



IT IS ORDERED as set forth below:

Date: January 5, 2016

*Mary Grace Diehl*

Mary Grace Diehl  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	:	CASE NUMBER
	:	
<b>THE S&amp;Q SHACK, LLC,</b>	:	<b>09-67151-MGD</b>
	:	
Debtor.	:	CHAPTER 7
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IN RE:	:	CASE NUMBER
	:	
<b>RAVING BRANDS, INC.,</b>	:	<b>09-68410-MGD</b>
	:	
Debtor.	:	CHAPTER 7
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<b>DARYL DOLLINGER and</b>	:	
<b>H. MARTIN SPROCK, III,</b>	:	
	:	
Movants,	:	CONTESTED MATTER
	:	
v.	:	
	:	
<b>BV RETAIL, LLC,</b>	:	
	:	
Respondent.	:	
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**ORDER DENYING BV RETAIL, LLC'S REQUEST FOR ATTORNEY'S FEES  
AND NOTICE OF TELEPHONIC STATUS CONFERENCE**

This matter is again before the Court on the Objection of H. Martin Sprock, III and Daryl Dollinger filed on October 2, 2013 (*see* Case No. 09-67151-MGD, Docket No. 137; Case No. 09-68410-MGD, Docket No. 73)<sup>1</sup> regarding claims filed by Respondent BV Retail, LLC against the estates of the above-named involuntary Debtors. The Court has entered three dispositive orders in this contested matter: (1) an Order on February 13, 2015 which partially overruled the Objection (Doc. 159), (2) an Order on March 2, 2015 which partially disallowed the claims (Doc. 168), and (3) an Order on September 24, 2015 which resolved the remainder of the Objection (Doc. 176). The sole remaining issue in this contested matter is whether Respondent is entitled to further attorney's fees under the Consent Judgment<sup>2</sup> dated March 4, 2009 (*BV Retail, LLC v. Raving Brands, Inc.*, No. 3:08CV00326 (W.D.N.C. Mar. 4, 2009), Doc. 179 *ex. 1*).

The Court, in its September 24, 2015 Order noted that "The Consent Judgment expressly approved [\$8,085.00] in fees along with \$350.00 in costs based on Respondent's request in that action as provided for in the Note and Guaranty, and the court included these amounts as part of its Judgment. As such, this Court agrees with Objectors that Respondent may not recover additional attorney's fees on the Note as its claim for fees under the Note merged into the Judgment on the original action and, thus, there is no longer a Note to support such claim." (Doc. 176 at 20). However, the Court permitted supplemental briefing on whether North Carolina law permits attorney's fees to be charged for post-judgment collection and enforcement. Respondent filed its brief on October 13, 2015 (Doc. 178), and Objectors filed their brief on October 22, 2015 (Doc. 179). Upon review of the briefs and applicable North Carolina law, the Court concludes that Respondent is

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<sup>1</sup> For convenience and brevity only, further references to the docket in this Order refer to *In re The S&Q Shack*, Case No. 09-67151-MGD.

<sup>2</sup> Undefined capital terms have the meanings set forth in the Order of September 24, 2015 (Doc. 176).

not entitled to a further award of attorney's fees.

## **I. Legal Standard**

The Court may award attorney's fees for litigating a contested involuntary petition or a contested matter if a statute, rule, or other ground entitles the party to an award of fees. Fed. R. Bankr P. 1018, 9014 (applying Fed. R Bankr. P. 7054(b)(2)). Inside of bankruptcy as well as out, the "basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253 (2010)); see also *Travelers Cas. & Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 448–50 (2007) (noting that "an otherwise enforceable contract allocating attorney's fees (i.e., one that is enforceable under substantive, nonbankruptcy law) is allowable in bankruptcy except where the Bankruptcy Code provides otherwise.").

## **II. Discussion**

As noted above, the Court has previously determined that any contractual right to attorney's fees arising from the Note or Guarantee merged into the Consent Judgment. Accordingly, the sole question for the Court is whether North Carolina law permits attorney's fees to be charged for collection on a judgment. Recovery of attorney's fees under North Carolina law must be supported by statutory authority as in the case of an obligation upon an "evidence of indebtedness." See *Harbortgate Property Owners Ass'n., Inc. v. Mountain Lake Shores Dev. Corp.*, 551 S.E.2d 207 (N.C. App. 2001) (discussing N.C. Gen. Stat. § 6-21.2 (2009)).

Respondent's arguments can be broken into two parts: First, that North Carolina law permits an award of post-judgment attorney's fees for enforcing a judgment if expressly provided for in the judgment. *PCI Energy Servs., Inc. v. Wachs Tech. Servs., Inc.*, 470 S.E.2d 565, 568 (N.C. App. 1996). Second, that the Consent Judgment, separate and apart from the promissory note, constitutes a contractual evidence of indebtedness which may provide for contractual attorney's fees under N.C. Gen. Stat. § 6-21.2.

*PCI Energy Services*, like this case, involved the enforcement of a consent judgment. However, that is where the similarities to this case end. That case was brought as a contempt action before the court that rendered the consent judgment, and there the court based its decision on the fact that "the consent judgment contained an express provision . . . [requiring payment of] costs associated with enforcing the consent judgment." 470 S.E.2d at 568. In this case, however, the Raving Brands Consent Judgment only provided that Respondent shall "have and recover from the defendant, Raving Brands, Inc., the sum of \$206,051.50 together with the costs of this action, including attorney fees in the amount of \$8,085.00 and \$350.00 in costs." (Doc. 179-1). Those amounts represented the fees as requested for litigation of that district court action. (*Id.*) Nowhere in the Consent Judgment is post-judgment enforcement addressed. Notwithstanding this absence, Respondent attempts to contort that provision to apply to enforcement of the Consent Judgment based on the non-exclusive nature of the word "including." This effort seeks to bring new meaning to the word "express."

Even if the Court were to adopt Respondent's strained reading, it is difficult to reconcile *PCI Energy Services* with the later-decided case of *Harborgate Property Owners Association*. 551 S.E.2d at 212. While not specifically addressing *PCI Energy Services*, the Court of Appeals

of North Carolina vacated an award of attorney's fees based on a consent judgment that provided that "[i]n the event any action is brought by either party to enforce this Judgment, the prevailing party or parties in said action shall be entitled to recover reasonable attorney fees from the non-prevailing party for its representation in said subsequent proceedings." *Id.* The court of appeals agreed that a consent judgment is construed as any other contract, but stressed that under North Carolina law "contractual provisions for attorney's fees are invalid in the absence of statutory authority." *Id.* (quoting *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 510 S.E.2d 690, 695 (N.C. App. 1999)). Over a dissent raising what is essentially Respondent's argument, the court specifically declined to construe the consent judgment "evidence of indebtedness" under N.C. Gen. Stat. § 6-21.2 because "no debt [arose] from the Consent Judgment, other than the payment of attorney fees from the non-prevailing party." 551 S.E.2d at 212, 213 (Tyson, J., dissenting); *see also Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr.*, 545 S.E.2d 745, 753 (N.C. App. 2001) (Tyson, J., dissenting), *aff'd*, 556 S.E.2d 293 (N.C. 2001). In this case, the "debt" arose from the Note, not the Consent Judgment, and Respondent properly sought attorney's fees under Section 6-21.2 based on the Note—it has had its bite at the apple.<sup>3</sup>

### III. Conclusion

Based on a review of applicable North Carolina law, the Court concludes that Respondent is not entitled to a further award of attorney's fees. Accordingly, it is

**ORDERED** that the Objections are **SUSTAINED** with respect to Respondent's claim for

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<sup>3</sup> Neither party discussed N.C. Gen. Stat. § 6-21.2(5) which appears to require five-day notice by a holder of a writing evidencing an unsecured debt to the debtor after maturity of the obligation prior to collection of attorney's fees. Because the Court's decision to deny attorney's fees under that statute rests on other grounds, it does not address the effect of this paragraph on Respondent's claims.

additional attorney's fees on the Consent Judgment.

It is **FURTHER ORDERED and NOTICE IS HEREBY GIVEN** that the Court will hold a telephonic status conference in this matter on **January 28, 2016 at 2:00 p.m. Eastern Time** in Courtroom 1201, United States Courthouse, Richard B. Russell Federal Building, 75 Ted Turner Drive SW, Atlanta, Georgia. The parties are **DIRECTED** to contact my Courtroom Deputy Eva Moody at (404) 215-1029 two days before the conference for call-in information.

The Clerk is directed to serve a copy of this Order on the attached distribution list.

**END OF DOCUMENT**

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