

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

Chapter 11

TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP.,  
REO SPECIALISTS, LLC, and  
HOME AMERICA MORTGAGE, INC.,

Case No. 3:09-bk-07047-JAF  
Case No. 3:09-bk-10022-JAF  
Case No. 3:09-bk-10023-JAF  
(Jointly Administered Under  
Case No. 3:09-bk-07047-JAF)

Debtors.

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TAYLOR, BEAN & WHITAKER MORTGAGE  
CORP.

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

Applicable Debtor.

\_\_\_\_\_/

**MOTION TO APPROVE SETTLEMENT AGREEMENT BETWEEN  
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,  
PA. AND THE TAYLOR, BEAN & WHITAKER PLAN TRUST**

Neil F. Luria, Plan Trustee ("Plan Trustee") to the Taylor, Bean & Whitaker Plan Trust (the "Plan Trust"), files this Motion to Approve Settlement Agreement between the Plan Trust and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union," together with the Plan Trust, the "Parties") (the "Motion") as to the Application for Payment of Administrative Expenses [D.E. 4026] and the Supplemental Application for Payment of Administrative Expenses [D.E. 4032] (collectively, the "Administrative Claim" and Claim No. 3484) filed by National Union. In support of the Motion, the Plan Trustee 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.

### **Procedural Background**

2. On August 24, 2009 (the "Petition Date"), the Debtor filed with this Court its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code.

3. Prior to the bankruptcy of TBW, National Union issued a Directors, Officers, and Private Company Liability Policy (the "Policy")<sup>1</sup> to Taylor, Bean & Whitaker Mortgage Corp. ("TBW" or the "Debtor").

4. During the Debtor's case, certain of its former directors and officers made claims against the policy for Defense Costs in regard to certain Claims. In connection with the Claims against the Policy, National Union filed a *Motion for Relief from the Automatic Stay, to the Extent Applicable, to Permit Insurer to Advance Defense Costs of Certain of the Debtors' Former Directors and Officers* [D.E. 1534] (the "Stay Relief Motion") on June 11, 2010. National Union filed an additional Motion [D.E. 1796] for relief from the automatic stay on August 13, 2010, in order to advance Defense Costs for Lee Farkas, the former Chairman of the Debtor and Paul Allen, the former CEO of the Debtor.

5. On July 2, 2010, the Official Committee of Unsecured Creditors (the "Committee") filed its response in opposition to National Union's Stay Relief Motion [D.E. 1623] (the "Stay Relief Response"). The Committee asserted that the Stay Relief Motion was an attempt to elevate any unsecured claims for indemnification of advanced defense costs into administrative expenses and that National Union's advance of defense costs in the context of a wasting policy would constitute a severe depletion of the property of the Debtor's estate to the detriment of all of the Debtor's creditors and would provide no benefit to the estate. The

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<sup>1</sup> Capitalized words refer to those words that are defined in the Policy.

Committee's Stay Relief Response further asserted that National Union appeared to be ignoring any defenses it had to advancing defense costs of some of the individual insureds under the Policy.

6. After the Court granted stay relief, National Union, along with other insurers, advanced Defense Costs on behalf of Paul Allen and Lee Farkas. Paul Allen pled guilty on April 1, 2011 to one count of conspiracy to commit bank and wire fraud and one count of false statements and was sentenced to forty months in prison on June 21, 2011. Lee Farkas was convicted at trial of multiple crimes and was sentenced on June 28, 2011 to thirty years in prison, among other penalties.

7. On July 21, 2011, the Bankruptcy Court confirmed the Third Amended and Restated Joint Plan of Liquidation (the "Plan"), and Neil F. Luria was appointed the trustee of the Plan Trust. The Plan went effective on August 10, 2011.

8. On September 12, 2011, National Union filed its Request and Application for an Administrative Expense Claim [D.E. 4026] seeking an administrative expense claim in the amount of \$928,977.59, for Defense Costs advanced to Lee Farkas. On September 13, 2011, National Union filed its Supplement to Request and Application for an Administrative Expense Claim [D.E. 4032] seeking an additional \$63,591.04, in Defense Costs advanced to Paul Allen. In sum, National Union seeks an administrative expense claim of \$992,568.63 (Claim No. 3484).

9. On March 8, 2012, the Plan Trustee filed his Response [D.E. 5009] in opposition to the Administrative Claim on a number of grounds. The Plan Trustee asserted that National Union was not entitled to an administrative expense claim because there was no post-petition transaction between TBW and National Union, that National Union lacked a contractual right to

reimbursement from TBW for National Union's advancement of Defense Costs to Mr. Allen and Mr. Farkas, and that National Union had attempted to rescind the policy without returning the premiums.

10. In December 2012, the Parties entered into a Settlement Agreement resolving the issues related to the Administrative Claim and other matters (the "Agreement"). A copy of the Agreement is attached hereto as **Exhibit "A"** and incorporated herein by reference.

### **Background**

11. Under the Agreement, the Parties agree that National Union does not have an Administrative Claim. In exchange, the Plan Trustee agrees to waive a potential claim the Plan Trust may have against National Union for return of premiums paid by TBW in connection with the Policy, as a result of National Union's position, disputed by the Plan Trustee, that the Policy is void.

12. The Parties also agree, subject to the limitations contained in the Agreement that the Policy was and is void as to all Insureds, potential Insureds and any third party who is asserting an interest in the Policy as a result of a Claim against an Insured. Specifically, the Plan Trustee, while not admitting that there may have been material misrepresentations by the former representatives of the Debtor in the application for the Policy, agrees that the Policy is void by virtue of the Agreement. The Parties agree that the Agreement does not constitute an admission and cannot be used in regard to any other insurance policy to which the Debtor, Plan Trust or the Plan Trustee is or was a party, including but not limited to any dispute relating to any other insurance policy, and the Agreement shall not be used and shall not be admissible in any lawsuit, claim, arbitration or litigation unrelated to this Policy, as an admission of the Debtor, the

Committee that existed during the bankruptcy case pre-confirmation, the Plan Trust or the Plan Trustee or for any purpose.

13. The Plan Trustee further stipulates and agrees that, in the event National Union, in National Union's sole discretion, files a declaratory judgment action to obtain a ruling that the Policy is void, the Plan Trustee will not oppose such an action nor take a position inconsistent with the Agreement.

### **Relief Requested**

14. Compromises are generally favored in Chapter 11 cases. *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); *In re Carson*, 82 B.R. 847 (Bankr. S.D. Ohio 1987); *In re Ericson*, 6 B.R. 1002 (D. Minn. 1980); *Knowles v. Putteraugh (In re Hallet)*, 33 B.R. 564 (Bankr. D. Me. 1983); *In re Mobile Air Drilling Co., Inc.*, 53 B.R. 605 (Bankr. N.D. Ohio 1985); *In re Hydronic Enterprise, Inc.*, 58 BR. 363 (Bankr. D. R.I. 1986).

15. The Plan Trustee 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. *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.

16. The Plan Trust Agreement authorizes the Plan Trustee to use his reasonable business judgment in administering the Plan Trust Assets. *See* Plan Trust Agreement § III.B.

17. 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).

18. A review of the above considerations demonstrates that a settlement of the issues resolved by the 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 the Plan Trustee’s sound business judgment.

19. The Agreement resolves the outstanding issues related to the Administrative Claim. Without such a resolution, the Plan Trust would be forced to expend significant resources on protracted litigation, thereby diminishing the ultimate distribution to creditors.

**WHEREFORE**, the Plan Trustee respectfully requests that the Court enter an order in the form attached hereto as **Exhibit “B”**: (i) authorizing the Plan Trustee to enter into the

compromise described above with the Parties; (ii) approving the Agreement; and (iii) granting such other and further relief as is just and equitable.

Respectfully submitted, this 12th day of February, 2013.

Respectfully submitted,  
BERGER SINGERMAN LLP  
*Counsel to Neil F. Luria, Plan Trustee for the  
Taylor, Bean & Whitaker Plan Trust*  
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Miami, FL 33131  
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By: /s/ James D. Gassenheimer

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**EXHIBIT A**  
**SETTLEMENT AGREEMENT**



## **SETTLEMENT AGREEMENT**

**THIS SETTLEMENT AGREEMENT** (this “**Agreement**”) is made and entered into as of this 18<sup>th</sup> day of January, 2013, by and among Neil F. Luria, as Plan Trustee (“Plan Trustee”) for the Taylor, Bean & Whitaker Plan Trust (the “Plan Trust”), and National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”).

### **RECITALS**

A. National Union issued a Directors, Officers, and Private Company Liability Insurance Policy (the “Policy”) to Taylor, Bean & Whitaker Mortgage Corp. (the “Debtor”) covering the Policy Period<sup>1</sup> from September 1, 2008, through September 1, 2009. Generally, the Policy provides insurance to Directors, Officers or Employees of Taylor Bean for Loss arising from Claims first made against such Insureds during the Policy Period and reported to the Insurer pursuant to the terms of the Policy for any actual or alleged Wrongful Act, subject to the terms, conditions, and exclusions of the Policy (“Coverage A”). The Policy also provides Private Company Insurance to Taylor Bean itself for Loss arising from Claims (i) first made against the Company, or (ii) first made against an Individual Insured, during the Policy Period and reported to the Insurer pursuant to the terms of the Policy for any actual or alleged Wrongful Act, subject to the terms, conditions, and exclusions of the Policy (“Coverage B”).

B. On August 24, 2009, the Debtor commenced a Chapter 11 bankruptcy case (Case No. 09-07048-JAF) (the “Bankruptcy Case”) before the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division (the “Bankruptcy Court”).

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<sup>1</sup> Capitalized terms used herein unless otherwise defined shall have the same meanings as ascribed to them in the Policy.

C. On July 21, 2011, the Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors (the “Plan”) was confirmed.

D. Pursuant to the Plan, the Debtor assumed certain contracts including the Policy.

E. On September 12, 2011 and September 13, 2011, National Union filed a Request and Application for payment of an administrative claim [D.E. 4026] and a Supplemental Request and Application [D.E. 4032] (collectively, the “Administrative Claim” and Claim No. 3484) with respect to the Policy.

F. The Plan Trustee has opposed the granting of the Administrative Claim and has denied that National Union is entitled to an Administrative Claim.

G. National Union has asserted that significant and material misrepresentations were made in the application for the issuance of the Policy and that the Policy is void because of those misrepresentations. National Union has provided written notice to the Debtor and those Individual Insureds who have reported a Claim or Notice of Circumstances that the Policy is void pursuant to the terms of the Policy as well as under the Florida Statutes.

H. The Plan Trustee has asserted a potential claim against National Union for premiums paid, if the Policy is void (the “Premium Claim”).

I. The parties, without admitting to the sufficiency of the claims made herein, agree to compromise the dispute in accordance with the terms set forth herein below.

J. To avoid uncertainty and further expense relating to the Administrative Claim and the Premium Claim, National Union and the Plan Trustee seek to resolve all disputes between them relating to the status of the Policy, of the Administrative Claim and the Premium Claim.

**OPERATIVE TERMS**

In consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Bankruptcy Court Approval. Within ten (10) business days after the execution of this Agreement, the Liquidating Trustee with the approval of National Union shall file and serve a motion with the Bankruptcy Court requesting approval of such motion and this Agreement. Notice of such motion and an opportunity to object shall be given to all interested parties, including all Individual Insureds who have reported a Claim or Notice of Circumstances under the Policy as well as the FDIC as Receiver for Platinum Community Bank. This Agreement is subject to approval by the Bankruptcy Court and shall not become binding on the parties until the date that an Order entered by the Bankruptcy Court approving such motion and this Agreement in its entirety becomes a final, non-appealable order of the Bankruptcy Court (the “Effective Date”).

2. Waiver of Administrative Claim. National Union hereby releases, waives and will withdraw the Administrative Claim.

3. Voiding of Policy. The Plan Trustee stipulates and agrees that the Policy was and is void as to all Insureds, potential Insureds and potential claimants. The Plan Trustee, while not admitting that there have been material misrepresentations by the Debtor’s representatives in the application for the Policy, agrees that the Policy is void. The Parties agree that this Agreement shall not be used in regard to any other insurance policy to which the Debtor or the Plan Trustee is or was a party, including but not limited to any dispute relating to any other

insurance policy, and this Agreement shall not be used and shall not be admissible in any lawsuit, claim, arbitration or litigation unrelated to this Policy, as an admission of the Debtor or the Plan Trustee or for any other purpose.

4. Declaratory Judgment Action. The Plan Trustee further stipulates and agrees, that in the event National Union, in National Union's sole discretion, files a declaratory judgment action to determine that the Policy is void, that the Plan Trustee will not oppose such an action nor take a position inconsistent with this Agreement, to wit: that the Policy was and is void as to all Insureds, potential Insureds and potential claimants.

5. Waiver of Claim to Recover Premiums. The Plan Trustee hereby releases, waives and will not assert the Premium Claim or any other type of claim to recover the premiums paid for the Policy.

6. Dismissal of Pending Proceedings. Within five (5) business days after the Effective Date, National Union will withdraw and dismiss the Administrative Claim.

7. Representations and Warranties.

(a) Each of the parties to this Agreement represents and warrants to the other parties that this Agreement is binding and enforceable against such party subject to the Bankruptcy Court Approval.

8. General Provisions.

(a) Binding Effect. This Agreement shall be enforceable against and binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors, and assigns.

(b) Entire Agreement. This Agreement constitutes the entire agreement of the parties hereto as to the subject matter hereof. Each of the parties to this Agreement acknowledges that there are no communications or oral understandings contrary, different, or that in any way restrict this Agreement, and that all prior agreements or understandings within the scope of the subject matter of this Agreement are superseded, null and void.

(c) Amendments. No waiver, modification, or amendment of any of the terms of this Agreement shall be valid or binding unless made in writing, signed by the party to be charged, and then only to the extent as set forth in such written waiver, modification, or amendment.

(d) Counterparts. One or more of the parties may execute this Agreement in counterparts, and execution of counterparts shall have the same force and effect as if the parties had signed the same instrument. Signatures transmitted by facsimile shall have the same effect as original signatures.

9. Retention of Jurisdiction. The Bankruptcy Court shall retain jurisdiction over the parties, subject matter, interpretation, effectuation, and enforcement of this Agreement.

10. Choice of Law; and Venue. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Florida, without regard to its conflict of law principles that could result in the application of the laws of any other jurisdiction. The sole, exclusive, and proper venue for resolving any dispute among any two or more of the

parties with respect to this Agreement and the subject matter hereof shall be the Bankruptcy Court.

11. Drafting of Agreement. All of the parties shall be considered collectively to be the drafting parties of this Agreement, and any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall be inapplicable.

12. Expenses. Each party shall bear such party's own costs, expenses, and attorney's fees.

13. Prevailing Party. If any proceeding is brought with respect to this Agreement, the prevailing party shall be entitled to all of its attorneys' fees and costs, including, without limitation, attorneys' fees and costs in any appellate or bankruptcy proceedings.


14. Captions. The captions and headings in this Agreement are solely for convenience and shall have no legal effect in construing the provisions of this Agreement.

15. WAIVER OF JURY TRIAL. EACH PARTY HERETO HEREBY AGREES IRREVOCABLY, KNOWINGLY, AND VOLUNTARILY THAT, IN ANY ACTION, PROCEEDING, CROSSCLAIM, COUNTERCLAIM, OR THIRD-PARTY CLAIM BROUGHT IN RESPECT OF ANY MATTERS WHATSOEVER ARISING OUT OF

OR IN ANY WAY CONNECTED WITH THIS AGREEMENT. SUCH PARTY SHALL AND DOES HEREBY (i) WAIVE ALL RIGHTS TO TRIAL BY JURY, AND (ii) WAIVES THE RIGHT TO CONSOLIDATE ANY ACTION OR PROCEEDING IN WHICH A RIGHT TO JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION OR PROCEEDING IN WHICH A RIGHT TO JURY TRIAL HAS NOT BEEN WAIVED.

The parties have entered into this Agreement as of the date stated in the first paragraph of this Agreement.

CHARTIS CLAIMS, INC., ON BEHALF OF  
NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.

By   
Printed Name: Cheryl Chiovetta  
As its: Vice President

NEIL F. LURIA, SOLELY IN HIS  
CAPACITY AS PLAN TRUSTEE OF THE  
TAYLOR BEAN & WHITAKER  
MORTGAGE PLAN TRUST

  
Printed Name: Neil F. Luria

**EXHIBIT B  
PROPOSED ORDER**

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:	Chapter 11 Case
TAYLOR, BEAN & WHITAKER MORTGAGE CORP., REO SPECIALISTS, LLC, and HOME AMERICA MORTGAGE, INC.,	Case No. 3:09-bk-07047-JAF Case No. 3:09-bk-10022-JAF Case No. 3:09-bk-10023-JAF
Debtors.	Jointly Administered Under Case No. 3:09-bk-07047-JAF

	/
In re:	
TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,	Case No. 3:09-bk-07047-JAF
Applicable Debtor.	

**ORDER GRANTING MOTION TO APPROVE SETTLEMENT  
AGREEMENT BETWEEN NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA. AND  
THE TAYLOR, BEAN & WHITAKER PLAN TRUST**

**THIS MATTER** came before the Court upon Plan Trustee’s *Motion to Approve Settlement Agreement Between National Union Fire Insurance Company of Pittsburgh, Pa. and the Taylor, Bean & Whitaker Plan Trust* (the “Motion”) [D.E. \_\_\_\_]. The Court, having considered the Motion, having noted that no objections to the Motion have been filed, finding good cause for the granting of the Motion, and being otherwise fully advised in the premises, does thereupon

**ORDER** as follows:

1. The Motion is GRANTED.



2. The Agreement<sup>2</sup> between the Plan Trustee and National Union, as set forth in the Motion, is APPROVED in its entirety.

3. The Plan Trustee and National Union are authorized to execute all documents and take all actions necessary to effectuate the Agreement.

4. The Agreement, the Motion and this Order are not admissible against the Debtors, the Plan Trustee or the Plan Trust, in any case, court, arbitration in regard to any other insurance policy and any other matter, as an admission of the Debtor, Plan Trustee, Committee or Plan Trust, or for any other purpose.

5. The Court retains jurisdiction to enforce the terms of the Agreement between the Parties or third parties, and the Parties are directed to comply with the terms and conditions of the Agreement.

**DATED** this \_\_\_\_\_ day of \_\_\_\_\_, 2013, in Jacksonville, Florida.

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Jerry A. Funk  
United States Bankruptcy Judge

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<sup>2</sup> All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.