

WRITTEN DECISION - NOT FOR PUBLICATION

☐	FILED
☒	ENTERED
☐	LODGED
☐	RECEIVED
JUL 6 2023	
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA	
BY LL	DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:

MICHAEL SIMSER,

Debtor.

} BK. No. 22-02617-LT13

} MEMORANDUM DECISION¹

The parties, at this point, are in partial agreement as to the amount owed to creditor Summit Imports, Inc. dba San Diego Trucks and Vans ("Summit") by debtor Michael Simser. The Court, having reviewed the matter thoroughly, will now sustain the claim objection in part and overrule it in part as follows.

FACTS

Debtor initiated this chapter 13 case on October 6, 2022 (Dkt. No. 1). In his case initiation documents, he scheduled Summit as holding a secured claim of \$4,000. *Id.*

The Debtor also scheduled Summit's collateral as having a value well in excess of the secured claim. As a result, Summit, an over-secured creditor, was and is entitled to recover interest, costs, and attorneys' fees to the extent owed under its contract.

¹ This opinion is intended only to resolve the dispute between these parties and is not intended for publication.

1 Debtor's initial plan proposed to pay Summit's scheduled claim at 0% interest.

2 The alleged \$4,000 claim amount was understated in the schedules and plan and,
3 thus, erroneous. It is likely that the \$4,000 number was a rough calculation of the amount
4 owed on the petition date. And Debtor initially asserted that it made two payments on this
5 debt – not one as Summit claims. But on the petition date four payments had come due; this
6 would leave a balance owing of no less than \$4,524 plus late charges. As one of the alleged
7 payments is in dispute – Debtor lacks any documentary evidence of the alleged second
8 payment – the amount owed appears to be higher. The Court makes this point only because
9 the Debtor makes strong claims about the inaccuracy of Summit's proof of claim. There are
10 significant problems there, but the Debtor needs to acknowledge his own lack of precision.
11

12 Summit filed a Proof of Claim on December 7, 2022 (Claim Dkt. No. 5) (the "Proof
13 of Claim"). It sought recovery of \$11,698.22. In its attachment it outlined the components of
14 its claim. The Debtor objected to every line item.

15 After several hearings and written submissions and after the parties agreed "for
16 purposes of settlement" in several areas, the Court sustains the objection in part:
17

- 18 1. **Costs.** Summit sought recovery of \$480 in unspecified costs. It has never
19 documented these costs or explained them. As Debtor reasonably asked for
20 specificity and proof, and given the lack thereof, the Court sustains the claim
21 objection in part and disallows this portion of the Proof of Claim.
- 22 2. **Repossession charges.** Summit retained a firm to repossess its collateral (the
23 "Truck") but was not successful. Summit requested \$1,795 in repossession
24 expenses in the Proof of Claim, but its evidence shows that its actual cost was
25 \$450. Summit now agrees to a reduction to this portion of its claim.
26 The Debtor, however, argues that no repossession costs should be awarded
27 given the allegedly plain language of the operative contract. It states that since
28

Summit could not repossess the car, which was behind a locked gate, a “repossession” did not occur and Summit cannot recover for repossession.

The Court initially determined that the term repossession should be read more broadly to include attempts at repossession. But even if this is not an appropriate interpretation, the contract allows recovery of these costs.

If, as Debtor argues, repossession costs are only available when a repossession actually occurs, the fees for attempted repossession are still allowable as post-default “costs of collection.” The contract states: “[y]ou agree that upon your default we shall be entitled to recover from you a reasonable collection cost including but not limited to an attorney fee.”

The Debtor cannot have it both ways. To the extent attempted repossession costs are not recoverable under the repossession paragraph, then they are recoverable as reasonable costs of collection.

The Court, thus, sustains the claim objection in part, reduces the claim for repossession costs, and awards \$450 in repossession costs.

3. **Penalty Charges.** The Debtor does not dispute that he owes penalty charges in connection with the payments he missed or where he was late by more than ten days. Instead, there is a dispute about whether they should cover three, four, or five months’ worth of missed payments. “For purposes of settlement” it appears that he is willing to concede that only one payment was made. Thus, unless the Debtor requests an evidentiary hearing within seven days of issuance of this Memorandum Decision, the Court will assume that only one payment was made.

Assuming that only one timely payment occurred before the petition date, the Debtor failed to make payments for June, July, August, and September. The

May payment was less than ten days late, so no penalty is due on that account. Thus, on the petition date he owed four late charge payments of \$57.81. The Debtor is correct that the fifth payment for the October payment would be due after the petition date. The due date appears to be the 21st of the month. The Court assumes, without deciding the point, that the Proof of Claim included the October payments in its calculation. The Court, thus, sustains the claim objection in part and reduces the amount of penalty charges by \$57.81. The new total, calculated as of the petition date, is \$231.24. If the October payment was not paid or was more than ten days late, the penalty is owed but this was not true on the petition date – the date relevant for the Proof of Claim.

4. **Principal and Interest.** The Court understands that the Debtor agreed to make seven payments of \$1,156.14 which totals \$8,092.98. This amount included contractual interest. The parties agree for purposes of settlement, unless Debtor requests an evidentiary hearing within seven days of the issuance of this Memorandum Decision, that only one of these payments was made timely, so interest continued to accrue on the unpaid balance; the amount owed cannot be calculated through simple reduction of the anticipated total payments less the payment made.

As to interest, the Court sustains the objection as to the additional claimed interest of \$597.35. This amount appears to double count interest already included in the total principal and interest paid.

Debtor provided detailed calculations which lead to only a small difference between the parties' principal and interest numbers. The Court will use Debtor's calculation of principal and interest owed "as of the petition" date of \$7,189.31. The slight difference in interest is probably – like the penalties -

1 just a matter of the choice of date for calculation. The claim objection is
2 sustained in this limited regard.

- 3
4 5. **Attorney's Fees.** The remaining objection is to the attorney's fees charged in
5 connection with this matter. The contract clearly provides for the costs of
6 collection, including attorney's fees. So, as the Court has previously noted,
7 some level of attorney's fees is awardable as collection costs. And in
8 accessing these fees, the Court will not, as the Debtor seems to wish, focus
9 only on the claim objection. As previously noted, the Debtor proposed a plan
10 which by any metric understated the arrearage (and amount) owed on the
11 petition date and proposed repayment with 0% interest. The Court notes that
12 the Debtor recently agreed to pay 7.5% interest towards repayment of
13 arrearage to another automotive secured creditor. The Court also notes that
14 *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) would require payment of the
15 risk-free (low risk) rate plus an upward adjustment. As a result, Summit had
16 every right to employ counsel to not only file its Proof of Claim but also to
17 defend against the plan and generally monitor the case. All reasonable fees are
18 recoverable as costs of collection.

19 The Court also notes that the Debtor's reliance on California Civil Code
20 § 1717 and his "prevailing party" argument is inapt. California Civil Code
21 § 1717 relates to litigation on the contract. Here there are some contractual
22 interpretation disputes. But the vast – vast majority of the requested fees
23 involve collection activity where contractual disputes do not exist. Most of the
24 claim will be allowed; Debtor is not the clearly prevailing party. The plan as
25 initially proposed will not be confirmed over opposition. The Court will not
26 second-guess fee generating activity in attending the 341(a) meeting and
27 monitoring the case.
28

1 Claimant agreed to a \$625.00 reduction in fees and costs to account for
2 inefficiency. The Court cannot identify other specific areas requiring
3 reduction. The Debtor's call for global disallowance is not helpful. The Court
4 will sustain the claim objection to fees in part and orders reduction of \$625.00
5 as agreed by Claimant. If an evidentiary hearing is not required, the Debtor
6 should lodge an order.

7
8 DATED: July 6, 2023

9 
LAURA S. TAYLOR, Judge
United States Bankruptcy Court

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Michael Simser, Bankruptcy Case No. 22-02617-LT13

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Jeffery R. Menard Law Offices of Jeffery R. Menard 325 7th Avenue, Suite 1706 San Diego, CA 92101	Jeffery R. Menard, Esq. 12089 Meriden Lane San Diego, CA 92128
Michael Simser 4659 Luneta View Julian, CA 92036	Pamela Kleinkauf Law Offices of Pamela Kleinkauf 16870 West Bernardo Dr., Suite 400 San Diego, CA 92127
Thomas H. Billingslea 402 West Broadway, Suite 1350 San Diego, CA 9210	Gary A. Sehnert Law Office of Gary Sehnert 418 W Ivy St. San Diego, CA 92101-1816
Joseph Delmotte Aldridge Pite, LLP 8880 Rio San Diego Dr., Suite 725 San Diego, CA 92108	Sheryl K. Ith Cooksey, Toolen, Gage, Duffy & Woog 535 Anton Blvd., 10th floor Costa Mesa, CA 92626

Said envelope(s) containing such document were deposited by me in a regular United States mailbox in the City of San Diego, in said district on July 10, 2023.


Regina A. Fabre, Judicial Assistant