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 Re: DE 76
Debtor. _____/	

BANK OF AMERICA'S MOTION FOR RECONSIDERATION OF AGREED ORDER APPROVING PROCEDURE FOR TRANSFER OF RESIDENTIAL CONSUMER LOAN MORTGAGE PORTFOLIOS TO U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, MANUFACTURERS AND TRADERS TRUST CO., AND BAYVIEW LOAN SERVICING

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 Motion for Reconsideration of the Agreed Order Approving Procedure for Transfer of Residential Consumer Loan Mortgage Portfolios to U.S. Bank National Association, as Trustee, Manufacturers and Traders Trust Co., and Bayview Loan Servicing (the "Agreed Order"), and states the following:

I. 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"). *See* 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". *See* 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". *See 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 Collapse of Colonial Bank and the Debtor

8. 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.

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

10. 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.

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

12. 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 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 funds in the custodial accounts at Colonial Bank (the "Colonial Account Funds") or the loans that were sold to investors of TBW mortgage loans (the "Investor Loans").

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

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

14. On August 21, 2009, the State of Florida Office of Financial Regulation 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 E** 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. E at ¶¶ 10 - 12.

15. 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 [DE 4]. Neither Navigant nor its team of consultants can currently identify with certainty who owns the Colonial Account Funds or the Investor Loans.

16. Furthermore, the FDIC, as receiver for Colonial Bank, has alleged 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.

C. Debtor's Bankruptcy Filing and the U.S. Bank Order

17. 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").

18. On August 27, 2009, U.S. Bank National Association as Trustee ("U.S. Bank"), Manufacturers and Traders Trust Co. ("MT&T"), and Bayview Loan Servicing, LLC

("Bayview") filed the Emergency Joint Motion of U.S. Bank National Association as Trustee, Manufacturers and Traders Trust Co., and Bayview Loan Servicing, LLC to Compel Post Termination Transfer of Those Residential Consumer Loan Mortgage Portfolios Previously Serviced by the Debtor (the "U.S. Bank Motion") [DE 44] requesting, among other things, that the Court issue an order (a) compelling the Debtor to transfer documents and records relating to the loans purchased by U.S. Bank (the "Mortgage Loans", as defined in the U.S. Bank Motion) to Bayview; (b) compelling the Debtor to transfer to U.S. Bank or Bayview all funds held by the Debtor in its capacity as servicer of the Mortgage Loans, and (c) granting Bayview immediate access to the data, documents, and records relating to the Mortgage Loans to complete the transfer of servicing.

19. The U.S. Bank Motion was scheduled to be heard on August 31, 2009. The hearing was canceled, however, when on the day of the hearing, counsel for the Debtor, U.S. Bank, MT&T and Bayview presented the Court with the Agreed Order, which was entered by the Court on the same day.

20. The Agreed Order provides, among other things, for the turnover to Bayview of all money received, or to be received, with respect to the Mortgage Loans.

II. REQUEST FOR RECONSIDERATION

Rule 9023 of the Federal Rules of Bankruptcy Procedure governs motions for reconsideration in bankruptcy cases. It incorporates Rule 59(e) of the Federal Rules of Civil Procedure. *See* Fed. R. Bankr. P. 9023. Rule 59(e) was adopted "to make clear that the court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *See White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982).. The

decision to grant such relief is committed to the sound discretion of the court. *Id.* at 806; *Prudential Securities, Inc. v. Emerson*, 919 F. Supp. 415, 417 (M.D. Fla. 1996).

A court has broad discretion to reconsider one of its own orders on various grounds, including a need to correct clear error or prevent manifest injustice. *See Williams v. Cruise Ships Catering & Serv. Int'l, N.V.,* 320 F. Supp. 2d 1347, 1357-58 (S.D. Fla. 2004); *Ass'n For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457 (S.D. Fla. 2002). A motion to reconsider is appropriate where, for example, the court has misunderstood a party, or has made an error not of reasoning but of apprehension. A motion to alter or amend a judgment permits the moving party to bring to the court's attention a manifest error of law or fact. *See Norman v. Arkansas Dep't of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996).

As noted above, the FDIC has raised allegations that the Debtor "double pledged" the Investor Loans. Therefore, it is possible that certain Investor Loans that are booked as belonging to U.S. Bank may in fact belong to Bank of America. In addition, there have been allegations that the Debtor has commingled funds. It is therefore possible that the funds turned over to Bayview under the terms of the Agreed Order may belong to Bank of America. Bank of America files this motion in an abundance of caution to clarify that, to the extent that it owns the Investor Loans that are the subject of the U.S. Bank Motion, it retains its rights to pursue U.S. Bank, MT&T or Bayview — or any investor or third party on whose behalf the movants are acting — to recover those loans. Similarly, Bank of America files this motion to clarify that, to the extent that it is entitled to or owns any of the funds turned over to Bayview (and ultimately U.S. Bank) under the Agreed Order, it retains its rights to pursue U.S. Bank, MT&T or Bayview to recover those funds.

Bank of America does not believe that the Agreed Order was intended to prejudice its rights to pursue U.S. Bank, MT&T or Bayview, if it is deemed the owner of the Mortgage Loans at issue, or related payments thereon. Because the U.S. Bank Motion was filed for purposes of lifting the automatic stay, the more likely meaning of the Agreed Order is that U.S. Bank, MT&T and Bayview are not impeded by the Debtor's bankruptcy filing from pursuing its nonbankruptcy remedies against the Debtor. This would not affect Bank of America's rights. Nevertheless, Bank of America files this motion as a protective measure in the event the Agreed Order could be read to have a broader meaning that would affect Bank of America's possible rights against U.S. Bank, MT&T or Bayview — or any investor or third party on whose behalf the movants are acting.

WHEREFORE Bank of America respectfully requests the entry of an order clarifying the terms of the Agreed Order as described above, and for such other and further relief as is just and proper.

Dated: September 10, 2009

Respectfully Submitted,

THE TESSITORE LAW FIRM, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been served either electronically or by United States Mail on the 10th day of September 2009 to the following:

Roy S. Kobert, P.A. and Nicolette C. Vilmos, Esq., (Florida counsel to U.S. Bank National Association as Trustee, Manufacturers and Traders Trust Co., and Bayview Loan Servicing, LLC) Broad and Cassel, P.O. Box 4961, Orlando, Florida 32802-4961.

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Kathleen LaManna, Esq., Ira Goldman, Esq. and Corrine Burnick, Esq., (co-counsel to U.S. Bank National Association as Trustee), Shipman & Goodwin LLP, One Constitution Plaza, Hartford, CT 06103

Edward J. Peterson, III, Esq. and Russell M. Blain, Esq. (counsel to the Debtor), Stichter, Riedel Blain & Prosser, P.A., 110 East Madison Street, Suite 200, Tampa, FL 33602

Debtor: Taylor Bean & Whitaker Mortgage Corp., 315 N.E. 14th Street, Ocala, FL 34470

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/s/ Michael A. Tessitore