UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,

Debtor.

Case No.: 3:09-BK-07047

Chapter 11

FEDERAL HOME LOAN MORTGAGE CORPORATION'S MOTION FOR CONTINUANCE OF HEARING ON, AND OBJECTION TO, DEBTOR'S MOTION TO APPROVE SETTLEMENT AGREEMENT BY AND AMONG TAYLOR, BEAN & WHITAKER MORTGAGE CORP., THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, AND BANK OF AMERICA, N.A.

Federal Home Loan Mortgage Corporation in conservatorship ("Freddie Mac"),[1] by and through its undersigned counsel, files this Motion for Continuance of Hearing on, and Objection (the "Objection") to, the Debtor's Motion (the "Settlement Motion") to Approve Settlement Agreement ("Settlement Agreement") By and Among Taylor, Bean & Whitaker Mortgage Corp. ("TBW"), the Official Committee of Unsecured Creditors, and Bank of America, N.A. ("BoA") [Docket No. 3300]. Freddie Mac respectfully requests that the Court continue the hearing on the Settlement Motion until Freddie Mac has had an adequate opportunity to analyze the proposed settlement. Alternatively, Freddie Mac requests that the Court deny approval of the settlement. In support of its Objection, Freddie Mac states as follows:[2]

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[1] On September 6, 2008, the Director of the Federal Housing Finance Agency ("FHFA" or "Conservator") 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.

[2] Freddie Mac reserves, and does not waive, its rights to assert additional objections to the Settlement Motion and Settlement Agreement beyond the objections included in this filing. This reservation is especially necessary and warranted in light of the inadequate notice that has been provided to Freddie Mac.

INTRODUCTION

1. The Debtor seeks Court approval on four business days' notice of a settlement agreement with BoA that, among other things, would grant the Debtor's wholly-owned subsidiary, Ocala Funding, LLC ("Ocala"), a $1.6 billion allowed general unsecured claim. One week's notice of any settlement involving a claim of this magnitude is wholly insufficient to afford parties in interest time to evaluate the merits of the proposed compromise. And this is not any settlement -- it is a settlement between related parties whose representatives have admitted conflicts of interest. There simply is no compelling justification for the Debtor's efforts to ram through a last-minute, insider settlement on the eve of confirmation without creditor review.

2. Heightened scrutiny rather than expedited consideration is mandated here because the party granting the claim (TBW) and the party benefitting from the claim (Ocala) are controlled by the same fiduciary (Navigant Capital Advisors, LLC). Consequently, Navigant stands on both sides of the negotiation and is unable to advocate what should be the diametrically-opposed interests of its clients. Navigant's disabling conflict is further compounded by TBW's counsel's (Troutman Sanders) admitted inability to represent TBW in matters adverse to BoA. Thus, it is entirely unclear who, if anyone, could have effectively represented TBW's interests in negotiating and consenting to the allowance of a $1.6 billion claim in favor of Ocala.

3. In light of (i) the insider relationship between TBW and Ocala, (ii) Navigant's role as fiduciary for both parties, and (iii) Troutman's acknowledged inability to be adverse to BoA, the Court must review the proposed settlement with increased scrutiny, with a meaningful period of evaluation rather than an artificially abbreviated one. Freddie Mac therefore respectfully requests that the Court reconsider its order shortening the time for hearing and

continue the hearing on the Settlement Motion for at least thirty (30) days to allow parties an opportunity to fully evaluate the merits of the proposed settlement. If the Court declines to continue the hearing, Freddie Mac requests that the Court deny the Settlement Motion.

BACKGROUND

4. By the Settlement Motion, TBW requests that the Court approve a settlement that, among other things, would grant TBW's wholly-owned subsidiary a $1.6 billion allowed claim. In addition to being the sole owner of Ocala, TBW also serves as Ocala's managing member, authorized to act on Ocala's behalf.[3]

5. Pursuant to an engagement letter dated August 24, 2009, TBW and Ocala both retained Navigant to serve as their financial advisor and manage the affairs of the companies.[4] Navigant is thus the ultimate decision-maker for both parties (subject to Court approval in certain instances).

6. Troutman Sanders serves as special counsel to TBW. In conjunction with its Court-approved retention, Troutman disclosed that BoA was a "substantial" client of the firm and that because of this relationship Troutman would not represent the Debtor in matters adverse to BoA.[5]

7. BoA asserts that it is the indenture trustee, collateral agent, and custodian with respect to certain short term notes and subordinated notes issued by Ocala as part of an asset-

[3] *See* Settlement Agreement at Recital B.

[4] *See* Navigant Engagement Letter, attached to Debtor's Emergency Application for Approval of Agreement with Navigant Capital Advisors, LLC to Provide the Services of Neil F. Luria as Chief Restructuring Officer and Other Support Personnel [Dkt. No. 13].

[5] *See* Affidavit of Jeffrey W. Kelley Pursuant to Rule 2014 of the Federal Rules of Bankruptcy Procedure [Dkt. No. 8] at ¶ 6 ("Bank of America, N.A. provide[s] banking services to, and [is a] substantial client of, Troutman Sanders. Troutman Sanders will not represent the Debtor in litigation in which [BoA] is adverse to the Debtor.").

backed commercial paper facility (the "Ocala Facility").[6] Deutsche Bank, AG ("Deutsche Bank") and BNP Paribas Mortgage Corp. ("BNPP") claim to be investors in the Ocala Facility.[7] BoA, Deutsche Bank, and BNPP each filed proofs of claim against TBW. BoA filed Claim No. 3063 in the amount of at least $1.75 billion "on behalf of [Deutsche Bank and BNPP] in connection with the Ocala Facility."[8]

8. TBW asserts that the claims filed by BoA, Deutsche Bank, and BNPP (collectively, the "Banks") seek payment of amounts for which TBW has no direct liability to the Banks.[9]

9. Ocala did not file a proof of claim against TBW's estate. TBW scheduled Ocala as having a claim in the amount of $0.[10]

ARGUMENT

A. The Court Should Deny Expedited Consideration of the Settlement Agreement.

10. The Bankruptcy Rules require at least twenty-one (21) days' notice of the hearing on a motion to approve a settlement.[11] Due process requires that parties in interest be afforded an adequate opportunity to review and, if necessary, oppose any settlement proposed by a debtor.[12] The prescribed minimum 21-day notice period thus cannot be abridged absent good

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6 *See* Settlement Agreement at Recital C.

7 *Id.* at Recital D.

8 *See* Ex. A to BoA Claim No. 3063 at ¶7.

9 *See* Settlement Motion at ¶ 16.

10 TBW's Schedule F [Dkt No. 481] at 92.

11 FED. R. BANKR. P. 2002(a)(3).

12 *In re Association of Volleyball Professionals*, 256 B.R. 313, 320 (Bankr. C.D. Cal. 2000) ("The notice requirements in bankruptcy are designed to satisfy the due process requirement of adequate notice to parties whose interests may be affected in such proceedings."); *In re Boykin*, 246 B.R. 825, 828 (Bankr. E.D. Va. 2000) ("The Federal Rules of Bankruptcy Procedure and the Bankruptcy Code were designed to satisfy the due process requirement of adequate notice to parties whose interests may be affected."); In re Masters, Inc., 149

cause.[13] Moreover, insider settlements between a debtor and its subsidiary require heightened scrutiny because they lack the inherent protections of arms-length negotiations.[14] This is especially true here where the parties and their representatives have admitted conflicts of interest.

11. However, far from providing at a minimum the required 21-day notice, the Debtor seeks approval of its $1.6 billion settlement on four business days' notice. This period is unreasonably short under any circumstances, but it is particularly unjustified on the present facts. As a threshold matter, Freddie Mac (which is owed more than $1 billion by TBW) is in conservatorship, subject to oversight by FHFA, whose mandate is to preserve and conserve Freddie Mac's assets and property. Not only is there not enough time for Freddie Mac to meaningfully analyze the merits of the proposed settlement in four business days, but there is insufficient time for Freddie Mac to consult with its Conservator regarding the compromise.

12. In stark contrast, there is no compelling justification to shorten the required notice period. The Debtor asserts that the Settlement Motion must be heard prior to plan confirmation, otherwise the BoA settlement will terminate by its own terms. The BoA settlement is not a

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B.R. 289, 292-93 (E.D.N.Y. 1992) ("The purpose of the procedural rules governing notice to creditors is to allow those parties with a pecuniary interest in the settlement to have an opportunity to be heard and to object if they find it unsatisfactory."); *In re Neuman*, 103 B.R. 491, 500 (Bankr. S.D.N.Y. 1989) ("The purpose of providing notice to creditors is to afford creditors the opportunity to review the compromise and settlement and to object to it if they find it unsatisfactory.").

[13] *In re Cahillane*, 2009 Bankr. LEXIS 3050, *1-2 (Bankr. N.D. Ind. Sept. 29, 2009); *see also In re Thompson*, 965 F.2d 1136, 1140 n.5 (1st Cir. 1992) ("[T]he general notice requirement under Bankruptcy Rule 2002(a)(3) is not absolute, but can be dispensed with 'for cause shown.'"); *In re Hester*, 889 F.2d 361, 364 (5th Cir. 1990) ("[B]ankruptcy courts should review ex parte motions to reduce the notice period carefully to be certain that there is, indeed, good cause for the handicap to the respondents and to the court's information-gathering capacity that is likely to result."); *In re Patel*, 43 B.R. 500, 503-04 (N.D. Ill. 1984).

[14] *See In re Foster Mtg. Corp.*, 68 F.3d 914, 918 (5th Cir. 1995) ("When a debtor subsidiary settles a claim it has against a parent corporation without the participation of the creditors, a bankruptcy court should carefully scrutinize the agreement."); *In re Drexel Burnham Lambert Group, Inc.*, 134 B.R. 493, 498 (Bankr. S.D.N.Y. 1991) ("We subjected the agreement to closer scrutiny because it was negotiated with an insider, and hold that closer scrutiny of insider agreements should be added to the cook book list of factors that Courts use to determine whether a settlement is fair and reasonable."); *In re N. Plaza, LLC*, 2006 Bankr. LEXIS 4694, *8-*9 (Bankr. S.D. Cal. Apr. 17, 2006) ("The circumstances and interrelations clearly call for heightened scrutiny . . . .").

component of the Debtor's plan (the "Plan"), and thus the Debtor could, if it desired, proceed with Plan confirmation in the absence of a settlement with BoA. The Debtor could then resolve the Banks' claims post-confirmation. For the minimal benefits that the settlement provides the Debtor, there is no justification to delay Plan confirmation simply to preserve the current settlement.

13. Even if the Debtor is inclined to have the Settlement Motion heard prior to Plan confirmation, that preference still does not justify denying parties proper notice of the settlement. There is no urgency to confirm the Debtor's plan or to hear the Settlement Motion on July 13. The Plan provides for the liquidation of the Debtor's remaining assets. There is no business to reorganize nor is there any goodwill to be preserved upon exiting bankruptcy. Indeed, confirmation of the Debtor's Plan has been consensually continued several times during the last six months. There simply is no sound reason to deny Freddie Mac and its Conservator an adequate opportunity to review the proposed settlement. An artificial deadline is insufficient justification to shorten the required settlement notice period.

14. Rather than justifying a reduction of the notice period, the facts compel the opposite result. An insider settlement mandates increased scrutiny, not expedited review. Here, TBW is consenting to the allowance of a $1.6 billion claim in favor of its wholly-owned subsidiary, Ocala. Navigant's role as a fiduciary of both TBW and Ocala raises significant questions about its ability to effectively represent the Debtor in compromise negotiations. TBW's other professional representative, Troutman, is similarly constrained by its conflicts of interest and its prior vow (as a condition of its retention by TBW) not to represent TBW in matters adverse to its significant client, BoA. These constraints on TBW's professionals

necessitate increased scrutiny of the settlement with adequate time for review, not expedited consideration.

15. For the foregoing reasons, Freddie Mac respectfully requests that the Court continue the hearing on the Settlement Motion for at least thirty (30) days to allow Freddie Mac and other parties in interest to adequately analyze the proposed compromise.

B. Alternatively, the Court Should Deny Approval of the Settlement Agreement.

16. If the Court declines to continue the hearing on the Settlement Motion, the Court should disapprove the settlement. The Court must make an informed, independent judgment as to whether the "proposed compromise is fair and equitable and in the best interests of the bankruptcy estate."[15] The Court cannot make an informed, independent judgment under the present circumstances. Because parties in interest have not had an adequate opportunity to examine the merits of the settlement, the Court will necessarily be presented with only the proponents' justification of the settlement; the Court will be denied the voice of informed objectors.

17. The Debtor's refusal to provide Freddie Mac with adequate notice also gives rise to potentially unnecessary litigation, a result that the notice provisions of the Bankruptcy Rules were designed to avoid. Freddie Mac has not yet had an opportunity to fully analyze the settlement, and thus it remains to be seen whether Freddie Mac ultimately would oppose the settlement on the merits if it were given adequate time to review it. Accordingly, by trying to force a decision on approval of the settlement with no meaningful notice, the Debtor is potentially needlessly burdening the Court with litigation.

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[15] *In re Winn-Dixie Stores, Inc.*, 356 B.R. 239, 251 (Bankr. M.D. Fla. 2006) (internal citations and quotations omitted).

18. In its limited opportunity to analyze the settlement, Freddie Mac has identified several issues that require further inquiry and, upon the current record, require denial of the Settlement Motion. As a threshold matter, the conflicting loyalties of TBW's professionals, as described above, impugn the fairness of the settlement. Navigant could not have negotiated on behalf of TBW and Ocala. And Troutman has an admitted conflict of interest and previously pledged not to represent TBW in matters adverse to BoA.[16] Accordingly, TBW appears to have been left without any independent representatives in its settlement negotiations.

19. On its face, the settlement agreement appears to reflect the absence of arms-length negotiations, meriting further inquiry. Among other things, Ocala did not even file a proof of claim against TBW, yet TBW is granting Ocala a $1.6 billion claim. In fact, no notice had been provided, until the filing of the Settlement Motion, that Ocala would be granted an allowed claim in any amount.

20. It is also unclear who was negotiating on behalf of Ocala. The only alternatives appear to be either Navigant or BoA. Navigant, as noted above, could not have negotiated for both TBW and Ocala. Moreover, BoA appears to lack the authority to assert or settle claims on behalf of Ocala. And Ocala, whose "claim" was purportedly settled, is conspicuously not a party to the settlement agreement. This glaring omission puts in sharp relief the suspect nature of this settlement, the conflicted and overlapping roles of the parties and their representatives, and the significant questions concerning whether TBW's interests were adequately represented. If Ocala was to have signed the Settlement Agreement, Navigant presumably would have signed the Agreement for both Ocala and TBW, a result that all parties to the negotiations must have deemed untenable because of the obvious conflicts of interest it would have exposed.

[16] Furthermore, in light of the fact that Navigant is acting on behalf of TBW and Ocala, it is unclear if Troutman also represents Ocala in addition to TBW.

21. The settlement also appears to provide no consideration for TBW foregoing its ability to potentially equitably subordinate Ocala's claim (had Ocala actually asserted a claim). Notably, Ocala appears to have been a co-conspirator of TBW in a criminal scheme that resulted in billions of dollars in damages to various creditors, including more than $1 billion in damages to Freddie Mac alone. Paul Allen, who served as the Chief Executive Officer of TBW as well as a member and lead manager of Ocala, pled guilty to numerous crimes relating to his actions at TBW and Ocala. Accordingly, there are significant questions regarding whether any claim granted to Ocala should be equitably subordinated to the claims of TBW's other creditors.

22. The settlement agreement also appears to be considerably one-sided in favor of the Banks and Ocala. For example, TBW is granting Ocala a $1.6 billion claim (which is virtually the face amount of BoA's $1.75 billion claim) and is also granting wide-ranging releases to the Banks (subject to limited carve outs). Yet the Banks are not granting releases to TBW, and it appears that they can continue to assert their individual claims against TBW. Moreover, Ocala's claims against TBW are not being released or limited, giving rise to the question of whether it can assert additional claims at a later date.[17] The settlement thus effectively creates a floor but no ceiling for TBW's liability, allowing the Banks (and apparently Ocala) to litigate their claims against TBW in the hopes of obtaining a greater recovery, while knowing that, under any circumstances, Ocala will be entitled to at least a $1.6 billion claim. In other words, TBW has conceded that it owes Ocala $1.6 billion, but the Banks (and apparently Ocala) have not agreed to limit their recoveries to $1.6 billion. The settlement therefore neither resolves TBW's liability to the Banks (or apparently Ocala) nor does it avoid the potential for future litigation. If the settlement is truly a resolution of the Banks' claims against TBW, the

[17] Settlement Agreement at § 2.2(c): "Ocala Funding shall not be deemed to be an Estate Releasor, and nothing herein shall be construed to limit, waive or release any claims of Ocala Funding."

Banks should be precluded from further litigating those claims. The settlement, however, does not appear to achieve that result. In sum, in this apparently one-sided agreement, the Debtor provides broad releases to the Banks (and Ocala) for what appears to be little to no consideration.

23. Additionally, Deutsche Bank and BNPP obtain significant benefits from the settlement, including releases of the Debtor's claims against them. Yet neither Deutsche Bank nor BNPP are parties to the settlement agreement. Their absence as signatories raises significant questions regarding what consideration they are providing in exchange for the Debtor's concessions.

24. Finally, the settlement agreement states without more that the Debtor, BNPP, Deutsche Bank, FDIC, and Ocala "have been negotiating a potential settlement regarding the distribution of assets of Ocala Funding."[18] The relationship between those negotiations and this Settlement Agreement is unclear and discovery may be needed to understand how those negotiations, and the interests of the parties involved in them, impacted this Settlement Agreement. The lack of transparency regarding how the proceeds from the current settlement will be divided among the settling parties precludes an informed analysis of the motivations and interests of the parties in reaching the present compromise.

CONCLUSION

For the reasons set forth above, Freddie Mac respectfully requests that the Court continue the hearing on the Settlement Motion for at least thirty (30) days to allow Freddie Mac to analyze the merits of the proposed settlement. If the Court declines to continue the hearing on the Settlement Motion, Freddie Mac requests that the Court deny approval of the settlement.

[18] *See* Settlement Agreement at Recital P.

Dated: July 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 11th day of July 2011, 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 served by email (a) counsel to the Debtor, (b) special counsel to the Debtor, (c) counsel to the Official Committee of Unsecured Creditors and (d) counsel to BoA.

/s/ Paul D. Moak
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