

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

In re:

**SALLYANN BRETAGNA FENDER,
a/k/a SALLYANN BRETAGNA CACACE,
Debtor.**

**CASE NO. 05-bk-26083-JKO
Chapter 13**

**SALLYANN BRETAGNA FENDER,
a/k/a SALLYANN BRETAGNA CACACE,
Plaintiff,**

v.

Adv. Pro. 05-ap-6082-JKO

**SECURITY WATCH, INC., d/b/a SWI
and CACACE IV TRUST, WENDY TABB,
TRUSTEE,
Defendants.**

**ORDER ON DEFENDANTS' LIMITED OBJECTION
TO EMPLOYMENT OF SPECIAL COUNSEL**

This adversary proceeding came on for hearing on the Limited Objection (the "Objection") by Security Watch, Inc., and Cacace IV Trust, Wendy Tabb, Trustee (the "Defendants") to the employment of James A. Bonfiglio and the Law Offices of James A. Bonfiglio, P.A. (collectively, "Bonfiglio")[CP 61]. Because the Court has already granted the Debtor's Application (the "Application") to Employ Special Counsel [CP 54], which sought the Court's approval for the

retention of Bonfiglio, by Order (the “Order”) entered March 15, 2006 [CP 57], the Court will treat the Objection as a motion for reconsideration.

The Application was filed and considered on an *ex parte* basis, as are virtually all applications to retain professionals. Here, however, the Application was filed in this Adversary Proceeding, rather than in the Debtor’s main Chapter 13 case. This is, of course, an error. Applications to employ professionals under 11 U.S.C. § 327 must always be filed in the main case, even if the retention of the professional involved is sought only in connection with a single adversary proceeding. The reason for this requirement is clear: the retention of a professional has financial implications for all creditors of the estate, not merely for those parties who are adverse to the debtor in a particular piece of litigation.

Besides this obvious error by the Court in granting the Application, the Defendants point out that in contrast to the Debtor’s proposed Chapter 13 Plan treatment of unsecured creditors (who would receive a *de minimis* distribution at the end of a 48 month plan), the proposed fee structure under which Bonfiglio would be paid as much as \$450 per hour is demonstrably one which the Debtor could not pay out of her own resources. The Defendants wish clarification “as to the manner in which such representation will proceed and its effect upon this Chapter 13 case,” particularly if the Debtor is unsuccessful in the litigation brought here. The Defendants suggest that the fee arrangement is excessive, whether measured by the proposed hourly rate or the contingent fee arrangement entered into by the Debtor a few days before the bankruptcy filing. Finally, the Defendants suggest that Bonfiglio is not “disinterested” because of the existence and prior non-disclosure of the prepetition contingent fee agreement.

The Court will sustain the Objection and vacate the Order authorizing the retention of Bonfiglio, without prejudice to the refiling of an application to retain Bonfiglio in the main case,

with service on parties in interest. The Court notes the Defendants' position that the fee arrangements – whether hourly rate or contingent – are not reasonable, but will overrule the Objection in that regard as premature. The Defendants' Objection to the amount of fees which may be sought or awarded in the case is preserved. This Court is of the view that fees to lawyers and other professionals in bankruptcy proceedings are always subject to *post facto* review to determine if the arrangement is reasonable in light of the results obtained. Bonfiglio should operate under no expectation that the Court's subsequent approval of a properly filed Application will represent the Court's blessing of the fees which the firm might subsequently seek, and it is of course obvious that the Debtor could not afford the firm's services except on a contingent fee basis. Whether fees are ultimately sought on a contingent or hourly basis hereafter, the Court will evaluate the fee application under the standards of 11 U.S.C. §§ 330 and 331. Finally, the Court finds that the prepetition contingent fee agreement between the Debtor and Bonfiglio does not disqualify Bonfiglio from acting as special counsel in this Adversary Proceeding under 11 U.S.C. § 327(e), without needing to reach the question as to whether Bonfiglio would be "disinterested" within the meaning of 11 U.S.C. § 327(a).

Accordingly, it is ORDERED:

1. The Objection is hereby SUSTAINED to the extent that the Order will be vacated, and is otherwise OVERRULED. The Defendants' Objection to the reasonableness of fees sought by Bonfiglio is preserved. The Objection to the retention of Bonfiglio because he is not "disinterested" is OVERRULED.

2. The Order [CP 57] is hereby VACATED, without prejudice to the filing in the main case of an Application seeking the retention of Bonfiglio as special counsel to the Debtor under 11 U.S.C. § 327(e).

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Copies provided to:

Sherri B. Simpson, Esquire

James A. Bonfiglio, Esquire

Barry P. Gruher, Esquire

Robin R. Wiener, Trustee