

STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A09-607

District Court File Nos. 17-CV-05-213 & 17-CV-06-247

United Prairie Bank - Mountain Lake,

Respondent,

vs.

Haugen Nutrition & Equipment
LLC., Leland Haugen, Ilene
Haugen et al,

Appellants.

APPELLANTS' REPLY BRIEF

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Appellants will reverse the order of argument presented in their initial brief and discuss the issue of the reasonableness of attorneys' fees first. This issue, of course, relates to the question of Appellants' right to a jury trial, because if the fees are unreasonable, the Appellants should be given a new trial anyway, and direction from the Supreme Court should help narrow the issues.

Respondent spends much less time on the issue of reasonableness, and much of the argument consists of generalities, such as the fact that there was testimony supporting UPB's claims. Let us examine them in more detail.

UPB was awarded \$117,110.24 in legal fees for defending against claims asserted in the Meadowlands lawsuit, a case which was defended prior to the declaration of any default on either of the mortgages which is the subject of the current action. As a representative sample of the attorneys' fee clauses in UPB's notes and mortgages, consider the notes annotated on page four of the Court's decision:

I [HNE/Haugen] will pay all costs of collection, replevin, or any other or similar type of cost if I am in default.

In addition, if you [UPB] hire any attorney to collect this note, I will pay attorney's fees plus court costs (except where prohibited by law).

(A-4)

Based on this, and similar language, the Court ordered attorneys fees in Meadowland and in other matters which were not

the subject of any default declared by the bank. This creates two problems: (a) can a creditor impose reasonable attorneys fees for protecting collateral if the action to protect the collateral is not the subject of a default? and (b) if a debtor defaults on one provision of a note or mortgage, can the creditor collect attorneys' fees for protecting the collateral in respects having nothing to do with the default? The answer to both questions is surely "No."

First, consider the consequences of a "yes" answer to either. Banks do all sorts of things to protect their collateral even when a debtor is not in default. They record their security agreements, often through a lawyer. They have arguments with mortgage assignees, junior creditors, and all sorts of other persons or entities which involve their mortgages and security interests with debtors. Usually these actions require legal representation. Sometimes they have to testify before governmental agencies, again matters which often involve attorneys. And of course, attorneys update, review, and make suggestions with regard to loans and loan documents all the time. If creditors are permitted to charge their attorneys' fees to debtors without regard to default, the debtor class will not only have to pay back principal and interest - it will have to pay attorneys fees, a significant portion of their potential debt. No Court would tolerate this, and lending would soon become

impossible.

That leave the second question: can a lender charge reasonable attorneys' fees for attorney services performed to protect the loan in the event of default even if the services performed are unrelated to the default? UPB never declared a default based upon being forced into the Meadowland litigation, and it is doubtful that it could have done so. As the New York Court said in *41 Fifth Owners Corporation v. 41 Fifth Equities Corporation*, 14 A.D.3d 386, 787 N.Y.S.2d 326 (N.Y.A.D. 1 2005):

Finally, the lease grants Owners the right to collect attorneys' fees in connection with any action involving the tenant's default of any term or covenant in the lease. It does not, however, bestow a commensurate right to attorneys' fees in connection with the defense of a claim, asserted by the tenant, that is unrelated to its default. Therefore, the matter must be remanded to Supreme Court for a determination of the appropriate fee attributable to Owner's prosecution of the action to effect a cure of the tenant's default in the payment of rent arrears.

(*Id.* at 386)

UPB's theory is that a bank may not have the right to charge reasonable attorneys' fees for matters unrelated to a default if there is no default, but if there is a default in any portion of the mortgage or note, it can "throw the kitchen sink" at the debtor. This makes neither legal nor equitable sense. As far as the undersigned knows, no court in the land has ever accepted this theory, and acceptance would be disastrous. Suppose a debtor defaulted by being thirty days late with payment. If one

accepts UPB's theory, the bank could then declare a default, add on any attorneys' fees ever related to the loan, and acquire a high-value property for a low-impact default, even if the debtor were ready, willing and able to make the actual default good in a short period of time. On the other hand, courts dealing with the issue have regularly held that in the event of default, reasonable attorneys' fees are limited to attorney time spent on the default. See, e.g., *In re 2495 Broadway Supermarket, Inc.*, 97 B.R. 765, 18 Bankr.Ct.Dec. 1448, Bkrtcy.S.D.N.Y., March 02, 1989 (NO. 88B 10749(TLB)); *In re Westworld Community Healthcare, Inc.*, 95 B.R. 730, 21 Collier Bankr.Cas.2d 587, Bkrtcy.C.D.Cal., January 10, 1989 (NO. SA 87-03985 JR). It is hard to imagine any jury in the world granting a bank attorneys' fees for work unrelated to the default, which is one reason why the Appellants should be entitled to a jury trial.

The Court also awarded UPB attorneys' fees for responding to Appellants' counterclaims:

(64) That UPB thereafter incurred numerous attorneys fees and costs in responding to Defendants answer and counterclaim, in conducting discovery, in bringing summary judgment motions, and in responding to various motions brought by defendants. That UPB offered and the Court received Exhibit 145 at trial, that Exhibit 145 thoroughly identifies all costs and attorney fees incurred by UPB throughout this litigation.

(A-14)

But the counterclaim basically has little if anything to do

with the defaults which justified UPB in foreclosing its mortgages. And certainly the bases for these counterclaims had nothing to do with those defaults. Appellants would have had the right to bring them as separate lawsuits. So in effect UPB is arguing that it can charge attorneys' fees to defend lawsuits unrelated to defaults, and that it can stretch the "protect the collateral" language to anything remotely connected to a mortgage - or even unconnected to a mortgage. Suppose a bank vehicle had run into a Haugen truck and Appellants had brought a damages and personal injury suit against UPB as a permissive counterclaim. Under UPB's theory, it could charge Appellants attorneys' fees for defending the personal injury action, because it arises out of a lawsuit in which the protection of the collateral is at issue. This will never do. A similar situation arose in California in the case of *Sherwood v. Wavecrest Corp.*, 2009 WL 1066518 (N.D.Cal. 2009):

In his initial letter, Sherwood's counsel identified approximately \$10,000 in costs associated not with Leisz's default under the settlement agreement but with the underlying litigation of the instant matter. Because Sherwood relinquished his right to recover these costs as part of the settlement agreement, he now requests that the Court add the costs to the total sum that Leisz must pay to cure his default. Leisz objects to the inclusion of these costs on the ground, *inter alia*, that compensation for more than the damage caused by the delayed payment amounts to a sanction as to which the Court first must make a finding of bad faith. See *Leon v. IDX Systems Corp.*, 464 F.3d 951, 961 (9th Cir.2006) ("Before awarding ... sanctions [pursuant to its inherent sanctioning powers], the court must make an express finding that the sanctioned party's behavior

'constituted or was tantamount to bad faith.' " (citation omitted)); see also *In re Keegan Mgmt. Co.*, § Litig., 78 F.3d 431, 436 (9th Cir.1996) (holding that sanctions pursuant to 28 U.S.C. § 1927 require a finding of recklessness or bad faith).

Sherwood understood the Court to authorize the requested costs at the hearing on March 23, 2009. However, the record is ambiguous, and the Court did not intend to authorize costs unrelated to the default. While the Court is not unsympathetic to Sherwood's request, and in fact agrees that Leisz's conduct throughout the instant litigation has caused considerable frustration and delay, the Court agrees with Leisz that requiring payment of the additional \$10,000 would be improper because the record does not support a finding of bad faith with respect to Leisz's delay in making the final payment. Accordingly, the total amount of payment required to cure the default will be \$55,100.

(*Id.* at 2)

So any attorneys' fees UPB should have received as a result of Appellants' counterclaims and motions would have to be payable, if at all, as a result of misconduct by Appellants' attorneys - something which was not even alleged, much less found by the court.

But the situation is worse than that, because Appellants prevailed in whole or in part on a good many of the motions. This is certainly true of the motions relating to equitable mortgage, but it is also true of motions with regard to use of the property, amount of bond, right to possession, etc., some of which Appellants won and many of which were "split decisions," as was the District Court's ultimate decision on the merits.

The consequences of permitting recovery of attorneys fees in

mortgage default cases for work performed not directly related to the default are vast. The lending industry depends upon a reasonable degree of certainty in its transactions. Debtors have to know that if they keep the terms of their underlying agreement, they will not be vulnerable to thousands of dollars in "extras" which they never bargained for. They also have to know that if they make a minor failure and do not pay on time or fall somewhat short of their payment obligations, they will be able to pay their obligations, without fear of having to pay hundreds of thousands of extras in attorneys fees which have little or nothing to do with their default. Finally, they have to know that they have access to the courts for their legitimate claims (here, their equitable mortgage claims) without fear that their own proper legal actions will fund the other party's attorney.

The Minnesota courts, like other courts, should read the "reasonable attorneys' fees" clauses in notes and mortgages narrowly, and require that any attorney work which is subject to an award is directly related to the default, not to everything else which has or might have happened to the parties during their lending history.

This brings us to the jury fee issue. First, Respondents cite numerous cases holding that a lender is entitled to reasonable attorneys' fees under a loan contract if they are entitled to them under the loan documents, whether collection on

the loan documents was authorized by a Court or jury. The problem with this argument is that none of those cases involved a defendant who demanded a jury trial on the attorneys' fees issue. UPB then argues that other jurisdictions have held that attorneys' fees are a matter for the Court, not the jury. But Respondent does not state whether these states have a constitutional provision entitling a party to a jury trial in civil cases or a line of cases holding that contract issues invoke the right to a jury trial, as does Minnesota. UPB then goes on to cite the Court of Appeals' decision below to the effect that Minnesota does not afford a defendant the right to a jury trial on the attorneys' fees issue. But the Supreme Court granted review in this case on precisely that issue, so any statement from the Court of Appeals has value only insofar as its logic is persuasive.

UPB makes a number of arguments claiming that *Ross v. Bernhard*, 396 U.S. 531 (1970) is (a) in point and (b) persuasive as a declaration of Minnesota law. Rather than discuss each of UPB's arguments in detail, it is worth considering them together, because the Ross factors (customary treatment, remedy sought, and abilities of juries) are interrelated. "Customary treatment" is not particularly helpful to this case, because this is a case of first impression. Of course Minnesota Courts have regularly handled attorney-fee issues as "judge alone" matters - no one has

ever challenged handling them in that manner before in this State, and besides, the overwhelming majority of reasonable attorney fees cases either occur in cases which are inherently for the bench (e.g. dissolutions, human rights complaints) or involve defaulting debtors who have not demanded a jury trial on the issue.

"Remedy sought" is problematical for Respondent. Respondent argues:

This Court has recognized that attorneys' fees are separate and distinct from recoverable damages of the underlying action.

(Respondent's Brief, p. 33)

Yes, but not in an action such as this one. Respondent is correct that the legislature can "explicitly provide for the recovery of 'reasonable attorneys' fees' in addition to 'damages' when it so desires." True, but it did not do so in the case of mortgages and notes. Respondent is correct in claiming that "Attorneys' fees and expenses incurred in an action for damages may be recovered by the injured party in a subsequent action against person whose tortious conduct gave rise to such damages," but UPB's action is one relating to foreclosure on a note and mortgage, not tortious conduct. And although courts have held that a trial court may determine the reasonableness of attorneys fees even where there is a jury award on the underlying action, that is only because the right to attorneys' fees did not arise

from the same document as underlay the action. What Respondent needs, and what it has not produced, is a Minnesota case stating that a defendant is not entitled to a jury trial on the issue of attorneys' fees when the source of the right to such fees is the same contract which gives the plaintiff the right to sue the defendant in the first place.

With respect to the third Ross factor, the alleged "better equipment" of judges to deal with attorneys' fees issues, the claim is a wash. To be sure, every Judge in Minnesota was a lawyer once. But which way does that cut? On the one hand, a judge is likely to know the nature of an attorney's services, the time likely spent on them, and the necessity for them. On the other, he is likely to be biased toward his colleagues and their tribulations in collecting their fees. The important "tiebreaker" is that this factor applies to no other professionals or their bills and fees. A physician wishing to collect on a contract for medical services, a veterinarian seeking to collect on veterinary fees, and an accountant seeking to collect on his bill all have to face a jury on their contract for services. There is no basis in the Minnesota Constitution, nor its statutes, nor its cases, which purports to except attorneys from the general rule, and no basis for doing so. The framers or the legislature could have said "there is a jury trial right in all contracts involving professional services except for

legal services." They did not.

Respondent then proceeds to attempt to distinguish *J.R. Simplot v. Chevron Pipeline, Inc.*, 563 F.3d 1102 (10th Cir. 2009). *Simplot* held that if the right to recover reasonable attorneys' fees arises by way of contract and a defendant has the right to a jury trial on the underlying contract, he or she has a right to a jury trial on the issue of attorneys' fees. UPB argues that *Simplot* involves a case like an insurance claim where the insurer has breached its duty to defend and the insured sues for recoupment of attorney fees. UPB then goes on to argue that this case is not much like a claim on an insurance policy.

Actually, this case does have some analogies to such an insurance case. In both cases, the right to recovery arises from a contract which grants recoupment for expenses incurred in enforcing it. But the instant case (and actually *Simplot* itself) is much stronger for the jury trial right than is the case with the insurance claim. As Respondent acknowledges:

In *Simplot*, there was no contractual provision for an award of attorneys' fees; that case involved an indemnity provision.

(Respondent's Brief, p., 38)

But that fact serves to make Appellants' case all the stronger. The Haugen have a right to a trial by jury on the attorneys' fees issue precisely because the right to reimbursement arises from a contract and they have a

constitutional right to a jury trial on a contract claim.

UPB's most important reliance on *Simplot* comes in the form of its quotation from the Appellate Court's decision:

We consider *Simplot* inapposite based on this significant distinction. Where the contract breach is premised on an obligation to provide a legal defense, attorney fees are the direct consequence of the breach and the measure of damages. Where, as here, the substance of the contract claim is nonpayment of a promissory note, the damages directly caused by nonpayment is the balance due under the note: the issue of fees is collateral.

(*United Prairie* at 271)

But this is not relevant to the issue at hand. Whether a given right is collateral to or central to the underlying contract, the only right to any attorneys' fees at all arises from, and is found in, the contract. Attorneys' fees are not recoverable absent specific authority allowing recover. See, e.g., *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W. 2d 46 (Minn. 1983). Had there been no contract here, there would have been no right to any attorneys' fees at all. So not only is the mortgage and note central to the right of UPB to collect attorneys' fees - it is the sole basis upon which such fees can be awarded. To rule otherwise would be to split the contract into two parts - one permitting foreclosure, another permitting recovery of attorneys' fees. There is nothing in the document which permits such a separation of clauses, and the court would not even consider subjecting different clauses to different rights in

cases involving any other form of professional.

UPB then makes the somewhat strange argument that "This lawsuit is not an attorneys' breach of contract claim."

(Respondent's Brief, p. 40). Respondent appears to mean that this is not a suit brought directly by an attorney to recover fees for services performed for his or her client. Perhaps not, but it is something very close to it. It is a suit brought by attorneys (by way of their client) to recover fees for services performed for their client. The difference between a fee-shifting claim for recovery of attorneys fees and a direct claim for recovery of attorneys' fees is unimportant - a distinction without a difference. In both cases, the measure of damages will be the "time, effort, experience etc." standard acknowledged by both parties. In both cases, the testimony will involve attorney records, attorney testimony, statements about the quality of services, etc. To be sure, the claim is likely to be higher in the fee shifting case, because the attorney is attempting to bill an enemy rather than a friend. But the nature, standard, and quality of the proof and the evaluation of the same will be identical.

The Court of Appeals' distinction between direct and indirect consequences of a breach is very problematical concerning attorney fees cases. The Court of Appeals appears to concede that if this had been a direct action, either by an

attorney to recover a fee or by an insured attempting to recover the attorneys' fees he or she has incurred, there would be a right to a jury trial. But what is there in this distinction which has any relationship to the questions at issue, such as labor performed, benefit received, experience of the practitioner, etc.? They will be the same in each type of case. So will the difficulty of the trier of fact in dealing with the issues presented. To make a distinction between the two types of cases invites confusion. Whether the instant case be viewed as an attorneys' breach of contract claim or an indirect attorneys claim founded on breach of contract, the result should be the same - there is a constitutionally-mandated right to a jury trial here.

Also, it should be noted that UPB has a judgment against Appellants for the attorneys' fee award independent of the value of the property sold at foreclosure. This is a general judgment, just as if the contract had been between the Haugen and UPB for the payment of UPB's attorneys' fees in connection with some matter other than the Haugen mortgage. Of course, this is one more reason why the District Court got it wrong in awarding attorneys' fees for things like the Meadowland lawsuit. But it is also a reason why an attorneys' fee clause in a mortgage or note should be treated like any other contract provision.

Finally, Respondent makes a public policy argument:

With the number of foreclosures and foreclosure-related lawsuits rising in this state, courts would be subject to a significant burden if a jury trial was required for each case in which the foreclosing lender sought a contractually-authorized attorneys' fee award.

(Respondent's Brief, p. 42)

It is hard to keep from pulling out the handkerchief. As Justice Page wrote in dissent in *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009):

Finally it is apparent with the benefit of hindsight that the ability of lenders to freely and anonymously transfer notes amount themselves facilitated, if not created, the financial and banking crisis in which our country currently finds itself. It is not only borrowers but also other lenders who rightfully are interested in who has a particular promissory note.

(*Id.* at 504)

And it is not only borrowers but other lenders who are prejudiced when their debtor is stripped of all his assets by an attorney fee claim. If banks had to worry about not recovering their attorneys' fees, perhaps they would be less reckless in making, processing, servicing, and foreclosing on loans and mortgages.

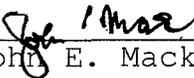
Perhaps more to the point, the right to attorneys' fees in foreclosure by advertisement, the most common avenue to foreclosure by fair, is strictly limited. If UPB had foreclosed by advertisement here, it would have been entitled to less than 1/100th of the fees it is claiming.

And there is an equally compelling public policy argument to

protect debtors from excessive attorneys' fees. The debtor has no right to discharge the creditor's attorney if the fees are becoming excessive. He has no access to the attorneys' billings prior to being sued, unlike the case where his own attorney is billing him. He has no protection against malpractice, and very little against sharp or unethical practice. There is a strong public interest in protecting debtors from excessive claims and insuring reasonable behavior on the part of attorneys. Making attorneys subject to the judgment of their peers is an excellent way to accomplish both.

Dated: September 20th, 2010

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Slip Copy, 2009 WL 1066518 (N.D.Cal.)

Motions, Pleadings and Filings

Judges and Attorneys

Only the Westlaw citation is currently available.

United States District Court, N.D. **California**,
San Jose Division.

Mark **SHERWOOD**, Plaintiff,

v.

WAVECREST CORPORATION; Amherst Systems Associates, Inc.; Dennis Leisz; and Michael K. Williams, Defendants.

No. C 05-2354 JF (RS).

April 20, 2009.

West KeySummary

89 Compromise and Settlement

89I In General

89k20 Performance or Breach of Agreement

89k20(2) k. Rights of Parties on Breach. Most Cited Cases

Defendant former CEO was entitled to an opportunity to cure his **default** of payments due under a settlement agreement because the penalty for **default** would likely not have had a reasonable relationship to the actual damages suffered as a result of delay. The stipulated judgment of \$652,106 would have been executed under the settlement agreement if the CEO failed to make his final payment of \$50,000. The original award stemmed from defamatory statements made by the CEO resulting in an employee's significant economic loss.

Robert David Baker, San Jose, CA, David J. Cook, Cook Collection Attorneys, San Francisco, CA, Nieve Anjomi, Newton, MA, for Plaintiff.

Leeh A. Dibello, Ronald Dole Digesti, Callahan, McCune & Willis, San Francisco, CA, for Defendants.

Dennis Leisz, pro se.

ORDER ^{FN1} DENYING WITHOUT PREJUDICE MOTION FOR ENTRY OF JUDGMENT

FN1. This disposition is not designated for publication in the official reports.

JEREMY FOGEL, District Judge.

*1 In this long-ago-filed and now-closed action, Plaintiff Mark **Sherwood** ("**Sherwood**") alleged that Dennis Leisz ("Leisz"), the former CEO of Wavecrest, Inc. ("Wavecrest"), made defamatory comments to **Sherwood's** then-employer, causing the employer to terminate **Sherwood**. The Court entered a **default** judgment against Wavecrest on July 2, 2007 and a corresponding "Amended Judgment Fixing Damages" in the amount of \$752,106.00, comprising \$652,106.00 in economic damages and \$100,000.00 for emotional distress. A two-day jury trial on the issue of Leisz's personal liability for the alleged defamation was held on August 28-29, 2007. The jury returned a verdict in favor of **Sherwood**. On August 30, 2007, while the damages portion of the trial was proceeding, the parties entered into settlement discussions with the Court and placed a settlement on the record. Pursuant to the settlement, Leisz agreed that he would pay **Sherwood** \$150,000.00 in three

installments. As a condition, Leisz stated that in the event of **default**, a stipulated judgment would be entered against him in the sum of \$752,106.00—the amount of the **default** judgment against Wavecrest—less any payments made.^{FN2} Leisz made the first two \$50,000 payments on schedule, but he did not pay the remaining \$50,000 by the due date.^{FN3} **Sherwood** therefore moved for entry of judgment in the amount of \$652,106.00 against Leisz (reflecting the payment of \$100,000), and per the terms of the settlement requested that the judgment be declared non-dischargeable in bankruptcy. The motion for entry of judgment was heard on March 23, 2009. Leisz, who did not file opposition, appeared at the hearing and informed the court that he was seeking counsel. Over **Sherwood's** objections, the Court granted Leisz's request for a brief continuance.

^{FN2}. The Court retained jurisdiction over this matter to ensure compliance with the terms of the settlement agreement. See Transcript of Proceedings, August 30, 2007, Baker Decl., Ex. B, at 537:7-9.

^{FN3}. **Sherwood** also has represented to the Court that Leisz failed to apologize to various parties, as required by the settlement agreement. The Court addresses this contention below.

Now represented by counsel, Leisz opposes the motion for entry of judgment. Leisz explains in a declaration that he became unable to make the final payment after he was forced to resign as CEO of Wavecrest in July 2008, when the company's business dried up and creditors seized its assets. Leisz states further that he attempted to sell his house, planning to use the proceeds to pay the final installment of the settlement, but that the house did not sell. In November 2008, Leisz apparently found a new job paying \$95,000 a year. Leisz states that he intends to pay the final installment under the settlement agreement, with interest, as soon as possible. He argues that under the circumstances, entry of the stipulated judgment against him would constitute an unconscionable penalty under **California** law.

Sherwood, who opposes any further opportunities for cure and requests that the Court enter the stipulated judgment in full, disputes whether the judgment would constitute a penalty and argues that **California** law is inapplicable in the context of a motion pursuant to Federal Rule of Civil Procedure 60(b). With respect to the penalty issue, the Court agrees with Leisz that without an opportunity to cure the **default**, entry of the stipulated judgment would constitute a penalty. In Sybron Corp. v. Clark Hosp. Supply Corp., 76 Cal.App.3d 896, 143 Cal.Rptr. 306 (1978), a breach-of-contract action, the parties entered a settlement requiring that the defendants pay the plaintiff \$72,000 in twelve equal monthly installments. The settlement provided that if the defendants defaulted on their payments, a judgment of \$100,000 would be entered for the plaintiff after ten days' notice and an opportunity to cure. *Id.* at 898-99, 143 Cal.Rptr. 306. After making \$42,000 in payments, the defendants defaulted and the plaintiff obtained a \$100,000 judgment. *Id.* The Court of Appeal reversed, holding that the \$28,000 difference between the judgment and the amount originally due under the settlement agreement "b[ore] no reasonable relationship to actual damages suffered by respondent as the result of delay" in paying the amounts prescribed by the settlement. *Id.* at 903, 143 Cal.Rptr. 306.

*2 Similarly, in Greentree Financial Group, Inc. v. Execute Sports, Inc., 163 Cal.App.4th 495, 78 Cal.Rptr.3d 24 (2008), the plaintiff sought \$45,000 in damages but the parties agreed to settle for \$20,000, payable in two installments. *Id.* at 498, 78 Cal.Rptr.3d 24. As part of the stipulated judgment, the parties agreed that upon **default**, judgment would be entered in the amount requested in the complaint. The defendant failed to pay the first installment, resulting in entry of the stipulated \$61,000 judgment. *Id.* In reversing the entry of judgment, the Court of Appeal focused on the fact that damages caused by a delay in making monetary payments are easily determinable. *Id.* at 500, 78 Cal.Rptr.3d 24 (citing Sybron, 76 Cal.App.3d at 900, 143 Cal.Rptr. 306). As in Sybron, the Court viewed the difference between the \$61,000 judgment and the \$20,000 settlement amount as a \$41,000 late payment penalty which bore no reasonable relationship to any actual damages caused by the delay. *Id.* at 501-02, 143 Cal.Rptr. 306.

Contrary to **Sherwood's** assertions, the record is clear that the \$150,000 schedule of payments constituted a settlement, not a judgment. See Transcript of Proceedings, August 30, 2007, Baker Decl., Ex. B, at 538:1-7 ("The Court: [The \$752,106 stipulated judgment is] not going to be executed. It's not going to be recorded unless you **default** It's meant to be a guarantee that you will make the payments according to this agreement."). As in *Sybron* and *Greentree*, the judgment would be entered only upon a **default** under the terms of the settlement agreement. Despite the lengthy history of prejudicial delay caused by Leisz, the Court finds that entry of a \$652,106 judgment against him would run afoul of *Sybron* and *Greentree* absent an opportunity for Leisz to make good on his obligations under the settlement. With respect to whether *Sybron* and *Greentree* apply in the context of a motion for entry of judgment, those cases appear to be the most apposite authority available in the present context.^{FN4}

^{FN4}. While **California** law may not be controlling in the context of a motion pursuant to Rule 60(b), it serves as the appropriate guide in the absence of any controlling authority from the Ninth Circuit. See *In re Wescot Intl., Inc.*, 236 B.R. 27, 32-33 & n. 3 (N.D.Cal.1999) (noting, in the context of determining whether entry of a stipulated judgment upon **default** by a party obligated to make periodic payments under a settlement agreement constituted a penalty, that **California** law, including *Sybron*, was "very instructive on the ... issue of whether this type of judgment can constitute an unconscionable penalty"); see also *In re VEC Farms, LLC*, 395 B.R. 674, 688 & n. 11 (N.D.Cal.2008) (citing *Wescot, supra*, for the proposition that state law, while potentially not controlling in the context of Rule 60(b), is "pertinent").

Consistent with the foregoing, Leisz will be given an opportunity to cure his **default**. Not later than 5:00 pm PDT on May 11, 2009, Leisz shall tender to **Sherwood** an amount equal to (1) the outstanding \$50,000 payment with interest at the judgment rate from the date the payment originally was due, and (2) **Sherwood's attorneys' fees** incurred in connection with Leisz's **default**.^{FN5} Also by that time, Leisz shall file with the Court proof that he (1) has made the required payments, and (2) has fulfilled his obligation to "provide to the Human Resources department at Lecroy Corporation, and to Scott Bausback, a redaction of any disparaging or derogatory comments made by Mr. Leisz to Mr. Bausback." See Transcript of Proceedings, August 30, 2007, Baker Decl., Ex. B, at 537:2-6.^{FN6} Because the record in this case amply reflects Leisz's pervasive dilatory behavior throughout this litigation and the resulting prejudice to **Sherwood**, Leisz will have no further opportunities to cure his **default**. Thus, should Leisz fail timely to satisfy all of the requirements of this order, a fully non-dischargeable judgment will be entered against him in the amount of \$652,106.^{FN7}

^{FN5}. In his initial letter, **Sherwood's** counsel identified approximately \$10,000 in costs associated not with Leisz's **default** under the settlement agreement but with the underlying litigation of the instant matter. Because **Sherwood** relinquished his right to recover these costs as part of the settlement agreement, he now requests that the Court add the costs to the total sum that Leisz must pay to cure his **default**. Leisz objects to the inclusion of these costs on the ground, inter alia, that compensation for more than the damage caused by the delayed payment amounts to a sanction as to which the Court first must make a finding of bad faith. See *Leon v. IDX Systems Corp.*, 464 F.3d 951, 961 (9th Cir.2006) ("Before awarding ... sanctions [pursuant to its inherent sanctioning powers], the court must make an express finding that the sanctioned party's behavior 'constituted or was tantamount to bad faith.' " (citation omitted)); see also *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th Cir.1996) (holding that sanctions pursuant to 28 U.S.C. § 1927 require a finding of recklessness or bad faith).

Sherwood understood the Court to authorize the requested costs at the hearing on March 23, 2009. However, the record is ambiguous, and the Court did not intend to authorize costs unrelated to the **default**. While the Court is not unsympathetic to **Sherwood's** request, and in fact agrees that Leisz's conduct throughout the instant

litigation has caused considerable frustration and delay, the Court agrees with Leisz that requiring payment of the additional \$10,000 would be improper because the record does not support a finding of bad faith with respect to Leisz's delay in making the final payment. Accordingly, the total amount of payment required to cure the **default** will be \$55,100.

FN6. The record contains only **Sherwood's** unsubstantiated assertion that Leisz has not fulfilled his obligations in this respect. If Leisz in fact has done so, he should have no difficulty providing the Court with the required proof.

FN7. The terms of the original settlement make clear that the entire \$752,106 stipulated judgment would be non-dischargeable in bankruptcy. See Transcript of Proceedings, August 30, 2007, Baker Decl., Ex. B, at 534:8-535:7.

***3 IT IS SO ORDERED**

N.D.Cal., 2009.

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