SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

DEPARTMENT 53

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| STEPHANIE CLIFFORD,<br>Plaintiff,<br><br>vs.<br><br>DONALD J. TRUMP, et al.,<br>Defendants. | Case No.: BC696568<br>Hearing Date: August 14, 2020<br>Time: 10:00 a.m.<br><br>~~[TENTATIVE]~~ **ORDER RE:**<br><br>PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS |

MOVING PARTY: Plaintiff Stephanie Clifford

RESPONDING PARTY: Defendant Donald J. Trump

**Plaintiff's Motion for Attorney Fees and Costs**

The court considered the moving, opposition, and reply papers.

On August 5, 2020, defendant Donald J. Trump filed a document titled "Objections and Request to Strike Plaintiff's Reply in Support of Motion for Attorney Fees and Costs, Declaration of Clark O. Brewster and Exhibits Thereto; or, in the Alternative, Sur-Reply of Defendant Donald J. Trump; Declaration of Charles J. Harder." In the document, defendant (1) objects to and moves to strike plaintiff Stephanie Clifford's reply brief, the Declaration of Clark O. Brewster filed in support of plaintiff's reply brief on March 18, 2020, and all exhibits thereto, on the ground that plaintiff's reply papers contain impermissible new evidence; (2) states that

plaintiff did not serve her reply papers on defendant; and (3) presents surreply arguments on the merits of plaintiff's motion.

First, the court grants in part and denies in part defendant's motion to strike plaintiff's reply papers. To the extent defendant is objecting to the new evidence presented in the Declaration of Clark O. Brewster, filed March 18, 2020, the court sustains defendant's objection to Exhibit G of the Declaration of Clark O. Brewster, filed March 18, 2020. "The general rule of motion practice . . . is that new evidence is not permitted with reply papers." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537.) Further, "[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) Here, defendant did not have an opportunity to address in his opposition the evidence presented in Exhibit G of the Declaration of Clark O. Brewster, filed March 18, 2020. The court therefore grants defendant's motion to strike Exhibit G of the Declaration of Clark O. Brewster, filed March 18, 2020. The court denies defendant's motion to strike plaintiff's reply brief, the Declaration of Clark O. Brewster, filed March 18, 2020, and Exhibits A through F thereto.

Second, the court notes that there is no valid proof of service attached to plaintiff's reply brief, filed March 18, 2020. Instead, the proof of service attached to plaintiff's reply brief states that plaintiff served "*Plaintiff's Motion for Attorney Fees & Costs*" (not plaintiff's reply brief) on defendant on March 18, 2020. There is also no proof of service attached to the Declaration of Clark O. Brewster, filed March 18, 2020. However, on August 10, 2020, plaintiff filed the "Declaration of Clark O. Brewster in Support of Plaintiff's Response in Opposition to Motion to Strike; Exhibits Thereto" and "Plaintiff's Response in Opposition to Motion to Strike; Exhibits Thereto." In his August 10, 2020 declaration, plaintiff's counsel, Clark Brewster, states that his office served a copy of plaintiff's reply brief on defendant's counsel by email on August 6, 2020, and by mail on August 7, 2020. (Brewster Decl., filed August 10, 2020, ¶ 4.) Plaintiff has also submitted evidence showing that she served copies of her reply papers, including her reply brief and the declaration and exhibits in support of her reply brief, on defendant on August 6 and

August 7, 2020. (Brewster Decl., filed August 10, 2020, Exs. A and B.) The court therefore finds that plaintiff properly served her reply papers on defendant at least five court days before the hearing on this motion. (Code Civ. Proc., § 1005, subd. (b).)

Finally, the court did not grant defendant leave to file any surreply arguments in connection with this motion, and defendant's surreply is therefore unauthorized and untimely. (Code Civ. Proc., § 1005, subd. (b).) The court therefore exercises its discretion to strike the surreply portions (page 1, line 20 through page 4, line 5) of defendant's August 5, 2020 document.

**BACKGROUND**

**1. Allegations in the First Amended Complaint**

Plaintiff Stephanie Clifford ("Plaintiff") filed this action on March 6, 2018, against defendants Donald J. Trump a.k.a. David Dennison ("Defendant") and Essential Consultants, LLC ("EC"), asserting one cause of action for declaratory relief. On March 26, 2018, Plaintiff filed the operative First Amended Complaint ("FAC"), which added a cause of action for defamation against defendant Michael Cohen ("Cohen").

In the FAC, Plaintiff alleges that she had an intimate relationship with Defendant from 2006 to 2007. (FAC, ¶ 10.) Plaintiff signed a written agreement titled "Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-Disparagement Agreement," dated October 28, 2016 (the "Agreement"). (FAC, ¶ 23, Ex. 1.) The Agreement states that the parties to it are EC and/or "David Dennison," on the one part, and "Peggy Peterson," on the other part. (FAC, Ex. 1, § 1.1.) The Agreement states that "David Dennison" and "Peggy Peterson" "are pseudonyms whose true identity [sic] will be acknowledged in a Side Letter Agreement attached hereto as 'EXHIBIT A.'" (FAC, Ex. 1, § 1.1.) The attached Side Letter Agreement states that, in the Agreement, Plaintiff is referred to by the pseudonym "Peggy Peterson," but the name of the person referred to by the pseudonym "David Dennison" is redacted in the copy of the Side Letter Agreement that is attached to the FAC. (FAC, Ex. 1, Side Letter Agreement (attached to Agreement).) Plaintiff alleges that, in the Agreement, "David Dennison" is the pseudonym for Defendant. (FAC, ¶¶ 2, 19.) Michael Cohen was an attorney licensed in the

State of New York, who worked as the "top attorney" at the Trump Organization from 2007 until after the 2016 election and who served as Defendant's personal attorney at the time the FAC was filed. (FAC, ¶ 16.) Although Plaintiff and Michael Cohen (on behalf of EC) signed the Agreement, Defendant did not sign it. (FAC, ¶ 23, Ex. 1, p. 14.)

In the Agreement, Plaintiff promised, among other things: (1) not to publicly disclose any confidential information (as defined in the Agreement) relating to "David Dennison" (including "information pertaining to . . . any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct . . ."), and (2) to arbitrate any dispute that may arise later between her and "David Dennison." (FAC, Ex. 1, §§ 3.1(d), 4.3.3, 5.2.) The Agreement provides that, in exchange for these promises, Plaintiff would receive $130,000 in consideration from EC. (FAC, Ex. 1, § 3.0.1.1.) Michael Cohen caused $130,000 to be wired to the trust account of Plaintiff's attorney. (FAC, ¶ 24.)

**2. Procedural History**

On or about February 22, 2018, EC filed an arbitration proceeding pursuant to provisions in the Agreement. (Brewster Decl., filed November 8, 2019, Ex. L, U.S. District Court's "Order Granting Defendants' Motions to Dismiss For Lack of Subject Matter Jurisdiction and Remanding Case to Los Angeles Superior Court," filed March 7, 2019 (the "March 7, 2019 Order"), p. 2.) The arbitrator issued an order prohibiting Plaintiff from violating the Agreement by disclosing any confidential information to the media or in court filings. (March 7, 2019 Order, p. 2.; Brewster Decl., Ex. E.)

On March 6, 2018, Plaintiff filed this action in the Los Angeles Superior Court, seeking a declaratory judgment that the Agreement is void, invalid, or unenforceable. (FAC, ¶¶ 42, 44, Prayer for Relief, p. 17:13-18.) On March 16, 2018, EC removed this action to the United States District Court for the Central District of California. (March 7, 2019 Order, p. 2.) Defendant filed a joinder to the removal. (Harder Declaration, filed March 12, 2020, ¶ 6.) On March 26, 2018, Plaintiff filed the operative FAC.

On April 13, 2018, Defendant, EC, and Cohen moved to stay this action, and on April 27, 2018, the District Court issued an order staying this action for 90 days. (March 7, 2019 Order, p.

2.) On July 13, 2018, the District Court issued an order staying this action for an additional 45 days and set a scheduling conference for September 24, 2018. (March 7, 2019 Order, p. 2.)

On September 7, 2018, EC sent Plaintiff a signed Covenant Not to Sue, in which EC "covenant[ed] not to assert any rights and/or claims against [Plaintiff] with respect to the validity and/or enforcement of the Confidential Settlement Agreement, including but not limited to any claims against [Plaintiff] for breach thereof. [Defendant EC reserved] the right to seek reimbursement for the $130,000 in consideration paid to [Plaintiff] in connection therewith." (March 7, 2019 Order, p. 2.; Brewster Decl., Ex. K.)

On September 8, 2018, Defendant's counsel filed a similar covenant on behalf of Defendant. (March 7, 2019 Order, p. 2; Brewster Decl., Ex, J.) Defendant's counsel sent a letter to Plaintiff's counsel stating that Defendant "does not, and will not, contest [Plaintiff]'s assertion that the Settlement Agreement was never formed, or in the alternative, should be rescinded. Moreover, [Defendant] hereby covenants that he will not bring any action, proceeding or claim against Plaintiff to enforce any of the terms of the Settlement Agreement." (March 7, 2019 Order, p. 2.; Brewster Decl., Ex. J.)

Defendant and EC subsequently filed motions to dismiss for lack of subject matter jurisdiction, asserting that their respective covenants not to assert any rights under the Agreement rendered Plaintiff's only remaining cause of action (for declaratory relief) moot and, therefore, there was no longer a "case or controversy" on which the District Court could rule. (March 7, 2019 Order, p. 3.)

On March 7, 2019, the District Court issued its order granting Defendant and EC's motions to dismiss for lack of subject matter jurisdiction and remanding the case back to the Los Angeles Superior Court. (March 7, 2019 Order, p. 14.) In the March 7, 2019 Order, the District Court found that the only remaining cause of action in Plaintiff's FAC (her claim for declaratory relief under federal and California law) was moot because there was no longer an active case or controversy. (March 7, 2019 Order, pp. 5-9.)

On July 10, 2019, EC and Cohen were dismissed from this action with prejudice pursuant to Plaintiff's Request for Dismissal. (Request For Dismissal, filed June 13, 2019.)

On September 13, 2019, the court dismissed this action as moot. (Order, filed September 13, 2019, p. 4.) In the September 13, 2019 order, the court observed that "an order of dismissal will not prevent Plaintiff from filing a motion for an award of attorney's fees pursuant to statutorily authorized procedures." (Order, filed September 13, 2019, p. 3:24-25.)

Plaintiff now moves for an award of attorney's fees and costs in the total amount of $64,440.65 pursuant to California Code of Civil Procedure section 1717 and 28 United States Code section 1447, subdivision (c). Defendant opposes the motion.

The court held a hearing on the motion and took it under submission on August 14, 2020. The court now issues its order ruling on the motion.

**DISCUSSION**

**1. Civil Code Section 1717**

Civil Code section 1717, subdivision (a) provides, in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Subdivision (b)(1) states: "The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered the greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section."

"California courts liberally construe the term ""on a contract"" as used within section 1717. [Citation.] As long as the action 'involve[s]' a contract it is 'on [the] contract' within the meaning of Section 1717. [Citations.]" (*Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 455.)

In *Hsu v. Abbara* (1995) 9 Cal.4th 863, the California Supreme Court explained the legal principles governing a court's determination of the prevailing party under a contractual

attorney's fee provision. "As one Court of Appeal has explained, '[t]ypically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought.' [Citation.] By contrast, when the results of the litigation on the contract claims are *not* mixed -- that is, when the decision on the litigated contract claims is purely good news for one party and bad news for the other -- the Courts of Appeal have recognized that a trial court has no discretion to deny attorney fees to the successful litigant. Thus, when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law. [Citations.] Similarly, a plaintiff who obtains all relief requested on the only contract claim in the action must be regarded as the party prevailing on the contract for purposes of attorney fees under section 1717. [Citation.]" (*Id.* at pp. 875-876 (emphasis in original).)

In *Hsu*, the Court went on to state: "we hold that in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Id.* at p. 876.) "*[I]n determining litigation success*, courts should respect substance rather than form, and to this extent should be guided by 'equitable considerations.' For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. [Citations.] But when one party obtains a 'simple, unqualified win' on the single contract claim presented by the action, the trial court may not invoke equitable considerations unrelated to litigation success, such as the parties' behavior during settlement negotiations or discovery proceedings, except as expressly authorized by statute. [Citations.]" (*Id.* at p. 877 (emphasis in original).)

**a. Plaintiff Seeks Attorney's Fees Provided by Contract and This is an Action on the Contract**

Plaintiff seeks to recover attorney's fees based on the Agreement. The parties do not dispute that (1) the Agreement provides that attorney's fees and costs which are incurred to enforce the contract shall be awarded to the party prevailing on the contract, and (2) Plaintiff's action is "on the contract" for purposes of Civil Code section 1717.

Section 8.2 of the Agreement provides that, in any action "regarding the existence, validity, interpretation, performance, enforcement, claimed breach or threatened breach of this Agreement, the prevailing party . . . shall be entitled to recover . . . all attorneys' fees, costs and expenses incurred or sustained by such prevailing Party in connection with such action . . . ." (Brewster Decl., filed November 8, 2019, Ex. B, § 8.2.)

Plaintiff filed this action seeking a declaratory judgment that the Agreement is void, invalid, or unenforceable. The court finds that Plaintiff's cause of action for declaratory relief is an action "on the contract" within the meaning of Civil Code section 1717.

**b. The Party Prevailing on the Contract**

Plaintiff contends that she is the "party prevailing on the contract" under Civil Code section 1717. Plaintiff argues that she began this litigation to free herself from the non-disclosure provisions of the Agreement and to keep the $130,000 paid by EC. Plaintiff argues that she achieved these litigation objections because (1) Defendant and EC filed Covenants Not to Sue on the Agreement, and (2) Plaintiff will not have to pay any damages for publicly disclosing her affair with Defendant and will not have to reimburse the $130,000 that she received as consideration for the Agreement. Plaintiff concedes that, as a result of the Covenants Not to Sue rendering her claims for declaratory relief moot, she did not obtain any direct relief on her cause of action for declaratory relief. However, Plaintiff relies on *Hsu* for the proposition that a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. Plaintiff also submits the District Court's March 7, 2019 Order, in which the District Court stated:

"Defendants have given Plaintiff exactly what she asked for in the FAC. Defendants agree not to enforce or attempt to enforce the Agreement against Plaintiff." (March 7, 2019 Order, p. 11.)

In opposition, Defendant first contends that Plaintiff did not obtain any of the recovery, orders, declarations or judgments that she sought in this litigation. Defendant cites Plaintiff's Prayer for Relief in her FAC, in which she requested, in relevant part: "(1) For a judgment declaring that no agreement was formed between the parties, or in the alternative, to the extent an agreement was formed, it is void, invalid, or otherwise unenforceable; [and] (2) For a judgment declaring that no agreement to arbitrate was formed between the parties, or in the alternative, to the extent an agreement was formed, it is void, invalid, or otherwise unenforceable . . . ." (FAC, Prayer for Relief, p. 17:11-18.) However, the court is not limited to a strict reading of the pleadings in determining Plaintiff's litigation success. "[T]he trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu, supra,* at p. 876.) "[A] party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective." (*Id.* at p. 877.)

Second, Defendant contends that Plaintiff's own prior admissions in her opposition to Defendant and EC's motions to dismiss in the District Court contradict her position on this motion because Plaintiff previously argued that she "will not obtain all of the relief she has requested" despite the Covenants Not to Sue. The court disagrees. Even if Plaintiff previously argued that she did not obtain all of the declaratory relief requested in the FAC, Plaintiff may still argue that she is the "party prevailing on the contract" under Civil Code section 1717 on the ground that she otherwise achieved her main litigation objective.

Third, Defendant contends that Plaintiff is not the prevailing party because the District Court dismissed this action for lack of jurisdiction. Defendant relies on *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968. In *DisputeSuite.com*, the plaintiff filed suit in Los Angeles Superior Court for breach of contract and the defendant subsequently moved to dismiss the action on grounds of forum non conveniens. (*Id.* at p. 972.) The trial court granted the

defendant's motion because the contracts at issue specified courts in Florida as the proper forum. (*Ibid.*) The trial court stayed the action to give the plaintiff time to refile its claims in Florida, and later dismissed the case. The plaintiff refiled the case in Florida before defendant filed a motion for attorney's fees pursuant to Civil Code section 1717. (*Id.* at pp. 972, 981.) The trial court denied the defendant's motion for attorney's fees on the ground that the defendant was not the "prevailing party" under section 1717 because the merits of the contract issues were still disputed and under litigation. (*Ibid.*) The California Supreme Court affirmed the trial court's ruling. The Court concluded that "the trial court did not abuse its discretion in finding that defendants were not the prevailing parties for purposes of section 1717" because, "[c]onsidering that the action had already been refiled in the chosen jurisdiction and the parties' substantive disputes remained unresolved, the court could reasonably conclude neither party had yet achieved its litigation objectives to an extent warranting an award of fees." (*Id.* at p. 971.) The Court stated: "A procedural victory that finally disposes of the parties' contractual dispute, such as an involuntary dismissal with prejudice and without any likelihood of refiling the same litigation in another forum, may merit a prevailing party award of fees under section 1717. The flaw in [defendant's] claim to be the prevailing party . . . is not that its victory in the California trial court was procedural but that it was not dispositive of the contractual dispute." (*Id.* at p. 981.)

*DisputeSuite.com* is clearly distinguishable from this case and does not support Defendant's position. Here, the District Court dismissed Plaintiff's action because, as a result of Defendant's Covenant Not to Sue, Plaintiff's claims for declaratory relief were moot and there was no longer an active case or controversy.[1] Like the defendant in *DisputeSuite.com*, Defendant achieved a procedural victory by succeeding on a motion to dismiss. However, unlike the contract issues in *DisputeSuite.com*, which were still disputed and under litigation in another forum, the contract issues in this case are no longer disputed or under litigation because Defendant covenanted not to enforce the Agreement against Plaintiff. As the Supreme Court

[1] After the District Court remanded the case to this court, this court also dismissed the action as moot for the same reason. (September 13, 2019 Order, pp. 2:25-4:2.)

stated in *DisputeSuite.com*, "[a] procedural victory that finally disposes of the parties' contractual dispute, such as an involuntary dismissal with prejudice and without any likelihood of refiling the same litigation in another forum, may merit a prevailing party award of fees under section 1717." (*Id.* at p. 981.)

Defendant also cites four unpublished federal cases to support his contention that "federal courts in the Ninth Circuit have uniformly held that a party cannot be the prevailing party under section 1717 where the case is dismissed for lack of jurisdiction." (Defendant's Opposition, p. 7:22-24 (emphasis omitted).) "While not binding on [state courts], a nonpublished federal district court case can be citable as persuasive authority." (*Baslam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, 1100.) However, the unpublished federal cases cited by Defendant are not only not binding on this court, but they are also not persuasive authority on Plaintiff's motion for attorney's fees because they are each distinguishable from the facts and circumstances presented in this case. Defendant cites (1) *Russell City Energy Co., LLC v. City of Hayward* (N.D. Cal., Feb. 17, 2015, No. C-14-03102 JSW (DMR)) 2015 WL 983858; (2) *HSBC Bank USA v. DJR Properties, Inc.* (E.D. Cal., Apr. 13, 2011, No. 1:09-CV-01239 SWI SKO) 2011 WL 1404899; (3) *Garzon v. Varese* (C.D. Cal., Jan. 11, 2011, No. CV 09-9010 PSG (PLAx)) 2011 WL 103948; and (4) *Vistan Corp. v. Fadei, USA, Inc.* (N.D. Cal., Apr. 2, 2013, No. C-10-04862 JCS) 2013 WL 1345023.

In *Russell City*, the plaintiff-energy company sued the defendant-city for breach of contract and declaratory relief, alleging that the defendant-city breached its agreement by assessing state taxes against the plaintiff-energy company, and seeking a declaratory judgment that the plaintiff-energy company was not required to pay the state taxes. (*Russell City, supra,* 2015 WL 983858, at *1.) The district court granted the defendant's motion to dismiss for lack of subject matter jurisdiction on the ground that the Tax Injunction Act precluded the district court from exercising jurisdiction over the plaintiff's claims. (*Ibid.*) The defendant moved for attorney's fees pursuant to Civil Code section 1717, and the district court denied the motion and stated: "In this case, while the City prevailed in this action, the court dismissed [the plaintiff's] claims for lack of subject matter jurisdiction. There was no determination or 'final resolution' of

the contract claim's merits; in fact, the breach of contract claims are now pending in state court." (*Id.* at **4-5.) On that ground, the district court ruled: "As the City has not prevailed 'on the contract' within the meaning of section 1717, the court recommends that its motion for attorneys' fees be denied." (*Id.* at *5.)

In *HSBC*, the plaintiff sought a declaratory judgment that its lien on the subject property was superior to the defendant's interest. (*HSBC, supra,* 2011 WL 1404899, at *1.) The district court dismissed the defendant based on mootness because the defendant's lien against the subject property had been extinguished. (*Ibid.*) The district court denied the defendant's subsequent motion for attorney's fees and ruled: "[Defendant] was dismissed for lack of subject matter jurisdiction. Therefore, [defendant] was not a prevailing party on the contract because the Court made no determination whatsoever as to the merits of [plaintiff's] underlying declaratory relief claim against [defendant.]" (*Id.* at *2.)

In *Garzon*, the plaintiff filed suit in state court against the defendant for breach of contract, and the defendant successfully removed the contract dispute to the district court. (*Garzon, supra,* 2011 WL 103948, at *1.) The district court denied the plaintiff's subsequent motion to continue the trial and dismissed the case without prejudice for failure to prosecute pursuant to Federal Rule 41(b). (*Ibid.*) The district court denied the defendant's motion for attorney's fees, stating: "Here, the Court dismissed this case without prejudice pursuant to Federal Rule 41(b) meaning the plaintiff is allowed to bring a new suit on the same claim. In this case there has been no determination whatsoever of the merits of the contract claims. Accordingly, Defendant has not prevailed 'on the contract' within the meaning of section 1717." (*Id.* at *3.)

In *Vistan Corp.*, the district court granted the defendant's motion for summary judgment on the plaintiff's federal claims and declined to exercise pendant jurisdiction over the plaintiff's remaining breach of contract claim. (*Vistan Corp., supra,* 2013 WL 1345023, at *1.) The district court therefore dismissed the plaintiff's contract claim without prejudice for lack of subject matter jurisdiction. (*Ibid.*) The district court denied the defendant's subsequent motion for attorney's fees on the ground that "there was no determination of the contract claim's merits"

and "Defendants have 'only succeeded at moving a determination on the merits from one forum to another.' [Citation.]" (*Id.* at *3.)

*Russell City*, *HSBC*, *Garzon*, and *Vistan Corp.* are clearly distinguishable from this case and the court finds that they are not persuasive authority. Here, the District Court dismissed Plaintiff's action because, as a result of Defendant's Covenant Not to Sue, Plaintiff's claims for declaratory relief were moot and there was no longer an active case or controversy. Similarly, after remand, this court also dismissed Plaintiff's action as moot. The contract issues in this case are no longer disputed or subject to further litigation because Defendant covenanted not to enforce the Agreement against Plaintiff. In contrast, the contract issues in *Russell City*, *HSBC*, *Garzon*, and *Vistan Corp.* were not resolved, and each district court denied the respective defendant's motion for attorney's fees on the ground that there had been no determination on the merits of the contract claims. In *Russell City*, the plaintiff's contract claims were pending litigation in the state court; in *HSBC*, the plaintiff's contract claim was rendered moot without any determination on the merits of the claim; and in *Garzon* and *Vistan Corp.*, each plaintiff's contract claims were dismissed without prejudice. The district courts in *Russell City*, *HSBC*, *Garzon*, and *Vistan Corp.* each emphasized the rule in *Hsu* that the "prevailing party determination is to be made only upon a final resolution of the contract claims." (*Russell City, supra,* 2015 WL 983858, at *4; *HSBC, supra*, 2011 WL 1404899, at *2; *Garzon, supra,* 2011 WL 103948, at *2; *Vistan Corp., supra,* 2013 WL 1345023, at **2-3)

In contrast to those four federal cases, in this case, there was a final resolution of Plaintiff's declaratory relief claim against Defendant. As the District Court noted: "Plaintiff's belief that Defendants will sue her based on the Agreement is conjecture and supposition in light of Defendant's Covenants. Because of the Covenants, there is no chance that Defendants will sue Plaintiff based on the Agreement because Defendants expressly waive this right." (March 7, 2019 Order, p. 8.) The District Court further stated: "Defendants do not deny liability nor do they challenge any of the allegations in the FAC. Rather, they covenant not to assert any rights and/or claims against Plaintiff under the Agreement, which is exactly the remedy sought by Plaintiff." (*Id.* at p. 13.) Therefore, even though Defendant succeeded on his motion to dismiss

in the federal court and on the Order to Show Cause re: dismissal in this court, and Defendant achieved a procedural victory in this case, Defendant's procedural victory also resulted in a final resolution of Plaintiff's declaratory relief claim because there is no longer any dispute as to Plaintiff's claim and there is no likelihood of Plaintiff's refiling the same litigation in another forum. Defendant's contention that Plaintiff is not the prevailing party because the District Court dismissed this action for lack of jurisdiction is therefore without merit.

Plaintiff's main litigation objective in this action was to prevent the Agreement from being enforced against her. In the FAC, Plaintiff alleges that, in January 2018, certain details of the Agreement emerged in the news media and Defendant's attorney at the time, Michael Cohen, made efforts to "silence" Plaintiff and ensure that the confidential information would not be disclosed. (FAC, ¶¶ 26-31.) On or about February 22, 2018, EC filed an arbitration proceeding pursuant to the Agreement, and the arbitrator issued an order prohibiting Plaintiff from violating the Agreement by disclosing any confidential information to the media or in court filings. (March 7, 2019 Order, p. 2; Brewster Decl., Ex. E.) Plaintiff then filed this action seeking a declaratory judgment that the Agreement is void, invalid, or unenforceable. (FAC, ¶¶ 42, 44, Prayer for Relief, p. 17:13-18.) Although Plaintiff requests various forms of declaratory relief in the FAC (such as a judgment declaring that no agreement was formed between the parties, or a judgment declaring that the Agreement is void, invalid, or otherwise unenforceable), it is clear that, above all, Plaintiff sought to establish that the Agreement is not enforceable against her. As the District Court stated: "Plaintiff's FAC primarily sought declaratory relief stating that the Agreement should be declared unenforceable against her. (FAC 8-9.)" (March 7, 2019 Order, p. 12.)

Plaintiff achieved her main litigation objective when Defendant and EC filed their Covenants Not to Sue. As the District Court noted, "Defendants have given Plaintiff exactly what she asked for in the FAC. Defendants agree not to enforce or attempt to enforce the Agreement against Plaintiff." (March 7, 2019 Order, p. 11.) The District Court also stated: "Plaintiff's FAC primarily sought declaratory relief stating that the Agreement should be declared unenforceable against her. (FAC 8-9.) Because Plaintiff received this relief through

Defendants' Covenants, there is no further controversy for the Court to address." (*Id.* at p. 12.) The District Court further found that "Plaintiff has received exactly what she wanted – proof that the Agreement is not enforceable." (*Id.* at p. 7.)

For the reasons set forth above, the court finds that Plaintiff is "the party prevailing on the contract" in this action under Civil Code section 1717.

**c. Recovery of Attorney's Fees Against Defendant**

Defendant contends that Plaintiff cannot seek to enforce the attorney's fees provision of the Agreement against Defendant because Defendant never signed, agreed to, sought to enforce, or sued under the Agreement.

"The language of [Civil Code section 1717] is unclear as to whether it shall be applied to litigants who like defendants have not signed the contract. . . . . [¶] Section 1717 was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party . . . , and to prevent oppressive use of one-sided attorney's fees provisions. [Citation.] [¶] Its purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128.)

"Accordingly, in cases involving nonsignatories to a contract with an attorney fee provision, the following rule may be distilled from the applicable cases: A party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed. Where a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382; see also 7 Witkin, Cal. Procedure (5th ed. 2020) Judgment, § 209, pp. 198-199 [discussing cases allowing attorney's fees sought against nonsignatory parties under Civil Code section 1717].)

In his opposition, Defendant contends that allowing Plaintiff to recover attorney's fees against him would circumvent the intent and purpose of Civil Code section 1717. The court disagrees. "Because Civil Code section 1717 refers to 'any action on a contract,' *Reynolds Metals* interpreted it to include 'any action where it is alleged that a person is liable on a contract, whether or not the court concludes he is a party to that contract.' (*Reynolds Metals Co. v. Alperson, supra,* 25 Cal.3d at p. 128.) Given the purpose of establishing mutuality of remedy, and to prevent one-sided attorney fee provisions, *Reynolds Metals* interpreted section 1717 to 'provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant.' [Citation.] Thus if plaintiff had prevailed on its cause of action claiming that the nonsignatory defendants were alter egos of the corporation, the defendants would have been liable on the promissory notes. Since they would have been liable for attorney fees pursuant to attorney fee provisions in those promissory notes if the plaintiff had prevailed, *Reynolds Metals* held that the defendants as prevailing parties could recover attorney fees pursuant to section 1717 even though they had not signed the contracts. [Citation.]" (*Sessions Payroll Management, Inc. v. Noble Const. Co., Inc.* (2000) 84 Cal.App.4th 671, 679.) The court finds that the rationale of *Reynolds Metals* applies to allow a prevailing signatory plaintiff to recover attorney's fees against a nonsignatory defendant if the nonsignatory defendant would have been entitled to its fees if the defendant prevailed.

Plaintiff contends that the attorney's fees provision of the Agreement is enforceable against nonsignatory Defendant because Defendant would have been able to recover attorney's fees against Plaintiff if Defendant was the prevailing party on the contract.

First, Plaintiff contends Defendant would have been able to recover attorney's fees against Plaintiff because the Agreement is binding on Defendant. Plaintiff argues that the Agreement and its attorney's fees provision are binding on Defendant because he filed a Covenant Not to Sue on the Agreement and the District Court held that the Covenant Not to Sue is binding on Defendant. However, the District Court never decided whether the Agreement was binding on Defendant. The District Court stated:

> As a threshold matter, a question exists as to whether DJT signed the Agreement in the first instance and was therefore, a party to the Agreement. In other words, a Covenant Not to Sue from DJT may not even be necessary because he was not a party to the Agreement. Assuming *arguendo* that DJT was a party to the Agreement, this Court has held that an attorney's statements on the record, confirming a client's written promise not to sue, are sufficient to legally bind the client to a covenant not to sue. [Citation.] Here, DJT's attorney clearly and unequivocally stated on the record that his client has covenanted not to sue Plaintiff based on the Agreement. (Tr. of Proceedings at 5:2-12 ("THE COURT: You have received the express authority from the President to enter into the covenant that is referenced in the letter here? MR. [HARDER]: Yes, Your Honor.")[.]) Mr. Harder's statement legally binds DJT.

(March 7, 2019 Order, pp. 13-14.) From this, Plaintiff also contends Defendant stipulated that he was a party to the Agreement. The court disagrees with Plaintiff's contentions that, based on Defendant's covenanting not to sue on the Agreement and the District Court's finding that the Covenant Not to Sue is binding on Defendant, Defendant stipulated that he is a party to the Agreement or that the Agreement is binding on Defendant.

Second, Plaintiff contends Defendant would have been able to recover attorney's fees against Plaintiff because Defendant voluntarily accepted the benefits of the Agreement or chose to assume its obligations, which would make the Agreement binding on Defendant. Plaintiff relies on Civil Code section 1589, which provides that "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting," and Civil Code section 3521, which states that "[h]e who takes the benefit must bear the burden."

"Civil Code section 1589 'has generally been held to apply only where the person accepting the benefit was a party to the original transaction.' [Citation.] However, under a well established exception to the general rule, section 1589 'requires the *assignee* of an executory contract to accept the burdens when *all* the benefits of a full performance have inured to him.' [Citations.]" (*Recorded Picture Co. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350,

362 (emphasis in original); see also *Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 603 ["[Section 1589] is a part of the Civil Code on contracts, and specifically of the chapter governing consent. Its principal application is to the parties to the original transaction, and to cases of assignment where the assignee's assumption of liability may be implied from his acceptance of rights and privileges under the contract."].)

The parties dispute whether Defendant received any benefits under the Agreement. However, even assuming *arguendo* that Defendant voluntarily accepted the benefits of the Agreement, Plaintiff has not established that Defendant was a party to the Agreement. Defendant is also not an assignee of the Agreement. Therefore, Civil Code section 1589 is inapplicable. The court notes that Plaintiff also relies on *Grant v. Long* (1939) 33 Cal.App.2d 725, 736, for the proposition that a party's actions or conduct establish a contract. However, as Defendant correctly points out in his opposition, *Grant* concerns implied contracts while the Agreement at issue is an express contract.

Third, Plaintiff contends that Defendant would have been able to recover attorney's fees against Plaintiff because Defendant was a third-party beneficiary under the Agreement.

"'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' (Civ. Code, § 1559.) 'The third party need not be identified by name. It is sufficient if the [third party] claimant belongs to a class of persons for whose benefit it was made.' [Citation.]" (*Otay Land Co., LLC v. U.E. Limited, L.P.* (2017) 15 Cal.App.5th 806, 855.) "While it is not necessary that a third party be specifically named, the contracting parties must clearly manifest their intent to benefit the third party. [Citation.] 'The fact that [a third party] is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of *the parties* to secure to him personally the benefit of its provisions.' [Citation.]" (*Kalmanovitz v. Bitting* (1996) 43 Cal.App.4th 311, 314 (emphasis in original).)

"In determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the circumstances and negotiations of the parties in making the

contract is both relevant and admissible." (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 437.) "Additionally, a court may consider the subsequent conduct of the parties in construing an ambiguous contract. [Citation.] In determining intent to benefit a third party, the contracting 'parties' practical construction of a contract, as shown by their actions, is important evidence of their intent.' [Citation.]" (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1024.)

Under the express terms of the Agreement, it is clear that the intent of the contracting parties was to provide a benefit to "David Dennison." Under the Agreement, Plaintiff promises not to disclose any confidential information, which the Agreement defines as all information and materials pertaining to "David Dennison." (Brewster Decl., Ex. B, §§ 3.1(d), 4.1(a)-(d), 4.3.3.) The Agreement also provides that, if Plaintiff breaches or threatens to breach the terms of the Agreement, Plaintiff is liable to "David Dennison." (Brewster Decl., Ex. B, § 5.1.) However, the Agreement does not mention Defendant explicitly by name. Although Plaintiff submits the Agreement as evidence to show that "David Dennison" is in fact Defendant (Motion, p. 10:23-24), the Side Letter Agreement attached to the Agreement is redacted and the true name and identity of "David Dennison" is not stated. Therefore, it is not clear from the express provisions of the Agreement that the parties intended to benefit Defendant.

Because resort to the express terms of the Agreement does not resolve the question of whether Defendant is the intended third-party beneficiary, the court looks to the circumstances surrounding the formation and performance of the Agreement. Plaintiff has not submitted any evidence as to the circumstances surrounding the formation of the Agreement. However, Plaintiff submits evidence of the contracting parties' actions after entering into the Agreement.

Plaintiff submits Defendant's Covenant Not to Sue on the Agreement. However, the fact that Defendant filed a Covenant Not to Sue on the Agreement is not itself sufficient to establish that Defendant is the intended third-party beneficiary. On the one hand, Defendant could have filed the Covenant Not to Sue because he was the intended third-party beneficiary of the Agreement who had standing to enforce it. However, on the other hand, Defendant also could

have filed the Covenant Not to Sue simply to avoid an unnecessary dispute and continued litigation.

But Plaintiff has also submitted Defendant and EC's "Joint Opposition to Motion of Plaintiff Stephanie Clifford for Reconsideration of Order Staying This Action," filed June 1, 2018 in the District Court, in which Defendant and EC admit and confirm that Defendant reimbursed EC for EC's $130,000 payment to Plaintiff pursuant the terms of the Agreement. (Brewster Decl., Ex. H, pp. 12:17-18 ["Mr. Trump's subsequent confirmation that he reimbursed EC's $130,000 payment to Plaintiff in 2017 does not change this finding."], 12:27-13:1 ["Likewise, Mr. Trump's reimbursement of the $130,000 payment does not resolve the many other challenges that Plaintiff has raised to the Agreement in the FAC, including that it is supposedly 'illegal' and 'violates public policy.'"], 13:7-8 ["Thus, Mr. Trump's confirmation that he reimbursed the payment to Plaintiff is immaterial to issues upon which the Court based its issuance of the Stay Order."].) This admission of fact is also supported by the testimony of Michael Cohen before the Committee on Oversight and Reform in the United States House of Representatives on February 27, 2019. (Brewster Decl., filed November 8, 2019, Ex. C, pp. 13-14.)

Thus, in their June 1, 2018 opposition brief filed in this action, EC and Defendant admitted that Defendant reimbursed EC for EC's $130,000 payment to Plaintiff, which was paid in consideration for Plaintiff's promises not to disclose confidential information pertaining to "David Dennison." Because, under the Agreement, "David Dennison" was the only person who was to receive the benefits of Plaintiff's promises not to disclose confidential information about him, the fact that Defendant reimbursed EC for EC's $130,000 payment to Plaintiff under the Agreement strongly supports the inference that EC and Plaintiff intended Defendant to be the person referred to as "David Dennison" in the Agreement. (Evid. Code, § 600 ["An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."].) The actions of EC and Defendant after the Agreement was entered into are relevant to determining the contracting parties' understanding of whether Defendant was the intended beneficiary of the Agreement. The court finds that a

reasonable inference can be drawn, from that fact that Defendant reimbursed EC for EC's $130,000 payment to Plaintiff under the contract, that the parties to the Agreement intended Defendant to be the person referred to as "David Dennison" in the Agreement.

The inference that the parties to the Agreement intended Defendant to be the person referred to as "David Dennison" in the Agreement is also supported by additional facts established by the evidence submitted in support of Plaintiff's motion. First, Plaintiff alleges in her FAC that Michael Cohen "worked as the 'top attorney' at the Trump Organization from 2007 until after the [2016 presidential] election and presently serves as Mr. Trump's personal attorney." (FAC, ¶ 16.) These factual allegations are supported by (1) Mr. Cohen's testimony before the Committee on Oversight and Reform in the United States House of Representatives on February 27, 2019: "I got to know [Defendant] very well, working very closely with him for more than 10 years, as his Executive Vice President and Special Counsel and then personal attorney when he became President" (Brewster Decl., filed November 8, 2019, Ex. C, p. 8), and (2) the New York Times article, dated March 7, 2018, reporting that Michael Cohen was Defendant's lawyer and that the White House's spokeswoman, Sarah Huckabee Sanders, said that "Mr. Trump's lawyer had won an arbitration proceeding against [Plaintiff]" (Brewster Decl., filed November 8, 2019, Ex. D, p. 1). The facts that Mr. Cohen was the Trump Organization's attorney at the time the Agreement was entered into and subsequently served as Defendant's personal attorney, taken together with (1) the fact that Mr. Cohen signed the Agreement both on behalf of EC and as its attorney (Brewster Decl., filed November 8, 2019, Ex. B, pp. 14-15), and (2) the fact that the Agreement provides that any notice Plaintiff is required to give to "David Dennison" under the Agreement is to be given to Michael Cohen (Brewster Decl., filed November 8, 2019, Ex. B, pp. 13-14), lend additional support to the inference that the parties to the Agreement intended Defendant to be the person referred to as "David Dennison" in the Agreement.

Moreover, in an opposition brief jointly filed by Defendant and EC in the District Court in this action, they stated that "Plaintiff's defamation claim against Mr. Trump falls squarely within the arbitration provision at issue in this case . . . ." (Brewster Decl., filed November 8,

2019, Ex. H, pp. 4:6-7, 7:6-8.) At the hearing on Plaintiff's motion for attorney's fees on August 14, 2020, the court confirmed with Defendant's counsel that he was not aware of any arbitration provision in this case other than that set forth in the Agreement. (See Brewster Decl., filed November 8, 2019, Ex. B, § 5.2, p. 10.) For Plaintiff's defamation claim against Defendant to "fall[ ] squarely within the arbitration provision at issue in this case," Defendant would have to be either a party to the Agreement or a third-party beneficiary of the Agreement. Thus, this statement made by Defendant and EC in this action provides further support for the inference that the parties to the Agreement intended Defendant to be the person referred to as "David Dennison" in the Agreement.

Based on the evidence discussed above and the reasonable inferences the court has drawn from that evidence, the court finds that Defendant is the intended third-party beneficiary of the Agreement.

In opposition, Defendant does not address the evidence submitted by Plaintiff to show that Defendant is the intended third-party beneficiary of the Agreement. Instead, Defendant submits Plaintiff's "Opposition to Defendant Essential Consultant, LLC's Motion to Compel Arbitration," filed April 9, 2018 in the District Court, and argues that Plaintiff has previously admitted that Defendant is not a third-party beneficiary of the Agreement. "A judicial admission in a pleading is not merely evidence of a fact; it is a conclusive concession of the truth of the matter." (*Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 187.) "To be considered a binding judicial admission, 'the declaration or utterance must be one of fact and not a legal conclusion, contention, or argument.' [Citation.]" (*Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626, 637.)

In her opposition to EC's Motion to Compel Arbitration, Plaintiff stated: "EC's signature on the Settlement Agreement is insufficient to create a contract for several reasons. . . . . *Third,* and perhaps most important, Mr. Trump is not a passive third-party beneficiary of the Settlement Agreement. To the contrary, Mr. Trump *is a party* who was required to deliver material consideration to Plaintiff." (Harder Decl., Ex. 4, p. 11:7-15 (emphasis in original).) In that opposition brief, Plaintiff was arguing rather than admitting that Defendant is not a passive third-party beneficiary of the Agreement. The court finds that Defendant has not met his burden of

showing that Plaintiff's previous statement that Defendant "is not a passive third-party beneficiary of the Settlement Agreement" constitutes a binding judicial admission or conclusive concession of the truth of the matter.

Based on the evidence presented, the court finds that Defendant is the intended third-party beneficiary of the Agreement. Therefore, if Defendant prevailed in this action by enforcing the Agreement as a third-party beneficiary, Defendant would have been entitled to recover attorney's fees against Plaintiff under Civil Code section 1717. If Defendant would have been entitled to recover attorney's fees against Plaintiff, Plaintiff (as the party prevailing on the contract) has a right to recover attorney's fees against Defendant under *Reynolds Metals*.

**d. Conclusion**

For the reasons set forth above, the court finds that Plaintiff is "the party prevailing on the contract" in this action under Civil Code section 1717, and that Plaintiff is entitled to recover reasonable attorney's fees from Defendant pursuant to section 8.2 of the Agreement.

**2. Title 28 United States Code section 1447, subdivision (c)**

The court notes that Plaintiff, in her Notice of Motion, states that she is also moving for an award of attorney's fees and costs pursuant to 28 U.S.C. § 1447, subdivision (c). However, in her Memorandum of Points and Authorities, Plaintiff has not presented any arguments in support of her motion pursuant to 28 U.S.C. § 1447, subdivision (c). Although Plaintiff presented an argument on reply, "[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) The court therefore finds that Plaintiff has not met her burden of showing that she is entitled to attorney's fees pursuant to 28 U.S.C. § 1447, subdivision (c).

Even if Plaintiff had properly raised her arguments in her moving papers, the court would find that Plaintiff is not entitled to attorney's fees under 28 U.S.C. § 1447, subdivision (c). Section 1447, subdivision (c) provides, in relevant part: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An

order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."

As an initial matter, Defendant contends that this court does not have jurisdiction to award attorney's fees under section 1447, subdivision (c). Defendant cites *Moore v. Permanente Medical Group, Inc.* (9th Cir. 1992) 981 F.2d 443, 445, which stated: "[I]t is clear that an award of attorney's fees [pursuant to section 1447, subdivision (c)] is a collateral matter over which a court normally retains jurisdiction even after being divested of jurisdiction on the merits." However, *Moore* does not stand for the proposition that the federal court has exclusive jurisdiction to award attorney's fees pursuant to section 1447, subdivision (c), or that the state court does not have concurrent jurisdiction to award attorney's fees pursuant to section 1447, subdivision (c).

In her reply brief, Plaintiff cites *Massad v. Greaves* (2009) 116 Conn.App. 672, 677, in which the Appellate Court of Connecticut discusses the well-established rule that, "in the absence of congressional intent to vest exclusive jurisdiction over a particular matter in the federal courts, state courts have concurrent jurisdiction over a matter arising under federal law." The Appellate Court stated that it could not find any case, and that the defendant did not cite any case, suggesting that Congress intended federal courts to have exclusive jurisdiction to award attorney's fees pursuant to section 1447, subdivision (c). (*Id.* at p. 679.) The Appellate Court therefore affirmed the state trial court's award of attorney's fees and costs under section 1447, subdivision (c). (*Id.* at p. 685.) Here, Defendant similarly failed to cite any authority suggesting that this court does not have concurrent jurisdiction to award attorney's fees under section 1447, subdivision (c). The court therefore finds that it has jurisdiction to award attorney's fees under 28 U.S.C. § 1447, subdivision (c).

However, even though this court has jurisdiction to award attorney's fees under section 1447, subdivision (c), "a court's discretion to award attorney's fees under § 1447(c) is triggered only if the court first finds that the defendant's decision to remove was legally improper." (*Avitts v. Amoco Production Co.* (1997) 111 F.3d 30, 32.) "Once a court determines that the removal was improper, thus satisfying the *Miranti* threshold requirement, § 1447(c) gives a court

discretion to determine what amount of costs and fees, if any, to award the plaintiff. Congress has plainly limited such an award to those costs and fees 'incurred as a result of removal.' [Citation.]" (*Ibid.*) As Defendant states in his opposition, the District Court never made a finding that removal in this action was improper. Instead, the District Court remanded this case back to the Los Angeles Superior Court as a necessary "procedural step" after granting Defendant and EC's motions to dismiss for lack of subject matter jurisdiction. (March 7, 2019 Order, p. 14, fn. 5.) The court finds that Plaintiff has not met her burden to show that removal in this case was improper.

For the reasons set forth above, the court denies Plaintiff's request for attorney's fees and costs under 28 U.S.C. § 1447, subdivision (c).

**3. The Amount of Reasonable Attorney's Fees Incurred by Plaintiff**

"[T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . . The reasonable hourly rate is that prevailing in the community for similar work. The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (internal citations omitted).)

In her moving papers, Plaintiff asserts that she incurred a total of $54,410 in attorney's fees for work performed by her attorneys Clark O. Brewster ("Brewster"), Mbilike M. Mwafulirwa ("Mwafulirwa"), Jason Tokoro ("Tokoro"), Adam Berger ("Berger"), David Olan ("Olan"), and Troy Skinner ("Skinner"). (Brewster Decl., filed November 8, 2019 ("Brewster Decl."), ¶¶ 24-28.) Brewster and Mwafulirwa of the Brewster & DeAngelis law firm have represented Plaintiff from March 7, 2019 to the present. (Brewster Decl., ¶ 25.) Tokoro and Berger of the Miller Barondess law firm represented Plaintiff as local counsel from May 2019 to July 2019. (Brewster Decl., ¶¶ 23, 26.) Olan and Skinner of the Olan Law Office replaced Tokoro and Berger as local counsel, and have represented Plaintiff from July 2019 to the present. (Brewster Decl., ¶¶ 23, 27.)

Brewster billed a total of $32,130 for 47.6 hours at an hourly rate of $675. (Brewster Decl., ¶ 25.) Mwafulirwa billed a total of $11,970 for 39.9 hours at an hourly rate of $300. (Brewster Decl., ¶ 25.) Brewster attests to his and Mwafulirwa's qualifications, skills, and experience. (Brewster Decl., ¶¶ 40-41.) Brewster states in his declaration that Plaintiff's counsel had to, among other things, "respond to a Show Cause Order and appear for a hearing on that issue, and brief this attorney fees request." (Brewster Decl., ¶ 21.)

Defendant contends that the attorney's fees requested by Plaintiff are not sufficiently substantiated. First, Defendant contends that Plaintiff failed to provide descriptions of the work performed by her attorneys and dates showing when her attorneys performed the work. However, "[i]t is well established that 'California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent. [Citations.]'" (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698.) "Because time records are not required under California law . . . , there is no required level of detail that counsel must achieve." (*Id.* at p. 699 (internal quotations and citations omitted).)

Second, Defendant also contends that only one of the seven attorneys, Brewster, provided a declaration, and that he alone is not competent to testify as to billable work conducted by anyone other than himself. Defendant objects to Brewster's testimony regarding the other attorneys' undisclosed time records on the grounds that Brewster's testimony is hearsay and in violation of Evidence Code section 1521. (Defendant's Opposition, p. 13, fn. 8.)

In support of her motion for attorney's fees, Plaintiff has submitted the Declaration of Clark Brewster, filed November 8, 2019. In his declaration, Brewster states the following as to the attorney's fees incurred for the work of Tokoro, Berger, Olan, and Skinner. "I have also reviewed Miller Barondess' time records submitted in support of this fee application. Those records, Miller Barondess has represented, reflect the time spent by the attorneys of that office prosecuting this litigation." (Brewster Decl., ¶ 31.) "I have also reviewed the Olan Law Office's time records submitted in support of this fee application. Those records, the Olan Law Office has represented, reflect the time spent by the attorneys of that office prosecuting this litigation."

(Brewster Decl., ¶ 32.) Brewster also states that "Miller Barondess' expense sheets will be produced upon request for in-camera review, should the Court so desire." (Brewster Decl., ¶ 36.) On reply, Plaintiff has submitted a supplemental declaration from Brewster, filed March 18, 2020, which attaches time records (Exhibit G) for Brewster, Mwafulirwa, Tokoro, Berger, Olan, and Skinner. However, as discussed above, the court has stricken Exhibit G of the Declaration of Clark O. Brewster filed in support of Plaintiff's reply because "new evidence is not permitted with reply papers." (*Jay, supra,* 218 Cal.App.4th at p. 1537.)

The court finds that Brewster's testimony as to the hours spent by Brewster and Mwafulirwa and their hourly rates is sufficient to establish the reasonableness of Brewster and Mwafulirwa's fees. (Brewster Decl., ¶¶ 33-41.) Based on the court's review of the pleadings filed by Brewster and Mwafulirwa in this court since the case was remanded by the federal court (including their briefs filed in response to the court's Order to Show Cause re dismissal and their moving papers filed in support of this motion for attorney's fees) and based on Brewster's participation in the hearing held by this court on the Order to Show Cause re dismissal on September 13, 2019, the court finds that Brewster and Mwafulirwa's time spent and hourly rates reflected in Brewster's declaration are reasonable. The court therefore finds that the lodestar attorney's fees requested by Plaintiff for Brewster and Mwafulirwa were reasonably incurred by Plaintiff ($32,130 for Brewster and $11,970 for Mwafulirwa, for a total of $44,100).

However, Plaintiff failed to meet her burden of introducing competent and admissible evidence to prove that the attorney's fees for Tokoro, Berger, Olan, and Skinner were reasonable. The court therefore denies Plaintiff's request for the attorney's fees incurred for Tokoro ($1,815 for 3.3 hours x $550), Berger ($1,320 for 4.4 hours x $300), Olan ($5,225 for 9.5 hours x $550), and Skinner ($1,950 for 6.5 hours x $300).

Plaintiff also seeks, on reply, a total of $57,050 in attorney's fees instead of $54,410. "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc., supra,* at p. 1453.) Here, Defendant did not have an opportunity to

oppose Plaintiff's supplemental request. The court therefore denies Plaintiff's supplemental request for an additional $2,640 in attorney's fees.

**4. Costs**

Plaintiff also requests costs in the amount of $10,030.65.

First, as Defendant points out in his opposition, Plaintiff is not the "prevailing party," as defined in Code of Civil Procedure section 1032, subdivision (a)(4), for purposes of recovering costs. Code of Civil Procedure section 1032, subdivision (b) provides: "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Section 1032, subdivision (a)(4) provides, in relevant part: "'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. If any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court . . . ." Although the court finds that Plaintiff is the "party prevailing on the contract" under Civil Code section 1717 for purposes of recovering attorney's fees, the court also finds that Plaintiff is not the "prevailing party" under Code of Civil Procedure section 1032 for purposes of recovering costs because Plaintiff did not obtain a net monetary recovery or any other relief requested in the FAC, a dismissal was entered in Defendant's favor, and neither Plaintiff nor Defendant obtained any relief. (Code Civ. Proc., § 1032, subd. (a)(4).)

Second, Plaintiff has not filed a memorandum of costs. California Rules of Court, rule 3.1700(a) provides: "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of costs are correct and were necessarily incurred in the case."

The court therefore denies Plaintiff's request for costs.

**ORDER**

For the reasons set forth above, the court grants plaintiff Stephanie Clifford's motion for attorney's fees. The court denies plaintiff Stephanie Clifford's request for costs.

The court orders that plaintiff Stephanie Clifford shall recover $44,100 in attorney's fees against defendant Donald J. Trump in this action.

The court orders plaintiff Stephanie Clifford to give notice of this order.

IT IS SO ORDERED.

DATED: August 17, 2020

Robert B. Broadbelt III
Judge of the Superior Court