

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

In re:

**TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,**

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

Chapter 11

Debtor.

**FREDDIE MAC'S LIMITED OBJECTION TO THE MOTION TO
APPROVE SETTLEMENT AGREEMENT BY AND BETWEEN
TAYLOR, BEAN & WHITAKER MORTGAGE CORP., THE
FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER OF COLONIAL BANK, AND THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS**

Federal Home Loan Mortgage Corporation ("Freddie Mac"), which is presently under conservatorship of the Federal Housing Finance Agency ("FHFA" or "Conservator"),¹ by and through its undersigned counsel, files this Limited Objection to the Motion (the "Motion") to Approve Settlement Agreement by and Between Taylor, Bean & Whitaker Mortgage Corp. ("TBW" or the "Debtor"), the Federal Deposit Insurance Corporation (the "FDIC"), as Receiver of Colonial Bank, and the Official Committee of Unsecured Creditors (the "Committee"). Freddie Mac respectfully requests that any order approving the Motion expressly preserve Freddie Mac's rights to (i) contest the ownership of the loans that are the subject of the Motion, and (ii) oppose the provisions of the settlement agreement via objection to confirmation of the Debtor's forthcoming plan of liquidation. In support of its request, Freddie Mac states as follows:

¹ On September 6, 2008, FHFA's Director placed Freddie Mac into conservatorship pursuant to express authority granted to him in the Housing and Economic Recovery Act of 2008 to preserve and conserve Freddie Mac's assets and property.

INTRODUCTION

1. The settlement agreement (the “Agreement”) between the Debtor, the FDIC, and the Committee appears to provide for a comprehensive resolution of claims between the FDIC and the Debtor’s estate. By its express terms, the Agreement becomes effective only upon entry of an order confirming the Debtor’s currently-unfiled plan of liquidation (the “Plan”). Yet, notwithstanding this predicate to the Agreement’s effective date, certain provisions of the compromise appear to take effect upon the Court’s entry of an order approving the Agreement. The Debtor has indicated that, notwithstanding any ambiguity regarding the effectiveness of the Agreement’s provisions, approval of the Agreement at the September 2 hearing will not serve to adjudicate or otherwise prejudice the rights of Freddie Mac.

2. The Agreement purports to resolve, at least as between the Debtor and the FDIC, the ownership of the thousands of mortgage loans (the “Loans”) identified in the various exhibits to the Agreement. Some of the Loans, however, may be owned by Freddie Mac, rather than the FDIC or the Debtor. Although the Debtor and the FDIC can disclaim their respective ownership of the Loans, they cannot establish each other’s ownership rights by agreement, to the detriment of third parties. Freddie Mac is continuing to analyze whether it asserts an ownership interest in any of the Loans at issue. Freddie Mac files this limited objection to preserve its rights to (i) contest the ownership of the Loans and (ii) assert objections to other provisions of the Agreement in conjunction with confirmation of the anticipated Plan.

THE SETTLEMENT AGREEMENT

A. The Treatment of the Mortgage Loans

3. By their Agreement, the Debtor and the FDIC purport to establish or recognize the ownership of various categories of Loans that are identified in the exhibits to the Agreement. The proposed treatment of the Loans is summarized as follows:

The COLB Loans

4. The Agreement requires the Debtor to transfer to the FDIC thousands of mortgage loans listed in Exhibit E, which are collectively referred to as the COLB Loans. The Agreement appears to predicate the conveyance of the COLB Loans to the FDIC on both the occurrence of Plan confirmation and the absence of “conflicting claims of ownership.” *See* Agreement at § 1.2. Accordingly, the Debtor’s conveyance obligations apply only to those COLB Loans that are not the subject of disputed ownership, thus apparently preserving third-parties’ rights to assert competing ownership interests in the COLB Loans.

5. Yet, in apparent contrast to the foregoing preservation of third-party rights, the Agreement also states, “A list as of the date of this Agreement of the loans for which the FDIC-R’s superior rights shall be recognized . . . is attached hereto as Exhibit E.” *Id.* Further, the Agreement requires the Plan to provide that the Debtor shall transfer each COLB Loan identified in Exhibit E to the FDIC. *Id.* The Agreement thus creates some ambiguity regarding the general preservation of third-party challenge rights in light of those provisions requiring conveyance of *all* COLB Loans to the FDIC.

6. The Debtor’s Final Reconciliation Report, filed with the Court on July 1, 2010 (Dkt. No. 1644), concluded that Freddie Mac had purchased, and paid for, 7,165 of

the loans analyzed by the Debtor in the report, including 4,802 COLB loans. *See* Report at 66 & 70. The Final Reconciliation Report also reflected that an additional 27 mortgage loans that were not allocated to Freddie Mac in the report “appear to have been purchased by Freddie Mac.” *Id.* at 66 (Table 8). Freddie Mac understands from discussions with Debtor’s counsel that the COLB Loans identified in Exhibit E to the Motion do not include any of the COLB loans identified in the Final Reconciliation Report as sold to Freddie Mac or the 27 loans that “appear” to have been sold to Freddie Mac.

The AOT Loans and the Overline Loans

7. The Agreement identifies certain AOT Loans² (listed in Exhibit F to Agreement) and Overline Loans (listed in Exhibit H to the Agreement) for which ownership shall be transferred to the Debtor upon entry of an order approving the Agreement. *See* Agreement at §§ 1.3 and 1.4. The FDIC shall be granted a first priority security interest in the AOT Loans and the Overline Loans to secure repayment of amounts purportedly outstanding under the AOT Agreements and the Overline Facility, which amounts the Debtor has agreed to pay the FDIC pursuant to the payment “waterfalls” set forth in the Agreement. All funds collected on account of the AOT Loans and the Overline Loans (whether from the payments by borrowers or through the Debtor’s sale of the loans) shall flow through the waterfall and, assuming sufficient funds are available, will ultimately be paid to the FDIC. Payments to the FDIC under the waterfall will not commence until after entry of the confirmation order. *Id.*

8. The Agreement also requires the Debtor to enter into additional agreements (the forms of which are not attached to the Motion) evidencing the Debtor’s

² Capitalized terms that are not defined in this Limited Objection shall have the meaning ascribed to them in the Agreement.

obligations to pay the AOT Balance and the Overline Balance, evidencing the FDIC's security interest in the AOT Loans and the Overline Loans, and providing the terms for the Debtor's cash management and servicing of the AOT Loans and the Overline Loans.

See id.

The Selene Loans

9. The Agreement requires the FDIC to acknowledge that, as between the FDIC and the Debtor, the Debtor is the owner of the loans currently serviced by Selene Residential Mortgage Opportunities Fund, which are listed in Exhibit K to the Motion. *See* Agreement at § 1.6.

The Ocala Funding Loans

10. The Agreement requires the FDIC to disclaim any ownership interest in the Ocala Loans, identified in Exhibit L to the Agreement. *See* Agreement at § 2.4. Any proceeds that the Debtor receives from the Ocala Loans shall be held in escrow pending determination of ownership.

B. Other Provisions of the Settlement Agreement

11. In addition to addressing the ownership of the Loans, the Agreement also contains numerous other material provisions, including the following:

The Colonial Bank Deposit Accounts

12. The Agreement provides that the Debtor's custodial accounts relating to servicing operations at Colonial Bank and the Debtor's corporate operating accounts at Colonial Bank (collectively, the "CB Deposit Accounts") will be distributed in accordance with the Debtor's Final Reconciliation Report. *See* Agreement at § 1.7. It appears that no payments from the CB Deposit Accounts will be made until after entry of a Plan confirmation order. The Debtor acknowledges that the timing and manner of

distribution of the CB Deposit Accounts, presumably after Plan confirmation, is within the exclusive jurisdiction and discretion of the FDIC. *Id.*

REO Transfer/Disclaimer

13. The FDIC agrees to disclaim its interest in any owned real estate titled in the Debtor's name related to the AOT Loans and the Overline Loans (as identified in Exhibit J to the Agreement).

Releases

14. The Agreement requires the Debtor's Plan to provide for the release of the FDIC by all creditors and parties-in-interest with respect to all claims that could have been brought in the bankruptcy case. *See* Agreement at § 2.1.

Allowed Claim and Trade Creditor Participation

15. The Agreement requires the Debtor's Plan to grant the FDIC an allowed general unsecured claim in the amount of \$3.25 billion, less certain adjustments. Further, the FDIC agrees to pay the liquidating trustee for the Debtor's estate up to \$15 million of the distributions received by the FDIC on account of its allowed general unsecured claim. The \$15 million payment is to be reserved for the exclusive benefit of the Debtor's trade creditors.

Effective Date of the Settlement Agreement

16. The Agreement provides that the parties' compromise shall become effective upon the Court's entry of a Final Order confirming the Plan. *See* Agreement at § 5.1. Yet the ownership of the AOT Loans and the Overline Loans shall be transferred to the Debtor upon entry of an order approving the Agreement. *See id.* at § 1.3(a) & 1.4(a). Similarly, the proposed first priority security interests to be granted to the FDIC

in the AOT Loans and the Overline Loans also purportedly will be effective upon approval of the Agreement. *See id.*

FREDDIE MAC'S LIMITED OBJECTION

17. Based upon its initial review of the Loans identified in the exhibits to the Agreement, Freddie Mac believes that it may own a number of the Loans. Because the exhibits do not identify the Loans by borrower or property address, however, Freddie Mac has been unable, as of the filing of this Limited Objection, to make a final determination regarding whether it asserts a competing ownership interest in any of the Loans. Freddie Mac and the Debtor have been in discussions regarding this potential dispute, and the Debtor has acknowledged that it is not seeking through its Motion to adjudicate, resolve, or otherwise prejudice Freddie Mac's rights to assert an ownership interest in the Loans. To the extent that the Motion or the Agreement attempts to adjudicate third-party claims of ownership to the Loans, Freddie Mac objects to the Motion and the Agreement.

18. Similarly, the Debtor has indicated that the proposed grant to the FDIC of a first priority security interest in the AOT Loans and the Overline Loans does not extend to any Loans that are owned by Freddie Mac, regardless of whether the Loans are identified in the exhibits. Rather, the Debtor has explained that the FDIC's security interest will extend only to those Loans that are ultimately determined (after a full and adequate opportunity to adjudicate the issue) to be owned by the Debtor. Thus, notwithstanding approval of the Motion and the Agreement, the FDIC should not be granted any security interest in any of the Loans that are owned by Freddie Mac. Freddie Mac reserves all of its rights to contest the grant of a security interest to the FDIC in any

Loans owned by Freddie Mac and objects to the Motion and the Agreement to the extent they otherwise seek to prejudice Freddie Mac's rights to contest the FDIC's security interests.

19. The Agreement appears to provide that no payments will be made to the FDIC under the "waterfall" provisions relating to collections on, or proceeds from, the AOT Loans and the Overline Loans until after entry of a Final Order confirming the Debtor's Plan. The Agreement likewise states that no payments will be made to the FDIC from the CB Deposit Accounts until after entry of a final confirmation order. Accordingly, it appears that no payments will be made to the FDIC under the terms of the Agreement unless and until those provisions are approved in the context of the Debtor's Plan, and Freddie Mac objects to the Motion to the extent it seeks present approval of any payments to the FDIC. Further, Freddie Mac notes that the mere entry of the confirmation order should not be sufficient to trigger payments to the FDIC. Rather, the Debtor should not be allowed to make any payments to the FDIC on account of the Loans or the CB Deposit Accounts until the ownership interests in the Loans and any disputes relating to the CB Deposit Accounts are finally resolved. Instead, the Debtor should escrow or otherwise hold the funds pending a resolution of the ownership of the Loans or any other disputes relating to the funds.³

20. The Debtor acknowledges that, although payments from the CB Deposit Accounts will not be made until after entry of a confirmation order, the timing and

³ Because the anticipated payments to the FDIC are predicated on Plan confirmation, any order granting the Motion and approving the Agreement should not authorize the payments. To the extent any order granting the Motion authorizes payments to the FDIC, the order should specifically provide for the escrow described above or, alternatively, should provide that payments made to the FDIC relating to any of the Loans or the CB Deposit Accounts are subject to disgorgement by the FDIC and recovery by the

manner of distribution of the CB Deposit Accounts is otherwise within “the exclusive jurisdiction and discretion of the FDIC.” *See* Agreement at § 1.7. Freddie Mac has not made the same acknowledgement, nor has the Court made such a determination. It appears to Freddie Mac from the language of the Agreement that this provision is binding only on the Debtor, not Freddie Mac or the Court. Freddie Mac reserves its rights to contest the jurisdiction of FDIC over the CB Deposit Accounts or any funds that are owed to Freddie Mac.

21. The Agreement provides that the Debtor shall enter into various agreements with the FDIC evidencing the Debtor’s obligation to pay the AOT balance and the Overline balance, evidencing the FDIC security interest in the AOT Loans and the Overline Loans, and providing terms related to the cash management and servicing of those loans. Freddie Mac has not been provided copies of these proposed Agreements, and it reserves its right to object to their contents. Freddie Mac requests that copies of any proposed agreement to be entered into between the FDIC and the Debtor be provided to Freddie Mac prior to execution and that Freddie Mac be provided an opportunity to object to any provisions in the agreements.

22. Freddie Mac also reserves its right to oppose the contents of any Plan proposed by the Debtor that incorporates the terms of the Agreement. The Debtor has acknowledged to Freddie Mac that it is not seeking, through the Motion, to approve the various provisions of the Agreement that are to be incorporated in the Plan and that

Debtor (or Freddie Mac) to the extent it is determined that payment was made to the FDIC on account of a Loan owned by Freddie Mac or from funds otherwise owed to Freddie Mac.

become effective upon entry of a confirmation order.⁴ As a consequence, Freddie Mac does not raise its potential objections to the various components of the Agreement that are to be incorporated in the Plan. Nevertheless, Freddie Mac notes, for the avoidance of doubt, that it has not agreed to the proposed release to be granted to the FDIC on behalf of Freddie Mac, nor has it consented to the proposed allowance of the FDIC's general unsecured claim or its substantial contribution claim. Accordingly, Freddie Mac specifically reserves its rights to object to the proposed release, to object to the allowance of any claim in favor of the FDIC, and to assert all of its Plan objections (including objections to the provisions of the Agreement to be incorporated in the Plan).

CONCLUSION

To the extent that the Motion and Agreement seek to adjudicate Freddie Mac's ownership interests in the Loans or to otherwise prejudice Freddie Mac's rights, they should not be approved. Further, any order approving the Agreement should provide for the reservation of Freddie Mac's rights to contest the FDIC's or the Debtor's interest in the Loans, including the proposed granting to the FDIC of a security interest in the Loans. Any order approving the Agreement should also provide that Freddie Mac is permitted to object to all aspects of the compromise to be included in the Debtor's proposed Plan, including, without limitation, the releases granted in favor of the FDIC and the allowance of any claims asserted by the FDIC. The Court should not authorize any payment to the FDIC on account of any Loans or from the CB Deposit Accounts

⁴ Any request by the Debtor to approve any aspects of the Agreement prior to Plan confirmation, without full reservation of Freddie Mac's rights to object to those terms in conjunction with Plan confirmation, should be denied. Because the Agreement attempts to establish the terms of a Plan, Freddie Mac should be permitted the full protections afforded by Bankruptcy Code § 1129.

until the ownership interests in the Loans and any disputes relating to the funds are resolved.

Dated: September 1, 2010

Respectfully submitted,

/s/ Jason Ward Johnson

Gary R. Soles
Florida Bar No.: 0616149
Jason Ward Johnson
Florida Bar No.: 0186538
Lowndes, Drosdick, Doster, Kantor & Reed,
P.A.
450 South Orange Avenue, Suite 800
Orlando, Florida 32803
Telephone: (407) 843-4600
Facsimile: (407) 843-4444
e-mail: jason.johnson@lowndes-law.com

and

/s/ Hugh Ray

Hugh Ray
Texas Bar No: 16611000
Paul Moak
Texas Bar No: 00794316
McKool Smith, P.C.
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile: (713) 485-7344
e-mail: pmoak@mckoolsmith.com

/s/ George Kielman

George Kielman,
Managing Associate General Counsel
Kenton W. Hambrick,
Associate General Counsel
Soha Mody, Associate General Counsel
Federal Home Loan Mortgage Corporation
8200 Jones Branch Drive - MS 202
McLean, Virginia 22102
Telephone: (703) 903-2640

Facsimile: (703) 903-3691
Attorneys for Federal Home Loan Mortgage
Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 1st day of September 2010, I electronically filed the foregoing pleading with the Clerk of Court by using the Case Management/Electronic Case Filing (“CM/ECF”) system which will send a notice of electronic filing, and I will complete service of the foregoing as required by Rule 5, Federal Rules of Civil Procedure, made applicable by Rule 7005, Federal Rules of Bankruptcy Procedure, to all parties indicated on the electronic filing receipt.

/s/ Jason Ward Johnson
Jason Ward Johnson