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CENTRAL DISTRICT OF CALIFORNIA
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re
QPS, Inc.

Debtor.

DAVID GOTTLIEB, Disbursing Agent for
the Estate of QPS, Inc.,

Plaintiff,

v.

DIGITAL PERIPHERAL SOLUTIONS,
INC., RAJEEV SHARMA AND PRITI
SHARMA

Defendants

BK. No. SA 02-16187 TA

Adv. No. SA 04-01628 TA

Chapter 11

**MEMORANDUM OF DECISION
AFTER TRIAL**

Date: August 15, 2006

Time: 10:00 a.m.

Place: Courtroom 5B

Trial of this matter was conducted August 15, 2006. All proffered exhibits were received in evidence. The direct testimony of the witnesses was received in evidence by declaration, although certain paragraphs were received for the limited purposes as described on the record. Cross examination and re-direct testimony during the trial was also received from each of the four witnesses. The Court was also aided by the "Joint Pre-

1 trial Order" entered March 1, 2006, the "Opposition to Plaintiff's Motion for Partial Summary
2 Judgment..." filed December 21, 2005, the "Order Granting in Part and Denying in Part
3 Plaintiff's Motion for Partial Summary Judgment" entered February 13, 2006, the
4 "Stipulation to Extend Deadline..." filed November 3, 2004 and as well by the post trial
5 briefs submitted by both sides.
6

7 **1. Background Facts**

8 A brief recital of the pertinent facts, most of which are not disputed, might be helpful.
9 Plaintiff David Gottlieb is the disbursing agent on behalf of the estate of the Debtor ("the
10 disbursing agent"). On January 14, 2003 the Court entered its order approving the sale of
11 substantially all of Debtor's assets to defendant Digital Peripheral Solutions, Inc. ("DPS").
12 As part of the sale agreement DPS agreed to pay \$150,000 to the Committee of Creditors
13 memorialized by a Note and Security Agreement signed by DPS. [Exhibits 1 and 2,
14 respectively] The Note has a schedule of payments attached which provides for monthly
15 payments of \$12,500 starting February 15, 2004. The Note has no attorney's fees clause
16 and does not bear interest. The Committee is also the "secured party" under the terms of
17 the Security Agreement. The Security Agreement at its paragraph 7.8 does contain an
18 attorney's fees clause. Under the plan of liquidation confirmed December 1, 2003, the
19 Note and Security agreement were assigned to the disbursing agent.
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22 DPS breached its obligations under the Note and Security Agreement by failing to
23 make the payments due there under for any of the months commencing February 2004
24 through November 1, 2004. The disbursing agent commenced this action for collection of
25 the obligation by complaint filed September 9, 2004. [Exhibit B] DPS as well as individual
26 defendants Bhuvan Chawla, Rajeev Sharma and Pritti Sharma are all named in the
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1 complaint. Pritti Sharma is the president of DPS and Mr. Chawla is apparently the 100%
2 shareholder of DPS. Bhuvan Chawla was dismissed without prejudice prior to trial.
3 However defendants DPS and the Sharmas remained as defendants as of the trial on all
4 counts except the Sixth Claim for Relief , Breach of Fiduciary Duty, in which only the
5 Sharmas are named. The Disbursing Agent through counsel announced after trial had
6 commenced that he would not be proceeding against the Sharmas on any of the claims.
7

8 **2. Disputed Communications Between October 19 through November 8, 2004**

9 This case comes down to a determination of what occurred between the parties in a
10 series of oral, written and e-mail communications between October 19 and November 19,
11 2004, and of what legal significance each of those events assumes as a matter of law. It is
12 admitted that defendant Pritti Sharma spoke by telephone with attorney Laura Portillo of
13 Brinkman & Portillo, P.C., counsel for the plaintiff, on October 19. The exact dialogue
14 between the parties is disputed. The version as appears in Ms. Portillo's direct testimony
15 by declaration follows:
16

17 ¶ 7. I had a telephone conference with defendant Priti Sharma on October
18 19, 2004. ¶ 8. During that telephone conference I discussed with Priti
19 Sharma procedural matters, including the deadline to file an answer or other
20 responsive pleading, and substantive matters, including the factual basis for
21 the adversary action. ¶ 9. Priti Sharma told me that she did not have the
22 ability to pay the money owed under the contract and that she would need to
23 obtain funding. ¶ 10. I told her to call back when she would be able to pay
24 the amounts owing. ¶ 11 I did not make an offer of settlement during the
25 telephone call."
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1 Although Ms. Portillo denies that settlement was offered, apparently it is conceded that at
2 least the issue of inability to make payment did come up.

3 The version of the conversation as reported in Ms. Sharma's declaration specifically
4 incorporates the issue of settlement: "I spoke to Laura Portillo on Oct. 19, 2004 and she
5 and I agreed that if DPS paid the payment due through 10/15/04 that she would withdraw
6 the complaint for collection...." Declaration of Pritti Sharma, ¶ 8

7
8 Apparently another conversation occurred the next day, October 20, this time
9 between Ms. Sharma and Ms Erickson, another lawyer at Brinkman Portillo. Ms. Sharma's
10 version of that conversation was as follows: "On 10/20/04 I called Tina Erickson to discuss
11 the payments and terms of settlement of the collection action. I state [sic] that Portillo and
12 I had agreed that DPS would pay 125,000 and perhaps the full \$150,000 if that would
13 settle the case. She stated she had discussed the settlement with Portillo and would
14 prepare the document." Declaration of Pritti Sharma, ¶ 9. No counterpart of this alleged
15 conversation appears in Ms. Erickson's declaration. However, the Court does note that a
16 time entry for October 20, 2004 appears in the billing records of Brinkman Portillo P.C.
17 [Exhibits C and 6] under the initials of Ms Erickson, as follows:
18
19

20 Telephone conference with Pritti Sharma regarding revised payment
21 schedule; draft letter to Sharma regarding arrangement of payments and
22 *terms of settlement* of suit. (emphasis added)

23 Although the cross examination of Ms. Erickson did not elicit any admission that a
24 discussion of settlement had indeed occurred on October 20, despite the description in the
25 billing entry, it seems to the Court very likely that, given the preceding alleged discussion
26 between Ms. Portillo and Ms. Sharma, and given that admittedly *something* was discussed
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1 between Ms Erickson and Ms. Sharma the very next day, that the issue of settlement
2 probably did come up, particularly given that the time entry from Ms Erickson was for *half*
3 *an hour*.

4
5 The parties apparently agree that a further telephone discussion occurred between
6 Ms. Erickson and Ms. Sharma on October 26 regarding an extension of time to file an
7 answer. See, Declaration of Sharma ¶10; Declaration of Erickson. ¶s 4 and 5; time entries
8 for October 26, Exhibits C and 6. The Court has also reviewed the "Stipulation to Extend
9 Deadline for Filing an Answer; and Order Thereon" filed November 3, 2004. This shows a
10 signature of Ms Sharma on behalf of DPS dated October 27, 2004, and an undated
11 signature of Ms. Erickson, but given that the document was prepared by Brinkman Portillo,
12 PC, we can infer that it was in fact prepared on or about October 26. The penultimate
13 sentence of the Stipulation is illustrative: "The Parties seek the foregoing extension of time
14 in order to afford the Parties an opportunity to resolve this matter consensually and avoid
15 incurring unnecessary costs of litigation." Therefore, while the material details may not
16 have been agreed, the Court finds that the issue of settlement was already in discussion
17 between the parties as of October 27, 2004. The extension to respond per the stipulation
18 was to November 5, 2004.

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21 Another telephone conference occurred on November 4, 2004. Ms Sharma reports
22 that she called Ms. Erickson to "tell her I had the full \$150,000 ready to wire but needed
23 wire instruction and a letter of release. Erickson said she would get the instructions and
24 release. At no time did she say to me there was no deal of \$150,000 payment for a
25 release of all claims." Declaration of Pritti Sharma, ¶ 11. Ms. Erickson's version of the call
26 appears in her declaration: "Pritti Sharma called BP's office and spoke with me on
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1 November 4, 2004. Pritti Sharma told me she had obtained a loan to pay \$150,000 to the
2 Disbursing Agent and asked me for the wire transfer information to BP's trust account so
3 that she could make a payment of \$150,000. I did not have the wire transfer information
4 and told her that I would email the information to her at a later time." Declaration of
5 Christina Erickson, ¶ 7 Ms Erickson testified that she did not tell Ms. Sharma during the
6 November 4 conference the action had been settled. Declaration of Christina Erickson, ¶
7 10. However, the time entry for Ms. Erickson shows that she had a "conference with TE
8 and LJP regarding negotiations of DPS note payment" on November 4 and another entry of
9 1 hour twenty minutes that same date reads: "Draft *stipulation to settle*; phone call from
10 Pritti Sharma." *Emphasis added* [Exhibits "C" and "6"] The testimony was unclear as to
11 whether the "conference with TE and LJP (Ms. Portillo)" occurred before or after the call on
12 the same date from Ms. Sharma. What is reasonably clear is that at least at some point on
13 Nov. 4, Ms. Erickson felt a settlement was enough in prospect that she spent over an hour
14 that day preparing a settlement document. According to her direct testimony, Ms Erickson
15 presented the draft stipulation to Ms. Portillo on Nov. 4th, but she was instructed "to keep
16 the drafted stipulation in the file for future use." Declaration of Christina Erickson, ¶ 12;
17 Declaration of L. Portillo, ¶ 14. Importantly, there is no testimony that Ms. Erickson was
18 instructed on Nov. 4th (or indeed at any time) to inform Ms. Sharma that a deal had not
19 been reached nor, apparently, did Ms. Erickson ever contact Ms. Sharma to that effect.
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Ms Sharma then sends an email to Ms. Erickson on Nov. 5th:

24 I called you yesterday November 4th to inform you that I am ready to wire the
25 funds to you, were [sic] suppose to send me the letter of release and wire
26 transfer instruction and today is the 5th of November last day for us to make
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1 the payment according to the court papers, we have arranged the funds to be
2 transferred to you as promised however we do need some kind of release
3 letter from you that you will withdraw the complain [sic] and the wire
4 instruction so we can send the wire transfer. Exhibit "9".
5

6 Ms. Erickson acknowledges receipt but testifies she did not respond to this email.

7 Declaration of Christina Erickson. ¶14. Nor is there any indication from any of the other
8 declarations or testimony that anyone from Brinkman Portillo, PC responded to the
9 November 5 email. This silence is significant because the email makes clear that Ms.
10 Sharma was under the impression that a settlement had been reached and that a release
11 was expected in return for payment.
12

13 Ms Sharma testified she again spoke to Ms. Erickson by telephone on November 8:

14 ...and told her that since I did not receive the wire instructions and release
15 that I would send the check with a letter explaining that the \$150,000 was
16 payment in full. She stated to me that was fine and apologized for not
17 sending the instructions and release. Erickson stated I was not to be
18 concerned about the lack of a response from Portillo and to send the letter
19 and check, that she would let Portillo know it was coming." Sharma
20 Declaration, ¶ 12.
21

22 No reference is made to this November 8th conversation in Ms. Erickson's declaration but,
23 interestingly, a time entry does appear on the billing records "Telephone conference with
24 Pritti Sharma regarding negotiation and settlement." Exhibits "6"and "C."
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1 **3. The November 9 letter**

2 The foregoing represents, in the main, disputed versions of what occurred in various
3 telephone conversations. The Court believes that it is unnecessary to make factual
4 findings regarding the specifics beyond the general findings that (a) the issue of settlement
5 had come up; (b) DPS had mentioned a specific amount, \$150,000 as full settlement and
6 in return for \$150,000 DPS expected a release; and (c) at the critical juncture there was
7 only silence from counsel for the Disbursing Agent. These findings serve as background.
8 The reason specifics are unnecessary is that the following largely speaks for itself.

9 On November 9 DPS through Ms. Sharma sent a letter to Brinkman Portillo, PC
10 which apparently enclosed a check for \$150,000. Exhibits "7" and "8." There is no
11 dispute that the letter was received and read by all of Daren Brinkman, Laura Portillo and,
12 at some point, by Christina Erickson , each of whom is indicated as an addressee. The
13 letter provides in pertinent part:
14

15 Enclosed please find Check No. 2234 for \$150,000 *as payment in full*
16 to the bankruptcy estate of QPS, Inc. arising from the purchase of assets on
17 January 14, 2003....During our phone conversation on October 19, 2004, Ms.
18 Laura Portillo agreed that if DPS, Inc. would pay all the payments due
19 through October 15, 2004, you would then *withdraw the complaint*....

20 On November 4, I had arranged to make payment as promised and I called
21 your office and asked to speak to Laura Portillo to get wire instructions so
22 that I might transfer the funds in a timely manner. Tina told me that she
23 would email me the bank wire instruction but I have still not received any
24 such instructions from her. Since then I have I have [sic] sent an email and
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1 made multiple phone calls requesting to talk to Laura Portillo. Each time I
2 was told that she would call me back. I have left my office number as well as
3 my cell phone number, but I have still not heard back from her.

4 Even though I was told by Tina that Brinkman Associates [sic] will not
5 take any further action and not to worry about not having received a response
6 from Laura, we are concerned and have therefore decided to send *the*
7 *enclosed check for \$150,000 as payment in full of all amounts due in the past*
8 *as well as prepayment of all amounts due in the future*, to include the final
9 payment due on January 25, 2004.

10 As per our phone agreement on October 19, 2004, I have complied by
11 making payment. *I would appreciate your compliance with our agreement by*
12 *withdrawing your case immediately*, and notifying me that you have done
13 so... (emphasis added) Exhibit "7."

14 According to Ms. Sharma, the \$150,000 was not available at the time in the assets
15 of DPS, but had to be borrowed from her family which still has not been repaid.
16 Declaration of Pritti Sharma, ¶ 14. Significantly, there is no evidence that anyone from
17 Brinkman Portillo, PC contacted Ms. Sharma in response to the November 9 letter to tell
18 her that an agreement had not been reached. Instead, the check was immediately
19 deposited in Brinkman Portillo's trust account and cleared the bank November 15, 2004.
20 Sharma declaration ¶¶15 and 16. Apparently, the first communication in reply to the
21 November 9 letter is a November 19 email from Daren Brinkman to counsel for DPS
22 wherein acknowledgment of the payment is made but citation is also made to the attorneys
23 fees clause in the Security Agreement. Exhibit "4".
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1 See, *Russell v. Riley & Peterson, et al.*, 82 Cal. App. 728, 736 (1927). The fact that the
2 label "accord and satisfaction" was not used is of no consequence.

3 Plaintiff cannot seriously argue surprise since the same facts and evidence as
4 underly all of the waiver, estoppel and release defenses likewise apply to accord and
5 satisfaction. Moreover, the pleadings can and should be liberally amended to conform to
6 proof, absent a showing of prejudice. Fed. Rule Bankr. Proc. 7015; See e.g. *Consolidated*
7 *Data Terminals v. Applied Digital Data Systems, Inc.*, 708 F. 2d 385, 396 (9th Cir. 1983).
8 Lastly, Defendant correctly points out that "accord and satisfaction" was presented in
9 opposition to the Summary Judgment motion filed December 21, 2005 by reference not
10 only to the label "accord and satisfaction" but also to Cal. Civ. Code §1526 (c), the
11 California statute that governs the accord and satisfaction defense. See, Defendants'
12 Opposition to Plaintiff's Motion For Partial Summary Judgment, p. 5:28 to 6:4. The
13 Summary Judgment was denied in part by the "Order Granting in Part and Denying in
14 Part..." entered February 13, 2006 specifically so the defenses raised by the facts and
15 circumstances as outlined above could be presented at trial. The Court finds that there is
16 no showing of prejudice and the Answer can and should be amended to conform to proof,
17 if that step is even necessary since the underlying elements of accord and satisfaction, if
18 not the label, are so interwoven within the paragraphs of the Joint Pretrial Order as cited
19 above.
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23 **B. Was an Accord and Satisfaction Proved?**

24 Cal. Civ. Code § 1521 defines an "accord and satisfaction" as follows:

25 An accord is an agreement to accept, in extinction of an obligation,
26 something different from or less than that to which the person agreeing to
27

1 accept is entitled.

2 Cal. Civ. Code § 1526(a) and (c) provide:

3 (a) Where a claim is disputed or unliquidated and a check is tendered by the
4 debtor in settlement thereof in full discharge of the claim, and the words
5 "payment in full" or other words of similar meaning are notated on the check
6 or draft, the acceptance of the check or draft does not constitute an accord
7 and satisfaction if the creditor protests against accepting the tender in full
8 payment by striking out or otherwise deleting that notation or if the
9 acceptance of the check or draft was inadvertent or without knowledge of the
10 notation....

11 (c) Notwithstanding subdivision (a), the acceptance of a check or draft by a
12 creditor constitutes an accord and satisfaction when the check or draft is
13 issued pursuant to or in conjunction with a release of claim.
14

15 Cal. Civ. Code § 1526 has been held to have been superseded, as to discharge of an
16 unliquidated claim or a claim subject to bona fide dispute by tendering a negotiable
17 instrument as full satisfaction of the claim, by Cal. Com. Code § 3311. *See, Woodridge v.*
18 *J.F.L. Electric, Inc.*, 117 Cal. Rptr. 2d 771, 96 Cal, App. 4th Supp. 52 (2002). Section 3311
19 provides:
20

21 (a) If a person against whom a claim is asserted proves that (1) that person in
22 good faith tendered an instrument to the claimant as full satisfaction of the
23 claim (2) the amount of the claim was unliquidated or subject to a bona fide
24 dispute and (3) the claimant obtained payment of the instrument, the
25 following subdivisions apply:
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1 (b) Unless subdivision (c) applies, the claim is discharged if the person
2 against whom the claim is asserted proves that the instrument *or an*
3 *accompanying written communication contained a conspicuous statement to*
4 *the effect that the instrument was tendered as full satisfaction of the claim.*

5
6 (c) Subject to subdivision (d), a claim is not discharged under subdivision (b)
7 if either of the following applies:

8 (1) The claimant , if an organization, proves that (A) within a
9 reasonable time before the tender, the claimant sent a conspicuous
10 statement to the person against whom the claim is asserted that
11 communications concerning disputed debts, including an instrument
12 tendered as full satisfaction of a debt, are to be sent to a designated
13 person, office, or place, and (B) the instrument or accompanying
14 communication was not received by the designated person, office, or
15 place.
16

17 (2) The claimant, whether or not an organization, proves that within 90
18 days after payment of the instrument, the claimant tendered
19 repayment of the amount of the instrument to the person against
20 whom the claim is asserted. This paragraph does not apply if the
21 claimant is an organization that sent a statement complying with
22 subparagraph (A) of paragraph (1).
23

24 (d) A claim is discharged if the person against whom the claim is asserted
25 proves that within a reasonable time before collection of the instrument was
26 initiated, the claimant, or an agent of the claimant having direct responsibility
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1 with respect to the disputed obligation, knew that the instrument was
2 tendered in full satisfaction of the claim. (emphasis added).

3 The elements of Cal. Com. Code § 3311 (as well as of Cal. Civ. Code § 1526(a)
4 and (c)) are all met here. Certainly it was proved that the amount of the total obligation
5 was unliquidated or disputed as of Nov. 9, 2004; if not true of the principal of the obligation
6 this was clearly so as to any claim for fees. An instrument [Exhibits "A" and "8"] was
7 tendered to the claimant *in full satisfaction*, by "accompanying written communication", i.e.
8 a cover letter [Exhibit "7"] in which the tender was expressly and conspicuously conditioned
9 as full satisfaction of *all* obligations. Moreover, the Court has seen no evidence suggesting
10 that Cal. Com. Code § 3311 subsection (d) should not apply, i.e. the agents for the
11 claimant, Brinkman Portillo, PC knew that the tender was in full satisfaction of the claim.
12 This is the only reasonable interpretation of the language of the November 9 letter wherein
13 it is mentioned twice that the payment of \$150,000 was intended as "payment in full" and in
14 the second reference it is made even more clear that "in full" includes "of all amounts due
15 in past as well as prepayment of all amounts due in the future..." Moreover, it was also
16 made clear in the November 9 letter that withdrawal of the complaint was expected in
17 return. Nor can it be reasonably said that the communication was not made "within a
18 reasonable time before the collection of the instrument was initiated..." Similarly, the
19 provisions of Cal. Civ. Code § 1526(a) and (c) are also met since the check was tendered
20 in full satisfaction of a disputed or unliquidated claim, or in conjunction with a release, and
21 there is no evidence of the requisite striking out of language or protest against same before
22 the check was cashed.
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1 Plaintiff argues that he was privileged to remain silent, cash the check
2 notwithstanding the clear terms of the conditional tender outlined above and then only raise
3 the further issue of fees after collection was in hand. Argument was also offered to the
4 effect that the Brinkman Portillo lawyers owed no "duty" to the Defendants to articulate to
5 them that, in Plaintiff's view, no settlement had been reached. Plaintiff's assumptions were
6 grievously in error. While it might be true that Plaintiff's lawyers owe no duty to educate
7 Defendants, it does not follow that Plaintiff was privileged to simply ignore the conditional
8 nature of the tender and cash the check. This is an almost classic case of an accord and
9 satisfaction. Where it is made clear that a tender is made in full satisfaction of a disputed
10 or unliquidated claim, if the obligee receiving the tender cashes the check he is presumed
11 in law to have "accepted", an accord is reached thereby and the obligation is extinguished
12 upon payment of the check. *Thompson v. Williams*, 211 Cal. App. 3d 566, 571-74 (1989);
13 *Potter v. Pacific Coast Lumber Co.*, 37 Cal. 2d 592 (1951); *Robertson v. Robertson*, 34
14 Cal. App. 2d 113 (1939); *Edgar v. Hitch*, 46 Cal. 2d. 309 (1956).

17 Plaintiff may argue that there was no "bona fide" dispute since the terms of the Note
18 are very straightforward, and/or that no consideration was received for extinguishment of
19 the debt. The dispute does not need a solid foundation to be "bona fide"; it is enough if the
20 dispute is honest and not fraudulent. *Thompson*, 211 Cal. App. 3d at 573. Ms. Sharma
21 testified as to the precarious financial condition of DPS and that it did not have nearly this
22 kind of money to make the payments due under the Note. Moreover, there is evidence in
23 the record to suggest that this shaky financial condition was made known to Ms. Portillo, as
24 is reflected in paragraphs 9 and 10 of the Portillo declaration and to Ms. Erickson as well,
25 as reflected in paragraph 7 of the Erickson Declaration. Further, fees of an additional
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1 \$35,000+ would certainly not have been a "liquidated" obligation nor an agreed amount as
2 of November 9, 2004. While it is doubtful that consideration even needs to be separately
3 proven in order for an accord and satisfaction based on a writing to occur [Cal. Civ. Code
4 §1524], there would be such consideration here since the insolvency of the obligor can
5 provide consideration for an accord and satisfaction. See, *Cloyne v. Levy*, 26 Cal. App.
6 637 (1915); *Baird v. Smith*, 7 Cal. App. 2d 597 (1935).

8 **C. Attorneys' Fees**

9 DPS is a party to the Security Agreement and, since it is also the prevailing party
10 hereunder, it is entitled to its reasonable attorneys' fees incurred in the breach of contract
11 cause of action. Cal. Civ. Code § 1717. Although Priti and Rajeev Sharma are not parties
12 to the contract, inexplicably they were named as defendants in the Second Claim for Relief
13 and remained so until after trial had begun. Moreover, as a "prevailing party" a non-
14 signatory can be entitled to attorneys' fees even if the decision rests on the finding that no
15 contract exists. *Hsu v. Abbara*, 9 Cal. 4th 863, 870 (1995); *Manier v. Anaheim Business*
16 *Center, Co.*, 161 Cal.App.3d 503, 506-509 (1984). The Joint Pre-Trial Order at ¶ G, page
17 9, makes clear that total attorneys fees and costs incurred by counsel for Defendants on
18 behalf of Defendants from September 9, 2004 through trial remained as a triable issue.
19 See also, ¶ F, page 10.

22 Plaintiff's citation to *Bradley v. Hortonville Vigilantes*, 66 F.R.D. 605 (E.D. Wis. 1975)
23 is wholly inapposite. That was not a case involving either a contract nor attorneys fees, but
24 only involved a sheriff who was dismissed at the pleading stage and denied costs.
25

26 Moreover, since the Plaintiff chose to put the Sharmas through all of the worry and
27 inconvenience of having to go to trial, it might appear just and proper that the Sharmas
28

1 recover their fees, and that a dismissal *after trial had commenced* should not deprive them
2 of "prevailing party" status. Fortunately for Plaintiff, California has a strong policy favoring
3 settlement precluding an award of fees and costs where there has been a voluntary
4 dismissal of a claim. See, *Intl. Industries, Inc. v. Olen*, 21 Cal.3d 218, 223 (1978). The
5 *Olen* holding was later codified by the addition of (b)(2) to Cal. Civ. Code § 1717, which
6 provides:
7

8 Where an action has been voluntarily dismissed or dismissed pursuant to
9 settlement of the case, there shall be no prevailing party for purposes of this
10 section.
11

12 Subsection (b)(2) does not require that the dismissal be entered before trial. *D&J, Inc. v.*
13 *Ferro Corp.*, 176 Cal.App.3d 1191, 1194 (1986). Even though Cal. Civ. Proc. § 581(d)
14 allows a dismissal "by the court" after the trial but before submission of the case if the
15 plaintiff abandons the claim, the court in *D&J* did not focus on technicalities but instead
16 regarded the dismissal as voluntary upon a clear, unequivocal and express intention to
17 abandon an action, which could be demonstrated to the court by way of a motion to
18 dismiss, stipulation of the parties, "or some other form of express intent on the record." *Id.*
19 at 1195, citing, *Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co.*, 10 Cal.App.3d
20 206, 213 (1970). The *D&J* court found that a mere oral request to the judge on the record
21 was sufficient to make the dismissal "voluntary" for purposes of Cal. Civ. Code § 1717.
22

23 In the case at bar, at the commencement of trial, counsel for Plaintiff announced on
24 the record to the effect that Plaintiff would not be proceeding on any of the claims as
25 against the Sharmas. Although technically a court order of dismissal would have been
26 necessary at that point to effect a dismissal under Fed. Rule Civ. Proc. 41(a)(2) as adopted
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1 under Fed. Rule Bankr. Proc. 7041, like the California procedure discussed in *D&J*, this
2 Court will not exalt technicalities over substance in view of the clear public policy underlying
3 Cal. Civ. Code § 1717(b) as expressed by California courts. Therefore, the Court finds that
4 the Sharmas were voluntarily dismissed and the Court is without authority under Cal. Civ.
5 Code § 1717(b) to find a "prevailing party" as between Plaintiff and the Sharma
6 defendants. Therefore, attorneys' fees as a part of costs recoverable by them will be
7 denied.
8

9 Defendants may (1) submit a form of judgment consistent with this opinion and (2)
10 schedule a separate hearing to determine DPS's costs and attorneys' fees, and costs only
11 as to the Sharmas. This memorandum shall serve as findings in the case.
12

13
14 DATED: **AUG 28 2006**



15 HONORABLE THEODOR C. ALBERT
16 United States Bankruptcy Judge
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
411 West Fourth St., Ste. # 2074, Santa Ana, CA 92701-4593

In re QPS, INC, Debtor	Case No.: SA 02-16187 TA Adv. No. SA 04-01628 TA Chapter 11
NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING	

TO ALL PARTIES IN INTEREST ON THE ATTACHED SERVICE LIST:

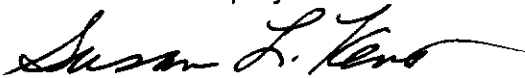
1. You are hereby notified, pursuant to Local Bankruptcy Rule 9021-1(1)(a)(v), that a judgment or order entitled: **MEMORANDUM OF DECISION AFTER TRIAL**

was entered on: **AUG 28 2006**

2. I hereby certify that I mailed a copy of this notice and a true copy of the order or judgment to the persons and entities on the attached service list on: **AUG 28 2006**

Dated: **AUG 28 2006**

JON D. CERETTO
Clerk of the Bankruptcy Court


By: Susan L. Kent
Deputy Clerk

SERVICE LIST

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