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6
7 UNITED STATES BANKRUPTCY COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
9

10 **In re**
11 **QMECT, INC., etc.,**
12 **Debtor-in-Possession.**

Case No. 04-41044 T
Chapter 11

13 **In re**
14 **FRED AND LINDA KOELLING,**
15 **Debtor-in-Possession.**

Case No. 04-46443 T
Chapter 11

16 **QMECT, INC., etc.,**
17 **Plaintiffs,**

A.P. No. 04-4190 AT
A.P. No. 04-4365 AT
A.P. No. 04-4366 AT

18 **vs.**
19 **BURLINGAME CAPITAL PARTNERS II,**
20 **L.P., etc. et al.,**
21 **Defendants.**

(Consolidated)

22 **And Related Adversary Proceedings**
23

SUPPLEMENTAL BRIEF IN
OPPOSITION TO AMENDED MOTION
FOR RECOVERY OF ATTORNEYS'
FEES AND COSTS

24 **Date: TBA**
25 **Time: TBA**
26 **Ctrm: 201**

United States Bankruptcy Court
1300 Clay Street
Oakland, California

1 Fred and Linda Koelling, Chapter 11 Debtors-In-Possession in the above-referenced Chapter 11
2 bankruptcy case (the “Koellings”), hereby submit this supplemental brief in opposition to the Amended
3 Motion for Recovery of Attorneys’ Fees and Costs (“Amended Motion”) filed by Burlingame Capital
4 Partners II, L.P. (“Burlingame”). The purpose of this supplemental opposition is to provide the Court
5 with the Koellings’ arguments in light of the United States Supreme Court’s ruling in Travelers Casualty
6 & Surety Co. of America v. Pacific Gas & Electric Co., 127 S. Ct. 1199 (2007).

7
8 **I. The Supreme Court’s Ruling In Travelers Eliminates Any Basis For Fees To Be Awarded**
9 **To Burlingame.**

10 In Travelers, the Supreme Court of the United States overruled In re Fobian, 951 F. 2d 1149,
11 1159 (9th Cir. 1991). Fobian held that an unsecured creditor could recover post-petition attorneys fees,
12 but to only recover those fees incurred litigating non-bankruptcy issues. The ruling in Travelers
13 eliminates the so called “Fobian Rule,” but did not rule post-petition fees are recoverable by an
14 unsecured creditor.

15 Without the authority of Fobian¹, Burlingame has no basis to recover any post-petition fees. It
16 was only under the “Fobian Rule” which allowed for the recovery of post-petition fees incurred
17 litigating non-bankruptcy related matters. As will be seen below, there is no other basis under the
18 Bankruptcy Code for the recovery of post-petition attorneys fees by an unsecured or under secured
19 creditor.
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23 It is undisputed that Burlingame is an under secured creditor. Through its Amended Motion,
24 Burlingame is attempting to leap frog other unsecured or under secured creditors and recover post-
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28 ¹In fact, Burlingame concedes in its reply that Fobian is the basis for its fee request. See Burlingame’s Reply Brief, page 3, lines 10-13 (“The Amended Motion is based on In re Fobian, as outlined by the Court’s Memorandum and Order, and other related and applicable 9th Circuit authority”)

1 petition collection costs incurred in this bankruptcy. Without the “Fobian Rule,” in order to achieve this
2 unfair and extraordinary result, Burlingame must look to some other authority for this request.

3 As this Court previously stated in its Memorandum of Order Denying Motion for Post-Petition
4 Attorneys Fee Without Prejudice (“Memorandum Re: Post-Petition Attorneys Fees”) entered on
5 November 16, 2006, “if an unsecured creditor is entitled to include its post-petition attorneys fees in its
6 claim, what is the need for Section 506(b)?”²

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8 Although Burlingame has argued that it is not making the fee request under Section 506(b), that
9 is the sole basis upon which it could bring the Amended Motion post Travelers.

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11 11 U.S.C. Section 506(b) provides as follows:

12
13 “(b) to the extent that an allowed secured claim is secured by property the
14 value of which . . . is greater than the amount of such claim, there shall
15 be allowed to the holder of such claim, interest on such claim, and
reasonable fees, costs or charges provided for under which such claim
arose.”

16
17 In this provision, the Congress specifically provided that contractual attorneys fees are allowed
18 for a creditor whose claim is secured by collateral that is more valuable than the debt owed. Clearly,
19 this means that Congress intended that if the claim was not secured, that you would not be entitled to
20 attorneys fees. Any other reading makes 11 U.S.C. Section 506(b) superfluous, which would go in
21 contravention of the directive that statutes are to be read to give them meaning to every word. Duncan
22 v. Walker, 533 U.S. 167, 174 (2001). In other words, if all creditors, unsecured, under secured, and
23 over secured, were allowed a claim for contractual post-petition attorneys fees by virtue of Section
24 502(b), then Section 506(b) would serve no purpose.

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28 ²Memorandum Re: Post-Petition Attorneys Fee, Page 4 - Footnote 2

1 **DECLARATION OF SERVICE**

2 I, the undersigned, declare:

3 I am employed in the City of Oakland, County of Alameda, California. I am over the age of 18
4 years and not a party to this action. My business address is 1999 Harrison Street, Suite 2675, Oakland,
5 California 94612.

6 I am readily familiar with the business practices of my employer, Kornfield, Paul & Nyberg,
7 P.C., for the collection and processing of correspondence for mailing with the United States Postal
8 Service and that correspondence is deposited with the United States Postal Service that same day in the
9 ordinary course of business.

10 On April 27, 2007, I served the following document(s):

11 SUPPLEMENTAL BRIEF IN OPPOSITION TO AMENDED MOTION FOR RECOVERY OF
12 ATTORNEYS' FEES AND COSTS

13 by placing copies of said document(s) in sealed envelope(s) and served in the manner or manners
14 described below addressed as follows:

15 Robert R. Moore, Esq.
16 William Huckins, Esq.
17 Marlene M. Moffitt, Esq.
18 Allen, Matkins, Leck, Gamble, Mallory &
19 Natsis, LLP
20 Three Embarcadero Center, 12th Floor
21 San Francisco, CA 94111-4074

22 I placed such envelope(s) for collection and mailing at my employer's office following ordinary business
23 practices, addressed to the addressee(s) designated.

24 I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day
25 of April, 2007 at Oakland, California.

26 Gail M. Aviles /s/
27
28

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