

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re:) CHAPTER 11
)
Taylor, Bean & Whitaker Mortgage Corp.) CASE NO. 3:09-BK-07047-JAF
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Debtors.)
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_____)

**APPLICATION OF AVISTA SOLUTIONS, INC. FOR ALLOWANCE OF
CONTRACT REJECTION DAMAGES AND ADMINISTRATIVE EXPENSES**

Avista Solutions, Inc. ("Avista"), through counsel and pursuant to 11 U.S.C. §§ 364(a), 365(g) and 503(b)(1), applies to the Court for the entry of an order allowing Avista a general unsecured claim for contract rejection damages in the amount of \$161,000 and an administrative priority expense claim for data transfer assistance in the amount of \$5,535.00. In support thereof, Avista states as follows:

1. On May 1, 2002, the Debtor entered into a Software License, Development and Support Agreement (the "Contract") with Avista for certain proprietary software systems for mortgage origination and processing via the internet, and for Avista to develop modifications to the software to the Debtor's specifications. A copy of the Contract is attached hereto as **Exhibit A** and incorporated herein by reference.

2. On August 25, 2003, the Debtor entered into an Amendment to Software License, Development, and Services Agreement (the "Contract Amendment"), where certain provisions of the Contract were amended, including increasing the monthly maintenance fee to \$23,000 per month for the period beginning March 1, 2004 through the remainder of the Contract. A copy of the Contract Amendment is attached hereto as **Exhibit B** and incorporated herein by reference.

3. Pursuant to the term of the Contract, the Contract renewed automatically for additional one year terms unless either the Debtor or Avista notified the other of its intent not to renew the Contract not later than sixty days prior to the expiration of the Contract. The Contract was renewed on May 1, 2009.

4. The Debtor last paid Avista in August 2009 for the September monthly maintenance fee.

5. On August 24, 2009 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

6. The Debtor never filed a motion to assume or reject the Contract. Pursuant to paragraph 83 of the Confirmation Order of the *Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors*, the Contract was deemed rejected. Accordingly, the Debtor owes Avista \$161,000 in contract rejection damages, representing payments for maintenance fees owing from September 2009 through March 2010. See Section 365(g), holding that "the rejection of an executory contract...constitutes a breach of such contract."

7. Pursuant to the *Notice of Entry of Order Confirming Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors; Effective Date of Plan; Bar Dates for Administrative Claims and Other Claims; and Other Matters* [Docket No. 3572, Filed August 11, 2011], Avista filed a claim via overnight delivery to BMC Group on September 6, 2011 for \$161,000. A copy of the proof of claim mailed to BMC Group is attached hereto as **Exhibit C** and incorporated herein by reference.

8. Further, after the Petition Date, Avista, at the request of the debtor in possession, provided post-petition data transfer assistance to the Debtor. The total value of these services was \$5,535.00, which represents an administrative claim against the Debtor's estate.

9. Section 503(b)(1)(A) allows an administrative claim for the "actual, necessary costs and expenses of preserving the estate." Under Section 503(b)(1)(A), an administrative claim arises when a creditor establishes that "the claim arose from a post-petition transaction and that the transaction actually benefitted the estate." In re Section 20 Land Group, Ltd., 261 B.R. 711, 715 (Bankr. M.D. Fla. 2000).

10. Under Section 364(a), a debtor in possession is authorized to "incur unsecured debt in the ordinary course of business," with such debt "allowable under section 503(b)(1) of this title as an administrative expense." See also In re Cliftondale Oaks, LLC, 2006 WL 6589915 at *2 (Bankr. N.D.Ga. 2006) (holding that an administrative expense claim "arising from such extensions of credit are automatically entitled to administrative expense priority under section 503(b)(1).")

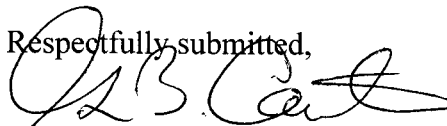
11. Further, when the debtor in possession seeks performance under the terms of an executory contract and "willingly accept[s] the benefits thereof, the Debtor is now estopped to deny that administrative claim status." In re Section 20 Land Group, Ltd., 261 B.R. at 717.

12. Avista provided the Debtor with post-petition services, with such services provided pursuant to the ordinary course of business under the Contract. As such, Avista is entitled to an administrative priority expense claim under Section 503(b)(1)(A) in the amount of \$5,535.00.

WHEREFORE, Avista respectfully requests that this Court enter its order allowing Avista a claim for contract rejection damages in the amount of \$161,000 and an administrative priority expense claim for post-petition data transfer assistance in the amount of \$5,535.00, and such other and further relief as this Court deems just and proper.

DATED this 9th day of September, 2011.

Respectfully submitted,



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Certificate of Service

I, the undersigned, administrative assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Avista Solutions, Inc., hereby certifies that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleadings: Application of Avista Solutions, Inc. for Allowance of Contract Rejection Damages and Administrative Expenses

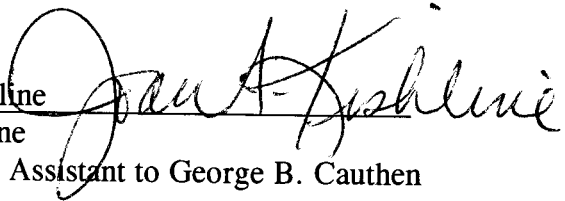
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Columbia, South Carolina
September 9, 2011