including fees not only in this adversary, but also those incurred from time spent on the underlying Ventura bankruptcy case and all associated matters. Movants' Motion mimics that of a trustee's counsel, who request fees for all services provided for the bankruptcy case under 11 U.S.C. § 330. Prevailing party fees are not the same. As detailed above, prevailing party fees are that of which an attorney reasonably expended on *litigation*, not the entirety of the bankruptcy case and associated matters.

Additionally, Movants vehemently litigated under 11 U.S.C. § 362(a)(2). Upon review of the complaint, there were six causes of actions, five of which argued 11 U.S.C. § 523(a)(2) and § 523(a)(4). Dckt. 1. Only the fifth cause of action, paragraphs 42-44 of the Complaint, mentioned 11 U.S.C. § 523(a)(6). *Id.* Movants' trial briefs also focus primarily on nondischargability due to Defendants' "fraudulent conduct." See Creditor's Trial Brief, Dckt. 46; Creditor's Post-Trial Brief, Dckt. 71.

Upon review of the transcript from trial, Movant Hill stated Defendants' actions were "clearly fraudulent, and it meets the requirements of § 523(a)(2) and potentially § 523(a)(6)." Trial Transcript Dckt. 98 at 42:13-14. After a scan of the trial transcript, fraud was mentioned at least thirty-six times by Movants, Defendants' Counsel, and the court. Trial Transcripts Dckts. 66 and 98. Willful and malicious conduct, however, was mentioned only once, and by Defendants' Counsel. See Trial Transcript, Dckt. 98 at 60:2-1. 11 U.S.C. § 362(a)(6) was presented to the court as an afterthought, a secondary request for relief that Movants used to bolster their fraud claim. However, 11 U.S.C. § 362(a)(6) is the only claim for relief Movants successfully prevailed on.

11 U.S.C. § 362(a)(2) and (a)(6) are two distinct causes of action. It is unclear whether under *Hensley* and *Chavez* fees should be awarded for time spent litigating 11 U.S.C. § 362(a)(2). Although some fees may relate to both 11 U.S.C. § 362(a)(2) and (a)(6), the court is not persuaded that Movants are entitled to all fees requested, when it is clear far more time and resources was spent litigating the

unsuccessful 11 U.S.C. § 362(a)(2) claim.

Before awarding prevailing party attorney's fees, the court allows parties to submit supplemental pleadings to clearly inform the court the extent of which Movants' requested fees relate to Movants' 11 U.S.C. § 362(a)(6) claim. Absent this information, the court cannot determine which fees requested, from the forty-eight (48) pages of task billing exhibits, are "reasonable" under lodestar.

### **Additional "Curious" Request by Counsel**

In the prayer at the end of the Motion, the two attorney's requesting that the court award them (not the prevailing party) attorney's fees add the following:

[a]nd authority to amend the state court judgment to include those fees and costs, and interest thereon from the entry of the judgment.

Motion, p. 6:7-8. No legal authority is provided for a federal judge awarding prevailing party attorney's fees pursuant to Federal Rule of Civil Procedure 54 to then further order that the federal judges determination shall be implanted into other, existing state court judgments. This court is awarding fees and costs as part of this federal judgment, which the prevailing party Plaintiff can enforce as a federal judgment.

The counsel can address in the supplemental pleadings the legal basis for such request for this court to authorize the amendment of a state court judgment, and how it is based on a good faith belief after research that existing law, or extension or modification of existing law.

At the hearing, **XXXXXXXXXX**

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Prevailing Party Fees filed by Attorneys for Plaintiff, Cindy Lee Hill and Michael J. Harrington, ("Movants"), in this Adversary Proceeding and prevailing party on appeal having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.

**IT IS ORDERED** that the hearing on the Motion for Prevailing Party Fees is continued to **XXXXXXX** . On or before **XXXXXXX**, 2022, Movants shall file and serve supplemental pleadings and admissible supporting evidence, of the attorney's fees and costs that may be awarded for a prevailing party, as well as their standing to personally as attorneys, and not the prevailing party, to seek an award for attorneys fees and costs. Opposition to the supplemental pleadings and evidence shall be filed and served on or before **XXXXXXX** , 2022; and Replies, if any, filed and served on or before **XXXXXXX** , 2022.

**HOPPER V. NAVY FEDERAL CREDIT  
UNION ET AL**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Attorney for Defendant, Navy Federal Credit Union on January 18, 2022. By the court's calculation, 44 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed \$1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Prevailing Party Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

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| <p><b>The Motion for Prevailing Party Fees is denied.</b></p> |
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J. Michael Hopper ("Movant") filed this Motion seeking prevailing party fees in the amount of \$18,013.00 pursuant to Cal. Civ. Code § 1717.

Movant states with particularity (FED. R. BANKR. P. 9011) the following grounds in support of the Motion:

1. Debtor filed a voluntary Chapter 7 petition on October 22, 2019, and Movant is the appointed trustee for Debtor's bankruptcy estate. Movant's discovery requests relating to Navy Federal Credit Union's ("NFCU") lien recorded against one of Debtor's assets make the subject of a dispute between Movant and NFCU. On June 7, 2021, Movant commenced adversary proceeding *Hopper v. Navy Federal Credit Union et al.* to resolve matters in connection with NFCU's lien. Movant

successfully negotiated resolutions of his claims against other defendants in the action, but negotiations with NFCU failed to yield a resolution.

2. On January 3, 2022, the court entered its judgment in favor of the Movant.
3. Cal. Civ. Code § 1717 makes reciprocal an otherwise unilateral contractual obligation to pay attorney's fees. § 1717 applies when: (a) the action in which the fees are incurred is an action "on a contract"; (b) the contract contains a provision stating that attorney's fees incurred to enforce the contract shall be awarded either to one of the parties or to the prevailing party; and (c) the party seeking fees must be the party who prevailed on the contract.
4. Movant requests an order awarding him a total compensation of \$18,013.00 as the prevailing party in *Hopper v. Navy Federal Credit Union et al.*, to be paid by defendant NFCU.

### **BASIS FOR ATTORNEY'S FEES**

In the Motion, Movant cites to California Civil Code § 1717, a substantive state law making contractual attorney's fees provisions reciprocal; which states:

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then **the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees** in addition to other costs.

...

(b)  
(1) **The court**, upon notice and motion by a party, **shall determine** who is **the party prevailing** on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2) [dismissals], the **party prevailing** on the contract **shall be the party who recovered a greater relief in the action** on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

Movant is the party who recovered the greater relief in *Hopper v. Navy Federal Credit Union et al.*

In the Motion, Movant does not cite the court to any contractual provision to be made reciprocal under California Civil Code § 1717. Rather than providing the contractual attorney's fees provision and evidence thereof, Movant dictates to the court the Movant's factual findings and legal conclusion, stating in the Motion:

Here, community liability was predicated on Spouse's liability to NFCU pursuant to the terms of the Line of Credit. These terms included attorney's fees and costs

for contract enforcement as evidenced by NFCU's breakdown of the judgment, which identified \$3696.46 in fees and \$569.90 in costs. In the absence of a statutory entitlement to fees, it may be inferred that the Line of Credit agreement included an attorney's fees provision.

Motion, p. 6:19-23; Dckt. 65. While referencing a Line of Credit Agreement, no attorney's fees provision is stated as being a grounds for the Motion.

No copy of the Line of Credit Agreement is provided by Movant as an exhibit.

### **Computation of Prevailing Party Attorney's Fees**

Unless authorized by statute or provided by contract, attorney's fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), amended, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). An attorney's fee award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

### **DISCUSSION**

Opposition to the Motion has been filed by Navy Federal Credit Union, to which the Movant has filed a Reply.

The first element for § 1717 to apply is that the action in which the fees are incurred must be an action "on a contract." Under California law, an action is "on a contract" when a party seeks to enforce, or avoid enforcement of, the provisions of the contract. *In re Penrod*, 802 F.3d 1084, 1088 (9th Cir. 2015). Here, Movant states that the only possible source of NFCU's asserted right to payment was the contract underlying the Visa line of credit ("Line of Credit") that Ms. Almeida ("Spouse") maintained through and after her separation from Debtor. Dckt. 65 at 6:8-9. Movant contends that the Court's analysis of the liability of the community estate for the Line of Credit necessarily had to look beyond NFCU's abstract based on the judgment NFCU received from its state court action against Spouse. *Id.* at 6:11. Movant concludes that in resolving the question of whether Debtor and his



bankruptcy estate were wholly liable for the post-separation debt Spouse accrued, the court decided the action based on the underlying contract between NFCU and Spouse. *Id.* at 6:15-17.

NFCU counters that its action on the contract was a previous action filed in state court against Spouse which resulted in a judgment. Opposition, Dckt. 70 at 2:4-6. NFCU further points out that in the *Hopper v. Navy Federal Credit Union et al* action, this court did not interpret or make any decisions on any provision in the underlying contract. *Id.* at 2:7-8. Civil minutes deciding the issue presented in the adversary proceeding at issue specifically state that the court's ruling "only determines how the lien has or has not attached to property of the bankruptcy estate." Civil Minutes, Dckt. 57 at 6. Movant did not provide the court with any law that furnishes them the right to attorney's fees based on determining whether a judgment lien encumbers community or separate property.

In a Reply, Movant argues the application of California Civil Code § 1717. Dckt. 72. However, Movant offers nothing with respect to what the alleged contractual attorney's fee provision applies.

The court notes the language used in California Civil Code § 1717 expressly states: "In any action on a contract, **where the contract specifically provides that attorney's fees and costs**, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party[.]" Cal. Civ. Code § 1717, subd. (a) (emphasis added). Movant has not provided any documentation of the underlying contract, much less any documentation of the underlying contract's provision which specifically provides for attorney's fees and costs to the prevailing party.

The only documentation Movant has provided in support of their Motion is a copy of Movant's special counsel's billing records. See Exhibit A, Dckt. 68. For the court to make a judgment on whether to award attorney's fees and costs pursuant to a contract, Movant must provide proof of such a provision within the underlying contract. Here, Movant has not done so and the court may not render a favorable judgment to Movant without examining proof that the underlying contract specifically provides for prevailing party's attorney's fees and costs.

### **Abstract of Judgment**

NFCU cites *Bos v. Bd. of Trs.*, 818 F.3d 486 (9th Cir. 2016) arguing against Movant's contention that Movant was the prevailing party in an action on Spouse's underlying credit card contract. Opposition, Dckt. 70. The adversary proceeding in *Bos* "arose entirely under the federal Bankruptcy Code, and in no way required the bankruptcy court to determine whether or to what extent the Trust Agreements or the Note were enforceable against Bos, or whether Bos had violated their terms." *Bos*, 818 F.3d at 490.

What we do not know is what the contractual attorney's fees provision provides, possible "litigation of any issues concerning the amount or right to enforce this obligation in any bankruptcy court proceeding." The complaint is in the nature of a quiet title action, concerning the enforceability of judgment liens.

While telling the court there is some contractual provision, no evidence of such contractual provision has been provided. Movant has not carried his burden of proof on a key element to the right to recover attorney's fees - there being a contractual right to attorney's fees not having been shown.

The court having determined that Movant has not met their burden for prevailing party attorney's fees, this Motion is denied without prejudice

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Prevailing Party Fees filed by the Plaintiff/Chapter 7 Trustee, J. Michael Hopper ("Movant"), in this Adversary Proceeding and prevailing party on appeal having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.

**IT IS ORDERED** that the Motion is denied.