

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA**

**IN RE:**

**Nomus-American, Inc.**

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**01-50255 11**

**ORDER**

THIS MATTER came on for hearing, after due and proper notice, before the undersigned Bankruptcy Judge, on December 19, 2001 in Winston-Salem, North Carolina, upon the Application by Janet Copia Pemberton for allowance of Administrative Expenses pursuant to 11 U.S.C. § 503(b)(1)(A). Appearing before the court were Gail C. Arneke, counsel for the Debtor, Wendell Schollander, counsel for Janet Copia Pemberton (hereinafter "Ms. Pemberton"), Gene B. Tarr and Nathan B. Atkinson, counsel for the Nomus-North Carolina Unsecured Creditors Committee, and Michael D. West, Bankruptcy Administrator.

The Court, after hearing the arguments presented and upon review of the exhibits and the file, finds for the reasons stated below that the Application by Ms. Pemberton requesting that her claim be treated as an administrative expense should be denied.

Ms. Pemberton was hired by the Debtor on May 10, 1999 and signed an Employment Agreement (hereinafter "Agreement") on November 1, 1999. The Agreement provided for, among other provisions, six months severance pay in the event of termination without cause, a stock option plan and a non compete clause. On January 31, 2001, the Debtor filed a Chapter 11 bankruptcy proceeding. The parties do not dispute that Ms. Pemberton was terminated without cause, as defined in the Agreement, on October 12, 2001. On November 14, 2001, Ms. Pemberton filed an application for administrative expenses in the amount of \$23,760.00 pursuant

to 11 U.S.C. § 530(a). The Agreement was rejected by the debtor in possession upon confirmation of the plan dated November 28, 2001.

11 U.S.C. § 503(b)(1)(A) provides: (b) after notice and a hearing, there shall be allowed administrative expenses . . . including (1)(A) the actual, necessary cost and expenses of preserving the estate including wages, salaries, or commissions for services rendered after the commencement of the estate. Courts that have addressed the issue of severance pay as an administrative expense have identified two distinct types of pay agreements, those that provide for severance in lieu of notice and those that provide for severance based on length of service. See, e.g., Mammoth Mart, 536 F.2d 950 (1<sup>st</sup> Cir. 1976); In re Public Ledger, 161 F.2d 762 (3d Cir. 1947); In re Miami General Hospital Inc., 89 B.R. 980 (S.D.Fl. 1988). The agreement in this case does not fall into either of these two categories. In the matter before the Court, paragraph 3.6b of the Agreement provides if the employment period is terminated by the company without cause. . .

after the six-month anniversary of the date of this agreement, the employee shall be entitled to continue to receive his base salary in effect at the time of the termination, in regular installments in accordance with the regular payroll practices of the company from the date of termination through the six-month period immediately thereafter (in each case a severance period) provided that the Executive has executed and delivered to the company a general release in form and substance satisfactory to the company and so long as the Executive has not breached the provisions of paragraph five hereof.<sup>1</sup>

Therefore, the Court must analyze Ms. Pemberton's claim under the general rules governing administrative expense priority. See In re Phones for All, Inc., 262 B.R. 914, 917 (N.D.Tex. 2001); In re Uly-Pak, Inc., 128 B.R. 763, 768 (Bankr. S.D.Ill. 1991).

The governing authority in this circuit in interpreting what constitutes an administrative

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<sup>1</sup>Paragraph 5 is a confidentiality and non-compete provision in which all parties agree is not applicable.

expense is set forth in In re Merry-Go-Round Enterprises, Inc., 180 F.2d 149 (4<sup>th</sup> Cir. 1999).

“For a claim to qualify as an actual and necessary administrative expense, (1) the claim must arise out of a post petition transaction between the creditor and the debtor in possession (or trustee); and (2) the payment must be supplied to and beneficial to the debtor in possession in the operation of the business.” Id. at 155 (quoting from In re Stewart Foods, Inc., 64 F.3d 141, 145 n 2 (4<sup>th</sup> Cir. 1995). Further, “since there is a general presumption in all bankruptcy cases that all of the debtor’s limited resources be equally distributed among creditors, § 503 must be narrowly construed.” Id. at 157.

Here, the severance provision of the Agreement was not the result of a transaction between the debtor in possession and Ms. Pemberton. Rather, the Agreement arose from a transaction that occurred entirely prepetition. There is no evidence to suggest that Ms. Pemberton was induced to continue to work postpetition by a promise of severance pay. The liability arose at the time the Agreement was executed; only Ms. Pemberton’s right to payment arose after the debtor in possession assumed control. Ms. Pemberton became eligible for severance pay immediately upon signing the Agreement. Her eligibility for severance pay did not arise from a transaction with the debtor in possession.

Ms. Pemberton’s claim also fails the second requirement that the consideration supporting her right to payment was both supplied to and beneficial to the debtor in possession in the operation of the business. Ms. Pemberton’s work postpetition was not consideration for the severance pay. That work was consideration for her salary, which she received in full. Ms. Pemberton contends that the Debtor benefitted following her termination from a non-compete clause contained in the Agreement. The Court finds, however, that the consideration for non-compete clause was the issuance to Ms. Pemberton of 500 shares of stock as it is plainly stated in

the Agreement in paragraph 3.12.<sup>2</sup> The consideration supporting Ms. Pemberton's right to severance payment was her agreement, prepetition, to forego other employment opportunities and remain an employee of Nomus. This consideration was rendered entirely prepetition and provided no benefit to the debtor in possession. See In re Commercial Financial Services, Inc., 246 F.3d 1291, 1294-95 (10<sup>th</sup> Cir. 2001).

In conclusion, the Court finds that Ms. Pemberton's severance pay neither arose from a transaction with the debtor in possession nor benefitted the debtor in possession in the operation of the business. The severance pay is not a necessary expense of preserving the estate under 503(b) and is not entitled to priority treatment as an administrative expense.

BASED ON THE FOREGOING, IT IS ORDERED, ADJUDGED AND DECREED, that the Janet Copia Pemberton's request that her claim for severance be accorded administrative priority is denied.

This the 8 day of February 2002.

**CATHARINE R. CARRUTHERS**

United States Bankruptcy Judge

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<sup>2</sup>Paragraph 3.1.2 provides "The Company will issue the Employee 500 Option shares of Nomus American, Inc., on a three year vesting schedule. . . in exchange for agreement to provisions covered in Section 5."