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United States Bankruptcy Court
Albuquerque, New Mexico

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:)	Chapter 11
)	
FURR'S SUPERMARKETS, INC.,)	
)	Case No. 11-01-10779 SA
Debtor.)	
)	
)	
)	

**METROPOLITAN LIFE INSURANCE COMPANY'S BRIEF
IN OPPOSITION TO MOTION OF UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCALS 540 AND 1564 FOR ORDER ALLOWING AND
REQUIRING IMMEDIATE PAYMENT OF ADMINISTRATIVE EXPENSES**

Metropolitan Life Insurance Company ("MetLife"), by and through its undersigned attorneys, Bingham Dana LLP and J.D. Behles & Associates, a Commercial Law Firm, P.C., hereby submits its Brief In Opposition to Motion of United Food and Commercial Workers Union Locals 540 and 1564 For Order Allowing and Requiring Immediate Payment of Administrative Expenses (the "Motion"). In contravention of established principles of bankruptcy law, the Unions' Motion seeks to elevate the entirety of the Unions' severance and vacation claims to administrative status and to compel the immediate payment of the claims from cash collateral. While MetLife acknowledges the benefit provided to the estate by the Debtors union employees, the union employees are only entitled to an administrative claim for that portion of the severance and other benefits attributable to their services performed post-petition which benefited the Debtor's estate

ORIGINAL

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I. INTRODUCTION

By their Motion, the United Food and Commercial Workers Union Locals 540 and 1564 (collectively, the “**Unions**”) argue that because Furr’s Supermarkets, Inc. (the “**Debtor**”) has yet to reject the collective bargaining agreements with the Unions, it has therefore assumed those contracts rendering all of the claims due under those agreements administrative claims. In the alternative, to the extent this Court rejects that argument, the Unions argue that the Debtor’s conduct in informing employees that it has not changed its employee benefits policies somehow converts all claims arising under those policies or the collective bargaining agreements to administrative expense status. The Unions are wrong on both fronts.

A debtor’s exercise of the right to deliberate and carefully consider whether to *assume or reject executory contracts as contemplated by the Bankruptcy Code, including collective bargaining agreements*, is not penalized by deeming those contracts assumed. Executory contracts in chapter 11 are not assumed until a debtor affirmatively moves for assumption and the court approves it. Nor does the Debtor’s conduct in this case elevate claims under the collective bargaining agreements to administrative claims. The Debtor was correct in informing employees that any claims they had after the bankruptcy case commenced were not altered by their continuing to work and to earn additional compensation. Employees’ claims under collective bargaining agreements remained the same whether they worked or not. Nothing the Debtor did or said altered the treatment of those claims under bankruptcy law. Notwithstanding the foregoing, the great weight of authority instructs that only part of those claims are entitled to administrative priority.

status, the balance of which are given pre-petition general unsecured claim status and share in parity with other similarly situated creditors.

After demonstrating below that the entirety of the claims arising under the collective bargaining agreements are not to be afforded administrative expense status, the Unions' further requests for relief in demanding immediate payment are easily disposed

II. BACKGROUND

On February 8, 2001 (the "**Petition Date**"). Furr's Supermarkets, Inc. (the "**Debtor**") filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "**Bankruptcy Code**"). Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtor has retained possession of its assets and has continued to operate and manage its business.

MetLife, along with certain other post-petition lenders (collectively, the "**DIP Lenders**")¹, agreed to provide post-petition financing to the Debtor pursuant to the Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection, and (3) Granting Other Relief, entered by this Court on March 14, 2001 (the "**Final DIP Order**"), and that certain Post-Petition Loan and Security Agreement dated as of March 14, 2001 among the Debtor and the DIP Lenders (the "**DIP Agreement**").² The DIP Lenders continue to provide post-petition financing to the Debtor pursuant to the Continuation of Second Post-Closing Order Arising from Emergency Hearing

¹ The other DIP Lenders are Heller Financial, Inc., Bank of America, N.A. and Fleet Capital Corporation.

² Post-petition financing was also evidenced by various interim orders of the Bankruptcy Court.

Supplementing Final Order (1) Authorizing Debtor to Obtain Secured Financing, (2) Granting Adequate Protection and (3) Granting Other Relief To Permit Short-Term Financing And Use of Cash Collateral and if business conditions warrant may continue to provide additional post-petition financing pursuant to subsequent cash collateral orders.

The Debtor is a party to several collective bargaining agreements with the Unions, which agreements provide severance and vacation benefits to certain of the Debtor's employees. These collective bargaining agreements form the basis of the Unions' claims.

Pursuant to a proposed Order Resulting from Preliminary Hearing on Motion of United Food and Commercial Workers Union Locals 540 and 1564 for Order Allowing and Requiring Immediate Payment of Administrative Expenses to which the Unions have consented, the issues addressed in this memorandum of law are limited to the legal grounds entitling the Unions to the relief requested. All arguments regarding the proper amounts of claims, if any, are reserved for subsequent briefing and hearing. Accordingly, MetLife specifically reserves its right to submit additional memoranda, responses and evidence to address additional factual issues associated with the Motion as and when they become due.

IV. ARGUMENT

The Unions' Motion seeking to compel the Court to treat all claims arising under their collective bargaining agreements as administrative expense claims should be denied because the Debtor has not assumed the collective bargaining agreements and assumption cannot be implied, nor has the Debtor's conduct elevated the entirety of those claims to administrative expense status.

A. The Debtor Has Not Assumed the Collective Bargaining Agreements And Assumption Cannot Be Implied

Bankruptcy Code § 365 prescribes the procedure a debtor must follow to assume an executory contract. Together with Federal Rule of Bankruptcy Procedure 6006, they require that notice and an opportunity for a hearing be afforded creditors and that the court must approve the assumption of an executory contract. Bankruptcy Code § 365(a) expressly makes the decision to assume or reject any executory contract “subject to court approval.” Indeed, executory contracts can be, and frequently are, assumed or rejected through plan confirmation. Bankruptcy Code § 1123(b)(2). No time limit is set forth in the Bankruptcy Code within which a chapter 11 debtor must assume or reject a collective bargaining agreement. While a 60-day time limit, subject to extension, does exist for the assumption or rejection of a *lease* of non-residential real property under Bankruptcy Code § 365(d)(4), no similar provision is provided for collective bargaining agreements. Moreover, even in the situation of a non-residential real property lease, the failure to act within the prescribed time period presumes rejection, not assumption—the result the Unions would have the Debtor’s inaction cause. Here, it is clear that the Debtor has not exercised its right under Bankruptcy Code § 365 to assume the collective bargaining agreement, and no time limit established by the Bankruptcy Code has passed within which the Debtor may exercise that right.

In the event of a decision by a debtor to reject a collective bargaining agreement, a debtor must comply with Bankruptcy Code § 1113, which specifically deals with the rejection of collective bargaining agreements. This section of the Bankruptcy Code was enacted to reconcile a number of divergent standards courts began to create

when assessing the soundness of a debtor's business judgment in deciding to reject a collective bargaining agreement. See 3 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 365.03[3] (15th ed. rev. 2000). As evident from the record, the Debtor also has not made the decision to reject its collective bargaining agreements. Until such time as the Debtor has fulfilled the preconditions and satisfied the standards to either assume or reject the collective bargaining agreements in compliance with the statutory requirements of the Bankruptcy Code, it ought not be presumed to have done either.³

Realizing that the Debtor has not affirmatively assumed or rejected the collective bargaining agreements, the Unions rely on the Fourth Circuit case of Adventure Resources, Inc. v. Holland, 137 F.3d 786 (4th Cir. 1998) for the proposition that the Debtor has by implication assumed its various collective bargaining agreements because it has not to date specifically rejected them. The court in Adventure Resources, a case involving an action commenced years after the petition date, held that the debtor had assumed the collective bargaining agreement in question as a result of its "failure to reject it in accordance with § 1113." Id. at 798. However, in this case, there is no justification for making such assumptions. In fulfillment of the bankruptcy policy of giving debtors breathing space upon filing a chapter 11 case, it is well recognized that debtors are afforded a reasonable time to decide whether to assume or reject executory contracts. In re Dunes Casino Hotel, 63 B.R. 939, 948-949 (D.N.J. 1986). In this case, the Debtor is well within the reasonable time frame of determining whether to assume or reject its

³ It should be noted that this case could not bear the creation of administrative claims far in excess of any other. The creation of improper administrative claims will dramatically prejudice the recoveries of many other legitimate administrative claimants.

executory contracts and has not run afoul of any time constraint found in the Bankruptcy Code

Moreover, Adventure Resources offers little precedential value insofar as the case has been roundly criticized by other courts and commentators. In fact, in a recent case, when addressing the rationale of Adventure Resources, the Eighth Circuit B.A.P. in In re Family Snacks, Inc., 257 B.R. 884, 904 (B.A.P. 8th Cir. 2001), found the reasoning of Adventure Resources to be "fatally flawed" because even though a debtor can breach a collective bargaining agreement by inaction or unilateral modification or termination, it cannot assume an executory contract through such actions or inactions. The Family Snacks court stated that:

[i]mplied assumption has no place in the law of executory contracts. Indeed, Section 365(d) presumes nonassumption by inaction, except in certain specified cases, such as nonresidential real property leases. See 11 U.S.C. § 365(d)(4) (1994). We find the Adventure Resources decision inconsistent with the explicit requirement under § 365 that a debtor may assume an executory contract only upon a motion

Id. (citing United States on behalf of Postal Serv. v. Dewey Freight Sys., Inc., 31 F.3d 620, 624 (8th Cir. 1994) (making clear that under Bankruptcy Code § 365(a), rejection is "subject to the court's approval," and that a debtor seeking such approval must proceed by motion upon reasonable notice and opportunity for hearing).

The guidance of the Bankruptcy Code is clear, inaction does not mean assumption. Indeed, the opposite is true; inaction presumes nonassumption.

The Unions further rely on In re Lady H Coal Company, 193 B.R. 233 (Bankr. S.D. W.Va. 1996) for this same proposition. However, the facts of Lady H are distinguishable. The debtor in Lady H affirmatively moved to reject its collective

bargaining agreement under Bankruptcy Code § 1113 and the court denied rejection. Of course, no motion has been made to this Court for either assumption or rejection.

Nowhere did the Lady H court discuss the issue of assumption of a collective bargaining agreement upon a denial of rejection under Bankruptcy Code § 1113 nor did the court find that the debtor had assumed the collective bargaining agreement upon such a rejection; it merely allowed employees to submit claims for breach of such agreements. Accordingly, Lady H fails to support the Unions' argument that the Debtor should be deemed to have assumed the collective bargaining agreements it has yet to seek to assume or reject.⁴

For these reasons, this Court should find that the collective bargaining agreements have thus far been neither assumed or rejected.

B. Claims Under Collective Bargaining Agreements Must Be Prorated Into Pre-Petition Claims and Administrative Expense Priority Claims

Although the subject collective bargaining agreements neither have been assumed or rejected, employees nonetheless have claims arising under them for severance and vacation pay. This is recognized by MetLife. The claims are simply not entitled to a complete administrative priority over all other general unsecured creditors. The task at hand is determining how these claims are to be properly classified.

Bankruptcy Code § 507(a)(1) grants a first priority to claims arising under Bankruptcy Code § 503(b). Bankruptcy Code § 503(b)(1)(A) provides that

⁴ To the extent that the Unions otherwise argue that the Debtor has waived its rights (or is estopped from exercising its rights) under Bankruptcy Code §§ 365 or 1113 based upon some conduct on the part of the Debtor, the position finds no basis in fact, no basis in the law of wages, no support in precedent and is contrary to the clear language of the Bankruptcy Code.

administrative expenses include “the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.” The precise treatment of severance and vacation claims, however, is not directly addressed in the Bankruptcy Code. The priority to be accorded severance and vacation claims has been left to judicial interpretation and a substantial body of case law deciding the proper priority to be accorded such claims.

“The prevailing view regarding vacation pay claims under a collective bargaining agreement in bankruptcy is that such claims are accorded administrative priority only to the extent of the proportionate part of total vacation pay earned during the period from the beginning of the bankruptcy administration to the date of termination of employment.” *In re Roth American, Inc.*, 975 F.2d 949, 957 (3d Cir. 1992)(internal quotations omitted)(citing what is now 4 Lawrence P. King, *COLLIERS ON BANKRUPTCY* ¶ 503.05[7][c] (15th ed. rev. 2000)); *Straus-Duparquet, Inc. v. Local Union 3, Int’l Bhd of Elec. Workers*, 386 F.2d 649 (2d Cir. 1967).

The case, which provides a seminal discussion on the subject, *Roth*, also explains that the “vast majority [of courts] has held that [severance] claims, like vacation pay claims, only have administrative priority to the extent that they are based on services provided to the bankruptcy estate post-petition.” *Id.* at 957 (citing *In re Public Ledger*, 161 F.2d 762, 773 (3d Cir. 1947), *In re Health Maintenance Found.*, 680 F.2d 619, 621-22 (9th Cir. 1982)(even if trustee assumed collective bargaining agreement, that would not alter rule that severance pay claim should only be given administrative priority to extent earned post-petition); *In re Mammoth Mart, Inc.*, 536 F.2d 950, 953 (1st Cir. 1976).

See also 4 Lawrence P. King, COLLAPSE ON BANKRUPTCY ¶ 503.05[7][d] (15th ed. rev. 2000).

Accordingly, the treatment of the employees vacation and severance claims in this case should be in accordance with the well established body of case law granting benefits earned for post-petition services post-petition administrative priority status and treating benefits earned for pre-petition services as general unsecured claims. With due regard to the service of union employees, the Bankruptcy Code strives for the equality of treatment for similarly situated creditors and there simply is no reason or statutory or judicial authority for elevating the claims of employees for severance and vacation benefits attributable to services rendered pre-petition above those of other general unsecured creditors.

The Unions argue that regardless of whether the Court finds that the Debtor assumed the collective bargaining agreements through non-rejection that the severance and vacation pay obligations would qualify as administrative claims based on their interpretation of Isaac v. Temex Energy, Inc. (In re Amarex, Inc.), 853 F.2d 1526 (10th Cir. 1988). Specifically, Amarex set forth two criteria for finding the existence of an administrative claim: (1) that the expense arises out of a transaction between the creditor and the bankrupt's trustee or debtor-in-possession, and (2) only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of its business. See id. at 1530. Amarex does not support the Unions' cause.

In fact, Amarex did not involve a union claim nor did it address collective bargaining agreements pursuant to Bankruptcy Code § 1113. Rather, Amarex dealt with

determining whether a bonus compensation provision of an employment contract should be afforded administrative expense priority status. The employee in *Amarex* was never paid his bonus, and he asked the court for administrative expense priority status for the bonus amount he had not been paid. The 10th Circuit Court of Appeals granted the administrative expense priority status because it found that the bonus was earned entirely post-petition. *Id.* at 1529. Thus, the fundamental precept that only benefits attributable or earned through services performed after a debtor files for chapter 11 can be granted administrative expense priority is ratified in *Amarex*.⁵

Additional support for finding that only severance pay earned after the petition date can be classified as an allowed administrative priority claim is found in *Roth*. In *Roth*, a union sought to have its claim for severance pay and vacation benefits earned pursuant to a collective bargaining agreement in effect prior to the bankruptcy filing afforded administrative expense priority status. The court disagreed with the union position that the entire amount of claims under unrejected collective bargaining agreements are entitled to priority status. Instead, the court found that severance pay based on length of employment, as well as vacation pay claims, “only have administrative priority to the extent that they are based on services provided to the bankruptcy estate post-petition.” *Id.* at 957. Accordingly, *Roth* stands for the proposition

⁵ Furthermore, in *Amarex*, the employee argued that the contract had been “implicitly assumed.” This Court should take note, however, of the fact that both the bankruptcy court and the district court in *Amarex* rejected that argument. See *id.* at 1528 n.2. As a result, *Amarex* fails to support the Unions’ thesis that claims arising post-petition must always be afforded administrative expense priority status.

that only those benefits attributable to post-petition services by union employees can be eligible for administrative expense priority status.

The Unions' protestations notwithstanding, reference to In re Commercial Financial Services, Inc., 246 F.3d 1291 (10th Cir. 2001) ("CFS"), is the proper analysis in this case. CFS adopted the Amarex test espoused by the Unions, and held that the liability in that case (lump sum termination payments) arose pre-petition at the time the contracts were executed. See id. at 1295. Accordingly, the appellants in CFS were not entitled to administrative priority because they did not meet the first requirement of Amarex, namely, that the claim arose from a transaction with the debtor-in-possession. See id. Moreover, the appellants in CFS were unable to establish the second prong of Amarex, which is that the consideration supporting the claimant's right to payment must be both supplied to and beneficial to the debtor-in-possession in the operation of the business. See id. In the CFS case, as in our case, the consideration for the obligation was the agreement entered into pre-petition.

The important issue in CFS, as here, is whether the consideration was for pre-petition services. In the present case, the severance pay was based on the length of prior service, and this unquestionably arose pre-petition. CFS held that "it is not determinative that payment of the lump sum was contingent upon appellants' termination, an event which occurred post-petition . . . [i]n determining administrative priority, courts look to 'when the acts giving rise to a liability took place, not when they accrued.' . . . [t]he liability arose at the time the contracts were executed; only the right to payment arose upon appellants' termination." Id. at 1295 (quoting Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 818 (6th Cir. 1997), see

also Pension Benefit Guar. Corp. v. Skeen (In re Bayly Corp.), 163 F.3d 1205, 1208-09 (10th Cir. 1998). Accordingly, CFS, a recent case by the Tenth Circuit Court of Appeals is strong authority, and supports the position that only benefits attributable to services rendered post-petition may be eligible for administrative expense priority status.

It is also noteworthy to point out, as the Roth court acknowledged when it found it to be “[o]f most significance,” id. at 956, that Bankruptcy Code § 1114 dealing with retiree benefits, which are not at issue in this case, contains a provision explicitly giving claims of retirees under this section administrative expense priority status. 11 U.S.C. § 1114(e)(2). Bankruptcy Code § 1113 dealing with collective bargaining agreements conspicuously does not contain such a provision granting claims under this section administrative expense status. Applying general statutory interpretation principles, which say that if Congress provided for something in one part of a statute and did not provide for it in another, then it intended to omit the provision and not have it apply in the later part of the statute, see e.g. Rusello v. United States, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”), leads to the conclusion that Congress did not intend for all claims arising under Bankruptcy Code § 1113 for rejection of collective bargaining agreement automatically to have administrative expense priority status as retiree claims do under Bankruptcy Code § 1114. Congress knows how to provide for such a result, and by omitting it from Bankruptcy Code § 1113, it intended to not have that result automatically obtain. As Justice Frankfurter observed in *Some Reflections on the Reading of Statutes*, COLUM. L. REV. 527, 535-36 (1947):

Though we may not end with the words in construing a disputed statute, one certainly begins there. You have a right to think that a hoary platitude, but it is a platitude not acted upon in many arguments. . . . One more caution relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.

(Emphasis supplied.) Similarly, notwithstanding the Unions' reference to the workers' hardships, the statutory basis for treating all of their claims as administrative priority claims simply does not exist. Accordingly, the judicially created methods of dealing with claims arising under collective bargaining agreements, namely prorating them by granting benefits earned for post-petition services post-petition administrative priority status and treating benefits earned for pre-petition services as general unsecured claims should be adhered to and applied.

Having determined that not all of the workers' claims for severance and vacation benefits should be granted administrative expense priority status, the Unions' remaining claims offer no support for immediate payment of those claims, or that such payments should be paid from cash collateral. The portion of benefits attributable to post-petition work, which may be entitled to administrative status, is yet to be determined. As they have yet to be determined, the Debtor has not been tardy in making those payments and no grounds exist now for compelling the Debtor to make immediate payments. As for making payments from cash collateral and the Unions' citation to Bankruptcy Code § 552(b)(1), this Court has already exercised its powers under this section and others upon which MetLife and the other DIP Lenders have relied. In the Final DIP Order, this Court granted MetLife and the other DIP Lenders adequate protection, including, among other

things, replacement liens to secure the pre-petition loans made by the DIP Lenders.

Resort by the Unions to Bankruptcy Code § 552(b)(1) is simply not available.”

V. CONCLUSION

For all of the foregoing reasons, MetLife respectfully requests that this Court deny the Motion of United Food and Commercial Workers Union Locals 540 and 1564 for an order allowing and requiring immediate payment of administrative expenses, and grant MetLife such other and further relief as the Court deems to be just and proper.

Dated: October 22, 2001
Albuquerque, New Mexico

Respectfully submitted,

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MetLife reserves its right to submit additional legal memoranda and evidence in response to any attempts by the Unions to obtain similar relief under other statutes or authority as the relief now improperly requested under this section.

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