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

RE: DE 222

BANK OF AMERICA'S OBJECTION TO THE PROPOSED STIPULATION BETWEEN DEBTOR, TAYLOR, BEAN & WHITAKER MORTGAGE CORP., AND THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR COLONIAL BANK

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 Objection to the proposed Stipulation (the "Stipulation") Between Debtor, Taylor, Bean & Whitaker Corp. (the "Debtor") and the Federal Deposit Insurance Corporation (the "FDIC"), as Receiver for Colonial Bank, N.A. ("Colonial Bank") [DE 222], and states the following:

I. INTRODUCTION

The Court should reject the proposed Stipulation for the following reasons. First, the Stipulation is an attempted end run by the FDIC around the injunction entered by the United States District Court for the Southern District of Florida against the FDIC to protect Bank of America's interests. The Stipulation purports to give the FDIC power over funds that the District Court specifically found belong to Bank of America and are not part of the Colonial Bank receivership estate. The Stipulation also purports to give the FDIC the final, unchallengeable right to determine how accounts will be reconciled, without any description of the methodology or procedures the FDIC will use to make these final determinations.

Second, the proposed Stipulation impermissibly shields the FDIC from potential claims by Bank of America and other third parties by providing the FDIC with a non-consensual, non-debtor release that binds Bank of America and anyone who receives notice of the injunction. The FDIC reiterates time and again that this Court lacks jurisdiction over it and cannot compel the FDIC to take certain actions that in any way affect the FDIC's statutory rights as receiver. The FDIC should not be allowed to selectively invoke the Court's jurisdiction to avoid third parties' independent claims through the broad release called for in the Stipulation. It cannot be that the Court lacks jurisdiction to mandate, but has jurisdiction to protect, the FDIC. If the Court cannot assert its jurisdiction because it interferes with the FDIC's duties as a receiver, the Court similarly cannot exercise jurisdiction to give the FDIC a substantive right to be free from liability when acting as a receiver. Even if it does, this request is procedurally improper and legally insufficient.

Third, the Stipulation permits the disbursement of funds to third parties, including the FDIC, without providing adequate protection for Bank of America's interest in such funds.

Fourth, the Stipulation does not provide for adequate sharing of information.

In sum, notwithstanding the comments at the preliminary hearing on the Stipulation, and the conclusory statement in the Stipulation and proposed order that the substantive rights of the parties will be unaffected, the Stipulation is patently unfair and purports to strip parties of substantive rights. Furthermore, nowhere does the Stipulation provide protections for the procedural rights of third parties; and in fact, the Stipulation violates the procedural rights of third parties. Accordingly, the Court should not approve the Stipulation.[1]

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"). *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.

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[1] In addition, the Stipulation includes recitations in its "WHEREAS" clauses. To the extent these clauses are not supported by sufficient evidence in the record, the Court should not adopt these allegations as facts. Furthermore, to the extent they contradict facts established through presentation of evidence and consent of the FDIC in the United States District Court for the Southern District of Florida, the Court should not adopt them.

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". *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 FDIC Injunction 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, including the $1 billion referenced above, held by Colonial Bank 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 "TRO") 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 TRO, 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.

Exh. G at 3-4.

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 noted that the "FDIC moved to dissolve the TRO. The FDIC does not dispute the propriety of the issuance of the temporary injunctive relief on the merits, nor does it challenge any of the findings I made in that order. Instead, it argues that pursuant to the jurisdiction-stripping provisions of the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"), I lack jurisdiction to enjoin the FDIC in its exercise of its receivership duties". *See* Exh. H at 2-3.

19. The District Court rejected the FDIC's jurisdictional argument. Consequently, it extended the terms of the TRO. The District Court specifically found that the funds at issue in the Colonial Bank Action - the Ocala Loans and Ocala Loan Proceeds - are property of Bank of America, and "outside the receivership". *See* Exh. H at 4. 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 FIRREA, and that the ***"FDIC's ability to dispose of these***

funds is a matter subject to the jurisdiction of an Article III court”. *See id.* at 7, 4 (emphasis added). The District Court, citing *Cummings Prop. Mgmt., Inc., v. FDIC*, 786 F. Supp. 144, 145-47 (D. Mass. 1992), also appropriately found that FIRREA “does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the Courts”. *See id.* at 7.

C. The Collapse of Colonial Bank and the Debtor

20. 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.[2] 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.

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

22. 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

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[2] The Debtor’s fiscal year ended March 31, 2009.

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.

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

24. 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. The Debtor has not received information from Colonial Bank since that time that would allow it to determine who owns the funds at Colonial Bank (the "Colonial Account Funds") or which loans are owned by which investors (the "Investor Loans"). The owners of the Investor Loans will be referred to herein as the "Mortgage Investors".

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

26. 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 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.

27. 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.

28. Furthermore, there have been allegations that the Debtor "double pledged" $866 million of Investor Loans, and that the Debtor "kited" loans. *See* Objection of FDIC to Debtor's Emergency Motion for Turnover, Approval of Procedures for the Maintenance and Use of Borrower Payments, and Immediate Resolution of Related Issues [DE 179]. The Debtor has admitted uncertainty regarding ownership of the Investor Loans, which has caused confusion among borrowers. *See* Debtor's Emergency Motion for Turnover, Approval of Procedures for the Maintenance and Use of Borrower Payments, and Immediate Resolution of Related Issues (the "Turnover Motion") [DE 83].

D. Debtor's Bankruptcy Filing and the Stipulation

29. 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").

30. On August 28, 2009, the FDIC filed the Motion of Federal Deposit Insurance Corporation, As Receiver for Colonial Bank, for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d) and Request for Emergency Hearing (the "FDIC Stay Relief Motion") [DE 64], by which it requested that the Court grant it relief from the automatic stay to, among other things: (i) compel the Debtor to transfer servicing of loans allegedly belonging to Colonial Bank to a successor servicer; and (ii) authorize the FDIC to transfer funds to the Mortgage Investors whom the FDIC believes own the loans allegedly belonging to Colonial Bank.

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

32. On September 10, 2009, Bank of America filed its objections to both the FDIC Stay Relief Motion and the Turnover Motion [DE 186 and 187, respectively].

33. On September 11, 2009, the FDIC and the Debtor unilaterally entered into the Stipulation, which purports to resolve the issues raised by the FDIC Stay Relief Motion and the Turnover Motion. Although Bank of America filed objections to both the FDIC Stay Relief Motion and the Turnover Motion, it was not given an opportunity to participate in the negotiations involving the Stipulation.

34. The Stipulation provides, among other things:

(a) Paragraph 1. <u>Reconciliation of Bank Accounts and Borrower Payments</u>

"The Debtor…shall perform a full and complete "Servicing Reconciliation" of: (a) all bank accounts maintained by the Debtor at Colonial Bank as of August 6, 2009; (b) all borrower payments received by and currently held in the Colonial Bank lock box; (c) all borrower payments received by and currently under the control of the Debtor; and, (d) payments received from parties other than borrowers that are related to the mortgage servicing activities of the Debtor…(the "Servicing Reconciliation")..."

(b) Paragraph 2. <u>Transfer of Mortgage Servicing</u>

"The Debtor shall, as soon as reasonably practicable, but no later than October 1, 2009, transfer all servicing to RoundPoint Mortgage Servicing Corporation ("RoundPoint") for all mortgage loans owned by Colonial Bank under the Mortgage Purchase Agreements, in its individual capacity or as agent for other participants, pursuant to the terms of the AOT and

COLB warehouse participation facilities. With respect to any mortgages about which there are questions or disputes regarding ownership, the parties will work in good faith with the applicable investors/claimants to develop a mutually agreeable method for RoundPoint to provide servicing for such mortgages. The Debtor will turnover to RoundPoint all electronic files and data, loan files and trailing documents required for servicing of all transferred mortgages in a commercially reasonable timeframe no later than October 1, 2009. The transfer of mortgage servicing is without prejudice to or limitation of the rights of the Debtor, the FDIC-Receiver or any other party regarding the ultimate determination of the ownership of the mortgage assets or the value and recovery of the mortgage servicing rights."

(c) Paragraph 4. Colonial Bank Account Reconciliation

"…the FDIC-Receiver shall provide the Debtor with all borrower payment detail, along with transactions and other information regarding the bank accounts previously maintained by the Debtor at Colonial Bank, so that the borrower payments can be reconciled and allocated to the appropriate Mortgage Investor custodial accounts and other accounts at Colonial Bank as part of the Servicing Reconciliation. Additionally, the FDIC-Receiver shall provide the Debtor with account level detail for all account activity for all Debtor bank accounts at Colonial Bank since August 4, 2009 as soon as practicable, but in, in any event, not later than October 1, 2009."

(d) Paragraph 6. Tax and Insurance Payments

"…Notwithstanding anything else in this paragraph six (6), the FDIC-Receiver shall be empowered to make payments to third parties on behalf of borrower taxes and insurance obligations immediately upon approval of this Stipulation from funds currently in the Colonial Accounts…Notwithstanding any other provision of this Stipulation, monies in the Regions Reconciliation Accounts may be disbursed by the Debtor to fund payments of taxes, insurance premiums and related tax or insurance payments or refunds to borrowers or to borrower's new escrow accounts maintained by Mortgage Investors' successor servicers upon: (i) the written consent of the Debtor and the FDIC-Receiver, or (ii) an order of the Bankruptcy Court approving such disbursement or use."

(e) Paragraph 8. <u>Asset Reconciliation</u>

"…the Debtor will work with the FDIC-Receiver, as well as other Mortgage Investors and creditors, to resolve and reconcile issues regarding ownership and other rights in mortgages, REO and other related assets that were serviced, maintained and controlled by the Debtor as of August 3, 2009 ("Asset Reconciliation")…"

(f) Paragraph 9. <u>Reconciliation Report</u>

"Upon completion of the Servicing Reconciliation and Asset Reconciliation efforts described herein, the Debtor shall file a report with this Court, which will include" the results of the Servicing Reconciliation; the results of the Asset Reconciliation; and the accounting and payments, if any, of tax and insurance premium payments on behalf of borrowers.

(g) Paragraph 10. <u>No Disbursement from Regions Reconciliation Accounts</u>.

"…To the extent that [funds in the Regions Bank Accounts opened by the Debtor after the Petition Date] are agreed by the FDIC-Receiver and TBW to be property of Colonial Bank, or determined as such by a court of competent jurisdiction, they shall be turned over to the FDIC-Receiver without further order of this Court."

(h) Paragraph 13. FDIC Approval

"Representatives of RoundPoint and the FDIC-Receiver shall be present to monitor and advise on all aspects and decisions related to the Servicing and Asset Reconciliations. ***The FDIC-Receiver shall have the final right to approve or deny each and every decision related to the Servicing and Asset Reconciliations of the Colonial Bank Accounts***.[3] ***All allocations and transfers of monies between and among the Colonial Bank Accounts by the Debtor require the written approval of the FDIC-Receiver. The FDIC-Receiver also has the sole and unequivocal right to prohibit any individual from participating in any reconciliation activity envisioned by this Stipulation…***" (emphasis added).

(i) Paragraph 14. Liability

"The FDIC-Receiver shall be released from any and all liability for any acts done in furtherance of this Stipulation (except for willful misconduct and gross negligence) by the Debtor, all parties with any interest in the Mortgage Loans and all parties that receive notice of this Stipulation. Furthermore, none of the FDIC Receiver's professionals, including, advisors, actuaries, accountants, attorneys, financial advisors, investment bankers, consultants, or agents, shall have or incur any liability to any holder of any interest in the Mortgage Loans or any party that received notice of this Stipulation for any act or omission in connection with, related to or arising out of, the Mortgage Loans or any act in furtherance of this Stipulation."

(j) Paragraph 16 Modification.

"This Stipulation may not be modified, altered, or amended except in writing signed by the parties hereto and subject to the approval of the Bankruptcy Court…"

[3] The term "Colonial Bank Accounts" is defined in the Stipulation to include all of the numerous accounts maintained at Colonial Bank by the Debtor, without any exception for the accounts containing the Ocala Loan Proceeds deemed property of Bank of America in the FDIC Injunction.

35. The Court held a hearing on September 11, 2009, the same day that the Stipulation was filed with the Court, at which the Stipulation was considered for the first time (the "Preliminary Hearing"). A copy of the transcript of the Preliminary Hearing is attached hereto as **Exhibit J**.

36. At the Preliminary Hearing, the FDIC repeatedly said it would provide assurances on the record that the Stipulation would not affect the FDIC Injunction. Yet, when asked to include a provision in an order approving the Stipulation or in the Stipulation itself that the Stipulation would not affect the FDIC Injunction, the FDIC declined. The FDIC also repeatedly said that it would segregate any funds its successor servicer receives in connection with the servicing of the Colonial Bank Loans. However, when the FDIC was asked to include a provision in an order approving the Stipulation or in the Stipulation itself that provided for such segregation, the FDIC again declined. The FDIC recognized that the release does, in fact, affect the substantive rights of the parties, but nevertheless stated that it "need[s]" the release going forward, and that it "can't have people objecting for their own agendas". *See id*. at 77. In other words, the FDIC believes that it is proper for the FDIC to take positions to further its agenda, but not appropriate for other parties, with billions of dollars at stake, to take positions that further their agendas.

37. At the hearing, the Debtor stated that "[t]he only act in the Stipulation that the FDIC receiver absolutely controls is the reconciliation of the accounts at Colonial Bank…" *See* Exh. J at 81.

38. At the hearing, the Debtor and the FDIC also told the Court that approval of the Stipulation is essential so that information sharing and reconciliations can begin, and so that taxes and insurance payments can be made on behalf of borrowers.

III. ANALYSIS

A. The Stipulation Cannot be Approved Because it Violates the FDIC Injunction

The Court must deny approval of the Stipulation because it is a violation of the FDIC Injunction. In the FDIC Injunction, the District Court finds that the Ocala Loans and Ocala Loan Proceeds are property of Bank of America. They are not property of the Colonial Bank receivership estate. Therefore, the FDIC's ability to "dispose of these funds is a matter subject to the jurisdiction of an Article III court". *See* Exh. H at 4.

Nevertheless, in paragraphs 13 and 14 of the Stipulation, the FDIC attempts to elevate itself to the position of a "sacred cow" that can avoid the implications of the FDIC Injunction. In particular, under paragraph 13 of the Stipulation, the FDIC has the "final right to approve or deny each and every decision related to the Servicing and Asset Reconciliations of the Colonial Bank Accounts" that the Debtor performs. The term "Colonial Bank Accounts" includes the "numerous accounts at Colonial Bank" maintained by the Debtor, even if those accounts contain Ocala Loan Proceeds which the District Court has found belong to Bank of America rather than the receivership estate of Colonial Bank. The District Court specifically held that the FDIC does not have jurisdiction over the Ocala Loans or Ocala Loan Proceeds, even if they are maintained in Colonial Bank Accounts. The District Court further found that the "FDIC's ability to dispose of the [Ocala Loan Proceeds] is a matter subject to the jurisdiction of an Article III Court".

By seeking a finding from this Court that it has the "final right to approve or deny each and every decision relating to the Servicing and Asset Reconciliations of the Colonial Bank Accounts," the FDIC is attempting to usurp power from the District Court, which has already denied the FDIC such rights with respect to the Ocala Loans and the Ocala Loan Proceeds. Apparently, under the Stipulation, Bank of America will not have the right to challenge any decision relating to how the Servicing and Asset Reconciliations are performed -- such as the methodology and protocol used by the Debtor, and approved along the way by the FDIC, for purposes of performing the Reconciliations -- or the results of the Servicing and Asset Reconciliations. Nor, apparently, will it be entitled to bring any disputes relating to these reconciliations to the District Court, which is clearly contemplated by the FDIC Injunction. Equally problematic, even if the Stipulation allowed Bank of America to participate in the decisions relating to the Servicing and Asset Reconciliations, under the Stipulation the FDIC retains the "sole and unequivocal right to prohibit any individual from participating in any reconciliation activity contemplated by [the] Stipulation". Thus, under the Stipulation, the FDIC, at its whim, can exclude representatives of Bank of America from participating in the reconciliation efforts.

In paragraph 14 of the Stipulation, the FDIC receives a release from "any and all liability for any acts done in furtherance of [the] Stipulation by the Debtor, all parties with any interest in the Mortgage Loans and all parties that receive notice of [the] Stipulation". Thus, if the FDIC makes a mistake in how the Servicing and Asset Reconciliations are performed — such as allocating Ocala Loans or Ocala Loan Proceeds, already found to be property of Bank America by the District Court, to another investor — then Bank of America will have no recourse against the FDIC, notwithstanding the protections provided to Bank of America under the FDIC Injunction. Further, if the FDIC makes a mistake in the final calculations of the Servicing and Asset Reconciliations, then Bank of America will have no recourse against the FDIC. Additionally, if the FDIC wrongfully excludes Bank of America representatives from participating in the Servicing and Asset Reconciliations, then Bank of America will have no recourse against the FDIC. In other words, the FDIC can violate the FDIC Injunction by usurping power from the District Court, and can deprive Bank of America of property the District Court has already found belongs to Bank of America, without any repercussions, and without any chance for Bank of America to be heard or to participate in the process. This is contrary to the terms and spirit of the FDIC Injunction.

The release provided to the FDIC's professionals is even more pervasive. Paragraph 14 of the Stipulation provides that the FDIC's professionals will be released by "any holder of any interest in the Mortgage Loans or any party that received notice of this Stipulation" not only for any act taken in furtherance of the Stipulation, but also ***"for any act or omission in connection with, related to or arising out of the Mortgage Loans***". Thus, the FDIC's professionals can direct the disbursement of the Ocala Loan Proceeds to a third party other than Bank of America, in direct contravention of the District Court's findings in the FDIC Injunction, and Bank of America will have no recourse to pursue the FDIC's professionals. This provision reveals the true purpose of the Stipulation - to allow the FDIC and its professionals to hollow out the FDIC Injunction. The FDIC and its professionals will be allowed to perform an unmonitored and unchallengeable "reconciliation" reallocating the Ocala Loans and Ocala Loan Proceeds, already deemed property of Bank of America by the District Court, to third parties, then disbursing these assets to those third parties with total immunity for their actions. This is exactly the result the FDIC Injunction was entered to prevent. Only the FDIC Injunction prevented Bank of America's property from being siphoned out of Colonial Bank by the FDIC without a proper accounting, and now the FDIC seeks to use the Stipulation to get around the FDIC Injunction.

In addition, Paragraph 6 of the Stipulation provides that the "FDIC shall be empowered to make payments to third parties on behalf of borrower taxes and insurance obligations immediately upon approval of this Stipulation from funds currently in the Colonial Accounts".

If the funds used to pay these tax and insurance obligations turn out to be Ocala Loan Proceeds, that would violate the terms of the FDIC Injunction. Worse, because of the release provided to the FDIC under paragraph 14 of the Stipulation, the FDIC undoubtedly would argue that Bank of America would have no recourse against the FDIC if this were to happen.

The FDIC's comments at the Preliminary Hearing that it does not intend to impact the FDIC Injunction provide little comfort to Bank of America. The FDIC refused to include language in the order approving the Stipulation or the Stipulation itself that the Stipulation would not affect the FDIC Objection, purportedly because this Court does not have jurisdiction to approve such language. Yet, if the Court has jurisdiction to allow the FDIC to make tax and insurance payments from Colonial Bank accounts, it should have jurisdiction to rule that the Stipulation shall in no way affect the FDIC Injunction. Furthermore, if the Court can provide the FDIC with a release of all liability from Bank of America -- who is not a party to the Stipulation, who is not a debtor in bankruptcy, and who objects to the Stipulation -- for acts taken in connection with the FDIC's unilateral decision-making relating to the reconciliations, it is hard to imagine how the FDIC could contest the jurisdiction of the Court to enter an order that clarifies the Stipulation will not in any way be deemed to impact the FDIC Injunction.[4] This refusal is particularly troubling where, as here, the Stipulation includes provisions that on their face appear to violate the FDIC Injunction, and specifically provide that the Stipulation can only be modified by written agreement of the parties. *See* ¶ 16 of the Stipulation.

[4] Bank of America agrees that the Stipulation cannot affect the FDIC Injunction, or Bank of America's rights thereunder. Nevertheless, as drafted, the Stipulation purports to do so by, among other things, giving the FDIC unfettered power over the reconciliations, and releasing itself from liability relating thereto. Bank of America is thus compelled to object to the Stipulation to ensure this Court does not enter an order that could be perceived as inconsistent with the FDIC Injunction.

B. The Stipulation Should Not be Approved Because it Impermissibly Provides the FDIC with a Third Party Release

The releases provided by Paragraph 14 of the Stipulation not only violate the FDIC Injunction, but are also impermissible as a matter of law because the Court lacks jurisdiction to grant such releases. Further, even if jurisdiction is present, such releases are procedurally improper in the context of a contested matter and are not justified by the circumstances of this Case.

Bankruptcy courts may have authority to enter orders barring a non-settling defendant in an adversary proceeding from bringing claims against a settling defendant or a plaintiff in that proceeding. *See In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). In *Munford*, a Chapter 11 debtor-in-possession brought an adversary proceeding in bankruptcy court against a valuation consultant, an investment bank, former officers and directors, and two of its largest groups of shareholders. *See id.* at 452. The valuation consultant and the debtor-in-possession entered into a settlement whereby the consultant would pay the debtor $350,000 from its $400,000 liability insurance policy. *See id.* The valuation consultant conditioned its settlement offer on the issuance of a protective order permanently enjoining the officers, directors, shareholders and the investment bank - the non-settling defendants - from pursuing contribution or indemnification claims against the consultant. *See id.* The bankruptcy court issued the bar order sought by the consultant and the debtor, and held that the non-settling defendants would receive a dollar-for-dollar reduction of the settlement amount for any judgment against them in the litigation. *See id.* The court of appeals affirmed the bankruptcy court's issuance of the bar order and setoff arrangement. *See id.* at 456. The court of appeals found that the bankruptcy court had subject mater jurisdiction to bar the contribution and indemnity claims of the non-settling defendants because a sufficient "nexus" existed between those claims and the administration of the debtor's estate. *See id.* at 454. The court of appeals further found that, in evaluating a proposed settlement bar order, a court must "make a reasoned determination that the bar order is fair and equitable". *See id.* Specifically, a court must consider "the interrelatedness of the claims that the bar order precludes, the likelihood of nonsettling defendants to prevail on the barred claim, the complexity of the litigation, and the likelihood of depletion of the resources of the settling defendants". *See id.* The court of appeals found that the proposed bar order with the valuation consultant was sufficiently "fair and equitable" because the $350,000 to be paid consumed almost all of the consultant's $400,000 insurance coverage, which was the consultant's only real asset for payment of any judgment. *See id.* at 456. The court of appeals found that litigation by the non-settling defendants and the debtor against the consultant would cause attorneys' fees to consume the insurance fund, thus likely leaving the debtor and the non-settling defendants with no way of collecting any judgment against the consultant if it prevailed on the merits. *See id.*

The decision in *Munford* is distinguishable from the instant Case. Specifically, an insufficient nexus exists between the claims to be settled and the claims to be barred to justify jurisdiction over the claims to be barred. Further, the proposed non-consensual release sought in the instant Case is not being requested in the context of an adversary proceeding, as required by Rule 7001 of the Bankruptcy Rules. Finally, the proposed non-consensual release in this Case is not "fair and equitable" to those investors, such as Bank of America, who would be losing their claims against the FDIC and its professionals. Accordingly, the Court should not approve the proposed non-consensual release of Bank of America's claims against the FDIC-Receiver and its professionals in the instant Case.

This Court lacks jurisdiction to issue the proposed non-consensual non-debtor release because there is an insufficient nexus between the claims to be released under the Stipulation and the claims to be settled between the Debtor and the FDIC. In *Munford*, the Court released the settling defendant from contribution and indemnification claims. *See Munford*, 97 F.3d at 452. The Court found that allowing the non-settling defendants to litigate against the settling defendant would drain the settling defendant's only asset, thus decreasing the recovery for the debtor's estate. *See id.* at 454, 456. Thus, loss of the proposed settlement would be a definite detriment to the estate. Here, however, the claims to be released - Bank of America's claims against the FDIC and its professionals - are not contribution or indemnity claims resulting from liability to the Debtor. Bank of America's claims are completely independent of the claims between the Debtor and the FDIC. Therefore, there is an insufficient nexus between the settlement at issue and the non-debtor claims to be non-consensually released under the stipulation for this court to exercise jurisdiction and release the non-debtor claims. *See In re Covington Properties, Inc.*, 255 B.R. 77 (Bankr. N.D. Fla. 2000). Unlike in *Munford*, failure to approve the proposed release will not deprive the estate of a concrete asset, and therefore the Court lacks jurisdiction over the claims to be released.

The decision in *Covington Properties* is instructive on this point. In *Covington Properties*, a trustee sought approval of a settlement that included a bar order resolving all claims by the trustee against a family whose members served as insiders of the debtor, and all claims by "*any creditor* of the Debtor's bankruptcy estate" against the insiders. *See id.* at 78 (emphasis original). The bankruptcy court concluded that it lacked jurisdiction to bar the claims of the non-insider creditors against family members. *See id.* at 79. "In *Munford*, a debtor-in-possession brought an adversary proceeding against the settling and non-settling defendants. The claims subject to the bar order flowed directly from the plaintiff's claims. In the instant matter, the Trustee has *not* instituted an adversary proceeding nor has she asserted any claims against the [non-insider creditors] … The [non-insider creditors'] state court litigation involving the [insiders] has little, if any, effect on Debtor's estate being administered in bankruptcy and is independent of the trustee's claims". *Id.*

The claims of Bank of America against the FDIC and its professionals are more analogous to the independent claims in *Covington Properties* than the contribution and indemnification claims released in *Munford*. As in *Covington Properties*, the claims of Bank of America against the FDIC and its professionals will have little, if any, effect on the estate. The estate will not lose a concrete asset, such as the cash payment in Munford, if the Stipulation is not approved due to the proposed releases. At worst, the Debtor would be obligated to litigate the FDIC Stay Relief Motion and the Turnover Motion. There is no evidence that the FDIC could not comply in the event the Debtor prevailed. Additionally, it makes little difference to the Debtor whether the Mortgage Loans and the proceeds thereof belong to the FDIC or Bank of America; resolution of that issue will not increase the liability of the Debtor to either party, but will merely allocate that liability. There is an insufficient nexus between the claims ostensibly being resolved by the Stipulation - the FDIC Stay Relief Motion and the Turnover Motion - and the claims to be released - Bank of America's independent claims against the FDIC - so as to justify the Court stretching its jurisdiction to release the latter in order to preserve a settlement of the former.

Even if the Court can exercise jurisdiction over the Bank of America claims to be non-consensually released, the Debtor and the FDIC have not provided Bank of America with the requisite due process, either in the District Court or this Court. With respect to the process due Bank of America in this Court, assuming this Court has jurisdiction, the non-consensual release to be given to the FDIC and its professionals qualifies as an injunction against Bank of America, and an injunction cannot be issued outside of an adversary proceeding, with full due process and procedural protection.[5] *See* Fed. R. Bankr. P. 7001(7); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 762-63 (5th Cir. 1995). A party cannot obtain a release in the form of an injunction by simply adding such release to a settlement agreement and seeking approval through a summarily adjudicated contested matter. *See Zale Corp.*, 62 F.3d at 763. "Including a matter governed by Rule 7001 in another matter already before the court … does not satisfy the procedural rules required by Rule 7001." *Id.* The Debtor and the FDIC cannot make an end run around Rule 7001 and due process by proposing an injunction against Bank of America in the context of a proposed settlement of a stay relief motion.

Finally, even if this Court has jurisdiction to issue the proposed non-consensual releases, and even if it can do so in the context of this summary proceeding, the Court should not approve the proposed non-consensual releases because they are not "fair and equitable" to Bank of America, as required by *Munford*. *See Munford*, 97 F.3d at 455. As discussed above, the claims to be released are not significantly interrelated with those being settled, as in *Munford*. Further, there is no evidence that, as in *Munford*, the resources of the defendant - the FDIC- will be so depleted by litigation by the parties to be released that it will be unable to comply with any ruling against it in favor of such parties or the Debtor. *See Munford*, 97 F.3d at 456; *Covington Properties*, 255 B.R. at 79. Finally, and most importantly, the proposed settlement, unlike the cash payment settlement with dollar-for-dollar setoff approved in *Munford*, provides no benefit to Bank of America that might compensate it for losing its claims against the FDIC-Receiver.

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5 Bank of America maintains that this Court lacks jurisdiction to enter the proposed release, and the proper forum for disposition of any claims between the FDIC and Bank of America with respect to the Ocala Loans and the Ocala Loan Proceeds is the District Court, which has already exercised jurisdiction over the Ocala Loans and the Ocala Loan Proceeds. Bank of America makes its due process and "fair and equitable" arguments alternatively to its jurisdictional contentions. The District Court is already providing appropriate due process with respect to Bank of America's claims regarding the Ocala Loans and the Ocala Loan Proceeds.

Unlike in *Munford*, the proposed Stipulation does not bring any additional assets into the estate for distribution to creditors such as Bank of America, and does not provide any other benefit as compensation for the release, such as the dollar-for-dollar credit provided for in *Munford*. The Debtor may contend that the reconciliations to be completed constitute a benefit to Bank of America, but such reconciliations will need to be performed in any event. The Debtor has promised to provide such reconciliations, and may have a fiduciary duty to do so; presumably the FDIC will do its own reconciliation even if the Stipulation is not approved. Thus, while the FDIC asserts that it "needs" the release, the reality is that it just "wants" the release. The FDIC and the Debtor can share information and perform reconciliations without giving the FDIC and its professionals the broad release provided by Paragraph 14.

C. The Stipulation Should Not be Approved Because it Allows for a Release of Funds Without Providing Protections to Bank of America

The Court should also decline to approve the Stipulation because it impermissibly allows for a disbursement of funds without providing protections to Bank of America. As the FDIC has stated, it believes that the Debtor kited mortgage loans, and double pledged $866 million of loans. The Florida Office of Financial Regulation stated in its Second Cease and Desist Order that the Debtor commingled funds. The Debtor's auditor refused to provide a clean audit of the Debtor's financial statements. HUD suspended the Debtor's HUD/FHA origination and underwriting approval because of financial irregularities at the Debtor. Ginnie Mae and Freddie Mac terminated the Debtor's origination and servicing rights. And the FBI raided the Debtor's offices. The Debtor admitted there is uncertainty regarding the ownership of Investor Loans. All of these facts point to the simple conclusion that, as of today, it is unclear who owns what loans and who is entitled to what funds - except, of course, that the District Court has determined already that Bank of America owns the Ocala Loans and the Ocala Loan Proceeds.

Nevertheless, the Stipulation provides for the disbursement of funds before there is a reconciliation of who owns what loans, and who is entitled to what funds. In particular, under paragraph 2 of the Stipulation, all servicing on "mortgage loans owned by Colonial Bank" will be transferred to RoundPoint Mortgage Servicing Corporation ("RoundPoint"). As noted in Bank of America's objection to the FDIC Stay Relief Motion, however, Bank of America may be left without recourse if payments on these loans are made to RoundPoint, and RoundPoint delivers those payments to the FDIC. If it is ultimately determined that those loans are owned by Bank of America, Bank of America may be left with a claim against the Colonial Bank receivership estate that will receive less than one hundred cents on the dollar.[6] This outcome directly contradicts the District Court's conclusion that, with respect to the Ocala Loans and the Ocala Loan Proceeds, Bank of America is an owner, not just a claimant entitled to a pro rata distribution. In addition, in the event funds are disbursed from the Debtor's accounts at Colonial Bank to pay RoundPoint, (which RoundPoint subsequently uses to pay the FDIC), there may be violations of the FDIC Injunction if the funds used to pay RoundPoint include Ocala Loan Proceeds.

The FDIC stated at the Preliminary Hearing that it would provide Bank of America with a side letter which says it will direct RoundPoint to segregate all principal and interest payments it receives to protect the interests of Bank of America. Nevertheless, when asked to include this provision in the order approving the Stipulation, or the Stipulation itself, the FDIC declined. The purported basis is that this Court does not have jurisdiction over such principal and interest payments. Again, it is difficult to imagine how this Court has jurisdiction to direct the transfer of

[6] The language in the Stipulation that provides that "[t]he transfer of mortgage servicing is without prejudice to or limitation on the rights of…any other party regarding the ultimate determination of the ownership of the mortgage assets or the value and recovery of the mortgage servicing rights," is of little comfort to Bank of America if the ultimate claims arising from a proper reconciliation will only return cents on the dollar.

servicing to RoundPoint, but does not have jurisdiction to say that RoundPoint should not disburse principal and interest payments it receives until there is a final adjudication of who owns the loans it is servicing, and who is entitled to the payments on those loans. Furthermore, this oral promise of the FDIC rings hollow in light of the language of Paragraph 16 of the Stipulation that the Stipulation may only be modified in writing by agreement of the parties. Instead of including the protective language that the FDIC purports it will provide to Bank of America, the parties are left with a Stipulation which simply provides that "the parties will work in good faith with the applicable investors/claimants to develop a mutually agreeable method for RoundPoint to provide servicing for" mortgages about which "there are questions or disputes regarding ownership". This does not protect Bank of America because there are no assurances of the outcome of "working in good faith".

Furthermore, under Paragraph 6 of the Stipulation "the FDIC-Receiver shall be empowered to make payments to third parties on behalf of borrower taxes and insurance obligations immediately upon approval of this Stipulation from funds currently in the Colonial Accounts…[and] monies in the Regions Reconciliation Accounts may be disbursed by the Debtor to fund payments of taxes, insurance premiums and related tax or insurance payments or refunds to borrowers or to borrower's new escrow accounts maintained by Mortgage Investors' successor servicers upon: (i) the written consent of the Debtor and the FDIC-Receiver, or (ii) an order of the Bankruptcy Court approving such disbursement or use". In other words, before there is a reconciliation of who owns what loans, and who is entitled to what funds, the Debtor and the FDIC will be entitled to disburse tax and insurance payments.[7] If tax and insurance

[7] Ironically, the FDIC believes that the Court has jurisdiction to authorize it to make payments for taxes and insurance, and to provide it with a release if it mistakenly uses Ocala Loan Proceeds to do so; yet, the FDIC does not

payments were commingled with other deposits, it is unclear how the rightful owner of those other deposits will have recourse against the Debtor or the FDIC if those other deposits are used to pay taxes and insurance. This is particularly problematic for recourse against the FDIC, since it is receiving a third party release for any actions taken in furtherance of the Stipulation. Moreover, by regulation, the FDIC insures the payment of taxes and insurance. *See* 12 CFR 330.7(d). Therefore, if there is a real concern that taxes and insurance must be paid to protect homeowners, the FDIC should do so without using potentially commingled funds.

Paragraph 10 of the Stipulation provides that "[t]o the extent that [funds in the Regions Bank Accounts opened by the Debtor after the Petition Date] are agreed by the FDIC-Receiver and TBW to be property of Colonial Bank … they shall be turned over to the FDIC-Receiver without further order of this Court". As noted, if Bank of America believes that funds in the Regions Bank Accounts belong to it, but the Debtor and the FDIC disagree, Bank of America will have little recourse under the Stipulation but to file a claim against a bankruptcy estate and receivership estate which will presumably be paid less than 100 cents on the dollar. Again, this outcome directly contradicts the District Court's conclusion that, with respect to the Ocala Loans and the Ocala Loan Proceeds, Bank of America is an owner, not just a claimant entitled to a pro rata distribution.

D. The Stipulation Should Not be Approved Because it Does Not Provide for Adequate Sharing of Information

Finally, the Court should deny approval of the Stipulation because it does not provide for adequate sharing of information. Paragraph 4 of the Stipulation provides that "the FDIC-Receiver shall provide the Debtor with all borrower payment detail, along with transactions and other information regarding the bank accounts previously maintained by the Debtor at Colonial

believe that the Court has jurisdiction to either compel RoundPoint (which is not the FDIC) to segregate principal and interest payments on Colonial Bank loans, or to provide that the Stipulation will not affect the FDIC Injunction.

Bank, so that the borrower payments can be reconciled and allocated to the appropriate Mortgage Investor custodial accounts and other accounts at Colonial Bank as part of the Servicing Reconciliation. Additionally, the FDIC-Receiver shall provide the Debtor with account level detail for all account activity for all Debtor bank accounts at Colonial Bank since August 4, 2009 as soon as practicable, but in, in any event, not later than October 1, 2009". The Stipulation should provide that the FDIC provide the Debtor with account level detail from at least the beginning of 2008 so that meaningful reconciliations can be performed. The Stipulation should also require the FDIC and the Debtor to share that information with the Mortgage Investors who have the real interest in the reconciliations.

Instead, the Stipulation merely provides at Paragraph 9 that "[u]pon completion of the Servicing Reconciliation and Asset Reconciliation efforts … the Debtor shall file a report with this Court" with the results of the Servicing Reconciliation, the results of the Asset Reconciliation, and the accounting and payments, if any, of tax and insurance premium payments on behalf of borrowers. The FDIC made clear at the Preliminary Hearing why it wants to limit the information it shares with Mortgage Investors: it "can't have people objecting for their own agendas". The FDIC does not explain, however, why its interest in avoiding criticism and oversight automatically trumps the "agendas" of the Mortgage Investors who have billions of dollars at stake. As the District Court stated in the FDIC Injunction, the FDIC is not a sacred cow entitled to run roughshod over the interests of other parties on a whim. Nor is the FDIC entitled to an order from this Court protecting it from any party that might complain about its violations of the FDIC Injunction entered by the District Court. This Court should not be used as a forum for a collateral attack on the District Court's FDIC Injunction.

IV. CONCLUSION

The Debtor and the FDIC raise two justifications for approval of the Stipulation: the need to share information to reconcile accounts, and the need to immediately pay homeowners' taxes and insurance. To meet these needs, the parties do not require a Stipulation that violates the FDIC Injunction, that improperly provides for third party releases, that creates a real risk that monies rightfully belonging to Mortgage Investors will be disbursed with limited, if any recourse, to the Mortgage Investors, and that limits information sharing with investors. Instead, the parties simply need a protocol for sharing information, and the FDIC needs to fulfill its obligations and pay outstanding taxes and insurance.

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

Dated: September 17, 2009
Miami, Florida

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 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