UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

May 12, 2022 at 11:00 a.m.

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1. **19-26574-E-7** **SEAN ALMEIDA**
21-2041 **DNL-4**

HOPPER V. NAVY FEDERAL CREDIT

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF DESMOND, NOLAN, LIVAICH & CUNNINGHAM PLAINTIFFS ATTORNEY(S)
1-18-22 [65]

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.

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.

The Motion for Prevailing Party Fees is dismissed.

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. Civ. P. 7(b), Fed. R. Bankr. P. 7007) the following grounds upon which the requested relief is based in 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

May 12, 2022 Hearing

At an earlier hearing on May 12, 2022, the court approved the settlement between Plaintiff Trustee and Defendant. Under the terms of the Settlement, the Plaintiff-Trustee dismisses this Motion for Attorney's Fees with 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 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 for Prevailing Party Fees is dismissed with prejudice.

2. **22-90128-E-12 RHS-1** **JEA2, LLC**

EXPEDITED INITIAL STATUS CONFERENCE RE: VOLUNTARY PETITION
4-19-22 [1]

Debtor's Atty: Stephen M. Reynolds

Notes:
Set by order of the court filed 4/27/22 [Dckt 10]. Jeffery Arambel, the Responsible Representative for Debtor in Possession JEA2, LLC, and Stephen Reynolds, the bankruptcy attorney of record for JEA2, LLC, to appear in person - No Telephonic Appearances Permitted.

MAY 12, 2022 EXPEDITED INITIAL STATUS CONFERENCE

On May 6, 2022, Focus Management Group, USA, Inc., the Plan Administrator under the confirmed Chapter 11 Plan in the Jeffery Arambel bankruptcy case and the fiduciary for the Estate in that case, filed a Statement in this case. Dckt. 17. Focus Management Group, USA, Inc. reports that when the Mr. Arambel signed the Bankruptcy Petition for JEA2, LLC on February 9, 2022, all interests in the Debtor were property of the Estate in the Arambel case. Additionally, the Plan Administrator reports that Mr. Arambel did not communicate with the Plan Administrator about the filing of a bankruptcy case for JEA2, LLC, the Debtor, and that the Plan Administrator, on behalf of the Estate which held all interests in Debtor, did not authorize such filing.

The Plan Administrator further reports that on February 15, 2022, the court entered an order in the Arambel bankruptcy case abandoning the interests in Debtor from the Arambel Estate to Jeffery Arambel. 18-90029; Order, Dckt. 1648. Therefore, as of the filing of the Bankruptcy Case by Mr. Arambel for Debtor, the Arambel Estate no longer held any interest in the Debtor.

At the Expedited Status Conference, counsel for the Debtor in Possession reported **XXXXXXX**

Review of Filing and Related Cases

On April 19, 2022, Jeffery Arambel, who is identified as the managing member of JEA2, LLC (the Debtor), presented a copy of a bankruptcy petition with is name (and copy of a signature) and that of Stephen Reynolds, Esq. (and a copy of a signature) on it, with Mr. Arambel's signature dated February 9, 2022, and Mr. Reynold's signature dated February 17, 2022. The Petition did not have any original signatures. The Clerk of the Court accepted the Petition for filing after Mr. Arambel signed the copy of the Petition, but there are no original signatures for Mr. Reynolds, the identified attorney for Debtor.

This paper Petition was delivered to court for physical filing by Mr. Arambel and not

electronically filed by Mr. Reynolds as required by Local Bankruptcy Rule 5005-1(b).

The Bankruptcy Petition, having the stale signature dates of February 9, 2022, and February 7, 2022, is not accompanied by the other required documents for the filing of a bankruptcy case, and a Notice of Incomplete Filing was issued by the Clerk of the Court. Dckt. 3. The Master Mailing List filed by Debtor lists only two persons:

SBN V Ag I LLC
c/o Christopher O. Rivas Reed Smith LLP
355 S. Grand Ave. Ste 2900
Los Angeles, CA 90071

West Stanislaus Irrigation District
PO Box 37
Sacramento, CA 95837

Dckt. 4.

Mr. Arambel personally and as the responsible representative of an entity he owns has been involved in at least two bankruptcy cases as/for the debtor which are now pending before this court. These cases are:

Jeffery Arambel, Chapter 11 Case 18-90029 ("Arambel Case")

In Mr. Arambel's Chapter 11 case, the Chapter 11 Plan was confirmed on September 15, 2019. 18-90029; Conf. Order, Dckt. 970. Under the terms of the Confirmed Plan, Focus Management Group USA, Inc. was appointed as the Plan Administrator for that Chapter 11 Plan. *Id*.; CH 11 Plan, § 7.3.1, Dckt. 860.

The Plan provides that the Property of the Bankruptcy Estate did not revest in Mr. Arambel, the debtor in Mr. Arambel's Chapter 11 Case, upon confirmation. *Id*.; Plan ¶ 7.2.1. Only upon the court entering a final decree in Mr. Arambel's Chapter 11 case *Id*.; ¶ 7.2.2. No final decree has been entered in Mr. Arambel's Chapter 11 Case.

Focus Management Group, as the Plan Administrator, was given all of the rights and powers of a debtor in possession in connection with Plan assets and administering the Chapter 11 Plan. Specific powers and duties of the Plan Administrator are set forth in § 7.3.3 of the confirmed Chapter 11 Plan. *Id*.

Mr. Arambel's duties and responsibilities as the Reorganizing Debtor are set forth in § 7.4 of the Chapter 11 Plan. *Id*. Much of his duties were to provide information and recommendations to the Plan Administrator. Section 7.4.3. of the Chapter 11 Plan provides for the termination of the duties of the Reorganizing Debtor for cause. *Id*.

On November 23, 2020, the Chapter 11 Plan Administrator filed a Notice of Termination of Duties of Reorganizing Debtor. *Id*., Dckt. 1299. Section 7.4.3 of the Chapter 11 Plan gave such power to terminate Mr. Arambel having duties as the Reorganizing Debtor. On November 23, 2020, the court granted the Motion to Withdraw for Mr. Arambel's counsel who represented him in getting the Chapter 11 Plan confirmed and as the Reorganizing Debtor. *Id*.; Order, Dckt. 1310.

Filbin Land & Cattle Co., Inc., Chapter 11 Case 18-90030 ("FL&C Case")

In the Filbin Land & Cattle Co., Inc., Chapter 11 case, Mr. Arambel was the responsible representative for that debtor in possession. Filbin Land & Cattle Co., Inc, as the debtor in possession was represented by Michael St. James, Esq.

On June 21, 2018, Mr. Arambel, as the Responsible Representative for the debtor in possession and as the fiduciary to the Bankruptcy Estate in the FL&C Case, had a motion to sell property free and clear of liens filed by counsel for that debtor in possession. 18-90030; Motion, Dckt. 194. The Motion sought to sell ten acres of property for $2,700,000.00. The proposed purchaser of the ten acres was identified as Boyett Petroleum. *Id*., Motion ¶ 5.

The Motion to sell caught the opposition of various extended family members of Mr. Arambel and other creditors. *Id*.; Dckts. 231, 267, 287. In reviewing the Motion and contract for the sale of property by the Bankruptcy Estate in the FL&C Case, the court's findings at the first hearing on the Motion include:

> At this point the court makes two observations. The seller purports to be the corporate Debtor, not the Debtor in Possession. At this juncture all of the property at issue is property of the bankruptcy estate in this case. 11 U.S.C. § 541(a). For a Chapter 11 estate, the trustee, or if a trustee is not appointed, the debtor in possession exercising the powers of a trustee has control of all property of the bankruptcy estate. 11 U.S.C. §§ 1106, 1107.
>
> Under the contract, the buyer is not an entity known as Boyett [spelling of name used in Motion] Petroleum (the court cannot find an assignment of the Agreement to "Boyett Petroleum" with the Motion to Sell), but two other entities.
>
> At this juncture, there is no agreement subject to 11 U.S.C. § 363 for the court to approve the sale of property of the bankruptcy estate. The Debtor corporate sell does not have the rights and interests.
>
> . . .
>
> The sale includes personal property including equipment, machinery, supplies, hoses, and other tangible personal property on the real property. Id. ¶ 1.B., at 6. The Agreement says that an Exhibit C to the Agreement identifies the personal property on a bill of sale. Exhibit C is a blank bill of sale with no personal property identified.
>
> . . .
>
> Though not stated with particularity in the Motion, grounds are stated in the Points and Authorities, Dckt. 196. These are:
>
> > With respect to each creditor asserting a lien, claim, encumbrance, or interest, one or more of the standards set forth in sections 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. **Those** holders of liens, claims, encumbrances, or interests **who did not object** or who withdraw their objections

> to the sale or the Motion can be deemed to have consented to the Motion and sale pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of liens, claims, encumbrances, or interests who do object fall within one or more of the other subsections of Bankruptcy Code Section 363(f).
>
> Points and Authorities, p. 6:1-6; Dckt. 196 (emphasis added). No legal authority is cited for the proposition that silence is consent to the loss of the rights in the property.
> . . .
> For purposes of 11 U.S.C. § 363(c)(2) the court merely authorizing the sale because it is not opposed is something different than consent. [discussion of Ninth Circuit case law on what constitutes consent omitted]

Id.; Civil Minutes p. 3. pp. 4-5, Dckt. 236 (emphasis in original).

At the first hearing on the Motion to Sell, Mr. Arambel, as the responsible representative for the debtor in possession and fiduciary of the Bankruptcy Estate in the FL&C Case, disclosed that he dispensed with the hiring of a real estate broker and the commercial marketing of the ten acres to be sold. Rather, he, as the fiduciary of the bankruptcy estate, just took it upon himself (not a Realtor, Broker, or Real Estate Agent) to contact potential purchasers he thought appropriate. The court did not find this consistent with Mr. Arambel's duties and required that a real estate broker be hired and the ten acres be marketed in a commercially reasonable manner. At the first hearing, Mr. Arambel, as the fiduciary of the bankruptcy estate, agreed to hire a real estate professional to market the property of that Bankruptcy Estate. *Id.*; Civil Minutes, p. 8.

A Real Estate Broker was engaged by Mr. Arambel, as the fiduciary to the Bankruptcy Estate in the FL&C Case, and the final hearing on a Motion for sale of the property by the Debtor in Possession (not the corporate Debtor individually), as the fiduciary of the Bankruptcy Estate, conducted on August 30, 2018. As addressed in the Civil Minutes from the August 30, 2018 hearing, after the hiring of the Real Estate Broker and the marketing of the property, robust bidding and overbidding ensued with the court approving three purchasers for the following purchase prices:

> Highest Bid Purchaser.....$8,350,000
> 1st Back Up Purchaser.....$8,300,000
> 2nd Back Up Purchaser.....$8,100,000

Id.; Civil Minutes, p. 14; Dckt. 304. This was a 209% increase above the proposed sales price for the buyer obtained by Mr. Arambel without the assistance of a Real Estate Broker. None of the authorized purchasers agreeing to pay more than $8,000,000.00 for the ten acres were the Boyett [spelling of name in the Purchase and Sale Agreement] Petroleum, the proposed purchaser for $2,700,000.00 initially presented to the court by Mr. Arambel.

Mr. Arambel, as the Responsible Representative for the Debtor in Possession in the FL&C Case, reported on January 10, 2019, that the sale closed for the $8,350,000 sales price. *Id.*; Report of Sale, Dckt. 390.

The Chapter 11 Plan was confirmed in the FL&C Case on March 18, 2019. *Id*.; Order, Dckt. 430.

Property of the Arambel Bankruptcy Estate and Plan Estate

The shares of stock in Filbin Land & Cattle, Co. (which are 100% of the shares of stock) and 100% of the member interest in JEA2, LLC are listed as property of Mr. Arambel when he commenced his Chapter 11 case. 18-90029; Schedule A/B, p. 7-8, Dckt. 96. As provided in Mr. Arambel's confirmed Chapter 11 Plan in his case, "The Reorganizing debtor shall not be revested with the Property of the Estate on the Effective Date of the Plan." *Id*.; CH 11 Plan, ¶ 7.2.1, Dckt. 860. It is only on the entry of the final decree in Mr. Arambel's case that the property of the Arambel Bankruptcy Estate will be revested in Mr. Arambel.

The Voluntary Chapter 12 Petition filed by Mr. Arambel and bankruptcy counsel Stephen Reynolds for JEA2, LLC is signed by Mr. Arambel as the Managing Member. Dckt. 1 at 4. The next page attached to the Petition is the Statement Regarding Authority to Sign and File Petition. It states that Mr. Arambel is the Managing Member of JEA2, LLC, that its in the best interests of JEA2, LLC to commenced a Chapter 12 Bankruptcy case, and

> Be it resolved that Jeffrey Arambel, is authorized, and directed to execute and deliver all documents necessary to perfect the filing of a Chapter 12 bankruptcy case on behalf of [JEA2, LLC]; . . . .

Id., p. 5. From this Statement, who is making the resolution and what third party is authorizing the Managing Member to commence the Chapter 12 bankruptcy case? It appears to be someone other than Mr. Arambel. All of the member interests in JEA2, LLC are property of the Arambel Bankruptcy Estate under the control of the Plan Administrator for the confirmed Chapter 11 Plan in Mr. Arambel's Bankruptcy Case.

In light of the attempt to file a "Petition" that was a photo copy of another document, the attorney's signature on the Petition not being an original "wet" signature, the Petition not being filed electronically by bankruptcy counsel for JEA2, LLC, the copy signatures on the Petition being two months stale, the member interest of JEA2, LLC being in the Bankruptcy Estate for Jeffery Arambel and under the control of the Plan Administrator in Mr. Arambel's Chapter 11 Case, the court set an Expedited Initial Status Conference, ordering Mr. Arambel and counsel for the Debtor in Possession to appear in person. Order, Dckt. 10.

3.	**19-22653-E-7** **19-2157**	**REECE/RODINA VENTURA** **CLH-4**	**CONTINUED MOTION FOR COMPENSATION FOR CINDY LEE HILL AND MICHAEL J. HARRINGTON, PLAINTIFFS ATTORNEY(S)** **1-18-22 [85]**
	VILLANUEVA V. VENTURA ET AL		

APPEARANCES OF MICHAEL J. HARRINGTON, ESQ. AND CINDY LEE HILL, ESQ. REQUIRED FOR THE MAY 12, 2022 HEARING

TELEPHONIC APPEARANCES PERMITTED

(In light of the court not issuing an order sufficiently in advance of the hearing requiring personal appearances by the two attorneys.)

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.

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.

The Motion for Prevailing Party Fees is xxxxxxxxxxxxxxxxxxxxx

MARCH 3, 2022 FIRST HEARING
ON MOTION FOR PREVAILING PARTY ATTORNEY'S FEES AND COSTS

Attorneys for Plaintiff, Cindy Lee Hill and Michael J. Harrington, ("Movants") filed this Motion seeking prevailing party fees in this Adversary Proceeding 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. [Fn.1.]

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.

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. Civ. P. 7(b), Fed. R. Bankr. P. 7007) 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 (9th 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 (9th Cir. 1996), amended, 108 F.3d 981 (9th 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 (9th 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." *Ketchem*, 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 (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.

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 continent 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. This totals $5,802.50.

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 to 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 for this Adversary Proceeding.

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. § 523(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 nondischargeability 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. § 523(a)(6) was argued to the court Movants as an afterthought, a secondary request for relief that Movants used to bolster their fraud claim. However, 11 U.S.C. § 523(a)(6) is the only claim for relief Movants successfully prevailed on.

11 U.S.C. § 523(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. § 523(a)(2). Although some fees may relate to both 11 U.S.C. § 523(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. § 523(a)(2) claim.

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 judge's 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.

Order for Supplemental Briefing on Motion as Filed

Though the court could have stricken much of what Movants' requested (and could have awarded nothing to Movants since they are not the "prevailing party" who is entitled to see prevailing party fees and costs), the court ordered specific supplemental briefing to the Motion as filed.

While not putting in the written tentative ruling that was posted on the website for the world to see, the court recalls at the March 3, 2022 hearing mentioning to the Movants that it appeared that many of the attorney's fees would properly have been asserted in the Complaint (which they were not) as damages caused by the tort of another. The court did this orally out of courtesy to the two Movants, who are Plaintiff's counsel, in light of the failure of Movants to seek such damages as part of the Complaint and failure to present any evidence at trial of such damages. As discussed below, Movants took such courtesy as a license to try and amend the Complaint and seek to litigate such unasserted, evidence absent claims outside of the trial in this Adversary Proceeding.

In providing Movants' with an opportunity to rectify their shortcomings in properly seeking for their client the proper attorney's fees for a prevailing party as provided under applicable Federal and California law, the court was very clear in what supplemental pleading would be allowed, stating in the Order continuing the hearing expressly stating (the court's reformatting the paragraph for illustrative purposes, emphasis added):

On or before March 25, 2022, Movants shall

(1) Movants shall file and serve supplemental pleadings and admissible supporting evidence, of:

(a) the attorney's fees and costs **that may be awarded for a prevailing party**, as well as

(b) their **standing to personally as attorneys**, and not the prevailing party, to **seek an award for attorney's fees and costs.**

(2) Additionally, Movants shall address the **legal basis for ordering that** attorney's fees allowed **pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054** can be ordered to be **made part of a separate state court judgment**; as well as

(3) the **basis for requesting attorney's fees pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054** for legal services not related directly to or incurred in this Adversary Proceeding.

The court specifically limited supplemental evidence to be submitted to be only of the legal fees and costs that may be awarded pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

As to supplemental legal briefing, only to address Movant's standing to request and obtain the attorney's fee award, the demand that such attorney's fees be ordered to be added to the State Court Judgment and how legal fees outside of this Adversary Proceeding could be sought pursuant to Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

That was the limited, focused scope of the court's order and the only supplemental pleadings allowed. As discussed below, Movants (Plaintiff's attorneys) took this as an opportunity to violate the court's order and to try and proceed with new, different post-trial litigation that was required to be done at trial.

SUPPLEMENTAL PLEADING FILED FOR CONTINUED HEARING ON MOTION

MOVANTS' SUPPLEMENTAL PLEADINGS

On March 25, 2022, supplemental pleadings were filed by the Attorneys for Plaintiff. The first supplemental pleading filed is titled:

SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS FEES AND REIMBURSEMENT COSTS POST JUDGMENT AND MOTION TO CONSTRUE THE MOTION AS A MOTION TO AMEND JUDGMENT TO INCLUDE ATTORNEYS FEES AND COSTS EXPENSES TO ENFORCE AND COLLECT MONEY JUDGMENT PURSUANT TO FRBP 9023 incorporating FRCP 59(2)(e), or FRBP 9024, incorporating FRBP 60

Dckt. 1, p. 1 (the "Supplemental Briefing/Motion").

As is clear from the title, the Attorneys (who are the Movants under the current Motion) for Plaintiff have grossly exceeded the focused, specific authorization for filing of supplemental pleadings. Rather, they have taken it upon themselves to dictate what shall be filed in this proceeding before this court.

In addition to violating the court's order, these self-identifying experienced Attorneys have chosen to violate the Local Bankruptcy Rules by cramming a motion into a supplemental brief. As experienced attorneys know, Local Bankruptcy Rules 9004-2(c)(1) and 9014-1(a)(applicable to adversary proceedings),(d), require that motions, briefs, declarations, and exhibits (which may be combined into one exhibit document) must be filed as separate documents. There is not a one, catch-all document pleading permitted.

In the Supplemental Briefing/Motion, it is now stated that "Plaintiff, Benjamin Villanueva, by and through his Attorneys," file the supplemental Brief and Motion. Supp. Brief/Mtn, p. 1:22; Dckt. 117. The Motion filed with the court for attorney's fees has as the movants Plaintiff's two attorneys. No substitution to correct such error has been filed.

Rather than a substitution of the real party in interest, in the Supplemental Briefing/Motion, it is stated:

MOVING PARTY

> With regard to the issue of the Moving party, Plaintiff initially requests the court deem the motion to have been made by Plaintiff, rather than his counsel as moving parties. It was erroneously drafted as a direct motion by his attorneys as it was their fees for which the request was made. Plaintiff previously approved the motion, and thus no prejudice is created by the modification.

Id., p. 2:2-6. While not citing to Federal Rule of Civil Procedure 19 and Federal Rule of Bankruptcy Procedure 7019, it appears that this should be an attempt to join the real party in interest, the Plaintiff, and dismiss the two persons who have no standing and no legal right to seek an award of fees from this court – the Plaintiff's two very experienced, by their own admissions, Attorneys.

The Supplemental Briefing/Motion does not state how a "mistake" in which the attorney forgets who is the client and who is the attorney could occur, and the attorney places him and herself is as the party for whom relief has been awarded. In reviewing the Supplemental Declarations filed by Plaintiff's two Attorneys, Dckts. 119 and 120, neither provide any insight as to what "mistake" occurred.

The court observes that upon reflect on the conduct of Plaintiff's Attorneys in this Adversary Proceeding, it appears that it has demonstrated that it is the Attorneys who view them as the "real parties" to litigate with Defendant-Debtor. The Plaintiff is mere surplusage.

One could well conclude that "cutting out the Plaintiff" was an intentional act and strategy of the two Attorneys to take from Plaintiff his right to recover the reasonable attorneys fees and costs. Additionally, that the Attorneys wanted their own personal judgment against Defendant-Debtor, and then

use that judgement to their advantage ahead of the Plaintiff.

While grounds exist to just deny the Motion for Prevailing Party Attorney's Fees and Costs, the court will not effectively penalize Plaintiff and cause him to lose, based on the conduct of his Attorneys, the reasonable attorney's fees and costs that could be recovered. The court will not visit on Plaintiff having to litigate that issue of loss and damages suffered in another court.

The court dismisses from this Motion for Prevailing Party Attorney's Fees and Costs Michael J. Harrington, Esq., and Cindy Lee Hill, Esq., and each of them, with prejudice, and substitutes in the real party in interest, Plaintiff Benjamin Zamora Villanueva.

SUPPLEMENTAL MATERIALS FOR ATTORNEY'S FEES AND COSTS FOR LITIGATING THE 11 U.S.C. § 523(a)(6) CLAIM

Plaintiff states the final fees incurred in prosecuting the successful 11 U.S.C. § 523(a)(6) portion of the adversary proceeding breaks down to:

Hill & Morris Attorneys at Law - 139.55 hours, $76,752.50

The Law Offices of Michael J. Harrington - 213.8 hours, $128,280.00

Total hours and fees for 11 U.S.C. § 523(a)(6) - **353.35 hours, $205,032.50**

Supplemental Briefing/Motion, p. 3:11-16; Dckt. 117.

Plaintiff further requests this court award additional fees for enforcing the State Court Judgment. These fees are being brought pursuant to California Labor Code §§ 218.5, 226, 1194(a), 1194.3, and California Code of Civil Procedure §§ 1021.5, 685.040, and 685.080. Plaintiff requests additional fees in the amount of:

Hill & Morris Attorneys at Law - 103.40 hours, $56,870.00

The Law Offices of Michael J. Harrington - 212.30 hours, $127,380.00

Total hours and fees for enforcing judgment - **315.70 hours, $184,250.00**

Plaintiff further requests the court construe the Motion as a Motion to Amend the Judgment under Federal Rules of Civil Procedure 59(e), as incorporated in Federal Rules of Bankruptcy Procedure 9023 or under Federal Rules of Civil Procedure 60 as incorporated in Federal Rules of Bankruptcy Procedure 9024 as omitted to inadvertence or excusable neglect because Plaintiff did not understand the court was limiting the fees to the adversary proceeding.

Plaintiff has submitted thirty-six (36) pages of contemporaneous billing statements to support their fee request. Dckt. 121.

Defendant's Opposition

Defendant states amending the Motion to treat it as a Federal Rules of Civil Procedure 23

Motion is improper because it does not meet the standard of inadvertence or excusable neglect. Additionally, Defendant states the amount is excessive and Plaintiff's billing records do not clearly delineate the fees relating to 11 U.S.C. § 523(a)(6), therefore, it cannot be determined whether the fees are reasonable under the Lodestar requirements.

Plaintiff's Reply

Plaintiff filed a reply (Dckt. 126) on April 14, 2022 stating Plaintiff had a clear misunderstanding of the court's ruling relating to how fees would be awarded, which is in line with Federal Rules of Civil Procedure 59 and 60. If the court deems this Motion as a motion to amend the judgment under Federal Rules of Civil Procedure 59, the Motion met the 14-day requirement. However, there is no such requirement under Federal Rules of Civil Procedure 60.

Plaintiff states they have set out the time where the work was performed on 11 U.S.C. § 523(a)(6) and is not requesting fees related to the losing causes of actions.

LEGAL AUTHORITY TO UNILATERALLY AMEND MOTIONS

Plaintiff's Supplemental Briefing/Motion requests the court to construe the Motion as a Motion to Amend Judgment under Federal Rules of Civil Procedure 59(e) as incorporated into Federal Rules of Bankruptcy Procedure 9023 or Federal Rules of Civil Procedure 60 as incorporated in Federal Rules of Bankruptcy Procedure 60. Plaintiff's authorities, arguments, and legal analysis as to why such would be proper consists of:

> Plaintiff's [sic] assert the fees for post petition actions to enforce the judgment are damages that should be non-dischargable, and request the court construe the motion in include a motion to amend the judgment to include these amounts pursuant to FRBP 9023 incorporating FRCP 59(2)(e), or FRBP 9024, incorporating FRBP 60.
> . . .
>
> Plaintiff further requests the court construe the remaining claim for fees for the underlying case as a motion to amend the judgment under FRCP 59(e), applicable through FRBP 9023 or under FRCP 60, incorporated through FRBP 9024 as omitted to to [sic] inadvertence or excusable neglect, as Plaintiff requested the fees, both in their pleadings and at the hearing, but did not understand the court to be limiting the fees to the adversary proceeding.

Supplemental Briefing/Motion, p. 4:6-9, 8:7-12; Dckt. 117.

From reading the Supplemental Briefing/Motion, Plaintiff gives no legal authority for how the court can now construe Plaintiff's original request for Prevailing Party Attorney's Fees as now a Motion for Prevailing Party Attorney's Fees *and* a Motion to Amend under Federal Rules of Civil Procedure 59 and 60. Rather, he merely says, "I want you to, so you do what I ask."

Federal Rules of Civil Procedure 15 as incorporated into Federal Rules of Bankruptcy Procedure 7015 governs amendments for pleadings. Courts have ruled that Plaintiffs are permitted to

amend pleadings to state additional claims and defenses, or drop claims and defenses. *Federal Election Com'n v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996).

However, Federal Rules of Civil Procedure 15(a) is limited to amending "pleadings." Pleadings are defined in Federal Rules of Civil Procedure 7(a) as incorporated into Federal Rules of Bankruptcy Procedure 7007. Under Federal Rules of Civil Procedure 7(a), only the following pleadings are allowed in federal court:

> (1) a complaint;
>
> (2) an answer to a complaint;
>
> (3) an answer to a counterclaim designated as a counterclaim;
>
> (4) an answer to a crossclaim;
>
> (5) a third-party complaint;
>
> (6) an answer to a third-party complaint; and
>
> (7) if the court orders one, a reply to an answer.

Federal Rules of Civil Procedure 7(b) discusses a request for court order, and how that must be made by motion, not pleadings. Rule 7(b) states the motion must: (A) be in writing; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought. Additionally, Rule 7(b) states only pleading rules governing "form," such as captions, also apply to motions. Rule 7(b) is silent to whether rules governing pleading amendments also govern motions.

Moore's Federal Practice discusses whether other papers are considered pleadings. 2 Moore's Federal Practice - Civil § 7.02 (2022). Moore's states, "[n]o other paper will be considered a pleading except those specifically named in Rule 7(a)." *Id.* (citing *Burns v. Lawther*, 53 F.3d 1237, 1241 (11th Cir. 1995) ("[T]he Rules themselves provide a clear and precise meaning of "pleadings" in Rule 7. . . . Under the well-settled doctrine of *inclusio unius*, *exclusio alterius*, the listing of some things implies that all things not included in the list were purposefully excluded.")). Additionally, Moore's confirms a motion **in any form** cannot stand as a pleading. *Id.* (citing *Mellon Bank v. Ternisky*, 999 F.2d 791, 795 (4th Cir. 1993) (stating a motion to dismiss is not a pleading); *In re Zweibon*, 565 F.2d 742, 747, 184 U.S. App. D.C. 167 (D.C. Cir. 1977) ([T]he Rules clearly distinguish between a 'pleading' and a motion . . . .")).

Wright and Miller discuss the effect of Rule 7 on Rule 15, and how clearly distinguishing pleadings from motions in Rule 7 may not permit amending motions under Rule 15.

> Under a literal application of Rule 15(a), therefore, motions are not "pleadings" and the amendment of a motion will not be permitted under subdivision (a). In light of the express but limited incorporation by Rule 7(b)(2) of only certain aspects of the federal rules relating to pleading into motion practice, the conclusion that the reference to pleadings in Rule 15(a) does not include motions seems sound.

§ 1475 Pleadings That May Be Amended Under Rule 15(a), 6 Fed. Prac. & Proc. Civ. § 1475 (3d ed.). However, given the liberal policy of Rule 15, Wright and Miller suggests that "[i]n theory, a motion may be amended at any time before the judge has acted upon the request, although it is particularly inappropriate after briefs have been interposed by the opposing parties, oral arguments have been heard, or other forms of reliance have been built up on the basis of the original motion." § 1194 Amendment of Motions, 5 Fed. Prac. & Proc. Civ. § 1194 (4th ed.) (citing *United States v. Filson*, 347 Fed. Appx. 987, 991 (5th Cir. 2009); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110 (D.D.C. 2018); *Espinoza v. Galardi South Enterprises, Inc.*, 2017 WL 4553451 (S.D. Fla. 2017); *German American Capital Corporation v. Morehouse*, 2017 WL 3411941, *2 (D. Md. 2017); *Hupp v. Switzerland of Ohio Local School Dist.*, 912 F. Supp. 2d 572 (S.D. Ohio 2012)); see also *MacNeil v. Whittemore*, 254 F.2d 820, 821 (2d Cir. 1958) (suggesting a judge has discretion to permit a party to expand grounds of motion well in advance of a hearing)).

Even if the court were to allow for an amendment of the Motion, Plaintiff and his two very experienced attorneys have not given the court the law for such relief. This court, after reviewing the cases cited by Wright and Miller, is not wholly convinced by the liberal construction of Rule 15(a) to apply to Motion practice. Under the plain language of Rule 15(a), amendments apply to pleadings only, which should be limited to those enumerated under Rule 7. As such, motion amendments are not permitted.

There are clear procedures and standards governing motion practice, enumerated in Federal Rules of Civil Procedure 7(b). Allowing parties to amend motions could encourage sloppy motion practice, failing to conform to what is required in Rule 7(b), knowing they can request the court to allow them to amend their motion if needed. The court does not find this supports judicial economy or efficiency, or to promote the practice of law consistent with that in federal court (nor in state court).

Even if this court were convinced by the liberal construction of Rule 15(a), the Motion has been vehemently litigated since filed in January. Defendants filed an opposition to the original Motion in February (Dckt. 108) in which Plaintiff filed a reply to a week later (Dckt. 110). Additionally, the court has already heard oral argument on the original motion, continued the matter, and required Plaintiff to submit a supplemental brief on very specific and limited issues for the Motion as filed by Plaintiff (which originally had Plaintiff's Attorneys as the persons seeking relief from the court). The court did not grant Plaintiff the ability to amend their motion. The court did not grant Plaintiff the right to reopen the trial and did not grant Plaintiff leave to litigate claims that should have been litigated at trial.

The court finds first that Plaintiff has not given the court any legal authority to grant the amendment and vacating relief requested in passing, nor any grounds stated with particularity for granting such relief. It clearly would be grossly prejudicial to Defendant to allow Plaintiff to reopen the litigation, try new claims, present new evidence and then issue what would be a new judgment.

Even if the court found no prejudice, and were inclined to grant the amendment, Federal Rules of Civil Procedure 59(e) provides a 28-day period to file the motion after the entry of judgment.

The "Motion" seeking to amend the Judgment (if the court were to allow a motion to be snuck into the supplemental briefing on specific issues order, amendment was filed on March 25, 2022 (Dckt. 117). The Judgment Plaintiff now seeks to amend was entered on January 3, 2022. Dckt. 80. The "Motion" to amend was filed eighty-one (81) days after the Judgement was entered. This is well outside the twenty-eight (28) day period the Supreme Court authorizes in Federal Rule of Civil

Procedure 59 and Federal Rule of Bankruptcy Procedure 2023.

Plaintiff's own pleadings document that such amendment relief cannot be granted.

ANALYSIS OF FEDERAL LAW RELATING TO AMENDING JUDGMENTS

Though Plaintiff has demonstrated that relief cannot be granted pursuant to Federal Rule of Civil Procedure 59 and Federal Rule of Bankruptcy Procedure 2023 in the "Motion" first filed eighty-one (81) days after the Judgment was entered, the court also considers the actual law and application to what Plaintiff is trying to do with the new "Motion" appended to the Supplemental Briefing filed on March 25, 2022.

Federal Rules of Civil Procedure 59(e)
Altering or Amending a Judgment

The applicable law for altering or amending a federal court judgement is found in Federal Rule of Civil Procedure 59(e), as made applicable in bankruptcy adversary proceeding and cases by Rule 9023. *Monahan-Pac. Constr. Corp. v. Comm. of Unsecured Creditors* (*In re MC2 Capital Partners, LLC*), No. NC-14-1190-PaJuTa, 2015 Bankr. LEXIS 579 (B.A.P. 9th Cir. Fed. 25, 2015). Motions under Civil Rule 59(e) should not be granted unless the trial court "is presented with newly discovered evidence, committed clear error, or if there is an intervening change in controlling law." *Id*.; *See also Kona., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). In addition, this rule gives the court a chance to rectify mistakes on to reconsider matters **properly encompassed in a decision on the merits**. *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (emphasis added). The court **does not address new arguments or evidence** that the moving party could have raised before the decision issued. *Id.* A motion to alter or amend generally may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment. 12 Moore's Federal Practice - Civil § 59.30 (2022).

There are four basic grounds where a court may grant a motion under Rule 59(e): (1) to take into account a change in controlling law; (2) newly discovered evidence; (3) to correct a clear legal error; and (4) to prevent injustice. *Id.* The clear legal error, however, is when the court commits either an error of law or fact. *Id.*

Here, if the court were to simply "construe the remaining claim for fees" as a motion to amend the judgment under Federal Rules of Bankruptcy Procedure 59, as incorporated in Federal Rules of Bankruptcy Procedure 9023, the court would only be able to reconsider matters properly encompassed in the court's existing judgment on the merits. Plaintiff, does not cite to any (1) change in controlling law, (2) newly discovered evidence, (3) to correct a clear legal error by the court, or (4) to prevent injustice. Rather, Plaintiff merely asks that it be done.

The court begins with a review of the Complaint (Dckt. 1), in which the causes of action are for the following:

First cause of action	Nondischargeabilitiy under 11 U.S.C. § 523(a)(2) for intentional and willful misrepresentations regarding

	Plaintiff's employment status to avoid paying taxes, workers compensation, and other employee benefits.
Second cause of action	Nondischargeabilitiy under 11 U.S.C. § 523(a)(4) for intentional misrepresentation to the Plaintiff regarding the standard pay to a caregiver.
Third cause of action	Nondischargeabilitiy under 11 U.S.C. § 523(a)(2) and (4) for intentionally failing to prepare accurate wage statements to underpay Plaintiff.
Fourth cause of action	Nondischargeability under 11 U.S.C. § 523(a)(6) for causing Plaintiff to receive less than entitled to.
Fifth cause of action	Nondischargeability under 11 U.S.C. § 523(a)(2) for inducing Plaintiff to dismiss third party defendants while intending to avoid payment of the settlement.

Not once did Plaintiff allege damages resulting for enforcing the state court judgment. Additionally, Plaintiff never presented evidence throughout the course of trial showing attorney's fees incurred from enforcing the judgment.

What Plaintiff now seeks to do is submit new evidence in the form of exhibits and declarations substantiating their new claim for attorney's fees in the form of damages arising from enforcing the State Court Judgment. There attorney's fees in connection with another proceeding in another court arising from the asserted tort of another, could be damages sought through the Complaint and trial. Not through reopening, trying new claims, introducing new evidence, and effectively get a second judgment to go with the existing final judgment.

Tort of another damages were addressed by the California Supreme Court in Prentice v. North American Title Guaranty Corp, 59 Cal. 2d 618, 621 (1963) stating:

> The section [Cal. C.C.P. § 1021 requiring that there either be a contractual or statutory obligation to pay attorney's fees] is not applicable to cases where a defendant has wrongfully made it necessary for a plaintiff to sue a third person. (*Stevens v. Chisholm, supra; Nelson v. Kellogg, supra*; *Contra Costa County Title Co. v. Waloff, supra; Peebler v. Olds*, 71 Cal.App.2d 382, 389.) In this case we are not dealing with "the measure and mode of compensation of attorneys" but with damages wrongfully caused by defendant's improper actions.
>
> When a paid escrow holder has, as in this case, negligently made it necessary for the vendor of land to file a quiet title action against a third person, attorney's fees incurred by the vendor in prosecuting such action are recoverable as an item of the vendor's damages in an action against the escrow holder.

This Doctrine would not appear to apply to the attorney's fees incurred outside of this Adversary Proceeding as all of the attorney's fees are in litigating with Defendant-Debtor and not third parties.

Plaintiff also asserts the right to recover his attorney's fees as damages incurred in various proceedings, actions, and events based on the state statutes, without regard to them not being incurred in connection with the litigation before the court. Rather, Plaintiff argues that he has damages in the form of fees and costs which he has incurred in other proceedings that he now seeks to reduce to judgment. Plaintiff did not seek those in the Complaint and did not provide evidence thereof at trial.

As the Supreme Court has stated in *Banister*, the court does not address new arguments or evidence that Plaintiff could have raised prior to the judgment. *Banister*, 140 S. Ct. at 1703. The court, therefore, cannot decide on this new evidence to support a new claim of damages.

Additionally, Plaintiff has not alleged any clear legal error the court has made. Rather, they state Plaintiff did not understand the court to limit fees to the adversary.

In her Supplemental Declaration, Cindy Lee Hill, Esq., one of Plaintiff's two Attorneys, states:

> At the hearing in which this court announced its judgment, we requested that the court allow Mr. Villanueva to request his attorneys fees "since the last fee application in 2019." The court indicated it would hear the fee application so that the court would weigh in on what happened before it. (Transcript of 12/24/2021 hearing page 34 In 18 to 35 pg 4).

Declaration, ¶ 6; Dckt. 120.

The Transcript of the court's Ruling on the Record on December 14, 2021, is found at Docket # 100 in this Adversary Proceeding. The discussion with the court paraphrased in the Declaration is:

> MS. LEE HILL: Yes, Your Honor. We had requested a reservation regarding the fees incurred since the last fee application in 2019. Would we be able to be referred back to state court to get additional fees for services since that time, and would those also be nondischargeable?
>
> THE COURT: I have my standard order. To the extent that the plaintiff believes there's attorneys' fees, costs, and expenses that relate to this litigation, you can seek it by a post-judgment motion in this court. I'm not going to have you go to state court and tell here's what we did in front of Judge Sargis. Let you all do that in home court where the judge knew what went on.
>
> MS. LEE HILL: Thank you, Your Honor.
>
> THE COURT: Okay. What else on your end?
>
> MS. LEE HILL: I'm assuming that includes the costs?
>
> THE COURT: Yes. I mean, it's my standard language that says cost bill and requests for attorneys' fees, if any, as provided under federal rules, yes.

Transcript, p. 34:18-25, 35:1-11.

In Plaintiff's Post Trial Brief (the court allowing post-trial, pre-ruling briefing on specific issues), Plaintiff requested:

Finally, Plaintiff has requested additional attorney's fees, and costs, pursuant to Cal. Labor C. §§ 218.5, 226, 1194(a), and C.C.P. §§ 1021.5, 685.040, 685.080, and any other applicable provisions. Plaintiff requests that the issue of the award of attorney's fees for fees and costs incurred after the fees requested in the first fee applicable be deferred until after trial, and if Plaintiff has prevailed, a remand to state court for liquidation and amendment to the judgment, as appropriate.

At the December 14, 2021 hearing at which the court stated the Ruling in this Adversary Proceeding on the Record, the court clearly understood that Plaintiff was seeking to have this court abdicate its duties and let the State Court judge order the attorney's fees and costs to be awarded in this Federal Court Proceeding. This court made it very clear that such abdication was not going to occur, stating:

> To the extent that the plaintiff believes there's **attorneys' fees, costs, and expenses that relate to this litigation**, you can **seek it by a post-judgment motion in this court**. I'm **not going to have you go to state court and tell here's what we did in front of Judge Sargis**.

Plaintiff's counsel, both Attorneys present in the courtroom, clearly understood that what remained was for this court to award attorney's fees for the prosecution of this Adversary Proceeding.

The court did not somehow say that all non-adversary attorney's fees damages would be considered post-trial as part of a Rule 54 motion for prevailing party attorney's fees. The court said the attorney's fees that relate to this litigation – not the state court litigation, not bankruptcy court litigation, not mediation litigation.

There are no other grounds Plaintiff alleges making Rule 59(e) applicable. Therefore, even if possible to construe this Motion as a motion to amend the judgment, it is not proper to award the damages requested under Rule 59(e).

Federal Rules of Civil Procedure 60
Relief from a Judgment

In the alternative, Plaintiff states they are entitled to relief under Federal Rules of Civil Procedure 60 as incorporated into Federal Rules of Bankruptcy Procedure 9024 due to "inadvertence or excusable neglect." Dckt. 126 at 4. Inadvertence or excusable neglect is a ground for relief from a final judgment under Rule 60(b). The enumerated grounds include "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

12 Moore's Federal Practice - Civil § 60.41 provides a discussion of what types of conduct are sufficient to grant relief pursuant to Federal Rule of Civil Procedure 60(b), noting that there is not a simple punch list test. While generally the mistake must be made by a party or party's counsel, it has been recognized that there can be a mistake of the court for which relief may be granted. However, when one is asserting a "judicial mistake," the Ninth Circuit Court of Appeals has required that the motion seeking relief pursuant to Federal Rule of Civil Procedure 60(b)(1) be filed before the time expires for filing an appeal on the judgment or order. *Gila River Ranch, Inc. v. United States*, 368 F.2d

354, 357 (9th Cir. 1966). This use of Rule 60(b)(1) in lieu of an appeal was discussed in the unpublished Ninth Circuit Decision *Sattler v. Russell (In re Sattler)*, 840 Fed. Appx. 214 (9th Cir. 2021), stating:

> "[U]nder Rule 60(b)[,] the [lower court] can, within a reasonable time not exceeding the time for appeal, hold a rehearing and change [its] decision." *Gila River Ranch, Inc. v. United States*, 368 F.2d 354, 357 (9th Cir. 1966) (emphasis added). While this rigid timeliness requirement does not apply to "mistakes" other than mistakes of law that go to the merits of a case, *see Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir. 2004) (mistake in post-judgment interest rate), that does not help Sattler here, *see, e.g., SEC v. Seaboard Corp.*, 666 F.2d 414, 415-16 (9th Cir. 1982) (courts should not grant a Rule 60(b) motion based only on alleged legal errors, if the motion comes after the time to appeal has expired). Granting motions to vacate orders involving alleged legal errors on the merits, "after a deliberate choice has been made not to appeal, would allow litigants to circumvent the appeals process and would undermine greatly the policies supporting finality of judgments." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) (alleged mistake in granting summary judgment). "The uncertainty resulting from such a rule would be unacceptable." Id. [the court then discusses when there can be an exception to the appeal period deadline based on "existence of extraordinary circumstances with prevented or rendered him [person filing the Rule 60(b)(1) motion based on judicial mistake] unable to prosecute an appeal."

Id., 214-215.

Here, Plaintiff states the inadvertence or excusable neglect stems from Plaintiff not understanding the court to be limiting the fees to the adversary proceeding. Therefore, the inadvertence or excusable neglect is not a mistake of the court. Rather, it is a mistake of Plaintiff's two Attorneys.

This assertion is without merit. The court does not set on a case by case, adversary by adversary basis what attorney's fees can be awarded a prevailing party pursuant to Federal Rule of Civil Procedure 54(b), as incorporated into Federal Rule of Bankruptcy Procedure 7054.

However, such relief under Rule 60(b) is available only to set aside a prior judgment or order; courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment. *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007).

Thus, a request pursuant to Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9023 to amend the final judgment of this court is not proper and would be denied.

~~For the foregoing reasons, the court denies Plaintiff's request for further fees in the amount of $184,250.00 from damages incurred in enforcing the state court judgment. Plaintiff is limited to prevailing party fees pursuant to Federal Rules of Civil Procedure 54(d)(2)(B)(ii) and 11 U.S.C. § 523(a)(6).~~

Fees Allowed

Plaintiff was able to obtain relief pursuant to the Complaint in the form of the Federal Judgment determining that $208,446.20 of the State Court Judgment was nondischargeable. Judgment, Dckt. 80. The State Court Judgment was initially entered for Plaintiff and against Defendant-Debtor in the amount of $125,000. That portion of the State Court Judgment was discharged, leaving Plaintiff with $0.00 State Court Judgment enforceable for the damage done to Plaintiff personally. [Fn.1.]

FN. 1. The Amended State Court Judgment adding State Court Defendant RML Children's Home, Inc. in the amount of $125,000.00 is Exhibit 3, at pages 3-191through 3-193, of Plaintiff's Exhibits.

The State Court post State Court Judgment order of Attorney's Fees and Costs granted "Plaintiff" $208,446.20 in attorney's fees and costs, of which he was obligated to pay (being awarded such attorney's fees because he owed such obligations to his Attorneys):

> $189,565.00 to Michael J. Harrington, Esq. for post judgment legal services provided in the State Court Litigation
>
> and
>
> $18,881.20 to Cindy Lee Hill, Esq., for post-State Court Judgment "costs" owed to her

State Court Order of Attorney's Fees and Costs; Plaintiff's Exhibit 2, p. 2-246 through 2-248.

As this Federal Court looks at the litigation further as requested by Plaintiff and his two Attorneys, it is clear that Plaintiff lost on every count for the damages in the amount of $125,000.00 he suffered and was awarded in the State Court Judgment. Using baseball parlance, he was "0 for 3" for the legal claims he asserted in this Federal Court proceeding.

What Plaintiff's Attorney's succeeded in "winning for Plaintiff" was a determination that the $208,446.20 in attorney's fees and costs Plaintiff was awarded in the State Court Litigation and owes to his two Attorneys would be nondischargeable and the State Court Judgment to recover $208,446.20 to pay Plaintiff's two Attorneys could be enforced and to the extent recovered, paid to the two Attorneys.

On trying to have the $125,000 State Court Judgment obligation due Plaintiff for his damages determined nondischargeable. Plaintiff and Plaintiff's two Attorneys failed, and Defendant prevailed. Much of the trial time, preparation, and litigation related to Plaintiff's failed assertion that his very experienced attorney Michael J. Harrington, Esq., was bamboozled, defrauded, and let to justifiably rely on alleged misrepresentations by Defendant-Debtor. Looking to the Transcript from the December 14, 2021 hearing where the court put the Ruling on the Record, the court's findings relating to the 11 U.S.C. § 523(a)(2)(A) fraud claim for relief include:

> Now, one of the problems where the plaintiff stumbles is now to the next element, justifiable reliance. Justifiable reliance is subjective, and it focuses on the qualities and characteristics of the plaintiff, or in this case, the plaintiff's counsel, to which the misrepresentations were made. And, again, this is the *Field v. Mans* Supreme Court case. It's not just an objective, reasonable person standard. And factors are, what's the sophistication of the party to whom the

misrepresentation is being made, as well as is there adequate warning?

Here, when they go into the mediation, **there's no way, based upon the evidence presented, that the Court believes that** the plaintiff and **plaintiff's counsel had any belief that the words coming out of the plaintiff's mouth would be truthful.** Again, this gets to the part to where I conclude that what they were doing was trying to make the best of a bad situation, with defendants they believed were slimy and would do everything possible in trying to come up with a settlement that would get a recovery for the plaintiff.

And I look at the complaint, the state court complaint filed by plaintiff. The allegations include -- I'm identifying them by paragraph number in the state court complaint, which is in our record, and it talks about how -- paragraph 16, plaintiff was required to work regularly in violation of the labor code and the wage order. And paragraph 17, that he was paid less than was required under Labor Code 1197. And that Labor Code 2011 requires an employee to pay all compensation upon discharge, and these defendant/debtors and the others didn't do that. And that they failed to, and that they were in violation of state law. They failed to make timely payments. They're liable for additional wages. They knowingly and intentionally -- this is paragraph 35 -- failed to furnish with information required by Labor Code Section 2226(b) and 1198.5, and those failures were intended to injure the plaintiff. And they had superior knowledge, and they made false statements intending to induce plaintiff to rely upon those false statements. And they repeatedly had plaintiff employed in violation of state law, not paying the minimum hourly wage in overtime, not providing meals, misclassifying him as an independent contractor, failing to provide pay stubs and information and proper deductions. That's paragraph 74. 75 gets into the California Business and Professions Code, 17200, unfair business practice and how they intentionally engaged in these unfair business practices to obtain a competitive advantage over other businesses. **And given that they have all of those terrible things they know, these two defendant/debtors have done, there's no justifiable reliance upon them just saying, yeah, we're going to pay it.** No other financial discovery. Nothing done.

Again, my conclusion that is that the **settlement was not done by the plaintiff because of that promise**. The evidence shows that there was some other bigger litigation strategy, and it's just one of those tough decisions that had to be made, but **I don't believe for a moment that Mr. Harrington was mislead** by a mere gentleman's statement that his client would pay it. When you have these defendant/debtors, who are so steeped in the allegations of misconduct and abuse of an employee, that that's [not] justifiable reliance by Mr. Harrington.

Also, the alleged harm caused by the reliance was the dismissal of the other defendants, dismissed without prejudice. Well, that wasn't in the mediation. That wasn't tied to the promise to pay under the settlement agreement. Here, the other parties were dismissed prior to the mediation. **Mr. Harrington's testimony** is that it was put to him by defendant/debtors' counsel that, for the defendant/debtors to even sit down at the table with him, you had to dismiss the

other entities and family members and focus on the two defendant/debtors we have here and their corporation, and that was done. And in consideration for doing that, they sat down at the table and then made misrepresentations to Mr. Harrington and the plaintiff. So, again, **what's alleged to be the harm caused, the damage caused by it, doesn't tie to the misrepresentation.**

. . .

So, again, we get to the fact that, **one, I don't think there was justifiable reliance**; **two, that what the alleged damages are from the misrepresentation aren't caused by the misrepresentation** because the damages clearly stated were, you know, the loss caused by the misrepresentation was the dismissal of the others. And that wasn't based upon the misrepresentation, the settlement agreement. That was something the plaintiff agreed to to get the defendant/debtors to the table.

. . .

So with respect to the fraud cause of action, I conclude, one, that the **type of damages being asserted, the dismissal without prejudice of the other defendants does not fall within the monies, services, goods, extension of credit provided in 523(a)(2)**. Second, it is **not the damages resulting from the fraud**. The fraud is entering into the settlement agreement with the defendant/debtors here, not the dismissing -- they had been dismissed before that settlement was reached. **That there was not justifiable reliance**. The reliance is based upon the statement by plaintiff's counsel that these defendant/debtors would be good for it. **I don't believe an attorney of Mr. Harrington's sophistication and experience** would just say, yeah, because some attorney tells me, when I've got guys that have pulled all of this wage and work conditions will pay. I think there was a more sophisticated decision going on there with respect to how to try to navigate the plaintiff's rights through in a manner that could lead to some kind of payment as opposed to having a pretty piece of paper one puts on the wall.

Transcript, p. 21:16 - p. 27:17 (emphasis added).

The court's ruling goes further in detail of Plaintiff's multiple failures in presenting a claim for nondischargeable debt based on fraud. These findings including the court finding that it did not believe Mr. Harrington's testimony that he, an experienced attorney, was mislead and justifiably relied upon, as the agent of Plaintiff, the misrepresentations by Defendant-Debtor. Plaintiff and Plaintiff's Attorneys grossly failed in their effort to prosecute the claim for that $125,000.00 State Court Judgment obligation owed to Plaintiff was nondischargeable based on 11 U.S.C. § 523(a)(2) fraud.

In finding the gross failings by Plaintiff and Plaintiff's two Attorneys on the fraud cause of action does not mean the court concluded that Defendant-Debtor, and each of them, were the innocent lambs being led to the slaughter by Plaintiff's Attorneys. The court findings are clear that Defendant-Debtor made multiple misrepresentations and actively worked to try and mover assets away from Plaintiff. While not constituting actionable fraud against Plaintiff through his agent, attorney Michael J. Harrington, Esq., the court concluded that with respect to the subsequent damages caused, the $208,446.20 in attorney's fees and costs awarded by the State Court judge for the post- State Court Judgment attorney's fees and costs (including having to amend the State Court Judgment to include the entity that Defendant-Debtor surreptitiously transferred the business assets into to try and shelter them from paying the judgment awarded against the prior business entity who Defendant-Debtor stipulated

would be a State Court Judgment debtor and would pay the debt.

Attorney's Fees Stated to Relate to This Adversary Proceeding

When this Motion was filed, subject to the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011 and as stated under penalty of perjury in their Declarations, Plaintiff's Attorneys stated that the universe of fees for everything done, whether in this Adversary Proceeding or in other proceedings, and including the failed cause of action prosecution for fraud, fees of:

(1) $279,900 should be awarded for Michael J. Harrington, Esq.'s legal services and

(2) $168,740.00 should be awarded for Cindy J Hill, Esq.'s legal services.

Motion, p. 5:23-26, 6:1-4; Dckt. 85. The $279,900 represents the total 446.5 hours for the universe of legal billings by Mr. Harrington, plus costs, and not those relating to this Adversary Proceeding. For Ms. Hill, the $168,740.00 is for the total 306.8 hours billed for the universe of legal billings, plus costs, and not those relating to this Adversary Proceeding.

As outlined above, for the Motion the portion of the fees which related to this Adversary Proceeding are stated to be:

Attorney Cindy Lee Hill, Esq.

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 - 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 continent fee hourly rate of $550 totals $92,565.00 in fees. This represents 54.8% of the total fees of $168,740.

B. 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. This totals $5,802.50.

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.

Attorney Michael J. Harrington, Esq.

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, and Mr. Harrington billing his time at $600.00 an hour, the court notes the following:

a. Task - Adversary Proceeding . Exhibit 1, Dckt. 90 at p. 27-31.

   i. 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.

   ii. The hours for these services total 234, which when multiplied by the continent fee hourly rate of $600 totals $140,400 in fees.

b. Task - Adversary Proceeding Fees. Exhibit 1, Dckt. 90 at p. 31-32

   i. 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.

   ii. For preparation of a prevailing party fee application, this represents fees of $11,880 (19.8 hours x $600/hour = $11,880).

c. Task - Discovery

   i. 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.

   ii. These fees relate to the Bankruptcy Case filed by Debtor and not this Adversary Proceeding.

Actual Legal Fees Relating to Adversary Proceeding
Stated in Motion and Supporting Documents

In the Supplemental Briefing/Motion, the Plaintiff is now requesting to be awarded attorney's fees relating to this Adversary Proceeding as follows:

(1) Michael J. Harrington, Esq.....$128,280.00

At $600.00 an hour, this represents 213.8 hours of billable time. As addressed above, the fees identified relating to the Adversary Proceeding were for 253.80 hours of billing my Mr. Harrington.

In adjusting for having lost on the vast majority of the Adversary Proceeding for which evidence was presented, arguments made, and preparation done, Plaintiff reduces this by only 40 hours (a nice, easy, convenient round number). This is Plaintiff stating that only 15% of the legal work related to Plaintiff losing the vast majority of the claims asserted.

From having been at the trial, been presented with the evidence and oral arguments, the trial briefs, and the current Motion, and what was presented to establish the case that Defendant-Debtor entered into an agreement to settlement, promised committed that the business entity would pay, and then gutted the business entity of its assets, a reduction of 80% would appear to be much more reasonable and in accordance with the facts.

(2) Cindy J. Hill, Esq.....$76,752.50

At the $550 hour billing rate, this represents 139.55 hours of billable time. As addressed above, the fees identified relating to the Adversary Proceeding were for 253.8 hours by Ms. Hill.

In adjusting for having lost on the vast majority of the Adversary Proceeding for which evidence was presented, arguments made, and preparation done, Plaintiff reduces Ms. Hill's fees by 114.25 hours. This is a 45% reduction of Ms. Hill's fees.

It is unclear why Ms. Hill's fees are cut by almost 50%, but Mr. Harrington's are only slightly trimmed by 15%. As one notes from reading the trial transcript, Ms. Hill was doing a lot of the trial work, with Mr. Harrington being the "witness" providing testimony that the court determined was not credible, and led to Plaintiff losing the claim based on fraud.

Clearly, the proposed fees of Michael J. Harrington, Esq. of $128,280.00 for losing the vast majority of the claims stated in the Complaint and not obtaining an nondischargeable judgment for his client are grossly unreasonable.

From a Macro view, total legal fees of $35,000 for what should have been less than a one day trial would not be grossly unreasonable.

At the hearing, **xxxxxxx**

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 Motion for Prevailing Party Fees is xxxxxxxxxxxxx

4. **20-24123-E-11 FWP-36** **RUSSELL LESTER**

CONTINUED SCHEDULING CONFERENCE RE: VOLUNTARY PETITION
8-27-20 [1]

The Scheduling and Status Conference is xxxxxxx

5. **20-24123-E-11 22-2016** **RUSSELL LESTER FWP-1**

LESTER V. FIRST AMERICAN TITLE COMPANY ET AL

CONTINUED MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR FINAL HEARING ON PRELIMINARY INJUNCTION
3-22-22 [7]

The Motion for Preliminary Injunction is xxxxxxxxxxxxxxxx

APRIL 7, 2020 HEARING

Counsel for the Reorganized Debtor reported that a meeting was held on April 5, 2022, with the land trust to address the process. It has been confirmed that the money has been granted to purchase the conservation easement, and the land trust is still waiting for its parties to approve the final documents.

Prudential's counsel states that the tweaks are ones that were sent to the land trust in March 2022, in response to the drafts at that time. The federal funders for the purchase have rejected the easement. Counsel for FNB reported that everyone agrees that the conservation easement is important and its closing.

The Reorganized Debtor concurs in the view of the various parties presented.

At the hearing the Parties could not agree to extend the Temporary Restraining Order for a sufficient period to allow for either a consensual resolution or litigating the issuance of a preliminary injunction in this Adversary Proceeding.

At the April 7, 2022 hearing, counsel for First Northern Bank of Dixon ("FNB") explained that he had not obtained authorization to extend the Temporary Restraining Order for as long a period as the court determined necessary, so could not consent to the extension beyond the twenty-eight days permitted under Federal Rule of Bankruptcy Procedure 65 and Federal Rule of Bankruptcy Procedure 9024.

As the court stated on the Record, and which is incorporated herein, an extension of the stay pending further discussions and briefing is in the best interests of all parties.

As the court determined at the prior hearing, if this matter was not resolved and some additional time was required, the court would either extend the Temporary Restraining Order with the agreement of the parties or issue a temporary or interim preliminary injunction to maintain the status quo while allowing for briefing on whether a preliminary injunction should be issued. No bond is required for the temporary of interim preliminary injunction, which shall continue in full force and effect what is ordered in the Temporary Restraining Order.

The court shall enter a Temporary/Interim Preliminary Injunction pending final hearing on the Motion for Preliminary Injunction, continuing in full force and effect of stay imposed by the Temporary Restraining Order which:

[r]estrains that for the period from the date of the issuance of this Order through and including April 15, 2022,

> (1) First American Title Company, and its agents and representatives, shall not deliver to be recorded, record, transfer any deeds, or take other action, or allow such to be done by any person, which is authorized or as provided in the Irrevocable Escrow Instructions/Conservation Easement, Escrow No. NCS-977917-CC (20-24123; Exhibit A, Dckt. 826), a copy of which is attached hereto as Addendum A, for the real properties known as the Carrion Ranch and McCune Ranch, and each of them, and
>
> (2) The court stays during the period of the Temporary Restraining Order said Irrevocable Escrow Instructions identified above and any provisions of the Chapter 11 Plan requiring any action to be taken thereon relating to the Carrion Ranch and McCune Ranch properties, and each of them, pending expiration of this Temporary Restraining Order.

Order, Dckt. 16. The Temporary/Interim Preliminary Injunction shall be in full force and effect through 11:59 p.m. on May 20, 2022.

No bond for the Temporary/Interim Preliminary Injunction is required given the respective security interests protecting each of the Parties and the alternative relief under the Plan for the sale of the property at issue.

The briefing schedule for the final hearing on the Motion for Preliminary Injunction is:

1. The Plaintiff-Reorganized Debtor shall file and serve any supplemental pleadings in support of Motion for Preliminary Injunction on or before April 14, 2022.

2. Oppositions, if any, to the Motion shall be filed and served on or before April 29, 2022.

3. Replies, if any, to the Oppositions shall be filed and served on or before May 5, 2022.

The final hearing on the Motion for Preliminary Injunction shall be conducted at 11:00 a.m. on May 12, 2022.

The Temporary/Interim Preliminary Injunction expires at 11:59 p.m. on May 20, 2022, unless terminated soon or extended by further order of the court.

MARCH 24, 2022 HEARING

On March 21, 2022, Russell Lester, the Reorganizing Debtor under his confirmed Chapter 11 Plan ("Plaintiff-Debtor") filed a Complaint naming First American Title Company and Russ Lester, LLC as defendants. Dckt. 1. The Complaint seeks a judgment for a preliminary injunction. *Id.*; First Claim for Relief. No other relief is sought in the Complaint. On March 22, 2022, Plaintiff-Debtor filed a Motion for Issuance of Temporary Restraining Order and Preliminary Injunction. Dckt. 7. The grounds stated with particularity in the Motion (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) state the grounds for the Motion "are more fully set forth in the complaint. . .." *Id.*, ¶ 4. The Motion also states that there are ambiguities in the confirmed Plan, that Plaintiff-Debtor has been delayed in obtaining a conservation easement due to governmental review, and that the Plan appears to cause the Plaintiff-Debtor to automatically lose real property if the conservation easement is not completed by March 31, 2022. *Id.*, ¶¶ 5b-5e. The Plaintiff-Debtor has also requested the court conduct a Status Conference in the related Bankruptcy Case, which the court has set and will conduct at 10:30 a.m. on March 24, 2022 (specially set to the Modesto Division Courthouse - Telephonic Appearances Permitted).

The entry of a temporary restraining order was requested on an *ex parte* basis. The court having set the Status Conference for March 24, 2022, and knowing that Movant's counsel and most major "players" in the Bankruptcy Case would be in attendance, the court set this request for a hearing on March 24, 2022, as well.

At the hearing, all parties in interest engaged in a constructive, productive discussion of their respective interests and issues. The consensus is that they are working to find agreement to allow for the prompt closing of the conservation easement and minimize the negative financial consequences for all parties in interest.

The court grants the motion for temporary restraining order, imposing to through and including April 15, 2022, the court finding cause existing to extend the time beyond fourteen days, and within the twenty-eight day maximum as provided in Federal Rule of Civil Procedure 65(b)(2).

The court shall conduct the initial hearing for issuance of a preliminary injunction at 11:30 a.m. on April 7, 2022. No further pleadings will be filed regarding the issuance of a preliminary injunction, with the court using the April 7, 2022 to issue a "temporary preliminary injunction" if warranted, and the parties in interest do not agree to extend the twenty-eight maximum allowed for a temporary restraining order.

As discussed with the parties in interest, the court uses this procedure to allow them to focus on the issue of extending the time to close the sale of the conservation easement and allowing the parties to avoid expending time and expense on pleadings that may well be unnecessary in light of the good faith work of all parties in interest demonstrated in this case and shown at the March 24, 2022 hearing for the Temporary Restraining Order.

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

TEMPORARY/INTERIM PRELIMINARY INJUNCTION
AND
ORDER SETTING FINAL HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing and on the Record at the April 7, 2022 hearing.

Declaration of Robin K. Klomparens

On April 14, 2022, Ms. Klomparens filed a declaration (Dckt. 25) stating Prudential's suggested revisions may delay the sale of the Conservation Easement. Ms. Klomparens states any and all delays are due to factors outside of the Reorganized Debtor's control. If no further changes are made to the subordination or conservation easement agreements, there is no reason the conservation easement sale will not close on or before May 31, 2022.

Plaintiff's Brief/Memorandum in Support of Motion

On April 14, 2022, the Reorganized Debtor filed a Supplemental Brief in support of the Motion for Preliminary Injunction. Dckt. 26. The Reorganized Debtor states the Conservation Easement is 98% of the way towards completion. The Reorganized Debtor argues there are inconsistencies in the Plan surrounding a cure period before recordation which warrants modification of the Plan. Additionally, Reorganized Debtor states the delay in sale is due to Prudential's additional revisions to the subordination and conservation agreements.

The Reorganized Debtor states they will face irreparable harm if the Grant Deed is recorded before the Conservation Easement Sale closes. The Reorganized Debtor argues it will cause a change in grantor and will require further approvals from various state and federal agencies, resulting in delay in the sale and possibly, a complete loss. If the sale is lost, and Carrion Ranch and McCune Ranch are transferred to SPE and sold, the Reorganized Debtor's ability to make Plan payments will be harmed because they will have less income due to a loss in crop production.

May 12, 2022 Hearing

At the hearing, XXXXXXXXXX

The Motion for Temporary Restraining Order filed by Russell Lester, the reorganized Debtor under the confirmed Chapter 11 Plan, 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 **xxxxxxxxxxxxxxxxxxxxx**

FINAL RULINGS

6.	**21-23301-E-7** **22-2002** **BARNES V. ROYER**	**BRIAN ROYER** **CRG-3**	**MOTION FOR SUMMARY JUDGMENT AND/OR MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL** **3-31-22 [14]**

Final Ruling: No appearance at the May 12, 2022 hearing is required.

Plaintiff and Defendant having filed a Stipulation to Withdraw Motion, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion for Summary Judgment was dismissed without prejudice (Order, Dckt. 27), and the matter is removed from the calendar.**