UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:	CHAPTER 11
TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,	CASE NO. 3:09-bk-07047-JAF
Debtor.	RE: D.E. 83 Hearing Set September 11, 2009, 10:00 am

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BANK OF AMERICA'S RESPONSE TO THE DEBTOR'S EMERGENCY MOTION FOR TURNOVER, APPROVAL OF PROCEDURES FOR THE MAINTENANCE AND USE OF BORROWER PAYMENTS, AND IMMEDIATE RESOLUTION OF RELATED ISSUES

Bank of America, National Association, as successor in interest through merger to LaSalle Bank, National Association and LaSalle Global Trust Services, and in its capacity as Collateral Agent, Indenture Trustee, and Custodian ("Bank of America"), with respect to Ocala Funding, LLC ("Ocala"), files this Response to the Emergency Motion for Turnover, Approval of Procedures for the Maintenance and Use of Borrower Payments, and Immediate Resolution of Related Issues (the "Turnover Motion") filed by Taylor, Bean & Whitaker Mortgage Corp. (the "Debtor") on August 31, 2009 [D.E. 83], and states the following:

I. INTRODUCTION

The Debtor requests that the Court direct the Federal Deposit Insurance Corporation ("FDIC"), as receiver of Colonial Bank, N.A. ("Colonial Bank"), to turnover to the Debtor all funds in "custodial" accounts at Colonial Bank titled in the Debtor's name (defined by the Debtor as the "Colonial Account Funds"). Upon information and belief, over $1.5 billion of the Colonial Account Funds may belong to Bank of America, and the Debtor admits that it does not know who owns the Colonial Account Funds. The Debtor has repeatedly alleged that from

August 6, 2009, Colonial Bank and the FDIC have prevented it from obtaining records that would reflect proper ownership of the Colonial Account Funds. Until a detailed reconciliation of the proper ownership of the Colonial Account Funds is performed, the Debtor cannot prove that such funds constitute property of the estate, and the Court should deny the Turnover Motion.

II. BACKGROUND

A. The MLPSA and the Ocala Loans

1. On June 30, 2008, Ocala entered into a Second Amended and Restated Mortgage Loan Purchase and Servicing Agreement (the "MLPSA") with the Debtor whereby Ocala agreed to purchase certain mortgage loans and related loan documents (collectively, the "Ocala Loans") from the Debtor, as well as the servicing rights associated with the Ocala Loans (the "Servicing Rights"). Bank of America is a third party beneficiary to the MLPSA. A copy of the MLPSA is attached hereto as **Exhibit A** and is incorporated herein by reference.

2. Under the terms of the MLPSA, the Debtor was designated with the right to service the Ocala Loans (the "Designated Rights"). Exh. A at 32, 52.

3. Ocala funded its purchase of the Ocala Loans by issuing subordinated notes and commercial paper. The holders of the subordinated notes and commercial paper will be referred to herein as the "Ocala Secured Parties." Bank of America served as Indenture Trustee, Collateral Agent, and Custodian for the Ocala Secured Parties. Copies of the June 30, 2008 Second Amended and Restated Base Indenture between Ocala, as issuer, and Bank of America, as Indenture Trustee (as amended and supplemented, the "Second Base Indenture"), and supplements thereto, are attached hereto as composite **Exhibit B** and are incorporated herein by reference.

4. Section 14.1 of the MLPSA provides that Ocala "hereby assigns, conveys, transfers, delivers and sets over unto [Bank of America, as Collateral Agent] for the benefit of the [Ocala] Secured Parties, all of its right, title and interest in, to and under, whether now owned or existing, or hereafter acquired, this Purchase Agreement". Exh. A at 65. Section 14.1 additionally provides that Ocala and the Debtor each "consent to such assignment and acknowledge that [Bank of America, as Collateral Agent] shall enjoy [Ocala's] rights under this Purchase Agreement … [Bank of America, as Collateral Agent] shall have all rights of [Ocala] to enforce the covenants and conditions set forth in this Purchase Agreement with respect to the Mortgage Loans". Id. at 65-66.

5. On June 30, 2008, Ocala also entered into an Indenture Agreement and Second Amended and Restated Security Agreement with Bank of America (the "Security Agreement") whereby Ocala, to secure its obligations under the Second Base Indenture, pledged to Bank of America, as Collateral Agent, among other things: (a) the Ocala Loans; (b) the principal and interest paid under the Ocala Loans; (c) any proceeds from the sale of the Ocala Loans to investors (the "Ocala Loan Proceeds"); and (d) the servicing rights relating to the Ocala Loans (collectively, the "Ocala Assets"). A copy of the Security Agreement is attached hereto as **Exhibit C** and is incorporated herein by reference.

6. Bank of America, as Collateral Agent for the holders of commercial paper and subordinated notes, perfected its first priority security interest in the Ocala Assets pursuant to the terms of a Second Amended and Restated Custodial Agreement, dated as of June 30, 2008, among Ocala as issuer, the Debtor, as seller and servicer, and Bank of America, as Custodian and Collateral Agent (the "Custodial Agreement"). Among other things, Bank of America filed a

UCC-1 financing statement with respect to the Ocala Assets. A copy of the Custodial Agreement is attached hereto as **Exhibit D** and is incorporated herein by reference.

7. The Debtor subsequently undertook the servicing of the Ocala Loans in accordance with the Designated Rights provided for in the MLPSA. Specifically, the Debtor accepted payments of principal, interest, taxes and insurance from borrowers under the Ocala Loans (the "Ocala PITI"), handled escrow funds and the release thereof, dealt with loan forbearance and modification requests, and evaluated and facilitated refinancing and sale transactions. Upon information and belief, the Debtor and/or Colonial Bank is in possession of the Ocala PITI.

B. The Colonial Bank Action in the District Court

8. Under a series of bailee letters (collectively, the "Bailee Letters"), also referred to as "Transmittal Letters," Colonial Bank agreed to hold the Ocala Loans and the Ocala Loan Proceeds in trust and as custodian, agent, and bailee for and on behalf of Bank of America and the Ocala Secured Parties. A copy of a form Bailee Letter is attached hereto as **Exhibit E** and is incorporated herein by reference.

9. Under the Bailee Letters, within fifteen days of its receipt of an Ocala Loan, Colonial Bank was obligated to either: (a) remit to Bank of America, as Collateral Agent, the Ocala Loan Proceeds for all Ocala Loans purchased by the Federal Home Loan Mortgage Association ("Freddie Mac"), or (b) return to Bank of America any Ocala Loans that Freddie Mac declined or refused to purchase.

10. Upon information and belief, during the period from June 11, 2009 through and including August 4, 2009, Freddie Mac delivered to Colonial Bank, for payment to Bank of

America, as Collateral Agent, an amount in excess of $1 billion resulting from Freddie Mac's purchase of Ocala Loans.

11. On August 11, 2009, Bank of America sent Colonial Bank a demand for documents and proceeds (the "August 11 Demand"), whereby Bank of America effectively revoked the Bailee Letters, to the extent not already revoked or expired, and terminated all of Colonial Bank's rights to hold possession of the Ocala Loans and Ocala Loan Proceeds in trust and as custodian, agent, and bailee on behalf of the Ocala Secured Parties. A copy of the August 11 Demand is attached hereto as **Exhibit F** and is incorporated herein by reference.

12. Colonial Bank failed to comply with the August 11 Demand.

13. Accordingly, on August 12, 2009, Bank of America filed a Complaint in the United States District Court for the Southern District of Florida (the "District Court") against Colonial Bank asserting various legal and equitable claims, thus initiating the case styled *Bank of America, National Association v. Colonial Bank, et. al.*, Case No. 09-22384-Civ-Jordan/McAlliey (the "Colonial Bank Action"). Bank of America also sought emergency injunctive relief in the Colonial Bank Action to prevent Colonial Bank from dissipating, transferring or commingling the Ocala Loans and the Ocala Loan Proceeds.

14. In the Colonial Bank Action, Bank of America asserted that the Ocala Loans and the Ocala Loan Proceeds held by Colonial Bank, including the $1 billion referenced above, are property of Bank of America, rather than Colonial Bank, under the terms of the Bailee Letters.

15. On August 13, 2009, the District Court entered an Order Granting Bank of America's Motion for Temporary Restraining Order (the "Temporary Restraining Order") granting Bank of America's request for emergency injunctive relief. A copy of the Temporary Restraining Order is attached hereto as **Exhibit G** and is incorporated herein by reference.

16. By the Temporary Restraining Order, the District Court enjoined Colonial Bank "and all persons acting under direction or control, or in concert with" Colonial Bank, from:

> [S]elling, pledging, assigning, liquidating, encumbering, transferring, or otherwise disposing of all or any portion of (a) the proceeds paid by Freddie Mac to Colonial Bank, as trustee, custodian, bailee, and agent, for certain mortgage loans and corresponding loan documents owned by Ocala Funding, LLC ("Ocala"), and (b) certain mortgage loans and corresponding loan documents delivered to Colonial Bank, as trustee, custodian, bailee, and agent, which were not purchased by Freddie Mac as set forth on the schedule annexed hereto as Schedule A to the complaint of this action.

17. On September 8, 2009, the District Court entered an Amended Order Granting & Extending Preliminary Injunction (the "FDIC Injunction") in the Colonial Bank Action. A copy of the FDIC Injunction is attached hereto as **Exhibit H** and is incorporated herein by reference.

18. In the FDIC Injunction, the District Court specifically found that the funds at issue in the Colonial Bank Action - the Ocala Loan Proceeds - are property of Bank of America, and "outside the receivership" under the terms of the Bailee Letters. *See* Exh. K at 4. The District Court concluded that, under the terms of the Bailee Letters, Colonial Bank is nothing more than a bailee of the funds at issue, and therefore such funds are not property of Colonial Bank's receivership estate. *See id.* at 4-5. The District Court found that "[c]ourts defining the boundaries of estates in analogous contexts have similarly concluded that property held pursuant to a bailment or other custodial arrangement is not part of the estate". *See id.* at 5. The District Court concluded that, since the funds were not property of Colonial Bank's receivership estate, they were not subject to the jurisdiction of the FDIC under the Financial Institutions Reform Recovery and Enforcement Act of 1989, the statute that governs the FDIC's receivership authority. *See id.* at 7.

C. The Collapse of Colonial Bank and the Debtor

19. Pursuant to certain regulations of the United States Department of Housing and Urban Development ("HUD"), as well as agreements with the Government National Mortgage Association ("Ginnie Mae"), Freddie Mac and various lenders, the Debtor was required to deliver year-end audited financial statements to these agencies and lenders.[1] Deloitte LLP ("Deloitte") served as the Debtor's auditor. On June 16, 2009, members of Deloitte's team expressed concerns that they were encountering delays in obtaining information and documentation from the Debtor regarding certain assets on the Debtor's balance sheet. Deloitte refused to issue a clean audit of the Debtor's financial statements.

20. On August 3, 2009, federal investigators, including agents of the United States Federal Bureau of Investigation, raided the Debtor's headquarters in Ocala, Florida.

21. On August 4, 2009, HUD suspended the Debtor's HUD/FHA origination and underwriting approval. In a press release announcing this suspension, HUD stated that this action was taken as a result of, among other things, its discovery that the Debtor's auditor ceased its financial examination after discovering certain irregular transactions that raised concerns of fraud, and that the Debtor failed to disclose, and falsely concealed, that it was the subject of two examinations into its business practices in the past year. In addition, Freddie Mac and Ginnie Mae terminated the Debtor's rights to issue and service loans for them.

22. On August 5, 2009, the Debtor laid off approximately 2,000 employees, or approximately 80% of its workforce, and significantly reduced its business operations.

23. On August 6, 2009, Colonial Bank, the Debtor's principal bank, froze all of the Debtor's accounts and refused to accept deposits, honor checks, receive wire transfers, or permit

[1] The Debtor's fiscal year ended March 31, 2009.

disbursements. According to the Debtor, it has not received information from Colonial Bank since that time that would allow it to determine who owns the Colonial Account Funds or the Investor Loans.

24. On August 14, 2009, the State of Alabama Department of Banking Regulation appointed the FDIC as receiver of Colonial Bank.

25. On August 21, 2009, the State of Florida Office of Financial Regulation (the "OFR") issued its Second Emergency Order to Cease and Desist against the Debtor (the "Cease and Desist Order"). A copy of the Cease and Desist Order is attached as **Exhibit I** hereto. The Cease and Desist Order reflects that the Debtor was using a "single bank account" to deposit operating funds and custodial funds, which "intermingling of funds poses a serious risk to Florida consumers." *See* Ex. I at ¶¶ 10 - 12.

26. In addition, "following the precipitous events of early August, the members of the [Debtor's] board of directors and the company's corporate officers, including the Chairman, Vice Chairman, Chief Executive Officer, and Chief Financial Officer, resigned...On or about August 20, 2009, the [Office of Thrift Supervision] approved Mr. Luria [of Navigant Consulting] to serve as [Chief Restructuring Officer] ... of the Debtor." *See* Case Management Summary filed by the Debtor [D.E. # 4]. Neither Navigant nor its team of consultants can currently identify with certainty who owns the Colonial Account Funds or the Investor Loans.

27. Furthermore, there have been allegations that the Debtor "double pledged" the Investor Loans, and the Debtor has admitted uncertainty regarding ownership of the Investor Loans, which has caused confusion among borrowers. *See* Turnover Motion, p. 11, n. 2.

D. Debtor's Bankruptcy Filing and the Turnover Motion

28. On August 24, 2009 (the "Petition Date"), the Debtor filed in this Court a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code").

29. On August 31, 2009, the Debtor filed the Turnover Motion. By the Turnover Motion, the Debtor requests that this Court enter an order, among other things requiring the FDIC to turnover all Colonial Account Funds to the Debtor.

II. ANALYSIS

Bank of America opposes the Turnover Motion. As of the date hereof, the Debtor cannot establish that the Colonial Account Funds qualify as property of the Debtor's estate rather than property of Bank of America. Furthermore, the District Court entered the FDIC Injunction, which prevents the FDIC from disbursing monies that belong to Bank of America. Because the Debtor cannot establish who owns the Colonial Account Funds, the Court should deny the Motion.

Section 542(a) of the Bankruptcy Code, 11 U.S.C § § 101 *et seq.*, provides that "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell or lease under section 363 of this title … shall deliver to the trustee, and account for, such property or the value of such property". *See* 11 U.S.C. § 542(a). Section 363 of the Bankruptcy Code provides that a trustee may use, sell or lease "property of the estate" under various circumstances. *See* 11 U.S.C. § 363. Section 541(a) of the Bankruptcy Code defines "property of the estate" as "all legal or equitable interests of the debtor in property as of the commencement of the case". *See* 11 U.S.C. § 541(a).

A turnover claim under § 542(a) is proper only when the property at issue unequivocally qualifies as property of the estate under § 541. *See In re Ven-Mar Int'l, Inc.*, 166 B.R. 191, 193 (Bankr. S.D. Fla. 1994) ("Section 542 allows trustees to recover property that is *clearly* property of the debtor.") (emphasis added); *see also In re Hechinger Inv. Co. of Del., Inc.*, 282 B.R. 149, 161-162 (Bankr. D. Del. 2002) ("Turnover under 11 U.S.C. § 542 is a remedy available to debtors to obtain *what is acknowledged* to be property of the bankruptcy estate.") (emphasis added); *Acolyte Elec. Corp. v. City of New York*, 69 B.R. 155, 168 (Bankr. E.D.N.Y. 1986) ("Section 542 is designed to compel an entity, other than a custodian, to turn over to the trustee property in which the estate has *a real and substantial interest*") (emphasis added); *In re FLR Co.*, 58 B.R. 632, 634 (Bankr. W.D. Pa. 1985) ("Implicit in the bankruptcy concept of turnover is the idea that the property being sought *is clearly the property of the Debtor* but not in the Debtor's possession.") (emphasis added).

In fact, a bankruptcy court lacks subject matter jurisdiction to hear a claim for turnover unless the property at issue clearly belongs to the estate:

> Whenever a trustee brings a turnover action, he must establish, however, as part of his invocation of the bankruptcy court's summary jurisdiction, that the property he seeks to recover in the turnover action is 'property of the bankruptcy estate' (property that will be available for distribution by the trustee). If the action does not involve property of the estate, then not only is it a noncore proceeding, it is an unrelated matter completely beyond the bankruptcy court's subject-matter jurisdiction.

In re Gallucci, 931 F.2d 738, 742 (11th Cir. 1991) (citations omitted). In order for a trustee or a debtor-in-possession to obtain turnover of property under § 542(a), the trustee or debtor-in-possession must also establish that the property at issue, if turned over to the bankruptcy estate, would be "available for distribution by the trustee". *See id.*

The Debtor has failed to satisfy its burden to establish that the Colonial Account Funds unequivocally qualify as property of the estate under § 541. As discussed above, the District Court concluded in the FDIC Injunction that the Ocala Loan Proceeds at issue in the Colonial Bank Action are property of Bank of America under the Bailee Letters and other relevant documents, rather than property of Colonial Bank or the FDIC. Furthermore, the Debtor cannot prove whether other assets for which it seeks turnover belong to the Debtor, rather than Bank of America. The Debtor admits that it has not received information from Colonial Bank to determine the proper ownership of the Colonial Account Funds.

Without a detailed evidentiary reconciliation of the Colonial Account Funds, it is not clear whether all or any portion of the Colonial Account Funds subject of the Turnover Motion unequivocally qualify as property of the estate under § 541 of the Bankruptcy Code. Therefore, the Debtor has failed to carry its burden to prove that all or any portion of the Colonial Account Funds are subject to this Court's jurisdiction and turnover under § 542(a). *See Gallucci*, 931 F.2d at 742.

IV. CONCLUSION

The Court should deny the Turnover Motion. As of the date hereof, the Debtor cannot establish that the Colonial Account Funds qualify unequivocally as property of the estate subject to turnover under § 542(a). The Colonial Account Funds may include the Ocala Loan Proceeds or other funds belonging to Bank of America for the benefit of the Ocala Secured Parties.

WHEREFORE, Bank of America respectfully requests the entry of an order denying the Turnover Motion and for such other and further relief as the Court deems just and proper.

Dated: September 10, 2009
Miami, Florida

Respectfully Submitted,

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___/s/ Andrew Zaron_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2009, I electronically filed the foregoing with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Andrew Zaron
Andrew Zaron