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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 00-30939DM
DENNIS C. T. CHOI,)	
)	Chapter 11
Debtor.)	
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DENNIS C. T. CHOI and DEBBIE CHOI,)	Adversary Proceeding
)	No. 00-3138DM
Plaintiffs,)	
)	
v.)	
)	
BANK OF CHINA, a foreign corpora-)	
tion,)	
)	
Defendant.)	
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MEMORANDUM DECISION

I. Introduction

In this matter plaintiffs Dennis C. T. Choi ("Choi") and his wife, Debbie Choi (together, "the Chois"), seek to limit the secured claim on their family residence held by defendant Bank of China ("Bank") to \$2 million, representing only a small portion of the Chois' liability to Bank on account of personal guarantees ("the Guarantees") given by them for loans made to a related corporation, Nature's Farm Products, Inc. ("NFP"). Bank relies on a 1997 restructuring of the underlying debt and the security documents pertaining to the Guarantees, and contends that the

1 entire liability under the Guarantees is secured at least up to
2 the full value of the Residence.

3 The Chois also contend that Bank is liable to them for the
4 breach of an implied covenant of good faith and fair dealing,
5 entitling them to general and punitive damages. Bank, in addition
6 to various defenses on the merits of the Chois' claims, contends
7 that this is a non-core matter and, in addition, that this court
8 lacks jurisdiction to enter judgment against it because it is a
9 foreign sovereign.

10 For the reasons stated below, the court concludes that the
11 court has jurisdiction to adjudicate this matter; that this matter
12 involves both core proceedings and non-core proceedings, on the
13 latter of which this court cannot enter a final adjudication, but
14 that the relief granted to the Chois herein does not involve non-
15 core proceedings; that the Chois are entitled to reformation of
16 the document that purports to modify their secured obligations to
17 Bank; that Bank's lien on their home is limited to no more than \$2
18 million as a secured claim; and that Bank is not liable to the
19 Chois for any damages but the Chois are entitled to recover their
20 reasonable attorneys' fees and costs.

21 II. Procedural History

22 On or about November 4, 1999, Bank began non-judicial
23 foreclosure proceedings against the Chois' family residence at 350
24 West Santa Inez Avenue, Hillsborough, California (the
25 "Residence"). A trustee's sale was scheduled for April 17, 2000.
26 In March, 2000, NFP filed a lender liability action against Bank
27 in the United States District Court for the Northern District of
28 California (Case No. C-2000-0721), in which the Chois joined later

1 that month. On or about March 30, 2000, NFP and the Chois filed a
2 motion for a temporary restraining order seeking to prevent Bank
3 from foreclosing on the Residence. That motion was heard on April
4 13, 2000, and orally denied.

5 On April 14, 2000, Choi filed a voluntary petition under
6 Chapter 11 of the Bankruptcy Code. On May 5, 2000, Bank filed a
7 motion for relief from the automatic stay. A preliminary hearing
8 on that motion was held on May 25, 2000, at which the parties
9 disputed the value of the Residence, the Chois' good faith, and
10 the validity and amount of Bank's lien. The matter ultimately
11 came to a trial on the valuation and good faith issues. On June
12 27, 2000, the Chois filed their Complaint For Reformation And
13 Damages (the "Complaint"). Bank thereupon moved to dismiss the
14 Complaint, primarily based upon the parol evidence rule of Cal.
15 Code Civ. Proc. ("CCP") § 1856(a). In making that motion Bank did
16 not question the jurisdiction of this court to enter a final
17 judgment in the matter.

18 By Order Denying Motion To Dismiss Complaint ("the Order
19 Denying Motion") filed on August 29, 2000, the court denied Bank's
20 motion to dismiss the Complaint, concluding, in essence, that the
21 action does not amount to an attempt to rescind the entire
22 encumbrance on their home, but merely seeks to reform a
23 modification of the security document that eliminated a \$2 million
24 ceiling on Bank's secured claim. Meanwhile, on August 4, 2000,
25 Bank filed proofs of secured and unsecured claims in the amounts
26 of \$24,172,766.68 and \$4,682,794.12, respectively.

27 Thereafter, Bank filed its First Amended Answer to the
28 Complaint on October 18, 2000 and the matter came on for trial

1 beginning on October 30, 2000. The last day of trial was November
2 27, 2000. The Chois appeared and were represented at trial by
3 Steven C. Finley, Esq.; Bank appeared and was represented by
4 Robert P. Pringle, Esq. and James J. Ostertag, Esq.

5 III. Discussion¹

6 Choi is one of the principal shareholders of NFP, a
7 California corporation engaged in the importation and wholesale
8 distribution of canned food products. NFP has had a borrowing
9 relationship with Bank since 1985. It was and is a substantial
10 customer of Bank and Choi was regarded as a very important client
11 of it. In May, 1996 NFP was the borrower under a revolving line
12 of credit facility with Bank in the maximum aggregate amount of
13 \$22 million (the "1996 Credit"). Bank held various guarantees,
14 some of which were secured. The Guarantees at issue in this
15 litigation are secured by a deed of trust on the Residence. The
16 June 25, 1996 Deed of Trust ("Deed of Trust") given by the Chois
17 as trustors to Bank (through its New York branch) as beneficiary
18 contains a limitation to the effect that the Deed of Trust is for
19 the purpose of securing "... payment of the indebtedness owed by
20 [NFP] under the [NFP-Bank loan documents] ... in the principal sum
21 up to TWO MILLION and 00/100 (\$2,000,00.00) DOLLARS...." ²

22 The 1996 Credit had an expiration date of May 15, 1997. In
23

24 ¹ The following discussion constitutes the court's findings
25 of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).
26 Should any portion of these proceedings be found to be non-core,
the findings and conclusions are proposed, subject to Fed. R.
Bank. P. 9033. See discussion at V.B, infra.

27 ² Throughout this Memorandum Decision the limitation on Deed
28 of Trust will be referred to as the "\$2 Million Cap".

1 the fall of 1996, NFP experienced business reverses due to
2 problems with its supply of wholesale food products. Also in the
3 fall of 1996 it transferred \$2 million to an affiliate, Nature's
4 Farm Products (Chile) S.A. ("NFP-Chile"). That transfer from NFP
5 to NFP-Chile was done without the knowledge of Bank.

6 At all times material to the dispute between the Chois and
7 Bank, the key representatives of Bank that Choi and NFP dealt with
8 were: Zhu ZhiCheng ("Zhu"), the then general manager of Bank's New
9 York branch with overall responsibility for loans; Jai Shu Luo
10 ("Luo"), Bank's New York branch deputy general manager; Pin Tai
11 ("Tai"), Bank's New York branch assistant general manager; and
12 Peggy Chan ("Chan"), Bank's New York branch credit officer.

13 When Bank and NFP entered into the 1996 Credit, the
14 approximate available equity (behind senior liens) in the
15 Residence available to secure the Deed of Trust was \$2 million.
16 The parties dispute, and the court need not resolve, whether the
17 \$2 Million Cap was based upon this equity or based upon varying
18 amounts of secured guarantees given by the Chois and other
19 shareholders of NFP.³ Regardless of the origins of the \$2 Million
20 Cap, by the fall of 1996 property values in the San Francisco Bay
21 Area had increased and the Residence was no exception.

22 Zhu understood that because the Guarantees were not limited
23 by the \$2 Million Cap, all of the Chois' assets, including the
24 full value of Residence, would be available to satisfy the Chois'

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27 ³ In fact, Zhu understood that limitations on secured claims
28 such as the Deed of Trust on the Residence were frequently limited
in some areas, such as New York, because borrowers were taxed upon
the dollar amount of secured encumbrances.

1 debts to Bank.⁴ However, he acknowledged that no written or
2 verbal agreement to that effect existed and that, if tested, the
3 \$2 Million Cap would have applied to the Deed of Trust.

4 In September, 1996, Zhu visited Choi at the Residence.
5 During the course of that visit Choi commented on the increased
6 value in the Residence and offered that if there was not enough
7 value in the Residence to discharge NFP's liabilities, he would
8 "work like a slave" in order to fulfill his obligations to Bank.
9 This comment by him was not inconsistent with his exposure to the
10 full amount of the NFP debt under the 1996 Credit via the
11 Guarantees. Indeed, as noted, whatever equity existed in the
12 Residence would stand for the Chois' debts, including any
13 unsecured portion of the Guarantees.

14 At around the same time Zhu learned of the transfer of \$2
15 million from NFP to NFP-Chile. He was very upset about that
16 transaction and admonished Choi for it. Choi apologized for what
17 had been done without Zhu's knowledge. Also in the fall of 1996
18 Bank's head offices in Beijing desired, and Zhu, Luo, Tai and Chan
19 all knew that Bank desired to eliminate the \$2 Million Cap.

20 In January, 1997, Choi approached Bank in New York about
21 restructuring NFP's \$22 million 1996 Credit. Chan and Luo
22 thereafter confirmed that meeting by delivering to NFP, through
23 Choi as its president, a letter of January 23, 1997, summarizing
24 tentative terms and conditions regarding restructuring of the 1996

25
26 ⁴ This understanding would be substantially but not
27 precisely correct because of the claims of other unsecured
28 creditors of the Chois and because of any exemption the Chois
might claim in the Residence. In addition, the Bank would not
protected against other creditors obtaining liens against the
Residence.

1 Credit. In general, the \$22 million credit line was to be split
2 into a \$17 million revolving line of credit and a \$5 million term
3 loan. Of significance to the present dispute, the security,
4 documentation and terms and conditions of the 1996 Credit were to
5 remain unchanged. As of January, 1997, neither of the Chois had
6 any knowledge that Bank desired to remove the \$2 Million Cap.
7 While Bank contends that Zhu and Choi had a discussion as early as
8 September, 1996, wherein Choi acknowledged that all of the value
9 in the Residence was available to meet his obligations to Bank,
10 there was no specific indication that Bank mentioned or required
11 removal of the \$2 Million Cap, nor that the Chois or either of
12 them were willing to remove it. Rather, Choi's own exposure on
13 the Guarantees is completely consistent with his recognition that
14 if NFP failed, essentially all of the value of the Residence would
15 be available to meet the obligations to Bank.

16 In early 1997, Choi had several meetings with Chan and Tai to
17 discuss the terms and conditions of the restructuring of the 1996
18 Credit. At no time did Choi discuss with Tai, Chan or anyone else
19 at Bank the removal of the \$2 Million Cap.

20 Zhu directed representatives of Bank to travel to the Bay
21 Area in the spring of 1997 to determine whether there had been
22 increases in the values of various properties available to
23 constitute additional collateral, including the Residence, to
24 secure NFP's debt to Bank. Choi was aware of the visit, as he met
25 with those representatives, but he was not informed of the Bank's
26 intentions to estimate the value of the Residence.

27 Chan and Luo signed and delivered to Choi, as president of
28 NFP, a letter of April 2, 1997 (the "April 2 Conditional

1 Commitment Letter"), indicating that Bank had approved the request
2 to restructure the \$22 million 1996 Credit under certain terms and
3 conditions. Immediately following the opening paragraph appear
4 the words "Conditional Nature Of Commitment Letter." Zhu
5 testified that the April 2 Conditional Commitment Letter was made
6 conditional because Bank needed the help of its attorneys to
7 eliminate the \$2 Million Cap. Following that caption, the letter
8 recites that the terms and conditions of the restructuring do not
9 become effective, and Bank is not bound by them, until a formal
10 agreement and related documents are signed and all conditions
11 precedent are fulfilled. Under a caption "Security And Support"
12 the unconditional continuing personal guaranties for \$22 million
13 from the Chois and others are noted, as is the Deed of Trust for
14 \$2 million on the Residence. Later in the letter appear fourteen
15 enumerated "Conditions Precedent" and eight enumerated "New Terms
16 And Conditions." No enumerated Condition Precedent nor any
17 enumerated New Term or Condition indicates the removal of the \$2
18 Million Cap. Thus, removal of the \$2 Million Cap was not stated
19 as a condition precedent to the new financing, nor a feature of
20 it.

21 It was Bank's practice to negotiate transactions such as
22 credit restructuring directly with borrowers, and to involve their
23 own attorneys only in the preparation of documents. In this
24 transaction Bank's attorneys, both in New York and California,
25 dealt only with Bank; they had no direct communication with NFP,
26 Choi, or any of their attorneys. In April, 1997, after Bank's
27 head offices indicated a willingness to approve a restructuring of
28 the 1996 Credit only upon removal of any limitations on security

1 available to them, including removal of the \$2 Million Cap, Bank's
2 California attorneys commented in writing to Chan about the \$2
3 Million Cap. Specifically, they reported that the more usual
4 practice is to have a deed of trust secure an entire obligation,
5 regardless of the actual value of the property, thus allowing the
6 lender in its sole discretion to resort to each property in any
7 order. Bank did not communicate this possible scenario to NFP or
8 the Chois.

9 Bank's attorneys did not advise Bank, nor is it the law, that
10 there is any legal requirement that deeds of trust or other
11 encumbrances be unlimited in their nature; in fact, the contrary
12 is true. The \$2 Million Cap does not violate any provision of
13 California law.

14 Consistent with the foregoing advice, Bank's California
15 attorneys prepared various items of loan documentation, including
16 a Modification Of Deed Of Trust (the "Modification") in respect of
17 the Residence. The Modification contained preamble recitals
18 reflecting the Deed of Trust given by the Chois to Bank in
19 connection with the 1996 Credit, referred to the restructuring of
20 the credit facility, and provided for various specific
21 modifications to the Deed of Trust. An unnumbered paragraph
22 entitled "For The Purpose Of Securing" that appeared in the Deed
23 of Trust was deleted and replaced by language in the Modification
24 that purported to secure payment of the entire indebtedness owed
25 by NFP to Bank and subject to the Guarantees. Thus, the \$2
26 Million Cap was eliminated not by specific reference, but by
27 deletion of the entire section of the Deed of Trust in which it
28 was contained, and replacement of a different series of

1 subparagraphs.

2 Chan acknowledged that eliminating the \$2 Million Cap without
3 notifying the Chois was a departure from the normal practice of
4 obtaining the agreement of any borrower when conditions such as
5 these are changed.

6 Choi believed that the April 2 Conditional Commitment Letter
7 was the agreement he had with Bank, based in part upon a long and
8 good relationship he and NFP had with Bank and further upon his
9 trust in Zhu as his banker. Choi received voluminous
10 documentation on or about April 28, 1997, which documentation
11 included the \$17 million revolving credit facility and a \$5
12 million term loan (set forth in the Amended Credit Agreement) from
13 Bank to NFP (collectively, with all related documentation, the
14 "1997 Credit"), and the Modification. Although Choi had
15 experience in buying at least four parcels of real estate between
16 1978 and 1987, and is generally able to read simple English
17 language documents, he did not read them in detail and did not
18 forward them to his or NFP's counsel. It was NFP's practice to
19 have its counsel review documents of this nature yet for some
20 unexplained reason, both in connection with the 1996 Credit and
21 the 1997 Credit, Bank required NFP and the Chois to sign a letter
22 that recited that they had chosen not to be represented by an
23 attorney. When confronted with the large number of documents Bank
24 wanted signed, Choi asked for more time to have the attorneys
25 review them. Both Chan and Zhu assured him that the documents
26 were needed right away and that the terms and conditions were the
27 same as recited in the April 2 Conditional Commitment Letter. In
28 reliance on those representations, and with no contrary

1 understandings to the effect of those documents, Choi signed them.

2 Apart from the Modification and the other related loan
3 documents pertaining to the 1997 Credit, Choi, as president of
4 NFP, was asked to sign Closing Instructions addressed to
5 Commonwealth Land Title Company. A set of those Closing
6 Instructions was executed as late as May 22, 1997, thus indicating
7 that Choi may have had more time to review the documents than he
8 testified at trial. But having additional time is irrelevant, as
9 Choi believed that the April 2 Conditional Commitment Letter was
10 the agreement, and because he relied on Zhu's and Chan's
11 assurances. In any event Choi signed those later Closing
12 Instructions solely in his capacity as president of NFP; neither
13 he nor his wife, Debbie Choi, signed in their individual
14 capacities. Of equal importance, the Closing Instructions insofar
15 as they pertain to the Residence are ambiguous. Under a provision
16 entitled "Insuring Priority" the title policy to be issued to Bank
17 was to insure the Deed of Trust as modified by the Modification
18 "securing a principal amount of up to \$22.0 million...." In the
19 very next subparagraph, however, following the caption "Amount Of
20 Insurance," the figure \$2 million appears.

21 When the Chois signed the Modification they did not realize
22 that the effect was to remove the \$2 Million Cap. Only in
23 November, 1999, when Bank declared a notice of default and
24 commenced foreclosure against the Residence did the Chois first
25 learn that the \$2 Million Cap was gone.

26 Apart from all that, Bank contends that the Chois knew of the
27 Modification and the effect it would have on encumbrances against
28 the Residence. Bank's entire case rests on an alleged telephone

1 conversation between Luo and Choi in April, 1997. Preliminarily,
2 Luo testified under oath in the district court action that to his
3 knowledge, personnel of Bank disclosed all terms and conditions of
4 the Modification to Choi. That statement lacks the specificity to
5 permit a finding that the Chois were informed that the \$2 Million
6 Cap was being removed. Further, Luo's testimony is not credible,
7 in part because he has also testified that Bank's California
8 lawyers told him that California law required that the \$2 Million
9 Cap would be removed, a fact that was neither established by any
10 other evidence nor, as noted, is accurate as a matter of law.
11 Further, Luo's recollection about the disputed telephone
12 conversation with Choi in April, 1997 is very vague. He made no
13 notations about it; he could not confirm whether Choi had already
14 received the loan documents pertaining to the 1997 Credit; he
15 offered no specifics as to the date of the telephone conversation;
16 and he merely testified that he told Choi about the written advice
17 from Bank's California counsel "... about the requirement of the
18 removal of the upper limit for the security amount on the real
19 properties and I remembered his answer that he, in any case, all
20 my properties have been mortgaged to your bank." Since the
21 attorney's letter only commented on the usual practice, and not
22 whether elimination of the \$2 Million Cap was required by law,
23 Luo's recollections of what was said on the alleged phone call are
24 imprecise and unreliable. Also, as previously noted in the
25 conversations between Zhu and Choi in September, 1996, Choi had
26 reason to believe that all of the equity in his properties was
27 available to cover his liability on the Guarantees; in actual
28 fact, Luo's testimony that Choi said all of his properties had

1 been mortgaged to the Bank was not accurate.⁵

2 His statement to the effect that he told Choi that the
3 lawyers wanted the \$2 Million Cap removed is equally unbelievable
4 since Zhu, Luo's superior, made it abundantly clear the decision
5 to eliminate the \$2 Million Cap was that of the Bank, and not the
6 decision of the attorneys. In sum, Choi did not learn from Luo
7 that Bank intended to remove the \$2 Million Cap.

8 IV. Issues

- 9 A. Does this court have jurisdiction to adjudicate these
10 matters?
11 B. Is this a core proceeding?
12 C. Are the Chois entitled to equitable relief by way of
13 reformation of the Modification?
14 D. Are the Chois entitled to damages, and if so, are they
15 entitled to punitive damages?
16 E. Are the Chois entitled to their attorneys' fees.

17 V. Analysis

18 A. This court has jurisdiction to adjudicate these matters.
19 Bank is a corporation organized under the laws of the Peoples
20 Republic of China, wholly owned by the government of the Peoples
21 Republic of China, and doing business in the United States with
22 branches in New York and California. Bank claims that
23 jurisdiction to enter a judgment in these matters rests
24 exclusively with the United States District Court under the
25

26 ⁵ Bank's Second Amended Response to the Chois' Request For
27 Admissions indicates that this vague recollection by Luo is the
28 only proof that anyone on behalf of Bank informed Choi (nobody
informed Debbie Choi) that Bank desired the \$2 Million Cap
eliminated.

1 Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330,
2 1603-1610. According to Bank, this court can only "hear
3 preliminary discovery matters" and enter proposed findings of fact
4 and conclusions of law.⁶

5 Bank did not raise FSIA in its twenty-nine affirmative
6 defenses, nor in its motion to dismiss the Complaint, nor in the
7 proceedings in connection with that motion, nor in time to save
8 the Chois from briefing the core/non-core issues discussed below.
9 Bank raised FSIA for the first time on the first day of trial, in
10 a supplemental trial brief. Moreover, although Bank's proofs of
11 claim state that it "neither expressly nor impliedly consents to

12 ⁶ Bank does not claim immunity from suit under FSIA. In
13 fact, FSIA includes exceptions for foreign instrumentalities that
14 engage in "commercial" as opposed to "regulatory" activities and
15 for "in rem" relief, among other exceptions. See 28 U.S.C.
16 § 1603(d) and (3); § 1605(a)(2) and (4); and Republic of Argentina
17 v. Weltover, Inc., 504 U.S. 607, 614; 112 S.Ct. 2160, 2166; 119
18 L.Ed.2d 394 (1992). Cf. Gates v. Victor Fine Foods, 54 F.3d 1457,
19 1463-1465 (9th Cir. 1995) (no jurisdiction because plaintiffs'
20 claims not related to foreign agency's commercial activity), cert.
21 denied sub nom Fletcher's Fine Foods, Ltd. v. Gates, 516 U.S. 869,
22 116 S.Ct. 187, 133 L.Ed.2d 124 (1995).

23 Therefore, Bank lacks immunity and under Section 1605(a)
24 jurisdiction is proper in "courts of the United States."
25 Moreover, under Section 1330(a) the "district courts shall have
26 original jurisdiction" over actions against a foreign state.

27 Bank apparently argues, although it does not explicitly
28 state, that bankruptcy courts are not "courts of the United
29 States," and that although the bankruptcy court is a unit of the
30 district court (See 28 U.S.C. § 151) it may not finally adjudicate
31 claims against Bank. For the reasons stated in the text this
32 court does not reach these issues. But see 28 U.S.C. § 451
33 (defining "courts of the United States"); Perroton v. Gray (In re
34 Perroton), 958 F.2d 889, 893 (9th Cir. 1992) (for purposes of 28
35 U.S.C. §§ 451 and 1915(a), bankruptcy court was not among "courts
36 of the United States" and therefore could not waive filing fees),
37 and compare United States v. Yochum (In re Yochum), 89 F.3d 661,
38 669 (9th Cir. 1996) (bankruptcy courts are "units of the district
39 court" and therefore "courts of the United States" for purposes of
40 award of attorneys' fees under 26 U.S.C. § 7430) and Bedford
41 Computer Corp. v. Israel Aircraft Industries, Ltd. (In re Bedford
42 Computer Corp.), 114 B.R. 2, 4-5 (Bankr. D. N.H. 1990) (bankruptcy
43 court had jurisdiction under FSIA as "unit" of district court).

1 the jurisdiction of the Bankruptcy Court" Bank did not cite FSIA
2 in those proofs of claim and Bank has never filed a motion with
3 the United States District Court to withdraw the reference to this
4 court under 28 U.S.C. § 157(d). Bank had every opportunity to
5 raise FSIA sooner, and understood that its claims and the Chois'
6 claims or counterclaims against Bank both arose from the same
7 transaction or occurrence.

8 In these circumstances Bank has waived and is estopped to
9 assert any rights it may have had as a "foreign state" to contest
10 the bankruptcy court's jurisdiction over the Chois claims or
11 counterclaims. Phoenix Consulting Inc. v. Republic of Angola, 216
12 F.3d 36, 39 (D.C. Cir. 2000) ("if the sovereign makes a 'conscious
13 decision to take part in the litigation,' then it must assert its
14 immunity under the FSIA either before or in its responsive
15 pleading"); cf. Alpha Therapeutic Corp. v. Nippon Hoso Kyokai,
16 199 F.3d 1078, 1085-86 (9th Cir. 1999) (declining to find waiver
17 where FSIA was raised three months after filing answer, but
18 defendant successfully moved to dismiss based on FSIA), opinion
19 withdrawn pursuant to parties' stipulation, ___ F.3d ___, 2001 WL
20 28095 (9th Cir. 2001). See also In re Lazar (Schulman v. State of
21 California), ___ F.3d ___, 2001 WL 29160, text accompanying nn. 9-
22 14 (9th Cir. 2001) (sovereign immunity can be waived, and where
23 arm of state files proofs of claim state waives Eleventh Amendment
24 immunity regarding counterclaims arising from same transaction or
25 occurrence). Contra Resolution Trust Corp. v. Miramon, 935
26 F.Supp. 838, 841 & n.2 (E.D. La. 1996) (sovereign immunity not
27 subject to waiver or estoppel).

28

1 B. These matters are core proceedings.

2 Bankruptcy courts may hear non-core proceedings but absent
3 the parties' consent they are limited to submitting proposed
4 findings of fact and conclusions of law to the district court. 28
5 U.S.C. § 157(c). The terms "core" and "non-core" are not defined
6 in the Bankruptcy Code. Section 157(b)(2) of Title 28 recites a
7 partial list of core proceedings. However, that statutory
8 provision is subject to limitations under the United States
9 Constitution. In Northern Pipeline Construction Co. v. Marathon
10 Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982),
11 "the Supreme Court held that the portion of the Bankruptcy Act of
12 1978 which allowed a bankruptcy court to entertain and decide a
13 state law contract claim over the objection of one of the parties
14 violated Article III of the United States Constitution." Piombo
15 Corp. v. Castlerock Properties (In re Castlerock Properties), 781
16 F.2d 159, 160 n.1 (9th Cir. 1986).

17 The Chois' Complaint alleged that this is a core proceeding,
18 citing 28 U.S.C. § 157(b)(2)(A) and (O), the "catch all"
19 provisions of that statute. Bank denied that this was a core
20 proceeding in its Answer, its First Amended Answer, and its trial
21 brief. The Chois then filed a supplemental trial brief on the
22 issue, adding citations to 28 U.S.C. § 157(b)(2)(G) (relief from
23 automatic stay) and (K) (validity and extent of liens), and
24 arguing that this proceeding is core because it involves allowance
25 or disallowance of a claim against the estate (§ 157(b)(2)(B)).
26 Both parties' briefs only refer to the "reformation claim," but it
27 is unclear whether this is a shorthand for the entire Complaint or
28 just the first claim for relief. Regardless of the parties'

1 intent, this court will consider how their arguments apply to both
2 claims for relief.

3 1. The first claim for relief is core

4 The Complaint's first claim for relief seeks reformation of
5 the Modification on grounds of fraud or mistake. This essentially
6 seeks to determine the validity and extent of Bank's lien, and is
7 therefore a core proceeding under 28 U.S.C. § 157(b)(2)(K).
8 Spartan Mills v. Bank of America Illinois, 112 F.3d 1251, 1256
9 (4th Cir. 1997), cert. denied, 522 U.S. 969, 118 S.Ct. 417, 139
10 L.Ed.2d 319 (1997); John Hancock Mutual Life Ins. Co. v. Watson
11 (In re Kincaid), 917 F.2d 1162, 1165 (9th Cir. 1990); Diversified
12 Mortgage Co., Inc. v. Gold (In re Gold), 247 B.R. 574, 577 (Bankr.
13 D. Mass. 2000) (adversary proceeding for reformation of mortgages
14 was core proceeding to determine validity, priority, or extent of
15 liens).

16 In addition, determining whether to award attorneys' fees is
17 sufficiently part of this proceeding that it is also treated as a
18 core proceeding. United States v. Yochum (In re Yochum), 89 F.3d
19 661, 669-670 (9th Cir. 1996) (award of attorneys' fees emanated
20 from bankruptcy proceedings and it "makes common sense" to
21 construe that award as core proceeding because bankruptcy court
22 was most familiar with case and attorneys).

23 2. The second claim for relief is also core

24 The Complaint's second claim for relief is for compensatory
25 and general damages for breach of the implied covenant of good
26 faith and fair dealing. Although this court decides below that no
27 such damages should be awarded, this court must determine whether
28 that decision should be by way of final or proposed findings of

1 fact and conclusions of law.

2 As noted, the Chois assert that this is a core proceeding
3 under the "catch all" provisions 28 U.S.C. § 557(b)(2)(A) and (O).
4 However, the Ninth Circuit Court of Appeals has ruled that these
5 provisions do not encompass "state law contract claims that do not
6 specifically fall within the categories of core proceedings
7 enumerated in 28 U.S.C. § 157(b)(2)(B)-(N)." Castlerock, 781 F.2d
8 at 162.

9 The Chois also assert that this is a core proceeding because
10 it was filed in response to Bank's motion for relief from the
11 automatic stay. Paragraph (G) of 28 U.S.C. § 157(b)(2) defines
12 core proceedings as including "motions to terminate, annul, or
13 modify the automatic stay." However, the creditor in Castlerock
14 had filed a motion for relief from the automatic stay, and that
15 did not prevent the Castlerock court from deciding that the
16 proceeding was non-core. Id. at 160. Filing a motion for relief
17 from the automatic stay is analogous, in this context, to
18 appearing for a limited purpose without consenting to
19 jurisdiction. Therefore, this court is not persuaded that this is
20 a core proceeding under paragraph (G).

21 The more relevant statutory provisions are paragraphs (B) and
22 (C) of 28 U.S.C. § 157(b)(2). Paragraph (B) concerns "allowance
23 or disallowance of claims against the estate." Paragraph (C)
24 concerns "counterclaims by the estate against persons filing
25 claims against the estate." Although the Chois do not cite
26 paragraph (C) both they and Bank focus heavily on Castlerock,
27 which was decided under paragraph (C). Moreover, the distinction
28

1 between "claims" and "counterclaims" is blurred in this case⁷ and,
2 as further discussed below, this court will treat paragraphs (B)
3 and (C) as two sides of the same coin.

4 In Castlerock the Ninth Circuit determined that paragraph (C)
5 did not apply for two reasons. First, the Ninth Circuit stated
6 that the creditor "would not have filed [its] Proof of Claim if
7 the bankruptcy court had declined jurisdiction over the
8 counterclaims" and therefore "it seems unfair under the facts of
9 this case to categorize the counterclaims as falling within this
10 provision." Id. at 161-162. The facts in Castlerock are
11 initially similar: the creditor in Castlerock was the plaintiff
12 in a pending state court action; the debtor filed state law
13 counterclaims; and the bankruptcy court elected, over the
14 creditor's objection, to try those matters in the bankruptcy
15 court. However, this court cannot find that Bank "would not have
16 filed" its proofs of claim but for the Chois' Complaint - to the
17 contrary, Bank had to file its proofs of claim to protect its
18 potentially very large unsecured claim. Therefore, Castlerock's
19 first ground for ruling the counterclaims non-core is
20 inapplicable.

21 Second, Castlerock held that "the apparent broad reading that
22 can be given to § 157(b)(2) should be tempered by the Marathon
23 decision." In particular:

24

25

26 ⁷ On the one hand, one could argue that the Chois did not
27 file a "counterclaim" to Bank's claims because the Chois filed
28 their Complaint just over one month before Bank filed its proofs
of claim, on August 4, 2000. On the other hand, Bank's motion for
relief from the automatic stay was predicated on its claims,
making the Complaint in the nature of a "counterclaim."

1 This circuit has interpreted Marathon as
2 depriving the bankruptcy court of jurisdiction "to
3 make final determinations in matters that could
4 have been brought in a district court or a state
5 court."

6 Castlerock, 781 F.2d at 162, quoting Lucas v. Thomas (In re
7 Thomas), 765 F.2d 926, 929 n.3 (9th Cir. 1985).

8 This test would appear to make the Chois' second claim for
9 relief a non-core proceeding, because that claim was in fact
10 brought in the district court. However, the Ninth Circuit
11 recognized what it called "well-settled law that a creditor
12 consents to jurisdiction over related counterclaims by filing a
13 proof of claim." Castlerock, 781 F.2d at 162 (emphasis added).
14 See also In re Levoy and Aikens (United States v. Levoy), 182 B.R.
15 827 (9th Cir. BAP 1995) (by filing proofs of claim, United States
16 submitted to bankruptcy court jurisdiction over counterclaims,
17 citing Langenkamp v. Culp, 498 U.S. 42, and other cases involving
18 waivers by filing proofs of claim).

19 The Ninth Circuit's focus on "related counterclaims" echoes a
20 line of similar cases. See Kaiser Steel Corp. v. Frates (In re
21 Kaiser Steel Corp.), 95 B.R. 782, 788-789 (Bankr. D. Colo. 1989)
22 (citing cases, and noting split in authority whether counterclaims
23 must be "compulsory"), aff'd, 109 B.R. 968 (D.C. Colo.), appeal
24 dismissed, mandamus granted as to jury right in some of
25 consolidated appeals, 911 F.2d 380 (10th Cir. 1990). In fact, as
26 the Supreme Court has pointed out, counterclaims are often "part
27 and parcel" of determining claims. Katchen v. Landy, 382 U.S.
28 323, 330; 86 S.Ct. 467, 473; 15 L.Ed.2d 391 (1966). See Taubman
 Western Assoc's, No. 2 v. Beugen (In re Beugen), 81 B.R. 994, 1000
 (Bankr. N.D. Cal. 1988) (Carlson, J.) (Katchen is "still good

1 law"), citing Commodity Futures Trading Com'n v. Schor, 478 U.S.
2 833, 853; 106 S.Ct. 3245, 3258; 92 L.Ed.2d 675 (1986). See also 1
3 Collier on Bankruptcy ¶ 3.02[3][d] (15th Ed., L. King Ed., through
4 Dec. 2000), text accompanying n. 54 ("it seems probable that the
5 filing of a proof of claim subjects the claimant to core treatment
6 only if the counterclaim involves the same subject matter as the
7 proof of claim [or involves avoiding powers].").

8 There is some authority that it matters whether the
9 "counterclaim" is filed before or after the creditor files its
10 proof of claim. However, this court believes the better analysis
11 focuses on whether the creditor would have filed a proof of claim
12 but for the bankruptcy court's adjudication of the issues and how
13 closely the claims and counterclaims are related. Compare Sun
14 West Distributors, Inc. v. Grumman Energy Systems Co. (In re Sun
15 West Distributors, Inc.), 69 B.R. 861 (Bankr. S.D. Cal. 1987)
16 (implying that sequence does matter), and Annotation, Action for
17 Breach of Contract as Core Proceeding in Bankruptcy Under 28
18 U.S.C.A. § 157(B) (1995 & Supp. through 2000), § 2 ("Virtually all
19 of the courts which have addressed the issue whether adversary
20 proceedings on behalf of the estate of the debtor for breach of
21 contract in which the defendants counterclaim against the estate
22 have held that such proceedings are not core proceedings under 28
23 U.S.C.A. § 157(b) ..., though there are a few cases to the
24 contrary"), with Kaiser Steel, 95 B.R. at 788 (explicitly
25 rejecting sequence of claims and counterclaims as a basis for
26 determining core and non-core) and Beugen, 81 B.R. at 1000
27 ("Numerous courts have held that a claim and a counterclaim
28 arising out of the same transaction comprise a single legal

1 controversy that should not be divided.").

2 Although Castlerock has sometimes been interpreted as relying
3 on the sequence of "claim" and "counterclaim" (e.g., Kaiser Steel,
4 95 B.R. at 788) a close reading shows otherwise. In Castlerock
5 the Ninth Circuit noted that the bankruptcy court had already
6 treated the proceeding as core over the creditor's objections, and
7 therefore the creditor's filing of a proof of claim was
8 effectively non-consensual. Castlerock, 781 F.2d at 162
9 ("Castlerock cites no case in which the filing of the proof of
10 claim followed the bankruptcy court's assertion of jurisdiction
11 over the counterclaims despite objections from the creditor.")
12 (Emphasis added.). The Ninth Circuit explained that the purpose
13 of treating the filing of a proof of claim as consent to
14 counterclaims is "to prevent a bankruptcy trustee from having to
15 split a cause of action by defending against the claim in the
16 summary proceedings and then seeking affirmative relief in a
17 plenary suit." Castlerock, 781 F.2d at 162 (quotation marks and
18 citation omitted). What the Ninth Circuit rejected has been
19 called "jurisdiction by ambush": "forcing the creditor to file a
20 proof of claim as a defensive maneuver, thereby conferring
21 jurisdiction on the bankruptcy court." Castlerock, 781 F.2d at
22 162-163, citing Dexter v. Gilbert (Matter of Kirchoff Frozen
23 Foods, Inc.), 496 F.2d 84, 86 (9th Cir.1974). The Ninth Circuit
24 explained what it means to file a claim for "defensive" purposes
25 in Kirchoff: "Only if the [creditors'] claim of right to retain
26 the funds were resolved adversely to them would it become
27 necessary for them to claim against the bankrupt estate as
28 creditors." Kirchoff, 496 F.2d at 86.

1 Those facts are inapplicable in this case. Bank did not have
2 to file a proof of claim "as a defensive maneuver" - Bank asserted
3 there was no equity in the Residence and it filed a multi-million
4 dollar unsecured claim, as well as a secured claim. The existence
5 of those claims does not depend on the second claim for relief
6 being "resolved adversely" to Bank. Moreover, the policy
7 identified in Castlerock would be undermined if the second claim
8 for relief were classified as non-core: then the Chois would have
9 to "split their cause of action" because their second claim for
10 relief constitutes not only a claim against Bank but also a
11 possible set-off to Bank's secured claim and hence a defense to
12 Bank's assertion that there is no equity in the Residence. In
13 fact, Bank's own nineteenth affirmative defense is for set-off.
14 Finally, Bank did not move the district court to withdraw the
15 reference to this court, and that is another reason why splitting
16 this case between two courts at this late stage is inappropriate.

17 In sum, Bank filed its proofs of claim voluntarily and this
18 court cannot find that Bank would have declined to file those
19 claims but for the presence of the second cause of action before
20 this court; the Chois' second claim for relief is "part and
21 parcel" of the process of allowing or disallowing Bank's secured
22 and unsecured claims; the second claim for relief and Bank's
23 asserted claims would each be compulsory counterclaims against the
24 other outside of bankruptcy; and designating the second claim for
25 relief as non-core would force the Chois to "split" their second
26 claim for relief. For all of these reasons, this court rules that
27 the Chois' second claim for relief is a core proceeding under the
28 facts of this case. See Durkin v. Benedor Corp. (In re G.I.

1 Industries, Inc.), 204 F.3d 1276, 1279-80 (9th Cir. 2000) (core
2 proceeding included not only determination of proof of claim
3 itself but also determination of validity of underlying agreements
4 between parties based on alleged lack of mutual intent between
5 parties and lack of consideration).

6 C. The Chois are entitled to rescind the Modification and
7 therefore reform their obligations under the Deed of
8 Trust.

9 In the Order Denying Motion the court set forth the legal
10 principles on which it permitted the Chois to take this matter to
11 trial. As stated therein, whether they could prove their
12 allegations would be determined as a factual matter. No purpose
13 would be served by restating the legal theories the court left
14 open for the Chois to apply. Rather, the following will
15 demonstrate how the application of those theories to the
16 established facts leads the court to reach the result that it
17 does.

18 1. Absence Of Fraud

19 In their trial brief the Chois set forth the well-known
20 elements of fraud that must be established to justify reformation
21 of the Modification under Cal. Civ. Code § 3399. It is sufficient
22 to focus only on the third element, intent to induce or deceive,
23 to demonstrate that the Chois may not prevail on this theory.
24 They have the burden to prove, but did not prove, that Bank or any
25 of its representatives set out on a course of action that resulted
26 in execution of the Modification with the intent to trick or
27 deceive the Chois. In fact, any such willful intent is completely
28 negated by the fact that the 1997 Credit documents themselves do

1 exactly what Bank wanted to do, namely restructure NFP's debt and
2 remove the \$2 Million Cap. If the Chois were tricked, they had
3 ample opportunity to learn that it was about to happen and how
4 such events would affect them.

5 The Chois no doubt contend that it is precisely the failure
6 of Bank, and in particular Zhu, Luo and Chan to point out the
7 legal effect of the Modification, that establishes fraud. The
8 court is convinced that the mere showing of a failure to disclose,
9 in light of the sequence of events that did in fact provide the
10 Chois with ample opportunity to understand the documents, negates
11 any inference of actual intent to deceive. No such proof can be
12 found from the evidence submitted.

13 2. Unilateral Mistake

14 As noted in the Order Denying Motion, the parol evidence rule
15 of CCP § 1856(a), does not prevent the Chois from proving that
16 they did not read the Modification as a result of their unilateral
17 mistake under circumstances the Bank knew or suspected to be
18 present.⁸ However, the Chois' burden is high: the courts have
19 generally required clear and convincing proof, or something more
20 than a preponderance of the evidence. Messner v. Mallory, 107
21 Cal. App. 2d 377, 381 (1951) (unilateral mistake); California
22 Trust Co. v. Cohn, 9 Cal. App. 2d 33, 40 (1935) (same); Bernstein
23 v. Pavich (In re Pavich), 191 B.R. 838, 845 (Bankr. E.D. Cal.
24 1996) (mutual mistake).

25 "Clear and convincing" proof "demands a high probability" but
26

27 ⁸ As established in the trial briefs and the undisputed
28 facts, the exception based upon mutual mistake does not apply in
this case.

1 "falls well short of what is required for a criminal conviction."
2 1 Witkin, Cal. Evid. 4th § 38 (2000) (emphasis in original),
3 citing BAJI (8th ed.), No. 2.62; Cal. Evid. Code §§ 115 and 502;
4 Mattco Forge v. Arthur Young & Co., 52 Cal. App. 4th 820, 848, 849
5 (1997). The evidence must be of such convincing force that it
6 demonstrates, in contrast to the opposing evidence, a high
7 probability of the truth of the facts for which it is offered as
8 proof. BAJI (8th ed.) No. 2.62.

9 Based upon the relationship of NFP and the Chois to Bank, the
10 evolution of the credit transactions from May, 1996 to May 1997,
11 the language of the April 2 Conditional Commitment Letter, and the
12 assurances that the loan documentation (which included the
13 Modification) were consistent with the terms and conditions of the
14 April 2 Conditional Commitment Letter, the evidence is clear, and
15 the court is convinced, that Bank knew or suspected that the Chois
16 were unwittingly and unknowingly removing the \$2 Million Cap by
17 signing the Modification, and that such action was material in
18 connection with their relationship with Bank.

19 The court acknowledges that the April 2 Conditional
20 Commitment Letter is exactly that, a conditional commitment. But
21 the course of dealing of the parties encouraged Choi's reliance on
22 its terms and, more importantly, by stating that the loan would
23 not become effective until the conditions precedent had been
24 fulfilled, Bank strongly implied the only conditions were those
25 stated. Not one of those conditions or the new terms described in
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27
28

1 the letter relate in any way to the \$2 Million Cap.⁹ Moreover,
2 the Modification itself says nothing in its recitals or text about
3 the \$2 Million Cap, and only by a careful comparison of the
4 Modification and the Deed of Trust could Choi have discovered that
5 the \$2 Million Cap was being eliminated. Finally, although
6 Section 7.10 of the 1997 Credit attempts to evade the rule that
7 ambiguities are construed against the drafter, that attempt is
8 both factually and legally ineffective. Factually, that section
9 says "all parties being represented by legal counsel," which is
10 directly contrary to the letter Bank had the Chois sign saying
11 they were not represented by legal counsel. Legally, it would not
12 be enough even were Bank to show that the parties were in equal
13 bargaining positions - there must be "evidence the actual
14 provision in dispute was jointly drafted." Vons Companies, Inc.
15 v. United States Fire Ins. Co., 78 Cal.App.4th 52, 58 (2000), as
16 modified, review denied. There is no evidence the documents
17 eliminating the \$2 Million Cap was jointly drafted.

18 When a contract is reformed on grounds of unilateral mistake,
19 the contract which was intended by the party acting under that
20 unilateral mistake is the contract of the parties (provided no
21 third parties are prejudiced thereby). See Cal. Civ. Code Section
22 3399; Stare v. Tate, 21 Cal. App. 3d 432, 438-439; 98 Cal. Rptr.
23 264, 268 (1971); Eagle Indem. Co. v. Industrial Accident
24 Commission, 92 Cal. App. 2d 222, 229; 206 P.2d 877, 881 (1949);

25 _____
26 ⁹ The April 2 Conditional Commitment Letter stated that
27 "[u]pon completion of all the required documentation and the
28 satisfaction of the terms and conditions, this credit facility
shall become effective." (Emphasis added.) The words "terms and
conditions" are not defined, but appear to refer to the enumerated
terms and conditions within that letter.

1 Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 603; 116
2 P.2d 465, 478 (1941) (reformation of deed). Here, no third
3 parties were or will be prejudiced. The Modification shall be
4 reformed so as to reinstate the \$2 Million Cap.¹⁰

5 D. The Chois are not entitled to general or punitive
6 damages.

7 As stated above, the court is not satisfied that Bank is
8 guilty of fraud. Rather, it appears that the worst that can be
9 said about Bank's practices is that they were careless. The
10 failure to include in the April 2 Conditional Commitment Letter
11 that the \$2 Million Cap would be removed does not amount to a
12 breach of any covenant of good faith or fair dealing. This is so
13 for the same reason that Bank will not be held liable for fraud.

14 E. The Chois are entitled to reasonable attorneys' fees.

15 Bank claims there is no right to attorneys' fees under the
16 terms of the parties' agreements. Bank's twelfth affirmative
17 defense cites CCP § 1021, which states:

18 Except as attorney's fees are specifically
19 provided for by statute, the measure and mode of
20 compensation of attorneys and counselors at law is
21 left to the agreement, express or implied, of the
22 parties; but parties to actions or proceedings are
23 entitled to their costs, as hereinafter provided.
24 [Emphasis added.]

25 California Civil Code ("Civil Code"), Section 1717(a),
26 provides in relevant part:

27 (a) In any action on a contract, where the
28 contract specifically provides that attorney's fees
and costs, which are incurred to enforce that

29 ¹⁰ Thus, the \$2 Million Cap is reimposed to limit the amount
30 of Bank's secured interest in the Residence. No other provisions
31 of the 1997 Credit or the Guarantees are to be affected by this
32 decision.

1 contract, shall be awarded either to one of the
2 parties or to the prevailing party, then the party
3 who is determined to be the party prevailing on the
4 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.

5 Section 7.13 of the 1997 Credit provides, in full:

6 **7.13 Legal Expenses and Fees**

7 In the event that Bank employs attorneys to remedy,
8 prevent or obtain release from a breach or default
9 of this Agreement or the loan documents arising out
10 of a breach or default of this Agreement or the
11 loan documents or in connection with or contesting
12 the validity of this Agreement or the loan
13 documents,[¹¹ any of the terms and covenants and
14 provisions and all condition [sic] hereof or
15 thereof or any of the matters referred [to?] herein
16 or therein or in connection with any bankruptcy or
17 postjudgment proceeding, Bank shall be entitled to
18 be reimbursed for all of its attorneys['] fees,
19 whether or not suit is filed and including without
20 limitation those incurred in each and every action,
21 suit or proceeding including all appeals and
22 petitions therefrom and all fees and costs incurred
23 by Bank in the event that Bank obtain the [sic]
24 judgment in connection of [sic] the enforcement and
25 interpretation of this Agreement or the loan
26 documents [then?] Bank shall be entitled to recover
27 from Borrower and each [sic], all costs and
28 expenses incurred in connection with the
enforcement of such, including, without limitation,
attorneys['] fees, whether incurred prior to or
after the entry of the judgment. The provision of
this subsection is [sic] severable from the other
provisions of the Agreement and shall survive the
entry of judgment referred to herein and shall not
be deemed merged into any judgment. [Emphasis
added.]

23 Bank makes no argument on the attorneys' fee issue other than
24 citing CCP § 1021. Presumably Bank is suggesting that the policy
25 of mutuality embodied in Civil Code § 1717(a) applies only to

26 ¹¹ Section 1.1 of the 1997 Credit defines "Loan Documents"
27 as including "the Deeds of Trust as amended by the Modifications,
28 ... the Guaranty, ... and all other agreements, documents and
instruments executed and delivered by Borrower to Bank in
connection herewith and therewith."

1 actions to "enforce" a contract, and therefore does not apply to
2 the Chois' action, which could be characterized as one "in
3 connection with" or "contesting the validity of" the Modification.
4 However, California courts have interpreted Section 1717 to apply
5 where plaintiff's action successfully challenges "the
6 enforceability" of the contract, or in this case a portion
7 thereof. Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.,
8 121 Cal. App. 3d 447, 460 (1981). Like the attorneys' fee
9 provision in this case, the one in Oro Hills arguably was broader
10 than "enforcement": it required payment of attorneys' fees "in
11 any action or proceeding in which Beneficiary [Oro Hills] or
12 Trustee may appear, and in any suit brought by Beneficiary to
13 foreclose this Deed." Id. at 459.

14 The Oro Hills court emphasized the statutory purpose of
15 "mutuality" and that if the deed of trust beneficiary therein had
16 prevailed it certainly would have sought attorneys' fees. Id. at
17 459-460. The same is true of Bank, which prayed for attorneys'
18 fees in its Answer and First Amended Answer. See Wagner v.
19 Benson, 101 Cal.App.3d 27, 36-37; 161 Cal.Rptr. 516, 522 (1980)
20 (emphasizing mutuality of remedy); Nevin v. Salk, 45 Cal.App.3d
21 331, 338-340; 119 Cal.Rptr. 370, 374-375 (1975) (same).

22 For the foregoing reasons, this court is persuaded that an
23 award of attorneys' fees is proper in this case.

24 VI. Conclusion

25 The Chois have requested a separate hearing to determine the
26 reasonable amount of their attorneys' fees and costs. Within
27 thirty days of the date of service of this Memorandum Decision,
28 the Chois shall file, serve and set for hearing a motion pursuant

1 to B.L.R. 7007-1 for allowance of their reasonable attorneys' fees
2 and costs, with a declaration attaching detailed time and expense
3 records. The Chois should address whether such award should be
4 set off against Bank's secured or unsecured claims, or should be
5 awarded as a separate judgment against Bank in the Chois' favor.

6 The Chois are entitled to judgment on their first claim for
7 relief; Bank is entitled to judgment on the Chois' second claim
8 for relief. The Modification shall be reformed so as not to
9 eliminate the \$2 Million Cap. The Chois shall be entitled to
10 their reasonable attorneys' fees and costs. Because it is unclear
11 whether those attorneys' fees and costs will be a separate
12 judgment or will reduce Bank's claims, this court will not enter
13 judgment at this time. After resolution of the attorneys' fees
14 issue, the court will enter a final judgment, consistent with this
15 Memorandum Decision and the resolution of the foregoing attorneys'
16 fees issue.

17 Dated: February 26, 2001

18 _____
19 Dennis Montali
20 United States Bankruptcy Judge
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