

918 F.Supp.2d 1156  
 (Cite as: **918 F.Supp.2d 1156**)

## H

United States District Court,  
 W.D. Washington,  
 at Seattle.  
 DZ BANK AGDEUTSCHE ZEN-  
 TRAL–GENOSSENSCHAFTBANK, FRANKFURT  
 AM MAIN, Plaintiff,  
 v.  
 CHOICE CASH ADVANCE, LLC, et al., Defend-  
 ants.

Case No. C11–1312JLR.  
 Jan. 14, 2013.

**Background:** Lender brought action against borrow-  
 er, alleging breach of contract and seeking to enforce  
 borrower's obligations under loan agreement. Parties  
 filed motions for summary judgment, and borrower  
 also moved for leave to file second amended answer.

**Holdings:** The District Court, [James L. Robart, J.](#),  
 held that:

- (1) loan agreement did not require lender to provide  
 borrower with notice of default and opportunity to  
 cure;
- (2) borrower offered no evidence to support its as-  
 serted defenses;
- (3) lender was entitled to attorneys' fees award of  
 \$61,450.45; and
- (4) borrower failed to demonstrate good cause re-  
 quired to warrant leave to file second amended an-  
 swer.

Lender's motion granted and borrower's motions  
 denied.

West Headnotes

### [1] Federal Civil Procedure 170A 2534

170A Federal Civil Procedure  
 170AXVII Judgment  
 170AXVII(C) Summary Judgment  
 170AXVII(C)3 Proceedings  
 170Ak2533 Motion  
 170Ak2534 k. By both parties. [Most  
 Cited Cases](#)

### Federal Civil Procedure 170A 2543

170A Federal Civil Procedure  
 170AXVII Judgment  
 170AXVII(C) Summary Judgment  
 170AXVII(C)3 Proceedings  
 170Ak2542 Evidence  
 170Ak2543 k. Presumptions. [Most  
 Cited Cases](#)

On cross–motions for summary judgment, the  
 court evaluates each motion separately, giving the  
 nonmoving party in each instance the benefit of all  
 reasonable inferences. [Fed.Rules Civ.Proc.Rule 56, 28  
 U.S.C.A.](#)

### [2] Bills and Notes 56 395

56 Bills and Notes  
 56IX Presentment, Demand, Notice, and Protest  
 56k393 Necessity of Demand for Payment and  
 Notice of Nonpayment  
 56k395 k. Nature of instrument or obliga-  
 tion. [Most Cited Cases](#)

### Contracts 95 320

95 Contracts  
 95V Performance or Breach  
 95k320 k. Rights and liabilities on defective  
 performance. [Most Cited Cases](#)

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

**Contracts 95**  327(1)

95 Contracts

95VI Actions for Breach

95k327 Conditions Precedent

95k327(1) k. In general. [Most Cited Cases](#)

Under Kansas law, loan agreement documents did not require lender to provide borrower with notice of default and opportunity to cure prior to initiating breach of contract suit to enforce borrower's obligations under loan; promissory note that was expressly incorporated into agreement provided lender with several remedies upon default, including any remedies available under federal or state law, and included borrower's waiver of any right to notice of default, and agreement contained "Interpretation" provision, under which parties expressly agreed that, to extent that agreement's provisions conflicted with those of other loan documents, they were to be interpreted so as to provide lender with greatest possible protection and rights.

**[3] Contracts 95**  147(1)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(1) k. In general. [Most Cited](#)

[Cases](#)

Under Kansas law, the primary rule for interpreting written contracts is to ascertain the parties' intent.

**[4] Contracts 95**  147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of contract.

[Most Cited Cases](#)

Under Kansas law, if the terms of a contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.

**[5] Contracts 95**  143.5

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143.5 k. Construction as a whole. [Most](#)

[Cited Cases](#)

**Contracts 95**  147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of contract.

[Most Cited Cases](#)

Under Kansas law, courts should strive to determine the document's meaning and the parties' intent from within the contract's four corners, and consider, construe, and harmonize the entire instrument without isolating any one particular sentence or provision.

**[6] Contracts 95**  143(1)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143 Application to Contracts in General

95k143(1) k. In general. [Most Cited](#)

[Cases](#)

**Contracts 95**  152

918 F.Supp.2d 1156

(Cite as: **918 F.Supp.2d 1156**)

**95** Contracts

**95II** Construction and Operation

**95II(A)** General Rules of Construction

**95k151** Language of Instrument

**95k152** k. In general. [Most Cited Cases](#)

Under Kansas law, unambiguous contracts are enforced according to their plain, general, and common meaning harmonizing the language therein if possible.

**[7] Contracts 95**  **176(1)**

**95** Contracts

**95II** Construction and Operation

**95II(A)** General Rules of Construction

**95k176** Questions for Jury

**95k176(1)** k. In general. [Most Cited](#)

[Cases](#)

Under Kansas law, the legal effect of a written instrument is a matter of law.

**[8] Contracts 95**  **328(1)**

**95** Contracts

**95VI** Actions for Breach

**95k328** Defenses

**95k328(1)** k. In general. [Most Cited Cases](#)

Borrower offered no evidence to support any element of its asserted defenses of lender's or non-party franchisor's breach of either loan agreement or franchise agreement and fraud in the inducement, precluding those defenses in lender's breach of contract suit to enforce borrower's obligations under loan agreement; borrower offered no evidence that licensor made false statement with respect to either agreement, nor any evidence that borrower relied on any such statement in entering into those agreements, and, even

if franchisor filed for bankruptcy and later breached its obligations under franchise agreement, performance on loan agreement was not contingent on performance on franchise agreement, and lender itself was not subjected to any obligations under franchise agreement.

**[9] Fraud 184**  **3**

**184** Fraud

**184I** Deception Constituting Fraud, and Liability Therefor

**184k2** Elements of Actual Fraud

**184k3** k. In general. [Most Cited Cases](#)

**Fraud 184**  **58(1)**

**184** Fraud

**184II** Actions

**184II(D)** Evidence

**184k58** Weight and Sufficiency

**184k58(1)** k. In general. [Most Cited](#)

[Cases](#)

Under Kansas law, causes of action for fraud and fraudulent inducement require the plaintiff to prove, by clear and convincing evidence, the same five elements: (1) a false statement of material fact; (2) known to be false by the party making it, or made with reckless disregard for the truth; (3) made with the intent to induce the other party into acting upon the statement; (4) upon which the other party justifiably relied; and (5) sustained damage as a direct result of such reliance.

**[10] Costs 102**  **194.32**

**102** Costs

**102VIII** Attorney Fees

**102k194.24** Particular Actions or Proceedings

**102k194.32** k. Contracts. [Most Cited Cases](#)

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

Awarding lender attorneys' fees award of \$61,450.45 was warranted, under Kansas law, in its breach of contract suit to enforce borrower's obligations under loan agreement, based on detailed billing record submitted by lender, and in light of time and labor expended by lender's counsel, difficulty of questions presented in suit, and amount involved and results of obtaining summary judgment.

**[11] Federal Courts 170B 830**

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)4 Discretion of Lower Court

170Bk830 k. Costs, attorney fees and other allowances. [Most Cited Cases](#)

Federal courts apply state law to interpret contractual attorney's fees provisions.

**[12] Costs 102 194.32**

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. [Most Cited Cases](#)

Kansas law permits any credit agreement to provide for the payment of costs, including attorneys' fees. West's [K.S.A. 58-2312](#).

**[13] Costs 102 207**

102 Costs

102IX Taxation

102k207 k. Evidence as to items. [Most Cited Cases](#)

Under Kansas law, an attorneys' fees applicant

bears the burden of documenting the appropriate hours expended in the litigation, and must submit evidence in support of those hours worked.

**[14] Federal Civil Procedure 170A 2737.4**

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2737 Attorney Fees

170Ak2737.4 k. Amount and elements.

[Most Cited Cases](#)

Under the lodestar approach to determining reasonable attorneys' fees, the court first determines a lodestar figure by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate, and the court may then adjust this lodestar calculation by other factors.

**[15] Federal Civil Procedure 170A 2737.4**

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2737 Attorney Fees

170Ak2737.4 k. Amount and elements.

[Most Cited Cases](#)

When determining a reasonable attorneys' fees award under the lodestar approach, the reasonable hourly rate corresponds to the prevailing market rate in the relevant community, considering the experience, skill, and reputation of the attorney in question.

**[16] Federal Civil Procedure 170A 2737.4**

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2737 Attorney Fees

170Ak2737.4 k. Amount and elements.

[Most Cited Cases](#)

918 F.Supp.2d 1156

(Cite as: **918 F.Supp.2d 1156**)

In calculating reasonable attorney fees under the lodestar approach, the court may consider the following factors: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill necessary to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relations with the client, and (12) awards in similar cases.

**[17] Federal Civil Procedure 170A**  **845**

170A Federal Civil Procedure

170AVII Pleadings

170AVII(E) Amendments

170Ak844 Answer

170Ak845 k. Time for amendment.

Most Cited Cases

**Federal Civil Procedure 170A**  **1935.1**

170A Federal Civil Procedure

170AXIV Pre-Trial Conference

170Ak1935 Pretrial Order

170Ak1935.1 k. In general. Most Cited

Cases

More strict standard requiring good cause and judge's consent applied to borrower's motion for leave to file second amended answer in lender's breach of loan agreement suit, rather than more liberal standard permitting court to grant leave when justice so requires, where borrower filed motion after parties had fully briefed their cross-motions for summary judgment, after deadline for amending pleadings had expired, and after discovery cut-off had passed. [Fed.Rules Civ.Proc.Rules 15\(a\)\(2\), 16\(b\)\(4\), 28](#)

U.S.C.A.

**[18] Federal Civil Procedure 170A**  **845**

170A Federal Civil Procedure

170AVII Pleadings

170AVII(E) Amendments

170Ak844 Answer

170Ak845 k. Time for amendment.

Most Cited Cases

**Federal Civil Procedure 170A**  **1935.1**

170A Federal Civil Procedure

170AXIV Pre-Trial Conference

170Ak1935 Pretrial Order

170Ak1935.1 k. In general. Most Cited

Cases

Borrower failed to demonstrate good cause required to warrant leave to file second amended answer in lender's breach of loan agreement suit after parties had fully briefed their cross-motions for summary judgment, after deadline for amending pleadings had expired, and after discovery cut-off had passed; borrower offered no explanation as to why it could not meet deadline for amending pleadings. [Fed.Rules Civ.Proc.Rule 16\(b\), 28 U.S.C.A.](#)

\***1158** [David Alexander Darcy, Michael William Debre, III](#), Askounis & Darcy, PC, Chicago, IL, [Noah Christian Davis](#), In Pacta, Seattle, WA, for Plaintiff.

\***1159** [David D. Hancock](#), Defender of the Accused PLLC, Seattle, WA, for Defendants.

Louis P. Meyer, Edmonds, WA, pro se.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

JAMES L. ROBERT, District Judge.

### I. INTRODUCTION

Before the court are three motions: (1) Defendant Choice Cash Advance, LLC, f/k/a Choice Insurance Agency, LLC's ("Choice Insurance") motion for summary judgment (Dkt. # 41); (2) Plaintiff DZ Bank AG Deutsche Zentral-Genossenschaftsbank, Frankfurt AM Main, New York Branch's ("DZ Bank") cross motion for summary judgment (Dkt. # 45); and (3) Choice Insurance's motion for leave to file a second amended answer (Dkt. # 53). The court has considered the motions, all submissions filed in support and opposition thereto, the balance of the record, and the applicable law. Being fully advised, the court GRANTS DZ Bank's motion for summary judgment and DENIES Choice Insurance's motions for summary judgment and to file a second amended answer.<sup>FN1</sup>

**FN1.** No party has asked for oral argument with respect to any of the three motions before the court, and the court deems oral argument unnecessary.

### II. BACKGROUND

This matter arises out of the failure and subsequent bankruptcy of an insurance agency franchiser and the cascading effects that failure had upon one of its franchisees and others involved in the franchise's financing.

#### A. Creation of Choice Insurance

In 2007, Defendant Louis Meyer created Choice Insurance in preparation for his acquisition of five insurance agencies. (*See Meyer Dep.* (Dkt. # 48-1) at 14:11-18; *Compl.* (Dkt. # 1) ¶ 5; *Am. Ans.* (Dkt. # 27) ¶ 5 (admitting allegations contained within paragraph 5 of complaint).) Mr. Meyer is the sole member of Choice Insurance. (*Id.*) On January 28, 2008, Choice Insurance entered into an agreement acquiring substantially all of the assets of five insurance agencies for the purchase price of \$1,911,235.20. (*Probst Decl.* (Dkt. # 48-3) ¶ 10, Ex. 1.)

#### B. Franchising Agreement with BCC

On January 31, 2008, Choice Insurance entered into a Franchise Agreement with Brooke Credit Corporation ("BCC"), which is not a party to this action. (*See Franchise Agreement* (Dkt. # 50-1).) Under this agreement, BCC promised to provide certain services to Choice Insurance in exchange for various fees and to serve as the "agent of record" for all insurance policies which Choice Insurance sold. (*See id.* ¶¶ 5.1-5.2, 7.1-7.2, 15.) For example, Choice Insurance agreed to pay BCC \$165,000.00 for each franchise location. (*Id.* ¶ 4.1.) Choice Insurance also agreed to pay BCC other additional fees for the services that BCC promised to provide pursuant to the Franchise Agreement. (*Id.* ¶¶ 4.2-4.4.) The Franchise Agreement contains an integration clause, which states in pertinent part that the "Agreement ... fully expresses the entire understanding and agreement between the parties ... with respect to the subject matter..." (*Id.* ¶ 28.1.)

In late 2008, BCC filed for bankruptcy and consequently breached its contractual obligations to Choice Insurance under the Franchise Agreement. (*See Meyer Decl.* (Dkt. # 49-1) ¶¶ 4-5; *see also Choice Resp.* (Dkt. # 49) at 4.) BCC's breach of the Franchise Agreement had a significantly adverse affect on the ability of \*1160 Choice Insurance to operate its business successfully. (*See id.*)

#### C. Financing Agreements with BCC

On the same day that they executed their Franchise Agreement, BCC, as lender, and Choice Insurance, as borrower, also entered into a Promissory Note (known as Promissory Note No. 6779) and an Agreement for Advancement of Loan (collectively, "the Loan Agreement"), in which BCC agreed to loan Choice Insurance \$1,771,715.20 towards Choice Insurance's purchase of the assets of the five insurance agencies referenced above.<sup>FN2</sup> (*Id.* ¶ 11, Ex. 2.) Promissory Note No. 6779 specifically references the "Agreement for Advancement of Loan dated January

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

31, 2008” under the heading “ADDITIONAL TERMS.” (*Id.* Ex. 2 at 1.) Likewise, the Agreement for Advancement of Loan specifically references the “Promissory Note ... in the amount of \$1,771,715.20,” and is expressly “subject to” its “terms and conditions.” (*Id.* at 27 (paragraph one of terms and conditions).) As Choice Insurance has recognized (*see* Choice Mot. at 2–3), Agreement for Advancement of Loan contains an integration clause, which states that it “represents the entire agreement between the parties hereto and shall supersede and take precedence over any and all prior agreements, arrangements or understandings between the parties related to the subject matter thereof.” (Probst Decl. Ex. 2 at 36 (paragraph 37).)

**FN2.** Mr. Meyer wrote an additional check of approximately \$190,000.00 for the down payment needed to purchase the assets of the five agencies. (Meyer Dep. at 63:20–64:4.)

#### D. Terms of the Loan Agreement

Under Promissory Note No. 6779, Choice Insurance's failure to make a payment on time is an event of default. (Probst Decl. Ex. 2 (Note) at 2 (Default Section at # 1) (“I will be in default if ... I fail to make a payment on time or in the amount due.”).) Additionally, Choice Insurance's failure to remain solvent is an event of default. (*Id.* at 2 (Default Section at # 5) (I will be in default if ... I ... become insolvent (either because my liabilities exceed my assets or I am unable to pay to pay my debts as they become due)....”).)

Under Promissory Note No. 6779, upon an event of default, the lender, who in this case is DZ Bank as the assignee of BCC, may: (1) accelerate that balance due under Promissory Note No. 6779, (2) exercise set-off rights, (3) demand additional collateral, (4) refuse to make additional advances to Choice Insurance, and/or (5) use any remedy available under state or federal law. (*Id.* at 2 (Remedies Section).) Under the section entitled “WAIVER,” Choice Insurance

expressly waives its rights to require the lender to: (1) demand payment of amounts due (presentment); (2) obtain official certification of nonpayment (protest); and/or (3) give notice that amounts due have not been paid (notice of dishonor). (*Id.* at 2 (Waiver Section).)

With regard to default, the Agreement for Advancement of Loan provides that DZ Bank “may upon written notice to [Choice Insurance], declare [Choice Insurance] to be in default if ... [Choice Insurance] fails to fulfill or perform any term, condition or obligation set forth in any Loan Document, including without limitations [Choice Insurance's] failure to make payments when due in accordance with the terms of the Note.” (*Id.* Ex. 2 (Agreement for Advancement of Loan) ¶ 13.) The Agreement for Advancement of Loan also lists a variety of remedies and effects of default which are expressly “[i]n addition to any remedy or right [DZ Bank] has under any Loan Document, the Uniform Commercial Code or other law, and in addition to any effect of default set forth in \*1161 any other Loan Document, the Uniform Commercial Code or other law....” (*Id.* Ex. 2 ¶ 14.)

With regard to the interpretation of the Note, the Agreement for Advancement of Loan states:

**Interpretation.** Provisions in the Loan Document are intended to be cumulative. To the extent that the provisions of this Agreement conflict with those of any other Loan Document, the provision of which provides [DZ Bank] most protection and grants [DZ Bank] the greatest rights shall control. Likewise, if the provisions of any Loan Document conflict with those of any other Loan Document, the provision which provides [DZ Bank] most protection and grants [DZ Bank] the greatest rights shall control.

(*Id.* Ex. 2 ¶ 38.)

#### E. Security for the Note

To secure Choice Insurance's obligations under

918 F.Supp.2d 1156

(Cite as: **918 F.Supp.2d 1156**)

the Note, Choice Insurance granted BCC a blanket security interest in all of Choice Insurance's assets pursuant to a commercial security agreement. (Probst Decl. ¶ 13, Ex. 4.) The security interest included the assets of the five new agencies that Choice Insurance acquired in the January 28, 2008, purchase agreement. (*Id.*) BCC properly perfected its security interest in the collateral by filing a Uniform Commercial Code (“UCC”) Financing Statement with the Washington Secretary of State. (*Id.* ¶ 14, Ex. 5.) In addition, Mr. Meyer and his wife, Defendant Lynn Meyer, each unconditionally guaranteed Choice Insurance's obligations under the Note pursuant to a Guaranty. (*Id.* ¶ 12, Ex. 3.) Pursuant to the Note, commercial security agreement, personal guaranties, and other loan documents executed by Choice Insurance, BCC disbursed \$1,771,715.20 towards Choice Insurance's purchase of the assets of the five agencies. (*Id.* ¶ 15.)

#### **F. Assignment of Note to BCF**

BCC assigned the Note and personal guarantees to Brooke Credit Funding, LLC (“BCF”), and BCF pledged the Note and personal guaranties to its lenders as security. (*Id.* ¶ 17.) BCF's senior secured creditors are DZ Bank and Autobahn Funding Company, LLC (“Autobahn”). (*Id.*) By written agreement, Autobahn appointed DZ Bank as its agent and authorized DZ Bank to enforce its rights under the Note and personal guaranties in DZ Bank's name. (*Id.*)

#### **G. BCF's Default on its Obligations to DZ Bank**

BCF defaulted on its obligations to DZ Bank. (*Id.*) On October 30, 2008, DZ Bank and BCF entered into a Surrender of Collateral, Consent to Strict Foreclosure, Release and Acknowledgment Agreement (the “Surrender of Collateral”). (*Id.* ¶¶ 17–20, Ex. 6.) Under Section 1.3.1 of the Surrender of Collateral, DZ Bank has full ownership of the Loan and personal guaranties. (*Id.* ¶ 19, Ex. 6.) On October 31, 2008, DZ Bank and BCF entered into an Omnibus Assignment Agreement whereby BCC further confirmed that DZ Bank has full ownership of BCF's rights as BCC's assignee under the Note and personal guaranties. (*Id.* ¶

20, Ex. 7.)

#### **H. Choice Insurance's Acknowledgment of its Obligations to DZ Bank**

In conjunction with the transfer of the Note and personal guaranties from BCF to DZ Bank, Choice Insurance executed an Acknowledgment and Agreement, under which Choice Insurance affirmed its obligations to DZ Bank under the Note (the “Acknowledgement”). (*Id.* ¶ 21, Ex. 8.) Specifically, the Acknowledgement stated that

**\*1162** [Choice Insurance] hereby confirm[s] [its] obligation to repay the Loan, together with all interest, fees and other amounts specified in the documents and agreements relating to the Loan ..., in accordance with the terms thereof, without condition or deduction for any counterclaim, defense, recoupment or setoff.

(*Id.* Ex. 8 at 1 (paragraph (i)).) The Acknowledgement also recites that it “is a ‘Loan Document’ and a breach of our obligations hereunder will constitute an ‘Event of Default’ under the Loan.” Choice Insurance has admitted executing the Acknowledgement. (*See* Dkt. # 45–5 (attaching Choice Insurance's responses to requests for admission) at 3, 32, 34.)

#### **I. Multiple Forbearance Agreements Between DZ Bank and Choice Insurance**

On March 10, 2009, Choice Insurance and DZ Bank entered into a forbearance agreement under which DZ Bank agreed to (1) reduce the principal balance of the Note by 15% (to \$1,524,219.66), and (2) require only interest payments for a period of six months—from May 15, 2009, to October 15, 2009 (the “March 2009 Forbearance Agreement”). (*Id.* ¶ 22, Ex. 9.) Choice Insurance made payments to DZ Bank totaling \$52,119.57 under the March 2009 Forbearance Agreement. (*Id.*)

On October 19, 2009, Choice Insurance and DZ

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

Bank entered into a second forbearance agreement under which DZ Bank agreed to extend Choice Insurance's interest-only payments by an additional two months—from November 15, 2009, to December 15, 2009 (the “October 2009 Forbearance Agreement”). (*Id.* ¶ 23, Ex. 10.) Choice Insurance made payments to DZ Bank totaling \$17,381.95 under the December 2009 Forbearance Agreement. (*Id.*) From January 2010 until May 2010, Choice Insurance resumed making full principal and interest payments under the Note by paying DZ Bank a total of \$73,308.50. (*Id.* ¶ 24.)

On May 19, 2010, Choice Insurance and DZ Bank entered into a third forbearance agreement under which DZ Bank agreed to accept reduced payment of \$3,000.00 in principal, plus accrued interest, for three months, beginning June 15, 2010, through August 15, 2010 (the “May 2010 Forbearance Agreement”). (*Id.* ¶ 25, Ex. 11.) Choice Insurance made payments to DZ Bank totaling \$29,807.28 under the May 2010 Forbearance Agreement. (*Id.*) From September 2010 until January 2011, Choice Insurance resumed making full principal and interest payments under the Note by paying DZ Bank a total of \$73,941.30. (*Id.* ¶ 26.)

In each of the foregoing forbearance agreements, Choice Insurance expressly acknowledged:

... [O]n November 4, 2008, DZ Bank ... foreclosed on all of the franchise loans ... previously pledged to DZ Bank by [BCC]. DZ Bank is the owner of [Choice Insurance's] loan and all notes that [Choice Insurance] executed in connection with the loan (collectively, the “Note”). DZ Bank is in possession of the Note, which gives it priority over any other claims regarding to [sic] payments of principal and interest due under the Loan Agreement.

(*Id.* Exs. 9, 10, 11.)

## J. Choice Insurance's Failure to Make Payments

### Required under the Loan Agreement

Choice Insurance failed to make the payment due on the Loan Agreement on February 15, 2011. (*Id.* ¶ 27.) On February 16, 2011, Oak Street Financing, LLC (“Oak Street”), the company serving the Loan Agreement on behalf of DZ Bank, inquired as to the status of the delinquent payment. (*Id.* ¶ 28, Ex. 12.) Mr. Meyer \*1163 replied by stating that Choice Insurance “can't make the payment.” (*Id.* ¶ 28, Ex. 12.) On February 21, 2011, Oak Street asked Mr. Meyer to elaborate as to why Choice Insurance could not make the February 11, 2011 payment. (*Id.* ¶ 29, Ex. 13.) Later that day, Mr. Meyer responded, “I don't have the funds to pay and all my credit cards are maxed out, so I can't make the payment.” (*Id.*)

On March 23, 2011, Choice Insurance and DZ Bank entered into a fourth forbearance agreement under which Choice Insurance would resume paying reduced payments of \$3,000.00 in principal plus accrued interest on April 15, 2011, and continue through to August 15, 2011, with the outstanding payments due upon maturity of the Note (the “March 2011 Forbearance Agreement”). (*Id.* ¶ 33, Ex. 17.) Choice Insurance failed to make any payments to DZ Bank under the March 2011 Forbearance Agreement or thereafter. (*Id.* ¶ 35.)<sup>FN3</sup>

**FN3.** Choice Insurance once again expressly acknowledged that DZ Bank “is the owner of [Choice Insurance's] loan and all notes that [Choice Insurance] executed in connection with the loan,” and that DZ Bank “is in possession of the Note, which gives it priority over any claims regarding to [sic] payments of principal and interest due under the Loan Agreement.” (Probst Decl. Ex. 17.)

On March 1, 2011, Mr. Meyer further elaborated on Choice Insurance's inability to make payments on the Loan Agreement by stating that he and Ms. Meyer's personal income had dropped from \$918,000.00 in 2008 to \$390,000.00 in 2010, and that he and Ms.

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

Meyer “have no money to pay the loan.” (*Id.* ¶ 30, Ex. 14.) On March 1, 2011, DZ Bank also issued a loan invoice to Choice Insurance showing that Choice Insurance was delinquent in the amount of \$14,800.96 for the February 2011 payment, and that another \$14,792.49 was due by March 15, 2011. (*Id.* ¶ 31, Ex. 15.)

On March 11, 2011, Oak Street emailed Mr. Meyer and inquired about the March 2011 payment. (*Id.* ¶ 32, Ex. 16.) Later that day, Mr. Meyer responded by stating: “No change in my situation as of yet. Tell Bank I won't be able to make the payment.” (*Id.*) Choice Insurance has admitted that it failed to make payments as required under the Promissory Note. (*See* Dkt. # 45–5 (attaching Choice Insurance's responses to requests for admission) at 5, 32, 34.)

#### K. Procedural Posture of the Litigation

On August 9, 2011, over six months after Choice Insurance made its last payment under the Note, DZ Bank filed its complaint in this matter.<sup>FN4</sup> (*See* Compl.) On September 2, 2011, Choice Insurance filed an answer to the complaint. (Ans.(Dkt. # 12).) On January 3, 2012, the court entered an order granting Choice Insurance's motion to file an amended answer. (1/3/12 Order (Dkt. # 21) at 6.) Choice Insurance filed its amended answer on January 6, 2012. (1st Am. Ans. (Dkt. # 27).)

**FN4.** Since the lawsuit was filed, Choice Insurance has made no attempt to make any payments under the Note. (*See* Meyer Rule 30(b)(6) Dep. (Dkt. # 48–2) at 16:1–4.)

On February 9, 2012, the court entered a scheduling order setting the trial date for March 4, 2013, the deadline for amended pleadings on September 5, 2012, the discovery cut off on November 5, 2012, and the deadline for dispositive motions on December 4, 2012. (Min. Ord. (Dkt. # 30).)

On July 27, 2012, Choice Insurance filed a motion for summary judgment. In its motion, Choice Insurance asserts that DZ Bank failed to abide by an alleged contractual requirement to provide Choice Insurance with written notice of default, and therefore, DZ Bank's complaint should be dismissed without prejudice to refiling \*1164 once it has complied with those notice requirements. (*See generally* Choice Mot. (Dkt. # 41).) On October 18, 2012, DZ Bank filed its cross motion for summary judgment asserting that this case is a straightforward breach of contract case based on Choice Insurance's admitted failure to make payments on the Note as agreed. (*See generally* DZ Bank Mot. (Dkt. # 45).) In response to DZ Bank's motion, Choice Insurance asserts that the Note is not negotiable, and it is therefore entitled to assert as a defense to payment of the loan BCC's failure to perform under the Franchise Agreement. (Choice Resp. (Dkt. # 49) at 11–13.)

Finally, on November 12, 2012, after the briefing on the cross motions for summary judgment was complete, Choice Insurance filed a motion for leave to file a second amended answer. (Mot. to Am. (Dkt. # 53).) Choice seeks to amend its answer to include a defense of economic duress and to assert certain counterclaims against DZ Bank. (*Id.* at 2.)

### III. ANALYSIS

#### A. Summary Judgment Standards

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Fed.R.Civ.P.* 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir.2007). The moving party bears the initial burden of showing there is no genuine issue of material fact and that he or she is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. If the moving party meets his or her burden, then the

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

non-moving party “must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of his case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477 F.3d at 658.

[1] Here, cross-motions for summary judgment are at issue. The court “evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences.” *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 790–91 (9th Cir.2006) (citations omitted); see also *Friends of Columbia Gorge, Inc. v. Schafer*, 624 F.Supp.2d 1253, 1263 (D.Or.2008).

#### **B. Choice Insurance's Motion for Summary Judgment**

[2] Choice Insurance asserts that it is entitled to summary judgment and a dismissal of DZ Bank's complaint without prejudice based solely on the fact that DZ Bank did not provide Choice Insurance written notice of default, along with an opportunity to cure the default, prior to filing its lawsuit. (See generally Choice Mot.) Choice Insurance bases this argument solely on paragraph 13 of the Agreement for the Advancement of Loan. (Choice Mot. at 3.) As noted above, paragraph 13 states that DZ Bank “may upon written notice to Borrower [Choice Insurance], declare Borrower to be in default” under certain delineated circumstances, “including without limitations Borrower's failure to make payments when due in accordance with the terms of the Note.” (Probst Decl. Ex. 2 (Agreement for Advancement of Loan) ¶ 13 (italics added).) Choice Insurance asserts that because DZ Bank did not provide it with formal written notice of default prior to filing suit, its complaint must now be dismissed without prejudice to re-filing once it has complied with the notice provisions of paragraph 13. (Choice Mot. at 6–7.)

[3][4][5][6][7] The parties agree that Kansas law applies to their dispute based on a \*1165 choice-of-law provision contained within the Agree-

ment for Advancement of Loan. (Choice Mot. at 5, n. 2 (citing paragraph 39); DZ Resp. (Dkt. # 48) at 13 (citing Probst Decl. Ex. 2); see Choice Resp. (Dkt. # 49) at 6, n. 4 (“Defendant agrees with Plaintiff that this controversy is governed by the substantive law of Kansas State.”).) Under Kansas law, “[t]he primary rule for interpreting written contracts is to ascertain the parties' intent.” *Osterhaus v. Toth*, 291 Kan. 759, 249 P.3d 888, 896 (2011). “If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.” *Id.* Kansas courts “strive to determine the document's meaning and the parties' intent from within [the contract's] four corners,” and “consider, construe, and harmonize the entire instrument without isolating any one particular sentence or provision.” *Cent. Natural Res. v. Davis Operating Co.*, 288 Kan. 234, 201 P.3d 680, 687 (2009). “Unambiguous contracts are enforced according to their plain, general, and common meaning ... harmonizing the language therein if possible.” *Hall v. JFW, Inc.*, 20 Kan.App.2d 845, 893 P.2d 837, 840 (1995). The legal effect of a written instrument is a matter of law. *Osterhaus*, 249 P.3d at 896; *Levin v. Maw Oil & Gas*, 290 Kan. 928, 234 P.3d 805, 814 (2010).

The trouble with Choice Insurance's position, which relies entirely upon one provision contained within the Agreement for the Advancement of Loan, is that it entirely ignores other provisions of the contract and renders them meaningless. It fails to “harmonize the entire instrument without isolating any one particular ... provision.” See *Cent. Natural Res.*, 201 P.3d at 687. As described above, the Promissory Note which is expressly incorporated into the Agreement for Advancement of Loan (and vice versa) provides DZ Bank with remedies upon default that do not require prior notice to Choice Insurance. (Probst Decl. Ex. 2 at 2 (Remedies section).) Those remedies include, but are not limited to, demand for the immediate payment of all principal, unpaid accrued interest, and other accrued charges, as well as any remedy under federal or state law. (*Id.*) Further, under the

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

Promissory Note, Choice Insurance has expressly waived any right to notice of default, stating that it “will not require [DZ Bank] to ... give notice that amounts due have not been paid...” (*Id.*)

Most importantly, the Agreement for the Advancement of Loan contains an “Interpretation” provision under which the parties expressly agreed that “[t]o the extent that the provisions of [the Agreement for the Advancement of Loan] conflict with those of any other Loan Document [which would include the Promissory Note], the provision which provides [DZ Bank] most protection and grants [DZ Bank] the greatest rights shall control.” (*Id.* at 36–37 (paragraph 38).) Thus, when read together within the four corners of their agreement, the material terms of the parties’ Loan Agreement are clear and unambiguous. Although DZ Bank may provide Choice Insurance with notice of default prior to exercising certain remedies, it is not required to do so and may instead rely upon other remedies also described in the parties’ agreement. In this way, all of the provisions of the parties’ agreement have meaning and can be appropriately harmonized under Kansas law. The court, therefore, concludes that the Loan Agreement does not require that DZ Bank provide notice of default to Choice Insurance prior to initiating this action and, accordingly, denies Choice Insurance’s motion for summary judgment.

### C. DZ Bank’s Motion for Summary Judgment

[8] Following the filing of Choice Insurance’s motion for summary judgment, \*1166 DZ Bank cross moved for summary judgment.<sup>FN5</sup> (*See generally* DZ Bank Mot. (Dkt. # 45).) DZ Bank seeks summary judgment with respect to its claim that Choice Insurance has defaulted on the parties’ Loan Agreement and is in breach of contract. As a result of Choice Insurance’s default and breach, DZ Bank asserts that it is entitled to a judgment against Choice Insurance for \$1,474,564.53 in principal, \$174,454.95 in interest, and \$61,450.45 in attorneys’ fees and costs, for a total judgment of \$1,710,469.93. (*See* DZ Mot. at 18–19.)

**FN5.** Individual Defendants Louis and Lynn Meyer have filed for bankruptcy and therefore are not subjects of DZ Bank’s motion for summary judgment. (*See* DZ Bank Mot. (Dkt. # 45) at 2, n. 1.)

Although Choice Insurance repeatedly baldly asserts that DZ Bank has breached its obligations (*see, e.g.*, Choice Resp. at 11), it has presented no evidence that either BCC or DZ Bank ever breached the Loan Agreement.<sup>FN6</sup> Indeed, the undisputed evidence before the court is that BCC fully performed its obligations under the Loan Agreement by disbursing \$1,771,715.20 toward Choice Insurance’s purchase of the assets of the five insurance agencies. (Probst Decl. ¶ 15.) Further, there is no dispute that Choice Insurance was obligated under the Loan Agreement to repay the funds extended pursuant to the terms of the contract (*see* Choice Resp. (Dkt. # 49) at 3 (“Having received this loan of funds, [Choice Insurance] was obligated to repay the funds at a specified rate of interest.”)), but failed to do so. As delineated above, DZ Bank has submitted competent evidence that beginning on February 15, 2011, Choice Insurance failed to make the payments required under the Loan Agreement and has made no payments since that time. (*See supra* § II.J.) Indeed, Choice Insurance has admitted that it failed to make payments as required under the Promissory Note. (*See* Dkt. # 45–5 (attaching Choice Insurance’s responses to requests for admission) at 5, 32, 34.)

**FN6.** The court has previously disposed of Choice Insurance’s assertion that DZ Bank breached the Loan Agreement by failing to provide written notice of default. (*See supra* § III.B.)

Finally, there is no genuine issue of material fact with respect to DZ Bank’s present ownership of the Loan Agreement. There is undisputed evidence that

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

BCC assigned the Loan Agreement to DZ Bank. (Probst Decl. ¶¶ 17–20, Exs. 6–7.) In addition, as noted above, Choice Insurance confirmed on at least four occasions following DZ Bank's acquisition of the loan that “DZ Bank is the owner of [Choice Insurance's] loan and all notes the [Choice Insurance] executed in connection with the loan (collectively the Note),” and that “DZ Bank is in possession of the Note.” (See Probst Decl. Exs. 9, 10, 11, and 17.) Thus, unless Choice Insurance can raise a genuine issue of material fact with respect to some defense for failing to make the required payments under the Loan Agreement, DZ Bank has satisfied its burden and is entitled to summary judgment on these facts.

In response, Choice Insurance asserts that the Promissory Note in possession of DZ Bank is not a negotiable instrument, and Choice Insurance is therefore entitled to raise any defense that it might have had against BCC with respect to payment of the Loan Agreement. (Choice Resp. (Dkt. # 49) at 6–11.) Even assuming this were true, Choice Insurance cannot escape the entry of summary judgment here. It is not enough at the summary judgment stage for Choice Insurance simply to assert that it is entitled to raise defenses that it might have had against BCC. To avoid the entry of summary judgment, Choice Insurance also must demonstrate \*1167 that there is a genuine issue of material fact with respect to such a defense warranting a trial. Accordingly, the burden shifts to Choice Insurance to present some evidence establishing a genuine issue of material fact with respect to some defense regarding the Loan Agreement that would justify its failure to make the required payments.

[9] Choice Insurance asserts that it is entitled to raise as defenses to DZ Bank's lawsuit any claims it might have against BCC for breach of the Franchise Agreement or fraud in the inducement with respect to either the Loan Agreement or the Franchise Agreement. (See Choice Resp. at 4, 11.) The court will address the fraud issue first. Under Kansas law, causes of

action for fraud and fraudulent inducement require the plaintiff to prove, by clear and convincing evidence <sup>FN7</sup>, the same five elements: (1) a false statement of material fact; (2) known to be false by the party making it, or made with reckless disregard for the truth; (3) made with the intent to induce the other party into acting upon the statement; (4) upon which the other party justifiably relied; and (5) sustained damage as a direct result of such reliance. See *Bomhoff v. Nelnet Loan Services, Inc.*, 279 Kan. 415, 109 P.3d 1241, 1246 (2005) (citation omitted); *Newcastle Homes, LLC v. Thye*, 44 Kan.App.2d 774, 241 P.3d 988, 998 (2010).

FN7. See *Alires v. McGehee*, 277 Kan. 398, 85 P.3d 1191, 1195 (2004).

Choice Insurance has submitted no evidence with respect to any of the foregoing elements of fraud in the inducement on the part of BCC. The only support that Choice Insurance provides is a Memorandum and Order from United States District Court for the District of Kansas entering a final judgment upon a consent decree between the Security and Exchange Commission (“SEC”) and former senior management of BCC and other entities. (Choice Resp. at 4, Ex. B.) In the enforcement action, the SEC alleged “massive financial fraud” against the senior management of BCC. (*Id.* Ex. B at 1.) Nevertheless, this decision from the District of Kansas does not raise a genuine issue of fact with respect to fraud or fraud in the inducement on the part of BCC in this matter. To do so, Choice Insurance would have to provide at least some evidence with respect to the elements of fraud listed above. Yet, there is no such evidence—no evidence that BCC made a false statement with respect to either the Loan Agreement or the Franchise Agreement and no evidence that Choice Insurance relied on any such statement in entering into those agreements. Although fraud may have occurred here, it is simply not enough at this stage of the proceedings for Choice Insurance to rely solely on its pleadings without some evidence in support of its allegations.

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

The only evidence before the court with respect to breach of the Franchise Agreement is the testimony of Mr. Meyer that BCC filed for bankruptcy and subsequently breached its obligations. (11/5/12 Meyer Decl. (Dkt. # 49-1) ¶¶ 3-5.) Even assuming this is so (and the court has no reason to doubt it), this fact does not entitle Choice Insurance to avoid DZ Bank's motion for summary judgment. Although the Franchise Agreement and the Loan Agreement were executed on the same day, there is no evidence that performance of one agreement was contingent upon performance of the other. Specifically, there is no evidence that Choice Insurance's performance of the Loan Agreement was subject to BCC's performance of the Franchise Agreement. As the court describes above, the two contracts are separate. Each contains separate promises and separate consideration, and significantly, each contains its own integration \*1168 clause. (*See supra* §§ II.B., II. C.) Finally, Choice Insurance has presented no evidence subjecting DZ Bank to the obligations assumed by BCC in the Franchise Agreement or demonstrating that DZ Bank has any interest in the Franchise Agreement.<sup>FN8</sup> The court concludes that there is no genuine issue of material fact supporting Choice Insurance's position that BCC's breach of the Franchise Agreement provides a defense with respect to its breach of the Loan Agreement. Accordingly, the court grants DZ Bank's motion for summary judgment with respect to Choice Insurance's default on the Loan Agreement.

**FN8.** Citing to [K.S.A. § 60-213](#), Choice Insurance attempts to argue that Kansas law prevents DZ Bank from bringing this action because “an assignment cannot defeat an aggrieved party's claim against the person who assigned the contractual rights and duties.” (Choice Resp. at 10.) Not only does Choice Insurance quote a former version of [K.S.A. § 60-213](#), but it misconstrues the provision as well. [K.S.A. § 60-213](#) is a provision of the Kansas Code of Civil Procedure

relating to compulsory counterclaims and cross-claims. It governs the obligations of defendants to bring compulsory counterclaims and cross-claims. It does not, in any way, prevent DZ Bank from bringing its claim against Choice Insurance for default, even if DZ Bank's claim is related to Choice Insurance's claims against BCC. The obligation to join the claims, if any, would fall upon Choice Insurance. Although Choice Insurance may have a right to assert any defenses with respect to the Loan Agreement that existed prior to the assignment in this lawsuit, as discussed above, it has not provided evidence of any such defense. To the extent that Choice Insurance believes it has a claim for breach of the Franchise Agreement against BCC, it could have moved to bring BCC into this lawsuit as a third-party defendant. It did not do so, and has not presented any evidence that DZ Bank has any responsibility with respect to the Franchise Agreement. Accordingly, any issues with respect to breach of that agreement are not before this court.

#### **D. DZ Bank's Motion for Attorneys' Fees**

[10] The Promissory Note provides as follows:

[Choice Insurance] agree[s] to pay all costs of collection, replevin or any other similar type of cost if [Choice Insurance is] in default. In addition, if [DZ Bank] hire[s] an attorney to collect this note, [Choice Insurance] also agree[s] to pay any fee [DZ Bank] incur[s] with such attorney plus court costs (except where prohibited by law).

(Probst Decl. Ex. 2 at 2 (Collection Costs and Attorney's Fees section).) DZ Bank seeks a total of \$56,673.00 in attorneys' fees and \$4,777.45 in costs (for a total of \$61,450.45) that it expended pursuing this matter against Choice Insurance. (*See Darcy Decl.* (Dkt. # 48-6) ¶¶ 4-7.)<sup>FN9</sup>

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

**FN9.** Choice Insurance did not provide any response or opposition to DZ Bank's request for attorneys' fees and costs in its opposition brief. (*See generally* Choice Resp.) When a party fails to respond, the court may consider such failure as an admission that the opposing party's position has merit. *See* Local Rules W.D. Wash, CR 7(b)(2).

[11][12] Federal courts apply state law to interpret contractual attorney's fees provisions. *See Resolution Trust Corp. v. Midwest Fed. Sav. Bank*, 36 F.3d 785, 800 (9th Cir.1993). Kansas law permits any note to "provide for the payment of reasonable costs of collection, including, but not limited to, court costs, [and] attorney fees..." *See* K.S.A. § 58-2312. Accordingly, DZ Bank is entitled to an award of its reasonable attorneys' fees and costs here.

[13][14] The court turns to the issue of whether the fees incurred are reasonable. "The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours \*1169 worked." *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir.2007). The court calculates the fee award by applying the lodestar method. *Id.* at 933. Under this approach, the court first determines a lodestar figure by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. *See id.* The court "may then adjust this lodestar calculation by other factors." *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989).

[15] The reasonable hourly rate corresponds to the prevailing market rate in the relevant community, considering the experience, skill, and reputation of the attorney in question. *Chalmers v. City of L.A.*, 796 F.2d 1205, 1210 (9th Cir.1986) *amended on other grounds*, 808 F.2d 1373 (1987). DZ Bank has submitted an affidavit from one of its attorneys, Alex

Darcy, briefly describing the qualifications and experience of the individuals who worked on the case. (Darcy Decl. ¶ 4.) Choice Insurance has not objected to the hourly rates of these attorneys. Given the lack of objections by Choice Insurance, and the testimony that the rates charged "are within the normal standards of the legal community for the type of services performed" (*id.* ¶ 8), the court finds that the rates DZ Bank's attorneys charged are reasonable.

[16] In calculating reasonable attorney fees, the court may also consider the following factors: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill necessary to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relations with the client, and (12) awards in similar cases. *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1341-42 (9th Cir.1986) (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir.1975)). The court need not apply every factor in every case, but rather only those factors that are relevant to the particular case. *See Kerr*, 526 F.2d at 70; *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 838 (9th Cir.1982).

DZ Bank submitted a detailed billing record with respect to this matter. (Darcy Decl. Ex. 1.) The court has reviewed this record with the foregoing factors in mind. The factors that the court finds to be particularly relevant to this case include the time and labor involved, the difficulty of the questions, and the amount involved and results obtained. Based on these factors, the court finds that the amount of attorneys' fees and costs requested by DZ Bank is reasonable. Accordingly, the court grants DZ Bank's motion for an award of attorneys' fees and costs in this matter in a

918 F.Supp.2d 1156

(Cite as: 918 F.Supp.2d 1156)

total amount of \$61,450.45.

### E. Choice Insurance's Motion for Leave to File a Second Amended Answer and Counterclaims

[17] On November 12, 2012, after the parties had fully briefed their cross motions for summary judgment, after the September 5, 2012, deadline for amending pleadings had expired (*see* Min. Ord.), and after the November 5, 2012, discovery cut-off had passed (*see id.*), Choice Insurance filed a motion for leave to file a second amended answer. Choice Insurance's motion includes a request to amend its answer to include a defense of economic duress and certain counterclaims against DZ Bank. (*See* Mot. to Am. at 2)

Choice Insurance asserts that the court should grant its motion pursuant to the \*1170 liberal standard established in [Federal Rule of Civil Procedure 15\(a\)\(2\)](#), which states that a “court should freely give leave [to amend a pleading] when justice so requires.” (Mot. to Am. at 3 (quoting [Fed.R.Civ.P. 15\(a\)\(2\)](#))). Due to the procedural posture of this case, however, this is not the standard that the court applies here. [Rule 16](#) provides that once the court enters a scheduling order it “may be modified only for good cause and with the judge’s consent.” [Fed.R.Civ.P. 16\(b\)\(4\)](#). Thus, the “good cause” standard of [Rule 16](#) governs Choice Insurance’s motion to amend and not the more liberal [Rule 15](#) standard. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir.1992) (“Once the district court had filed a pretrial scheduling order pursuant to [Federal Rule of Civil Procedure 16](#) which established a timetable for amending pleadings that rule’s standards controlled.”).

The Ninth Circuit explained the “good cause” standard as follows:

[Rule 16\(b\)](#)’s “good cause” standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pre-

trial schedule “if it cannot reasonably be met despite the diligence of the party seeking the extension.” Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party’s reasons for seeking modification. If that party was not diligent, the inquiry should end.

*Id.* at 609 (citations omitted); *see also Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir.2002).

[18] Choice Insurance has not demonstrated good cause in support of its motion to amend at this late date as required by [Rule 16\(b\)](#). Specifically, Choice Insurance fails to explain why it could not meet the September 5, 2012, deadline through reasonable diligence. The alleged conduct about which Choice Insurance complains, and which forms the basis for its defense of economic defense and the counterclaims, occurred in 2008. In any event, Choice Insurance has provided no explanation as to why it could not have amended its answer earlier. (*See generally* Mot. to Am.) As the Ninth Circuit teaches, absent a showing of diligence, “the inquiry should end” and the court need inquire no further. *Id.* Choice Insurance’s failure to demonstrate reasonable diligence requires the court to deny the motion to amend. In addition, the court is mindful that Choice Insurance seeks to amend on the brink of trial and after the deadline for filing dispositive motions. These considerations weigh against granting the motion to amend. Therefore, the court denies Choice Insurance’s motion to amend.

### IV. CONCLUSION

Based on the foregoing, the court DENIES Choice Insurance’s motion for summary judgment (Dkt. # 41) and its motion for leave to amend its first amended answer (Dkt. # 53). The court GRANTS DZ Bank’s motion for summary judgment (Dkt. # 45), and

918 F.Supp.2d 1156

**(Cite as: 918 F.Supp.2d 1156)**

will enter judgment against Choice Insurance and in favor of DZ Bank for \$1,474,564.53 in principal, \$174,454.95 in interest, and \$61,450.45 in attorneys' fees and costs, for a total judgment of \$1,710,469.93.

W.D.Wash.,2013.

DZ Bank AG Deutsche Zentral-Genossenschaftsbank,  
Frankfurt AM Main v. Choice Cash Advance, LLC  
918 F.Supp.2d 1156

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