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7 UNITED STATES BANKRUPTCY COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
9 FRESNO DIVISION

10 In re ) Case No. 11-19212-B-11  
11 Merced Falls Ranch, LLC, )  
12 Debtor. )  
\_\_\_\_\_ )

13 MEMORANDUM DECISION REGARDING SUPPLEMENTAL  
14 APPLICATION FOR PAYMENT OF ATTORNEY'S FEES  
15 AND REIMBURSEMENT OF EXPENSES

16 Jasper L. Ozborn, Esq., of Cappello & Noël LLP, appeared on behalf of the applicant,  
17 Cappello & Noël LLP.

18 Jake A. Soberal, Esq., of Walter & Wilhelm Law Group, appeared on behalf of the  
19 debtor, Merced Falls Ranch, LLC.

20 Before the court is an application filed by the law firm of Cappello & Noël LLP  
21 ("Cappello") for payment of legal fees and reimbursement of expenses under 11 U.S.C.  
22 § 328<sup>1</sup> (the "Supplemental Application"). Cappello seeks compensation for services it  
23 performed in the prior prosecution of a contested fee application and for its opposition to  
24 the Debtor's motion for entry of a final decree. The debtor, Merced Falls Ranch, LLC  
25 (the "Debtor") opposes the Supplemental Application on the grounds that the requested  
26 fees are unreasonable. Because Cappello didn't exercise prudent billing judgment in the  
27 performance of its legal services, and for the reasons set forth below, the Supplemental

28 \_\_\_\_\_  
<sup>1</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (enacted Apr. 20, 2005).

1 Application will only be allowed in part.

2 This memorandum decision contains the court's findings of fact and conclusions  
3 of law required by Federal Rule of Civil Procedure 52(a), made applicable to this  
4 contested matter by Federal Rules of Bankruptcy Procedure 7052 and 9014(c). The court  
5 has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, 11 U.S.C. § 328, and  
6 General Order Nos. 182 and 330 of the U.S. District Court for the Eastern District of  
7 California. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A).

8 **BACKGROUND AND FINDINGS OF FACT.**

9 The background of this dispute is recited in the court's earlier Memorandum  
10 Decision Regarding [Cappello's] Application for Payment of Contingency Fee, filed  
11 October 16, 2012 (ECF No. 245), and will not be fully revisited here. However, for  
12 purposes of this memorandum, the relevant facts may be summarized as follows:

13 The Debtor filed a voluntary petition under chapter 11 in August 2011, in order to  
14 stay a non-judicial foreclosure sale by its secured creditor American AgCredit, ACA<sup>2</sup>  
15 ("AAC"). Prior to the bankruptcy, the Debtor retained Cappello to prosecute an action in  
16 the state court for, *inter alia*, damages against AAC based on claims of lender liability  
17 (the "State Court Action"). The Debtor initially engaged Cappello pursuant to the terms  
18 of a fee agreement (the "Fee Agreement" or "Agreement"). The Fee Agreement  
19 provided for a hybrid fee arrangement whereby Cappello was entitled to recover both  
20 hourly fees for services rendered (outlined in sections 3.1 and 3.2 of the Fee Agreement)  
21 and a contingency fee dependent upon future events (outlined in section 3.4 of the Fee  
22 Agreement). Soon after commencement of the bankruptcy case, the Debtor filed an  
23 application seeking to employ Cappello as its "special counsel" to continue prosecuting  
24 the State Court Action. Cappello's employment was approved according to the terms of  
25 the prepetition Fee Agreement.

26 Before conclusion of the State Court Action, in June 2012, the Debtor and AAC

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28 <sup>2</sup> The acronym "ACA" stands for Agricultural Credit Association.

1 confirmed a “joint” chapter 11 plan of reorganization, which effectively resolved their  
2 dispute. Following confirmation of the plan, Cappello filed an application requesting  
3 payment of a contingency fee pursuant to the terms of the Fee Agreement (the  
4 “Contingency Application”). The Debtor disputed Cappello’s interpretation of the Fee  
5 Agreement and opposed the Contingency Application.<sup>3</sup>

6 After oral argument and the submission of supplemental briefs, this court granted  
7 the Contingency Application and awarded Cappello its entire contingency fee, in the  
8 amount of \$554,650. Cappello prepared and submitted the proposed order, which was  
9 signed on November 9, 2012. The order expressly authorized Cappello to “submit a  
10 further application for payment of the fees and expenses it has incurred in applying for  
11 and obtaining this Order.”

12 Five days after the court awarded Cappello’s contingency fee, on November 14,  
13 2012, the Debtor filed a motion for entry of a final decree and for an order closing the  
14 case (the “Final Decree Motion”). The court continued the Final Decree Motion  
15 because, *inter alia*, it had not been served on Cappello and was not supported by  
16 evidence to show that the recently awarded contingency fee had been paid. The court  
17 ordered that Cappello be served with notice of the Final Decree Motion and the matter  
18 was then set for a further hearing on January 31, 2013. After being properly served,  
19 Cappello filed an opposition to the Final Decree Motion on the grounds that (1) the  
20 contingency fee had not yet been paid and (2) Cappello needed more time to file and  
21 litigate the current Supplemental Application. For reasons not directly related to this  
22 dispute, the court has not yet ruled on the Final Decree Motion.<sup>4</sup>

23 Cappello now requests payment of additional hourly fees pursuant to § 328 of the  
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25 <sup>3</sup> Cappello had previously filed a motion for payment of hourly fees and costs totaling \$88,245.  
26 That motion was unopposed by the Debtor and was approved by the court. Those fees have been paid.

27 <sup>4</sup> Based on the Debtor’s status report dated June 13, 2013, and Cappello’s supplemental  
28 opposition to entry of a final decree dated June 13, 2013, the Debtor has not yet sold or refinanced its real  
property as provided in the chapter 11 plan and the Debtor has not yet paid Cappello’s contingency fee.

1 Bankruptcy Code and the terms of the Fee Agreement. In addition to the contingency  
2 fee, the Fee Agreement entitles Cappello to recover its “reasonably related” hourly fees:

3 3.1 Attorneys’ Fees. Clients agree to pay Cappello & Noël for all time  
4 spent by Cappello & Noël reasonably related to the representation of Clients. . . .

5 In recognition of the fact that Cappello could be receiving both a contingency fee  
6 and an hourly fee, the Fee Agreement provided for a 20% reduction in Cappello’s hourly  
7 billing rates:

8 3.2 Application of Retainer and Hourly Rates. . . . Since Clients also may  
9 be responsible for a contingency fee pursuant to Section 3.4, Cappello & Noël  
will discount only its hourly fees by twenty percent (20%).<sup>5</sup>

10 In this Supplemental Application, Cappello requests payment of additional hourly  
11 fees in the amount of \$60,095 and reimbursement of additional expenses in the amount  
12 of \$156.15.<sup>6</sup> The fees represent about 140 hours of time spent by Cappello’s staff from  
13 April 19, 2012 to January 18, 2013,<sup>7</sup> in preparing the prior Contingency Application,  
14 litigating that Application, preparing the order granting the Contingency Application,  
15 objecting to the Debtor’s Final Decree Motion, and preparing the present Supplemental  
16 Application. Attached to the Supplemental Application are the detailed billing records  
17 showing how much time Cappello spent on these tasks (the “Billing Records”).

18 As with the prior Contingency Application, Cappello’s Supplemental Application  
19 is opposed by the Debtor. Comparing Cappello’s services to those billed by Debtor’s  
20 counsel for similar work in connection with the same activities, the Debtor contends that  
21 the fees requested by Cappello are unreasonable and requests that the fees be reduced to  
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24 <sup>5</sup> Cappello’s initial billing rates for attorneys ranged from a low of \$395 per hour to a high (for A.  
25 Barry Cappello) of \$850 per hour. In March 2012, Cappello exercised its right under section 3.3 of the  
26 Fee Agreement to alter its existing fee schedule and sent a letter notifying the Debtor of increases in the  
27 firm’s rates. The new attorney rates ranged from \$425 per hour to \$950 per hour.

28 <sup>6</sup> The Debtor has not objected to the expenses requested by Cappello.

<sup>7</sup> The Supplemental Application showed approximately 155 hours of work performed, but  
Cappello voluntarily cut about 15 hours from its request.

1 \$11,343.75, a reduction of approximately 80%.

2 **DISCUSSION AND CONCLUSIONS OF LAW.**

3 Review of Professional Fees Under § 328. Cappello requests additional  
4 compensation pursuant to the terms of the previously approved Fee Agreement and § 328  
5 of the Bankruptcy Code, which somewhat limits the scope of the court's ability to review  
6 the fee request:

7 where the bankruptcy court has previously approved the terms for  
8 compensation of a professional, [pursuant to § 328] when the professional  
9 ultimately applies for payment, the court cannot alter those terms unless it  
10 finds the original terms "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 *Pitrat v. Reimers (In re Reimers)*, 972 F.2d 1127, 1128 (9th Cir. 1992) (quoting  
12 § 328(a)); *see also In re Confections by Sandra, Inc.*, 83 B.R. 729, 731 (9th Cir. BAP  
13 1987). When no such unforeseen circumstances exist to warrant adjustment of fees,  
14 "§ 328(a) limits the authority of the bankruptcy court to depart from the terms of the fee  
15 agreement previously approved." *In re First Magnus Fin. Corp.*, No. AZ-08-1160-  
16 PaDMo, 2009 WL 7809001, at \*8 (9th Cir. BAP Feb. 24, 2009). Generally, once the  
17 court has already and unconditionally approved the professional's employment under  
18 § 328, "[t]here is no question that [it] may not conduct a § 330 inquiry into the  
19 reasonableness of the fees and their benefit to the estate." *Friedman Enters. v. B.U.M.*  
20 *Int'l, Inc. (In re B.U.M. Int'l, Inc.)*, 229 F.3d 824, 829 (9th Cir. 2000). The inquiry then,  
21 whether Cappello is entitled to an additional \$60,095 in hourly fees, begins with an  
22 analysis of the terms that have already been approved in the Fee Agreement.

23 The Contractual 20% Reduction of the Hourly Fees. First, the court notes that  
24 nothing in the Supplemental Application suggests that Cappello applied the 20%  
25 reduction to its hourly billing rates as required by the Fee Agreement.<sup>8</sup> Specifically, the

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27 <sup>8</sup> At the hearing on February 28, 2013, the court asked the attorney appearing for Cappello  
28 whether the contractual 20% reduction had been applied to the fees requested. The attorney responded  
that he was unsure whether that had occurred.

1 last sentence of section 3.2 of the Agreement provides, “Since Clients also may be  
2 responsible for a contingency fee pursuant to section 3.4, Cappello & Noël will discount  
3 only its hourly fees by twenty percent (20%).” Because this court has already awarded  
4 Cappello its contingency fee pursuant to section 3.4 of the Agreement, it follows that the  
5 Debtor is entitled to a 20% reduction of the hourly fees charged pursuant to section 3.2.<sup>9</sup>  
6 By the plain language of section 3.2, the 20% reduction is a “discount” of the billing rate,  
7 not a reduction of the hours that were billed.<sup>10</sup> In recognition of this provision in the Fee  
8 Agreement, the court must first reduce the fees requested in the Supplemental  
9 Application by 20%. Therefore, before the court gives further consideration to the  
10 Application, the amount of its fee request will be reduced to \$48,076.

11 After application of the contractual discount, the court will not further review the  
12 billing rates charged by Cappello. The Debtor has not objected to the hourly rates and  
13 Cappello’s billing rates, and the right to adjust those billing rates, were agreed to in the  
14 Fee Agreement. The constraints of § 328 limit review of the terms of Cappello’s  
15 employment, even if the applicable billing rates do not represent the prevailing market  
16 rates in the relevant community.

17 The Hours Billed and the Prudent Billing Judgment Test. Even though the court  
18 may be bound by governing principals to honor Cappello’s discounted hourly rates, those  
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20 <sup>9</sup> The last sentence of section 3.2 was drafted in a less-than-artful way. Nevertheless, this  
21 sentence is susceptible to only one reasonable interpretation and the court construes it to mean that (1)  
22 Cappello was obligated to reduce its hourly fees by 20% (based on the placement of the words “may” and  
23 “will” in the sentence without any subsequent qualifications) and (2) the obligation was not expressly  
24 conditioned on the requirement that a contingency fee actually be awarded or paid. To the extent this  
25 contractual language may be ambiguous, the court notes that the Fee Agreement must be strictly  
26 construed against the attorney who drafted it. *See In re Cnty. of Orange*, 241 B.R. 212, 221 (C.D. Cal.  
1999) (citing *Alderman v. Hamilton*, 205 Cal. App. 3d 1033, 1037 (1988)). Thus, regardless of whether  
the last sentence of section 3.2 is ambiguous or not, and regardless whether the Debtor has or yet paid the  
contingency fee, the 20% reduction in billing rates must apply.

27 <sup>10</sup> The court acknowledges that Cappello did voluntarily reduce the number of hours it billed from  
28 155 to 140 hours in the Supplemental Application. However, this reduction amounted to only 10% of the  
hours reportably worked and does not appear to have been intended as a way of complying with the last  
sentence of section 3.2.

principals do not also preclude judicial review of the hours reflected in the Supplemental Application. By its terms, § 328 allows the court to review and adjust Cappello's fee request based on "developments not capable of being anticipated" at the time of the agreement. One assumption that the Debtor, and the court, were entitled to make when entering into and approving the Fee Agreement, was that Cappello would exercise prudent billing judgment for the time it billed to the Debtor.<sup>11</sup> If, as discussed below, Cappello failed to exercise prudent billing judgment, that certainly would be a "development not capable of being anticipated" when the court approved the Fee Agreement.<sup>12</sup> Accordingly, the court is not bound by § 328 and the terms of the Fee Agreement to compensate Cappello for all of the hours reflected in the Supplemental Application.

Whenever the court must determine the reasonableness of the hours expended by a fee applicant, a universal consideration in the court's analysis is whether the applicant exercised reasonable or prudent billing judgment when it billed for those fees. *See Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswick Drug Co. (In re Mednet)*, 251 B.R. 103, 109 (9th Cir. BAP 2000) ("Professionals always must exercise proper billing judgment."); *Lobel & Opera v. U.S. Tr. (In re Auto Parts Club, Inc.)*, 211 B.R. 29, 33 (9th Cir. BAP 1997) ("Professionals have an obligation to exercise billing judgment.");

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<sup>11</sup> While an attorney's exercise of reasonable billing judgment is typically an implicit understanding in an hourly fee arrangement between the attorney and the client, the Fee Agreement in this case may be interpreted as expressly including a "reasonableness" component. Section 3.1 of the Agreement, provided, in part, that "Clients agree to pay Cappello & Noël for all time spent by Cappello & Noël *reasonably* related to the representation of Clients."

<sup>12</sup> Even if Cappello's lack of prudent billing judgment does not constitute a "development[ ] not capable of being anticipated," the court would still engage in a "reasonableness" analysis. Since nothing in the Fee Agreement fixed or established the number of hours Cappello was allowed to bill the Debtor, the court is not departing from any provision of the Agreement by considering whether the hours actually billed were reasonable. *See Confections by Sandra*, 83 B.R. at 733 (remanding to bankruptcy court for determination as to whether hours expended by attorney, who was employed under § 328, were reasonable under the circumstances); *see also Unsecured Creditors' Committee v. Puget Sound Plywood, Inc.*, 924 F.2d 955, 960 (9th Cir. 1991) (noting in dicta that where "bankruptcy court [has] approved an hourly rate, [but has] not fix[ed] the number of allowed hours, that matter still would be subject to the court's review").

1 *see also Puget Sound Plywood*, 924 F.2d at 958–59 (noting that a bankruptcy  
2 professional had an “obligation to exercise billing judgment” and did not have “free  
3 reign to run up a tab” without considering several factors). On this “billing judgment”  
4 issue, the Supreme Court has commented,

5 [A court] . . . should exclude from [the] initial fee calculation hours that  
6 were not “reasonably expended.” Cases may be overstaffed, and the skill  
7 and experience of lawyers vary widely. Counsel [who is requesting fees]  
8 should make a good faith effort to exclude from a fee request hours that are  
9 excessive, redundant, or otherwise unnecessary, just as a lawyer in private  
practice ethically is obligated to exclude such hours from his fee  
submission. In the private sector, “billing judgment” is an important  
component in fee setting. It is no less important here.

10 *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (citations omitted) (internal quotation  
11 marks omitted) (Civil Rights Attorney’s Fees Awards Act context). Thus, “[i]t does not  
12 [necessarily] follow that the amount of time *actually* expended is the amount of time  
13 *reasonably* expended.” *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en  
14 banc) (emphasis added).

15 “The [applicant] applying for fees bears the burden of proving the reasonableness  
16 of those fees.” *Dalessio v. Pauchon (In re Dalessio)*, 74 B.R. 721, 724 (9th Cir. BAP  
17 1987) (§ 506(b) context). It is not sufficient for the applicant to simply represent that all  
18 of the time claimed was usefully spent, and the court should not uncritically accept those  
19 representations. *Jordan v. Multnomah Cnty.*, 815 F.2d 1258, 1263 n.8 (9th Cir. 1987).  
20 Instead, the applicant must show that the time spent was reasonably necessary and that it  
21 made a good faith effort to exclude excessive, redundant, or unnecessary hours. *Id.* And  
22 unless the court is satisfied that the fee applicant exercised prudent billing judgment, the  
23 court is not required to accept the actual hours expended as being reasonable.

24 Categories of Tasks Performed. The tasks that make up the Supplemental  
25 Application can be categorized into four time blocks: (1) preparing the Contingency  
26 Application (from April 19 to July 18, 2012); (2) defending against the Debtor’s  
27 objection to the Contingency Application (from August 9 to September 21, 2012);  
28 (3) preparing the order allowing the contingency fee (from October 19 to November 13,



2012); and (4) preparing the Supplemental Application and the objection to the Final Decree Motion (from November 28, 2012 to January 18, 2013). The threshold question is whether these tasks are reasonably related to in the scope of Cappello's employment. The court answers this question in the affirmative.

The concept of reasonableness when applied to a body of legal work invokes a combination of objective and subjective inquiries. Objectively, the court must be persuaded that the legal work performed in a particular case was consistent with the kind of legal service which a similarly situated creditor might require. The court must also determine that the value of the legal services is consistent with the cost of similar legal services for similar work. Subjectively, the court must inquire whether the professionals exercised prudent billing judgment in the decisions that were made to engage the legal services, the way the work was assigned, and the manner in which it was actually performed. As the Bankruptcy Appellate Panel has opined,

Reasonableness embodies a range of human conduct. The key determinant is whether the [attorney applying for fees] incurred expenses and fees that fall within the scope of the fees provision in the agreement, and took the kinds of actions that similarly situated [attorneys] might reasonably conclude should be taken, or whether such actions and fees were so clearly outside the range as to be deemed unreasonable.

*Dalessio*, 74 B.R. at 723.

It is undisputed that an attorney employed by the estate is entitled to compensation for preparing and presenting a fee application to the court. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 662 (9th Cir. 1985). Similarly, compensation may be awarded for successfully litigating the fee application (i.e., by defending against objections to the fee application) may be awarded as well. *See Smith v. Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 928–29 (9th Cir. 2002) (requiring fee applicant to show that time and expense spent litigating fee application was necessary), *abrogated on other grounds by Lamie v. U.S. Tr.*, 540 U.S. 526 (2004); *Boldt v. Crake (In re Riverside-Linden Inv. Co.)*, 945 F.2d 320, 323 (9th Cir. 1991) (holding that bankruptcy court did not abuse discretion in denying fees incurred by fee applicant in unsuccessfully opposing objection to fee

1 application).

2 Here, Cappello has a right to be compensated for reasonable services connected  
3 with preparation of both the Contingency Application and this Supplemental  
4 Application. Additionally, Cappello is entitled to compensation for its successful  
5 defense of the Contingency Application and for preparation of the resulting order, both  
6 of which were reasonably related to the Contingency Application. Lastly, Cappello's  
7 work in objecting to the Debtor's Final Decree Motion was reasonably related to defense  
8 of the Contingency Application since the objection resulted from the Debtor's failure to  
9 pay the contingency fee that had been awarded. Thus, the court has no problem with the  
10 categories of work reflected in the Supplemental Application. The only remaining issue  
11 relates to the amount of time Cappello expended to perform these tasks.

12 Application to the Fee Application. Upon review of the Billing Records, the court  
13 is not persuaded that Cappello exercised prudent billing judgment as a general matter.  
14 These records show several, varied instances where Cappello "overlawyered" on certain  
15 tasks or otherwise billed for excessive, redundant, or unnecessary work. Specifically, the  
16 following issues support the court's conclusion:

17 Time Spent Preparing the Contingency Application. Based on the Billing Records,  
18 it appears that Cappello spent approximately 30 hours, between April 19, 2012, and July  
19 18, 2012, at a billed cost of approximately \$25,175, to prepare and file the Contingency  
20 Application. That amount of time is patently excessive and particularly troubling given  
21 that Cappello only requested the award of a contingency fee. The Contingency  
22 Application did not require the production and analysis of time records, and the amount  
23 of the proposed contingency fee was readily calculable. Excluding the exhibits (copies  
24 of other documents already filed in the case), the Contingency Application consisted of a  
25 four-page motion, a seven-page declaration of attorney Thielemann, and a five-page  
26 narrative summary. There was nothing particularly remarkable or complicated about the  
27 Contingency Application and much of the material was unnecessary. For example, it  
28 was not necessary to offer biographical summaries of Cappello's attorneys since its

1 employment had already been approved and it was only requesting payment of a  
2 contingency fee fixed by contract under the Fee Agreement.

3 Cappello notes that much of the time spent preparing the Contingency Application  
4 was actually work performed in anticipation of the Debtor's forthcoming objection.  
5 However, Cappello billed an additional \$10,585 for work performed after the objection  
6 was filed, between August 9, 2012, and September 21, 2012, when the court finally took  
7 the matter under submission after the filing of supplemental briefs. This time appears,  
8 from a review of the pleadings filed, to be unreasonably excessive. The only legal  
9 standard cited by Cappello in support of its contingency fee was the basic standard for  
10 the application of § 328. There was no analysis relating to the contract interpretation  
11 issue, which was the ultimate issue in the dispute. Indeed, most of the court's decision  
12 awarding Cappello's contingency fee was based on the court's own independent  
13 research. It appears that Cappello either spent very little time researching the relevant  
14 legal issues or simply researched the wrong ones. Whichever may be the case, the time  
15 spent preparing and defending the Contingency Application was unreasonable.

16 Time Spent Preparing An Order Allowing the Contingency Fee. Similarly, the  
17 amount of time spent preparing the order allowing Cappello's contingency fee showed a  
18 lack of prudent billing judgment. When the court issued its memorandum decision  
19 allowing the contingency fee, Cappello was directed to submit an appropriate order.  
20 What Cappello had to do at that point was fairly straightforward: just prepare and lodge  
21 with the court an order approving the contingency fee. Yet, Cappello somehow spent 14  
22 hours between October 19 and November 13, 2012, at a billed cost of \$7,272.50  
23 completing this simple task.

24 According to its Billing Records, Cappello did a significant amount of unnecessary  
25 work related to this task, such as performing additional legal research (after the court had  
26 already decided the issues in its memorandum decision) and seeking the Debtor's  
27 bankruptcy counsel's signature for the order (when the court did not require the Debtor's  
28 approval). It is unclear why Cappello chose to do these things. Whatever the reasons,

1 the firm should not have billed for all of that work in its Supplemental Application.  
2 Again, the Billing Records show that Cappello did not exercise prudent billing judgment.

3 Double Billing for Internal Conferences. Next, when members of the firm had  
4 internal office or email conferences with one another, Cappello, for the most part,  
5 appropriately included only one billing entry for each conference. However, there were  
6 five instances of “double billing” and one instance of “triple billing,” where two or more  
7 attorneys each billed for the same conference. Cappello fails to explain why a “team” of  
8 expensive attorneys was required to present and defend Cappello’s interests at the end of  
9 this case. These additional entries should not have been included in the Supplemental  
10 Application.

11 Hours Expended by Attorney Cappello. The Supplemental Application included  
12 1.5 hours billed by attorney A. Barry Cappello. Mr. Cappello is a well- respected,  
13 highly-specialized and very expensive attorney who bills his time at \$950 an  
14 hour—nearly twice the rate of the next costliest attorney in the firm. It is unclear why  
15 his participation in these matters was necessary, especially in light of the fact that the  
16 attorney who was assigned to present the Contingency and Supplemental Applications,  
17 Troy A. Thielemann, is promoted as the head of “the firm’s appellate research and  
18 writing department, where he is responsible for overseeing the preparation of substantial  
19 written materials including complaints, summary judgment mentions, trial motions, and  
20 appellate briefs.” If Mr. Cappello felt compelled to oversee and supervise Mr.  
21 Thielemann’s work product, then Mr. Cappello’s time should have been logged as an  
22 internal administrative expense and not billed to the Debtor.

23 Unrelated Services. Lastly, Cappello improperly included in its Billing Records  
24 the time spent researching and contacting bankruptcy attorneys in the Fresno area to  
25 represent Cappello in the Debtor’s bankruptcy case. Again, it’s not clear why Cappello  
26 felt it needed to retain the services of a local bankruptcy attorney, but this appears to be a  
27 task that should have been treated as an internal overhead expense; it should not have  
28 been billed to the Debtor.

1        Determination of the Allowed Amount of Fees. Once the court finds that a fee  
2 applicant has not exercised prudent billing judgment, the court has the discretion to  
3 determine the reasonable amount of fees to be allowed. In light of Cappello's lack of  
4 prudent judgment as discussed above and evidenced throughout the Billing Records, the  
5 court is persuaded that a downward adjustment to the already-discounted fee is  
6 appropriate. In reducing the fees, the court must "provide a concise but clear explanation  
7 of its reason for the fee award," *Hensley*, 461 U.S. at 437, and must also "articulate with  
8 sufficient clarity the manner in which it makes its determination." *Chalmers v. City of*  
9 *Los Angeles*, 796 F.2d 1205, 1211 (9th Cir. 1986), *amended*, 808 F.2d 1373 (9th Cir.  
10 1987). However, this does not require the court to include detailed calculations in its  
11 explanations, but "something more than a bald, unsupported amount is necessary." *Id.* at  
12 1211 n.3.

13        Given the variety and pervasiveness of the issues relating to how Cappello  
14 performed its work, and the difficulty in scrutinizing and recalculating each individual  
15 entry in the Billing Records, the court finds it appropriate to reduce the discounted fee  
16 request by half. *Cf. Leichty v. Neary (In re Strand)*, 375 F.3d 854, 861 (9th Cir. 2004)  
17 (finding no abuse of discretion when bankruptcy court reduced by half the attorney's fees  
18 requested in fee application). Therefore, Cappello will be entitled to fees in the amount  
19 of \$24,038.<sup>13</sup>

## 20        CONCLUSION.

21        Based on the foregoing, the court finds and concludes that Cappello is entitled to  
22 reasonable compensation for the work it performed in preparing and litigating the  
23 Contingency Application and protecting its interest. However, Cappello was at all times  
24 required to exercise prudent billing judgment, and its right to be compensated for the  
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26        <sup>13</sup> To fall in line with the requirements of § 328, the court clarifies that no adjustment is being  
27 made to the hourly rates charged by Cappello. Instead, to reach the \$24,038 figure, the court is reducing  
28 the amount of time for each billing entry by half. *See Chalmers*, 796 F.2d at 1211 n.3 ("While the [court]  
need not set forth in exhaustive detail the method of calculating an attorney's fee award, at the very least  
[it] must set forth the number of hours compensated and the hourly rate applied.").

1 time spent in the case was qualified by the “reasonableness” standard applicable  
2 generally to the award of attorney’s fees in bankruptcy cases. Pursuant to the terms of  
3 the Fee Agreement, Cappello’s fees are subject to an immediate 20% reduction.  
4 Thereafter, and for the reasons stated above, the court is not persuaded that Cappello  
5 exercised prudent billing judgment for the 140 hours that it billed to the Debtor.  
6 Accordingly, Cappello’s request for additional fees will be allowed in the amount of  
7 \$24,038. Its request for reimbursement of expenses will be allowed in full in the amount  
8 of \$156.15. No additional fees will be awarded for litigating the present dispute.

9 Dated: June 20, 2013

10  
11 /s/ W. Richard Lee  
12 W. Richard Lee  
13 United States Bankruptcy Judge  
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