# NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

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| In Re:<br><br>CAMPION, MICHAEL C.,<br><br>Debtor(s). | No. 99-03598-W13<br><br>Adv. No. A00-00229-W13 |
| MICHAEL C. CAMPION,<br><br>Plaintiff(s),<br><br>vs.<br><br>ASSOCIATED CREDIT SERVICES, INC., a Washington corporation,<br><br>Defendant(s). | MEMORANDUM DECISION RE: PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES BASED ON JUDGMENT FOR PLAINTIFF |

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on August 23, 2001 upon Plaintiff's Motion for Award of Attorney's Fees Based on Judgment for Plaintiff. Plaintiff was represented by Timothy Durkop; Defendant was represented by Gregory Lockwood; and David Solberg, the Secretary/Treasurer and Owner of defendant Associated Credit Services was also present. The court heard argument of counsel and was fully advised in the premises. The court now enters its Memorandum Decision.

Bankruptcy Rule 7068 adopts Fed. R. Civ. P. 68 in adversary proceedings. Fed. R. Civ. P. 68 allows a party to submit an offer to

allow judgment to be taken against it. If the offer is accepted, a final judgment consistent with the offer is entered. If the offer is not accepted and the final judgment after resolution on the merits is less favorable than the offer, the offering party is not liable for costs and attorney fees incurred after it made the offer. If the final judgment after resolution on the merits is more favorable than the offer, the offering party is liable for costs and attorney fees.

Plaintiff debtor commenced this adversary action alleging that the defendant violated the automatic stay. In July, the defendant, pursuant to Bankruptcy Rule 7068 made an offer of judgment. On July 23, 2001, the plaintiff accepted the offer. On August 3, 2001, the plaintiff filed an Acceptance of Offer of Judgment and a Motion for Award of Attorney Fees Based on Judgment for Plaintiff. The defendant objected to the Motion on the basis that the Acceptance of Offer of Judgment precluded such request.

The Offer of Judgment states that defendant

> . . . submits an Offer of Judgment pursuant to FRCiv.P 68 in the amount of $251.00 (Two hundred and fifty-one dollars - 0/00). This offer is based upon plaintiffs answers to interrogatories and represents full recovery of plaintiff's claim. . . .

Defendant intended this offer to fully satisfy all the claims that the plaintiff held under 11 U.S.C. § 362(h) which would include compensatory damages, costs and attorney fees. Consequently, the defendant argues that plaintiff cannot now request an award of attorney fees. Alternatively, defendant argues that as each party held a mistaken belief as to the effect of the offer and the effect of its acceptance, the offer and the acceptance should be rescinded or revoked. Plaintiff

understood the offer to exclude attorney fees, in other words, an offer to pay $251 as compensatory damages with plaintiff's statutory right to reasonable attorney fees unaffected. Plaintiff argues that the court should determine the amount of reasonable attorney fees and costs incurred by the plaintiff and enter final judgment for the sum of $251 plus the attorney fees.

Cases interpreting Fed. R. Civ. P. 68 have held that even though the offer of judgment does not refer to costs, as the rule itself refers to entry of a judgment for money "with cost then accrued", an offer of judgment necessarily requires the payment of costs. *Holland v. Roeser*, 37 F.3d 501 (9th Cir. 1994). The question of whether attorney fees are included in "costs" must be answered by the underlying statute giving rise to the cause of action. If the underlying statute distinguishes between costs and attorney fees, the offer of judgment will necessarily include an offer to pay costs but not necessarily attorney fees. *Marek v. Chesny*, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985).

The underlying statute in this case is 11 U.S.C. § 362(h) which distinguishes between costs and attorney fees as each is listed as a separate element of damages. Application of the above cases interpreting Fed. R. Civ. P. 68 lead to the conclusion that the defendant's Offer of Judgment necessarily included an offer to pay plaintiff's costs. As to attorney fees, further analysis is necessary.

The parties agreed to a consent decree in *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695 (9th Cir. 1989). The consent decree was silent as to costs and attorney fees. A dispute then arose between the parties regarding the plaintiff's right to seek attorney

fees under 11 U.S.C. § 1983 of the Civil Rights Act. The court held that the burden was on the offering party to demonstrate "by clear language in the release" that attorney fees had been waived.

Also analyzing an action arising under 11 U.S.C. § 1983 of the Civil Rights Act, *Erdman v. Cochise County*, 926 F.2d 877 (9th Cir. 1991), resolved a dispute similar to the one now presented by these parties. In *Erdman*, the defendant made an offer of judgment "for the sum of $7,500 with costs now accrued." The defendant intended to include attorney fees in the offer, i.e., that $7,500 would be the full recovery on all claims. The plaintiff accepted the offer and construed it to mean a payment of $7,500 to the plaintiff with a later award of fees after the court determined reasonableness.

> Typically, a settlement agreement is analyzed in the same manner as any contract, i.e., any ambiguities are construed against the drafter. Where necessary, district courts are authorized to look to extrinsic evidence to clarify ambiguities as to the intended meaning of material terms. *Callie*, 829 F.2d at 890-91. Rule 68 offers, however, differ from contracts with respect to attorney fees. We have held that any waiver or limitation of attorney fees in settlements of § 1983 cases must be clear and unambiguous. *Muckleshoot Tribe v. Puget Sound Power & Light Co.*, 875 F.2d 695, 698 (9th Cir. 1989).
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> We hold that as the terms of the accepted offer here did not clearly exclude an additional attorney fee award as required by *Muckleshoot*, the City is bound by the letter of its agreement and must pay Erdman's reasonable attorney fees in addition to the amount contained in its offer.

*Erdman v. Cochise County*, 926 F.2d at 880-881 (9th Cir. 1991).

*Erdman* essentially holds that for an offer of judgment to include attorney fees in the amount offered, the offer must clearly and unambiguously state attorney fees are included. Stated negatively, if the offer of judgment does not clearly and unambiguously state that

attorney fees are included, they are excluded. When attorney fees are not specifically and clearly included in the offer, the accepting party may file a Motion for an Award of Attorney Fees if the underlying statute gives the plaintiff the right to recover fees.

The clearest statement of the rule is found in *Nusom v. Comh Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997) which was an action under the Truth-in-Lending Act. The offer of judgment in that case was ". . . for $15,000 together with costs accrued to the date of this offer." The holding appears at page 835:

> We hold only that a Rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorney fees, does not preclude the plaintiff from seeking fees when the underlying statute does not make attorney fees a part of costs.

As to defendant's argument that recession or revocation of the offer and acceptance is appropriate, *Erdman* recognizes that courts typically look to extrinsic evidence to clarify ambiguous terms of contracts, including offers of judgment. However, the analysis regarding attorney fee provisions in offers of judgment differs. An offer under Fed. R. Civ. P. 68 which attempts to preclude an accepting party from obtaining its statutory right to attorney fees must clearly and unambiguously set forth the preclusion of attorney fees. Any ambiguity results in attorney fees being excluded from the offer. There is no need for extrinsic evidence of intent as if an ambiguity exists, the fees are not included in the offer. Although recession and revocation may be available remedies when an ambiguity results in each party having a mistaken belief as to the effect of the agreement, they are inappropriate under the logic of *Erdman* and *Nusom*. Those cases

mandate a particular effect when an ambiguity exists. Absent a clear and unambiguous inclusion of attorney fees in the offer, they are excluded and the later award of fees is not precluded. *See also, Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp, Inc.*, 260 F.3d 1054, 2001 W.L. 897384 (9th Cir. 2001) wherein the court stated ". . . where a Rule 68 offer makes no reference to attorneys' fees whatsoever, they are not automatically precluded. Rather, the matter of fees remains an open question." *Sea Coast Foods, Inc.*, 260 F.3d at 1059. Therefore, plaintiff is not precluded from filing its Motion for Award of Attorney's Fees and said motion will be set for hearing to determine the reasonable amount of fees.

The Clerk of Court is directed to file this Memorandum Decision and provide copies to counsel.

DATED this 21st day of September, 2001.

PATRICIA C. WILLIAMS, Bankruptcy Judge