UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

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In re:

NAVIGATOR GAS TRANSPORT PLC, et al.,

Reorganized Debtors.

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Chapter 11

Case No. 03-10471 (ALG)

MEMORANDUM OF OPINION

A P P E A R A N C E S:

PAUL, WEISS, RIFKIND, WHARTON, & GARRISON LLP
Attorneys for the Official Committee of Unsecured Creditors
1285 Avenue of the Americas
New York, New York 10019
By: Alan W. Kornberg, Esq.
Elizabeth R. McColm, Esq.
Maria T. Vullo, Esq.

KAYE SCHOLER LLP
Attorneys for Compass Adviser Associates LLP
425 Park Avenue
New York, New York 10022
By: Arthur Steinberg, Esq.

OFFICE OF THE UNITED STATES TRUSTEE
By: Greg M. Zipes, Esq.
33 Whitehall Street
21st Floor
New York, New York 10004

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
Counsel to the Debtors and Debtors in Possession
1633 Broadway
New York, New York 10019
By: Adam L. Shiff, Esq.
Howard W. Schub, Esq.

ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE

Introduction

Navigator Gas Transport PLC, five of its ship-owning subsidiaries, and its parent holding company, Navigator Holdings PLC (collectively the "Debtors"), filed for Chapter 11 protection on January 26, 2003. The Debtors' business involved the ownership and operation of vessels which were utilized principally in the shipping of liquefied petroleum gas and petrochemical gas pursuant to charter agreements. On February 6, 2003, a creditors' committee (the "Committee") was appointed in the Chapter 11 cases. The Committee opposed a plan of reorganization filed by the Debtors and filed a competing plan that was eventually confirmed.

On February 17, 2004, in preparation for a contested confirmation hearing on the plans filed, respectively, by the Debtors and the Committee, the Debtors hired Compass Advisor Associates LLP ("Compass") to provide financial analysis, litigation consulting services and expert testimony. An engagement letter dated February 17, 2004, recognized that Compass' retention was subject to the approval of the Bankruptcy Court, and the Debtors agreed to promptly seek such approval.[1]

The confirmation hearing was scheduled to begin on March 16, 2004, and Compass immediately began work. On March 3, 2004, the Debtors filed an application for interim and final orders authorizing the employment and retention of Compass *nunc pro tunc* to February 17, 2004. No objections were filed, but the order was not entered.

[1] The engagement letter required Compass to (a) become familiar with the business operations of the Debtors; (b) analyze the disclosure statements and plans of reorganization filed by the Debtors and the Committee; (c) prepare a report supporting its findings; (d) provide testimony as needed; and (e) render any such other financial advisory services as later agreed upon.

On March 16, 2004, the confirmation hearing commenced. The Committee plan had received the overwhelming support of creditors, and the Debtors' objections to that plan were overruled by Judge Blackshear, before whom the cases were pending. Late at night during the confirmation hearing, an officer of Compass was tendered as an expert witness on behalf of the Debtors' plan and in opposition to the Committee plan, but his testimony was excluded by the Court on the ground that he was not a shipping expert. The Court confirmed the Committee's Second Amended Joint Plan of Reorganization (the "Plan") on March 17, 2004. Compass does not seek compensation for any time after March 17, 2004.

Judge Blackshear never ruled on the unopposed order for Compass' retention and retired from the bench on March 30, 2005, when the case was transferred to the undersigned. On October 10, 2006, in accordance with a schedule set by Court order, Compass submitted a Final Fee Application for allowance of services rendered and reimbursement of expenses incurred as consultant to the Debtors from February 17, 2004, to March 17, 2004. Compass has requested $93,127.50 in compensation, $3,197.69 for expense reimbursement, and $13,132.10 in legal fees for defending its fee application. The United States Trustee and the Committee have objected to Compass' request for compensation on the ground that the Court never approved Compass' retention and that the services provided did not confer any benefit on the Debtors' estates.

Discussion

Compass' motion is based on §327(a) of the Bankruptcy Code, which provides that "the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons…to represent or assist

the trustee in carrying out the trustee's duties under this title." Bankruptcy Rule 2014(a) provides the procedures for seeking court approval by requiring that "an order approving the employment of attorneys, accountants, appraisers, auctioneers, agents or other professionals pursuant to § 327…of the Code shall be made only on application of the trustee or committee." Section 1107(a) conferred on the Debtors, as debtors in possession, the rights of a trustee in connection with the employment of professionals.

The appointment of Compass might have been expected to be a routine matter if it had been acted on in March 2004, as it was not opposed. Since three years have passed, however, it is necessary to consider the power of the court to authorize appointment *nunc pro tunc* to an earlier date. In *In re Keren*, 189 F.3d 86, 87 (2d Cir. 1999), the Second Circuit held that "*nunc pro tunc* approval should only be granted in narrow situations and requires that (i) if the application had been timely, the court would have authorized the appointment, and (ii) the delay in seeking court approval resulted from extraordinary circumstances." The Second Circuit has also recognized that "a bankruptcy court should exercise its discretionary powers over the approval of professionals in a manner which takes into account the particular facts and circumstances surrounding each case and the proposed retention before making a decision." *In re AroChem Corp.*, 176 F.3d 610, 621 (2d Cir. 1999) (citations and internal quotations omitted).

Concerning the first factor of the *Keren* test, it is not possible to find on this record any reason why the retention application should not have been approved when it was filed, *nunc pro tunc* to a date three weeks earlier. Compass meets the requirements imposed by §327(a) that professional persons retained by the debtor be disinterested and not hold or represent an interest adverse to the estate. In addition, Compass appears

qualified to have rendered advice to the Debtors and seems to have acted in good faith. The Debtors explained that the three-week delay in seeking a court order had been the result of pressure from the scheduled confirmation hearing. Under the time constraints, with a contested confirmation hearing scheduled, a three-week delay from commencement of services to the application for authorization was not unreasonable. *See In re Sinor*, 87 B.R. 620 (Bankr. E.D. Cal. 1988) (30 days from start of services presumed to be a reasonable time within which professional must seek retroactive employment.)

In its opposition papers, the Committee argues that Harvey Tepner, a managing director of Compass, lacked the requisite experience to testify concerning the Debtors' business, the shipping industry. The Committee focuses on the fact that Judge Blackshear did not accept expert testimony from Mr. Tepner when he was called during the confirmation hearing. However, in other cases Mr. Tepner has been qualified "as an expert in valuations and review of feasibility of financial projections in reorganization cases." *In re Cellular Information Systems, Inc.*, 171 B.R. 926, 930 (Bankr. S.D.N.Y. 1994) (quotations omitted). There, Judge Lifland accepted Mr. Tepner's expert testimony on the cellular phone industry although "Mr. Tepner had only minimal experience in valuing cellular telephone companies, and had never advised a purchaser of a cellular telephone system." *Id.* Mr. Tepner was identified as the proposed Compass professional in the retention application, and if the Committee had been concerned that he lacked the requisite credentials to act as the Debtors' advisor, it could have challenged his credentials initially. Ordinarily, parties are allowed to select their own professionals

without interference from adverse parties. *See In re Magna Products Corp.*, 251 F.2d 423 (2d Cir. 1957); *In re W.T. Grant Co.*, 4 B.R. 53, 82 (Bankr. S.D.N.Y. 1980).

The second factor of the *Keren* test provides that in exercising its discretion a court should consider the existence of "extraordinary circumstances." These include factors such as

> whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will injure third parties; and other relevant factors.

In re Keren, 225 B.R. 303, 307 (S.D.N.Y. 1998), *aff'd*, 189 F.3d 86 (2d Cir. 1999). In this case there was time pressure to begin work immediately, and the Debtors sought Court approval on March 3, 2004, less than three weeks after retaining Compass.[2]

While the courts have disfavored authorizing payment for services rendered prior to court approval,[3] many of the reasons for refusing retroactive approval of retention orders do not arise in the present case. Compass only performed services after being hired by the Debtors, who promptly requested court approval. It stopped work immediately after its representative's testimony was excluded. Further, it has been observed, with respect to refusals to allow compensation on the ground that a court order

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[2] Moreover, "the case law and the Bankruptcy Code itself are unclear as to exactly who has the burden of providing a sufficient explanation for the failure of a firm to obtain the Bankruptcy Court's approval of its retention." *In re Platinum Mgmt. Corp.*, 226 B.R. 762 (W.D.N.Y. 1998). In *In re F/S Airlease II*, 844 F.2d 99, 106 (3d Cir. 1988), the Third Circuit held that a professional person who seeks appointment has the responsibility to understand that court approval is necessary and to insure that it has in fact been sought. In any event, in this case the engagement letter confirms that Compass knew that court approval was necessary.

[3] *See Matter of Futuronics Corp.*, 655 F.2d 463, 469 (2d Cir. 1981) (A professional who acts without court approval may be denied any compensation for such services.) Such a rule avoids the emotional pressure to award fees which can arise if services have already been rendered. *In re Rogers-Pyatt Shellac Co.*, 51 F.2d 988 (2d Cir. 1931). Also, it "discourages volunteer services and maintains control of costs to the estate by avoiding payment for services which may not otherwise have been authorized." *In re Bennet Funding Group, Inc.*, 213 B.R. 234, 242 (Bankr. N.D.N.Y. 1997), citing *In re Eureka Upholstering Co.*, 48 F.2d 95, 96 (2d Cir. 1931).

of retention had not been obtained, "in almost every early Circuit case out of which the rule grew there were alternate grounds to deny appointment of the professional even if timely application had been made." *In re Bennett Funding Group*, 213 B.R. 234, 243 (Bankr. N.D.N.Y 1997), citing *In re Piecuil*, 145 B.R. 777 (Bankr. W.D.N.Y. 1992). In this Court's view, these grounds do not exist in this case.

The fact that three years have passed since the Debtors filed the application to retain Compass does not prevent the granting of Compass's retention *nunc pro tunc* to February 17, 2004. *See Cuoco v. Moritsugu*, 222 F.3d 99, 105 (2d Cir. 2000) (district court did not rule on re-argument motion for nearly six years); *In re Landmark Land Co.*, 76 F.3d 553, 560 (4th Cir. 1996) (district court held a hearing on a reimbursement motion, but did not rule on that motion at that time, and the motion remained dormant for almost two years); *U.S. v. Hernandez*, 975 F.2d 706, 709 (10th Cir. 1992).[4] It would be unduly harsh to deny Compass' retention due to judicial inaction, especially where the Debtors were on notice that an unopposed retention motion was on file. *Cf. Adelphia Bus. Solutions, Inc., v. Abnos*, 2007 U.S. App. LEXIS 8612 (2d Cir. April 13, 2007).

The objectors also assert that Compass' services did not confer any benefit on the bankruptcy estate. Section 330(a)(1) of the Bankruptcy Code provides, "After notice to the parties in interest and the United States Trustee and a hearing…the court may award to… a professional person employed under §327…

(A) reasonable compensation for actual, necessary services rendered…and

[4] The United States Supreme Court has also indicated that "motions for costs or attorneys fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for modification of the original decree.'" *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (U.S. 1990), citing *Spraque v. Ticonic Nat'l Bank*, 307 U.S. 161, 170 (1939). "Thus, even 'years after the entry of a judgment on the merits' a federal court could consider an award of counsel fees." *Id.*, citing *White v. N.H. Dept. of Employment Security*, 455 U.S. 455 (1982). This Court notes that it was never informed, after it succeeded to the case, that there was a pending application for retention that the predecessor judge had not ruled on.

(B) reimbursement for actual, necessary expenses."

As the movant, Compass has the burden to show that the services it provided were necessary. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The issue whether services are necessary centers on "whether it is reasonably necessary for the welfare of the estate that professionals should be so employed." 3 Lawrence P. King, *et al., Collier on Bankruptcy*, ¶ 330.03 [2][b][ii] (15th ed. rev. 1999).

The Court finds that Compass' work was necessary in connection with the contested confirmation hearing held in March 2004. The Committee had an expert, and the Debtors had a competing plan and were entitled to their own advisor. Compass became familiar with and analyzed the Debtors' business, operations and financial condition, prepared a report regarding the feasibility of the competing plans of reorganization, and testified at depositions. In hindsight it is clear that the creditors overwhelmingly preferred their own plan, and it is also clear that the owners of the Debtor later acted in a contemptuous and inexcusable manner. *See In re Navigator Gas Transport PLC*, 358 B.R. 80 (Bankr. S.D.N.Y. 2006). The Court can understand the Committee's frustration at the post-confirmation expense it was forced to incur in order to effectuate its plan. At the time of Compass' retention, however, this was not known, and the Debtors were entitled to representation. All concerned parties had an interest in making certain that the confirmation hearing was not delayed and that the Debtors not seek an adjournment on the ground that they had not had an opportunity to retain an expert.

The Committee cites *In re Entertainment, Inc.*, 225 B.R. 412 (Bankr. N.D. Ill. 1998), where the Court held that debtor's counsel was not entitled to fees incurred after a

majority shareholder filed a competing plan and counsel breached his duty of loyalty by acting at the behest of one of the feuding shareholders. However, the Debtors in this case had a plan on file and a contested confirmation hearing had been scheduled. Even though Compass performed half of its services after March 3, 2004, when the voting results were clear, there was no requirement that the Debtors concede or waive a confirmation hearing. Most tellingly, the deadline for objecting to Compass' retention was March 12, 2004, after the voting results were known, and no party (including the Committee) filed an objection to the retention on the ground that the creditors had not approved the Debtors' plan and the Debtors should simply concede. "It is hardly fair to deny compensation to a professional because hindsight reveals that which no one could foresee." *In re Coast Trading Co.*, 62 B.R. 664, 667 (Bankr. D. Or. 1986).

There are cases where a professional seeks compensation for services which were not necessary and provided no benefit to the debtor. In *In re Keene Corp.*, 205 B.R. 690, 696 (Bankr. S.D.N.Y 1997), relied on by the Committee, the Court denied some of the fees of debtors' counsel for work described as a vengeful contempt motion against a member of the committee to which the "maximum possible recovery was so small that no reasonable attorney would have commenced this proceeding." *Id.* at 702. Also, the fees requested in *Keene* were over $13 million and represented approximately one-third of the cash and cash equivalents of the estate. Such grossly inflated fees are not present here, and the Court finds that the hourly rates charged by Compass are reasonable for the New York market, and no party has argued otherwise.

Moreover, Compass is entitled to be reimbursed for legal fees incurred during these proceedings. In the engagement letter, the Debtors agreed to indemnify Compass

from all costs arising from the employment. This fee shifting provision is sufficient to overcome the "American rule" that each party pays its own legal fees. *See McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir. 1993) ("Parties may agree by contract to permit recovery of attorneys' fees, and a federal court will enforce contractual rights to attorneys' fees if the contract is valid under applicable state law.") (citations omitted); *In re United Merchants & Mfrs., Inc.*, 674 F2d 134, 137 (2d Cir. 1982); *see also Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 127 S. Ct. 1199 (2007).

Conclusion

The Debtors' application for an order authorizing the employment and retention of Compass is approved *nunc pro tunc* to February 17, 2004. Compass' First and Final Fee Application is granted. Compass' counsel shall settle an order on three days' notice.

Dated: New York, New York
April 27, 2007

/s/ Allan L. Gropper
UNITED STATES BANKRUPTCY JUDGE