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**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| In re<br>COMPUTER AIDED SYSTEMS, INC.,<br>Debtor. | Case No. LA 99-52454 TD<br>Chapter 11<br>MEMORANDUM OF DECISION RE: MILLER NASH LLP INTERIM FEE APPLICATION<br>DATE: March 15, 2007<br>TIME: 11:00 a.m.<br>PLACE: Courtroom 1345 |

## INTRODUCTION

Computer Aided Systems, Inc. (CASI), Debtor and Debtor in Possession, filed this chapter 11 case on November 19, 1999. At the time, CASI had ceased its normal business operations due to difficulties with two major projects: (1) a contract with Nike, Inc., to build a material handling system for use in Nike's business, and (2) a series of contracts with Lockheed Martin Corporation (Lockheed) involving letter sorting systems for use by the United States Postal Service. These difficulties resulted in millions of dollars of claims against CASI and lesser claims by CASI against Nike and

Lockheed, all predicated on allegations of breach of contract and related legal theories.

Miller Nash LLP (MN), applicant herein, was retained by CASI pre-bankruptcy to provide legal services in connection with an arbitration proceeding with Nike. The retention agreement was approved early in CASI's bankruptcy by my order entered August 7, 2000. That agreement provided that MN was to be compensated on an hourly basis. At about the same time, CASI's physical assets were sold at auction for a disappointing sum that turned out to be much less than CASI's anticipated chapter 11 administrative expenses.

As a result, MN greatly reduced its efforts on the Nike arbitration. MN was concerned that it was not likely to be paid for its efforts unless it successfully (a) defeated Nike's $17 million claim against CASI and (b) prevailed on CASI's $2 million claim against Nike. To address this problem, in September 2000, MN proposed to CASI revising the retention agreement to provide for payment to MN at the greater of hourly-based fees or contingency-based fees. CASI rejected that proposal. Meanwhile, the period of reduced MN substantive activity on the Nike arbitration continued through late 2001.

At that time, money became available from Admiral Insurance Company, CASI's liability carrier, to pay at least a portion of MN's hourly charges on a discounted basis for the defense of CASI against Nike's $17 million claim. While MN was encouraged by the prospects of some payment from Admiral, MN again suggested to CASI revising MN's hourly fee arrangement to include contingent fee provisions. MN began drafting a new "Retainer/Engagement Agreement," including provisions for payment to MN of the Admiral money as well as a new contingent fee agreement, as discussed with CASI. Once drafting was completed by MN, CASI's bankruptcy counsel drafted a notice and motion seeking court approval of the amended basis for

MN's compensation. After the papers were signed and notice was given, and, when no objection was raised, I approved the Agreement by order entered April 2, 2002.

Two years later in May 2004, after a lengthy trial with the help of non-MN counsel, CASI recovered a $16 million judgment against Lockheed. Lockheed appealed. Two years later, in July 2006, and before the appellate court ruled, CASI received $10 million from Lockheed in a settlement. MN was not involved in any way in the Lockheed litigation or settlement activity. MN filed its fee application in June 2006, when CASI recovered the Lockheed settlement proceeds.

In its fee application, MN asks for an award of fees and costs on an interim basis "calculated on an hourly basis as an administrative expense" of the CASI estate. MN also asks for "an additional amount based upon a percentage of the [CASI] estate's recovery, if any, from the Nike litigation . . . ."

CASI and CASI's Official Committee of Creditors (Committee) filed evidence and briefs in opposition. The parties then undertook a long period of discovery and in February and March 2007, filed additional evidence, briefing and evidentiary objections. The MN fee application was argued at length at a hearing on March 15, 2007, and taken under advisement.

This memorandum constitutes my findings of fact and conclusions of law with respect to the issues presented by the MN fee application.[1]

## THE CIRCUMSTANCES SURROUNDING THE AMENDED FEE AGREEMENT

Originally, MN was employed as special litigation counsel for CASI on an hourly basis in the Nike matter pursuant to 11 U.S.C. §§ 327(e) and 364 (c)(2) by my order entered August 7, 2000, based on a May 3, 2000 ruling. On September

[1] My rulings on the parties' evidentiary objections are set forth in two separate memoranda.

18, 2000, after MN learned that CASI did not have enough money to pay MN its anticipated fees on an hourly basis, MN's Dennis Rawlinson wrote to CASI's Chairman of the Board Charles Anderson, enclosing a proposed "revised engagement agreement." Rawlinson explained: "[P]lease note that under the enclosure, Miller Nash would receive the greater of the fees paid as administrative expenses or under the contingency agreement . . . ."

Alan Tippie, CASI's general bankruptcy counsel, responded to MN on October 12, 2000, suggesting changes in the MN proposal. Tippie urged that MN "make it clear that the entitlement to an administrative expense for fees is contingent upon receipt of a net recovery to the estate [from Nike by reason of MN's services] . . . ."

Rawlinson replied by letter to Tippie on October 13, 2000, "MN wishes to continue to be eligible to have its fees paid as an administrative expense . . . ." and acknowledged that "an additional consideration is whether or not we can convince CASI's . . . insurer to provide CASI with its defense costs for the Nike [claim]. Absent a provision like the one we propose, there is no incentive for our firm to seek this [insurance] reimbursement for the estate . . . ."

Three weeks later, on November 1, 2000, Rawlinson wrote directly to CASI's Anderson, without copying CASI's general bankruptcy counsel Tippie, "[H]ow [can] we get these [MN fee] negotiations resolved [so we can get to work on Nike]?" One week after that, on November 8, Rawlinson wrote again to Anderson, without copying Tippie, to further outline terms of MN's proposal for a mixed hourly and contingent fee engagement.

No agreement was reached in 2000 between MN and CASI concerning MN's proposed amendment. Instead, on December 15, 2000, Anderson wrote to Rawlinson. Anderson noted MN's "apparent reluctance" to work on the Nike

matter and regretfully concluded, "[W]e must substitute in new counsel [to go forward with the Nike arbitration]."

Seven more months passed before Admiral Insurance Company wrote to Elissa Miller, another member of Tippie's firm, on July 13, 2001, that "Admiral is prepared to accept tender of CASI's defense against Nike's [claims]." Anderson forwarded Admiral's commitment letter to MN's Rawlinson on August 8, 2001.

Rawlinson responded on August 20, 2001, "I regret . . . I cannot recommend to the firm [MN] that we represent CASI solely on a contingency basis with only the limited reimbursement outlined in [Admiral's] letter."

Anderson responded on August 29, 2001: "CASI has and can agree to the general terms of your [November 8, 2000] proposed arrangement." (Emphasis added.) Still, Admiral's August 2001 acceptance of responsibility for part of the cost of CASI's defense against the Nike claim necessitated further revision of the previously rejected MN November 8, 2000 proposed fee arrangement, as is evident from MN's proposed agreement that ultimately was sent to CASI in early 2002.

Rawlinson wrote to MN management on the same day, August 29, 2001. Rawlinson recommended that MN continue to represent CASI in the Nike arbitration on the following revised terms:

> 2. Terms of Proposed Arrangement
>
> a. Our firm will be paid on an hourly basis for its time at current billing rates to the extent that there are funds in CASI's bankruptcy estate available to pay our firm as an administrative expense.
>
> b. Although CASI's bankruptcy estate is presently insolvent, it has two claims that it is prosecuting on a contingency basis against solvent defendants. Each claim exceeds $2 million. If CASI is successful on either of the claims, there may be sufficient assets in the bankruptcy estate to pay all or a substantial portion of our fees as an administrative expense.

c. CASI's insurer has agreed to pay our firm for its time at a rate of $135 an hour for the defense of NIKE's claims against CASI.

d. To the extent that there are assets available to pay our firm as an administrative expense, our firm would not be entitled to resign, except as may be required by the Rules of Professional Responsibility.

e. To the extent that our firm is successful in recovering amounts from NIKE as a result of award and judgment or settlement, our firm will be paid 40 percent of any recovery after arbitration and 33-1/3 percent of any recovery prior to arbitration. Such contingency payment will not entitle our firm to a double recovery, but to the extent that the contingency entitlement is greater than amounts the firm would have earned on an hourly basis, the firm will be entitled to recover such amounts.

f. In the event that there are insufficient amounts in the estate to pay our firm on an hourly basis for its time as an administrative expense, our firm will be entitled, subject to bankruptcy court approval, to resign as attorneys for CASI if we conclude that it is unlikely that the amounts that would be recovered for the estate will exceed the cost of recovery.

3. Recommendation

This matter continues to carry some risk. This claim, however, appears to have sufficient merit to be handled by our Seattle office, which is under capacity at the moment. James Jordan, who will be back in the office in mid-September, has indicated an interest in handling this matter. Subject to Mr. Jordan's continued willingness to handle this matter (or a willingness to handle the matter by a partner of similar talent and experience), I recommend that the Contingency Committee grant approval.

cc: David W. Hercher
James H. Jordan, Jr.
Peter C. Richter
Thomas C. Sand

(Rawlinson Decl. 10:21–27 and Ex. 19, page 2.)

So far as the record shows, Rawlinson's internal memorandum to MN management was never shared with CASI or incorporated in the revised agreement later sent to Anderson on January 8, 2002.

In late 2001, Rawlinson handed off legal work on the CASI/Nike arbitration to

James Jordan, another MN lawyer. Daniel Brown, a third MN attorney, was brought in as second chair to Jordan with responsibilities to MN for "drafting the Retainer/Engagement Agreement at issue" including coordinating with CASI's general bankruptcy counsel, dealing and communicating with the Admiral Insurance Company, and all billing issues in the case. Brown went to work on the CASI/Nike matter in late October/early November 2001. The result, a new, proposed agreement was transmitted to Anderson on January 8, 2002.

Anderson's June 22, 2006 declaration (3:3–4:22 and 5:11–23) describes his understanding of the negotiations and the resulting agreement. Specifically, Anderson commented: "Miller Nash offered to remain as CASI's special counsel on the condition that, among other things, the engagement be modified from that of a hourly fee to be paid from estate funds if and when available, to a contingency fee arrangement." (Anderson Decl. 4:12–14.) Anderson added, "the motion and the notice signed by Daniel Brown of Miller Nash provides, 'Miller [Nash] has requested and CASI by this motion has agred to seek amendment of the terms of the employment to one of a **contingency basis** as set forth more fully herein and in the Agreement attached hereto as Exhibit '1.' [Emphasis added.]" (Anderson Decl. 5:12–16; emphasis in Anderson declaration.)

Elissa Miller, responded to MN for CASI by communicating to Jordan that "the Admiral Insurance reimbursement needed to be disclosed and that the vague wording of the [proposed amended] retention agreement was not sufficient." (E. Miller Decl. 7:1–5.) According to Miller, Jordan responded, ". . . MN was unwilling to disclose the existence of the terms of the Admiral Insurance reimbursement as [MN] felt it would somehow prejudice arbitration with Nike." (E. Miller Decl. 7:5–7.) Miller added: ". . . we did not discuss just including the name Admiral but also the terms of the agreement." (E. Miller Decl. 7:8–9.)

Miller later prepared a Notice of Motion and Motion to Employ MN on the proposed revised terms, and on February 21, 2002, transmitted the documents to Jordan for Brown's signature. In her cover letter Miller said,

> This confirms that we have previously advised you that the existence of the insurance reimbursement need [sic] to be disclosed at this time and that such failure to disclose the reimbursement in more detail may put your fees at risk, notwithstanding your intent to report the reimbursement at the time you file any fee application.

Miller commented in her March 7, 2007 declaration,

> Based on the wording of the retention letter and conversations with Mr. Anderson and/or Mr. Jordan and/or Mr. Brown of Miller Nash, I understood the retention was now a contingency retention, subject only to the Admiral Insurance reimbursement. However, I acceded to Mr. Jordan's request when I prepared the Notice of Motion and Motion and did not include the disclosure of the Admiral reimbursement but paraphrased the retention letter. I never understood that MN was entitled to receive the higher of a contingency or hourly fee. Had I understood that it was a dual fee arrangement, I would not have drafted the language in the Notice and Motion to say, "CASI has agreed to seek amendment of the terms of the employment to one of a contingency basis."

[E. Miller Decl. 7:16–25].

I find it noteworthy (but not determinative) that Jordan's letter to Anderson on January 8, 2002, and his follow up letter to Anderson on February 6, 2002, had "subject" headings that read: "CASI v. Nike Inc./Contingent Fee Retainer-Engagement Agreement." (Emphasis added.) The "Contingent Fee" heading in Jordan's letters provide some support for Elissa Miller's understanding that led to Miller's phraseology in the Notice of Motion filed and served in March 2002, that "CASI has agreed to seek amendment of the terms of [MN's] employment to one of a contingent basis as set forth more fully in the Agreement attached to the Motion as Exhibit '1' and as summarized herein." (Notice of Motion filed March 8, 2002, 2:6–8.)

The Anderson Declaration dated March 5, 2002, that was a part of the March

8, 2002 Notice of Motion also said "Miller Nash has requested its employment arrangement be amended to one of contingency due to the change in CASI's financial condition from that which was anticipated at the time of entering into the original agreement . . . ." (9:24–26; emphasis added.)

Brown's declaration dated March 5, 2002, in support of the Motion says:

> Miller Nash originally agreed to be compensated at its regular hourly billing rates for services performed, subject to order and award of compensation by this Court. Miller Nash now requests that its fee agreement be amended to a contingency agreement . . . .

(Motion filed March 8, 2002, 11:14–16; emphasis added.)

The evidence persuades me that neither CASI nor its bankruptcy counsel understood that MN's 2002 proposal sought approval of an agreement allowing MN to recover from CASI's estate either (a) the higher of either MN's hourly rates or a contingency fee award or (b) "on an hourly basis for its time at current billing rates to the extent there are funds in CASI's bankruptcy estate available to pay our firm as an administrative expense," as Rawlinson wrote to MN management in his internal memorandum six months earlier. (See, 5:21–22, above.)

If MN wanted an agreement with CASI to require payment to MN "on an hourly basis for its time at current hourly rates to the extent that there are funds in CASI's bankruptcy estate available to pay our firm as an administrative expense," as stated in Rawlinson's August 29, 2001 recommendation to MN management, the agreement that MN sent to CASI on January 8, 2002, does not say so. Nothing in MN's extrinsic evidence adequately explains the absence of such clear and unambiguous terms from the agreement referred to in the 2002 Notice and Motion or the Agreement referred to in my April 2, 2002 order.

Brown claimed that he put together the revised Retainer/Engagement Agreement based on the August 29, 2001 agreement between Anderson and

Rawlinson, which was based on the November 8, 2000 letter from Rawlinson to Anderson. (D. Brown Decl., Feb. 21, 2007, 2:22–25.) However, the evidence outlined above (3:23–5:2) establishes that the terms of the November 8, 2000 letter from Rawlinson to Anderson had been rejected by CASI, first by Tippie in his October 12, 2000 letter and later by Anderson's December 15, 2000 letter, as discussed above.

Brown, states in his February 21, 2007 declaration:

> . . . we did have some discussions about whether or not the fee agreement should specifically mention 'Admiral Insurance' by name in the agreement itself, as opposed to the reference 'other source(s)' as I called it throughout the retainer agreement. Because Miller Nash was to be paid a portion of its hourly fees that it spent on defense activities directly from Admiral monthly (albeit at a severely reduced rate), Ms. Miller was concerned that if 'Admiral Insurance' was not mentioned by name in the agreement, we might risk having to 'disgorge' those fees for some (as yet inarticulated) reason. Despite question by us, Ms. Miller did not provide us any authority in the Bankruptcy Code or case law for her concerns. However, contrary to this, we, as litigation counsel for CASI, were very concerned that if Nike learned that there was an insurance company defending the case, it would adversely affect CASI. If Nike believed that a bankrupt counterclaim defendant had insurance covering Nike's $17 million claim, then it might think its counterclaim had more merit or more value, thus a positive settlement for our bankrupt client would be far less likely. Thus, our advice to our client, Dick Anderson and CASI, was not to disclose the existence of Admiral unless absolutely necessary so as to protect CASI.

(Brown Decl., Feb. 21, 2007, 3:21–4:7.)

Brown later acknowledged that by leaving Admiral's name out of the proposed Notice and Motion for approval of an amended retention agreement, he, and thus MN, were trying to leverage Admiral to provide a fund to settle the Nike dispute and to enable MN to collect an "administrative fee as a contingency." (See, Brown letter to Anderson and Tippie, March 31, 2005, especially pages 2 and 3.) I find that MN did not omit the name "Admiral" from the Agreement solely to protect CASI. Brown's letter establishes that the omission by MN also was a

self-serving effort to enhance MN's prospects for collecting a contingent fee award that might be derived from a payment from Admiral.

As it later turned out, (a) MN was not able to persuade Admiral to settle the Nike dispute, let alone to pay enough in settlement to enable MN to collect a contingent fee award; (b) the dispute with Nike was not settled; and (c) MN lost the Nike arbitration battle. In the end, the arbitrator awarded Nike about $5 million, including attorneys' fees and costs as prevailing party against CASI, net of CASI's claim. The award to Nike was confirmed by the state trial court. An appeal is pending.

There is no question in my mind that MN ultimately performed substantial legal services at CASI's request with my approval. MN now seeks to recover reasonable compensation calculated on an hourly basis.

**THE RETAINER/ENGAGEMENT AGREEMENT APPROVED BY MY APRIL 2, 2002 ORDER**

The following is the result of my review and assessment of the central terms of the Retainer/Engagement Agreement (the Agreement) approved by my order entered April 2, 2002, as they bear on MN's pending fee application. I have reached the following conclusions (among others discussed later in this memorandum) based on the evidence introduced. First, the Agreement must be read to allow MN fees on an hourly basis only to the extent unambiguously specified by the terms of the Agreement. (See, In re The Circle K Corp., 279 F.3d 669 (9th Cir. 2002).) Second, to the very limited extent that the Agreement contains ambiguity, the ambiguity should be resolved to be consistent with the clear and explicit, non-ambiguous terms of the Agreement. Third, I am required by law to consider extrinsic evidence of the surrounding circumstances under which the Agreement was negotiated, drafted, and approved. Fourth, no convincing

basis for an award of fees to MN either at the higher of contingency fees or hourly fees has been established by MN, or, in this instance, for an award based on hourly billing rates.

**1. The Unambiguous Terms of the Agreement**

The Agreement specifies that CASI retained MN to prosecute CASI's claim against Nike and to defend CASI against the Nike claim on the following terms:

Paragraph 1[2] provides:

> Miller Nash shall receive [a] 33% of all sums recovered by settlement . . . if such settlement is reached 30 days or more before the first date set for the hearing on the arbitration . . . . [b] 40% of all such sums recovered [thereafter] . . . . [and c] In the event that settlement is reached . . . after an appeal has been filed . . . Miller Nash shall receive 50% of all sums recovered by settlement or judgment . . . .

(Agreement, ¶ 1.)

Paragraph 4 begins:

> The fee arrangement discussed above, shall be considered a mixed administrative expense payment and contingent fee basis. This means that to the extent Miller Nash recovers any of its hourly fees . . . from the bankruptcy estate prior to resolution of the Claim or from any other source(s), such payments will be deducted from the total amount of fees which Miller Nash is entitled to receive in light of the contingent fee percentage provisions above.

(Agreement, ¶ 4; emphasis added.)

Paragraph 4 continues:

> To the extent that Miller Nash receives more fees as administrative expenses or from any other source(s) prior to resolution of the Claim on an hourly billing basis than it is ultimately entitled to under the contingent fee percentage calculations above, Miller Nash shall be entitled to retain those fees paid as an administrative expense or from any other source(s) without recourse or repayment of any

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[2] Paragraph numbers as used herein refer to the paragraph numbers of the Agreement approved by my April 2, 2002 order, unless otherwise specifically mentioned.

such excess . . . .

(Agreement, ¶4; emphasis added.)

Paragraph 4 concludes: " . . . [A] full and fair accounting of any payment from any such other source [e.g., Admiral] will be made to the Court by Miller Nash prior to final payment from the estate." (Agreement, ¶4.)

I conclude under all the circumstances of this matter that paragraph 4 refers only to the reduced hourly fees that MN expected to receive from Admiral. I come to this conclusion for several reasons. First, nothing in paragraph 4 says: "CASI agrees to pay the higher of contingency or hourly fees," as an earlier retainer agreement proposal from MN had envisioned. Second, paragraph 4 does not say "CASI agrees to pay MN fees based on MN's normal hourly rates . . . ." Third, and most importantly, because of my reading of the plain words of paragraph 10, discussed below, and its relationship to paragraphs 4 and 8, I believe that paragraph 10 clearly and explicitly clarifies and limits the effects of paragraphs 4 and 8.

Paragraph 5 provides:

> In addition to and notwithstanding any of the contingent fee provisions above, CASI also agrees to pay all Miller Nash's costs and expenses incurred in this matter. Such costs and expenses include, but are not limited to, filing fees, service fees, witness fees, research fees, electronic research fees, investigation fees, expert fees, file supplies, records, medical charges, court reporter fees, and charges for transcripts. Although Miller Nash will advance such costs and expenses as necessary for the prosecution of the Claim, CASI agrees to reimburse Miller Nash for such costs and expenses to the extent such funds are available and capable of disbursement in accordance with the Chapter 11 bankruptcy proceeding that CASI has filed.

(Agreement, ¶5; emphasis added.)

The verb forms in paragraph 5 are clear and explicit: "CASI . . . agrees to pay all Miller Nash's costs and expenses . . . ." and "CASI agrees to reimburse

Miller Nash for such costs and expenses . . . ."

In addition, the language in paragraph 5 that says: "notwithstanding any of the contingent fee provisions above, CASI also agrees to pay all Miller Nash's costs and expenses . . . ." (emphasis added) seems to establish a clear contractual boundary between the Agreement's "contingent fee provisions" and the Agreement's "costs and expenses" provisions. Secondly, the emphasized language leaves no room to infer (as MN now seems to suggest) that CASI agreed to pay MN the higher of contingency fees or hourly fees. Instead, the language of paragraph 5 would tend to limit MN's general right to attorneys' fees to those recoverable as a contingent fee, not hourly fees.

Finally, the extended discussion in paragraph 5 of MN's right to be paid its "costs and expenses" appears to refer back directly to the (ungrammatical and somewhat confusing) opening line of paragraph 4: "the fee arrangement . . . [is] a mixed administrative expense payment and contingent fee basis." The "contingent fee" phrase obviously refers to paragraph 1 of the Agreement. The "administrative expense payment" phrase most logically is understood to refer to the recovery of "costs and expenses," as outlined in paragraph 4 of the Agreement.

The remainder of the Agreement focuses on specific variations of the "contingent fee" entitlement of paragraph 1 and the "costs and expenses" entitlement of paragraph 4, with the single exception of paragraph 10, discussed below.

Paragraph 5 continues:

> To the extent such funds become available before Miller Nash has made such necessary cost and expense disbursements, CASI agrees to place a reasonable sum, subject to Court approval and authorization, to be fixed by Miller Nash into an appropriate trust account selected by Miller Nash, with the funds to be applied as

costs and expenses are incurred.

(Agreement, ¶5; emphasis added.)

By contrast to the clear and explicit verb forms of paragraph 5 of the Agreement (i.e., "CASI agrees"), paragraph 4 does **not** say "CASI agrees to pay MN hourly fees for its services in the Nike matter." Instead, the Agreement says in paragraph 8:

> If no money is received by settlement or judgment or otherwise, Miller Nash shall receive no fees for its time and services, save those fees and costs or expenses it has received from the bankruptcy court as administrative expenses or from any other source(s), CASI shall still be responsible for reimbursing Miller Nash for all outstanding costs and expenses incurred, subject to Court approval.

(Agreement, ¶8.) Again, the "fees . . . it has received from the bankruptcy court as administrative expenses or from any other source(s)" provision is limited by paragraph 10, as discussed below.

All things considered, I interpret paragraph 8 to mean: ". . . [contingent] fees and costs and expenses . . . received . . . as administrative expenses or [fees] received from any other source(s) [i.e., Admiral Insurance] . . . ."

Paragraph 8 concludes: ". . . CASI shall still be responsible for reimbursing Miller Nash for all outstanding costs and expenses incurred, subject to Court approval." (Agreement, ¶8; emphasis added.) Again, as to "costs and expenses," a clear and explicit verb form is used: i.e., "CASI shall . . . be responsible . . . ."

Paragraph 9 says:

> . . . If, at any state of the proceedings, Miller Nash feels that the Claim is not meritorious, Miller Nash may withdraw from the case, subject to Court approval. CASI acknowledges that Nike, Inc.'s counterclaim in excess of $17,000,000 is one fact among many that may influence Miller Nash in such a decision. Miller Nash further reserves the right to withdraw from representation regarding the Claim after reasonable notice to CASI. In such cases of

> withdrawal, Miller Nash waives any right to additional fees in this matter in the future.

(Agreement, ¶9.)

The two opening sentences of paragraph 9 clearly were written with contingent fees or fees paid by Admiral Insurance in mind (as Brown conceded in his February 21, 2007 declaration), not hourly fees. (See, 10:11–11:2.)

Paragraph 9's next sentence says: "However, upon any withdrawal, CASI shall pay any outstanding costs and expenses incurred up to the point by Miller Nash." (Agreement, ¶9; emphasis added.) Again, when the Agreement talks about "costs and expenses," it uses the clear and explicit phrase "CASI shall pay . . . ." (Emphasis added.)

Paragraph 9 concludes:

> If Miller Nash is forced to withdraw because CASI refuses to accept a reasonable settlement offer, CASI shall be responsible for Miller Nash's actual attorney fees based on the contingent fee percentage rate as applied to the unaccepted settlement offer and the timing of such an offer relative to the original hearing date, in addition to any unpaid costs and expenses incurred up to that point.

(Agreement, ¶9; emphasis added.)

Thus, MN's contingent fee expectation is protected against CASI obstinance, clearly and explicitly: "CASI shall be responsible . . . ." Notably, paragraph 9 does not protect MN's asserted right to recover hourly fees from the CASI estate.

By contrast to all the above, paragraph 10 provides:

> If CASI elects at any time to abandon the Claim or to discharge Miller Nash, CASI agrees to pay Miller Nash at the time, and prior to release of CASI's file in this matter, a reasonable fee for services performed to date of such discharge or abandonment, which shall be computed at the rate of not less than the actual billings that will be maintained by Miller Nash during the prosecution of the Claim at the standard rates utilized by attorneys at Miller Nash who have worked on prosecuting the Claim less any fees previously paid as

administrative expenses or from any other source(s).

(Agreement, ¶10; emphasis added.)

Paragraph 10 contains the only language in the Agreement that uses the clear and explicit language "CASI agrees to pay . . . a reasonable fee for services performed . . . computed at the rate of not less than the actual billings . . . maintained by Miller Nash . . . at the standard [hourly] rates utilized by [MN] attorneys . . . ."

I find persuasive the fact that Brown admitted (as discussed above, 9:25–10:19) that the "previously paid . . ." clause in paragraph 10 was simply a euphemism MN employed in the Agreement to conceal from Nike hourly fee payments that MN expected to receive from Admiral. I also conclude that under the circumstances, the extrinsic evidence here does not render the Agreement reasonably susceptible to the reading that would support MN's asserted right to recover hourly fees from CASI's estate. I also find it persuasive that Rawlinson's language from paragraph 2 a. of his August 29, 2001 recommendation to MN, as discussed above (5:17–6:22 and 9:16–24), does not appear in paragraphs 4 or 8.

The language in paragraph 10 also clarifies what the parties meant in paragraph 4 when MN wrote "to the extent Miller Nash recovers any of its hourly fees . . . from the bankruptcy estate prior to the resolution of the Claim or from any other source(s) . . . ." (Agreement ¶ 4; emphasis added.) Paragraph 4 only discusses a situation in which MN "received" hourly fees "prior to the resolution of the Claim." The only circumstance identified in the Agreement where "receipt" or "recovery" of hourly fees is mandated or agreed upon by the parties is "[i]f CASI elects at any time to abandon the Claim or to discharge Miller Nash." (Agreement ¶ 10.) A similar conclusion applies to the "administrative expenses" and "other sources" language of paragraphs 4 and 8.

In other words, paragraph 10 is applicable only if CASI abandons the Nike claim or fires MN. The language of paragraph 10 differs greatly from the language of paragraphs 4 and 8, discussed above. The language in paragraph 10 highlights the ambiguity created in paragraphs 4 and 8 by MN's hourly fee request and contributes to my conclusion that as a matter of law and under all the circumstances, nothing in the Agreement or the extrinsic evidence supports the MN interpretation of paragraphs 4 and 8 or entitles MN to be paid generally the higher of a contingency fee or a fee based on hourly rates "as a mixed administrative expense payment and contingent fee basis," as MN asserts paragraphs 4 and 8 require.

Paragraph 10 concludes: "In addition, Miller Nash shall be entitled to be reimbursed for all outstanding costs and expenses incurred." (Agreement, ¶10; emphasis added.) Once again, MN's right to be paid for its costs and expenses is clear and explicit; MN's asserted right to be paid hourly fees is based on language in paragraphs 4 and 8 that is, at best (from MN's standpoint), vague and ambiguous. The Agreement, taken as a whole, is not reasonably susceptible to MN's claim of a right to be paid hourly fees from CASI's estate.

Paragraph 12 gives Miller Nash a lien on the Nike claim. (Agreement, ¶12.)

Although the Agreement contains no integration clause, I approved the Agreement by order entered April 2, 2002, and the Agreement is subject to federal statutory law and decisional rules of construction applicable to MN as special counsel employed by a bankruptcy estate. (See, e.g., In re The Circle K Corp., 279 F.3d 669 (9th Cir. 2002).)

**2. The MN Fee Application Depends on a Reading of the Agreement that is Ambiguous**

Based on the MN fee application, MN asserts the position that MN is entitled to hourly fees in any event. Put another way, MN seems to be asserting that it is entitled to the higher of fees based either (a) on MN's hourly rates or (b) the contingency formula of paragraph 1. Either viewpoint depends, at best, on ambiguities in paragraphs 4 and 8 of the Agreement. For example, paragraph 4 says,

> To the extent that Miller Nash receives more fees as administrative expenses or from any other source(s) prior to resolution of the Claim on an hourly billing basis, than it is ultimately entitled to under the contingent fee percentage calculations above, Miller Nash shall be entitled to retain those fees paid . . . .

(Agreement, ¶ 4; emphasis added.) Secondly, paragraph 8 says,

> If no money is received by settlement or judgment or otherwise, Miller Nash shall receive no fees for its time and services, save those fees and costs or expenses it has received from the bankruptcy court as administrative expenses or from any other source(s) . . . [and] CASI shall still be responsible for reimbursing Miller Nash for all outstanding costs and expenses incurred, subject to Court approval."

(Agreement, ¶ 8; emphasis added.) It is MN's contention that paragraphs 4 and 8 mean in this instance that MN is entitled to payment on an hourly basis as an administrative expense of CASI's chapter 11 case. The opposing parties, CASI and the Committee challenge MN's interpretation.

MN seeks an hourly fee award for its time (in addition to its expenses) (a) even though MN has not earned a contingent fee award and (b) in addition to $210,400 that Admiral Insurance has paid MN directly based on discounted hourly rates for time incurred by MN in defending CASI against the Nike claim.

The question presented is whether the language of paragraphs 4 and 8 of the Agreement quoted above "mandates" a court award for MN's non-discounted

hourly rates for its time recorded when (a) MN so far has lost the CASI/Nike arbitration, the arbitration having resulted, to date, in a net award to Nike of approximately $5 million, and (b) CASI has not abandoned its claim against Nike or discharged MN.

My conclusion as a matter of contractual interpretation is that it does not. In my view, any other construction of the Agreement under the circumstances would lead to a conclusion that is not "clear and explicit," a requirement of California Civil Code §1638. I cannot find in the language of the Agreement or in the extrinsic evidence a meeting of the minds between MN and CASI that would support MN's position.

## APPLICABLE LAW

### 1. The Plain Meaning of the Contract

According to § 1638 of the California Civil Code, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Because we are dealing with a written agreement, the preferred method of contract interpretation is to ascertain the "intention of the parties . . . from the writing alone, if possible." (Cal.Civ.Code § 1639.)

In the immediately preceding section, commencing on page 11, line 13, I examined the Agreement by reviewing its language. Through my analysis I reach the conclusion that while aspects of paragraphs 4 and 8 of the Agreement as asserted by MN reveal an ambiguity, the non-paragraph 4 and 8 terms reviewed are abundantly "clear and explicit." I conclude that the plain meaning of the non-paragraph 4 and 8 terms of the Agreement do not include any provision that would obligate CASI to pay MN the higher of hourly or contingent fees. I

conclude that reading the terms of paragraphs 4 and 8 of the Agreement, as MN urges me to do, that is, to find that MN is entitled to be paid hourly fees on this application, would not be consistent with the clear and explicit language of the Agreement.

**2. Admission of Extrinsic Evidence**

Although I have concluded that on the application before me the plain meaning of the written Agreement only binds CASI to pay MN a contingency fee plus costs and expenses but not hourly fees (although MN is allowed to retain hourly fees paid directly by Admiral), I nevertheless find it necessary as a matter of law, appropriate, and helpful to look beyond the four corners of the contract for a more complete understanding of the circumstances under which the Agreement was drafted and adopted. In doing so, I believe I have adhered to the principles of contract interpretation as found in the California Civil Code, including sections 1636, 1637, 1638, 1639, 1641, 1643, 1647, 1648, 1649, 1650, 1653, and 1654.

Parol evidence is not admissible to vary or contradict an agreement that is complete and unambiguous on its face. However, to decide whether a contract is ambiguous, I must also consider the surrounding circumstances leading to the formation of the contract. Parol evidence also may be admissible to clarify the intent of the parties. Where an ambiguity is raised by a dispute between the contracting parties, extrinsic evidence is admissible to determine how the parties intended the agreement to be interpreted.

In 1892, the Supreme Court reviewed a railroad contract dispute that arose

under circumstances perhaps more intricate than the Agreement before me. As the Supreme Court said,

> There can be no doubt whatever of the general proposition that in the interpretation of any particular clause of a contract, the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed.

Chicago, R.I. & P. Ry. Co. v. Denver & R.G.R.Co., 145 U.S. 596, 609 (1892).

In Trident Center v. Conneticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988), Judge Kozinski went even further in explaining California law:

> . . . Two decades ago the California Supreme Court in Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 442 P.2d 641, 69 Cal.Rptr. 561 (1968), turned its back on the notion that a contract can ever have a plain meaning discernible by a court without resort to extrinsic evidence. The court reasoned that contractual obligations flow not from the words of the contract, but from the intention of the parties. "Accordingly," the court stated, "the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone." 69 Cal.2d at 38, 442 P.2d 641, 69 Cal.Rptr. 561. This, the California Supreme Court concluded, is impossible: "If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. . . .
>
> * * *
>
> Under Pacific Gas, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity. If that evidence raises the specter of ambiguity where there was none before, the contract language is displaced and the intention of the parties must be divined

> from self-serving testimony offered by partisan witnesses whose recollection is hazy from passage of time and colored by their conflicting interests.

Id. at 568–69; citations omitted. Judge Kozinski concluded:

> While we have our doubts about the wisdom of Pacific Gas, we have no difficulty understanding its meaning, even without extrinsic evidence to guide us. As we read the rule in California, we must reverse and remand to the district court in order to give plaintiff an opportunity to present extrinsic evidence as to the intention of the parties in drafting the contract. It may not be a wise rule we are applying, but it is a rule that binds us. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938).

Id. at 569–70; footnotes omitted.

In order to uncover potential ambiguities and other reasonable interpretations of the Agreement, I began by looking at the "mutual intention of the parties as it existed at the time of contracting." (Cal.Civ.Code § 1636.) Courts have found that when interpreting contractual intent it is the "expressed intent, under an objective standard" that is important. (1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW Contracts § 744 (10th ed. 2005).) Thus, "Contract formation is governed by objective manifestations, not the subjective intent of any individual involved . . . . The test is 'what the outward manifestations of consent would lead a reasonable person to believe.'" Beard v. Goodrich, 110 Cal.App.4th 1031, 1038 (Cal.App. 1 Dist., 2003).

As previously discussed, commencing on page 3, line 20, it is clear from the evidence that from CASI's perspective this was a contingent fee arrangement. That was Anderson's March 2002 understanding, as discussed above (8:26–9:4), and as Anderson discussed again later in his June 22, 2006 declaration. Ms.

Miller points out in her March 7, 2007 declaration that "Based on the wordings of the retention letter and conversations with Mr. Anderson and/or Mr. Jordan and/or Mr. Brown of Miller Nash, I understood [in March 2002] the retention was now a contingency retention." [E. Miller Decl. 7:16–18]. I find that Anderson's and Miller's understandings of the Agreement to be reasonable and consistent with the clear and explicit language of the Agreement and the circumstances surrounding its formation.

Brown, too, acknowledged in his declaration accompanying the March 8, 2002 Motion To Employ MN, that MN was requesting "that its fee agreement be amended to a contingency agreement," as discussed above (5:5-8).

The extrinsic evidence also leads me to believe that at the time of contract formation, there was a meeting of the minds between CASI and MN as to an amendment to provide for a contingency fee rather than an hourly-based fee, including an exception in the Agreement that allowed MN to receive and retain hourly fees that MN might recover from Admiral Insurance. Brown's e-mail sent to Elissa Miller as late as October 13, 2004, candidly acknowledged that fact. Brown, in seeking reimbursement for costs and expenses said: "we are of course not seeking fees from [CASI] as the matter is a contingent fee one with costs still the responsibility of [CASI] if it has any money for such costs . . . ." It was not until two years later, more than three years after the Agreement was drafted by Brown, and after CASI's judgment against Lockheed was entered that MN asserted that it was entitled to be paid hourly fees from CASI. See, Brown's May

13, 2005 letter to Tippie. Looking at MN's objective manifestations of intent in drafting the Agreement and discussing it with CASI in early 2002, I conclude that MN's expressed intent was that the Agreement was to be a contingent fee arrangement subject only to the hourly fees that MN might have received from Admiral, plus costs and expenses.

At the same time, there is no persuasive evidence that MN manifested an intent, either in the Agreement itself or in the discussions that led to the Agreement, that the CASI estate was obligated to pay for anything based on the current MN fee application beyond MN's costs and expenses, although it is consistent with the Agreement to conclude the parties understood that MN was and is entitled to retain any hourly fees actually paid to MN on CASI's account by Admiral Insurance. Such payment by Admiral directly to MN would satisfy the requirement of paragraph 4,

> that to the extent Miller Nash recovers any of its hourly fees . . . from the bankruptcy estate prior to the resolution of the Claim or from any other source(s) such payments will be deducted from the total amount of fees which Miller Nash is entitled to receive in light of the contingent fee percentage provisions above.

What is particularly telling about MN's intent at the time of contract formation is the fact that when MN drafted the provisions about costs and expenses in paragraph 5, MN stated that "CASI agrees to pay all Miller Nash's costs and expenses." However, in paragraphs 4 and 8 of the Agreement when hourly fees are discussed, MN did not use clear and explicit language but instead vaguely referred to the situations in which, for example, MN previously may have

recovered hourly fees from "the bankruptcy estate . . . or any other source(s)." (Agreement, ¶ 4.) As Rawlinson's August 29, 2001 memorandum attests (see, 5:21–22), MN obviously knew how to say clearly "Our firm will be paid on a hourly basis for its time at current billing rates to the extent that there are funds in CASI's bankruptcy estate available to pay our firm as an administrative expense." If that was a term that MN wanted CASI and me to approve, in 2002, when MN drafted and sought approval of the Agreement, MN could have said so. MN did not do so, either to CASI, or to its creditors, or the court. (See, Circle K, 279 F.3d 669.)

Brown's admissions, as discussed above (9:5-8, 10:7–19 and 17:8–11) speak louder and more clearly and explicitly than the language of paragraphs 4 and 8 of the Agreement with respect to the interpretation asserted by MN in its pending fee application. See, Trident Center, 847 F.2d at 569.

Taking into account (a) the written terms of the Agreement; (b) the extrinsic evidence of the surrounding circumstances leading to the Agreement, and (c) every ambiguity in the Agreement created by MN's asserted rights to hourly fees based on its pending fee application, I conclude that both parties agreed to an arrangement in which CASI would not be obligated to pay MN (d) hourly fees from funds available to CASI (other than those received by MN directly from Admiral) unless CASI abandoned the Nike claim or fired MN, or (e) contingent fees unless MN was successful in achieving a cash recovery for CASI in the Nike matter. MN's unilateral subjective interpretation of the Agreement is irrelevant. It is necessary for me to determine that a reasonable person would understand that (f)

MN and CASI consented to the Agreement and (g) consented to the same terms in the same sense, to paraphrase the court's decision in Beard v. Goodrich, 110 Cal.App.4th at 1040. I believe that I have done that in arriving at this decision. In the end, and under the circumstances of this fee application, the parol evidence rule requires me to reject the interpretation that MN asserts that would vary the terms of the Agreement approved April 2, 2002.

**3. Special Rules of Interpretation Applicable to This Contract**

Even though I have determined that based on both the plain language of the Agreement and my consideration of the surrounding parol evidence, CASI was not obliged by the Agreement to pay MN the higher of hourly or contingent fees, it is important to note that the Agreement was drafted by MN, a law firm, for the benefit of CASI, its client, and as such is subject to special rules of construction.

Under California law, "[i]n cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Cal.Civ.Code § 1654. Here, it is clear that any ambiguity is the result of MN's drafting of the Agreement. As previously mentioned, Elissa Miller repeatedly warned MN that "the Admiral Insurance reimbursement needed to be disclosed and that the vague wording of the [proposed amended] retention agreement was not sufficient." (E. Miller Decl. 7:1–5.) Despite Miller's concerns, MN insisted on omitting clarifying language for strategic reasons having to do with the Nike arbitration and MN's contingent fee aspirations. (Brown Decl., Feb. 21,

2007, 3:21–4:7; and Brown March 31, 2005 letter to Anderson and Tippie.) I conclude that because MN was the party who caused the ambiguity by its drafting, MN's unilateral subjective interpretation of the Agreement is not controlling.

The lawyer-client relationship of the parties provides an additional reason why the contract should be construed against MN's position. "The generally accepted rule in construing contracts between attorney and client is that the construction most favorable to the interests of the client will be accepted." 7 Cal. Jur. 3d Attorneys at Law § 163. In Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 630 (1901) the court quoted the Supreme Court of Tennessee in Planters' Bank of Tennessee v. Hornberger, 1867 WL 2226 (Tenn. 1867), as follows:

> If a written contract was susceptible of two constructions, fairly and reasonably, and the one mind assented to it upon the one construction, and the other upon the other construction, this would be no contract at all between the parties; and, where it is a contract between attorney and client, it would be the duty of the attorney to inform the client of the fact of its susceptibility of two constructions, and having pointed out this liability of the contract, proceed to know, definitely and clearly, his client's views, before proceeding further. An attorney dealing with his client for further professional services, where the contract is reduced to writing, is bound to show, when he seeks to enforce it, that the latter fully understood it in the same sense, otherwise it cannot be enforced . . . . We therefore declare that in all cases where the relation of attorney and client exists, and it is desired to make further professional engagements, that it is the duty of the attorney to have the contract (if there be one) clearly and definitely stated and understood, not only in its language, but also in its spirit, legal consequences, and practical results.

This rule of construction provides a particularly compelling reason for construing the Agreement's ambiguities in CASI's favor and against MN. As

drafter of the Agreement and CASI's lawyer, MN had a duty to prevent ambiguity. It would be improper here to accept MN's view at the expense of CASI's other creditors.

The foregoing rules of construction are very important here for an additional reason: MN's employment was subject to federal statutory law and court approval on matters affecting CASI's bankruptcy estate and the rights of numerous creditors.

**CONCLUSION**

I conclude that based on the mutual, express, written intention of the parties at contract formation, and under the circumstances of the MN fee application before me, CASI committed itself only to paying MN contingent fees if MN achieved a positive recovery from Nike, plus costs and expenses in any event. This conclusion is supported by the plain terms of the contract, California rules of contract construction, and persuasive parol evidence, in favor of CASI's and the Committee's position and against MN's position. I reject MN's assertion that the Agreement was a mixed hourly fee, contingent fee arrangement in which MN was entitled to recover from CASI the higher of either MN's hourly rates or a contingency award. As such, I deny MN's hourly-based fee application. I also deny MN's request for an additional interim award based on a percentage of the CASI estate's recovery, if any, from the Nike litigation because there has been no such recovery to date. MN is awarded its costs in the sum of $38,245.96, and should be allowed to retain the $210,400 it has been paid by Admiral Insurance

Company in consideration of its services to CASI, all on an interim basis. The balance of MN's fee application is denied.

SO ORDERED.

DATED: 5/4/07

/s/

THOMAS B. DONOVAN
United States Bankruptcy Judge

NOTICE OF ENTRY OF JUDGMENT OR ORDER
AND CERTIFICATE OF MAILING

TO ALL PARTIES IN INTEREST LISTED BELOW:

1. You are hereby notified that a judgment or order entitled:

MEMORANDUM OF DECISION RE: MILLER NASH LLP INTERIM FEE APPLICATION

was entered on 5/7/07.

2. I hereby certify that I mailed a true copy of the order or judgment to the persons and entities listed below on 5/7/07.

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Dated: 5/7/07

Clerk