

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**July 28, 2022 at 11:00 a.m.**

---

1. [22-20108-E-11](#) KAMCARE, LLC  
[CAE-1](#)

**CONTINUED STATUS CONFERENCE  
RE: VOLUNTARY PETITION  
1-18-22 [1](#)**

Debtor's Atty: Gabriel E. Liberman

Notes:

Continued from 5/4/22 [specially set]

Operating Reports filed: 5/26/22 [Mar, Apr]

Second Status Conference Statement filed 7/19/22 [Dckt 51]

--

**JULY 27, 2022 STATUS CONFERENCE**

On July 19, 2022, the Debtor in Possession filed a Second status Conference Statement. Dckt. 51. The Debtor in Possession reports that though the court granted relief from the Stay for U.S. Bank in April 2022, the Bank has not initiated any foreclosure proceedings.

The Debtor in Possession intends to file a plan of reorganization that will provide for a 100% dividend on all claims to be paid over a four year period.

Reviewing the latest Monthly Operating Report (for June 2022), the Debtor in Possession reports the bankruptcy estate having a cash balance of \$1,297. Total receipts since the commencement of this case are reported to be \$3,774.

At the Status Conference, **XXXXXXX**

**July 28, 2022 at 11:00 a.m.**

**Page 1 of 10**

## MAY 4, 2022 STATUS CONFERENCE

This bankruptcy case was filed on January 18, 2022. The February 2022 Monthly Operating Report was filed on April 5, 2022 (approximately three weeks late). No Monthly Operating Report has been filed for March 2022, which was due to be filed by April 14, 2022. L.B.R. 2015-1(c).

The Monthly Operating Report for February 2022 provides the following financial information about the Debtor in Possession and operation of the Bankruptcy Estate:

- A. Full Time Employees, Current.....None
- B. Full Time Employees, as of filing Bankruptcy.....None
- C. Cash Receipts and Disbursements
  - 1. Cash Balance 2/1/2022.....\$ 83
  - 2. Receipts for 2/2022.....\$400
  - 3. Disbursements for 2/2022.....(\$483)
  - 4. Cash Balance 2/28/2022.....\$ 0.00
- D. Assets
  - 1. Total.....\$778,023
- E. Income
  - 1. Gross Income/Sales for 2/2022.....\$ 0.00
  - 2. Cost of Goods Sold for 2/2022.....\$ 0.00
  - 3. Gross Profit for 2/2022.....\$ 0.00
  - 4. General Administrative Expenses for 2/2022.....(\$286)
  - 5. Other Expenses for 2/2022.....(\$ 16)
  - 6. Profit/(Loss) for 2/2022.....(\$233)

On the last page there is information for “Additional Cash Received.” For February 2022 for line items with the abbreviations “H&P” and “A” there nine entries totaling \$985.00. Then, as part of the February 2022 Report, there is also information under the hearing KIP Account Open 03/02/2022 (indicating that the Debtor in Possession did not open the required debtor in possession account until two months after the case was filed, though apparently receiving income for the bankruptcy estate.

As reflected in the Civil Minutes from the hearing on the Motion for Relief From the Automatic Stay in this case (and as stated at the hearing), the Debtor in Possession and its Responsible Representative, as fiduciaries of the bankruptcy estate, have a lot of work to do before the automatic stay is terminated and a creditor allowed to foreclose on the real property which Debtor stating having an interest in worth \$752,000. Schedule A/B, ¶ 55. They have a lot to do working with their bankruptcy counsel and other family members who live in the real property in which the Debtor has a 30% Absolute Interest (but is having to pay rent to “use” while family members, who are members of the Debtor LLC,

I've there).

The hearing on the Motion for Relief From the Stay was sufficient for a Status Conference for this case in which there are only two identified creditors – the creditor obtaining relief from the stay and the Internal Revenue Service who is asserted to have a claim in an amount less than \$15,000 for penalties due to Debtor failing to file its informational returns timely.

The court continues the Status Conference to allow the Debtor in Possession, the Responsible Representative of the Debtor in Possession (the managing member), and counsel for the Debtor in Possession to spend time focused on trying to comply with the Bankruptcy Code and the Debtor in Possession prosecute this case, rather than being detoured by a short “meet and greet, oh yeah, we talked about that” status conference.

# FINAL RULINGS

2. [17-25403-E-13](#) **BYLLIE DEE** **MOTION FOR SANCTIONS**  
[21-2070](#) **Bert Carter** **DON-26-30-22 [63]**

**DEE V. BDM MORTGAGE SERVICES,  
INC. ET AL**

**Final Ruling:** No appearance at the July 28, 2022 hearing is required.  
-----

**The Motion for Sanctions is dismissed without prejudice.**

BDM Mortgage Services, Inc., Rudy Grant Wilson, BDM Loan Services, Inc., Christopher M. Herrmann, Pamela Herrmann, Andrea Michele Eluting, George Stetler Warrick, Jr., Melodia Loquinario Warrick, Robert C. Gaby, Dennis D. Johnson, Carol A. Johnson, Mark A. Henn, Debra L. Henn, Amy H. Isabella, Pensco Trust Company, Robert R. Dizon, Cristina V. Dizon, and Rodolfo G. De Leon (“Defendants”) filed a “Withdrawal of Motion” (which the court construes to be an *Ex Parte* Motion to Dismiss the pending Motion) on July 21, 2022, Dckt. 71. There is no prejudice to the responding party appearing by the dismissal of the Motion. Defendants have the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041. The dismissal being consistent with the opposition filed by Byllie Dee (“Plaintiff-Debtor”). Therefore, the *Ex Parte* Motion is granted, Defendant’s Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 Sanctions filed by BDM Mortgage Services, Inc., Rudy Grant Wilson, BDM Loan Services, Inc., Christopher M. Herrmann, Pamela Herrmann, Andrea Michele Eluting, George Stetler Warrick, Jr., Melodia Loquinario Warrick, Robert C. Gaby, Dennis D. Johnson, Carol A. Johnson, Mark A. Henn, Debra L. Henn, Amy H. Isabella, Pensco Trust Company, Robert R. Dizon, Cristina V. Dizon, and Rodolfo G. De Leon (“Defendants”) having been presented to the court, Defendants having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 71, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Sanctions is dismissed without prejudice.

3. [19-26574](#)-E-7      **SEAN ALMEIDA**  
[21-2041](#)                      **Timothy Walsh**  
**DNL-4**

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

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

**Final Ruling: No appearance at the June 23, 2022 Hearing is required.**

-----

Local Rule 9014-1(f)(1) Motion—No 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.

<p><b>The Motion for Prevailing Party Attorney's Fees and Costs is dismissed without prejudice.</b></p>
---

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.

The hearing is continued to allow the Settlement to be consummated and this Motion to be dismissed by Plaintiff-Trustee.

### **June 23, 2022 Hearing**

On June 20, 2022, Plaintiff-Trustee filed a Status Report. Dckt. 79. Plaintiff-Trustee reports that the Settlement, which has been approved by the Court in the Sean Almeida bankruptcy case, is being performed, with the settlement funds having now been disbursed by check by the Plaintiff-Trustee.

Plaintiff-Trustee requests that the hearing be continued to allow for the check to clear, judgment liens released, and this Motion to be dismissed.

The court continues the hearing to July 28, 2022.

### **Plaintiff-Trustee's Withdrawal**

Plaintiff-Trustee having filed a "Withdrawal of Motion", which the court construes to be an *Ex Parte* Motion to Dismiss the pending Motion on July 19, 2022, Dckt. 83; no prejudice to the responding party appearing by the dismissal of the Motion; Plaintiff-Trustee having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition of NFCU; the *Ex Parte* Motion is granted, Plaintiff-Trustee's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 Attorney's Fees and Costs filed by Plaintiff-Trustee J. Michael Hopper having been presented to the court, the court having approved a settlement in this Adversary Proceeding, the dismissal of this Motion contingent on performance of the terms and conditions of the Settlement, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Prevailing Party Attorney's Fees and Costs is dismissed without prejudice.