

No. 22-557

ORIGINAL

In the
Supreme Court of the United States

_____ Δ _____
PETER KLEIDMAN

Petitioner,

v.

RFF FAMILY PARTNERSHIP, LP

Respondent,

_____ Δ _____

On Petition for Writ of Certiorari
to the Supreme Court of California

_____ Δ _____

PETITION FOR WRIT OF CERTIORARI

_____ Δ _____

Peter Kleidman, pro se
680 E. Main St., #506
Stamford CT 06901
971 217 7819
kleidman11@gmail.com

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QUESTIONS PRESENTED

Petitioner Kleidman requests that this petition be liberally construed. *Erickson v. Pardus*, 551 US 89, 94 (2007).

Kleidman sued respondent RFF Family Partnership, LP ("RFF") in connection with a contract. The purported contract had a supposed clause, which provided that the prevailing party could recover its attorney's fees from the losing party (hereinafter, "Attorney's Fees Clause").

The court found that RFF prevailed. RFF then made a motion for \$40,072.50 in attorney's fees, based on the Attorney's Fees Clause. Kleidman opposed RFF's motion and refused to pay any money at all.

As RFF claimed \$40,072.50 in contractually-owed attorney's fees, and as Kleidman refused to pay, one sees that from RFF's perspective, Kleidman breached the contract and RFF suffered \$40,072.50 in damages.

However, under California law, a prevailing party's contractually-owed attorney's fees are deemed costs, and the matter is summarily adjudicated as a claim for costs. Thus RFF's motion was adjudicated summarily as a claim for costs. On the other hand, California law generally provides that claims for money owed on a contract are adjudicated plenary as claims for damages.

Question 1. Does California's legal framework — whereby prevailing parties' claims for contractual attorney's fees are adjudicated summarily as claims for costs, whereas other, contractual, monetary claims are adjudicated plenary as claims for damages — violate the Fourteenth Amendment's Equal Protection Clause?

California law provides that in certain scenarios, a party can make a claim for its attorney's fees as damages, in which case the claims for attorney's fees are adjudicated plenary as claims for damages.

Question 2. Does California's legal framework — whereby prevailing parties' claims for contractual attorney's fees are adjudicated summarily as claims for costs, whereas other types of claims for attorney's fees are adjudicated plenary as claims for damages — violate the Fourteenth Amendment's Equal Protection Clause?

Under California law, parties generally have the right to trial by jury in connection with contractual, monetary claims.

Question 3. Does California's legal framework — whereby prevailing parties' claims for contractual attorney's fees are determined by the court, whereas other contractual, monetary claims may be determined by the jury — violate the Fourteenth Amendment's Equal Protection Clause?

STATEMENT OF RELATED PROCEEDINGS

Kleidman v. RFF Family Partnership, LP, Superior Court of California, County of Los Angeles, No. SC121303, possible¹ judgment as to RFF Family Partnership, LP (“RFF”) filed June 13, 2014; interlocutory amended judgment as to RFF filed August 20, 2015; order for attorney fees filed September 19, 2019.

Kleidman v. RFF Family Partnership, LP, California Court of Appeal, Second Appellate District, Division Four, No. B302449, opinion filed April 14, 2022.

Kleidman v. RFF Family Partnership, LP, Supreme Court of California, No. S274740, Petition for Review summarily denied July 13, 2022.

Kleidman v. RFF Family Partnership, LP, California Court of Appeal, Second Appellate District, Division P, No. B260735, order of dismissal filed February, 25, 2015; motion to reinstate appeal denied March 27, 2015.

Kleidman v. RFF Family Partnership, LP, Supreme Court of California, No. S225536, petition summarily denied May 13, 2015.

Kleidman v. Cal. Court of Appeal, Second Appellate District, Supreme Court of California, No. S236562, petition summarily denied August 31, 2016.

Kleidman v. RFF Family Partnership, LP, California Court of Appeal, Second Appellate District, No. B268541, opinion filed Jul. 10, 2018.

¹This judgment is ambiguous.

Kleidman v. RFF Family Partnership, LP, Supreme Court of California, No. S250726, petition summarily denied Sep. 26, 2018.

Kleidman v. Hon. Willhite, et al., No. 2:20-cv-02365-PSG-JDE (C.D. Cal.), judgment entered September 29, 2020; motion for reconsideration denied October 29, 2020.

Kleidman v. Cal. Court of Appeal for the Second Appellate Dist., et al., No. 20-56256 (9th Cir.), opinion filed April 19, 2022; petition for rehearing denied August 31, 2022.

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Kleidman v. Hon. Collins, et al., No. 2:22-cv-03263-CJC-JDE (C.D. Cal.), pending

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Kleidman v. Cal. Court of Appeal, Second Appellate Dist., et al., California Court of Appeal, Fourth Appellate District, Division One, No. D079855, pending.

Kleidman v. Cal. Court of Appeal, Second Appellate Dist., et al., California Court of Appeal, Fourth Appellate District, Division One, No. D079856, pending.

Kleidman v. Division P, et al., California Court of Appeal, Fourth Appellate District, Division One, No. D079855, pending.

Kleidman v. RFF Family Partnership, LP, No. 2:22-cv-03947-SPG-AFM (C.D. Cal.), pending.

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PETITION FOR WRIT OF CERTIORARI

Kleidman sued RFF, claiming (inter alia) breach of contract. RFF was deemed the prevailing party, and there was a purported attorney-fee clause in the contract which supposedly provided for the prevailing party to recover attorney's fees. RFF thereupon claimed \$40,072.50 in attorney's fees.

California procedural law allowed RFF to prosecute its claim against Kleidman for these contractual attorney's fees summarily as a claim for costs. But in essence, RFF sought contractual damages, i.e., money allegedly owed on the contract which Kleidman refused to pay. Kleidman, in attempting to defend against RFF's contractual, attorney-fee claim, was denied crucial rights which are generally afforded to parties defending against contractual, monetary claims. Namely, Kleidman was denied the rights to conduct discovery, to cross-examine RFF's declarant, and to a jury trial. On the other hand, contractual, monetary claims are generally adjudicated plenary as claims for damages, whereby the parties enjoy these valuable rights. Is there an invidious, arbitrary classification?

Similarly, other claims for the recovery of attorney's fees are adjudicated plenary as claims for damages. E.g., *Bertero v. Natl. Gen. Corp.*, 13 Cal.3d 43, 48, 62-63 (1974) (*Bertero*) (discussing jury's determination of attorney's fees in malicious prosecution case). Why then should RFF's claim for its attorney's fees be adjudicated summarily as a claim for costs? Is there an invidious, arbitrary classification?

OPINIONS BELOW

Kleidman v. RFF Family Partnership, LP, California Court of Appeal, Second Appellate District, Division Four, No. B302449, opinion filed April 14, 2022. App.1-6.

Kleidman v. RFF Family Partnership, LP, Supreme Court of California, No. S274740, Petition for Review denied July 13, 2022. App.7.

Kleidman v. RFF Family Partnership, LP, Superior Court of California, County of Los Angeles, No. SC121303, order for attorney fees entered September 19, 2019. App.8-11.

JURISDICTION

This Court has subject matter jurisdiction under 28 USC § 1257(a).

The decision of the Supreme Court of California was entered July 13, 2022. Kleidman obtained a 60-day extension on the deadline to file this petition from October 11, 2022 to Saturday, December 10, 2022, which extends to December 12, 2022. Supreme Court Rule 30.1.

28 USC § 2403(b) may apply. No court of the United States, as defined by 28 USC § 451, has, pursuant to 28 USC § 2403(b), certified to the California Attorney General the fact that the constitutionality of a statute of California was drawn into question.

None of the three state courts adjudicated the aforementioned federal questions in their decisions. However, Kleidman raised these federal questions in his briefing to all three state courts, so this Court has jurisdiction thereover. *Goeke v. Branch*, 514 US 115, 118 (1995).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

US Cons., 14th Amendment, Section 1,
 Equal Protection Clause
 California Civil Code § 1655
 California Civil Code § 1717
 California Civil Code § 3281
 California Civil Code § 3300
 California Code of Civil Procedure § 592
 California Code of Civil Procedure § 1032
 California Code of Civil Procedure § 1033.5
 California Code of Civil Procedure § 2009

STATEMENT OF THE CASE

**A. Facts material to consideration of the questions
presented**

1. Procedural history

- a. According to the record, RFF made a
claim for contractual attorney's fees as
the prevailing party**

Kleidman is involved in state-court litigation against respondent RFF (*Kleidman v. RFF*). Kleidman and RFF were mortgagor and mortgagee, respectively. The gist of *Kleidman v. RFF* is that RFF allegedly overcharged on the mortgage, and consequently Kleidman overpaid thereon. Kleidman sued RFF to recover the amount he allegedly overpaid. App.2, App.9.

According to the appellate opinion, "[t]he loan agreement between [RFF] and [Kleidman] had a clause awarding attorney fees to the prevailing party." App.2. Hereinafter, this purported clause shall be designated, "Attorney's Fees Clause." RFF prevailed. App.3, App.9. RFF sought to enforce the

Attorney's Fees Clause against Kleidman, claiming \$40,072.50 in attorney's fees. App.2, App.3, App.8, App.9, App.10.

b. RFF's claim for reasonable attorney's fees as the prevailing party was a contractual claim, even though it was brought under procedural statutes

Under California law, in the context of contract litigation, wherein the contract provides for an award of attorney's fees to the prevailing party, the claim for contractual attorney's fees is governed (inter alia) by Civil Code § 1717,² which 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 ... to the prevailing party, then ... the party prevailing on the contract[] ... shall be entitled to reasonable attorney's fees....

Civ. Code § 1717(a). App.42-44.³ This language, as applied to the purported circumstances herein, does little more than confirm that the alleged Attorney's Fees Clause is enforceable against Kleidman. The only limitation that Civil Code § 1717(a) putatively

² References to "Code" are to a California code section.

³ Strictly speaking, this language applies only when the contract provides that the prevailing party is to be awarded attorney's fees *and costs*. As it turns out, the purported Attorney's Fees Clause further provides for costs. Both the Superior Court and the Court of Appeal applied Civil Code § 1717, App.2, App.4, App.10-12, so one reasonably infers that the purported Attorney's Fees Clause indeed provided for costs, but the state courts omitted this detail from their decisions.

imposes on the Attorney's Fees Clause is that RFF is entitled only to its *reasonable* attorney's fees. However, that RFF is entitled only to its reasonable attorney's fees is, by law, impliedly embedded in the contract anyway. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 683-684 (1988) ("Every contract imposes ... a duty of ... fair dealing"); Civ. Code § 1655 ("Stipulations ... necessary to make a contract reasonable ... are implied"). App.42. In any event, Civil Code § 1717(a), as applied here, merely provides that RFF's claim for its contractual, reasonable, attorney's fees (as the prevailing party) is enforceable against Kleidman.

Based on the foregoing, Civil Code § 1717(a), as applied to RFF's claim for contractual, reasonable attorney's fees as the prevailing party, does nothing more than affirm that such claim is enforceable against Kleidman. Thus in the instant circumstances, *Civil Code § 1717(a) does not create an independent, statutory grounds for RFF's claim for reasonable attorney's fees.* Although RFF's claim for contractual, reasonable attorney's fees as the prevailing party was made under Civil Code § 1717, such claim should not be treated as a claim for statutory attorney's fees, but rather as a claim for contractual attorney's fees. RFF used Civil Code § 1717 merely as a procedural mechanism for claiming contractual attorney's fees as the prevailing party.⁴(By analogy, Code of Civil Procedure § 1021

⁴ In other scenarios not applicable here, Civil Code § 1717 does supply an independent basis for attorney's fees. For instance, Civil Code § 1717(a) forbids a party X from claiming contractual attorney's fees when there is one-sided attorney's provision in favor of X and X is the losing party. In this scenario, Civil Code § 1717(a) equitably provides that the prevailing party shall

provides that parties may contract for the recovery of attorney's fees in litigation, but "does not independently authorize recovery of attorney fees." *Mountain Air Enters., LLC v. Sundowner Towers, LLC*, 3 Cal.5th 744, 751 (2017).)

The statutory scheme further dictates that such contractual attorney's fees shall be part of the costs; shall be determined by motion, and shall be determined by the court. Civ. Code § 1717(a) ("Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs"); Code Civ. Proc. § 1032(b) ("Except as otherwise expressly provided by statute, a prevailing party is entitled ... to recover costs"); Code Civ. Proc. § 1033.5(a)(10)(A) ("Attorney's fees, when authorized by ... [c]ontract" "are allowable as costs under [Code Civ. Proc. § 1032]"); Code Civ. Proc. § 1033.5(c)(5) ("Attorney's fees allowable as costs pursuant to [Code Civ. Proc. § 1033.5(a)(10)(A)] shall be fixed ... upon a noticed⁵ motion. ... Attorney's fees awarded pursuant to [Civ. Code § 1717] are allowable costs under [Code Civ. Proc. § 1032] as authorized by [Code of Civil Procedure § 1033.5(a)(10)(A)]"). App.43, App.45-50.

This statutory scheme deprives the parties of the right to cross-examination, because motions may be determined by the court based solely on affidavits and declarations.⁶ *Beckett v. Kaynar Mfg. Co., Inc.*,

recover its attorney's fees from X, despite the contractual provision that X is to be awarded its attorney's fees even if it loses.

⁵ The term "noticed motion" is used to distinguish the proceeding from an ex parte application. *People ex rel. Allstate Ins. Co. v. Suh*, 37 Cal.App.5th 253, 257 (2019).

⁶ A declaration under penalty of perjury may be used in lieu of an affidavit. Code Civ. Proc. § 2015.5.

49 Cal.2d 695, 698, n. 3 (1958); Code Civ. Proc. § 2009 (“An affidavit may be used to verify ... a paper ... upon a motion”); *People v. Johnson*, 38 Cal.4th 717, 730 (2006); *People v. Tucker*, 117 Cal. 229, 230-231 (1897); *Van Loan v. Van Loan*, 142 Cal. 423, 425-426 (1904). App.50. This statutory scheme also deprives the parties of a right to a jury trial.

According to this statutory scheme, RFF made its claim for contractual, reasonable attorney’s fees as the prevailing party by way of a motion in the Superior Court (“Fee Motion”). App.8-10.

c. Kleidman opposed RFF’s Fee Motion on the grounds that the summary procedure violated the Equal Protection Clause

Kleidman opposed RFF’s Fee Motion, arguing (inter alia) that under the Equal Protection Clause, RFF should not be allowed to prosecute its claim for contractual attorney’s fees summarily. App.33-41. Kleidman argued that RFF’s Fee Motion should be adjudicated plenary, just like other, contractual, monetary claims. App.33, App.36-41. Kleidman argued that in his defense of RFF’s claim for contractual attorney’s fees, Kleidman was entitled to:

- conduct discovery;
- cross-examine RFF’s declarant (RFF’s attorney, Mr. Parcels) providing evidence;
- a jury trial.

App.34-41, App.5 (referencing Mr. Parcels), App.9-10 (same).

Kleidman propounded discovery regarding the Fee Motion. App.10. In response, RFF filed a motion for a protective order, arguing that it need not respond to

Kleidman's discovery requests. App.10-11.⁷

The Superior Court substantially granted RFF's Fee Motion, awarding around 96% of what RFF claimed (\$38,572.50 out of \$40,072.50) ("Fee Order"). App.10. The Fee Order adjudicated neither Kleidman's Equal-Protection argument nor his argument for cross-examination. App.8-11. The Fee Order forbade a jury trial on the grounds that RFF's Fee Motion "does not constitute an action separate from the underlying breach of contract claim." App.10.⁸ However, the Superior Court did not analyze Kleidman's Equal-Protection argument as to the right to a jury trial. The Superior Court granted RFF's motion for a protective order, thereby issuing a protective order barring Kleidman's discovery requests ("Protective Order"). App.10-11. The Superior Court did not mention Kleidman's Equal-Protection argument as to discovery. *Ibid.*

Kleidman appealed the Fee Order and Protective Order, giving rise to B302449 in the California Court of Appeal. Kleidman again argued that the summary adjudication of RFF's Fee Motion violated the Equal Protection Clause. App.28-32. Kleidman again argued that he was entitled to conduct discovery, cross-examine RFF's declarant, and to a jury trial. App.23-28. The Court of Appeal affirmed the Fee Order without mentioning Kleidman's arguments for Equal Protection, cross-examination or a jury

⁷ Kleidman propounded discovery after the discovery cutoff date in the underlying litigation. But Kleidman argued that RFF's claim for attorney's fees was a new action, entitling him to new rounds of discovery.

⁸ Presumably, "underlying breach of contract claim" means Kleidman's underlying claim against RFF for overcharging on the mortgage.

trial. App.1-6. The Court of Appeal affirmed the Protective Order, barring discovery. App.6. The Court of Appeal did not address Kleidman's Equal-Protection argument as to discovery. *Ibid.*

Kleidman then filed a Petition for Review in the Supreme Court of California, requesting discretionary review. Kleidman presented the aforementioned Equal-Protection issues for a third time. Kleidman requested review of the issue of whether the summary adjudication of the Fee Motion violated the Equal Protection Clause. App.12-19. Kleidman requested review of the issue of whether being deprived of the rights to conduct discovery, to cross-examine, and to trial by jury, violated the Equal Protection Clause. *Ibid.* The Supreme Court of California summarily denied Kleidman's petition. App.7.

§2. The Equal Protection Clause is at issue because claims for contractual attorney's fees as the prevailing party are adjudicated summarily as claims for costs, whereas other contractual, monetary claims are adjudicated plenary as claims for damages

To state the obvious, California recognizes a cause of action for breach of contract. *Oasis W. Realty, LLC v. Goldman*, 51 Cal.4th 811, 821 (2011) (providing "elements" of a cause of action for breach of contract); *Erlich v. Menezes*, 21 Cal.4th 543, 550-553 (1999) (discussing breach of contract claims vis-à-vis tort claims); *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 906 (2002) ("breach of contract gives rise to a single cause of action"). Generally, when one party to a contract is in breach thereof, the other, aggrieved party can maintain an original lawsuit

against the former to redress the breach. When the breaching party fails to pay money owed under the contract, the aggrieved party can bring an original lawsuit for contractual damages. Civ. Code § 3281; Civ. Code § 3300. App.44-45. Such a lawsuit is adjudicated plenary, whereby the defendant enjoys rights to conduct discovery, *Williams v. Superior Court*, 3 Cal.5th 531, 541 (2017), cross-examination, *Pence v. Industrial Acc. Com.*, 63 Cal.2d 48, 50-51 (1965); *Lacrabere v. Wise*, 141 Cal. 554, 556, 557 (1904), and a jury trial. *Raedeke v. Gibraltar Sav. & Loan Assn.*, 10 Cal.3d 665, 670-671 (1974); *Abbot v. City of L. A.*, 50 Cal.2d 438, 461-462 (1958); Code Civ. Proc. § 592, App.45.

Here, RFF's Fee Motion alleges that Kleidman owed RFF \$40,072.50 pursuant to their contract, and Kleidman disputes said obligation. Therefore RFF's Fee Motion impliedly alleges that Kleidman breached the contract by refusing to pay the money contractually owed to RFF. After all, had Kleidman agreed to pay the \$40,072.50 that RFF sought, then there would have been no need for RFF to make the Fee Motion. That RFF made the Fee Motion at all is an implied allegation that Kleidman refused to pay the amount owed under the contract, and consequently is an implied allegation that Kleidman breached the contract.

Although RFF's claim for contractual attorney's fees was for breach of contract seeking monetary damages, because it was a claim for contractual attorney's fees as the prevailing party, it was adjudicated summarily as a claim for costs. However all other claims for breach of contract seeking monetary damages are adjudicated plenary as claims for

damages. This classification should be scrutinized in an Equal-Protection analysis.

§3. The Equal Protection Clause is at issue because claims for contractual attorney's fees as the prevailing party are adjudicated summarily as claims for costs, whereas other claims for attorney's fees are adjudicated plenary as claims for damages

In various circumstances, a party can maintain an original lawsuit to recover its attorney's fees as damages.

For instance, California adopts the tort-of-another doctrine. "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary ... attorney's fees ... thereby ... incurred." *Prentice v. N. Amer. Title Guar. Corp.*, 59 Cal.2d 618, 620 (1963) (*Prentice*) (citing Rest. Torts, § 914); *Gray v. Don Miller & Assoc., Inc.*, 35 Cal.3d 498, 505 (1984) (*Gray*), citing Rest. (2d) Torts, § 914(2)). California has applied the tort-of-another principle in numerous contexts. *Prentice*, at 621 (in the context of an action against an escrow holder for negligence, "When ... escrow holder has ... negligently made it necessary for the vendor ... to file a quiet title action against a third person, attorney's fees incurred by the vendor in prosecuting such action are recoverable as ... vendor's damages in an action against the escrow holder"); *Nelson v. Kellogg*, 162 Cal. 621, 623-624 (1912) (in the context of a false arrest, arrestee can sue for recovery of attorney's fees incurred for "services

performed in securing the discharge" from the false arrest); *Gray*, at 507 (real estate broker's tortious misrepresentation to a potential buyer caused the potential buyer to sue the seller, and so the potential buyer could sue the broker to recover its attorney's fees incurred in the lawsuit against the seller).

A person can also maintain an original action to recover its attorney's fees as damages in original actions for malicious prosecution, *Bertero*, 50-51, and for legal malpractice. *Budd v. Nixen*, 6 Cal.3d 195, 202 (1971) ("plaintiff would have had a viable claim, as tort damages, for the fees he paid ... his second attorney ... for his efforts to extricate plaintiff from the effect of [the first attorney's] negligence").

And of course, an attorney may sue his/her client to recover unpaid attorney's fees in a plenary action. *Oliver v. Campbell*, 43 Cal.2d 298, 304, 305 (1954) (attorney wrongfully discharged may sue in quantum meruit "to recover ... reasonable value of ... services performed"); *Jogani v. Superior Court*, 165 Cal.App.4th 901, 903-904 (2008) (right to jury trial in action in quantum meruit).

These examples are significant in the following sense. In the Equal-Protection analysis, one might argue that there is something unique about a claim to recover attorney's fees, as opposed to other types of damages. The foregoing examples show that such an argument lacks merit. These examples show that when a party sues to recover attorney's fees, a plenary action is viable.

Because RFF's claim was a contractual claim for the recovery of attorney's fees as the prevailing party, it was adjudicated summarily as a claim for costs. However, the foregoing examples show that other claims for recovery of attorney's fees are

adjudicated plenary as claims for damages. This classification should be scrutinized in an Equal-Protection analysis.

REASONS FOR GRANTING THIS PETITION

I. The California courts resolved the questions presented in a way that conflicts with the decision of the Supreme Court of Minnesota

In *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 NW2d 49 (Minn. 2012) (*United Prairie*), the Supreme Court of Minnesota considered “[t]he question ... whether the Minnesota Constitution provides the right to a jury trial for a claim to recover attorney fees based on a contract.” *Id.*, 51-52. In a 5-2 decision, *United Prairie* held:

[Plaintiff’s] claim ... is one for contractual indemnity, and ... requests money damages in the form of attorney fees as relief. ... [¶] ... [Plaintiff’s] claim for the recovery of attorney fees is legal rather than equitable because it is an action seeking a monetary payment for contractual indemnity. Because the nature of the claim is contractual and the remedy sought is legal, ... [defendants] are entitled to a jury trial on attorney fees under Article I, Section 4 of the Minnesota Constitution.

Id., at 62-63, footnote omitted.

The force of *United Prairie* is that it impliedly invoked the Equal Protection Clause by refusing to treat a contractual claim for attorney’s fees differently from any other contractual, monetary claims. *United Prairie* rejected numerous arguments that such contractual claims for attorney’s fees should be treated differently.

United Prairie rejected the argument that the contractual claim for attorney's fees should be treated differently because it was somehow a claim for *restitution*. *Id.*, at 58 ("The[] purpose [of restitution] is to prevent the defendant's unjust enrichment," whereas here, "an award of attorney fees [to plaintiff] would not require [defendants] to divest themselves of a benefit ..., but would ... compensate [plaintiff] for the loss it incurred").

United Prairie rejected the argument that the contractual claim for attorney's fees should be treated differently because it was somehow a claim for *specific performance*. *Id.*, at 58-59.

United Prairie rejected the argument that the contractual claim for attorney's fees should be treated differently because it was *collateral* to the main action. *Id.*, at 59. It held that treating the claim for attorney's fees differently from other, monetary contract claims runs "contrary to basic contract law principles...." *Ibid.*

[T]he payment of attorney fees ... is a ... contractual obligation of [defendants], no different from [defendants'] obligation to pay accrued interest and principal under the [contracts]. When a party seeks attorney fees under the ... provisions of a contract, the fees are an agreed element of damages available under the contract and are not collateral. ... [T]he promise to pay attorney fees was part of the contract and obligation of the maker.... [L]ike other damages available for breach of contract, payment of the plaintiff's attorney fees reimburses the plaintiff for its loss and serves the purpose of making the plaintiff

whole.... The damages remedy is a money remedy aimed at making good the plaintiff's losses. ... Therefore, ... the [Minnesota] court of appeals was wrong in concluding that [plaintiff's] claim for ... attorney fees was collateral; [plaintiff's] claim for attorney fees derived from ... obligations contained in the [contracts] and was a direct consequence of [defendants'] breach.

Ibid., quotations omitted.

United Prairie rejected the argument that the contractual claim for attorney's fees should be treated differently because of the *practical limitations of juries*. *Id.*, 60 ("the [US] Supreme Court has ... limited the applicability of [this] ... factor to a narrow set of circumstances ... inapplicable here. ... The availability of a constitutionally-guaranteed right to trial by jury does not ... turn on the practical difficulties of its implementation").

United Prairie rejected the argument that the contractual claim for attorney's fees is a claim for an *equitable accounting*. *Id.*, at 61, n. 6.

United Prairie rejected the argument that the contractual claim for attorney's fees is equitable merely because the fees to be awarded should be fair and reasonable. *Id.*, at 61-62.

United Prairie rejected the argument that the contractual claim for attorney's fees is *sui generis*. *Id.*, at 62.

In essence, *United Prairie* conducted an implied Equal-Protection analysis and found that a prevailing party's contractual claim for attorney's fees must be treated just like any other claim for monetary, contractual damages.

Kleidman v. RFF was decided in a manner which conflicts with *United Prairie*. Had the State courts in *Kleidman v. RFF* followed *United Prairie*, *Kleidman* would at least have had the right to a jury trial. California law provides:

In actions for ... money claimed as due upon contract, or as damages for breach of contract, ... an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code.

Code Civ. Proc. § 592. App.45. According to *United Prairie*, a claim for contractual attorney's fees is like any other claim for money due on a contract and so, according to *United Prairie*, RFF's claim for attorney's fees would fall under Code of Civil Procedure § 592.⁹ The State court decisions herein are therefore in conflict with the decision in *United Prairie*.

II. The California courts resolved the questions presented in a way that conflicts with the decision of *McGuire* from the Second Circuit Court of Appeals

In *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2nd Cir. 1993) (*McGuire*), defendants and cross-complainants countersued plaintiff and cross-defendant.¹⁰ *Id.*, at 1308-1309. The cross-action was tried by the jury. *Id.*, at 1309. One of the questions for the

⁹ There is no assertion in the record that a jury was waived or that a reference was ordered.

¹⁰ The caption of *McGuire* may be misleading. The plaintiff and cross-defendant is Richard A. McGuire. *McGuire v. Wilson*, No. 87-8156, 1992 WL 380497, *1 (S.D.N.Y., Dec. 9, 1992).

jury was whether defendants¹¹ were contractually-entitled to recover their attorney's fees from plaintiff in that very cross-action. *Ibid.* The jury answered affirmatively. *Ibid.* However, the jury was never asked to, and never did, determine the amount of such fees. *Id.*, at 1309 ("verdict form did not include a question about the amount of such fees[;] ... jury did not compute the amount of fees defendants were entitled to recover"); *Id.*, at 1313 ("court decided not to ask the jury in question 24 to determine the amount of attorneys' fees"). Indeed, "[d]efendants argue[d] that it would have been impossible for them to prove the amount of attorneys' fees at trial, because that amount was still accruing." *Id.*, at 1312.

McGuire bifurcated the issue of attorney's fees into liability and damages. As to liability, *McGuire* held:

[A]n action to recover attorneys' fees pursuant to a contract presents traditional common-law contract issues which should be submitted to a jury.... [¶¶] ... [D]efendants' counterclaim for attorneys' fees was a claim for a contractual "legal right," and plaintiff had the right to have a jury decide whether defendants should recover attorneys' fees under the agreement.

Id., at 1314, 1315, accord, *AIA Amer., Inc. v. Avid Radiopharmaceuticals*, 866 F.3d 1369, 1372 (Fed. Cir. 2017) (dictum).

(As to the amount of attorney's fees, *McGuire* held, "the subsequent determination of the amount of

¹¹ *McGuire* uses "plaintiff" and "defendants" instead of "cross-defendant" and "cross-complainants" when discussing the cross-action. That terminology is followed here to match *McGuire*.

attorneys' fees owed presents equitable issues of accounting which do not engage a Seventh Amendment right to a jury trial." *Id.*, at 1314.¹²)

Thus, as to the issue of liability regarding contractual attorney's fees, *McGuire* impliedly invoked the Equal Protection Clause by treating that contractual right to attorney's fees exactly the same as all other contractual rights to money.¹³ Had the State courts in *Kleidman v. RFF* followed this holding in *McGuire*, *Kleidman* would at least have had the right to a jury trial on the question of liability, i.e., whether RFF had any rights to attorney's fees at all.

III. This petition poses important federal questions that have not been, but should be, settled by this Court

- 1. A ruling in *Kleidman's* favor would have profound, far-reaching effects throughout federal and state courts nationwide**

The question of whether a prevailing party's contractual claim for attorney's fees can be adjudicated differently from other contractual, monetary claims is of profound significance, reaching all federal courts and most state courts. Similarly, the question of

¹² *United Prairie* criticizes *McGuire's* equitable-accounting argument as "[nothing] more than a bare, conclusory statement," without "expla[nation] or support." *United Prairie*, at 57, n. 3. Other Circuits have followed *McGuire* here. *Ideal Elec. Sec. Co., Inc. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 150 (D.C. Cir. 1997); *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 626-627 (7th Cir. 2000); *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1341-1342 (Fed. Cir. 2013).

¹³ That *McGuire* is a federal case is of no moment when considering the Equal Protection Clause. *Adarand Constructors, Inc. v. Pena*, 515 US 200, 217 (1995).

whether contractual claims for attorney's fees can be adjudicated differently from other claims for attorney's fees is of profound, far-reaching consequence.

Suppose, *arguendo*, that Kleidman is correct in asserting that a prevailing party's claim to contractual attorney's fees must be litigated plenary like all other monetary, contractual claims. Well, then the summary adjudication of contractual attorney's fees must fall by the wayside nationwide. As to the federal courts, Federal Rule of Civil Procedure 54(d)(2) would be deemed unconstitutional insofar as it treats contractual claims for attorney's fees differently from other, contractual, monetary claims. Federal courts would be compelled to plenary adjudicate a prevailing party's claim for contractual attorney's fees (providing rights to discovery, cross-examination and a jury trial).

Likewise most states invoke a summary procedure for determining contractual attorney's fees to the prevailing party. All such summary procedures must be dismantled as unconstitutional if Kleidman's Equal-Protection argument has merit. Indeed, the dissent in *United Prairie* complains, "The majority's decision ... casts Minnesota as an outlier among jurisdictions that have considered the issue. Our court is the only court in the country that recognizes a constitutional right to a jury trial under these circumstances." *United Prairie*, at 67 (Dietzen, J, dissenting, joined by Gildea, CJ). The dissent then cites examples in Florida, Georgia, Mississippi, Missouri, New York and Vermont, in which the state courts treat a prevailing party's claim for contractual attorney's fees differently from other contractual, monetary claims. *Id.*, at 68. The dissent's comments and research support the contention that most states

summarily adjudicate the issue of contractual attorney's fees to the prevailing party.

Thus a ruling in Kleidman's favor (whereby courts are compelled to plenary adjudicate a prevailing party's claim for contractual attorney's fees) would place an immense burden on federal and state courts, as a vast number of summary proceedings would be eliminated and replaced by full-blown, plenary adjudications. Nevertheless, such a result flows from the force of the Equal Protection Clause. These proceedings should never have been summary in the first place. The legislative and judicial branches cannot lighten the courts' workloads by arbitrarily dictating that large classes of disputes will be adjudicated summarily. "[T]he Constitution recognizes higher values than speed and efficiency." *Cleveland Bd. of Ed. v. LaFleur*, 414 US 632, 646-647 (1974). The legislative and judicial branches cannot circumvent Constitutional mandates because of perceived burdens those mandates may impose. *Thermtron Products, Inc. v. Hermansdorfer*, 423 US 336, 344 (1976).

Of course, Kleidman may be wrong. There may be something special about prevailing parties' claims for contractual attorney's fees which distinguishes them from other monetary, contractual claims, and from other actions for attorney's fees. This Court should at least clearly articulate the distinction for the benefit of the legal community.

A similar discussion applies to the distinction between, on the one hand, a prevailing party's claim for contractual attorney's fees, and on the other hand, other claims for attorney's fees, such as claims under the theories of the tort-of-another, legal malpractice, malicious prosecution, and an attorney's

claim against the client to recover payment for services rendered. *supra*, at 12-13.

2. This Court has not addressed the issues presented

This Court has not addressed the questions presented herein. In *Ray Haluch Gravel Co. v. Cent. Pension Fund, etc.* 571 US 177 (2014) (*Ray Haluch*), this Court held that a judgment is final in the sense of 28 USC § 1291 even though the issue of contractual attorney's fees has yet to be determined. *Id.*, at 777, 781 (issue of attorney's fees is "collateral for finality purposes").¹⁴ However, *Ray Haluch* never considers the issue of how the adjudication of the attorney's fees should occur. *United Prairie*, at 62, n. 7 (that the determination of attorney's fees is a "distinct issue" vis-à-vis the underlying claim does not mean it is undeserving of a jury trial). Kleidman is aware of no decision of this Court which squarely addresses the questions presented herein.

3. McGuire's concern — that "the jury would have to keep a running total" — is unfounded because the claim for contractual attorney's fees can be tried separately from the trial of the underlying action

¹⁴ *United Prairie* held that the issue of contractual attorney's fees is not collateral. *Id.*, at 59. But *United Prairie* and *Ray Haluch* are not inconsistent. *United Prairie* held that such fees are not collateral in that they are not "secondary" or "subordinate." ahdictionary.com. *Ray Haluch* held they are collateral in that they are "parallel," "concomitant or accompanying," but distinct from the underlying claim. ahdictionary.com. *United Prairie* and *Ray Haluch* are reconcilable with a jury trial on the issue of a prevailing party's claim to contractual attorney's fees, occurring after the judgment on the underlying action is final under 28 USC § 1291.

McGuire raises the concern that if the jury were to determine the amount of attorney's fees, then it "would have to keep a running total of fees as they accrued" during trial. *McGuire*, at 1316. Not so. The adjudication of contractual attorney's fees to the prevailing party can be tried separately from the underlying action. The first jury tries the underlying lawsuit. The second jury tries the issue of attorney's fees pertaining to the underlying lawsuit. (The two juries can consist of the same members, whereby they hear two distinct trials at two distinct times.) After all, the cause of action of the underlying lawsuit is altogether distinct from the cause of action for contractual attorney's fees. For instance, in *United Prairie*, the first cause of action for non-payment on the loan is completely distinct from the second cause of action for attorney's fees incurred in connection with the first cause of action. The two, distinct causes of action deserve two, distinct, plenary adjudications, including two, distinct jury trials.

If the parties desire to avoid the burdens of such a scenario, they can easily do so with additional language in their contract. But absent such language, the party defending against the second cause of action for contractual attorney's fees should enjoy all the rights that any other defendant enjoys when defending against an action for contractual damages. In particular, if the law provides for a right to a jury trial in a contract action for damages, then the party defending against a claim for contractual attorney's fees likewise deserves the right to trial by jury by virtue of the Equal Protection Clause.

Petitioner, pro se
680 E. Main St., #506
Stamford CT 06901
(971) 217 7819
kleidman11@gmail.com

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