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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 DALE SUNDBY, Trustee,

12 Plaintiff,

13 v.

14 MARQUEE FUNDING GROUP, INC. et  
15 al.,

16 Defendants.

Case No.: 19-cv-390-GPC-AHG

**ORDER DENYING MOTION FOR  
ATTORNEY'S FEES**

**[ECF No. 265]**

17 Before the Court is Defendant Marquee Funding Group, Inc.'s ("MFG") Motion  
18 for Attorney's Fees ("Motion"). Specifically, MFG requests \$109,335 in attorney's fees  
19 plus such additional amount to prosecute the Motion. Upon considering the moving  
20 papers and the case record, the Court **DENIES** MFG's Motion.<sup>1</sup>  
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23 <sup>1</sup> Even though the case is under appeal, this Court has jurisdiction to decide the matter.  
24 "A 'district court retain[s] the power to award attorney's fees after the notice of appeal  
25 from [its] decision on the merits [has] been filed.'" *Edwards v. Vemma Nutrition*, 835 F.  
26 App'x 174, 176 (9th Cir. 2020) (alterations in original) (quoting *Masalosalo by*  
27 *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983)). See generally  
28 Bennett Evan Cooper, *Federal Appellate Practice: Ninth Circuit* § 9.1 (2020 ed.).

1 **BACKGROUND**

2 The Court limits the discussion to the facts necessary to issue this Order. MFG  
3 originated two mortgage loans for Plaintiff, one in 2016, and another in 2017. These  
4 loans became subject to Plaintiff’s lawsuit, in part pursuant to the Truth in Lending Act  
5 (“TILA”), 15 U.S.C. § 1601, *et seq.* On December 6, 2019, MFG served Plaintiff an  
6 Offer of Judgment (“Offer”) pursuant to Federal Rule of Civil Procedure (“Rule”) 68.  
7 *See* MFG Mem. Ex. 3, ECF No. 265-2. The Offer, in part, allowed entry of judgment  
8 with an amount of \$8,001.00. *See id.* Plaintiff did not accept the Offer.

9 On September 15, 2020, the Court issued its Summary Judgment Order. ECF No.  
10 209. The Court concluded that Plaintiff met his burden of demonstrating “one TILA  
11 violation as to the Defendant MFG,” and found “that Defendant MFG’s statutory  
12 damages under [15 U.S.C.] § 1640(a)(2)(A)(i), (iv) are capped to \$4,000 per violation  
13 and that § 1640(a)(4) does not apply.” *Id.* at 53–54.

14 On April 22, 2021, the Court issued a Judgment and Order that resolved the  
15 remaining issues that the Court had declined to decide when issuing its Summary  
16 Judgment Order. ECF No. 264. In the April 22, 2021 Judgment and Order, the Court  
17 stated that MFG was “liable for \$4,000,” and ordered that Plaintiff was entitled to such  
18 damages. *See id.* at 2 n.3, 19.

19 On May 6, 2021, MFG filed the instant Motion. ECF No. 265. Plaintiff filed an  
20 Opposition, and MFG filed a Reply. *See* ECF Nos. 271, 273. In the meantime, the entire  
21 case is pending appeal, in which Plaintiff filed a Notice of Appeal on May 17, 2021, and  
22 Defendants filed a Notice of Cross Appeal on June 1, 2021. *See* ECF Nos. 267, 274.

23 **DISCUSSION**

24 The Court declines to grant MFG’s Motion because TILA does not award  
25 attorney’s fees to the defendants of the lawsuit. MFG’s case for attorney’s fees is as  
26 follows. An award of attorney’s fees is available if MFG meets the requirements under  
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1 Rule 54(d)(2), which includes providing “grounds entitling the movant to the award.”  
2 Fed. R. Civ. P. 54(d)(2)(B)(ii). Rule 68(d) provides such grounds since Plaintiff rejected  
3 MFG’s Offer, and thus “the offeree must pay the costs incurred after the offer was  
4 made.” Per *Marek v. Chesny*, 473 U.S. 1, 9 (1985), “costs” in Rule 68 could include  
5 attorney’s fees if the statute provides so. And under TILA, “costs” includes attorney’s  
6 fees. See MFG Mem. 2–3, ECF No. 265-2. Of note, MFG must satisfy each part of the  
7 syllogism to succeed in its claim for attorney’s fees.

8 MFG’s chain of reasoning breaks down in the last two parts. Applying the Ninth  
9 Circuit’s understanding of *Marek*, a statute including attorney’s fees as costs is not  
10 enough—MFG must prove that such statute applies to them. The Ninth Circuit expressly  
11 stated the following:

12 In *Marek*, the Supreme Court held that “the term ‘costs’ in Rule 68 was  
13 intended to refer to all costs *properly awardable* under the relevant  
14 substantive statute.” We have interpreted this to mean that attorney’s fees  
15 may be awarded as Rule 68 costs only if those fees would have been  
16 properly awarded under the relevant substantive statute in that particular  
case.

17 *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1034 (9th Cir.  
18 2013) (emphases in original) (internal citation omitted); *accord Energy Intel. Grp., Inc. v.*  
19 *Kayne Anderson Cap. Advisors, L.P.*, 948 F.3d 261, 279–80 (5th Cir. 2020) (agreeing  
20 with the Ninth Circuit’s decision to reject the cross-appellant’s interpretation that it may  
21 recover attorney’s fees “so long as the substantive statute authorizes the district court to  
22 award fees as part of costs to *some party*” (emphasis in original)). To put it differently, if  
23 the statute designates attorney’s fees to a particular party but not others in the lawsuit, the  
24 Rule 68 offeror must also demonstrate that it meets that designation. Otherwise, it  
25 contravenes *Marek*’s qualifying language that Rule 68 refers to all costs “properly  
26 awardable” under the relevant statute.

1 And under Section 1639b of TILA, the award of attorney’s fees is unidirectional,  
2 i.e., available to the consumer but not so to the mortgage originator. To minimize the  
3 Court’s intrusion in an action that is currently in front of the Ninth Circuit, the Court will  
4 solely analyze Section 1639b(d)(2), which MFG cites as the basis for an attorney’s fees  
5 award. That provision includes “a reasonable attorney’s fee” in assessing “costs *to the*  
6 *consumer of the action.*” 15 U.S.C. § 1639b(d)(2) (emphases added). Thus, this Section  
7 is not defining “costs” writ-large. It permits costs to include attorney’s fees, but only to  
8 the extent that attorney’s fees are part of *Plaintiff’s* costs as the mortgage consumer.

9 While the parties have not identified any case law that has interpreted Section  
10 1639b in a context similar to the dispute before this Court,<sup>2</sup> the Court concludes that this  
11 is the appropriate reading of the TILA statute. First, the canon of statutory construction  
12 prefers that every word of the statute be given effect. *See generally* Antonin Scalia &  
13 Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174–79 (2012) (the  
14 Surplusage Canon). Second, the Court’s interpretation is in tune with other provisions of  
15 TILA that limit attorney’s fees to the plaintiffs. *See, e.g., Bonner v. Redwood Mortg.*  
16 *Corp.*, No. C 10-00479 WHA, 2010 WL 2528962, at \*4 (N.D. Cal. June 18, 2010) (“No  
17 provision under TILA grants attorney’s fees to prevailing lenders.”); *cf. Nigh v. Koons*  
18 *Buick Pontiac GMC, Inc.*, 478 F.3d 183, 189 (4th Cir. 2007) (discussing that the rationale  
19 behind fee-shifting provisions such as those in TILA is to subsidize the prosecution of  
20 such laws).

21 Accordingly, the Court concludes that an attorney’s fees award to MFG is not  
22 appropriate. Before the Court concludes the Order, however, it makes one additional  
23 observation. In his Opposition brief, Plaintiff flagged that the Court’s April 22, 2021  
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26 <sup>2</sup> MFG acknowledges that there is no case addressing whether Section 1639b(d)(2) meets  
27 the *Marek* test. *See* MFG Reply 4, ECF No. 273.

1 Judgment and Order made an “error statement,” since Plaintiff should be entitled to  
2 \$8,000 against MFG instead of \$4,000. *See* Pl.’s Opp’n 3–4, ECF No. 271. The Court  
3 agrees with Plaintiff. The Summary Judgment Order makes clear that there was “one”  
4 violation of TILA for “each” loan document, thus “\$4,000 per violation.” *See* ECF No.  
5 209 at 40, 53.

6 Normally this would be considered a “clerical mistake” that the Court may amend  
7 on its own. “But after an appeal has been docketed in the appellate court and while it is  
8 pending, such a mistake may be corrected only with the appellate court’s leave.” Fed. R.  
9 Civ. P. 60(a). With no leave appearing in the case record, the Court lacks jurisdiction to  
10 amend its final judgment, and thus the Court will wait for further instructions from the  
11 Ninth Circuit instead.

### 12 CONCLUSION

13 For the reasons discussed above, the Court **DENIES** Defendant MFG’s Motion for  
14 Attorney’s Fees. Relatedly, the Court **VACATES** the hearing on the matter, currently  
15 scheduled for June 11, 2021.

16 **IT IS SO ORDERED.**

17  
18 Dated: June 4, 2021

  
19 Hon. Gonzalo P. Curiel  
20 United States District Judge