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United States Bankruptcy Court,
E.D. Virginia.

In re: DORNIER AVIATION (NORTH AMERICA), INC. Debtor
In re: FAIRCHILD DORNIER CORP. Debtor

Nos. 02–82003–SSM, 02–82004–SSM.
|
Dec. 18, 2002.

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MEMORANDUM OPINION

MITCHELL, Bankruptcy J.

***1** Before the court is the motion filed by Mark H. Neely on October 4, 2002, seeking payment of an administrative expense in the amount of $53,123.20 for severance pay due under a prepetition employment agreement after his employment was terminated some 86 days after the filing of the petitions in these two cases. The motion is opposed by the debtors in possession and by the Official Committee of Unsecured Creditors. At a hearing held on October 22, 2002, the parties submitted a stipulation of facts and presented oral argument, and the court then took the matter under advisement. [1] Having reviewed the facts and the applicable law, the court concludes that Mr. Neely is not entitled to payment of his severance pay as an administrative expense.

Background

On April 24, 2002, several former employees of Dornier Aviation (North America), Inc. ("DANA") and Fairchild Dornier Corp. ("FDC") filed an involuntary petition against those companies in this court under chapter 7 of the Bankruptcy Code. [2] An order for relief was entered in each case on May 20, 2002. That same day orders were entered converting each case to chapter 11. The debtors remain in possession of their estates as debtors in possession.

At the time the cases were commenced, FDC and Mr. Neely (whose title was Director Airline Sales) were parties to a letter agreement dated September 1, 2000. This agreement made certain changes to Mr. Neely's existing terms of employment. Relevant to the present motion, FDC agreed to provide six months of severance pay if Mr. Neely's employment were terminated for any reason other than the following: (a) voluntary resignation, including retirement, that is not requested by FDC; (b) death or permanent disability (as defined by FDC's benefit plans); or (c) determination by FDC that Mr. Neely (i) committed any willful malfeasance or gross negligence in the performance of his duties, (ii) violated substantial policies of FDC; (iii) committed any illegal, dishonest, or unethical act that adversely affects the reputation of FDC or FDC's business in its industry or business community or evidences an unfitness to perform or be entrusted with his duties, or (iv) committed a felony.

Although Mr. Neely's original employer was FDC, at some point during 2001 he was informed that he was now an employee of DANA, and his paychecks thereafter came from DANA. DANA terminated Mr. Neely's employment on July 19, 2002. The debtors stipulated that Mr. Neely was not terminated for any of the reasons that would disqualify him from receiving severance. It is also undisputed that the severance due under the agreement at the time Mr. Neely was terminated was $53,123.20.

On August 1, 2002 (twelve days after Mr. Neely's termination), the debtors in possession filed motions to reject certain executory contracts and unexpired leases which they represented were burdensome or unnecessary.

Mr. Neely's severance agreement was one of the contracts that the debtors sought to reject. On October 2, 2002, an order was entered granting the motion and stating that to the extent that any of the severance agreements were executory contracts under § 365, Bankruptcy Code, the severance agreements were deemed rejected as of the entry of the order. The order further stated, however, that it was without prejudice to the right of any party to assert that its contract was not executory.

Discussion

A.

***2** The sole issue before the court is whether Mr. Neely's claim for severance pay is entitled to priority as an expense of administration or is simply a general unsecured claim (with the exception of the limited priority accorded prepetition wage claims).[3] Although resolution of this issue does not ultimately hinge on whether the severance agreement was or was not an executory contract, it is nevertheless appropriate to address the question in light of the arguments put forth by the parties.

A bankruptcy trustee or debtor in possession may, with court approval, elect whether to assume (that is, to perform) or reject (that is, to breach) an unexpired lease or executory contract. § 365(a), Bankruptcy Code. Although the Bankruptcy Code does not define "executory contract," most courts have adopted the familiar definition first articulated by Professor Vern Countryman:

> [A] contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.

Vern Countryman, Executory Contracts in Bankruptcy, 57 Minn.L.Rev. 439, 450–460 (1973). *Compare Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc.* 756 F.2d 1043 (4th Cir.1985) (license agreement was an executory contract because performance remained due to some extent on both sides) *with Stewart Foods, Inc. v. Broecker (In re Stewart Foods, Inc.),* 64 F.3d 141 (4th Cir.1995) (post-petition payments due former president under "Salary Continuation Agreement" was a "claim" in the corporation's bankruptcy, not an executory contract, because the former president had no duties). The court looks at the petition date to determine whether the contract is executory. Under § 365(d)(2), Bankruptcy Code, a chapter 11 debtor in possession has until plan confirmation to decide whether to reject the executory contract.[4] When the debtor in possession exercises such right, either prior to plan confirmation or under a confirmed plan, the rejection is treated as a prepetition breach. § 365(g), Bankruptcy Code. The result is that any damages resulting from the breach are treated as a general unsecured claim. § 502(a), Bankruptcy Code; *Stewart Foods,* 64 F.3d at 145.

Here, there can be little doubt that the severance agreement was an executory contract. Both parties to the agreement still had duties on the date the petition was filed. Mr. Neely, in order to receive the benefit of the agreement, had to continue working for FDC (and subsequently, DANA) until such time as he was involuntarily terminated other than for malfeasance. To obtain the benefit of those services, FDC (and subsequently, DANA) was obligated to pay Mr. Neely the salary set forth in the agreement so long as it continued to employ him, as well as severance pay if it terminated his employment. Had this agreement been assumed by the debtors there can be no doubt that the damages resulting from its subsequent breach would constitute an administrative expense. Here, however, the debtors in possession availed themselves of their statutory right to breach the agreement by rejecting it. Rejection, to be sure, is not cost-free to the bankruptcy estate, since it gives rise to a claim for damages. However, that claim is treated as a prepetition claim, not an administrative expense, even though the breach takes place post-petition. § 365(g), Bankruptcy Code.

B.

***3** Mr. Neely's position, however, does not ultimately stand or fall on whether the September 1, 2000, letter agreement was executory. Rather, he asserts that the severance pay owed to him constitutes an "actual, necessary ... expense" of the bankruptcy estate within the meaning of § 503(b)(1)(A), Bankruptcy Code, which permits the court to allow as an expense of administration "the actual, necessary costs and expenses of preserving the estate, *including wages, salaries or commissions for services rendered after the commencement of the case."* § 503(b)(1)(A), Bankruptcy Code (emphasis added). Allowed administrative expenses are paid ahead of all other types of priority claims as well as general unsecured claims. § 507(a)(1), Bankruptcy Code. As the Fourth Circuit has observed, "because '[o]ne of the goals of chapter 11 is to keep administrative costs to a minimum in order to preserve scarce resources," ' the provision for allowance of administrative claims should not be read "to 'saddle debtors with special post-petition obligations lightly or give preferential treatment to certain select creditors." ' *Ford Motor Credit Co. v. Dobbins,* 35 F.3d 860, 866 (4th Cir.1994) (denying administrative expense claim for loss in value of secured creditor's collateral held for sale). Rather, the administrative priority provision must be narrowly construed. *Id.* In order for a claim to qualify for administrative priority, there must be *"actual use* of the creditor's property by the debtor, thereby conferring a *concrete benefit* on the estate." *Id.* (emphasis in original). Moreover, the moving party bears the burden of proving that his claim is an administrative priority expense. *Id.* at 865–67.

As a threshold matter, the debtors argue that severance pay can never be allowed as an administrative expense because severance pay is not encompassed within the definition of "wages, salary, or commissions" as that phrase is used in Section 503(b)(1)(A). The court cannot concur. Even if an argument could be made that severance pay does not fall within a plain reading of "wages, salary, or commissions," *see In re Phones For All, Inc.,* 249 B.R. 426 (Bankr.N.D.Tex.2000), *aff'd* 262 B.R. 914 (N.D.Tex.2001), *aff'd* 288 F.3d 730 (5th Cir.2002), that particular phrase is nevertheless preceded by the word "including." The term "including" as used in the Bankruptcy Code is illustrative rather than limiting. § 102(3), Bankruptcy Code. Thus, whether severance pay is allowable as an administrative expense does not depend upon whether it falls within the definition of "wages, salary, or compensation"—which is merely one example of a qualifying expense—but instead on whether it is a reasonable and necessary cost of preserving the bankruptcy estate. It not infrequently happens in chapter 11 cases that the court is asked to approve post-petition retention bonuses—which are essentially nothing more than severance agreements—for key employees. Such bonuses, if approved by the court, would unquestionably constitute an expense of administration. Accordingly, there is no conceptual bar to treating severance pay—at least where it arises under a post-petition agreement with the trustee or debtor in possession or under a prepetition agreement that is assumed by the trustee or debtor in possession—as an administrative expense.

C.

***4** The question then boils down to whether severance pay should be treated as a component of post-petition compensation when the right to receive it arises, not from a post-petition agreement with the trustee or debtor in possession but rather under an agreement with the prepetition debtor that is not assumed by the trustee or debtor in possession. There is a surprising divergence of opinion among the reported cases. Some hold that severance pay due under a prepetition agreement is an administrative expense, others that it is not, and still others that only a pro-rata amount will qualify. For many of the courts, the outcome depends on whether the severance is measured by length of service or whether it is payable in lieu of notice.

The disagreement predates the enactment of the present Bankruptcy Code. Section 64(a)(1) of the former Bankruptcy Act of 1898 contained language essentially identical to § 503(b)(1)(A) of the present Code. [5] The most often-cited pre-Code case denying administrative expense status to severance pay is *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.),* 536 F.2d 950 (1st Cir.1976). In that case, the debtor's policy prior to instituting the chapter XI proceedings had been to pay severance pay of one week's salary for each year's employment, with no maximum. Sometime after filing the chapter XI petition, the debtor, acting as debtor in possession, discharged a number of employees and paid them severance of one week of pay for each year of service, up to a maximum of four weeks. Five employees who had worked for the debtor for more than four years then sought payment as an administrative expense of the additional severance they would have been entitled to under the prepetition practice. The bankruptcy judge allowed the additional sums, but only as a general unsecured claim, and the Court of Appeals affirmed. In doing so, the Court articulated a two-part test for determining whether a claim is entitled to administrative expense status. Specifically, the Court held that a claim will be treated as an administrative expense only if "the debt arises from a transaction with the debtor-in-possession[, and] ... the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business." *Id.* at 954; *In re Larsen,* 80 B.R. 784, 787 (Bankr.E.D.Va.1987) (Bostetter, C.J.); *Stewart Foods, Inc.* 64 F.3d at 145 n. 2. This test limits administrative priority status to situations where the consideration for the claim was received by the debtor in possession. *Pension Benefit Guar. Corp. v. Sunarhauserman (In re Sunarhauserman, Inc.),* 126 F.3d 811, 816 (6th Cir.1997). *See also Lines v. System Bd. of Adjustment No. 94 (In re Health Maint. Found.),* 680 F.2d 619 (9th Cir.1982) (denying administrative expense status to claim for severance pay under collective bargaining agreement for employees discharged two months after chapter XI petition was filed); *In re Nomus–American, Inc.,* No. 01–5025511, 2002 WL 230701 (Bankr.M.D.N.C. Feb. 8, 2002) (severance pay not entitled to administrative expense where entitlement did not arise from agreement with debtor in possession).

***5** The *Mammoth Mart* approach has been followed most recently at the court of appeals level by *In re Phones for All, Inc.,* 288 F.3d 730 (5th Cir.2002). [6] In that case, an employee who had been terminated 21 days after the filing of a chapter 11 petition brought an administrative expense claim for $432,601 he would have been due under a prepetition employment agreement. The bankruptcy judge disallowed the claim as an administrative expense. *In re Phones for All, Inc.,* 249 B.R. 426 (Bankr.N.D.Tex.2000). The bankruptcy court reasoned that even if severance pay fell within the definition of "wages, salary, or commissions," the employee nevertheless "earned his severance benefit *when he entered the agreement,* prepetition." 249 B.R. at 429–30 (emphasis added). The right to receive severance became at that point a contingent claim. *Id.* at 429. As the court noted, contingent claims are treated in bankruptcy as prepetition claims even if the triggering event that causes the claim to mature occurs post-petition. *Id.; see* § 101(5)(A), Bankruptcy Code. The Court of Appeals affirmed, stating,

> We essentially agree with the bankruptcy court's reasoning. We understand that court's statutory interpretation to mean that a prepetition severance agreement is not entitled to post-petition administrative priority status. As the Tenth Circuit explained, to attain such status, a severance claim "must have arisen from a transaction with the debtor in possession" and must then confer a benefit on the debtor's estate. *In re Commercial Financial Services, Inc.,* 246 F.3d 1291, 1294 (10th Cir.2001). This reading of the statutory provisions *makes clear the claimants' burden to reconfirm or renegotiate post-petition any severance packages they may have if they continue to work for the debtor.*
>
> 288 F.3d at 732 (emphasis added).

Other courts, as noted, have reached the opposite conclusion. The most frequently cited case for the position Mr. Neely is asserting is the Second Circuit's decision in *Straus–Duparquet, Inc. v. Local Union No. 3 Int'l Bhd. of Elec. Workers,* 386 F.2d 649 (2d Cir.1967). In that case, the claimants were unionized employees who had been discharged approximately a month after the company filed a chapter XI petition. The debtor's collective bargaining agreement with the union provided for severance equal to one week's pay for workers who had been in the company's employ between one and three years, and two weeks' severance pay if the worker had been employed more than three years. The court held that severance pay (unlike vacation pay, which the court held must be pro-rated between the portion earned prepetition and the portion earned postpetition) does not "accrue" from day to day. *Id.* at 651. As a result, "the full severance pay is due whenever the termination of employment occurs." *Id.* The reason this is so, the court explained, is because severance pay is

> a form of compensation for the termination of the employment relation, for reasons other than the displaced employees' misconduct, primarily to alleviate the consequent need for economic readjustment but also to recompense him for certain losses attributable to the dismissal.

***6** *Id.* Accordingly, the court held that "since the employment of [the] claimants was terminated as an incident of the administration of the bankrupt's estate, severance pay was an expense of administration and is entitled to priority as such[.]" *Id.* A similar result was reached in *In re Public Ledger, Inc.,* 161 F.2d 762 (3rd Cir.1947), in which the court held that where the chapter X trustees for a newspaper had continued the employment of the debtor's workers "upon the same terms as were provided in the collective [bargaining] agreement," the severance pay to which the workers were entitled under that agreement was an administrative expenses. *See also In re Roth Am., Inc.,* 975 F.2d 949, 958 (3d Cir.1992) (allowing administrative expense status to that portion of severance pay earned under collective bargaining agreement after the filing of the chapter 11 petition).

Although the Fourth Circuit has not yet ruled on the issue, at least one lower court in the Fourth Circuit has found *Straus–Duparquet* persuasive. *In re Landmark Land Co. of Oklahoma, Inc.,* 136 B.R. 410 (D.S.C.1992). It is important to note, however, that in *Landmark* the issue did not arise in the same context as presented here. The matter came before the court in that case precisely because the debtor in possession expressly sought authority from the court to continue its prepetition personnel practices, which included two weeks severance pay for 12 months continuous employment, and the greater of two weeks or one week for each year of employment, up to a maximum of twelve weeks, for employees who had worked more than 12 months. The court allowed the debtor in possession to do so, reasoning that the estate would benefit from the "maintenance of a stable, competent work force that smoothly continues operation of the debtor company despite the reorganization proceeding," and that "[i]f post-petition there were a mass exodus, the debtor would have to start again with new employees at every level and operations would slow to a near halt as personnel adjusted to their new work." *Id.* at 413.

D.

Having carefully considered the competing arguments, the court concludes that the analysis set forth in *Mammoth Mart* and *Phones for All* is the more persuasive and is also more consistent with the Fourth Circuit's policy, expressed in *Dobbins,* not "to 'saddle debtors with special post-petition obligations lightly or give preferential treatment to certain select creditors." ' 35 F.3d at 866.[7] Here, Mr. Neely's right to severance pay is solely a creature of a contract that was entered into prepetition. Upon entry into the agreement, he acquired a contractual right to receive severance pay if he were later to be involuntarily terminated. Since the triggering event had not yet occurred on the date the bankruptcy petition was filed, any claim to severance pay was contingent on that date. The Bankruptcy Code's definition of "claim," however, is not limited to rights to payment that are matured on the filing date. Rather, "claim" is broadly defined as

> ***7** right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, *contingent,* matured, *unmatured,* disputed, undisputed, legal, equitable, secured, or unsecured.

§ 101(5)(A), Bankruptcy Code (emphasis added). The claim of a creditor arising under a prepetition contract is simply a general unsecured claim in the bankruptcy case even if the time for performance—and hence, the breach—occurs post-petition. *Stewart Foods,* 64 F.3d at 146. In *Stewart Foods,* the Fourth Circuit held that post-petition payments due the company's former president under a prepetition salary continuation agreement were not an administrative expense, even though performance was not due until after the filing of the petition. Although the contract in *Stewart Foods* was not executory, the same result would follow even if the employment contract were executory—so long, of course, as it was not assumed—since rejection of an executory contract is treated as a prepetition breach. § 365(g)(1), Bankruptcy Code; *NLRB v. Bildisco and Bildisco,* 465 U.S. 513, 531, 104 S.Ct. 1188, 1199, 79 L.Ed.2d 482 (1984) ("Damages on the contract that result from the rejection of an executory contract ... must be administered through bankruptcy and receive the priority provided general unsecured creditors."). Only if the prepetition contract is assumed, or the party enters into a new contract with the trustee or debtor in possession, are the claims for its breach entitled to administrative expense status.[8] *In re Klein Sleep Prods., Inc.,* 78 F.3d 18 (2d Cir.1996); *Devan v. Simon DeDartolo Group, LP (In re Merry–Go–Round Enters., Inc.),* 180 F.3d 149 (4th Cir.1999).

II.

It is, of course, true that "[i]f the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value for those services." *Bildisco,* 465 U.S. at 531, 104 S.Ct at 1199. It is also true that, depending on the circumstances, the reasonable value of those services may be what is specified in the contract. *Id.* Here, Mr. Neely received the full amount of the salary specified in his contract for the 86 days he worked post-petition for the debtor and debtor in possession.[9] If the dispute were simply over the payment of that salary, the court—at least in the absence of evidence to the contrary—would likely treat the contract as persuasive evidence of the reasonable value of his services during that period.

The court is unwilling, however, to treat the contract as evidence that six months of severance pay, in addition to the stipulated salary, represents the reasonable value of 60 days of service to the debtor in possession. This is not to say that the court would never treat contractual provisions for severance pay as evidence of the reasonable value of an employee's service. The question of whether contractually-specified payments are appropriately considered as a proxy for the reasonable value of the services received by the trustee or debtor in possession depends, in the court's view, on whether the contract is one that the trustee or debtor in possession could have entered into without court approval. A trustee or debtor in possession may enter into contracts "in the ordinary course of business" without the necessity for court approval. § 363(c)(1), Bankruptcy Code; *In re Roth Am., Inc.,* 975 F.2d 949, 952 (3rd Cir.1992). By contrast, notice and a hearing are required before a trustee or debtor in possession may enter into contracts that are not in the ordinary course of business. *Id., citing* § 363(b)(1), Bankruptcy Code. As explained in *Roth American,*

> ***8** The framework of section 363 is designed to allow a trustee (or debtor-in-possession) the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight, while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary.

975 F.2d at 952. As the court further noted in *Roth American,* neither the Bankruptcy Code nor its legislative history provides a framework for analyzing whether particular transactions are in the ordinary course of business. *Id.* The tests applied by the courts have included a so-called "horizontal dimension" test that looks to whether the transaction is of the sort commonly undertaken by companies in the industry, and a "vertical dimension" (or creditor's expectation) test that looks to whether the transaction would subject a hypothetical creditor to an economic risk of a nature different from that existing at the time credit was extended. *Id.* at 952–53.

Under either test, a trustee's post-petition agreement to pay the debtor's employees, say, two weeks of severance pay in lieu of notice would likely qualify as being in the ordinary course of business, since the practice of giving two weeks notice to laid-off employees, though by no means universal, is certainly not uncommon. That being the case, the court *might* accept a prepetition contract providing for two weeks of severance pay as evidence of the reasonable value of services provided by an employee who continued to work for a chapter 11 debtor but was then terminated post-petition without notice. Indeed, even in *Mammoth Mart* there appeared to be no quarrel on anyone's part with the four weeks of severance pay that the debtor had paid to the employees it laid off, and the only dispute centered on the additional amounts that the company had been in the practice of paying prior to the bankruptcy filing.

However, an agreement to pay a highly-compensated executive six months of severance pay simply does not fall within the category of agreements that are appropriately considered to be "in the ordinary course of business." Such an agreement, if entered into by a trustee or debtor in possession—whether with an existing employee of the debtor or with an employee specially hired to assist in the debtor's reorganization or liquidation—would require court approval after notice to creditors. Indeed, it is not at all unusual for chapter 11 debtors in possession to seek specific court approval—as was done in *Landmark*—to continue existing employment policies, including severance pay,[10] or to enter into new severance or retention agreements, particularly for executives or other key employees. That was not done here. Since a post-petition employment contract providing for six months of severance pay to a highly-compensated executive would have required court approval, the court is unwilling to accept a prepetition contract to the same effect as establishing the reasonable value of Mr. Neely's services to the debtor in possession. Mr. Neely has the burden of proof on the issue of value to the bankruptcy estate, and since there is no other evidence in the record establishing that the reasonable value of his services was greater than the amount he was paid, the court declines to allow the claim for severance pay as an expense of administration.[11]

III.

***9** For the foregoing reasons, a separate order will be entered denying the motion for payment of the severance pay as an administrative expense.

All Citations

Not Reported in B.R., 2002 WL 31999222

Footnotes

1 Subsequent to the hearing on the motion, two other former employees who were terminated post-petition have also filed motions for payment of severance pay as an administrative expense: David A. Nixon, who is seeking $85,409.79, and Dean Rush, who is seeking $241,800.00. Those motions will be separately addressed.

2 FDC is the parent holding company. DANA is a subsidiary five levels removed from the parent. One of the intermediate subsidiaries, Fairchild Dornier GmbH, is the subject of insolvency proceedings in Germany.

3 Under § 507(a)(3), Bankruptcy Code, unpaid wages (including vacation, severance, and sick leave) earned within the 90 days prior to the filing of the bankruptcy petition are entitled to third-level priority in the amount of $4,650

4 Section 365(d)(2) states in relevant part as follows: "In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract ... at any time before the confirmation of a plan."

5 Section 64(a)(1) of the Bankruptcy Act provided in relevant part as follows:

> The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, including *the actual and necessary costs and expenses* of preserving the estate subsequent to filing the petition....

(Emphasis added)

6 In argument, Mr. Neely suggests that the decision in *Phones for All* (even though written by a respected jurist who sat as a member of the National Bankruptcy Review Commission) is entitled to little weight because it is relatively brief and does not include a lengthy analysis of the issue. The bankruptcy court's published opinion, however, discusses the issues in considerable detail. This court knows of no rule that an appellate court decision is entitled to less weight simply because, as in *Phones for All,* it adopts a lower court's analysis as its own.

7 The starkly preferential treatment that would be accorded "certain select creditors" if Mr. Neely's argument were accepted is evident if one considers that an employee terminated the day the bankruptcy petition was filed would have no portion of his or her claim for severance pay treated as an administrative expense, while an employee terminated one day later would have the entirety of the severance pay obligation paid as an administrative expense.

8 There is one important exception. If the contract at issue is a collective bargaining agreement governed by § 1113, Bankruptcy Code, the failure to reject the agreement is treated as an assumption, with the result that all amounts due under the agreement are treated as administrative expenses. *Adventure Res., Inc. v. Holland.* 137 F.3d 786, 798–99 (4th Cir.1998).

9 Because this case was commenced as an involuntary case, the 26 days Mr. Neely worked between the filing of the petition and the entry of the order for relief represents employment by the debtor, not the debtor in possession. The actual period Mr. Neely was employed by the debtor in possession was 60 days Claims incurred by a debtor during the so-called "gap" period between the filing of an involuntary petition and the entry of the order for relief are treated as prepetition claims but are nevertheless paid immediately after administrative claims and ahead of other prepetition claims. § 502(f) and 507(a)(2), Bankruptcy Code.

10 As noted, the company's severance policy in *Landmark* ranged from two to twelve weeks of pay, depending on length of service. The objecting creditor in that case apparently did not oppose—at least not "rigorously"—severance pay for lower level employees, but did question its appropriateness for higher level management. 136 B.R. at 412.

11 The parties have not specifically asked the court to make a ruling as to whether some portion of the severance pay would be entitled to third-level priority under § 507(a)(3), Bankruptcy Code, which grants priority status—after payment of administrative expense and "gap" claims—to "allowed unsecured claims, but only to the extent of [$4,650] for each individual ... earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for ... wages, salaries, or commissions, *including vacation, severance, and sick leave pay* earned by an individual[.]" (Emphasis added). Nevertheless, some brief comment is appropriate. Since Mr. Neely's

employment was terminated post-petition, and since the legal effect of rejecting the employment agreement was to make the breach effective as of the filing date, his right to severance pay is properly treated as having occurred within 90 days of the filing of the petition and would therefore be entitled to third-level priority, at least in DANA's case, to the extent of $4,650, with the balance of his claim being a general unsecured claim. There is insufficient evidence in the record for the court to determine whether an additional $4,650 might be payable in FDC's case. Mere assignment of a contract, even if assented to by the counter party. does not necessarily eliminate the liability of the assignor. Whether Mr. Neely, by accepting performance (i.e., his pay) after 2001 from DANA rather than FDC, effectively released FDC from liability under the September 1, 2000, letter agreement, is an issue the court does not reach on the present record.

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