

**IN THE 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.	:	
	:	
	:	

**RESPONSE OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER OF COLONIAL BANK, TO THE OBJECTION OF THE FEDERAL HOME
LOAN MORTGAGE CORPORATION TO THE DEBTORS’
JOINT DISCLOSURE STATEMENT**

The Federal Deposit Insurance Corporation, as receiver of Colonial Bank, Montgomery, Alabama, N.A. (the “FDIC-R”), by its undersigned counsel, hereby files this response (“Response”) to the Objection of the Federal Home Loan Mortgage Corporation (“FHLMC”) to the Debtors’ Joint Disclosure Statement (“Objection”), filed on November 2, 2010 [Docket No. 2109], and respectfully represents as follows:

Background

1. Prior to the Petition Date (as defined below), Taylor, Bean & Whitaker Mortgage Corp. (“Debtor”) had an extensive banking relationship with Colonial Bank, Montgomery, Alabama, N.A. (“Colonial Bank”). The Debtor maintained operating accounts at Colonial Bank, as well as numerous custodial accounts necessary to operate its mortgage servicing operations. Colonial Bank also provided financing to the Debtor for its mortgage origination business.

2. On August 14, 2009, the Alabama State Banking Department closed Colonial Bank and appointed the FDIC-R as the receiver of Colonial Bank.

3. By operation of law, the FDIC-R succeeded to all rights, title, powers and privileges of Colonial Bank and of any stockholder, member, accountholder, depositor, officer, or director of Colonial Bank with respect to such institution and the assets of such institution pursuant to 12 U.S.C. § 1821(d)(2)(A)(i).

4. On August 24, 2009 (“Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Middle District of Florida, Jacksonville Division (“Bankruptcy Court”).

5. The Debtor remains in possession of its assets and continues to manage its business as debtor in possession. No trustee or examiner has been appointed in its case.

6. On September 11, 2009, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Committee”).

7. On or about September 10, 2009, the FDIC-R and the Debtor entered into a stipulation (the “FDIC Stipulation”) [Docket No. 222] to resolve issues raised in the Debtor’s bankruptcy case as a result of the Debtor’s close relationship with Colonial Bank.

8. The FDIC Stipulation was approved by the Bankruptcy Court by orders entered on September 29, 2009 and October 16, 2009 [Docket Nos. 348 and 468].

9. In accordance with the FDIC Stipulation, the Debtor performed the servicing reconciliation and the asset reconciliation (“Reconciliation”), the results of which are set forth in the Debtor’s Final Reconciliation Report, filed on July 1, 2010 [Doc. No. 1644].

10. On August 11, 2010, the Debtor, the FDIC-R and the Committee entered into a settlement agreement (“Settlement Agreement”) to resolve issues presented during the Reconciliation.

11. The Settlement Agreement was approved by the Bankruptcy Court by order entered on September 14, 2010 [Docket No. 1936].

12. On September 21, 2010, the Debtor filed its Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors (“Plan”) [Docket No. 1966] and accompanying Disclosure Statement (“Disclosure Statement”) [Docket No. 1968].

Response

13. In its Objection, the FHLMC states that the Disclosure Statement should not be approved because, among other reasons, the Disclosure Statement fails to provide adequate information regarding the distribution of funds by the FDIC-R. See Objection ¶ 12. Specifically, the FHLMC argues that the Disclosure Statement does not specify which funds held by the FDIC-R will be distributed, the parties to whom funds will be distributed, and the amounts of such distributions. Id. However, pursuant to applicable law and as indicated in Section 1.7 of the Settlement Agreement, the timing and manner of distribution of the CB Deposit Accounts (as defined in the Settlement Agreement) are within the exclusive jurisdiction and discretion of the FDIC-R. The manner and timing of distribution are not items appropriate for this proceeding and are not suitable for the Disclosure Statement because they can have no conceivable effect on the treatment of any claim or creditor under the Plan.

14. Pursuant to 12 U.S.C. § 1821(j) “no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC-R] as a conservator or a receiver.” 12 U.S.C. § 1821(j); see also Bank of America National Association v. Colonial Bank, 604 F.3d 1239, 1243 (holding that the distribution of custodial assets is an express power and function of the FDIC as a receiver). Further, 12 U.S.C. § 1821(d)(2)(G) grants the FDIC-R the power to “transfer any asset or liability of the institution in default (including assets and liabilities

associated with any trust business) without any approval, assignment, or consent with respect to such transfer.” 12 U.S.C. § 1821(d)(2)(G).

15. These provisions demonstrate that the FDIC-R has the exclusive authority and discretion to distribute funds within its possession. Therefore, information regarding the timing and manner of distribution of the funds need not be included in the Disclosure Statement because it is not “information of a kind . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan” 11 U.S.C. § 1125(a)(1).

16. Further, the FHLMC contends that the Disclosure Statement fails to provide adequate information regarding the amount of the FDIC-R’s allowed unsecured claim and the release of claims against the FDIC-R. Objection ¶¶ 10-11, 13-14. Here, establishing a finite number for the FDIC-R’s allowed unsecured claim has no bearing on whether the Disclosure Statement contains adequate information regarding the Plan. Similarly, the release of claims against the FDIC-R is an issue relevant to Plan confirmation rather than the Disclosure Statement. Therefore, the Disclosure Statement need not provide the exact calculation of the FDIC-R’s allowed unsecured claim or any further information regarding the releases against the FDIC-R.

17. Accordingly, the Disclosure Statement provides adequate information regarding the Settlement Agreement and should be approved by the Bankruptcy Court.

Dated: November 4, 2010
Tampa, Florida

Of Counsel:

Thomas R. Califano
John J. Clarke, Jr.
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, New York 10020
Phone: (212) 335-4500
Fax: (212) 335-4501

DLA PIPER LLP (US)

By: /s/ Lonnie Simpson
Lonnie Simpson

100 North Tampa Street, Suite 2200
Tampa, FL 33602-5809
Phone: (813) 229-2111
Fax: (813) 229-1447

Attorneys for the
Federal Deposit Insurance Corporation, as
Receiver for Colonial Bank