

Cole, Jr. (“Cole” or “Defendant”) and the responses, replies, and supplemental briefing thereto.²

After reviewing the relevant pleadings and the record, the Court **FINDS, ORDERS, AND ADJUDGES** as follows:

RELEVANT BACKGROUND³

Plaintiff PRN Real Estate Investments, Ltd. (“PRN” or “Plaintiff”), is a company owned and operated by Nancy Rossman (“Rossman”) and her family. Cole and Rossman are former romantic and business partners. Cole and Rossman have a contentious business and personal history.

Over the years Cole formed numerous separate entities for his real estate development projects, including C&G Real Estate Group, LLC (“C&G”). Starting in 2000, PRN funded numerous projects that Cole proposed through C&G (and perhaps other operating entities).

In 2008, PRN and Cole entered into a written agreement pursuant to which PRN would loan additional capital to complete Cole’s real estate projects, and Cole personally guaranteed repayment of the loans (the “Memorandum Agreement”). Cole did not pay PRN when the loans came due in November 2011. However, in June 2012, the parties entered into a written agreement to resolve their business disputes (the “Settlement Agreement”). In relevant part, the Settlement Agreement included the following prevailing party fee provision:

² *Response in Opposition to Defendant’s Motion for Determination of Entitlement to Attorneys’ Fees as Prevailing Party Under Count I* (Doc. No. 166); *Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Determination of Entitlement to Attorney’s Fees as Prevailing Party* (Doc. No. 517); *Defendant’s Reply to Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Determination of Entitlement to Attorneys’ Fees as Prevailing Party* (Doc. No. 522); *Defendant’s Supplemental Memorandum of Law in Support of Defendant’s Motions for Determination of Entitlement to Attorneys’ Fees as Prevailing Party* (Doc. No. 549); *Plaintiff’s Memorandum in Response to Supplemental Memorandum Filed by Defendant for Determination of Entitlement to Attorney’s Fees as Prevailing Party* (Doc. No. 556).

³ For a more extensive background on this case, see the *Memorandum Opinion* (Doc. No. 504).

In the event of any litigation between the parties in connection with this Settlement Agreement, the prevailing party shall be entitled to its attorneys' fees and costs, at trial and on appeal, from the non prevailing party.⁴

After two years, PRN declared the Settlement Agreement in default, and extensive litigation between the parties commenced and has continued since at least 2014.⁵

On July 27, 2015 (the "Petition Date"),⁶ Cole filed this Chapter 7 bankruptcy case seeking to discharge his substantial debts due to Rossman, PRN and other creditors. PRN initiated this proceeding by filing an eleven-count complaint seeking to have the debts owed by Cole to PRN determined to be nondischargeable pursuant to § 523 of the Bankruptcy Code⁷ and to deny the Defendant his discharge pursuant to § 727 of the Bankruptcy Code.⁸ PRN amended its complaint three times and expanded its complaint to thirteen counts.⁹

Count I of the Second Amended Complaint sought a determination under § 523(a)(2)(A) that Cole fraudulently induced PRN into agreeing to the Memorandum Agreement by making false statements that he had no available funds.¹⁰ The Court entered an *Agreed Order Dismissing Count I of the Second Amended Complaint and Deeming Defendant's Motion for Judgment on the Pleadings on Count I of Plaintiff, PRN Real Estate & Investments, Ltd.'s Second Amended*

⁴ Doc. No. 318-2 at 11. Although the Settlement Agreement was entered into on June 2, 2012, it was effective as of May 8, 2012.

⁵ The first lawsuit between the parties was filed on July 28, 2014. Rossman and PRN filed the action in Florida state court and named Cole, his wife Terre, and one of his business entities, Cole of Orlando Limited Partnership, as defendants. *PRN Real Estate & Investments, Ltd vs. Cole*, Case No. 2014-CA-008104-O (Fla. 9th Cir. Ct. filed July 28, 2014). Other lawsuits followed.

⁶ Doc. No. 1 in the Main Case, No. 6:15-bk-06458-GER. Until July 21, 2020, this case was administered by the Honorable Cynthia C. Jackson. This case was reassigned to the Honorable Karen S. Jennemann. Upon Judge Jennemann's retirement, this case was reassigned to the Honorable Grace E. Robson.

⁷ All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq.*

⁸ Doc. No. 1.

⁹ While the Court entered an *Agreed Order Dismissing Count I of the Second Amended Complaint and Deeming Defendant's Motion for Judgment on the Pleadings on Count I of Plaintiff, PRN Real Estate & Investments, Ltd.'s Second Amended Complaint Moot* (Doc. No. 152), the Plaintiff later filed the *Third Amended Complaint to A) Determine Dischargeability of Debt Pursuant to Section 523 of the Bankruptcy Code; B) Determine Amount of Nondischargeable Claim; and C) to Deny Debtor a Discharge Pursuant to Section 727 of the Bankruptcy Code* (Doc. No. 230).

¹⁰ Doc. No. 49.

*Complaint Moot.*¹¹ After the dismissal, Cole sought attorneys' fees, arguing he was the prevailing party on Count I and was entitled to attorneys' fees based on the relevant provision in the Memorandum Agreement.¹² The Court abated the matter until after the trial.¹³

PRN then filed the *Third Amended Complaint to A) Determine Dischargeability of Debt Pursuant to Section 523 of the Bankruptcy Code; B) Determine Amount of Nondischargeable Claim; and C) to Deny Debtor a Discharge Pursuant to Section 727 of the Bankruptcy Code* (the "Third Amended Complaint").¹⁴ PRN's claims fell into three broad categories: (1) a determination that debt owed under the Settlement Agreement was not dischargeable under § 523 of the Bankruptcy Code (Counts I and II) (the "Contract Claims"); (2) a determination that debt from allegedly fraudulent transfers was not dischargeable under § 523 of the Bankruptcy Code (Counts III-VI) (the "Husky Claims");¹⁵ and (3) denial of discharge under § 727 of the Bankruptcy Code (Counts VIII-XIII) (the "727 Claims").

On August 16, 2018, the Court granted summary judgment in favor of Cole on the Husky Claims.¹⁶ Counts X, XII, and XIII of the Third Amended Complaint were abandoned by the Plaintiff as reflected in the *Order Partially Granting Debtor's Ore Tenus Motion for Judgment on Partial Findings Under Bankruptcy Rule 7052(c)*.¹⁷

Of the remaining counts, PRN asserted that Cole's debts are not dischargeable under § 523(a)(2)(A) [Count I] and § 523(a)(2)(B) [Count II] of the Bankruptcy Code, and he is not entitled to a discharge under § 727(a)(2)(A) [Count VIII], § 727(a)(2)(B) [Count IX] and § 727(a)(4)(A)

¹¹ Doc. No. 152.

¹² Doc. No. 161.

¹³ Doc. No. 201.

¹⁴ Doc. No. 230.

¹⁵ *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356 (2016).

¹⁶ Doc. No. 401.

¹⁷ Doc. No. 425. Federal Rule of Bankruptcy Procedure 7052 makes Federal Rule of Civil Procedure 52 applicable to this proceeding.

[Count XI] of the Bankruptcy Code. Count VII sought a determination of the amount of PRN's claim. Cole strenuously denied the allegations.¹⁸ After a trial and consideration of the record including the parties' post-trial briefs,¹⁹ final judgment was entered in favor of Cole on all counts.²⁰

PRN filed a notice of appeal on March 4, 2021.²¹ PRN only appealed as to Counts III through IX and Count XI (the Husky Claims and 727 Claims). Relevant here, the Plaintiff *did not* appeal the ruling as to the Contract Claims, *i.e.*, Counts I and II.²² The District Court affirmed this Court's ruling,²³ and PRN appealed the District Court's opinion to the Eleventh Circuit Court of Appeals.²⁴ At this time, the appeal before the Eleventh Circuit is still pending.²⁵

In the Motions, Cole asks this Court to determine whether he is entitled to attorneys' fees and costs on the Contract Claims in the Third Amended Complaint and on Count I of the Second Amended Complaint. However, PRN argues, among other things, that Cole is not entitled to fees, but even if he might be, that it is premature to make this determination while the appeal is pending.

DISCUSSION

I. Attorneys' Fees in Federal Litigation – General Rule

“Generally, in federal litigation, including bankruptcy litigation, a prevailing litigant may not collect an attorney's fee from his opponent unless authorized by either a federal statute or an enforceable contract between the parties.”²⁶ The general rule allows “a prevailing debtor in a dischargeability action brought by his creditor [to] recover his attorney's fees and costs incurred

¹⁸ Doc. No. 241.

¹⁹ Doc. Nos. 435 and 436.

²⁰ Doc. No. 505.

²¹ Doc. No. 507.

²² See Doc. No. 556 at 2.

²³ Doc. No. 548.

²⁴ Notice of Appeal, *PRN Real Estate & Investments, Ltd. v. Cole*, No. 22-11118 (11th Cir. Apr. 7, 2022), ECF No. 1.

²⁵ The Eleventh Circuit has scheduled the case for oral argument for the week of March 6, 2023. *PRN Real Estate & Investments, Ltd. v. Cole*, No. 22-11118 (11th Cir. Nov. 10, 2022), ECF No. 23.

²⁶ *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1288 (11th Cir. 2005) (first citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); and then citing *All Am. of Ashburn, Inc. v. Fox (In re Fox)*, 725 F.2d 661, 662 (11th Cir. 1984)).

in those dischargeability proceedings if recovery of such are due under an enforceable contractual right.”²⁷ However, there is no right to prevailing party attorneys’ fees on a claim objecting to discharge under § 727(a).²⁸

II. Attorneys’ Fee Provision is Enforceable Under Florida Law

PRN argues that Counts I and II of the Third Amended Complaint are not contract claims entitling Cole to prevailing party attorneys’ fees, but rather claims for fraud in the inducement and seeking an exception to discharge for which no right to fees exists.²⁹ PRN also argues that Cole cannot enforce the attorneys’ fee provision because he materially breached the Settlement Agreement.³⁰

The Court disagrees with both arguments. First, the Supreme Court has rejected the *Fobian* rule³¹ “that ‘attorney fees are not recoverable in bankruptcy for litigating issues ‘peculiar to federal bankruptcy law.’”³² Instead, the Supreme Court has consistently recognized that “claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed.”³³ Relevant here, the Florida Supreme Court has concluded that fraudulent misrepresentation claims can fall within a prevailing party attorneys’ fee clause in a contract.³⁴

²⁷ *Id.*

²⁸ *Banner Bank v. Wyatt (In re Wyatt)*, 609 B.R. 530, 533 (Bankr. D. Idaho 2019) (first quoting *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997); and then citing *Optekar v. Tickemyer (In re Tickemyer)*, No. 08-07012-TLM, 2011 WL 1230326 (Bankr. D. Idaho Mar. 31, 2011)).

²⁹ Doc. No. 517 at 5; Doc. No. 556 at 2.

³⁰ Doc. No. 556 at 9. The cases cited by PRN refer to “material” breach excusing the other party from performance.

³¹ *Fobian v. W. Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991) (denying attorneys’ fees incurred by a bank regarding litigation in bankruptcy case regarding confirmation of a plan, holding that “where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney’s fees will not be awarded absent bad faith or harassment by the losing party”).

³² *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451-53 (2007) (quoting *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 167 F. App’x 593, 594 (9th Cir. 2006)).

³³ *Id.* at 452 (citing 11 U.S.C. § 502(b)).

³⁴ *Caufield v. Cantele*, 837 So. 2d 371, 379 (Fla. 2002) (“Had there been no contract, the ensuing misrepresentation would not have occurred. Therefore, the existence of the contract and the subsequent misrepresentation in this case are inextricably intertwined such that the tort complained of necessarily arose out of the underlying contract. As a result, the contractual provisions, including the prevailing party clause, should be given effect.”); *cf. Azar v. Nat’l City Bank*, 382 F. App’x 880, 886-87 (11th Cir. 2010) (applying rationale of *Caufield* to fraudulent inducement claim).

The Court also rejects the argument that Cole’s breach precludes his ability to enforce the Settlement Agreement. While the Court found that Cole breached the Settlement Agreement, the Court did not find a *material* breach – in fact, the Court found that Cole consistently and substantially performed.³⁵ Consistent with the Supreme Court’s recognition that the term “claim” incorporates rights under state law, when considering the issue of entitlement to fees in a dischargeability action, the Eleventh Circuit’s analysis focuses on whether the contract is generally an enforceable agreement under state law, not when it was enforceable.³⁶ Therefore, the question is whether a plaintiff would have been entitled to fees under Florida law in an action to liquidate its claim, not whether the legal right existed at the time the complaint was filed.³⁷ “[W]here there is a contractual basis for an award of legal fees, such fees may be awarded even if the only matter presented in [the bankruptcy court] is whether a previously liquidated debt should be excepted from discharge.”³⁸

Applicable here, PRN sought to enforce the Memorandum Agreement and Settlement Agreement as part of this proceeding, as well as part of the State Court actions. PRN’s Contract Claims (Counts I and II) sought a declaration and determination that “the entire amount owed under the Memorandum Agreement, [Settlement Agreement] and all related documents . . . be deemed non-dischargeable.”³⁹ The Eleventh Circuit has interpreted § 523 of the Bankruptcy Code to include a debtor’s contractual obligation to pay a creditor’s attorney’s fees as part of a claim that is excepted from discharge where a creditor is successful in excepting the creditor’s debt from discharge.⁴⁰ Therefore, if PRN had been the prevailing party on the Contract Claims, the entire

³⁵ See Doc. No. 504 at 10-12.

³⁶ *Silvestri v. Allen (In re Allen)*, No. 10-38136-EPK, 2012 WL 1999532, at *3 (Bankr. S.D. Fla. May 31, 2012).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Doc. No. 230, ¶¶ 85 and 92.

⁴⁰ *TranSouth Fin. Corp. of Fla. v. Johnson*, 931 F.2d 1505, 1507 (11th Cir. 1991).

debt owed to it would be excepted from discharge, including attorneys' fees and costs pursuant to provisions of the Memorandum Agreement and Settlement Agreement because those agreements are enforceable contracts under Florida law. Correspondingly,

[t]o deny a debtor attorney's fees and costs for prevailing in a dischargeability proceeding brought by a creditor, where those same fees would have been available under state contract law for the creditor had it prevailed, would contravene the primary purpose of the bankruptcy statute, which is "to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh."⁴¹

Therefore, the Court finds that the prevailing party attorneys' fee provision contained in the Settlement Agreement is enforceable under Florida law as applied to Counts I and II of the Third Amended Complaint.

III. Cole is the Prevailing Party on Contract Claims

As discussed above, the Settlement Agreement is an enforceable agreement under Florida law and provides that the prevailing party is entitled to attorneys' fees and costs. Here, there is no dispute that Cole is the prevailing party as to the Contract Claims. However, PRN argues that if it prevails on the Husky Claims and 727 Claims subject of the appeal, PRN would be the prevailing party on the predominant claims, and Cole will not have achieved a benefit of a bankruptcy discharge; therefore, it makes no sense to award fees prior to conclusion of the appeal.

"Under Florida law, the prevailing party is 'the party prevailing on the significant issues in the litigation.'"⁴² While, in a contract action, typically there is just one prevailing party, that is not always so.⁴³ Florida law permits more than one prevailing party in a lawsuit where each of the claims that support award of attorneys' fees is separate and distinct.⁴⁴

⁴¹ *In re Martinez*, 416 F.3d at 1291 (quoting *TranSouth Fin. Corp.*, 931 F.2d at 1508).

⁴² *Martinair Holland, N.V. v. Benihana, Inc.*, 815 F. App'x 358, 360 (11th Cir. 2020) (quoting *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992)).

⁴³ *Id.* (first citing *Sabina v. Dahlia Corp.*, 678 So. 2d 822, 822 (Fla. 2d DCA 1996); and then citing *Avatar Dev. Corp. v. DePani Constr., Inc.*, 883 So. 2d 344, 346 (Fla. 4th DCA 2004)).

⁴⁴ *Id.* (citing *Leon F. Cohn, M.D., P.A. v. Visual Health & Surgical Ctr., Inc.*, 125 So. 3d 860, 863 (Fla. 4th DCA 2013)).

Under Florida law, deciding the prevailing party is a “holistic” inquiry.⁴⁵ “A court must consider who prevailed on the significant issues in the litigation. It must also consider whether the claims are so distinct that there may be multiple prevailing parties. This analysis typically comes at the close of the litigation.”⁴⁶

Here, the Court does not need to undertake the analysis of who prevailed on the significant issues in the litigation because the Contract Claims are so separate and distinct from both the Husky Claims and the 727 Claims that there may be multiple prevailing parties. The Husky Claims and the 727 Claims are separate and distinct from the Contract Claims, are not alternative theories of liability for the same wrong, and are not logically related to the Contract Claims. The Husky Claims and 727 Claims are premised on facts wholly distinct and separate from the Contract Claims, could have been filed as separate actions, and could have been filed by parties other than PRN.⁴⁷

Even if PRN prevails on either the Husky Claims or the 727 Claims, there would be no award of prevailing party fees to PRN because there is no contractual or statutory basis for such fees on those claims.⁴⁸ Therefore, the outcome of the appeal does not impact Cole’s entitlement to an award of attorneys’ fees on the Contract Claims. PRN argues that if Cole loses on the 727 Claims his success on the Contract Claims is only a pyrrhic victory since he would not receive the benefit of a bankruptcy discharge. However, there is nothing in the Bankruptcy Code that precludes the possibility that a debtor can successfully defend a dischargeability claim under § 523

⁴⁵ *Id.* at 361.

⁴⁶ *Id.* (first citing *Moritz*, 604 So. 2d at 810; then citing *Leon F. Cohn, M.D.*, 125 So. 3d at 863; and then citing *Shaw v. Schlusemeyer*, 683 So. 2d 1187, 1188 (Fla. 5th DCA 1996)).

⁴⁷ With limited exceptions not applicable here, in a chapter 7 case, avoidance of fraudulent transfers may be brought exclusively by a chapter 7 trustee, and objections to discharge under § 727 may be brought by a chapter 7 trustee, the Office of the U.S. Trustee, or any creditor. *See* 11 U.S.C. §§ 544, 548, and Federal Rule of Bankruptcy Procedure 4004.

⁴⁸ *In re Wyatt*, 609 B.R. at 533 (quoting *Peplinski v. Whitaker (In re Whitaker)*, No. 13-1068J, 2017 WL 354314 (Bankr. D.N.M. Jan. 24, 2017)).

and lose a discharge under § 727. Further, as discussed above, Florida law recognizes that there can be multiple prevailing parties when there are multiple claims that are distinct.

Here, the only claims in which either party could possibly be entitled to attorneys' fees are the Contract Claims. As noted above, the Settlement Agreement included a provision entitling the prevailing party to attorneys' fees at trial and on appeal. Cole prevailed on the Contract Claims, and PRN is not pursuing an appeal of the final ruling in Cole's favor.⁴⁹ The litigation as to the Contract Claims in the Third Amended Complaint has ended. Therefore, Cole is entitled to an award of legal fees on the Contract Claims regardless of whether PRN ultimately prevails on either the Husky Claims or 727 Claims on appeal.

IV. PRN is Not Entitled to Setoff Against Fees for Homestead Litigation

The Court rejects PRN's argument that it is entitled to a setoff for its attorneys' fees and costs in connection with its successful objection to Cole's homestead exemption in the main bankruptcy case.⁵⁰

"The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'"⁵¹ There is no federal right of setoff, but the Bankruptcy Code preserves whatever right exists.⁵² Section 553 of the Bankruptcy Code provides, in relevant part:

[T]his title does not affect any right of a creditor to offset a *mutual debt* owing by such creditor to the debtor that arose before the commencement of the case . . . against a claim of such creditor against the debtor that arose before the commencement of the case⁵³

⁴⁹ See Doc. No. 556 at 2.

⁵⁰ See *Memorandum Decision Sustaining, In Part, Objections to Debtor's Claim of Exemption*, Main Case, No. 6:15-bk-06458-GER, Doc. No. 788.

⁵¹ *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995) (quoting *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913)).

⁵² *Id.*

⁵³ 11 U.S.C. § 553(a) (emphasis added).

Section 553 preserves the ability to setoff pre-bankruptcy debts. Here, PRN argues it can offset any post-petition attorneys' fees awarded to Cole against post-petition attorneys' fees that PRN asserts it is entitled to based on successful litigation as to Cole's homestead exemption.

Presuming one post-petition debt can be setoff against another post-petition debt, the debt must be *mutual*. In order to satisfy the mutuality requirement, the debts and claims must be "in the same right and between the same parties, standing in the same capacity."⁵⁴ "The mutuality requirement is strictly construed."⁵⁵

Here, there is no mutuality of debt stemming from the homestead exemption litigation. The attorneys' fees and costs of Cole incurred in connection with the Contract Claims are based on contract rights between the parties that can only be enforced by, and solely benefit, the contracting parties. On the other hand, the rights and benefits of the homestead exemption litigation are based on provisions of the Bankruptcy Code that are available to the bankruptcy trustee and all creditors, and it is the bankruptcy estate that benefits from the litigation. Furthermore, Cole and PRN were not acting in the same capacity in the homestead exemption litigation (i.e., rights of bankruptcy estate) as they were when litigating the Contract Claims (i.e., parties to contract). Finally, there is no debt for attorneys' fees arising from the homestead exemption litigation, as the homestead exemption litigation is not subject to an award of attorneys' fees.⁵⁶

⁵⁴ *United States v. Carey (In re Wade Cook Fin. Corp.)*, 375 B.R. 580, 594 (9th Cir. BAP 2007) (quoting *Newbery Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398-99 (9th Cir. 1996)).

⁵⁵ *Id.* (first citing *Newbery*, 95 F.3d at 1399; then citing *Parkway Plaza Investors v. Bacigalupi (In re Bacigalupi, Inc.)*, 60 B.R. 442, 446 (9th Cir. BAP 1986); and then citing *Hopkins v. D.L. Evans Bank (In re Fox Bean Co.)*, 287 B.R. 270, 286 (Bankr. D. Idaho 2002)).

⁵⁶ There is no applicable provision of the Bankruptcy Code that would entitle PRN to attorneys' fees and costs regarding the homestead exemption litigation. PRN does not cite to any statute in support of its argument, and the Court cannot find any such support. In addition, attorneys' fees and costs were not requested by PRN as part of the homestead exemption litigation, so any right was waived.

V. Cole Waived Fees and Costs in Connection with the Second Amended Complaint

Finally, the Court agrees with PRN regarding its argument that Cole waived the right to seek attorneys' fees because he failed to plead a claim prior to the dismissal of Count I of the Second Amended Complaint.⁵⁷ Count I of the Second Amended Complaint sought a determination under § 523(a)(2)(A) that Cole fraudulently induced the Plaintiff into agreeing to the Memorandum Agreement by making false statements that he had no available funds.⁵⁸ Count I of the Second Amended Complaint was dismissed after PRN agreed it would not pursue it in open court.⁵⁹ The relevant answer to the Second Amended Complaint did not include a request for attorneys' fees and costs.⁶⁰ Cole sought attorneys' fees after the dismissal of Count I of the Second Amended Complaint,⁶¹ and the Court abated the matter until after the trial.⁶² Thereafter, PRN filed the operative Third Amended Complaint.⁶³ In its answer to the Third Amended Complaint, Cole requested attorneys' fees and costs.⁶⁴

Because Cole failed to plead a request for attorneys' fees prior to the dismissal of the Second Amended Complaint, the Court finds he waived his right to attorneys' fees for litigating Count I of the Second Amended Complaint.⁶⁵ However, because Cole included his right to attorneys' fees and costs in his answer to the Third Amended Complaint,⁶⁶ he did not waive his

⁵⁷ Doc. No. 556 at 12.

⁵⁸ Doc. No. 49.

⁵⁹ Doc. No. 152.

⁶⁰ See Doc. Nos. 38 and 49.

⁶¹ Doc. No. 161.

⁶² Doc. No. 201.

⁶³ Doc. No. 230.

⁶⁴ Doc. No. 241.

⁶⁵ *Bowman v. Corbett*, 556 So. 2d 477 (Fla. 5th DCA 1990); *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991); *Vie-A-Mer, Ltd. v. S. Toub & Assocs., Inc.*, 684 So. 2d 216 (Fla. 2d DCA 1996).

⁶⁶ See *VPNetworks, LLC v. Collective 7, Inc.*, No. 6:19-cv-1179-Orl-40LRH, 2020 WL 13227750, at *3 (M.D. Fla. Feb. 20, 2020) (recognizing that a plaintiff filing an amended complaint gives the defendant the right to file a new answer).

right to recover attorneys' fees and costs regarding Counts I and II of the Third Amended Complaint.

CONCLUSION

For the reasons discussed above, the Court finds that Cole is entitled to recover his attorneys' fees and costs incurred in connection with defending the Contract Claims [Counts I and II of the Third Amended Complaint]. Accordingly, it is

ORDERED:

1. *Defendant's Motion for Determination of Entitlement to Attorneys' Fees as Prevailing Party Under Count I* (Doc. No. 161) is **DENIED**.

2. *Defendant's Motion for Determination of Entitlement to Attorneys' Fees as Prevailing Party* (Doc. No. 513) is **GRANTED**.

3. The Defendant is entitled to recover attorneys' fees and costs for litigating Counts I and II of the Third Amended Complaint.

4. The Defendant shall file an affidavit or declaration of attorneys' fees and costs, along with supporting time records and other documentation regarding the amount he is seeking as recoverable attorneys' fees and costs, by **February 10, 2023**.

5. The Plaintiff may file a response to the fees and costs requested by the Defendant on or before **March 3, 2023**.

6. The Court shall conduct a hearing to determine whether an evidentiary hearing is required on the fees and costs requested on **March 29, 2023 at 10:00 a.m.** in Courtroom D, Sixth Floor, 400 West Washington Street, Orlando, Florida 32801.

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Attorney Christopher R. Thompson is directed to serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the order.