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3 **UNITED STATES BANKRUPTCY COURT**
4 **DISTRICT OF ARIZONA**
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7 **CA-TEL TELECOMMUNICATIONS, INC.**)
8 **Debtor**) **In Chapter 11 proceedings**
9) **Case No. 2-08-bk-1089-RTBP**
10 **CA-TEL TELECOMMUNICATIONS, INC.**)
11 **Plaintiff,**)
12 **vs.**) **Adv. No. 2-08-ap-00837-RTBP**
13 **QWEST CORPORATION, et al.**)
14 **Defendants.**) **UNDER ADVISEMENT DECISION**
15) **RE MOTION FOR SUMMARY**
16) **JUDGMENT**

17 **I. Introduction**

18 The Debtor and Qwest have been locked in a bitter, and from this Court’s perspective, often
19 unnecessary battle over the payment of third party subcontractors. The parties are in the final stages
20 of their dispute – subcontractors have been paid and the Debtor has converted to a Chapter 7. The
21 Court must decide the amount of attorney fees Qwest is entitled to based on its contracts with the
22 Debtor. The Court concludes that Qwest is entitled to \$72,669.50 in fees and \$1,844.25 in costs.

23 **Background**

24 Before the Court is Qwest's application for attorney fees filed on August 24, 2009
25 (“Application”). Qwest filed the Application based on the Court’s directive in its August 4, 2009
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1 Order (“Order”). The Debtor timely filed a response (“Response”) to the Application and Qwest
2 filed a reply (“Reply”).¹

3 In the Order, the Court determined as a matter of law that attorney fees may be awarded, but
4 only if they are allowed under the three contracts (collectively “Contracts”) that govern the
5 relationship between the parties.² However, the Court could not determine factually whether
6 attorney fees could be awarded because no application had been submitted to the Court and therefore
7 denied the Debtor’s Motion for Partial Summary judgment. Accordingly the Court directed Qwest
8 to file a fee application and “identify whether the fee can be approved under Section 13.5, Section
9 19.2, or both, and provide supporting documentation as necessary. To the extent Qwest claims
10 attorneys fees related to the administration of the bankruptcy that are not related to a specific claim,
11 Qwest must justify why the claimed fees can be awarded under the Contracts.”

12 The Application makes it clear that Qwest views Sections 13.5 and 19.2 of the Contracts as
13 expansive stating, “the Contracts explicitly provide that Qwest is entitled to recover its attorneys’
14 fees and costs incurred by it for all but a very limited range of services performed by its attorneys.”
15 Based on this view, Qwest claims that it incurred \$156,450 in fees and costs of which \$138,789.50
16 is recoverable under the Contracts. In other words, according to Qwest almost 90% of its attorney
17 fees and costs are awardable under the Contracts.

18 Unsurprisingly, the Debtor objects to the award of most of Qwest’s claimed fees. It claims
19 that, at most, \$32,504 in fees and \$750 in costs are allowable. In its Response, the Debtor claims
20 that attorney fees in the following categories are not awardable under the Contracts:

Category	Amount
Insurance	\$ 2,787.00
Financing	7,716.50

23 ¹ The Court directed Qwest to notify the Court’s staff when the parties completed briefing. Qwest did not notify the
24 Court’s staff. Instead, the Court learned that briefing was completed when it reviewed the docket in early February based
upon a notice of appearance from the Chapter 7 Trustee.

² The three Contracts are:

- 25 i. General Construction and Maintenance Agreement, effective May 1, 2005, to April 30, 2008 (“General
26 Agreement”);
- ii. Buried Service Wire Work Agreement effective May 1, 2006, to April 30, 2009; and
- 27 iii. Specific Bid General Construction and Maintenance Agreement, effective May 1, 2006 to October 31,
2007.

For ease of reference, the Court will refer to the provision in the General Agreement.

1	Secured Creditor Reviews	612.00
	General Bankruptcy Issues	33,094.50
2	Motion prep, Reviews, Internal Communication	10,239.50
	Contact Reviews	5,311.00
3	Ca-Tel License Reviews	3,058.00
	Rule 2004 Examination	20,372.50
4	Tax Issues	225.00
	Legal Fee Support Preparation	15,254.50
5	Disgorement	4,006.50
	Damage Claim	1,890.00
6	Miscellaneous	5,997.50
	Total	\$110,564.50

7 The Debtor lists the following categories as allowable under the Contracts:

8	Category	Amount
9	Sub Contractor [sic] Lien	\$27,659.00
	Vendor Settlement	4,845.00
10	Total	\$32,504.00

11 The Debtor lists the following as questionable under the Contracts:

12	Qwest Motion to Fully Pay Sub Contractors [sic]	\$9,615.00
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13 In other words, The Debtor concedes that just over 20% of Qwest's fees are recoverable, but
14 challenges the rest.

15 Qwest, in its Reply, defends its Application. Qwest does not take issue with how the Debtor
16 has categorized the fees or the amount placed in each category. Instead, Qwest defends the
17 Application claiming that it is entitled to recover fees under each category listed by the Debtor.
18 Qwest's overarching theme in its Application and Reply is that the requested attorneys fees were
19 incurred because the Debtor refused to timely pay subcontractors. Thus, Qwest argues, it was forced
20 to incur substantial attorneys fees to force the Debtor to pay the subcontractors

21 **III. Analysis**

22 In the Order the Court set forth the parameters of recovering attorney fees:

23 Under *Travelers* "state law determines rights and obligations when the Code is
24 silent." *In re Rodriguez*, 375 B.R. 535 (9th Cir. BAP 2007). As such, "[p]roperty
25 interests are created and defined by state law," and "[u]nless some federal interest
26 requires a different result, there is no reason why such interests should be analyzed
27 differently simply because an interested party is involved in a bankruptcy
28 proceeding." *Travelers* at 451 (quoting *Butner v. United States*, 440 U.S. 48, 57
(1979)). In Arizona, parties can contractually shift attorneys' fees. *See Cortaro
Water Users's Ass'n v. Steiner*, 148 Ariz. 314, 316 (Ariz. 1986) ("[i]n Arizona we
follow the general American rule that attorneys' fees are not recoverable unless they
are expressly provided for either by statute or contract.") Hence, Qwest can recover

1 attorneys' fees if allowed under the Contracts.

2 In short, fees are awardable under the Contracts as allowed under state law.

3 The ability to contractually shift attorneys fees is governed by A.R.S. §12-341.01. Under
4 subsection §12-341.01(A), “[i]n any contested action arising out of a contract, express or implied,
5 the court may award the successful party reasonable attorney fees.” However, under §12-341.01(B),
6 “[t]he award of reasonable attorney fees pursuant to subsection A should be made to mitigate the
7 burden of the expense of litigation to establish a just claim or a just defense. It need not equal or
8 relate to the attorney fees actually paid or contracted, but the award may not exceed the amount paid
9 or agreed to be paid.” The party requesting attorney fees under A.R.S. § 12-3431.01(A) bears the
10 burden of proof. *Woerth v. City of Flagstaff*, 808 P.2d 297, 304 (Ariz. App. 1990).

11 Though the parties disagree on the amount of fees that the Court should award, they
12 implicitly agree on the broad categories on which the Court should analyze the fees³: 1) Insurance,
13 2) Financing, 3) Secured Creditor Reviews, 4) General Bankruptcy Issues, 5) Motion Prep, Reviews,
14 Internal Communication, 6) Contract Reviews, 7) Ca-Tel License Reviews, 8) Rule 2004
15 Examination, 9) Tax Issues, 10) Legal Fee Support Preparation, 11) Disgorement, 12) Damage
16 Claim, 13) Miscellaneous and 14) Qwest’s Motion to Fully Pay Subcontractors.

17 Before beginning the analysis of each category, it is important to define the parameters under
18 which fees can be awarded - namely Sections 13.5⁴ and 19.2⁵ of the Contracts. Under 13.5 Qwest

19 _____
20 ³ The Debtor defined the categories in its Response. Qwest directly addressed each category in its Reply, except for
21 Qwest’s Motion to Fully Pay Subcontractors. Qwest did not object to the categorization or dollar amounts calculated
22 by the Debtor.

23 ⁴ Section 13.5 reads in part:

24 Contractor warrants that no mechanics' liens or other claims or demands, including but not limited to personal
25 injury, death, property damage or other liability claims (collectively "Payment Claims") will be filed or
26 maintained by it, Subcontractors or any other third party against any Qwest equipment, real estate or other
27 property on account of the Work. . . . Contractor agrees to hold Qwest free and harmless from and against any
28 and all Payment Claims with respect to the value of labor or materials included in the Job or otherwise relating
to Contractor’s performance of the Work and from and against all expenses and liability in connection therewith
(including without limitation any court costs and attorneys’ fees and expense resulting or arising there from)
. . . . Qwest will have the right, but not the obligation, to pay, settle or discharge such Payment Claims and
recover the amount paid, including all reasonable costs and attorney’s fees and a twenty (20) percent handling
fee.

⁵Section 19.2 reads:

In addition to Contractor's obligation to obtain and keep insurance as set forth elsewhere in this Agreement,
Contractor will indemnify, defend and hold harmless each Indemnified Party from and against all suits, losses,

1 must show that the claimed attorney fees are associated with “Payment Claims.” Payment Claims
2 include “mechanics’ lines or other claims or demands, including but not limited to personal injury,
3 death property damage or other liability claims.” Accordingly, to be entitled to attorney fees under
4 13.5, Qwest must show that the fees relate to a claim by the third party.

5 Under 19.2 attorney fees must be a Claim incurred in association with the Work as defined
6 in Paragraph 2 of the Contracts or must be a Claim associated with a breach of the Contracts.
7 “Work” is a defined term relating to contracting work performed by the Debtor for Qwest.

8 In short, to award attorneys fees under the Contracts Qwest must show that the fees incurred
9 were due to third party claims, claims arising via the work done by the Debtor or for a breach of
10 contract.

11 *A. Awardable Fees*

12 Qwest’s claims for Contract Review and Damage Claims are recoverable under the
13 Contracts. A review of the Contracts is necessary to determine if the Contracts were breached under
14 19.2. The Damage Claim fees are based on a tort committed by The Debtor that was allegedly
15 covered by insurance. This is exactly the type of claim for which fees are awardable under both 13.5
16 and 19.2 as they relate to liability claims by a third party.

17 The Debtor argues that there was no need for Qwest to review the Debtor’s licenses as it had
18 operated under the same licences for Qwest for many years. Qwest counters that due to the Debtor’s
19 breach of contract a review of the Debtor’s licenses with its subcontractors was necessary. The
20 Debtor is required to maintain proper licenses under Section 7.3 of the Contracts - a failure to do so

21 costs, lawsuits, judgments, orders, awards, fines, penalties, expenses, liabilities, actions, damages or claims of
22 any character (each a "Claim") arising from or in connection with (a) any personal injuries or property damage
23 received or sustained by any person or property arising in whole or in part from the acts or omissions of
24 Contractor, its Subcontractors and their respective officers, employees, agents or Affiliates in the performance
25 of the Work; (b) any actual or alleged act or omission, neglect, negligence, gross negligence or willfull
26 misconduct of Contractor, its Subcontractors and their respective officers, employees, agents or Affiliates in
27 connection with the Work; (c) assertions under workers' compensation or similar employee benefit laws made
28 by Contractor, its Subcontractors and/or their respective officers, employees, agents or Affiliates in connection
with the Work, (d) any breach by Contractor of the Contract Documents, regardless of whether such injuries
or damages are caused in part by the negligence of any Indemnified Party and (e) the furnishing or use of any
materials by Contractor in connection with the Work or any product liability claims relating to the materials..
Contractor will reimburse Qwest or any other Indemnified Party for any and all costs, settlements, judgments,
or expenses incurred by them in defending or investigating any Claim, including attorneys' fees, expert witness
fees, investigative and court costs.

1 is a breach of the Contracts. It follows that, under the circumstances, it was reasonable for Qwest
2 to review and investigate whether the Debtor was maintaining the proper licences. Fees are
3 awardable under Section 19.2.

4 The Debtor challenges the amount of fees incurred for the Rule 2004 Examination because
5 the amount, \$20,372.50, is “outrageous and unsupportable.” Qwest justifies the fees because the
6 examination sought information regarding the financial condition of the Debtor. Before the
7 examination, according to Qwest, it was discovered that the financial statement prepared by the
8 Debtor contained serious errors - errors that constituted a breach of the Contracts. Further, argues
9 Qwest, the purpose of the 2004 exam was to determine the Debtor’s ability to pay third parties that
10 had filed claims, such as mechanic’s liens, against Qwest and thus attorney fees are justified under
11 the Contracts. Under Section 19.2 Qwest allows recovery of attorney fees for investigating a claim.
12 Here, Qwest used the 2004 Exam as an opportunity to investigate the misconduct of the Debtor
13 related to the work. The fees are awardable under 19.2.

14 *B. Partially Awardable Fees*

15 The Debtor argues that fees related to Insurance are not awardable because Qwest’s fees
16 were incurred opposing the Debtor’s insurance financing motion in which the Debtor eventually
17 prevailed. Qwest counters that the Insurance fees were incurred under 19.2 on two fronts: 1) The
18 Debtor claimed that its damage liability was covered by insurance, but Qwest had not received
19 confirmation that the Debtor’s insurance would provide coverage. Thus Qwest was forced to find
20 replacement insurance; and 2) Qwest learned that the Debtor did not maintain proper insurance as
21 required under the Contract.

22 Here, the question is why were the fees incurred? On the one hand, if the fees were incurred
23 opposing the Debtor’s obtaining insurance, it does not appear that the fees are awardable under the
24 Contracts because the issue at hand was regarding the super priority status of the financing, not the
25 amount, type or extent of the insurance. On the other hand, the Debtor is required to maintain proper
26 insurance under Section 19.2; Section 13.7 requires maintenance of driver’s insurance; Section 16
27 requires maintenance of disability insurance; 17.2 requires maintenance of subcontractor insurance

1 and Sections 21.1 through 21.5 require a variety of insurances. If these sections were breached, the
2 fees incurred are awardable.

3 A review of the record shows that \$753 in fees were incurred opposing the Debtor's
4 insurance financing motion. These are not awardable. The Court concludes that the remainder of
5 the fees were incurred in investigating insurance claims and are thus awardable.

6 Debtor believes that the amount of fees incurred to prepare the Application are
7 inappropriately claimed and are unreasonable. Qwest counters that under Section 13.5 fees must
8 be documented and therefore the fees are awardable. "Arizona law supports the recovery of
9 attorneys' fees incurred in preparing a fee application." *Gamtech Intern., Inc. v. Trend Gaming*
10 *Systems, L.L.C.*, 380 F.Supp.2d 1084, 1101 (D.Ariz. 2005) (citing to *China Doll*). Accordingly, fees
11 are awardable. However, the fees requested must be reasonable. *Id.* Qwest requests \$15,254.50
12 for the preparation of its fee application, almost 10% of the total fees incurred. Even though the fees
13 in this case have been hotly contested – involving a motion for summary judgment and detailed post
14 hearing briefings – the amount incurred is unreasonable. Under the circumstances the Court awards
15 \$7,500 in fees.

16 *C. Not Awardable Fees*

17 Qwest argues that Financing, Secured Creditor Review, General Bankruptcy Issues and
18 Motion Preparation fees are awardable because work on these issues effects Qwest's ultimate ability
19 to recoup funds from the Debtor. While this may be true, Qwest must show that the fees are
20 awardable under 13.5 and 19.2 of the Contracts. Qwest has not done so. These are the types of
21 issues that would arise regardless of the Contracts and are not specifically related to a breach of the
22 Contracts, a third party claim or work done by Ca-Tel. Accordingly, these fees are not awardable.

23 Qwest claims that Tax Claims fall under 13.5 because they are "payment claims" under
24 Section 13.5. However, these claims are not a catch-all category, instead payment claims are
25 "mechanics' liens or other claims or demands, including but not limited to personal injury, death,
26 property damage or other liability claims." Tax claims against Ca-Tel do not fall into this definition
27 and are therefore not awardable.

1 Qwest justifies an award related to Disgorgement under 19.2(b) because “the postpetition
2 payment of a professional, who is also an insider, without court authority is an ‘actual or alleged act
3 or omission, neglect, negligence, gross negligence or willful misconduct of’ the Debtor.” Qwest
4 does not claim Disgorgement was a breach of the Contract. Qwest misses the mark. An award
5 under 19.2(b), unless it’s related to a breach of contract, must be related to “Work.” “Work” is a
6 defined term relating to contracting work performed by Ca-Tel for Qwest. As presented by Qwest,
7 the “negligence” does not relate to Work or a breach of the Contracts and therefore attorneys’ fees
8 are not awardable.

9 Qwest states that the Miscellaneous fees all relate to attempt to recover under the Contracts.
10 This justification is insufficient to award fees. In the Order the Court required ruled, “[t]o the extent
11 Qwest claims attorneys’s fees related to the administration of the bankruptcy that are not related to
12 a specific claim, Qwest must justify why the claimed fees can be awarded under the Contracts.” It
13 has not done so. Accordingly, the fees are not awardable.

14 Qwest justifies an award for the Motion to Fully Pay Subcontractors under Section 13.5.
15 Though the Court stated in its decision, “[t]here is a lot of merit to Qwest’s motion,” the Court
16 ultimately denied Qwest’s Motion. Qwest was clearly unsuccessful in its Motion to Fully Pay
17 Subcontractors. The Court can only award fees if the party is successful. A.R.S. 12-341.01(A).
18 Accordingly, the fees for this category are not awardable.

19 *D. Costs*

20 As the Court has awarded approximately half the total fees incurred by Qwest, the Court will
21 award half the costs incurred.

22 **IV. Conclusion**

23 Based on the foregoing the Court makes the following attorney fees calculations:

24 *Uncontested Fees*

<u>Category</u>	<u>Fees Requested</u>	<u>Fees Awarded</u>
Sub Contractor Lien	\$27,659.00	\$27,659.00
Vendor Settlement	<u>\$4,845.00</u>	<u>\$4,845.00</u>
<i>Sub-Total</i>	\$32,504.00	\$32,504.00

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3 *Contested Fee*

4 Category

5 Insurance	\$2,787.00	\$2,034.00
6 Financing	\$7,716.50	\$0.00
7 Secured Creditor Reviews	\$612.00	\$0.00
8 General Bankruptcy Issues	\$33,094.50	\$0.00
9 Motion prep, Reviews, Internal Communication	\$10,239.50	\$0.00
10 Contract Reviews	\$5,311.00	\$5,311.00
11 Ca-Tel License Reviews	\$3,058.00	\$3,058.00
12 Rule 2004 Examination	\$20,372.50	\$20,372.50
13 Tax Issues	\$225.00	\$0.00
14 Legal Fee Support Preparation	\$15,254.50	\$7,500.00
15 Disgorement	\$4,006.50	\$0.00
16 Damage Claim	\$1,890.00	\$1,890.00
17 Miscellaneous	\$5,997.50	\$0.00
18 Qwest Motion to Fully Pay Subcontractors	<u>\$9,615.00</u>	<u>\$0.00</u>
19 <i>Sub-Total</i>	\$110,564.50	<u>\$40,165.50</u>
20 Total Award		\$72,669.50

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27 Additionally, the Court awards \$1,844.25 in costs. The motion for summary judgment is granted
28 in part and denied in part. Counsel for Qwest is to upload a form of order.

DATED: March 26, 2009


CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

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