Dated: April 20, 2012
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re	
Dalphis Holding, LLC,	Case No. 11-24849
Debtor.	Chapter 11
Tax ID/EIN: 27-2770975	

MEMORANDUM AND ORDER RE NONCOMPETITION AGREEMENTS COMBINED WITH NOTICE OF ENTRY THEREOF

Introduction

This contested matter governed by Fed. R. Bankr. P. 9014 arises out of a motion previously filed by the above-named chapter 11 debtor in possession, Dalphis Holding, LLC, under 11 U.S.C. § 363 and related proceedings. The gravamen of the controversy centers around the enforceability of the two noncompetition agreements dealing with the sale of a business discussed hereafter.

Procedural History

On November 23, 2011, the debtor, Dalphis Holding, LLC, filed a "Motion to Sell Property Free and Clear of Liens," which in essence sought to sell substantially all of the property of the estate under 11 U.S.C. § 363(b) and (f) ("363 Sale"). In response to this motion, several parties in interest filed objections including, for example, Ms. Deborah Sutton ("Ms. Sutton") and Mr. Sidney Goldstein ("Mr. Goldstein"), who were the original owners of Dalphis, Inc., the predecessor entity to the debtor, Dalphis Holding, LLC, and also employees of Dalphis Holding, LLC. This gave rise to this contested matter pursuant to Fed. R. Bankr. P. 9014.

Ms. Sutton and Mr. Goldstein, as shareholders of Dalphis, Inc., sold the assets of their business to Dalphis Holding, LLC, on June 21, 2010. As part of the "Purchase Transaction," multiple agreements were signed among Dalphis Inc., Ms. Sutton, and Mr. Goldstein, as the sellers, and Dalphis Holding, LLC, as the buyer. These agreements included, among other things, an asset purchase agreement, promissory note, assignment and assumption agreement, employment agreements, noncompetition agreements, consulting and advisory agreements, incentive units offer letters, and a bill of sale. Overall, these documents represent the "Purchase Transaction."

Ms. Sutton and Mr. Goldstein specifically objected to the noncompetition agreements being included in the 363 Sale from Dalphis Holding, LLC to the successor entity, Dalphis Legacy Partners, LLC. The debtor had defaulted on the employment agreements and most of the other agreements within the Purchase Transaction and was unable to cure this default. Ms. Sutton and Mr. Goldstein sought a judicial determination to have the noncompetition agreements deemed terminated, the terms of the agreements declared void and unenforceable, and the agreements, themselves, excluded from the properties of the estate being sold pursuant to the 363 Sale motion.

After notice and a hearing on January 4, 2012, the court granted the debtor's § 363 motion after the asset purchase agreement for the 363 Sale was amended to delete Ms. Sutton's and Mr. Goldstein's

agreements from the properties of the estate being sold.[1] Ms. Sutton's and Mr. Goldstein's objections to the 363 Sale essentially became moot after their agreements were removed from the assets being sold. By oral motion made at the hearing, Ms. Sutton and Mr. Goldstein moved to compel the debtor to reject the employments agreements, noncompetition agreements, consulting and advisory agreements, and incentive units offer letters. The court entered an order on January 11, 2012, giving the debtor a January 24, 2012 deadline to file a notice of rejection or motion for assumption regarding the identified agreements.

Debtor satisfied this deadline by filing a response and notices of assumption/rejection of executory contracts on January 24, 2012. In these filings, the debtor takes the position that the noncompetition agreements are fully executed, stand alone contracts that do not need to be accepted/rejected under 11 U.S.C. § 365. Alternatively, if the noncompetition agreements are found to be executory contracts, the debtor will assume the agreements and assign them to the successor entity, Dalphis Legacy Partners, LLC. On February 9, 2012, Ms. Sutton and Mr. Goldstein filed responses to the debtor's response and also filed notices indicating their position is that the noncompetition agreements are executory contracts in incurable default, and, therefore, the agreements cannot be assumed and assigned as the debtor proposes.

All of these said motions, objections, responses, and notices give rise to a contested matter pursuant to Fed. R. Bankr. P. 9014 that has led to the hearing conducted in the bankruptcy court on April 5, 2012. The issues before the court are whether the noncompetition agreements, first, are executory contracts governed by 11 U.S.C. § 365, second, whether the noncompetition agreements can be assumed under 11 U.S.C. § 365(b) and assigned under 11 U.S.C. § 365(c), and, third, whether the noncompetition agreements are reasonable as to the time, the territory, and the nature of the

[1] The order granting the 363 sale on January 6, 2012, was later amended after the City of Memphis filed a motion to reconsider pursuant to Rule 9023. This amendment merely sought to resolve the security status on the City of Memphis' claim and did not impact Ms. Sutton's and Mr. Goldstein's interests or objections to the 363 Sale.

employment or trade protected in accordance with applicable Mississippi law. As noted, this contested matter arises out of a motion to sell property under 11 U.S.C. § 363(b) and (f) and a motion to compel the acceptance/rejection of executory contracts under 11 U.S.C. § 365. *Compare* Fed. R. Bankr. P. 7001(9). By virtue of 28 U.S.C. § 157(b)(2)(A),(N), and (O), this contested matter is a core proceeding. Debtor, Ms. Sutton, and Mr. Goldstein have all stated on the record that these are core proceedings under 28 U.S.C. § 157(b)(1) - (2) and also have consented to the bankruptcy court's jurisdiction to hear and determine these matters; i.e., there is no dispute that this court has the statutory and constitutional authority to hear and determine these matters. The court also has subject matter jurisdiction under 28 U.S.C. §§ 1334(a) - (b) and 157(a) - (b) and Miscellaneous Order No. 84-30 of the United States District Court for the Western District of Tennessee.

Based on statements of counsel for the parties, the testimonies of Ms. Sutton, Mr. Goldstein, and Mr. Ben Morris, CEO of Dalphis Holding, LLC, the motions, objections, responses, and notices of the parties, and consideration of the entire case record as a whole, the following shall constitute the court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

Background Facts

Ms. Sutton founded Dalphis Inc.[2] over 25 years ago. Ms. Sutton was the 51% shareholder in Dalphis, Inc., and Mr. Goldstein was 34% shareholder.[3] Dalphis Inc. made and sold blinds, shades, shutters, drapery hardware, and other window coverings. On June 21, 2010,[4] Dalphis Inc. sold

[2] Dalphis Inc. is the predecessor entity to the debtor, Dalphis Holding, LLC. Subsequent to the sale of substantially all of its business assets to Dalphis Holding, LLC, Dalphis Inc. has changed its name to "D&S Inc." Simply, Dalphis Inc., now known as D&S Inc., sold its business assets to Dalphis Holding, LLC, which later sold substantially the same business assets to Dalphis Legacy Partners, LLC in the 363 Sale.

[3] Mr. Scott E. Smith owned the remaining 15% of Dalphis, Inc., but he is not a party to this contested matter, as he does not appear to be bound by noncompetition agreements similar to Ms. Sutton and Mr. Goldstein.

[4] The original date in the Asset Purchase Agreement is May 7, 2010; however, this date was later amended to be June 21, 2010.

substantially all its business assets to a new entity, Dalphis Holding, LLC, the debtor in this chapter 11 case. This sale is referred to as the "Purchase Transaction."

What actually constitutes the Purchase Transaction is somewhat hazy, as there are at least 12 agreements[5] signed at substantially the same time that all make reference to the Purchase Transaction but are not wholly incorporated into one agreement so as to clearly establish the intent of the parties. Dalphis Holding, LLC received substantially all of Dalphis Inc.'s business assets as consideration. The Asset Purchase Agreement clearly indicates Dalphis Inc. received return consideration as follows: 1) a promissory note for $849,126.00 payable by Dalphis Holding, LLC to Dalphis Inc., 2)Dalphis Holding, LLC's assumption of $1,490,056.86 in Dalphis Inc.'s liabilities to Trust One Bank, 3) Dalphis Holding, LLC's assumption of Dalphis Inc.'s accounts payable, 4) Dalphis Holding, LLC's assumption of Dalphis' Inc.'s customer deposit liabilities, 5) Dalphis Holding, LLC's assumption of Dalphis Inc's capital leases as specified, 6) Dalphis Holding, LLC's assumption of Dalphis Inc.'s facility and storage leases, and 7) Dalphis Holding, LLC's assumption of other less significant liabilities. However, less clear is whether the employment agreements, noncompetition agreements, and consulting and advisory agreements also are consideration given in the Purchase Transaction[6]. The Asset Purchase Agreement requires Dalphis Holding, LLC to deliver these documents as a condition of closing, and each agreement independently indicates that those agreements are subject to the closing of the Purchase Transaction, with the

[5] These agreements are entered as exhibits in the current contested matter and include the 1) "Asset Purchase Agreement," 2) "Assignment and Assumption Agreement," 3) "Bill of Sale," 4) "Promissory Note," 5) "Deborah Sutton's Employment Agreement," 6) "Deborah Sutton's Noncompetition Agreement," 7) "Deborah Sutton's Consulting and Advisory Agreement," 8) "Deborah Sutton's Incentive Agreement," 9) "Sidney Goldstein's Employment Agreement," 10) "Sidney Goldstein's Noncompetition Agreement," 11) "Sidney Goldstein's Consulting and Advisory Agreement," and 12) "Sidney Goldstein's Incentive Units Offer Letter." There appears to be other documents associated such as "Landlord Agreements;" however, such documents have not been entered as exhibits nor are of record before this court.

[6] Ms. Sutton's and Mr. Goldstein's Employment Agreements, Noncompetition Agreements, Consulting and Advisory Agreements, and Incentive Units Offer Letters are substantially similar to each other except for the amount of compensation in each. The court will refer to both individuals' agreements collectively going forward.

noncompetition agreements going as far as to say that they are "in furtherance of the Purchase Transaction, and in consideration of the foregoing . . . ."

The employment agreements entered into on June 21, 2010, gave Ms. Sutton a 3.5% equity interest in Dalphis Holding, LLC and Mr. Goldstein a 2.5% equity interest. Ms. Sutton was to be compensated $975,000 for her employment term of 5 years. In addition, she was to receive other employee benefits, incentives, and reimbursed expenses. Likewise, Mr. Goldstein was to receive $600,000 over 5 years with similar benefits, incentives, and reimbursed expenses. The Asset Purchase Agreement requires as a condition of closing that these employee agreements be signed and delivered. The employment agreements themselves contain an "Independent Agreement" clause that reads:

> Notwithstanding any other provision of this Agreement, the Purchase Agreement, or any other contract or agreement, it is agreed that (a) the obligations of Employee to Company under this Agreement are independent of any covenants or obligations between the parties in other documents, and (b) so long as Company shall perform its obligations in accordance with this Agreement, the obligations of Employee to Company under this Agreement shall not be abated, offset, limited, or impaired in any way by any future performance or nonperformance by the Company under the Purchase Agreement, the Subordinated Promissory Note issued by Seller in connection with the closing, or any other agreement between Company and Employee.

The noncompetition agreements entered into on June 21, 2010, prohibit Ms. Sutton and Mr. Goldstein from competing in the "Restricted Territory"[7] with Dalphis Holding, LLC for a period of 5 years starting June 21, 2010. The noncompetition agreements are "in furtherance of the Purchase Transaction and in consideration of the foregoing." Paragraph 1.1 reads:

> Stockholder [Ms. Sutton/Mr. Goldstein] acknowledges and agrees that (i) Stockholder is an equity owner of Seller and will directly benefit from the Purchase Transaction, (ii) as a result of the Purchase Transaction, Stockholder will receive sufficient value and consideration to support Stockholder's agreements herein, and (iii) Stockholder shall not receive consideration for Stockholder's agreements herein in addition to the benefits received by Stockholder under the Purchase Transaction.

[7] Restricted Territory is defined as "any city or geographic area in the United States of America in which Seller has sold at any time during the past three (3) years any blinds, shades, shutters, drapery hardware, or any other window covering."

The noncompetition agreement is only assignable to a successor entity. Furthermore, similar to the employment agreements, the noncompetition agreements contain their own "Independent Agreement" clauses that read:

> Notwithstanding any other provision of this Agreement, the Purchase Agreement, or any other contract or agreement, it is agreed that (i) Buyer has fully earned its rights under this Agreement by closing under the Purchase Agreement, (ii) the obligations of Stockholder to Buyer under this Agreement are independent of any covenants or obligations between the parties in other documents, and (iii) so long as Buyer shall perform its obligations in accordance with this Agreement, the obligations of Stockholder to Buyer under this Agreement shall not be abated, offset, limited, or impaired in any way by any future performance or nonperformance by the Buyer under the Purchase Agreement, the Subordinated Promissory Note issued to Seller in connection with the closing, or any other agreement between Buyer and Stockholder.

Like both the employment agreements and noncompetition agreements, the consulting and advisory agreements were executed on June 21, 2010, contain similar references to the Purchase Transaction, and contain their own "Independent Agreement" clauses.

After the sale, Dalphis Holding, LLC has been principally owned and operated by Mr. Morris and Mr. Charles Duffley with Ms. Sutton and Mr. Goldstein working to fulfill their Employment Agreements. Mr. Morris and Ms. Sutton both testified that they had high expectations that this transaction would grow the revenues of the company and be to the benefit of all parties. Unfortunately from June 21, 2010, until the filing of the chapter 11 case on May 12, 2011, Dalphis Holding, LLC struggled to remain solvent, sustain positive cash flow, and meet its obligations. This resulted in the loss of sales and the concern that Dalphis Holding, LLC may not continue as a going concern.

As with most business transactions that do not meet expectations, Dalphis Holding, LLC, Ms. Sutton, and Mr. Goldstein began to explore the cause of the problems and whether they could keep the business solvent. It appears from the testimony of Mr. Morris and Ms. Sutton that there was a dispute over the Purchase Transaction and whether representations made by Dalphis Inc. were accurate. No lawsuits were brought, and it appears that the dispute was resolved internally. At some point, however, Dalphis Inc. forgave the Promissory Note. Mr. Morris testifies that the note forgiveness was done to

remedy the dispute. Ms. Sutton testifies that the note forgiveness was done to allow for Dalphis Holding, LLC to obtain new financing from Trust One Bank. Further, she states that Trust One Bank would not give Dalphis Holding, LLC the necessary financing to continue as a going concern without the loan forgiveness. She and Mr. Goldstein, the beneficiaries of the promissory note, were willing to forgive the note to obtain the new financing because payments under the employment agreements and assumption of Dalphis Inc.'s liabilities was dependent upon Dalphis Holding, LLC continuing as a going concern. Mr. Morris, in testimony, did not disagree with Ms. Sutton's testimony, but he did testify that resolving the dispute was also a reason for the forgiveness. Neither party presented any agreements or documents related to the loan forgiveness nor is anything beyond this testimony on record with the court. The Promissory Note appears to be forgiven, and, therefore, the Promissory Note is not in default.

On or about the filing of the chapter 11 petition, the debtor, Dalphis Holding, LLC, terminated Mr. Goldstein's employment. Mr. Goldstein testified that he was told by Mr. Morris that his termination was related to the bankruptcy filing and that he received no notice before being told of his employment termination. Mr. Morris testified that the termination was for cause, but on cross-examination he did not specifically identify the cause other than to say that it was performance related. Mr. Morris could not remember if he told Mr. Goldstein that it was for cause and was not sure if he gave Mr. Goldstein notice. The nature of the termination does affect the amount due and owing to Mr. Goldstein under the employment agreement; however, both Mr. Morris and Mr. Goldstein testify that, regardless of the nature of the termination, Dalphis Holding, LLC owes Mr. Goldstein a substantial sum under the employment agreement. Dalphis Holding, LLC is in default of the employment agreement and cannot cure the default because the bankruptcy estate has no assets, as all proceeds from the 363 Sale went to the secured creditors, whose debts were not satisfied in full. Mr. Goldstein has not been paid any money required under the consulting and advisory agreement; therefore, the consulting and advisory agreement is also in default and incapable of cure.

Ms. Sutton is technically still employed by Dalphis Holding, LLC even though this involves no responsibilities because the debtor no longer operates the business. Upon filing her objection to the 363 Sale motion, Mr. Morris told her to stop performing her responsibilities for Dalphis Holding, LLC but did not terminate her. Ms. Sutton appears to be in good standing under the employment agreement. In contrast, Dalphis Holding, LLC is in default on the employment agreement and cannot cure the default. Ms. Sutton is owed a substantial sum under the employment agreement. Ms. Sutton has not been paid any money under the consulting and advisory agreement; therefore, the consulting and advisory agreement is also in default and incapable of cure. Dalphis Legacy Partners, LLC has approached Ms. Sutton about future employment, but at the time of the hearing no definite terms or agreement had been reached.

The Asset Purchase Agreement between Dalphis Inc. and Dalphis Holding, LLC required Dalphis Holding, LLC to assume liabilities and indemnify Dalphis Inc. for these assumed liabilities. At the April 5, 2012 hearing, Ms. Sutton testified that Mr. Goldstein and she have been sued by one vendor, Springs Window Fashions, the principle supplier. The liability owed to Springs Window Fashions was an account payable due at the time of the sale and was to be assumed as an "Account Payable" under paragraph 2.5(a)(ii) of the Asset Purchase Agreement. Dalphis Holding, LLC did not pay this liability, and, therefore, Springs Window brought a claim against Dalphis Inc., forcing Dalphis Inc. to seek chapter 7 bankruptcy protection and liquidate the business.[8] No efforts were made by Dalphis Holding, LLC to indemnify Dalphis Inc. As the debtor no longer has assets, this liability and others like it cannot be paid by the debtor, and the debtor cannot indemnify for these liabilities. The Asset Purchase Agreement is in default and is incapable of cure.

[8] D&S Inc., also known as Dalphis Inc., filed a chapter 7 case on January 13, 2012, and the case was completed and terminated on February 29, 2012. This case was filed in the Western District of Tennessee and is case no. 12-20442.

These contractual agreements gave exclusive jurisdiction and venue to the United States District Court for the Northern District of Mississippi with jurisdiction over Union County, Mississippi, to resolve any litigation arising out of these agreements. All parties to this contested matter have waived the exclusive contractual jurisdiction and venue provisions in all of these agreements and have expressly consented to this contested matter being heard and determined by the Bankruptcy Court for the Western District of Tennessee. Moreover, the parties have requested this bankruptcy court to hear and determine these matters subject to review under 28 U.S.C. § 158. Though this contested matter was heard in Tennessee, the agreements were entered into in Mississippi[9], and, accordingly, Mississippi state law controls these agreements.

Legal Analysis

The threshold issues before the court are whether the noncompetition agreements, first, are executory contracts under Mississippi law and, therefore, governed by 11 U.S.C. § 365; second, whether the noncompetition agreements can be assumed under 11 U.S.C. § 365(b) and assigned under 11 U.S.C. § 365(c); and, third, whether the noncompetition agreements are reasonable as to the time, the territory, and the nature of the employment or trade protected in accordance with applicable Mississippi law. Ultimately, the question is whether the noncompetition agreements should be enforced under applicable Mississippi state law.

Nature of the Contracts

The Mississippi Supreme Court views noncompetition agreements as "restrictive covenants" that restrain trade and individual freedom, and such covenants "are not favorites of the law." *Frierson v. Sheppard Bldg. Supply, Co.*, 154 So. 2d 151, 156 (Miss. 1963); *Texas Rd. Boring Co. of Louisiana-Mississippi v. Parerk*, 194 So. 2d 885, 888 (Miss. 1967). Mississippi case law distinguishes between covenants not to compete in an employer-employee setting, and those dealing with the sale of a

[9] At the time of the Purchase Transaction, the business was being operated in Mississippi. Between the time of the Purchase Transaction and Dalphis Holding, LLC's filing of bankruptcy, the business was moved to Tennessee.

business. *Cooper v. Gidden*, 515 So. 2d 900, 904 - 905 (Miss. 1987). Regardless of this distinction, the court, first, applies Mississippi contract law to determine if these noncompetition agreements are independent, stand-alone agreements or if the noncompetition agreements are incorporated into a larger purchase transaction. Second, the court will determine whether the noncompetition agreements are executory contracts.

Here, the court has before it 12 agreements signed at substantially the same time and referencing each other and the Purchase Transaction at large; however, many of these agreements contain clauses indicating each agreement is independent of the others. To demonstrate, the Asset Purchase Agreement's closing is contingent upon the employment agreements and noncompetition agreements being delivered, yet both sets of these agreements have "Independent Agreement" clauses declaring its independence from the other agreements and the Asset Purchase Agreement. Whether these agreements can be integrated into one "Purchase Transaction" is critically important to determining whether the noncompetition agreements are executory contracts because some of the agreements have been executed, e.g. Promissory Note, while others are clearly lacking complete performance, e.g. employment agreements and consulting and advisory agreements.

"The first rule of contract interpretation is to give effect to the intent of the parties" and the best resources for ascertaining intent and assigning meaning with fairness and accuracy are the words in the contract. *Herring Gas Co., Inc. v. Pine Belt Gas, Inc.*, 2 So. 3d 636, 639 (Miss. 2009)(quoting *Simmons v. Bank of Miss.*, 593 So. 2d 40,42 (Miss. 1992)). "When a written instrument is clear, definite, explicit, harmonious in all its provisions, and is free from ambiguity, a court construing it will look solely to the language used in the instrument itself;" however, when the document does not meet this standard the court can look to extrinsic evidence. *Gulfside Casino P'ship v. Miss. State Port Auth. at Gulfport*, 757 So. 2d 250 (Miss. 2000) (quoting *Pfisterer v. Noble*, 320 So. 2d 383, 384 (Miss. 1975)); *see also Salmen Brick & Lumber Co. v. Williams*, 50 So. 2d 130, 132 (Miss. 1951) (applying an "ambiguity test" that requires

courts to look at the totality of the circumstances when faced with a contract that is not clear on its face). The court will now proceed through each agreement applying Mississippi's rules of contract interpretation.

The noncompetition agreements are the heart of this contested matter, and the language of these agreements poses the most important interpretations. Paragraph 2.13(ii), the "Independent Agreement" clause of these agreements, reads: "the obligations of . . . this Agreement are independent of any covenants or obligations between the parties in other documents." Paragraph 1.1, "Payment to [Ms. Sutton/Mr. Goldstein]," reads: "as a result of the Purchase Transaction, [Ms. Sutton/Mr. Goldstein] will receive sufficient value and consideration to support [Ms. Sutton's/Mr. Goldstein's] agreements herein." Looking at the explicit language of these two paragraphs, the court finds an inherent conflict. The language of noncompetition agreements indicates these agreements are independent of obligations in other documents, while at the same time referring to other documents for the obligations that serve as consideration supporting their own formation. The clauses themselves are clear, definite, and explicit; however, they are not harmonious with the rest of the document. A thorough review of the four corners of the noncompetition agreements for obligations that serve as consideration proves unfruitful, as no independent obligations binding Dalphis Holding, LLC exist within the document. The noncompetition agreements cannot stand alone because to be independent of other documents would mean that they are completely void of consideration. Simple execution of a contract does not give rise to consideration; otherwise, every contract would automatically have sufficient consideration. The court must look beyond the four corners of these agreements to determine the consideration that underlies their formation and for the obligations imposed on Dalphis Holding, LLC. As is such, the court finds that the Independent Agreement clauses in the noncompetition agreements are unharmonious to the agreement as a whole.

Furthermore, the language of the contract demonstrates that it was the intent of the parties to reference the Purchase Transaction and the Asset Purchase Agreement in order to determine the consideration and obligations associated with the formation of the Noncompetition Agreement, as explicitly stated in paragraph 1.1. The parties intended the noncompetition agreements to be "in furtherance of the Purchase Transaction." This leads the court to find that the Independent Agreement clauses are not consistent with the intent of the parties. This court believes each word and paragraph of an agreement was intended to have meaning; therefore, a court should not arbitrarily strike or void a contract provision. However, where a conflict between terms of the same document exists that cannot be resolved, the court has no choice but to interpret the language of the contract in a manner that best conveys the intent of the parties. For the aforementioned reasons, the conflict within the noncompetition agreements cannot be resolved. As the intent of the parties was for the obligations of the purchase transaction to serve as consideration for the noncompetition agreements, the court is left with no choice but to render the Independent Agreement clauses void. The court is unable to fashion an interpretation of the Independent Agreement clauses that would prove consistent with paragraph 1.1 and with the intent of the parties to look to other documents for consideration underlying the formation of these noncompetition agreements.

Unlike the noncompetition agreements, the employment agreements' Independent Agreement clauses are harmonious with the entire document, clear, definite, and without ambiguity. Paragraph 24 indicates that obligations in the employment agreements are independent of obligations arising in other agreements within the purchase transaction. Furthermore, unlike the noncompetition agreements, the employment agreements clearly articulate obligations for Ms. Sutton, Mr. Goldstein, and Dalphis Holding, LLC within the four corners of the agreements. Where the noncompetition agreements reference the Asset Purchase Agreement for determining consideration and obligations giving rise to its formation, the employment agreements provide their own, wholly independent obligations and

consideration when they create an employee and employer relationship, as well as other obligations detailed within the documents. The court finds the Independent Agreement clauses in the employment agreements are mutually agreed upon terms, supported by adequate consideration, and enforceable.

As a further note, the court is not holding that the employment agreements are not incorporated as part of the larger purchase transaction. They are. The employment agreements and Asset Purchase Agreement both specifically reference and incorporate each other. However, the court is holding that the obligations and consideration as detailed in the employment agreements are independent of performance of the purchase transaction. Breach of the Asset Purchase Agreement or noncompetition agreements does not trigger default of the employment agreements, and, likewise, breach of the employment agreements does not trigger default under the Asset Purchase Agreement or noncompetition agreements.

Similar to the employment agreements, the consulting and advisory agreements' Independent Agreement clauses are harmonious with the entire document, clear, definite, and without ambiguity. The clauses in both the employment agreements and consulting and advisory agreements are almost identical and operate in similar manners. Therefore, the court finds that the analysis applied to the employment agreements applies to the consulting and advisory agreements without exception. As is such, the consulting and advisory agreements can be read to be wholly independent because they provide ample consideration by both parties to justify their formation, and, furthermore, the Independent Agreement clauses are valid and enforceable terms of these agreements.

Continuing the interpretation of the various agreements, the court next turns to the Asset Purchase Agreement. Paragraph 4.2 provides: "each of the [Dalphis Holding, LLC's] Closing Documents will constitute the legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with its respective terms." The Closing Documents collectively refer to "the Assignment and Assumption Agreement, the Promissory Note, the Employment Agreements, the Noncompetition Agreement, and

the Consulting and Advisory Agreements, as well as any other agreement to be executed or delivered by Buyer at Closing." The court has reviewed the 61 pages of the Asset Purchase Agreement and the subsequent five page amendment to the Asset Purchase Agreement and finds that these Closing Documents represent the Dalphis Holding, LLC's consideration given in return for substantially all of Dalphis Inc.'s business assets. The court finds this language clear, definite, explicit, harmonious, and free from ambiguity. The court is not aware of any language within the Asset Purchase Agreement that would contradict this finding and believes the Asset Purchase Agreement clearly incorporates the employments agreements, noncompetition agreements, and consulting and advisory agreements into the Purchase Transaction. This finding is consistent with the fact that all agreements were entered into at the same time on June 21, 2010, and with Ms. Sutton's testimony that she understood the noncompetition agreement and employment agreement to be parts of the same transaction.

The only evidence that the debtor, Dalphis Holding, LLC, has offered to indicate that these agreements are not parts of one purchase transaction are the Independent Agreement clauses within the employment agreements, the consulting and advisory agreements, and the noncompetition agreements. As has been discussed, the court finds the Independent Agreement clauses of the noncompetition agreements to be void as being in direct conflict with the language and intent of the parties elsewhere in the documents. As for the Independent Agreement clauses of the employment agreements and consulting and advisory agreements, the clauses are valid terms of those agreements; however, these clauses do not prevent the incorporation of these agreements into the Purchase Transaction, but rather, the clauses function to allow the agreements to operate independently subsequent to their formation. As is such, the court finds that the agreements entered into on June 21, 2010, by the parties represent one purchase transaction as intended by the parties.

Next, the court considers whether the Purchase Transaction incorporating the noncompetition agreements is an executory contract. An executory contract is "a contract that remains wholly

unperformed or for which there remains something still to be done on both sides, often as a component of a larger transaction . . . ." *Black's Law Dictionary* 344 (8th ed. 2004). Bankruptcy courts have substantially applied the so-called "Countryman definition" which states: "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy*; Part I 57 Minn. L. Rev. 439, 460 (1973). The court believes these two definitions parallel each other and present the common guidance for determining executory contracts in Mississippi and the bankruptcy courts. The parties' attorneys essentially acknowledged the Countryman definition and did not dispute its application and use. An executory contract requires obligations under the contract to be unperformed; it doesn't require all obligations to be unperformed, but rather, if any obligations remain unperformed, the contract is executory in nature.

The court begins this analysis by first looking at the Asset Purchase Agreement. Dalphis Holding, LLC was obligated to pay the Promissory Note, assume and indemnify the liabilities detailed in the Asset Purchase Agreement, and enter into the employment agreements, the consulting and advisory agreements, and the noncompetition agreements. Dalphis Inc. was obligated to sell substantially all of the business assets and enter into the employments agreements, the consulting and advisory agreements, and the noncompetition agreements. The court will analyze the different obligations in the Purchase Transaction to determine if any obligations serving as consideration for the noncompetition agreements remain unperformed.

First, the promissory note has been satisfied due to the forgiveness of the note by Dalphis Inc. There is some dispute as to why the note was forgiven, but no evidence has been tendered that indicates any new obligations arose from the forgiveness of the note; therefore, despite the dispute, the court must take the note's forgiveness for what it is worth; complete performance of the obligations

under the promissory note. As of the hearing, all obligations under the promissory note have been performed.

Second, Dalphis Holding, LLC is obligated to assume specified liabilities detailed in the Asset Purchase Agreement. Principal among these liabilities is the significant liability to Trust One Bank that was secured by the business assets. This liability was assumed by Dalphis Holding, LLC and was satisfied in the 363 Sale. Dalphis Holding, LLC sold the business assets in the 363 Sale free and clear of all liens. In return for relinquishing its liens and satisfaction of the debt owed to it, Trust One Bank received a lump sum payment of $140,000, as proceeds from the 363 Sale. Dalphis Holding, LLC has assumed and satisfied the Trust One Bank note; therefore, this obligation has been performed.

In addition to the Trust One Bank debt, the debtor, Dalphis Holding, LLC, was to assume Dalphis' Inc.'s debts related to accounts payable, advanced customer deposits, capital leases, facility and storage leases, and other less significant debts. Furthermore, the debtor, Dalphis Holding, LLC, was to indemnify Dalphis Inc. for these debts. As of the hearing date, some of these obligations are due and owing. According to testimony at the hearing, Springs Window Fashions and the landlords have in fact sued Dalphis Inc., Ms. Sutton, and Mr. Goldstein related to liabilities that were to be assumed and paid by Dalphis Holding, LLC per the Asset Purchase Agreement. The accounts payable debt owed to Springs Window Fashions is estimated at nearly $500,000. Dalphis Holding, LLC has not paid this debt, cannot pay this debt, and has indicated that it has no intention or capacity to indemnify Dalphis Inc., Ms. Sutton, or Mr. Goldstein. The court finds that Dalphis Holding, LLC has not assumed and paid all liabilities as required by the Asset Purchase Agreement. As is such, the obligations to assume and pay these liabilities in accordance with the Asset Purchase Agreement remain substantially unperformed. Dalphis Holding, LLC must pay these liabilities for the Purchase Transaction to be a fully performed and executed contract. As of the hearing date, the Purchase Transaction is an executory contract due to these remaining obligations.

In addition, Dalphis Holding, LLC's obligations under the employment agreements and consulting and advisory agreements are substantially unperformed. Likewise, Ms. Sutton's and Mr. Goldstein's obligation to provide services under the employment agreements and consulting and advisory agreements are substantially unperformed. The employment agreements and consulting and advisory agreements are executory contracts, and this holding is uncontested by the parties. However, the court is convinced that the executory nature of these agreements does not impact the nature of the Purchase Transaction. The Purchase Transaction required these agreements to be signed and delivered at the time of the Purchase Transaction's closing. Since the court has found the Independent Agreement clauses in these agreements are valid and enforceable, performance related to the employment agreements and consulting and advisory agreements as required as an obligation under the Asset Purchase Agreement was completed upon signing and delivering the documents at closing on June 21, 2010. Put more simply, the Asset Purchase Agreement does not require performance under the employment agreements but rather requires only the mere signing and delivery of the agreements at closing, which occurred. This result is accomplished by the Independent Agreement clauses within each of those agreements. Therefore, the executory nature of these agreements does not impact the executory nature of the Purchase Transaction, and performance of the employment agreements and the consulting and advisory agreements is not necessary for the noncompetition agreements to be enforced.

Now, the court arrives to the executory contract determination for the noncompetition agreements. Clearly, Ms. Sutton and Mr. Goldstein have obligations under the noncompetition agreements that remain unperformed because they must not compete with Dalphis Holding, LLC for five years from June 21, 2010. The more difficult determination is whether Dalphis Holding, LLC has unperformed obligations under the noncompetition agreements. For all the aforementioned reasons, Dalphis Holding, LLC's noncompetition agreement obligations arise "as a result of the Purchase

Transaction." Therefore, to determine whether performance remains, the court looks to the Purchase Transaction and more specifically to the Asset Purchase Agreement to determine if all the obligations underlying the Purchase Transaction have been performed. As Dalphis Holding, LLC still has unperformed obligations to assume and liabilities to pay under the Asset Purchase Agreement, the court holds that Dalphis Holding, LLC's obligations under the noncompetition agreements are unperformed, and, therefore, the noncompetition agreements are executory contracts.

Assumption and Assignment

Under 11 U.S.C. § 365(a), a trustee or debtor in possession may assume or reject any executory contract subject to the court's approval. However, under 11 U.S.C. § 365(b), if there has been a default in the executory contract, the debtor in possession may not assume such contract unless the trustee or debtor in possession, among other things, cures such default and provides adequate assurance of future performance under such contract.

Here, the debtor in possession, upon its own testimony, admits that it cannot cure the defaults in the Purchase Transaction. The estate in this case has no remaining assets to assume and pay the liabilities under the Asset Purchase Agreement. Debtor is incapable of curing the default. As is such, Dalphis Holding, LLC may not assume the Asset Purchase Agreement and the noncompetition agreements associated with the Purchase Transaction. Furthermore, since such agreements may not be assumed, they, likewise, cannot be assigned to another entity.

Reasonableness

As the noncompetition agreements cannot be assumed by the debtor, Dalphis Holding, LLC, and cannot be assigned to any entity, the court finds that there would be no purpose in determining the reasonableness of the time, territory, and nature of the employment or trade protected. The noncompetition agreements are unenforceable because the buyer did not fulfill the required obligations representing the consideration underlying the formation of the noncompetition agreements. As the

noncompetition agreements are unenforceable, determining the reasonableness of the terms of the noncompetition agreements would have no application, as reasonable and unreasonable terms are both unenforceable in this situation.

ORDER AND NOTICE

Based on the forgoing, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that the noncompetition agreements discussed above are not subject to being enforced.

The Bankruptcy Court Clerk is directed to cause a copy of the Memorandum, Order, and Notice to be sent to the following persons:

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