

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

**TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,**

Debtor.

Case No.: 3:09-bk-07047-JAF

Chapter 11

**EMERGENCY HEARING REQUESTED
ON DEBTOR'S MOTION**

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**OBJECTION OF FEDERAL HOME LOAN MORTGAGE CORPORATION
TO DEBTOR'S EMERGENCY MOTION
FOR AUTHORITY TO USE CASH COLLATERAL**

Federal Home Loan Mortgage Corporation ("Freddie Mac"), by and through its undersigned counsel and pursuant to Rule 4001, *Federal Rules of Bankruptcy Procedure*, files this, its objection to *Debtor's Emergency Motion for Entry of Interim and Final Orders Authorizing Use of Cash Collateral and Granting Replacement Liens Pursuant to 11 U.S.C. §§ 105(a), 361, 363, 541 and 552 and Bankruptcy Rule 4001* (the "Motion") (Doc. No.: 5), and states:

FACTUAL BACKGROUND

The Debtor's Bankruptcy Case

1. On August 24, 2009 (the "Petition Date"), Taylor, Bean & Whitaker Mortgage Corp. ("TBW" or the "Debtor") filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

2. TBW is operating its business as a debtor-in-possession, pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

Freddie Mac And Its Business

3. Freddie Mac is a corporate instrumentality of the United States of America, chartered by Congress under the Federal Home Loan Mortgage Corporation Act, Title III of the Emergency Home Finance Act of 1970, 12 U.S.C. §§ 1451-59. Congress created Freddie Mac for the purpose of increasing the funds available to homebuyers via the creation of a secondary mortgage market for the purchase and sale of conventional residential mortgage loans. To achieve this congressionally mandated purpose, Freddie Mac, among other activities, purchases conventional mortgage loans from mortgage seller/servicers approved by Freddie Mac, pools those loans into mortgage-backed securities, and then sells those securities to investors. Capital from investors is then used to buy more mortgage loans, and in this way, Freddie Mac facilitates the flow of funds from investors to homebuyers.

4. Freddie Mac purchases mortgage loans from approved mortgage loan originators or “seller/servicers” and contracts with those seller/servicers to service the loans. Mortgage seller/servicers agree to sell and service mortgages pursuant to the terms and conditions contained in certain purchase documents (collectively, the “Purchase Documents”) consisting of, *inter alia*, a purchase contract, Freddie Mac’s Sellers and Servicers Guide (the “Guide”), and bulletins issued periodically by Freddie Mac to its

seller/servicers which supplement the parties' agreement as set forth in the Purchase Documents.¹

5. Pursuant to the Guide, the seller/servicer coordinates virtually all transactions related to each loan. It invoices and collects principal and interest payments from each borrower, and calculates and collects monthly tax, insurance and other escrow payments, so that real estate taxes, annual or semi-annual hazard insurance payments and other property related charges may be paid. The monies received by the seller/servicer are ultimately deposited into various custodial accounts solely holding payments attributable to Freddie Mac Loans, most importantly a principal and interest custodial account and a tax and insurance custodial account. See Guide §§ 52.1 through 52.6. Prior to deposit into the custodial accounts, it is possible that the payments may be placed for a short period of time into intermediate clearing accounts containing payments attributable to loans owned by other lenders or investors. Freddie Mac requires that all clearing account funds be moved into the custodial accounts within two business days of receipt.

6. After deposit into the principal and interest custodial account, the total amount of the principal and interest payments are thereafter remitted to Freddie Mac on a regular basis, except for a small so-called "servicing strip", which is a small portion of the monthly payment and constitutes the fee paid to the seller/servicer for its services (the

1. The Guide, which consists of several hundred pages, sets forth in detail the terms and conditions of the transactions between Freddie Mac and its seller/servicers, and expressly provides that seller/servicers agree to sell mortgage loans to and agree to service mortgage loans for Freddie Mac in accordance with the standards set forth in the Guide. See Guide Sections 1.2 and 50.2. Due to its size, the Guide is not attached to this Response as an exhibit. Rather, relevant portions are excerpted and cited herein.

“Servicing Fee”). The tax and insurance custodial account is maintained by the seller/servicer for payment of periodic real estate taxes and insurance. Draws are made on those accounts when such payments are due.

7. The seller/servicer also handles, among other things, funds received for payoffs of Freddie Mac Loans. These funds go through a similar deposit process before they are ultimately remitted to Freddie Mac.

8. From time to time, Freddie Mac determines that it is necessary to terminate a particular company as an approved Freddie Mac seller/servicer. When this happens, the Freddie Mac Loans need to be transferred to another seller/servicer for continued servicing of the loans. This may be accomplished by immediate transfer of the loans to another seller/servicer on a permanent basis or may be done on an interim basis, with a permanent transfer to be concluded later. In the latter instance, the seller/servicer is referred to as an interim servicer. The Mortgage Loan Files and the related monies in the custodial or other accounts must be transferred to the new seller/servicer (whether interim or permanent) so that the loan may be properly serviced going forward.

9. The Guide includes detailed provisions related to the termination of a seller/servicer, including the following:

§ 73.3 Upon termination of the Servicing of any Mortgage, the Servicer is responsible for supplying ... all reports, documents and information ... requested by Freddie Mac on the date specified by Freddie Mac.

§ 73.4 The remittance to Freddie Mac of Mortgage collections for each Mortgage for which Servicing is terminated must be made on the date specified by Freddie Mac Additionally, all Escrow Funds, Escrow Accounts and prepared installments ... must be transferred to the new Servicer on the date specified by Freddie Mac.

The Termination of TBW

10. Up until on or about August 4, 2009, TBW was an approved Freddie Mac seller/servicer. TBW serviced approximately Two Hundred Ninety-One Thousand Five Hundred Twenty-Five (291,525) Freddie Mac mortgage loans with a total value of approximately Fifty Billion Six Hundred Forty-Six Million Three Hundred Sixty Thousand One Hundred Thirty Seven Dollars (\$50,646,360,137.00) (the “Mortgage Loans”).

11. Freddie Mac is the owner of approximately seventy percent (70%) of all of the loans serviced by TBW.

12. Freddie Mac notified TBW that TBW’s eligibility to sell and/or service Freddie Mac mortgages was terminated “with cause” immediately by overnight letter dated August 4, 2009 (the “Termination Notice”).

13. The Termination Notice constituted a valid termination with cause pursuant to the Purchase Documents and the Guide.

Mortgage Loan Payments and Payoffs Not Yet Transferred to Freddie Mac

14. On August 6, 2009, and on each business day thereafter until the Petition Date, Freddie Mac employees went to TBW to manage the servicing transfer process to three interim servicers retained by Freddie Mac. As of the Petition Date, certain funds belonging to Freddie Mac not yet been transferred to it or to the interim servicers including, but not limited to a) checks in TBW’s vault (the “Vault Checks”), b) certain clearing accounts at Colonial Bank containing monthly principal and interest remittances,

tax and insurance escrow funds and loan pay-off funds (collectively, the “Clearing Account Funds”),² c) unendorsed checks at Colonial payable to TBW for Freddie Mac loans (the “Unendorsed Checks”), and d) certain Automated Clearing House (“ACH”) payments for borrowers’ payments which had not been debited as scheduled (the “ACH Payments”). Freddie Mac needs to gain access to all of this Freddie Mac Property to complete the transfer of the servicing to the interim servicers.

15. **Vault Checks.** Prior to its termination as a seller/servicer, TBW utilized Colonial Bank (“Colonial”) as a depository for loan payments received in connection with the Freddie Mac Loans and loans owned by other entities.³ Subsequent to its receipt of the Termination Notice, TBW altered its normal business practice of depositing checks from Freddie Mac’s borrowers for mortgage/taxes/insurance payments into separate bank accounts at Colonial and instead bundled and commingled those checks with checks from other lenders in TBW’s vault. As of August 10, 2009, Freddie Mac has identified approximately four thousand two hundred twenty (4220) checks relating to its loans with a face value of approximately Forty Three Million One Hundred Seventeen Thousand One Hundred Eighty Nine Dollars and eighty three cents (\$43,117,189.83). The checks represent borrower pay-off funds, principal and interest payments and tax and insurance escrow funds received by TBW. Upon information and belief, additional checks are

² Concurrent with the Termination Notice and with the approval of FDIC, Freddie Mac re-titled in its own name certain TBW custodial bank accounts at Colonial Bank (“Colonial”) in which borrower funds related to Freddie Mac loans were held. These accounts contained borrower principal and interest payments, insurance and tax escrow funds, pay-off proceeds, repurchase proceeds and make-whole payments owed to Freddie Mac. Funds in the custodial accounts were withdrawn from Colonial by Freddie Mac on or about August 21, 2009.

³ On or about August 14, 2009, Colonial Bank was placed in receivership by FDIC and its assets sold to BB&T.

received daily. These checks must be timely obtained by Freddie Mac so that the borrowers' loans may be timely credited with payments of principal and interest or tax and insurance escrow monies.

16. **Unendorsed Checks.** Colonial also received checks directly from borrowers. As of August 10, 2009, Colonial had received directly from borrowers approximately thirty thousand (30,000) checks made out to TBW (the "Unendorsed Checks"). The Unendorsed Checks represent commingled funds belonging to Freddie Mac and other investors, of which, upon information and belief, approximately eighty percent (80%) belong to Freddie Mac. The aggregate value of the Unendorsed Checks is Thirty Five Million to Fifty Million Dollars (\$35,000,000.00 - \$50,000,000.00). As their defined name implies, the Unendorsed Checks were never endorsed by TBW or deposited into any account. The Unendorsed Checks represent borrower principal and interest payments, and tax and insurance escrow funds. These funds must be transferred to the interim servicers so that the funds can be applied to the borrowers' principal, interest, tax and insurance obligations as they become due. BB&T, as successor-in-interest to Colonial, has not deposited the Unendorsed Checks, nor have they released them to the respective investors.

17. As with Vault Checks, if these borrower funds are not properly endorsed and remitted to the respective loan owner, Borrower loan remittances may not be correctly credited and loan pay-offs may not be properly applied in a manner discharging the loan. Borrower insurance policies will lapse for non-payment, and real property tax bills will go unpaid, resulting in increased tax liabilities and possible tax deed/foreclosure sales.

18. **ACH Payments.** On or about August 12, 2009, Freddie Mac employees discovered that since the Termination Notice, as many as thirty five thousand (35,000) ACH automatic debit payments authorized by borrowers were not executed as scheduled. Such ACH payments include standing authorizations, as well as one-time payments, from borrowers. The value of the ACH payments is currently unknown. Although Freddie Mac has repeatedly asked TBW for the ACH information, they have not provided sufficient information needed to allow the interim servicers to authorize such ACH payment debits.

19. **Clearing Account Funds.** Since the Termination Date, some monthly mortgage payments received from borrowers via electronic debit, wire transfer or via check have accumulated in clearing accounts at Colonial, each titled in TBW's name (collectively, the "Clearing Account Funds"). The subject accounts include commingled borrower funds attributable to loans owned by numerous lenders and investors. Upon information and belief, the amount of current Clearing Account Funds attributable to Freddie Mac loans total approximately One Hundred Sixty One Million Dollars (\$161,000,000.00). Freddie Mac requires access to its funds in these accounts in order to identify borrowers' principal and interest payments and escrow funds used to pay property taxes and insurance and to allow for uninterrupted and orderly loan servicing.

OBJECTIONS TO DEBTOR'S CASH COLLATERAL MOTION

20. The Motion does not adequately identify the source of the "cash collateral" TBW wants to use. On August 21, 2009, the Florida Office of Financial

Regulation issued a second emergency cease and desist order (copy attached hereto as Exhibit A), barring TBW from, among other things, depositing funds from Florida consumers into non-custodial accounts, prosecuting or commencing any foreclosure actions, assessing any late fees and/or reporting Florida consumers to credit bureaus for August, 2009 and later payments. Paragraphs 10 and 11 of this order noted that TBW has been utilizing a single bank account, and was denied in its efforts to open new bank accounts at other financial institutions. Yet in paragraph 31 of the Motion, TBW states that it has “funds on deposit in various bank accounts.”

21. The proposed budget attached to the Motion shows a Beginning Cash Balance of approximately Four Million Two Hundred Forty-Three Thousand Dollars (\$4,243,000.00). Footnote 3 to the budget states that the “[b]eginning cash balance represents identifiable operating cash per management and does not include any amounts associated with borrower payments received and funded into Debtor’s accounts since the freezing of TBW’s accounts at Colonial Bank.” TBW was apparently operating with only one bank account for some period of time prepetition. This one bank account presumably contained commingled funds of TBW and of various owners for which TBW serviced loans.

22. The Motion is wholly deficient in explaining to the Court (i) the original source of the funds debtor proposes to use as cash collateral; (ii) the current location of these funds; (iii) whether these funds were diverted from any Colonial Bank accounts; (iv) whether any of these funds are derived from payments on Freddie Mac loans, and (v) how TBW has both “identified” these funds as operating cash and determined that these funds do not include any amounts associated with borrower payments to TBW.

23. TBW is no longer a servicer for Freddie Mac, as its rights to sell and service loans to and for Freddie Mac were duly terminated on August 4, 2009.

24. All funds associated with loan servicing activities performed by TBW for Freddie Mac both before and after the termination are property of Freddie Mac and not available to TBW to fund its Chapter 11 operations.

25. Pursuant to the Guide, these funds must immediately be transferred to Freddie Mac's interim servicers so that the account reconciliation process may be completed, servicing of loans by the interim servicers can proceed in an orderly manner and any funds due to TBW can be remitted after the servicing transfer is completed.

26. Because it is unclear whether any of the funds TBW proposes to use may constitute payments made by borrowers and, consequently, monies in which TBW holds no equitable interest, direct, immediate and substantial harm will potentially occur to the interests of Freddie Mac and hundreds of thousands of Freddie Mac's borrowers if the Motion is granted.

WHEREFORE, Freddie Mac requests that the Court enter an Order denying the Motion and granting such other further relief this Court deems just and proper.

Respectfully submitted,

/s/ Jason Ward Johnson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 25th day of August, 2009, the foregoing *Response Of Federal Home Loan Mortgage Corporation In Opposition To Debtor's Emergency Motion For Authority To Use Cash Collateral* was filed and served via the Court's ECF/Electronic Filing System, and to the extent that the foregoing was not served electronically via the CM/ECF System, I caused a copy of same to be served on August 26, 2009 via first class mail postage prepaid to: **Debtor:** Taylor, Bean & Whitaker Mortgage Corp., 315 N.E. 14th Street, Ocala, Florida 34470; **Counsel for Debtor:** Edward J. Peterson, III, Stichter, Riedel, Blain & Prosser, PA, 110 East Madison Street, Suite 200, Tampa, FL 33602; **Special Counsel for Debtor:** J. David Dantzler, Esq., Troutman Sanders, LLP, 600 Peachtree Street, NE Suite 5200, Atlanta, Georgia 30308-2216; **United States Trustee:** Kenneth C. Meeker, Assistant U.S. Trustee, 135 West Central Boulevard, Suite 620, Orlando, Florida 32801.

/s/ Jason Ward Johnson

Jason Ward Johnson

Label Matrix for local noticing
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Middle District of Florida
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