

1 ROBERT R. MOORE (BAR NO. 113818)  
MICHAEL S. GREGER (BAR NO. 156525)  
2 WILLIAM W. HUCKINS (BAR NO. 201098)  
MARLENE M. MOFFITT (BAR NO. 223658)  
3 ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
4 Three Embarcadero Center, 12th Floor  
San Francisco, CA 94111-4074  
5 Telephone: (415) 837-1515  
Facsimile: (415) 837-1516

6 Attorneys for Defendant Burlingame  
Capital Partners II, L.P.

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,	
16 Debtor.	
Adv. No. 04-4190 (Consol. with Adv Proc. Nos. 04-4365 and 04-4366)	
17 QMECT, INC.,	BURLINGAME CAPITAL PARTNERS II,
18 Plaintiff,	L.P.'S POST-HEARING 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.
	Ctrm: 201
	Judge: Hon. Leslie Tchaikovsky

23 AND RELATED ADVERSARY  
24 PROCEEDINGS.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
1	
2	
3 I. INTRODUCTION.....	1
4 II. ARGUMENT .....	3
5 A. BANKRUPTCY CODE SECTION 502(b) DIRECTS THAT	
6 CLAIMS, INCLUDING CLAIMS FOR POSTPETITION	
7 ATTORNEYS' FEES, SHALL BE ALLOWED UNLESS	
DISALLOWED UNDER ONE OF THE ENUMERATED	
EXCEPTIONS .....	3
8 B. THE SUPREME COURT'S DECISION IN <i>TRAVELERS</i>	
9 CONFIRMS THAT BURLINGAME'S CLAIM FOR	
POSTPETITION ATTORNEYS' FEES MUST BE ALLOWED	
UNDER BANKRUPTCY CODE SECTION 502(b).....	5
10 C. ABSENT THE <i>FOBIAN</i> "EXCEPTION," NINTH CIRCUIT LAW	
11 RECOGNIZES A CREDITOR'S RIGHT TO RECOVER ITS	
12 ATTORNEYS' FEES IN ACCORDANCE WITH APPLICABLE	
STATE LAW .....	7
13 D. SEVERAL CIRCUIT COURTS ALREADY RECOGNIZED A	
14 CREDITOR'S RIGHT TO RECOVER ITS POSTPETITION	
15 ATTORNEYS' FEES, AND EVEN THOSE THAT DENIED SUCH	
RECOVERY DID SO BECAUSE THE FEES WERE NOT	
16 RECOVERABLE UNDER NONBANKRUPTCY LAW NOT	
BECAUSE THEY WERE INCURRED POSTPETITION .....	8
17 E. A BLANKET PROHIBITION OF POSTPETITION ATTORNEYS'	
18 FEES WOULD BE CONTRARY TO ESTABLISHED FEDERAL	
LAW .....	10
19 F. BANKRUPTCY CODE SECTION 506(b) PRESENTS NO	
OBSTACLE TO ALLOWANCE OF BURLINGAME'S CLAIM	
20 FOR RECOVERY OF POSTPETITION ATTORNEYS' FEES .....	10
21 G. BURLINGAME'S POSTPETITION ATTORNEYS' FEES	
22 OTHERWISE RECOVERABLE UNDER STATE LAW CANNOT	
BE DISALLOWED UNDER BANKRUPTCY CODE SECTION	
502(b) ON THE GROUNDS OF "REASONABLENESS" .....	17
23 H. BANKRUPTCY CODE SECTION 503 PROVIDES NO BASIS TO	
24 DISALLOW BURLINGAME'S POSTPETITION ATTORNEYS'	
FEES.....	18
25 III. CONCLUSION .....	19
26	
27	
28	

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

1  
2  
3  
4 *Abercrombie v. Hayden Corp. (In re Abercrombie)*,  
5 139 F.3d 755 (9<sup>th</sup> Cir. 1998)..... 5  
6  
7 *Alport v. Ritter (In re Alport)*,  
8 144 F.3d 1163 (8<sup>th</sup> Cir. 1998)..... 9  
9  
10 *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*,  
11 205 F.3d 532 (2<sup>nd</sup> Cir. 2000) ..... 9  
12  
13 *Boeing North American, Inc. v. Ybarra (In re Ybarra)*,  
14 424 F.3d 1018 (9<sup>th</sup> Cir. 2005)..... 5  
15  
16 *Burns v. Greater Lakes Higher Ed. Corp. (In re Burns)*,  
17 3 Fed.Appx. 689 (10<sup>th</sup> Cir. 2001) ..... 10  
18  
19 *Cadle Co. v. Martinez (In re Martinez)*,  
20 416 F.3d 1286 (11<sup>th</sup> Cir. 2005)..... 9  
21  
22 *Christison v. Norm Ross Co. (In re Eastview Estates II)*,  
23 713 F.2d 443 (9<sup>th</sup> Cir. 1983)..... 8  
24  
25 *Cohen v. De La Cruz*,  
26 523 U.S. 213 (1998) ..... 3, 14  
27  
28 *Fleischmann Distilling Corp. v. Maier Brewing Co.*,  
386 U.S. 714 (1967) ..... 10  
*Ford v. Baroff (In re Baroff)*,  
105 F.3d 439 (9<sup>th</sup> Cir. 1997)..... 7  
*In re Bayly Corp.*,  
163 F.3d 1205 (10<sup>th</sup> Cir. 1998)..... 5  
*In re Davidson*,  
947 F.2d 1294 (5<sup>th</sup> Cir. 1991)..... 8  
*In re Dow Corning*,  
456 F.3d 668 (6<sup>th</sup> Cir. 2006)..... 9, 16  
*In re Fobian*,  
951 F.2d 1149 (9<sup>th</sup> Cir. 1991)..... 1, 5, 7  
*In re Kadjevich*,  
220 F.3d 1016 (9<sup>th</sup> Cir. 2000)..... 5  
*In re Sheridan*,  
105 F.3d 1164 (7<sup>th</sup> Cir. 1997)..... 9  
*In re Tricca*,  
196 B.R. 214 (Bankr. D. Mass. 1996)..... 12, 16

	<u>Page(s)</u>
1	
2 <i>Martin v. Bank of Germantown (In re Martin)</i> ,	
3        761 F.2d 1163 (6 <sup>th</sup> Cir. 1985).....	9
4 <i>Raleigh v. Ill. Dep't of Revenue</i> ,	
5        530 U.S. 15 (2000) .....	3
6 <i>Renfrew v. Draper</i> ,	
7        232 F.3d 688 (9 <sup>th</sup> Cir. 2000).....	7
8 <i>Sanson Investment Co. v. 268 Limited (In re 268 Limited)</i> ,	
9        789 F.2d 674 (9 <sup>th</sup> Cir. 1986).....	3, 12, 15
10 <i>Serrano v. Priest (Serrano III)</i> ,	
11        20 Cal.3d 25 (1977).....	18
12 <i>Siegel v. Federal Home Loan Mortgage Corp.</i> ,	
13        143 F.3d 525 (9 <sup>th</sup> Cir. 1998).....	5
14 <i>Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.)</i> ,	
15        167 F.3d 843 (4 <sup>th</sup> Cir. 1999).....	8
16 <i>Thrifty Oil Co. v. Bank of America N.T. &amp; S.A.</i> ,	
17        322 F.3d 1039 (9 <sup>th</sup> Cir. 2003).....	7
18 <i>Transouth Fin. Corp. v. Johnson</i> ,	
19        931 F.2d 1505 (5 <sup>th</sup> Cir. 1991).....	8
20 <i>Travelers Casualty &amp; Surety Co. of America v. Pacific Gas &amp; Electric Co.</i> ,	
21        127 S.Ct. 1199 (2007) .....	passim
22 <i>United Merchants &amp; Manufacturers, Inc. v. Equitable Life Assurance</i> ,	
23        674 F.2d 134 (2 <sup>nd</sup> Cir. 1982) .....	8
24 <i>United States v. Noland</i> ,	
25        517 U.S. 535 (1996) .....	13
26 <i>United States v. Ron Pair Enter., Inc.</i> ,	
27        489 U.S. 235 (1989) .....	passim
28 <i>Vanston Bondholders Protective Committee v. Green</i> ,	
29        329 U.S. 156 (1946) .....	3, 14
30 <i>Welzel v. Advocate Realty Investments, LLC (In re Welzel)</i> ,	
31        275 F.3d 1308 (11 <sup>th</sup> Cir. 2001).....	passim
32 <b><u>Statutes</u></b>	
33 11 U.S.C. § 101(5) .....	3, 5
34 11 U.S.C. § 1129(b)(2).....	11
35 11 U.S.C. § 502(a).....	4
36 11 U.S.C. § 502(b) .....	4, 5, 6

	<u>Page(s)</u>
1	
2 11 U.S.C. § 502(b)(1).....	17
3 11 U.S.C. § 502(b)(2).....	15
4 11 U.S.C. § 502(b)(4).....	4, 6, 14, 17
5 11 U.S.C. § 503(b)(3)(D) .....	18
6 11 U.S.C. § 503(b)(4).....	18
7 11 U.S.C. § 506(a).....	14
8 11 U.S.C. § 506(b) .....	1, 10, 13, 14
9 11 U.S.C. § 507 .....	18
10 11 U.S.C. § 726 .....	18
11 11 U.S.C. § 726 .....	11
12 Cal. Civ. Code § 1717 .....	4, 17
13 Cal. Code Civ. Proc. § 1032.....	4
14 Cal. Code Civ. Proc. § 1033.5.....	4
15 <b><u>Other Authorities</u></b>	
16 4 Collier on Bankruptcy .....	9, 11, 12
17 5 Collier on Bankruptcy (15 <sup>th</sup> ed. 2004).....	4
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

1 **I. INTRODUCTION**

2 Burlingame Capital Partners II, L.P. ("Burlingame") hereby submits this Post-Hearing  
3 Brief re Recoverability of Postpetition Attorneys' Fees.

4 On March 20, 2007, the Supreme Court issued its opinion in *Travelers Casualty & Surety*  
5 *Co. of America v. Pacific Gas & Electric Co.*, 127 S.Ct. 1199 (2007). In *Travelers Casualty*, the  
6 Supreme Court rejected the rule in *In re Fobian*, 951 F.2d 1149 (9<sup>th</sup> Cir. 1991) that attorneys' fees  
7 are not recoverable in bankruptcy for litigating issues peculiar to federal bankruptcy law, and  
8 instead held that attorneys' fees incurred by an unsecured creditor in litigating federal bankruptcy  
9 law issues that are provided for by contract cannot be disallowed, absent a clear and express  
10 provision in the Bankruptcy Code disallowing the claim. *Travelers*, 127 S.Ct. at 1206-07.

11 After the decision in *Travelers*, Burlingame filed a supplemental memorandum regarding  
12 its pending motion for recovery of attorneys' fees and costs in the case, seeking instructions from  
13 the Court on how to proceed in light of the *Travelers* decision. Fred and Linda Koelling (the  
14 "Koellings") also filed a supplemental memorandum, observing that *Travelers* left open the  
15 possibility that other principles of bankruptcy law might provide a basis for disallowing  
16 postpetition attorneys' fees and arguing that Bankruptcy Code section 506(b) was such a basis. On  
17 April 6, 2007, the Court entered its Order Directing Parties to File Post-Hearing Briefs on whether  
18 or not postpetition attorneys' fees are recoverable.

19 For the following reasons, the postpetition attorneys' fees incurred by Burlingame in  
20 enforcing and collecting its debts against the Koellings are recoverable where, as here, Burlingame  
21 has a contractual right to recover such fees that is enforceable under California law and the  
22 Bankruptcy Code does not clearly and expressly disallow Burlingame's right to recover such fees.

23 First, Bankruptcy Code section 502(b) provides that a creditor's claim shall be allowed  
24 unless one of the nine enumerated exceptions applies. Under Section 502(b)(1), a creditor's claim  
25 is generally allowed in accordance with applicable nonbankruptcy substantive law, subject to the  
26 remaining exceptions of Section 502(b). None of the enumerated exceptions bars a creditor's  
27 claim for postpetition attorneys' fees that are otherwise (i) recoverable pursuant to a contract  
28 allocating the burden of attorneys' fees between the creditor and debtor, and (ii) enforceable under

1 applicable nonbankruptcy law. In *Travelers*, the Supreme Court made clear that in light of the  
2 broad, permissive scope of Section 502(b), a claim enforceable under State law should be allowed  
3 in bankruptcy unless Congress has clearly and expressly provided for the disallowance of such  
4 claim. As such, there is no basis to deny Burlingame's contractual claim for postpetition attorneys'  
5 fees which would be enforceable under California law, when the Supreme Court in *Travelers*  
6 abrogated the Federal common law rule in *Fobian* and there is likewise no textual support for  
7 disallowance of a creditor's claim for postpetition attorneys' fees under the Bankruptcy Code.

8         Second, even before the demise of *Fobian*, the Ninth Circuit recognized a party's right to  
9 recover its attorneys' fees in bankruptcy proceedings where a contract entitles the party to such  
10 recovery and state law authorizes fee shifting arrangements. Ninth Circuit law imposes no blanket  
11 proscription disallowing a party's claim for postpetition attorneys' fees. As such, disallowing  
12 Burlingame's claim for attorneys' fees on the grounds that they were incurred postpetition is not  
13 only contrary to the provisions of Section 502(b), but also Ninth Circuit law.

14         Third, outside of the Ninth Circuit, a clear majority of the other Circuit Courts rejected the  
15 *Fobian* distinction before *Travelers* and recognized a party's right to postpetition attorneys' fees  
16 when recoverable under contract and permitted under state law. Like the Ninth Circuit, none of  
17 the other Circuit Courts impose a blanket prohibition disallowing a party's claim for postpetition  
18 attorneys' fee. As *Collier on Bankruptcy* explained, a claim for attorneys' fees that is valid under  
19 applicable state law should be allowed in bankruptcy.

20         Fourth, Bankruptcy Code section 506(b) presents no obstacle to allowance of a creditor's  
21 claim for postpetition attorneys' fees under Section 502(b). Section 506(b) addresses only the  
22 status of an oversecured allowed claim, and directs the priority and inclusion of items in making  
23 that determination. Section 506(b) does not govern the allowance or disallowance of claims  
24 generally. That is the province of Section 502(b). Section 506(b) is silent whether postpetition  
25 attorneys' fees may constitute an unsecured claim under Section 502, and certainly does not  
26 contain an express and clear disallowance provision, as the Supreme Court has found is required  
27 to disallow a claim. Furthermore, construing Section 506(b) as a disallowance provision  
28 applicable to unsecured creditors would render superfluous and conflict with other important

1 provisions of Section 502(b). Moreover, two Circuit Courts, including the Ninth Circuit, have  
2 held that even if attorneys' fees are not allowed as part of a secured claim under Section 506(b),  
3 they may nevertheless be allowed as an unsecured claim under Section 502. Thus, Section 506(b)  
4 plainly provides no basis to disallow an otherwise allowable claim under Section 502.

5 Last, there is no exception under Section 502(b), permitting the disallowance of a claim for  
6 postpetition attorneys' fees that a party is otherwise entitled to recover under applicable  
7 nonbankruptcy law on the grounds of "reasonableness." The reasonableness determination is  
8 made under applicable nonbankruptcy law.

## 9 **II. ARGUMENT**

### 10 **A. BANKRUPTCY CODE SECTION 502(b) DIRECTS THAT CLAIMS, 11 INCLUDING CLAIMS FOR POSTPETITION ATTORNEYS' FEES, SHALL 12 BE ALLOWED UNLESS DISALLOWED UNDER ONE OF THE 13 ENUMERATED EXCEPTIONS**

13 Bankruptcy Code section 101(5)(A) defines a claim as a right to payment. 11 U.S.C. §  
14 101(5)(A)(claim means right to payment whether or not such right is reduced to judgment,  
15 liquidated, unliquidated, fixed, contingent, matured, unmatured, etc.).

16 "A 'debt' is defined in the Code as 'liability on a claim,' § 101(12), a 'claim is  
17 defined in turn as a 'right to payment,' § 101(5)(A), and a 'right to payment,' we  
18 have said, is nothing more nor less than an enforceable obligation. Those  
19 definitions reflect Congress' broad ... view of the class of obligations that qualify  
20 as a 'claim' giving rise to a 'debt.'" *Cohen v. De La Cruz*, 523 U.S. 213, 218, 223  
(1998) (concluding that treble damages and postpetition attorneys' fees and costs  
constitute debts and claims against the debtor).

20 Fundamentally, a creditor's entitlement in bankruptcy arises from the underlying substantive law  
21 creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy  
22 Code. *Travelers*, 127 S.Ct. at 1204-05. State law governs the substance of claims in bankruptcy  
23 in the absence of overruling federal law. *Id.* at 1205; *Vanston Bondholders Protective Committee*  
24 *v. Green*, 329 U.S. 156, 161 (1946)(in the absence of overruling federal law, whether creditor  
25 claims are valid and subsisting obligations against the bankrupt are determined by reference to  
26 state law); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000)("The basic federal rule in  
27 bankruptcy is that state law governs the substance of claims"); *Sanson Investment Co. v. 268*  
28 *Limited (In re 268 Limited)*, 789 F.2d 674, 677 (9<sup>th</sup> Cir. 1986)("the validity of claims against the

1 estate, with a few statutory exceptions, is determined by state law and private agreement."). A  
2 creditor's right to payment is not "analyzed differently simply because an interested party is  
3 involved in a bankruptcy proceeding." *Travelers*, 127 S.Ct. at 1205.

4 Bankruptcy Code section 502(a) provides that a party's claim, proof of which was filed  
5 under section 501, "is deemed allowed," unless a party in interest objects. 11 U.S.C. § 502(a).  
6 Even where a party in interest objects, the court shall allow the claim under Bankruptcy Code  
7 section 502(b) unless one of the nine specifically enumerated grounds for disallowance applies.  
8 *See* 11 U.S.C. § 502(b); *Travelers*, 127 S.Ct. at 1204. "In this manner § 502 lays down general  
9 instructions for the bankruptcy court in considering whether a claim should be allowed or  
10 disallowed." *Welzel v. Advocate Realty Investments, LLC (In re Welzel)*, 275 F.3d 1308, 1316-17  
11 (11<sup>th</sup> Cir. 2001)(*en banc*). Furthermore, *Travelers* makes clear that in light of the broad and  
12 permissive scope of Section 502(b), a creditor's enforceable claim under State law shall be allowed  
13 unless one of the nine specifically enumerated exceptions applies. *Travelers*, 127 S.Ct. at 1204,  
14 1206 (creditor claims enforceable under State law are presumptively allowed unless they are  
15 expressly disallowed). Notably, only Section 502(b)(4) mentions claims for services of an  
16 attorney, but, by its clear and unambiguous terms, that exception to the general rule of allowability  
17 applies only to services of an attorney of the debtor that exceed the reasonable value of such  
18 services. 11 U.S.C. § 502(b)(4).

19 Here, there is no dispute that, before the petition date, the Koellings executed a guarantee  
20 of QMECT's debt to Burlingame, obligating them to pay the costs of collection and enforcement  
21 of the QMECT debt and the guaranties. Burlingame's contractual right to recovery of its attorneys'  
22 fees incurred in collecting and enforcing the Koellings' guaranties and underlying QMECT  
23 indebtedness is enforceable under California law. Cal. Civ. Code § 1717; Cal. Code Civ. Proc. §§  
24 1032, 1033.5. Burlingame filed a proof of claim against the Koellings, which has been allowed by  
25 the Court. The costs of collection and enforcement incurred by Burlingame postpetition are part  
26 of Burlingame's claim against the Koellings.<sup>1</sup> None of the grounds for disallowance under

27 \_\_\_\_\_  
28 <sup>1</sup> While the fees and costs were incurred by Burlingame postpetition, they are nevertheless part  
of Burlingame's claim. *See* 5 Collier on Bankruptcy, ¶ 553.03[1][i] at 553-20-21 (15<sup>th</sup> ed.  
2004)("In general, if the creditor incurs the attorney's fees postpetition in connection with

1 Bankruptcy Code section 502(b) apply. Therefore, Burlingame's claim for attorneys' fees against  
2 the Koellings, regardless of whether they were incurred postpetition, must be allowed under  
3 Section 502, to the extent recoverable under applicable California law.

4 **B. THE SUPREME COURT'S DECISION IN *TRAVELERS* CONFIRMS THAT**  
5 **BURLINGAME'S CLAIM FOR POSTPETITION ATTORNEYS' FEES**  
6 **MUST BE ALLOWED UNDER BANKRUPTCY CODE SECTION 502(b)**

7 In *Travelers*, the Supreme Court abrogated the Ninth Circuit's distinction (i.e., the *Fobian*  
8 Rule) that postpetition attorneys' fees incurred in litigating issues governed by nonbankruptcy law  
9 were recoverable, but not postpetition attorneys' fees incurred in litigating issues peculiar to  
10 federal bankruptcy law. There, *Travelers* filed a general unsecured claim based on its indemnity  
11 agreements with PG&E. *Travelers*, 127 S.Ct. at 1203. *Travelers* sought to recover, among other  
12 things, its postpetition attorneys' fees in litigating bankruptcy related issues during PG&E's  
13 bankruptcy proceedings. *Id.* PG&E objected to *Travelers*' claim for postpetition attorneys' fees,  
14 and the lower courts, relying on *Fobian*, held that *Travelers*' claim was not allowable because  
15 attorneys' fees are not recoverable in bankruptcy for litigating issues peculiar to federal bankruptcy  
16 law. *Id.*

17 *Travelers* required the Supreme Court "to consider whether the Bankruptcy Code disallows  
18 contract-based claims for attorney's fees based solely on the fact that the fees at issue were  
19 incurred in litigating issues of bankruptcy law. We conclude that it does not." *Id.* at 1204. In  
20 reversing the lower courts' rulings, the Court analyzed the issue under Section 502 and found that

---

21 exercising or protecting a prepetition claim that included a right to recover attorney's fees, the  
22 fees will be prepetition in nature, constituting a contingent prepetition obligation that became  
23 fixed postpetition when the fees were incurred. As a result, the incurred fees would become  
24 part of the creditor's prepetition claim . . . ."); *In re Bayly Corp.*, 163 F.3d 1205, 1208-09 (10<sup>th</sup>  
25 Cir. 1998)("If a debtor becomes liable to a claimant before the bankruptcy petition is filed, but  
26 the liability is contingent on the occurrence of some future event, the claim to recover that debt  
27 is treated as a pre-petition claim even if the condition does not occur and the right to payment  
28 does not arise until after the bankruptcy petition is filed."); *Abercrombie v. Hayden Corp. (In*  
*re Abercrombie)*, 139 F.3d 755, 756-59 (9<sup>th</sup> Cir. 1998)(postpetition attorneys' fees incurred on  
appeal and awarded pursuant to prepetition contract were part of prepetition debt); *In re*  
*Kadjevich*, 220 F.3d 1016, 1020-21 (9<sup>th</sup> Cir. 2000)(postpetition attorneys' fees on prepetition  
obligation held to be general unsecured claim); 11 U.S.C. § 101(5). Notably, in *Kadjevich*, the  
Ninth Circuit did "not deal" with the case where the debtor commenced litigation on behalf of  
the estate postpetition or voluntarily continued postpetition litigation that was commenced  
prepetition. *In re Kadjevich*, 220 F.3d at 1021; see also *Boeing North American, Inc. v.*  
*Ybarra (In re Ybarra)*, 424 F.3d 1018 (9<sup>th</sup> Cir. 2005); *Siegel v. Federal Home Loan Mortgage*  
*Corp.*, 143 F.3d 525 (9<sup>th</sup> Cir. 1998)

1 none of the grounds for disallowance of Travelers' claim under Section 502(b) applied. *Id.* at  
2 1204-05. The Court explained that the *Fobian* rule "finds no support in the Bankruptcy Code,  
3 *either in § 502 or elsewhere.*" *Id.* at 1205 (emphasis added). The absence of textual support in the  
4 Bankruptcy Code for disallowance of Travelers' claim was fatal. *Id.* at 1206.

5 By contrast, the Court found the existence of Bankruptcy Code section 502(b)(4) indicated  
6 that a claim for attorneys' fees was allowable in bankruptcy to the extent enforceable under state  
7 law unless it was of a kind proscribed by Section 502(b)(4). *Id.* "Consistent with our prior  
8 statements regarding creditors' entitlements in bankruptcy [citation omitted], we generally  
9 presume that claims enforceable under applicable state law will be allowed in bankruptcy unless  
10 they are *expressly disallowed.*" *Id.* (Emphasis added). "Congress, of course, has the power to  
11 amend the Bankruptcy Code by adding a provision expressly disallowing claims for attorneys' fees  
12 incurred by creditors in litigation of bankruptcy issues. . . . [b]ut [] no such provision exists." *Id.*  
13 (Internal citations and quotes omitted).

14 The Court concluded

15 "where Congress has intended to provide exceptions to provisions of the  
16 Bankruptcy Code, it has done so clearly and expressly. . . . [T]he Code says  
17 *nothing* about unsecured claims for contractual attorney's fees incurred while  
18 litigating issues of bankruptcy law. In light of the broad, permissive scope of §  
19 502(b)(1), and our prior recognition that the character of contractual obligations to  
20 pay attorney's fees presents no obstacle to enforcing it in bankruptcy, it necessarily  
21 follows that the *Fobian* rule cannot stand." *Id.* at 1206.

19 The Supreme Court's decision in *Travelers* confirms that Burlingame's claim for  
20 postpetition attorneys' fees must be allowed under Bankruptcy Code section 502(b). The Supreme  
21 Court held that a claim enforceable under State law cannot be disallowed absent the Bankruptcy  
22 Code clearly and expressly disallowing the claim. There is no provision of the Bankruptcy Code  
23 which *disallows* a creditor's contractual right to recover its attorneys' fees incurred in enforcing its  
24 rights, regardless of whether the fees are incurred prepetition or postpetition, or in connection with  
25 litigating issues governed by nonbankruptcy law or peculiar to federal bankruptcy law. While  
26 *Travelers* addressed a subset (i.e., postpetition fees incurred in litigating bankruptcy issues) of the  
27 broader subject of a creditor's contractual right to recover its attorneys' fees against a debtor's  
28 estate, *Travelers* makes clear that the principles apply with equal force to, as here, the recovery of

1 postpetition fees incurred in litigating both bankruptcy and nonbankruptcy issues. In short, there  
2 is no provision of the Bankruptcy Code expressly disallowing creditor's right to recover such fees.  
3 In light of the broad, permissive scope of Bankruptcy Code section 502(b)(1) and Burlingame's  
4 contractual right to recover its attorneys' fees under California law, there is no basis to deny or  
5 disallow Burlingame recovery of its postpetition attorneys' fees.

6 **C. ABSENT THE *FOBIAN* "EXCEPTION," NINTH CIRCUIT LAW**  
7 **RECOGNIZES A CREDITOR'S RIGHT TO RECOVER ITS ATTORNEYS'**  
8 **FEES IN ACCORDANCE WITH APPLICABLE STATE LAW**

9 Prior to *Travelers*, the Ninth Circuit's typical formulation of a creditor's contractual right to  
10 recover its attorneys' fees in bankruptcy was:

11 "Where a contract or statute provides for an award of attorneys' fees, a creditor may  
12 be entitled to such fees in bankruptcy proceedings. Such an award is governed by  
13 state law." *In re Fobian*, 951 F.2d at 1153.

14 "Because state law necessarily controls an action on a contract, a party to such an  
15 action is entitled to an award of fees if the contract provides for an award and state  
16 law authorizes fee shifting arrangements." *Ford v. Baroff (In re Baroff)*, 105 F.3d  
17 439, 441 (9<sup>th</sup> Cir. 1997)(citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738,  
18 741 (9<sup>th</sup> Cir. 1985).

19 From this general rule of recovery of attorneys' fees in bankruptcy, the Ninth Circuit then  
20 carved out an exception, which became known as the "*Fobian Rule*:"

21 "However, where the litigated issues involve not basic contract enforcement  
22 questions, but issues peculiar to federal bankruptcy law, attorney's fees will not be  
23 awarded absent bad faith or harassment by the losing party." *Id.* at 1153; *see also*  
24 *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9<sup>th</sup> Cir. 1997)(while no general  
25 right to attorney fees exists under the Bankruptcy Code, "a prevailing party in a  
26 bankruptcy proceeding may be entitled to an award of attorney fees in accordance  
27 with applicable state law if state law governs the substantive issues raised in the  
28 proceedings"); *Renfrew v. Draper*, 232 F.3d 688, 694 (9<sup>th</sup> Cir. 2000)(creditor  
entitled to recover contractual attorneys' fees in bankruptcy proceedings, but  
entitlement limited solely to the extent that fees were incurred in litigating state law  
issues).

Numerous Ninth Circuit cases awarded postpetition attorneys' fees under the general rule  
for recovery, even while the *Fobian* rule/exception remained vital. *See, e.g., Thrifty Oil Co. v.*  
*Bank of America N.T. & S.A.*, 322 F.3d 1039, 1041 (9<sup>th</sup> Cir. 2003)(awarding bank postpetition  
attorneys' fees in successful defense of claim under state law); *Renfrew*, 232 F.3d at 694 (creditor  
awarded postpetition attorneys' fees incurred in litigating validity and amount of debts owed under  
divorce decree with debtor); *In re Baroff*, 105 F.3d at 440-442 (awarding postpetition attorneys'

1 fees incurred in defending state law fraudulent inducement claim, but not fees incurred in  
2 connection with related bankruptcy law issue); *Christison v. Norm Ross Co. (In re Eastview*  
3 *Estates II)*, 713 F.2d 443, 451-52 (9<sup>th</sup> Cir. 1983)(awarding fees under contractual fee provision).

4 As such, following the abrogation of the *Fobian* rule/exception, the touchstone for a  
5 creditor's right to recover its attorneys' fees and costs in bankruptcy under Ninth Circuit law is the  
6 contract itself and applicable nonbankruptcy law, which, under Section 502(b), requires allowance  
7 of the claim because no exception applies. Indeed, the Supreme Court in *Travelers* observed that  
8 Ninth Circuit law acknowledges a prevailing party in bankruptcy proceedings may be entitled to  
9 an award of attorneys' fees in accordance with applicable state law. *Travelers*, 127 S.Ct. at 1205.

10 **D. SEVERAL CIRCUIT COURTS ALREADY RECOGNIZED A CREDITOR'S**  
11 **RIGHT TO RECOVER ITS POSTPETITION ATTORNEYS' FEES, AND**  
12 **EVEN THOSE THAT DENIED SUCH RECOVERY DID SO BECAUSE**  
13 **THE FEES WERE NOT RECOVERABLE UNDER NONBANKRUPTCY**  
14 **LAW, NOT BECAUSE THEY WERE INCURRED POSTPETITION**

15 Before *Travelers*, a clear majority of the Circuit Courts had already rejected the *Fobian*  
16 exception and had recognized a party's right to recover postpetition attorney's fees as provided for  
17 under contract and applicable nonbankruptcy law, regardless of the nature of the proceedings in  
18 federal court or whether state law issues were actually litigated. See *United Merchants &*  
19 *Manufacturers, Inc. v. Equitable Life Assurance*, 674 F.2d 134, 137-38 (2<sup>nd</sup> Cir. 1982)(allowing  
20 recovery by unsecured creditor of contractually negotiated collection costs and rejecting argument  
21 that Section 506(b) only permitted oversecured creditors to recover postpetition attorneys' fees);  
22 *Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, (4<sup>th</sup> Cir.  
23 1999)(reversing ruling that prepetition attorneys' fees were recoverable but not postpetition fees in  
24 litigating issues peculiar to bankruptcy law, and holding that the proper analysis was whether the  
25 fees were recoverable under the contract and applicable state law); *In re Davidson*, 947 F.2d 1294,  
26 1297-98 (5<sup>th</sup> Cir. 1991)(awarding postpetition attorneys' fees to nondebtor wife under divorce  
27 settlement agreement after she prevailed that the debtor's payment obligations were  
28 nondischargeable alimony); *Transouth Fin. Corp. v. Johnson*, 931 F.2d 1505, 1507-10 (5<sup>th</sup> Cir.  
1991)(holding that creditor may recover contractual attorneys' fees incurred postpetition after  
examining plain language and policy of the Bankruptcy Code); *In re Dow Corning*, 456 F.3d 668,

1 683-86 (6<sup>th</sup> Cir. 2006)(unsecured creditors' right to recover postpetition attorneys' fees governed  
2 by state law regardless of the nature of the proceedings in federal court); *Martin v. Bank of*  
3 *Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6<sup>th</sup> Cir. 1985)("creditors are entitled to recover  
4 attorney's fees in bankruptcy claims if they have a contractual right to them valid under state law;"  
5 "the creditor's claim for attorney's fees does not depend on whether the obligation is secured");  
6 *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8<sup>th</sup> Cir. 1998)(allowing recovery of  
7 postpetition attorney's fees based upon clear language of the contract providing for recovery by  
8 prevailing party); *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290-91 (11<sup>th</sup> Cir.  
9 2005)(awarding debtor postpetition attorneys' fees as matter of contract "without regard to whether  
10 state law issues were actually litigated").

11 The leading bankruptcy treatise agreed with the majority of the Circuit Courts which  
12 rejected the *Fobian* distinction and explained that a valid claim under State law is allowed in  
13 bankruptcy unless the Bankruptcy Code expressly disallows it

14 "In *Fobian v. Western Farm Credit Bank (In re Fobian)*, the court concluded that,  
15 if the claim for attorney's fees arises in the context of litigating bankruptcy issues,  
16 the claim for fees must be authorized by a provision of the Bankruptcy Code in  
17 order to form part of a creditor's allowed claim even though the claims for  
18 attorney's fees may be valid under state law. This conclusion, however, inverts the  
19 proper analysis. As the Supreme Court has explained, a claim that is valid under  
20 state law is allowable in bankruptcy unless some provision of the Bankruptcy Code  
expressly *disallows* it. Other courts expressly rejected *Fobian*, and properly  
concluded that a claim for attorney's fees arising in the context of litigating  
bankruptcy issues must be allowed if valid under applicable state law. Courts have  
held generally that a creditor with a claim for attorney's fees that is valid under  
applicable state law should be allowed in bankruptcy.

21 4 Collier on Bankruptcy, ¶506.04[3][a] at 506-118.

22 Even the Circuit Courts that cited *Fobian* and its progeny before *Travelers*, denied  
23 allowance of the postpetition attorneys' fees because they were not recoverable under applicable  
24 state law. See *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2<sup>nd</sup> Cir.  
25 2000)(denying request for attorneys' fees because litigation did not involve questions of  
26 contractual enforceability recoverable under Connecticut statute); *In re Sheridan*, 105 F.3d 1164,  
27 1167 (7<sup>th</sup> Cir. 1997)(denying recovery of postpetition attorneys' fees because action did not qualify  
28 as an action with respect to a contract under Florida statute); *Burns v. Greater Lakes Higher Ed.*

1 *Corp. (In re Burns)*, 3 Fed.Appx. 689, 690 (10<sup>th</sup> Cir. 2001)(denying recovery of attorneys fees  
2 under Oklahoma statute because substantive issues decided were independent of the terms of the  
3 loan documents).

4 Thus, even the Circuit Courts that previously cited *Fobian*, decided the issues by  
5 determining whether the requesting party was entitled to an award of attorneys' fees under  
6 applicable state law, not whether the fees were incurred postpetition. Moreover, as the foregoing  
7 cases illustrate, no Circuit Court has adopted a blanket denial of postpetition attorneys' fees.

8 **E. A BLANKET PROHIBITION OF POSTPETITION ATTORNEYS' FEES**  
9 **WOULD BE CONTRARY TO ESTABLISHED FEDERAL LAW**

10 Under a blanket rejection approach to postpetition attorneys' fees, private parties would be  
11 prohibited from contractually allocating the burden of attorneys' fees between them. Such a rule  
12 would be contrary to well-established Federal law. As the Supreme Court in *Travelers* made  
13 clear, parties may overcome the "American Rule" by entering into contracts valid under state law  
14 which allocate litigation costs among them, unless Congress has prohibited them from doing so.  
15 *See Travelers*, 127 S.Ct. at 1203; *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S.  
16 714, 717 (1967). Congress set forth no such prohibition in the Bankruptcy Code. As such, a  
17 blanket prohibition against postpetition attorneys' fees cannot be sustained under either the  
18 Bankruptcy Code or existing Federal law.

19 **F. BANKRUPTCY CODE SECTION 506(b) PRESENTS NO OBSTACLE TO**  
20 **ALLOWANCE OF BURLINGAME'S CLAIM FOR RECOVERY OF**  
21 **POSTPETITION ATTORNEYS' FEES**

22 In *Travelers*, the Supreme Court refused to consider PG&E's argument that Bankruptcy  
23 Code section 506(b) categorically disallows unsecured claims for contractual attorney's fee  
24 because the argument was not raised below, nor was it an issue upon which certiorari was  
25 granted.<sup>2</sup> In its supplemental memorandum, the Koellings seized upon this and argued Section  
26 506(b) provides a basis to disallow Burlingame's claim for postpetition attorneys' fees. For several

27 <sup>2</sup> Bankruptcy Code section 506(b) states "To the extent that an allowed secured claim is secured  
28 by property the value of which, after any recovery under subsection (c) of this section, is  
greater than the amount of such claim, there shall be allowed to the holder of such claim,  
interest on such claim, and any reasonable fees, costs, or charges provided for under the  
agreement or State statute under which such claim arose." 11 U.S.C. § 506(b).

1 reasons, Section 506(b) presents no obstacle to allowance of Burlingame's claim for postpetition  
2 attorneys' fees under Bankruptcy Code section 502(b). Furthermore, the Circuit Courts that have  
3 analyzed the recoverability of attorneys' fees under Sections 506(b) and 502(b), including the  
4 Ninth Circuit in *268 Limited*, have held that attorneys' fees are recoverable under Section 502(b)  
5 even if disallowed under Section 506(b).

6 First, by its terms, Section 506 (captioned "Determination of secured status") prescribes  
7 *only* when a particular right to payment is given *secured* status and, therefore, afforded priority  
8 over unsecured claims and administrative expenses. *See* 11 U.S.C. § 726, 1129(b)(2); *United*  
9 *States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 238-39 (1989)("Section 506 . . . governs the  
10 definition and treatment of secured claims."); *Welzel*, 275 F.3d at 1317-18 (the title of Section 506  
11 indicates that the focus of the Section is more narrow than the broad focus of determining whether  
12 a claim is allowed or disallowed under § 502; "§ 506 deals with the entirely different, more narrow  
13 question of whether certain types of claims should be considered secured or unsecured."). Here,  
14 Burlingame does not contend that its claim for postpetition attorneys' fees is secured. Burlingame  
15 contends that its claim for postpetition attorneys' fees is unsecured. Accordingly, Section 506  
16 does not apply and there is no basis to disallow Burlingame's claim under the general provisions of  
17 Section 502.

18 Second, treating Section 506(b) as a disallowance provision mistakes the operational  
19 differences between Section 502(b) and 506(b). *See Welzel*, 275 F.3d at 1317 ("Section 506 deals  
20 with whether a claim is secured or not, as opposed to the larger question of whether the claim is  
21 allowed or disallowed, as addressed by § 502."); 4 Collier on Bankruptcy, ¶ 506.01, at 506-6  
22 ("[A]lthough section 506 supplies a number of important rules specifying the determination of the  
23 secured status of a claim, the section does not govern the allowance or disallowance of the  
24 underlying claim itself. Rules governing the allowance of claims generally are provided in section  
25 502."). Section 502(b) deals with claims generally (*see Welzel*, 275 F.3d at 1318 ("Section 502  
26 deals with the threshold question of whether a claim should be allowed or disallowed")), and, as  
27 discussed previously, directs that all prepetition rights to payment are to be allowed, *except* those  
28 that are specifically excluded. The fact that Section 502(b) does not specifically mention the

1 allowability a creditor's contractual right to recover its postpetition attorneys' fees is entirely  
2 consistent with Section 502(b). Section 502(b) allows a claim unless specifically excluded, not  
3 the other way around.

4 By contrast, Section 506(b) deals specifically with a claim's secured status, and directs the  
5 priority and inclusion of items in that determination. *See 268 Limited*, 789 F.2d at 678 ("Section  
6 506 establishes the requirements for a secured claim. Subsection (a) defines such claims.  
7 Subsection (b) states that under some circumstances "there shall be allowed to the holder of such  
8 claim" interest, fees, costs or charges. When read literally, subsection (b) arguably limits the fees  
9 available to the oversecured creditor. When read in conjunction with § 506(a), however, it may be  
10 understood to define the portion of the fees which shall be afforded secured status. We adopt the  
11 latter reading."); *see also Ron Pair*, 489 U.S. at 241 ("[s]uch claim refers to an oversecured  
12 claim"); *In re Tricca*, 196 B.R. 214, 219 (Bankr. D. Mass. 1996)("Section 506(b) addresses only  
13 the question of what is part of an allowed secured claim.").

14 Collier on Bankruptcy explained the interplay between Section 506(b) and 502(b) as  
15 follows, concluding that there is no basis under the Bankruptcy Code to disallow a claim for  
16 attorney's fees that is valid under applicable state law:

17 The issue of whether a claim for attorney's fees that is *not* valid under applicable  
18 state law may nevertheless be allowed as part of a[] creditor's *oversecured* claim  
19 under section 506(b) . . . should not be confused with the separate issue of whether  
20 a claim for attorney's fees that *is* valid under applicable state law may be allowed as  
21 part of a creditor's claim. If a claim for attorney's fees is valid under applicable  
22 state law, then it is properly included as part of the creditor's claim under section  
23 502. In turn, the fees may be added to the creditor's *secured* claim under section  
24 [506(b)] to the extent of any oversecurity and to the extent the fees are reasonable .  
25 . . . The oversecurity and reasonableness inquiries apply only with respect to  
26 whether the fees may be added to the creditor's secured claim, not to whether the  
27 fees are properly included as part of the creditor's claim and allowed on an  
28 unsecured basis if not properly included as part of the creditor's secured claim  
under section 506(b). There is no general basis under the Bankruptcy Code for  
disallowing a claim for attorney's fees that is valid under applicable state law.

4 Collier on Bankruptcy, ¶506.04[3][a] at 506-117.

26 Third, resolving a "dispute over the meaning of § 506(b) begins where all such inquiries  
27 must begin: with the language of the statute itself." *Ron Pair*, 489 U.S. at 241. The plain  
28 language of Section 506(b) makes clear that it only prescribes the treatment of allowed secured

1 claims (i.e., "To the extent that an allowed secured claim is secured by property . . . "). 11 U.S.C.  
2 § 506(b); *Ron Pair*, 489 U.S. at 239 ("subsection (b) is concerned *specifically* with oversecured  
3 claims, that is, any claim that is for an amount less than the value of the property  
4 securing")(emphasis added.). Section 506(b) is silent about whether postpetition interest and  
5 attorneys' fees may constitute an *unsecured* claim under Section 502. *Welzel v. Advocate Realty*  
6 *Investments, LLC (In re Welzel)*, 275 F.3d 1308, 1317 (11<sup>th</sup> Cir. 2001)(*en banc*)("This silence  
7 suggests that § 506(b) is not meant to displace the general instructions laid down in § 502 . . .").  
8 Section 506 does not state postpetition attorneys' fees are to be disallowed. *Id.* ("§ 506(b) does not  
9 state that attorney's fees . . . are to be disallowed"). Thus, the plain language of Section 506(b) is  
10 also where the inquiry must end in this case, "for, where, as here, the statute's language is plain,  
11 the sole function of the courts is to enforce it according to its terms." *Ron Pair*, 489 U.S. at 241;  
12 *see also United States v. Noland*, 517 U.S. 535, 540 (1996)(Bankruptcy Courts lack authority to  
13 create novel rules governing the treatment of claims in bankruptcy). Section 506(b) provides no  
14 basis to disallow an unsecured claim; Section 502(b) and the nine enumerated exceptions thereto  
15 provide the exclusive grounds for denial of a claim.

16 Fourth, construing Section 506(b) to disallow postpetition interest or attorneys' fees from  
17 an *unsecured* claim - simply because Section 506(b) mentions interest and attorneys' fees in  
18 determining a creditor's *secured status* - would render superfluous critical provisions of Section  
19 502 and conflict with the express language of Section 502. *See Ron Pair*, 489 U.S. at 243  
20 (construing Section 506(b) to avoid interpretations that would conflict with other sections of the  
21 Code).

22 For example, Section 502(b)(2) disallows from an unsecured claim any postpetition  
23 interest. The fact that Section 506(b) permits adding postpetition interest to an oversecured claim  
24 cannot be construed to mean that, by implication, Section 506(b) subtracts postpetition interest  
25 from an unsecured claim because doing so would render Section 502(b)(2) superfluous.

26 Likewise, construing Section 506(b) to disallow postpetition attorneys' fees with respect to  
27 unsecured claims would directly conflict with the express language of Section 502(b) that a claim  
28 shall be allowed, "except to the extent that" one of the enumerated exceptions applies. Congress

1 plainly knew about prepetition contractual rights to attorneys' fees when it drafted the Code. *See*  
2 11 U.S.C. 506(b). Congress also knew that prepetition and postpetition attorneys' fees would be  
3 allowed as part of a creditor's unsecured claim under Section 502. *See* 11 U.S.C.  
4 502(b)(4)(expressly excepting *only* a claim for unreasonable attorneys' fees of the debtor). Had  
5 Congress intended to disallow all postpetition attorneys' fees from an allowed unsecured claim,  
6 Congress would have added such a prohibition in Section 502(b), as it did with postpetition  
7 interest and claims for attorneys' fees of the debtor. As the Supreme Court stated "where Congress  
8 has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so  
9 clearly and expressly." *Travelers*, 127 S.Ct. at 1206. There is no clear or express exception in the  
10 Bankruptcy Code disallowing postpetition attorneys' fees from a creditor's claim for such fees  
11 otherwise recoverable under applicable nonbankruptcy law.

12 Fifth, construing Section 506(b) as a blanket disallowance provision applicable to both  
13 secured and unsecured claims simply because Section 506 includes interest and attorneys' fees in  
14 determining a creditor's secured status, cannot be right. If such were the case, it would require the  
15 disallowance of *prepetition* interest and attorneys' fees from unsecured claims as well because  
16 Section 506 does not specify that it applies *only* to *postpetition* interest and attorneys' fees. Such a  
17 result would conflict with well established bankruptcy law. *See Ron Pair*, 489 U.S. at 239  
18 ("Section 506(b) allows a holder of an oversecured claim to recover, *in addition to the prepetition*  
19 *amount* of the claim [postpetition interest and attorneys' fees]" (emphasis added)); *Cohen v. De La*  
20 *Cruz*, 523 U.S. 213, 223 (1998); *Vanston*, 329 U.S. at 163-64.

21 Sixth, treating the purpose of Section 506 as determining a creditor's secured status rather  
22 than determining the allowability of an unsecured claim, harmonizes the Section with other  
23 provisions of the Bankruptcy Code. Section 506(a) provides that a claim secured by a lien on  
24 property of the bankruptcy estate is a secured claim to the extent of the value of the property  
25 securing the claim (i.e., the claim is conferred with secured status to the extent of the value of the  
26 collateral), and any balance of the claim is treated as an unsecured claim. *See* 11 U.S.C. § 506(a);  
27 *Ron Pair*, 489 U.S. at 239. Section 506(b) then prioritizes the elements of the secured claim by  
28 adding postpetition interest and attorneys' fees to the prepetition amount of the claim to the extent

1 that the value of the collateral exceeds the amount of the claim. *Ron Pair*, 489 U.S. at 239  
2 ("Section 506(b) allows a holder of an oversecured claim to recover, in addition to the prepetition  
3 amount of the claim [postpetition interest and attorneys' fees]."). The function of Section 506 is  
4 that a secured party's property interest covers the postpetition interest and attorneys' fees, not the  
5 remaining unencumbered assets of the estate that are available for unsecured claims. In  
6 prioritizing the elements of a secured claim in this manner, Section 506(b) prevents, among other  
7 things, lenders from "front-loading" their secured claims with postpetition interest so as to avoid  
8 the disallowance of postpetition interest on the undersecured portion of the claim (*see* 11 U.S.C. §  
9 502(b)(2)) while converting the principal and prepetition fees and cost into an allowable unsecured  
10 deficiency claim.

11 Seventh, adopting a blanket disallowance of postpetition attorneys' fees to unsecured  
12 creditors would create another Federal common law rule, like *Fobian*, that finds no textual support  
13 in the Bankruptcy Code and was just rejected in *Travelers*. *See Travelers*, 127 S.Ct. at 1206.

14 The Circuit Courts which have examined Section 506(b) in conjunction with Section 502,  
15 including the Ninth Circuit in *268 Limited*, have concluded Section 506(b) does not create  
16 additional exceptions to the allowance of claims; rather it only provides for the classification of  
17 allowed claims as secured or unsecured.

18 For example, in *268 Limited*, an oversecured creditor sought recovery of \$197,500 in  
19 attorneys' fees under an attorneys' fees provision of a deed of trust. *268 Limited*, 789 F.2d at 675.  
20 The bankruptcy court awarded the creditor \$20,000 under Section 506(b) as the reasonable fees  
21 under the circumstances, despite the fact that there were surplus proceeds from the foreclosure  
22 sale. *Id.* While the Ninth Circuit upheld the bankruptcy court's \$20,000 award on reasonableness  
23 grounds under Section 506(b), the Court nonetheless found that the creditor could seek the  
24 remainder of the fees sought under Section 502. *Id.* at 677-78.

25 Likewise, in *Welzel*, an oversecured creditor sought recovery of approximately \$147,000 in  
26 attorneys' fee under promissory notes with the debtor and Georgia statutes. *Welzel*, 275 F.3d at  
27 1311-12. The bankruptcy court awarded a portion of the fees sought under Section 506(b) as the  
28 reasonable fees and treated the balance as an unsecured claim under Section 502. *Id.* at 1312. The

1 District Court reversed, and the Eleventh Circuit, *en banc*, reversed the District Court. The  
2 specific question addressed by the Court in *Welzel* was:

3 In a bankruptcy proceeding where an over-secured creditor recovers its reasonable  
4 attorneys' fees as a secured claim pursuant to a contractual attorney's fees  
5 agreement valid under the governing state law, is the bankruptcy court entitled to  
6 disallow that part of the fee determined to be unreasonable as a secured claim  
7 pursuant to 11 U.S.C. § 506(b)? *Id.*, n. 2.

8 The Court answered: "No."

9 In concluding that any fees which did not meet the reasonableness standard would not be  
10 disallowed under Section 506(b), but would simply remain part of the creditor's unsecured claim  
11 under Section 502(b), the Court analyzed the interplay between Section 506(b) and Section 502

12 "the threshold question is whether Advocate's claim for its contractually set  
13 attorney's fees is allowed under § 502. The entire claim to fees is allowable under §  
14 502 as long as the exceptions in subsection (b) do not apply. As already noted,  
15 none of these exceptions apply here, so Advocate's claim for its contractual  
16 attorney's fees passes muster under § 502. Given that the fees claim is allowed, the  
17 fees must then be assessed for reasonableness under § 506(b). Reasonable fees are  
18 then to be treated as a secured claim. If a portion of the fees are deemed  
19 unreasonable, however, the fees should be bifurcated between the reasonable  
20 portion, treated as a secured claim, and the unreasonable portion, treated as an  
21 unsecured claim. By failing to adopt this bifurcation approach and instead  
22 disallowing unreasonable fees, the district court erred."

23 *Welzel*, 275 F.3d at 1318. *See also In re Dow Corning*, 456 F.3d at 680-83 (rejecting argument  
24 that Section 506(b) operates to disallow an unsecured creditor's right to recover postpetition  
25 attorneys' fees); *In re Tricca*, 196 B.R. at 221 (recognizing the distinction between Section 506(b)  
26 and Section 502(b) and allowing bank's claim for attorney's fees under Section 502 even though  
27 not allowed as part of secured claim under Section 506(b)).

28 Thus, in terms of recovery and allowance of postpetition attorneys' fees, 268 *Limited* and  
29 *Welzel* make clear that Section 506(b) and Section 502(b) are analytically distinct. The former  
30 involves the determination of a claim's secured status, while the latter involves the allowability of  
31 a creditor's claim generally. Moreover, even if a creditor claim is not afforded secured status, it  
32 may still be an allowed claim.

1           **G.     BURLINGAME'S POSTPETITION ATTORNEYS' FEES OTHERWISE**  
2           **RECOVERABLE UNDER STATE LAW CANNOT BE DISALLOWED**  
3           **UNDER BANKRUPTCY CODE SECTION 502(b) ON THE GROUNDS OF**  
4           **"REASONABLENESS"**

5           In their supplemental memorandum, the Koellings also argue that Burlingame's request for  
6 recovery of postpetition attorneys' fees can be denied on the grounds of reasonableness, which was  
7 not "diminished by *Travelers*." It is unclear whether the Koellings are referring to reasonableness  
8 under Section 506(b), or under applicable California law. If the Koellings are referring to a  
9 reasonableness determination under Section 506(b), the argument fails.

10           As discussed previously, Burlingame is not seeking recovery of its postpetition attorneys'  
11 fees under Section 506(b). Moreover, Congress imposed no federal bankruptcy reasonableness  
12 restriction on the allowance of attorneys' fees under Section 502(b), other than Section 502(b)(4)  
13 which applies only to claims for attorneys' fees of the debtor. *See* 11 U.S.C. § 502(b)(4). Instead,  
14 for purposes of Section 502, Congress incorporated whatever standard of reasonableness exists  
15 under applicable nonbankruptcy law. Specifically, Section 502(a)(1) provides that a claim shall be  
16 disallowed to the extent that "such claim is unenforceable against the debtor and property of the  
17 debtor, under any agreement or applicable law . . . ." 11 U.S.C. § 502(b)(1). Under Section  
18 502(b)(1), if a claim for attorneys' fees is unenforceable as unreasonable under applicable  
19 nonbankruptcy law, it is unenforceable under Section 502.

20           Here, the contractual right to recovery of attorneys' fees is governed by California law. In  
21 California, Civil Code § 1717 governs the recoverability of attorneys' fees and costs in contract  
22 actions. Section 1717(a) provides that the prevailing party shall be entitled to reasonable  
23 attorneys' fees

24           In any action on a contract, where the contract specifically provides that attorney's  
25 fees and costs, which are incurred to enforce that contract, shall be awarded . . . to  
26 the prevailing party, then the party who is determined to be the party prevailing on  
27 the contract . . . *shall be entitled to reasonable attorney's fees* in addition to other  
28 costs. Civil Code § 1717(a) (emphasis added)

29           Furthermore, under California law, the standard for determining "reasonableness" is the lodestar  
30 method which calculates reasonable attorneys' fees for purposes of Civil Code § 1717 by  
31 multiplying the number of hours spent by a reasonable hourly compensation, taking into

1 consideration such things as the nature and difficulty of the litigation, the success of the attorneys'  
2 efforts, the attorneys' experience and skill, etc. *Serrano v. Priest (Serrano III)*, 20 Cal.3d 25, 48  
3 (1977).

4 Thus, Burlingame's claim for postpetition attorneys' fees to which it is otherwise entitled to  
5 recovery under California law, cannot be denied or disallowed under Bankruptcy Code section  
6 502(b) because the fees are purportedly unreasonable or unnecessary. The reasonableness  
7 determination is made under California law, and once made, cannot be disturbed under  
8 Section 502(b).

9 **H. BANKRUPTCY CODE SECTION 503 PROVIDES NO BASIS TO**  
10 **DISALLOW BURLINGAME'S POSTPETITION ATTORNEYS' FEES**

11 Like Section 506(b), the Koellings may also argue that Burlingame is not entitled to  
12 recover its postpetition attorneys' fees unless it qualifies for recovery under Section 503.  
13 Specifically, Bankruptcy Code section 503(b)(3)(D) provides that after notice and a hearing, there  
14 shall be allowed, *administrative expenses*, including

15 (3) the actual, necessary expenses . . . incurred by –

16 \*\*\*

17 (D) a creditor . . . in making a substantial contribution in a case under chapter 9 or  
18 11 of this title. 11 U.S.C. § 503(b)(3)(D).

19 Bankruptcy Code section 503(b)(4) brings "reasonable compensation for professional services by  
20 an attorney" within the scope of allowable administrative expenses for "making a substantial  
21 contribution." 11 U.S.C. § 503(b)(4). If the Koellings were to make such an argument, it would  
22 fail.

23 By its plain language, Section 503 pertains only to a party seeking payment of  
24 *administrative expenses*, which if allowed would entitle the party to payment priority. *See* 11  
25 U.S.C. §§ 507, 726. Here, however, Burlingame is not seeking its postpetition attorneys' fees as  
26 administrative expenses; it is not seeking a payment priority or improved position over other  
27 creditors. Instead, Burlingame is seeking allowance under Section 502(b) of what it is legally  
28

1 entitled to under State law, just as other creditors have. As such, there is no basis to treat  
2 Burlingame differently than other similarly situated creditors.

3 Similarly, like Section 506(b), Section 503 does not provide any exception to allowance of  
4 a claim under Section 502. Just as Section 506 provides that certain items are recoverable from a  
5 secured creditor's collateral, Section 503 specifies the procedures and substantive requirements for  
6 a party seeking payment as a priority administrative expense. However, simply because Section  
7 503 provides that a creditor may be entitled to payment of its attorneys' fees as an administrative  
8 expense for making a substantial contribution, it does not mean by negative inference that *unless* a  
9 creditor makes a substantial contributions, it is denied allowance of its postpetition attorneys' fees  
10 under Section 502(b).

11 **III. CONCLUSION**

12 Based on the foregoing, Burlingame's postpetition attorneys' fees, which Burlingame is  
13 entitled to recover under its contracts and applicable California law, must be allowed as part of  
14 Burlingame's claim against the Koellings and their bankruptcy estate in accordance with  
15 applicable California law.

16 Dated: April 27, 2007

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP

17  
18 By: /s/ William W. Huckins  
19 WILLIAM W. HUCKINS  
20 Attorneys for Defendant Burlingame Capital  
21 Partners II, L.P.  
22  
23  
24  
25  
26  
27  
28