

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

In re:

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

Debtor.

Chapter 11

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

**MOTION TO APPROVE SETTLEMENT AGREEMENT BY AND
AMONG TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,
NATIXIS REAL ESTATE HOLDINGS LLC, AND THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS**

Taylor, Bean & Whitaker Mortgage Corp., debtor and debtor in possession herein (“TBW” or “Debtor”), pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), hereby files this motion (“Motion”) to approve a settlement by and among the Debtor, Natixis Real Estate Holdings LLC (successor-by-merger to Natixis Real Estate Capital, Inc.) (“Natixis”), and the Official Committee of Unsecured Creditors of the Debtor (“Committee”, and the Debtor, Natixis, and the Committee are collectively referred to hereinafter as the “Parties”). The Parties desire to settle their respective claims to the proceeds of a settlement between the Debtor and the Committee, on the one hand, and the Federal Home Loan Mortgage Corporation (“Freddie Mac”), on the other hand. In support of this Motion, the Debtor respectfully represents as follows:

Jurisdiction

1. 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 in this district pursuant to 28 U.S.C. § 1408.

Background

2. On August 24, 2009 (“Petition Date”), the Debtor filed with this Court its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).
3. 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.
4. On September 11, 2009, the Office of the United States Trustee appointed the Committee.
5. No trustee or examiner has been appointed in this case.
6. On November 12, 2010, the Debtor and the Committee, as Co-Proponents, filed the Second Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors (the “Plan”), along with the Second Amended and Restated Disclosure Statement, which was approved pursuant to the Order Approving Second Amended and Restated Disclosure Statement, Scheduling Confirmation Hearing, and Fixing Time for Filing Acceptances or Rejection of Second Amended and Restated Joint Plan of Liquidation entered on November 23, 2010 [Dkt. No. 2200].
7. Prior to the Petition Date, Natixis was a lender to the Debtor pursuant to that certain Second Amended and Restated Loan and Security Agreement between Natixis and the Debtor dated as of November 28, 2008 (the “Natixis Loan Agreement”).
8. Natixis filed Claim No. 1360 in the Chapter 11 Case as a secured creditor in the amount of \$46,485,801.85 (the “Natixis Claim”). Pursuant to the Plan, to the extent the Natixis Claim is an Allowed Secured Claim (as those terms are defined in the Plan) such Claim will be included in TBW Class 5.

9. The Debtor and the Committee have entered into a comprehensive settlement agreement with Freddie Mac (the “Freddie Mac Settlement Agreement”).¹ If approved by the Court, the Freddie Mac Settlement Agreement will, among other things, result in funds paid or made available to the Debtor by Freddie Mac (the “Freddie Mac Settlement Proceeds”). As part of its alleged secured claim, Natixis claims an interest in the Freddie Mac Settlement Proceeds and in certain force placed insurance and tax refunds. The Parties dispute the nature and extent of Natixis’ interest in the Freddie Mac Settlement Proceeds and the insurance and tax refunds.

10. The complexity of the factual and legal issues, the uncertainty of a specific result, and the inherent delay and substantial expense of litigation, have led the Parties to conclude that it is in their respective best interests to resolve their dispute concerning the Freddie Mac Settlement Proceeds and the insurance and tax refunds.

11. The Parties have memorialized the terms of their compromise in the attached Settlement Agreement, dated June 22, 2011, by and among the Parties (the “Natixis Settlement Agreement,” a copy of which is attached hereto as Exhibit A) and are seeking court approval of the Natixis Settlement Agreement by this Motion.

12. Among other things, the Natixis Settlement Agreement:

- a. provides for payment in the amount of \$34,300,000 of the Freddie Mac Settlement Proceeds to Natixis in partial satisfaction of the Natixis’ TBW Class 5 Claim (the “Natixis Allocation”);
- b. provides for payment to Natixis, in further, partial satisfaction of Natixis’ TBW Class 5 Claim, the sum of \$3,000,000 in settlement of Natixis’ rights, if any, to the insurance and tax refunds (the “Natixis Refunds”);
- c. provides that 15% of the Natixis Allocation (\$5,145,000) will be released for the exclusive benefit of holders of TBW Class 9 claims under the Plan;

¹ The Debtor is contemporaneously filing a motion seeking approval of the Freddie Mac Settlement Agreement, which describes in more detail the Freddie Mac Settlement Agreement.

- d. provides that Natixis consents to the sale of the mortgage servicing rights related to the Freddie Mac loan portfolio serviced by TBW (the “MSRs”) on terms and conditions agreed upon by Freddie Mac and the Debtor, which includes Navigant Capital Advisors, LLC and Milestone Advisors, LLC acting as a co-brokers in the sale;²
- e. provides for Natixis’ potential receipt of proceeds from the sale of the MSRs (the “Natixis MSR Participation”);
- f. provides that the Natixis Allocation, the Natixis Refunds, and the Natixis MSR Participation shall constitute the entire distribution to which Natixis is entitled on its Class 5 Claim;
- g. provides that Natixis agrees to enter into mutual releases with Freddie Mac with respect to the MSRs; and
- h. provides that Natixis will not oppose confirmation of the Plan or the Court’s approval of the Freddie Mac Settlement.

13. The Natixis Settlement Agreement shall only become effective upon: (a) the Bankruptcy Court’s approval of the Natixis Settlement Agreement by granting this Motion; (b) the Bankruptcy Court’s approval of the Freddie Mac Settlement Agreement; (c) the Effective Date (as defined in Article 12 of the Plan) has occurred; and (d) the Debtor’s receipt of the Freddie Mac Settlement Proceeds.

14. In addition to forming the basis of the Natixis Settlement Agreement, the Freddie Mac Settlement Agreement, if approved, forms the basis for a similar settlement agreement with Sovereign Bank (the “Sovereign Settlement Agreement”) regarding the allocation and use of the Freddie Mac Settlement Proceeds and proceeds of the sale of the MSRs, if any. A motion seeking the approval of the Sovereign Settlement Agreement is being filed contemporaneously with the filing of this Motion.

² Because the terms of the sale are commercially sensitive, the specifics are set forth in Exhibit A to the Settlement Agreement, which has been redacted from the filed version of the Settlement Agreement attached to this motion. Upon motion of a party-in-interest and order of the Court, the Debtor will make this Exhibit available to the Court under seal or in some other confidential manner.

Relief Requested

15. By this Motion, the Debtor respectfully requests that the Court authorize the Debtor to enter into the Natixis Settlement Agreement pursuant to Bankruptcy Rule 9019.

16. Compromises are generally favored in Chapter 11 cases. *See e.g., Barry v. Smith (In re New York, New Haven and Hartford R.R. Co.)*, 632 F.2d 955, 959 (2d Cir. 1980).

Approval of a settlement is left to the sound discretion of the court based upon the particular circumstances of the proposed settlement and the case as a whole. *See Langes v. Green*, 282 U.S. 531, 541 (1931).

17. The Debtor is obligated to maximize the value of the estate and make its decisions in the best interests of all of the creditors of the estate. *See e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 394 (3d Cir. 1996). Courts generally defer to a Debtor's business judgment when there is a legitimate business justification for the decision to compromise a dispute. *Id.* at 395.

18. In determining whether a settlement should be approved under Bankruptcy Rule 9019, the court must consider: "(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; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises." *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir. 1990) (internal citations omitted).

19. As reiterated by numerous courts, "a bankruptcy court is not required to hold a mini-trial on the merits of the settlement. Instead, it is charged with 'canvassing the issues to determine whether the settlement falls below the lowest point in the range of reasonableness.'"

In re Enron Corp., 2003 U.S. Dist. LEXIS 1383 at*6 (S.D.N.Y. Jan. 31, 2003) (affirming

bankruptcy court order approving settlement) (quoting In re Interstate Cigar Co., 240 B.R. 816, 822 (E.D.N.Y. 1999)); Abeles v. Infotechnology (In re Infotechnology), 1995 U.S. App. LEXIS 39883 at *4-5 (2d Cir. Nov. 9, 1995) (the court should not substitute its business judgment for that of the debtor in possession).

20. A review of the above considerations demonstrates that a settlement of the issues addressed in the Natixis Settlement Agreement and on the terms contained therein, is in the best interests of the estate and all of the creditors, is fair and reasonable, and is within the Debtor's sound business judgment.

21. The Natixis Settlement Agreement is of paramount importance to the Debtor's chapter 11 case. Without a compromise of the issues and claims contained therein, the Debtor will be forced to expend significant resources on protracted litigation, resulting in a significantly diminished distribution to creditors.

WHEREFORE, the Debtor respectfully requests that the Court enter an order:

- (i) authorizing the Debtor to enter into the compromise described above with the Parties;
- (ii) approving the Natixis Settlement Agreement; and (iii) granting such other and further relief as is just and equitable.

Respectfully submitted, this 22 day of June, 2011.

Respectfully submitted,

/s/ Jeffrey W. Kelley

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