

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP., REO SPECIALISTS, LLC, and
HOME AMERICA MORTGAGE, INC.,

Debtors.

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,

Applicable Debtor.

Chapter 11

Case No. 3:09-BK-07047-JAF

Case No. 3:09-BK-10022-JAF

Case No. 3:09-BK-10023-JAF

Jointly Administered Under
Case No. 3:09-BK-07047-JAF

Case No. 3:09-BK-07047-JAF

**AT&T'S MOTION FOR ALLOWANCE OF AN ADMINISTRATIVE
EXPENSE CLAIM AND COMPELLING IMMEDIATE PAYMENT**

AT&T Corp., on its own behalf and on behalf of its subsidiaries and affiliates, (collectively, "AT&T"), by and through their undersigned counsel, hereby moves (the "Motion") for entry of an order allowing and compelling the Debtor's payment of administrative expenses pursuant to section 503(b) of the Bankruptcy Code. In support, AT&T respectfully state as follows:

BACKGROUND

1. On August 24, 2009 (the "Petition Date"), Taylor, Bean & Whitaker Mortgage Corp. ("TBW" or "Debtor") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Middle District of Florida (the "Court" or the "Bankruptcy Court"). On November 25, 2009, REO Specialists, LLC ("REO") and Home American Mortgage, Inc. ("HAM"), together with

TBW and REO, the “Debtors”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

2. On January 19, 2010, the Court entered an order jointly administering the Debtors’ bankruptcy cases.

3. The Debtors continue to operate their businesses and manage their properties as debtors in possession under Bankruptcy Code §§ 1107(a) and 1108.

4. As described below, the Debtor has failed to make any payments under the AT&T Contracts for the post-petition services the Debtor has received and is continuing to receive from AT&T. In fact, the Debtor has not made any payments to AT&T under the AT&T Contracts since the Petition Date. The total amount owed for post-petition services under the AT&T Contracts is approximately \$1 million, and continues to grow each day.

The AT&T Contracts

5. AT&T provides various telecommunications services to the Debtor, including land-line, video streaming, internet, fiber connectivity and other data services under several agreements with the Debtor (collectively, the “AT&T Contracts”). Specifically, TBW and AT&T are parties to (i) that certain Master Agreement, No. 109054, dated September 11, 2001 (“Master Agreement No. 109054”), and (ii) that certain Master Agreement, No. DCMT384576, dated May 31, 2004 (“Master Agreement No. 384576”, collectively, the “Master Agreements”). Subsequently, TBW and AT&T also entered into the following attachments, addendums and pricing schedules that were issued pursuant to and governed by the Master Agreements:

- Comprehensive Addendum to Master Agreement No. IX or X, dated November 11, 2004;
- AT&T ACCU-Ring Service Pricing Schedule, dated April 20, 2007;
- AT&T Data Services Pricing Schedule, dated April 20, 2007;

- AT&T Business Network Service Pricing Schedule, dated April 20, 2007;
- AT&T Managed Internet Service Addendum, dated May 22, 2007;
- AT&T Teleconferencing Service Pricing Schedule, dated November 7, 2007¹;
- AT&T Circuit Term Plan-Access to AT&T VPN Service Pricing Schedule, dated May 16, 2008; and
- AT&T ACCU-Ring Service Pricing Schedule, dated March 9, 2009.

(collectively, the “Supplemental Agreements”).

6. The “General Terms and Conditions” of the Master Agreements also govern the Supplemental Agreements. The Master Agreements provide that the parties may terminate any Supplemental Agreement if either party fails to perform their respective obligations under such agreement and such failure continues for thirty days. Specifically, the Master Agreements state:

If a party fails to perform or observe any material term or condition of this Agreement and the failure continues unremedied for thirty (30) days after receipt of written notice ... the other party may terminate for cause any Attachment affected by the breach,

Master Agreements at §10.1. In addition, under Master Agreement No. 109054, AT&T has the additional right to terminate, suspend service or require a deposit if TBW defaults in its respective obligations. Master Agreement No. 109054 provides, “(ii) where the failure is a non-payment by You of any charge when due, AT&T may, at its option, terminate or suspend Service or require a deposit under affected Attachments.” Master Agreement No. 109054 at §10.1.

7. The Debtor has not made any of payments under the AT&T Contracts despite the fact that the Debtor has continued to utilize the services provided by AT&T during the approximately seven months since the bankruptcy filing.² In that connection, the Debtor owes

¹ This is the only Supplemental Agreement related to Master Agreement No. 384576.

² The Debtor has made certain post-petition payments related to other contracts with AT&T but has not made any post-petition payments required under the AT&T Contracts.

approximately \$782,955.31, which represents the late and past due payments for post-petition services. In addition, the Debtor presently owes approximately \$210,881.23 for the current billing cycle, which will come due shortly. If the Debtor continues its non-payment with respect to the current billing cycle, the total post-petition amount owed will increase to approximately \$993,836.54 (the "Post-Petition Claim") and will continue to increase each month the Debtor does not make the required payments.³

8. In short, the Debtor is continuing to receive services under the AT&T Contracts, but is failing to make any post-petition payments owed under the AT&T Contracts. The Debtor's post-petition payment obligations to AT&T are accruing monthly and AT&T is being forced to continue performing its obligations under the AT&T Contracts without receiving any payment from the Debtor.

ARGUMENT

9. AT&T has an administrative expense claim for the services provided to the Debtor under the AT&T Contracts pursuant to section 503(b) of the Bankruptcy Code and, as discussed below, the Court should utilize its discretion to compel the Debtor to make immediate payment of all the post-petition amounts owed.⁴

A. AT&T is Entitled to an Allowed Administrative Expense Claim Pursuant to Section 503(b)(1)(a) of the Bankruptcy Code

10. Section 503(b)(1)(A) allows for the priority payment for post-petition expenses of the debtor in possession incurred in preserving the estate. The overriding purpose for allowing

³ A spreadsheet showing the post-petition arrearages and claims is attached hereto as Exhibit A. In addition to the Debtor's failure to make post-petition payments, the Debtor owes AT&T approximately \$769,910.38 for pre-petition services provided under the AT&T Contracts. AT&T reserves its rights to assert additional amounts owed under the AT&T Contracts or any other agreement with the Debtors as administrative expense or general unsecured claims.

⁴ Contemporaneous with the filing of this Motion, AT&T is filing a motion for an order (i) compelling the Debtor pursuant to section 365 of the Bankruptcy Code immediately to reject the AT&T Contracts, or alternatively, (ii) modifying the stay pursuant to section 362 of the Bankruptcy Code to allow AT&T to exercise its rights under the AT&T Contracts to terminate such contracts immediately.

payment of administrative expenses under 11 U.S.C. § 503(b)(1)(A) is to facilitate the efforts by the debtor in possession to rehabilitate its business for the benefit of all the estate's creditors. Park National Bank v. University Centre Hotel, Inc., 2007 U.S. Dist. LEXIS 12237, *13-14 (N.D. Fla. 2007) ("This encourages parties to conduct business with a post-petition debtor because such administrative claims are accorded the first level of priority and are paid in full before claims in a lower category."). An administrative expense under section 503(b)(1)(A) exists when the claimant shows "that the claim arose from a post-petition transaction and that the transaction actually benefited the estate." In re Section 20 Land Group, Ltd., 261 B.R. 711, 715 (Bankr. M.D. Fla. 2000).

11. Transactions in the ordinary course of business of the debtor in possession generally create expenses of estate administration. See In re Crystal Apparel, Inc., 220 B.R. 816, 830 (Bankr. S.D.N.Y. 1998); see also In re Clifondale Oaks, LLC, 2006 Bankr. LEXIS 2274, *5 (Bankr. N.D. Ga. June 2, 2006) ("A debtor-in-possession may incur unsecured debt in the ordinary course of business. . . . Claims arising from such extensions of credit are automatically entitled to administrative expense priority under section 503(b)(1)."). Furthermore, where a debtor in possession induces the performance of the counterparty to an executory contract and accepts the benefits from such performance, the debtor in possession is estopped from denying the administrative claim status. In re Section 20 Land Group, Ltd., 261 B.R. 711, 717 (Bankr. M.D. Fla. 2000) ("Having induced IMG to perform and willingly accept the benefits thereof, the Debtor is now estopped to deny that administrative claim status to IMG.").

12. Here, AT&T provided post-petition services to the Debtor in the ordinary course of business under the AT&T Contracts. Accordingly, the Post-Petition Claim should be allowed as an administrative expense priority claim under section 503(b)(1)(A).

B. AT&T is Entitled to the Immediate Payment of its Allowed Administrative Expense Claim

13. AT&T respectfully requests that the Debtor be directed to pay immediately the Post-Petition Claim pursuant to section 503(b)(1)(A) of the Bankruptcy Code.

14. Courts have discretion to order debtors to pay immediately an allowed administrative expense claim. In re Colortex Industries, Inc., 19 F.3d 1371, 1384 (11th Cir. 1994) (“The determination of the timing of payment of administrative expenses is a matter within the discretion of the bankruptcy court.”). There are several factors courts consider in deciding whether to grant such a request, including the prejudice to the debtor, hardship on the creditor and potential detriment to other creditors. In re TI Acquisition, LLC, 410 B.R. 742, 746 (Bankr. N.D. Ga. 2009) (citing another court that recognized “three factors in determining how to exercise its discretion on the timing of payment of an administrative expense claim: (1) the prejudice to the debtors, (2) hardship to claimant, and (3) potential detriment to other creditors”); see also In re Garden Ridge Corp., 323 B.R. 136, 143 (Bankr. D. Del. 2005).

15. In weighing the factors listed above, courts may compel immediate payment if the estate is able to pay administrative claims in full. In re King, 392 B.R. 62, 68 (Bankr. S.D.N.Y. 2008); In re Standard Furniture Co., 3 B.R. 527, 532 (Bankr. S.D. Cal. 1980) (providing for immediate payment of administrative expense claim since all administrative expenses were to be paid in full). However, even if the Debtor is administratively insolvent, the Debtor is still required to pay its ongoing post-petition operating expenses when they become due despite the fact that other administrative creditor may not receive full payment. As one court stated:

When there is the possibility that the assets of the estate will not be sufficient to cover all expenses of administration, it is legally improper to pay one expense of the Debtor or Debtor-in-Possession before paying another, *except those incurred in the ordinary course of the Debtor-in-Possession's business operation.*

In re Western Farmers Assoc., 13 B.R. 132 (Bankr. W.D. Wash. 1981) (emphasis added) (denying interim payment of professionals and rejecting argument that interim payment was warranted because debtor was currently paying other expenses); see also In re Vernon Sand & Gravel, Inc., 109 B.R. 255 (Bankr. N.D. Ohio 1989) (“Practical necessities require that administrative expenses resulting from the ordinary course of business be paid immediately . . .”).

16. Here, the Debtor is continuing to operate its business and incur ordinary course expenses, paying other vendors, suppliers, service providers and its professionals. Accordingly, the Debtor is presumably solvent and can meet its ongoing post-petition obligations. There would be little prejudice in compelling the Debtor to pay the Post-Petition Claim, since the Debtor is required to meet its ongoing operational expenses and is continuing its operations.

17. On the other hand, the harm to AT&T is clear; the post-petition amount is approaching \$1 million, which is a significant sum for any business. AT&T has been forced to provide continued service to the Debtor under the AT&T Contracts, without any payment, resulting in mounting losses. The Debtor should not have it both ways. The Debtor should not be permitted to reap the benefit of the use of the services without compensating AT&T for such use. The Debtor should be compelled to make AT&T whole for the post-petition period by paying the requisite amounts owed under the AT&T Contracts.

18. Accordingly, the Post-Petition Claim should be an allowed administrative expense claim and the Debtor should be compelled to immediately pay the Post-Petition Claim pursuant to section 503(b)(1)(A) of the Bankruptcy Code.

WHEREFORE, AT&T respectfully request that the Court enter an order allowing and compelling immediate payment of the post-petition amounts owing to AT&T as administrative expenses and granting such other and further relief as is deemed just and proper.

Dated: March 3, 2010

Respectfully submitted,

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Counsel to AT&T

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served electronically through the Court's EM/ECF system on all parties requesting electronic service on this 3rd of March, 2010.

/s/ Mark S. Roher
Mark S. Roher