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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.**

(Consolidated)

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

REPLY TO BURLINGAME CAPITAL
PARTNERS II, L.P. POST HEARING
BRIEF RE: RECOVERABILITY POST-
PETITION ATTORNEYS' FEES

22 **And Related Adversary Proceedings**
23

24 **Date: March 8, 2007**
Time: 2:00 p.m.
Ctrm: 201

United States Bankruptcy Court
1300 Clay Street
Oakland, California

1 Fred and Linda Koelling hereby submit this Reply to Burlingame Capital Partners II, L.P.'s Post
2 Hearing Brief Re: Recoverability of Post-Petition Attorneys' Fees ("Post Hearing Brief") as follows:

3
4 In its Post Hearing Brief, Burlingame primarily argues that the Supreme Court's ruling in
5 Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co., 127 S. Ct. 1199 (2007)
6 ("Travelers") which overturned the Ninth Circuit case of In re Fobian, 951 F. 2d 1149 (9th Cir. 1991)
7 coupled with 11 U.S.C. Section 502(b) allows them to recover post-petition attorneys' fees for all fees
8 incurred since the filing of this bankruptcy. Burlingame completely misses the point. The Supreme
9 Court in Travelers did not find that an unsecured creditors such as Burlingame is allowed post-petition
10 fees under 11 U.S.C. Section 502(b). In fact, the Supreme Court, specifically indicated that it was not
11 ruling whether 11 U.S.C. Sections 502(b) or 506(b) provide a basis to award post petition attorneys fees
12 to an unsecured creditor.

13
14 **I. Burlingame Should Not Be Allowed To Post-Petition Fees Because It Is An**
15 **Unsecured Creditor And There Is No Basis Under Bankruptcy Law To Allow For**
16 **Post-Petition Fees.**

17 Just like in Travelers, Burlingame is an under secured or unsecured creditor in this case. Like
18 virtually all credit card companies and other unsecured claims based on contract, Burlingame has a fee
19 provision in its agreements. If Burlingame's theories were adopted, it would mean that the Bankruptcy
20 Code allows unsecured creditors, such as Burlingame, to enhance its share of the bankruptcy recovery
21 over other unsecured creditors by inflating its underlying claim to include attorneys fees and costs.

22 Unfortunately for Burlingame, the Bankruptcy Code does not allow such post petition claims
23 expansion for unsecured creditors. As the Supreme Court held in United Sav. Ass'n of Tex v. Timbers
24 of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371-75 (1988) ("Timbers"), the Bankruptcy Code does
25 not allow for an unsecured creditor to increase its claim by the accrual of interest which would be in
26 contravention of the Bankruptcy Code.

1 Furthermore, over the years, most Court's that have addressed this question have concluded that
2 unsecured creditors generally may not collect attorneys fees incurred after filing bankruptcy petition,
3 even if they can point to a contract appointing to allow such fees. In re Pride Cos., 285 B.R. 366, 372
4 (Bankr. M.D. Tex. 2002) (categorizing cases and describing this as a view supported the majority of the
5 published opinions).

6
7 **A. The Applicable Code Sections Do Not Authorize This Court To Award Burlingame
8 Its Post-Petition Fees.**

9
10 Although the definition of claim under 11 U.S.C. Section 101(5)(a) is a very broad and
11 expansive definition, claims are "subject to any qualifier or contrary provision of the Bankruptcy Code."
12 Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000).

13
14 Furthermore, 11 U.S.C. Section 502(b) provides as follows:

15 (b) . . . the Court, after notice and a hearing, shall determine the amount
16 of such claim in lawful currency of the United States as of the date of the
17 filing of the petition, and shall allow such claim in such amount, except
to the extent that -

18 (1) such claim is unenforceable against the debtor and property of the
19 debtor, under any agreement or applicable law for a reason other than
20 because the claim is contingent or unmatured."

21
22 Even if Burlingame claims for attorneys' fees were allowed under 11 U.S.C. Section 502, they
23 would be capped "as of the date of the filing of the petition" as expressed in the statute.

24
25 11 U.S.C. Section 506(b) supports this position. As set forth in the Koellings Supplemental
26 Brief in 11 U.S.C. Section 506(b), Congress specified that contractual attorneys' fees are allowed only
27 for a creditor whose claim is secured by collateral more valuable than the debt. As most court's have
28

1 held, this specific provision means that fees are available only to a so-called over secured creditor, and
2 only to the extent the creditors has an equity cushion. Any other reading would make 11 U.S.C. Section
3 506(b) superfluous.

4
5 As referenced above, the Supreme Court in Timbers also found that 11 U.S.C. Section 506(b)
6 limited interest only to an over secured creditor. The Court characterized 11 U.S.C. Section 506(b) as
7 a provision that had the “substantive effect that denying under secured creditors post-petition interest
8 on their claims - just as it denies over secured post-petition interests to since the such interest, when
9 added to the principal amount of claim, will exceed the value of the collateral. Id. Although the Timbers
10 case related to post-petition interest, the same analysis applies to attorneys fees. Just as the words “to
11 the extent that” in 11 U.S.C. Section 506(b) provides that post-petition interest may only be paid out
12 of security cushion, the same must be true with fees and costs.

13
14 Finally, the underlying purpose of the Bankruptcy Code would be turned on its head if
15 Burlingame’s arguments are adopted. The dominant feature of the Bankruptcy Code is the distinction
16 between pre and post petition debts. Furthermore, there is a bankruptcy theme of a equality of
17 distribution. Burlingame proposes a rule that would violate this principal by giving one large class of
18 unsecured creditors an inflated claim and voting power contrary to the Bankruptcy Code. Furthermore,
19 if Burlingame’s rule is adopted, it will further dilute the distribution of other creditors, some of which
20 were not as fortunate to have attorneys fees provision in their contracts. Burlingame’s arguments
21 contravene the goal of maximizing a distribution of creditors and the efficient administration of
22 bankruptcy estates.

23 **CONCLUSION**

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25 Based on the foregoing, the Koellings requests that the Court deny Burlingame’s request for
26 payment of fees.

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Dated: May 3, 2007

KORNFIELD, PAUL & NYBERG, P.C.

By: Chris D. Kuhner /s/
(Bar No. 173291)
Attorneys for Fred and Linda Koelling

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 May 3, 2007, I served the following document(s):

11 **REPLY TO BURLINGAME CAPITAL PARTNERS II, L.P. POST HEARING BRIEF RE:
12 RECOVERABILITY POST-PETITION ATTORNEYS' FEES**

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 3rd day
25 of May, 2007 at Oakland, California.

26 Gail M. Aviles /s/

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