UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

ENTERED
JUN 17 2003
U.S. BANKRUPTCY COURT
MDNC - YHP

IN RE:	)	
	)	
Convenience USA, Inc.,	)	Case Nos. 01-81478C-11
et al.,	)	through 01-81489C-11
Debtors.	)	(Procedurally Consolidated)
	)	

MEMORANDUM OPINION

These cases came before the court on December 19, 2002, for hearing upon a Motion to Enforce Management Restructuring Agreement which was filed on behalf of Charles Ford, Adam Wald and Scott Preston ("Movants"). Charles F. Carpenter appeared on behalf of the Movants, John A. Northen appeared on behalf of the Debtors, Diane P. Furr appeared on behalf of the Unsecured Creditors Committee, John H. Small and Gary W. Marsh appeared on behalf of LaSalle Bank National Association ("LaSalle Bank") and Michael D. West appeared as United States Bankruptcy Administrator.

MATTER BEFORE THE COURT

In the Motion to Enforce Management Restructuring Agreement, the Movants seek an order requiring the Debtors to pay to the Movants additional amounts which the Movants contend are due under a management restructuring agreement which the Movants entered into with the Debtors. The Debtors, the Committee, LaSalle Bank and the Bankruptcy Administrator oppose the motion, arguing that the Movants have been paid all amounts that were due under the management restructuring agreement.

JURISDICTION

The court has jurisdiction over the subject matter of this matter pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (B) which this court may hear and determine pursuant to 28 U.S.C. § 157(b)(1).

FACTS

Convenience USA was founded in February of 1998 and became a large consolidator of convenience stores in the southeastern region of the United States during the two years preceding the filing of these cases. When these cases were filed on May 21, 2001, the Debtors operated 235 convenience stores in Alabama, Florida, Georgia and North Carolina, which they owned or leased. The Movants were management level employees with the Debtors when these cases were filed. Charles Ford was the Chief Operating Officer, Adam Wald was the Vice President-Gasoline and Scott Preston was the Vice President-Marketing. The Debtors' top level of management consisted of Donald R. Draughon, the Chief Executive Officer, and Thomas U. Turner, President and Chief Financial Officer.

Shortly after the Chapter 11 cases were filed, the Movants were informed by Mr. Draughon and others that the Debtors wished for the Movants to continue as employees of the Debtors during the Chapter 11 case and that arrangements would be made for their continuing employment. On July 20, 2001, the Debtors filed a Motion for Order Authorizing Debtors to Adopt Interim Key Employee Retention Plan (the "KERP Motion"). The KERP Motion sought authority to adopt an interim key employee retention plan under which the Debtors would "pay certain Key Employees retention compensation, as well as provide the Key Employees with base-line severance benefits." The motion noted that the proposed plan would require the use of the cash collateral of LaSalle and recited that LaSalle had consented to the proposed plan.

The proposed plan divided Debtors' key employees into four tiers and described the benefits proposed for each tier of employees. Tier 1 consisted of Mr. Draughon and Mr. Turner. Tier 2 consisted of Messrs. Ford, Wald and Preston. Tier 3 consisted of Debtors' Controller, Treasurer, Vice President-Facilities, Regional Vice President for Florida and Alabama, Regional Vice President for North Carolina and Georgia, Vice President-Information Technology and Vice President-Training. Tier 4 consisted of all corporate employees at Debtors' headquarters who were not included in Tiers 1, 2, or 3, and all district managers.

Under the proposed treatment in the KERP Motion the Movants, as Tier 2 employees, continued at their current salaries and were entitled to retention compensation of one month's salary per quarter beginning with the quarter ended June 30, 2001, for so long as the Debtors employed each Tier Two Employee through confirmation of a plan. The Motion further provided that each Tier Two Employee "will also maintain a minimum severance benefit of twelve months' salary paid at Termination", which was defined as the firing of an employee without cause. Pursuant to an order entered September 19, 2001, the court authorized the Debtors to adopt the interim key employee retention plan as to Tiers 3 and 4, and continued the hearing on the motion as to Tiers 1 and 2 until a later date.

In August 2001, a series of meetings over a period of two days were held in Atlanta, Georgia, regarding the status and future course of the Debtors' bankruptcy cases. These meetings were attended by representatives of the Debtors, the Unsecured Creditors Committee, Debtors' primary secured creditors (i.e., LaSalle Bank, Morgan Stanley Asset Funding, Inc. and Enterprise Mortgage Acceptance Company) and by Messrs. Draughon, Turner and Ford.

The Debtors made an extensive presentation regarding their concept of a reorganization plan and future course of action for the Debtors. The Debtors' presentation was not well received by the secured creditors who were unwilling to go forward voluntarily with any course of action that did not include exposing the Debtors' assets for sell and disposition in the marketplace. The discussions in Atlanta ultimately led to a settlement regarding the manner in which the Debtors' Chapter 11 cases would be pursued. This settlement included several related and interdependent agreements. There was an agreement between the Debtors and Morgan Stanley which permitted the stores subject to the security interest of Morgan Stanley to be sold promptly and which contained a mechanism limiting the amount of any deficiency claim by Morgan Stanley. The Debtors also reached an agreement with LaSalle Bank in which the Debtors agreed to expose the stores subject to the LaSalle liens to the market in order to determine whether the best return would be achieved by a sale of the stores or through a plan of reorganization. The LaSalle agreement also provided for the continuing use of cash collateral by the Debtors while the Chapter 11 cases proceeded on the dual track of exposing the stores for sale while holding open the option of reorganizing. One of the conditions to LaSalle agreeing to the continuing use of its cash collateral was that there be a change in Debtors' management, which led to a third agreement providing for the restructuring of Debtors' management. This restructuring involved replacing "old management" (i.e., Messrs. Draughon and Turner) with a chief restructuring officer and "new management" consisting of Messrs. Ford, Wald and Preston. The transition from old management to new management was to be accomplished pursuant to a management restructuring agreement ("MRA") which would set forth the terms under which old management would leave and new management would remain.

There were extensive negotiations at the August meetings among counsel for LaSalle Bank, Debtors' financial advisor and counsel for the Debtors regarding the terms of the MRA. Because the Debtors had so few unencumbered assets, the only source for any payments to both old management and new management was the cash collateral of LaSalle Bank. Since the payments under the MRA were proposed to be "carved out" from LaSalle Bank's liens, LaSalle Bank therefore was an essential party to the negotiations and its approval of any management restructuring agreement was necessary.

Under the terms that were negotiated by Mr. Lederman and representatives of LaSalle, Ford was to be promoted to President and his annual salary increased by $75,000 to $200,000 per year. Ford also would receive reorganization/retention payments equal to one year's salary, payable in quarterly installments at the rate of one month's salary for every quarter beginning with the quarter ending June 30, 2001, and the balance due (if any) at plan confirmation or the sale of substantially all of the Debtors' assets. In the event of a termination without cause, Ford would be entitled to 12 month's severance pay in lieu of any other claims or benefits. Wald was to continue as Vice President, with his annual salary increased by $12,000 to $122,000 per year. Wald would receive retention payments equal to one month's salary at the end of every quarter beginning with the quarter ending June 30, 2001 and a lump sum reorganization bonus of $50,000 upon confirmation of a Chapter 11 plan or the sale of substantially all of the assets of the Debtors. In the event of a termination without cause, Wald would be entitled to 12 month's severance pay in lieu of any other claims or benefits. Preston was to continue as Vice President, with his annual salary increased by $12,000 to $97,000 per year. Preston would receive retention payments equal to one month's salary at the end of every quarter beginning with the quarter ending June 30, 2001 and a lump sum reorganization bonus of $50,000 upon confirmation of a Chapter 11 plan or the sale of substantially all of the assets of the Debtors. In the event of a termination without cause, Preston would be entitled to 12 month's severance pay in lieu of any other claims or benefits.

The only member of the new management that was present in Atlanta for the August meetings was Mr. Ford. The terms that were negotiated between the Debtors and LaSalle for new management were presented to Mr. Ford, who agreed to the terms that applied to him, and who also agreed to present the proposed terms to Messrs. Wald and Preston upon his return to North Carolina. Such a presentation thereafter was made to Mr. Wald and Mr. Preston, who also accepted the restructuring terms that were negotiated in Atlanta.

Counsel for the Debtors then proceeded with the preparation of a written agreement. The final draft of the MRA was completed in October of 2001 and was executed on October 9, 2001. The Debtors also finalized agreements with Morgan Stanley, LaSalle and the Committee of Unsecured Creditors pursuant to the overall settlement reached in Atlanta. The agreement with LaSalle which included provisions permitting the Debtors to use cash collateral, was expressly conditioned on court approval of the MRA, as well as the other agreements that comprised the settlement reached in Atlanta.

On October 16, 2001, following a hearing on a motion filed by the Debtors seeking court approval of the settlement, an order was entered approving the settlement and the agreements with Morgan Stanley, LaSalle Bank and the Committee, as well as the MRA. In approving the settlement, the order provides that "the MRA is necessary to preserve the business operations and thereby preserve the value of the Debtors' assets, for the benefit of secured and unsecured creditors." The order also recites that the "Retention and Severance Plan as to Tiers 1 and 2, would be superceded by the terms of the MRA, thereby preserving the business value which flows from retaining critical key employees . . ." By separate order entered on October 16, 2001, the Court denied as moot the KERP Motion as to Tiers I and 2.

Following the entry of these orders the Debtors proceeded with their Chapter 11 operations as contemplated by the terms of the settlement and the various agreements. Pursuant to the MRA, old management was replaced by the Chief Restructuring Officer, Jan Freiderich, and Messrs. Ford, Wald and Preston as new management. The portion of the settlement involving Morgan Stanley was implemented and the Morgan Stanley stores were sold and the net proceeds paid to Morgan Stanley. Pursuant to the LaSalle agreement, the Debtors undertook a major marketing effort to solicit sales for the remaining stores which resulted in the sale of 30 additional stores. The Debtors also rejected leases for an additional 26 stores which were closed. While these steps were being taken the Debtors continued to operate their remaining stores and Messrs. Ford, Wald and Preston continued as a part of the management of the Debtors until March 26, 2002, when their employment with the Debtors was terminated without cause.

Following the terminations, the Debtors paid to Messrs. Ford, Wald and Preston the amounts which Debtors contended were owed to them under the MRA. According to the Debtors, the amounts due were any accrued and outstanding salary at the increased salary levels, any unused vacation, any unpaid business expenses, the reorganization/retention payments from the second quarter of 2001 through the first quarter of 2002 and twelve month's severance pay.[1] The Debtors maintained that no reorganization/retention bonus payments were due or payable subsequent to the first quarter of 2002, the quarter in which termination of employment occurred and for which payment was made. The Movants contend that additional amounts are due them under the MRA. According to the Movants, the retention/reorganization bonuses remain payable notwithstanding the termination of their employment. Specifically, in addition to the $200,000 severance benefit already received, Mr. Ford seeks an additional $133,333.32, representing the unpaid portion of the $200,000 reorganization/retention bonus referred to in the MRA. Messrs. Wald and Preston, in addition to the $122,000 and $97,000 severance payments already received, seek payment of a reorganization bonus of $50,000.00 each plus payment of a retention bonus of one month's salary for each quarter from the second quarter of 2002 until confirmation of a Chapter 11 plan or a sale of substantially all of the assets of the Debtors, whenever that occurs and even though they no longer are employed by the Debtors.

[1]The payments that were made consisted of the following:

Employee	Increased Salary	Severance	Reorg/Retention	Accrued Vac.
Ford	$200,000.00/yr	$200,000.00	$16,666.67/qtr x 4 = $66,666.68	$11,538.46
Wald	$122,000.00/yr	$122,000.00	$10,166.67/qtr x 4 = $40,666.68	$ 7,038.46
Preston	$97,000.00/yr	$97,000.00	$8,083.33/qtr x 4 = $32,333.32	$ 3,730.77

Contrary to Debtors' position, the Movants maintain that the payment of the retention and reorganization bonuses was not conditioned upon their continued employment with the Debtors or the performance of any beneficial services to the Debtors following the date they signed the MRA. In short, Movants contend that they received "signing bonuses" which were payable in full once the agreement was signed and without regard to whether they elected to remain as employees of the Debtors after the agreement was signed.

DISCUSSION

The Movants argue that they are entitled to prevail in this proceeding because the written agreement signed by the parties does not explicitly provide that the retention/reorganization bonuses are payable only while the Movants remained employed by the Debtors. This argument is not accepted because it is contrary to a proper interpretation of the agreement under applicable principles of North Carolina law and because Movants' argument also is contrary to the intent of the parties and the purpose for which the parties entered the agreement.

I. Under a Proper Interpretation of the Agreement in accordance with Applicable North Carolina Law No Further Amounts Are Owed to Movants.

North Carolina courts[2] subscribe to the general rule of contract construction that "when a contract is fairly susceptible

[2]The agreement provides that it "shall be governed by the laws of the State of North Carolina, without regard to the choice of law provisions thereof."

of two constructions, one of which makes it fair and customary and which prudent persons would naturally enter into while the other makes it inequitable, the former interpretation must be preferred to the latter." Management Systems Associates, Inc. v. McDonnell Douglas Corporation, 762 F.2d 1161, 1172 (4th Cir. 1985), (quoting Bank of North Carolina v. Rock Island Bank, 570 F.2d 202, 207 (7th Cir. 1978)). In Management Systems, the Circuit Court, applying North Carolina law, was called upon to determine the amount of royalty payments that were required by the term "paid up license fee." The court held that royalties were required to be paid based upon the term of the leases and not the useful life of the systems, as proposed by the licensor. The court did so in reliance upon the above-stated rule of construction, stating:

> To adopt [the licensor's] argument on the construction of the Agreement would be to impose an obligation on [the licensee] to pay royalties on purely phantom, fictitious license fee payments, payments which were neither to be made by the lessee of the system nor to be collected by [the licensee]. Such a construction, in contrast to that which was presented by [the licensor], would give the Agreement an unreasonable construction, contrary to common sense.

Id.

Other North Carolina courts have applied similar reasoning in ruling on issues involving contract interpretation. See, e.g., De Bruhl v. State Highway & Public Works Commission, 245 N.C. 139, 145, 95 S.E.2d 553, 557 (1956) ("Instruments should receive sensible and reasonable constructions and not such a one as will lead to absurd consequences or unjust results."); Averea and Ledbetter Roofing and Heating Company v. Phillips, 85 N.C. App. 248, 253, 354 S.E.2d 321, 324 (1987) (to avoid unjust results, stockholders agreement providing for a right of first refusal on all transfers of stock in the company deemed not to apply to testamentary transfer, despite no such exception being explicitly included in the stockholders agreement).

Courts in other jurisdictions have followed the same approach. "When contractual interpretation makes no economic sense, that's an admissible and, in the limit, compelling reason for rejecting it." Dispatch Automation, Inc. v. Richards, 280 F.3d 1116, 1119 (7th Cir. 2002) (holding that new version of software product was a "new development," as opposed to a "new product," thereby entitling the developer to ownership rights, based on the rule that the more reasonable interpretation should control). "To the extent that a contract is susceptible of two interpretations, one of which makes it fair, customary, and such as prudent persons would naturally execute, while the other makes it inequitable, unusual, or such as reasonable persons would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred." Horbach v. Kaczinarek, 988 F. Supp. 1126, 1129 (N.D. Ill. 1997) (holding that language in stock purchase agreement providing for one party to "defend and hold harmless" the other party should not necessarily be read to prohibit a rescission claim made by the first party upon the failure of the transaction to close). Even in cases where courts have deemed the language of an agreement to be facially unambiguous, courts have departed from facially clear language that would lead to an unreasonable result: "[A] court can consider an alternative interpretation of a facially unambiguous contract term when the plain meaning interpretation of the contract would lead to an absurd and unreasonable outcome." Bohier-Uddehoim America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 95 (3rd Cir. 2001).

The rule outlined above also has been endorsed by the leading treatises on the law of contracts. One treatise notes "the well-settled rule that in construing the terms of an agreement, the fact that informed and experienced persons do not customarily bind themselves to unjust and unreasonable obligations must be considered by the court." 11 Samuel Williston & Walter Jaeger, A TREATISE ON THE LAW OF CONTRACTS § 32:11 (4th ed.). Moreover, "an interpretation which gives a reasonable, lawful and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." RESTATEMENT SECOND OF CONTRACTS § 203(a) (1981).

The position taken by the Movants in the present case is inconsistent with the rule of construction outlined in the foregoing cases and authorities in several respects. Specifically, (i) it is neither fair nor customary for an employee to be paid retention bonuses or performance-based bonus compensation related to a period subsequent to his termination or for accomplishments in which he took no part; (ii) it does not make economic sense that the Debtors would have agreed to pay new management both severance and an additional bonus relating to the period during which they were not employed by the Debtors; (iii) it does not make economic sense for LaSalle Bank to have carved out from its liens payments for retention/reorganization bonuses that remained payable post-termination, in addition to substantial severance payments, to individuals who no longer would be working to protect, preserve and enhance the collateral of LaSalle Bank; and (iv) prudent business people acting on the Debtors' behalf would not have knowingly entered into an agreement with the consequences that flow from the construction adopted by Movants.

The unreasonableness of Movants' interpretation of the MRA is perhaps best illustrated by their position that even if the day after they signed the agreement, they had quit work or been terminated without cause, they would still be entitled to the retention/reorganization bonuses, as well as the severance payments. Thus, a bonus that clearly was intended to retain employees and create incentive for future performance would be devoid of any retention or incentive effect. Such an interpretation clearly does not fit with what makes economic sense, what was reasonable under the circumstances or what prudent business people would have agreed to. Rather, Movants seek exactly the type of unreasonable and irrational outcome that courts in North Carolina and other jurisdictions have consistently rejected. In such a circumstance, the court has the discretion to adopt the interpretation that is reasonable and that likely fits with the parties' actual intent and understanding at the time of the agreement. In the present case, the reasonable interpretation of the MRA, consistent with economic and common sense and the surrounding circumstances at the time the agreement was reached, is that Movants are entitled to receive only the retention/reorganization payments for the period prior to their termination, all of which have been paid.

The position of the Debtors regarding the Motion to Enforce also is supported by the rule of construction that terms used in a contract should be construed based on their ordinary meanings. This rule has been embraced by the North Carolina Courts. See Internet East, Inc. v. Duro Communications, Inc., 146 N.C. App. 401, 553 S.E.2d 84 (2001) (citing Webster's Collegiate Dictionary in determining the meaning of the words "shall" and "unless"); see also RESTATEMENT SECOND OF CONTRACTS § 202 (1981); 11 Samuel Williston & Walter Jaeger, A TREATISE ON THE LAW OF CONTRACTS § 30:10 (4th ed.).

The plain meaning of the terms used in the MRA render unnecessary any express statement regarding the cessation of the continued accrual of retention and reorganization bonus payments post-termination. The meaning of "retain" – "to keep or hold in one's possession . . . to continue to practice, employ or the like" – necessarily implies that the retention bonus was intended to relate only to the period during which new management was actually in the employ of the Debtors, i.e., while they were "retained." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1109 (1976). Moreover, the payment of a "bonus" for services not actually performed conflicts with the ordinary usage of the word. "Bonus . . . . A premium or extra or irregular remuneration in consideration of offices performed or to encourage their performance." BLACK'S LAW DICTIONARY, 126 (6th ed). Movants' position on the payment of the retention and bonus amounts conflicts with the plain meaning of the relevant terms and thus should not be accepted.

Another relevant principle of North Carolina law is that a contract encompasses not only its express provisions, but also such implied provisions as are necessary to effect the intention of the parties, unless express terms prevent such inclusion. Lane v. Scarborough, 284 N.C. 407, 200 S.E.2d 622 (1973); Strader v. Sunstates Corporation, 129 N.C. App. 562, 500 S.E.2d 752 (1998) (court implied a term in a lease requiring the tenant to pay any financing charges incurred in constructing improvements on leased property despite lack of any express term in lease addressing the subject); Market America, Inc. v. Christman-Orth, 135 N.C. App. 143, 520 S.E.2d 570 (1999) (court held that covenant not to compete was enforceable against a distributor during her tenure as a distributor despite plain language of provision stating that covenant was applicable "for a period, of six months from [her] written resignation or termination."). Application of this principle in the present case dictates that the MRA should be read not to require the payment of any retention or reorganization bonus payments to the Movants subsequent to the termination of their employment.

In the Lane case, the North Carolina Supreme Court considered whether the surviving spouse of an individual who had died intestate should share in the estate of the deceased where the spouse and the deceased had entered into a separation and property settlement agreement one year prior to the death of the deceased. The separation agreement included language providing that neither party would "in any manner . . . molest or interfere with the personal rights, liberties, privileges or affairs of the other," as well as an agreement by the wife to "make no demands" upon the deceased for support. However, the separation agreement did not include the language required by the applicable North Carolina statute to effectuate a spouse's release of the right to intestate succession. Without this term, the spouse of the deceased would have been entitled to his entire estate upon his death if the court had limited its consideration to the actual contents of the agreement. In rejecting such a result, the Court cited liberally from Williston and other commentators and adopted the following rule:

> If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair and just men they ought to have made.

Lane, 284 N.C. at 410-11, 200 S.E.2d at 625 (quoting 17 Am. Jur. 2d § 255 at 649 (1964)).

The above principle has been adopted in other jurisdictions, as well. See e.g., In re Big V Holding Corp., 267 B.R. 71, 107 (Bankr. D. Del. 2001) (holding under New Jersey law that selling shareholder in a cooperative was required to make a withdrawal payment to the company despite the express terms of the applicable stockholders agreement not requiring such a payment upon the consummation of a sale of the type undertaken by the shareholder: "Terms will be implied in a contract where the parties must have intended them because they are necessary to give business efficacy to the contract as written." (quoting New Jersey Bank v. Palladino, 77 N.J. 33, at 46 (1978)); Scribner v. Worldcom, Inc., 249 F.3d 902, 907 (9th Cir. 2001) (holding under Washington law that "termination for cause," in the context of an employee's right to stock options, should be interpreted by "viewing contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties." (quoting Berg v. Hudesman, 801 P.2d 222, 228 (Wash. 1990)); Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Wells, 213 F.3d 398, 402 (7th Cir. 2000) (holding that ERISA plan, as subrogee of insured, was entitled to reimbursement of plan expenses based on insured's recovery in a personal injury suit related to her claim, but requiring that plan pay its pro rata share of the insured's legal fees, despite no provision of the plan requiring such contribution: "[C]ontracts . . . are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' intent that they not govern."

The adoption of this principle also is consistent with the general rule as stated by recognized and respected commentators on the law of contracts. See 11 Samuel Williston & Walter Jaeger, A TREATISE ON THE LAW OF CONTRACTS § 31:7 (4th ed.) ("where indispensable to effectuate the intention of the parties, a contract may be implemented beyond its express language");

3A CORBIN ON CONTRACTS § 670 (3d ed. 1961) (under certain circumstances, a condition will be implied "on grounds of fairness and justice."); RESTATEMENT SECOND OF CONTRACTS § 204 (1981) ("[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court").

Movants' assertion that they are entitled to both severance payments and the retention and reorganization bonuses for the period subsequent to their termination does not fit with the implicit terms of the MRA, as supported by the clear business purpose of the MRA. The purpose of the MRA was to facilitate the retention of new management for purposes of maximizing the value of the assets of the Debtors in the context of a sale or reorganization. Indeed, the Court's approval of the MRA was based on effectuating this goal and only under such circumstances would the MRA have been approved. While the written agreement does not explicitly state that payments on the retention/reorganization bonuses cease upon termination of employment, neither does it explicitly provide that payments continue notwithstanding the termination of employment. Hence, there is no express term that precludes an implied provision dealing with the status of retention/reorganization payments upon the termination of employment. Implicit in the concept of severance payments is that such payments are only made upon dismissal of an employee. Likewise, implicit in the concept of retention payments and reorganization bonuses, respectively, is that such payments are only made based on the retention of an employee or as a reward for an employee's contribution to the consummation of the reorganization or other transaction that triggers the payment. Because these meanings are obvious, the failure of the agreement to expressly provide that the accrual of the retention and reorganization bonuses would cease upon new management's termination should not change the result, particularly since the agreement does not expressly provide that the payments are to continue notwithstanding the termination of employment.

In the present case, as in Lane, the issue regarding payments following termination of employment relates to a term that was "perfectly obvious" to the parties to the contract. It was an implicit term of the MRA that the retention and reorganization bonuses would be payable only with respect to the period of time during which the New Management was actually employed by the Debtors. These bonuses were payments to be made directly in exchange for benefits received by the Debtors from new management during the period of their employment. Consistent with Lane and the predominant view of commentators and other courts, Movants are not entitled to retention or reorganization bonus payments for the period after their termination.

II. Movants' Interpretation of the Agreement is Contrary to the Intent of the Parties and the Purpose of the Agreement.

Without objection, both the Movants and the Debtors offered evidence regarding the negotiations and discussions in which the terms under which the Movants would function as the Debtors' new management were determined. Such negotiations occurred within and as a part of the broader negotiations in Atlanta concerning the terms under which Debtors' ongoing, overall Chapter 11 operations would be conducted. Because any payments to the Movants had to be "carved out" from the cash collateral of LaSalle, the employment terms for Movants had to be approved by LaSalle and, hence, were negotiated with LaSalle. It is undisputed that none of the Movants had any direct involvement in the negotiations with LaSalle. Instead, all of the negotiations with LaSalle in which the terms of Movants' compensation were negotiated were conducted by Michael Lederman, the Debtors' financial adviser. Once he determined from these negotiations the compensation terms for the Movants which LaSalle was willing to agree to, Mr. Lederman then presented those terms to Mr. Ford who was present in Atlanta. All sides agree that Mr. Ford was pleased with the terms presented by Mr. Lederman and accepted the terms proposed for him and agreed to present the terms proposed for Messrs. Preston and Wald, who also accepted the proposed terms. However, there is a sharp dispute in the testimony regarding the nature of the terms that, in fact, were presented by

Mr. Lederman and accepted by Mr. Ford. This dispute presents issues of fact to be resolved by the court as the trier of fact.

At first blush, the course of the negotiations in Atlanta might appear somewhat unusual in that Mr. Lederman undertook to negotiate the employment terms without having talked with Mr. Ford about such terms while the two men were in Atlanta. However, as disclosed by the testimony of Mr. Lederman, he earlier had discussed with Mr. Ford the proposed employment terms for Mr. Ford that were contained in the KERP Motion that had been filed in July. Under the terms contained in the KERP Motion, Mr. Ford was to be retained in his position at that time (i.e., chief operating officer) at his current salary, was to receive retention compensation consisting of an extra month's salary for each quarter that he remained employed with the Debtors and would receive a severance payment equal to his annual salary if his employment was terminated without cause. According to Mr. Lederman he had presented these terms to Mr. Ford before the motion was filed and Mr. Ford had been pleased with the terms. Mr. Ford disputes that the terms were discussed with him prior to the filing of the KERP Motion or that he found the terms acceptable. Based upon a credibility determination by the court as the trier of fact, the court accepts the testimony of Mr. Lederman and finds that the terms in the KERP Motion pertaining to Mr. Ford were presented to Mr. Ford prior to the motion being filed and that Mr. Ford indicated to Mr. Lederman that such terms were acceptable to him. Because he was thus aware that Mr. Ford was satisfied with the terms in the KERP Motion and that he would be asking that those terms be enhanced since it was proposed that Mr. Ford was to become Debtors' president, Mr. Lederman was able to proceed with the discussions in Atlanta with LaSalle without first meeting with Mr. Ford. Furthermore, all parties present understood that any proposed agreement would be presented to Messrs. Ford, Wald and Preston for their approval.

In discussing the employment terms for proposed new management, Mr. Lederman dealt primarily with the attorneys for LaSalle, including Gary Marsh. During these discussions Mr. Lederman requested that Mr. Ford's title be changed to president, that his salary be increased to $200,000, and that he have a retention bonus and a severance payment similar to the ones in the KERP Motion except that both be increased commensurate with the increase in salary. A similar request was made on behalf of Messrs. Wald and Preston. Because LaSalle was concerned that the Chapter 11 case move as quickly as possible, the concept of creating incentive for the new management to move the case along became a part of the discussions between Mr. Lederman and LaSalle's attorneys. These discussions led to the inclusion of a component in Mr. Ford's proposed compensation under which he would receive quarterly retention payments to remain with the Debtors and would be rewarded by paying him the balance of the retention compensation as a bonus if he led the Debtors to an early reorganization or sale of assets. This combination retention/reorganization bonus was quantified at $200,000, the amount of Ford's proposed annual salary, was payable in quarterly payments of $16,666.66 during Mr. Ford's employment unless a reorganization or sale of assets was achieved during his tenure, in which event the balance of the $200,000 would be paid to Mr. Ford.

The final proposal for Mr. Ford that came out of these discussions was that he be designated President, that his salary be increased to $200,000 per year, that he receive a retention/reorganization bonus under which he stood to receive $200,000 at the rate of $16,666.66 per quarter if he remained employed by the Debtors, but which included an incentive feature under which the entire unpaid balance of the bonus would be paid if he led the Debtors to an early reorganization or sale of assets and that he retain the same severance plan as provided under the KERP Motion which consisted of a lump sum payment equal to one-year's salary if he were terminated without cause. Similar terms were proposed for Messrs. Wald and Preston, except lower amounts corresponding to their lower salaries.

During the discussions with LaSalle, Mr. Lederman did not request or propose any type of "signing bonus" or any retention or reorganization bonus which would continue to be payable if

Mr. Ford's employment was terminated, and there was no discussion or approval of any such compensation during the discussions with LaSalle. To the contrary, the only compensation for Messrs. Ford, Wald and Preston that was discussed and approved that was payable after the termination of their employment was the severance compensation.

Once Mr. Lederman ascertained the extent of the compensation that LaSalle was willing to fund for new management, he then presented the proposed compensation to Mr. Ford, the only member of new management present in Atlanta. According to the testimony of Mr. Lederman, which the court accepts as credible, the presentation that he made to Mr. Ford consisted of a description of the compensation proposals which LaSalle had agreed to fund from its cash collateral. According to Mr. Lederman, he told Mr. Ford that the proposal for Mr. Ford was that he be elevated to president, that his annual salary be increased to $200,000 and that he receive a standard retention bonus except that in order to provide incentive for him to work for an early reorganization, the entire bonus would be paid early if a reorganization or sale of assets were achieved during his tenure. Mr. Lederman also explained to Mr. Ford that the proposed compensation for him included a severance plan under which he would be paid a sum equal to one year's salary if his employment were terminated without cause. In Mr. Lederman's presentation to Mr. Ford, the severance plan and the retention/reorganization bonus were presented to Mr. Ford as being alternative types of compensation by Mr. Lederman, who explained that one or the other would be available, but not both.

While Mr. Ford admits that Mr. Lederman may have referred to the retention/reorganization bonus as being a "standard" type of bonus, he otherwise disputes Mr. Lederman's version of their discussion. According to Mr. Ford, Mr. Lederman told him that the severance/reorganization bonus was like a "signing bonus" and that the minimum amount he would receive was $400,000.00. In his testimony, Mr. Lederman denied making any such statements to Mr. Ford or any other member of new management and testified that there was no reference to a "signing bonus" during his presentation to Mr. Ford. This conflict between the testimony of Mr. Lederman and that of Mr. Ford presents another credibility determination to be made by the court as the trier of fact. Based upon a credibility determination, the court accepts the testimony of Mr. Lederman as being truthful and accepts as factual his version of the discussion between him and Mr. Ford. Specifically, the court finds that Mr. Lederman at no time described any of the proposed compensation for Mr. Ford or the other members of new management as being a "signing bonus" or ever told Mr. Ford that the minimum that he would receive was $400,000.00. On these latter points, Mr. Lederman's testimony is corroborated by the testimony of Richard M. Hutson, one of the Debtors' attorneys, who was present during the conversation between Mr. Lederman and Mr. Ford. Mr. Hutson testified that he was present and heard the discussion between Mr. Lederman and Mr. Ford. According to Mr. Hutson there was no reference to a signing bonus during those discussions. Had there been a reference to a signing bonus, Mr. Hutson further testified that he was certain that he would have remembered it because he was not aware of a signing bonus ever having been approved in any case in this district.

Based upon the foregoing findings, the court is satisfied that there was no intent or understanding by either of the parties that the Movants would continue to receive payments pursuant to the retention and reorganization bonuses after the termination of their employment. Movants' position thus is contrary to the intent of the parties and to the purpose of their agreement.

III. Conclusion.

According to the Movants, when they signed the management restructuring agreement, Mr. Ford received a signing bonus of $200,000 payable without regard to whether he worked another day, while Messrs. Wald and Preston each received a signing bonus of $50,000, plus an entitlement of $10,166.66 per month for Mr. Wald and $8,083.33 per month for Mr. Preston until a plan was confirmed or the assets were sold, whenever that might occur and whether or not Messrs. Wald and Preston worked another day or contributed one iota to the reorganization or sale. Such a construction of the agreement is precluded by applicable principles of North Carolina law concerning the interpretation and construction of contracts. Moreover, at the time the agreement reached there was no intent or understanding by either of the parties that such benefits would be available to the Movants if their employment were terminated. Once the Debtors filed for bankruptcy, Movants were in the precarious position of being employees at will who stood to receive no severance pay or other benefits of any kind if their jobs with the Debtors ended. Once they accepted the MRA, however, Movants received a substantial increase in pay, a retention/reorganization bonus with an incentive feature that provided at least quarterly payments on top of their regular pay for as long as their employment continued and a guaranteed year's salary as severance pay if their employment were terminated without cause. Movants' testimony that they would not have signed the MRA and continued to work for the Debtors without the alleged "signing bonus" simply is not credible and is not accepted. Finally, the additional payments sought by the Movants are completely at odds with the applicable standards for the granting and approval of retention and reorganization compensation in bankruptcy cases and this court would not have approved such payments had they been presented for approval. Therefore, based upon the foregoing findings and conclusions, the Motion to Enforce Management Restructuring Agreement shall be denied. An order so providing will be entered contemporaneously with the filing of this memorandum opinion.

This 17 day of June, 2003

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
Convenience USA, Inc.,	)	Case Nos. 01-81478C-11
et al.,	)	through 01-81489C-11
Debtors.	)	(Procedurally Consolidated)
	)	

ORDER

For the reasons stated in the memorandum opinion filed contemporaneously herewith, the Motion to Enforce Management Restructuring Agreement filed on behalf of Charles Ford, Adam Wald and Scott Preston is hereby overruled and denied.

This 17 day of June, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge