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: DE 498
Debtor	
_____/	

BANK OF AMERICA'S LIMITED OBJECTION TO DEBTOR'S
MOTION TO OBTAIN POSTPETITION FINANCING

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 with respect to Ocala Funding LLC, ("Bank of America"), files this Limited Objection ("Objection") to the Motion of the Debtor Seeking Order (A) Authorizing the Debtor to Obtain Postpetition Financing From the DIP Lender on a Final Basis Pursuant top Sections 105 and 364 of the Bankruptcy Code; (B) Providing Liens, Security Interests and Superpriority Claims to the DIP Lender; and (C) Approving the Form and Method of Notice Thereof (the "Financing Motion") [DE 498], filed by Taylor, Bean & Whitaker Mortgage Corp. (the "Debtor"). In support of its Objection, Bank of America states as follows:

I. INTRODUCTION

The Court should deny the Financing Motion because the Debtor has not established that it is the actual owner of the property to be encumbered under the Financing Motion. Additionally, the Court should deny the Financing Motion because the Debtor has failed to establish the necessity of the proposed amount of financing. Finally, the Court should deny the

Financing Motion because it does not provide adequate protection to the parties with an interest in the property to be encumbered under the Financing Motion.

II. BACKGROUND

1. On June 30, 2008, Ocala Funding, LLC, ("Ocala"), a special-purpose commercial paper and financing conduit, agreed to purchase certain mortgage loans and related loan documents (collectively, the "Ocala Loans") from the Debtor pursuant to a Second Amended and Restated Mortgage Loan Purchase and Servicing Agreement (the "MLPSA").

2. Under the terms of the MLPSA, Ocala permitted the Debtor to service the Ocala Loans for a fee.

3. Ocala funded its purchase of the Ocala Loans under the MLPSA by issuing subordinated notes and commercial paper, for which Bank of America served as Indenture Trustee, Collateral Agent, and Custodian. Among other things, on June 30, 2008, Ocala issued notes pursuant to a Second Base Indenture between Ocala, as issuer, and Bank of America, as Indenture Trustee (as amended and supplemented, the "Second Base Indenture").

4. On June 30, 2008, Ocala also entered into an Indenture Agreement 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").

5. Bank of America, as Collateral Agent for the Ocala Secured Parties, 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").

6. As of the date hereof, the outstanding balance of commercial paper and subordinated notes issued by Ocala, and for which Bank of America serves as indenture trustee, is approximately $1.765 billion.

7. 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.[1]

8. Deloitte LLP ("Deloitte") served as the Debtor's auditor.

9. Deloitte refused to issue a clean audit opinion because, among other things, Deloitte determined that the Debtor was listing real estate-owned properties ("REO Properties") as assets on its books and records when in fact such properties actually belonged to investors for whom the Debtor serviced mortgages.

10. Further, the Debtor may have converted the proceeds of the Ocala Assets - which constitute property of Bank of America - that led to its possession of some of the REO Properties.

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

12. 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

---

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

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.

13. In addition, on or about August 4, 2009, Ginnie Mae terminated the Debtor's authority to act as a Ginnie Mae issuer and to service its $26 billion mortgage portfolio, and Freddie Mac terminated the Debtor's eligibility to sell loans and service its $51.2 billion portfolio.

14. During this time period, at least 14 states, including New Jersey, North Carolina, Connecticut, Massachusetts, and Florida, issued cease and desist orders regarding the Debtor's mortgage lending operations due to, among other things, the Debtor's failure to fund mortgage loans.

15. On August 24, 2009 (the "Petition Date"), the Debtor filed in this Court a voluntary petition under Chapter 11 of the Bankruptcy Code.

16. On October 21, 2009, the Debtor filed the Financing Motion. By the Financing Motion, the Debtor seeks authority to borrow up to $25 million from an affiliate of the prospective buyer of the REO Properties, with such borrowing secured by a priming lien on certain of the REO Properties.

17. On October 30, 2009, the Debtor filed its First Interim Reconciliation Report [DE 555], which detailed the Debtor's initial, concentrated efforts to make sense of its unreliable books and records and determine exactly what the Debtor actually owns. The First Interim Reconciliation Report begins with a disclaimer detailing the parlous state of the Debtor's records and the unreliability of the information contained therein. The Debtor states in the disclaimer that "[t]he information contained in this Report (including the tables and exhibits) is subject to change and is neither intended to be nor should it be construed as an opinion or assurance of any

lawyer, accountant, or other professional involved in the reconciliation process." In other words, at this point no lawyer or accountant will risk placing its imprimatur on any conclusions based on the Debtor's books and records.

18. For the reasons set forth below, the Court should deny the Financing Motion.

III. OBJECTION TO THE FINANCING MOTION

Section 364(d)(1) of the Bankruptcy Code, in combination with § 1107(a) of the Bankruptcy Code, provides that a debtor may obtain financing secured by a "priming" lien on previously encumbered property of the estate if such financing cannot be obtained on an unsecured basis and the holders of preexisting liens are adequately protected. *See* 11 U.S.C. § 364(d)(1). The debtor-in-possession bears the burden of establishing that all the elements of § 364(d)(1) have been satisfied. *See In re 495 Central Park Avenue Corp.*, 136 B.R. 626, 630 (Bankr. S.D.N.Y. 1992). Specifically, § 364(d)(2) provides that a debtor-in-possession bears the burden of proof on the issue of adequate protection under § 364(d)(1). *See* 11 U.S.C. § 364(d)(2).

In the instant Case, the Financing Motion should be denied for three reasons, First, the Debtor has not carried its burden to prove that the REO Properties qualify as "property of the estate". There is considerable confusion as to the Debtor's assets, and the Debtor cannot give a report of its assets without a substantial disclaimer. The Debtor must satisfy its burden to establish that the REO Properties are property of the estate before the Court can approve financing that encumbers the REO Properties under § 364(c), and the Debtor has not yet done so.

Second, the Debtor has failed to establish that the proposed financing is necessary. By the Financing Motion, the Debtor seeks authority to borrow up to $25,175,000 in order to fund operating expenses. However, the Debtor's proposed budget indicates that the Debtor requires considerably less than $25 million in order to fund operations pending the approval of a sale of

the REO Properties. In particular, on October 21, 2009, the Debtor filed a motion to sell REO Properties for approximately $133 million (the "Sale Motion") [DE 495], at which point the financing to be provided should not be necessary because the sale will provide sufficient funds for operations.

According to the Debtor's budget, attached as Exhibit D to the Financing Motion, the Debtor will not draw on the proposed financing at all until the week of December 11, 2009 - the date of the proposed auction of the REO Properties under the Sale Motion. The Sale Motion provides that a sale hearing will be held on December 15, 2009. At this point, the Debtor should not have any need for the proposed financing. Even assuming the Debtor cannot close on the sale within the period provided for in the budget, the budget indicates that the Debtor will only draw a total of $4,340,000 of the proposed financing through January 1, 2010. There is no need for the Debtor to seek $25 million in availability when it will only need $4,340,000 through January 1, 2010.

Furthermore, the $25 million figure is speculative. The Debtor could get by with no financing for the next several weeks, or take out a much smaller loan that would be less likely to be accompanied by the various fees, expense reimbursements and other bonuses sought by the proposed lender in the Financing Motion. For example, the loan requires the Debtor to pay a closing fee of 3% of the total advance commitment. Because the advance commitment is $25 million, the closing fee is $750,000. The estate should not bear the burden of paying this fee when the budget shows the cash needs are substantially below $25 million.

Third, the Financing Motion should be denied because the Debtor has not established that the interests of Bank of America and other investors in the REO Property to be encumbered are adequately protected. Bank of America and other investors may have equitable liens,

constructive trusts or other interests in the REO Properties, by virtue of the Debtor's conversion of their collateral, or otherwise, which ultimately led to the Debtor's alleged ownership of the REO Properties. Such interests must be adequately protected before the Court can grant a priming lien in the REO Properties in favor of the lender. Specifically, the Debtors should provide adequate protection in the form of a replacement lien on unencumbered assets or in the cash proceeds of the sale of the REO Properties as proposed in the Sale Motion. The Debtor bears the burden of proving that whatever protections are provided to Bank of America and others with claimed interests in the REO Properties to be encumbered with a priming lien are adequate under § 364(d)(2). *See In re 495 Central Park Avenue Corp.*, 136 B.R. 626; *see also, In re Whitehall Jewelers Holdings, Inc.*, 2008 WL 2951974, *4 (Bankr. D. Del. July 28, 2008)(to sell property under § 363(b), a debtor must first show that the property belongs to the estate.)

WHEREFORE, Bank of America respectfully requests the entry of an order denying the Financing Motion, and granting such other and further relief as the Court deems just and proper.

Dated: November 4, 2009
Miami, Florida

Respectfully Submitted,

HUNTON & WILLIAMS, LLP
Counsel for Bank of America National Association, as Collateral Agent, Indenture Trustee, and Custodian
1111 Brickell Avenue - Suite 2500
Miami, FL 33131
Tel: (305) 810-2500
Fax: (305) 810-2460

___/s/ Andrew Zaron_____
Andrew Zaron (FBN 965790)
Kevin Eckhardt (FBN 412902)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 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 identified on the attached Service List in the manner specified, either 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