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

APPEARANCES:

MENTER, RUDIN & TRIVELPIECE, P.C.
Attorneys for Debtor
500 S. Salina Street
Syracuse, New York 13202-3300

JEFFREY A. DOVE, ESQ.
Of Counsel

ANN W. MANION, ESQ.
Attorney for Richard Cordisco
1750 Genesee Street
Utica, New york 13502

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

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

Under consideration by the Court is a motion filed by D. Clark Ogle, Trustee of the Agway Liquidating Trust (the "LT") on August 25, 2004, seeking an order, pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") and sections 105 and 502(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), fixing or expunging the claims of certain former employees, including the claim of Richard Cordisco ("Cordisco"). The Motion seeks to reduce Cordisco's proof of claim from $30,000 to $662.58. Cordisco filed an objection to the Motion, asserting that he is entitled to his $30,000 claim for a severance benefit.

The Court heard the motion at its regular motion terms in Utica, New York on September 28, 2004 and October 26, 2004. The Court then scheduled the contested matter for an evidentiary on March 30, 2005. Upon conclusion of the March 30th evidentiary hearing, the Court reserved decision on the LT's two requests. The Court provided the parties an opportunity to file memoranda of law by April 29, 2005.

JURISDICTION

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

FACTS

Cordisco was an employee of Agway Energy Products, a division of Agway, Inc. (collectively referred to as "Agway"). Article 12 of Agway's Employees' Retirement Plan (the "Plan") provides an Additional Retirement Benefit ("Severance Benefit") to those employees, including Cordisco, who met certain criteria, one of which was that the employees' jobs must have been terminated involuntarily because of a "Work Force Reduction." *See LT Ex. 6*. Article 12.05(e) defined Work Force Reduction as a "permanent elimination by the Employer of an employment position or positions as a direct result of a plant or facility closing, an operation shutdown, or a job elimination or discontinuance." *Id.* Excluded from receiving the Severance Benefit were those employees who were "offered reasonably comparable employment with an entity to which the Employer has sold or otherwise transferred some or all of the Employer's assets, operations, or employees, at the time of the Work Force Reduction..." *LT Ex. 6*, *Article 12.05(d)(2)(iv)*.

When Suburban Propane ("Suburban") purchased the Agway Energy Products division pursuant to an order of this Court in December 2003, Suburban offered Cordisco the same at-will employment at the same permanent position and at the same compensation he had been receiving when he was employed by Agway. *See LT Ex. 2*. Cordisco did not have to relocate, but the offer

did require Cordisco to sign both a covenant not to compete and a confidentiality agreement. *See id*. The non-compete agreement placed several restrictions upon Cordisco. *See id*. For example, the agreement provided that during Cordisco's employment with Suburban and for two years after the employment ends, Cordisco could not work for himself or for anyone else within a 30 mile radius of a Suburban customer service center or regional office center (or a Suburban regional or sales territory if Cordisco ever became responsible for such a territory) where Cordisco worked at any time in the two years preceding his employment termination with Suburban. *See id*. Using the same geographic and time restrictions, the agreement also prohibited Cordisco from soliciting Suburban's customers or soliciting the employment of Suburban employees. *See id*. The agreement additionally prevented Cordisco from disclosing confidential information relating to Suburban's trade secrets, customers, suppliers, financial information, etc. *See id*.

Cordisco notified Suburban by letter dated on December 18, 2003, that he declined the offer of employment because he did not want to sign the covenant not to compete "in the absence of significant additional compensation to offset the burden of the covenant." *Cordisco Ex. 3*. Cordisco's employment with Agway terminated on December 23, 2003. Agway's Employee Separation form signed by Cordisco's supervisor and an Agway Human Resource Director/Representative states that Cordisco was not eligible for Severance Pay and that he voluntarily quit because he "refused offer of work." *LT Ex. 8*. William Parker ("Parker"), a former member of Agway's Administration Committee and a former Agway vice-president who now works for the LT, testified at the evidentiary hearing that Agway does not normally provide a copy of the Employee Separation form to its departing employees; instead, it is kept as an

internal record.

On December 31, 2003, Cordisco sent a letter (the "December letter") by certified mail to Agway demanding benefits he claimed he was entitled to under the Agway Employees' Retirement Plan.[1] *See Cordisco Ex. F*. Receiving no response, Cordisco sent a follow up letter on January 15, 2004. *See Cordisco Ex. G*. Cordisco testified that he mailed the January letter to an address that Agway had provided in a letter to Cordisco in December 2003, concerning his unused vacation amount. This address contained a different P.O. box number than the P.O. box number in Cordisco's December letter to Agway. *See Cordisco Exs. F & G*. In his January letter, Cordisco requested his Severance Benefit. *See Cordisco Ex. G*. He also allegedly enclosed a copy of the December 18th letter to Agway. *See id*. A return receipt shows that an Agway employee signed the receipt and accepted the letter. *See id*. Cordisco testified that in February of 2004, he spoke with a human resources representative who confirmed that she had received the letters and that they had been forwarded to the appropriate persons at Agway.

This Court confirmed Agway's Second Amended Joint Plan of Liquidation on April 28, 2004. On May 3, 2004, Agway mailed a letter to all of its employees letting them know that this Court had established June 18, 2004, as the bar date for pre-petition employment related claims. *Cordisco Ex. I*. In the letter to Cordisco, Agway enclosed a proof of claim form indicating that Cordisco's claim was $662.58 for a pre-petition vacation benefit. *See id*. Cordisco then amended the form by adding a claim for a Severance Benefit and filed the $30,000 proof of claim with the Court on June 17, 2004. *See id*.

---

[1]Cordisco though, did not provide a return receipt showing proof of delivery, and the Court does not know if the December letter's address was a correct Agway address.

ARGUMENTS

Cordisco argues that Agway acted arbitrarily and capriciously in determining that Suburban's employment offer was reasonably comparable to Cordisco's position with Agway because Agway failed to consider the non-compete agreement Suburban required Cordisco to sign. *See Cordisco Mem. of Law, p.6*. Cordisco asserts that it would have been prudent to assess whether or not the non-compete was void or voidable, what impact the non-compete would have on an employee Suburban terminates, and to take into account that Agway did not require non-compete agreements for its employees. *See id. at p.7*.

The LT counters by arguing that Parker testified in Court that the Administration Committee for the Employees' Retirement Plan consistently determines whether an employment offer is reasonably comparable by analyzing only three factors: (1) whether the compensation with the new company was within 80% of base pay at Agway; (2) whether the position was permanent; and (3) whether the employee would be required to move as a condition to accepting such new employment. *See LT Post Hearing Brief*, *p. 4*. The LT argues that based on these three factors, Suburban offered Cordisco "reasonably comparable employment." Cordisco refused the employment offer and is therefore not entitled to a Severance Benefit. *See id*. at p. 6. The LT asserts that its decision to reject Cordisco's proof of claim cannot be characterized as "arbitrary and capricious" under the legal standard of review. *See id*.

DISCUSSION

Congress created the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, to safeguard employees from the abuse and mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from the accumulated funds. *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). ERISA regulates two types of plans, pension plans, 29 U.S.C. § 1002(2)(A), and welfare benefit plans, 29 U.S.C. § 1002(1). The ERISA term "employee welfare benefit plan" has been held to apply to most, but not all, employer undertakings or obligations to pay severance benefits. *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 75 (2d. Cir. 1996). The Supreme Court of the United States and the Second Circuit Court of Appeals have "emphasized that ERISA applies only where such an undertaking or obligation requires the creation of an ongoing administrative program." *Schonholz*, 87 F.3d at 75. The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation and is, therefore not an ERISA governed employee welfare benefit plan. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). The Second Circuit has held that courts should look to the following factors in determining which employer obligations and undertakings should be deemed to have created an ERISA plan: (1) whether the employer's undertaking or obligation requires managerial discretion in its administration; (2) whether a reasonable employee would perceive an ongoing commitment by the employer to provide benefits; and (3) whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria. *Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 566 (2d Cir. 1998); *Schonholz*, 87 F.3d at 76. In *Schonholz*, the Court did not decide whether each factor is determinative. 87 F.3d at 76. The Second Circuit has also not precluded the possibility that other factors might be

relevant in a different factual setting. *Tischmann*, 145 F.3d at 566.

Here, Agway's Plan required managerial discretion in determining an employee's eligibility to receive the Severance Benefit by examining whether the employee was "offered reasonably comparable employment with an entity to which the Employer has sold or otherwise transferred some or all of the Employer's assets, operations, or employees, at the time of the Work Force Reduction..." *LT Ex. 6*, *Article 12.05(d)(2)(iv)*. Agway needed to analyze each employee's termination in light of whether the employee had been offered reasonably comparable employment. Agway provided several forms of payment for the Severance Benefits, such as a lump sum payment and an annuity. *See id*., *Articles 5.01 & 12.03*. Annuity payments show that Agway made an ongoing commitment to provide benefits. Based on the *Schonholz* factors, the Court concludes that ERISA governed Agway's Plan to provide Severance Benefits.

While ERISA imposes stringent accrual, vesting, and funding requirements on retirement benefit plans, similar requirements are not imposed on welfare benefit plans. 29 U.S.C. §§ 1051, 1081; *see Reichelt v. Emhart Corp.*, 921 F.2d 425, 429 (2d Cir. 1990); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039, 1045 (7th Cir. 1988). An employer may, therefore, unilaterally amend or eliminate severance benefits without violating ERISA and without considering the employees' interests. *See id.*

The Court must first determine whether Cordisco exhausted his administrative remedies upon denial of ERISA benefits. The Second Circuit recognizes "the firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases." *Alfarone v. Bernie Wolff Constr.*, 788 F.2d 76, 79 (2d Cir. 1986). *See, e.g., Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 107 (2d Cir. 2003); *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d

506, 511 (2d Cir. 2002). While nowhere in the text of ERISA is there any mention of this exhaustion requirement, case law clearly holds that Congress intended to grant courts the authority to apply the requirement in ERISA suits. *Amato v. Bernard*, 618 F.2d 559, 566-67 (9th Cir. 1980). The purposes of the administrative remedy exhaustion requirement are to: (1) uphold Congress's desire that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of administrative action if litigation should ensue; and (3) assure that any judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, not *de novo*, if the benefit plan at issue gave the fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *See Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993).

The Employees' Retirement Plan declares that Agway is the Plan Administrator and its Board of Directors may delegate the responsibility of administering the Plan, except for the responsibility of managing the Plan's assets, to an Administration Committee whose members are appointed by the Board. *LT Ex. 6*, *Article 8.01*. Under Article 8.09, the Plan provides that benefits claims must be made in writing to the Administration Committee. *LT Ex. 6*. However, because the Plan did not provide an address for that Committee, Cordisco mailed two letters requesting a Severance Benefit to Agway in an attempt to file a claim with the Administration Committee, and a return receipt shows that Agway, in fact, received the second letter. Cordisco testified without contradiction that he spoke to a woman in human resources who confirmed receipt of the letters. It appears to the Court that Cordisco met his burden of seeking administrative review of his claim. If an employer wants to avoid having employees mail their claims to the corporate headquarters or any other address belonging to the employer, it should

include in its current retirement plan an address for employees to use when mailing their benefits claims. An address for the Administration Committee contained in Agway's five year old former severance plan, which Cordisco admittedly possessed, is not enough. *See LT Ex. 3, Summary Plan Description for the Agway, Inc. Severance Pay Plan*.

The second issue for the Court is to determine what standard of review the Court should apply to the Administration Committee's decision to deny Cordisco the Severance Benefit. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), the Supreme Court held that "a denial of benefits challenged under § 1132(a)(1)(B) of ERISA is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." When the benefit plan confers upon a plan administrator the discretionary authority to determine eligibility, a reviewing court will not disturb the administrator's ultimate conclusion unless it is "arbitrary and capricious." *See Murphy v. Int'l Bus. Machs. Corp.*, 23 F.3d 719, 721 (2d Cir. 1994); *Reichelt*, 921 F.2d at 43. *See generally Bruch*, 489 U.S. at 411. The plan administrator bears the burden of proving that the arbitrary and capricious standard, as opposed to the *de novo* standard of review, applies. *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 249 (2d Cir. 1999).

Here, the LT has carried it burden of showing that the Employees' Retirement Plan gave the Administration Committee the requisite discretionary authority. Article 8.07 of the Plan provides that "the Administration Committee shall have exclusive authority and discretion to interpret and apply the terms of the Plan and to construe any uncertain or disputed term or provision in the Plan" and that this "exercise of discretionary authority" shall "be final and

binding upon any individual claiming benefits under this Plan..." *LT Ex. 6*.

Under the arbitrary and capricious standard, a reviewing court may only overturn a decision to deny benefits if it was "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir. 1995) (quoting *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993)). The scope of review is narrow and highly deferential. *See Pagan*, 52 F.3d at 442; *Jordan v. Ret. Comm. of Rensselaer Inst.*, 46 F.3d 1264, 1271 (2d Cir. 1995). The Court is not free to substitute its own judgment for that of the plan administrator as if the Court "were considering the issue of eligibility anew." *Pagan*, 52 F.3d at 442. In reviewing the plan administrator's decision, a court must determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Jordan*, 46 F.3d at 1271 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)). Substantial evidence means "such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the [decision maker and]...requires more than a scintilla but less than a preponderance." *Miller v. United Welfare Fund*, 72 F.3d 1066, 1072 (2d Cir. 1995) (quoting *Sandoval v. Aetna Life & Cas. Ins. Co.,* 967 F.2d 377, 382 (10th Cir. 1992)).

ERISA goes on to require that employee benefit plans shall:

> (1) provide adequate notice in writing to any participant or beneficiary whoseclaim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1333. In accordance with Sections 503 and 505 of ERISA, the Secretary of Labor has

established additional notice requirements when denying a claim:

> The notification shall set forth, in a manner calculated to be understood by the claimant
> (I) The specific reason or reasons for the adverse determination;
> (ii) Reference to the specific plan provisions on which the determination is based;
> (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;
> (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review;

29 C.F.R. § 2560.503-1(g). The regulations exist to provide an adequate explanation of the denial of the claim and to ensure meaningful review of that denial by the claimants so that they understand what the determinative issues are if they choose to appeal the denial to the plan administrator. *See Halpin v. W.W. Grainger*, 962 F.2d 685, 688-89 (7th Cir. 1992); *Hall v. Employee Benefits Manager Analytical Techs., Inc.*, No. IP 00-1058 C-T/K, 2001 WL 1708828, at *4 (S.D. Ind. Dec. 14, 2001).

A court's review under the arbitrary and capricious standard is limited to the administrative record. *Miller*, 72 F.3d at 1071. Here, there is nothing in the administrative record concerning the Administration Committee's rejection of Cordisco's claim. The LT made a decision to move the Court to expunge Cordisco's proof of claim, but the Administration Committee never provided adequate notice to Cordisco that it had denied his claim, let alone why it denied his claim, nor did it provide him with a reasonable opportunity for a full and fair review of his denied claim. The LT simply provided the Court with the testimony of Parker, a former Administration Committee member, who explained how the Committee generally treated such claims while he was a member. Parker testified that he did not attend an Administration

Committee meeting that reviewed Cordisco's claim. Parker also admitted during his testimony that he reviewed the Administration Committee's written records and files and could not find anything concerning Cordisco's appeal. Agway's Plan does not provide any written criteria an Administration Committee must use to determine whether an employee had received a "reasonably comparable" offer of employment. The Court thus does not know for certain how a current administration committee would treat Cordisco's claim. ERISA does not permit the Court to function as a substitute for a plan administrator. *See Miller*, 72 F.3d at 1071. Therefore, the Court remands the contested matter to the LT to provide, to the extent possible, a full and fair review of Cordisco's claim consistent with the applicable provisions of ERISA and this Memorandum-Decision and Order. Pending that review, the Court denies the LT's motion to expunge Cordisco's proof of claim without prejudice.

IT IS SO ORDERED.

Dated at Utica, New York

this 21st day of July 2005

/s/
STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge