UNPUBLISHED

#366
(See #373)

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	:	
JOHN M. GRIFFIN,	:	**Bankruptcy Number 90B-02845**
	:	**[Chapter 11]**
Debtor.	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING VERIFIED APPLICATION OF MURPHY, THOMPSON & GUNTER FOR PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES

Murphy, Thompson & Gunter (MT&G) filed its Verified Application for Allowance of Compensation and Reimbursement of Expenses (Fee Application) as Debtor's Special Counsel on April 13, 1992. The Fee Application is based on the terms of a letter contingency fee agreement (Contingency Fee Agreement) that provided MT&G fees in an amount equal to forty percent (40%) of any recovery pursuant to settlements of litigation covered by the Contingency Fee Agreement. The pending Fee Application requests final allowance of total fees of $938,617.16 and payment of the balance of outstanding costs in the amount of $4,128.14. John M. Griffin (Griffin), the Chapter 11 debtor, filed an objection

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to the Fee Application arguing that the fees were unreasonable, improvident in light of the present circumstances and, if awarded, would impede Griffin's chances for reorganization. The United States Trustee also objected to MT&G's pending Fee Application as well as previously submitted fee applications.

Hearings on this matter were held on May 21, 1992, September 4, 1992,[1] and April 1 and 2, 1993, with final argument on May 3, 1993.[2] The court heard the evidence, judged the credibility of the witnesses, reviewed the memoranda and arguments of counsel, made an independent evaluation of applicable statutes and case law and based thereon, makes the following:

I. FINDINGS OF FACT

A. Griffin's Development of Big Bear Lake Property.

1. In 1982, Griffin commenced the development of a proposed 70-lot subdivision and construction of improvements within Tract No. 12166 located in the City of Big Bear Lake, San Bernardino County, California (Tract 12166). (Gunter Affidavit at p. 16.)[3]

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1 See Section I, paragraph I, herein, concerning allegations of legal malpractice that caused a delay in the proceeding.

2 The transcript of the hearings will be cited herein as "5/21/92 Tr. at __", "9/4/92 Tr. at __", "4/1/93 Tr. at __" and "4/2/93 Tr. at __".

3 Affidavit of Roy C. Gunter, III, dated April 23, 1992 (Gunter Affidavit). The Gunter Affidavit and the Affidavit of John M. Griffin, dated May 12, 1992 (Griffin Affidavit), were accepted by the Court as proffered testimony pursuant to the Supplemental Scheduling Order entered by the Court during the September 4, 1992, hearing. The court also accepted proffered testimony in affidavit form including: 1) the Affidavit of Edward Pilot, dated August 24, 1992 (Pilot Affidavit), 2) the Affidavit of Craig H. Millet, dated May 13, 1992 (Millet Affidavit), 3) the Supplemental Declaration of Craig H. Millet in Opposition to Fee Application of Murphy, Thompson & Gunter dated August 20, 1992 (Supp. Millet Affidavit), 4) Affidavit of Jeffrey T. Thomas, dated May 13, 1992 (Thomas Affidavit), 5) Supplemental Affidavit of Jeffrey T. Thomas, dated August 20, 1992 (Supp. Thomas Affidavit), 6) Affidavit of David E. Malnick, dated May 8, 1992 (Malnick Affidavit). (Supplemental Scheduling Order, Docket No. 160).

2. The City of Big Bear Lake (City), a small mountain resort community, agreed to sponsor a municipal improvement bond that would allow a construction lender to advance construction funds to be repaid by the sale of the municipal bonds to third party investors at the completion of the improvements. The City, as the sponsor of the bonds, would retain general liability as the guarantor to the bondholders in the event of default by the property owner of the bond payments. The City retained the right, in the event of default, to commence a foreclosure in order to obtain reimbursement for the monies paid by it under its guaranty to bondholders if an installment payment became delinquent. (5/21/92 Tr. at pp. 66-67; Gunter Affidavit at p. 19.)

3. First Mountain Bank (Bank), located in the City of Big Bear Lake, agreed to lend Griffin $1,900,000 necessary to fund construction of the subdivision improvements that would provide the infrastructure for a 70-lot subdivision. The Bank required Griffin to sign a power of attorney that could be utilized by the Bank if needed to satisfy any requirements for the completion of the subdivision improvements. (Gunter Affidavit at p. 16.)

4. The contract for rough grading and compaction was performed by an individual named Real Williams. Williams, in the performance of his contract, failed to adequately compact the soil on the down slopes of the roadways and otherwise failed to perform under the contract. Williams was a friend of both the Chairman of the Board of Directors of the Bank and the Mayor of the City. The Mayor was also a director of the Bank, and a member of its loan committee. (5/21/92 Tr. at p. 68; Gunter Affidavit at p. 17.)

5. Even though there were obvious defects in the work performed by Williams, he was able to prevail upon Griffin's engineer, Jim Hicks, of Hicks & Hartwick, Inc., to certify the work as being complete. Moreover, the Mayor of the City was able to persuade the City Engineer to certify that the improvements complied with the plans and specifications as required by the City. Griffin refused to sign the Notice of Completion and other documents required by the Bank as a pre-requisite to the sale of the bonds required to pay off the construction loan to the Bank. Nevertheless, the Bank, in financial trouble and knowing the work was defective, used the power of attorney delivered to it by Griffin to sign the Notice of Completion and obtain the payoff of its construction loan. (5/21/92 Tr. at p. 68; Gunter Affidavit at p. 17.)

6. As a result, Griffin was left with defective lots, crumbling roadways and unstable soil on a number of lots. Nevertheless, the City accepted the subdivision as being complete in December 1984, and the assessment bonds were sold to innocent third party investors, secured by individual assessment liens against the lots as security for the bonds, in addition to the City's guarantee. Griffin was unable to market the lots locally due to the general public knowledge of the defects in the subdivision. (5/21/92 Tr. at p. 69; Gunter Affidavit at p. 18.)

7. Without any sales, Griffin was unable to pay the bond installments that became due in December of 1985. Griffin decided to conduct an auction sale of lots in April, 1986. The City feared that the good, non-defective lots would be sold at the auction leaving the defective lots unsold and the City, as the general obligor guaranteeing the bonds,

responsible for the assessments against the defective lots. (5/21/92 Tr. at p. 69; Gunter Affidavit at p. 18.)

8. In April of 1986, the City filed a foreclosure complaint (San Bernardino County Superior Court Case No. BCV002085) and a blanket *lis pendens* against Griffin's Tract 12166, to stop Griffin's auction sale of lots and to commence judicial foreclosure of delinquent assessment bond payments (Assessment Liens) secured by Tract 12166 (Lien Foreclosure Case). The blanket *lis pendens* precluded the sale of individual lots unless the Assessment Liens, attaching to all lots, were first brought current. The commencement of the Lien Foreclosure Case by the City caused the cancellation of the auction sale. (5/21/92 Tr. at 69-70; Gunter Affidavit at p. 18.)

9. At the time of the Lien Foreclosure Case, Griffin had also placed a first deed of trust against all seventy (70) lots in connection with a note in the amount of $300,000. Griffin obtained the loan secured by the first trust deed to post a bond to remove mechanics liens created by contractors in a pending state California state court action (Contractor Case). (Gunter Affidavit at pp. 18-19.)

10. Griffin also obtained a note and second deed of trust in the amount of $150,000, which he borrowed to pay for the costs of hiring the auction company. (Gunter Affidavit at p. 19.)

11. In April of 1986, Griffin did not have the financial resources to pay off the first and second deeds of trust, nor sufficient funds to pay off the entire amount of the Assessment Liens that were then payable. (Gunter Affidavit at p. 19.)

12. Griffin ultimately lost the Contractor Case and the case was not appealed. (9/4/92 Tr. at 62.)

13. The Contractor Case resulted in a judgment against Griffin in an amount totaling more than $450,000. Griffin was represented by attorney Arthur Knuckey (Knuckey) in the Contractor Case. The judgment encumbered Tract 12166 and imposed an additional lien against Tract No. 12166 of approximately $130,000 by First American Title Company after it paid the contractors on the mechanics lien release bond in the Contractor Case. (Gunter Affidavit at p. 19.)

14. The second deed of trust was foreclosed in September of 1986. At the foreclosure sale Griffin lost forty-one (41) of his seventy (70) lots. The value of the forty-one (41) lots was in excess of $3.3 million, leaving Griffin with twenty-nine (29) lots that had an appraised value of approximately $5.5 million in 1985. (5/21/92 Tr. at pp. 50, 72-73; Gunter Affidavit at p. 20.)

15. Late in 1986 or early in 1987, Griffin learned that the holder of the second trust deed, who had foreclosed on forty-one (41) lots, was being allowed by the City to sell individual lots subject only to the payment of individual assessment liens. (5/21/92 Tr. at p. 72; Gunter Affidavit at p. 19.)

<u>B. Representation of Griffin by MT&G.</u>

16. In July of 1986, Griffin was referred to MT&G for legal representation in unrelated litigation regarding Griffin's attempt to purchase property known as the Donlon Ranch, in Monterey County, California. (5/21/92 Tr. at p. 26; 9/4/92 Tr. at 59.)

17. No later than October 1986, MT&G reviewed the Tract 12166 issues to determine whether MT&G would undertake litigation on behalf of Griffin against the City and other defendants (City Case).[4] At that time, Roy C. Gunter, III (Gunter), a partner in the MT&G firm, informed Griffin that MT&G was unwilling to represent him on a contingency fee basis unless Griffin could first pay a $25,000 retainer for costs and provide a complete trial transcript of the Contractor Case. (Gunter Affidavit at p. 9.)

18. Griffin was unable to pay the $25,000 retainer but did obtain the trial transcript. MT&G agreed to prepare, on an hourly fee basis, a complaint to be filed against the City by Griffin, *in propria persona*, to protect Griffin against the running of any applicable statute of limitations until Griffin could retain other legal counsel or pay the $25,000 retainer. (5/21/92 Tr. at pp. 29-30; Applicant Exhibit 19; Gunter Affidavit at p. 9.)

19. The complaint against the City of Big Bear Lake in the City Case sought recovery for damages suffered by Griffin during his development of Tract 12166. The damages claimed by Griffin in the City Case were derived from the conduct of certain parties and the denial by the City of Griffin's constitutional rights actionable under 42 U.S.C. § 1983. The complaint in the City Case was filed by Griffin, *in propria persona*, on November 26, 1986, as Case No. 235342. (5/21/92 Tr. at pp. 29-30; Gunter Affidavit at pp. 9, 15-20.)

20. Sometime in late 1986 or early 1987, Griffin or MT&G discovered that the complaint filed against Griffin in the Lien Foreclosure Case by the City had not been

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[4] The City Case is described throughout the testimony and exhibits offered in support of the Fee Application and summarized in the Gunter Affidavit.

answered by Knuckey, Griffin's attorney in the Contractor Case. Knuckey had been representing Griffin at or about the same time the Lien Foreclosure Case was filed in 1986. (Gunter Affidavit at p. 7; Griffin Affidavit at p. 7.)

21. At Griffin's request, in January, 1987, MT&G prepared and Griffin filed a general denial, *in propria persona*, in the Lien Foreclosure Case (BCV002085), thus enabling Griffin to avoid a default judgment. (4/2/93 Tr. at 224-226; Gunter Affidavit at p. 10.)

22. MT&G continued to represent Griffin on variety of tasks related to the Lien Foreclosure Case and various other matters on an hourly fee basis. (9/4/92 Tr. at p. 115; Gunter Affidavit at pp. 5-6; Griffin Affidavit at pp. 5, 11.)

23. MT&G and Griffin entered into a written attorneys' fee agreement that provided for payment of fees at $140 per hour, plus costs (Hourly Fee Agreement). MT&G signed the Hourly Fee Agreement on August 31, 1988. Griffin signed the Hourly Fee Agreement on September 29, 1988. Under the Hourly Fee Agreement, MT&G agreed to represent Griffin in the pending litigation in Monterey County regarding the Donlon Ranch and the Lien Foreclosure Case, BCV002085. (Debtor Exhibit M.)

24. On October 28, 1988, MT&G file a notice of substitution as attorneys of record in the Lien Foreclosure Case, Case No. BCV002085. (Debtor Exhibit M; Gunter Affidavit at p. 24.)

25. The Hourly Fee Agreement was accompanied by a cover letter explaining that the Donlon Ranch action and the Lien Assessment Case were to be billed

separately from the City Case, which would be covered by a separate fee agreement. (Applicant Exhibit 60.)

26. The Hourly Fee Agreement was later extended to cover MT&G's representation of Griffin in San Bernardino County Superior Court Case Nos. BCV001955 (booster station case)[5]; BCV004051 (Rubendall quiet title action unrelated to Tract 12166); and San Bernardino County Municipal Court Case No. CRE10990 (Hicks & Hartwick, Inc., engineers' fee case).[6] (Debtor Exhibit M.)

27. MT&G did not enter an appearance in the City Case until September of 1988, when Griffin was able to pay a $25,000 retainer to cover costs, pay MT&G current on other hourly billing matters and execute a contingency fee agreement dated September 1, 1988 (Contingency Fee Agreement). (5/21/92 Tr. at p. 30; Gunter Affidavit at p. 11.)

28. By letter dated September 26, 1988, and concurrently with the execution of the Hourly Fee Agreement, Griffin entered into the Contingency Fee Agreement with MT&G. The Contingency Fee Agreement provided for a fee payable to MT&G equal to forty percent (40%) of the "amount recovered" in the City Case by way of settlement. The Contingency Fee Agreement was dated September 1, 1988, and presumably signed by

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[5] The booster station case was an action against Griffin by the City of Big Bear Lake filed in San Bernardino County Superior Court, Case No. BCV001955, for the collection of a sum of $60,000 for a cost overrun on a contract for installation of a water booster station within Tract No. 12166, plus interest at ten percent (10%) from approximately July of 1985. This action was resolved by its dismissal as part of the 1/25/92 Settlement Agreement in the City Case.

[6] The engineers' fee case was an action filed by Civil Engineers Hicks & Hartwick, Inc., against Griffin for collection of engineering fees remaining unpaid in regard to Tract No. 12166. A judgment against Griffin had attached as a lien against all of the lots within Tract No. 12166, including the forty-one (41) lots acquired through foreclosure by the second trust deed holder. The engineering fees were paid by the second trust deed holder in order to obtain the release of liens against the forty-one (41) lots. This case was dismissed, at Griffin's request, through MT&G in 1988 or 1989. Gunter Affidavit at p. 12.

MT&G on the same date. (9/4/92 Tr. at p. 68; 4/2/92 Tr. at pp. 84-85; Applicant Exhibit 1; Debtor Exhibit M.)

29. The Contingency Fee Agreement refers to the title of the litigation defined herein as the City Case, San Bernardino County Superior Court Case No. 23542 (sic), but does not describe the substance of the pending litigation. The City Case sought recovery for damages suffered by Griffin during his development of Tract 12166. (Applicant Exhibit 1.)

C. Circumstances Applicable to the Contingency Fee Agreement.

30. At the time Griffin entered into the Contingency Fee Agreement, the following circumstances existed with respect to the City Case:

a. Griffin was unable to retain MT&G or any other counsel on an hourly fee basis. (5/21/93 Tr. at p. 36.)

b. Griffin was unable to locate any other counsel willing to undertake his representation on a contingency fee basis. (5/21/93 Tr. at p. 36)

c. The subject matter was complex. (5/21/92 Tr. at p. 46.)

d. It was anticipated that the matter would be vigorously contested by all defendants. (5/21/92 Tr. at pp. 51-52.)

e. The legal issues and theories were unique and substantial defenses could be raised to Griffin's recovery of any damages. (5/21/92 Tr. at p. 46-48, 55-56; Gunter Affidavit at pp. 26-36.)

f. There was uncertainty as to the outcome and likelihood of success, coupled with the risk of an adverse result and concomitant loss to Griffin and MT&G. (Gunter Affidavit at pp. 26-36.)

g. The matter would have to be prosecuted, at inconvenience to MT&G, approximately 350 miles away from MT&G's office. (5/21/92 Tr. at p. 46; Gunter Affidavit at pp. 22-23.)

h. The City Case was complex, ultimately involving 21 different defendants that were represented by nine different law firms. (5/21/92 Tr. at pp. 50-51; Gunter Affidavit at p. 15.)

i. The fourth amended complaint, however, reflects essentially land use claims as they pertain to the way the City handled Griffin's request that his lots be released from liens imposed by the City. (Thomas Affidavit ¶ 4.)

j. The City Case involved legal and factual issues related to attorney malpractice, civil engineer malpractice, inverse condemnation, denial of civil rights, fraud, breach of fiduciary duty and defamation of character. (5/21/92 Tr. at pp. 46-51; Gunter Affidavit at p. 15.)

k. MT&G's representation of Griffin in the City Case involved the commitment of all attorneys at the firm with respect to the preparation for trial, conducting discovery and travel time between MT&G's office location and the court location, all of which limited MT&G's ability to undertake work for other clients while representing Griffin. (Gunter Affidavit at p. 23.)

1. MT&G was required to construct a case based in part upon establishing that nearly everyone associated with Griffin's development of the subdivision, from City officials to Bank officers, had conspired to cause Griffin's damage. (Gunter Affidavit at pp. 22-23.)

31. At the time the Contingency Fee Agreement was signed by MT&G and Griffin, the following California statute governed the attorney/client relationship:

> § 6147. Contingency fee contracts; duplicate copy; contents; effect of noncompliance; recovery of workers' compensation benefits.
>
> (a) An attorney who contracts to represent a plaintiff on a contingency fee basis shall, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the plaintiff, or his guardian or representative, to the plaintiff, or to the plaintiff's guardian or representative. The contract shall be in writing and shall include, but is not limited to, all of the following:
>
> (1) A statement of the contingency fee rate, which the client and attorney have agreed upon.
>
> (2) A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.
>
> (3) A statement as to what extent, if any, the plaintiff could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee contract. This may include any amounts collected for the plaintiff by the attorney.
>
> (4) Unless the claim is subject to the provisions of Section 6146, a statement that the fee is not set by law but is negotiable between the attorney and client.
>
> (5) If the claim is subject to the provisions of Section 6146, a statement that the rates set forth in that section are to the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate.

(b) Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee.

(c) This section shall not apply to contingency fee contracts for the recovery of workers' compensation benefits.

Cal. Bus. & Prof. Code § 6147. (Debtor Exhibit WW.)

32. At the time the Contingency Fee Agreement was entered into, Griffin was provided with a duplicate copy of the Contingency Fee Agreement signed by both MT&G and Griffin. The Contingency Fee Agreement included all of the following:

a. A statement of the contingency fee rate agreed upon between the Griffin and MT&G.

b. A statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the City Case would affect the contingency fee and Griffin's recovery.

c. A statement that the contingency fee was not set by law but was negotiated between Griffin and MT&G.

33. The Contingency Fee Agreement did not contain a statement as to the extent of matters covered by the agreement other than a reference to the title of the City Case and the incorrect case number. (Applicant Exhibit 1.)

34. The Contingency Fee Agreement and the Hourly Fee Agreement do not cross-reference each other or explicitly disclose any related representation of Griffin by MT&G as required by Cal. Bus. & Prof. Code § 6147(a)(3), but both agreements were prepared and executed at approximately the same time. (Applicant Exhibit 1.)

35. By letter dated November 7, 1988, Gunter summarized a telephone conversation with Griffin on November 4, 1988, to confirm Gunter's understanding that:

> [I]f we are successful in keeping the City of Big Bear Lake in the San Bernardino County Superior Court Action No. 23542, the major case which you filed in October 1986 against the engineers and attorneys el al., then of course any work we do even if it involves the assessment district or the $60,000.00 bond litigation will be subject to our contingency agreement. However, in the event that the litigation with the City of Big Bear Lake is kept separate by the San Bernardino Courts, then pursuant to our prior agreement, this will be on a fee basis at $140.00 per hour. This is because the contingency fee agreement cannot apply to a situation in which there are no net monies to be gained by you and because it would involve a separate trial of the issues in each of the actions.

(Applicant Exhibit 61.)[7]

36. The Contingency Fee Agreement, without modification, was later affirmed by Griffin on July 7, 1989, as indicated by Griffin's signature on the bottom margin of a copy of the Contingency Fee Agreement. (5/21/92 Tr. at p. 37; Applicant Exhibit 1.)

D. Griffin's Bankruptcy Filing.

37. On May 4, 1990, Griffin, filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code.

38. This court entered its order on August 31, 1990, authorizing the employment of MT&G as Griffin's special counsel and also approving the Contingency Fee Agreement. The order approved MT&G as special counsel to represent Griffin in the City

[7] Applicant's Exhibit 61 also contains language that "[t]he same procedure in regard to the City of Big Bear Lake also applies to the separate Municipal Court action that Hicks & Hartwick, Inc. filed against you in San Bernardino County in . . . ." The remainder of Applicant's Exhibit 61 is obscured by a related but not relevant telephone message slip copied over the bottom of the page.

Case pursuant only to the terms and conditions of the Contingency Fee Agreement annexed as Exhibit "B" to Griffin's application for appointment of special counsel.[8]

39. MT&G did not disclose its representation of Griffin in other pending litigation until ordered to by the court as a result of an objection filed by the United States Trustee to MT&G's third interim fee application. (Application for Order Authorizing Debtor to Employ Attorney for Special Litigation on a Contingent Fee Basis, Docket No. 130.) MT&G never sought authority to represent Griffin's estate in any case other than the City Case. (Order dated April 29, 1991, Docket No. 78.)

40. Griffin owed certain fees to MT&G as of the date of filing pursuant to the Hourly Fee Agreement. MT&G did not disclose this pre-petition debt at the time of its employment application. The amount of those fees varies from document to document. Griffin's bankruptcy schedules as amended reflect $15,303. (Docket No. 43.) MT&G represented the amount to be $11,349.32. (Docket No. 79.) No identifiable amount representing the pre-petition hourly fee is set forth on the Proof of Claim filed by MT&G.

41. MT&G agreed to waive its pre-petition fees, but only upon the condition that this court awarded the fees requested pursuant to the Contingent Fee Agreement. (Applicant Exhibit 67; Gunter Affidavit at pp. 40-41.)

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[8] The order was entered pursuant to sections 327, 328 and 330 of the Bankruptcy Code, 11 U.S.C. §§ 327, 328, and 330. The order specifically states that MT&G's employment complies with Section 327 by finding that "said attorney represents no interest adverse to the estate with respect to matters upon which he will be engaged." At the time this court approved the Contingent Fee Agreement, Griffin owed $11,000 to $15,000 to MT&G for fees billed on an hourly basis. (Applicant Exhibit 67; Gunter Affidavit at pp. 40-41; Exhibit A attached to Griffin Affidavit; Application for Order Authorizing Debtor to Employ Attorney for Special Litigation on a Contingent Fee Basis, Docket No. 13).

42. Schedule A-2 of Griffin's Statement of Affairs filed with the court on May 31, 1990, listed the Assessment Liens as an undisputed secured claim in the amount of $1,559,198. (Applicant Exhibit 11.)

43. As of June 30, 1991, the Assessment Liens had delinquent principal and interest installments that were due and unpaid in the amount of $1,335,605.43. This figure did not include approximately $690,000 for additional delinquency interest, redemption penalties, attorneys fees and costs. (Gunter Affidavit at pp. 13-14.)

44. On January 15, 1991, Griffin filed an amended Schedule A-2 that listed the Assessment Liens as "Assessment for Special Service District. Disputed." The amount of the claim was listed as disputed in the approximate amount of $1,500,000.[9]

E. Proposed Modification of the Contingency Fee Agreement.

45. By letter dated June 13, 1990[10], MT&G proposed an amendment to the Contingency Fee Agreement. MT&G characterized the proposed modification as an accommodation of a possible settlement with the City offered to the City by MT&G on behalf of Griffin on May 10, 1990. (Applicant Exhibit 50.)[11]

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9 Paragraph 3.3 of the 1/25/92 Settlement Agreement (Applicant Exhibit No. 5, see explanation below) provided that the assessment be paid in full satisfaction of Griffin's obligations in the amount of $1,335,605.43. The Debtor's Monthly Financial Report for the period from March 1, 1992 to March 31, 1992, shows that the assessment was paid. Applicant Exhibit No. 12.

10 A date shortly after Griffin's bankruptcy filing, but prior to the Court's order approving MT&G's employment.

11 The progression of events toward eventual settlement of the City Case and the Lien Foreclosure is discussed below in more detail. *See* Section I., F., *infra*.

46. The June 13, 1990, letter proposed a modification to the Contingency Fee Agreement and the Hourly Fee Agreement "to take into consideration the value received by you as the result of the increased marketability of your remaining 27 Lots in Tract 12166 through a settlement of the City's foreclosure of assessment liens case . . . in conjunction with settlement of your claims against the City for damages in [the City Case]":

> If both cases are settled between you and the City of Big Bear Lake as a package deal, then the fees paid to this law firm shall be in the same manner and on the same percentages as previously agreed in the September 1, 1988 letter agreement except for the following:
>
> 1. The "total amount recovered by way of settlement" shall include any cash received from the City of Big Bear Lake plus the net amount of cash and/or other consideration received from the sale of your remaining 27 lots. . . .
>
> 4. The attorneys fees and costs paid or payable in regard to our separate billing account of "87-206" (for the foreclosure lien defense against the City of Big Bear Lake) shall be treated as part of the contingency fee agreement in regard to our billing account of "86-318" (for the prosecution of claims against the City of Big Bear Lake and other parties). All attorneys fees previously paid by you in regard to account "87-206" shall be deducted from any sums due us for attorneys fees in regard to account "86-318". This modification shall not, however, change any other fee agreements that you may have with us regarding other billing account (e.g. Defense v. Rubendall). Any bankruptcy attorneys fees and costs paid by you shall be treated as a costs paid by you under the [Contingency Fee Agreement]. . . .
>
> 7. If the City of Big Bear Lake does not agree to a package settlement of the two above referenced cases, then the [Contingency Fee Agreement] shall not be modified by this letter, and the billing account for "87-206" shall remain as a non-contingency account.
>
> If you agree to the foregoing, please sign and date the acknowledgement below after consulting with Attorney Keith Henderson or any other attorney of your choice. Then send the original to us, keep one executed copy, and send one executed copy to Mr. Henderson for presentation to the Bankruptcy Court. . . .

(Applicant Exhibit 50.)

47. Through the June 13, 1990, modification to the Contingency Fee Agreement, MT&G proposed to take a forty percent (40%) interest in Griffin's remaining lots. MT&G contemplated payment upon sale of the lots. (5/21/92 Tr. at pp. 84-85; Applicant Exhibit 51.)

48. The June 13, 1990, proposed modification to the Contingency Fee Agreement corresponded in time to MT&G's offer of settlement to the City that did not include a circular payment from the City to Griffin and repayment by Griffin for release of the Assessment Liens. (See Para. ____, *supra*.) (Applicant Exhibit 31.)

49. Griffin never executed the proposed modification to the Contingency Fee Agreement contained in the June 13, 1990, letter. (4/2/92 Tr. at p. 106; Applicant Exhibit 50.) No amended contingency fee agreement has ever been approved by this court.

50. By letter dated October 25, 1990, MT&G objected to the direction by J. Scott Lundberg (Lundberg), Griffin's bankruptcy counsel appointed to replace Keith Henderson, to combine the hourly billings on the Lien Foreclosure Case with the contingency fee City Case billings:

> Our hourly fee billing agreement was requested for Bankruptcy Court approval, both through Mr. Keith Henderson and your law office. The fees and costs were necessarily incurred and have nothing to do with the [City] case. The representation was requested by Mr. Griffin and services were rendered. We intend to collect all fees and costs billed through October 22, 1990. Therefore, as previously requested, please submit to the Bankruptcy Court our hourly fee arrangement so that it may decide the reasonableness of our fees for the period after Mr. Griffin filed bankruptcy.

(Applicant Exhibit 40 at p.4.)

51. By letter dated December 7, 1990, Gunter reiterated his understanding of a discussion with Griffin regarding the effect of a package settlement of the City Case and the Lien Foreclosure Case:

> As we discussed, offers such as this which relieve you of your otherwise legal obligations (such as payments of ordinary assessment installments on retained lots) will have an effect upon your obligation to pay our law firm under our contingent fee contract. Basically, to the extent you would have had to pay a legal obligation but for the forgiveness of the obligation as part of the settlement our firm will be entitled to 40% of the obligation forgiven (the 40% would be paid by you from other monies received as part of the settlement). Please also take this factor into consideration prior to committing to any future similar settlement proposal.
>
> However, to the extent you are given something of contingent, unknown future value (such as the City's obligation to indemnify you regarding future claims), we assert no claim to 40% of such contingent value under our contract. Further, to the extent the City drops its claim for sums which you should never have had to pay but for the City's breach of your constitutional rights (such as the attorney fees, redemption interest and penalty interest in the assessment foreclosure proceedings), our contract does not apply to such sums.

(Applicant Exhibit 46.)

52. By letter dated December 11, 1990, Griffin's bankruptcy counsel requested MT&G to summarize the current status of Griffin's various billing accounts with MT&G. By letter dated January 15, 1991, MT&G addressed a question regarding MT&G's handling of both the City Case and the Lien Foreclosure Case:

> In a recent conversation with John, he brought to my attention a conversation about handling both the foreclosure matter and the [City Case] on a contingency fee basis. This was discussed and we proposed that we would combine the cases as one contingency matter if we were successful in being allowed to filed our cross-complaint against the City in either the foreclosure matter BCV002085 or the separate case BCV001905 which the City had brought against Mr. Griffin to collect for the booster station. Our Motions for Leave to File a Cross-Complaint in both the foreclosure and booster station actions were denied, so the precondition was never fulfilled. However, I verbally assured John after the motions were denied that if the City's foreclosure action and the civil rights action against the City were <u>both</u> settled concurrently, as a package deal, then we would agree to treat the entire matter as a

> contingency action. The foregoing was volunteered by me and was not within the original fee agreements with Mr. Griffin. We still agree to this; and, as detailed in my prior letter to John, any contingency fee would be calculated on both monies recovered and the value of relief received from the release of legal obligations owed by John. If John agrees with this proposal, it should be reduced to writing by way of an amended fee agreement.
>
> . . . .
>
> Our position throughout these cases, as explained to Mr. Griffin, was that it was impossible to make a contingency fee case out of a defense of the foreclosure action since he was not seeking affirmative monetary relief; nor, to our understanding, would affirmative relief be allowed due to the statutory basis of the judicial foreclosure of assessment liens. Since independent work must be performed on each case, there must be some provision for compensation on each and this is the agreement we have with Mr. Griffin, as reflected in the enclosed documents [referring to the Contingency Fee and the Hourly Fee Agreement].

(Applicant Exhibit 32 at p. 4, emphasis in the original.)

53. During the course of MT&G's representation of Griffin, MT&G threatened to withdraw as Griffin's counsel in the City Case. (5/21/92 Tr. at pp. 36-37; Gunter Affidavit at pp. 47, 49; Griffin Affidavit at p. 7.) Without prior court approval, MT&G could not unilaterally withdraw from representation of Griffin. *See* Cal. Bus. & Prof. Code § 6147; Local Rule of Practice, Bankr. D. Utah 542.

54. MT&G did not seek to withdraw as Griffin's special counsel.

55. The Contingency Fee Agreement allowed Griffin to discharge MT&G at any time upon reasonable notice. In the event of MT&G's discharge, MT&G was entitled to immediate payment of a reasonable attorney's fee. The Contingency Fee Agreement provided:

> You may discharge this office as your attorneys at any time upon reasonable notice. In the event of discharge this office shall be entitled to immediate payment

of reasonable attorney's fees based on all work done to the date of discharge, plus reimbursement for all costs and expenses incurred.

(Applicant Exhibit 1 at pp. 1-2, 3.)

F. The Settlement Process.

56. On April 16, 1991, the City proposed terms of settlement to Griffin to resolve all claims then existing including those arising out of the denial of Griffin's civil rights by the City that were actionable pursuant to Section 42 U.S.C. § 1983, in favor of Griffin. (4/1/93 Tr. at pp. 176-77.)

57. The offer provided for a payment of $1,000,000 cash to Griffin and relief from subdivision lot assessment installment payments for a total value of $1,335,646. (Applicant Exhibit 52.) Griffin had previously refused a City offer (presented on March 21, 1991) that would have given Griffin $1,000,000 cash, but left the foreclosure action pending and unresolved. (4/2/92 Tr. at p.p. 8-9.)

58. The City's settlement proposal was conveyed to Griffin at a April 16, 1991, settlement conference. The presiding settlement judge relayed the settlement information to Griffin over the telephone because Griffin was ill and unable to attend the hearing. The judge informed Griffin that unless Griffin accepted the offer, the Judge would not conduct further settlement conferences. (4/1/93 Tr. at pp. 176-177.)

59. On April 17, 1991, MT&G delivered to Griffin and Lundberg, his bankruptcy counsel, an outline of the City's proposal and an outline of a suggested counter-proposal which outline admonished Griffin to seek independent tax advice. (4/1/93 Tr. at 177; Applicant Exhibit 52.)

60. The settlement proposals as outlined were discussed during a lengthy telephone conference among Gunter, Lundberg and Griffin on April 17, 1991. (4/1/92 Tr. at pp. 177-185.)

61. On April 22, 1991, the California court conducted a further settlement conference. During the conference, the parties agreed in principle to a settlement. At the conclusion of the conference, Gunter of MT&G read into the record the terms of the settlement. The settlement was essentially Griffin's counter-proposal. (Compare Applicant Exhibit 52 with Transcript of Hearing, Applicant Exhibit 10.)

62. A Compromise, Mutual Release and Settlement Agreement dated May 30, 1991 (5/30/91 Proposed Settlement Agreement) was prepared by MT&G and set forth the settlement terms as agreed to by the parties at the April 22, 1991, settlement conference.

63. The 5/30/91 Proposed Settlement Agreement was structured by MT&G to resolve both the City Case and the Lien Foreclosure Case by providing for: a) the City to pay Griffin $2,553,122.47 as settlement of the City Case, and b) Griffin to immediately pay back to the City $1,335,605.34 of the same funds in exchange for a dismissal of the Lien Foreclosure Case. The $1,335,605.34 represented the amount due on the delinquent taxes and assessments against Tract 12166 through the date of June 30, 1991. (3/4/93 Tr. at p. 4.)

64. On May 14, 1991, Griffin filed a motion with this Court seeking approval of the settlement and gave notice to all parties in interest. (Docket No. 81.) Hearing on the motion was set for June 19, 1991. (Docket No. 85.) The hearing was continued to July 26, 1991, but hot heard. (Docket No. 91.)

65. Between April 1991 and December 1991, MT&G on behalf of Griffin and the parties to the City Case continued to negotiate the terms of settlement and the following factors contributed to the delay in obtaining final court approvals of the settlement:

a. The City's liability insurer, Reliance Insurance Company (Reliance), objected to any characterization of payment as solely for personal injury and emotional distress damages and was also unwilling to fund a circular flow of settlement proceeds that purported to assist Griffin in obtaining potential income tax deductions. Nevertheless, Reliance desired to preserve the essence of the Settlement Agreement. (Applicant Exhibits 54 and 55.)

b. The City was required to obtain City council approval, decide Griffin's re-zoning application and negotiate with Reliance concerning the method of funding the settlement amount. (Applicant Exhibit 56.)

c. Concerns by Griffin that he be given assurances by tax counsel (with substantial malpractice insurance) as to the tax consequences of the revised settlement that deleted the "personal injury, emotional distress" language from the Settlement Agreement. (Applicant Exhibit 57.)

d. Griffin's decision to terminate the services of MT&G in November or December of 1991. (9/4/92 Tr. at p. 122; Gunter Affidavit at pp. 49-50.)

e. Griffin's request to re-zone eight (8) of his remaining lots. (Affidavit of Edward W. Pilot, ¶ 9.)

f. The City and Reliance did not have a written agreement memorializing the City's and Reliance's respective obligations to Griffin. (Pilot Affidavit, ¶ 9.)

66. Griffin terminated MT&G's representation in the City Case and the Lien Foreclosure Case in November or December of 1991 for a number of reasons, including MT&G's inability to provide to Griffin tax advice on the implications of the settlement with the City. No final settlement existed with the City at the time Griffin terminated MT&G's services. (9/4/92 Tr. at p. 122; Gunter Affidavit at pp. 49-50.)

67. On or about December 24, 1992, Griffin retained Gibson, Dunn & Crutcher (GD&C) as substitute special counsel to represent Griffin in the City Case. (Millet Affidavit at p. 1.)

68. On January 17, 1992, Griffin filed an application to retain GD&C as substitute special litigation counsel and an order was entered approving such employment on February 3, 1992. The Order provided that GD&C was retained to render tax advice concerning the structure of the settlement and to litigate in the event the settlement was not consummated. (Docket No. 114.)

69. Because of deadlines imposed by the City and Reliance, GD&C negotiated a final settlement with the City that modified the 5/30/91 Proposed Settlement but did not alter the treatment of the approximately $1.3 million payment by the City to Griffin and Griffin's immediate repayment in settlement of the Lien Foreclosure Case. (Millet Affidavit at p. 4.)

70. A final settlement agreement (1/25/92 Settlement Agreement) between Griffin and the City, was signed on or about February 3, 1992. (Applicant Exhibit 5.)

71. The material terms of the settlement agreement presented to the California Court on April 22, 1991, were contained in the 5/30/91 Proposed Settlement Agreement prepared by MT&G and the 1/25/92 Settlement Agreement prepared by GD&C including the following:

a. A payment by the City to Griffin in full and final settlement of the City Case. (The amount of $2,335,605.43 plus a growth factor of 3% per annum in the 5/30/91 Proposed Settlement Agreement (Applicant Exhibit 6, ¶ 3.1) and the sum of $2,553,122.47 with no growth factor in the 1/25/92 Settlement Agreement (Applicant Exhibit 5, ¶ 3.1.)

b. The payment was allocated to settle Griffin's claims for personal injury and emotional distress damages suffered by reason of the denial of his constitutional rights to equal protection and due process pursuant to 42 U.S.C. § 1983. (¶ 3.2 in both Applicant Exhibit 5 and 6.)

c. Payment to the City by Griffin in full satisfaction of the Assessment Liens in the amount of $1,335,605.43 (¶¶ 3.3 in both Applicant Exhibits 5 and 6.)

d. The dismissal of the City Case and the Lien Foreclosure Case. (Exhibit 6,¶ 3.5; Exhibit 5, ¶ 3.7.)

72. The 5/30/91 Proposed Settlement Agreement prepared by MT&G (Applicant Exhibit 4) and the 1/25/92 Settlement Agreement prepared by GD&C (Applicant

Exhibit 5) are essentially the same except for the following differences (4/2/93 Tr. at pp. 23-27.)

a. Paragraph 3.1 of the Proposed 5/30/91 Settlement Agreement contained a three percent (3%) interest factor while paragraph 3.1 of the 1/25/92 Settlement Agreement did not contain an interest factor but contained a higher settlement amount that, in part, included an amount equivalent to the growth factor and an amount to compensate Griffin for his inability to obtain rezoning.

b. The Mutual Release Agreement in the Proposed 5/30/91 Settlement Agreement was limited while the Release language in the 1/25/92 Settlement Agreement was general. (Millet Affidavit at pp. 4-5.)

c. The 1/25/92 Settlement Agreement contained language in paragraph 3.14 dealing with the attorneys' lien claimed by MT&G. (Millet Affidavit at p. 5.)

73. The motion to approve the 1/25/92 Settlement Agreement was finally rescheduled for hearing by this Court on March 4, 1992. The Court approved the 1/25/92 Settlement Agreement and executed an order at the hearing. (March 4, 1992, transcript of hearing on Motion to Approve Settlement with City of Big Bear Lake at p. 12, hereinafter 3/4/92 Tr. at ___.; 3/4/92 Tr. p. 9; Docket No. 120.)

74. At that hearing, Lundberg informed the court that Griffin was "somewhat unhappy" with the results of the 5/30/91 Settlement Agreement because it would leave Griffin with very little cash but it was probably the best offer available from the City and its insurer. (3/4/92 Tr. at p. 7.)

75. At the same hearing, also attended by MT&G's local counsel, the Court inquired why Griffin's payment of delinquent taxes and assessments had been structured as an actual repayment rather than an off-set calculation. The court inquired whether the settlement structure would make any difference regarding the ultimate amount of attorney fees based on the money coming in and out of the estate rather than a mere off-set. (3/4/92 Tr. at p. 9.)

76. The court was informed by Lundberg that Griffin had sought advice with respect to tax consequences of the settlement structure and did not have any objections to the 5/30/91 Proposed Settlement Agreement based on taxation issues. However, Griffin had been informed that the repayment to the City was a requirement imposed by the City. (9/4/92 Tr. at p. 112.) Furthermore, Griffin had been informed by MT&G that MT&G believed that no matter how the settlement was structured, MT&G would be entitled to the same fee based on the total computation. (3/4/92 Tr. at pp. 8-9.)

77. The Court was not advised the MT&G intended to apply the Contingency Fee Agreement to a combined settlement of the City Case and the Lien Foreclosure Case.

78. The court granted the Motion to Approve Settlement with City of Big Bear Lake without further independent inquiry into the facts or law because the parties consented to approval, and, upon proper notice, no other objection to the terms of the settlement agreement had been filed with the court. The Court expressed its reservations and concerns regarding MT&G's position on the calculation of its contingent fees, but accepted MT&G's assertion that the structure of the settlement was required by the City and

that it would have a contingent interest in the settlement funds no matter how the settlement was structured. (3/4/92 Tr. at pp. 10-11.)

<u>G.</u> <u>Tax Considerations.</u>

79. One of the reasons given by Griffin for terminating the services of MT&G was the inability of MT&G to provide Griffin with a formal written opinion as to the tax consequences of the settlement of the City Case. (Griffin Affidavit, ¶ 120; Supp. Millet Affidavit, ¶ 17.)

80. On April 17, 1991, MT&G urged Griffin to seek tax advice and proposed a restructuring of the settlement that would provide Griffin a cash payment to be allocated to "general damages and emotional distress damages." At that time, MT&G informed Griffin that the restructuring of the settlement might possibly mean that the entire payment by the City would be tax exempt as either general damages or civil rights recovery and that the payment by Griffin of the assessment in the amount of $1,335,647 might be deductible as real property taxes. MT&G expressly advised Griffin in writing to seek advice from his certified public accountant and not to rely upon MT&G for any tax advice. (4/1/92 Tr. at p. 182; Applicant Exhibit 52.)

81. On April 18, 1991, Gunter sent by facsimile to Griffin a copy of Internal Revenue Code § 164 and a portion of Internal Revenue Code Regulation 1.164-4 that discussed the deductibility of taxes assessed against local benefits. (Applicant Exhibit 53.) These materials were sent to Griffin so that he could discuss them with his tax adviser. (4/1/92 Tr. at pp. 184-85.)

82. Between May and September, 1991, Reliance required the deletion of the "personal injury, emotional distress" language from the Settlement Agreement, and thereby caused Griffin to question the exemption from income tax of the proposed settlement payments. (4/2/92 Tr. at pp. 63-78.)

83. On October 8, 1991, MT&G was advised by Lundberg, Griffin's bankruptcy counsel, that Griffin wanted certain assurances from either Griffin's bankruptcy counsel or MT&G concerning tax implications of the settlement and that despite efforts made by Griffin's bankruptcy counsel and MT&G, Griffin had been unwilling to make contacts with anyone in order to obtain the tax advice deemed necessary by Griffin. (Applicant Exhibit 57.)

84. On October 15, 1991, MT&G advised Griffin of an attorney who was qualified, apparently willing to render tax advice to Griffin and had $1,000,000 malpractice insurance coverage. (Applicant Exhibit 58.)

85. On November 1, 1991, MT&G provided proposed tax counsel with information to assist counsel in the event he was requested to prepare a tax opinion for use by Griffin. (Applicant Exhibit 59.)

86. Although Gunter testified that MT&G did not give Griffin tax advice regarding the proposed settlement, MT&G structured the 5/30/91 Proposed Settlement Agreement with the City in an attempt to provide a non-taxable settlement award for deprivation of Griffin's civil rights in the amount of $2,553,122.47. The 5/30/91 Proposed Settlement Agreement required Griffin to return to the City $1,335,605.43 of the same funds for the stated purpose of paying delinquent assessments and interest. The circuitous

payment to the City was purportedly structured to create an interest deduction of approximately $800,000 for Griffin. (4/2/92 Tr. at pp. 98-100; Fee Application at 19(g).)

87. Despite MT&G's alleged attempt to structure the 5/30/91 Proposed Settlement Agreement for tax purposes, MT&G stated that offering Griffin advice regarding implications of the settlement terms was not with the parameters of its representation. (4/2/92 Tr. at p. 98; Fee Application at p. 20.)

88. The settlement with the City was not complete when Griffin terminated MT&G's services on November 25, 1991. (Griffin Affidavit, ¶ 123.)

89. Because of the deadline required by the City and Reliance to have a settlement signed before December 31, 1991, GD&C modified the settlement agreement to protect Griffin without so greatly altering the settlement agreement so as to jeopardize the settlement. (Supp. Millet Affidavit, ¶ 9.)

90. The 1/25/92 Settlement Agreement between Griffin and the City was signed on or about February 3, 1992. (Applicant Exhibit 5.)

91. The 1/25/92 Settlement Agreement (Applicant Exhibit 5) adopts essentially the same payment structure as proposed by MT&G to the California Court on April 22, 1991 (Applicant Exhibit 10) and included by MT&G in the 5/30/91 Proposed Settlement Agreement. (Applicant Exhibit 6; Millet Affidavit at p. 4.)

92. The $1,335,605.43 delivered to the City through escrow was a portion of the same $2,553,122.47 previously delivered to the escrow agent by the City. (Applicant Exhibit 5 at pp. 3-4.)

93. GD&C questioned why the City was making the circuitous payment of $1,335,605.43 rather than dismissing the Lien Foreclosure Case. (Millet Affidavit, ¶ 9.)

94. GD&C remarked on the settlement structure and told Griffin that it appeared to be structured to maximize the proceeds paid to Griffin to increase MT&G's contingency fee. (Millet Affidavit, ¶ 9.)

95. GD&C did not restructure the circuitous payment of $1,335,605.43 because the City and Reliance had imposed a deadline for settlement and further restructuring would have jeopardized the settlement. (Millet Affidavit, ¶ 10.)

96. The structure of the 1/25/92 Settlement Agreement compelled the City to arrange a short-term loan to temporarily fund the payment of the $1,335,605.43 portion of the $2,553,122.47 settlement. (4/2/92 Tr. at pp. 76, 102-104.) The City would have preferred to structure the settlement to dismiss the Lien Foreclosure Case and pay Griffin the approximate sum of $1,217,517.04 to settle the City Case. (Pilot Affidavit, ¶ 8.)

97. The payment by the City to Griffin pursuant to the terms of the 1/25/92 Settlement Agreement in the amount of $2,553,122.47 was allocated to settle Griffin's claims against the City and the individual City defendants for Griffin's alleged damages under 42 U.S.C. § 1983, including damages for personal injury and emotional distress, proximately caused by the alleged denial of his constitutional rights to equal protection and due process. (*See* paragraph 3.2 of Applicant Exhibit 5.)

98. The payment by Griffin to the City of the sum of $1,335,605.43 was paid in full satisfaction of Griffin's obligations payable to Assessment District 16 for past due interest and principal installments due and payable by Griffin through June 30, 1991, and

in full satisfaction of the City's secured claim in this bankruptcy case. (*See* paragraph 3.3 of Applicant Exhibit 5.)

99. Despite the testimony of MT&G's expert witness, who is a partner in the law firm representing MT&G in this proceeding, MT&G has failed to provide credible evidence, in the context of this case, that the $1,335,605.43 paid to Griffin and immediately repaid to the City constitutes an "amount recovered" as that term is used in the Contingency Fee Agreement.

100. Pursuant to paragraph 3.14 of the Settlement Agreement (Applicant Exhibit 5) the sums necessary to pay Applicant's fees and costs are held by the firm of GD&C in its trust account[12] at interest.[13]

101. The court heard the testimony of each party's expert witnesses regarding the tax consequences of the City Case settlement. Based thereon, the more credible testimony indicates that the structure of MT&G's 5/30/91 Proposed Settlement Agreement in fact provides no economic benefit to Griffin if MT&G is allowed to recover, as a contingent fee, forty percent (40%) of the entire $2,553,122.47. Payment of forty percent (40%) of $2,553,122.47, as attorneys' fees, is greater than Griffin's proposed tax savings based on Griffin's highest possible effective tax rate. (4/1/92 Tr. at pp. 52-54; 4/2/92 Tr. at pp. 201-09; Debtor Exhibit YY.)

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[12] Now held by the Court pursuant to stipulated Order dated July 26, 1993. (Docket No. 282.)

[13] MT&G has estimated that interest in excess of $47,000 has accrued on the total amount of funds held by GD&C. See MT&G's memorandum at 3.

102. Griffin would have received a greater economic benefit had the City Case and the Lien Foreclosure Case been settled separately, as anticipated by the Hourly fee Agreement and the Contingency Fee Agreement. (4/1/92 Tr. at pp. 52-54; Debtor Exhibit YY.)

103. From a tax and financial planning standpoint, MT&G's structure of the Proposed Settlement benefits Griffin only if MT&G's forty percent (40%) contingency fee is not applied to the $1,335,605.43 portion of the combined settlements that Griffin immediately paid back to the City. (Debtor Exhibit YY.)

104. MT&G structured the Proposed Settlement with the intent of increasing its recovery of attorneys' fees.

105. MT&G's pending fee application represents MT&G's proposal to apply the Contingency Fee Agreement to a combined settlement of both the Lien Foreclosure Case and the City Case.

106. This Court could not have anticipated, or was not made aware of, the following circumstances at the time it approved MT&G to represent Griffin on a contingent fee basis:

a. MT&G was representing Griffin in other matters, including the Lien Foreclosure Case.

b. MT&G failed to disclose a pre-petition unsecured debt owed by Griffin for between $11,000 and $15,000 in fees due under the Hourly Fee Agreement.

c. MT&G would structure a combined settlement with the City of both the City Case and the Lien Foreclosure Case.

d. That a combined settlement of the Lien Foreclosure Case and the City Case would include a circuitous payment of $1,335,605.43.

e. A combined settlement of the Lien Foreclosure Case and the City Case, allegedly structured for tax purposes, which included the payment to the City of $1,335,605.43 of disputed assessments and interest.

f. MT&G would structure a settlement to provide Griffin with tax benefits without giving Griffin tax advice and without having a reasonable basis for the tax structure of the Proposed Settlement.

g. The Contingency Fee Agreement, as drafted by MT&G, did not comply with applicable California law.

h. MT&G would attempt to expand its claimed forty percent (40%) contingent fee to include alleged benefits Griffin received by the settlement of the City's disputed claim.

i. MT&G would attempt to expand the Contingency Fee Agreement to include the settlement of the Lien Foreclosure Case.

j. MT&G's failure to inform Griffin that separate settlements of the Lien Foreclosure Case and the City Case would produce a greater economic benefit to Griffin.

k. MT&G would artificially inflate the amount of the Proposed Settlement to increase its fees, and

l. MT&G would seek to recover total fees of $1,118,400.33 from Griffin's actual recovery of $1,471,579.38, which recovery amounts to approximately 76% of Griffin's total recovery in the City Case.

H. Griffin's Allegations of Malpractice.

107. At the September 4, 1992, hearing, MT&G asserted that Griffin may be barred under principles of *res judicata* from raising any allegations of legal malpractice against MT&G citing *In re W.J. Service, Inc.*, 139 B.R. 824 (Bankr. S.D. Tex. 1992).

108. This court permitted Griffin to supplement his objection to MT&G's Application in order to assert any specific allegations of malpractice that may relate to the reasonableness of the Contingency Fee Agreement or MT&G's legal services. Accordingly, on December 10, 1992, Griffin filed his supplemental pleading concerning the reasonableness of services rendered by MT&G with respect to Griffin's claims related to Dana Pankey (Pankey), William H. Curry (Curry) and Robert Wood and Kenneth Wood (Woods). Based upon the evidence presented and judging the credibility of the various witnesses, the court finds the more credible evidence concerning these allegations is as follows:

a. Pankey. (Generally, Applicant Exhibit 65A.)

(i) Attorney Pankey represented Griffin during 1983 and 1984 regarding certain mechanic lien and contract issues relating to the development of Griffin's subdivision.

(ii) Griffin alleged a cause of action against Pankey in the City Case based upon Pankey's failure to associate competent trial counsel and failure to preserve certain rights under a contract with a construction company. (Debtor Exhibit GG.)

(iii) On July 7, 1989, Griffin agreed that claims against Pankey could be settled for the amount of $20,000 and an offer was thereafter presented to Pankey on July 25, 1989. (9/4/92 Tr. at p. 95.)

(iv) The claim against Pankey was settled with Griffin's approval for $17,500. It was approved by this Court upon Griffin's Motion on November 20, 1990, without objection by any party. (*See* Docket No. 38.)

(v) Griffin was aware of Pankey's financial condition prior to the settlement as early as 1985 when Pankey's wealth was disclosed to Griffin in a hearing to arbitrate a fee dispute between Griffin and Pankey. (Applicant Exhibit 65A.)

(vi) There was no evidence that MT&G conducted an independent investigation of Pankey's financial condition. (9/4/92 Tr. at p. 100.)

(vii) Pankey's liability to Griffin was questionable and Griffin's allegations against him were defensible.

(viii) The settlement agreement with Pankey did not contain either a representation with respect to Pankey's financial condition or any safeguard providing for the agreement to be set aside in the event those representations were inaccurate that would have allowed Griffin to seek a higher amount. (4-1-93 Tr. at pp. 97-99.)

(ix) The total damages recovered by Griffin from other contributing defendants were in excess of any damages allegedly caused by Pankey.

(x) MT&G's time and expenses directed to the Pankey matter have not been separately itemized or accounted for by MT&G.

b. Curry. (Generally, Debtor Exhibits Q through W.)

(i) Curry was hired by Griffin in 1984 to provide certain soil compaction testing with respect to the subdivision.

(ii) Despite facts establishing a substantial basis for alleging a cause of action in excess of $25,000 against Curry, MT&G failed to allege a cause of action against Curry in the City Case in an amount sufficient to assure that Griffin's claim against Curry would not be transferred to a lower court.

(iii) MT&G alleged a cause of action against Curry in the City Case based upon fraudulent billing practices, and claimed damages against Curry "in excess of $7,500" plus punitive damages.

(iv) MT&G filed a motion to amend the complaint in the Superior Court alleging only punitive damages and failing to allege any further consequential damages of Curry's conduct sufficient to assure that Griffin's claim against Curry would not be transferred to the lower court. The Superior Court denied the motion.

(v) Griffin could not economically pursue a claim against Curry in the lower court because the expense of retaining necessary experts exceeded the jurisdictional limits and Griffin was concerned about negative facts regarding his subdivision becoming public knowledge if a jury trial were necessary. (4-1-93 Tr. at pp. 105-107.)

(vi) Other defendants already had paid Griffin's damages in excess of that allegedly caused by Curry. (9/4/92 Tr. at p. 54.)

(vii) A number of proceedings were filed in the inferior court, including a motion to amend the complaint, and a considerable amount of activity was devoted to this matter until the eve of trial before the decision was made to dismiss the inferior court action against Curry without any monetary consideration from Curry. (4-1-93 Tr. at p. 105.)

(viii) MT&G's time and expense directed to the Curry matter was not separately identified or accounted for by MT&G. (4/2/92 Tr. at p. 90)

(ix) MT&G's time spent related to the transfer of the case from the Superior Court to the inferior court, and the time spent preparing for trial in a court where the potential recovery was limited and could not justify the expenses of trial were not reasonable.

c. Woods. (Generally, Debtor Exhibits X through EE.)

(i) The Woods were members of the Board of Directors of the Bank in the City of Big Bear Lake. The Bank furnished a loan to Griffin to finance the development of the subdivision that was secured by the subdivision property.

(ii) Griffin alleged a cause of action in the City Case against the Bank claiming damages for breach of the Bank's implied covenant of fair dealing, defamation of credit and breach of fiduciary duty in use of Griffin's power of attorney.

(iii) The Woods ultimately were named as defendants because they were on the Bank's board of directors during the period in question. There was no showing that they had any direct dealing with anyone concerning the Bank loan.

(iv) MT&G attempted service of process on the Woods on the eve of a three-year statute of limitation for service of process from the date the complaint had been filed.

(v) The independent contractor process server hired by MT&G to serve the Woods filed a fraudulent proof of service with the Court, certifying that the Woods had each been personally served. The Woods moved to set aside the default entered by the court. By the time the motions to set aside were heard, the statute of limitations had run and there was no further opportunity to serve them.

(vi) Griffin was informed by MT&G of his right to pursue a claim against the process server, but elected not to do so.

(vii) The damages recovered from other defendants were in excess of the damages allegedly attributable to the Woods. (9/4/92 Tr. at p. 38.)

(viii) MT&G expended a considerable amount of time attempting to correct a situation caused by the ineffective service on the Woods on the eve of a service deadline limitation. (4-1-93 Tr. at p. 111.)

(ix) MT&G's time and expense directed to the Woods matter was not separately itemized or accounted for by MT&G. (4/2/92 Tr. at p. 90.)

(x) MT&G would have expended less time to rectify the situation caused by the process server if the Woods could have been reserved timely, therefore the time expended related to the fraudulent proof of service was not reasonable.

I. Fee Applications Presented to this Court.

109. This Court entered interim orders approving four prior fee applications of MT&G and allowed payment of fees to MT&G calculated in accordance with the Contingency Fee Agreement as a result of settlements with various defendants in the City Case: (1) $78,718.92 in fees and $33,983.50 in costs on the first fee application approved on November 26, 1990; (2) $57,099.00 in fees and $8,029.91 in costs on the second fee application approved on March 25, 1991; (3) $43,965.25 in fees and $15,086.87 in costs on the third fee application approved on April 29, 1991; and (4) $7,171.76 in costs on the fourth application approved on October 4, 1991. These fee awards were based upon cash settlements covered by the Contingency Fee Agreement listed above in the total amount of $526,199.06. (Applicant Exhibit No. 3.) The prior interim fees allowed in the total amount of $179,783.17, together with the pending application for $938,617.16, represent a total amount requested by MT&G from this estate of $1,118,400.33.

110. MT&G was required to submit detailed time records in conjunction with its applications for compensation under the Contingency Fee Agreement to allow the court

to review the reasonableness of the fees, even though MT&G maintained that its fees were to be based on a contingency. (Docket Nos. 38, 74.)

111. MT&G maintained contemporaneous billing statements (Applicant Exhibit 2) and recorded time in one-tenth hour increments but did not identify the length of time to complete specific tasks within entries where more than one task is described. (5/21/92 Tr. at pp. 42-44.)

112. MT&G was aware that the United States Trustee considered portions of its contemporaneous time records to be deficient and that this court also viewed portions of the cost and expense itemization as deficient. (United States Trustee's Memorandum in Support of Objection to Third Fee Application of Debtor's Special Counsel, dated April 9, 1991, (Docket No. 72).)

113. MT&G has now submitted billing statements to support its final Contingency Fee Agreement request that contain descriptions of services totalling 2699.90 hours. (5/21/92 Tr. at p. 42; Applicant Exhibit 2.)

114. The billing statements reflect that Gunter performed a majority of the work related to Griffin's representation in the City Case billed at rates that ranged from $125/hour to $170/hour. (Applicant Exhibit 2). Other members of the MT&G firm and para-professionals devoted time to Griffin's representation at rates between $80/hour and $170/hour.

115. The time records contain various entries with descriptions that are insufficient to identify the nature of the services performed. Some entries do not disclose to whom telephone calls were made or the subject of the conversation. Some entries merely

state that the file was reviewed. Some entries indicate only that a conference was held but fail to state with whom or the subject matter of the conference. Most entries contain several discrete tasks, but provide only one figure for time expended.

116. The time records are not sufficiently detailed or organized in such a manner that it is possible to ascertain the time spent in relation to each of the settlements presented to the court, or in relation to specific defendants.

117. Gunter testified that the description of services contained in Applicant Exhibit 2 represent a summary of the time spent in connection with the matters for which MT&G was retained as special counsel with bankruptcy court approval. (5/21/92 Tr. at p. 42.)

118. The August 31, 1990, Order Authorizing Employment of Counsel authorized MT&G to represent Griffin only in connection with matters relating to the City Case pursuant to the terms and conditions of the Contingency Fee Agreement. (Docket No. 14.)

119. The Hourly Fee Agreement was never presented to the Court for approval.

120. MT&G has not submitted an application for fees for any time that may have been spent post-petition related to the legal matters billed pursuant to the Hourly Fee Agreement.

121. The total amount of costs that MT&G seeks to be reimbursed pursuant to the August 31, 1990, Order Authorizing Employment of Counsel, is $100,820.70, less

certain adjustments. The total amount of interim costs previously allowed to MT&G is $95,965.69. (Applicant Exhibit 3.)

122. By Affidavit dated January 4, 1992, MT&G submitted its request for reimbursement of costs in the amount of $4,855.01. The itemization supporting this request is attached to the January 4, 1992, Affidavit. (Docket No. 115.) The Fee Application requests reimbursement of costs in the amount of $4,128.14 that reflects an agreement of the parties to grant Griffin a credit in the amount of $726.87. (Docket No. 124.)

123. The itemization supporting the request for reimbursement of $4,128.14 is sufficient to establish that the costs were actually incurred, but insufficient to determine what costs apply to what settlements or defendants.

124. The itemization supporting the total request for reimbursement of costs in the amount of $100,093.83, collectively the subject of multiple admonitions by the court for more detailed disclosure, is sufficient to establish that the costs were actually incurred, but is insufficient to determine what costs apply to what settlements or defendants.

J. Reasonableness of MT&G's Services.

125. During MT&G's representation of Griffin MT&G recorded 2,699.90 hours attributable to the City Case and developed files and approximately 50,000 pages of documents that filled approximately 21 "banker's boxes." (5/21/92 Tr. at p. 42; Applicant Exhibits 2 and 68.)

126. Based on the Fee Application, MT&G seeks to recover approximately $414.24 for each of the 2,699.90 hours expended in prosecution of the City Case. (Applicant Exhibit 2.)

127. The time records and description of services rendered by MT&G on behalf of Griffin are not sufficient to satisfy the record keeping requirements of this court. During the course of this case, MT&G was admonished by this court at hearings on interim fee applications that its fee applications were sub-standard. (5/21/92 Tr. at p. 430.)

128. The 2,699.90 hours expended by MT&G in the City Case includes travel time. MT&G's travel time cannot be accurately identified and separated because MT&G lumped descriptions of different tasks in single entries.

129. Counsel for Griffin identified approximately 496 hours billed for travel and MT&G did not dispute this calculation. (4/2/92 Tr. at pp. 89, 226; Applicant Exhibit 2.)

130. Gunter testified that, although many entries contained descriptions of several tasks including travel time, he calculates that total travel time did not exceed 294.60 hours and only one-third of 294.60 hours (98.2 hours) was passive travel time. (4/2/92 Tr. at p. 228.)

131. The 2,699.90 hours expended by MT&G includes time spent, the amount of which cannot be identified, structuring the Proposed Settlement in a manner that was not required by the City for the purpose of increasing MT&G's fees, in a manner that provided no tax benefit to Griffin. The time spent by MT&G in so structuring the Proposed Settlement was not reasonable or necessary.

132. The 2,699.90 hours expended by MT&G in the City Case includes time spent, the amount of which MT&G cannot identify, in pursuing Curry, from whom no

recovery was obtained. The court relies on the more credible testimony of Griffin's expert witness that the time expended by MT&G regarding Curry was not reasonable or necessary.

133. The 2,699.90 hours expended by MT&G in the City Case includes time spent, the amount of which MT&G cannot identify, in pursuing the Woods, from whom no recovery was obtained. The court relies on the more credible testimony of Griffin's expert witness that the time expended by MT&G in the City Case pursuing the Woods was not reasonable or necessary.

From the foregoing Findings of Fact, the court makes the following:

II. CONCLUSIONS OF LAW

A. Jurisdiction.

1. This court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). This matter is a core proceeding entitling the court to enter a final order. The contested matter is before the court under Local Rule of Bankruptcy Procedure D. Utah 404(a). Rule 404(a) automatically refers bankruptcy cases and proceedings to this court for hearing and determination.

2. The burden of proving the value of the services for which compensation is sought is always on the applicant. *See, generally, In re Pettibone Corp.*, 74 B.R. 293, 299 (Bankr. N.D. Ill. 1987).

B. The Contingency Fee Agreement is Void.

3. "Attorney fee agreements are evaluated at the time of their making and must be fair, reasonable and fully explained to the client" and that "such contracts are strictly

construed against the attorney." *Alderman v. Hamilton*, 252 Cal. Rptr. 845, 847-48 (Cal. Ct. App. 1988).

4. Section 6147(a)(3), Cal. Bus. & Prof. Code, requires that a contingency fee agreement state the extent to which a plaintiff could be required to pay any compensation to an attorney for related matters arising out of their relationship and not covered by their contingency fee contract.

5. The Contingency Fee Agreement does not describe the Lien Foreclosure Case, nor does it disclose that MT&G may apply the terms of the Letter Contingency Fee Agreement to the Lien Foreclosure Case.

6. The Contingency Fee Agreement, at the time it was prepared and drafted by MT&G, failed to meet the requirements of California law found at Cal. Bus. and Prof. Code § 6147(a)(3) because it fails to discuss related matters.

7. The Contingent Fee Agreement states that the fee will be charged on the "total amount recovered by way of settlement or judgment." (Debtor Exhibit A.) Failure to discuss related matters in the Contingent Fee Agreement renders the words "total amount recovered" meaningless because the agreement does not specify whether the agreement applies to related matters such as the Lien Foreclosure Case.

8. Failure to discuss related matters in the Contingent Fee Agreement also introduces ambiguity regarding the recovery in the Lien Foreclosure Case that Griffin received nominally but had to return to the City.

9. Griffin terminated the Contingency Fee Agreement in November or December of 1991.

10. MT&G failed to establish that despite there services being terminated pursuant to the terms of the Contingency Fee Agreement, it is entitled to forty percent (40%) of the City Case settlement.

11. The $1,335,605.43 sum paid to Griffin and immediately repaid to the City in settlement of the Lien Foreclosure Case was not an "amount recovered" as that term is used in the Contingency Fee Agreement.

12. MT&G has failed to establish that the Contingency Fee Agreement applies to a settlement of the Lien Foreclosure Case.

13. The Contingency Fee Agreement violated the language and the apparent objective of the California statute.

14. The California statute further provides that "[f]ailure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee." Cal. Bus. & Prof. Code § 6147(b).

15. By his objection to the Fee Application, Griffin elected to void the Contingency Fee Agreement.

16. Based on the Contingency Fee Agreement's failure to meet applicable California law, and Griffin's objection to the Fee Application, the Contingency Fee Agreement is void under California Law.

17. MT&G's application for reimbursement of fees and costs for representation of Griffin is deemed to include all billings against this estate for all fees incurred by MT&G in representation of Griffin, except for those pre-petition hourly fees not

disclosed at the time of MT&G's application for employment. (Exhibit A attached to Griffin Affidavit.)

18. The pre-petition hourly fees are not the subject of this application. The proof of claim filed in this case does not identify any amount that clearly represents the pre-petition hourly fee.

C. MT&G is Entitled to a Reasonable Fee.

19. The Contingent Fee Agreement failed to comply with the California statute and this deficiency was not disclosed to this court at the time MT&G was appointed as Griffin's special counsel. Therefore, the terms and conditions of the Contingent Fee Agreement have proven to have been improvident in light of developments not anticipated at the time of the fixing of such terms. 11 U.S.C. § 328(a).

20. Additionally, the terms and conditions of the Contingency Fee Agreement are improvident under the circumstances set forth above. 11 U.S.C § 328(b). The court will allow compensation different from the compensation provided under the terms of the Contingency Fee Agreement in light of the developments that were not disclosed to the court and not capable of being anticipated at the time the court approved the Contingency Fee Agreement.

21. MT&G's offer to treat the combined settlement of the Lien Foreclosure Case and the City Case as a single contingency action required (a) Griffin's acceptance of such offer through the execution of an amended contingency fee agreement, and (b) this Court's approval. Griffin never accepted MT&G's offer, nor were the terms of such an amended fee agreement approved by this court.

22. MT&G is entitled to an award of a reasonable fee as provided by the California statute. Cal. Bus. and Prof. Code § 6147(b).

D. Principles Governing Fee Applications.

23. Section 330 of the Bankruptcy Code governs compensation of professionals in the bankruptcy context. Section 330 provides:

> [R]easonable compensation for actual, necessary services . . . based on the nature, the extent, and the value of such services, the time spent on such services and the cost of comparable services other than in a case under this title.

11. U.S.C. § 330.

24. In order to determine the appropriate compensation, Fed. R. Bankr. P. 2016 requires that:

> A person seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.

25. Whether the professional is working on a contingency fee basis or an hourly basis, a detailed record of the time spent must be kept and submitted to the court for consideration in approving a fee application under Fed. R. Bankr. P. 2016.

26. The primary objective of any fee application is "to provide sufficient data to enable the court to determine whether the services rendered were reasonable, actual, and necessary." *In re Wire Cloth Prods., Inc.*, 130 B.R. 798, 806 (Bankr. N.D. Ill. 1991).

27. The Tenth Circuit requires lawyers to keep meticulous, contemporaneous time records. *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). In particular:

> These records must reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks--for example, how many hours spent researching, how many hours interviewing the client, how many drafting the complaint, and so on.

Id.

28. The correct approach for determining fee applications in Bankruptcy Court is the "lodestar" method of calculating fee awards. *Blanchard v. Bergeron*, 489 U.S. 87, 88 (1989); *Boston and Maine Corp. v. Moore*, 776 F.2d 2, 6 (1st Cir. 1985). Under this methodology, "the fee-setting court first establishes a 'threshold point of reference' or the 'lodestar,' which is the number of hours reasonably spent by each attorney multiplied by his reasonable hourly rate." *Boston and Maine Corp.*, 776 F.2d at 7; *Jane L. v. Bangerter*, 1993 WL 276328 (Civil No. 91-C-345G, slip op. at 4)(D. Utah 1993). After the lodestar figure is set, it can be "adjusted up or down to reflect a variety of factors, such as . . . quality of representation and the results obtained, if they have not already been taken into account in computing the lodestar." *Id.* (citations omitted); *see also In re Swansea Consol. Resources, Inc.* 155 B.R. 28 (Bankr. D.R.I. 1993)(opposing party must show factor warranting adjustment in lodestar amount).

29. All fees of professionals charged to and paid by the estate are subject to a "reasonableness test." 11 U.S.C. §§ 327(a) and 328(a); *In re Gillett Holdings, Inc.*, 137 B.R. 475, 478 (Bankr. D. Colo. 1992).

30. This court approves the rationale adopted by Judge Brooks in *Gillett Holdings*: "In evaluating the reasonable number of hours required for the task, the Tenth Circuit has observed that the actual time expended is not necessarily the reasonable time expended." *Id.* at 478 (citing *Smith v. Freeman*, 921 F.2d 1120,1122 (10th Cir. 1990); *see also, Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)(professionals, in applying for fees "should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission").

31. Judge Brooks remarked that many recorded hours result in no benefit to the estate and, accordingly, unproductive hours may reduce the fee request. *Gillett Holdings*, 137 B.R. at 481. "Reasonableness is a most subjective standard with a range of acceptability." *Id.*

32. The Tenth Circuit has established a framework of considerations in awarding fees. *In re Lederman Enters., Inc. v. United States Trustee*, 997 F.2d 1321 (10th Cir. 1993); *Matter of Permian Anchor Servs., Inc.*, 649 F.2d 763 (10th Cir. 1981)(adopting the standards set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)).[14]

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[14] "In awarding fees in bankruptcy matters, the court should consider the following factors: (1) the time and labor required; (2) the novelty and difficulty of the issues presented; (3) the skill required to perform the services properly; (4) the preclusion of other employment 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 the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the professionals; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Gillett Holdings*, 137 B.R. at 481, n.10.

33. In *Permian Anchor Services*, the court noted that the rationale announced in *Johnson v. Georgia Highway Express*, applies "to a determination of reasonable attorneys' fees in a bankruptcy proceeding that involves construing contracts and notes which expressly call for the award of reasonable attorneys' fees." *Permian Anchor Servs.*, 649 F.2d at 768. In the absence of an enforceable contingent fee agreement, MT&G is entitled by California statute to a reasonable fee.

34. Bankruptcy courts begin the process of determining reasonable compensation by multiplying the attorney's reasonable hourly rate by the numbers of hour reasonably expended, which produces the lodestar amount. Billed hours that are not reasonably expended should be excluded from the initial lodestar amount. *In re Xebec*, 147 B.R. 518, 524 (9th Cir. BAP 1992).

35. In the absence of detailed, complete or meaningful time records or fee application disclosures, the court is less able to apply a reliable lodestar approach and must look instead to increased reliance on the *Permian Anchor Services* criteria. *See, generally, Gillett Holdings,* 137 B.R. at 485; *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988).

E. Adjustments to the Number of Hours Expended.

36. Based upon the settlements with Pankey, Chester Carville, Carville Engineering, Inc., James Hicks, Hicks & Hartwick, Inc., Knuckey and First Mountain Bank,

the Court authorized, on an interim basis, payment to MT&G under the Contingent Fee Agreement of $179,283.17 as contingent fees and $95,956.69 of un-reimbursed costs.[15]

37. MT&G provided a summary of professional time broken down by attorney or para-professional, rates and amounts as Applicant Exhibit 2A. Applicant Exhibit 2A was withdrawn and never re-submitted. Therefore, other than the un-summarized billing statements, the court has no information regarding the allocation of time by attorney during the term of MT&G's representation of Griffin. MT&G did provide a key to the billing statement as to the individual performing the work and the range of billing rates during the relevant time period.

38. This court need not engage in a line by line evaluation of MT&G's fee application. *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983). "While the court may not merely 'eyeball' the application, 'it is generally unrealistic to expect a trial court to evaluate and rule on every entry in an application.'" *Tomazzoli v. Sheedy*, 804 F.2d 93, 97-98 (7th Cir. 1986). Thus, with voluminous fee petitions percentage reductions have been permitted. *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646,653 (7th Cir. 1985). This court holds that, in the present situation, with 140 pages

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[15] While MT&G represented Griffin, the Court approved Griffin's settlements with the following defendants in the City Case:

1. A settlement with defendant Pankey resulting in Griffin receiving $17,500;
2. A settlement with defendants Chester Carville and Carville Engineering, Inc. resulting in Griffin receiving $17,500;
3. A settlement with defendants James Hicks and Hicks & Hartwick, Inc. resulting in Griffin receiving $215,321.66;
4. A settlement with defendant Knuckey resulting in Griffin receiving $147,500;
5. A settlement with defendant First Mountain Bank resulting in Griffin receiving $125,000.

of entries originally prepared by attorney's unfamiliar with bankruptcy court practices and not anticipating to be held to a federal standard of review, it is within its discretion to employ percentage reductions.[16] *Ramos v. Lamm*, 713 F.2d at 553 (the Tenth Circuit requires lawyers to keep meticulous, contemporaneous time records).

39. The appropriate lodestar amount for MT&G's pending fee application can only be reached after the following reductions for billed hours not reasonably expended:

a. Adjustment for travel time.

40. Travel time is compensable for professionals. *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 583 (Bankr. D. Utah 1985). However, under certain circumstances, even when travel is reasonably necessary, it may not be fully compensable because "it is rarely totally productive." *In re Automobile Warranty Corp.*, 138 B.R. 72, 78 (Bankr. D. Colo. 1991); *see also, Jane L. v. Bangerter*, 1993 WL 276328 (Civil No. 91-C-345G at 9)(D. Utah 1993); *Matter of Pothoven*, 84 B.R. 579, 585 (Bankr. S.D. Iowa 1988)(finding that allowing travel time to be billed at one-half the normal hourly rate is more than charitable).

41. Gunter testified that of the 496 hours of lumped entries containing references to travel, he could extrapolate 294.6 hours of actual travel time. Gunter estimated that one-third of that time (98.2 hours) was unproductive travel time.

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[16] In *In re CF&I Fabricators of Utah, Inc.*, 131 B.R. 474, 482-83 (Bankr. D. Utah 1991), this court criticized the use of percentage limitations on time billed the estate for preparing fee applications. This court noted that it is impossible to pick a percentage without being arbitrary. Faced with the fee application before the court and the task of reconstructing a reasonable fee where the law firm did not provide time records that adequately designate how time was allotted to specific tasks, the court is compelled to apply a percentage reduction based on the court's observations and the reasons articulated for each reduction.

42. The court recognizes that some portion of the 496 hours of entries that lump productive tasks and travel time together includes productive time. The court does not find Gunter's calculation by extrapolation particularly convincing, and, within its discretion, discounts the entries containing travel time by fifty percent (50%) for a total reduction of 248 hours for unproductive travel that the Court will allow compensation at one-half the applicable lodestar rate. The net reduction is equivalent to elimination of 124 hours of non-compensable time.

b. Adjustment for insufficient time entries.

43. Many of the actual time entries before the court are cryptic, lumped, inadequate or incomplete. Due to the extensive lumping of tasks and lack of adequate description, it is impossible to review the reasonableness of the time devoted to a particular task, and a percentage reduction is necessary. *In re Smuggler's Beach Props., Inc.* 149 B.R. 740, 745 (Bankr. D. Mass. 1993)("[B]ecause it is impossible to evaluate the reasonableness or necessity of such services, a percentage reduction of allowable time is appropriate.").

44. Accordingly, a downward adjustment of the time reasonably expended in behalf of the estate is required to compensate for lack of adequate description and lumping of entries. The total number of hours expended (2,699.90) minus the 124 hours of travel will be reduced by five percent (5%) for a total reduction of 128.80 hours for inadequate time entries (2,699.90 - 124 = 2,575.90 x .05 = 128.80).

c. Adjustment for ineffective representation.

45. As discussed above at Finding of Fact ¶ 107, MT&G

raised an issue regarding the *res judicata* effect of these proceedings in any malpractice action that Griffin may choose to bring against MT&G in the future. In *In re W.J. Services, Inc.*, 139 B.R. 824 (Bankr. S.D. Tex. 1992), involved a malpractice action commenced in state court by debtors after their bankruptcy court case had been dismissed. The attorney removed the action to the bankruptcy court and then moved for summary judgment or dismissal of the action on the basis that the dispute concerning counsel's fees had been considered and decided while the bankruptcy case was pending. The court held that a bankruptcy court's order for fee payment, despite active litigation, is a determination that the services provided are reasonable and sufficient to receive an award of attorney's fees, thus, implicitly resulting in a finding that malpractice has not occurred. *W.J. Services*, 139 B.R. at 828.

46. Griffin was given the opportunity to file an adversary proceeding alleging malpractice (which was filed and later dismissed), or to amend the objection to the Fee Application specifically to raise allegations of malpractice. The court heard additional evidence from Griffin and his expert witness regarding his claims against MT&G for malpractice. It is unnecessary for this court to make any findings of fact or conclusions of law regarding whether malpractice has occurred, for no affirmative relief is sought by Griffin. It is only necessary for this court to consider the defense raised by Griffin, and to weigh the

testimony of the witnesses in its calculation of the appropriate lodestar amount that will include time reasonably spent by MT&G in its representation of Griffin.[17]

47. As discussed above, some portion of MT&G's fee request includes time expended in matters regarding Pankey, Curry and the Woods. The court has made a finding that a portion of time expended on these matters was not reasonably expended and will be deducted from the total number of hours otherwise reasonably expended.

48. Accordingly, the court finds that the total number of hours expended (2,699.90) minus the 124 hours of travel will be reduced by five percent (5%) for a total reduction of 128.80 hours for ineffective representation that shall not be compensated as a reasonable charge against the estate (2,699.90 - 124 = 2,575.90 x .05 = 128.80).

d. Reduction for manipulating the settlement.

49. Based on the court's finding that MT&G manipulated the settlement process to inflate the "amount recovered" under the Contingency Fee Agreement, and because it is impossible to ascertain the time spent in such activity, the court finds that the total number of hours expended (2,699.90) minus the 124 hours of travel time will be reduced by ten percent (10%) for a total reduction of 257.60 hours for inappropriate manipulation of the settlement process (2,699.90 - 124 = 2,575.90 x .10 = 257.59).

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[17] Because this court is not making any finding specifically related to a determination whether malpractice occurred during MT&G's representation of Griffin, it is also not necessary to determine whether MT&G would be entitled to a jury trial in a legal malpractice action. *See, Jackson State Bank v. King*, 992 F.2d 256 (10th Cir. 1993)(in Wyoming, legal malpractice claim is contractual in nature); *FDIC v. Regier Carr & Monroe*, 996 F.2d 222 (10th Cir. 1993)(in Oklahoma, legal malpractice claim is an action in tort).

e. **Reduction of costs.**

50. The court has previously allowed actual costs requested by MT&G in relation to the various settlements. In large part, it appears that the costs set forth on the various applications were actually incurred and were necessary. However, it is apparent that some additional costs were incurred as a result of the Curry and Woods matters that would not have been incurred had those matters been handled properly. Because of the nature of the cost itemization it is impossible for the court to ascertain the exact additional costs incurred. Therefore, the Court will make a reduction of $100.00 in the costs requested.

F. **Setting the Appropriate Lodestar Rate.**

51. "Appropriate hourly rates for counsel are calculated according to the 'prevailing market rates in the relevant community.' . . . . In determining those rates, the fee applicant should produce evidence that 'the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Jane L. v. Bangerter*, 1993 WL 276328 (Civil No. 91-C-345G, slip op. at 15)(D. Utah 1993)(citing *Blum v. Stenson*, 465 U.S. 886, 895 (1984)).

52. The court did not receive any testimony that established that an hourly rate of $414.24, as requested by MT&G, is a reasonable hourly rate for attorneys practicing in California who specialize in the type of legal work necessary to represent Griffin in this matter.

53. The billing statements reflect that Gunter performed a majority of the work related to Griffin's representation in the City Case. (Applicant Exhibit 2). During the course of MT&G's representation of Griffin, Gunter's hourly rate ranged from $125/hour

to $170/hour but there is no indication what the prevailing rate was at the time most of the work was performed. Other members of the MT&G firm and para-professionals devoted time to Griffin's representation at rates between $80/hour and $170/hour. No evidence was presented that the rates for legal services generally applicable in Monterey County, California, and Salt Lake County, Utah, are different.

54. Based upon this court's consideration of (a) the hourly rates customarily charged in this jurisdiction, (b) the hourly rates charged by MT&G, (c) the services performed, (d) the complexity of the case; and (e) the applicant's level of expertise, the court concludes that $160/hour is the maximum rate allowable to MT&G for its services in this case.[18] This court also "looks to years of experience as one important factor in fixing rates." *Jane L. v. Bangerter*, Civil No. 91-C-345G, slip op. at 16 (D. Utah 1993). With $160/hour as the lodestar and 2,060.71 as the total number of allowable hours obtained applying the percentage discounts discussed above, the total lodestar amount available to MT&G is $329,713.60.

55. With respect to justifying its fee request, MT&G, through it supporting memorandum, the Gunter Affidavit and testimony at trial, discussed the factors set forth in *Permian Anchor Services* and *Johnson v. Georgia Highway Express.* MT&G pointed out the complexity of the case, the firm's reputation, its preclusion from other employment, the novelty of the issues presented by the City Case and what MT&G calculates as the total

[18] The Tenth Circuit recently noted in the bankruptcy context; "As a general comment, we observe that $150 is a more than generous hourly fee." *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir. 1990). While this *dicta* is not controlling and must be adjusted for the passage of time, if appropriate, this court finds it instructive under these circumstances where the Contingency Fee Agreement has been voided and the court must identify and appropriate hourly rate.

economic benefit Griffin derived from MT&G's representation. The court has a relatively useful and meaningful disclosure of the results obtained by MT&G rather than general disclosure of the *Permian Anchor Services* criteria. Based on this disclosure, the court finds that an award of $329,713.60 is objectively supported by the evidence and is a reasonable fee.

56. MT&G has cited *In re. D.W.G.K. Restaurants*, 106 B.R. 194, 197 (Bankr. S.D. Cal. 1989) for the theory that the interest that has accrued on the City settlement proceeds, "applicable to the fees" should be awarded to MT&G in addition to the fees requested. The circumstances of that case are much different than those recited here, and the Court finds *D.W.G.K. Restaurants* inapplicable. The interest that has accrued on the City settlement proceeds will remain an asset of this estate to be distributed according to Griffin's plan, if confirmed. *See In re Riverside-Linden Inv. Co.*, 945 F.2d 320, 323-24 (9th Cir. 1991).

III. CONCLUSION

Therefore, based upon the findings of fact and conclusions of law entered herein, it is hereby

ORDERED,

A. MT&G's request for total fees of $1,118,400.33 is unreasonable and is disallowed; and

B. MT&G is hereby granted a final allowance of total fees in the amount of $329,713.60, including previously allowed fees in the amount of $179,783.17; and

C. MT&G is allowed reimbursement for costs in the amount of $4,028.14 for the period of time between July 20, 1991, through December 31, 1991; and

D. MT&G is allowed final reimbursement of costs previously allowed in interim applications in the amount of $95,965.69; and

E. MT&G is allowed to amend its proof of claim to reflect the accurate amount of its pre-petition claim for fees owed by Griffin as of the date of the filing of this petition, based on the Hourly Fee Agreement, in an amount consistent with its prior representations to this court.

DATED this 7 of September, 1993.

Judith A. Boulden
United States Bankruptcy Judge