

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	§	
	§	
ENCOMPASS SERVICES CORPORATION, et al.,	§	CASE NO. 02-43582-H4-11
	§	Jointly Administered
	§	
DEBTORS	§	

MEMORANDUM OF DECISION

Came on to be considered the Expedited Application of Certain Debtors for Entry of an Order Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code Authorizing Employment and Retention of Wright, Fulford, Moorhead & Brown, P.A. (the "Firm"), as Special Counsel (the "Application") (Docket #2422).

BACKGROUND

On November 19, 2002, each of the Debtors and certain of their affiliates filed for relief under chapter 11 of the Bankruptcy Code. The Firm was retained by Debtors as ordinary course professionals pursuant to the Court's December 18, 2002 Order Authorizing the Retention of Professionals Utilized in the Ordinary Course of Business (Docket #388).¹ Almost immediately, Debtors had difficulty remaining current on their agreed monthly payments to the Firm. On April 17, 2003, Debtors and the Firm entered into a contingency fee agreement, and the terms of the Firm's employment were supplemented by Debtors with the CFA. On May 15, 2003, Encompass Services Corporation and Encompass Power Services, Inc. filed the Expedited Application of Certain Debtors for Entry of An Order Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code Authorizing the Employment and Retention of Wright, Fulford, Moorhead & Brown, P.A. as Special Counsel (Docket #2422). A hearing was originally commenced on the Application on May 21, 2003. At the conclusion of that hearing, the Court requested the Firm submit an affidavit addressing certain issues raised by the Court, and a subsequent hearing was scheduled for June 4, 2003.

At the June 4, 2003 hearing, the Court stated it would not approve the retention of the Firm in accordance with the CFA executed on April 17, 2003. The Court further stated it would not award the contingency fee of \$300,000.00 sought by the Firm, but that it would instead allow compensation in the amount of \$200,000.00, as well as reimbursement for any itemized expenses incurred during the Firm's representation of Debtors. Finally, the Court stated it would allow the Firm the opportunity to submit a brief in support of an award of a fee enhancement, and the matter was taken under advisement. The Firm filed its Memorandum of Authorities Regarding Enhancement of Attorneys' Fees Award to Special Counsel (Docket #2693) on June 13, 2003.

¹Debtors retained the Firm as their counsel in connection with an ongoing dispute regarding a project that EDG Power Group, Inc. performed for Valero Refining Company – California.

DISCUSSION

In its Memorandum of Authorities, the Firm states it was only able to identify one Texas bankruptcy court decision, *In re El Paso Refinery, L.P.*, 257 B.R. 809 (Bankr. W.D. Tex. 2000), discussing the propriety of a fee enhancement to special counsel in a bankruptcy case. (Memorandum of Authorities, p. 4) “In that case, after an extensive discussion of applicable Fifth Circuit precedent, it was ultimately concluded that a fee enhancement to special counsel in a bankruptcy case was a matter left to the *discretion of the court*, and such an award could be made.” (Memorandum of Authorities, p. 4) (emphasis added) According to the *El Paso Refinery* court, whether or not any particular case is one of the “rare and exceptional” cases warranting a fee enhancement should be determined by considering (1) whether the professionals encountered unique or unforeseen obstacles, (2) the result obtained, and (3) whether the party paying the fee has consented to the award. *Id.* at 836-39.

The Firm contends the circumstances surrounding this case should lead the Court to conclude that this is one of those “rare and exceptional” cases warranting a fee enhancement. “The Firm’s representation of the Debtors commenced under a belief that the Valero dispute was a complex, affirmative claim supported by available witnesses, documents, and an operating subsidiary, and a nonbankrupt client able to pay for its ongoing services and to provide ample resources for the litigation.” (Memorandum of Authorities, p.5) The Firm then proceeds to explain how virtually none of these beliefs turned out to be true.

This Court, however, finds the circumstances of this case are not so “rare and exceptional” as to warrant a fee enhancement. More importantly, the Court is troubled by the parties’ conduct in entering into a contingency fee agreement purportedly modifying the Firm’s compensation without seeking prior approval from this Court. The Court believes any award of enhanced fees at this point could be viewed as this Court condoning such conduct.

In hindsight, the Court is also skeptical of the appropriateness of the Firm’s original characterization as an “ordinary course” professional. Given the complexity and magnitude of the litigation undertaken by the Firm, the initial retention should have been presented as conventional special counsel retention, rather than that of an “ordinary course” professional. The subsequent agreement to convert the traditional hourly fee arrangement to a contingent fee arrangement would serve to work a prejudice against the estate – which is why the Court earlier announced its intent to deny the application. The instant “enhancement” application is simply a means of circumventing the “form” of the Court’s prior ruling to arrive at the same economic “substance” as the proposed contingent fee arrangement. The Court refuses to allow this to occur.


CONCLUSION

Consistent with this Court’s comments made on the record in open court on June 4, 2003, and in light of the foregoing discussion, the Court concludes the Expedited Application of Certain Debtors for Entry of An Order Pursuant to Sections 327(e) and 328(a) of the Bankruptcy Code Authorizing the Employment and Retention of Wright, Fulford, Moorhead & Brown, P.A. as Special Counsel (Docket #2422) shall be **MODIFIED** and **GRANTED** as follows. The contingency fee of

\$300,000.00 sought by the Firm is not allowed. Instead, the Firm is allowed compensation in the amount of \$200,000.00, as well as reimbursement for itemized expenses in the amount of \$12,218.50. Additionally, the Firm's request for a supplemental fee enhancement is **DENIED**.

It is so **ORDERED**.

SIGNED this 16th day of April, 2004.


WILLIAM GREENDYKE
UNITED STATES BANKRUPTCY JUDGE