

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

In re: )  
 )  
Federal Transtel, Inc., ) Case No.: 01-09182-BGC-7  
 )  
Debtor. )

**ORDER**

The matters before the Court are:

- 1) An Application for Payment of Administrative Claim in the Amount of \$110.022. filed on September 27, 2005, by Randy Miller (Proceeding No. 780);<sup>1</sup>
- 2) An Application for Payment of Administrative Claim in the Amount of \$2,405 filed on September 27, 2005, by Randy Miller (Proceeding No. 781);<sup>2</sup> and
- 3) The Trustee's Objection to Administrative Claim of Randy Miller filed on November 10, 2005 (Proceeding No. 801).

After notice, a hearing was held on December 14, 2005. Appearing were: the claimant, Randy Miller (by telephone); Thomas Reynolds, the Trustee; Latanishia Watters for the Trustee; Daniel Sparks for Mercantile Capital; and Thomas Corbett for the Bankruptcy Administrator.

**I. Background**

This case was filed on December 11, 2001.<sup>3</sup> On December 21, 2001, a Motion to Appoint Interim Trustee on Expedited Basis or in the Alternative, Appointing an Examiner (Proceeding No. 15) was filed by Jesse Vogtle, Jr., the attorney for the Petitioning Creditors. A hearing was scheduled for February 4, 2002.

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<sup>1</sup> Mr. Miller has not filed a formal proof of claim for this claim.

<sup>2</sup> Mr. Miller has not filed a formal proof of claim for this claim.

<sup>3</sup>The case was originally filed in the Northern District of Georgia on December 11, 2001, and was transferred to the Northern District of Alabama on December 11, 2001.

On January 10, 2002, a Motion to Convert from Chapter 11 to Chapter 7 (Proceeding No. 31) was filed by the Bankruptcy Administrator. A hearing was scheduled for February 6, 2002.

On January 15, 2002, a Motion to Appoint Chapter 11 Trustee or in the Alternative, Appointment of an Examiner (Proceeding No. 44) was filed by Ronald Itzler, the attorney for Traffix, Inc. On January 17, 2002, a Joinder in Motion for Appointment of Interim Trustee (Proceeding No. 47) was filed by Brett Bloomston, the attorney for creditor Ami Shafir. A hearing was scheduled for February 6, 2002.

On January 23, 2002, the debtor filed a Motion to Continue (Proceeding No. 62) the February 6, 2002, hearing date. The Court heard the motion to continue on January 28, 2002. The Court entered an Order (Proceeding No. 90) on January 30, 2002, granting the continuance.

Mr. Shafir filed an Emergency Motion for Order Finding that Ami Shafir is Entitled to Participate in Discovery and to Compel the Appearance of Randy Miller and Daniel Nicherie at Their Depositions (Proceeding No. 98) on February 1, 2002. The Court entered an order on February 1 granting the motion.

The February 6 hearing was held. The Court continued the matters to March 5-6, 2002, for trial.

On February 28, 2002, the Bankruptcy Administrator filed an Amended Motion to Convert or Dismiss (Proceeding No. 157).

The debtor filed a Notice of Conversion from Chapter 11 to Chapter 7 (Proceeding No. 179) in open Court on March 5. On March 6, 2002, the Unsecured Creditors Committee filed a Motion to Reconvert the Debtor's Chapter 7 Case Back to Chapter 11 (Proceeding No. 181). Also on March 6, 2002, Mr. Shafir filed a Motion for Expedited Hearing on the Motion to Reconvert the Debtor's Chapter 7 Case Back to Chapter 11 (Proceeding No. 183).

The Court entered an Order (Proceeding No. 189) on March 8, 2002, granting the Motion to Reconvert the Debtor's Chapter 7 Case Back to Chapter 11 and ordering the appointment of a Trustee. On March 8, 2002, the Court appointed Thomas Reynolds as the Chapter 11 Trustee (Proceeding No. 191).

Mr. Reynolds filed a Motion to Convert from Chapter 11 to Chapter 7 (Proceeding No. 381) on August 20, 2002. A hearing was scheduled for September 23, 2002. The September 23 hearing was continued to November 19, 2002. The November 19 hearing was continued to January 29, 2003. The January 29 hearing was held and the Court gave the parties a deadline of February 18, 2003, to file briefs. The Court took under advisement the Motion to Convert from Chapter 11 to Chapter 7 and other pending matters on February 19, 2003.

On February 13, 2003, Daniel Nicherie, a creditor, filed a Motion to Convert from Chapter 11 to Chapter 7 (Proceeding No. 499). After notice, a hearing was held on March 18, 2003. The matter was taken under advisement.

On July 17, 2003, the Court entered an Order (Proceeding No. 541) denying the Trustee's motion to convert the case from one under Chapter 11 to Chapter 7. On August 18, 2003, the Court entered an Order (Proceeding No. 546) denying Mr. Nicherie's motion to convert from Chapter 11 to Chapter 7.

On August 2, 2005, the Trustee filed a Motion to Convert Case from Chapter 11 to Chapter 7 (Proceeding No. 758). After notice, a hearing was held on August 31, 2005. The Court entered an Order (Proceeding No. 765) on September 1, 2005, granting the Trustee's motion to convert. On September 2, 2005, the Court appointed Mr. Reynolds as the Chapter 7 Trustee.

On September 27, 2005, Mr. Miller filed an Application for Payment of Administrative Claim in the Amount of \$110,022 (Proceeding No. 780) and an Application for Payment of Administrative Claim in the Amount of \$2,405 (Proceeding No. 781). After notice, a hearing was held on October 26, 2005. The October 26 hearing was continued to December 14, 2005. On November 10, the Trustee filed an Objection to Administrative Claim of Randy Miller (Proceeding No. 801). In that pleading, the Trustee objected to Mr. Miller's Application for Payment of Administrative Claim in the Amount of \$110,022. In that pleading, the Trustee objected to Mr. Miller's request for an administrative claim in the amount of \$110,022.

## II. Findings of Fact

Mr. Miller has made two requests for administrative expenses. He has not filed formal proofs of claims for those requests, but he did file a proof of claim on September 27, 2005, (claim no. 111) for wages earned within 180 days of the bankruptcy filing. The amount of the filed claim is \$11,250.

Mr. Miller's first claim for administrative expenses is for severance pay and vacation pay. His request reads:

Dear Sir:

I am filing an administrative claim for payment of compensation due post-filing in the above cited case.

The claim is in the amount of \$110,022.00 for the compensation due in accordance with my employment agreement with the debtor. This amount consists of \$101,022.00 in severance pay and \$9,000.00 in accrued vacation. As support for this claim, I have included a copy of my Employment and NonCompetition Agreement, which was reviewed and agreed to by the

Bankruptcy Court and the Creditor's Committee at several court hearings during the first weeks of the case.

My contact information is:  
20610 Hatton St.  
Winnetka, CA 91306  
Telephone: 818.618.7217

Sincerely,

Randy S. Miller

Application for Payment Of Administrative Claim, filed September 27, 2005, Proceeding No. 780.

Mr. Miller's second claim for administrative expenses is for housing expenses. That request reads:

Dear Sir:

I am filing an administrative claim for payment of expenses incurred post-filing in the above cited case.

The claim is in the amount of \$2,405.00 for the rental of an apartment that was included in my employment agreement with the debtor. As support for this claim, I have included a copy of my American Express invoice for September 2002 with the rental charge denoted and a copy of a letter from the Mr. Thomas Reynolds, Trustee stating that the rent on the apartment was the responsibility of the debtor.

My contact information is:  
20610 Hatton St.  
Winnetka, CA 91306  
Telephone: 818.618.7217

Sincerely,

Randy S. Miller

Application for Payment Of Administrative Claim, filed September 27, 2005, Proceeding No. 781.

According to the pleadings, Mr. Miller was an executive with the debtor before the pending case was filed. The Employment and NonCompetition Agreement he refers to in his first request was a contract entered into between Mr. Miller and Federal Transtel, Inc. (FTT) on December 7, 2001. FTT filed a Chapter 11 petition in the Northern District of Georgia on December 11, 2001. That case was transferred to this Court. The Chapter 11 case was converted to Chapter 7 on September 2, 2005.

In contrast to Mr. Miller's statements in his first request, there is no evidence that Mr. Miller's contract, as he describes it, "was reviewed and agreed to by the Bankruptcy Court and the Creditor's Committee at several court hearings during the first weeks of the case." Similarly, there is no evidence that either FTT as the debtor-in-possession, the Chapter 11 trustee, or the Chapter 7 trustee assumed Mr. Miller's contract after the bankruptcy was filed.<sup>4</sup>

### III. Conclusions of Law

Section 503 of the Bankruptcy Code allows certain claims to be treated as administrative expenses. If those claims are so treated, they are entitled to priority payment before other claims. Section 503 reads in part:

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case....

11 U.S.C. § 503.

#### A. Employment Claim

Is a contract such as Mr. Miller's Employment and NonCompetition Agreement captured by section 503? The answer can be found in case law. In In re Airlift Intern., Inc., 761 F.2d 1503 (11<sup>th</sup> Cir. 1985), the Court of Appeals for the Eleventh Circuit recognized, "The Code, in order to streamline reorganization procedure, allows a debtor in possession to enter into contracts in the ordinary course of business without seeking court approval." Id. at 1509. In that light, courts agree that, "Employment contracts that substantially increase officers' salaries and severance benefits are extraordinary, falling outside the course of business." In re General Homes Corp., 199 B.R. 148, 150 (Bankr. S.D.Tex.1996). See also In re Dornier Aviation (North America), Inc., Case No. 02-82003-SSM-11, 2002 WL 31999222, (Bkrtcy. E.D. Va., Dec. 18, 2002), where the court recognized, "an agreement to pay a highly-compensated executive six months of severance pay simply does not fall within the category of agreements that are

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<sup>4</sup> Mr. Miller contends that a letter the Chapter 11 trustee wrote to Premier Living was an informal assumption of his contract. That letter is quoted in full later in this opinion.

appropriately considered to be 'in the ordinary course of business.' Such an agreement, ...would require court approval after notice to creditors." Id. at 8. And see In re Airlift Intern., Inc., 761 F.2d 1503 (11<sup>th</sup> Cir. 1985).

This Court agrees. The contract FTT entered into with Mr. Miller is not a contract entered in the ordinary course of business and is one that must be approved by the Court. In order for it to be approved by the Court, there must have been an assumption of the contract by either the debtor-in-possession or the case's trustees.

The first question then is: Did the debtor-in-possession or either trustee assume this contract? There is no evidence that any formal assumption was made. Neither the debtor-in-possession, the Chapter 11 trustee, nor the Chapter 7 trustee assumed Mr. Miller's contract and none of them sought the Court's approval for an assumption.

In contrast, in his argument to the Court Mr. Miller seems to contend that the debtor-in-possession, or the Chapter 11 trustee, informally assumed the contract. In support of his argument, Mr. Miller asks the Court to consider a letter the Chapter 11 trustee wrote to Premier Living. That letter reads:

Premier Living  
Post Office Box 361383  
Birmingham, Alabama 35236

Re: Randy Miller/Federal TransTel, Inc.

Dear Sirs:

I am serving as the Trustee in the bankruptcy case of Federal Transtel, Inc. The Chapter 11 bankruptcy case is filed in the Northern District of Alabama, Southern Division and has been assigned case number 01-09182-BGC-11.

Federal Transtel, Inc. employed Randy Miller as the Chief Operating Officer of the company pursuant to an employment agreement dated December 7, 2001. Because Mr. Miller was a resident of the State of California and was required to work in Birmingham, Alabama, the employment agreement included a provision for Federal Transtel, Inc. to pay rent on an apartment to be provided for Randy Miller. Apparently this arrangement worked fine until the company was compelled to cease operations and close its doors in 2002. At that time, Federal Transtel, Inc. discontinued operations and discontinued the payment of rent to Premier Living for the benefit of Randy Miller.

I enclose herewith a Proof of Claim form which you may wish to complete and file with the bankruptcy court in the bankruptcy case of Federal Transtel, Inc. Because the lease was not assumed or rejected within ninety days of the bankruptcy, it is my understanding that it should be deemed a rejected lease. It is my understanding that Mr. Miller has surrendered the premises to Premier

Living. It is the intention of Federal Transtel, Inc. to abandon any claim or interest which it might have in the premises.

Yours very truly,

Thomas E. Reynolds

Application for Payment of Administrative Claim in the Amount of \$2,405, September 27, 2005, Proceeding No. 781.

A similar situation existed in In re Enron Corp., 300 B.R. 201 (Bankr. S.D.N.Y. 2003). The court there wrote:

The Court notes that in continuing to employ Arnold, the Employment Agreement was not assumed by the Company by implication. A debtor's decision to elect to receive benefits under a contract post-petition does not translate into an obligation to assume the contract, because a debtor cannot assume a contract by implication. See Mason v. Official Comm. of Unsecured Creditors for FBI Distribution Corp. and FBC Distribution Corp. (In re FBI Distribution Corp.), 330 F.3d 36, 45 (1st Cir. 2003) (noting that, absent a court-approved assumption, an executory contract cannot be assumed by the unilateral acts of the debtor-in-possession). The assumption of a contract cannot be implied because notice to creditors and court approval is specifically required before contractual burdens can be imposed on an estate. In re Child World, 147 B.R. 847, 852 (Bankr. S.D.N.Y.1992). "Court approval ... provides protection to the unsecured creditors whose claims could be prejudiced by potentially burdensome contracts--ones that may have driven the business into bankruptcy in the first place ... it also insures that the [Unsecured Creditors] Committee has an opportunity to object." In re FBI Distribution Corp., 330 F.3d at 45.

Id. at 213-14.

The court in In re BankVest Capital Corp., 360 F.3d 291 (1<sup>st</sup> Cir. 2004) explains the rationale. The court recognized:

Section 365 generally allows the trustee in bankruptcy--or, as in this case, the debtor-in-possession--to assume or reject any pre-petition executory contract or unexpired lease, subject to the approval of the bankruptcy court. § 365(a); In re FBI Distrib. Corp., 330 F.3d 36, 42 (1st Cir.2003). This is one of the basic reorganizational tools available to debtors under the Bankruptcy Code. "[T]he authority to reject an executory contract is vital to the basic purpose [of] a Chapter 11 reorganization, because [it] can release the debtor's estate from burdensome obligations that can impede a successful reorganization." NLRB v. Bildisco & Bildisco, 465

U.S. 513, 528, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Under the Code, a rejected contract is considered to have been in breach prior to the bankruptcy petition, leaving the nondebtor party to the contract with a general unsecured claim for contract damages. 11 U.S.C. §§ 365(g)(1), 502(g); FBI Distrib., 330 F.3d at 42. If the debtor assumes a contract, however, it accepts both the burdens and the benefits of the bargain, and any liabilities incurred in the contract's postpetition performance will be treated as administrative expenses with priority status. See 11 U.S.C. § 507(a)(1) (priority for administrative expenses); FBI Distrib., 330 F.3d at 45. By permitting debtors to shed disadvantageous contracts but keep beneficial ones, § 365 advances one of the core purposes of the Bankruptcy Code: "to give worthy debtors a fresh start." In re Carp, 340 F.3d 15, 25 (1st Cir. 2003).

Id. at 295-96.

The court in In re Dornier Aviation (North America), Inc., 2002 WL 31999222, Case No. 02-82003-SSM-11, (Bkrtcy. E.D. Va. Dec. 18, 2002) agrees. The court wrote:

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, 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.

Id. at 8 (footnote omitted).

Based on the facts before the Court and the legal support described above, the Court finds that Mr. Miller's Employment and NonCompetition Agreement was not assumed by the debtor-in-possession, the Chapter 11 trustee, or the Chapter 7 trustee. What then is the status of Mr. Miller's request?



The court in In re Central Florida Metal Fabrication, Inc., 190 B.R. 119 (Bkrtcy. N.D. Fla. 1995) offers this advice:

where the contract is not assumed, the claim is not given administrative priority. Instead, it is limited by § 502. When the executory contract is rejected, the claim is deemed to have "arisen before the date of the filing of the petition." § 502(g). The result in this case would be an unsecured claim.

Id. at 122.

That court relied on the opinion of the Court of Appeals for the Eleventh Circuit in In re Airlift Intern., Inc., 761 F.2d 1503 (11<sup>th</sup> Cir. 1985). That opinion includes this explanation:

Our review indicates there are three general situations involving executory contracts or unexpired leases where the effect of a breach by the debtor or trustee must be considered: (1) where the trustee elects not to assume an ongoing executory contract or unexpired lease and rejects it, (2) where the trustee assumes an ongoing executory contract or unexpired lease prior to confirmation of the plan, and (3) where the trustee during reorganization proceedings enters into a new executory contract.

**In the first instance where the contract is not assumed prior to confirmation, the breach of the executory contract or unexpired lease is deemed to have occurred pre-petition, giving rise to a pre-petition claim under section 502(g), but not an administrative expense under section 503(b).**

Id. at 1508-09 (footnote omitted).

That court added this explanation of the reason this Court should review situations such as this one. The court explained:

By requiring the court to determine the reasonable necessity of the newly entered contract under § 503(b), Congress has insured some judicial control over the determination of what executory contracts will be granted administrative expense priority. The Code, in order to streamline reorganization procedure, allows a debtor in possession to enter into contracts in the ordinary course of business without seeking court approval. Thus, contracts initially entered into during reorganization, unlike contracts assumed during reorganization, will not have undergone court scrutiny. By

limiting automatic administrative expense treatment under § 365(g) to assumed contracts, and by requiring initially entered contracts to qualify under § 503(b) in order to be granted an administrative expense priority, Congress has insured both similar treatment and similar procedural safeguards for these fundamentally similar obligations.

Id. at 1509, n.5.

Therefore, based on the above, while Mr. Miller may have an unsecured claim based on his prepetition contract, he does not have an administrative expense claim based on that contract. If Mr. Miller chooses to file a claim for an unsecured debt, the trustee may respond.

### **B. Housing Claim**

As quoted above, Mr. Miller also makes a request for an administrative claim for housing expenses he incurred in connection with his employment. Mr. Miller requests, “\$2,405.00 for the rental of an apartment that was included in my employment agreement with the debtor.”

The court in In re White Motor Corp., 831 F.2d 106, 110 (6th Cir.1987) summarizes:

The test for whether a claim qualifies for payment as an administrative expense is set forth in In re Mammoth Mart, Inc. 536 F.2d 950 (1st Cir.1976). In Mammoth Mart the court stated that a claimant must prove that the debt (1) arose from a transaction with the debtor-in-possession as opposed to the preceding entity (or, alternatively, that the claimant gave consideration to the debtor-in-possession); and (2) directly and substantially benefitted the estate. Id. at 954.

Id. at 110.

Mr. Miller paid for housing under a rental agreement “assumed” by the debtor-in-possession. While Mr. Miller recites in his letter that the housing was in connection with the employment agreement this Court finds was not assumed, it is obvious that Mr. Miller continued to use the housing after the Chapter 11 case was filed and that according to the trustee’s letter, the debtor continued to pay for the housing until it ceased business in July 2002.

The expense also satisfies the other standards necessary for an administrative expense. It is probable that the work of a chief operating officer benefitted the estate.

Based on the above, the Court finds that Mr. Miller's request for \$2,405 for housing expenses is entitled to status as an administrative expense.

**Order**

Based on the above, it is **ORDERED, ADJUDGED and DECREED** that:

- 1) Mr. Miller's Application for Payment of Administrative Claim in the Amount of \$110,022 is **DENIED**;
- 2) Mr. Miller's Application for Payment of Administrative Claim in the Amount of \$2,405 is **GRANTED**;
- 3) The Trustee's Objection to Administrative Claim of Randy Miller of \$110,022 is **SUSTAINED**. It does not appear that the Trustee formally objected to Mr. Miller's administrative claim for \$2,405;
- 4) This order is a written opinion for purposes of the E-Government Act, Pub. L. No. 107-347.

Dated: January 3, 2006

/s/Benjamin Cohen  
BENJAMIN COHEN  
United States Bankruptcy Judge