JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In re LETICIA JOY ARCINIEGA,

Debtor.

LETICIA JOY ARCINIEGA,

Defendant-Appellant,

v.

JAMES CLARK,

Plaintiff-Appellee.

Case No. 5:19-CV-01383-JLS

Adv. Case No. 6:11-AP-01735-SY

BK Case No. 6:11-BK-15412-SY

ORDER VACATING AND REMANDING BANKRUPTCY COURT JUDGMENT

This is the third appeal in an adversary action that was filed in the bankruptcy proceedings of Debtor-Appellant Leticia Joy Arciniega ("Debtor"). Twice before Debtor filed an appeal with the Ninth Circuit Bankruptcy Appellate Panel ("BAP"), and twice before the Bankruptcy Court's ruling was affirmed in part, reversed in part, and remanded in part. Currently, Debtor appeals the Bankruptcy Court's Judgment entered after the second remand; however, Plaintiff-Appellee, James Clark ("Clark"),

elected to have this Court hear the present appeal. (*See* Doc. 2 at 28.) As set forth herein, the Court VACATES and REMANDS the Bankruptcy Court's Judgment.

I. BACKGROUND

Debtor filed a bankruptcy petition on February 18, 2011. (BK Doc. 1.)[1] The present adversary action was filed on May 26, 2011 by Clark, a creditor who sought an adjudication that certain debt was not dischargeable in bankruptcy.[2] (AP Doc. 1 ("AP Compl.").)

Debtor and Clark were married in 1976; their marriage was dissolved in 2000. (AP Compl. ¶¶ 10, 20.) While married, they acquired property in Arrowhead, California ("the Arrowhead property") and on Verona Avenue in San Jacinto, California ("the Verona property"). (*Id.* ¶¶ 11, 13.) The couple took out a Veteran's Affairs loan ("the VA loan") to finance the Verona property. (*Id.* ¶ 15.) They were eligible for this financing because Clark is a United States Armed Forces Veteran. (*Id.* ¶ 14.) At the time of the filing of the Adversary Complaint in 2011, the VA loan was secured by a deed of trust, first in priority, against the Verona Property. (*Id.* ¶ 16.)

Since the time the couple separated in 1991, Clark has lived at the Arrowhead property and Debtor has lived at the Verona property. (*Id.* ¶ 18.) In 2006, at Debtor's request, Clark transferred his interest in the Verona property to her. (*Id.* ¶ 21.) In 2007, Clark filed an action against Debtor, seeking a transfer of Debtor's interest in the Arrowhead property to him. (*Id.* ¶ 22.) In 2009, the two settled their dispute, agreeing that Clark would pay Debtor $50,000, and that Debtor would quitclaim her interest in the Arrowhead property. (*Id.* ¶ 29(a).) Debtor also agreed to pay off the VA loan, essentially relieving Clark of any remaining obligation thereon. (*Id.*

[1] Herein, the Court cites to docket entries of the main bankruptcy case as "BK Doc." and the adversary action docket as "AP Doc."

[2] Specifically, Clark filed the adversary proceeding captioned *James Clark v. Leticia Joy Arciniega*, 6:11-ap-01735-SY (Bankr. C.D. Cal.). Herein, the Court cites to docket entries of the adversary action as "AP Doc."

¶ 29(b).) The settlement agreement provided for $1,000 per day in liquidated damages should either party fail to perform. (*Id.* ¶ 30.)

Although Debtor fulfilled her promise to relinquish her property rights to the Arrowhead property, she failed to pay off the VA loan, thus breaching the settlement agreement. Specifically, as noted by the Bankruptcy Appellate Panel ("BAP") in the first appeal, partial performance occurred when Clark paid Debtor $50,000, and Debtor surrendered her interest in the Arrowhead property. (AP Doc. 164, BAP Feb. 3, 2016 Mem. Op. at 4.) However, despite being given a year to perform, Debtor, who did not disclose that she had been experiencing financial difficulties for a number of months before entering into the settlement agreement, did not refinance the VA loan as promised. (*See id.* at 4-7.) Under the terms of the settlement agreement, liquidated damages in the amount of $1,000 per day continued to accrue. (*See id.* at 9.)

At trial, the Bankruptcy Court held that, pursuant to 11 U.S.C. § 523(a)(2)(A), the debt was not dischargeable. (*See id.* at 11.) Section 523(a)(2)(A) makes nondischargeable any debt for money, property, services or an extension, renewal, or refinancing of credit, to the extent it is obtained by false pretenses, a false representation, or actual fraud. Clark's theory, accepted by the Bankruptcy Court and affirmed on appeal, was that in light of Debtor's financial troubles at the time of the execution of the settlement agreement, Debtor acted with an intent to defraud when she promised to pay off the VA loan because she knew she could not do so. (*See* BAP Feb. 3, 2016 Mem. Op. at 16-21.) The Bankruptcy Court determined the nondischargeable debt included $50,000 Clark had paid to Debtor, liquidated damages of $281,000, and $209,806.42 in attorney's fees and costs. (*Id.* at 11.)

On appeal, the BAP recognized five elements that Clark was required to establish to support nondischargeability under § 523(a)(2)(A).[3] The BAP affirmed the

[3] The BAP identified the five elements as (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of the representation or omission; (3) an intent to deceive; (4) the creditor's justifiable reliance on the representation or

Bankruptcy Court as to four of the five elements, leaving open only the question of damages. (*Id.* at 13-24, 34 n.10.)

As to this fifth element, "damage to the creditor proximately caused by reliance on the debtor's representations or conduct" (*id.* at 13), the BAP reversed the Bankruptcy Court's award as to both the $50,000 paid by Clark and the $281,000 in liquidated damages. (*Id.* at 21-24.) The BAP interpreted the parties' settlement agreement as requiring Clark's payment of $50,000 in exchange for Debtor's execution of a quitclaim deed as to the Arrowhead property, untied to any other performance required by the settlement agreement. (*Id.* at 23-24.) The BAP held that because Debtor ceded the Arrowhead property to Clark in the manner required by the settlement agreement, it was an abuse of discretion for the Bankruptcy Court to award the $50,000. (*Id.*)

Also as to the fifth element, the BAP held that it was an abuse of discretion to award $281,000 without first considering whether the amount of liquidated damages was enforceable under California law, which requires that the amount be reasonable "under the circumstances existing at the time the contract was made." (*Id.* at 24-27 (quoting Cal. Civ. Code § 1671(d)).) In remanding, the BAP expressly noted that it seemed "unlikely" that the $1,000 per day provision was related to any anticipated actual loss. (*Id.* at 26-27.)

As to the attorney's fees, the BAP held that attorney's fees were authorized under the attorney's fee provision in the settlement agreement. (*Id.* at 29-34.) California law awards fees under such provisions where fees are incurred as a result of "action on a contract," and the BAP reasoned that because Clark's nondischargeability claim required interpretation of the settlement agreement, it was an "action on a contract" even though Clark's claims were premised on Debtor's fraudulent actions. (*Id.* at 32-33.) However, the BAP reversed the award of fees because it could not tell

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conduct; and (5) damage to the creditor proximately caused by reliance on the debtor's representations or conduct. (*See* BAP Feb. 3, 2016 Mem. Op. at 13, *citing Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010).)

from the record whether the Bankruptcy Court had properly apportioned fees between those incurred as to a contract claim and those incurred as to a fraud claim. (*Id.* at 33-34.) The latter fees would generally not be recoverable. (*Id.*) In doing so, the BAP expressly noted that California law would permit a conclusion that apportionment was not required if the fee and non-fee claims were based on a common core of facts, based on related legal theories, and/or were inextricably intertwined in a manner making impractical or impossible a separation of the attorney time. (*Id.* at 33-34 n.9.)

In sum, the BAP vacated the award of $50,000 because the loss was not proximately caused by Debtor's misrepresentation (*id.* at 21), and remanded the liquidated damages issue and the apportionment issue to the Bankruptcy Court. (*Id.* at 34.)

On remand, the Bankruptcy Court again ruled in favor of Clark, again awarding $281,000 in liquidated damages, and awarding $244,586.50 in fees and $11,032.02 in costs. (*See* AP Doc. 195, May 9, 2017 Amended Judgment.) Debtor again appealed. (AP Doc. 197, Notice of Appeal.)

The BAP again reversed the Bankruptcy Court as to the liquidated damages. (*See* AP Doc. 207-1, BAP Dec. 11, 2017 Mem. Op. at 14-22.) The BAP reasoned that because the purpose of requiring Debtor to pay off the VA loan was to enable Clark to obtain a new VA loan, the value of Debtor's performance could be estimated at the difference in cost—as reflected by the difference in interest rates—between a new VA loan and a non-VA loan. (*Id.* at 17.) That difference could not be reasonably estimated at $1,000 per day. (*Id.*) Moreover, there was no end date to the accrual of liquidated damages, meaning that they could continue in perpetuity, and the BAP held that this aspect of the liquidated damages provision was by itself a reason to invalidate it. (*Id.* at 18.)

The BAP then remanded on the issue of actual damages. The BAP noted that, ordinarily, it would have expected Clark to have presented evidence of such damages at trial "because proximate cause and damages are elements of his nondischargeability

claims." (*Id.*at 21.) However, upon examining the record, the BAP noted that Clark had not been given the opportunity to prove actual damages, which would be recoverable under the settlement agreement, because the validity of the liquidated damages provision was not raised until closing argument. (*Id.* at 21-22.) Accordingly, the BAP ordered the Bankruptcy Court to "reopen the record and give the parties a reasonable opportunity to present evidence on proximate cause and damages." (*Id.* at 22.)

The BAP also reversed the attorney's fee award. (*Id.* at 27-28.) It did so on the rationale that after invalidation of the liquidated damages award, Clark could not be considered a prevailing party. (*Id.*) The BAP expressly noted that if, on remand, the Bankruptcy Court awarded some actual damages to Clark, then it would be called upon to determine whether Clark or Debtor was the prevailing party. The BAP cited *In re Tobacco Cases I*, 216 Cal. App. 4th 570, 577, (2013), *as modified* (May 8, 2013), as setting forth the standard for making the prevailing party determination. (*Id.*) In the event the Bankruptcy Court found Clark to be the prevailing party, it could "reinstate or amend its last fee award." (*Id.* at 28.)

On remand, the Bankruptcy Court held a brief bench trial on the issue of damages. (*See generally* AP Doc. 240, Apr. 30, 2019 Tr.) In his opening statement, Clark stated that he intended to prove actual damages by proving that, as a result of Debtor's failure to refinance the VA loan, Clark borrowed funds at a higher, non-VA rate. (*Id.* at 4-5.)

Specifically, Clark testified that in 2016, he applied for but was denied a VA loan. (*See id.* at 17-18.) Notably, he does not testify to the reason for the denial.[4] He testified that at the time he applied, the VA loan had a 4.2% annual interest rate. (*Id.* at 19.) After his VA loan application was denied, he obtained a home equity line of credit ("HELOC") of $100,000 that was secured by the Arrowhead property. (*Id.* at

[4] Clark's counsel framed the question to Clark as whether he "qualified" for a VA loan, but the Court's ruling on an objection to Clark's testimony clarified that Clark could testify regarding whether his application was approved or denied. (*See id.* at 18-19.)

16.) He withdrew approximately $50,000 from that line of credit to pay credit cards and some other miscellaneous debt. (*Id.* at 16-17.) The HELOC had a 13-month introductory rate of 1.2% that increased to 5.25%. (*Id.* at 19.) The introductory rate expired on or about July 2017 and had not dropped below 5.25%. (*Id.* at 20.) By the time the introductory rate expired, Clark had borrowed approximately $95,000. (*Id.*) From July 2017 to the date of trial, Clark made monthly principal and interest payments, paying down the principal balance to $82,500. (*Id.* at 21.) By the date of trial, the interest rate had increased to 6.5%. (*Id.*)

Clark also testified that if Debtor paid off the VA loan that secured the Verona property, he would refinance the HELOC with a new VA loan. (*Id.* at 22.) Moreover, Clark testified that he would consider purchasing a new residence if he could obtain a new VA loan. (*Id.* at 23-24.)

After simultaneous post-trial briefing, the Bankruptcy Court stated its ruling on the record. (*See generally* AP Doc. 262, June 25, 2019 Tr.) It awarded actual damages of $1,511.27 based on Clark's conservative calculation of damages based on 21 months of interest at 1.05% (the difference between the HELOC and the VA loan rate) on the lowest principal balance of Clark's HELOC. (*Compare id.* at 14 *with* AP Doc. 242, Clark Post-Trial Br. at 8-9.) The Bankruptcy Court rejected future damages as speculative because the HELOC rate was variable. (*See* June 25, 2019 Tr. at 21-22.) The Bankruptcy Court found that Clark was the prevailing party, and therefore reinstated the attorney's fee award in the amount of $244,586.50. (*Id.* at 23.)

As noted, the bench trial focused entirely on evidence relating to actual damages. However, in his post-trial brief, Clark requested an "alternative" award of nominal damages. (AP Doc. 242, Clark Post-Trial Br. at 16.) Specifically, Clark argued that Debtor's continued refusal to perform her obligation under the contract "constitute[d] a breach by [Debtor] and an invasion of [Clark's] rights," entitling Clark to one dollar in nominal damages under California Civil Code § 3360. *Id.* Clark urged the Bankruptcy Court to award such nominal damages in the alternative

in case of "further appeal and reversal of actual damages."[5] *Id.* The Bankruptcy Court did so. (June 25, 2019 Tr. at 7-10, 23.)

The Bankruptcy Court entered its Judgment on July 11, 2019. (*See* AP Doc. 245, July 11, 2019 Judgment.) In addition to actual damages, nominal damages, and the attorney's fee award, the Bankruptcy Court awarded $11,032.02 in costs. The Bankruptcy Court's July 11, 2019 Judgment forms the basis of the present appeal. (Doc. 1.)

II. STANDARDS OF REVIEW

The district court reviews the bankruptcy court's legal conclusions de novo and its factual determinations for clear error. *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 526 (9th Cir. 2001). "De novo means review is independent, with no deference given to the trial court's conclusion." *In re Curtis*, 571 B.R. 441, 444 (B.A.P. 9th Cir. 2017) (internal quotation marks omitted).

An award of damages is reviewed de novo as to the legal conclusions underlying it and for clear error as to the factual findings upon which it is based. *See In re Zenovic*, No. AP 13-90218-LT, 2017 WL 431400, at *4 (B.A.P. 9th Cir. Jan. 31, 2017), *aff'd*, 727 F. App'x 369 (9th Cir. 2018); *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859-60 (9th Cir. 2011).

The bankruptcy court's allowance of attorney's fees will not be disturbed on appeal absent an abuse of discretion. *In re Park-Helena Corp.*, 63 F.3d 877, 880 (9th Cir. 1995). In other words, an appellate court should "not disturb a bankruptcy court's award of attorneys' fees unless the bankruptcy court abused its discretion or erroneously applied the law." *In re Strand*, 375 F.3d 854, 857 (9th Cir. 2004) (internal quotation marks omitted). A bankruptcy court abuses its discretion in awarding fees where the reviewing court has "a definite and firm conviction that the

[5] Because the Bankruptcy Court ordered simultaneous post-trial briefing and did not permit argument during the proceeding in which the ruling was issued (*see* June 25, 2019 Tr. at 1), Debtor had no opportunity below, either orally or in writing, to be heard as to Clark's request for nominal damages.

bankruptcy court committed clear error in the conclusion it reached after weighing all of the relevant factors." *In re Eliapo*, 468 F.3d 592, 596 (9th Cir. 2006).

A reviewing court may affirm a bankruptcy court's order on any basis supported by the record. *In re E. Airport Dev., LLC*, 443 B.R. 823, 828 (B.A.P. 9th Cir. 2011).

III. THE FIFTH ELEMENT OF DISCHARGEABILITY—DAMAGES

On the first appeal, the BAP concluded that Clark had established the first four elements; accordingly, only the fifth element was at issue on both the first and the second remand. Below, the Bankruptcy Court found that the fifth element—damage to Clark proximately caused by his reliance on Debtor's statement or conduct—was met because he established actual damages or, alternatively, because he established entitlement to nominal damages. However, as discussed herein, Clark failed to establish the causal element of actual damages, and an award of nominal damages is improper in these circumstances. Therefore, Clark failed to meet his burden in establishing the fifth element of nondischargeability. The Court elaborates on each point below.

A. Dischargeability Under 11 U.S.C. § 523(a)(2)(A)

"Section 523(a)(2)(A) of the Bankruptcy Code prohibits the discharge of any enforceable obligation for money, property, services, or credit, to the extent that the money, property, services, or credit were obtained by fraud, false pretenses, or false representations." *In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010); 11 U.S.C. § 523(a)(2)(A) (making nondischargeable "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud"). "Because a fundamental policy of the Bankruptcy Code is to afford debtors a fresh start, exceptions to discharge [are] strictly construed against an objecting creditor and in

favor of the debtor." *In re Scheer*, 819 F.3d 1206, 1209 (9th Cir. 2016) (internal quotation marks omitted).

"[T]he issue of nondischargeability [is] a matter of federal law governed by the terms of the Bankruptcy Code." *Grogan v. Garner*, 498 U.S. 279, 284 (1991). The Supreme Court has held that federal law governing nondischargeability under § 523(a)(2)(A) relies upon the general common law of torts as set forth in the Restatement (Second) of Torts (1976) ("Restatement"). *See Field v. Mans*, 516 U.S. 59, 70 & n.9 (1995) ("We construe the terms in § 523(a)(2)(A) to incorporate the general common law of torts, the dominant consensus of common-law jurisdictions, rather than the law of any particular State.").

To establish nondischargeability under § 523(a)(2)(A), a creditor must establish five elements by a preponderance of the evidence. Those elements are:

> (1) the debtor made representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

In re Sabban, 600 F.3d at 1222 (internal quotation marks and alteration marks omitted).

Although nondischargeability is determined by federal law, "[t]he validity of a creditor's claim is determined by rules of state law." *Grogan*, 498 U.S. at 283. And more specifically, "[e]ven though federal law controls the issue of nondischargeability, a determination of the existence and amount of the underlying debt is controlled by state law." *In re Young Hui Kim*, No. AP 15-90001, 2017 WL 5634224, at *5 n.3 (B.A.P. 9th Cir. Nov. 21, 2017) (relying on *Grogan*), *aff'd*, 753 F. App'x 451 (9th Cir. 2019); *see, e.g., In re Cossu*, 410 F.3d 591, 595-96 & n.3 (9th Cir. 2005) (holding that the bankruptcy court erred as to the amount of nondischargeable debt and discussing the creditor's burden pursuant to underlying state law regarding

indemnity); *In re Hashim*, 213 F.3d 1169, 1171-72 (9th Cir. 2000) (applying Arizona state law on the recognition of foreign judgments and concluding that the bankruptcy court erred in rejecting creditor's claim based on a judgment rendered by an English court). Thus, the Ninth Circuit has observed:

> Supreme Court precedent establishes that, unless Congress has spoken, the nature and scope of a right to payment is determined by state law. The Supreme Court has "long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law." . . . This means that "when the Bankruptcy Code uses the word 'claim'—which the Code itself defines as a 'right to payment,'—it is usually referring to a right to payment recognized under state law."

In re Fitness Holdings Int'l, Inc., 714 F.3d 1141, 1146 (9th Cir. 2013) (internal citations and footnote omitted); *see, e.g., Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998) (affirming nondischargeability of an obligation arising from a landlord's "actual fraud" within the meaning of § 523(a)(2)(A), including not only actual damages, but also treble damages and attorney's fees available under New Jersey statutory law).

Such nondischargeable obligations can include those arising from judgments entered by state courts, so long as those judgments resulted from debtor's actual fraud. *See, e.g., In re Jung Sup Lee*, 335 B.R. 130, 137 (B.A.P. 9th Cir. 2005); *In re Younie*, 211 B.R. 367, 373-74 (B.A.P. 9th Cir. 1997), *aff'd*, 163 F.3d 609 (9th Cir. 1998); *In re Davis*, 486 B.R. 182, 191-92 (Bankr. N.D. Cal. 2013), *decision supplemented*, No. 10-74245 MEH, 2013 WL 2304684 (Bankr. N.D. Cal. May 24, 2013). Or, as occurred in this case, such obligations can be adjudicated in the first instance by the Bankruptcy

Court in an adversary action. *In re Kennedy*, 108 F.3d 1015, 1017-18 (9th Cir. 1997), *as amended* (Mar. 21, 1997).

In light of this standard, the Court next considers whether the Bankruptcy Court erred in determining that Clark established actual damages that were proximately caused by Debtor's fraud.

B. Actual Damages

The parties do not directly address whether the issues of actual damages and causation are governed by federal or state law principles. In the first appeal, the BAP discussed the tort damages available to Clark under California state law. (BAP Feb. 3, 2016 Mem. Op. 22-23; *see also* BAP Dec. 11, 2017 at 16-21 (invalidating the liquidated damages clause as unenforceable under California law).) Because the issues of actual damages and proximate cause establish "[t]he validity of a creditor's claim" and determine "the existence and amount of the underlying debt," the Court analyzes them under California state law. *Grogan*, 498 U.S. at 283; *In re Young Hui Kim*, 2017 WL 5634224 at *5 n.3.

An award of actual damages must be supported by causation. As to fraud and deceit claims, causation includes, but extends beyond, the fraud element of "resulting damages." *See Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 974 (1997). Specifically, "'[t]he causation aspect of actions for damage for fraud and deceit involves three distinct elements: (1) actual reliance, (2) damage resulting from such reliance, and (3) right to rely or justifiable reliance.'" *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1062 (2012) (quoting *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498, 513 (1980).) Thus, "it is not enough to claim a fraudulent act; the fraudulent act must have caused harm." *Panoutsopoulos v. Chambliss*, 157 Cal. App. 4th 297, 308 (2007). However, "[w]here the fact of damages is certain, the amount of damages need not be calculated with absolute certainty." *Meister v. Mensinger*, 230 Cal. App. 4th 381, 396-97 (2014) (internal quotation marks omitted).

Thus, to establish entitlement to actual damages, Clark was required to show financial loss and causation. In the context of this case, as noted by the BAP in the second appeal, he first had to show some actual and cognizable financial loss, that is, he had to show that he paid more interest for the HELOC than he would have paid had he obtained a VA loan. And second, as to causation, he had to show his inability to obtain a VA loan was due to Debtor's fraudulent conduct.[6]

For purposes of this discussion, the Court assumes that Clark established financial loss. The Bankruptcy Court's mathematical calculation of financial loss, based on the difference in interest rates between a government-guaranteed VA loan and the HELOC obtained by Clark, is sound.[7]

However, the Bankruptcy Court clearly erred in finding causation. Specifically, Clark failed to establish that Debtor's "fraudulent act . . . caused him harm." *Panoutsopoulos*, 157 Cal. App. 4th at 308. There is evidence that Clark applied for a VA loan and that his application was rejected, but there is no evidence in the record as to why his application was rejected, and hence no evidence that the denial was caused by Debtor's fraud. Clark simply failed to connect Debtor's fraudulent act—entering into the settlement agreement despite knowing she would not be able to refinance the VA loan—to his financial loss.

The Bankruptcy Court may have determined that such evidence was unnecessary based on an erroneous conclusion that, as a matter of law, Clark was

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[6] Debtor's fraudulent conduct consists of entering into the settlement agreement when she "knew her representation that she would pay off the VA loan or remove Clark's name from it was false, because she knew or should have known at the time she entered into the Settlement Agreement that she could not perform." (BAP Feb. 2, 2016 Mem. Op. 16.)

[7] Debtor's argument to the contrary—that Clark actually saved money by getting the HELOC once one factors in the interest saved by the "teaser rate" of 1.25% for the first thirteen months—was waived. As a matter of calculation, Debtor is accurate, but she waived this "teaser rate" argument by failing to raise it below. *See Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011). The Court declines Debtor's invitation to exercise its discretion to consider the argument. (*See* Doc. 29, Reply Br. at 14.) Although the Court has the discretion to consider arguments raised for the first time on appeal, the exercise of such discretion is generally reserved to circumstances where its exercise is necessary "(1) to prevent a miscarriage of justice; (2) when a change in law raises a new issue while an appeal is pending; [or] (3) when the issue is purely one of law." *Baccei*, 632 F.3d at 1149.

ineligible for a VA loan because the loan securing the Verona property remained outstanding. The Bankruptcy Court clearly believed there was a simple rule that a veteran could have only one VA loan outstanding at any one time. (*See* Apr. 30, 2019 Tr. at 10 ("I could almost take judicial notice of that fact that veterans are entitled to one V.A. loan at a time."); *cf.* June 25, 2019 Tr. at 11 ("[W]e have this question that arose, whether or not the Plaintiff was eligible for another VA loan so that he did not have to have the Defendant refinance the property so that he could get his entitlement back.").) As a matter of law, this limitation simply does not exist. Instead, statutory provisions regarding VA loans speak in terms of a veteran's dollar amount of "entitlement" in a manner that does not impose the one-loan-at-a-time limit relied upon by the Bankruptcy Court. *See, e.g.*, 38 U.S.C. § 3702(b) (provision regarding "computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran").[8] Thus, any harm to Clark would not arise from the fact that he could not obtain another VA loan, it would arise, if at all, from the fact that the VA loan securing the Verona property would reduce the total dollar amount of his remaining amount of eligibility.[9] *Cf.* 38 U.S.C. § 3702(b)(4)(A) (providing that paid-in-full VA loans do not reduce the amount of full entitlement). But there is no evidence in the record that Clark suffered damages as a result of his reduced dollar-amount eligibility.[10]

[8] Thus, the Bankruptcy Court's reliance on Clark's Exhibit 4 is misplaced. (*See* June 25, 2019 Tr. at 15-18.) Exhibit 4 is a printout of the VA's website. (AP Doc. 234 at 56-61, Clark. Tr. Ex. 4.) Viewed in context, and read with the relevant statutory provisions, "entitlement" refers to dollar value eligibility rather than number of loans.

[9] Harm might also arise if a lender's credit analysis deemed Clark uncreditworthy as a result of the outstanding VA loan. That theory of damages was not pursued here.

[10] Indeed, the evidence of record suggests another reason for the denial of Clark's application. The evidence admitted at trial (in the form of Clark's testimony) was that after he was denied a VA loan, he obtained the HELOC, using it to pay his attorney's fees and to pay off preexisting debt, including credit card debt. As argued by Debtor, VA loans may be used for a variety of purposes, but these loans may not be used to repay existing debt (other than refinancing an existing mortgage loan). (*See* Doc. 16, Opening Br at 42-43); 38 U.S.C. § 3710(a)-(b) (setting forth permissible purposes for a VA loan, all related to the purchase of, construction of, alteration of, or improvements to dwellings to be occupied by the veteran, or the refinancing of existing mortgage loans encumbering such dwellings).

In short, Clark attempted to prove causation by testifying that he was denied a VA loan. This was competent evidence as to both his application for the loan and the denial of his application, but not as to the reason for the denial. He neither testified nor presented any other evidence as to the reason. In this manner, the evidence fails to link the denial of Clark's application to the outstanding VA loan in any way. And as explained above, the Bankruptcy Court erred in concluding that, as a matter of law, Clark was ineligible for a second VA loan because of the outstanding Verona Property VA loan.

Because Clark did not establish causation, the Court VACATES the award of actual damages.

C. Nominal Damages

The Bankruptcy Court alternatively awarded nominal damages based on Debtor's fraudulent actions.[11] (*See* June 25, 2019 Tr. at 7-10; July 11, 2019 Judgment at 2.) As was the case with actual damages, the parties do not directly address whether the issue of nominal damages is governed by federal or state law principles. Because entitlement to nominal damages is "a determination of the existence and amount of the underlying debt[, it] is controlled by state law." *In re Young Hui Kim*, 2017 WL 5634224 at *5 n.3. However, whether an award of nominal damages is nondischargeable remains a matter of federal law. *See Grogan*, 498 U.S. at 284.

Here, the Bankruptcy Court relied upon a California statute, Cal. Civ. Code § 3360, which authorizes nominal damages where there is "a breach of duty" even where such breach "has caused no appreciable detriment to the party affected." (*See* June 25, 2019 Tr. at 7-9.)_The Bankruptcy Court also reasoned that nominal damages are proper for the two reasons set forth in *Avina v. Spurlock*, which held that

[11] The significance of the nominal damages award in this action is, of course, that "[i]n the absence of a damages award in his favor, Clark is not the prevailing party for attorneys' fees purposes." (BAP Dec. 11, 2017 Mem. Op. at 27.) The BAP discussed this issue in the context of an award of actual damages. Because the Court concludes that nominal damages are not properly awarded here, it does not consider whether such an award, standing alone, would confer prevailing party status on Clark.

"[n]ominal damages are properly awarded in two circumstances: (1) Where there is no loss or injury to be compensated but where the law still recognizes a technical invasion of a plaintiff's rights or a breach of a defendant's duty; and (2) although there have been real, actual injury and damages suffered by a plaintiff, the extent of plaintiff's injury and damages cannot be determined from the evidence presented." 28 Cal. App. 3d 1086, 1088 (1972). (*See* June 25, 2019 Tr. at 8-9.)

As discussed below, California law does not authorize nominal damages for fraudulent inducement claims and, more specifically, the grounds relied on by the Bankruptcy Court do not support an award of nominal damages here. And in any event, at least as to *Avina*'s first reason, even if an award were proper, it would be dischargeable.

1. Nominal Damages Are Unavailable for Fraudulent Inducement Claims

As described by the BAP, Debtor's relevant conduct was that she "knew her representation that she would pay off the VA loan or remove Clark's name from it was false, because she knew or should have known at the time she entered into the Settlement Agreement that she could not perform." (BAP Feb. 2, 2016 Mem. Op. 16.) This type of fraud is described in California variably as "promissory fraud," "fraudulent inducement," "deceit," or simply as "fraud." *See Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) (stating that "'[p]romissory fraud' is a subspecies of the action for fraud and deceit" and that "[a]n action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract."); Cal. Civ. Code § 1710 (defining "deceit" as including "[a] promise, made without any intention of performing it"). Conspicuously absent from Clark's Responsive Brief is a citation to *any* California case in which nominal damages have been awarded for fraudulent inducement, and the Court's research has revealed a lack of such cases.

Few cases speak directly to whether nominal damages may be awarded for fraudulent inducement under California law. The Court has found only two, both of

those federal district courts applying California law. The first held that nominal damages may not be awarded. *See Lusa Lighting, Int'l, Inc. v. Am. Elex, Inc.*, No. SACV 07-674-DOC, 2008 WL 4350741, at *9 (C.D. Cal. Sept. 22, 2008) ("This leaves Defendants without the possibility of making a viable fraud claim, as neither nominal damages nor loss of profits satisfy the element of damages in a fraud claim."). The second held the same, but with a caveat: nominal damages "can be awarded where a plaintiff has proven actual damage has occurred (and therefore has satisfied fraud's damages element), but the plaintiff cannot prove the amount of the actual damage." *Hynix Semiconductor Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084, 1100 (N.D. Cal. 2007)).

Here, the Bankruptcy Court cited a California statute, California Civil Code § 3360, which is somewhat compelling regarding the availability of nominal damages for fraud. Specifically, § 3360 provides that "[w]hen a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages." *Id.* However, although § 3360 has been interpreted to authorize nominal damages in the case of a breach of contract even in the absence of actual damages,[12] and to authorize nominal damages as to a number of other causes of action,[13] it has never been interpreted to authorize nominal damages for fraud.

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[12] The "breach of duty" referred to in § 3360 has been repeatedly interpreted to include breach of contract. *See, e.g., Tribeca Companies, LLC v. First Am. Title Ins. Co.*, 239 Cal. App. 4th 1088, 1103 n.12 (2015) ("Generally, a plaintiff who proves a "breach of duty" (including breach of contract) but fails to show any "appreciable detriment"—i.e., damages—nevertheless "may . . . recover" nominal damages and, when appropriate, costs of suit.") (citing Cal. Civ. Code § 3360); *Midland Pac. Bldg. Corp. v. King*, 157 Cal. App. 4th 264, 275 (2007) ("[I]n the absence of a showing of actual damages, nominal damages are available.") (citing Cal. Civ. Code § 3360); *Opperman v. Path*, Inc., 84 F.Supp.3d 962, 990-91 (N.D.Cal.2015) ("Section 3360 sets forth the rule that a plaintiff who has suffered an injury, but whose damages are speculative, is entitled to nominal damages."); *HiRel Connectors, Inc. v. United States*, No. 2:01-CV-11069-DSF-VBK, 2006 WL 3618008, at *1 n.3 (C.D. Cal. July 18, 2006) (denying summary judgment on breach of contract claim for lack of damages based on right of plaintiff to recover nominal damages) (citing Cal. Civ. Code § 3360).

[13] *See, e.g., Scofield v. Critical Air Med., Inc.*, 45 Cal. App. 4th 990, 1007 (1996), *as modified on denial of reh'g* (June 19, 1996) (nominal damages awardable for the tort of false imprisonment); *Hotel & Rest. Employees etc. Union v. Francesco's B. Inc.*, 104 Cal. App. 3d 962, 973 (1980) (nominal damages awardable for violations of workers' rights to self-organize under Labor Code); *Crane v. Heine*, 35 Cal. App. 466, 467 (1917) (nominal damages awardable for use of attorney's name on debt-collection letters); *Keister v. O'Neil*, 59 Cal. App. 2d 428, 435 (1943) (nominal

California Supreme Court case law, developed independently of § 3360, strongly suggests that § 3360 does not authorize nominal damages for fraud. Specifically, the California Supreme Court, eighteen years after the passage of § 3360, without discussing nominal damages or § 3360, stated that "[f]raud without damage furnishes no ground for action, nor is fraud without damage a defense." *Holton v. Noble*, 83 Cal. 7, 9 (1890). The California Supreme Court has at least twice made the same observation since. *See Edward Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 571 (1912) ("It is fundamental, o[f] course, that, no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action."); *Maynes v. Angeles Mesa Land Co.*, 10 Cal. 2d 587, 590 (1938) ("In short, even if fraud had been well pleaded, the complaint would still be fatally defective in its attempted pleading of damage, an essential element of the cause of action."). These cases suggest that, in the absence of "appreciable detriment," fraud claims do not get past the pleadings stage, thus implying nominal damages would not ever be awarded in such cases.

For instance, relying on *Holton*, a federal district court in 2007 held that a common law fraud claim must be supported by allegations regarding actual damages and, in the absence of such allegations, dismissed the claim with prejudice at the pleadings stage. *Chavez v. Blue Sky Nat. Beverage Co.*, 503 F. Supp. 2d 1370, 1373-75 (N.D. Cal. 2007), *rev'd on other grounds*, 340 F. App'x 359 (9th Cir. 2009). By precluding a claim at the pleadings stage based on the lack of allegations of actual damages, the *Chavez* case supports the principle that nominal damages are unavailable for fraud claims. Additionally, California cases not expressly relying on *Holton* nevertheless reach the same conclusion as that reached in *Chavez*. In a case involving misrepresentations made in connection with a promissory note that resulted in no

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damages may be awardable for assault and battery); *Empire Gravel Min. Co. v. Bonanza Gravel Min. Co.*, 67 Cal. 406, 409 (1885) (nominal damages awardable for trespass upon land); *cf. Fields v. Napa Mill. Co.*, 164 Cal. App. 2d 442, 448 (1958) (nominal damages not awardable for negligence without injury).

legally recognizable actual damages, the court stated: "Fraudulent representations which work no damage cannot give rise to an action at law . . . and an allegation of a definite amount of damage is essential to stating a cause of action." *Abbot v. Stevens*, 133 Cal. App. 2d 242, 247 (1955) (citation omitted) (affirming lower court's demurrer on fraud claim); *see also Serv. by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1816-20 (1996) (affirming judgment of dismissal based on the failure to allege damages as a result as promissory fraud); *Building Permit Consultants, Inc. v. Mazur*, 122 Cal.App.4th 1400, 1415 (2004) (affirming demurrer of promissory fraud claim where no damage was alleged).

Having reviewed California law generally, the Court now turns to the Bankruptcy Court's reliance on the two reasons set forth in *Avina v. Spurlock*, which held nominal damages are proper based on "(1) . . . a technical invasion of a plaintiff's rights or a breach of a defendant's duty" even in the absence of loss or injury, or "(2) [when] the extent of plaintiff's injury and damages cannot be determined from the evidence presented." 28 Cal. App. 3d at 1088.[14] The Court considers the second reason first.

Although the second *Avina* reason for awarding nominal damages—namely, that the extent of plaintiff's injury and damages cannot be determined—could theoretically provide a basis for nominal damages, such an award is not warranted here. To the contrary, the damages at issue here were quantifiable, and Clark offered what evidence he had regarding the interest cost difference between a VA loan and a HELOC. The evidentiary shortcoming was not in the inability to quantify any financial loss, but in failing to offer proof of causation.

For that reason, the present case is distinguishable from *Hynix*, where the court concluded that nominal damages, although not generally available for claims of deceit, were available based on *Avina*'s second reason. Specifically, in an action

[14] *Avina* itself did not involve a fraudulent inducement claim; instead, *Avina* involved claims for wrongful eviction and wrongful detention of personal property. *Avina*, 28 Cal. App. 3d at 1087.

between competitors, the court determined that nominal damages were available based on evidence of "actual but unquantifiable" fraud damages where the plaintiff's "senior vice-president testified that significant management time and efforts was expended as a result of [defendant's] conduct which could have otherwise been used for more productive opportunities," and where "management had to respond to investors' concerns." *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. CV-00-20905-RMW 2008 WL 350638, at *2 (N.D. Cal., Feb. 2, 2008).

Turning back to the first *Avina* reason, Clark argued in his post-trial brief to the Bankruptcy Court that nominal damages are available for Debtor's failure to perform under the contract even without proof of actual damage because that conduct constitutes a technical invasion of Clark's rights or a breach of duty. As a proposition of law, this is correct. It has long been established under California law that "[i]n actions for the breach of a contract, nominal damages are presumed to follow as a conclusion of law, from proof of the breach." *Browner v. Davis*, 15 Cal. 9, 11 (1860); *see also Sweet v. Johnson*, 169 Cal. App. 2d 630, 632 (1959) ("A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him . . . since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages.") (citation omitted).

The trouble with this theory is that Clark's claim for nondischargeability is, by necessity, based on Debtor's fraud, not on Debtor's breach of contract. In this regard, that nominal damages would have been available under California law for a breach of contract claim, had such a claim been asserted, is not relevant. What is relevant is that, as discussed herein, nominal damages are not available for a fraudulent inducement claim under California state law. Moreover, as discussed below, even if nominal damages were proper, they would be dischargeable in bankruptcy.

2. Nominal Damages Would Not Fall into the Exception to Dischargeability

In the absence of actual damages, nominal damages in this case would not fall into the exception to dischargeability. To be nondischargeable, the nominal damages (forming the "claim" or the "debt") must be "obtained by," that is, they must "aris[e] from," Debtor's fraud. *Cohen*, 523 U.S. at 223. More specifically, the fifth element of nondischargeability under § 523(a)(2)(A), "damage to the creditor proximately caused by reliance on the debtor's representations or conduct" (BAP Feb. 3, 2016 Mem. Op. at 13), requires that Clark "sustain[] the alleged loss and damage as the proximate result of the misrepresentations having been made," *In re Sabban*, 600 F.3d at 1222.

The details of *In re Sabban* are instructive in this regard. There, a homeowner-creditor had been induced to enter a contract for home remodeling in reliance on the debtor-contractor's fraudulent misrepresentation that his company was licensed, and the homeowner had paid the contractor $123,000 for the work. The creditor sued in state court, alleging that the debtor had violated California Business & Professions Code §§ 7160 and 7031(b). Section 7160 provides a cause of action for fraudulent inducement in contracting and authorizes recovery of a $500 penalty, reasonable attorney's fees, and damages. Section 7031(b) allows for recovery of all compensation paid to an unlicensed contractor without regard to fraud or actual injury to the homeowner. A state court found fraud in the inducement and awarded the homeowner a $500 penalty and attorney's fees pursuant to § 7160. The state court declined to award the $123,000 as "damages" under § 7160, apparently finding that the homeowner-creditor did not actually suffer any damages, but the state court did award that amount pursuant to § 7031(b), as § 7031(b) allows for disgorgement of all compensation paid. *Id.* at 1220-21. After various bankruptcy proceedings and an appeal from the BAP, the Ninth Circuit was called upon to consider whether the $123,000 awarded in the state court judgment represented nondischargeable "loss and

damage" sustained by the homeowner-creditor "as the proximate result" of the debtor's false representation that his business held a contractor's license.[15] *Id.* at 1222-24. There was no question that the debtor had engaged in fraud, and that four of the five nondischargeability elements had been met. The Ninth Circuit nevertheless held that the fifth element of nondischargeability was not met in part because, while the creditor had established that fraud occurred, he did not establish actual damages arising directly out of the fraud. *Id.* at 1224. In the absence of actual damages caused by fraud, the fraud exception to dischargeability did not apply. *Id.* Nor was the Ninth Circuit persuaded by the creditor's argument that the award of $123,000 was "traceable to" the fraud. *Id.* at 1223.

The award under § 7031(b) in *In re Sabban* is similar to any award of nominal damages here based on the first *Avina* reason. Both are monetary awards premised on a technical invasion of a legal right that caused no monetary loss to the creditor. Both were amounts awarded in transactions involving fraudulent inducement, but neither constitutes "damage" caused by fraudulent inducement. Thus, under *In re Sabban*, to the extent that the Bankruptcy Court awarded Clark nominal damages based on "a technical invasion of [Clark's] right or a breach of duty by [Debtor]," this does not give rise to "loss and damage" suffered "as the proximate result" of Debtor's fraudulent conduct as required to meet the fifth element of nondischargeability.

Accordingly, the Court VACATES the award of nominal damages.

IV. PREVAILING PARTY STATUS

A. Attorney's Fees

The Bankruptcy Court awarded attorney's fees pursuant to California Civil Code § 1717. Debtor challenges the award on appeal, arguing that Clark was not a prevailing party. In light of this Court's vacatur of the actual and nominal damages awards, the Court also VACATES the award of attorney's fees. The Court

[15] The Ninth Circuit noted that the BAP had held the $500 penalty and award of attorneys' fees pursuant to § 7160 to be nondischargeable because a violation of § 7160 is directly premised on fraud. The parties did not appeal this determination.

REMANDS the issue of attorney's fees to the Bankruptcy Court with the following instructions.

The Bankruptcy Court's determination of this issue is to be guided by the BAP's December 11, 2017 Memorandum Opinion. There, because the BAP vacated the liquidated damages award, it also vacated the attorney's fee award in favor of Clark because Clark lacked prevailing party status. (BAP Dec. 11, 2017 Mem. Op. at 13, 26-28.) The BAP instructed the Bankruptcy Court that if Clark proved actual damages, the Bankruptcy Court could "reinstate or amend its last fee award." (*Id.* at 28 (emphasis added).) However, as discussed herein, Clark failed to prove any damages in this action. Therefore, Clark cannot be considered a prevailing party in this action. (*See id.* at 27 ("In the absence of a damages award in his favor, Clark is not the prevailing party for attorneys' fees purposes.").)

The BAP left open the possibility that Debtor could be considered the prevailing party (*see id.* at 28), but on the relevant legal standard cited by the BAP (and set forth more fully below),[16] a court could also conclude that there was no prevailing party in this action.

Accordingly, on the full record of this case, with additional briefing and/or reopening of the record left to the discretion of the Bankruptcy Court, and on the legal standard set forth below, the Bankruptcy Court must consider whether Debtor is the prevailing party in this case or if there is no prevailing party in this case. If the Bankruptcy Court determines that Debtor is the prevailing party, it must determine what amount of fees (if any) should be awarded.

Prevailing party status is determined with reference to California Civil Code § 1717, which in relevant part provides:

[16] The BAP instructed the Bankruptcy Court to determine prevailing party status pursuant to the legal standard set forth in *In re Tobacco Cases I*, 216 Cal. App. 4th 570, 577 (2013), as modified (May 8, 2013). (BAP Dec. 11, 2017 Mem. Op. at 28.) This Court does not cite *In re Tobacco Cases I* in the legal standard set forth below. However, the standard set forth in *In re Tobacco I*, a California appellate decision, is derived directly from California Civil Code § 1717 and the two California Supreme Court decisions that are cited below.

> (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 . . . . [T]he 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.

Cal. Civ. Code § 1717.

"[T]he determination of prevailing party for purposes of contractual attorney fees [must] be made without reference to the success or failure of noncontract claims." *Hsu*, 9 Cal. 4th at 873-74. "[P]arties whose litigation success is not fairly disputable" are entitled to "attorney fees as a matter of right," but a "trial court [retains] discretion to find no prevailing party when the results of the litigation are mixed." *Hsu*, 9 Cal. 4th at 876. In determining "prevailing party" status under § 1717, courts must "compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." *Id.* This comparison must "be made only upon final resolution of the contract claims and only by a comparison of the extent to which each party has succeeded and failed to succeed in [his or her] contentions." *Id.* (internal quotation marks and alteration marks omitted). Moreover, "in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by equitable considerations." *Id.* at 877 (emphasis

omitted). Significantly "[i]f neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." *Scott Co. of California v. Blount*, *Inc.*, 20 Cal. 4th 1103, 1109 (1999).

B. Costs

The definition of prevailing party for purposes of costs is different than that used for attorney's fees. *See* Cal. Code of Civ. Pro. § 1032(a)(4) ("'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant.").

In light of the vacatur of the award of actual damages, the Court VACATES the award of costs and REMANDS the issue of costs to the Bankruptcy Court. The Bankruptcy Court shall consider whether to award costs in accordance with the relevant legal standard set forth above.

V. REQUEST FOR REASSIGNMENT ON REMAND

Debtor asks that if this case is remanded for a third time, the Court order that it be reassigned to a different bankruptcy judge. Such an order is authorized by 28 U.S.C. § 2106, which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Id.; *see also Stetson v. Grissom*, 821 F.3d 1157, 1167 (9th Cir. 2016) (ordering reassignment on remand pursuant to § 2106).

"Absent proof of personal bias on the part of the district judge, remand to a different judge is proper only under unusual circumstances." *Disability Rights Montana, Inc. v. Batista*, 930 F.3d 1090, 1100 (9th Cir. 2019) (quoting *United States v. Reyes*, 313 F.3d 1152, 1159 (9th Cir. 2002)). Whether these "unusual circumstances" are present depends upon three factors, referred to as the *Arnett* factors:

> "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

Batista, 930 F.3d at 1100 (quoting *Arnett*, 628 F.2d at 1165). A finding of either the first or the second factor "'is sufficient to support reassignment on remand.'" *Batista*, 930 F.3d at 1100 (quoting *Krechman v. Cty. of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013)).

Here, the Court does have significant concerns as to the statements the bankruptcy judge made about the BAP panels' rulings on liquidated damages. Specifically, on the second remand, the bankruptcy judge expressly—and repeatedly—criticized the BAP opinion reversing his liquidated damages ruling. (*See, e.g.,* AP Doc. 175, Oct. 6, 2016 Tr. at 6 ("Here's why I think, even though I'm stuck with this or I have [to] do this, one of the reasons why I think the BAP got this decision wrong, Ms. Arciniega had a lawyer throughout the whole case until trial."); June 25, 2019 Tr. at 9-10 (discussed below); *id.* at 22 ("This is the type of sort of damage calculation that the BAP—although I truly truly believe the first BAP Panel was wrong especially governing California Law regarding who has the burden of proof. In fact, the California Law says, 'It's deemed reasonable.' Even the second

BAP opinion is wrong because its view is it should have been abundantly clear the liquidated damages bear no reasonable relationship in actual damages. . . . So, I think even the second BAP Panel just got California Law wrong.").) Indeed, the bankruptcy judge expressed his belief that a particular BAP panel member from the first appeal was responsible for an erroneous conclusion regarding liquidated damages that bound both the Bankruptcy Court and the subsequent BAP panel to perpetuate the error. (*See id.* at 9-10.) The bankruptcy judge further commented on other purported reversals of the panel member's cases by the Ninth Circuit. (*See id.* ("I've seen him get reversed by the Ninth Circuit on BAP decisions where he was a lead multiple times where he just flat out got California case wrong. I think the Ninth Circuit at least once, probably twice, since I became a Judge, reversed [him] where he just miscited California Law. And I truly truly believe to the day I retire, [he] just made a mistake.").)

This Court certainly understands that an appellate reversal can be frustrating when a trial judge believes he got it right. However, the judge's on-the-record statements that the Panels got it "wrong" on liquidated damages, made after two reversals on the award of those damages, does suggest that the bankruptcy judge might have "substantial difficulty in putting out of his . . . mind previously-expressed views" related to this case, and that his comments might affect the "appearance of justice." *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979)*;see, e.g., Nozzi v. Housing Authority of City of Los Angeles*, 806 F.3d 1178, 1203-04 (2015) (ordering reassignment where "the district judge made a number of statements indicating his strong disagreement with" previous appellate decisions in the case because reassignment was necessary to "preserve the appearance of justice"); *Stetson*, 821 F.3d at 1167 (ordering reassignment when reversing and remanding the district court's attorney fee rulings for the third time).

Were this case being remanded on the issue of liquidated damages, the Court's concerns might be sufficient to warrant reassignment. But that is not the case here. In

light of the considerable time and resources the bankruptcy judge has put into this matter, and the fact that remand is limited to determining the prevailing party and, if necessary, reasonable attorney's fees, the counterbalancing third *Arnett* factor, "whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness," *Arnett*, 628 F.2d at 1165, counsels against reassignment.

VI. CONCLUSION

As set forth herein, the Court VACATES the Bankruptcy Court's Judgment. The matter is remanded for further proceedings consistent with this Order.

IT IS SO ORDERED.

DATED: March 03, 2021

Hon. Josephine L. Staton
United States District Judge

CC: BANKRUPTCY; BAP