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: DEs 20, 33, 58, 97, 108, 185
Debtor. _____/	

BANK OF AMERICA'S AMENDED OBJECTION TO (I) MOTIONS FOR RELIEF FROM STAY FILED BY THE FEDERAL HOME LOAN MORTGAGE CORPORATION; SOVEREIGN BANK; WELLS FARGO BANK, N.A.; NATIXIS REAL ESTATE CAPITAL, INC.; AND (II) JOINDER FILED BY MBIA INSURANCE CORPORATION

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 Amended Objection to (I) the Motions for Relief From Stay filed by the Federal Home Loan Mortgage Corporation [DE 20]; Sovereign Bank [DE 33]; Wells Fargo Bank, N.A**.** ("Wells Fargo") [DE 58]; and Natixis Real Estate Capital, Inc [DE 108]; and (II) the Joinder to Certain Motions Requesting the Lifting of Stay to Transfer Servicing Rights and Related Relief[1] filed by MBIA Insurance Company ("MBIA")[2] [DE 185] (collectively, the "Stay Relief Motions")**,** and states the following:

[1] By the Joinder, MBIA joins with the Motion for (i) Relief From the Automatic Stay and (ii) to Prohibit Use of Certain Funds filed by Wells Fargo (the "Wells Fargo Motion"), and a separate Motion for Relief From the Automatic Stay Pursuant to 11 U.S.C. § 362(d) and Request for Emergency Hearing filed by the FDIC (the "FDIC Motion") [DE 64]. To the extent MBIA joins the Wells Fargo Motion, this limited objection applies to MBIA. Bank of America has filed a separate objection to the FDIC Motion.

[2] Bank of America will hereinafter refer to the Federal Home Loan Mortgage Corporation, Sovereign Bank, Wells Fargo, Natixis Real Estate Capital, Inc., and MBIA collectively as the "Movants".

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 Ex. 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 Ex. 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 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, 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 "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, and various related pleadings in the Colonial Bank Action, are attached hereto as **Composite Exhibit H** and 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. H 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. The Court also extended the terms of the Temporary Restraining Order, as cited above.

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.[3] 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 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").

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

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 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 [DE 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, 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.

D. The Stay Relief Motions

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. Between August 25, 2009 and September 10, 2009, the Movants[4] filed the Stay Relief Motions. By the Stay Relief Motions, the Movants seek essentially the same relief, namely, an order (a) compelling the Debtor to transfer to the Movants documents and records relating to the Investor Loans arising from their investments; (b) compelling the Debtor to transfer to the Movants all funds held by the Debtor in its capacity as servicer of such Investor Loans, and (c) granting the Movants immediate access to the data, documents, and records relating to such Investor Loans to complete the transfer of servicing rights relating to those mortgage loans.

II. OBJECTION TO STAY RELIEF MOTIONS

Bank of America objects to the Stay Relief Motions to the extent that the Movants seek any relief beyond a lifting of the stay solely for the purpose of pursuing any rights Movants might have under applicable non-bankruptcy law with respect to the Investor Loans. This objection extends not only to the Stay Relief Motions but to any agreement or agreed order proposed for the purpose of resolving any of the Stay Relief Motions.

As noted above, the FDIC has raised allegations that the Debtor "double pledged" certain of the Investor Loans. HUD is concerned that the Debtor has engaged irregular transactions and fraud. There is great uncertainty as to the proper disposition of the documents and funds in the possession of the Debtor and Colonial Bank relating to the Investor Loans. Under these circumstances, it is possible that funds or documents turned over to the Movants under the terms of any order on the Stay Relief Motions may belong to Bank of America. No relief should be granted that could produce this result or which could enhance the rights or position of the

[4] For the purpose of this Objection, the "Movants" shall include the moving parties as well as any investors or third parties on whose behalf the moving parties are seeking relief.

Movants with respect to any of the Investor Loans. Such relief would not only unfairly prejudice Bank of America but would exceed the relief available in connection with a motion for relief from the automatic stay. *See In re Kahihikolo*, 807 F.2d 1540, 1542 (11th Cir. 1987) (order granting relief from the automatic stay returns the parties to whatever legal relationship existed before the stay became operative and the parties and their transactions are governed by applicable non-bankruptcy law).

As also noted above, the FDIC Injunction makes clear that the Ocala Loans and Ocala Loan Proceeds are property of Bank of America and that the FDIC is enjoined from disposing of these proceeds. No relief should be granted to the Movants that could be construed to limit the effect of the FDIC Injunction or to authorize any party to directly or indirectly take any action that might violate any terms of the FDIC Injunction. Similarly, no relief should be granted that could be construed to authorize any party to exercise any control over Ocala Loans and Ocala Loan Proceeds which are exclusively owned by Bank of America. Bank of America objects to the Stay Relief Motions to the extent they seek any such relief. In addition, Bank of America submits that an order that authorizes the Movants to merely exercise any rights they may have under applicable non-bankruptcy law is an appropriate means of ensuring that the rights and obligations established by the FDIC Injunction and Bank of America's ownership interest in the Ocala Loans and Ocala Loan Proceeds are preserved, without prejudicing any rights of the Movants.

The relief sought by the stay Relief Motions should not affect Bank of America's rights or prejudice its position with respect to the Investor Loans. All of Bank of America rights, including without limitation all of its rights under the FDIC Injunction, should be preserved. If this Court determines that it has jurisdiction to authorize the release of loans, loan files or funds

from Colonial Accounts, it should not authorize such action until there is a reconciliation of who is entitled to what loans, and who is entitled to what funds, and a fair opportunity to be heard on the issues. The relief afforded the Movants should be strictly limited to the pursuit of any rights they might have under applicable non-bankruptcy law.

WHEREFORE Bank of America requests that the court deny the Stay Relief Motions and grant such other and further relief as is just and proper.

Dated: September 17, 2009

Respectfully Submitted,

TESSITORE LAW FIRM

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been served either electronically on the 17th day of September 2009 or by United States Mail on the 18th day September 2009 to the following:

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