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7 NOT FOR PUBLICATION  
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9 UNITED STATES BANKRUPTCY COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

11 In re ) Case No. 01-15517-B-7  
12 Bryant Tank, Inc., ) DC No. LRP-3  
13 Debtor. )  
14 \_\_\_\_\_)

15 **MEMORANDUM DECISION REGARDING ATTORNEY'S**  
16 **FINAL APPLICATION FOR COMPENSATION**

17 This memorandum decision is not approved for publication and may not be cited except  
18 when relevant under the doctrine of law of the case or the rules of res judicata and claim  
preclusion.

19 Craig B. Fry, Esq., appeared on behalf of the applicant, Lang, Richert & Patch P.C.

20 Justin D. Harris, Esq., appeared on behalf of Rossana A. Zubrzycki-Blanco, the chapter 7  
trustee.

21 Before the court is the final application for compensation of professional fees (the  
22 "Application") filed by Lang, Richert & Patch P.C. ("LRP"), which performed services as  
23 special counsel to chapter 7 trustee, Rossana A. Zubrzycki-Blanco (the "Trustee"). In  
24 addition to the fees that have already been approved, LRP requests an award of fees in the  
25 amount of \$16,588.36 under the terms of its "contingency" fee agreement with the  
26 Trustee. For the reasons set forth below, the Application will be approved to the extent of  
27 interim fees already awarded plus costs. The Application for additional fees related to the  
28 Gibbs Judgment will be denied.

1 This memorandum decision contains the court's findings of fact and conclusions of  
2 law required by Federal Rule of Civil Procedure 52(a), made applicable to this contested  
3 matter by Federal Rule of Bankruptcy Procedure 7052. The court has jurisdiction over  
4 this matter under 28 U.S.C. § 1334 and 11 U.S.C. §§ 328 & 330<sup>1</sup> and General Orders 182  
5 and 330 of the U.S. District Court for the Eastern District of California. This is a core  
6 proceeding as defined in 28 U.S.C. § 157(b)(2)(A).

7 **Background and Findings of Fact.**

8 This case against Bryant Tank, Inc., commenced as an involuntary chapter 7  
9 petition on June 5, 2001. An order for relief was entered October 4, 2001, and the  
10 Trustee was appointed. On March 14, 2002, the court authorized the Trustee to employ  
11 LRP to serve as her special counsel pursuant to § 327(e) to prosecute a number of  
12 collection and avoidance actions. LRP agreed to accept compensation for its legal  
13 services on a contingency basis. LRP prepared a written letter agreement dated  
14 December 19, 2001, which set forth "the terms and scope of that engagement" (the  
15 "Contingency Agreement"). A copy of the Contingency Agreement was attached to the  
16 Trustee's motion to employ LRP. It was not signed by the Trustee and it was not attached  
17 to or expressly incorporated into the subsequent order authorizing LRP's employment.

18 Altogether, LRP filed 15 adversary proceedings between April 2002 and  
19 December 2003. The adversary proceedings sought to recover, *inter alia*, alleged  
20 avoidable transfers, usurious interest payments, and damages for violation of the  
21 automatic stay. A few of the adversary proceedings were dismissed, many were settled,  
22 and some were adjudicated against the Trustee. As a result of LRP's activities, the  
23 Trustee collected \$154,968.30, which represents virtually all of the assets recovered in the  
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26 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy  
27 Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-  
28 9036, as enacted and promulgated *prior* to October 17, 2005, the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20,  
2005, 119 Stat. 23.

1 bankruptcy estate.

2 The Trustee prevailed in one adversary proceeding number 02-1108 against Steven  
3 Gibbs (“Gibbs”) on a motion for summary judgment. A judgment was entered against  
4 Gibbs in the amount of \$40,197.14 (the “Gibbs Judgment”) and LRP attempted to find  
5 some property from which the Gibbs Judgment could be satisfied. However, when Gibbs  
6 subsequently filed a chapter 7 bankruptcy petition, the Gibbs Judgment was discharged  
7 and rendered uncollectable.

8 LRP filed two interim fee applications which were approved. LRP has already  
9 been awarded fees for its services in the amount of \$52,503.89, and costs in the amount of  
10 \$5,371.61 for a total award of \$57,875.50. The Trustee reports that LRP has been paid to  
11 date the sum of \$47,159.49 leaving a balance due of \$10,716.01, subject to approval of  
12 LRP’s final Application. The Trustee has no opposition to payment of this balance  
13 previously awarded.<sup>2</sup>

14 In support of its fee applications, LRP lodged copies of its internal billing records  
15 to detail the nature and amount of time actually spent in this case. Those billing records  
16 show that LRP spent 205 hours of professional time with value of \$42,983 representing  
17 the Trustee from December 12, 2003 to December 14, 2006. Those billing entries include  
18 time spent on the unsuccessful Gibbs litigation. They also include the time spent on  
19 another unsuccessful litigation against Central California Escrow. These records suggest  
20 that the court has already awarded \$9,520.89 more in “interim” contingency fees than  
21 LRP could recover if it were being compensated for its actual time.

22 In the Application, LRP requests payment of the money already awarded, but not  
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24 <sup>2</sup>The Trustee notes in her supplemental opposition that the fees awarded to LRP exceed  
25 the amount that should have been awarded, based on money actually collected from the  
26 adversary proceedings (30% contingency fee x \$154,968.30) by approximately \$6,012.44. The  
27 Trustee explains that some of the settlements were variable in nature and that LRP requested  
28 interim compensation based on the maximum amount which the Trustee could have received  
under the “variable” settlements. The Trustee did not object to the interim fee awards and did  
not raise this issue until late in the proceedings. Even then, the Trustee did not raise the issue as  
a formal objection and has not asked the court to revisit the interim awards.

1 paid (\$10,716.01), which the Trustee does not oppose. LRP also requests additional  
2 compensation for services rendered and costs incurred in connection with the Gibbs  
3 Judgment. LRP calculates this fee to be \$16,588.56 based on 40% of the Gibbs Judgment  
4 (the “Gibbs Fee”), plus additional costs in the amount of \$649.67. The Trustee objects to  
5 the Gibbs Fee award on the grounds that the estate was unable to collect any of the Gibbs  
6 Judgment.<sup>3</sup>

7 **The Contingency Fee Agreement.**

8 The Contingency Agreement between LRP and the Trustee described the scope of  
9 LRP’s engagement and the terms for its compensation in pertinent part as follows:

10 This letter states the terms and scope of that engagement.

11 We agree to provide you legal services as necessary for  
12 representation in the foregoing matter. We would act as your special  
13 counsel and *be responsible for all litigation. . . .* It may also includes  
14 [sic] *attempts to recover other transfers* and payments of which  
neither you nor we are currently aware. These services may include,  
but not limited to, investigation of the facts, legal research, non-legal  
research, and drafting documents and pleadings.

15 . . .

16 You will either act as your own general counsel in this case or you  
will employ another attorney for that purpose. *We will not, for*  
17 *example, be responsible for objecting to claims, except to the extent*  
18 *that defendants in the litigation to be filed submit such claims. We*  
19 *will not normally be responsible for handling sale transactions.*  
(The one exception to this would be where the assets are tanks  
involved in the “adopt-a-tank” program and we would be litigating  
with holders of security interests in the tank or tanks).

20 At present, it is understood that there are no unsecured assets in this  
21 estate, and there are likely to be none unless we are successfully [sic]  
22 in litigation. Also, there is no hard evidence as to whether  
judgments, if obtained, can be collected.

23 As a consequence, we are willing to undertake these litigations only  
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26 <sup>3</sup>The Trustee initially supported the Application and only raised this objection after the  
27 court questioned the Application and asked for an accounting of what LRP had been paid versus  
28 the moneys that had been collected. The bankruptcy court has an independent duty to review the  
reasonableness of a professional’s fees, even when the trustee who employed that professional  
does not object. *In re Montgomery Drilling Co.*, 121 B.R. 32, 35-36 (Bankr. E.D. Cal. 1990).

on a contingency fee basis.

We would propose the following:

(1) All litigation costs (filing fees; deposition transcripts; and the like) would be paid from any assets of the estate in a super priority position, but first from recoveries from any litigation in which our firm acted as special counsel. These costs would be reimbursed from any assets of the estate (including assets presently unknown) ahead of all other administrative expenses.

(2) Our firm will earn a contingency fee of 30% of any settlement amount approved by the Court prior to the commencement of trial (including a judgment by default or stipulated judgment) and 40% of *any amount obtained by agreement or judgment* after the commencement of trial.

(3) *The payment of any such earned contingency fees* will be payable from any recovery by the estate from any of the litigations which our firm handles as special counsel, except as to a case where we have elected to withdraw. . . . Such contingency fees will be paid on a “super priority” basis from such litigation recoveries, ahead of all other administrative claims of the estate. (Emphasis added.)

### **Analysis and Conclusions of Law.**

#### **The Contingency Fee Agreement Does Not Support Compensation Based on the Gibbs Judgment.**

Under California law, an attorney’s contingency fee agreement is governed by statute pursuant to Cal. Business and Professions Code § 6147, which provides in pertinent part:

(a) An attorney who contracts to represent a client 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 client . . . . 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 that 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 client 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.

1 . . .

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

5 By its very nature, a contingency attorney fee agreement implies that the attorney's  
6 right to compensation is subject to some contingency. That contingency is usually  
7 understood to be the collection of money from which the fee would be paid. A contingent  
8 fee is generally defined as: A fee charged for a lawyer's services only if the lawsuit is  
9 successful or is favorably settled out of court. Contingent fees are [usually] calculated as  
10 a percentage of net recovery . . . . *Black's Law Dictionary* 338 (8<sup>th</sup> ed. 2004).

11 Looking at the Contingency Agreement here, paragraph 1 governs the  
12 compensation of litigation costs. Costs are to be reimbursed in full and LRP's right to  
13 recover costs is not contingent upon a successful result in any litigation. LRP's right to  
14 recover litigation costs is therefore governed by the "actual and necessary" test set forth  
15 in § 330(a)(1)(B). The Trustee has only objected to LRP's request for the Gibbs Fee.  
16 Accordingly, LRP's request for reimbursement of unpaid litigation costs in the amount of  
17 \$649.67 will be approved.

18 Paragraph 2 defines how LRP's fees would be calculated and awarded. The  
19 language in paragraph 2 clearly contemplates that LRP's fee would be based on "any  
20 amount obtained." LRP argues that it is entitled to compensation for the Gibbs Judgment  
21 based on the language in paragraph 3. However, paragraph 3 deals with the source of  
22 funds and priority for payment and it refers back to "such earned contingency fees" from  
23 paragraph 2. LRP would parse out and ignore the language in paragraph 2 of the  
24 Contingency Agreement which contemplates a 40% recovery fee for "any amount  
25 obtained by agreement or judgment after the commencement of trial."<sup>4</sup> Paragraph 2 is the

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27 <sup>4</sup>The court initially questioned LRP's request for 40% of the Gibbs Judgment even  
28 though there never was a trial. LRP argued that the summary judgment motion was the  
functional equivalent of a trial. Because the court is not awarding any compensation for the

1 only paragraph in the Contingency Agreement that defines how LRP's fee would be  
2 calculated and awarded.

3 LRP argues that it was not required to actually collect any of the judgments or  
4 settlements it obtained for the estate. However, LRP can point to no provision of the  
5 Contingency Agreement that so limits the scope of its engagement. Indeed, LRP  
6 acknowledges that it was instrumental in collecting much of the money gathered by the  
7 Trustee. The Contingency Agreement does specifically limit LRP's engagement to  
8 exclude, for example, service as the Trustee's general counsel, responsibility for claim  
9 objections, and representation in sale transactions. The Contingency Agreement is silent  
10 with regard to collection of the settlements and judgments that LRP was engaged to  
11 prosecute. In that regard, the Contingency Agreement does not appear to comply with  
12 Cal. Bus. & Prof. C. § 6147(a) in that (1) it was not signed by the Trustee, and (2) it does  
13 not clearly and unambiguously state the basis upon which LRP's fee would be calculated,  
14 nor does it state that the Trustee could be required to pay a fee without a positive result  
15 for the estate.

16 LRP argues that the Contingency Agreement should be interpreted and enforced as  
17 a matter of contract law. However, LRP prepared the Contingency Agreement and the  
18 Agreement is vague and ambiguous as to the interpretation now urged by LRP. If LRP  
19 intended to exclude the collection of money as a factor in its compensation formula, then  
20 that exclusion should have been clearly stated and disclosed, both to the Trustee and to  
21 the court at the time LRP's employment was up for approval. As a result, LRP now finds  
22 itself arguing a position adverse to its own client, a position which the court cannot  
23 condone.

#### 24 **The Fairness of LRP's Compensation.**

25 LRP contends that the Gibbs Fee should be awarded out of fairness. It argues that  
26 \_\_\_\_\_  
27 Gibbs Judgment, it is not necessary to decide what LRP's percentage of compensation would  
28 have been.

1 its internal billing records still show a balance of \$44,801.10 owed for services rendered  
2 in the case. LRP argues that it would not have agreed to work for the Trustee if it had  
3 known it would not be compensated for all of its services. However, as noted above, the  
4 only billing records provided in support of LRP's three fee applications show that the fees  
5 already awarded to LRP (\$52,503.89) exceed the actual billing entries, including time  
6 spent on the unsuccessful Gibbs and Central California Escrow litigations, by \$9,520.89.  
7 LRP offers no evidence or additional records to support the contention that it has not been  
8 more than fairly compensated for all services rendered.

9 **Conclusion.**

10 Based on the foregoing, the court finds and concludes that the Application does not  
11 support LRP's request for "contingency" fee compensation based on the Gibbs Judgment.  
12 The court further finds and concludes that LRP has been fairly compensated for the  
13 services rendered as reflected in the billing records filed with the court. The Application  
14 will be granted to the extent LRP seeks final approval and payment of fees and costs  
15 already awarded in prior interim fee applications. The Application will also be approved  
16 to the extent that LRP seeks reimbursement for costs relating to the Gibbs Judgment in  
17 the amount of \$649.67. The Application will be denied to the extent LRP seeks an  
18 additional award of fees relating to the uncollectable Gibbs Judgment.

19 Dated: February 25, 2009  
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22 /s/ W. Richard Lee  
23 W. Richard Lee  
24 United States Bankruptcy Judge  
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