

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

In re:

**Taylor, Bean & Whitaker Mortgage Corp.,

Debtor.**

Chapter 11

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

**LIMITED OBJECTION OF FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR COLONIAL BANK, TO DEBTOR'S
MOTION FOR ORDERS AUTHORIZING USE OF CASH COLLATERAL**

The Federal Deposit Insurance Corporation, in its capacity as receiver (“FDIC-Receiver”) for Colonial Bank, Montgomery, Alabama (“Colonial Bank”), by and through its undersigned counsel, hereby files this limited objection (the “Limited Objection”) to the 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, dated August 24, 2009 (the “Motion”), filed by the debtor and debtor in possession, Taylor, Bean & Whitaker Corp (the “Debtor”). In support of the Limited Objection, the FDIC-Receiver respectfully states:

Preliminary Statement

The Motion does not distinguish between the use of cash collateral that is allegedly held in accounts at Colonial Bank from the use of cash collateral held by the Debtor in accounts with other financial institutions. To the extent that the Motion seeks use of funds held by Colonial Bank, or undeposited funds related to accounts held at Colonial Bank or mortgages owned by Colonial Bank, it should be denied. Although not disclosed in the Motion, the FDIC-Receiver has been appointed receiver of Colonial Bank. Pursuant to 12 U.S.C. § 1821(j), “no court may

take any action . . . to restrain or affect the exercise of powers or functions” of the FDIC-Receiver. Since August 6, 2009, when the Debtor’s accounts at Colonial Bank were put on administrative hold, Colonial Bank, the FDIC-Receiver and the Debtor have received payments from borrowers that have not been deposited (or were deposited elsewhere by the Debtor). The FDIC-Receiver is currently performing its statutory duties as receiver and additionally has been focused on protecting the interests of the investors in the mortgage loans and determining what payments need to be made on their behalf, including payments that protect the value of the borrower property securing the mortgage loans, including taxes and insurance. In addition, reliable information has come to the attention of the FDIC-Receiver that may indicate that certain assets may have been “double pledged” and that other improprieties including some related to cash management and payments may have occurred prepetition.

Notwithstanding the lack of jurisdiction, the FDIC-Receiver attempted to work with the Debtor to reach an agreement regarding the transition of mortgage servicing of the Colonial Bank loans from the Debtor to a successor servicer, as well as an interim solution for borrower payments that have accumulated in the pipeline since August 6, 2009. These negotiations were unsuccessful largely because the FDIC-Receiver believes the integrity of the Debtor’s payment processes may be compromised and, consequently, the Debtor’s use of any cash related to any account at Colonial Bank would be improper. Accordingly, the FDIC-Receiver objects to the Motion unless the relief requested is modified to make clear that Debtor is not seeking any relief with respect to any account at Colonial Bank or funds related thereto, including funds received by the Debtor with respect to mortgage loans owned by Colonial Bank.

Background

A. Responsibilities of the FDIC-Receiver

1. The Federal Deposit Insurance Corporation (the “FDIC”) is an independent agency of the United States, established pursuant to the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811-1833e (the “FDI Act”). Since its creation in 1933, the FDIC’s primary function has been to promote the stability of the nation’s banking system through a system of federal deposit insurance.

2. The FDIC functions in two capacities: in its “corporate” capacity, the FDIC acts as regulator and insurer of open depository institutions; in its capacity as receiver, the FDIC acts as the appointed receiver for depository institutions that have been closed by their chartering authority. As receiver, the FDIC seeks to recover to the extent possible the value of a failed bank’s assets and use the recovered amounts to pay creditors of the failed bank.

3. In response to the savings and loan crisis of the 1980’s, Congress amended the FDI Act in the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) (“FIRREA”), which enacted a comprehensive statutory scheme granting specific powers and responsibilities to the FDIC as receiver for failed depository institutions. Congress explained that the authority granted to the FDIC was “designed to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default.” H.R. Rep. 54(I), 101st Cong., 1st Sess. 2 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 126.

B. The Pre-Receivership Relationship Between the Debtor and Colonial Bank

4. In an order dated August 14, 2009, the Alabama State Banking Department closed Colonial Bank and appointed the FDIC-Receiver as its receiver. By operation of law, the

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

5. On August 24, 2009 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in this Court. According to the Debtor, the Debtor was the largest non-bank warehouse mortgage lender in the United States and a significant aspect of the Debtor’s business was devoted to mortgage servicing, which involves the collection of monthly mortgage payments from individual borrowers and, in turn, the disbursement of those funds appropriately. The Debtor maintained a number of deposit accounts with Colonial Bank, some of which were used in its mortgage servicing operations.

6. Colonial Bank and the Debtor were parties to a certain repurchase agreement and several servicing agreements prior to the Colonial Bank receivership. Prior to the receivership and Petition Date, Colonial Bank validly and effectively terminated all of the servicing agreements and, since being appointed receiver, but prior to the Petition Date, the FDIC-Receiver validly and effectively terminated all of the repurchase agreement. The FDIC-Receiver has devoted substantial efforts to transferring servicing operations to successor servicers. Until the past several days, however, the FDIC-Receiver’s efforts in this regard were hindered by the Debtor’s failure or inability to provide necessary assistance and information.

7. During the past several days, however, the FDIC-Receiver and the Debtor and their representatives have been engaged in a substantial dialogue with the aim of reaching agreement on a process that will allow the prompt processing of borrower payments that have been received by both the Debtor and Colonial Bank and the payment of property insurance premiums and real estate taxes for the benefit of borrowers as those amounts become due.

8. The Debtor's Motion, filed in the midst of these discussions, came as a surprise to the FDIC-Receiver. In subsequent conversations, however, the Debtor's counsel has informed counsel for the FDIC-Receiver that the Debtor did not intend to include the Debtor's deposit accounts with Colonial Bank or funds held by the Debtor related to the agreements with Colonial Bank in its request for relief.

Limited Objection

9. The relief requested in the Motion should be denied to the extent it attempts to permit use of any funds at Colonial Bank or funds (deposited or not) held by the Debtor that should be deposited in Colonial Bank. This is necessary to comply with applicable provisions of the FDI Act.

10. 12 U.S.C. § 1821(j) provides:

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the [FDIC] Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.¹

11. The prohibition imposed by section 1821(j) is “[e]ssential to . . . the FDIC’s ability to carry out its basic functions as a receiver free from judicial restraint,” *Sahni*, 83 F.3d at 1058 (9th Cir. 1996), and it “effect[s] a sweeping ouster of courts’ power to grant equitable remedies” that would frustrate the FDIC’s exercise of its statutory powers as receiver or conservator. *Freeman v F.D.I.C.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995). As the court in *Freeman* explained:

¹ The phrase “[e]xcept as provided in this section” at the beginning of the provision refers to two subparts of section 1821(d) that are not applicable on this motion: (1) section 1821(d)(6), which allows actions in specified federal district courts seeking a judicial determination of disallowed receivership claims and (2) section 1821(d)(11)(B)(iii), which permits judicial review of determinations of inconsistency between federal and state priority schemes.

Although this limitation on courts' power to grant equitable relief may appear drastic, it fully accords with the intent of Congress at the time it enacted FIRREA in the midst of the savings and loan insolvency crisis to enable the FDIC and the Resolution Trust Corporation ("RTC") to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country.

Id. at 1398.

12. Section 1821(j) acts as a broad prohibition against any form of relief that would enjoin the FDIC from exercising its receivership and conservatorship powers and functions. *RPM Investments, Inc. v. R.T.C.*, 75 F.3d 618, 622 (11th Cir. 1996) (*per curiam*) ("Section 1821(j) limits our jurisdiction such that we cannot grant relief that would restrain or affect the RTC's exercise of its statutory powers."); *see, e.g., Gross v. Bell Sav. Bank*, 974 F.2d 403, 408 (3d Cir. 1992); *Telematics Int'l, Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703, 707 (1st Cir. 1992) ("[t]o enable the FDIC to move quickly and without undue interruption to preserve and consolidate the assets of the failed institution, Congress enacted a broad limit [section 1821(j)] on the power of the courts to interfere with the FDIC's efforts"); *Ward v. R.T.C.*, 796 F. Supp. 256, 258 (S.D. Tex. 1992) ("It is clear from (§ 1821(j)) that the [R]eceiver is free to perform its functions, which include the liquidation of receivership assets, without being encumbered by the possibility of injunctive actions."); *see also Rosa v. R.T.C.*, 938 F.2d 383, 399-400 (3d Cir.), *cert. denied*, 502 U.S. 981 (1991); *Joint Venture v. Onion*, 938 F.2d 35, 39 (5th Cir. 1991) ("the courts lack the ability to enjoin" the receiver regarding foreclosure of an asset of the estate); *In re Landmark Land Co.*, 973 F.2d 283 (4th Cir. 1992); *Costa v. RTC*, 789 F. Supp. 43, 44 (D. Mass. 1991) (holding that a court is precluded by statute from granting injunctive relief).

13. The Eleventh Circuit, along with other courts, has recognized that section 1821(j) is not subject to judicially created exceptions. *See Bursick v. One Fourth St. N., Ltd.*, 84 F.3d 1395, 1397 & n.2 (11th Cir. 1996) (collecting cases).

14. The relief requested in the Motion, if granted as to any account or cash related to accounts held by Colonial Bank, would restrain or affect the FDIC-Receiver in the exercise of its powers or functions as receiver. Under federal law, no court has jurisdiction to enter such an order. The relief requested in the Debtor's Motion therefore must be modified to exclude any account at Colonial Bank from the scope of any order entered by this Court with respect to the Debtor's requested use of cash collateral.

Dated: August 26, 2009
Tampa, Florida

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