

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

**In re:**

**TAYLOR, BEAN & WHITAKER  
MORTGAGE CORPORATION,**

**Debtor.**

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**Chapter 11**

**Case No. 3:09-bk-07047-JAF**

**DEBTOR'S MOTION TO APPROVE COMPROMISE  
RELATED TO PAYMENTS OF ADEQUATE ASSURANCE  
FOR UTILITY SERVICE WITH CITY OF OCALA**

Taylor, Bean & Whitaker Mortgage Corporation (the “**Debtor**” or “**TBW**”), by and through its undersigned counsel, hereby files its Motion to Approve Compromise Related to Payments of Adequate Assurance for Utility Services with City of Ocala (the “**Motion**”) and requests the entry of an order approving the compromise and payments set forth below. In support of its Motion, the Debtor respectfully represents as follows:

**BACKGROUND**

1. On August 24, 2009, (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.
2. The Debtor continues to operate its business and manage its property as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.
3. No trustee or examiner has been appointed in this case.

4. On September 11, 2009, the Office of the United States Trustee filed its Notice of Appointment of Creditors' Committee (Doc. No. 203) and appointed an Official Committee of Unsecured Creditors (the "**Committee**").

7. TBW continues to operate its business and manage its property as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

### **JURISDICTION AND VENUE**

8. This Court has jurisdiction to consider this motion pursuant to 28 U.S.C. §§157 and 1334. The subject matter of this motion is a core proceeding pursuant to 28 U.S.C. §157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§1408 and 1409.

### **PROCEDURAL HISTORY**

9. Prior to the Petition Date, the City of Ocala, a Florida municipal corporation ("**Ocala**" or "**City**") provided utility services (including electric, sewer, solid waste, fire service availability, and stormwater services) (the "**Utility Services**") to the Debtor.

10. Ocala provides and is continuing to provide Utility Services to the Debtor for its eight (8) facilities (the "**Facilities**").

11. Pursuant to Section 366 of the Bankruptcy Code, Ocala originally requested adequate assurance of payment for the furnishing of Utility Services to the Debtor in the form of a deposit in the amount of \$161,971.95, which is equal to the average bill for the Utility Services for 2.25 months calculated over the 12 months period preceding the Petition Date.

12. Ocala and the Debtor have reached an agreement regarding the amount of adequate assurance to be provided to Ocala and the continuation of the Utility Services, which agreement is outlined hereinbelow.

### **SUMMARY TERMS OF SETTLEMENT AGREEMENT<sup>1</sup>**

13. The Debtor and Ocala have entered into the Agreement Concerning Adequate Assurance (the “**Agreement**”) in order to resolve all issues related to Ocala’s continuing to provide Utility Services to the Debtor’s facilities. A copy of the Agreement is attached hereto as Exhibit 1.

14. The pertinent terms of the Agreement are described hereinbelow:

a. **Deposit.**

- i. Debtor has furnished City with security in the form of a cash deposit (the “**Deposit**”) in the amount of \$71,987.53, representing the average monthly charge for Utility Services provided to the Debtor’s Facilities calculated over the 12 monthly billing periods preceding the date that Debtor filed its Bankruptcy Petition.
- ii. The Deposit is subject to adjustment as set forth in paragraph 4 of the Agreement, including being reduced as Debtor closes Facilities (as it anticipates doing so).
- iii. Debtor’s failure to provide and maintain the Deposit as required by the Agreement shall entitle City to terminate Utility Services to Debtor without any further notice or order of the Bankruptcy Court.
- iv. City shall be entitled to an administrative claim for any post-petition charges remaining unpaid after application of the Deposit pursuant to Sections 503(b)(1) and 507(a)(1) of the U.S. Bankruptcy Code.

b. **Billing for Utility Services.** City shall bill Debtor for Utility Services as follows:

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<sup>1</sup> In the event of a conflict between the summary contained herein and the Agreement, the express terms of the Agreement shall control.

- i. Within ten days of the execution of the Agreement, City will bill or has billed Debtor for all post-petition Utility Services rendered through the service date.
- ii. Thereafter, City will bill Debtor twice a month, or on approximately 31 day periods, for Utility Services as follows:
  1. The first bill to be rendered each month (referred to in the Agreement as the “**First Cycle Bill**”) will equal one-half of the average monthly charge for Utility Services provided to Debtor’s Facilities calculated over the 12 monthly billing periods preceding the date of the bill. In addition, each First Cycle Bill shall include an administrative charge of \$150.00 for the first First Cycle Bill, and \$100.00 for each subsequent First Cycle Bill.
  2. Approximately 15 to 16 days after the City renders each First Cycle Bill, the City shall render another bill (referred to in the Agreement as the “**Second Cycle Bill**”), which will be in the amount of: (a) the utility charges calculated pursuant to the applicable provisions of the Code of Ordinances of the City of Ocala (the “**City Code**”); less (b) the amount of the previous First Cycle Bill.
- iii. The Agreement provides a mechanism for Debtor to dispute bills or claims for additional Deposits.

c. **Payment.**

- i. The Agreement requires Debtor to pay bills submitted for Utility Services within 10 days of the delivery of the bill by City.
- ii. If Debtor fails to do so, the Agreement requires City to provide Debtor with a notice of default and permits the City to terminate Utility Services to Debtor if the default is not cured within four days thereafter.

## **STANDARDS FOR COURT APPROVAL**

It is generally recognized that the law favors compromise of disputes over litigation. *In re Bicoastal Corp.*, 164 B.R. 1009, 1016 (Bankr. M.D. Fla. 1993) (Paskay, J.). Some courts have held that a proposed settlement should be approved unless it yields less than the lowest amount that the litigation could reasonably produce. *In re Holywell Corp.*, 93 B.R. 291, 294 (Bankr. S.D. Fla. 1988) (Weaver, J.). In the case of *In re Justice Oaks II, Ltd.*, 898 F.2d 1544 (11<sup>th</sup> Cir. 1990), *cert denied* 498 U.S. 959, 111 S.Ct. 387, 112 L.Ed. 2d 398 (1990), the Court enunciated certain factors which must be considered in determining whether to approve a compromise, which are:

- a. The probability of success in the litigation;
- b. The difficulties, if any, to be encountered in the matter of collection;
- c. The complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and
- d. The paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In the case at bar, the *Justice Oaks* factors are supportive of the settlement in the Agreement attached hereto. The Agreement provides a reasoned and fair business solution to the myriad of issues that would otherwise present a morass of litigation regarding the City's entitlement to adequate assurance under Section 366 of the Bankruptcy Code.

In essence, the Agreement provides adequate assurance to the City in the form of a Deposit equal to the amount of utility service charges that could be accrued by the Debtor

before the City is able to discontinue utility service, while avoiding placing an undue financial strain on Debtor's resources.

The Debtor submits that the Agreement represents a fair compromise of the disputes and issues referenced herein and helps to ensure that the Debtor will continue to receive Utility Services.

By this Motion, the Debtor seeks approval of the Agreement, as specifically described herein.

WHEREFORE, Debtors respectfully request this Court grant this Motion and for such other and further relief as may be just.

DATED: October 28, 2009

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