

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

BIOPLASTY, INC.,  
a Minnesota corporation,

BKY 4-93-2600

BIO-MANUFACTURING, INC.,  
a Minnesota corporation,

BKY 4-93-2603

and

UROPLASTY, INC.,  
a Minnesota corporation,

BKY 4-93-2604

Debtors.

ORDER ALLOWING UNSECURED  
CLAIM IN THE AMOUNT OF  
\$130,856.00

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At Minneapolis, Minnesota, March 21, 1994.

W. Allen Putnam's (Putnam) Motion for Payment of Administrative Claim in the cases of Bioplasty, Inc. (Bioplasty), Bio-Manufacturing, Inc. (Bio-Manufacturing), and Uroplasty, Inc.'s (Uroplasty) (collectively "Debtors") and the Debtors' Objection to Putnam's Claim No. 3078 came on for hearing before the undersigned on March 14, 1994. Appearances were noted in the record. Based upon the testimony and other evidence adduced at the hearing, the arguments of counsel, and all the files and records, the Court being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Debtors filed voluntary petitions for relief under Chapter 11 of Title 11, United States Code, on April 29, 1993. Their cases were jointly administered pursuant to this court's Order dated June 9, 1993. By Order dated February 4, 1994, the court confirmed Debtors' First Amended Joint Plan of Reorganization

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NOTICE OF ENTRY AND FILING ORDER ON JUDGMENT
Filed and Booked Entry made on 3/21/94
FBI/DOJ, DA/USDOJ, Court, by [Signature]

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(Modified) dated January 31, 1994. The plan became effective on March 1, 1994.

2. On December 17, 1993, Putnam filed a motion for payment of administrative claim in the amount of \$195,031.63. Debtors then filed a joint motion for partial summary judgment as to Putnam's claim to administrative priority. By Order dated March 14, 1994, I denied administrative status and reserved all other issues relating to Putnam's claim.

3. On January 25, 1994, Putnam had also filed Proof of Claim No. 3078. On January 31, 1994, Debtors filed their joint objection to that claim.

4. At the hearing on March 14, I heard the remaining issues on Putnam's motion for administrative expense status and the Debtors' objection to Putnam's claim. The parties have agreed that I do not now have before me for resolution Putnam's separate claim for unpaid pre-petition wages and/or benefits.

5. Putnam's claim and his motion are based on an Employment Agreement ("Contract") dated April 27, 1993, entered into between Putnam and Bioplasty. Under the Contract:

- (a) Putnam agreed to perform services as Uroplasty's president in good faith and to the best of his ability (Contract §§ 1 and 3).
- (b) The term of Putnam's employment was to begin on May 1, 1993, and to extend to May 1, 1994 or to the effective date of Bioplasty's confirmed plan of reorganization, whichever period was longer (Contract ¶ 6).
- (c) Putnam was entitled to "one year annual compensation" if he was severed from his employment for any reason other than "cause" (Contract ¶ 2).

- (d) The amount of annual compensation was \$120,000, plus benefits, the value of which has been calculated at \$10,856. (Contract ¶ 1.b).
- (e) Bioplasty would defend and indemnify Putnam for attorneys fees and costs as well as damages incurred in connection with claims "arising out of Putnam's performance of services for the Company . . . ." (Contract ¶ 4).

6. Putnam was thus not an employee at will. He had a one year employment contract which was set to expire on May 1, 1994. It was contemplated that, if Debtors terminated Putnam for any reason other than "cause", Putnam was entitled to be paid one year's "compensation". The terms "cause" and "compensation" were not further defined.

7. Putnam served as President of Uroplasty until November 12, 1993, when Daniel Holman, President and Chairman of the Board of Bioplasty and Chairman of the Board of Uroplasty, terminated him. Until that point in time, Putnam had regularly been paid his post-petition salary and benefits. He had never been told his performance was unsatisfactory nor warned that the quality of his work was jeopardizing his job.

8. In my prior order of March 14, 1994, I held that the Contract was a pre-petition contract which Debtor rejected by the unequivocal act of terminating Putnam's employ on November 12, 1993.

9. I find that Putnam was not terminated "for cause", as that term was used in the contract. The term, it seems to me, was meant to cover a situation where Putnam, intentionally or in a grossly malfeasant manner, took acts inimical to the best interests of the company. No such acts were established.

10. Taking Debtors' evidence in its most favorable light, the most that was demonstrated was that things did not go well at Uroplasty under Putnam's stewardship. Uroplasty products had problems, some of which remain unsolved to this date. International markets were difficult to penetrate. Manufacturing procedures were not fully documented. FDA approval was not obtained because clinical data was not available. A doctor was hired to perform clinical tests on the product and he has failed to deliver his data. None of these problems is unusual or unique in any start up manufacturing operation, particularly one engaged in taking a new and untested clinical implant product to market in national and international markets.

11. Debtor introduced no evidence that Putnam failed to try or to make his best good faith efforts to achieve better results. Until the day he was terminated he was never told his performance was sub-par or that he was not "doing his job". Rather, he was repeatedly given bonuses for achieving pre-set goals. The reason given for his termination was not cause. He was told the company was downsizing and reorganizing and his services were no longer needed.

12. It does not bear well for the Debtors to say one thing at termination and another in litigation.

#### CONCLUSIONS OF LAW

1. This court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157.

2. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B); In re Johnson, 117 B.R. 461, 465 (Bankr. D. Minn. 1990).

3. As I previously determined in my order granting Debtors' motion for partial summary judgment, Putnam's claim is not entitled to administrative priority. My Order granting partial summary judgment and memorandum are incorporated herein.

4. To the extent allowable, Putnam's claim is a general unsecured claim subject to the cap under 11 U.S.C. § 502(b)(7).

5. Consistent with my ruling during trial, Debtor is not entitled to attorneys fees under Paragraph 4 of the Contract. Paragraph 4 was designed to cover the situation where Putnam was required to defend claims by third parties against him arising out of his employment with the Debtors. It does not cover attorneys fees incurred in connection with claims made by him against his employer arising out of a dispute over the contract.

6. The rejection by Debtor of the Contract gives rise to a general unsecured claim as if the breach had occurred immediately prior to the filing of the petition. 11 U.S.C. § 365(g)(1).

7. The amount of damages for rejection of the Contract is the amount provided in Paragraph 2 of the Contract, one year's "compensation". I construe "compensation" to include base salary of \$120,000, plus the value of fringe benefits in the amount of \$10,856.00.

8. This claim is limited by § 502(b)(7) which provides a cap on such claim, limiting it to the amount of one year's compensation and benefits calculated from the time of the filing of the case or

from the time of termination, whichever is earlier. Since the case was filed before Putnam was terminated, the time from which the cap runs is April 29, 1993.

9. This amount is not to be reduced by the amount Putnam was paid post-petition. He had a separate administrative claim for that amount which he has been paid. The cap in Section 502(b)(7) is applicable only to Putnam's claim for "damages resulting from the termination of an employment contract" which in this case means only the severance pay. The purpose for which the cap is included in the Code is accomplished by applying the cap to the claim for termination damages and dealing with the administrative expense separately.

10. Nor is the claim to be reduced by the amount by which Putnam was able to mitigate his damages by obtaining new employment. See In re Uly-Pak, Inc., 128 B.R. 763, 769 (Bankr. S.D. Ill. 1991).

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The claim of W. Allen Putnam is ALLOWED as a general unsecured claim in the amount of \$130,856.00.

2. Putnam's motion for treatment of the claim as an administrative expense is DENIED.

  
Nancy C. Dreher  
United States Bankruptcy Judge