

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF MASSACHUSETTS

In re	)	
	)	
ESSENTIAL.COM, INC.	)	Chapter 11
	)	Case No. 01-15339-WCH
Debtor.	)	
	)	

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS  
TO THE REQUEST OF BASIL G. PALLONE FOR PAYMENT OF  
CHAPTER 11 ADMINISTRATIVE PRIORITY EXPENSE**

**Preliminary Statement**

The Official Committee of Unsecured Creditors of Essential.com Inc. (the "Committee") hereby objects to the Request of Basil G. Pallone for payment of an alleged chapter 11 administrative expense (the "Request"). As further set forth below, the claim asserted by Mr. Pallone arises under a prepetition Retention Agreement which remained executory as of the Petition Date. The Debtor has not assumed the Retention Agreement in accordance with section 365 of the Bankruptcy Code. In fact, the Committee expects that the contract will be rejected under the Joint Plan of Liquidation filed on November 2, 2001 and confirmation of which is scheduled for hearing on December 21, 2001. Moreover, the claims asserted by Mr. Pallone do not arise from a transaction with the Debtor in its capacity as a debtor-in-possession, nor are the claims supported by postpetition consideration as required under the First Circuit's decision in Mammoth Mart. Because the alleged administrative claim asserted by Mr. Pallone arises under a prepetition executory contract, and because such claim does not satisfy the strictures of

Bankruptcy Code section 503(b) as interpreted in the First Circuit, Mr. Pallone's Request must

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be denied. In further support of this objection, the Committee respectfully submits the following:

### **Background**

1. On June 29, 2001 (the "Petition Date") Essential.com Inc (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"). Prior to the Petition Date, the Debtor entered into a Retention Agreement with Mr. Pallone, a copy of which is attached to the Request as Exhibit A (the "Retention Agreement"). The Retention Agreement set forth the terms of Mr. Pallone's employment, including provisions for retention bonus of \$150,000, and a dissolution/liquidation payment equal to three months of Mr. Pallone's salary (which calculates to \$41,250). Prior to the Petition Date, Mr. Pallone was paid \$50,000 of the retention bonus pursuant to the terms of the Retention Agreement. His Request of an administrative expense claim of \$141,250 therefore includes the balance of his retention bonus and dissolution/liquidation bonus.

2. On August 9, 2001, the Court entered an Order approving a private sale of substantially all of the Debtors' assets to United Systems Access, Inc. The sale was consummated on August 10, 2001. Upon information and belief, Mr. Pallone remained in the Debtor's employment to facilitate the wind-down of the Debtor's business operations. Mr. Pallone ceased working for the Debtor under the Retention Agreement on or about October 31, 2001, and was paid full salary and benefits until his departure date. Since that time, Mr. Pallone has worked for the Debtor in a consulting capacity pursuant to a new agreement.

3. In a separate effort to accomplish the very same result currently being sought by Mr. Pallone, the Debtor previously filed a motion for authority to implement a retention bonus

program. The Committee objected to that motion and, after a hearing on notice to all interested parties, the Court denied the motion.

**Claims Arising Under The Retention Agreement Will  
Constitute General Unsecured Claims Upon Rejection Of That Agreement**

4. The Request completely disregards the fact that the Retention Agreement represented an executory contract as of the Petition Date. Unless the Retention Agreement is assumed by the Debtor, claims arising thereunder will represent prepetition general unsecured claims upon rejection. See 11 U.S.C. § 365(g).

**The Alleged Administrative Priority Claim Does Not  
Satisfy The Requirements Of Section 503(b)(1)**

5. Section 503(b) of the Bankruptcy Code provides, in relevant part, that:

[T]here shall be allowed administrative expenses, ..., including (1) the actual necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case ...

6. In the First Circuit:

An expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor-in-possession and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business. A debt is not entitled to priority simply because the right to payment arises after the debtor-in-possession has begun managing the estate.

Cramer v. Mammoth Mart (In re Mammoth Mart, Inc.), 536 F.2d 950 (1st Cir. 1976).

7. In several cases, subsequent to the First Circuit's Mammoth Mart decision, courts have uniformly determined that severance and incentive related payments arising under prepetition contracts are not entitled to administrative priority simply because the payment arises postpetition. See In re Commercial Fin. Servs., Inc., 246 F.3d 1291 (10th Cir. 2001); FBI Distrib. Corp., f/k/a Filene's Basement, Inc., (Chapter 11 Case Nos. 99-16984 through 99-16985-

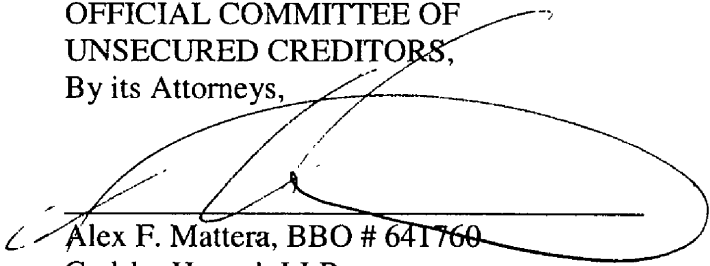
WCH) (unpublished decision with respect to claim of Kathleen Mason dated August 14, 2001). Here, there is no question that the claim asserted by Mr. Pallone does not arise out of transactions with the Debtor in its capacity as debtor-in-possession. Further, the consideration supporting his claim was provided to the Debtor prior to the Petition Date. Indeed, Mr. Pallone's retention agreement was dated November 27, 2000.

8. Given that Mr. Pallone was paid his normal wage during the postpetition period, no bonus could arguably satisfy the actual and necessary requirement of section 503(b) as interpreted in Mammoth Mart. On the contrary, Mr. Pallone has been paid fair value for his postpetition services.

WHEREFORE, the Committee respectfully requests that the Court enter an Order denying the Request Of Basil G. Pallone For Payment Of Chapter 11 Administrative Priority Expenses.

Respectfully submitted,

OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS,  
By its Attorneys,



Alex F. Mattera, BBO # 641760  
Gadsby Hannah LLP  
225 Franklin Street  
Boston, MA 02110  
(617) 345-7000

Date: December 14, 2001 .