

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

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

**Debtors and Debtors in
Possession.**

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**

**MOTION TO ASSUME AGREEMENT AS AMENDED BETWEEN
TAYLOR, BEAN & WHITAKER MORTGAGE CORP. AND FINANCIAL INDUSTRY
COMPUTER SYSTEMS, INC.**

Taylor, Bean & Whitaker Mortgage Corp., as debtor and debtor-in-possession (“TBW” or the “Debtor”), respectfully submits this Motion to Assume Agreement as Amended Between Taylor, Bean & Whitaker Mortgage Corp. and Financial Industry Computer Systems, Inc. (the “Motion”). In support of the Motion, the Debtor shows the Court as follows:

Jurisdiction

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are Sections 365(a) and 105(a) of the Bankruptcy Code (as defined herein).

Background

2. On August 24, 2009 (the “Petition Date”), the Debtor filed with this Court its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code.

3. The Debtor continues to manage its property as a debtor in possession pursuant to

Sections 1107(a) and 1108 of the Bankruptcy Code.

4. On September 11, 2009, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Committee”).

5. No trustee or examiner has been appointed in this case.

6. On July 21, 2011, the Court entered its Order Confirming Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors [Dkt. No. 3420 in the Main Bankruptcy Case] (the “Confirmation Order”), which confirmed the Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors [Dkt. No. 3240] (the “Plan”), including the terms of the Plan Supplement (as defined in the Confirmation Order) and all documents attached to the Plan Supplement [Dkt. No. 3322].

7. The Plan will likely be effective on or about August 10, 2011.

8. On March 22, 1999, TBW and Financial Industry Computer Systems, Inc. (“FICS,” together with TBW, the “Parties”) entered a Software License Agreement (together with all schedules, amendments, and addenda, the “Agreement”).

9. Pursuant to the terms of the Agreement, TBW licenses certain software programs from FICS that previously allowed TBW to conduct its mortgage servicing business and continues to provide TBW with access to its historical servicing records. TBW’s access to its historical servicing records is of critical importance to the ongoing liquidation efforts of TBW.

10. The Agreement provides that it shall remain in force until terminated. TBW may terminate the Agreement at any time.

11. The specific programs licensed by TBW (the “Licensed Programs”) are set forth in certain schedules to the Agreement titled Schedule A that have been executed by the Parties

from time to time. Further, the number of concurrent users authorized to use the Licensed Programs is set forth in certain schedules to the Agreement called Schedule I Change in Concurrent Users (“Schedule I”) that have been executed by the Parties from time to time.

12. On August 9, 2011 the Parties executed an amended Schedule I reducing the number of concurrent users of the Licensed Programs and thereby reducing the monthly fees paid by TBW to FICS (the “Amendment”). The Amendment reduces TBW’s monthly license fees from approximately \$3,986.50 to approximately \$2861.50.

13. The Agreement, together with all schedules and addenda, including the Amendment, is attached hereto as Exhibit A.

Relief Requested

14. TBW requests that this Court enter an order authorizing the assumption of the Agreement as amended by the Amendment, effective as of the date of the filing of this Motion.

Basis for Relief

15. Section 365 of the Bankruptcy Code provides, in pertinent part, that a debtor in possession, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

16. Courts evaluate a debtor’s decision to assume or reject an executory contract or unexpired lease under the “business judgment” standard. *See In re Gardinier, Inc.*, 831 F.2d 974, 976 n.2 (11th Cir. 1987); *Sharon Steel Corp. v. Nat’l Fuel Gas Distr. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *In re Wells*, 227 B.R. 553, 564 (Bankr. M.D. Fla. 1998); *Sundial Asphalt Co. v. V.P.C. Investors Corp.*, 147 B.R. 72 (E.D.N.Y. 1992). A debtor satisfies this standard by determining that, in the debtor’s business judgment, the assumption or rejection of the subject executory contract or unexpired lease would likely benefit the estate. *See Sharon Steel*, 872 F.2d

at 39-40; *In re Bicoastal Corp.*, 125 B.R. 658, 667 (Bankr. M.D. Fla. 1991); *In re Kong*, 162 B.R. 86 (Bankr. E.D.N.Y. 1993). Absent a finding of bad faith or carelessness, courts generally will not disturb a debtor's business decision to assume or reject an executory contract or unexpired lease. *See Lubrizol Enter. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985); *In re Prime Motor Inns*, 124 B.R. 378, 383 (S.D. Fla. 1991); *In re Federal Mogul Global, Inc.*, 293 B.R. 124 (D. Del. 2003); *In re III Enter., Inc. V*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994). Thus, to the extent that sound business reasons justify the assumption of a particular unexpired executory contract, assumption should be approved by the court.

17. The Agreement is of crucial importance to TBW's liquidation efforts as TBW cannot access its historical mortgage servicing information without the Licensed Programs. TBW therefore must be allowed to assume the Agreement if it is to wind down its affairs in an orderly fashion.

18. The terms of the Amendment are fair and favorable to TBW. As TBW continues to wind down its affairs, TBW no longer requires the number of concurrent users previously authorized to use the Licensed Programs. Accordingly, the Amendment reduces the number of concurrent users of the Licensed Programs and thereby reduces by \$1,125 TBW's monthly fees owed under the Agreement.

19. Accordingly, TBW has determined that the Agreement as amended by the Amendment will be valuable to TBW's ongoing liquidation efforts.

20. TBW has met the standard required to assume an executory contract and has determined in the exercise of its sound business judgment to assume the Agreement as amended by the Amendment.

21. Accordingly, the Debtors request that the Court authorize the Debtors'

assumption of the Agreement as amended by the Amendment under Section 365(a) of the Bankruptcy Code as a sound exercise of business judgment.

Conclusion

WHEREFORE TBW respectfully requests entry of an order granting the relief requested herein and granting such other and further relief as may be just.

This 9th day of August, 2010.

/s/ Jeffrey W. Kelley
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