

---

In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of: )  
 )  
TOPGALLANT LINES, INC. ) Chapter 7 Case  
 )  
 ) Number 89-41996  
 )  
Debtor )

**ORDER APPROVING PAYMENT OF ATTORNEY'S FEES AND EXPENSES**

By separate order this Court has approved the Trustee's compromise of a claim against Military Sealift Command (hereinafter "MSC") for \$425,000.00 in adversary proceeding 90-4028. That matter was initiated by the Debtor and, upon conversion from Chapter 11, the Trustee has prosecuted this case utilizing Brennan, Harris & Rominger and Richard C.E. Jennings as counsel. On March 12, 1991, Trustee initially proposed and subsequently received Court approval to employ counsel at the rate of \$100.00 per hour. Within the Order, this Court reserved the right "to allow different compensation if the terms and conditions upon which such agreement is based, prove later to have been improvident . . ." See Topgallant Lines, Inc., v. Military Sealift Command (Matter of Topgallant Lines), Ch. 7 Case No. 89-41996, Doc. No. 253, slip op. (Bankr.S.D.Ga. March 14, 1991) (Davis, J.). On December 11, 1991, the Trustee applied for \$19,412.00 in attorneys' fees and

\$712.34 in costs to pay Brennan, Harris, and Rominger for services. On January 21, 1992, this Court held a hearing to consider the interim fee application.

During the hearing, objections were interposed by Ambassador Factors Inc., a creditor which claims a security interest in MSC accounts, asserting that counsel for the Trustee could not be paid out of other funds held by the Trustee which Ambassador claimed, and that counsel could only be awarded compensation from funds that their services had produced. Realizing that the claim in adversary proceeding 90-4028 potentially might result in zero recovery, in light of the fact that MSC had already paid over \$700,000.00 which at the time was what it contended its maximum liability to be, the question arose whether it was feasible for counsel to proceed at an hourly rate when the Trustee might lack any funds to pay the fee. Counsel for Ambassador, SEMCO, and the Trustee alluded to a contingent fee arrangement as an alternative means of securing counsel's services. As a result, the Trustee later requested, and I approved, an amended compensation arrangement providing for a contingent fee not to exceed forty percent. *See Topgallant Lines, Inc., v. Military Sealift Command (Matter of Topgallant Lines)*, Ch. 7 Case No. 89-41996, Adv. No. 90-4028, Doc. No. 98, slip op. (Bankr.S.D.Ga. Jan. 30, 1992) (Davis, J.). That order was appealed by Ambassador and the appeal was dismissed as premature essentially because all interim fee awards are interlocutory in nature. *See Topgallant Lines, Inc., v. Military Sealift Command*

(Matter of Topgallant Lines), Civil Action No. 492-096, slip op. (S.D.Ga. June 17, 1993)  
(Edenfield, J.).

The Trustee now asks that counsel be compensated based on a contingency fee of not forty, but thirty-three percent plus expenses or a fee of \$141,666.52 and Ambassador objects. Actual time devoted to the case at \$100.00 per hour would be \$75,893.98, plus approximately \$4,000.00 for post-application services or approximately \$80,000.00. Ambassador has renewed its objection to the validity of this Court's January 28, 1992 Order approving a contingent fee arrangement before the conclusion of such employment. Because I hold that Sections 328(a) and 105(a) permit a court to modify a compensation agreement during the pendency of a matter and, in the alternative, hold that the Court may now modify the fee arrangement because the original terms and conditions proved improvident, Ambassador's objection is overruled.

11 U.S.C. Section 328(a) provides as follows:

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, *or on a contingent fee*

*basis.* Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions. (Emphasis added).

The statute does, as Ambassador contends, authorize the Court to allow different compensation if the terms and conditions of employment prove to have been improvident "after the conclusion of such employment." However, Ambassador's contention that a court only may alter the terms at the conclusion of the such employment is unpersuasive.

Section 328(a) coupled with the power Congress granted bankruptcy courts in Section 105(a) permit this Court to modify the fee arrangement with Trustee's counsel during the pendency of the case. First, Section 328(a) does not contain restrictive language such as "shall only modify" which would support Ambassador's conclusion. Second, in cases similar to the present, common sense and Section 105(a) support an interpretation that permits a court to modify the employment arrangement during the case in order to insure the continued availability of competent counsel and to give notice to all parties of that determination as soon as it is apparent that the contract terms were is "improvident." *See In re Allegheny International, Inc.*, 100 B.R. 244, 246 (Bankr.W.D.Pa. 1989) ("it would be

absurd to conclude that we must wait until the conclusion of such employment, when the court realizes that it has acted improvidently in approving the terms and conditions of such employment").

In the alternative, pursuant to the clear discretionary authority of Section 328(a) to modify the employment arrangement at the conclusion of litigation if the original terms and conditions prove to have been improvident, I now modify the terms of Trustee's counsel representation arrangement to permit employment on a contingency fee basis. Counsel has pursued this claim since 1992 with full knowledge that its work might not be fully compensated in the absence of a substantial recovery. It is well to remember that it was Ambassador which brought to the Court's attention in 1992 the prospective inability of the Trustee to pay counsel for their efforts. That placed counsel in the unenviable position of prosecuting a case at a flat hourly rate with no guarantee of any recovery. The traditional non-bankruptcy vehicle for attracting competent counsel when compensation cannot be guaranteed is the offer of a contingent fee arrangement which envisions greater compensation than the hourly rate, but only if the case is successful. The Code provides that compensation in bankruptcy should be comparable to fees for non-bankruptcy services in order to insure availability of competent counsel. *See* H.R.Rep. No. 595, 95th Cong., 2d Sess. 329-30, reprinted in 1978 U.S.C.C.A.N. 5963, 6286; *see also* 11 U.S.C. § 330(a)

(bankruptcy court "may award . . . to the debtor's attorney . . . reasonable compensation for actual, necessary services rendered . . . based on the nature, the extent, and the value of such services, the time spent on such services, *and the cost of comparable services*"). Accordingly, a contingent fee of up to forty percent is appropriate in a case such as this where the Trustee has no funds to guarantee payment of an hourly rate.

In this case Debtor sued for \$1.9 million and after service Military Sealift Command tendered approximately \$700,000.00, denying further liability. Later the Trustee hired present counsel. Vigorous defenses were asserted and a motion for summary judgment was prosecuted by Military Sealift Command. Counsel were not assured of compensation from any source other than this claim, and the amount and certainty of any recovery was questionable. These circumstances justified entry of the January 28, 1992, Order, and independent of its validity, justify a modification of the terms of employment now. Through the efforts of counsel, the estate recovered an additional \$425,000 and, in light of the possibility of no recovery, counsel is entitled to receive compensation that reflects the inherent risks associated with this representation.

Ambassador and SEMCO also argue that an award of one-third is not fair and reasonable because of Military Sealift Command's previous offer in 1992 to settle for

\$450,000.00. That contention is overruled. First, it was Ambassador and SEMCO who induced or pressured the Trustee in 1992 not to consummate the settlement of \$450,000.00. It is at best inconsistent for them now to attack the Trustee's application on the theories that: (a) the Trustee had this offer in his pocket when the contingent fee order was entered, which the Trustee has refuted; or (b) that the Trustee spent excessive time on the case when it was Ambassador and SEMCO who directly caused the Trustee all the additional time and expense for which compensation is sought.

I hold that the terms and conditions under which counsel were originally employed proved to be improvident and that now, at the conclusion of employment, as well as in 1992, I may allow a contingent fee award. Because the case was settled, counsel voluntarily asked for a fee of one-third rather than forty percent. Counsel could have argued for the full forty percent or \$170,000.00 and the Court would have been called on to determine whether that figure was an excessive windfall in relation to the actual time spent on the case. Counsel instead have exercised billing judgment, viewing the results obtained, the time spent, and the contingent nature of their being paid and asked for one-third or \$141,666.52. I find that voluntary reduction commendable and the fee sought to be reasonable. While it exceeds the original hourly rate fee of \$80,000.00 by a substantial amount, under the authority of Norman v. the Housing Authority of the City of

Montgomery, 836 F.2d 1292 (11th Cir. 1988), the amount sought is much closer to the hourly rate that could actually be awarded. Specifically, current law contemplates that fees may be awarded at current rates to compensate for the delay in payment. *See Id.* at 1302 ("where there is a delay the court should take into account the time value of money and the effects of inflation and generally award compensation at current rates rather than at historic rates"). While the \$100.00 rate would yield an \$80,000.00 award, at the current lodestar rate of \$150.00, the hourly fee would total approximately \$120,000.00. If counsel sought the full forty percent, the fee would be \$170,000.00. In this context, the request of \$141,666.52 is reasonable.

IT IS THEREFORE ORDERED that counsel be awarded the sum of \$141,666.52 as fee and \$2,835.32 as expenses out of the settlement of \$425,000.00 with Military Sealift Command.

---

Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of August, 1996.