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8 UNITED STATES BANKRUPTCY COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 OAKLAND DIVISION

11 In re	Case No. 04-41044-LT
12 QMECT, INC.,	Chapter 7
13 Debtor.	Case No. 04-46443-LT
14 In re	Chapter 11
15 FRED AND LINDA ANN KOELLING,	Adv. No. 04-4190
16 Debtor.	(Consol. with Adv Proc. Nos. 04-4365 and 04-4366)
17 QMECT, INC.,	BURLINGAME CAPITAL PARTNERS II,
18 Plaintiff,	L.P.'S POST-HEARING REPLY BRIEF re
19 vs.	RECOVERABILITY POSTPETITION
20 BURLINGAME CAPITAL PARTNERS II,	ATTORNEYS' FEES
21 L.P.; ELECTROCHEM FUNDING, LLC,	Date: March 8, 2007
22 Defendants.	Time: 2:00 p.m.
23 AND RELATED ADVERSARY	Ctrm: 201
24 PROCEEDINGS.	Judge: Hon. Leslie Tchaikovsky

1           Burlingame Capital Partners II, L.P. ("Burlingame") hereby submits this Post-Hearing  
2 Reply Brief re Recoverability of Postpetition Attorneys' Fees in response to the Koellings'  
3 Supplemental Brief in Opposition to Amended Motion for Recovery of Attorneys' Fees and Costs  
4 (Koellings' Supplemental Brief).

5           As set forth in Burlingame's Post-Hearing Brief re Recoverability of Postpetition  
6 Attorneys' Fees (Burlingame's Post-Hearing Brief), the Supreme Court in *Travelers Casualty &*  
7 *Surety Co. of America v. Pacific Gas & Electric Co.*, 127 S.Ct. 1199 (2007) stated "we generally  
8 presume that claims enforceable under applicable state law will be allowed in bankruptcy unless  
9 they are expressly disallowed" and held that an unsecured creditor's claim for postpetition  
10 attorneys' fees incurred in litigating federal bankruptcy law issues cannot be disallowed absent a  
11 clear and express provision of the Bankruptcy Code disallowing the claim. *Id.* at 1206-07. There  
12 is no dispute that Burlingame's contracts with the Koellings allow Burlingame to recover its  
13 attorneys' fees and that such fee-shifting agreements are enforceable under California law. *See*  
14 Cal. Civ. Code § 1717; Cal. Code Civ. P. §§ 1032, 1033.5. Under the Bankruptcy Code, as the  
15 Supreme Court made clear in *Travelers*, a creditors' claim for attorneys' fees enforceable under  
16 State law must be allowed unless one the enumerated exceptions to Section 502(b) applies.<sup>1</sup> Here,  
17 none of the exceptions to Section 502(b) apply. Thus, there is no basis to disallow Burlingame's  
18 claim for postpetition attorneys' fees that is otherwise enforceable under California law.

19           The Koellings attempt to avoid this inescapable conclusion by arguing that Burlingame's  
20 claim for recovery is based on *Western Farm Credit Bank v. Fobian (In re Fobian)*, 951 F.2d 1149  
21 (9<sup>th</sup> Cir. 1991) and by characterizing the *Fobian Rule* as: an unsecured creditor can only recover  
22 postpetition attorneys' fees incurred in litigating non-bankruptcy related matters. (Koelling's  
23 Supp. Brief at 2:10-13.) Based on these false premises, the Koellings argue that following the  
24 Supreme Court's rejection of the *Fobian Rule* in *Travelers*, there is no basis for an unsecured  
25 creditor like Burlingame to recover its postpetition attorneys' fees. (*See* Koellings' Supplemental

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26  
27 <sup>1</sup> Notably, the Ninth Circuit Bankruptcy Appellate Panel recently stated: "the Supreme Court in  
28 *Travelers* overruled the Ninth Circuit's *Fobian* rule and made clear that contract-based fees  
incurred in the course of litigating issues of federal bankruptcy law may be awarded pursuant  
to state law." *Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai)*, \_\_ B.R. \_\_, 2007 WL  
1119913 (9<sup>th</sup> Cir. B.A.P. (Hawai'i), at \* 5.

1 Brief at 2:16.) As set forth above and in Burlingame's Post-Hearing Brief, the Koellings are  
2 wrong.

3 First, the Koellings attempt to turn *Fobian* and *Travelers* on their head. In *Travelers*, the  
4 Supreme Court abrogated the Ninth Circuit's *prohibition* against allowance of postpetition  
5 attorneys' fees in litigating issues of federal bankruptcy law. It did not reject the recoverability of  
6 post-petition attorneys' fees incurred by an unsecured creditor in litigating non-bankruptcy related  
7 matters, as the Koellings attempt to characterize the *Fobian Rule*. The Supreme Court in  
8 *Travelers* framed the issue before it and its resolution of that issue as follows:

9 We are asked to consider whether federal bankruptcy law precludes an unsecured  
10 creditor from recovering attorney's fees authorized by a prepetition contract and  
11 incurred in postpetition litigation. The Court of Appeals for the Ninth Circuit held,  
12 based on a rule [i.e., *Fobian*] previously adopted by that court, that such fees are  
13 *categorically prohibited*-even where the contractual allocation of attorney's fees  
14 would be enforceable under applicable nonbankruptcy law-*to the extent the*  
15 *litigation involves issues of federal bankruptcy law*. Because that rule finds no  
16 support in the Bankruptcy Code, we vacate and remand. *Travelers*, 127 S.Ct. at  
17 1202 (emphasis added).

18 Moreover, the Koellings' position – which would amount to a blanket prohibition against an  
19 unsecured creditor's right to recover its postpetition attorneys' fees – is not only contrary to Ninth  
20 Circuit law (*see Travelers*, 127 S.Ct. at 1205 (observing that the Ninth Circuit denied *Travelers*'  
21 claim "based solely on a rule of that court's own creation-the so-called *Fobian Rule*-which dictates  
22 that attorneys' fees are not recoverable in bankruptcy for litigating issues peculiar to federal  
23 bankruptcy law," while nevertheless acknowledging "that, in at least some circumstances, a  
24 prevailing party in a bankruptcy proceeding may be entitled to an award of attorney fees in  
25 accordance with applicable state law"), but would create another federal common law rule that,  
26 like *Fobian*, finds no textual support in the Bankruptcy Code and was rejected by the Supreme  
27 Court in *Travelers*.

28 Second, contrary to the Koellings' argument, Burlingame's claim for allowance of its  
postpetition attorneys' fees is based on Bankruptcy Code section 502 and its contractual rights  
pursuant to state law. Burlingame only limited its request for recovery in the Amended Motion to  
fees permitted under *Fobian* based on the Court's Memorandum and Order following the initial  
motion. In the Amended Motion, however, Burlingame specifically reserved the issue of the

1 continued viability of the *Fobian Rule's* limitation in light of *Travelers*, which was pending before  
2 the Supreme Court at the time the Amended Motion was filed.

3 Third, after the Supreme Court's rejection of the *Fobian Rule* (which, as discussed in  
4 Burlingame's Post-Hearing Brief, is properly characterized as the *Fobian* exception to the general  
5 rule that a creditor is entitled to an award of postpetition attorneys' fees where provided by  
6 contract or statute), the touchstone for an unsecured creditor's right to recover its attorneys' fee  
7 under Ninth Circuit law is the contract itself and applicable nonbankruptcy law, consistent with  
8 statutory framework of Section 502.

9 Fourth, the Koellings' argument that Burlingame is attempting to "leapfrog" other  
10 unsecured creditors in seeking recovery of its postpetition attorneys' fees is erroneous. (*See*  
11 Koellings' Supplemental Brief at 2:23-3:2.) Burlingame is not seeking an administrative priority  
12 (e.g., under 11 U.S.C. § 503) or secured status (e.g., under 11 U.S.C. § 506) that would entitle it to  
13 more favorable treatment than other unsecured creditors. Burlingame is simply seeking allowance  
14 of its contractual right to recover attorneys' fees as an unsecured creditor, just like any other  
15 creditor holding an unsecured claim against the Koellings based on a contract (indeed, just like  
16 *Travelers* in the *Pacific Gas & Electric Co.* case). There is nothing "unfair" or "extraordinary"  
17 about this. On the contrary, what would be unfair and unjust would be to deny Burlingame its  
18 contractual rights while permitting other creditors to recover under their contracts when there is no  
19 express provision of the Bankruptcy Code providing for disallowance of Burlingame's claim.

20 Fifth, the Koellings' argument that Bankruptcy Code section 506(b) provides the sole basis  
21 for a creditor to recover postpetition attorneys' fees post *Travelers* (*see* Koellings' Supplemental  
22 Brief at 3:8-24), is likewise mistaken. As clearly demonstrated in Burlingame's Post-Hearing  
23 Brief, Burlingame's claim for allowance of its post-petition attorneys' fees is properly made under  
24 Bankruptcy Code section 502, there is no applicable exception to disallow the claim under Section  
25 502(b), and Section 506(b) provides no obstacle to allowance of Burlingame's claim.

26 Without re-hashing all of the reasons set forth in Burlingame's Post-Hearing Brief, the  
27 Koellings' argument confuses the purposes of Bankruptcy Code sections 506(b) and 502(b).  
28 Section 506 addresses only the status of an allowed oversecured claim and directs the priority and

1 inclusion of items in determining the amount of such allowed oversecured claim. *See* 11 U.S.C. §  
2 506(b); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989)("Such claim' refers to an  
3 oversecured claim."). By contrast, Section 502(b) governs the allowance or disallowance of  
4 claims generally; Section 506(b) is silent whether postpetition attorneys' fees may constitute an  
5 unsecured claim under Section 502 and certainly contains no express disallowance provision, as  
6 the Supreme Court in *Travelers* found was required to disallow a claim. *See* 4 Collier on  
7 Bankruptcy, ¶ 506.01, at 506-6 (15<sup>th</sup> ed. 2004) ("[A]lthough section 506 supplies a number of  
8 important rules specifying the determination of the secured status of a claim, the section does not  
9 govern the allowance or disallowance of the underlying claim itself. Rules governing the  
10 allowance of claims generally are provided in section 502.") Confirming that Section 506(b)  
11 provides no bar to a creditor's recovery of postpetition attorneys' fees under Section 502(b), the  
12 Ninth Circuit in *Sanson Investment Co. v. 268 Limited (In re 268 Limited)*, 789 F.2d 674, 677-78  
13 (9<sup>th</sup> Cir. 1986) and the Eleventh Circuit in *Welzel v. Advocate Realty Investments, LLC (In re*  
14 *Welzel)*, 275 F.3d 1308, 1318 (11<sup>th</sup> Cir. 2001), concluded, after examining the interplay between  
15 Sections 502 and 506, that even if attorneys' fees are not allowed as part of an allowed  
16 oversecured claim under Section 506(b), they may nonetheless be recoverable under Section 502  
17 as an unsecured claim. Thus, Section 506(b) obviously provides no grounds to disallow a claim  
18 for postpetition attorneys' fees under Section 502.<sup>2</sup>

19 The Koellings' argument that Section 506(b) would be rendered superfluous if creditors  
20 were allowed a claim for contractual postpetition attorneys' fees under Section 502(b) (*see*  
21 Koellings' Supplemental Brief at 3:18-23), is likewise erroneous for the same reasons. As  
22 discussed above, Section 506 addresses the methodology and items includable as part of an  
23 allowed oversecured claim. *See Ron Pair Enterprises*, 489 U.S. at 24 ("subsection (b) is  
24 concerned specifically with oversecured claims"). It is not a general disallowance provision.

25  
26 <sup>2</sup> The Koellings' argue, without any citation or development, that because Section 506(b)  
27 provides for the allowance of postpetition attorneys' fees *as part of an allowed oversecured*  
28 *claim*, it clearly means that an unsecured creditor is not entitled to recover its postpetition  
attorneys' fees as part of its unsecured claim. (*See* Koellings' Supplemental Brief at 3:17-19.)  
This argument fails as well for the same reasons set forth above and in Burlingame's Post-  
Hearing Brief.

1 Moreover, as discussed in Burlingame's Post-Hearing Brief, if Section 506(b) were to be read to  
2 disallow an unsecured creditor's claim for recovery of attorneys' fees, it would (a) conflict with the  
3 express language of Section 502(b) that a claim shall be allowed "except to the extent" that one of  
4 the nine enumerated exception applies, and (b) render Section 502(b)(4) superfluous, which, in  
5 contrast to Section 506(b), is an express disallowance provision.

6 Sixth, the Koellings argue that there are cases in the Ninth Circuit (*e.g.*, *Kord Enterprises*  
7 *II v. California Commerce Bank (In re Kord Enterprises II)*, 139 F.3d at 684 (9<sup>th</sup> Cir. 1998) and  
8 other cases cited in the Koellings' Opposition to Amended Motion) that support its argument  
9 Bankruptcy Code section 506(b) provides the sole basis for a creditor to recover its postpetition  
10 attorneys' fees. (Supp. Brief at 4:1-9.) The Koellings' are wrong.

11 In *Kord Enterprises*, both parties stipulated that the bank was oversecured and thus came  
12 within the purview of Bankruptcy Code section 506(b). *Id.* at 687. Thus, *Kord Enterprises* is  
13 factually inapposite. Here, there is no dispute that Burlingame is undersecured and thus Section  
14 506(b) does not apply. *See Ron Pair Enterprises*, 489 U.S. at 238-239 ("Section 506 . . . governs  
15 the definition and treatment of secured claims."), 241 ("subsection (b) is concerned specifically  
16 with oversecured claims").

17 Furthermore, *Kord Enterprises* and the Koellings' Supplemental Brief simply sets forth the  
18 four elements under Section 506(b) for an oversecured creditor to have its attorneys' fees allowed  
19 as part of its allowed oversecured claim. *See* 11 U.S.C. § 506(b).<sup>3</sup> The four elements are

20 \_\_\_\_\_  
21 <sup>3</sup> The Koellings reference (by incorporation to its earlier brief) to *Kamai v. Long Beach*  
22 *Mortgage Co. (In re Kamai)*, 316 B.R. 544, 548 (9<sup>th</sup> Cir. B.A.P. 2004) and *Meritor Mortgage*  
23 *Corp. v. Salazar (In re Salazar)*, 82 B.R. 538, 540 (9<sup>th</sup> Cir. B.A.P. 1987) likewise simply  
24 repeat the four elements an oversecured creditor must meet for its postpetition attorneys' fees  
25 to be allowed as part of its allowed oversecured claim under Section 506(b). Indeed, in  
26 *Salazar*, the Court observed that the Ninth Circuit in *In re Johnson*, 756 F.2d 738, 741 (1985)  
27 stated "*Section 506(b) concerns only the award of attorney's fees oversecured creditors with a*  
28 *contractual right to reimbursement. . . .*" Furthermore, the Koellings reference to *Takisaki v.*  
*Alpine Group, Inc. (In re Takisaki)*, 151 B.R. 931, 934 (9<sup>th</sup> Cir. B.A.P. 1993) confirms  
Burlingame's position, observing that *Fobian* and the cases on which it relied merely restated  
the "American Rule" that absent a statute or contract allocating litigation costs between the  
parties, each party bears its own litigation costs. Here, there is no dispute that the parties  
allocated the litigation costs to the non-prevailing party (i.e., the Koellings), which is  
enforceable under applicable California law. Cal. Civ. Code § 1717. Thus, the Supreme Court  
in *Travelers* made clear, parties such as Burlingame and the Koellings may overcome the  
"American Rule" by entering into contracts valid under state law which allocate litigation costs  
among them, unless Congress has prohibited them from doing so, which is not the case. *See*

1 inapposite, where, as here, Burlingame seeks allowance of its postpetition attorneys' fees as part of  
2 its unsecured claim against the Koellings under Bankruptcy Code section 502(b). Indeed, the  
3 Ninth Circuit in *Kord Enterprises* made just that distinction with respect to *Fobian* (i.e., *Fobian*  
4 involved an undersecured creditor and Section 506(b) was not at issue). See *In re Kord*  
5 *Enterprises*, 139 F.3d at 687 ("We note at the outset what *In re Fobian* is not. It is not a § 506(b)  
6 case. The creditor in *In re Fobian* was undersecured and, consequently, § 506(b) was not at  
7 issue.").

8 In summary, for the reasons set forth in Burlingame's Post-Hearing Brief, as well as those  
9 set forth above, Burlingame's claim for postpetition attorneys' fees, recoverable under its contracts  
10 with the Koellings and enforceable under applicable California law, must be allowed as part of  
11 Burlingame's unsecured claim against the Koellings and their bankruptcy estate, as none of the  
12 enumerated exceptions to disallow such claim under Section 502(b) apply.

13 Dated: May 3, 2007

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14  
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28 *Travelers*, 127 S.Ct. at 1203; *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S.  
714, 717 (1967).