UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

AGWAY, INC.

Debtor

CASE NO. 02-65872 through 02-65877
Chapter 11
Jointly Administered

IN RE:

AGWAY GENERAL AGENCY, INC.

Debtor

IN RE:

BRUBAKER AGRONOMIC CONSULTING SERVICE LLC

Debtor

IN RE:

COUNTRY BEST ADAMS, LLC

Debtor

IN RE:

COUNTRY BEST-DEBERRY LLC

Debtor

IN RE:

FEED COMMODITIES INTERNATIONAL LLC

Debtor

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a contested matter arising out of an auction sale conducted before the Court on December 15, 2003 in which Agway, Inc. and its affiliated debtor companies

("Agway" or the "Debtors") sold Country Best Adams, LLC ("CBA") to Del Monte Fresh Produce N.A., Inc. ("Del Monte"). Ancillary to the CBA sale, the Debtors moved, pursuant to § 365 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), to assume and assign to Del Monte various CBA-related executory contracts and unexpired leases. On December 11, 2003, A. Smoot Langston, Jr. ("Langston") filed an objection to the assumption and assignment of an employment agreement between himself and the Debtors dated August 6, 1997 (the "Agreement"). In an Order dated December 19, 2003, the Court approved the sale of CBA to Del Monte and authorized the Debtors to assume and assign to Del Monte various CBA-related executory contracts and unexpired leases save the Agreement (the "Sale Order").

The Court agreed to hear oral argument on the issue of the assumability and assignability of the Agreement during its regular motion term in Syracuse, New York, on January, 6, 2004, after which the Court provided the parties an opportunity to submit memoranda of law. Further oral argument was heard in Syracuse on February 3, 2004, and the matter was submitted for decision.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(A).

FACTS

On August 6, 1997, Agway caused CBA to acquire, *inter alia*, Adams Produce Co. ("Adams"), a wholesale produce concern based in the Atlanta State Farmers Market in Forest Park, Georgia (the "Atlanta Market"), one of the largest markets of its kind in the nation. *See* Atlanta State Farmers Market Fact Sheet (2003) (reporting over $400 million in total sales for fiscal year 2003), *available at* http://www.agr.state.ga.us/assets/applets/FACT.pdf (last visited Mar. 5, 2004). At the time of the acquisition, Langston was president and forty-eight percent shareholder in Adams. Agreement, Background Statement, at 1. After the acquisition, Langston owned twenty percent of CBA and, as memorialized in the Agreement, became employed by the Debtors as executive vice president of CBA. *Id.* ¶ 1(a). The Agreement states an initial term of three years, which expired on August 6, 2000. *Id.* ¶ 2.

Paragraph 6 of the Agreement sets forth a restrictive covenant precluding Langston from competing with CBA, soliciting CBA's customers, and disclosing or using CBA's confidential information in exchange for annual payments of $18,000 through and including 2008 (the "Non-Compete Covenant"). *Id.* ¶ 6(c)-(e) & (j). The Non-Compete Covenant also provides that, should Langston resign or be terminated before 2008, he would be entitled to receive the present value of the balance of the non-compete compensation in a lump sum thirty days following his resignation or termination. *Id.* ¶ 6(j).

Before CBA was sold to Del Monte, the Court signed an Order approving a settlement with Langston, under which the Debtors paid Langston $700,000 in satisfaction of Langston's right to exercise a buy-out right or "put option" pursuant to article 10.6 of the Operating Agreement of CBA, dated August 6, 1997 (the "Operating Agreement"). *In re Agway, Inc.*, No. 02-65872 (Bankr. N.D.N.Y. Dec. 8, 2003). The Operating Agreement provides that contemporaneous with the closing of the put option, Langston shall resign from CBA and Agway.

Operating Agreement, at art. 10.6(D).

As noted above, the Debtors sold CBA to Del Monte in an auction conducted before the Court on December 15, 2003. Sale Order, at 4 ¶ I. Concomitant with the sale of CBA, the Debtors moved to assume and assign a bundle of CBA-related executory contracts and unexpired leases, which included the Agreement. *Id.* at 7 ¶ 9, Sched. 1. After Langston objected to the assumption and assignment of the Agreement, the Debtors and Del Monte agreed to close the sale of CBA without assuming and assigning the Agreement. *Id.* at 5 ¶ N, 7 ¶ 10. According to the Debtors, Langston's resignation from CBA became effective on December 12, 2003, upon the closing of Langston's put option. Letter from Jeffrey A. Dove, Esq. to Langston, dated December 16, 2003, *in* Debtors' Mem. of Law, filed Jan. 30, 2004 ("Debtors' Mem. of Law"), at Ex. C; *see* Debtor's Mem. of Law ¶ 20.

The Non-Compete Covenant provides the following, in pertinent part:

> (c) Noncompetition. . . . For so long as Executive [*i.e.*, Langston] is employed by the Company [*i.e.*, Agway] and continuing for . . . the 24 month period commencing on the effective date of termination or expiration of such employment by the Company for any reason, including a termination by the Company without Cause or a resignation with Good Reason (the "Restricted Period"), Executive covenants and agrees that in the Territory [*i.e.*, a 100-mile radius from the Atlanta Market] he will not, unless he receives the prior written consent of the Company, directly or indirectly:
>
> (A) have any interest in (whether as owner, consultant, officer, director or otherwise) (but excluding an interest by way of employment only),
>
> (B) act as agent, broker or distributor for, or adviser or consultant to, or,
>
> (C) be employed as an executive or hold an executive position in,
>
> any business (without regard to the form in which conducted) which is engaged, or which he reasonably knows is undertaking to become engaged, in the Territory in the business of wholesale distribution of fresh produce (the "Restricted Business").

> (d) Noninterference. During the Restricted Period, Executive shall not, whether for his own account or for the account of any other individual, partnership, firm, corporation or other business organization or entity (other than the Company), solicit or endeavor to entice away from the Company, any subsidiary or affiliate of the Company known by Executive to be a subsidiary or an affiliate of the Company (an "Affiliate") or otherwise interfere with the relationship of the Company or any Affiliate with, any person who is employed by or associated with the Company or any Affiliate (including, but not limited to, any independent sales representatives or organizations) or any person or entity who is, or was within the then most recent 12-month period, a customer, or client of the Company or any Affiliate located within the Territory.
>
> (e) Nondisclosure. . . . Executive covenants and agrees with the Company that he will not at any time, except in performance of Executive's obligations to the Company hereunder or with the prior written consent of the Board of Directors of the Company, directly or indirectly, disclose any secret or confidential information that he may learn or has learned by reason of his association with the Company, or any predecessors to its business, or use any such information to the detriment of the Company or any of its Affiliates. . . . "[C]onfidential information" includes . . . product price lists, costs sheets, customer lists, marketing plans or strategies, financial information . . . , business plans, prospects or opportunities. Executive understands and agrees that the rights and obligations set forth in this subparagraph 6(e) shall survive the Restricted Period and Executive's employment hereunder indefinitely, in the case of confidential information that constitutes a trade secret under applicable law, and for three years for all other confidential information.

Agreement ¶ 6(c)-(e). The Non-Compete Covenant also requires Langston to turn over confidential business documents upon his termination or upon Agway's request. *Id.* ¶ 6(f). The Non-Compete Covenant also is prefaced by a statement providing that Agway "would not cause CBA to acquire substantially all of the assets of Adams [*sic*] employ [Langston], or make the expenditures necessary to enable Executive to perform the duties incident to his employment by the Company, without obtaining the covenants and agreements of Executive set forth in this paragraph 6." *Id.* ¶ 6(a) (numbering omitted).

The Agreement is governed by Georgia law, *Id.* ¶ 13, and provides that invalid terms and provisions are severable from the remainder of the Agreement and are to be reformed to reflect the intention of the invalid term or provision. *Id.* ¶ 11.

ARGUMENT

Langston argues that the Agreement is not assumable because (1) the Agreement is a personal services contract; (2) the Agreement and the Non-Compete Covenant no longer exist because they expired on August 6, 2000, and August 6, 2002, respectively; and (3) the Agreement is not executory under the applicable tests.

The Debtors contend that the Agreement is executory and can be assumed and assigned under Code § 365. The Debtors contend, in the alternative, that if the Agreement is not executory they can sell their rights under the Non-Compete Covenant pursuant to Code § 363(b). Del Monte echoes the Debtors' position and adds that the Non-Compete Covenant did not expire and that the Agreement is not a personal services contract.

DISCUSSION

The initial question before the Court is whether the Agreement qualifies as an executory contract that the Debtors may assume and assign. Debtors in possession, such as the Debtors in this case, acquire under Code § 1107(a) a trustee's right to "assume or reject any executory contract or unexpired lease." 11 U.S.C. § 365(a).

Courts generally analyze executoriness under the "Countryman" test and the functional test. The Countryman test provides that a contract is executory if performance is owing by both parties to the contract and is so far underperformed that non-performance by either party would be considered a material breach of the contract. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973); *see Sharon Steel Corp. v. Nat'l Fuel Gas Dist. Corp.*, 872 F.2d 36, 39 (3d Cir. 1989); *In re Chateaugay Corp.*, 130 B.R. 162, 164 (S.D.N.Y. 1991). Under the functional approach, "the question of whether a contract is executory is determined by the benefits that assumption or rejection would produce for the estate." *Sipes v. Atlantic Gulf Communities Corp. (In re Gen. Dev. Corp.)*, 84 F.3d 1364, 1375 (11th Cir. 1996); *see also In re Magness*, 972 F.2d 689, 694 (6th Cir. 1992).

Courts determine the executoriness of a contract as of the petition date, which in this case is October 1, 2002. *Enterprise Energy Corp. v. United States (In re Columbia Gas Sys.)*, 50 F.3d 233, 240 (3d Cir. 1995); *Collingwood Grain, Inc. v. Coast Trading Co., Inc. (In re Coast Trading Co.)*, 744 F.2d 686, 692 (9th Cir. 1984).

Before analyzing the executoriness of the Non-Compete Covenant, the Court notes that the outcome of its analysis has no bearing on the question of whether the Non-Compete Covenant is enforceable. *See In re III Enters., Inc. V*, 163 B.R. 453, 459 n.4 (E.D. Pa. 1994) ("The enforceability of the terms of a contract is an issue which may properly be addressed after assumption or rejection occurs."). That is an issue the Court will leave for aggrieved parties to raise in an appropriate forum other than this Court. Accordingly, the Court's analysis will assume that the Non-Compete Covenant is enforceable without deciding the issue.

Preliminarily, the Court must dismiss two of Langston's arguments. First, he contends that Georgia law treats non-compete covenants as personal service contracts, which are not

assumable pursuant to Code § 365(c)(1)(A). Georgia case law clearly refutes this proposition as it applies to covenants such as the Non-Compete Covenant. *E.g., West Coast Cambridge, Inc. v. Rice*, 584 S.E.2d 696, 700, 262 Ga. App. 106, 111 (Ga. Ct. App. 2003). Second, Langston argues that the Agreement no longer exists because by its terms it expired on August 6, 2000. Even if the general provisions of the Agreement expired in 2000, the Agreement provides that the parties' rights and obligations under the Non-Compete Covenant are to be triggered by Langston's termination or resignation, which at the earliest is December 12, 2003. Agreement ¶ 6(c). Therefore, the Non-Compete Covenant survived the Agreement's alleged expiration in 2000 and is currently in effect.

The Court observes, just as our eminent brother, Chief Judge Stuart M. Bernstein of the United States Bankruptcy Court of Southern District of New York, did in *In re Riodizio, Inc.*, 204 B.R. 417, 421 (Bankr. S.D.N.Y. 1997), that executoriness "lies in the eye of the beholder." *Id.* at 423. There is a passel of case law supporting the notion that a non-compete agreement is not executory as well as similarly robust case law holding otherwise. *Compare In re Hughes,* 166 B.R. 103, 105 (Bankr. S.D. Ohio 1994) (non-executory); *In re Paveglio*, 1995 WL 465339 at * 5 (Bankr. M.D. Pa. 1993); *In re Drake*, 136 B.R. 325, 327-28 (Bankr. D. Mass. 1992); *In re Oseen*, 133 B.R. 527, 529 (Bankr. D. Idaho 1991); *In re Bluman*, 125 B.R. 359, 362 (Bankr. E.D.N.Y. 1991); *In re Cutters*, 104 B.R. 886, 890 (Bankr. M.D. Tenn. 1989)*; In re Hawes,* 73 B.R. 584, 586 (Bankr. E.D. Wis. 1987) *with Andrews v. Riggs Nat'l Bank (In re Andrews),* 80 F.3d 906, 914 (4th Cir. 1996) (Widener, J., dissenting) (executory); *In re Teligent, Inc.*, 268 B.R. 723, 731-32 (Bankr. S.D.N.Y. 2001); *In re VisionAmerica, Inc.*, No. 01-24615-B, 2001 WL 1097741, at *5 (Bankr. W.D. Tenn. Sept. 12, 2001); *In re Constant Care Comty. Health Ctr., Inc.*, 99 B.R. 697, 702 (Bankr. D. Md. 1989)*; In re Lopez*, 93 B.R. 155, 158 (Bankr. N.D. Ill.

1988); *In re Norquist*, 43 B.R. 224, 230-31 (Bankr. E.D. Wash. 1984); *In re Centr. Watch, Inc.*, 22 B.R. 561, 564 (Bankr. E.D. Wis. 1982). What this comparison illustrates is that not all non-compete covenants are created equal and that a court must rest its executoriness analysis on its interpretation of the language of the particular agreement before it and the parties' rights and obligations that arise from that agreement.

In support of his argument that the Non-Compete Covenant is not executory, Langston cites this Court's dicta in *In re Schneeweiss*, 233 B.R. 28 (Bankr. N.D.N.Y. 1998). While the Court in *Schneeweiss* did mention in a non-dispositive passage that a non-compete agreement between the debtor, Stephen M. Schneeweiss, a former college president, and his employer, Cazenovia College, was not executory, the posture of *Schneeweiss* is entirely inapposite. *Id.* at 32. There, the chapter 7 trustee was attempting to recover payments made to the debtor under a non-compete agreement on the theory that they were estate assets under Code § 541; there was no attempt by the trustee to assume or reject the agreement. *Id.* at 28-29. The debtor's principal argument was that, because the agreement was executory, the payments constituted "earnings for services performed . . . after the commencement of the case," which is a type of property excepted from the estate under Code § 541(a)(6). *Id.* at 29. This argument was a creative but nonetheless futile attempt to evade the trustee's marshaling of estate assets. In any event, the Court disagreed, holding that the payments were property of the estate and dismissing in dicta the debtor's fallacious and misplaced argument regarding the executoriness of that agreement. *Id.* at 30-32. Unlike the case at bar, *Schneeweiss* did not arrive before the Court on a motion to assume or reject, which is the only basis on which a court's determination of executoriness is outcome-determinative. Moreover, a hypothetical rejection of the non-compete agreement in *Schneeweiss* would have failed the functional test because rejection would not have benefited the

creditors. *Id.* at 32. Our application of the functional test below leads us to contrary conclusion in this case.

In this case, the Non-Compete Covenant is prefaced by the following language: "[Agway] would not cause CBA to acquire substantially all of the assets of Adams [*sic*] employ [Langston], or make the expenditures necessary to enable Executive to perform the duties incident to his employment by the Company, without obtaining the covenants and agreements of Executive set forth in this paragraph 6." Agreement ¶ 6(a) (numbering omitted). This language cannot more clearly express the materiality of the Non-Compete Covenant relative to the Agreement. It evinces the parties' understanding that Langston's performance of the Non-Compete Covenant was a substantial element of the Agreement. It is worth noting that not all non-compete covenants contain such language of material inducement. The court in *Teligent* dealt with an agreement that arrived before it on a nearly identical posture. It found a non-compete covenant that was executed coextensively with a merger agreement and that contained language of material inducement to be executory.[1] *See Teligent*, 268 B.R. at 731-32. In addition, both Langston and the Debtors owed substantial performance under the terms of the Non-Compete Covenant as of the date of the Debtors' motion to assume the Agreement—the Debtors still owed annual payments to Langston in exchange for his compliance with the Non-Compete

[1] In contrast, in *Schneeweiss* the debtor and Cazenovia College executed a non-compete agreement in contemplation of Schneeweiss's retirement from his post as president of the college. Thus, one could conclude that the non-compete agreement in *Schneeweiss* was nothing more than a vehicle whereby the debtor was to be provided with a lucrative retirement compensation package rather than an instrument reflecting Cazenovia College's desire to prevent Schneeweiss from seeking employment in a similar college setting.

Covenant. Applying the Countryman test to the prefatory language and the terms of the Non-Compete Covenant, the Court finds that the Agreement, including subparagraph 6, was executory because non-performance of the Non-Compete Covenant by either party would comprise a material breach.

The functional test also supports this conclusion. The Debtors would benefit from relieving themselves of the Agreement's obligations. Specifically, the assignment of the Agreement would allow the Debtors to shift their duty to pay Langston to Del Monte. The addition of such funds to the Debtors' estates would clearly benefit the creditors as well.

Finally, the Court's conclusion regarding executoriness effectively moots the Debtors' argument that they can sell their rights under the Agreement pursuant to Code § 363(b) should the Agreement be found to be non-executory.

Accordingly, for the foregoing reasons, the Court grants the Debtors' motion to assume and assign the Agreement to Del Monte.[2]

IT IS SO ORDERED.

Dated at Utica, New York

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[2] The Court notes certain correspondence among the parties after December 15, 2003 concerning an apparent dispute regarding compensation allegedly due under ¶ 6(j) of the Agreement. The Court expects that, in the course of the assumption and assignment of the Agreement, the parties will resolve this issue in an orderly fashion and in accordance with the procedures laid out by Code § 365(b)(1).

this 5th day of March, 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge