

**Debtors' Motion for an Order Pursuant to Section 363(b) of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure Authorizing TOUSA Homes, Inc. to Enter Into Certain Agreements Relating to Regal Oaks at Old Town (the "Regal Oaks Motion").**

By the Regal Oaks Motion, the Debtors seek an order authorizing TOUSA Homes, Inc. ("TOUSA Homes") to enter into (a) an agreement to terminate certain escrow, brokerage, and marketing agreements (the "Termination Agreement") with Superior Homes and Investments, LLC ("Superior"), and (b) a settlement and release agreement (the "Settlement Agreement," and together with the Termination Agreement, the "Agreements") with certain property owners (the "Owners").

The Agreements relate to a Florida townhome development commonly known as Regal Oaks at Old Town ("Regal Oaks"). TOUSA Homes developed certain lots in Regal Oaks into townhome units, 94 of which were developed and sold to the Owners. Of the remaining townhome units, 69 have been completed but are unsold and 293 lots remain undeveloped.

**A. The Termination Agreement**

Prepetition, TOUSA Homes was party to a contract (the "Prepetition Contract") with Superior whereby TOUSA Homes agreed to develop townhome units in Regal Oaks and convey such units to Superior. Superior would then contract directly with third parties (such as the Owners) who wished to purchase the units. After its chapter 11 filing, TOUSA Homes, with Bankruptcy Court approval, rejected the Prepetition Contract.<sup>1</sup> In connection therewith, Superior has filed proofs of claim asserting both secured and unsecured prepetition claims in excess of \$100 million (the "Prepetition Claims").<sup>2</sup>

The rejection of the Prepetition Contract left both TOUSA Homes and Superior in precarious positions: TOUSA Homes still owned a significant number of unsold townhome units and undeveloped lots in Regal Oaks, while Superior had procured 188 purchasers and collected deposits from each pursuant to the Prepetition Contract, but had only purchased 83 units from TOUSA Homes prior to the rejection. In addition, the clubhouse facility in Regal Oaks, which was vital for attracting new purchasers to the community, could not be completed without additional funding. As a result, TOUSA Homes and Superior, with the approval of the Bankruptcy Court,<sup>3</sup> entered into several agreements regarding Regal Oaks (together, the "Superior Agreements"), which provided each party with an opportunity to resolve its obligations concerning the Regal Oaks community. After disputes arose between TOUSA Homes and Superior regarding the obligations of each under the Superior Agreements, the parties

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<sup>1</sup> See Order Granting Debtors' Fourth Motion to Reject Certain Unexpired Leases and Executory Contracts [Docket No. 1597].

<sup>2</sup> Superior has filed proofs of claim number 2411 and 4185 against TOUSA Homes.

<sup>3</sup> See Order Granting Motion for Entry of an Order Pursuant to Section 363(b) of the Bankruptcy Code Approving TOUSA Homes Inc.'s Entry Into Certain Agreements Relating to Regal Oaks at Old Town [Docket No. 1812].

began negotiating the termination of the Superior Agreements to allow TOUSA Homes to sell its units within Regal Oaks free of the contractual restrictions.<sup>4</sup>

To avoid expensive and time-consuming litigation with respect to the Superior Agreements, and to immediately improve the marketability of the completed units in Regal Oaks, TOUSA Homes and Superior have negotiated the Termination Agreement. The salient terms of the Termination Agreement are as follows:

- **Termination of Agreements.** The Superior Agreements, including certain lease, brokerage, marketing, bulk services, and escrow agreements, will be terminated.
- **Settlement Payment.** TOUSA Homes will pay \$190,000.00 (the “Settlement Amount”) to the Trustee.
- **Prepetition Claims.** The Trustee will retain all rights with respect to the Prepetition Claims, and TOUSA Homes will retain all rights with respect to its defenses to same.
- **Mutual Releases.** The parties agree to mutually release one another from all claims (other than the Prepetition Claims) regarding the Superior Agreements and Regal Oaks.

The Debtors assert that the Termination Agreement is in the best interests of their estates and creditors because the Settlement Amount is likely far less than the potential costs of litigation that TOUSA Homes would incur in resolving the current disputes under the Superior Agreements. Further, the Termination Agreement will allow TOUSA Homes to move forward with marketing and eventually selling the unsold lots and units in Regal Oaks. Although the parties reserve their rights with respect to the Prepetition Claims, the Debtors assert that the mutual releases of all other claims will eliminate any further exposure that the Debtors may have under the Superior Agreements.

## **B. The Settlement Agreement**

Pursuant to the declaration governing Regal Oaks (the “Declaration”), the Owners are obligated to pay certain assessments (the “Assessments”) to the homeowners’ association of which the Owners are members (the “Association”) to cover, among other things, the operating expenses of the Regal Oaks community. However, the Owners have alleged that Superior has not fulfilled its obligations under their purchase agreements, and have thus refused to pay Assessments invoiced by the Association. TOUSA Homes is currently paying such Assessments pursuant to the Declaration.

To avoid litigation regarding the Assessments, TOUSA Homes and the Owners have negotiated the Settlement Agreement with the Owners regarding their Assessment obligations and the

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<sup>4</sup> On February 20, 2009, an involuntary chapter 7 bankruptcy case was commenced against Superior. Negotiations have continued with the Trustee for Superior (the “Trustee”).

proposed completion and operation of the Regal Oaks clubhouse. The salient terms of the Settlement Agreement are as follows:

- **Assessments.** The Owners' Assessment obligations for the period prior to and including March 31, 2010 will be waived. The Owners must satisfy their Assessment obligations for the period from April 1, 2010 forward.
- **Board Seat.** For as long as the Owners who execute the Settlement Agreement hold title to at least 45 units, such Owners may appoint one representative to the board of the Association.
- **Club Budget.** Existing Owners (but not their transferees) will have access to the clubhouse facilities, with future increases in membership costs capped at 7.5% per year, excluding capital improvement costs.
- **Improvements to Club.** TOUSA Homes is responsible for the cost of completing construction of the clubhouse and making capital improvements thereto, with the Owners liable for their pro rata share of the operating costs in connection with such improvements, subject to the cap above.
- **Release of TOUSA Homes.** The Owners agree to release TOUSA Homes from any claims arising out of the Superior Agreements.

The Debtors assert that the Settlement Agreement is in the best interests of their estates and creditors because it will efficiently and finally resolve the entire controversy between TOUSA Homes and the Owners regarding the Assessments and expenses of the Regal Oaks community. Absent entry into the Settlement Agreement, TOUSA Homes would continue to bear the costs of maintaining the Regal Oaks community, given the Owners' refusal to pay the Assessments. Further, any litigation with the Owners regarding their Assessment obligations would necessarily involve expensive and time-consuming litigation with Superior. Accordingly, the Debtors assert that the releases contained in the Settlement Agreement eliminate these risks and the significant costs that would be associated therewith.

***A hearing on the Regal Oaks Motion is scheduled for April 15, 2010, with an objection deadline of April 9, 2010.***