

POSTED ON WEBSITE

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

In re	)	Case No. 11-19212-B-11
Merced Falls Ranch, LLC,	)	DC No. CN-1
Debtor.	)	

---

**ORDER TO FILE DOCUMENTS AND SUPPLEMENTAL BRIEFS  
RELATING TO DEBTOR'S OPPOSITION TO APPLICATION OF SPECIAL  
COUNSEL FOR PAYMENT OF FINAL FEES AND/OR EXPENSES**

On August 23, 2012, a hearing was held before this court on the application filed by special counsel Cappello & Noël LLP ("Cappello") for payment of final fees and/or expenses (the "Application"). The Application is opposed by the Debtor, Merced Falls Ranch, LLC (the "Debtor"). Cappello seeks payment of a contingency fee in the amount of \$554,650 based on the terms of a "Retainer Agreement For Legal Services" between Cappello, the Debtor, its principal, Stephen Sloan, and a related entity (the "Fee Agreement"). At the Debtor's request, this court approved the employment of Cappello as special counsel pursuant to the terms of the Fee Agreement under 11 U.S.C. § 328 by order dated October 20, 2011. Cappello was employed specifically for the purpose of prosecuting a lawsuit in state court relating to a dispute with the Debtor's fully secured creditor American AgCredit ("AAC").<sup>1</sup>

On June 28, 2012, the Debtor confirmed a chapter 11 plan (the "Plan") that provided for, *inter alia*, settlement and payment of the Debtor's dispute with and obligation to AAC. At oral argument of this matter, Debtor's counsel argued for the first

---

<sup>1</sup>American AgCredit filed a proof of secured claim in the amount of \$12,509,567.53.

1 time that confirmation of the Plan did not constitute a “modification or extension” of the  
2 Debtor’s financing agreement with AAC such as to trigger Cappello’s right to a  
3 contingency fee within the meaning of paragraph 3.4 of the Fee Agreement.<sup>2</sup> However,  
4 the Plan at paragraph 5.1 provides for the treatment of AAC’s claim pursuant to the  
5 terms set forth in a “Confidential Letter.” The Confidential Letter was not included in  
6 the Plan, it was not offered as evidence in support of the Debtor’s opposition to the  
7 Application and it is not part of the record in this case. The court cannot evaluate the  
8 merits of the Debtor’s opposition to the Application without considering the terms of the  
9 Confidential Letter. Based thereon,

10 IT IS HEREBY ORDERED that the Debtor shall, within 14 days, file with the  
11 court and serve on opposing counsel a complete copy of the Confidential Letter referred  
12 to in the Plan, and any supplemental opposition brief the Debtor wishes the court to  
13 consider with regard to the “extension or modification” issue raised at the hearing.  
14 Thereafter, Cappello shall have 14 days to file and serve a supplemental reply. The  
15 matter shall stand submitted upon filing of the supplemental briefs.

16 ///

---

18  
19 <sup>2</sup>The operative term of the Fee Agreement is found in paragraph 3.4, which states, “In the  
20 event any existing financing Clients have with American AgCredit, ACA is *extended or*  
21 *modified*, or in the event Clients obtains [sic] *new financing from American AgCredit*, ACA, or  
22 any other source developed for Clients by Cappello & Noël, then Clients shall pay Cappello &  
Noël the sum equal to five percent (5%) of the amount of any new, modified, or restructured  
financing Clients obtain. . . .” (Emphasis added.)

23 The Debtor originally argued in opposition to the Application that Cappello was not  
24 entitled to a contingency fee because the Plan did not constitute “new financing” from AAC, and  
25 that Cappello did not participate in or contribute to the negotiations with AAC that led to  
26 confirmation of the Plan. In its opposition brief, at paragraph 14, the Debtor refers those  
27 negotiations and the end result embodied in the Plan as “[t]he extension and modification of  
28 financing from AAC to the Debtor . . . .” In its reply brief, Cappello correctly pointed out that  
the Debtor was focusing on the wrong provision of the Fee Agreement, and that “new financing”  
was not a condition of its entitlement to a fee. At oral argument, Debtor’s counsel essentially  
abandoned the “new financing” position taken in the opposition brief and argued for the first  
time that the Plan was not an “extension or modification” of the existing financing from AAC.

1 IT IS FURTHER ORDERED that if the Debtor elects not to file the Confidential  
2 Letter, the court will consider the Debtor's opposition to have been waived and the  
3 Application will be approved without further review.

4 Dated: August 24, 2012

5  
6 /s/ W. Richard Lee  
7 W. Richard Lee  
8 United States Bankruptcy Judge  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28