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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Unite Here Health, et al.,  
Plaintiffs  
v.  
Craig Gilbert, et al.,  
Defendants

**2:13-cv-00937-JAD-GWF**  
**Order Denying Motion for Attorney's**  
**Fees**  
[ECF No. 62]

10 Plaintiffs are Culinary Union-related employee-benefit trusts that brought this ERISA breach-  
11 of-fiduciary-duty action against the principals of Nuthin' Fancy, LLC<sup>1</sup> the bankrupt operator of the  
12 short-lived Lynyrd Skynyrd BBQ and Beer restaurant inside the Excalibur Hotel & Casino. The  
13 Trusts sought to recover more than half a million dollars in unpaid benefits allegedly due under the  
14 terms of the collective bargaining agreement between the union and the hotel. On September 30,  
15 2015, I denied the Trusts' motion for partial summary judgment on liability and granted the  
16 Principals' motion for summary judgment. Relying on the Ninth Circuit's recent decision in *Bos v.*  
17 *Board of Trustees*,<sup>2</sup> I declined to adopt an exception to the general rule announced by the Ninth  
18 Circuit in *Cline v. Industrial Maintenance Engineering and Contracting Company*<sup>3</sup> that unpaid  
19 benefits are not plan assets.<sup>4</sup> The Principals now seek attorney's fees in excess of \$130,000.<sup>5</sup>  
20 Having considered the five *Hummel* factors that govern fee awards in ERISA cases, I exercise my  
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23 <sup>1</sup> Craig Gilbert, Michael Frey, Mathilda Murdock, Benjamin Lutz, Drive This Entertainment! LLC,  
24 Drive This! LLC, Eleventeen Enterprises LLC, and Trifecta Partners, LLC ("the Principals").

25 <sup>2</sup> *Bos v. Board of Trustees*, 795 F.3d 1006 (9th Cir. 2015).

26 <sup>3</sup> *Cline v. Indust. Maint. Engr. & Contracting Co.*, 200 F.3d 1223 (9th Cir. 2000).

27 <sup>4</sup> ECF No. 60.

28 <sup>5</sup> ECF No. 62.

1 discretion to decline an award and deny the motion.<sup>6</sup>

2 **Discussion**

3 **A. Attorney’s fees under 29 U.S.C. § 1132(g)(1)**

4 The American Rule recognizes that each party in litigation must bear its own attorney’s fees  
5 in the absence of a rule, statute, or contract authorizing an award of fees.<sup>7</sup> ERISA is a fee-shifting  
6 statute; it allows a court to award “a reasonable attorney’s fee and costs of the action”<sup>8</sup> to a party that  
7 has achieved some degree of success on the merits of the claim.<sup>9</sup> Once a court makes the threshold  
8 determination that the moving party has achieved some success on the merits, it must consider the  
9 five factors outlined by the Ninth Circuit in *Hummel v. S.E. Rykoff & Co.* to determine whether an  
10 award of fees is warranted:

11 (1) the degree of the opposing parties’ culpability or bad faith; (2) the  
12 ability of the opposing parties to satisfy an award of fees; (3) whether  
13 an award of fees against opposing parties would deter others from  
14 acting under similar circumstances; (4) whether the parties requesting  
fees sought to benefit all participants and beneficiaries of an ERISA  
plan or to resolve a significant legal question regarding ERISA; and (5)  
the relative merits of the parties’ positions.<sup>10</sup>

15 The Ninth Circuit has recognized that, although § 1332(g)(1) allows defendant-employers to recover  
16 attorney’s fees, these factors very frequently counsel against awarding attorney’s fees against ERISA  
17 plaintiffs.<sup>11</sup>

18 **B. The *Hummel* factors weigh against an award of fees.**

19 Because the Principals have achieved some degree of success on the merits by virtue of my  
20 order granting their motion for summary judgment, I consider whether the *Hummel* factors warrant  
21 an award of fees.

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22 <sup>6</sup> I find this motion suitable for disposition without oral argument. L.R. 78-2.

23 <sup>7</sup> *MRO Commc’n Inc. v. Tel. & Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999).

24 <sup>8</sup> 29 U.S.C. § 1332(g)(1).

25 <sup>9</sup> *Hardt v. Reliance Standard Ins. Co.*, 560 U.S. 242, 244–45 (2010).

26 <sup>10</sup> *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980).

27 <sup>11</sup> *Carpenters S. Cal. Admin. Corp. v. Russel*, 726 F.2d 1410, 1416 (9th Cir. 1983).

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2 ***1. The degree of the Trusts' culpability or bad faith, relative merits of the parties' positions, and deterrent effect of a fee award***

3 I do not find that the Trusts acted in bad faith in bringing or maintaining this action. A  
4 plaintiff acts in good faith if he has a reasonable belief that he could prove an actionable ERISA  
5 claim.<sup>12</sup> The Trusts' claim was not patently frivolous, and there is no evidence in the record that the  
6 Trusts brought this suit to harass the Principals.

7 The relative strength of the parties' positions weighs slightly in favor of awarding fees.  
8 Though the Principals' arguments ultimately prevailed, the Trusts made a good-faith argument to  
9 adopt an exception to the *Cline* rule that had been recognized in other circuits. And while the  
10 Principals' summary-judgment motion was pending, a Ninth Circuit panel in *Bos v. Board of*  
11 *Trustees* refused to adopt an exception to the *Cline* rule in the bankruptcy context, which bolstered  
12 my conclusion that the Ninth Circuit would likely decline to apply the exception to the *Cline* rule  
13 urged by the Trusts. When the Trusts brought this action, they did not have the benefit of the *Bos*  
14 decision.

15 Finally, because I find that the Trusts did not act in bad faith and raised reasonably  
16 meritorious arguments to support their claim, an award of fees would likely have small, if any,  
17 deterrent effect. Accordingly, the first and third factors weigh strongly against awarding fees, and  
18 the fifth factor weighs slightly in favor of awarding fees.

19 ***2. The ability of the Trusts to satisfy an award of fees and whether the parties requesting***  
20 ***fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a***  
21 ***significant legal question regarding ERISA***

22 The Principals argue that, as "two of the largest union trust funds in the state, controlling  
23 hundreds of millions of dollars in assets," the Trusts can easily afford the requested fees.<sup>13</sup> The  
24 Trusts respond that they are non-profit employee-benefit trusts that exist for the exclusive purpose of  
25 providing pension and health benefits to their beneficiaries and that any recoveries for unpaid  
26 contributions for work performed at the now-defunct Lynyrd Skynyrd restaurant can only be used for

27 <sup>12</sup> *Cline*, 200 F.3d at 1236.

28 <sup>13</sup> ECF No. 62 at 5.

1 the benefit of the Trusts' beneficiaries, not legal fees.<sup>14</sup> The Trusts' ability to satisfy the requested  
2 award of fees cannot be determined from the record before me because the exhibits the Principals  
3 cite do not adequately address the current financial status of the Trusts.<sup>15</sup> This leaves the fourth  
4 *Hummel* factor: whether the parties requesting fees sought to benefit all participants and beneficiaries  
5 of an ERISA plan or sought to resolve a significant legal question about ERISA, which does not  
6 apply in this case.<sup>16</sup> The second and fourth factors are therefore neutral and do not factor into my  
7 analysis. In total and on balance, I find that the *Hummel* factors counsel against awarding attorney's  
8 fees, so I deny the Principals' motion.

9 **Conclusion**

10 Accordingly, IT IS HEREBY ORDERED that **defendants' motion for attorney's fees [ECF**  
11 **No. 62] is DENIED.**

12 Dated this 22nd day of July, 2016.

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15 Jennifer A. Dorsey  
16 United States District Judge  
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23 <sup>14</sup> ECF No. 64 at 13–14.

24 <sup>15</sup> The Principals cite to a one-page payment accounting summary sheet, but the most recent balance  
25 shown is from April 2015, six months before their motion for fees was filed. Principals also  
26 generally cite to a 60-page document from Nuthin' Fancy, LLC's bankruptcy proceeding. The  
27 Principals do not explain how they derive the figures they throw out in their motion from these  
28 documents, and I decline to comb through them to find out.

<sup>16</sup> *Tingey v. Pixley-Richards W., Inc.*, 958 F.2d 908, 910 (9th Cir. 1992) (stating that the fourth  
*Hummel* factor is generally considered only when a prevailing plaintiff seeks an award of fees).