

I. INTRODUCTION

This appeal concerns various post-final judgment orders for attorneys fees and costs. The appeal from the final judgment of dismissal of this case is also in the briefing stages as of the date of this brief. *See* Appeal B198217.

If Plaintiff and Appellant Cyrus Sanai completely prevails in Appeal B198217, then Sanai prevails in all but one respect in this appeal. The issue left open will be whether Plaintiff is entitled to receive costs in relationship to the removal of Irvine Apartment Communities LLC, Irvine Apartment Communities LP, and The Irvine Company (the “Irvine Entities”) from this lawsuit (the Irvine Entities, Harvey Saltz, and First Advantage Corporation are referred to as the “Respondents”). If Sanai does not completely prevail in B198217, then every issue raised and order appealed in this appeal must be considered by his Court.

This Court hardly needs introduction to the basic facts of this dispute, as they are set forth in three prior opinions: the opinion in B147392 dated March 21, 2002, B170618 dated February 16, 2005, and a combined opinion in dockets B174924 and B170618, dated June 28, 2005. Virtually every judicial action by the two trial court judges in the matter, Judge Horowitz and Judge Grimes, was vacated as void.

In the June 28, 2005 opinion this Court disqualified Judge Grimes in the interest of justice, along with the all other judges whose rulings were affected by the decision; and issued the following instructions:

The matter is remanded to the trial court with directions to vacate all orders entered after January 16, 2001 and to conduct further proceedings based on the state of the pleadings as of January 16, 2001.

....

Mr. Sanai is to recover his costs on appeal.

B170618/B174924, June 28, 2005 slip. op. at 17 (“June 28, 2005 Opinion”)

The Court also “granted Mr. Sanai's unopposed motions to substitute First Advantage Corporation for UDR”. *Id.* at 2, fn.2

The new trial court judge, Terry Green, refused to accept this Court’s instructions, declining to “vacate all orders entered after January 16, 2001”. The judge made additional breaches of settled law include, without limitation, the following:

1. After counsel Michael Saltz defaulted in discovery responses, entered an absolute discovery stay during the entire time the case was before Judge Green;
2. Repeatedly entered void orders on reapplications by the Defendants which violated the jurisdictional requirements of Code Civ. Proc. §1008(b).
3. Repeatedly refused to allow amendments to Sanai’s original complaint based on the actions taken by Judge Horowitz and the various void judicial acts taken during the period of the automatic stay; and

4. Dismissed Sanai's federal claim on the grounds that he had no "evidence" supporting an amended complaint, all the while refusing Sanai the discovery which would demonstrate the validity of the amendment.
5. Awarded attorneys fees to the Defendants as prevailing parties under a statute which does not permit fees to be awarded based on prevailing or not prevailing in the litigation.

As in the case with Judge Grimes, all of these obvious judicial errors were accompanied by vile personal attacks on Sanai. Once again, a Los Angeles County Superior Court judge who displays contumacious refusal to comply with judicial precedent sought to inflict the maximum amount of judicial punishment on a pro se plaintiff asserting obviously meritorious claims.

II. ISSUES PRESENTED

1. Did Judge Green err in granting Respondents' motion for attorneys fees pursuant to Code Civ. Proc. §724.080?
2. Did Judge Green err in granting Respondents' motion for attorneys fees pursuant to 15 U.S.C. §1681n(c) and 15 U.S.C. §1681o(b)?

3. Were the two awards of attorneys fees void due to the failure of the Respondents to comply with Proc. Code Civ. Proc. §1008?
4. Was Judge Green's order denying Sanai's motion to strike the memorandum of costs filed by the Respondents, and granting the Defendants' motion to strike the memorandum of costs, in error?
5. Should Sanai be awarded attorneys fees in respect of this appeal?

III. STATEMENT OF THE CASE

A. A Note Concerning Judge Green's Orders and the Appendix

When it comes to issuing written orders, Judge Green is a disaster. Throughout this litigation orders have been stated on the record by the Judge but not entered, entered completely incorrectly, or signed but not docketed.

This issue has been addressed in Appeal B198217, but is relevant here as well. On August 17, 2007 Judge Green announced his ruling concerning cross motions to strike or tax memoranda of costs, and took under submission one of Defendants' motions for attorneys fees. The motion for attorneys fees was granted in an order entered on September 6, 2007. APPFEE 417.¹ Plaintiff Cyrus Sanai ("Sanai") filed an appeal,

¹ Sanai has submitted an Appellant's Appendix and relevant transcripts as the record on appeal. Because of the previous appeals, Sanai has incorporated by reference the previous appellate record in his Appendix, and was granted judicial notice of the related writ proceedings by this Court on March 3, 2003 in appeal B174924, thereby incorporating such documents into the appellate record of that appeal. References to pages in the Clerk's Transcript of appeal B147392 are referred to as SLAPPCT. References to pages in the Clerk's Transcript of appeal B152745 are referred to as DISCT. References to pages in the Appendix to the Petition for Writ of Mandamus, etc., B156098, are referred to as WRITAPP. References to the Appellant's Appendix in pending appeal B198217 are to APPAPP. References to the Appendix filed with this brief are to APPFEE. References to other motions, requests for judicial notice or the other petition for writs of supersedeas are not abbreviated.

believing that the order concerning the cross motions was in a unserved minute order. In fact, Judge Green had entered no formal order, and it took five months to persuade Judge Green to enter the order. APPFEE 424. Nonetheless, the order is still appealable under CRC 8.104(e)(2).

B. Background.

This case originates in a landlord-tenant dispute and the reporting of the amount claimed by the landlord to consumer credit reporting agencies without the requisite notice or any judicial determination of the amount claimed. From 1997 to 1999 Sanai was a tenant of the Promontory Point apartment complex in Newport Beach. Original Complaint, SLAPPCT 1 *et seq.*, APPAPP 1 *et seq.* This business operated under the name “Promontory Point Villa Apartments” though no such entity exists and no fictitious business name therefor has been registered. This complex is now owned and controlled by former Defendants The Irvine Company "TIC", Irvine Apartment Communities LLC ("IACLLC") and Irvine Apartment Communities LP ("IACLP"), though the exact ownership structure remains unclear. *See generally*, June 28, 2005 slip. op. at 3-13. Sanai entered into a lease agreement for six months. *Id.*

Sanai accepted a written offer for a new lease for one year. *Id.* After the contract was concluded, the persons purporting to be Promontory Point, while acknowledging that Sanai had accepted the offer in a timely fashion,

asserted that it made a unilateral mistake in the offered rent and attempted rescission of the contract. *Id.* Sanai refused to accept the rescission, and he paid the rent set forth in the offer he had accepted. *Id.* After a campaign of harassment by Promontory Point, which appears to have been motivated more out of spite as any legitimate business reason, Sanai moved out of Promontory Point in January 1999. *Id.* Upon moving out Sanai paid his pro-rated rent and gave Promontory Point his forwarding address. WRITAPP 346-7. This address was entered into Promontory Point's records by February 24, 1999. WRITAPP 349.

Promontory Point then hired Defendants and Respondents Harvey Saltz (“Saltz”) and Defendant First Advantage Corporation’s predecessor-in-interest, The U.D. Registry, Inc. (“UDR”) to assert to consumer credit reporting agencies that an “undisputed” debt to Promontory Point was in collection. APPAPP 5. UDR made its report as follows:

“Status: collection account, \$2,781 past due as of 9-1999.

Account history:

Collection as of 9-1999”

The report also states “Original Creditor: Promontory Point”.

APPAPP 5.

UDR sent a letter to Sanai in May of 1999 stating that they were filing derogatory credit information with certain consumer credit reporting agencies. This letter was addressed to the apartment Sanai moved out of four months previously, rather than to the last known address Sanai had provided to Promontory Point. WRITAPP 352.

After requesting Harvey Saltz and UDR to remove this item promptly and voluntarily and receiving a rebuff, Sanai sued them on September 7, 2000. June 28, 2005 slip op. at 5. UDR and Saltz answered the Complaint, then filed a Code Civ. Proc. §425.16 “anti-SLAPP” Special Motion to Strike against the entirety of Sanai's complaint. *Id.* at 5-6. The motion to strike was denied on December 5, 2000. *Id.* at 5-6. This denial was first subject to an unsuccessful writ petition and then an unsuccessful appeal. (Court of Appeal Case Nos. B147603 and B147392, respectively).

Sanai’s complaint was dismissed by Judge Horowitz on grounds that the Respondents never argued before Judge Green, and therefore are irrelevant to this appeal. In the June 28, 2005 opinion, this Court found that all of the orders made by Judge Grimes and all but one made by Horowitz were void, and made the following orders:

The matter is remanded to the trial court with directions to vacate all orders entered after January 16, 2001 and to conduct further proceedings based on the state of the pleadings as of January 16, 2001.

....

Mr. Sanai is to recover his costs on appeal.

June 28, 2005 slip. op. at 17.

C. Appellate Costs Proceedings.

In conformity with the Court of Appeal’s combined award of costs in the combined decision in B174924 and B170618, Sanai served by mail on September 21, 2005 and filed on September 22, 2005 a combined

memorandum of costs on appeal, requesting costs jointly and severally against Harvey Saltz, First Advantage Corporation, and the Irvine Entities. APPAPP 339. Sanai did not request any costs from UDR, as it no longer exists.

On October 12, 2005, Respondents' counsel filed a motion to tax costs. On January 6, 2006 Judge Green struck that motion to tax costs as untimely. On March 28, 2006 the trial court signed the order at the hearing. APPAPP 339.

On April 12, 2006 Sanai caused to be served a memorandum of costs pursuant to Code Civ. Proc. §685.070. APPAPP 339, 398. Copies of the memorandum of costs were served on April 12, 2006 by Express Mail, as permitted under Code Civ. Proc. §685.070(b). APPAPP 339-340. Pursuant to Code Civ. Proc. §684.020(a), the memorandum of costs was served “on the judgment debtor instead of the attorney for the judgment debtor.” APPAPP 336. Pursuant to Code Civ. Proc. §684.120(a)(2), the memoranda of costs were served on each “person’s current mailing address”. The current mailing address of Harvey Saltz—the father of counsel Michael Saltz--was determined from the address he provided for service in this case. *Id.* The current mailing address for First Advantage Corporation was determined from its website. *Id.* The current mailing address for The Irvine Company, Irvine Apartment Communities LLC and Irvine Apartment Communities LP was determined from the website of The Irvine Company and the California Secretary of State business search web portal. *Id.*

The three packages containing the copies of the memoranda of costs were processed by the United States Post office on April 13, 2006. APPAPP 339, 402-403. One of the packages was delivered on April 14, 2006 and the others were delivered on April 17, 2006. APPAPP 354-358. All three packages were accepted by signatories. APPAPP 339, 354-356.

Though the Respondents, including Harvey Saltz, received the memoranda of costs, counsel Michael Saltz again failed to file a timely motion under Code Civ. Proc. §685.070(b)-(f) to challenge the memorandum of costs. For this reason, the Clerk of the Superior Court issued an augmented Judgment on May 8-9, 2006. APPAPP 269-270.

On May 10, 2006 Counsel Michael Saltz left the following message on Plaintiff's telephone messaging system:

Cyrus Sanai, this is Michael Saltz giving you ex parte notice that I'll be in Department 14 at 8:30 tomorrow, uh, seeking an order to shorten time on a motion to strike your memorandum of costs also an, uh, order to , uh, have a satisfaction of judgment entered. Thank you.

APPAPP293.

At the time of preparation of this motion, the message was still on Plaintiff's telephone messaging system, and multiple taped copies of said message has been made. *Id.*

Based on this notice, Sanai prepared on opposition to a motion to shorten time for hearing on a motion to strike the memorandum of costs and a motion to shorten time for hearing on a motion to have satisfaction of judgment entered. APPAPP 293-294. Sanai did not directly address the

propriety of the motion to strike procedure, because he believed it would not be before the Court.

In fact, Saltz filed a motion to strike Sanai's memorandum of costs pursuant to Code Civ. Proc. §436. At the hearing Counsel Michael Saltz filed a declaration under penalty of perjury stating the following:

On Monday, May 9, 2006, at about 9:50 A.M. I gave notice to Plaintiff in pro per, Cyrus Sanai ("Sanai") of the hearing on this Application in which I would seek an Order striking his Memorandum of Costs After Judgment, or an shortening time to hear a motion striking same and to freeze all collection efforts until this issue is resolved. This Notice was given by a telephone message that I left with Sanai's answering machine or voice mail. I also said in the message that I would make this application on May 11, 2006 at 8:30 a.m. in Department 14 of the above entitled court, located at 111 North Hill Street Los Angeles, California. In that telephone conversation I pointed out to Sanai that there has not been any judgment issued in this case and he disagreed claiming that he believed that his March 28, 2006 Order directing the Clerk to prepare a Judgment was a judgment. He also indicated that he intended to oppose the foregoing application.

APPAPP 359.

This declaration is perjury. It is a slapdash amendment of a declaration Mr. Saltz signed on May 8, 2006, as can be seen by the last two sentences, which refer to a conversation Mr. Saltz had with Plaintiff on May 8, 2006. *Id.* Mr. Saltz's declaration that he gave notice of "the hearing on this Application in which I would seek an Order striking his Memorandum of Costs After Judgment, or an shortening time to hear a motion striking same and to freeze all collection efforts until this issue is

resolved” is and was a lie. He only gave notice of an intent to seek “an order to shorten time on a motion to strike your memorandum of costs also an, uh, order to , uh, have a satisfaction of judgment entered.” He never identified the alternative motion to directly strike the memorandum of costs.

At the hearing Sanai objected to the trial court entering a motion to strike his memorandum of costs on the grounds that such relief had not been part of the notification message left by Michael Saltz to Sanai. APPAPP 294. Sanai also raised the objection that this Court lacked the power to enter the ex parte order. *Id.* The trial court rejected the objections. *Id.* Sanai stated he would bring a motion for reconsideration if he still had the message on his voice messaging system. Judge Green granted Saltz’s motion. APPAPP 296.

On returning to his home, Plaintiff found that Mr. Saltz’s message was still on his answering machine. APPAPP 294. He made multiple taped copies and notified a late emergency ex parte hearing. *Id.*

At the hearing Plaintiff played the tape. Counsel Michael Saltz admitted the tape was a true copy of his message. This Court vacated its order striking the memorandum of costs. *See* Transcript of May 12, 2006 Hearing.

On June 26, 2006, counsel Michael Saltz dispatched for filing and service a motion to strike the April 12, 2006 memorandum of costs pursuant to Code Civ. Proc. §436. APPAPP 305-328. The notice of motion requested no relief in respect of the existing judgment. The

supporting declaration made no mention of the earlier filed motion or its outcome.

The trial court granted this motion, despite the fact that Plaintiff pointed out that the order to strike the memorandum of costs would be nugatory and would do nothing to the judgment. APPAPP 383-384. The trial court ignored this basic tenet of civil procedure. To demonstrate the trial court's ignorance of civil procedure and the ineffectiveness of its order, Sanai obtained abstracts of judgment based on the augmented amount and filed them.

It is an understatement to say that demonstrating to Judge Green his deficient understanding of civil procedure—i.e. that striking a memorandum of costs after the costs have been reduced to a judgment is a null and void act—infuriated him. Respondents filed a motion to require Sanai to file acknowledgements of satisfaction of judgment and to recall and quash abstracts of judgment, and requested damages, including attorneys fees as a component of such damages. APPAPP 474-475. Judge Green granted the motion and fined Sanai \$500.00, but did not grant the request for damages or attorneys fees as a component of damages. (This order does not appear to be docketed).

After the request of attorneys fees as a component of damages was rejected, the Respondents filed a motion for attorneys fees citing the correct statute. APPFEE 50 *et seq.* The trial court granted the motion. APPFEE 229.

On June 5, 2007 Plaintiff filed an ex parte motion to vacate the order granting Respondents' second motion to strike Plaintiff's memorandum of costs after judgment pursuant to Code Civ. Proc. §1008(b). On June 8, 2007 the trial court denied the motion. APPFEE 285, 286.

D. Denials of Motion for Leave to Amend.

The Respondents filed motions for judgment on the pleadings. APPAPP 221-223; 265-267. Sanai filed multiple motions to amend his original complaint seeking to meet Judge Green's demands. APPAPP 17-68; 69-120; 170-220; 436-459. The trial court refused to grant Sanai leave to amend his complaint based on rulings made by Judge Horowitz. APPAPP 162-165; 301-303 (to be refiled if Respondents do not submit). Despite Sanai offering repeated complaints that met Judge Green's supposed objections, he flat out refused to permit Sanai to amend his complaint to add newly discovered facts.

E. Motion for Judgment on the Pleadings.

The Respondents filed motions for judgment on the pleadings. APPAPP 221-223; 265-267. The trial court granted Respondents' motion for judgment on the pleadings of all state law claims on the grounds that all such claims are pre-empted by federal law. The judge granted a motion to dismiss the federal claim on grounds that Sanai failed to allege that he had raised an objection with a consumer credit reporting agency, even though

Sanai offered evidence he had done so, and more importantly, even though discovery aimed at the relevant consumer credit reporting agency or First Advantage Corporation would reveal the documents.

After the motion for judgment on the pleadings were granted, Sanai had a judgment of dismissal entered in order to create an appealable order. APPAPP 476-477.

F. Motions for Attorneys Fees.

After entry of judgment, the Respondents filed a motion for attorneys fees pursuant to 15 U.S.C. §1681n(c) and 15 U.S.C. §1681o(b) on the grounds that they were prevailing parties. APPFEE 107 *et seq.* The trial court granted the motion. APPFEE 417 *et seq.*

G. Memoranda of Costs.

Plaintiff filed a memorandum of costs prior to judgment in respect of the costs relating to the involvement of Irvine Apartment Communities LLC, Irvine Apartment Communities LP, and The Irvine Company in the litigation. Harvey Saltz, First Advantage Corporation, Irvine Apartment Communities LLC, Irvine Apartment Communities LP, and The Irvine Company filed a single memorandum of costs as prevailing parties in the litigation. APPFEE 1.

Sanai filed a motion to strike or tax the memoranda of costs of Respondents. APPFEE 31 et. seq. Respondents filed a similar motion, which is not yet at issue in this appeal. The trial court denied Sanai's motion to strike the Respondents' memorandum, but partially granted the motion to tax the memorandum, and ordered the Respondents to file a new memorandum of costs. APPFEE 424-425. The rationale employed by the trial court in taxing Respondents' motion necessarily required the court to strike Sanai's motion.

H. Petitions for Writs of Mandamus.

Sanai filed two separate petitions for writs of mandamus seeking to have Judge Green removed pursuant to Code Civ. Proc. §170.1-3. Both were summarily denied.

IV. STATEMENT OF APPEALABILITY

The trial court granted a motion for judgment on the pleadings in respect of all claims in Sanai's complaint in two separate orders, the latter of which was entered on or about February 27, 2007. APPAPP 462-473. Soon thereafter the trial court suggested it would seek to frustrate Sanai's right to appeal by delaying entry of the judgment. As it turns out, this is not the first time plaintiffs have faced this problem, and there is, in some cases, a ready remedy: treating a voluntary dismissal with prejudice as an appealable order

“[A]ppellate courts treat a voluntary dismissal with prejudice as an appealable order if it was entered after an adverse ruling by the trial court in order to expedite an appeal of the ruling. (*Casey v. Overhead Door Corp.* (1999) 74 Cal.App.4th 112, 116, fn. 1; *Denny v. Lawrence*, supra, at p. 930, fn. 1; *Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790, 793.)

Stewart v. Colonial Western Agency (2001) 87 Cal.App.4th 1006, 1012.

The first appellate court to permit this procedure analyzed it as follows:

Provence contends Ashland may not appeal after voluntarily dismissing its complaint (*Parenti v. Lifeline Blood Bank* 49 Cal.App.3d 331 [122 Cal.Rptr. 709]) (1975). However, many courts have allowed appeals by plaintiffs who dismissed their complaints after an adverse ruling by the trial court, on the theory the dismissals were not really voluntary, but only done to expedite an appeal. (*See cases collected in Annot.*, 23 A.L.R.2d 664, 673-675.) Here Ashland dismissed its complaint after the superior court sustained Provence's demurrer without leave to amend. Moreover, it did so only to obtain a final judgment so it could contest the court's ruling. Under these circumstances, Ashland's request for dismissal was tantamount to a request to enter judgment on Provence's demurrer. We allow the appeal.

Ashland Chemical Co. v. Provence 129 Cal.App.3d 790, 792-793 (1982).

Relying on the foregoing precedents, Sanai filed a request for entry of dismissal with prejudice, which was entered as of March 13, 2007. APPAPP 476-477. A notice of appeal from this final judgment was filed on April 5, 2007. APPAPP 480-481. Sanai filed a notice of appeal of the

two orders awarding attorneys fees, the June 8, 2008 order denying the motion to vacate the order “striking” Sanai’s memorandum of costs after judgment, and the order concerning the cross motions to strike or tax the memoranda of pre-judgment costs on September 14, 2007. APPFEE 421-422. These four orders which have been appealed are all orders affecting substantial rights issued after judgment, and thus are appealable under Cal. Code Civ. Proc. §904.1(a)(2). Though one of the orders was docketed after the notice of appeal was filed, it was announced in August of 2007 by the trial court, and therefore is appealable under CRC 8.104(e)(2).

**V.
LEGAL DISCUSSION**

A. The Trial Court’s Order “Striking” Sanai’s Memorandum of Costs After Judgment was Invalid and Void, as were All Later Orders Which Flowed from it.

The standard of review of Judge Green’s order awarding attorneys fees is de novo, as all of the errors asserted are issues of law. *See, e.g., Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437-438 (standard of review is de novo where relevant facts not subject to dispute).

Sanai filed a memorandum of costs after judgment in respect of enforcement costs and attorneys fees relating to the appellate costs awarded automatically awarded due to the failure of Counsel Michael Saltz and his time to file a timely motion challenging the memorandum of costs. APPAPP 398-400.

Appellate costs awards are unique:

[T]rial court costs are a mere incident of the main judgment, and not separately enforceable [citation], but after appeal, there may be a new trial with even a further appeal, and the proceedings may cover a long period of time. Accordingly, the award of *costs on appeal*, when properly allowed in the trial court, represents an independent *judgment*, enforceable by any available means. `It is a complete judgment in itself that finds its origin in the order of an appellate [court] or the Supreme Court affirming or reversing a judgment of a lower court. The right to such

judgment comes into being when the order of the reviewing court becomes final. The judgment itself is created when the successful party files his cost bill and his costs are taxed."

Los Angeles Cty. Unified Schl. Dist. v. Wilshire Center Marketplace (2001) 89 Cal.App.4th 1413, 1419 (2001) quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 826, p. 852, italics in original. See also Eisenberg, et al., Cal. Practice Guide, Civil Appeals and Writs (The Rutter Group 2006) § 14:111 ("The costs award is enforceable in the same manner as a money judgment."); Cal. R. Court 27(d)(3) ("An award of costs is enforceable as a money judgment.")

Though the trial court entered an order directing the clerk of the court to enter a formal judgment, the clerk ignored the direction. This was not significant, because the order for costs was immediately enforceable as a judgment.

The Respondents ignored the order and Sanai took enforcement measures. He served the memoranda of costs on the judgment debtors on April 12, 2006. APPAPP 339, 398-400. The procedure for filing and challenging a memoranda of enforcement costs is set forth in Code Civ. Proc. §685.070(b)-(f), which reads in relevant part as follows:

(b) Before the judgment is fully satisfied but not later than two years after the costs have been incurred, the judgment creditor claiming costs under this section shall file a memorandum of costs with the court clerk and serve a copy on the judgment debtor. Service shall be made personally or by mail. The memorandum of costs shall be executed under oath by a person who has knowledge of the facts and shall state that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied.

(c) Within 10 days after the memorandum of costs is served on the judgment debtor, the judgment debtor may apply to the court on noticed motion to have the costs taxed by the court. The notice of motion shall be served on the judgment creditor. Service shall be made personally or by mail. The court shall make an order allowing or disallowing the costs to the extent justified under the circumstances of the case.

(d) If no motion to tax costs is made within the time provided in subdivision (c), the costs claimed in the memorandum are allowed.

”””

(f) Section 1013, extending the time within which a right may be exercised or an act may be done, applies to this section.

Code Civ. Proc. §685.070(b)-(d), (f) (bold emphasis added).

The mandatory requirement for filing a motion to tax costs is re-emphasized in a different part of the code, Code Civ. Proc. §685.090:

(a) Costs are added to and become a part of the judgment:

...

(2) If a memorandum of costs is filed pursuant to Section 685.070 and no motion to tax is made, upon the expiration of the time for making the motion.

Counsel Michael Saltz filed a motion to strike the memorandum of costs after the judgment had been entered. There are a number of reasons that this motion should have been denied which are at issue in appeal B198217. If this Court agrees with any of them, then the attorneys fees awarded for prevailing on the motions to force Sanai to execute

acknowledgments of satisfaction of judgment must be reversed along with the orders to execute such acknowledgements, and the acknowledgments themselves must be vacated, since all of them are premised on the validity of the trial court's order "striking" the memorandum of costs after judgment following the addition of such costs to the judgment.

The orders obtained by Saltz were void, which is an issue that can be addressed in both appeals.

On May 11, 2007 Respondents filed a motion pursuant to Code Civ. Proc. §436 to strike Plaintiff's Memorandum of Costs after Judgment that was filed on April 17, 2006. APPAPP 271-282. Though the notice of motion did not disclose the statutory grounds for granting the motion, the memorandum of points and authorities does:

Code Civ. Proc. § 436 also provides that this court may grant a request to strike a pleading or document....

APPAPP 280:13-14.

The trial court granted the motion. APPAPP 283-284.

On May 12, 2006 the trial court entered an order vacating the May 11, 2006 order; thus the relief requested in the May 11, 2006 motion was refused by the trial court. The order was subsequently re-issued *nun pro tunc* due to a typographical error. APPAPP 460-461. The grounds for the court's May 12, 2006 order was that counsel Michael Saltz filed a declaration stating he had given notice of the May 11, 2006 motion to strike

when in fact he gave notice of a motion to shorten time to file such motion, which is a very different thing. *See* Transcript of May 12, 2007 hearing. On or about June 26, 2006 Respondents filed a motion “to strike Plaintiff’s premature Memorandum of Costs After Trial in its entirety....[t]he motion is based on the California Code of Civil Procedure §436....”. APPAPP 305 *et seq.* Neither the motion nor the memorandum of points and authorities made any mention of Code Civ. Proc. §1008. APPAPP 307-321.

Attached to the June 26, 2006 motion was a declaration of counsel Michael Saltz that presented an exceptionally selective and misleading prior procedural history. In the first place, Saltz completely omits all mention of his May 11, 2006 motion, even though he does refer to the May 11, 2006 hearing. APPAPP 323:13-26. Likewise, there is no mention whatsoever of the outcome of the May 11, 2006 motion, i.e. the May 11, 2006 order granting the May 11, 2006 motion and the May 12, 2006 order vacating the May 11, 2006 order. Finally, there is nothing in Mr. Saltz’s declaration which demonstrates the existences of any new or different facts, circumstances or law arising since May 11, 2006 justifying the re-grant of relief.

Code Civ. Proc. §1008 reads in relevant part as follows:

(b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts,

circumstances, or law, **in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.**

...

(d) A violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7. In addition, an order made contrary to this section may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.

(e) **This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final.** No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.

Code Civ. Proc. §1008(a), (b), (d), (e) (emphasis added).

Prior to 1993 Section 1008 was neither jurisdictional nor exclusive.

After the provision was amended by the Legislature,

several appellate courts have enforced the expressed intent of the Legislature to impose jurisdictional and exclusive procedures on motions for reconsideration. (*See Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 669-670; *Baldwin v. Home Savings of America, supra*, 59 Cal.App.4th at p. 1200; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 686; *Wilson v. Science Applications Internat. Corp.* (1997) 52 Cal.App.4th 1025, 1031; *Lucas v.*

Santa Maria Public Airport Dist. (1995) 39 Cal.App.4th 1017, 1027; *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1499; and *Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485, 490-491.)

Kollander Construction, Inc. v. Superior Court (2002) 98 Cal.App.4th 304, 312.

The first appellate court to confront the effects of the revisions to Section 1008 was this Court, which held that section 1008 was expressly jurisdictional. *Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485, 492-493. In addition to the explicit requirement that the reapplication for relief include an affidavit or declaration which explicitly states “what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown”, the appellate courts have created an additional implicit requirement for the declaration or affidavit:

The indulgent construction of section 1008 urged by HSA also cannot be squared with the jurisdictional nature of the statute. Prior to the addition of subdivision (e) in 1992, it was held that the requirements of section 1008 were not jurisdictional and did not divest a trial court of its inherent power to reconsider its prior rulings. (*See, e.g., Curtin v. Koskey* (1991) 231 Cal.App.3d 873, 876 [282 Cal.Rptr. 706]; *Magallanes v. Superior Court* (1985) 167 Cal.App.3d 878, 882 [213 Cal.Rptr. 547] .) Since the addition of this language, the prevailing view is that section 1008 now imposes a jurisdictional constraint. As stated in *Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485 [23 Cal.Rptr.2d 666], section 1008 "is the exclusive means for modifying, amending or revoking an order. That limitation is expressly jurisdictional." (19 Cal.App.4th at p. 490.) ...

“[S]ection 1008 is jurisdictional.” (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1499 [38 Cal.Rptr.2d 626]; *Hejmadi, supra*, 58 Cal.App.4th 674, 692.) If a trial court has no jurisdiction to reconsider a prior order on the basis of "different facts" in the absence of a satisfactory explanation for the failure to present them earlier, it cannot have jurisdiction to reconsider on the basis of "different law" absent the same showing of diligence, because there is no basis for any distinction either in the statute or in reason. Accordingly, we hold that the diligence requirement applicable to motions to reconsider on the basis of different facts is also applicable to motions to reconsider on the basis of different law.

Absolutely no such showing was made in this case. As earlier described, the affidavit of counsel submitted in support of respondent's motion for reconsideration simply recites that in the process of "considering further options" after the adverse order, "the *Moallem* case was found. Since it appears relevant to the facts of this case, Home Savings requests its consideration at the present time." Counsel made no effort whatsoever to explain the failure to previously present the case, then two years old, or the principle for which it stands, as an alternative basis for denial of appellants' motion for attorney fees.

Baldwin v. Home Savings of America (1997) 59 Cal.App.4th 1192, 1200-1201.

There are no new or different facts justifying reapplication by the Respondents that were shown or could be shown. The consequences of voidness are set forth in the June 28, 2005 opinion in this case: the order striking the memorandum of costs, and all subsequent orders flowing therefrom, are void and must be vacated. Plaintiff explicitly raised the

voidness issue with the trial court, which rejected the contention. APPFEE. However, even if the issue had not been raised, jurisdictional attacks may be made for the first time on appeal.

There is a second, independent application of these jurisdictional principles to the order awarding attorneys fees. The original motion requesting relief under Code Civ. Proc. §724 had the following argument justifying the award of attorneys fees:

C. SANAI IS LIABLE FOR ATTORNEYS'S FEES AND DAMAGES

If the judgment has been satisfied and the judgment creditor fails without just cause to comply with the demand within the time allowed, the judgment creditor is liable to the person who made the demand for all damages sustained by reason of such failure and shall also forfeit one hundred dollars (\$100) to such person. Liability under this subdivision may be determined in the proceedings on the motion pursuant to subdivision (d) or in an action. [Code Civ. Proc. § 724.050(d)]

1) Attorneys Fees

According to the attached declaration of Michael J. Saltz, Defendants have suffered in incurring attorneys fees trying to get Sanai to comply with the subject demand. Thus, Defendants are entitled to an award of attorneys fees against Sanai in the amounts set forth in the declaration of Michael Saltz

APPFEE 23.

It is crystal clear that Respondents rested their initial claim for attorneys fees in respect of the on Code Civ. Proc. §724.050, specifically sub-paragraph (e), on the theory that such fees are damages. This section only permits the award of statutory and actual “damages”. Attorneys fees are not damages, and so the trial court denied recovery of attorneys fees as “damages”.

Respondents then reapplied for attorneys fees under a new motion, this time citing the correct provision of the Code of Civil Procedure, namely Code Civ. Proc. §724.080, but without following the jurisdictional procedure required for reapplications under Code Civ. Proc. §1008. APPFEE 50 *et seq.* Because the mandatory information concerning the prior applications for the same relief were not followed, the award of attorneys fees was void. Moreover, there are no new or different facts justifying reapplication by the Respondents that were shown or could be shown; the failure to obtain relief under the original motion was due to the failure of the counsel to Respondents to make a motion under the correct portion of the Code of Civil Procedure for the fees requested.

B. Reversal of the Motion For Judgment on the Pleadings Requires Reversal of the Costs Award and Award of Attorneys Fees on a Prevailing Party Basis.

Respondents were awarded a portion of the costs they requested and all of the attorneys fees they requested as prevailing parties. APPFEE 417-420, 424-425. Obviously if the trial court's order granting the motions for judgment on the pleadings filed by Harvey Saltz and First Advantage Corporation are reversed, then these orders must be reversed as well.

C. The Trial Court Erred in Taxing, Rather than Striking, the Respondent's Memorandum of Costs.

All of Sanai's contentions concerning the Memoranda of Costs are issues of law, and so are subject to de novo review. *See, e.g., Nguyen, supra.*

Counsel Michael Saltz filed a memorandum of costs identifying the persons on whose behalf he claimed costs as the "DEFENDANTS". APPFEE 1. A few lines below he identifies "The U.D. Registry, Inc." as the nominal defendant; in fact, the short title of this litigation has always been *Sanai v. Saltz*. The memorandum of costs thus fails to provide one of the minimal pieces of information necessary for this Court to evaluate it, the identities of the present and former parties to the litigation claiming costs. Where multiple parties in litigation have different outcomes, the memorandum of costs must identify the specific parties claiming costs as a matter of basic due process. The memorandum filed by Mr. Saltz failed to

do this, and therefore should have been struck for failing to include the necessary information required by the mandatory judicial council form.

An additional reason the memorandum should have been struck was that it was filed by a party who is not a “prevailing party”. CRC 3.1700(a)(1) (restricting the filing of costs to a “prevailing party”); Wegner, Fairbank & Epstein, California Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) § 17:137 (“a motion to strike challenges the entire costs bill (e.g., on the ground the claimant is not the "prevailing party")”).

The statutory right to costs recoverable by filing of a memorandum of costs is limited to those parties who meet the statutory definition of a prevailing party under Code Civ. Proc. § 1032(a). These are the following:

- (a) As used in this section, unless the context clearly requires otherwise:
 - (1) "Complaint" includes a cross-complaint.
 - (2) "Defendant" includes a cross-defendant or a person against whom a complaint is filed.
 - (3) "Plaintiff" includes a cross-complainant or a party who files a complaint in intervention.

- (4) "Prevailing party" includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

Code Civ. Proc. § 1032(a)

“If the party does not fall into one of these four express categories, the court may exercise its discretion to award or deny costs.” Wegner, Fairbank & Epstein, California Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) § 17:93. Such award must be accomplished via a motion and incorporated into the judgment or made during the time period during which a memorandum of costs may be awarded. Wegner, Fairbank & Epstein, California Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) § 17:110; *see, e.g. Lincoln v. Schurgin* (1995) 39 Cal. App. 4th 100 (awarding discretionary costs as part of judgment).

So which of the Respondents were the prevailing parties in this litigation at the time the memorandum of costs was filed? Harvey Saltz was a prevailing party, as he was a defendant in the original complaint, and judgment of dismissal was entered in his favor. The U.D. Registry, Inc. and its successor, First Advantage Corporation, were prevailing parties.

However, the Irvine Entities were not prevailing parties under the statutory definition.

The trial court agreed with Sanai concerning the above, but chose to tax the costs claimed on their behalf, rather than strike the memorandum; in so doing, the trial court ordered that a new memorandum of costs would have to be filed including costs claimable by Harvey Saltz and The U.D. Registry, Inc., only. APPFEE 424-425. This was an error. The memorandum was fatally defective from inception, and should have been struck. There is no provision in the statutes or rules or case law concerning civil procedure for a do over of the kind contemplated by the trial court.

The trial court also excluded certain categories of claimed costs. Plaintiff does not challenge that portion of the ruling. As the rationale employed by the trial court to exclude the costs claimed by the Irvine Entities necessarily excluded Sanai's claim for costs via the memorandum of costs procedure, Sanai elects not to challenge that portion of the order. If Respondents do challenge it by filing an appeal, then Sanai will address the issue.

D. The Trial Court Erred in Granting the Motion for Attorneys Fees.

1. Standard of Review.

All of Sanai's contentions are issues of law, and thus are subject to de novo review. *See, e.g., Nguyen, supra.*

2. The Award of Attorneys Fees Was Void.

Judge Grimes held that attorneys fees could not be awarded to three of the Respondents, which order was appealed and affirmed “in all respects” by the Court of Appeal.

As this Court explained,

Final judgment was entered in the case on September 17, 2002.
Notice of entry of judgment was served on September 24, 2002.

3. The Award of Costs and Attorney Fees

UDR and the Irvine Entities filed both a joint memorandum of costs and a consolidated motion for attorney fees on November 25, 2002.... The court awarded UDR \$136,034 in fees, 25 percent of the total fees sought by all defendants in their consolidated attorney fee motion. Mr. Sanai filed a timely notice of appeal challenging the award of costs and attorney fees. UDR and the Irvine Entities filed a timely cross-appeal from the order denying their request for fees....

....

[W]e affirm in all respects the trial court’s denial of fees to the Irvine Entities.

Sanai v. Saltz, B170618, February 16, 2005 slip. op at 10-11, 18.

This Court considered thus considered Judge Grimes’ denial of attorneys fees as correct, and upheld it. This Court did vacate all of the rulings of Judge Horowitz and remand the case to the state it was in the original complaint, which is the operative complaint. However, the original complaint contains no causes of action against any of the three Irvine

Entities, so there were no additional attorneys fees they could possibly have incurred in respect of the merits of the complaint.

Four of the five moving Respondents previously requested attorneys fees to be awarded (Harvey Saltz did not). Of these four parties, three were previously denied fees on the merits by Judge Grimes, and the award of fees to the fourth, First Advantage Corporation, was overturned on appeal.

The Respondents' motion requested fees on behalf of all of the Respondents, including the three Irvine Entities as to whom attorneys fees were completely denied on the merits. Once a motion has been denied by a court, any request for the same or similar relief is governed by Code Civ. Proc. §1008. The test as to whether a second motion is a reapplication or reconsideration of a prior motion is whether the court must decide the same issues, even if the second motion goes under a different title. *Curtin v. Koskey* (1991) 231 Cal. App. 3d 873, 878. Here, the issue is whether Plaintiff is liable for attorney fees incurred by the Respondents in opposing this lawsuit.

In this particular instance, the reapplication for the same relief is governed by paragraph Code Civ. Proc. §1008(b). The party re-applying for the same or similar relief must show "by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown". *Id.*

The Respondents' motion did have a declaration attached which contains part of the procedural history; however, it lacks any mention of the prior motions for attorneys fees before Judge Grimes or their result. APPFEE 127-144. The failure to comply with the procedural steps set forth in Code Civ. Proc. §1008(b) required the trial court to deny the motion for lack of subject matter jurisdiction under the explicit statutory language of Code Civ. Proc. §1008(e), which states that Section 1008 "specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions...No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section". The Courts of Appeal have repeatedly and explicitly held that an order granting a motion for reconsideration or reapplication for relief which violates this section must be reversed and vacated for lack of jurisdiction. *See, e.g. Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 691.

The motion should also have been denied because the moving papers do not comply with CRC 3.1113(j), which reads in relevant part as follows:

(j) Copies of non-California authorities

If any authority other than California cases, statutes, constitutional provisions, or state or local rules is cited, a copy of the authority must be lodged with the papers that cite the authority and tabbed as required by rule 3.1110(f).

CRC 3.1113(j)

CRC 3.1110(f), which is referenced in CRC 3.1111(j), reads as

follows:

(f) Format of exhibits

Each exhibit must be separated by a hard 8 1/2 x 11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. An index to exhibits must be provided. Pages from a single deposition and associated exhibits must be designated as a single exhibit.

CRC 3.1110(f).

The motion for attorneys fees rested solely on two federal statutes; however, no copies of the statutes, or any case law referring or applying the statutes, was provided with the moving papers. CRC 3.1113(j) requires that a copy of any federal statute cited or relied upon “must be lodged with the papers that cite the authority and tabbed as required by rule 3.1110(f).” This was not done. In addition, the voluminous exhibits which were attached lack an index, in violation of CRC 3.1110(f).

These omissions are not immaterial. The California Judicial Council has dictated by rule that every party opposing a motion which relies on out of state authorities, and the trial court which is deciding the issue, is not obliged to hunt down the non-California authorities, but is instead entitled to a complete copy furnished by the moving party. The Respondents flagrantly violated the rule in this case; this Court should note that it is rule which Respondents’ counsel is aware of, as proper federal law

appendices were filed in respect of the successful motions for judgment on the pleadings. Here no such documents were provided.

If the Respondents had provided complete copies of the relevant statutes in their moving papers, they might be able to argue that their error did not prejudice Sanai. However, the Respondents only provide a partial quotations of the statutes “in relevant part” rather than setting them out in full. Similarly, if the complete statutes had been set out in a federal case which they had provided, a lack of prejudice to Sanai might be asserted; however, Respondents failed to cite a single case concerning the two statutes cited, meaning that nowhere was Sanai provided with a complete copy of the two statutes on which the motion is premised.

The failure to provide a complete copy of the federal statutes on which they rely is a prejudicial violation of the mandatory obligation to provide such copies; for this reason the Respondents failed to provide the mandatory elements needed to prevail on their motion, and it thus must be denied.

The omission of an index is also not immaterial. While the form of the index is not specified, where what appear to be several hundred pages of exhibits are furnished by a party, an index is necessary to navigate the documents. While on its own such omission might be overlooked by a trial court without risk of being overturned, when combined with the failure to

provide mandatory documents critical for determination of the motion, the additional failure to provide an index is fatal.

Respondents cite incomplete portions of two sections of the federal law concerning credit reports. In both cases, the quoted language permits recovery for “an unsuccessful pleading, motion or other paper filed in connection with an action under this section” which is found by a court to be in bad faith or for harassment. *See* 15 U.S.C. §1681n(c), 15 U.S.C. §1681o(b). These statutes cited are not prevailing party attorneys fees statutes, but rather fees for parties who successfully defend against a motion or pleading. Accordingly, the Respondents must make a motion by motion, pleading by pleading request for attorneys fees; here the Respondents are claiming attorneys not for prevailing on a particular motion filed by Sanai, but rather for prevailing under the federal action as whole.

There is in fact a prevailing party attorneys fee statute under the Fair Credit Reporting Act, but it is solely in favor of a prevailing plaintiff, not a prevailing defendant where the action is for willful noncompliance (as was the case here):

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)

- (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; or
- (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or \$1,000, whichever is greater;
- (2) such amount of punitive damages as the court may allow; and
- (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. §1681n(a).

If the federal action was for negligent non-compliance, again only the plaintiff can recover fees.

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

- (1) any actual damages sustained by the consumer as a result of the failure; and
- (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. §1681o(a)

The trial court created a “bad faith” prevailing party attorneys fees statute, where none exists under the law.

3. The Award of Attorneys Fees Was Contrary to the Language of the Statute.

The reason that Respondents have failed to provide any case law showing the application of these statutes is that such decisional law would demonstrate that no attorneys fees are available. To take one example, in *Ryan v. Trans Union Corporation* (N.D.Ill. 2001) Case No. 99 C 216, a successful defendant moved for attorneys fees for the entire action under the same statute claimed by the Respondents here based on its assertion that the plaintiff knew that the factual assertions in the complaint were false.

The district court rejected this approach:

The only basis cited by defendants for their request to impose their attorney's fees on Ryan himself is § 1681n(c); 28 U.S.C. § 1927 permits an award only against counsel. Section 1681n(c) requires a showing that a pleading, motion, or paper was filed "in bad faith" or for purposes of harassment. The term "bad faith," as it is ordinarily used in the attorney's fee context, requires a showing either that the party subjectively acted in bad faith — knowing that he had no viable claim — or that he filed an action or paper that was frivolous, unreasonable, or without foundation. [Citation]. The Court rejects defendants' argument that as used in § 1681n(c), "bad faith" should be construed to encompass a broader range of conduct than this; they have provided nothing from the statute, legislative history, or any case interpreting § 1681n(c) that Congress intended anything more wide-sweeping than the commonly accepted meaning of the term bad faith.

....

By the time Ryan was deposed, it had become clear that the original factual underpinning of his claims was no longer

valid. This, however, does not permit the Court to impose sanctions under § 1681n(c) for Ryan's failure to withdraw his complaint at that point. The statute requires a showing that a document was filed in bad faith; in addressing a similar issue under the former version of Federal Rule of Civil Procedure 11, the Seventh Circuit held that the rule (which imposed sanctions for signing a baseless pleading, motion, or paper) did not impose an obligation to withdraw or revise a pleading or motion that later turned out to be baseless. *See Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1200-01 (7th Cir. 1990).

Ryan, supra, slip. op at 5-6; APPFEE 302-303.

Here, the Respondents cannot argue that Sanai knew about any legal infirmity in his complaint, because all of the case law relied upon by the Respondents concerning the federal claim were issued after the filing of Sanai's original complaint in 2000; indeed all of the key cases concerning pre-emption of state claims likewise were issued after 2000. Moreover, none of the case law relied upon by Respondents are California appellate cases, and none of the pre-emption cases are even federal appellate cases. There is no barrier to the Court of Appeal completely rejecting this Court's legal rulings and weigh in with Plaintiff.

Furthermore the Respondents failed to prevail on any motions in their favor during the period from January, 2001 to May 2003, because of the automatic stay; they have further failed to make the required showing on a motion by motion basis, or to properly apportion such fees.

4. The Award of Attorneys Fees Violated California Public Policy.

Under the recent cases of *Wood v. Santa Monica* (2007) 151 Cal.App.4th 1186 and *Carver v. Chevron U.S.A.* (2004) 119 Cal.App.4th 498, other panels of the Court of Appeal held that when a defendant prevails on an action which includes a cause of action where there is an asymmetrical attorneys fee clause in favor of a plaintiff, and other causes of action where a symmetrical attorneys fee entitlement exists, the prevailing defendant is barred from collecting fees for work performed by the attorneys which involves or implicates the cause of action governed by the asymmetrical attorneys fee clause.

In this case, Sanai's primary cause of action under Civil Code §1785 was governed by an asymmetrical attorneys fee clause set out in Civil Code §1785.31. Respondents claimed entitlement to fees in respect of Sanai's cause of action under the Fair Credit Reporting Agencies Act. However, virtually all of the litigation in this case involved matters and issues common to the California state law cause of action and the federal cause of action. Under *Wood* and *Carver*, this Court could only award attorneys fees for the sliver of work performed that was uniquely devoted to issues under the federal statute. Respondents argued that *Wood* and *Carver* do not apply because the attorneys fee clause at issue is a matter of "federal policy". However, entitlement to attorneys fees is a matter of procedural law, not substantive law, so the law of the forum in which the litigation

occurs governs. *See, e.g.* Code Civ. Proc. §1032 (setting forth entitlement to attorneys fees under California law); *Stokus v. Marsh* (1990) 217 Cal.App.3d 647 (holding that attorneys fees are no part of the substantive claim before the court); *Smithco Engineering v. Internal Fabricators, Inc.* (Wyo. 1989) 775 P.2d 1011, 1017-19 (surveying other state laws and concluding that award of attorneys fee is a procedural matter governed by law of forum).

Of course, federal procedural law does govern many aspects of state court procedural law, such as the law of removal; the law of due process; and the enforceability of arbitrations. So the fact that a federal statute includes a procedural rule concerning attorneys fees does not make that rule inapplicable to a federal action which state courts are permitted to hear and which is litigated in state court.

The question, then is how a court should deal with mandatory state law procedural rules in cases involving mixed federal and state causes of actions. It should come as no surprise that federal courts face this question on a regular basis, and there is a universal answer: state law must be followed.

The federal courts frequently litigate cases involving federal and state claims. The United States Supreme Court and the lower Courts of Appeals follow the principal that where the federal court is exercising

jurisdiction over state law claims, the state law principles concerning award

of attorneys fees must be followed:

so long as "state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." *Alyeska Pipeline Serv.*, 421 U.S. at 259 n. 31 (quoting 6 Moore's Federal Practice § 54.77[2] (2d ed. 1974)).

MRO Comm. v. American Tel. & Tel. Co. (9th Cir. 1999) 197 F.3d 1276, 1281.

The next question, then, is whether the rule of *Carver* and *Wood* embodies a "substantial policy of the state", in this case California. The answer is set forth in *Wood*:

In this case, *Carver v. Chevron U.S.A., Inc.*, *supra*, 119 Cal.App.4th 498, is controlling. There dealer-lessees sued Chevron alleging antitrust violations under the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.), as well as a number of other causes of action, including breach of contract. Chevron prevailed and moved for an award of attorney fees under a fee provision in the contract. The trial court refused to award fees for defense of the Cartwright Act cause of action and other causes of action where there was an "inextricable overlap" with Cartwright Act issues. (*Carver, supra*, at pp. 503-504.)

On appeal, Chevron conceded it was not entitled to fees for defending the Cartwright Act cause of action, but argued that under Reynolds it was entitled to fees on issues in common with causes of action for which fees are awardable. The Court of Appeal disagreed. The court pointed out that the Cartwright Act contains a unilateral fee-shifting provision under which fees are awarded to a prevailing plaintiff, but not to a prevailing defendant. (Bus.

& Prof. Code, § 16750, subd. (a); *Carver v. Chevron U.S.A., Inc.*, *supra*, 119 Cal.App.4th at p. 503.) Such provisions are created by the Legislature as a deliberate stratagem to encourage more effective enforcement of some important public policy. (*Carver, supra*, at p. 504.) **To allow Chevron to recover fees for work on Cartwright Act issues simply because they overlap issues related to other causes of action, would create a judicially imposed reciprocity.** This result is not intended by the Legislature and would frustrate legislative policy. (119 Cal.App.4th at p. 504.) The court concluded the unilateral fee-shifting provision of the Cartwright Act prohibits an award of fees for successfully defending Cartwright Act and non-Cartwright Act claims that overlap. (119 Cal.App.4th at p. 504.)

Wood, supra, 151 Cal.App.4th at 1190-91 (bold, underline emphasis).

Here, allowing the Respondents to recover for work which overlapped between the Civil Code §1785 action and the federal action would likewise create judicial reciprocity, in violation of the policy of the California Legislature. Moreover, allowing the Respondents to recover solely for the portion of their work devoted to the federal issues would in no way violate any part of the relevant statute under which the Respondents purport to be entitled to attorneys fees, and in no way conflicts with any case law or other authority binding on this Court.

E. The Court Should Reassign this Case Pursuant to the Reasons Set Forth in the Accompanying Motion.

Sanai filed a motion to disqualify Judge Grimes on the grounds that she was illegally biased against Sanai and had committed misconduct. This Court granted the motion, apparently on grounds of Judge Grimes' bias. Sanai submits that Judge Green should be removed from this case for the same reason. To the extent Judge Green's obvious bias and other disqualifying interests constitute grounds for reversing his actions in this litigation, Sanai incorporates such reasons as to every order of Judge Green which Sanai is challenging or, in the case of the orders he was directed to issue by this Court but refused to issue or was required to issue but did not issue, every action he failed to take.

F. The Court Should Award Sanai Attorneys Fees.

This Court should award Sanai attorney fees in respect of this appeal, and instruct the trial court to award attorneys fees and costs in respect of work performed at trial, in the following respects.

Sanai is entitled to attorneys fees under Code Civ. Proc. §724.050, which allows the prevailing party in a motion to force a judgment creditor to execute an acknowledgment of judgment to obtain attorneys fees. Sanai was forced to defend against such a motion which was based on the trial court's illegal and void order "striking" Sanai's judgment for costs after judgment. Rather than vacating the judgment, the trial court forced Sanai

to execute acknowledgment of judgment in court based on Respondents' ex parte application. These actions flowed from the trial court's illegal and void order "striking" Sanai's memorandum of costs after judgment when the judgment had already been issued. There is no authority barring a pro se lawyer from obtaining attorneys fees in such a case, and it is equitable under these circumstances. Recent Court of Appeal authority authorizes the award of attorneys fees in this situation:

The most recent case, *Lolley*, held that, although the legal services provided by the Labor Commissioner were at no cost to the successful litigant, he could nevertheless recover such fees under Labor Code section 98.2, subdivision (c) which permits recovery of attorney fees "incurred." (*Lolley, supra*, 28 Cal.4th at p. 371, 121 Cal.Rptr.2d 571, 48 P.3d 1128.) The court dealt with the language it had used in *Trope* that appears to disallow fees simply because they were not "incurred" and made it clear that the analysis was neither that easy nor that mechanical. The court acknowledged that the holding in *Trope* seemed to be based on the fact that " 'the usual and ordinary meaning of the words "attorney's fees," both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation.' [Citation.]" (*Id.* at p. 377, 121 Cal.Rptr.2d 571, 48 P.3d 1128.) But a mechanical reading of the word "incur" does not determine entitlement to fees.

As *Lolley* explained, "[t]his language, however, was not intended to resolve issues, such as the one presented here, that were not raised in *Trope*. This was demonstrated by our later decision in [*PLCM*], in which we rejected the defendant's reliance on ... language in *Trope* that the term

'attorney fees' generally refers to fees the litigant 'actually pays or becomes liable to pay,' noting that *Trope* did not address [the issues in *PLCM*] and citing the familiar rule that 'the language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts. [Citation.] [Citation.]" (*Lolley, supra*, 28 Cal.4th at p. 377, 121 Cal.Rptr.2d 571, 48 P.3d 1128.)

It is thus obvious that the rule enunciated in *Trope* is limited to its facts: lawyers representing themselves in cases involving contractual fees under Civil Code section 1717 are not entitled to such fees because of the resulting disparate treatment between lawyer and non-lawyer litigants.

...
In *Abandonato v. Coldren* (1995) 41 Cal.App.4th 264, 268-269 (*Abandonato*), we affirmed an award of sanctions under section 128.5 in the form of attorney fees to self-represented lawyers. In addition to noting that a denial of such fees would frustrate the purposes of section 128.5 (*id.* at p. 269), we distinguished *Trope*, stating, "there is nothing oppressive or one-sided in awarding attorney fees under Code of Civil Procedure section 128.5 to an attorney who litigates in propria persona." (*Id.* at p. 268.)

Relying in part on *Abandonato*, *In re Marriage of Adams* (1997) 52 Cal.App.4th 911 affirmed an award of attorney fees under section 128.5 to a party whose lawyer represented her under a contingent fee agreement. (*Id.* at p. 915.) The *Adams* court focused on the absence of disparate treatment as described in *Trope*, but noted an equal troubling problem: "If we disallowed sanction awards in favor of parties represented by contingent fee lawyers, but allowed sanctions awards against such parties, we would create an imbalance and defeat the true intent of the statute." (*Id.* at p. 916.)

This case does not put all questions regarding fee awards to rest. The *Argaman* court took issue with our decision in *Abandonato*. (*Argaman, supra*, at 73 Cal.App.4th pp. 1180-1181.) And, relying on *Argaman* and *Trope*,

Kravitz v. Superior Court (2001) 91 Cal.App.4th 1015, 1020, again held that self-represented litigants, whether lawyers or not, cannot recover fees as discovery sanctions, although they may recover reasonable expenses incurred.

....

Based on the cited cases, we conclude that fees or monetary sanctions in the form of fees may be ordered where the award does not result in disparate treatment between litigants. And this is true whether or not a party actually "incurs" additional fees as a result of the opposing party's conduct as is the case here where the party is represented by a lawyer who does not charge a fee.

Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 1216-1219.

The second basis for awarding attorneys fees is as a private attorney general. The work in this appeal directly relates to the issues in the accompanying appeal concerning the alleged pre-emption of the California Consumer Credit Reporting Agencies Act by the Fair Credit Reporting Act. This law is wrong. By obtaining the first appellate court ruling demonstrating this, Sanai will have conferred an enormous benefit to the public, one which has imposed upon Sanai extraordinary costs and burdens, not the least of which is vicious personal attacks by two Los Angeles Superior Court Judges, Grimes and Green, who either do not know, or do not care about, the basic principles of California civil procedure. The Supreme Court has held that pro-se parties may be awarded attorneys fees, irrespective of whether the party is an attorney, under the public benefit and private attorney general exceptions allowing fee awards. *Trope v. Katz* (1995) 11 Cal.4th 274, 284 ; *Consumers Lobby Against Monopolies v.*

Public Utilities Com. (1979) 25 Cal.3d 891, 906. The time spend on this appeal should be counted for purposes of awarding private attorney general fees.

VI. CONCLUSION

Based on the foregoing, this Court should take the following actions:

1. Reverse the two orders awarding attorneys fees in favor of Respondents;
2. Reverse the trial court's order taxing Respondents' memorandum of costs, and instruct the trial court to enter a new order striking the memorandum of costs;
4. Disqualify Judge Green from this case in the interests of justice; and
5. Award Sanai attorneys fees under Code Civ. Proc. §724.050 and private attorney general and public benefit grounds for all work performed in the trial court to date and all appeals litigated to date, instructing the trial court to utilize an appropriately high lodestone multiplier given the complexity of the subject matter, the quality of Sanai's legal work, and the poor quality of the judicial officers who handled the case to date.

Respectfully submitted,

Dated: _____, 2008

By _____
Cyrus M. Sanai
Appellant in Pro Per

CERTIFICATE OF COMPLIANCE

I hereby certify that the according the word count feature of my Microsoft Word word processing program, the number of words in this brief (excluding this certificate, the title pages, the table of contents, the table of authorities and the proof of service) was 11,702.

Respectfully submitted,

Dated: _____, 2008

By _____
Cyrus M. Sanai
Appellant in Pro Per

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 and not a party to the within action. My address is [DELETED].

On January 28, 2008 I served the foregoing document described as **OPENING BRIEF** and **APPELLANT'S APPENDIX** on the interested parties in the action and the **OPENING BRIEF** only to the others persons set forth below: by placing () the original (X) true copies thereof enclosed in sealed envelopes addressed as follows:

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(X) BY US MAIL (X) I caused the foregoing document(s) to be delivered by US Mail, with the exception of the briefs to the Supreme Court, which were personally delivered to the Court's offices there.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 28, 2008, at Los Angeles, California.

Type or print name

Signature

2nd Civil No. B202787

**IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN**

CYRUS M. SANAI
Plaintiff and Appellant,

vs.

HARVEY SALTZ, FIRST ADVANTAGE CORPORATION, IRVINE
APARTMENT COMMUNITIES LLC, THE IRVINE COMPANY, AND
IRVINE APARTMENT COMMUNITIES, LP
Defendants, Former Defendants and Respondents.

OPENING BRIEF

[Los Angeles County Superior Court Case No. BC235671]
(Hon. Terry Green)

Cyrus Sanai
[DELETED]

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Cyrus Sanai
[DELETED]

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