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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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(See #366)

In re

JOHN M. GRIFFIN,

Debtor.

MEMORANDUM DECISION AND ORDER

Case No. 93-C-1048

MURPHY, THOMPSON & GUNTER,

Appellant,

-vs-

JOHN M. GRIFFIN

Appellee.

90-22845

This matter is before the court on Appellant Murphy, Thompson & Gunter's ("MT&G") appeal of the bankruptcy court's order setting aside MT&G's Contingent Fee Agreement with John M. Griffin ("Griffin") and reducing MT&G's requested fees. A hearing on the appeal was held on February 11, 1994. At the hearing, William G. Fowler and Robert D. Merrill represented MT&G. J. Randall Call and Sally B. McMinimee represented Griffin. Before the hearing, the court considered carefully the briefs and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to the appeal. Now being

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fully advised, the court renders the following Memorandum Decision and Order.

FACTUAL BACKGROUND

In the early 1980s, Griffin was developing subdivision property in the City of Big Bear Lake, California (the "City"). While pursuing this development, Griffin encountered difficulties that would later give rise to a cause of action against the City under 42 U.S.C. § 1983, based on the denial of his civil rights (the "City Case"). These difficulties caused Griffin to default on obligations to pay assessment bonds to the City and on other related development loans. These defaults resulted in a lawsuit brought by the City to foreclose on approximately $400,000 in municipal bond assessments against property that Griffin had been attempting to develop since 1982 (the "Foreclosure Case").[1]

In 1986, MT&G assisted Griffin in preparing a Complaint, in propria persona, permitting him to preserve his civil rights claims against the City, as well as against other defendants. The Complaint was filed in San Bernardino County,

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[1] Griffin's claims in the City Case included a claim for inverse condemnation, alleging that the City had improperly recorded a blanket lis pendens in the Foreclosure Case, thereby preventing Griffin from selling his property and paying off the assessments.

California. Ultimately, in September 1988, Griffin entered into two fee agreements with MT&G. The first agreement was an hourly fee agreement for MT&G's work on the Foreclosure Case (the "Hourly Fee Agreement"). The second agreement was a contingent fee agreement (the "Contingent Fee Agreement") pertaining to the City Case, which provided that MT&G's fees would be equal to forty percent of the "amount recovered" in that case. The Contingent Fee Agreement was reaffirmed by Griffin in July 1989 after MT&G had twice informed him in writing that the Foreclosure Case was not part of the Contingent Fee Agreement, unless the City Case and the Foreclosure Case were joined as one action. The two cases were never consolidated, however, and Griffin never agreed to amend the Contingent Fee Agreement to apply to a settlement of the Foreclosure Case.

In 1990, Griffin filed a chapter 11 bankruptcy in Utah, where he maintained a residence. In August 1990, the bankruptcy court, upon the application of Griffin, approved the Contingent Fee Agreement and authorized the employment of MT&G as Griffin's special counsel in the City Case. The bankruptcy court subsequently approved three interim fee applications relating to settlements against other defendants in the City Case. In each instance, the bankruptcy court allowed interim fees consistent

with the terms of the Contingent Fee Agreement. These recoveries totalled $526,199.00, of which $179,783.17 in fees were provisionally awarded to MT&G. The Hourly Fee Agreement was never presented to or approved by the bankruptcy court.

In April 1991, MT&G and counsel for the City and the City's insurer reached a tentative agreement on some aspects of a settlement in principle of both cases. Pursuant to that tentative agreement, the City would pay Griffin approximately $1.2 million ($1,217,517.13) to settle the City Case. In addition, the City would dismiss the Foreclosure Case, including the $1.3 million ($1,335,605.43) assessment claim asserted against Griffin in that action. MT&G structured the proposed settlements so that in addition to the $1.2 million actually received by Griffin, he would also receive a $1.3 million payment from the City, which he would immediately repay to the City in settlement of the disputed assessment claims.[2] Although a

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[2] MT&G argues that it structured the settlement for tax reasons to give a greater economic benefit to Griffin, even though MT&G admitted it had no tax expertise and it refused to give Griffin any tax advice concerning the structure of the settlement. However, the bankruptcy court found that the structure of the settlement did not confer a greater economic benefit on Griffin and that Griffin would have received a greater economic benefit had the City Case and the Foreclosure Case been settled separately, as anticipated by the Hourly Fee Agreement and the Contingent Fee Agreement. Consequently, the bankruptcy

hearing was scheduled to approve the settlement, it was not held and details of the settlement continued to be negotiated.

In November or December 1991, however, Griffin became dissatisfied with MT&G's representation and terminated its services. Griffin then hired the firm of Gibson, Dunn & Crutcher ("GD&C") to finalize the settlement and to provide tax advice to Griffin regarding the settlement. Although the $1.2 million actual payment and the $1.3 million circuitous payment generally remained intact because of settlement deadlines imposed by the City's insurer, other important aspects of the settlement were negotiated or renegotiated by Griffin and GD&C after Griffin terminated MT&G's representation. The final settlement agreement with the City was not signed until February 1992 and was approved by the bankruptcy court at a March 4, 1992 hearing.

On April 13, 1992, MT&G filed its fee application in the bankruptcy court with respect to this last settlement in the

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court found that the reason MT&G structured the settlement the way it did was so that MT&G could claim a contingent fee based upon a $2.5 million settlement, rather than the $1.2 million actually recovered by Griffin. See Bankruptcy Court Decision at 33, ¶ 102-04.

City Case and requested fees of $938,617.16.[3] Griffin filed an objection to the application, arguing that the fees were unreasonable, improvident in light of the present circumstances, and, if awarded, would impede Griffin's chances for reorganization. After hearings held on May 21, 1992, September 4, 1992, April 1-2, 1993, and May 3, 1993, the bankruptcy court entered its Findings of Fact, Conclusions of Law and Order, consisting of 61 pages, on September 7, 1993 (the "Bankruptcy Court Decision").

In summary, the bankruptcy court found that (1) the $1.3 million circuitous payment, representing the disputed amount sought by the City in the Foreclosure Case, was not an "amount recovered" in the City Case within the meaning of the Contingent Fee Agreement; (2) the Contingent Fee Agreement was voidable under California Business and Professions Code § 6147 because it did not comply with the requirements set forth in that statute, and that Griffin properly voided the Contingent Fee Agreement; and (3) the Contingent Fee Agreement was void under 11 U.S.C. § 328(a) because it was improvident in light of developments not

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[3] The fee application was calculated based on forty percent of both the $1.2 million actually received by Griffin and the $1.3 payment to Griffin that was to be immediately repaid to the City to settle the Foreclosure Case.

capable of being anticipated at the time the bankruptcy court originally approved the agreement. Consequently, because the bankruptcy court found the Contingent Fee Agreement to be void under both California law and the Bankruptcy Code, the bankruptcy court determined that reasonable fees for all work done by MT&G in the City case amounted to $329,713.60, including the $179,783.17 previously awarded to MT&G on a provisional basis from the recoveries from the City's codefendants in the City Case. The bankruptcy court did not allow MT&G's claim for prejudgment interest, but it did allow MT&G to assert a claim for its pre-petition fees in the Foreclosure Case under the Hourly Fee Agreement, which has been paid by Griffin.

MT&G appeals the bankruptcy court's ruling, alleging that (1) the bankruptcy court erred in finding that the forty percent Contingent Fee Agreement, which applied to the City Case, did not apply to forgiveness of indebtedness in the Foreclosure Case; (2) the bankruptcy court erred by failing to analyze the fee application under 11 U.S.C. § 328; (3) the bankruptcy court erred in finding that the Contingent Fee Agreement violated California Business and Professions Code § 6147 and was therefore voidable, and it also erred in finding that Griffin properly voided the Contingent Fee Agreement; (4) the bankruptcy court

abused its discretion in finding that MT&G failed to meet its burden of establishing the reasonableness of the fees requested by MT&G in its fee application; and (5) the bankruptcy court abused its discretion in finding that MT&G is not entitled to prejudgment interest on its fees.

STANDARD OF REVIEW

In reviewing a bankruptcy court decision, this court reviews the bankruptcy court's legal determinations de novo, and its factual findings under the clearly erroneous standard. Gill v. Winn (In re Perma Pac. Properties), 983 F.2d 964, 966 (10th Cir. 1992). Findings of fact will not be disturbed unless, after reviewing the record, this court is left with a definite and firm conviction that a mistake has been made. Id. Moreover, on a mixed question of whether the facts satisfy the proper legal standard, this court conducts a de novo review if the question primarily involves the consideration of legal principles and applies the clearly erroneous standard if the question is primarily a factual inquiry. Clark v. Security Pac. Bus. Credit, Inc. (In re West Dor, Inc.), 996 F.2d 237, 241 (10th Cir. 1993).

DISCUSSION

This is an appeal from the Bankruptcy Court Decision of September 7, 1993. The crux of the five issues on appeal is

whether the bankruptcy court properly set aside the Contingent Fee Agreement between Griffin and MT&G and reduced MT&G's requested fees from $938,617.16 to $149,730.43.[4]

I. Contract Interpretation

MT&G argues that the bankruptcy court erred in concluding that MT&G "manipulated" the settlement agreement by including in the "amount recovered" not only the $1.2 million Griffin actually received, but also the $1.3 million circuitous payment for the forgiveness of indebtedness in the Foreclosure Case. Griffin, on the other hand, argues that the bankruptcy court correctly determined that the term "amount recovered," as used in the Contingent Fee Agreement, was not intended by the parties to apply to the forgiveness of indebtedness alleged by the City in the Foreclosure Case.[5]

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[4] The bankruptcy court granted a final allowance of total fees in the amount of $329,713.60, which includes previously allowed fees in the amount of $179,783.17.

[5] Because this court affirms the bankruptcy court's determination that the Contingent Fee Agreement is void under both the Bankruptcy Code and under California law, the bankruptcy court's interpretation of the (void) Contingent Fee Agreement is essentially a moot issue. However, this court will address the interpretation issue because MT&G's argument that the bankruptcy court erred in determining that MT&G "manipulated" the settlement does bear upon the bankruptcy court's finding of improvidence under 11 U.S.C. § 328 and upon the bankruptcy court's determination that MT&G did not prove that forty percent of $2.5

The interpretation of a contract is a question of law only if its meaning can clearly be determined from the four corners of the document. Abifadel v. Cigna Ins. Co., 9 Cal. Rptr. 2d 910, 919 (Ct. App. 1992); Robinson & Wilson, Inc. v. Stone, 110 Cal. Rptr. 675, 682-83 (Ct. App. 1973). Similarly, whether a contract is ambiguous is a question of law. Titan Corp. v. Aetna Casualty & Sur. Co., 27 Cal. Rptr. 2d 476, 482 (Ct. App. 1994). If the contract is ambiguous, however, its interpretation is a factual issue because the court must determine the intent of the parties from all of the surrounding facts and circumstances. Robinson & Wilson, Inc., 110 Cal. Rptr. at 683; Schmidt v. Macco Constr. Co., 260 P.2d 230, 240 (Ct. App. 1953).

The term "amount recovered," as used in the Contingent Fee Agreement, is undoubtedly an ambiguous term.[6] While the term

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million ($938,617.16) was the reasonable fee that should be awarded to MT&G.

[6] The Contingent Fee Agreement provides, in pertinent part:

> From the total amount recovered by way of settlement or judgment, all costs and expenses incurred on your behalf will be repaid to you or us depending upon which party has paid for them. After the payment of such charges, your attorney's fees will be

clearly applies to the $1.2 million actually received by Griffin in settling the City Case, it is far from certain that the parties intended that it would apply to the dismissal of the $1.3 disputed claim against Griffin in the Foreclosure Case. Therefore, the intent of the parties is a factual issue that must be determined from all the surrounding facts and circumstances.

Consequently, this court reviews the bankruptcy court's factual determination that the "amount recovered" does not include the forgiveness of indebtedness in the Foreclosure case under a clearly erroneous standard. Under that standard, "'[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'" In re Perma Pacific Properties, 983 F.2d at 966. If the bankruptcy court's "account of the evidence is plausible in light of the record viewed in its entirety," this court may not reverse it even though it may have weighed the evidence

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> a percentage of the remaining balance as follows:
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> Forty Percent (40%) if settled at or before Settlement Conference;

MT&G's Brief at 25-26 n.14.

differently. Cannon v. Comm'r of Internal Revenue, 949 F.2d 345, 349 (10th Cir. 1991).

The bankruptcy court found that "[d]espite 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 Contingent Fee Agreement." Bankruptcy Court Decision at 32, ¶ 99. Further, the bankruptcy court found that MT&G previously acknowledged that, unless amended, the Contingent Fee Agreement would not apply to a settlement of the Foreclosure Case. Id. at 16-20, ¶¶ 45-48, 50-52. Griffin never executed the proposed modification, and the bankruptcy court never approved an amended contingent fee agreement. Id. at 18, ¶ 49. After considering all the evidence, the bankruptcy court found that "MT&G structured the Proposed Settlement with the intent of increasing its recovery of attorneys' fees." Id. at 33, ¶ 104.

Accordingly, after considering the record, this court finds the bankruptcy court was not clearly erroneous in its determination that MT&G structured the Proposed Settlement with the intent of increasing its recovery of attorneys fees.

Therefore, this court affirms the bankruptcy court's conclusion on the interpretation of the Contingent Fee Agreement.

II. 11 U.S.C. § 328

MT&G also argues that the bankruptcy court erred in failing to analyze MT&G's Contingent Fee Agreement under 11 U.S.C. § 328(a) before calculating a reasonable fee under 11 U.S.C. § 330. In particular, MT&G contends that the bankruptcy court failed to make a specific finding of improvidence, a prerequisite for overturning a pre-approved agreement under the Bankruptcy Code.

Section 328 of the Bankruptcy Code states:

> (a) The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a). Thus, under § 328, where the bankruptcy court has previously approved the terms for compensation, the court cannot alter those terms unless it finds the original terms

to have been improvident in light of developments that were not capable of being anticipated at the time the bankruptcy court approved the terms of compensation. See Pitrat v. Reimers (In re Reimers), 972 F.2d 1127, 1128 (9th Cir. 1992); In re Confections by Sandra, Inc., 83 B.R. 729, 731 (Bankr. 9th Cir. 1987). Further, the term "unanticipated developments" in § 328(a) is subject to a broad interpretation. In re Confections by Sandra, Inc., 83 B.R. at 733; In re Cal Farm Supply Co., 110 B.R. 461, 465 (Bankr. E.D. Cal. 1989). Under § 328(a), "the bankruptcy court has substantial discretion in altering fee agreements when the circumstances warrant." In re Confections by Sandra, Inc., 83 B.R. at 733; see also In re Cal Farm Supply Co., 110 B.R. at 465; In re Churchfield Mg't & Inv. Corp., 98 B.R. 893, 899 (Bankr. N.D. Ill. 1989).

Contrary to MT&G's assertion, the bankruptcy court did make a specific finding of improvidence under § 328(a) based upon (1) MT&G's failure to comply with California Business & Professions Code § 6147, see Bankruptcy Court Decision at 48, ¶ 19, and (2) findings of facts that were not disclosed to the court and were not capable of being anticipated at the time the

court approved the Contingent Fee Agreement. Id., ¶ 20.[7] In its Findings of Fact, the bankruptcy court listed twelve critical facts that either existed at the time the court approved the Contingent Fee Agreement and were not disclosed to the court, or that occurred later and could not have been anticipated by the court. Id., ¶ 106. The bankruptcy court stated:

> This Court could not have anticipated, or was not made aware of, the following circumstances at the time it approved MT&G to

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[7] The bankruptcy court found

> 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).

Bankruptcy Court Decision at 48, ¶ 19. Further, the bankruptcy court found that

> Additionally, the terms and conditions of the Contingency Fee Agreement are improvident under the circumstances set forth above. 11 U.S.C. § 328(b) [sic]. The court will allow compensation different from the compensation provided under the terms of the Contingent 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 Contingent Fee Agreement.

Id., ¶ 20.

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.[8]

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.

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[8] This court notes that the bankruptcy court might have had a basis to award no fees based on this nondisclosure of a conflict of interest. Under 11 U.S.C. § 328(c), a court may deny compensation for services of a professional if at anytime the professional is not disinterested or holds an interest adverse to the estate. See Pierce v. Aetna Life Ins. Co., 809 F.2d 1356, 1361-62 (8th Cir. 1987); In re Smuggler's Beach Properties, Inc. 149 B.R. 740, 742 (Bankr. E.D. Mass. 1993); In re Maui 14K, Ltd., 133 B.R. 657, 660 (Bankr. D. Haw. 1991).

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 Contingent 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.

Bankruptcy Court Decision at 33-35, ¶ 106.

Thus, the bankruptcy court applied the correct legal standard and made specific findings, supported by the record, of several unanticipated developments and facts that were not disclosed to the court at the time it approved the Contingent Fee Agreement, rendering the original terms of the Contingent Fee Agreement to be improvident, and thereby justifying such a departure. Consequently, the bankruptcy court did not abuse its discretion in setting aside the fee agreement under the circumstances in this case.

III. California Business and Professions Code § 6147 and the Validity of the Contingent Fee Agreement

Next, MT&G argues that the bankruptcy court erred in its determination that the Contingent Fee Agreement violated California Business and Professions Code § 6147 by failing to fully and adequately disclose the extent to which Griffin could be required to pay any compensation to MT&G for related matters that arise out of their relationship not covered by the Contingent Fee Agreement. MT&G also contends that Griffin terminated MT&G's services after MT&G had successfully negotiated all material elements of the settlement agreement with the City. Under these circumstances, MT&G asserts, Griffin is estopped from repudiating the Contingent Fee Agreement, and MT&G is entitled to its fees in accordance with the Contingent Fee Agreement. Because this issue involves a legal determination, the bankruptcy court's decision is reviewed de novo. See In re Perma Pac. Properties, 983 F.2d at 966.

Section 6147 provides, in pertinent part:

> (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 . . . to the plaintiff . . . . The contract shall be in writing and shall include, but is not limited to, all of the following:

. . .

> (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.

. . .

> (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.

Cal. Bus. & Prof. Code § 6147 (1989).

In Alderman v. Hamilton, 252 Cal. Rptr. 845 (Ct. App. 1988), the court found that because the fee agreement in question did not meet the stringent statutory requirements of § 6147, the defendants "had an absolute right to void the contract before or after services were performed." Id. at 848; see also Fineberg v. Harney & Moore, 255 Cal. Rptr. 299, 303 (Ct. App. 1989), cert. denied, 493 U.S. 852 (1989). The Alderman court also noted that attorney fee agreements are "strictly construed against the attorney," Alderman, 252 Cal. Rptr. at 848, explaining that the policy behind the California statute was to "protect clients and to assure fee agreements are fair and understood by the client." Id. at 847.

In the instant case, the Contingent 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. Further, the Contingent 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 California Business & Professions Code § 6147(a)(3).

This court is not persuaded by MT&G's argument that MT&G satisfied the requirements of § 6147 because the two fee agreements, while they do not reference each other, were filled out contemporaneously. Under Alderman, California law requires strict adherence to the statutory requirements of § 6147, which were designed to prevent ambiguities from arising in contingent fee agreements. Additionally, MT&G contends that even if the Contingent Fee Agreement is voidable, the bankruptcy court erred in concluding that the Contingent Fee Agreement is void because Griffin's objection to MT&G's fee application cannot be construed as an affirmative rescission of the Contingent Fee Agreement. However, this court finds that the bankruptcy court did not err in concluding that Griffin voided the Contingent Fee Agreement by objection to MT&G's fee application.

Similarly, this court finds unavailing MT&G's argument that Griffin is estopped from repudiating the contract because Griffin reaped the benefits of the contract. Even assuming that the contract was substantially complete when Griffin terminated MT&G's representation, this court finds that Griffin was entitled to repudiate the contract, and MT&G is entitled to reasonable attorneys fees up to the time of discharge.[9] In Fracasse v. Brent, 494 P.2d 9 (Cal. 1972), the court held that an attorney discharged with or without cause is entitled to recover the reasonable value of his services rendered until the time of discharge. Id. at 14-15; see also Spires v. American Bus Lines, 204 Cal. Rptr. 531, 533 (Ct. App. 1984). The Fracasse court also stated that "[t]o the extent that such discharge occurs 'on the courthouse steps,' . . . the factors involved in a determination of reasonableness would certainly justify a finding that the entire fee was the reasonable value of the attorney's services."

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[9] The bankruptcy court found, however, that the settlement agreement was not complete when Griffin terminated MT&G's services on November 25, 1991. Bankruptcy Court Decision at 30, ¶ 88. That court also found that 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. Id. at 28, ¶ 79.

Id. at 14. However, the court did not say that a determination of reasonable fees necessarily compelled a finding that the entire fee was the reasonable value of the attorney's services. The Fracasse court explained that:

> we find no injustice in a rule awarding a discharged attorney the reasonable value of the services he has rendered up to the time of discharge. In doing so, we preserve the client's right to discharge his attorney without undue restriction, and yet acknowledge the attorney's right to fair compensation for work performed.

Fracasse, 494 P.2d at 533. Furthermore, under the Contingent Fee Agreement itself, Griffin could terminate the agreement at any time, and MT&G would be entitled to reasonable attorneys fees for work done up to the date of discharge.[10] Thus, the bankruptcy

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[10] The Contingent Fee Agreement stated, in part:

> This office may, in its absolute discretion and upon reasonable notice, withdraw from this case if investigation establishes the case is without merit or cannot be economically pursued for lack of applicable liability insurance or other funds and assets from which to satisfy a judgment or settlement. 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.

court properly rejected MT&G's argument that Griffin was estopped from repudiating the contract.

IV. Reasonable Attorneys Fees

Because the bankruptcy court found that the Contingent Fee Agreement was voidable under California law and voided by Griffin, and also that the Contingent Fee Agreement was improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions, the bankruptcy court determined reasonable compensation under 11 U.S.C. § 330.[11]

MT&G's Brief at 25-26 n.14.

[11] Section 330 provides in pertinent part:

> (a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 382, and 330 of this title, the court may award to . . . a professional person employed under section 327 . . . of this title, or the debtor's attorney--
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> > (1) reasonable compensation for actual, necessary services rendered by such . . . professional person, or attorney, . . . based on the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

MT&G argues that even though the bankruptcy court found the Contingent Fee Agreement to be void under both 11 U.S.C. § 328(a) and under California Business & Professions Code, § 6147, MT&G is still entitled to the void contingent fee as a reasonable fee, including forty percent of the circuitous payment pertaining to the Foreclosure Case. Based on the Fee Application, MT&G sought to recover approximately $414.24 for each of the 2,699.90 hours expended in prosecution of the City Case, totalling $938,617.16. MT&G asserts that the bankruptcy court did not properly consider the factors adopted by the Tenth Circuit in determining attorneys fees and thus erred in concluding that the fees requested by MT&G are not reasonable.

The bankruptcy court's determination of a reasonable fee award may be reversed only for abuse of discretion. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974); In re Kucek Dev. Corp, 113 B.R. 652, 654-55 (Bankr. E.D. Cal. 1990). Further, the fee applicant has the burden of establishing reasonableness. In re Gillett Holdings, Inc., 137 B.R. 475, 480 (Bankr. D. Colo. 1992); In re Roger J. Au & Sons,

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(2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330.

Inc., 114 B.R. 482, 485 (Bankr. N.D. Ohio 1990);

In the instant case, the bankruptcy court found that because MT&G's fee application did not provide time records that adequately detailed how time was allotted to specific tasks, "it [was] within [the court's] discretion to employ percentage reductions." Bankruptcy Court Decision at 53-54, ¶ 38. The bankruptcy court properly noted that the correct approach for determining fee applications in bankruptcy court is the "lodestar" method of calculating fee awards. See Blanchard v. Bereron, 489 U.S. 87, 88 (1989). Under this method, "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 & Maine Corp. v. Moore, 776 F.2d 2, 7 (1st. Cir. 1985). The bankruptcy court also noted that the actual time expended is not necessarily the reasonable time expended. Also, the lodestar figure 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.

The bankruptcy court then reduced the number of hours expended on the case (2699.90) because the court found they were

not reasonably expended.[12] The bankruptcy court delineated detailed reasons as to why the deductions were made, and those reasons are supported by the record. See Bankruptcy Court Decision at 54-58. Consequently, this court does not find that the bankruptcy court abused its discretion in reducing the number of hours expended by MT&G.

The bankruptcy court also correctly stated that the Tenth Circuit has established a framework of considerations in determining reasonable attorneys fees. See Bankruptcy Court Decision at 51, ¶ 32 (referring to In re Lederman Enters., Inc., 997 F.2d 1321, 1323 (10th Cir. 1993); First Nat. Bank of Lea County v. Niccum (In re Permian Anchor Serv., Inc.), 649 F.2d 763, 767-68 (10th Cir. 1981) (adopting factors set forth in

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[12] In connection with the adjustments to the time billed by MT&G, MT&G argues that it was penalized twice based upon the bankruptcy court's "erroneous conclusion that the $1,335.605.43 sum paid to [Debtor] 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 Contingent Fee Agreement." MT&G's Brief at 60. First, MT&G argues, the bankruptcy court found that the Contingent Fee Agreement was improvidently approved, and then it reduced MT&G's hourly recovery by ten percent based on the bankruptcy court's finding that MT&G manipulated the settlement process to inflate the amount recovered under the Contingent Fee Agreement. It would have been quite illogical, however, for the bankruptcy court to first void the Contingent Fee Agreement because of counsel's improper behavior and lack of candor to the court, and then award fees for time spent engaging in that behavior.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974)). In its Conclusions of Law, the bankruptcy court set forth those twelve factors announced in Johnson, see Bankruptcy Court Decision at 51 n.14, and in its Findings of Fact, it made specific findings as to the Johnson factors. See id. at 10-12, ¶ 30. Although the court did not specifically delineate how each finding on each Johnson factor impacted its final determination of the lodestar rate, the court obviously had considered carefully the Johnson factors as it determined the lodestar rate. See id. at 10-12, 51, 59.

The bankruptcy court then found that

> [b]ased upon this court's consideration of (a) the hourly rates customarily charged in this jurisdiction, (b) the hourly rated 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.[13]

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[13] The bankruptcy court also noted that MT&G had discussed the Johnson factors in its supporting memorandum, in the Gunter Affidavit, and in testimony at trial. In reference to MT&G's assertion about the economic benefits Griffin derived from MT&G's representations--one of the Johnson factors--the court noted that it "has a relatively useful and meaningful disclosure of the results obtained by MT&G rather than general disclosure of the Permian Anchor Services [Johnson] criteria." Bankruptcy Court Decision at 59-60, ¶ 55.

Id. at 59, ¶ 54. This amount is $20 per hour more than the hourly rate usually charged by MT&G.[14] Thus, the court determined that the total lodestar amount available to MT&G is $329,713.60 ($160/hr. x 2060.71 hours). Accordingly, this court finds that the bankruptcy court carefully considered the law and the facts and did not abuse its discretion in awarding $329,713.60 in attorneys fees to MT&G.

V. Prejudgment Interest

MT&G argues that the bankruptcy court abused its discretion in declining to add prejudgment interest to the fees awarded to MT&G. MT&G argues that an award of prejudgment interest is appropriate because MT&G has waited over five years to receive attorneys fees for the work it performed in bringing about a successful settlement of the City Case.

This court may reverse the bankruptcy court's decision concerning the award of prejudgment interest only if that court abused its discretion. See Turner v. Davis, Gillenwater & Lynch

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[14] MT&G's Hourly Fee Agreement in the Foreclosure Case provided for payment of fees at $140 per hour. Also, the Contingency Fee Agreement stated that Griffin had an option of paying $140 per hour rather than a contingent fee.

(In re Inv. Bankers, Inc.), 4 F.3d 1556, 1566 (10th Cir. 1993), cert. denied, ___U.S.___, 113 S.Ct. 1061 (1994); Western Trimming Corp. v. Craftmart, Inc. (In re Craftmart, Inc.), No. C-93-4174, 1994 WL 118274 (N.D. Cal. Mar. 10, 1994). An abuse of discretion occurs only when the bankruptcy court clearly erred in its judgment. See (In re Inv. Bankers, Inc.), 161 B.R. 507, 509 (Bankr. D. Colo. 1992) aff'd 4 F.3d 1556 (10th Cir. 1993); Gordon v. United States Steel Corp., 724 F.2d 106, 108 (10th Cir. 1983).

The Investment Bankers court set forth that prejudgment interest may generally be awarded if (1) the award of prejudgment interest would serve to compensate the injured party, and (2) the award of prejudgment interest is otherwise equitable. In re Investment Bankers, Inc., 4 F.3d at 1566. In light of this test, and given the bankruptcy court's factual findings pertaining to MT&G's improper motives, which is supported by the record, this court cannot find that the bankruptcy court abused its discretion in refusing to award prejudgment interest to MT&G.

Accordingly, for the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that

The bankruptcy court's Findings of Fact, Conclusions of Law, and Order Regarding Verified Application of Murphy, Thompson

& Gunter for Payment of Fees and Reimbursement of Expenses, dated September 7, 1993, is affirmed.

Dated this 18th day of July, 1994.

David K. Winder, Chief Judge
United States District Court