UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Southern Film Extruders, Inc.,	)	Case No. 13-10977
	)	
Debtor.	)	
	)	

MEMORANDUM OPINION AND ORDER DISALLOWING CLAIMS

THIS CASE came before the Court for hearing on October 27, 2015, on the motion by the Unsecured Creditors' Committee (the "Committee") to dismiss (the "Motion to Dismiss") the Amended Joint Motion for Allowance of Administrative Expense Claims Pursuant to 11 U.S.C. § 503(b)(1)(A), § 503(b)(1)(A)(i), § 507(b)(2) of the Bankruptcy Code, Applicable Contract Law, and *Quantum Meruit* Doctrine [Doc. # 434][1] (the "Amended COA Application"), filed by of John L. Barnes, Jr. ("Barnes"), Gaston Roberts Baker, Jr. ("Baker"), Lanny Brooks Rampley ("Rampley"), John Scott Leven ("Leven"), Howard Regan, Jr.

[1] All docket references are to Case No. 13-10977 unless otherwise indicated.

("Regan") and Thomas R. Donaldson ("Donaldson") (collectively, "Claimants").[2] The Committee filed a Response in Opposition to the Amended COA Application [Doc. # 444] and supporting Memorandum of Law [Doc. # 445]. In its Response, the Committee requests that the Court dismiss the Amended COA Application pursuant to Rule 12(b)(6) Fed. R. Civ. Pro., made applicable to this contested matter pursuant to Rules 7012(b) and 9014(c) Fed. R. Bankr. Pro. and this Court's prior Scheduling Order [Doc. # 418], as amended [Doc. #'s 424 and 441] (collectively as amended, the "Scheduling Orders"). The Debtor filed a Response, joining the Committee's position [Doc. # 450]. Claimants filed a Memorandum of Law in Support of the Amended COA Application [Doc. # 453].

Jurisdiction and Authority

This Court has subject matter jurisdiction over the allowance or disallowance of cost of administration claims pursuant to 28 U.S.C. § 1334(b), as matters arising in a bankruptcy case. See Collier on Bankruptcy ¶ 3.01[3][e][iv] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (allowance or disallowance of claims are matters that "arise in" bankruptcy

[2] The Amended COA Application incorporates by reference the Response of Six (6) Claimants to Objections of the Official Unsecured Creditors' Committee Filed on June 10, 2014 and Motion to Conduct Limited Discovery Pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure [Doc. # 288] (the "Claimants' Original Response"). The Court has considered both documents for purposes of the pending Motion to Dismiss.

cases). The Amended COA Application is a statutorily core matter under 28 U.S.C. § 157(b)(2)(B), which this Court may hear and determine under and Local Rule 83.11 of the United States District Court for the Middle District of North Carolina. This Court has constitutional authority to enter final orders over the allowance and disallowance of claims against the estate – even where those claims may be based upon non-bankruptcy law. See Wiswall v. Campbell, 93 U.S. 347, 350, 23 L.Ed. 923 (1876) (concluding that the bankruptcy power includes the non-Article III authority to adjudicate state-law based claims against the estate). Article V, § 5.1 of the Plan of Reorganization filed on December 23, 2013 [Doc. #87] and confirmed on April 11, 2014 [Doc. # 139] (the "Plan") retained jurisdiction for this Court to determine the allowance of claims.

Standard of Review

The sole matter before the Court is the Committee's Motion to Dismiss the Amended COA Application for failure to state a claim under Rule 12(b)(6) Fed. R. Civ. Pro. Pursuant to Bankruptcy Rule 9014(c), the Court ordered in the Scheduling Orders that Bankruptcy Rules 7008 and 7012(b) would apply to this contested matter. Under Rule 12(b)(6), made applicable to this contested matter by Bankruptcy Rule 7012(b),"[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is

plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Although a plaintiff need only plead a short and plain statement of the claim establishing that he or she is entitled to relief, Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Thus, each claim asserted by Claimants will survive the Motion to Dismiss only if the Amended COA Application (as augmented by the Claimants' Original Response) contains "sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" Iqbal, 556 U.S. at 678, 129 S.Ct. 1937 (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955). The United States Supreme Court set forth this plausibility standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. (citations omitted).

To determine plausibility, all facts set forth in the Amended COA Application are taken as true. However, "legal

conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement" will not constitute well-pled facts necessary to withstand a motion to dismiss. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009).

In analyzing the claims alleged in the Amended COA Application in light of the Motion to Dismiss, the Court will determine if the Claimants have "nudged their claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570, 127 S.Ct. 1955. "Although '[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party,' a 'court need not [] accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.'" Anderson v. Kimberly-Clark Corp., 570 Fed.Appx. 927, 931 (Fed. Cir. 2014) (quoting Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)). See also GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1385 (10th Cir. 1997) ("[F]actual allegations that contradict . . . a properly considered document are not well-pleaded facts that the court must accept as true.").

Finally, when a motion to dismiss is based upon an affirmative defense, the court may dismiss the claim only if all the facts necessary to the affirmative defense clearly appear on the face of the complaint or matters of which the court may take

judicial notice, or if the complaint on its face reveals an "insurmountable bar" to recovery. See, e.g., Devlin v. Wells Fargo Bank, N.A., No. 1:12-CV-000388-MR-DLH, 2014 WL 1155415, at *3-4 (W.D.N.C. Mar. 21, 2014) (dismissing claim on statute of limitations grounds where the facts on the face of the complaint, along with consideration of the underlying loan application which the court considered for purposes of a motion under Rule 12(b)(6), demonstrated that the claim was barred by the statute of limitations).

Procedural and Factual Background[3]

This bankruptcy case is the result of the substantive consolidation of an involuntary petition filed against the Debtor under chapter 7 on July 25, 2013 (Case No. 13-10977) (the "Involuntary Case"), and a subsequent voluntary petition filed by the Debtor under chapter 11 on August 4, 2013 (Case No. 13-11026) (the "Voluntary Case"). The Involuntary Petition and the Voluntary Petition were consolidated under the captioned bankruptcy case number. (Claimants' Original Response, pp. 1-2; Order Granting Motion for Procedural and Substantive Consolidation [Doc. # 12; Case No. 13-11026, Doc. # 68]).

[3] The procedural and factual background is taken from the allegations of fact in the Amended COA Application and the Claimants' Original Response, the factual allegations of which are accepted as true for purposes of the Motion to Dismiss, and from the Court's own "docket in this case, including all documents and pleadings filed, all orders entered, and all arguments made at the hearings held before the Court during the pendency of this case," of which the Court may take judicial notice for purposes of the Motion to Dismiss. In re Cervantes, 503 B.R. 689, 691 (Bankr. N.D. Ill. 2013).

Barnes signed the Voluntary Petition as vice president on behalf of the Debtor in the Voluntary Case.

From its inception in 1965 through September 30, 2013, the Debtor produced and sold polyethylene packaging film. (Claimant's Original Response, p. 4, ¶ 1, p. 6, ¶ 5). In 1993, Joseph Martinez ("Martinez"), the president and CEO of the Debtor, purchased the other shareholders' interests, becoming the sole shareholder. (Id. ¶ 2). The Debtor sold its product through a salesforce that worked on a straight commission basis. (Id. p. 5, ¶ 3). Each of the Claimants was a salesman for the Debtor, who worked entirely on a commission basis, other than Barnes, who also drew a salary as a Vice President of Finance. (Id. p. 5, ¶ 5). In addition to being a salesman, Barnes was the Debtor's Vice President of Finance and chief financial officer. (Id. p. 6, ¶ 5; Amended COA Application ¶ 3 n. 2). As an officer of the Debtor, Barnes was an "insider" of the Debtor as defined under 11 U.S.C. § 101(31)(B)(ii). The Claimants were some of the Debtor's most successful salesmen, whose customers accounted for approximately $46,979,554 in sales, or 77% of the Debtor's entire 2012 sales revenue. (Id. pp. 6-7, ¶ 7; and Amended COA Application ¶ 4). The Claimants had substantial longevity with the Debtor pre-petition, having worked for the Debtor for at least twelve years, and Regan having been with the company for forty-six years. (Id. p. 5-6, ¶ 5).

None of the Claimants had a written employment contract with the Debtor, or was under any covenant not to compete, and each was an at will employee. (Id. p. 7, ¶ 8; and Amended COA Application ¶ 4). Despite the lack of a written contract, the Claimants "had express employment contracts with SFE . . ." with the terms established through a course of dealing and reflected in "extensive contractual documentation in the form of routine computer printouts and accompanying checks drawn on SFE's checking account. (Amended COA Application ¶ 4; Original Response ¶ 8). These express employment contracts provided compensation in the form of commissions payable to each salesman. The commissions were calculated based upon a combination of the invoiced amount and the profitability of the particular customer. (Claimants' Original Response, pp. 7-9, ¶¶ 8-10). The contracts specifically provided that "[e]ach salesman was compensated as and when SFE collected, from a customer for whom that salesman was responsible, full payment of an invoice to that customer." (Id. ¶ 3). Although the methods for calculating commissions varied among the Claimants, each of their contracts was identical in that the commission calculations were "based on the accounts receivable remitted to SFE by his customers during the preceding calendar month . . ." (Id. ¶¶ 9-12) (emphasis added). Therefore, unless and until SFE collected any account receivable from its customer, no

commissions were due or payable to the Claimants under the terms of their express contracts.

Four days after the filing of the Involuntary Petition, but prior to the entry of an Order for Relief, Martinez further left each of the Claimants a voicemail stating as follows:

> I'd appreciate it if you can call on our customers and see if we can drum up some business. We need orders and we need them as soon as possible. You know, things have been very hectic, as you well know. So, I'd appreciate your help if you can go and get some business. There is a price increase announced for next month by the resin companies, which we feel will probably go through; because they have not had one in a while and they get leery when they don't get their increases. So anything you can do to help, we'd really appreciate it. Take care and good luck.

(Id. ¶ 16).[4]

Also soon after the Involuntary Petition date, but prior to the entry of the Order for relief, Mr. Martinez and Barnes, acting on behalf of Martinez, encouraged the Claimants: (a) to accelerate their efforts to seek new purchase orders from customers; (b) to try to avert any cancellations of orders; (c) to assure customers that the Debtor would emerge from bankruptcy as a reliable supplier to its customers; (d) to assure the customers that the Claimants would remain with the Debtor; and (e) to assure customers that they could continue to work with the Claimants. (Id. ¶ 14). Contemporaneous with these

[4] Paragraph 16 of the Original Response adds emphasis and allegedly implied, but unstated, additional terms to the voicemail message. These non-factual, editorial, and argumentative additions by Claimants have been omitted here.

requests, there were "company-wide rumors that an agreement was in the making for SFE to sell its business to a competitor, Sigma . . . ."[5] (Id. ¶ 5).[6]

On the petition date of the Voluntary Case, Debtor filed its motion for authority to use cash collateral and incur post-petition secured financing [Case No. 13-11026, Doc. # 3] (the "DIP Financing Motion"). On the next day, this Court entered its Order designating Barnes to act on behalf of the Debtor [Case No. 13-11026, Doc. # 15].

The Court conducted hearings on August 6 and 16, 2013, to consider the DIP Financing Motion, among other matters. At these hearings, the Court advised all parties that it would not approve financing unless Epsilon obligated itself to pay for of all the Debtor's operational costs, including employee salaries and commissions, and any "trailing expenses" that were incurred by the estate but unpaid as of the termination of financing. [Case No. 13-11026, Doc. # 23, 20:45, 21:35, 23:25, Doc. # 24,

[5] According to the Amended COA Application, Epsilon Plastics, Inc. ("Epsilon") is an affiliate of Sigma Plastics, Inc. ("Sigma"). (Amended COA Application p. 2, n.1). Claimants refer to Sigma as the purchaser of the Debtor's assets in their filings. (E.g. Amended COA Application ¶¶ 5 and 6). The interchangeable references by Claimants to Epsilon or Sigma is consistent with the references by Barnes to Sigma or Epsilon when referring to Epsilon during his testimony in this case. (E.g. Testimony of Barnes at August 16, 2013 Hearing at 13:29). The record in this case is clear that Epsilon purchased the Debtor's assets. Therefore, the Court will refer to the buyer as Epsilon.

[6] On September 12, 2013, Barnes sent another email to the Claimants, among others, stating "we need orders badly. We have 6 lines down with risk of more going down this weekend. North plant especially needs orders." (Id. ¶ 19, Exhibit E).

5:30, 6:29, 7:15, 7:45]. The parties (including the Debtor, the Committee, Epsilon, and Barnes, testifying on behalf of the Debtor) repeatedly assured the Court that it was the intention and obligation of Epsilon to pay all operational expenses, and that all such expenses were provided in the budget submitted to the Court on behalf of the Debtor and as testified to by Barnes. [Case No. 13-11026, Doc. # 23, 20:45, 21:35, 23:25, 29:45, Doc. # 54, 3:00, 5:30, 10:00 (Barnes testimony), 29:45 (Barnes testimony)]. Barnes testified that he prepared the Debtor's operating budgets (the "Budgets") attached to the interim DIP financing orders and the Final DIP Order. On September 5, 2013, the Court entered its Order approving the DIP Financing Motion [Doc. # 19] (the "Final DIP Order"). The orders specifically prohibited the use of cash collateral or the proceeds of the DIP Financing "to pay expenses of the Debtor . . . except for those expenses . . . that are expressly permitted under the Budget." (See e.g. Final DIP Order ¶ 3). Pursuant to the Final DIP Order, "Epsilon [was] obligated to provide the DIP Financing to allow the Debtor to pay all administrative expenses incurred by the Debtor up to the time of the termination of the Debtor's right to use Cash Collateral, use the DIP Financing, and incur further post-petition obligations provided that and solely to the extent that such payments are in compliance with the Budget." ("Trailing Expenses") (Id. ¶ 15). The Debtor's

authority to use cash collateral under the Final DIP Order terminated at the earlier of October 5, 2013, or the day before closing of the sale to Epsilon. (Id. ¶ 22). Consistent with the terms of the Order, the Budget for the final DIP Order ran through the week of September 30, 2013, and not beyond. The Final DIP Order provided that it was binding on all parties in interest in the bankruptcy case. (Id. ¶ 9). No Claimant objected to the budget, or to the terms of the Final DIP Order. There is no dispute that Epsilon paid all Trailing Expenses set forth in the Budget, including commissions owed to the Claimants under the terms of their express employment agreements.

On August 19, 2015, the Debtor filed its emergency motion to establish bidding and auction procedures to sell substantially all of its assets to Epsilon Plastics, Inc. ("Epsilon") [Case No. 13-11026, Doc. # 55] (the "Sale Motion"). Attached to the Sale Motion was a copy of the proposed Asset Purchase Agreement with Epsilon (the "Epsilon APA"). Section 1.3 of the Epsilon APA provides in relevant part:

> Purchaser shall in no event assume or be responsible in any way for any liability or obligation of Seller. Seller shall retain full responsibility for all of its liabilities and obligations, whether known or unknown, liquidated or unliquidated, contingent, fixed, accrued or disclosed (collectively the "Excluded Liabilities"). Specifically, but without limiting the foregoing, Purchaser shall not assume or otherwise be liable for Excluded Liabilities . . . with respect to:

> (a) Employees or former employees of Seller, including any liability for accrued salaries, wages, [or] commissions….

On October 2, 2013, the Court entered its Order authorizing the sale of all of the Debtor's assets to Epsilon free and clear of liens, claims, interests, and encumbrances [Doc. # 46] (the "Final Sale Order"). The Final Sale Order provided that Epsilon did not assume any debt of the Debtor in connection with the sale of the Debtor's assets, and that the assets were sold free and clear of all liens, security interests, encumbrances, and claims (broadly defined), including any claims for successor liability. (Final Sale Order ¶¶ G and H).

At the hearing on confirmation of the sale, Barnes testified that time was of the essence for closing the sale because, among other reasons, the Debtor had no funds beyond the DIP financing provided by Epsilon to pay operating expenses, including employees. [Doc. # 49, 12:38 through 13:35]. At the October 1, 2013 hearing, counsel for the Committee discussed the terms of the Final Sale Order. Among other issues, the parties and the Court made clear that the Debtor's operating expenses were not to be taken out of the net $1,500,000 to be paid by Epsilon to the estate, but that those expenses were obligated to be paid by Epsilon as Trailing Expenses under paragraph 15 of the Final DIP Order. [Id. at 24:24 through 26:20]. Other than Barnes, none of the Claimants appeared at the hearings regarding

DIP financing or the hearing on confirmation of the sale, and none of them objected to the Final DIP Order (or the budget) or the Final Sale Order.

Both pre-petition and post-petition, the Debtor provided printouts to the Claimants on the fifteenth day of each month in the format set forth on Exhibit B to the Claimants' Original Response (the "Commissions Data"). (Claimants' Original Response, ¶ 8 and Exhibit B). Consistent with the terms of the parties' express employment contracts as alleged by the Claimants, the Commissions Data is based upon "CASH RECEIVED ON INVOICES PAID IN FULL." (Id., Exhibit B). Post-petition, on July 31, August 15, September 15, and September 30, leading up to the sale of the Debtor's business on October 1, 2013, the Claimants continued to receive monthly printouts setting forth commission information in the same format, and the Debtor simultaneously compensated the Claimants for the earned commissions on the same basis as it had pre-petition. (Id. ¶ 18). Claimants were free to leave their employment at any time "with impunity." (Amended COA Application ¶ 4). In addition to being compensated by commissions on accounts that were collected by the Debtor on the same terms and basis as had occurred pre-petition, the Claimants continued to perform as salesmen because they "reasonably believed that they would be retained as highly

paid salesmen of Sigma after closing (were Sigma to close on the purchase of the assets of the Debtor). . . .” (Id. ¶ 6).

Despite being an insider of the Debtor, Barnes did not file a motion for approval of any inducement to remain with the Debtor’s business as required by 11 U.S.C. § 503(c).[7] None of the Claimants re-negotiated their pre-petition contracts, requested approval of any retention agreements, or requested any equity interest in the estate or the Debtor. None of the Claimants objected to the terms of the sale to Epsilon, the cash

[7] Section 503(c) provides in relevant part:

> Notwithstanding subsection (b), there shall neither be allowed, nor paid—
>
> (1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor’s business, absent a finding by the court based on evidence in the record that—
>
> (A) the transfer or obligation is essential to retention of the person because the person has a bona fide job offer from another business at the same or greater rate of compensation;
>
> (B) the services provided by the person are essential to the survival of the business; and
>
> (C) either—
>
> (i) the amount of the transfer made to or obligation incurred for the benefit o, the person is not greater than the amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation incurred; or
>
> (ii) if no such similar transfer were made to, or obligations incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which the transfer is made or obligation is incurred . . . .”

collateral orders, or the terms of the post-petition financing including the Budgets.

Instead, only after the closing of the sale to Epsilon, Barnes and the other Claimants each filed a proof of claim during the month of November, 2013 as follows: (1) Claim No. 40 by Regan in the amount of $71,055; (2) Claim No. 41 by Leven in the amount of $60,437; (3) Claim No. 39 by Barnes in the amount of $34,637; (4) Claim No. 44 by Donaldson in the amount of $17,000; (5) Claim No. 51 by Rampley in the amount of $38,398; and (6) Claim No. 53 by Baker in the amount of $68,645 (collectively, the "Claimants' Proofs of Claim"). Instead of asserting claims for commissions due pre-petition, each of these claims asserted a priority claim for unpaid commissions as of September 30, 2013, comprised of three categories of sales: (1) sales for which the order had been accepted and fulfilled by the Debtor and for which the Debtor had an outstanding account receivable from the customer as of September 30, 2013 ("A/R Commissions"); (2) sales for which the Debtor had received a purchase order from the customer, but no work had been produced in connection with the order as of September 30, 2013 ("PO Commissions"); and (3) sales for which the Debtor had a purchase order from the customer, had produced the goods for the customer, but had neither shipped the goods to the customer, nor issued an invoice to the customer as of September 30, 2013 ("WIP

Commissions"). The A/R Commissions, the PO Commissions, and the WIP Commissions shall be referred to as the "Pre-asset sale Commission Claims".[8] Each of the Pre-asset sale Commission Claims asserted that all three categories of commissions were entitled to priority. All but the Rampley claim asserted that the commissions were entitled to priority under 11 U.S.C. § 507(a)(4), as commissions earned within the 180 days pre-petition. The Rampley claim did not specify the basis on which it asserted that the commissions were entitled to priority.

On June 10, 2014, the Committee, as authorized under Article II, § 2.8, ¶ C. of the Plan, objected to the Original Commission Claims [Doc. #'s 198, 201, 202, 204, 208, and 209]. In its objections, the Committee argued that the Original Commission Claims did not contain sufficient information to determine whether the commissions were earned during the 180 days pre-petition, and that the claims did not sufficiently identify the agreement pursuant to which the commissions were claimed.

The Claimants filed the Original Response to the Committee's objection, and, incorporating the allegations in its Original Response, moved to amend the claims [Doc. # 289]. On

[8] At the hearing on this matter, the parties agreed that all Pre-asset sale Commission Claims had been paid to the Claimants in full in the ordinary course of the Debtor's business for commissions on which the Debtor collected the outstanding account receivable prior to closing the sale to Epsilon.

October 27, 2014, and with the consent of the Committee, the Court entered its Order permitting the Claimants to amend their pre-petition claims on or before December 15, 2014, to file any motions for allowance of cost of administration claims within the scope of the Original Response, and to conduct limited discovery [Doc. # 318]. On December 15, 2014, the Claimants each filed amended proofs of claim (the "Amended Pre-petition Claims"),[9] asserting pre-petition claims entitled to priority under 11 U.S.C. § 507(a)(4) for commissions on accounts receivable that were outstanding as of July 25, 2013.[10] The Claimants calculated the commissions that they claimed were due to them based on accounts receivable that were outstanding, but for which no payment had been made by the customer as of July 25, 2013.[11] There is no indication in the Amended Pre-petition Claims whether the Claimants' services which gave rise to the underlying accounts receivable occurred within the one hundred

[9] The efficacy of the Amended Prepetition Claims is not before the Court on the current motion.

[10] Donaldson's amended proof of claim asserts a claim in the amount of $0.

[11] The Claimants have capped their pre-petition priority claims at $12,475 as provided in 11 U.S.C. § 507(a)(4). Any amounts in excess of that are asserted as general unsecured claims. For example, Barnes asserts a priority claim in the amount of $12,475, and a general unsecured claim in the amount of $2,163. Leven asserts a priority claim in the amount of $12,475, and a general unsecured claim in the amount of $3,660. Baker asserts a priority claim in the amount of $8,002.00, and a general unsecured claim in the amount of $1,927.20. Regardless of priority, however, the claims all are asserted based upon accounts receivable, purchase orders, or work in process that were generated by the Claimants' respective clients, but that remained unpaid as of the July 25, 2013 petition date.

and eighty (180) days prior to the petition date as required under 11 U.S.C. § 507(a)(4).

On July 6, 2015, the Claimants filed the Joint Motion for allowance of administrative expense claims pursuant to 11 U.S.C. §§ 503(b)(1)(A), 503(b)(1)(A)(i), and 507(b)(2), and under *quantum meruit* [Doc. # 410] (the "Original COA Application"). The Court thereafter entered its Scheduling Orders, and the Claimants filed the Amended COA Application on August 17, 2015, incorporating the Original Response, and superseding the Original COA Application.

Under the Amended COA Application, Claimants assert the following claims for relief: (1) claims in the total amount of $159,585 under an express contract and entitled to priority under 11 U.S.C. § 503(b)(1)(A)(i) for unpaid commissions on accounts receivable allegedly generated by the Claimants post-petition, but for which accounts receivable the Debtor had not collected from the customer as of the closing of the sale to Epsilon [Amended COA Application ¶ 10] (the "Post-petition Receivables Commission Claims"); (2) claims in the total amount of $40,228 under either an express contract, or alternatively *quantum meruit*, entitled to priority under 11 U.S.C. § 503(b)(1)(A)(i) for unpaid commissions on purchase orders allegedly generated by the Claimants' customers post-petition, and for which the Debtor had created the finished goods for the

respective customers, but for which purchase orders the Debtor neither had generated an account receivable, nor collected from the customer as of the closing of the sale to Epsilon [Id. ¶ 11] (the "Post-petition Finished Goods Commission Claims"); 3) claims in the total amount of $27,776.70 under either an express contract, or alternatively *quantum meruit*, entitled to priority under 11 U.S.C. § 503(b)(1)(A)(i) for unpaid commissions on purchase orders allegedly generated by the Claimants post-petition, but for which the Debtor had not created any finished goods, created any account receivable, or collected from the customer as of the closing of the sale to Epsilon [Id. ¶ 11] (the "Post-petition Purchase Order Commission Claims"); 4) claims in the total amount of $218,370.32 for breach of contract, or alternatively *quantum meruit*, entitled to priority under 11 U.S.C. § 503(b)(1)(A) "on account of [each Claimant's] preservation of his portion of SFE's customer base for the benefit of the Debtor and/or his election to remain with the Debtor as opposed to leaving the Debtor's employ and porting his customers to a competitor . . ." [Id. ¶¶ 14-15] (the "Equity Enhancement Claims"). Collectively, the Post-petition Receivables Commission Claims, the Post-petition Finished Goods Commission Claims, and the Post-petition Purchase Orders Commission Claims shall be referred to as the "Post-petition Commission Claims."

Analysis

The Post-Petition Commission Claims

In North Carolina, an express contract for employment is not required to be in writing. Walker v. Goodson Farms, Inc., 90 N.C. App. 478, 486, 369 S.E.2d 122, 126 (1988) (finding that, despite the plaintiff's failure to counter-sign a letter offering employment, the parties' course of dealing which was consistent with the terms of the unsigned letter was sufficient to create an employment contract). The Claimants allege that they each had an express employment contract with the Debtor, as further evidenced by "extensive contractual documentation" in the form of the computer print-outs and paychecks. (Claimants' Original Response ¶ 8). (See also Amended COA Application ¶ 4) ("the course of dealing between SFE and its salesmen reflects that all Six (6) Claimants (like all other SFE salesmen) had express employment contracts with SFE . . . ."). With the exception of Barnes' salary as an officer, which is not at issue here, the Claimants allege that their compensation was based solely on commissions calculated at various percentages under their respective express employment contracts. (Original Response ¶¶ 8-12). This compensation, however, was conditioned upon payment to SFE by the Claimants' customers. (Amended COA Application ¶ 3) ("Each salesman was compensated as and when SFE collected from a customer for whom that salesman was

responsible, full payment of an invoice to that customer.”). The Claimants allege that the terms of their post-petition compensation remained the same as it had pre-petition, stating that the computer print-outs that reflected the calculation of commissions post-petition were “in the same manner and with like effect” of those print-outs delivered pre-petition. (Original Response ¶ 18). Claimants specifically concede that “[s]uch computer print-outs generated by the Debtor and delivered to each Claimant reinforced to each Claimant the proposition that he would be compensated for his efforts in the future in the same manner as in the past.” (Id.) Consistent with the terms of their express contracts, the Claimants conceded at the hearing in this case that, with possible minor exceptions that are not relevant here, SFE paid all commissions due to each of them under the terms of their agreements for pre-petition and post-petition sales upon which their customers paid invoices to SFE. Nevertheless, and despite the express terms of the contracts, the Claimants assert contractual claims for commissions on sales to their customers that stood at varying stages of completion as of the sale of the Debtor’s assets to Epsilon, but for which SFE never received payment from the customers. In doing so, the Claimants contend that they are entitled to commissions for their generation of post-petition purchase orders “pursuant to an express employment contract with

the Debtor, . . . [for] purchase orders [that] eventually resulted in invoices, which invoices in turn became accounts receivable, and which accounts receivable in turn resulted in cash to [Epsilon] . . . ." (Amended COA Application ¶ 6).

The Committee does not dispute the terms of the Claimants' existing express employment contracts as alleged above. The Committee argues that the Claimants were not entitled to be paid any commissions under the terms of their express contracts unless and until Claimants' customers actually paid the invoices in full. The Claimants' own allegations confirm this precondition to the Claimants' right to commissions. In fact, the "contractual documentation" Claimants attached to the Original Response further confirms this condition to the right to payment. The Commissions Data specifically states that it is based upon "CASH RECEIVED ON INVOICES PAID IN FULL." (Claimants' Original Response, Exhibit B). Post-petition, on July 31, August 15, September 15, and September 30, leading up to the sale of the Debtor's business on October 1, 2013, the Claimants continued to receive monthly printouts setting forth commission information in the same format, and the Debtor simultaneously compensated the Claimants for the earned commissions on the same basis as it had pre-petition. (Id. ¶ 18).

This Court cannot re-write the contract from its undisputed terms.

> When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. Hartford Acc & Indemnity Co. v. Hood, 226 N.C. 706, 710, 40 S.F.2d 198 [sic]. It is the province of the courts to construe and not to make contracts for the parties. Williamson v. Miller, 231 N.C. 722, 727, 58 S.E.2d 743; Green v. Fidelity-Phenix [sic] Fire Insurance Co., 233 N.C. 321, 327, 64 S.E.2d 162. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense. Bailey v. Life Insurance Co., 222 N.C. 716, 722, 24 S.E.2d 614, 166 A.L.R. 826. A court cannot grant relief from a contract merely because it is a hard one. Durant v. Powell, 215 N.C. 628, 633, 2 S.E.2d 884.

Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N.C. 717, 719-20, 127 S.E.2d 539, 541 (1962). In this case, the contracts as alleged by Claimants required that any accounts receivable generated by their clients be paid in full to SFE prior to their entitlement to any commissions. The Amended COA Application asserts claims solely for accounts receivable, finished goods (but without accounts receivable), and purchase orders for which the Debtor never received payment from its customers due to the sale to Epsilon. Under the terms of the Claimants' employment contracts, commissions never became due from the Debtor to the Claimants for any of these sales or potential sales, and the Claimants are not entitled to recover under the terms of their express pre-petition contracts.

The pre-petition employment contracts were unchanged post-petition.

Claimants allege that a new post-petition contract was entered by the parties. This conclusory statement is not supported by the factual allegations, and is contradicted by the documents in the case. In support of this allegation, Claimants allege that, "on or soon after July 25, 2013," Martinez and Barnes asked Claimants: "(a) [to] accelerate their efforts to seek new purchase orders . . . , (b) to try to avert cancellation by customers of existing purchase orders . . . , (c) to assure customers that the Debtor would emerge successfully from bankruptcy . . . , (d) to assure customers that they (the Claimants) would continue to work directly with such customers . . . ." (Original Response ¶ 14). Martinez further sent an email to Claimants asking them to "call on our [SFE's] customers and drum up some business . . . ," (Amended COA Application ¶ 5), and left them a voicemail, telling them that "[w]e need orders, [s]o, . . . go get some business . . . ." (Original Response ¶ 16). Claimants assert that these requests were not part of their pre-bankruptcy employment agreement with SFE, (id. at ¶ 15), but that these "inducements" constituted a new "inherent" offer of employment. (Amended COA Application ¶ 6).

The conclusory allegation that a new employment contract was created is unsupported by the foregoing general statements attributed to Martinez and Barnes. These statements are insufficiently specific to plausibly state a claim for the creation of a new employment contract. See Conner v. Nucor Corp., Civil Action No. 2:14-cv-4145, 2015 WL 5785510, at *10 (D.S.C. September 9, 2015) ("Although the Complaint alleges that these two handbook policies 'altered plaintiff's employment status as they contained explicit promises regarding the terms and conditions of employment' . . . , such characterization is conclusory. Courts need not accept legal conclusions as true for purposes of Rule 12(b)(6) review."). See also Kirby v. Stokes County Bd. Of Educ., 230 N.C. 619, 628, 55 S.E.2d 322, 328 (1949) ("A contract for service must be certain and definite as to the nature and extent of the service to be performed . . . , and the compensation to be paid, or it will not be enforced."); Mayo v. North Carolina State University, 168 N.C. App. 503, 508, 608 S.E.2d 116, 121 (2005) ("[T]he terms of employment contracts require sufficient certainty and specificity with regard to the nature of the services to be performed, the place in which the services are to be rendered, and the compensation to be paid."). Even if the Court construes the allegations to be that all terms of the new contract remained the same as the old contract except for a new term under which commissions now would be fully earned

when the Claimants obtained a purchase order or when the company sold its assets (including accounts receivable), the foregoing statements by Martinez and Barnes — even in the context of a known pending asset sale — cannot plausibly be construed to create such a new contractual term. No other facts (as opposed to conclusory allegations) are set forth which would reflect anyone acting on behalf of the Debtor suggested or agreed that commissions would be due on conditions other than as previously agreed. If the Debtor believed such a bargain had been struck with the requisite meeting of the minds, the additional resulting commissions undoubtedly would have been reflected in the operating Budgets and Trailing Expenses prepared by Barnes and submitted to the Court, which it was not. See Fulk v. Piedmont Music Center, 138 N.C. App. 425, 430, 531 S.E.2d 476, 479 (2000) (finding that to constitute a valid contract, the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms; if any portion of the proposed terms is not settled, there is no agreement).[12]

[12] It is illuminating to contrast the facts in this case with those in Fulk. In Fulk, the court upheld the trial court's judgment in favor of a salesman where his claim for commissions was consistent with the terms of the parties' unwritten employment agreement, and the plaintiff's previous pay checks corroborated the plaintiff's right to the commissions under the terms of the contract as he asserted. Unlike in Fulk, in this case, not only were the statements by Barnes and Martinez insufficiently specific to create a contractual agreement, but the conclusory allegation of the existence of a new contract also: (a) is inconsistent with the terms of the agreement and course of conduct between the parties, including evidence of payment of commissions both pre-petition and post-petition; (b) is inconsistent with the Claimants' more specific allegation that the Claimants would be compensated

The statements attributed to Barnes and Martinez do not mention compensation in any way. Even if these requests could form the basis for an amendment to their compensation terms, it is implausible to allege that these duties were not part of their pre-petition job expectations. Clearly, highly compensated and successful salesmen who are paid commissions only when sales are collected by the company would usually be expected to attempt to maximize sales, to avert cancellation of orders, to assure customers of the company's viability if necessary, and to assure customers that they would continue to receive the service to which they were accustomed. See Ashcroft v. Iqbal, 556 U.S. 662, 663-64, 129 S.Ct. 1937, 1940-41 (2009) ("[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense . . . , [and] [w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."). For the foregoing reasons, the Claimants were not entitled to compensation under the terms of

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upon the same terms post-petition as they were in the past, (Original Response ¶ 18); and (c) is inconsistent with the written statement on the spreadsheets that commissions were calculated on "CASH RECEIVED ON INVOICES PAID IN FULL." (Claimants' Original Response, Exhibit B). See Doe v. Columbia University, 101 F.Supp.3d 356, 369 (S.D.N.Y. 2015) ("[A] court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss[,] . . . [a]ccordingly, that is an independent basis to ignore the allegation."); see also GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1385 (10th Cir. 1997) ("[F]actual allegations that contradict . . . a properly considered document are not well-pleaded facts that the court must accept as true.").

their express contracts, no new contract was created, and the Court will dismiss the Claimants' claims based upon express contract.

Quantum Meruit Claim for Commissions

The Claimants assert a right to recover the Post-petition Receivables Commissions Claims solely pursuant to an alleged express contractual agreement, which claims will be denied for the reasons set forth above. The Claimants alternatively assert a right to recover the Post-petition Finished Goods Commission Claims and the Post-petition Purchase Order Claims under a theory of *quantum meruit*. These alternative claims similarly will be denied.

Quantum meruit is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. Whitfield v. Gilcrhist, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998). "It operates as an equitable remedy based upon a quasi contract or a contract implied at law." Id. at 42, S.E.2d at 415. The North Carolina Supreme Court has outlined the contours of *quantum meruit* as follows:

> This Court has noted that a contract implied in fact arises where the intent of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts. Snyder v. Freeman, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980). Such an implied contract is as valid and enforceable as an express contract. Id. Except for the method of proving the fact of mutual assent, there is no difference in the legal effect of express

> contracts and contracts implied in fact. Id. "Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact." Id. It is essential to the formation of any contract that there be "mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." Id. at 218, 266 S.E.2d at 602. Mutual assent is normally established by an offer by one party and an acceptance by the other, which offer and acceptance are essential elements of a contract. Id. With regard to contracts implied in fact, however, "one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance." Id.

Creech v. Melnik, 347 N.C. 520, 526-27, 495 S.E.2d 907, 911-12 (1998). In Whitfield, the North Carolina Supreme Court further instructed:

> An implied contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. Id. Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment.

Whitfield, 348 N.C. at 42, 497 S.E.2d at 415.

In this case, the Claimants allege, and the facts support, the existence of express employment contracts that govern the employment relationship between the parties, including the terms and conditions of the Claimants' compensation. Under the terms of those contracts, the Claimants were not entitled to be paid commissions unless and until the Debtor's customers paid the Debtor on any account receivable generated from a sale made by the Claimants. There is no dispute that the Claimants were paid

all commissions due for sales upon which the Debtor was paid by its customers. The Claimants now seek to recover in *quantum meruit* commissions to which they were not entitled under the terms of their express contracts. Because the employment and compensation relationship between the Debtor and the Claimants was governed by an express contract, the law will not imply a contract pursuant to which the remedy of *quantum meruit* could be awarded. See Vetco Concrete Co. v. Troy Lumber Co., 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) ("It is a well established principle that an express contract precludes an implied contract with reference to the same matter"); Klebe v. U.S., 263 U.S. 188, 192, 44 S.Ct. 58, 59 (1923) ("[A]n express contract speaks for itself and leave no place for implications."); Southeastern Shelter Corp. v. BTU, Inc., 154 N.C. App. 321, 330-31, 572 S.E.2d 200, 206 (2002) ("If there is a contract between the parties, the contract governs the claim and the law will not imply a contract."); Industrial & Textile Piping, Inc. v. Industrial Rigging Services, Inc., 69 N.C. App. 511, 515, 317 S.E.2d 47, 50 (1984) (reversing trial court's award of *quantum meruit* damages where the parties had an express contract governing the relationship).

Claimants rely heavily upon In re Pre-Press Graphics Co., Inc., 287 B.R. 726 (Bankr. N.D. Ill. 2003) ("Pre-Press I"), in support of their assertion that they may recover in *quantum*

meruit. The opinion in Pre-Press I does not support their claims in this case. In Pre-Press I, the court considered whether incentive payments owed to the claimant under the terms of his pre-petition employment contract was entitled to priority. Claimant was an officer of the debtor, whose compensation under his employment contract consisted of two components: (1) the right to payment of cash in lieu of stock under a stock option agreement (the "incentive payments"); and (2) commissions on sales (the "commissions payments"). Id. at 727-29. Post-petition, the debtor encouraged him to stay and assured him that the debtor would honor the employment agreement. Id. at 729. With this assurance, the claimant continued to work, and the pre-conditions to his rights to the incentive payments accrued post-petition. Id. at 730. After attempts to renegotiate his employment contract failed, the debtor rejected the contract (including the incentive stock option agreement). The debtor maintained that the entire claim became a general unsecured claim for breach of the pre-petition employment contract. Id.at 729-30. The claimant asserted that, since the benchmarks underlying the incentive payments were met post-petition, his entire claim for the incentive payments was entitled to be treated as a cost of administration claim. Id. at 730.

The court in Pre-Press I began its analysis by considering the consequences of rejection of the contract. It noted that rejection constitutes a breach of the contract which is deemed to have occurred immediately pre-petition, and "usually results in a three-prong claim against the estate: (1) a general unsecured claim for any accrued . . . [obligations under the] contract prior to the bankruptcy filing . . . ; (2) an administrative . . . claim for . . . [obligations] that accrued post-petition but prior to rejection or the reasonable value of services or goods for that same time whichever the court finds appropriate . . . ; and (3) a general unsecured claim for 'rejection damages' (amounts due under the . . . contract) . . . ." Id. In determining whether any amounts that are due under the contract are entitled to administrative status, the court applied the test from the Seventh Circuit in In re Jartran, 732 F.2d 584, 586 (7th Cir. 1984). Pre-Press I, 287 B.R. at 730. In order for a debt to be entitled to priority under the Jartran test, the debt must: (1) arise out of a transaction with the debtor-in-possession; and (2) benefit the estate. Id. The court found that "[t]his two-part test employed in Jartran . . . is applied to executory contracts such as Employment Agreements even if the agreement has been rejected." Id. The court held that the post-petition inducement by the debtor for the claimant to continue to perform under the agreement was sufficient to

satisfy the first prong of the Jartran case. Id. at 731. In assessing the second requirement, that the debt benefit the estate, the court found that the portion of the debt given administrative status must be reasonable and "not disproportionate to the value of services rendered." Id. Therefore, although the claimant was entitled to a larger payment under the terms of his contract, the amount entitled to administrative status would be limited to the value of the post-petition services to the estate. Id. at 733 ("Hence, the ultimate question turns on whether the amount of Nolte's administrative claim as calculated under the Agreements is equal to the reasonable value for his services rendered post-petition for the Debtor."). The court ultimately allowed a portion of the amount claimed as an administrative expense, after calculating the benefit conferred upon the estate by the services. Id. at 734. In *dicta*, the court referred to the value of the services as *quantum meruit*.[13] Id. at 733 (citing 1 R. Ginsberg and R. Martin, Ginsberg & Martin on Bankruptcy, § 7.04 [C] at 7-44 (1998 Supp.) (citing, in turn, In re Vermont Real Estate Inv. Trust, 25 B.R. 809 (Bankr. D. Vt. 1982); and In re Selva & Sons, Inc., 21 B.R. 929 (Bankr. E.D.N.Y. 1982)). The Court interprets this reference as a literal translation of the

[13] "'*Quantum meruit*' as an amount of recovery means 'as much as deserved' . . . ." Quantum Meruit, Black's Law Dictionary (6th ed. 1990).

Latin, rather than used in the legal sense as an independent basis for recovery under an implied contract. The court did not allow the claimant to recover any amounts in excess of those to which he was contractually entitled, but limited his cost of administration claim to "as much as deserved." This literal interpretation of the Latin, rather than creating an independent right to recovery in *quantum meruit* where no right to recovery exists under the applicable agreements or state law, is consistent with Vermont Real Estate and Selva & Sons. These cases merely limit administrative rent claims to the value of the post-petition leasehold to the estate without even mentioning *quantum meruit*.[14] This interpretation also is consistent with the impetus for the limitation of administrative claims to the actual value of the services rendered. Unlike pre-petition wage claims under 11 U.S.C. 502(b)(7), administrative claims have no statutory maximum under 11 U.S.C. § 503(b).[15] To permit employees to recover wages beyond that

[14] The rejection of the employment contract in Pre-Press I did not terminate the express contract such that an implied contract could take its place. As the court later observed in In re Pre-Press Graphics, Inc., 300 B.R. 902, 909 (Bankr. N.D. Ill. 2003) ("Pre-Press II"), "the rejection of the Employment Agreement for § 365 purposes did not terminate it *ipso facto*. Rather, rejection constitutes a breach giving rise to Nolte's damage claim arising therefrom." Therefore, the court recognized the continuing existence of the rejected contract, and merely limited the administrative portion of the contractual claim to the post-petition value conferred on the estate.

[15] As observed by the court in Pre-Press I:

> A further restriction on administrative wage claims in all types of cases is necessary finding that the amount claimed as compensation for the services is reasonable. Section

which their express contracts permit in the guise of *quantum meruit* would turn this limiting policy and the opinion in Pre-Press I on their respective heads, and, more importantly, ignore the clear limitations of the availability of *quantum meruit* under applicable North Carolina law. If the Claimants were successful, it would permit any employee of a debtor to assert a cost of administration claim in hindsight by arguing that his compensation — whether by commission or salary — did not truly represent his value to the debtor. Such a result is not permitted under any theory of the Code or applicable non-bankruptcy law, and would cause uncertainty and costly valuation litigation for virtually every chapter 11 estate. Therefore, the Claimants cannot rely upon *quantum meruit* to recover commissions to which they are not entitled under the express terms of their contracts, and the Court will deny the Post-petition Commission Claims based upon either express or implied contract.

The Equity Enhancement Claims

The Claimants also assert claims in contract, or alternatively *quantum meruit*, for the value of "their post-petition preservation of their respective portions of the

> 503(b)(1)(A) does not impose a statutory maximum on administrative wage claims. The courts have, thus, policed against excessive wage claims by demanding that the claim not be disproportionate to the value of services rendered.

Pre-Press I, 287 B.R. at 731.

Debtor's customer base." (Amended COA Application ¶ 14). As argued by the Claimants, "[s]imply put, the claimants will not have been compensated for having added that value to the bankruptcy estate merely by the commissions they earned by soliciting post-petition purchase orders or by the *quantum meruit* equivalent thereof." Id. In their brief in support of this claim, the Claimants mix allegations from the Amended COA Application between the alleged express contract for Post-petition Account Receivable Commission Claims and the Equity Enhancement Claim, relying on the same statements by Martinez and Barnes for each alleged contract. (See October 19, 2015 Memorandum of Law [Doc. # 453] ("Claimants' Brief") ¶ 2). For the reasons set forth above, these allegations are insufficient to plausibly support the existence of post-petition contracts on terms other than the terms of the pre-petition contracts.

The Claimants also fail to plausibly allege a breach of any contracts. The Claimants repeatedly allege that they were employees at will. (See e.g., Amended COA Application ¶ 4). Therefore, even if the Claimants had alleged sufficient facts to establish a post-petition contract with the Debtor, which they did not for the reasons set forth above, they have not sufficiently alleged facts supporting a breach of any contract by the Debtor. The Claimants were employees at will, and prior to the end of their jobs due to the asset sale to Epsilon, the

Debtor paid all commissions due to each of them under the express terms of their employment contracts.

Since they each had express employment contracts with which the Debtor complied, as explained above, the Claimants similarly cannot recover in *quantum meruit* for any Equity Enhancement Claims.

For the foregoing reasons,[16]

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Amended COA Application is **DENIED** and **DISMISSED WITH PREJUDICE**.

[END OF DOCUMENT]

[16] As an independent basis for denial of any request by Barnes for compensation arising in connection with any "post-petition inducement" for him to remain with the Debtor, the request is disallowed for his failure to request approval of any such an arrangement under 11 U.S.C. § 503(c). At the hearing, Debtor and the Committee additionally raised the affirmative defenses of: (1) laches due to the reliance by the creditors supporting the plan which contemplated the full $1,500,000.00 being available for unsecured creditors; and (2) estoppel due to Barnes' testimony and completion of the Budgets that did not include any additional compensation for the Claimants. Since the Court has disposed of the claims on other bases, it is unnecessary to consider whether these affirmative defenses were sufficiently apparent on the face of the pleadings for purposes of Rule 12(b)(6).