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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SWA Painting, Inc. Plaintiff, v. Golden Eagle Insurance Corporation; Does 1-100; XYZ Corporations 1-100; Black and White Business Entities 1-100, Defendants.	No. CIV-03-2364-PHX-DGC **DEFENDANT'S OBJECTION TO PLAINTIFF'S FORM OF JUDGMENT AND COSTS REQUESTED THEREIN** *Oral Argument Requested*

Defendant Golden Eagle Insurance Company hereby objects to Plaintiffs' form of judgment filed on January 24, 2006, on grounds that, *inter alia*, the amounts sought in prejudgment and postjudgment interest are contrary to law.

MEMORANDUM OF POINTS AND AUTHORITIES

Following evidentiary and summary judgment rulings in its favor, Plaintiff seeks judgment from this Court for $500,000, plus prejudgment interest at 10 percent compounded monthly from "March, 2002" to the present, postjudgment interest at the federal funds rate, and attorney fees and costs. Contrary to Plaintiff's position, however, judgment was already entered in Plaintiff's favor on October 10, 2003 and interest-on-judgment calculations should be based on that date. Moreover, Plaintiff's request for "10 percent compounded" interest has no basis in either contract or statute.

I. BACKGROUND

The conclusions of this Court establish the following factual background as relevant here. In 2001, CMS manufactured and supplied defective paint to Plaintiff that injured Plaintiff's subcontracting business. CMS was insured by Defendant Golden Eagle and sought coverage for Plaintiff's claims against it from Golden Eagle, which Golden Eagle initially denied. CMS and Plaintiff then entered into a *Damron* agreement in the "Spring of 2002". Clause 2 of that agreement provided as follows:

> CMS hereby stipulates that judgment may be entered against it and in favor of SWA in the amount of $500,000. CMS agrees that this sum may be deemed liquidated as of the date of this Agreement, and further agrees that **compound and not simple interest–both pre-judgment and post-judgment, be computed on a compound basis from the date of this Agreement**.

(**Exhibit 1**, Damron Agreement) (emphasis added). Interest rates are not addressed anywhere else in the Agreement or in an Addendum to the Agreement that was executed in June of 2002. (**Exhibit 2**, Addendum). On October 10, 2003, Plaintiff and CMS signed a stipulation resulting in a judgment in Arizona state court. (**Exhibit 3**). The judgment did not address interest rates either.

This Court made a number of different rulings in this case up to and including findings of fact made after an evidentiary hearing on October 26, 2005. Based on those rulings, Plaintiff now requests entry of judgment whereby prejudgment interest applies from "March, 2002" to whenever this Court enters judgment, and postjudgment interest following entry of judgment. These requests by Plaintiff require the Court to ignore the October 10, 2003 judgment.

II. LAW AND ARGUMENT

Interest rates on judgments are governed by statute. 28 U.S.C. § 1961(a) ("Interest shall be allowed on any money judgment in a civil case recovered in a district

court"). Notably, Plaintiff's October 10, 2003 judgment against CMS in Arizona state court fits squarely within the language of § 1961(a). The judgment was a "money judgment in a civil case" that will be "recovered in a district court." The language of § 1961 leaves no discretion as to the governing rate or as to when interest shall start accruing:

> Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

Id.

A. Interest should be calculated based on the October 10, 2003 judgment

The *Damron* agreement entered into in the "Spring of 2002" was not a "judgment" and no contractual agreement between Plaintiff and CMS should be permitted to alter that undeniable fact. Federal courts uniformly hold that the reference in § 1961 to "judgment" is in fact to judgments. *See, e.g., Explosives Corp. of America v. Garlam Enterprises Corp.*, 817 F.2d 894, 903 (1st Cir. 1987) (district court's liability determination was not a "judgment" for purposes of § 1961); *Duffer v. American Home Assur. Co.*, 512 F.2d 793, 799 (5th Cir. 1975) (trial court's "oral expression of future intention" to enter judgment was not a "judgment" for purposes of § 1961); *Kincade v. General Tire & Rubber Co.*, 540 F.Supp. 115, 121 (D.C.Tex 1982) (court approved settlement was not a "judgment" for purposes of § 1961), *rev'd on other grounds*, 716 F.2d 319 (5th Cir. 1983).

Here, the actual "judgment" entered into in Plaintiff's favor was the stipulated judgment entered by the Arizona state court on October 10, 2003. Plaintiff entered into nothing more than an oral, unsigned, undocumented agreement in principle as of the Spring of 2002. That oral agreement cannot be construed to be a "judgment"

under even the most liberal construction of § 1961. Thus, both prejudgment and postjudgment interest calculations should be based on the October 10, 2003 judgment and not the Spring, 2002 agreement. With respect to postjudgment interest, Plaintiff is entitled to interest at the federal funds rate from October 10, 2003 to the present.

B. Section 1961 law governs the prejudgment rate

With respect to prejudgment interest, the rate of "both prejudgment and postjudgment interest is the Treasury Bill rate as defined in 28 U.S.C. § 1961 unless the district court finds on substantial evidence that a different prejudgment rate is appropriate." *Northrop Corp. v. Triad Int'l Marketing S.A.*, 842 F.2d 1154, 1155 n.2 (9th Cir. 1988). The "recognized general rule is that state law determines the rate of prejudgment interest in diversity actions." *Id.*

As this Court has held, the *Damron* agreement entered into in the Spring of 2002 was strictly an oral agreement. In approximately June of 2002, Plaintiff and CMS drafted a written agreement but again failed to fill in numerous blank spaces throughout the document and never signed it. Clause 2 of the written draft purported to address interest rates, but Plaintiff again failed to specify any particular rate of interest other than mere reference to "compound" and not "simple" interest. A plain reading of Clause 2 indicates an intention by the parties to simply defer to governing statutes to determine what prejudgment interest shall apply.

While Plaintiff has a natural incentive in asking this Court to stretch the language of Clause 2 to conclude that the agreement referred to an interest rate that compounds monthly at "10 percent", such a conclusion is not supported by either the language of the contract or by statute. The rule in the 9th Circuit is that the federal funds rate should govern prejudgment interest unless "substantial evidence" warrants a different rate. *Northrop*, 842 F.2d at 1155. The federal funds rate does in fact apply compounded

interest, and not simple interest, which is consistent with the *Damron* agreement. The vague reference in Clause 2 to compound interest only does not meet the "substantial evidence" standard set forth by *Northrop* for purposes of proving Plaintiff's position of "10 percent compounded".

Even in the alternative that Plaintiff's failure to specify an interest rate is nonetheless construed in its favor by applying state and not federal law on interest rates, such a liberal construction should not be expanded to apply the Arizona statutory rate of 10 percent in a compounded manner. The Arizona state rate is 10 percent in simple interest. ARIZ. REV. STAT. § 44-1201(A).

CONCLUSION

In sum, judgment was entered in Plaintiff's favor on October 10, 2003 in Arizona state court. That judgment fits the definition of 28 U.S.C. § 1961. Accordingly, postjudgment interest at the federal funds rate should apply to the $500,000 amount from October 10, 2003 to the present. The federal funds rate should also apply to the period between the Spring of 2002 and October 10, 2003, pursuant to the plain language of the *Damron* agreement.

RESPECTFULLY SUBMITTED this 7th day of February, 2006.

JONES, SKELTON & HOCHULI, P.L.C.

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DEFENDANT'S OBJECTION TO PLAINTIFF'S FORM OF JUDGMENT AND COSTS REQUESTED THEREIN electronically filed/served this 7th day of February, 2006, to:

ALL PARTIES ON ELECTRONIC SERVICE LIST

/s/: Mica Milano