

**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 THE TAYLOR, BEAN & WHITAKER PLAN
TRUST AND SOVEREIGN BANK**

The Taylor, Bean & Whitaker Plan Trust (the "Plan Trust"), hereby files this motion ("Motion") to approve a settlement (the "Settlement") by and among the Plan Trust and Sovereign Bank, on its own behalf and as agent for other lenders as described below ("Sovereign" together with the Plan Trust, the "Parties"). The Parties desire to settle their respective claims related to alleged secured claims held by Sovereign and certain preference claims held by the Plan Trust. In support of this Motion, the Plan Trust respectfully represents as follows:

Jurisdiction

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. The subject matter of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(A), (B) and (F). Venue is proper in this district pursuant to 28 U.S.C. § 1408.

Background

2. On August 24, 2009 ("Petition Date"), Taylor, Bean & Whitaker Mortgage Corp. ("TBW") filed with this Court its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

3. On July 21, 2011, the Court entered its Order [Dkt. No. 3420] (the “Confirmation Order”) confirming the Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors (the “Plan”). Pursuant to the Plan and the Confirmation Order, the Court retained jurisdiction to the fullest extent of 28 U.S.C. §§ 1334 and 157.

4. Pursuant to the Confirmation Order and the Plan, the Plan Trust is the successor to TBW with respect to all Causes of Action (as defined in the Plan) and litigation-related matters.

5. Pursuant to the Plan Trust Agreement between TBW, REO Specialists LLC, and Home America Mortgage, Inc., on the one hand, and Neil F. Luria, as trustee, on the other hand (the “Plan Trust Agreement”), Neil F. Luria has been appointed as trustee (“Trustee”) to act on behalf of the Plan Trust. The Plan Trust Agreement, which was approved by the Court in the Confirmation Order, gives Trustee, among other things, the authority to prosecute or settle objections to and estimations of Claims (as defined in the Plan) and to prosecute, settle or otherwise deal with all Causes of Action (as defined in the Plan) and Claims in favor of or against the Plan. The Plan Trust Agreement further gives Trustee the authority to seek approval of any settlement from the Court.

6. Prior to the Petition Date, Sovereign was a lender to TBW and the agent for various other lenders (together with Sovereign, the “Lenders”) and has filed on behalf of the Lenders Claim No. 1362 against TBW as a secured creditor in the amount of \$168,231,302.17 (the “Sovereign Claim”).

7. On December 30, 2010, TBW filed an adversary proceeding against Sovereign, as agent for the Lenders, in the Chapter 11 Case styled *Taylor, Bean & Whitaker Mortgage Corp. v.*

Sovereign Bank, Adversary Proceeding No. 3:10-ap-00644-JAF in this Court seeking a determination of the nature, scope and extent of the Lenders' purported security interest and related lien(s), and Sovereign has filed an answer, defenses and counterclaims against the Debtor (the "Lien Litigation").

8. On December 16, 2010, Sovereign filed its *Response of Sovereign Bank to Motion to Approve Settlement Agreements* (the "REMIC Settlement Agreements") *Related to Mortgage Pools Held by 12 Separate Mortgage Backed Securities Trusts with Respect to which ... Wells Fargo Bank, N.A. Served as Master Servicer* [Dkt. No. 2293] in which Sovereign asserted that it had a security interest in proceeds of the Wells Settlement Agreements to be paid to the Plan Trust and contended that the proceeds should be segregated pending a resolution of Sovereign's claim (the "REMIC Objection").

9. On April 19, 2011, Sovereign filed its *Limited Objection of Sovereign Bank to Motion to Approve Settlement Agreement by and between Debtor Taylor, Bean & Whitaker Mortgage Corp., U.S. Bank National Association as Trustee [et al.]* (the "Bayview Settlement Agreement") *Regarding Certain Mortgage-Backed Securities Transactions* [Dkt. No. 2973] in which Sovereign asserted that it had a security interest in proceeds of the Bayview Settlement Agreement to be paid to the Plan Trust and contended that the proceeds should be segregated pending a resolution of Sovereign's claim (the "Bayview Objection" together with the REMIC Objection, the "Settlement Objections").

10. In compliance with paragraph 50 of the Confirmation Order, the proceeds of the REMIC Settlement Agreements and the Bayview Settlement Agreement (together, the "Settlement Proceeds") have been segregated by the Trustee pending resolution of Sovereign's claim to the proceeds.

11. TBW, the Official Committee of Unsecured Creditors of TBW and Sovereign are parties to that certain Settlement Agreement dated as of June 22, 2011, approved by the Court in the Confirmation Order, pursuant to which Sovereign has received the “Sovereign Allocation” (as defined therein) and will receive the “Sovereign MSR Participation,” if any (as defined therein).

12. On August 8, 2011, Trustee filed an adversary proceeding against Sovereign, as agent for the Lenders, in the Chapter 11 Case styled *Neil F. Luria, as Trustee for The Taylor, Bean & Whitaker Plan Trust v. Sovereign Bank*, Adversary Proceeding No. 3:11-ap-00435-JAF in the this Court seeking to avoid as preferences certain payments from TBW to Sovereign (the “Preference Action”).

13. 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 disputes concerning the Lien Litigation and the Preference Action.

14. The Parties have memorialized the terms of their compromise in a Settlement Agreement, dated January 27, 2012, by and among the Parties (the “Sovereign Settlement Agreement,” a copy of which is attached hereto as Exhibit A) and are seeking court approval of the Sovereign Settlement Agreement by this Motion.

15. Among other things, the Sovereign Settlement Agreement:
- a. provides for payment in the amount of \$15,750,000 to Sovereign (the “Settlement Payment”), that upon payment of the Settlement Payment Sovereign’s claim to the Settlement Proceeds will be resolved, and the Trustee will no longer need to segregate the Settlement Proceeds pursuant to paragraph 50 of the Confirmation Order;
 - b. provides that the Settlement Payment shall constitute the entire distribution to which Sovereign is entitled on its Class 4 Claim (as

defined in the Plan), with the exception of the Sovereign Allocation, the Sovereign MSR Participation, and any recovery it may receive in adversary proceeding number 3:10-ap-00243-JAF pending in this Court;

- c. provides for the dismissals with prejudice of the Lien Litigation and the Preference Action;
- d. provides that Sovereign shall have allowed unsecured claims in TBW Class 8, REO Class 3, and HAM Class 3 in the amount of \$136,781,302.17;
- e. preserves all claims of Ocala Funding, LLC against Sovereign; and
- f. does not release the claims, if any, of Sovereign against certain third parties and the claims of any Lender in its individual capacity which (i) do not relate to the Sovereign Claim and (ii) are separate and apart from its claim as a Lender or successor or assignee of a Lender under the Servicing Facility.

16. The Sovereign Settlement Agreement shall only become effective upon this Court's approval of the Sovereign Settlement Agreement by granting this Motion.

Relief Requested

17. By this Motion, the Plan Trust respectfully requests that the Court approve the Sovereign Settlement Agreement.

18. 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).

19. In determining whether a settlement should be approved, courts 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).

20. 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).

21. The Plan Trust Agreement authorizes Trustee to use his reasonable business judgment in administering the Plan Trust Assets. *See* Plan Trust Agreement § III.B. Further, the Plan Trust Agreement authorizes Trustee to enter into the Sovereign Settlement Agreement subject to the approval of the Plan Advisory Committee (as defined in the Plan). *See* Plan Trust Agreement § V.D. The Plan Advisory Committee has approved the Sovereign Settlement Agreement.

22. A review of the above considerations demonstrates that a settlement of the issues addressed in the Sovereign Settlement Agreement and on the terms contained therein, is in the best interests of the Plan Trust and all of the creditors, is fair and reasonable, and is within Trustee’s sound business judgment.

WHEREFORE, the Plan Trust respectfully requests that the Court enter an order approving the Sovereign Settlement Agreement and granting such other and further relief as is just and equitable.

Respectfully submitted, this 30th day of January 2012.

Respectfully submitted,

/s/ Jeffrey W. Kelley

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