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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

1			
2			
3			
4	In re	)	Case No. 19-13374-B-7
5	<b>KENNETH RAY HUDSON,</b>	)	
6		)	
7	Debtor.	)	
8	<hr/>		
9	MICHELLE BROWN	)	Adv. Proceeding No. 19-1128-B
10		)	
11	Plaintiff,	)	DCN: GEG-2
12		)	
13	v.	)	
14	KENNETH RAY HUDSON,	)	
15		)	
16	Defendant.	)	
17	<hr/>		

**RULING ON MOTION FOR SUMMARY JUDGMENT**

**Before: René Lastreto II, Bankruptcy Judge**

\_\_\_\_\_  
Glen E. Gates, GATES LAW GROUP, Fresno, CA, for Michelle Brown,  
Plaintiff.

Ahren A. Tiller, BLC Law Center, APC, San Diego, CA, for Kenneth  
Hudson, Defendant.

\_\_\_\_\_  
RENÉ LASTRETO II, Bankruptcy Judge:

INTRODUCTION

Michelle Brown ("Plaintiff") moves for summary judgment  
that the debts owed to her by Debtor Kenneth Ray Hudson

1 ("Defendant") are non-dischargeable under 11 U.S.C. § 523(a)(2).<sup>1</sup>  
2 Under the issue preclusion doctrine, Plaintiff seeks judgment  
3 (1) determining that Defendant owes Plaintiff the judgment sum  
4 of \$47,041.18; (2) determining that the debt owed by Defendant  
5 is non-dischargeable in his chapter 7 bankruptcy case;  
6 (3) awarding costs and fees, including attorney fees; and  
7 (4) for such other and further relief as deemed just and proper.  
8 Doc. #108.

9 Defendant timely opposed on the basis that the record fails  
10 to establish or allocate damages for fraud versus Plaintiff's  
11 other dischargeable causes of action, and therefore the motion  
12 should be denied. Doc. #124. Alternatively, if the court must  
13 enter a judgment against Defendant due to issue preclusion,  
14 Defendant argues that Plaintiff is not entitled to additional  
15 attorney fees under Cal. Civ. Code ("C.C.C.") § 1717 because  
16 these proceedings are not "on a contract." *Id.*

17 Plaintiff replied asserting that Defendant provided no  
18 evidence and ignores the state trial court's thorough judgment  
19 as to the third cause of action for fraud, and thus under issue  
20 preclusion, the motion should be granted.

21 This Motion for Summary Judgment was filed on 42 days'  
22 notice as required by LBR 7056-1 and in conformance with Rule  
23 7056 and Civil Rule 56. This matter was originally scheduled to  
24 be heard on May 26, 2021. Doc. #130. The court required  
25 additional briefing on the issue of recoverability of attorney  
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27 <sup>1</sup> Unless otherwise indicated, references to "LBR" will be to the Local  
28 Rules of Practice for the United States Bankruptcy Court, Eastern District of  
California; "Rule" will be to the Federal Rules of Bankruptcy Procedure;  
"Civil Rule" will be to the Federal Rules of Civil Procedure; and all chapter  
and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 fees and ordered the parties to simultaneously submit, file, and  
2 serve briefs not later than June 16, 2021. *Id.*

3 Both parties timely filed supplemental briefs on June 16,  
4 2021. Docs. #135; #137.

5 This motion will be GRANTED as to Plaintiff's  
6 § 523(a)(2)(A) cause of action, including attorney fees as  
7 awarded in the underlying judgment. Further, the motion will be  
8 GRANTED as to additional attorney fees incurred while  
9 prosecuting this action.

10  
11 BACKGROUND

12 Kern Bluff Resources, LLC ("KBR") was formed by Defendant  
13 in 2011 to invest in and own real estate, including mineral,  
14 oil, and gas resources. Doc. #102. Plaintiff was then counsel  
15 for Defendant and KBR. While representing Defendant and KBR,  
16 Plaintiff acquired 2 million shares of KBR units and a 4.1667%  
17 interest in mineral rights. Doc. #125, ¶¶ 1-5.

18 In 2014, a dispute arose. Plaintiff resigned as counsel for  
19 KBR. Defendant sued Plaintiff in Kern County on April 11, 2014,  
20 Case No. S-1500-CV-281744. Four months later, after mediation,  
21 the parties stipulated to resolve the Kern County litigation.  
22 *Id.*, ¶¶ 15-16. All parties signed a final, binding settlement  
23 agreement on October 14, 2014 ("Settlement Agreement"). *Id.*,  
24 ¶ 21. The Settlement Agreement provided that Defendant,  
25 individually and as trustee of the Hudson Family Trust, the  
26 Hudson Family Trust, and KBR would pay Plaintiff \$10,000 on or  
27 before December 31, 2014. In return, Plaintiff would release all  
28

1 claims and transfer Plaintiff's mineral rights and 1.1 million  
2 KBR units to Defendant. *Id.*, ¶¶ 24-24.

3 Plaintiff performed the Settlement Agreement and delivered  
4 a signed and notarized transfer and reconveyance of membership  
5 interest and mineral rights in favor of Defendant. After the  
6 transfer of 1.1 million KBR units to Defendant, Plaintiff was  
7 left with 900,000 remaining KBR units. *Id.*, ¶ 24. On November  
8 11, 2014, Plaintiff quitclaimed her 4.1667% interest in mineral  
9 rights to Defendant. *Id.*, ¶ 26. Defendant dismissed the Kern  
10 County action with prejudice on December 1, 2014, causing the  
11 state court to lose jurisdiction to enforce the settlement  
12 pursuant to Cal. Civ. Proc. ("C.C.P.") Code § 664.6. *Ibid.*

13 On December 18, 2014, Plaintiff sought assurances that the  
14 \$10,000 payment would be made on or before December 31, 2014.  
15 *Id.*, ¶ 27. On January 5, 2015, Defendant's attorney in the state  
16 court action responded, "My client is working on it. By the end  
17 of the month (sooner if a capital event happens first). She is  
18 first on the list."<sup>2</sup> *Id.*, ¶ 28; Doc. #115, Ex. 45.

19 On or about July 31, 2015, Citadel Corporation, Inc., a  
20 third party and publicly traded oil and gas company, closed  
21 escrow and purchased KBR's assets for a purchase price of \$2  
22  
23  
24

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25 <sup>2</sup> The parties dispute whether Defendant had intention to pay the \$10,000  
26 at this time. Doc. #125, ¶ 29. Plaintiff claims that Defendant did not intend  
27 to pay the \$10,000, evidenced by his recording of the reconveyance to the  
28 mineral rights on November 11, 2014, allegedly in violation of the Settlement  
Agreement, *Id.*, ¶ 31. Defendant claims these statements are false, that KBR  
owed the debt and he intended KBR to pay Plaintiff, but there was not any  
money available. Defendant contends he did not personally owe Plaintiff  
anything. *Id.*, ¶¶ 30-31; Doc. #126, ¶ 14.

1 million as well as 6 million shares in Citadel, and KBR retained  
2 an overriding royalty.<sup>3</sup> Doc. #125, ¶ 33.

3 In September 2015, after learning escrow closed on the  
4 Citadel sale, Plaintiff demanded payment of the \$10,000 and  
5 delivery of the promised documents in the Settlement Agreement.<sup>4</sup>  
6 *Id.*, ¶ 34.

7 July 29, 2016, Plaintiff learned that Defendant, his wife,  
8 and his son had been removed from KBR's management by Order of  
9 the Court in a consolidated action in San Diego County Superior  
10 Court, Case No. 37-2015-00014099 ("Consolidated Investor  
11 Action"), which was brought by investors and KBR's new  
12 management against Defendant, his wife, and son. *Id.*, ¶ 35; see  
13 also Doc. #115, Ex. 48. The court found, "There is a sufficient  
14 showing of a likelihood of prevailing on the claim of breach of  
15 fiduciary duty." *Id.*, at 2. Defendant testified under oath at  
16 his deposition taken in the Consolidated Investor Action that  
17 the value of the mineral rights was never determined. Doc. #125,  
18 ¶ 40.

19 Not having received the consideration under the Settlement  
20 Agreement, Plaintiff filed an action for breach of contract,  
21 common counts, and fraud in the San Diego Superior Court Case  
22 No. 37-2017-00037943-CL-CO-CTL ("San Diego Action") against  
23

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24 <sup>3</sup> Defendant claims that Plaintiff was listed on the accounts payable  
25 list included in the sale of KBR assets to Citadel Corporation. Doc. #126,  
26 ¶ 16. Plaintiff claims that she was not notified of the sale. Doc. #110,  
27 ¶ 22.

28 <sup>4</sup> Plaintiff claims that the new KBR board and accountant notified  
investors they were having difficulty reconciling the members' respective  
ownership interest in KBR and tracing missing funds from the sale of KBR  
assets to Citadel as a result of Defendant's mismanagement of KBR. Doc. #125,  
¶ 36. Defendant insists that the sale documents identify where every dollar  
went. Doc. #125, ¶ 17.

1 Defendant, individually and as trustee of the Hudson Family  
2 Trust, the Hudson Family Trust, and KBR. *Id.*, ¶ 41 on October  
3 12, 2017. The complaint sought rescission of a portion of the  
4 settlement agreement requiring transfer of 1.1 million KBR  
5 membership units as well as the transfer of the 4.1667% of  
6 mineral rights in the Kern Bluff oil field in exchange for the  
7 promise to pay \$10,000 and full disclosure of KBR's books and  
8 records. *Id.*, ¶ 42; Doc. #117, RJN-1. Plaintiff requested the  
9 sum of \$8,813.21 as and for restitution and damages for  
10 royalties that were received by Defendant because of his alleged  
11 fraud against Plaintiff.<sup>5</sup> *Ibid.*; Doc. #125, ¶ 43.

12 Plaintiff sought rescission of the portion of the  
13 Settlement Agreement based on Defendant's false promise to pay  
14 Plaintiff \$10,000 and produce books and records of KBR. *Id.*,  
15 ¶ 45. Provisions including mutual waiver and release were  
16 retained. *Ibid.* Plaintiff also sought an award of punitive  
17 damages, but this count was dismissed on April 27, 2018.  
18 Doc. #126, Ex. C.

19 Defendant was personally served with Plaintiff's summons  
20 and complaint on January 23, 2018. Doc. #125, ¶ 46. Defendant  
21 did not respond to the complaint and his default was entered on  
22 April 27, 2018. Doc. #110. On May 30, 2018, Defendant appeared  
23 *ex parte* in the San Diego Action and requested the court set  
24 aside the default. Doc. #125, ¶ 47. The court denied the  
25

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26  
27 <sup>5</sup> Plaintiff contends that the \$8,813.21 was attributable to royalty  
28 payments due Plaintiff but received by Defendant between 2015 and 2018.  
Doc. #125, ¶ 44. Defendant insists this is not possible, and that if  
Plaintiff were owed royalty of .04%, then less than \$500 would be owed  
plaintiff for that period of time. Doc. #125, ¶ 21.

1 request, instructed Defendant to file a noticed motion, with an  
2 answer, and retain legal counsel. *Ibid.*

3 Defendant's motion to set aside the default was heard on  
4 July 11, 2018. *Id.*, ¶ 48. Defendant appeared and was permitted  
5 to present testimony and evidence in support of his motion to  
6 set aside the entry of Default. *Ibid.* Defendant did not file an  
7 answer and the motion was denied. *Ibid.* In denying the motion,  
8 the court found that "[t]he neglect exhibited by [Defendant] in  
9 this circumstance was of the inexcusable variety. He was fully  
10 aware he had been sued and simply failed to do what the summons  
11 clearly requires: to file a responsive pleading within 30 days."  
12 *Ibid.*

13 Plaintiff's application for Default Judgment (prove up) was  
14 heard November 9, 2018. *Id.*, ¶ 49. The court advised it had read  
15 everything, including all 87 Exhibits, the Plaintiff's  
16 declaration, the declarations of Andrew Servais, Jeffrey  
17 Coleman, and Sharonrose Cannistraci. *Ibid.* At the conclusion of  
18 the hearing, the court ruled that Defendant's promise to pay  
19 \$10,000 was a false promise made without any intention to  
20 perform, that Plaintiff relied on Defendant's false promise to  
21 her detriment and that the false promise was a substantial  
22 factor in causing Plaintiff's harm including the loss of mineral  
23 rights, the KBR units and royalties on the mineral rights, and  
24 violation of her right to inspect KBR books and records. *Ibid.*;  
25 Doc. #117, RJN-2. The court's judgment was based on Plaintiff's  
26 testimony, other evidence, and written declaration. *Ibid.*

27 The court specifically found that Defendant's false  
28 promises were made to induce Plaintiff to sign the mediated

1 agreement and the final October 15, 2014 Settlement Agreement.  
2 The agreements included Plaintiff's executed promise to sell,  
3 transfer and reconvey Plaintiff's 1.1 million KBR membership  
4 units, and to sign a mineral, gas, and oil quitclaim deed giving  
5 up Plaintiff's interests in the mineral rights. *Ibid.* The court  
6 found that the transfer and reconveyance of the KBR units and  
7 mineral rights from Plaintiff to Defendant was induced by  
8 Defendant's false promise and made without Defendant intending  
9 to pay for the units, mineral rights, or produce the promised  
10 KBR books and records. *Ibid.*

11 The court granted partial rescission of the October 15,  
12 2014 Settlement Agreement and rescinded Paragraphs 1(a) through  
13 1(c) regarding the sale and reconveyance of the transactions of  
14 the membership units and mineral rights, and left the mutual  
15 waiver and other terms and conditions intact and ordered  
16 restitution of the consideration Plaintiff paid Defendant in  
17 connection with the Settlement Agreement, specifically,  
18 reconveyance of the mineral rights, revocation of the sale of  
19 membership and restoration of Plaintiff's 1.1 million KBR  
20 membership units. *Ibid.*

21 Plaintiff separately settled her claims against KBR's new  
22 managing member on May 13, 2018. Doc. #126, Ex. A.

23 On February 8, 2019, Plaintiff's noticed motion for  
24 attorney's fees and costs following entry of the Default  
25 Judgment was heard. Doc. #125, ¶ 53. Among the evidence  
26 considered by the court was the declaration of Sharonrose  
27 Cannistraci, one of Plaintiff's attorneys. Doc. #118, RJN-5. Ms.  
28 Cannistraci assisted in drafting the Settlement Agreement, which



1 included the KBR Membership Operating Agreement ("Operating  
2 Agreement") as an exhibit by reference. Per the Operating  
3 Agreement, Ms. Cannistraci testified that her fees were covered  
4 under Paragraph 13.18, an attorney fee clause for recovery by  
5 the prevailing party in an action on dispute among KBR members.  
6 Doc. #114, Ex. 39, at 39, ¶ 13.18. The court found Plaintiff was  
7 the prevailing party, and the attorney fees requested were fair  
8 and reasonable taking into consideration the high burden of  
9 proof required to establish fraud. *Ibid.* The court awarded  
10 attorney fees in the amount of \$34,000 and costs that were added  
11 to the Original Judgment and filed as the Amended Judgment.  
12 Doc. #117, RJN-2.

13 March 29, 2019, Defendant and his spouse, Elaine Greco  
14 Hudson, appeared in court for an examination. Doc. #125, ¶ 54.  
15 Defendant advised that he was not bound by the judgment because  
16 he had transferred his mineral rights to a revocable trust he  
17 held with his spouse. Defendant also admitted, and his spouse  
18 concurred, that Defendant had the power to execute a quitclaim  
19 transferring the mineral rights to Plaintiff. *Ibid.* Defendant  
20 executed the quitclaim deeds at the examination.<sup>6</sup> *Id.*, ¶ 55.

21 A few days later on April 2, 2019, Ms. Greco left a voice  
22 message for Plaintiff advising she would not quitclaim the  
23 interest in the mineral rights unless Plaintiff released her  
24 claims. *Id.*, ¶ 56. The next day, Defendant emailed Jeffrey

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25  
26 <sup>6</sup> Plaintiff contends that Defendant's wife, Elaine Hudson, left the  
27 court before Plaintiff could obtain her signature on the quitclaim deed and  
28 she did not return. Doc. #125, ¶ 55. Defendant declares that his wife did  
return to court but was not required to sign anything because the mineral  
rights belonged solely to him. Doc. #126, ¶ 22. Defendant states that he was  
entitled to remove the mineral rights from the family trust per the trust  
agreement. *Ibid.*

1 Coleman, attorney for Citadel Exploration and instructed him,  
2 "Until the issue of the quitclaim is resolved please continue to  
3 pay our royalty check to Ken and Elaine Family Trust . . ."  
4 *Ibid.* Citadel then refused to pay Plaintiff any royalty  
5 payments. *Ibid.*

6 At the May 5, 2019 hearing on the motion to add Ms. Greco  
7 as an alter-ego judgment debtor, the state court was notified of  
8 Defendant's bankruptcy filing. *Id.*, ¶ 58. Defendant's chapter 13  
9 proceeding was dismissed by the bankruptcy court on July 23,  
10 2019. *Id.*, ¶ 59. Plaintiff reset the hearing on the motion to  
11 add Ms. Greco as co-debtor for August 7, 2019, but at the  
12 hearing the state court was notified of Defendant's chapter 7  
13 filing. *Ibid.*

#### 14 15 DISCUSSION

##### 16 I.

17 Civil Rule 56 applies in adversary proceedings. Rule 7056.  
18 The moving party has the burden of demonstrating that there is  
19 the "absence of a genuine issue of material fact." *Celotex Corp.*  
20 *v. Catrett*, 477 U.S. 317, 323 (1986); Civil Rule 56(c). A  
21 "genuine issue" exists where "based on the evidence presented, a  
22 fair-minded jury could return a verdict in favor of a non-moving  
23 party on the issue in question." *In re Tills*, 419 B.R. 444, 449  
24 (Bankr. S.D. Cal. 2009). An issue is genuine if there is a  
25 sufficient evidentiary basis on which a reasonable fact finder  
26 could find for the nonmoving party and a dispute is "material"  
27 only if it could affect the outcome of the case under the  
28

1 governing law. *Barboza v. New Form, Inc. (In re Barboza)*, 545  
2 F.3d 702, 707 (9th Cir. 2008).

3 The court must view all the evidence in a summary judgment  
4 motion in the light most favorable to the nonmoving party. *Id.*,  
5 citing *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F. 3d 1148,  
6 1154 (9th Cir. 2001); *Matsushita Elec. Indus. Co. v. Zenith*  
7 *Radio Corp.*, 475 U.S. 574, 587 (1986). A court generally cannot  
8 grant summary judgment based on its assessment of the  
9 credibility of the evidence presented. *Barboza*, 545 F.3d at 707  
10 quoting *Agosto v. INS*, 436 U.S. 748, 756 (1978). "At the summary  
11 judgment stage, the judge's function is not to weigh the  
12 evidence and determine the truth of the matter but to determine  
13 whether there is a genuine issue for trial." *Anderson v. Liberty*  
14 *Lobby, Inc.*, 477 U.S. 242, 249 (1986).

15 To survive a motion for summary judgment, the non-moving  
16 party must show specific facts that demonstrate a genuine issue  
17 of material fact remains for trial. *Celotex Corp.*, 477 U.S. at  
18 324. The non-moving party cannot rest upon mere allegations or  
19 denials in the pleadings. *Anderson*, 477 U.S. at 248.

20  
21 A.

22 Plaintiff contends here that the San Diego state court  
23 judgment conclusively requires the bankruptcy court to determine  
24 that Defendant's debt to Plaintiff is non-dischargeable under  
25 the issue preclusion doctrine (collateral estoppel) and 11  
26 U.S.C. § 523(a)(2)(A) (money obtained by false pretenses, false  
27 representations, or actual fraud). Doc. #112. Plaintiff argues  
28 that there is no genuine issue of material fact that collateral

1 estoppel and issue preclusion apply to the San Diego state court  
2 judgment. On this basis, Plaintiff asks that the judgment be  
3 given a preclusive effect on these proceedings.

4 Defendant does not dispute that the state court entered a  
5 judgment for \$47,041.18 and attached findings of fact that would  
6 support a finding of fraud under California law, but insists  
7 that nothing in the record establishes the \$47,041.18 judgment  
8 was entered as result of Plaintiff's third cause of action for  
9 fraud, rather than the two causes of action for breach of  
10 contract or common counts. Doc. #124.

11 Defendant argues there are remaining factual claims in  
12 Plaintiff's motion that are clearly disputed factual issues,  
13 which cannot be determined by a motion for summary judgment.  
14 These factual issues include whether Defendant had intent to  
15 deceive and whether Defendant had the power to pay Plaintiff,  
16 since he was no longer the CEO of KBR when the alleged non-  
17 payment occurred.

## 18 19 II.

20 Collateral estoppel is applicable to proceedings brought  
21 under § 523(a) for exception of discharge. *Grogan v. Garner*, 498  
22 U.S. 279, 284 n.11 (1991). Under 28 U.S.C. § 1738, the  
23 preclusive effect of a state court judgment is determined by the  
24 law of the state in which the judgment was issued. *Gayden v.*  
25 *Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995);  
26 *see also Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S.  
27 373, 380 (1985). "Collateral estoppel precludes re-litigation of  
28 issues argued and decided in prior proceedings." *Lucido v.*

1 *Superior Court*, 51 Cal. 3d 335, 341 (1990). Issue preclusion  
2 applies if five "threshold requirements" are met:

- 3 (1) The judgment is final;
- 4 (2) The issues are identical;
- 5 (3) The proceeding was actually litigated;
- 6 (4) The issues were necessarily decided in favor of the  
former proceeding; and
- 7 (5) The parties are the same or are in privity.

8 *Id.*, at 1225; see also *Harmon v. Kobrin (In re Harmon)*, 250 F.3d  
9 1240, 1245 (9th Cir. 2001). State law collateral estoppel  
10 principals apply. *Ibid.* The party asserting issue preclusion has  
11 the burden of proving a record sufficient to reveal the  
12 controlling facts and pinpoint the exact issues litigated in the  
13 prior action. *In re Lambert*, 233 F. App'x 598, 599 (9th Cir.  
14 2007).

15 In California, a default judgment is given issue preclusive  
16 effect if the defendant had actual knowledge of the litigation  
17 and had an opportunity to participate and the issues were  
18 actually litigated. *In re Kaut*, 596 B.R. 698, 703 (Bankr. E.D.  
19 Cal. 2019); *Cal-Micro Inc. v. Cantrell*, 329 F.3d 119 (9th Cir.  
20 2003).

21 Even after the five threshold factors are met, application  
22 of issue preclusion is discretionary. *Lopez v. Emerg. Serv.*  
23 *Restoration, Inc. (In re Lopez)*, 367 B.R. 99, 103, 107-08  
24 (B.A.P. 9th Cir. 2007). In exercising that discretion, this  
25 court needs to consider the circumstances of the particular case  
26 and whether application of the doctrine is fair and consistent  
27 with the policies underlying it. *Baldwin v. Kilpatrick (In re*  
28 *Baldwin)*, 249 F.3d 912, 919-20 (9th Cir. 2001).

1 A.

2 Plaintiff argues that collateral estoppel applies. Doc.  
3 #124. The state court judgment is final and binding. Defendant's  
4 opportunity to appeal has lapsed. Plaintiff insists the issues  
5 in the state court action are identical to the issues in  
6 Plaintiff's § 523(a)(2)(A) action. The issues were actually  
7 litigated because they were raised in the pleadings and  
8 submitted for determination prior to the entry of judgment on  
9 November 9, 2018. The issues were decided in the proceeding and  
10 the parties are the same as in the state court judgment.

11 Defendant disputes each prong except the fifth of the  
12 collateral estoppel test but provides little evidence for those  
13 contentions. Doc. #124.

14 The court finds that the principals of collateral estoppel  
15 apply in this case as set forth below.

16  
17 1.

18 The San Diego County Superior Court issued a judgment by  
19 default on November 9, 2018. Doc. #117, RJN-2. This judgment was  
20 amended on February 8, 2019. *Ibid.* The amended judgment is  
21 final, binding, and on the merits.

22  
23 2.

24 The issues decided in the state court proceeding are  
25 identical to the elements of § 523(a)(2)(A).

26 11 U.S.C. § 523(a)(2)(A) excepts from discharge "any debt  
27 . . . for money, property, services, or an extension, renewal, or  
28 refinance of credit, to the extent obtained by . . . false

1 pretenses, a false representation, or actual fraud[.]” To  
2 establish that a fraud judgment is non-dischargeable under  
3 § 523(a)(2)(A) based on collateral estoppel, the following  
4 statutory elements must be met:

5 (1) misrepresentation, fraudulent omission or  
6 deceptive conduct by the debtor; (2) knowledge of the  
7 falsity or deceptiveness of his statement or conduct;  
8 (3) an intent to deceive; (4) justifiable reliance by  
9 the creditor on the debtor’s statement or conduct; and  
10 (5) damage to the creditor proximately caused by its  
11 reliance on the debtor’s statement or conduct.

12 *In re Harmon*, 250 F.3d at 1246. The court may rely on a  
13 preclusive effect of an existing state court judgment to grant  
14 summary judgment. *Plyam v. Precision Dev., LLC (In re Plyam)*,  
15 530 B.R. 456, 462 (B.A.P. 9th Cir. 2015). “A promise made  
16 without any intention of performing it constitutes fraud.” *Union*  
17 *Flower Mkt., Ltd. v. S. Cal. Flower Mkt., Inc.*, 10 Cal. 2d 671,  
18 676 (1938).

19 “Promissory fraud” is a subspecies of the action for  
20 fraud and deceit. A promise to do something  
21 necessarily implies the intention to perform; hence,  
22 where a promise is made without such intention, there  
23 is an implied misrepresentation of fact that may be  
24 actionable fraud.

25 *Lazar v. Superior Court*, 12 Cal. 4th 631 (1996) citing *Union*  
26 *Flower Mkt.*, 10 Cal. 2d at 675.

27 The elements of § 523(a)(2)(A) “mirror the elements of  
28 common law fraud” and match those for actual fraud under  
29 California law. *Tobin v. Sans Souci Ltd. Pshp. (In re Tobin)*,  
30 258 B.R. 199 (B.A.P. 9th Cir. 2001) (internal citations omitted)  
31 quoting *Youngie v. Gonya (In re Younie)*, 211 B.R. 367, 373-74  
32 (B.A.P. 9th Cir. 1997), *aff’d*, 163 F.3d 609 (9th Cir. 1998).

1 a.

2 Plaintiff contends that all of elements for fraud under  
3 California law are present here. The state court found that:

- 4 (1) Defendant, individually and as trustee of the Hudson  
5 Family Trust, the Hudson Family Trust, and KBR, deceived  
6 and defrauded Plaintiff to enter into and rely on the  
7 Settlement Agreement. The false promise included the  
8 unconditional promise to pay \$10,000 to Plaintiff by  
9 December 31, 2015 in exchange for Plaintiff's conveyance  
10 of mineral rights and KBR units, as well as the promise  
11 to allow Plaintiff to inspect KBR books and records under  
12 the control of Defendant.
- 13 (2) Defendant did not intend to perform the false promises at  
14 the time the promises were made and therefore had  
15 knowledge of the falsity. The state court noted that  
16 Defendant had never performed either promise to date.
- 17 (3) Defendant made the false promises with intent to induce  
18 Plaintiff to sign over her mineral rights and KBR units,  
19 which she did. The court found that the promises were  
20 meant to induce the transfer of the KBR units and mineral  
21 rights and such transfer would not have occurred but for  
22 Defendant's false promise.
- 23 (4) Plaintiff justifiably relied on Defendant's false  
24 promises to her detriment. Plaintiff partially performed  
25 by conveying her mineral interests and KBR units to  
26 Defendant.
- 27 (5) The court found that the promises were a substantial  
28 factor in causing Plaintiff's harm, including the loss of  
mineral rights, KBR units, and royalties from her mineral  
rights.

23 Doc. #117, RJN-2. The court based its decision to partially  
24 rescind the Settlement Agreement and transfer and conveyance of  
25 Plaintiff's interests on Defendant's false promise. The decision  
26 to rescind resulted in the retransfer and reconveyance of the  
27 mineral rights and the KBR units.



1           The state court found that Plaintiff would suffer serious  
2 harm unless the court granted the rescission and cancellation of  
3 the mineral, gas, and oil quitclaim deed and the reconveyance of  
4 the units.

5  
6                           b.

7           Defendant argues that the state court's findings do not  
8 specify that the entire judgment was for the fraud count as  
9 opposed to breach of contract or other counts. Defendant argues  
10 that the state court's judgment is without preclusive effect as  
11 to § 523(a)(2)(A) because it does not include any express  
12 findings of fact or conclusion that relates to the \$47,041.18  
13 amended judgment, as opposed to the other dischargeable counts  
14 for breach of contract or common counts. Doc. #124. Nothing in  
15 the state court's findings of fact and conclusions of law  
16 identify the basis on which it determined the amount owed, or  
17 that facts alleged in the fraud claim were the cause of the  
18 \$47,041.18 damages awarded, says Defendant. The order does not  
19 cite a specific finding that all of the elements of the fraud  
20 claim asserted by Plaintiff in the complaint were the cause of  
21 the damages awarded in the judgment. On this basis, Defendant  
22 argues that the judgment does not set forth a clear record for  
23 the judgment to have a preclusive effect that the fraud claim  
24 was necessarily decided by the state court.

25           In response, Plaintiff contends the state court judgment  
26 specifies express findings of fact that the judgment for fraud  
27 was based solely on the third cause of action in the complaint.  
28 Doc. #127. The judgment was found specifically against Defendant

1 individually, and other defendants. The rescission was specified  
2 and set forth with particularity, based on fraud of the  
3 Defendant, and that as a result of that fraud the requirements  
4 of the underlying agreement were null and void and had no force  
5 or effect. The state court does not mention the other two causes  
6 of action because it did not award any damages or make any  
7 findings on the breach of contract or common counts. The damages  
8 awarded in the San Diego Action rest on the third cause of  
9 action for rescission and restitution as result of Defendant's  
10 fraud.

11  
12 c.

13 This court disagrees with Defendant's assertion that the  
14 state court judgment does not provide express findings of fact  
15 that the judgment amount was based on the third case of action  
16 for fraud in the complaint. If the state court made a breach of  
17 contract finding, it would have been inconsistent with the  
18 rescission and restitution remedies based on fraud.

19 The state court found that Defendant (1) made false  
20 promises with no intention to perform; (2) had knowledge of the  
21 falsity and deceptiveness of the statement and conduct at the  
22 time the statements were made; (3) made the statements to induce  
23 Plaintiff to enter into the Settlement Agreement and willfully  
24 failed to perform; (4) Plaintiff was deceived by Defendant's  
25 promises and justifiably relied on his statements and conduct;  
26 and (5) Plaintiff suffered damage as result of the fraud. This  
27 is sufficient to show that the issues litigated in state court  
28

1 for false promise without intent to perform are the same as  
2 those for § 523(a)(2)(A).

3  
4 3.

5 The issues were "actually" litigated in the state court  
6 proceeding. *Newsom v. Moore (In re Moore)*, 186 B.R. 962, 971  
7 (1985) ("[A]n issue is actually litigated when it is properly  
8 raised in the pleadings, or otherwise, and is submitted for  
9 determination, and is determined, noting that a determination  
10 may be based on a failure of proof.").

11 There is no dispute the fraud claim was properly raised in  
12 the pleadings in the San Diego Action.

13 Plaintiff argues that the San Diego Superior Court found  
14 the issue to be making a promise without intent to perform and  
15 was actually litigated.

16 Defendant does not dispute that he was personally served  
17 with Plaintiff's summons and complaint on January 23, 2018.  
18 Doc. #125, ¶ 46. Defendant appeared *ex parte* in San Diego and  
19 requested the court to set aside his default prior to the entry  
20 of final judgment. *Id.*, ¶ 47. The court denied that request and  
21 instructed Defendant to retain counsel and file a noticed motion  
22 with an answer. *Ibid.*

23 Defendant's motion to set aside the default was heard on  
24 July 11, 2018, where he appeared and was permitted to present  
25 testimony and evidence in support of his motion to set aside the  
26 entry of default. *Id.*, ¶ 48. Defendant did not file an answer  
27 and his motion was denied because "[t]he neglect exhibited by  
28 [Defendant] in this circumstance was of the inexcusable variety.

1 He was fully aware he had been sued and simply failed to do what  
2 the summons clearly required: to file a responsive pleading  
3 within 30 days." *Ibid.*

4  
5 4.

6 This court finds that the issues in the state court  
7 proceeding were necessarily decided. The state court proceeding  
8 was finalized on the merits. Defendant appeared and was heard in  
9 his attempt to set aside the entry of default judgment. *Ibid.*  
10 The court issued a final judgment with findings of fact  
11 specifically tailored to Plaintiff's fraud complaint. *Ibid.*

12  
13 5.

14 The parties before this court are the same parties from the  
15 state court litigation. The party against whom issue preclusion  
16 is sought to be enforced is the same as in the underlying state  
17 court litigation. Defendant does not dispute this contention.  
18 Doc. #124.

19  
20 B.

21 Defendant argues that because he disputed the facts in  
22 response to the statement of undisputed facts, there is a  
23 dispute and thus there are triable material issues of fact. But  
24 Defendant fails to provide any supporting evidence that the  
25 denials to Plaintiff's statement of undisputed facts warrant  
26 denial of this motion. Doc. #125. Some facts are in dispute, but  
27 Defendant concedes that (1) the state court litigation occurred;  
28 (2) he was properly served, (3) he appeared and prosecuted a

1 motion to set aside the default, which was denied; (4) the state  
2 court issued a final judgment against him. That Defendant now  
3 disputes some facts is not relevant since the court has reviewed  
4 the state court record.

5 Defendant points to other factual issues warranting denial  
6 of this motion, such as whether Defendant had an intent to  
7 deceive or whether he had the power to pay Plaintiff, as he was  
8 no longer the CEO of KBR. Doc. #124. Despite his denial, the  
9 state court explicitly found that he had an intent to deceive  
10 Plaintiff to induce her into signing over her mineral rights and  
11 KBR units. Defendant is no longer the CEO of KBR. He was removed  
12 from management prior to the filing of the San Diego Action.  
13 Throughout the entire San Diego Action, Defendant was not the  
14 CEO and did not have the power to authorize payment from KBR to  
15 Plaintiff. The state court disagreed with what Defendant now  
16 claims are material factual disputes.

17 And even though the state court action was a default  
18 judgment, Defendant still appeared seeking to set aside the  
19 default. He was instructed to file an answer. He did not.

20 Defendant has failed to support his contention that  
21 collateral estoppel should not apply here. The state court's  
22 judgment is clear and Defendant's disputed facts, even when  
23 viewed in the light most favorable to him, do not negate the  
24 effect of the state court's findings of fact. LBR 7056-1(b)  
25 provides:

26 Any party opposing a motion for summary judgment or  
27 partial summary judgment shall reproduce the itemized  
28 facts in the Statement of Undisputed Facts and admit  
those facts which are undisputed and deny those facts

1           which are disputed, including with each such denial a  
2           citation to the particular portions of any pleading,  
3           affidavit, deposition, interrogatory, answer,  
4           admission, or other document relied upon in support of  
5           that denial.

5       Defendant's denials are not supported by facts. Viewing the  
6       evidence in the light most favorable to Defendant still does not  
7       negate the San Diego Superior Court's judgment and findings of  
8       fact in favor of Plaintiff.

10    C.

11           "Even when the five threshold criteria for issue preclusion  
12       are met, a bankruptcy court must conduct an 'inquiry into  
13       whether imposition of issue preclusion in the particular setting  
14       would be fair and consistent with sound public policy' before  
15       applying issue preclusion." *Delannoy v. Woodlan Colonial, L.P.*  
16       (*In re Delannoy*), 615 B.R. 572, 582 (B.A.P. 9th Cir. 2020  
17       (quoting *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 824-  
18       25 (B.A.P. 9th Cir. 2006), *aff'd* 506 F.3d 956 (9th Cir. 2007)).

19       "Three fundamental policies should be considered: 'preservation  
20       of the integrity of the judicial system, promotion of judicial  
21       economy, and protection of litigants from harassment by  
22       vexatious litigation.'" *Delannoy*, 615 B.R. at 582 (quoting  
23       *Lucido v. Superior Court*, 51 Cal.3d at 343); *see also Lopez v.*  
24       *Emergency Serv. Restoration, Inc. (In re Lopez)*, 367 B.R. 99,  
25       103 (B.A.P. 9th Cir. 2007).

26       ///

27       ///

28       ///

1 1.

2 The first inquiry is into the integrity of the judicial  
3 system and whether application of collateral estoppel would  
4 create the possibility of inconsistent verdicts. *Baldwin*, 249  
5 F.3d at 920 citing *Lucido*, 51 Cal.3d at 343-44. Here, as in  
6 *Baldwin*, "the state court was fully capable of adjudicating the  
7 issue subsequently presented to the bankruptcy court[.]" *Ibid*.  
8 "[R]elitigation in bankruptcy court of the issue decided by the  
9 state court would conflict with the principle of federalism that  
10 underlies the Full Faith and Credit Act" and "the public's  
11 confidence in the state judicial system would be undermined[.]"  
12 *Ibid*. citing *Marrese*, 470 U.S. at 380.

13 Moreover, Defendant was adequately served the summons and  
14 complaint in the San Diego Action. Defendant appeared *ex parte*  
15 before the San Diego court seeking to turn over the previous  
16 default judgment. He was instructed to file a noticed motion,  
17 file an answer, and retain counsel. Later, his motion was denied  
18 because he had not filed an answer as instructed. The state  
19 court described his neglect as of "the inexcusable variety"  
20 because he knew he was being sued and did nothing. Defendant was  
21 given multiple opportunities to defend the action before the  
22 final judgment was entered. Defendant attempts to re-litigate  
23 the merits of the state court action here, which, if allowed and  
24 if successful, could compromise the integrity of the judicial  
25 system *vis-à-vis* inconsistent verdicts. This factor weighs in  
26 favor of application of collateral estoppel.

27 ///

28 ///

1 2.

2 Second, we consider whether application of collateral  
3 estoppel would promote judicial economy. *Lucido*, 51 Cal.3d at  
4 350.

5 The record on this motion is over 500 pages. The San Diego  
6 Superior Court considered 87 exhibits prior to issuing its  
7 judgment. Doc. #125, ¶ 49. The state court copiously expended  
8 judicial resources in rendering its verdict, including  
9 adjudication of Defendant's motion to set aside the default  
10 judgment. Re-litigating in bankruptcy court these issues that  
11 have already been fully and finally determined in state court  
12 favors application of issue preclusion here. *See Baldwin*, 249  
13 F.3d at 920 ("Relying on the state court's determination allows  
14 the bankruptcy court to conserve judicial resources.").

15  
16 3.

17 Lastly, we consider whether application of collateral  
18 estoppel will protect the parties from vexatious litigation.  
19 *Ibid*. Defendant had a full and fair opportunity to litigate this  
20 claim before the state court. Defendant was properly served the  
21 summons and complaint and had notice of the lawsuit. Defendant  
22 appeared before the court on at least two occasions seeking to  
23 set aside the default judgment. He was unsuccessful. Defendant  
24 forfeited his right to defend himself without adequate  
25 justification. "The neglect exhibited by Defendant in this  
26 circumstance was of the inexcusable variety." Doc. #125, ¶ 48.

27 Plaintiff already successfully prosecuted her state court  
28 lawsuit years ago. It would be unfair to now require her to re-



1 litigate those same claims years later. *See Baldwin*, 249 F.3d at  
2 920 ("It would be unfair to [creditor] to require him to  
3 relitigate before the bankruptcy court what was properly decided  
4 by the state court.").

5  
6 D.

7 Plaintiff's motion for summary judgment will be GRANTED as  
8 to the preclusive effect of the state court judgment.

9 The San Diego County Superior Court's amended judgment  
10 awarding \$8,813.21 in damages, \$997.26 in pre-judgment interest,  
11 \$34,000.00 in attorney fees, and \$3,230.71 in costs for a total  
12 of \$47,041.18 will be deemed non-dischargeable pursuant to 11  
13 U.S.C. § 523(a)(2)(A).

14  
15 III.

16 Next, we turn to the issue of whether Plaintiff is entitled  
17 to recover additional fees in prosecuting this non-  
18 dischargeability action. California law permits recovery fees  
19 under certain circumstances. While there is no general right to  
20 attorney fees, bankruptcy courts may award fees in § 523 actions  
21 when authorized by state law. *Travelers Cas. & Sur. Co. of Am.*  
22 *v. PG&E*, 549 U.S. 443, 451-52 (2007) ("[T]he 'basic federal  
23 rule' in bankruptcy is that state law governs the substance of  
24 claims."); *see also Cohen v. de la Cruz*, 523 U.S. 213, 223  
25 (1998) ("In short, the text of § 523(a)(2)(A) . . . encompasses  
26 any liability arising from money, property, etc., that is  
27 fraudulently obtained, including treble damages, attorney's  
28

1 fees, and other relief that may exceed the value obtained by the  
2 debtor.”).

3 In non-dischargeability actions, the question for awarding  
4 attorney fees is “whether creditor plaintiff would be entitled  
5 to fees in state court for establishing those elements of the  
6 claim which the bankruptcy court finds support a conclusion of  
7 nondischargeability.” *Kilborn v. Haun (In re Haun)*, 396 B.R.  
8 522, 528 (Bankr. D. Idaho 2008).

9 California law offers two primary avenues for the recovery  
10 of attorney fees by a prevailing party:

- 11 1. C.C.C. § 1717; and
- 12 2. C.C.P. §§ 685.040 and 1021.

13  
14 A.

15 C.C.C. § 1717 allows a party to recover attorney fees  
16 incurred in the litigation of a contract claim. *Redwood*  
17 *Theaters, Inc. v. Davison (In re Davison)*, 289 B.R. 716, 722  
18 (B.A.P. 9th Cir. 2003) (C.C.C. § 1717 provides for attorney’s  
19 fees in an “action on a contract”) citing *Santisas v. Goodin*, 17  
20 Cal. 4th 599, 615 (1998). For C.C.C. § 1717 to apply, (1) the  
21 action in which the fees are incurred must be an action “on a  
22 contract”; (2) the contract must contain a provision stating  
23 that attorney’s fees incurred to enforce the contract shall be  
24 awarded either to one of the parties or to the prevailing party;  
25 and (3) the party seeking fees must be the party who “prevailed  
26 on the contract” meaning “the party who recovered a greater  
27 relief in the action on the contract.” C.C.C. § 1717(b) (1); see  
28 also *Penrod v. AmeriCredit Fin. Servs. (In re Penrod)*, 802 F.3d

1 1084, 1087-88 (9th Cir. 2015) (“[A]n action is ‘on a contract’  
2 when a party seeks to enforce, or avoid enforcement of, the  
3 provisions of the contract.”); *cf. Bos. V. Bd. Of Trs.*, 818 F.3d  
4 486, 489 (9th Cir. 2015) (“[W]e have previously held that a  
5 nondischargeability action is ‘on a contract’ within section  
6 1717 if ‘the bankruptcy court needed to determine the  
7 enforceability of the . . . agreement to determine  
8 dischargeability.”).

9 Plaintiff has the burden of showing that this action is  
10 (1) an “action on a contract” and (2) this contract has a  
11 prevailing party attorney’s fee provision which is the basis of  
12 the fraud claim in order for her to recover her attorney fees  
13 incurred prosecuting this adversary proceeding. In determining  
14 whether the proceeding was an action on a contract, courts may  
15 look beyond the parties’ pleadings. *Sea Win, Inc. v. Tran (In re*  
16 *Tran)*, 301 B.R. 576, 584 (Bankr. S.D. Cal. 2003).

17 Whether this is an action on a contract turns on whether  
18 the Settlement Agreement played an integral role in the non-  
19 dischargeability action. *Heritage Ford v. Baroff (In re Baroff)*,  
20 105 F.3d 439, 442 (9th Cir. 1997) (non-dischargeability action  
21 “was an action on the contract because the document containing  
22 the attorney’s fee clause . . . played an integral role in the  
23 proceedings.”).

24  
25 1.

26 Plaintiff contends that she is entitled to further attorney  
27 fees for bringing this adversary proceeding. Doc. #135. In the  
28 San Diego Action, Plaintiff argued that she had incurred fees of

1 \$34,000.00 and that this amount sought was reasonable under the  
2 circumstances under C.C.C. § 1717 and Paragraph 13.18 of the  
3 Operating Agreement. The Superior Court awarded \$34,000 to  
4 Plaintiff for the enforcement of the contract as reasonable  
5 attorney fees permitted under the contractual provisions of the  
6 KBR Operating Agreement Section 13.18, which covered the amount  
7 of time, effort, and energy in bringing the request to enter the  
8 default and the prove up hearing.

9 Plaintiff cites to *Cohen*, wherein the Supreme Court  
10 concluded under 11 U.S.C. § 523(a)(2)(A) that any liability  
11 arising from money or property that is fraudulently obtained,  
12 including treble damages, and any other relief that may exceed  
13 the value of what was received by the debtor. *Id.*, citing *Cohen*,  
14 523 U.S. at 223. Here, Plaintiff argues that *Cohen* prevents  
15 discharge of all liability out of Defendant's conduct because  
16 she is able to recover fees outside of the bankruptcy court  
17 under state or federal law.

18 Plaintiff emphasizes the impact of the attorney fee  
19 provision in a contract under C.C.C. § 1717, which provides for  
20 attorney fees in contracts incurred to enforce the contract to  
21 be awarded to the prevailing party. The attorney fee provision  
22 at issue is broad enough to encompass a tort claim, Plaintiff  
23 insists. Doc. #135, citing *Santisas v. Goodin*, 17 Cal. 4th at  
24 615, 622-23.

25  
26 2.

27 Meanwhile, Defendant argues that Plaintiff is not entitled  
28 to any additional fees under C.C.C. § 1717. Although the

1 contract's terms could arguably be construed as broad enough to  
2 include tort claims as fraud, Defendant contends that these fees  
3 can only be awarded to a prevailing party in an "action on the  
4 contract." C.C.C. § 1717(a); *Seyed Shahram Hosseini v. Key Bank*  
5 *N.A. (In re Seyed Shahram Hosseini)*, 504 B.R. 558, 567 n.13  
6 (B.A.P. 9th Cir. 2014) ("[C.C.C.] § 1717 is to be narrowly  
7 applied and is available to a party only if the dispute involves  
8 litigation of a contract claim.") citing *Santisas*, 17 Cal. 4th  
9 at 599. Thus, Defendant insists that attorney fees are only  
10 recoverable on a breach of contract claim, not a fraud claim.

11 Defendant cites Plaintiff's admission on the record that  
12 there is no legal or factual basis to award additional attorney  
13 fees for prosecuting the non-dischargeability action. The basis  
14 of Plaintiff's claim is that Defendant fraudulently  
15 misrepresented that he would pay \$10,000 to Plaintiff in  
16 exchange for her 900,000 KBR units pursuant to the Settlement  
17 Agreement. Since the Settlement Agreement contains no provision  
18 for attorney fees, Defendant insists that Plaintiff is not  
19 entitled to any additional fees.

20 Although the San Diego Superior Court's judgment is based  
21 on the subject Settlement Agreement, there is no basis under  
22 C.C.C. § 1717 to award attorney fees for prosecuting this action  
23 because the Settlement Agreement was not an integral part in  
24 this non-dischargeability proceeding. Defendant urges the court  
25 to focus its analysis on the attorney fees provision in the  
26 Settlement Agreement, which is governed by California law and  
27 the only basis on which Plaintiff could be awarded fees. If the  
28 scope of that provision is broad enough to encompass a state



1 estoppel and issue preclusion, the fees for prosecuting the  
2 action were not "on a contract" for the purposes of C.C.C.  
3 § 1717. But Plaintiff is not without recourse.

4  
5 B.

6 The second option for attorney fees lies in both C.C.P.  
7 §§ 685.040 and 1021. Both provide for recovery of attorney fees  
8 as allowable costs under C.C.P. §§ 1032 and 1033.5. C.C.P.  
9 § 1021 provides:

10 Except as attorney's fees are specifically provided  
11 for by statute, the measure and mode of compensation  
12 of attorneys and counsels at law is left to the  
13 agreement, express or implied, of the parties; but to  
parties to actions or proceedings are entitled to  
their costs, as hereinafter provided.

14 C.C.P. § 1021 permits attorney fees by agreement between the  
15 parties and does not limit recovery of fees to actions on the  
16 contract. *Davison*, 289 B.R. at 724, citing *3250 Wilshire*  
17 *Boulevard Bldg. v. W.R. Grace & Co.*, 990 F.2d 487, 489 (9th Cir.  
18 1993). Attorney fees for fraud claims may be recovered if the  
19 contract for which the fraud judgment is based so provides for  
20 the prevailing party to be awarded their attorney fees.

21 "[S]ection 1021 allows 'the parties to agree that the prevailing  
22 party in litigation may recover attorney fees, whether the  
23 litigation sounds in contract or in tort.'" *Maynard v. BTI*  
24 *Group, Inc.*, 216 Cal. App. 4th 984, 991 (2013) quoting *Miske v.*  
25 *Coxeter*, 204 Cal. App. 4th 1249, 1259 (2012).

26 If there is an attorney fee provision in the underlying  
27 agreement of the parties, the court must examine the language of  
28 the agreement to determine whether an award of fees is

1 warranted. *Davison*, 289 B.R. at 724, citing *3250 Wilshire*  
2 *Boulevard Bldg. v. W. R. Grace & Co.*, 990 F.2d 487, 489 (9th  
3 Cir. 1993); *In re KLAUSE*, 181 B.R. 487, 500 (Bankr. C.D. Cal.  
4 1995).

5 Meanwhile, C.C.P. § 685.040 provides:

6 The judgment creditor is entitled to the reasonable  
7 and necessary costs of enforcing a judgment.  
8 Attorney's fees incurred in enforcing a judgment are  
9 not included in costs collectible under this title  
10 unless otherwise provided by law. Attorney's fees  
11 incurred in enforcing a judgment are included as costs  
12 collectible under this title if the underlying  
judgment includes an award of attorney's fees to the  
judgment creditor pursuant to subparagraph (A) of  
paragraph (10) of subdivision (a) of Section 1033.5.

13 C.C.P. § 685.040. C.C.P. § 1033.5(a)(10) permits attorney fees  
14 when authorized by contract, statute, or law.

15 [T]here are two requirements before a motion for an  
16 award of post-judgment attorney fees may be awarded as  
17 costs: (1) the fees must have been incurred to  
18 "enforce" a judgment; and (2) the underlying judgment  
19 had to include an award for attorney fees pursuant to  
20 [C.C.P. § 1033.5(a)(10)(A)], which provides that  
attorney fees may be awarded when authorized by  
contract.

21 *Jaffe v. Pacelli*, 165 Cal. App. 4th 927, 935 (2008) (quoting  
22 *Berti v. Santa Barbara Beach Props.*, 145 Cal. App. 4th 70, 77  
23 (2006)).

24 "CCP § 685.040 addresses the 'problem unique to a claim for  
25 post-judgment fees in actions based on contract.'" *Tinajero v.*  
26 *Zavala (In re Tinajero)*, 2020 Bankr. LEXIS 2157, at \*13 (B.A.P.  
27 9th Cir. Aug. 4, 2020) (quoting *Jaffe*, 165 Cal. App. 4th at 934;  
28 *Berti*, 145 Cal. App. 4th at 77). C.C.P. § 685.040 entitles a



1 judgment creditor to post-judgment attorney fees incurred in  
2 enforcing a judgment "if the underlying judgment includes an  
3 award of attorney's fees to the judgment creditor pursuant to  
4 subparagraph (A) of paragraph (10) of subdivision (a) of Section  
5 1033.5." C.C.P. § 685.040. C.C.P. § 1033.5(a)(10)(A) allows  
6 attorney fees as "costs" for the purposes of C.C.P. § 1032.  
7 Thus, post-judgment fees under § 685.040 is "not based on  
8 survival of the contract but is instead based on the award of  
9 attorney fees and costs in the trial judgment." *Jaffe*, 165 Cal.  
10 App. 4th at 935. Actions taken in bankruptcy proceedings may  
11 qualify as enforcement proceedings subject to C.C.P. § 685.040.  
12 *Jaffe*, 165 Cal. App. 4th at 938; *Chinese Yellow Pages Co. v.*  
13 *Chinese Overseas Mktg. Serv. Corp.*, 170 Cal. App. 4th 868, 888  
14 (2008).

15

16

1.

17 Defendant acknowledges that the terms of the contract could  
18 potentially be construed to include fraud, but states that the  
19 contract explicitly references C.C.C. § 1717, which would still  
20 require litigation of the contract. Doc. #124. Defendant does  
21 not reference C.C.P. § 685.040, but does acknowledge C.C.P.  
22 § 1021. Doc. #137. However, Defendant focuses his argument on  
23 C.C.C. § 1717.

24

25

26

27

28

In his supplemental briefing, Defendant cites to *Fobian v.*  
*Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153  
(9th Cir. 1991), whereby the Ninth Circuit refused to award  
attorney fees despite an express contractual provision because  
the substantive litigation raised federal bankruptcy law issues

1 rather than "basic contract enforcement questions." *Id.* at 1153.  
2 On this basis, the Ninth Circuit held that the creditor could  
3 not recover attorney fees under the contract absent bad faith or  
4 harassment. *Id.*, citing *Johnson v. Righetti (In re Johnson)*, 756  
5 F.2d 738, 740-41 (9th Cir. 1985) (Ninth Circuit refused to award  
6 attorney fees under California law and a contractual provision,  
7 because the underlying stay litigation raised federal statutory  
8 issues rather than issues relating to the contract).

9       However, reliance on *Fobian* is misplaced. The U.S. Supreme  
10 Court effectively overruled *Fobian*, stating that "[t]he *Fobian*  
11 rule finds no support in the Bankruptcy Code, either in § 502 or  
12 elsewhere." *Travelers*, 549 U.S. 443 (concluding that the Court  
13 of Appeals erred applying the *Fobian* rule to disallow a claim  
14 based on the fact that the fees were incurred litigating issues  
15 of bankruptcy law); see also *Penrod*, 802 F.3d at 1089 ("The  
16 Supreme Court squarely rejected that [*Fobian*] view in  
17 *Travelers*.").

18       Nonetheless, Defendant implies that Plaintiff cannot  
19 recover fees incurred while prosecuting this non-  
20 dischargeability action because federal statutory issues rather  
21 than contractual issues predominate. Defendant reiterates his  
22 argument that the Settlement Agreement contained no attorney fee  
23 provision before reasserting Plaintiff's counsel's admission at  
24 the hearing by stating, ". . . I don't have anything, or cannot  
25 see anything at this junction [sic] that would grant further  
26 attorney's fees on top of what the court ordered." Doc. #131.  
27 Defendant concludes that additional fees pursuant to C.C.C.  
28 § 1717 are unavailable.

1 2.

2 Plaintiff claims that she is not limited to C.C.C. § 1717  
3 and may recover fees under C.C.P. § 1032(a)(4), which allows as  
4 allowable costs to include attorney fees when authorized by any  
5 of the following: (a) contract; (b) statute; (c) law. Doc. #135.  
6 While Plaintiff does not specifically mention C.C.P. § 1021, she  
7 cites authority relying on C.C.P. §§ 1021, 1032 and 1033.5  
8 together. Plaintiff further contends that C.C.P. § 685.040 is  
9 applicable.

10 Plaintiff cites the Settlement Agreement, which included  
11 the KBR Membership Operating Agreement as "Exhibit 1" for the  
12 purposes of characterizing Plaintiff as an "Economic Interest  
13 Holder."<sup>7</sup> See Docs. #6, Ex. 1, ¶ 1a; #114, Ex. 39. The Operating  
14 Agreement provided in Paragraph 13.18:

15 **Attorney Fees.** In the event that *any dispute* between  
16 the Company and the Members of among the Members  
17 should result in litigation or arbitration, the  
18 prevailing party in such dispute shall be entitled to  
19 recover from the other party all reasonable fees,  
20 costs, and expenses of enforcing any right of the  
21 prevailing party, including without limitation,  
22 reasonable attorneys' fees and expenses, all of which  
23 shall be deemed to have accrued upon the commencement  
24 of such action and shall be paid whether or not such  
25 action is prosecuted to judgment. Any judgment or  
26 order entered in such action shall contain a specific  
27 provision providing for the recovery of attorney fees  
28 and costs incurred in enforcing such judgment and an

---

25 <sup>7</sup> Exhibit A to the Operating Agreement defines an "Economic Interest  
26 Holder" as "a Person who holds only an Economic Interest in the Company. An  
27 Economic Interest Holder shall include an owner of Economic Interest Units to  
28 the extent of the ownership of such Economic Interest. Wherever reference is  
made to a Member in the Membership Operating Agreement such reference shall  
also be deemed to apply to Economic Interest Holders, except for rights and  
obligations, such as the right to vote and the right to information  
concerning the financial condition of the Company, which are exclusive to  
Members." *Membership Operating Agreement*, Doc. #114, Ex. A to Ex. 39, at 33.

1 award of prejudgment interest from the date of the  
2 breach at the maximum rate of interest allowed by law.  
3 For the purposes of this Section 13.18: (a) attorney  
4 fees shall include, without limitation, fees incurred  
5 in the following: (1) post judgment motions; (2)  
6 contempt proceedings; (3) garnishment, levy, and  
7 debtor and third party examinations; (4) discovery;  
8 and (5) bankruptcy litigation; and (b) prevailing  
9 party shall mean the party who is determined in the  
10 proceeding to have prevailed or who prevails by  
11 dismissal, default or otherwise.

12 Doc. #114, Ex. 39, at 39, ¶ 13.18.

13 Defendant was a signatory to the October 15, 2014  
14 Settlement Agreement and was KBR's controlling owner and  
15 operating member. Doc. #6, Ex. 1. The Settlement Agreement was  
16 filed in the San Diego Action and the San Diego Superior Court  
17 used it as a basis for its decision finding that the settlement  
18 was procured by fraud and Plaintiff's reliance in the agreement  
19 resulted in damages. Doc. #117, RJN-2.

20 Since the San Diego Superior Court applied California law,  
21 which allows the prevailing party to recover attorney fees in  
22 litigation in connection with or arising from the agreement,  
23 Plaintiff argues that she is entitled to reasonable attorney  
24 fees. Doc. #135, citing *Maynard v. BTI Group, Inc.*, 216 Cal.  
25 App. 4th 984 (finding that the parties entered into an attorney  
26 fee agreement under C.C.P. § 1021 that provided the prevailing  
27 party a right to recover costs in any action or proceeding under  
28 C.C.P. § 1032(a)(4), which included attorney fees under C.C.P.  
§ 1033.5(a)(10)).

The KBR Operating Agreement Section 13.18 provides for all  
disputes arising between the parties and specifically included a

1 provision for bankruptcy litigation. The parties contracted for  
2 the provision, which was in the Operating Agreement and  
3 incorporated by reference into the Settlement Agreement.  
4 Doc. #114, Ex. 39, at 1, ¶ 1.

5 The Settlement Agreement also contains provisions for  
6 final integration and severability. The final integration  
7 provision provides:

8 The full form Agreement *and exhibits referred to*  
9 *herein*, constitute the entire final and binding  
10 understanding between the parties hereto with respect  
11 to the matters set forth herein and supersedes the  
12 Stipulation for Settlement dated August 13, 2014. No  
13 other statement or representation, written or oral,  
14 express or implied, has been received or relied upon  
15 in entering into the settlement, and that *all prior*  
16 *discussions, statements and negotiations made or which*  
17 *have occurred prior to the date of this Agreement*  
18 *shall be deemed merged into this Agreement and the*  
19 *documents referred to herein*, and shall not be used  
20 for any other purpose whatsoever. Each of the  
21 recitals, titles and headings used in this Agreement  
22 shall be interpreted and construed as part of the  
23 Agreement and not as a mere recital.

19 *Id.*, at 4, ¶ 9a (emphasis added). Per the final integration  
20 clause, the Operating Agreement attached as Exhibit 1 is  
21 integrated and deemed merged into the final Settlement  
22 Agreement.

23 To incorporate another document into a contract in  
24 California: (1) the reference must be clear and unequivocal;  
25 (2) the reference must be called to the attention of the other  
26 party, and he must consent thereto; (3) the terms of the  
27 incorporated document must be known or easily available to the  
28 contracting parties. *Shaw v. Regents of Univ. of Cal.*, 58 Cal.

1 App. 4th 44, 54 (1997). But the contract does not need to recite  
2 that it incorporates another document, so long as it guides the  
3 reader to the incorporated document. *Id.* The reference to the  
4 previous agreement here was clearly stated in the Settlement  
5 Agreement. The reference was called to both parties' attention  
6 in Paragraph 1 and elsewhere. Both parties signed the Settlement  
7 Agreement which contained a final integration clause. The  
8 previous agreement involved the parties and the parties signed  
9 that as well. There was no mystery between the parties what the  
10 settlement agreement referenced and incorporated.

11 Although Defendant has argued that the Settlement Agreement  
12 contained no attorney fee provision, there have been no  
13 contentions that the Operating Agreement was not incorporated  
14 into the Settlement Agreement by reference. Sharonrose  
15 Cannistraci consulted in the drafting of the Settlement  
16 Agreement that incorporated the Operating Agreement by  
17 reference. Doc. #118, RJN-5. Ms. Cannistraci declared that her  
18 attorney fees were covered under Paragraph 13.18 for recovery by  
19 the prevailing party in an action on dispute among KBR members.  
20 *Cf.* Doc. #114, Ex. 39, at 39, ¶ 13.18. The San Diego Superior  
21 Court subsequently awarded attorney fees. Though the court did  
22 not specify the basis upon which it awarded fees, it considered  
23 Plaintiff's written declarations, testimony, and other evidence  
24 in issuing its judgment, which included the declaration of Ms.  
25 Cannistraci. Doc. #117, RJN-2. Therefore, Paragraph 13.18 of the  
26 Operating Agreement was incorporated by reference into the  
27 Settlement Agreement, which the court used to award Plaintiff's  
28 attorney fees.

1           The San Diego Superior Court rescinded Plaintiff's  
2 obligations under Paragraph 1(a) through (c) under the  
3 Settlement Agreement, but this did not affect incorporation of  
4 the Operating Agreement by reference in Paragraph 1. Doc. #117,  
5 RJN-2. The Settlement Agreement also contained a severability  
6 clause, which provides:

7           Severability. In the event that any provision of this  
8 Agreement should be held to be void, voidable or  
9 unenforceable, the remaining portions hereof shall  
remain in full force and effect.

10 *Id.*, at 5, ¶ 13. Per the severability clause, the remaining  
11 portions of the agreement shall remain in full force and effect.

12           This case arises out of a contract that incorporates as an  
13 exhibit an attorney fees provisions that references contract and  
14 other disputes. Defendant signed the agreement and falsely  
15 promised to comply with the terms of the agreement when he had  
16 no intention of doing so. The provision in 13.18 is intertwined  
17 with the settlement agreement, so recovery of attorney fees is  
18 available under C.C.P. § 1021.

19           Although Defendant argues that this is not a  
20 dischargeability action based on a contract for which attorney  
21 fees are to be awarded, Plaintiff asserts that she would be  
22 entitled and was entitled in the state court action for the  
23 attorney fees. Paragraph 13.18 broadly encompasses the nature of  
24 the dispute here as between members of KBR.

25           Further, Plaintiff cites to *Phillips v. Gilman (In re*  
26 *Gilman)*, 603 B.R. 437 (B.A.P. 9th Cir. 2019). In *Phillips*, the  
27 court reviewed whether a successfully prosecuted adversary  
28 proceeding to deny a debtor's discharge warranted an award of

1 attorney fees. *Id.*, at 440. The court examined C.C.P. § 685.040,  
2 as well as C.C.P. § 108(c), and noted that recovery of post-  
3 judgment attorney fees is available based on the California  
4 Enforcement of Judgments Act, C.C.P. §§ 685.040, 685.080. *Id.*,  
5 at 441, citing *Carnes v. Zamani*, 488 F.3d 1057, 1060 (9th Cir.  
6 2007) (finding that post-judgment attorney fees under C.C.P.  
7 § 685.040 must comply with the timeliness requirements of C.C.P.  
8 § 685.080).

9 Plaintiff argues that C.C.P. § 685.040 allows her to be  
10 reimbursed her costs of enforcing the judgment because the  
11 underlying judgment includes an award of attorney's fees under  
12 C.C.P. § 1033.5(a)(10), which permits attorney fees to be  
13 allowable costs under C.C.P. § 1032. Plaintiff again offers to  
14 further move for reasonable fees under Rule 7054(b)(2)(A).

15 Plaintiff also maintains that she should receive attorney  
16 fees on a policy basis because Defendant would receive a "free  
17 ride" in the bankruptcy court trying to discharge that which is  
18 non-dischargeable. The only way the attorney fees could be  
19 deemed non-dischargeable are through the enforcement efforts by  
20 Plaintiff. There would be no recourse for Plaintiff seeking to  
21 disallow a non-dischargeable debt otherwise. Forgoing attorney  
22 fees in this instance would give Defendant a "free ride" for his  
23 wrongful conduct. The state court was not going to condone  
24 Defendant's conduct without payment to Plaintiff for asserting  
25 her rights against Defendant, and the bankruptcy court should do  
26 no less since the state court has made the requisite findings  
27 and orders.

28





1 The court finds that that Plaintiff is entitled to attorney  
2 fees under C.C.P. § 1021. As with C.C.P. § 1021, C.C.P. §  
3 685.040 allows attorney fees as costs for judgment creditors  
4 under C.C.P. §§ 1032, 1033.5. The fraud judgment is based on the  
5 Settlement Agreement. The Settlement Agreement incorporates the  
6 Operating Agreement by reference. The Operating Agreement  
7 provides for fees, costs, and expenses, with fees specifically  
8 defined to include those incurred during bankruptcy litigation.  
9 Accordingly, Plaintiff is entitled to fees under C.C.P.  
10 § 685.040. The amounts of those fees will be determined later by  
11 noticed motion.

#### 12 13 CONCLUSION

14 Plaintiff's motion for summary judgment will be GRANTED as  
15 to the preclusive effect of the state court judgment.

16 The San Diego County Superior Court's amended judgment  
17 dated February 8, 2019, awarding \$8,813.21 in damages, \$997.26  
18 in pre-judgment interest, \$34,000.00 in attorney fees, and  
19 \$3,230.71 in costs for a total of \$47,041.18, will be deemed  
20 non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) under the  
21 doctrine of issue preclusion.

22 Further, the motion will be GRANTED as to additional  
23 attorney fees in prosecuting this adversary proceeding.  
24 Plaintiff is entitled to attorney fees under C.C.P. §§ 685.040,  
25 1021, 1032(a)(4), and 1033.5(a)(10)(A) under the KBR Operating  
26 Agreement, which is incorporated into the Settlement Agreement  
27 by reference and was the basis upon which the San Diego Superior  
28 Court awarded attorney fees to Plaintiff. As noted above, the


1 specific amounts of those fees and their reasonableness is yet  
2 to be determined; the court will determine the amount of  
3 attorney fees after a duly noticed hearing. Plaintiff is  
4 directed to seasonably file a motion and set for hearing her  
5 request for attorney fees with supporting evidence, including  
6 copies of her counsel's time records.

7 Plaintiff to prepare the order granting this motion and a  
8 separate judgment. The judgment may later be amended to include  
9 any allowed attorney's fees following a further hearing on  
10 reasonableness of fees.

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Dated: Jul 09, 2021

By the Court

  
René Lastreto II, Judge  
United States Bankruptcy Court

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**Instructions to Clerk of Court  
Service List - Not Part of Order/Judgment**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked \_\_\_\_\_, via the U.S. mail.

Kenneth Ray Hudson  
2000 Ashe Road Unit 3  
Bakersfield CA 93309

Glen E. Gates  
2445 Capitol Street, Suite 160E  
Fresno CA 93721

Ahren A. Tiller  
1230 Columbia St #1100  
San Diego CA 92101