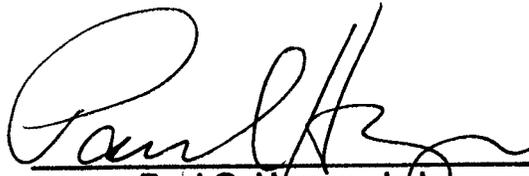
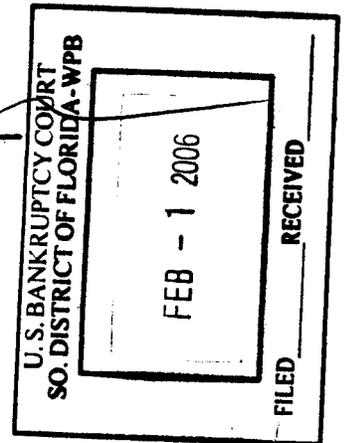


ORDERED in the Southern District of Florida on January 30, 2006



  
Paul G. Hyman, Judge  
United States Bankruptcy Court



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

In re:

CASE NO.: 05-30162-BKC-PGH  
CHAPTER 11

The Main Line Corporation,  
Debtor.

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**ORDER GRANTING DEBTOR'S MOTION FOR SUMMARY JUDGMENT  
REGARDING WALTER CLOUGH'S MOTION FOR ADMINISTRATIVE EXPENSE  
CLAIM**

THIS MATTER came before the Court upon the Main Line Corporation's ("Debtor") Motion for Summary Judgment Regarding Walter Clough's Motion for Administrative Expense Claim (the "Motion"), Walter Clough's ("Clough") Response to the Motion (the "Response"), Debtor's Reply (the "Reply") thereto, the Joint Stipulation of Facts filed on November 14, 2005 (the "Initial Joint Stipulation"), and the Joint Stipulation and Agreed Order Regarding Procedure for Consideration of Motions for Administrative Expense Claim Filed by Walter Clough and Clough Marketing Services, Inc., (the "Second Joint Stipulation and Agreed Order"). The Court, having

considered the Motion, the Response, the Reply, the Initial Joint Stipulation, the Second Joint Stipulation and Agreed Order, applicable law and being otherwise fully advised in the premises, hereby **GRANTS** the Motion.

### **BACKGROUND**

Debtor provides document management and imaging systems to government entities responsible for processing official records. Debtor sells and services various computer software products including Official Records Imaging System, Court Records Imaging System and others. On December 10, 1999, Clough Marketing Systems, Inc., (“CMS”) and Clough commenced an action against Debtor and its president, Noe Santamarina, in the Superior Court of Fulton County, Georgia (the “State Court Action”).

In the State Court Action, Clough alleged that he entered into a commission agreement (the “Alleged Agreement”) with Debtor, where Clough, as an independent contractor, would provide marketing and consulting services for the sale of Debtor’s products. Pursuant to the Alleged Agreement, CMS was entitled to 8% of the price of any contract awarded to Debtor, excluding off-the-shelf hardware for which percentages would be negotiated separately.<sup>1</sup> Allegedly, CMS would be paid any commissions earned by Clough at the time Debtor received payments from customers secured by Clough. The Alleged Agreement was terminated in September of 1999. In his Second Amended Complaint in the State Court Action (the “State Court Complaint”), Clough claimed that Debtor breached the Alleged Agreement by failing to appropriately compensate him with

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<sup>1</sup> According to the Alleged Agreement, Debtor initially made all payments for Clough’s services to Clough Management Consultants, Inc. In 1997, Debtor allegedly consented to make all payments to CMS, when Clough and his wife agreed to form CMS, which was solely owned by Clough’s wife.

commission payments for several contracts entered into by Debtor. Clough sought damages for, *inter alia*, breach of contract, promissory estoppel and quantum meruit. Clough also sought damages against CMS because CMS asserted ownership of the claim against Debtor. On April 2, 2004, the jury rendered a verdict in the State Court Action (the “Jury Verdict”) finding that there was no contract between Debtor and CMS or Clough. However, the jury awarded damages against Debtor in favor of CMS based upon quantum meruit and awarded damages against CMS in favor of Clough. A judgment was entered in accordance with the Jury Verdict on May 11, 2004 (the “State Court Judgment”).

On January 13, 2005, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code (the “Petition Date”). The Court set May 17, 2005 as the last day for parties, other than government entities, to file proofs of claim. Neither Clough nor CMS filed a proof of claim in this case. On May 5, 2005, Debtor delivered to Clough’s counsel via e-mail its personal ledger for 2005, which showed Debtor’s deposits from the Petition Date through March 16, 2005. On June 6, 2005, Clough filed a Motion for Allowance and Payment of Administrative Claim (Clough’s Administrative Claim Motion”). In Clough’s Administrative Claim Motion, he asserts that Debtor received over \$900,000 postpetition from customers secured through Clough’s consulting services. Clough claims that he is entitled to a commission on these alleged contracts and his commission claim should be classified as an administrative claim under 11 U.S.C. § 503(b)(1)(A). On September 23, 2005, Clough received ownership and control of CMS from his wife as part of their Kansas divorce settlement. On October 7, 2005, CMS filed a Motion for Allowance and Payment of Administrative Claim or in the Alternative to Allow Late Filing of Proof of Claim (“CMS’s Administrative Claim Motion”). On October 31, 2005, Clough filed a Motion to Merge Clough’s

Administrative Claim Motion with CMS's Administrative Claim Motion.

In the Motion, Debtor argues that Clough and CMS's claim to commission payments for Debtor's postpetition receipt of funds is barred by res judicata and collateral estoppel based upon the State Court Judgment. Debtor also asserts that Clough and CMS's commission claim is not entitled to priority as an administrative expense because neither Clough nor CMS provided any postpetition services to Debtor. In the Initial Joint Stipulation and the Second Joint Stipulation and Agreed Order, the parties have stipulated that neither CMS nor Clough have been employed by Debtor or provided any services to Debtor on or after the Petition Date.

In the Response, Clough counters that the State Court Action resolved damages owed to Clough as of the date of the State Court Action and not Clough's future entitlement to commission payments. Therefore, Clough claims that his entitlement to commission payments postpetition is not barred by res judicata or collateral estoppel. Clough also counters that Debtor's postpetition receipt of payments from customers secured by Clough entitles him to an administrative expense claim for commission payments. Clough further asserts that Debtor's contracts with its customers are executory contracts, and once those contracts were assumed Clough's claim to commission payments matured and is entitled to priority as an administrative expense.

Pursuant to the Second Joint Stipulation and the Agreed Order, the Court shall first consider and determine whether Clough or CMS are entitled to the allowance of an administrative expense claim against Debtor without taking into account Debtor's arguments that res judicata and collateral estoppel preclude such relief. In the event the Court determines that Clough or CMS is entitled to the allowance of an administrative expense claim, the Court shall schedule a trial to determine the amount of any such administrative expense claim, subject to Debtor's right to re-assert the

applicability of res judicata and collateral estoppel to preclude the relief sought by Clough or CMS prior to such trial. If the Court determines that Clough and CMS are not entitled to the allowance of an administrative expense claim, the Court shall consider and determine whether Clough or CMS is entitled to the allowance of a prepetition claim. Should the Court determine that Clough or CMS is entitled to the allowance of a prepetition claim, the Court shall schedule a trial to determine the amount of such prepetition claim.

### **CONCLUSIONS OF LAW**

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

#### **A. The Summary Judgment Standard**

Federal Rule of Civil Procedure 56(c), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment is appropriate if the Court determines that the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In considering a motion for summary judgment, “the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.” *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) (*citing Anderson*, 477 U.S. at 248). Summary Judgment is appropriate when, after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor

of the non-moving party. *Anderson*, 477 U.S. at 248-49.

In a motion for summary judgment, the moving party initially bears the burden of establishing the absence of a genuine issue as to any material fact. *See Celotex*, 477 U.S. at 322 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970)). When a motion for summary judgment is made and supported by the movant, Federal Rule of Civil Procedure 56(e) requires the nonmoving party to set forth specific facts demonstrating that genuine issues of material fact remain for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The party opposing a summary judgment motion “must do more than simply show that there is some metaphysical doubt as to the material facts,” mere conclusions are not enough to create an issue of material fact. *Id.* at 586.

In light of the standard for summary judgment, and for the reasons discussed below, the Court finds it appropriate to grant summary judgment in favor of Debtor.

**B. Neither Clough nor CMS are Entitled to the Allowance of an Administrative Claim Under 11 U.S.C. § 503(b)(1)(A)**

In the Motion, Debtor argues that Clough and CMS’s commission claims are not entitled to priority status as administrative expenses because neither Clough nor CMS provided any postpetition services to Debtor. In the Response, Clough counters that Debtor received revenue postpetition based upon Clough’s prepetition services under the Alleged Agreement. Therefore, Clough asserts that Debtor owes him or CMS commission payments pursuant to the Alleged Agreement and the claim to commission payments should be entitled to a priority as an administrative expense. Clough also claims that Debtor’s contracts with customers secured by Clough are executory contracts, and once those contracts were assumed Clough’s right to payment under the Alleged Agreement matured as an administrative expense.

11 U.S.C. § 503(b) governs administrative expenses and provides in pertinent part that:

(b) After notice and a hearing, there shall be allowed, administrative expenses . . . including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries or commissions for services rendered after the commencement of the case.

11 U.S.C. § 503(b)(1)(A).

Pursuant to 11 U.S.C. § 507(a)(1), administrative expenses are afforded a first priority. This priority is based on the premise that the operation of the business by a debtor in possession benefits prepetition creditors; therefore, any claims that result from the operation are entitled to payment prior to payment to “creditors for whose benefit the continued operation of the business was allowed.” *In re Worldcom, Inc.*, 308 B.R. 157, 165 (Bankr. S.D.N.Y. 2004) (citing *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976)). Administrative expenses are afforded a priority to facilitate the reorganization effort by encouraging third parties, who might be reluctant to deal with a debtor-in-possession, to transact such business. *In re Worldcom*, 308 B.R. at 165 (citing *Amalgamated Ins. Fund v. McFarlin’s Inc.*, 789 F.2d 98, 101 (2d Cir. 1986)). The burden of proving entitlement to an administrative expense rests with the party seeking its allowance. *In re Dynacircuits, L.P.*, 143 B.R. 174, 176 (Bankr. N.D. Ill. 1992).

An expense will be accorded administrative status (1) if it arises out of a transaction between the creditor and the bankrupt’s trustee or the debtor-in-possession, and (2) 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. *See, e.g., Amalgamated Ins. Fund*, 789 F.2d at 101; *In re Jartran, Inc.*, 732 F.2d 584, 587 (7th Cir. 1984). In order for a claim based on a prepetition contract to be entitled to a priority as an administrative expense, that contract must be

executory. *In re Keren Ltd. P'shp*, 225 B.R. 303, 307 (S.D.N.Y.1998), *aff'd*, 189 F.3d 86 (2d Cir. 1999) (citing *In re J.M. Fields, Inc.*, 22 B.R. 861, 864 (Bankr. S.D.N.Y. 1982)). In the bankruptcy context an executory contract is a contract in which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other party. *Id.* A claim based on an executory contract is entitled to priority if the trustee or debtor in possession elects to assume the contract or if the estate receives benefits under it. *Id.* at 308. However, if the consideration was supplied prepetition, the claim is not entitled to administrative priority even where the right to payment arises postpetition. *See, e.g., Jartran, Inc.*, 732 F.2d at 587; *In re Precision Carwash Corp.*, 90 B.R. 34, 37 (Bankr. E.D.N.Y. 1988). It is the time at which the services are rendered that is dispositive of the issue of whether an administrative expense is allowed. *In re Dynacircuits, L.P.*, 143 B.R. at 176.

Clough primarily relies upon the case of *In re Ingram*, No. Civ. A. 94-165, 1994 WL 150807 (E.D. La. Apr. 6, 1994) in support of his argument that his right to payment under the Alleged Agreement should be afforded priority as an administrative expense. In *Ingram*, one of the joint Chapter 11 debtors owned property with his non-debtor sisters and entered into a lease agreement with a tenant prepetition. *Id.* at \*1. Pursuant to the lease agreement, a leasing agent received a commission from the owners on a monthly basis. *Id.* After the lease expired, the tenant did not exercise the option to renew the lease but continued to occupy the property on a month to month basis paying the same rent. *Id.* Approximately ten months after the lease expired, the tenant submitted an offer to purchase the property from the owners. *Id.* The Bankruptcy Court conducted a hearing at which time it solicited bids from the tenant and another potential purchaser. *Id.* The

trustee accepted the tenant's offer and filed a motion for authority to sell the property, free and clear of all liens and encumbrances. *Id.* The leasing agent filed an objection to the sale, claiming that she was entitled to a sales commission based upon the lease agreement. *Id.* Thereafter, the trustee filed a motion to reject the lease agreement claiming that it was a burden to the estate. *Id.* The Bankruptcy Court denied the motion to reject the lease and found that the leasing agent was entitled to a sales commission. *Id.* One of the non-debtor owners filed an appeal of the Bankruptcy Court's order on behalf of the owners. *Id.* The District Court affirmed the Bankruptcy Court's decision that the leasing agent was entitled to a sales commission based upon the language of the lease agreement. *Id.* at \*2. While the leasing agent did not participate in the final negotiations, the District Court found that the leasing agent was the procuring cause of the sale because she brought the parties together. *Id.* Furthermore, the District Court found that the leasing agent had an ongoing participation in the relationship postpetition because she continued to receive monthly rental commissions after the debtor filed for bankruptcy. *Id.* at \*2-3. The District Court observed that the monthly rental commissions were recognized administrative expenses that no one objected to. *Id.* at \*3. Consequently, the District Court concluded that the sales commission should not be treated differently from the rental commissions and should be afforded priority as an administrative expense under § 503(b)(1)(A). *Id.*

The Court finds the facts of this case distinguishable from *Ingram*. In *Ingram*, the District Court found that the leasing agent performed services postpetition by participating in the tenant and the owner's relationship. In this case, while Clough may have been the procuring cause of several customer contracts entered into by Debtor postpetition, Clough and CMS concede that they performed no services for Debtor on or after the petition date. As previously stated, if the

consideration was supplied prepetition, the claim is not entitled to administrative priority even where the right to payment arises postpetition. *See, e.g., Jartran, Inc.*, 732 F.2d at 587; *In re Precision Carwash Corp.*, 90 B.R. at 37. Consequently, the Court is unpersuaded by Clough's reliance upon *Ingram*.

Clough also argues that Debtor's contracts with customers secured by Clough are executory contracts and once those contracts were assumed Clough's right to payment matured as an administrative expense. In support of this argument, Clough cites the case of *In re Keren Ltd. P'shp*, where a brokerage firm entered into a commission agreement prepetition with the debtor. *Id.* at 305. The commission agreement provided that the brokerage firm would be entitled to a commission in the event of the consummation of a lease agreement between debtor and a prospective tenant. *Id.* Postpetition the lease agreement was executed and the brokerage firm sought to recover the commission as an administrative expense. *Id.* The Bankruptcy Court denied the brokerage firm's motion to recover the commission as an administrative expense, and the brokerage firm subsequently appealed arguing that the commission agreement was an executory contract. *Id.* In its opinion, the District Court analyzed the commission agreement between the debtor and the brokerage firm, not the lease agreement between the debtor and the prospective tenant. *Id.* at 307-08. The District Court found that the commission agreement was not an executory contract for several reasons including that the payment obligation was incurred prepetition, the brokerage firm fully performed under the commission agreement prepetition, and the brokerage firm had no affirmative duties under the commission agreement. *Id.* at 308. The District Court observed that where a payment obligation is incurred prepetition, the fact that payment may be dependent upon a postpetition contingency is irrelevant. *Id.* Therefore, the District Court affirmed the Bankruptcy Court's decision to refuse to

treat the brokerage firm's claim as an administrative expense. *Id.*

As in the case of *In re Keren Ltd. P'shp*, the Court must analyze the Alleged Agreement between Debtor and Clough in making its determination as to whether Clough's claim should be treated as an administrative expense. Debtor's contracts with customers secured by Clough are irrelevant to the issue of whether the Alleged Agreement is an executory contract. The Court finds that the Alleged Agreement is not an executory contract because the jury found that there was no contract between Debtor and Clough or CMS in the State Court Action. As a result, the Court finds Clough's executory contract argument unpersuasive.

### **CONCLUSION**

The Court finds Clough and CMS's admission that neither performed services on or after the Petition Date fatal to Clough's argument for treatment of the commission claim as an administrative expense. The case law is clear that if the consideration under the Alleged Agreement was performed prepetition, the claim is not entitled to administrative expense priority even where the right to payment arises postpetition. Furthermore, the Court dismisses the executory contract argument because it was previously determined in the State Court Action that there was no contract between Debtor and CMS or Clough. As a result, the Court concludes that neither Clough nor CMS's claim to commission payments is entitled to treatment as an administrative expense under 11 U.S.C. § 503(b)(1)(A).

### **ORDER**

Having reviewed the submissions of the parties, applicable law, and being otherwise fully advised in the premises, it is hereby:

**ORDERED AND ADJUDGED** that:

1. The Motion is **GRANTED**.
2. Upon completion of discovery on the issue of whether Clough or CMS are entitled to a prepetition claim, the parties are instructed to contact the Court's Courtroom Deputy to schedule an evidentiary hearing.

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