IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	
Taylor Bean & Whitaker Mortgage Corp., *et al.*,	Chapter 11
Debtors	Case No. 09-07047 JAF

WELLS FARGO'S OBJECTION TO DEBTOR'S EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING USE OF CASH COLLATERAL

Wells Fargo Bank, National Association ("Wells Fargo"), solely in its capacity as master servicer (the "Master Servicer") for the twelve residential mortgage-backed securitizations described on Exhibit 1 (the "Trusts"), files this objection (the "Objection") to the motion (the "Motion") of Taylor Bean & Whitaker Mortgage Corp. (the "Debtor"), seeking entry of an interim and final order 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. In support of its Objection, Wells Fargo shows this Court as follows:

OBJECTION

1. The Bankruptcy Code provides that a trustee or debtor in possession, after notice and a hearing, may "use, sell, or lease, other than in the ordinary course of business, property of the estate." *See* 11 U.S.C. § 363(b)(1); *see also* 11 U.S.C. § 363(c)(1). Nonetheless, any such authorization to use property of the estate is subject to certain expressed limitations. "[A]t any time, on request of an entity that has an interest in property used, sold, or leased, or property to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."

11 U.S.C. § 363(e). Further, as to a debtor in possession's use of cash collateral, the Bankruptcy Code provides:

> (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—
>
> > (A) each entity that has an interest in such cash collateral consents; or
> >
> > (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.
>
> (3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.
>
> (4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

11 U.S.C. § 363(c)(2)-(4).

2. "Cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest, and includes the proceeds, products, offspring, rents, or profits of property . . . subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of case under this title" constitute "cash collateral" under Section 363 of the Bankruptcy Code. *See* 11 U.S.C. § 363(a).

3. If the Debtor uses a third party's cash collateral, it must provide that party with adequate protection. *See* 11 U.S.C. § 363(e). "Congress in enacting Section 363 of the Code gave a special treatment to 'cash collateral' for the obvious reason that cash collateral is highly volatile, subject to rapid dissipation and requires special protective safeguards in order to assure

that a holder of a lien on 'cash collateral' is not deprived of its collateral through unprotected use by the Debtor." *E.g. In re Mickler*, 9 B.R. 121, 123 (Bankr. M.D. Fla. 1981).

4. This Court should deny the Debtor's Motion. First, the Motion should be denied to the extent the Debtor is attempting to access funds in its possession, which the Debtor derived from its collection of receipts from individual borrowers' mortgage payments. Paragraph 3 of this Court's Order Authorizing Interim Use of Cash Collateral (the "Interim Order"), explicitly prohibits the Debtor from using funds in its possession that it derived from "individual borrowers' mortgage payments." *See* Interim Order at Docket No. 172 at ¶ 2. If the Court is inclined to grant the Debtor's Motion, the same explicit prohibition should be part of any final order authorizing the use of cash collateral.

5. Second, the Debtor is in possession of funds that are not property of its estate under Section 541 of the Bankruptcy Code. In the Motion, the Debtor states that it has "funds on deposit in various bank accounts as well as various accounts/notes receivable which may constitute cash collateral as defined by section 363(a) of the Bankruptcy Code." *See* Motion at ¶ 31. Nowhere in the Motion does the Debtor identify the source of such funds. Likewise, the Debtor has not disclosed at which institutions it holds these funds.

6. Under the Servicing Agreements, as set forth in Exhibit 2, the Debtor is charged with, among other things, collecting payments on the mortgage loans, including any property taxes and insurance premiums, and establishing and maintaining necessary custodial and escrow accounts to be held in trust for each of the Trusts, into which all payments received from the mortgagors are required to be deposited. Except to the extent of any applicable "servicing strip," or specific funds which are "eligible funds" for the repayment of advances made by the Debtor, as servicer, the Debtor has no beneficial interest in funds held in these accounts or in funds

intended to be deposited into these accounts. Thus, any order should clarify that the funds held in trust by the Debtor in custodial or escrow accounts are not available for use by the Debtor as cash collateral.

WHEREFORE, Wells Fargo respectfully requests that if the Court grants any relief sought by the Debtor in the Motion, that the order granting such relief clearly state that (i) the estate has no beneficial interest in borrower payments held in custodial or escrow accounts or intended to be deposited into such accounts and (b) any authorization for the Debtor to use cash collateral shall not include payments received from individual borrowers, except as expressly set forth in the Servicing Agreements.

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