

**Debtors' Motion to (A) Reject the Purchase Agreement By and Between TOUSA Homes, Inc. and Ramona Fricosu and (B) Remove Related Notice of *Lis Pendens* (the "Fricosu Motion").**

By the Fricosu Motion, the Debtors seek entry of an order authorizing them to (i) reject a sale agreement (the "Contract") between Engle Homes Colorado, a division of Debtor TOUSA Homes, Inc., ("TOUSA Homes") and Ramona Fricosu ("Fricosu") for the purchase and sale of certain real property in El Paso County, Colorado (the "Property") and (ii) remove the notice of *lis pendens* related to the Property. While the Debtors believe that the Bankruptcy Court may ultimately be required to determine damages related to the rejection of the contract, they seek an order immediately to clarify the status of the Property and any obligations related thereto.

On October 31, 2007, the Debtors entered into the Contract with Fricosu. As a condition to closing, Fricosu was required to obtain a pre-qualification letter from a lender within 10 business days and a financing commitment within 30 days. Fricosu failed to complete both of the requirements and, under the Contract, the Debtors had the option to terminate the Contract at the end of the thirty day period.

After it became clear to the Debtors that Fricosu would be unable to procure financing, on November 20, 2007, TOUSA Homes notified Fricosu that it intended to terminate the Contract. On November 26, 2007, Fricosu brought suit against TOUSA Homes in the El Paso County Court of Colorado, seeking, among other remedies, specific enforcement of the Contract. In addition, Fricosu filed a notice of *lis pendens* with respect to the Property, to alert potential purchasers of the ongoing litigation and Fricosu's asserted interest in the property. When the Debtors filed for bankruptcy protection, Fricosu's litigation was stayed by the automatic stay.

The Debtors argue that if the Contract was not properly terminated before the Petition Date, which the Debtors believe it was, the Contract is executory, and may therefore be rejected under section 365 of the Bankruptcy Code. Here, the Debtors argue that the Contract is executory because, if the Contract is in effect, TOUSA Homes must deliver and convey the Property to Fricosu, and Fricosu must obtain the proper financing commitments and pay the balance of the Contract price—none of which has occurred.

The standard for rejection of a contract under the Bankruptcy Code is the business judgment standard, which requires only that the Debtors use reasonable business judgment in deciding which contracts to reject. The Debtors assert that rejection of Fricosu's Contract will benefit the estate because they will be able to sell the Property to another, more creditworthy homebuyer, rather than continue to hold the Property while Fricosu attempts to find financing, a benefit that Fricosu was never entitled to under the Contract.

The Debtors further allege that should the Court approve their motion to reject the Contract, the Court should order the *lis pendens* removed from the property because Fricosu's remedy for rejection of the Contract is damages (if any), not possession of the property. While the Bankruptcy Code provides for a lien right for parties whose contracts are rejected, the Bankruptcy Code provision applies only to parties in possession of the real property. According to the Debtors, Fricosu is not in possession, and the *lis pendens* does not create a possessory interest. The Debtors propose that Fricosu be required to file a proof of claim within thirty days from entry of an order approving the Fricosu Motion.

***An order approving the Fricosu Motion was entered on March 6, 2008.***