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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CATAPHORA INC.,)	
)	
Plaintiff(s),)	No. C09-5749 BZ
)	
v.)	ORDER AWARDING ATTORNEY'S
)	FEES AND INTEREST
JERROLD SETH PARKER, et al.,)	
)	
Defendant(s).)	
_____)	

Plaintiff has moved for attorney's fees and costs, as the "prevailing party" under California Civil Code section 1717, and for prejudgment and postjudgment interest.¹

ATTORNEY'S FEES

"In an action involving state law claims, [federal courts] apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule." MRO Commc'ns v. Am. Tel. & Tel. Co., 197 F.3d 1276, 1282 (9th Cir.

¹ A ruling on Plaintiff's motion for costs is deferred until after the Clerk has taxed costs and objections, if any, are filed.

1 1999). Here, the parties signed a contract which provides, in
2 relevant part, that the "prevailing party ... shall be
3 entitled ... to reimbursement for its costs and expense [sic]
4 (including court costs and reasonable fees for attorneys and
5 expert witnesses) incurred with respect to the bringing and
6 maintaining" of any legal action brought by one party against
7 the other and arising out of the contract. (See Declaration
8 of William W. Farrer at ¶ 7.) Under California law, "where
9 the parties have contractually obligated themselves to pay
10 attorneys' fees," California Civil Code section 1717 governs.
11 Farmers Ins. Exchange v. Law Offices of Conrado Joe Sayas,
12 Jr., 250 F.3d 1234, 1237 (9th Cir. 2001). Section 1717
13 provides in relevant part:

14 (a) In any action on a contract, where the contract
15 specifically provides that attorney's fees and costs,
16 which are incurred to enforce that contract ... then the
17 party who is determined to be the party prevailing on the
18 contract, whether he or she is the party specified in the
19 contract or not, shall be entitled to reasonable
20 attorney's fees in addition to other costs ...

21 (b)(1) The court, upon notice and motion by a party,
22 shall determine who is the party prevailing on the
23 contract for purposes of this section, whether or not the
24 suit proceeds to final judgment. Except as provided in
25 paragraph (2), the party prevailing on the contract shall
26 be the party who recovered a greater relief in the action
27 on the contract.

28 The California Supreme Court has explained that in
deciding whether there is a "party prevailing on the
contract," the trial court is "to compare the relief awarded
on the contract claim or claims with the parties' demands on
those same claims and their litigation objectives as disclosed
by the pleadings, trial briefs, opening statements, and
similar sources." Hsu v. Abbara, 9 Cal. 4th 863, 876 (1995).

1 "The prevailing party determination is to be made only upon
2 final resolution of the contract claims and only by a
3 'comparison of the extent to which each party has succeeded
4 and failed to succeed in its contentions.'" Id. (citation
5 omitted).

6 Here, Defendants argue that Plaintiff is not the
7 "prevailing party" because Plaintiff did not recover the full
8 amount it sought under the contract. Defendants' argument is
9 unpersuasive. Unlike other cases where courts have refused to
10 award attorney's fees under section 1717, this case was
11 decided on the merits of Plaintiff's contract claims, and
12 produced a "final resolution" of these claims in Plaintiff's
13 favor. Hsu, 9 Cal. 4th at 876; Cf. Laurel Village Bakery, LLC
14 v. Global Payments Direct, Inc., Case No. 06-1332, 2007 U.S.
15 Dist. LEXIS 95238, at *10 (N.D. Cal. Dec. 14, 2007) (no fees
16 awarded where case dismissed for improper venue because
17 "[d]efendants do not constitute a 'prevailing party' entitled
18 to fees because no decision has been reached on the merits of
19 Plaintiff's contract claims."); N.R. v. San Ramon Valley
20 Unified Sch. Dist., Case No. 05-0441, 2006 U.S. Dist. LEXIS
21 47287, 2006 WL 1867682, at *7 (N.D. Cal. Jul. 6, 2006)
22 (concluding that defendant was not a prevailing party because
23 the court "dismissed plaintiffs' breach of contract claim for
24 lack of jurisdiction, and made no determination whatsoever as
25 to the merits of that claim"); Idea Place Corp. v. Fried, 390
26 F. Supp. 2d 903 (N.D. Cal. 2005) (no award of attorneys' fees
27 where court dismissed breach of contract action for lack of
28 subject matter jurisdiction); Advance Fin. Res., Inc. v.

1 Cottage Health Sys., Inc., Case No. 08-1084, 2009 U.S. Dist.
2 LEXIS 79647, 2009 WL 2871139, at *2 (D. Or. Sep. 1, 2009)
3 (holding that defendant was not a prevailing party under
4 section 1717 because the "contract claim was dismissed on
5 jurisdictional grounds and there [had] been no final
6 resolution of the underlying contract claim"); Estate of
7 Drummond, 149 Cal. App. 4th 46, 51 (2007) (denying attorney's
8 fees because "appellants obtained only an interim victory,
9 based on [the attorney] having attempted to pursue his claims
10 in the wrong forum"); Garzon v. Varese, Case No. 09-9010, 2011
11 U.S. Dist. LEXIS 4250, 2011 WL 103948, at *3 (C.D. Cal. Jan.
12 11, 2011) (stating that because "Defendant secured a dismissal
13 on technical grounds, rather than a judgment on the merits of
14 the contract claim, he is not the prevailing party withing the
15 meaning of section 1717 and is, therefore, not entitled to
16 attorney's fees").²

17 Defendants also assert that Plaintiff is not the
18 "prevailing party" because Plaintiff had advanced several of
19 damages theories, including a "lost business opportunity"
20 theory, under which Plaintiff sought nearly two million
21 dollars in damages, which it never collected. This argument
22 is also unpersuasive. Plaintiff's sued to recover \$366,000 on

23
24 ² Defendants' reliance on Horning v. Shilberg, 130 Cal.
25 App. 4th 197 (2005), is misplaced. In Horning, the trial court
26 found that while defendant had breached the contract, plaintiff
27 had suffered no legally recoverable damages. The trial court
28 then found that defendant was the prevailing party and awarded
him attorney fees. After affirming the trial court's rulings
on the merits, the Court of Appeal simply held the trial court
had not abused its discretion in awarding fees. Here, the jury
not only found Defendants liable for breaching the contract,
but also awarded Plaintiff damages according to proof.

1 the grounds that Defendants had breached the contract. While
2 Plaintiff only recovered \$317,000, the fact that Plaintiff
3 recovered less than the total it sued for does not
4 automatically make it a nonprevailing party. See, e.g., In re
5 Sparkman, 703 F.2d 1097, 1100 (9th Cir. Cal. 1983) (rejecting
6 the position that a party who recovers less than the total
7 relief requested is not a "prevailing party"); see also
8 Sukut-Coulson, Inc. v. Allied Canon Co., 85 Cal. App. 3d 648,
9 656 (1978). While Plaintiff may have asserted alternative
10 damage theories in discovery, Plaintiff nevertheless obtained
11 its primary litigation objective.

12 Had Plaintiff had been awarded only a small percentage of
13 the relief it requested, Defendants might have a stronger
14 argument. See, e.g., Berkla v. Corel Corp., 302 F.3d 909, 920
15 (9th Cir. 2002) (concluding that district court did not abuse
16 its discretion in denying attorneys' fees to plaintiff as
17 plaintiff "recovered only \$23,502 in compensatory damages for
18 breach of the NDA, although he sought more than \$ 1.2 million"
19 -- i.e., only 2% of amount originally sought; emphasizing
20 that, "[i]n this case, [the plaintiff's] demands and
21 objectives clearly involved a substantial financial payoff"
22 but the jury "completely rejected [his] contractual damages
23 theory, instead awarding damages consistent with the estimates
24 offered by [defendant's] expert"). But here, Plaintiff was
25 hardly awarded a minute percentage of the relief sought; the
26 jury gave Plaintiff all the relief it sought on one of its
27 damage theories which amounted to about 90% of what it
28 originally sought. While it is true that I rejected

1 Plaintiff's initial damages theory on summary judgment, and
2 that Plaintiff altered its damages theory during discovery,
3 the bottom line is that Plaintiff won. The results of the
4 litigation were not "so equivocal" that the court should
5 conclude that there was no prevailing party, Hsu, 9 Cal. 4th
6 at 874. Tellingly, Defendants did not cite any case where a
7 party recovered the amount it sought at trial, despite having
8 articulated alternative damages theories during discovery, and
9 yet was not deemed the prevailing party for purposes of a fee
10 award. Given the final resolution of Plaintiff's breach of
11 contract claims in its favor, I find that Plaintiff is the
12 "prevailing party" within the meaning of section 1717 and is
13 therefore entitled to attorney's fees.

14 In computing attorney's fees pursuant to contract under
15 California or federal law, courts follow the "lodestar"
16 approach. Signature Networks, Inc. v. Estefan, 2005 WL 151928
17 (N.D. Cal. 2005); PLCM Group v. Drexler, 22 Cal. 4th 1084,
18 1095 (2000). The loadstar is calculated by multiplying
19 time spent by a reasonable hourly rate. Here, the vast
20 majority of the time Plaintiff claims was spent by William W.
21 Farrer. Plaintiff claims a total of 1,569 hours at an hourly
22 rate of \$500, for a total of \$790,545.00.³ Defendants do not
23 challenge Mr. Farrer's hourly rate or the hourly rate of his
24 legal assistant, but instead claim that the hours spent by Mr.
25 Farrer are unreasonable and should be reduced because (1) the
26 request for fees, in proportion to the amount of the judgment

27
28 ³ This fee award also includes \$7,095 in legal
assistant fees at an hourly rate of \$50.00.

1 rendered, is unreasonable and disproportionate on its face;
2 (2) the fee request includes hours for common claims that were
3 ultimately dismissed; (3) the fee request includes hours for
4 time spent litigating tort claims against Lenny Davis, who was
5 ultimately dismissed from the lawsuit; and (4) the fee request
6 includes time spent on a motion for summary judgment wherein
7 the court determined that the amount sought by Plaintiff was
8 an unenforceable penalty.

9 As for the hours claimed, while the time is substantial,
10 it was Defendants who pursued an aggressive litigation
11 strategy.⁴ It is therefore not surprising that Plaintiff was
12 forced to incur the fees for which it seeks reimbursement.⁵
13 Moreover, absent a challenge to specific hours, I cannot fault
14 Plaintiff for incurring fees related to the prosecution of its
15 lawsuit given Defendants' litigation strategy. See, e.g.,
16 International Longshoremen's & Warehousemen's Union v. Los
17 Angeles Export Terminal, Inc., 69 Cal. App. 4th 287, 304
18 (1999) (a defendant "cannot litigate tenaciously and then be
19 heard to complain about the time necessarily spent by the

21 ⁴ While Defendants successfully defeated Plaintiff's
22 motion for summary judgment by arguing, inter alia, that the
23 \$366,000 was an illegal penalty and Plaintiff was only entitled
24 to any lost profits it could prove, the practical effect of
this victory was to convert a fairly simple case involving a
fixed fee into a more laborious one in which Plaintiff had to
prove lost profits.

25 ⁵ For example, very early in the litigation Defendants
26 filed a motion to stay pending transfer of the case as a tag-
27 along action in the *Chinese Drywall* MDL. (Docket No. 4.)
28 Plaintiff also asserts that Defendants never engaged in any
meaningful settlement discussions until after a jury verdict
had been rendered. (See, e.g., Supplemental Declaration of
William W. Farrer at ¶¶ 5-10.)

1 plaintiff in response."). It is also noteworthy that
2 Plaintiff has paid the fees that Mr. Farrer claims. (See
3 Farrer Decl. at ¶¶ 42-63.) Nevertheless, some adjustments to
4 the hours claimed by Plaintiff are warranted.⁶

5 I agree with Defendants that a reduction in the hours
6 requested by Plaintiff for the work associated with the claims
7 against Lenny Davis is justified. The tort claims asserted
8 against Mr. Davis were voluntarily dismissed by Plaintiff
9 based on lack of personal jurisdiction. (Docket No. 37.) I
10 therefore reduce Plaintiff's claimed hours by 8.⁷ Cf.
11 Reynolds Metals Co. v. Alperson, 25 Cal. 3d 124, 129-130
12 (1979); see also PLCM Group, Inc. v. Drexler, 22 Cal.4th 1084,
13 1095-1096 (2000) (the amount of attorneys' fees is within the

14
15 ⁶ At the hearing, Defendants argued that Plaintiff
16 should be awarded no fees for work done prior to March 2011
17 because Defendants were treated unfairly by the court during
18 the first pretrial conference at which the court "pushed"
19 Plaintiff to back off of one damages theory and pursue a lost
20 profits theory instead. Inasmuch as this argument was raised
21 for the first time during the hearing and is not mentioned in
22 Defendants' opposition, I decline to consider it. White v.
23 FedEx Corp., Case No. 04-99, 2006 U.S. Dist. LEXIS 9975, 2006
24 WL 618591, at *2 (N.D. Cal. Mar. 13, 2006) ("The Court will not
consider any arguments or evidence raised for the first time at
the hearing") (citing Civ. L.R. 7-3(a), (d)); Google Inc. v.
Am. Blind & Wallpaper Factory, Inc., Case No. 03-5340, 2006
U.S. Dist. LEXIS 58970, at *6 n.3 (N.D. Cal. Aug. 10, 2006).
That said, it was Defendants who introduced the lost profits
theory into the case when they opposed Plaintiff's summary
judgment motion in November 2010 by arguing successfully that
the \$366,000 fee was an illegal penalty and that all Plaintiff
was entitled to was lost profits. See Freedman v. The Rector,
37 Cal. 2d 16 (1951).

25 ⁷ In its reply brief, Plaintiff agreed to reduce its
26 hours for fees associated with the Lenny Davis claims by 8
27 hours. At the hearing, I asked whether Defendants had any
28 reason to increase the number of hours that should be reduced
for work pertaining to Lenny Davis and was given no suggestion
from Defendants' counsel regarding what deduction beyond 8
hours would be appropriate.

1 sound discretion of the trial court).

2 I also agree with Defendants that a minor adjustment in
3 Plaintiff's requested fee award should be made to omit hours
4 billed for the common counts asserted by Plaintiff, which were
5 ultimately summarily dismissed.⁸ Based on my recollection of
6 this case and the course of the litigation, I do not believe
7 that prosecution of these common counts added materially to
8 Mr. Farrer's work, and neither party addressed this issue
9 during oral argument. Moreover, neither common count was ever
10 the focus of the litigation and both were factually inter-
11 related with the main claim for breach of contract. Cf.
12 Reynolds, 25 Cal. 3d at 129-130. Nevertheless, I find that
13 given the outcome of these claims, a reduction of 15 hours for
14 time spent researching the common claims and defending them
15 against summary adjudication is warranted.

16 I agree with Defendants that a reduction in hours is
17 warranted with respect to Plaintiff's unsuccessful summary
18 judgment motion. Mr. Farrer billed approximately 184 hours
19 pursuing Plaintiff's summary judgment motion. (See
20 Declaration of William W. Farrer ¶¶ 51-54.) While Plaintiff
21 did not summarily prevail on its damages theory, Plaintiff did
22 obtain a number of favorable rulings by way of its motion,
23 such as a finding that there was a valid and enforceable
24 contract between the parties. These rulings were helpful to
25 Plaintiff, and helped streamline the trial. Considering all
26 these factors, I find that a reduction of 92 hours is

27 ⁸ These common counts included Plaintiff's fourth and
28 fifth claims for relief for accounting.

1 warranted. See Cabrales v. County of Los Angeles, 935 F.2d
2 1050, 1052 (9th Cir. 1991) ("If a plaintiff ultimately wins on
3 a particular claim, she is entitled to all attorney's fees
4 reasonably expended in pursuing that claim - even though she
5 may have suffered some adverse rulings.")

6 Finally, Defendants argue that Mr. Farrer's hours should
7 be reduced because Mr. Farrer engaged in block billing.

8 "Block billing" refers to "the time-keeping method by which
9 each lawyer and legal assistant enters the total daily time
10 spent working on a case, rather than itemizing the time

11 expended on specific tasks." Mendez v. County of San
12 Bernardino, 540 F.3d 1109, 1129 n.2 (9th Cir. 2008) (quoting
13 Welch v. Met. Life Ins. Co., 480 F.3d 942, 948 (9th Cir.

14 2007)). Generally, courts have discretion to reduce block-
15 billed hours because the nature of these time entries renders
16 it difficult to determine whether fees are unnecessarily
17 duplicative or unreasonable. See Welch, 480 F.3d at 948.

18 This is so because it is "more difficult to determine how much
19 time was spent on particular activities." Id. Having

20 reviewed the time records, I do not find any entries that
21 appear excessive or objectionable. Although Mr. Farrer does
22 occasionally engage in block billing, his time entries are

23 both specific and itemized in a fashion that permit a
24 meaningful review of the entries for purposes of determining
25 their reasonableness. Moreover, any concerns regarding

26 duplication of effort or administrative overlap are mitigated
27 in this case by virtue of the fact that Mr. Farrer completed
28 nearly all of the legal work performed in this case on his

1 own, without the assistance of other attorneys.¹⁰ I therefore
2 find that no additional reductions in Mr. Farrer's time are
3 necessary.

4 **INTEREST**

5 Under California law, prejudgment interest is governed by
6 Civil Code section 3287 and is recoverable in any action in
7 which damages are certain or "capable of being made certain by
8 calculation" and the right to recover such damages is vested
9 in the plaintiff on a particular day. Cal. Civ. Code §
10 3287(a); see also, Cortez v. Purolator Air Filtration Products
11 Co., 23 Cal. 4th 163, 174-75 (2000). The test for determining
12 "certainty" under section 3287(a) is whether the defendant
13 actually knows the amount owed or could have computed the
14 amount from reasonably available information.¹¹ Children's
15 Hosp. & Med. Ctr. v. Bonta, 97 Cal. 4th 740, 774 (2002).
16 Under this section, prejudgment interest cannot be awarded
17 when the amount of damages cannot be ascertained except on
18 conflicting evidence. Lineman v. Schmid, 32 Cal.2d 204, 212
19 (1948); Coughlin v. Blair, 41 Cal.2d 587, 604 (1953). The
20 rationale behind the rule is that where a defendant does not

21
22 ¹⁰ Mr. Farrer has also provided a very detailed monthly
23 analysis of the work he performed in this case in his
24 declaration, thereby further mitigating any concerns regarding
25 his billing practices in this litigation. Notably, under
26 certain circumstances the Local Rules permit an attorney to
27 submit a "summary" of the time spent in this litigation (see
28 L.R. 54-5(b)(2)), and Mr. Farrer has provided significantly
more detailed records to support Plaintiff's fee request.

26 ¹¹ "[The] certainty requirement of section 3287,
27 subdivision (a) has been reduced to two tests: (1) whether the
28 debtor knows the amount owed or (2) whether the debtor would be
able to compute the damages." Chesapeake Industries, Inc. v.
Togova Enterprises, Inc., 149 Cal. App.3d 901, 911 (1983).

1 know what amount he owes and cannot ascertain it except by
2 accord or judicial process, he cannot be in default for not
3 paying it. Conderback, Inc. v. Standard Oil Co., 239 Cal.
4 App. 2d 664, 689-690 (1966) (citing Cox v. McLaughlin, 76 Cal.
5 60, 70 (1888)). Thus, where the amount of damages cannot be
6 resolved except by verdict or judgment, section 3287(a)
7 prejudgment interest is not appropriate. See, e.g., Wisper
8 Corp. v. California Commerce Bank, 49 Cal. App. 4th 948, 960-
9 61 (1996) (prejudgment interest not awardable on bank's
10 liability for customer damages because portion of damages
11 attributable to bank's negligence not subject to calculation
12 until after trial and determination of relative fault).

13 A defendant's denial of liability does not make damages
14 uncertain for purposes of Civil Code section 3287. See, e.g.,
15 Stein v. Southern Cal. Edison Co., 7 Cal. App. 4th 565, 572
16 (1992); Marine Terminals Corp. v. Paceco, Inc., 145 Cal. App.
17 3d at p. 995. "Damages are deemed certain or capable of being
18 made certain within the provisions of subdivision (a) of
19 [Civil Code] section 3287 where there is essentially no
20 dispute between the parties concerning the basis of
21 computation of damages if any are recoverable but where their
22 dispute centers on the issue of liability giving rise to
23 damage." Esgro Central, Inc. v. General Ins. Co., 20 Cal.
24 App. 3d 1054, 1060 (1971); see also Fireman's Fund Ins. Co. v.
25 Allstate Ins. Co., 234 Cal. App. 3d 1154, 1172-1173 (1991).
26 Thus, it is clear that Civil Code section 3287 looks to the
27 certainty of the damages suffered by the plaintiff, rather
28 than to a defendant's ultimate liability, in determining

1 whether prejudgment interest is mandated. If the defendant
2 does not know or cannot readily compute the damages, the
3 plaintiff must supply him with a statement and supporting data
4 so that defendant can ascertain the damages. Levy-Zentner Co.
5 v. Southern Pac. Transportation Co., 74 Cal. App. 3d 762, 798
6 (1977).¹² In other words, "If the amount owing can be
7 calculated and determined from statements rendered by the
8 plaintiff to the defendant and those statements are found to
9 be true and correct, it is a matter of mere calculation and
10 prejudgment interest can be awarded." Conderback, 239 Cal.
11 App. 2d at 689 (citing Anselmo v. Sebastiani, 219 Cal. 292,
12 301 (1933)).

13 Here, Plaintiff asserts that it is entitled to
14 prejudgment interest in the amount of 18% pursuant to the
15 contract.¹³ In support of its argument, Plaintiff relies
16 principally on Roodenburg v. Pavestone Co., L.P., 171 Cal.
17 App. 4th 185, 191 (2008), for the proposition that where
18 prejudgment interest is part of an amount owed under the terms
19 of a contract, section 3287(a) and the "certainty" of damages
20 requirement do not apply. In Roodenburg, the court affirmed
21 an award of interest on the value of plaintiff's capital

22
23 ¹² In Levy-Zentner Co., the court found that estimates
24 of expert appraisers were required to render certain, damages
25 for loss of market value of real property. Id. at p. 800. The
court allowed interest from the date on which plaintiff
supplied defendants with these estimates. Id. at p. 801.

26 ¹³ Section 3.5 of the contract states as follows: "Late
27 Fees. Any payments that are late shall carry a late fee of
28 eighteen percent (18%) per annum simple interest (1.5% per
month), which shall become due and payable with such late
payment."

1 account, as found by the jury, where the parties contract
2 expressly obligated the defendant to pay interest on any part
3 of the value of the capital account that was not paid within
4 30 days. In Roodenburg, there was no dispute that some amount
5 of prejudgment interest was owed on the unpaid value of the
6 capital account under the express terms of the parties'
7 agreement; here, nothing in the contract provided for interest
8 in the event plaintiff recovered lost profits. The provision
9 of the contract relied upon by Plaintiff is in the
10 "Consequences of Non-Payment" and "Late Fees" section.
11 Plaintiff drafted the contract. Had it wanted a provision for
12 prejudgment interest in the event of any dispute arising out
13 of the contract, it could have easily drafted one. Instead,
14 the contract provides for interest only in the event of a late
15 payment, and the dispute here was not over a late payment. I
16 therefore find Roodenburg inapplicable to the facts of this
17 case, and apply the test articulated by California courts
18 under 3287(a).

19 Under that test, the amount Plaintiff claimed under
20 Plaintiff's theory of the case which the jury accepted, was
21 not identified in any contractual document and could not be
22 calculated until late in the litigation. In part, this is
23 because Plaintiff changed its damages theory as the litigation
24 progressed. In fact, Plaintiff presented the jury with two
25 different damages calculations - one for \$324,000 and one for
26 \$317,000. Thus, I do not believe that under all the
27 circumstances of this case, the applicable test (*i.e.*, whether
28 the sum found to be due to plaintiff was known to defendant in

1 that it was certain or readily ascertainable) has been met.
2 Howard v. American National Fire Ins. Co., 187 Cal. App. 4th
3 498, 535 (2010). I therefore find that Plaintiff is not
4 entitled to prejudgment interest under section 3287(a). See
5 Esgro Central, Inc. v. General Ins. Co., 20 Cal. App. 3d 1054,
6 1062 (1971) ("Subdivision (a) of section 3287 does not
7 authorize prejudgment interest as a matter of law where the
8 amount of damage, as opposed to only the determination of
9 liability, depends upon a judicial determination based upon
10 conflicting evidence and is not ascertainable from truthful
11 data supplied by the claimant to his debtor.")

12 Plaintiff also contends that it should be awarded
13 prejudgment interest pursuant to 3287(b). Section 3287(b)
14 provides that "Every person who is entitled under any judgment
15 to receive damages based upon a cause of action in contract
16 where the claim was unliquidated, may also recover interest
17 thereon from a date prior to the entry of judgment as the
18 court may, in its discretion, fix, but in no event earlier
19 than the date the action was filed." Cal. Code Civ. Proc. §
20 3287(b). "The discretion conferred [under section 3287(b)] is
21 limited by the purposes underlying interest awards"
22 Gourley v. State Farm Mut. Auto. Ins. Co., 53 Cal. 3d 121, 133
23 (1991).¹⁴ Here, Plaintiff argues that the court should award

24
25 ¹⁴ Prejudgment interest is awarded to compensate a party
26 for the loss of the use of his or her property. Nordahl v.
27 Department of Real Estate, 48 Cal. App.3d at p. 665; Cassinis
28 v. Union Oil Co., 14 Cal. App. 4th 1770, 1790 (1993) ("The
policy underlying authorization of an award of prejudgment
interest is to compensate the injured party—to make that party
whole for the accrual of wealth which could have been produced
during the period of loss."). "It has long been settled that

1 the 18% interest rate from the date that the complaint was
2 filed because Defendants agreed to pay interest at that rate
3 on any amounts owed under the contract. I disagree.
4 Defendants agreed to pay interest on late payments - not for
5 any dispute arising out of the contract. Moreover, the
6 \$366,000 originally sought in this case by Plaintiff was ruled
7 to be an illegal penalty, and therefore unenforceable. Given
8 the circumstances of this case, I decline to award Plaintiff
9 prejudgment interest under subsection (b) of 3287.

10 Finally, Plaintiff seeks postjudgment interest at the 18%
11 contract rate. While state law governs prejudgment interest
12 on state-law claims in diversity cases, federal law governs
13 postjudgment interest. American Tel. & Tel. Co. v. United
14 Computer Sys., Inc., 98 F.3d 1206, 1209 (9th Cir. 1996)
15 (citing Northrop Corp. v Triad Int'l Marketing, S.A., 842
16 F.2d 1154, 1155 (9th Cir. 1988)). Postjudgment interest is
17 mandatory. 28 U.S.C. § 1961(a) ("Interest shall be allowed on
18 any money judgment in a civil case recovered in a district
19 court."); see also Air Separation v. Underwriters at Lloyd's
20 of London, 45 F.3d 288, 290 (9th Cir. 1995). Plaintiff
21 recognizes that federal law governs postjudgment interest, but
22 argues that parties can contractually agree to a different
23 rate of interest. In other words, Plaintiff contends that
24 parties can "contract around [section] 1961" and that the
25 parties did so in this case. (Pl.'s Reply at p.4.)

26
27 [Civil Code] section 3287 should be broadly interpreted to
28 provide just compensation to the injured party for loss of use
of money during the prejudgment period." Gourley v. State Farm
Mut. Auto. Ins. Co., 53 Cal.3d 121, 132 (1991).

1 Plaintiff is correct that an exception to section 1961
2 exists when the parties contractually agree to waive section
3 1961's application. Fid. Fed. Bank, FSB v. Durqa Ma Corp.,
4 387 F.3d 1021, 1023 (9th Cir. 2004) (citing Citicorp Real
5 Estate, Inc. v. Smith, 155 F.3d 1097, 1107-08 (9th Cir. 1998)
6 (promissory notes at issue included an express,
7 mutually-agreed upon interest rate in the case of default)).¹⁵
8 Here, however, as stated above, the contractual provision upon
9 which Plaintiff relies is a provision for interest in the
10 event of a late payment - not a provision that expressly
11 states that the parties agreed to a specified prejudgment or
12 postjudgment interest rate in the event of a dispute arising
13 out of the contract, nor is it one that clearly expresses the
14 parties' intent to "contract around" section 1961. Cf. FCS
15 Advisors, Inc. v. Fair Fin. Co., 605 F.3d 144 (2d Cir. 2010).
16 I therefore find that postjudgment interest shall be governed
17 as per section 1961(a), calculated "from the date of the entry
18 of the judgment, at a rate equal to the weekly average 1-year
19 constant maturity Treasury yield, as published by the Board of
20 Governors of the Federal Reserve System, for the calendar week
21 preceding the date of the judgment." 28 U.S.C. § 1961(a).

22 For the reasons stated above, **IT IS ORDERED** that

23
24 ¹⁵ "[M]ost courts that have addressed the question have
25 held that parties may contract around § 1961 and agree to a
26 different postjudgment interest rate." Jack Henry &
27 Associates, Inc. v. BSC, Inc., 753 F.Supp.2d 665, 667-68
28 (E.D.Ky. 2010) (citing FCS Advisors, Inc. v. Fair Finance Co.,
605 F.3d 144, 147-48 (2d Cir. 2010); In re Riebesell, 586 F.3d
782, 794 (10th Cir. 2009); Cent. States, SE & SW Areas Pension
Fund v. Bomar Nat'l, Inc., 253 F.3d 1011, 1020 (7th Cir. 2001);
In re Lift & Equip. Serv., Inc., 816 F.2d 1013, 1018 (5th Cir.
1987)).

1 Plaintiff is awarded \$734,095 in fees as follows:

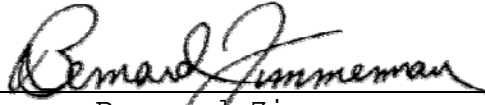
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ATTORNEY/ LEGAL ASSISTANT	HOURLY RATE	HOURS	FEE AWARD
William Farrer	\$500	1,454	\$727,000.00
Julie Lundgren	\$50	141.9	\$7,095.00
Total Fees			\$734,095.00

7 It is further **ORDERED** that Plaintiff is entitled to
8 postjudgment interest at the rate permitted by § 1961(a).

9 Dated: January 4, 2012

10 

11 _____
12 Bernard Zimmerman
13 United States Magistrate Judge

14 G:\BZALL\BZCASES\CATAPHORA V. PARKER\POST TRIAL MOTIONS\ORDER ON PS MOT FOR
15 ATTORNEYS FEES.BZ VERSION.wpd