**IN THE UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**LUBBOCK DIVISION**

| | | |
|---|---|---|
| **FORD MOTOR CREDIT COMPANY LLC,** | § | |
| ***Plaintiff,*** | § | |
| | § | |
| **v.** | § | |
| | § | **Civil Action No.: 5:18-cv-00186** |
| **BART REAGOR AND RICK DYKES,** | § | |
| ***Defendants.*** | § | |

# DEFENDANT BART REAGOR'S MOTION FOR NEW TRIAL AND BRIEF IN SUPPORT

Marshall M. Searcy, Jr.
State Bar No. 17955500
marshall.searcy@kellyhart.com
Frank P. Greenhaw IV
pete.greenhaw@kellyhart.com
Scott R. Wiehle
State Bar No. 24043991
scott.wiehle@kellyhart.com
KELLY HART & HALLMAN, LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Telecopy: (817) 878-9280

**ATTORNEYS FOR BART REAGOR**

# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**

## TABLE OF AUTHORITIES CONT.

**Page(s)**

**STATE CASES**



**FEDERAL STATUTES**



**FEDERAL RULES**

Pursuant to Federal Rule of Civil Procedure 59, Defendant Bart Reagor ("Reagor") moves for a new trial, or, alternatively, seeks a remittitur of the improper attorneys' fees, costs, and post-petition interest awarded in the Final Judgment, and respectfully shows the Court as follows:

## I.
## BACKGROUND

In this deficiency action on a guaranty, the Court granted Plaintiff Ford Motor Credit Company LLC's ("FMCC") Motion for Summary Judgment on liability on or about May 24, 2019. [*See* Doc. 48]. On October 2, 2019, a jury trial was commenced to determine FMCC's damages. [*See* Doc. 88]. The jury awarded FMCC $53,759,450.96 as the sum of money that would fairly and reasonably compensate FMCC for its damages. [*See* Doc. 95 at 9]. After both parties submitted post-verdict briefs regarding FMCC's recovery of attorneys' fees and costs, the Court awarded FMCC $1,771,258.63 in attorneys' fees and costs. [*See* Doc. 103]. The Court entered a Final judgment on November 26, 2019. [*See* Doc. 104]. Based on the jury's verdict, the Court attorney's fees and costs award, and a stipulation between the parties regarding certain judgment credits, the Court ordered that FMCC is entitled Final Judgment against Reagor for $49,280,709.59.

## II.
## ARGUMENT AND AUTHORITY

A new trial (or remittitur) is necessary because the Final Judgment awards attorney's fees and damages to which FMCC is not entitled. Specifically, the Final

Judgment includes an award of attorney's fees that FMCC incurred in the Reagor-Dykes Dealerships' bankruptcy that is not recoverable from Reagor (and for which FMCC failed to put on proof at trial) as a matter of law. Moreover, the Final Judgment includes interest on the bankrupt entities' underlying debt that is neither recoverable from the Reagor-Dykes Dealerships or Reagor under the guaranty and well-established law. *See* FED. R. CIV. P. 59(a)(1); *Carr v. Wal-Mart Stores, Inc*., 312 F.3d 667, 670 (5th Cir. 2002) ("[i]f the trial judge is not satisfied with the verdict of a jury, he has the right—and indeed the duty—to set the verdict aside and order a new trial."); *Guajardo v. GC Servs., LP*, 498 F. App'x 379, 387 (5th Cir. 2012).

**A. As an Undersecured Creditor, FMCC's Bankruptcy Fees Are Not Recoverable.**

The Honorable Robert L. Jones, who is presiding over the Reagor-Dykes Dealerships' bankruptcy case, has long held that unsecured and undersecured creditors, like FMCC, may not recover their post-petition attorney's fees in a bankruptcy proceeding as a matter of law. Thus, because those fees are not an obligation of the Reagor-Dykes Dealership debtors (or a sum due FMCC), those fees may not be recovered from the guarantor, Reagor, either.

In *In re Pride Companies, L.P.,* an issue before the Bankruptcy Court was whether an unsecured creditor could recover its post-petition attorneys' fees. 285 B.R. 366, 371 (Bankr. N.D. Tex. 2002). Judge Jones noted that "[t]he majority of published opinions hold that an unsecured creditor may not recover post-petition attorney's fees from a bankruptcy estate." *Id.* at 372. Judge Jones examined four main reasons why the Bankruptcy Code prohibits such a recovery.

First, the court recognized that Section 506(b) is the only provision authorizing attorney's fees by a creditor. *Id.* The court further acknowledged:

> The majority employs the legal maxim of *expressio unius est exclusio alterius*, meaning the expression of one is the exclusion of another, to argue that Congress, by permitting the recovery of attorney's fees in the case of an oversecured creditor, necessarily denied the recovery of attorney's fees in the case of an **undersecured** or unsecured **creditor**.

*Id.* (emphasis added). The court stated "[a]s only oversecured creditors are allowed to recover their fees under section 506(b), statutory construction and logic compel the conclusion that unsecured creditors may not recover post-petition attorney's fees." *Id.* The same logic applies to undersecured creditors, like FMCC.

The second reason is based on the Supreme Court's opinion in *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.* In *Timbers*, the Supreme Court held that section 506(b) prohibits an unsecured creditor from collecting post-petition interest: "[s]ince this provision [506(b)] permits post-petition interest to be paid only of the 'security cushion,' the **undersecured creditor**, who has no such cushion, falls within the general rule disallowing post-petition interest." *Id.* at 373 (quoting 484 U.S. 365, 372-73, 108 S.Ct. 626, 631, 98 L.Ed.2d 740 (1988)) (emphasis added). Judge Jones recognized that since §506(b) prohibits an unsecured creditor from recovering post-petition interest, and since §506(b) speaks to attorney's fees as well, courts have concluded that the *Timbers* opinion by implication prohibits the recovery of attorney's fees by unsecured or undersecured creditors.

The third reason is based on the premise that an unsecured (or undersecured) creditor's claim is calculated as of the date of the bankruptcy filing. *Id.* As Judge Jones

noted, attorney's fees incurred by an unsecured or undersecured creditor after the bankruptcy filing cannot become part of the claim, because a creditor's claim is calculated as of the date of the bankruptcy filing. *Id.*

The fourth reason is based on policy. As Judge Jones recognized, "[a]llowing unsecured [or undersecured] creditors to recover post-petition fees is inequitable to other unsecured [or undersecured] creditors and may, in some cases, consume the estate. *Id.* Stated differently, "[i]t is not equitable to deplete everyone's 'pot,' only because of an asserted right granted by a contract." *Id.* at 374.

Judge Jones also noted that, although the Fifth Circuit Court of Appeals has yet to squarely address the issue, "its opinions in similar situations suggest that post-petition fees would be disallowed. The Fifth Circuit has held that federal law governs the enforcement of post-petition attorney's fees, notwithstanding contrary state law or contractual provisions." *Id.* at 375-76.

Earlier this year, Judge Jones, in *In re Christian*, reaffirmed that undersecured creditors may not recover their post-petition attorney's fees. 597 B.R. 319 (Bankr. N.D. Tex. 2019). In that case, Judge Jones denied an undersecured creditor's request for attorney's fees incurred in defending against a motion filed by the debtor. Judge Jones reaffirmed the analysis from the *Pride* case, and further held that such attorney's fees are not recoverable even if an undersecured "creditor's attorney's fees arise as a matter of contract." *Id.* at 326. The court reasoned: "[B]ankruptcy routinely alters creditors rights, and this is simply a situation where the policy of ratable distribution and equitable treatment of the varying interests in bankruptcy should override any asserted rights by

unsecured creditors to recover attorney's fees." *Id.*

Texas state courts are in accord and hold that guarantors are not liable for post-petition attorney's fees either. In *Western Bank-Downtown v. Carline*, an undersecured creditor sought post-petition interest and attorney's fees from the guarantors. 757 S.W.2d 111, 112 (Tex. App.—Houston [1st Dist.] 1988, writ denied). The court noted that a "guarantor's liability on a debt is measured by the principal's liability." *Id.* at 113. Like Judge Jones's analysis, the court recognized that, by virtue of the bankruptcy proceeding, the principal "would *never* incur post-petition interests or costs on its indebtedness." *Id.* (emphasis in original). Stated differently, the Bankruptcy Act extinguished the principal's obligation to pay any post-petition interest and attorney's fees. The court thus reasoned that, because the principal does not owe such fees as a matter of law, neither does the guarantor:

> [T]he limited guarantors do not owe post-petition interest and attorney's fees because these sums can never be charged against the principal, TexLa. [The guarantors] bound themselves to pay "any and all indebtedness . . . *which Tex-La* . . . may now or may at any time hereafter owe. . . ." (Emphasis added.) We interpret this as excluding any liability for post-petition interest and attorney's fees because any other interpretation would extend their obligation beyond the written terms of the guaranty agreement.

*Id.* at 114. The court concluded, "[i]n the case before us, the [creditor's] asserted right to post-petition interest and attorney's fees has **no foundation and is legally non-existent as a matter of law.**" *Id.* (emphasis added). Thus, the *Pride, Christian,* and *Carline* opinions foreclose FMCC from recovering attorney's fees for legal work performed in the bankruptcy case from Reagor as a matter of law. In this case, the bankruptcy attorney's fees and costs charged by the Langley, LLP firm and Severson & Werson, PC

firm are not recoverable from Reagor as a matter of law, and the award of such fees and is error.[1] Therefore, a new trial is necessary, or, alternatively, a remittitur of the attorney's fees and costs award.

**B. FMCC May Not Recover Its Bankruptcy Fees, Because It Failed To Prove Such Fees as Damages at Trial.**

FMCC is also precluded from recovering the bankruptcy attorney's fees because it failed to prove such fees as damages at trial. Per the American rule, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.LP. v. ASARCO LLC*, 135 S. Ct. 2158, 2161 (2015). Thus, "[a] district court may not award attorneys' fees 'unless a statute or contract provides' the basis for such an award." *Spear Mktg., Inc. v. BancorpSouth Bank*, 844 F.3d 464, 470 (5th Cir. 2016) (quoting *Baker Botts*, 135 S. Ct. at 2164). In regards to procedure, Federal Rule of Civil Procedure 54(d)(2)(A) provides, "A claim for attorney's fees and related nontaxable expenses must be made by motion *unless the substantive law requires those fees to be proved at trial as an element of damages*." (emphasis added). In regards to substance, "[s]tate law controls both the award of and the reasonableness of [attorneys'] fees awarded." *BMO Harris Bank N.A. v. Vanover*, No. 3:18-CV-3028-K, 2019 WL 3324269, at *7 (N.D. Tex. June 10, 2019) (citing *Mathis v. Exxon Corp*., 302 F.3d 448, 462 (5th Cir. 2002)). Here, it is undisputed that Texas substantive law applies.

---

1 A plain reading of the guaranty indicates that Reagor did not agree to guarantee payment of attorney's fees in a bankruptcy proceeding that FMCC could never recover from the Reagor-Dykes Dealerships. Holding otherwise is a stretch of contractual interpretation. At most, Reagor agreed to guarantee payment of attorney's fees incurred in civil litigation, like this case. *See e.g.*, Doc. 30-3, Ex. C at APP21

"Two factors are 'dispositive' in determining 'whether the fees are an element of damages': (i) '[t]he language of the contract' and (ii) 'the nature of the claim.'" *Rodriguez v. Quicken Loans, Inc.*, 257 F. Supp. 3d 840, 849 (S.D. Tex. 2017) (citing *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1039 (5th Cir. 2014). First, the pertinent contractual language states a guaranty for:

> [A]ll losses, costs, attorney's fees or expenses which [Lender] may suffer by reason of Dealer's default; and agrees to be bound by and on demand to pay any deficiency established by a sale of paper or security held with or without notice to us; together with a reasonable attorney's fee (15% if permitted by law) if placed with an attorney for collection from us.[2]

The language of the contract distinguishes between (i) attorneys' fees by reason of Dealer's default (i.e., damages for breach of guaranty) and (ii) attorneys' fees incurred in pursuing such remedies (i.e., collection efforts). Regarding the nature of the claim, ***the purpose of an action for breach of guaranty is to collect the amounts owed by the defaulting primary obligor.*** *See Universal Metals & Mach., Inc. v. Bohart*, 539 S.W.2d 874, 879 (Tex. 1976) ("The liability of a surety is of course commensurate with that of its principal."). Therefore, the legal fees incurred in the bankruptcy proceeding are an independent ground of recovery for breach of guaranty, "and are therefore distinguishable from the collateral legal costs associated with collecting a debt or prosecuting or defending against a pending lawsuit." *Richardson v. Wells Fargo Bank*, N.A., 740 F.3d 1035, 1038 (5th Cir. 2014). FMCC even argues that its losses and expenses incurred as a

[2] *See e.g.*, Doc. 30-3, Ex. C at APP21.

result of the Reagor-Dykes Dealerships' defaults "include attorneys' fees and costs incurred in Dealerships' bankruptcy actions." [Doc. 97 at 6].

A claimant is required "to plead and prove its claim to such fees as damages before entry of final judgment." *Rodriguez*, 257 F. Supp. 3d at 848. Therefore, because FMCC did not prove the bankruptcy legal fees during the damages trial, Texas law prohibits the award of such fees.

Accordingly, because the Final Judgment improperly awards bankruptcy fees as unproven damages, a new trial is necessary.

**C. FMCC May Not Recover Bankruptcy Post-Petition Interest.**

FMCC filed its Original Complaint in this lawsuit on July 31, 2018. [*See* Doc. 1]. The following day, August 1, 2019, the Reagor-Dykes Dealerships filed a petition for protection under Chapter 11 of the United States Bankruptcy Code. [*See* Doc. 6]. Under well-established law, the accrual of interest ceases as of the date of the filing of the bankruptcy petition. Thus, once the dealerships filed their petition for bankruptcy, FMCC, as an undersecured creditor, was foreclosed from recovering interest accruing on the underlying debt from the Reagor-Dykes Dealerships moving forward. Stated differently, FMCC's damages "froze" at the principal amount owed August 1, 2018 (subject to reduction by the sale of its collateral). Consequently, any post-petition interest (i.e., interest accruing as of August 1, 2018 forward) was never an "obligation" of the Reagor-Dykes Dealerships or a "sum due" FMCC, and thus not guaranteed by Reagor or recoverable from him.

Here, the jury verdict rendered damages in the amount of $53,759,450.96. [*See* Doc. 95 at 9]. However, only one question was presented to the jury: "What sum of money, if paid now in cash, would fairly and reasonably compensate Ford Credit for its damages claimed in this case?" [*Id*.]. Despite Reagor's plea, FMCC did not segregate or itemize the bankruptcy post-petition interest, and the Court did not require segregation in the jury charge. Consequently, the damages award includes principal and interest accrued since August 1, 2018 (as was evidenced by FMCC's monthly statement exhibits), the date of the filing of the bankruptcy petition. Because post-petition interest is not recoverable from Reagor, a new trial, or remittitur, is necessary to correct the excess damages awarded to FMCC.

**1. Under Bankruptcy Law, an Undersecured Creditor May Not Recover Post-petition Interest.**

Section 502(b)(2) of the Bankruptcy Code provides the general rule disallowing post-petition interest. *See* 11 U.S.C. § 502(b)(2) (creditor is not entitled to "unmatured interest" on its unsecured claim). Further, Section 506(b) states: "To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim." *Id*. at § 506(b). In analyzing those provisions, the Supreme Court has held that "[s]ince this provision permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 372–73 (1988). Applying this rule, the Bankruptcy

Court for the Southern District of Texas has held that, "[Creditor] has only an unsecured claim and it is not entitled to receive post-petition interest or costs relating to the [promissory notes]." *In re Perry*, 425 B.R. 323, 345 (Bankr. S.D. Tex. 2010). The Fifth Circuit has also recently affirmed this rule of law. *See In re Ultra Petroleum Corp*., 913 F.3d 533, 544–45 (5th Cir. 2019) (discussing the general rule that Section 502(b)(2) disallows postpetition interest and that the exception in Section 506(b) applies only to *oversecured* creditors).

**2. Because the Dealerships Cannot Be Liable for Post-petition Interest, Reagor is Likewise Not Liable as Guarantor.**

As shown above, the law is clear that an undersecured creditor, such as FMCC, is not entitled to recover post-petition interest from a bankrupt debtor. As such, "post-petition interest" is not an "obligation" of the Reagor-Dykes Dealerships and not a "sum due" FMCC. The relevant inquiry is whether the guaranty requires Reagor to pay post-petition interest to FMCC, even though such interest is not an "obligation" of the debtors or a "sum due" FMCC. To make this determination, the Court must examine the guaranty agreement itself. To that end, "[a] guarantor is entitled to have his agreement strictly construed so that it is limited to his undertakings, and it will not be extended by construction or implication." *Coker v. Coker*, 650 S.W.2d 391, 394 n. 1 (Tex. 1983). Further, "[w]here uncertainty exists as to the meaning of a contract of guaranty, its terms should be given a construction which is most favorable to the guarantor." *Id*.

**Here, the language of the guaranty does not mention interest (or post-bankruptcy petition interest), nor does it contain any language wherein it could be construed that Reagor agreed to guarantee post-petition interest** :

> [E]ach of the undersigned Guarantors hereby, jointly and severally, and unconditionally, guaranties to you, your successors or assigns that the Dealer will fully, promptly and faithfully perform, pay and discharge all Dealer's present and future obligations to you; and agrees, without your first having to proceed against Dealer or to liquidate paper or any security therefor, to pay on demand all sums due and to become due to you from Dealer and all losses, costs, attorney's fees or expenses which [Lender] may suffer by reason of Dealer's default; and agrees to be bound by and on demand to pay any deficiency established by a sale of paper or security held with or without notice to us; together with a reasonable attorney's fee (15% if permitted by law) if placed with an attorney for collection from us.[3]

To the extent there is contractual ambiguity as to whether Reagor is liable for post-petition interest, Reagor is entitled to favorable construction and strict interpretation—i.e., no liability for post-petition interest.

Regarding the scope of a guarantor's liability, in *Ryder Transportation*, the beneficiary of a guaranty agreement argued that "an absolute guaranty generally imposes liability on the guarantor, regardless of whether the principal debtor is liable." *Ryder Transportation Servs. v. Maalt LP*, No. 3:15-CV-3325-N, 2016 WL 11372210, at *4 (N.D. Tex. July 5, 2016). The court found "[t]his argument has no basis in law." *Id.* Further, although "a guarantor can be held liable for an underlying obligation even when that obligation cannot be enforced against the principal obligor, it does not follow that a

[3] *See e.g.*, Doc. 30-3, Ex. C at APP21.

guarantor can be held liable when there is no obligation or liability in the first place." *Id.* Thus, a guarantor is not liable for obligations beyond that of the principal obligor.

Factually analogous to this case, in *Western Bank-Downtown v. Carline*, an undersecured creditor sought post-petition interest from the guarantors. 757 S.W.2d 111, 112 (Tex. App.—Houston [1st Dist.] 1988, writ denied). The court noted that a "guarantor's liability on a debt is measured by the principal's liability." *Id.* at 113. By virtue of the bankruptcy proceeding, the court reasoned that the principal "would *never* incur post-petition interest or costs on its indebtedness." *Id.* (emphasis in original). Stated differently, the Bankruptcy Act extinguished the principal's obligation to pay any post-petition interest. The court reasoned that, because the principal does not owe interest as a matter of law, neither does the guarantor:

> [T]he limited guarantors do not owe post-petition interest and attorney's fees because these sums can never be charged against the principal, TexLa. [The guarantors] bound themselves to pay "any and all indebtedness . . . *which Tex-La* . . . may now or may at any time hereafter owe. . . ." (Emphasis added.) We interpret this as excluding any liability for post-petition interest and attorney's fees because any other interpretation would extend their obligation beyond the written terms of the guaranty agreement.

*Id.* at 114. The court concluded, "[i]n the case before us, the [creditor's] asserted right to post-petition interest and attorney's fees has no foundation and is legally non-existent as a matter of law." *Id.*

Here, Reagor's personal guaranty only extends to amounts owed by the Dealerships to FMCC (e.g., guaranty of "**Dealer's** present and future obligations to [FMCC] . . . all sums due and to become due to [FMCC] ." Doc. 30-8, p. 2). In fact, even FMCC argues that the guaranties "unambiguously require Defendant Reagor to

repay Ford Credit for *all* of the **dealerships'** obligations to Ford Credit." [Doc. 52, p. 3. (emphasis added)]. Therefore, because (i) FMCC cannot recover post-petition interest from the Dealerships (primary obligors) under well-established bankruptcy law; and (ii) Reagor's guaranties only apply to the Dealerships' obligations, FMCC cannot recover post-petition interest from Reagor as a matter of law. Further, to the extent that silence in the guaranty as to interest creates an ambiguity, Reagor is entitled to the presumption limiting his liability.

The damages awarded in this case clearly include post-petition interest that accrued on the principal amount of the debt since August 1, 2018—the date of the bankruptcy filing. Under well-established law, FMCC is not entitled to this interest, Reagor never agreed to pay it, and Reagor cannot be held liable for it. Consequently, the Court should grant this Motion and order a new trial, or alternatively, order a remittitur on the excess damages.

## III.
## REQUEST FOR RELIEF

For these reasons, Reagor respectfully requests that the Court grant a new trial on the issues set forth above, or alternatively order remittitur of the improper attorneys' fees, costs, and post-petition interest awarded, and award such other and further relief as the Court deems just.

Respectfully submitted,

*/s/ Marshall M. Searcy, Jr.*

Marshall M. Searcy, Jr.
State Bar No. 17955500
marshall.searcy@kellyhart.com
Frank P. Greenhaw IV
pete.greenhaw@kellyhart.com
Scott R. Wiehle
State Bar No. 24043991
scott.wiehle@kellyhart.com
KELLY HART & HALLMAN, LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Telecopy: (817) 878-9280

**ATTORNEYS FOR BART REAGOR**

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all parties in accordance with the Federal Rules of Civil Procedure on December 23, 2019.

*/s/ Marshall M. Searcy, Jr.*
Marshall M. Searcy, Jr.