UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,   CASE NO: 09-07047-3F1

Debtor.
_________________________/

TRANSCRIPT OF PROCEEDINGS

Various motions before the Honorable Jerry A. Funk, U.S. Bankruptcy Judge, to commence at 9:30 a.m., on Thursday, November 5, 2009, at the United States Courthouse, Room 4D, 300 North Hogan Street, Jacksonville, Florida, as reported by Cindy Danese, Notary Public in and for the State of Florida at Large.

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TABLE OF CONTENTS

		PAGE
Item 1,	Motion for Entry of Order Clarifying Creditors Committee's Obligation to Provide Access to Information	9
Item 2,	Rescheduled Motion for Relief from Stay Filed by Massachusetts Property and Rhode Island Joint Reinsurance	8
Item 3,	Rescheduled Motion for Relief from Stay, Filed by Natixis	7
Item 4,	Rescheduled Motion for Relief from Stay, Filed by Bayview	6
Item 5,	Rescheduled Final Hearing on Motion for Orders Authorizing Use of Cash Collateral	19
Item 6,	Rescheduled Limited Objections to Various Motions for Relief from Stay	7
Item 7,	Motions for Relief from Stay, Filed by Scott Wynn	29
Item 8,	Motion to Compel Assumption or Rejection of Executory Contract, Filed by Centurion	79
Item 9,	Motion for Order Authorizing Rejection of Executory Contracts with Centurion	79
Item 10,	Continued Motion for Order Authorizing 2004 Exams of TBW	8

TABLE OF CONTENTS (CONTINUED)

	PAGE
Item 11, Rescheduled Motion for Relief from Stay Related to Servicing of Ocala Loans	18
Item 12, Rescheduled Motion to Compel Debtor to Assume or Reject Executory Contract with Nationwide Title Clearing	26
Item 13, Motion for Order Approving Bid Procedures and Terms of Auction for Sale of REO Property	35
Item 14, Motion Seeking Order Authorizing Post-Petition Financing From DIP Lender	80
Item 15, Motion to Approve Contract with Interim Servicing Agent	139
Item 16, Motion to Establish Procedures to Permit Monthly Payment of Interim Fee	14

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E X H I B I T S

Debtor's Exhibit 1	86

1 P R O C E E D I N G S

2 November 5, 2009 10:15 a.m.

3 - - -

4 THE COURT: Good morning. For the record,
5 we're here on the case of Taylor, Bean & Whitaker
6 Mortgage Corp.
7 Mr. Blain, let's do some housekeeping first.
8 MR. BLAIN: Yes, Your Honor. Good morning,
9 may it please the Court. Russ Blain appearing on
10 behalf of the debtor, Taylor, Bean & Whitaker
11 Mortgage Corp.
12 Since we were last before the Court, the one
13 thing I wanted to bring to the Court's attention
14 from the docket is that the debtor has filed its
15 first interim reconciliation report. That was
16 filed this past Friday with the Court. It is on
17 the docket and available for parties to read. So I
18 wanted the Court to be aware that that is there,
19 and that was prepared and done in connection with
20 the stipulation with the FDIC that was approved by
21 the Court.
22 The second thing to bring to the Court's
23 attention are the settled or resolved matters on
24 the calendar.
25 First off is item number 4, which is a motion

1 for relief from stay filed by Bayview Loan
2 Servicing. It has been agreed that that will be
3 rolled to December 3rd, which is one of the
4 regularly scheduled hearing dates on the court.
5 MR. KOBERT: Your Honor, Roy Kobert on behalf
6 of Bayview and related entities.
7 That's correct. And also item 6 can be
8 withdrawn, Your Honor. That's been resolved by
9 various rulings made by the Court on stay relief.
10 So item 6 can be taken off the calendar.
11 THE COURT: Item 6 is off, and you'll file a
12 notice of withdrawal?
13 MR. KOBERT: Yes, Your Honor.
14 MR. BLAIN: Thank you, Judge.
15 THE COURT: Thank you.
16 MR. BLAIN: Your Honor, also, item number 3 is
17 a rescheduled motion for relief from stay filed by
18 Natixis Real Estate Capital. We have spoken with
19 Jeff Rich of the K & L Gates firm, who is Natixis'
20 counsel. Natixis has no desire to pursue that
21 today, and would like that to stay on the calendar
22 and roll to mid December. My understanding is that
23 there is a hearing time slotted on December 15th,
24 so I would propose that that one be rolled to the
25 December 15th date.

1 THE COURT: Very well.

2 MR. BLAIN: The next item, Your Honor, is item
3 number 10 on the calendar. This is docket number
4 246, 279 and 298. This was a motion filed by
5 Deutsche Bank.

6 Ms. Mautner of the Bingham McCutchen firm is
7 here. We have agreed on this one. There was an
8 order that was entered pursuant to the agreement
9 between the parties as to a partial granting of the
10 motion for authorization to conduct a Rule 2004
11 examination.

12 This is the continued hearing on the remaining
13 parts of that motion, and we have agreed with them
14 that that also would be rolled over and there would
15 be no ruling sought today. So we would ask the
16 Court that that one be rolled and added to the
17 December 3rd calendar.

18 THE COURT: Very well. Fine with me.

19 MR. BLAIN: The next item, Your Honor, is
20 number 2. This is a motion for relief from stay
21 filed by the Massachusetts Property Insurance
22 Underwriting Association and the Rhode Island Joint
23 Reinsurance Association. This deals with insurance
24 coverage that the debtor has placed on various
25 properties.

1 Ms. Israel was here earlier. She had to leave
2 to go to another hearing, but she authorized us to
3 represent to the Court that we are attempting to
4 work that one out, and we believe that there likely
5 may not be the need for a resolution of that, but
6 for purposes of calendaring, that one should be
7 rolled to the hearing that is scheduled on
8 November 13th, which is next Friday.
9 THE COURT: Okay.
10 MR. BLAIN: The next item, Your Honor, this
11 one will require a little bit of explanation. This
12 is item number 1 on the calendar. This a motion
13 for entry of an order clarifying the creditors
14 committee's obligation to provide access to
15 information.
16 I will present the debtor's side of this, and
17 then call on Mr. Singerman to present this from the
18 committee's side because this is essentially a
19 committee issue.
20 This is a motion that is necessitated because
21 of the changes made under BAPCPA that require the
22 committee to provide access to information to
23 creditors.
24 The statutory provision is very vague. There
25 is no guidance in the legislative history about

1 what that means and how that is to be done. And
2 there is also no provision for how there would be
3 exceptions to that and what information would be
4 conveyed and how various issues that arise would be
5 dealt with.
6 So what this motion seeks -- it's filed
7 pursuant to two sections, 1102 and 1103. It seeks
8 the entry of an order that would set forth
9 essentially a protocol for dealing with both
10 confidential and privileged information and other
11 information requests by various creditors in the
12 case.
13 For a committee to work effectively with a
14 debtor requires that there be shared information,
15 and the debtor has been forthcoming with the
16 committee in this case and the committee has worked
17 well with the debtor in response.
18 There is a confidentiality agreement that is
19 signed between the committee and the debtor and
20 between the members of the committee and the
21 debtor.
22 What this motion does is to ask that
23 information that is confidential that is provided
24 by the debtor to the committee not be made
25 accessible just on a basis without further adieu.

1 It provides a procedure that, if a party seeks
2 information from the committee and the committee
3 deems that information confidential, that the
4 matter could be brought before the Court to
5 determine whether the information should be
6 disseminated or not. Likewise, it provides
7 procedure for dealing with privileged information
8 that comes into the committee's hands.
9 And the motion itself sets forth a very
10 specific protocol for doing that. It is intended
11 to stay within the intent of the statute, which is
12 to provide access to information. It provides
13 certain things that will regularly be provided to
14 the committee to creditors, primarily through the
15 website, and sets forth the procedure I just set
16 out as to dealing specifically with confidential
17 and privileged information.
18 I think it would be appropriate, and I would
19 ask that the Court permit Mr. Singerman as the
20 committee counsel to address this because he is the
21 one who has to deal with this information and has
22 to deal with information requests that come from
23 various parties and with the information that the
24 committee on a regular basis shares with the
25 creditor body.

1 THE COURT: Certainly.
2 Mr. Singerman?
3 MR. SINGERMAN: Good morning, Your Honor.
4 Thank you. May it please the Court. I'm Paul
5 Singerman, and our firm is counsel to the official
6 committee of unsecured creditors.
7 Your Honor, I'm not going to take a great deal
8 of time other than in replying to any questions the
9 Court has for me regarding the relief sought in the
10 protocol motion.
11 It appears to me, Your Honor, that the Court
12 is familiar with the issue occasioned by the
13 amendments to 1102 under BAPCPA. A similar order
14 as sought by our motion in this case was entered by
15 Your Honor in the Bray & Gillespie case.
16 I agree with Mr. Blain's characterization that
17 the legislative history to the changes to 1102 is
18 sparse and unhelpful, and that the statute is vague
19 in implementation of the requirements imposed by
20 1102(b)(3)(A). But the problem, as recognized by
21 Your Honor in Bray & Gillespie and other courts
22 that have granted this relief, is that the statute
23 in its language in 3(A) is mandatory, "The
24 committee shall provide information." So
25 committees in other cases have sought the relief

1 we're seeking, which is to comply with the statute
2 on the one hand, but on the other hand not imperil
3 our attorney-client privilege. That's the essence
4 of the relief.
5 Just two or three other points. Mr. Blain
6 referred to the existence of a confidentiality
7 agreement in place between the debtor and the
8 committee. In fact, there are confidentiality
9 provisions in the committee's bylaws that are for
10 the benefit of the committee and its privilege, and
11 to protect the debtor, but there's not a separate
12 agreement.
13 The motion states that the debtor and the
14 committee have entered into a common interest
15 agreement. That's true, we are operating under a
16 common interest agreement and that will be
17 memorialized, but it's in place now in accordance
18 with the case law.
19 And, lastly, Your Honor, the Office of the
20 United States Trustee has worked with us on the
21 relief sought. We've accomodated questions and
22 concerns of the U.S. Trustee in the proposed order
23 if Your Honor is inclined to grant this relief, or
24 reflect the position and added language that the
25 U.S. Trustee's office has requested.

1 No parties have filed an objection to the
2 relief sought, Judge.
3 THE COURT: I've reviewed the motion, and I've
4 done this before. I think it's appropriate. It
5 gives a debtor or a creditor that wants the
6 information an opportunity to seek it, and then I
7 can determine its purposes and whether it would
8 serve any useful purpose for them to have some of
9 that information.
10 Barring no objection from the United States
11 Trustee, the Court will grant the motion.
12 MR. SINGERMAN: Thank you, Your Honor.
13 THE COURT: You'll furnish a fresh order in
14 due course?
15 MR. SINGERMAN: Yes, sir, Your Honor, we will.
16 THE COURT: Thank you.
17 MR. BLAIN: Your Honor, the next item that we
18 would ask the Court to take up is item number 16 on
19 the calendar. Item number 16 is the court docket
20 number 443, and that is a motion to establish
21 procedures for making monthly payments of interim
22 compensation to professionals.
23 In preparing this motion and seeking this
24 relief, we have looked at courts that have dealt
25 with this issue in other mortgage cases. We have

1 also looked at the procedures that have been
2 approved by this Court and other courts in the
3 Middle District, and we have attempted to tailor a
4 set of procedures that are consistent with what
5 have been approved in prior cases, and there is a
6 great deal of uniformity and consistency that
7 courts have applied in this regard.
8 What the motion specifically sets forth is a
9 procedure by which the professionals in the case
10 would on a monthly basis submit invoices on the
11 15th of the month for the prior month. Those would
12 be served on specifically enumerated parties and
13 other parties that the Court would order.
14 In the absence of an objection, those monthly
15 amounts would be paid on the 25th of the month and
16 they would be paid at the rate of 80 percent of the
17 fee amount that is sought and 100 percent of the
18 cost amount that is sought.
19 Again, this is just a payment procedure. This
20 in no way undermines the provisions of Section 330
21 with regard to filing of applications, and the
22 motion also sets forth a specific procedure and
23 time frame for filing interim applications for
24 allowance, and provides that the first one would be
25 filed on January 15th, the next one on May 15th and

1 so on, and sets forth those specific dates at which
2 the applications would come before Your Honor and
3 Your Honor would make a determination as to the
4 appropriate granting and approval of the fee
5 amounts that were accrued during that time period.
6 And only after the Court has approved the interim
7 application would the 20-percent holdback be paid
8 at that time.
9 We have set forth in the motion and in a
10 proposed order that has been circulated these
11 procedures in a very specific fashion. We have
12 looked at the cases and the specific orders that
13 Your Honor has entered in other cases and believe
14 this is consistent with those.
15 We have also consulted with the United States
16 Trustee, who has reviewed the procedures and has no
17 objection and has set forth the fact that it will
18 not oppose this procedure.
19 As far as I know, this is acceptable to the
20 parties in the case, and we would ask that the
21 Court enter a motion granting this, and that
22 procedure would begin upon entry by the Court of an
23 order to that effect.
24 THE COURT: Mr. Meeker, does the U.S. Trustee
25 have any position?

1 MR. MEEKER: Mr. Blain is correct, Your Honor,
2 we have no objection to the procedure that is
3 suggested by the motion.
4 THE COURT: Normally I have the professionals
5 submit financial statements to the U.S. Trustee so
6 he can determine that -- so that they could
7 disgorge if need be.
8 But I'll take your word for it that these
9 people are all able to disgorge if that were the
10 situation. Is that correct?
11 MR. MEEKER: Yes, Your Honor.
12 THE COURT: Based on your representation --
13 oh, we got somebody objecting to that.
14 MR. JOHNSON: It's not an objection, Your
15 Honor. Good morning. Jason Johnson for Federal
16 Home Loan Mortgage Corporation, Freddie Mac.
17 We would simply like Freddie Mac's name to be
18 added to the list of parties that are going to
19 receive the monthly statements.
20 THE COURT: That's fine. Anybody that wants
21 to be on the list can.
22 MR. JOHNSON: And we'd like that provided for
23 in the order.
24 Thank you.
25 MR. WEITNAUER: Your Honor, may it please the

1 Court. Kit Weitnauer on behalf of Wells Fargo as
2 master servicer for 12 trusts.
3 We'd like to get the notice as well. We would
4 also suggest that the monthly reports that the
5 debtor files show the accrued earned paid amount of
6 the fees so that folks would just know how big that
7 hole is getting.
8 Thank you.
9 THE COURT: Mr. Blain?
10 MR. BLAIN: Your Honor, I think that's fine.
11 We will set forth those provisions in the order
12 that is submitted to Your Honor.
13 THE COURT: Sounds good. I'll look for that
14 order in due course. This matter is concluded.
15 MR. BLAIN: Your Honor, the next item is one
16 that we thought there might be argument, but I
17 think we've agreed to roll that. This is item
18 number 11 on the calendar. That is the motion for
19 relief from stay that was filed by Bank of America
20 with respect to the servicing of Ocala Funding
21 loans.
22 We have agreed with Bank of America that it
23 would be appropriate for the hearing on that motion
24 be continued and rolled to December 3rd.
25 THE COURT: Very well.

1 MR. BLAIN: The next item that we'd ask the
2 Court to consider, Your Honor, is item number 5,
3 which I believe is the fourth hearing on the
4 debtor's motion that was filed in the early part of
5 the case seeking authorization to use cash
6 collateral. It's docket number 5.
7 In three previous hearings the Court has
8 authorized the use of cash collateral, and it has
9 approved the debtor's budgets for the time periods
10 that run through tomorrow.
11 At the last hearing the Court, in setting the
12 hearing today, scheduled this as a final hearing on
13 the motion to use cash collateral and directed that
14 we provide copies of the budget on a going-forward
15 basis to the parties that were the service parties
16 in the case who requested notice.
17 We did that, and on October 29th we filed and
18 served the debtor's budget, which is a 13-week
19 budget which runs through January 1st. I say
20 January 1st because the weekly basis for the
21 budgeting process is Saturday through Friday, and
22 the 1st falls on a Friday.
23 We have received no further objections to cash
24 collateral. The budget that was filed last
25 Thursday would be the budget for which we would

1 seek approval in connection with the final granting
2 of the motion for authorization to use cash
3 collateral.
4 We have agreed on a going-forward basis to
5 provide quarterly budgets -- 13-week budgets is
6 what they're generally referred to -- to the
7 parties who request them 10 days before the
8 beginning of each quarterly period.
9 But, apart from that, we would ask that the
10 Court enter an order that grants the motion on a
11 final basis, ratifies and confirms the previous
12 relief that was given in the cash collateral
13 orders, and authorizes the debtor to proceed under
14 the budget that we have filed with the Court as of
15 last Thursday. And I believe that that might take
16 care of our cash collateral issues in the case.
17 THE COURT: Comments? Objections?
18 MR. ZARON: Good morning, Your Honor. Andy
19 Zaron on behalf of Bank of America as indentured
20 trustee --
21 THE COURT: Good morning.
22 MR. ZARON: Good morning, sir.
23 All we want to do is reiterate the objections
24 that we raised at the prior interim hearing, which
25 is namely that, if it turns out that some of the

1 cash that they're using actually belongs to the
2 Ocala Funding line, that we would want a
3 replacement lien on otherwise unencumbered assets.
4 Again, we don't think that that's extraordinary
5 relief under the circumstances. And if it turns
6 out that we don't actually own any of the cash or
7 are entitled to any of the cash, there's no harm to
8 the debtor.
9 So we reiterate the objection to the use of
10 cash collateral only to the extent that we believe
11 we should be entitled to get a replacement lien as
12 adequate protection if the debtor uses any of our
13 cash.
14 THE COURT: Thank you.
15 MR. WEITNAUER: Your Honor, Kit Weitnauer
16 again on behalf of Wells Fargo as master servicer.
17 I rise only because buried in Footnote 13 of
18 the attachment showing the use of cash collateral,
19 the debtor reserves its right to make certain
20 offsets. We'd earlier objected to any use of
21 borrower payments as part of the cash collateral
22 authorization, which this Court has underscored
23 time and again, and we only point out that any
24 right the debtor might have to offset to get their
25 advances back, which is the point of that

1 reservation of rights, is limited to those specific
2 buckets of money that are so-called eligible funds,
3 and that's only after a recovery by Wells Fargo of
4 its early advances of those monies and any rights
5 of recoupment we might have. And only because we
6 found that buried in the footnote felt like we had
7 to say something.
8 Thank you, Your Honor.
9 THE COURT: Okay.
10 Mr. Singerman?
11 MR. SINGERMAN: May it please the Court, Your
12 Honor. Paul Singerman for the committee.
13 Your Honor, I think that you've been apprised
14 at prior hearings in this case that the Troutman
15 Sanders firm is not in a position to be adverse to
16 Bank of America on any matter in the case, and by
17 agreement with the debtor and the debtor's special
18 counsel, the committee is carrying the laboring
19 order of responding to Bank of America's positions,
20 as just articulated by its counsel.
21 And later in the hearing, too, I'll be
22 responding on behalf of the estate to the objection
23 that Bank of America filed to the debtor's proposed
24 DIP financing.
25 On behalf of the committee and speaking for

1 the estate, we again oppose the reservation of
2 rights that Mr. Zaron has sought on behalf of his
3 client. We understand why he's doing it, but the
4 fact remains that this objection has been
5 interposed several times before, and Your Honor in
6 each instance has overruled the objection or any
7 requirement that the order approving cash
8 collateral, including now this final order that's
9 proposed, confirm or provide for the reservation of
10 rights that Bank of America has sought.
11 So I can, Your Honor, ask that you rule again
12 today in respect of the final order on cash
13 collateral as you have before. Bank of America has
14 objected before. Bank of America has filed notices
15 of appeal. There's nothing that has been filed of
16 record that indicates that Your Honor's prior
17 orders have been stayed, and we'd ask that that
18 objection to the extent it was or request for a
19 reservation of rights be overruled.
20 And, with Your Honor's permission, I will
21 reserve a more lengthy argument to the specific
22 objection that Bank of America filed in writing
23 regarding the debtor's proposed DIP financing.
24 Thank you, Your Honor.
25 THE COURT: Mr. Zaron?

1 MR. ZARON: Your Honor, just one point of
2 clarification. We have not actually appealed any
3 of the cash collateral orders. We've appealed
4 other orders, but not that one.
5 THE COURT: Thanks, I feel better now.
6 (General laughter.)
7 THE COURT: Mr. Blain, anything from you?
8 MR. BLAIN: No, Your Honor. I believe that
9 covers it on that matter.
10 THE COURT: All right. The Court will
11 overrule that objection. How about your response
12 to the other matter, the footnote?
13 MR. BLAIN: Your Honor, may I have just a
14 second?
15 THE COURT: Yes.
16 MR. WEITNAUER: I think we're just preserving
17 our rights, and it would take some extra order for
18 them to come take that money unless it's a borrower
19 payment.
20 MR. BLAIN: Your Honor, I think that's
21 correct. I think the point is, if I understood Mr.
22 Weitnauer correctly, he was seeking to prevent the
23 footnote from giving some right that's not already
24 there. And that footnote is not intended to
25 change rights or positions but to give information.

1 THE COURT: With that understanding, the Court
2 will grant the motion for use of cash collateral in
3 a final form, look to you for the appropriate
4 order, and this matter is concluded.
5 MR. BLAIN: Thank you, Your Honor.
6 THE COURT: Next item?
7 MR. PETERSON: Good morning, Your Honor.
8 Edward Peterson on behalf of the debtor. Your
9 Honor --
10 THE COURT: Before you start, Mr. Peterson,
11 we're getting to the meat of it now? The settled
12 stuff's over, or is this a resolved matter?
13 MR. PETERSON: It's slightly resolved.
14 THE COURT: Let me do my housekeeping.
15 Items that have been continued on the calendar
16 to specific dates that were announced on the record
17 are continued by announcement made in open court.
18 There will be no further notice given.
19 I just wanted to put that on the record.
20 That's it.
21 MR. PETERSON: Thank you, Your Honor.
22 THE COURT: If you want to send notices, you
23 can, but the Court is not going to be renoticing
24 those items.
25 MR. PETERSON: Your Honor, the next item I'd

1 like to take up is number 12 on the docket, and
2 this is a motion to compel assumption or rejection
3 that has been on the calendar for a few weeks now
4 filed by Nationwide Title Clearing.
5 The debtor had a contract with Nationwide with
6 respect to the filing of lien releases on loans
7 that have been paid off. The debtor has agreed
8 that we will file a motion to reject this agreement
9 in exercise of our business judgment. We can file
10 the motion by tomorrow and maybe get it set for
11 next Friday, if that's okay with Your Honor.
12 This is something that has some urgency
13 because we want to make sure that these amounts get
14 paid. Some of the investors have agreed to pay the
15 amounts to get the lien releases recorded. They've
16 asked us to reject the agreement, and, based on our
17 analysis, it looks like it would make sense for the
18 estate to reject it.
19 Most of the investors at this point have
20 agreed to pay the amounts. They do face some
21 liability if the lien releases are not recorded, so
22 it's in their interest to do so as well. And so
23 we'd like to get a motion filed by tomorrow and,
24 with Your Honor's permission, have it set on
25 Friday.

1 MS. LIM: Your Honor, this is Angelina Lim
2 appearing telephonically on behalf of Nationwide
3 Title, Your Honor.
4 THE COURT: Yes.
5 MS. LIM: There is some urgency in this
6 motion, and while I appreciate that the debtor
7 would like to follow niceties and file the motion
8 to reject it, and, Your Honor, my motion also does
9 request that the debtor reject or assume our
10 contract, and I really -- for the sake of
11 shortening the period of time, I'm not certain that
12 Your Honor would require a motion in light of my
13 filing, Your Honor.
14 So my client's preference, because we want to
15 get the ball rolling, we have multiple calls from
16 actual borrowers who have inquired about these lien
17 releases and were a little concerned about the
18 liability, we would, Your Honor, prefer that an
19 order just be entered on our motion granting the
20 rejection of our contract.
21 MR. PETERSON: Your Honor, the debtor's fine
22 with that. Normally you've got to file a motion to
23 reject and get it approved, but if Your Honor would
24 allow us to -- it was in Ms. Lim's prayer for
25 relief.

1 My understanding from Mr. Singerman is the
2 committee would be fine with an order authorizing
3 the rejection without the need to file a motion. I
4 think most of the parties who would be interested
5 in this matter are here -- counsel for Freddie Mac
6 is here -- and it may cut down on expenses if we
7 could go ahead and get an order authorizing the
8 rejection.
9 THE COURT: Is there anybody opposed to the
10 Court granting the motion based on the debtor's
11 consent to that portion of the motion allowing me
12 to reject the agreement?
13 (No response.)
14 THE COURT: There being no objection, the
15 Court will grant their motion to the extent that it
16 allows a rejection forthwith.
17 And, Ms. Lim, you will be preparing that order
18 and sending it in?
19 MS. LIM: Yes, Your Honor, I'll send it today.
20 THE COURT: Make sure everybody sees it before
21 it comes to me, or they approve the form, the
22 committee and the debtor for sure and the U.S.
23 Trustee.
24 MS. LIM: Yes, Your Honor.
25 THE COURT: Thank you very much. This portion

1 of the hearing is concluded.
2 MR. PETERSON: Thank you, Your Honor.
3 Your Honor, the next item I'd like to take up
4 is number 7 on the docket, which is a motion to
5 lift stay filed by Mr. Scott Wynn who is here in
6 the courtroom. I'll let him argue his motion. It
7 requests to lift the automatic stay to allow a
8 state court proceeding to go forward.
9 The state court proceeding requests a
10 declaratory judgment that the debtor agreed to a
11 modification of Mr. Wynn's loan as a result of
12 cashing a check, and also requests the return of
13 the amount of the check that was negotiated, which
14 was $24,000.
15 We filed a response where we go through the
16 factors the courts normally consider in determining
17 whether to lift the automatic stay for cause. We
18 had somewhat of a similar issue before the Court
19 about three weeks ago where we had another movant
20 requesting to lift the automatic stay for cause to
21 allow a state court proceeding to go forward.
22 The movant doesn't address those factors in
23 his papers. We tried in our response to go through
24 each of the factors, and as we set forth in our
25 response, we think that the balancing of the

1 factors at this point weighs against the lifting of
2 the automatic stay.
3 And I'll let Mr. Wynn speak as well.
4 THE COURT: Good morning, sir. State your
5 full name, please.
6 MR. WYNN: Your Honor, my name is Scott Wynn,
7 and I'm here pro se.
8 I am not a creditor, I am a mortgagor. Taylor
9 Bean holds my mortgage. I am current in the
10 mortgage.
11 There were a couple of lump-sum payments to
12 Taylor Bean made contingent upon a change of
13 interest rate, the second one being directly
14 through their counsel.
15 In their response, they list that they're
16 concerned about -- and I've already filed a
17 declaratory judgment action. We were set for
18 mediation in state court. Days before the
19 mediation, this petition was filed.
20 So I'm asking to go back to state court. If
21 there's a concern about my request for return of
22 any monies, I would waive that. I would stipulate
23 that I'm not entitled to any monies returned. We
24 just need to find out where we're at, how much is
25 owed.

1 It's very possible we could reach an agreement
2 to pay it off, but we don't know how much it is
3 right now.
4 So I'd ask that the stay be lifted so we can
5 go back to state court and litigate this and go to
6 mediation and hopefully resolve it. I'm very
7 confident it can be resolved at mediation.
8 THE COURT: And the issue in state court is
9 just the balance on the mortgage?
10 MR. WYNN: Yes, sir, and whether or not I'm
11 entitled to a modification of the mortgage. But I
12 think that would be the most expedient and most
13 cost-effective means of disposing of this matter.
14 THE COURT: Are you a lawyer?
15 MR. WYNN: Yes, sir, but I'm not a bankruptcy
16 attorney.
17 THE COURT: That's fine. You articulate very
18 well. That was good. Okay.
19 Mr. Peterson?
20 MR. PETERSON: Your Honor, as we set forth in
21 our response, this is something the debtor would
22 have to pay the cost to defend. There's no
23 insurance coverage here.
24 At this stage in the case, we think it's
25 premature to lift the automatic stay to require us

1 to litigate in another forum. We think it would be
2 somewhat of a distraction for the debtor's CRO and
3 its financial advisors.
4 Mr. Wynn can obviously file a Proof of Claim
5 in this case, but we would ask that you keep the
6 automatic stay in place at this time.
7 THE COURT: How can he file a Proof of Claim?
8 He's not owed any money.
9 MR. PETERSON: Well, in his complaint he's
10 asking for return of the $24,000.
11 THE COURT: He waived that.
12 MR. PETERSON: If he's waiving that and he's
13 telling the Court he doesn't have a claim, then
14 obviously he wouldn't be in a position to file a
15 Proof of Claim.
16 THE COURT: And he'll just stay in limbo until
17 y'all are ready to go down and talk to him?
18 MR. PETERSON: Well, Your Honor, I told Mr.
19 Wynn I'll be glad to talk to him now to try to
20 resolve it.
21 THE COURT: Who is handling that litigation?
22 MR. PETERSON: There's a lawyer in Ocala, Mr.
23 Akerman, who is representing the debtor in that
24 litigation.
25 The complaint was just filed in April. There

1 subsequently have been two amended complaints that
2 were filed. At this point discovery has not been
3 completed.
4 Basically the argument is that, because he
5 sent in a $24,000 check and the debtor negotiated
6 it, that somehow the debtor agreed to a
7 modification.
8 We'll be glad to continue to talk to Mr. Wynn
9 to try to resolve it and get him in touch with the
10 appropriate servicer of this loan. And I spoke
11 with Mr. Wynn about that prior to the hearing.
12 I'm not looking to hold him up indefinitely.
13 I just think at this point it's premature to have
14 us litigating in another forum. We'll be glad to
15 continue to talk to him, and I told him I would,
16 and see if we can try to get it resolved.
17 THE COURT: Okay, thank you.
18 MR. PETERSON: Thank you, Your Honor.
19 THE COURT: Mr. Wynn, we've got a lot going on
20 here right now trying to reconcile all these
21 mortgages, trying to sell off a bunch of REO
22 assets, trying to get a loan and get all this done
23 very quickly so that debtors can get credit for
24 their mortgages.
25 On the other hand, you're just as important as

1 anybody else as far as you're concerned.
2 MR. WYNN: I'm just trying to give them money,
3 Your Honor.
4 THE COURT: I understand. I think the
5 appropriate thing to do is I'll grant your motion
6 for relief from the stay, but it won't be effective
7 until January 15, 2010. So hopefully by then we'll
8 be through all these other hurdles, and then they
9 can address your situation and there will be
10 somebody there that can do it.
11 MR. WYNN: And I'll try to work it out with
12 Mr. Peterson.
13 THE COURT: In the meantime, y'all can talk
14 about it. Prepare an order, pass it by each other
15 and submit it.
16 MR. PETERSON: Thank you, Your Honor.
17 THE COURT: Thank you very much. This matter
18 is concluded.
19 MR. KELLEY: Good morning, Your Honor.
20 THE COURT: Good morning.
21 MR. KELLEY: My name is Jeff Kelley. I
22 practice with Troutman Sanders in Atlanta, along
23 with Mr. Dantzler, one of the special counsel
24 lawyers that's been laboring on this case.
25 I'm here to present the motion seeking

1 approval of bid procedures aiming toward the sell
2 of the REO collateral.
3 THE COURT: Item number 13 on the calendar?
4 MR. KELLEY: Yes, Your Honor. Prior to the
5 hearing I handed to Mr. Headdick (sic) a hearing
6 notebook. This actually relates to two matters on
7 the calendar. It relates to both the REO bulk sale
8 bid procedures matter which I'm prepared to address
9 at this point, and the second part relates to the
10 DIP loan motion, which is another item on the
11 calendar.
12 The matters in this notebook, there is a Table
13 of Contents, which I passed around the courtroom.
14 The matters in this notebook are all matters of
15 record filed in the court, they're just organized
16 in this notebook for ease of reference by tab
17 numbers in case the Court wishes to refer to them
18 during the presentation.
19 Your Honor, the motion seeks approval of an
20 auction process whereby the debtor seeks to conduct
21 a bulk sale of approximately 1,969 widely
22 disbursed, foreclosed residential properties
23 located throughout the United States.
24 The debtor holds title to these properties,
25 referred sometimes as real estate owned or REO, as

1 a byproduct of its extensive prepetition mortgaging
2 servicing business.
3 Your Honor, there's only been one objection
4 filed, and I'm happy to report I don't believe it's
5 going to be opposed. That's an objection filed by
6 Centurion, which was one of the entities with whom
7 the debtor negotiated toward becoming a stalking
8 horse builder, but is not the stalking horse
9 bidder. Centurion is also the entity that, if the
10 Court has had a chance to review, filed what is on
11 the docket as number 8 today, docket number 427, if
12 I can read my notes. It's a motion to compel the
13 debtor to assume or reject a prepetition contract
14 to sell this REO.
15 We have also filed -- it's number 9 on for
16 today -- a motion to reject that prepetition
17 contract. That's docket number 532.
18 I'm happy to report -- I've discussed this
19 yesterday and today with Mr. Pulignano, who
20 represents Centurion -- he's here in court -- I
21 don't believe that any of the debtor's motions are
22 going to be opposed. The motion to reject is not
23 going to be opposed.
24 Mr. Pulignano did want me to state to the
25 Court and I will state to the Court that what

1 Centurion wants is to be treated fairly in the sale
2 process. And I can assure Centurion and the Court
3 that Centurion and all other prospective bidders
4 will be treated fairly in the process.
5 THE COURT: I've got a question early on.
6 They were going to buy it for $580-something
7 million and your stalking horse is $133 million.
8 That's a big difference.
9 MR. KELLEY: Yes, Your Honor.
10 THE COURT: You just want to give people
11 opportunity to bid? You don't want to chill
12 anybody out. I mean, what's the purpose? Or are
13 we talking apples and oranges?
14 MR. KELLEY: Apples and oranges, Your Honor.
15 The prepetition contract included the huge Wells
16 portfolio, which has been removed from the estate
17 by virtue of the stipulation we've entered into
18 with Wells. That's approximately half of it right
19 there that's gone.
20 The debtor didn't have the ability to sell
21 that half of the REO without Wells's consent, and
22 Wells would not consent, and that matter's been
23 resolved, so that accounts for a large part of that
24 number.
25 Plus, Your Honor, when we began negotiating,

1 we did go to Centurion first when we started this
2 process early September, because we were presented
3 with this prepetition contract that none of the
4 professionals, by the way, knew had been executed,
5 but we were presented with this prepetition
6 contract.
7 We dutifully went to Centurion and attempted
8 to reach an agreement for them to be the stalking
9 horse bidder. It quickly became apparent that that
10 pricing structure in that contract was not going to
11 hold up, that that was not going to be something
12 that was going to come to fruition.
13 So we then went through the process, and we've
14 arrived at Selene as the stalking horse bidder.
15 The bid price is not really $133 million, Your
16 Honor. That's a threshold number below which the
17 breakup fee goes away. There's a formula that I'll
18 describe to the Court in a moment that sets the bid
19 price and depends on valuations, very expensive
20 valuations to be done during the due-diligence
21 period going forward.
22 THE COURT: Very well.
23 Mr. Pulignano wanted to make a statement.
24 MR. PULIGNANO: Thank you, Your Honor. Good
25 morning. I represent Centurion Asset Partners.

1 I assume the Court has had an opportunity to
2 read the objection we filed. I do not have
3 authority to withdraw that objection and I'd like
4 the Court to rule on it. My client does not want
5 to delay the sale, however. We recognize the
6 debtor has the right to reject this contract, and
7 that's what they sound like they want to do.
8 That's fine.
9 But I did want to bring to the Court's
10 attention the process that happened that my client
11 feels was extremely unfair, and we're concerned
12 that it's going to be unfair going forward.
13 And so we've got an assurance that that won't
14 happen, but my client -- the president of my client
15 is a woman who operates her business out of her
16 home, and sometimes you get her on the phone and
17 she's got a baby or a child screaming in the
18 background.
19 But she's a sophisticated lady. She had the
20 funding. She's prepared. It is apples and apples
21 in terms of the ability to perform.
22 So we're not going to argue the objection any
23 further than that, but my client was not treated
24 fairly. In fact, if you look at Schedule G, we're
25 not even listed as a holder of an executory

1 contract.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. KELLEY: Your Honor, I don't know how much
5 you want to hear on that point. The debtor
6 obviously disagrees. I think part of the problem
7 here is what Mr. Pulignano said, the debtor felt it
8 necessary to present a very credible stalking horse
9 bidder to the Court, and we did develop some
10 problems with whether Centurion would be the right
11 horse to ride, to use that pun, as the stalking
12 horse bidder.

13 The debtor in its business judgment decided to
14 go with somebody else. I think you heard Mr.
15 Pulignano say that he's not going to argue it any
16 further.

17 Centurion will be treated fairly in the
18 process. They have already been granted access to
19 the virtual data room, which I'm going to talk
20 about in a minute. They're already part of the
21 process.

22 THE COURT: Continue.

23 MR. KELLEY: Your Honor, the REO in question
24 is a depreciating asset. The houses are
25 unoccupied, generally without utilities, subject to

1 ongoing deterioration from weather, vandalism,
2 typical things you might expect from foreclosed
3 houses located throughout the United States.
4 We're heading into winter, when the greatest
5 likelihood of damage occurs. Real estate prices
6 are certainly not predicted to rebound across the
7 United States in the next 18 months, and may
8 deteriorate further in the Southeast and the
9 Midwest where many of these houses are located.
10 It's a significant burden on the debtor's
11 cash, Your Honor, to provide taxes, insurance and
12 maintenance for this REO. In addition, we are
13 seeing a lot of building code violations coming in
14 from municipalities, who are starting to be more
15 aggressive.
16 In short, the debtor believes it's clearly in
17 the best interest of this estate, creditors and
18 other interested parties to sell these assets and
19 get them -- turn the assets into cash, if you will,
20 as quickly as practical.
21 At today's hearing we're asking Your Honor to
22 do four things:
23 Number one, approve Selene RMOF REO
24 Acquisition II LLC, which I'll refer to as Selene,
25 as the proposed stalking horse bidder -- they're

1 represented by Mr. Shuker, who is sitting over to
2 my left -- approve them as the bidder on the terms
3 set forth in the debtor's agreement with Selene, a
4 copy of which was attached to the motion filed more
5 than two weeks ago, and it's in the hearing
6 notebook as tab number 1.
7 The second thing, Your Honor, is we're asking
8 you to approve the bid procedures set forth in the
9 motion and a proposed order, including the
10 specified bid protections for Selene. There will
11 be a few tweaks to that proposed order, which I'll
12 get to in a moment.
13 The third thing we're asking Your Honor to do
14 is to approve the form of the sale notice attached
15 to the motion. That's also in the book at tab 4.
16 And, finally, we're asking Your Honor to set
17 the hearing date of December 15th for the sale,
18 approving the sale to whoever the highest and best
19 bidder is at the action, and setting an objection
20 deadline of December 11th for any objections to
21 that sale, with the sale of the REO to be free and
22 clear of liens, claims and interest, with liens,
23 claims and interest to attach to the proceeds,
24 normal 363 sale process.
25 The proposed order, which I said will need to

1 be modified, is the one we filed with the Court and
2 is in the book at tab 5.
3 This, of course, is turning out to be a
4 Chapter 11 liquidation case, and this proposed sale
5 is a significant step along the way to that
6 liquidation. Through the sale the debtor hopes to
7 generate well in excess of $100 million, hopefully
8 $200 million for the estate, in excess of $200
9 million.
10 We've kept counsel for the committee in the
11 loop throughout this process. In fact, committee
12 counsel has made many constructive comments which
13 led to some of the tweaks in the proposed order,
14 which I'll get to in a moment.
15 In support of the motion, I'm going to offer
16 the following proffer of testimony of Mr. Neil
17 Luria, who is the CRO of the debtor, Your Honor.
18 Mr. Luria is present in court today with me.
19 As to the ownership of the REO, the REO
20 management system at the company, Your Honor, which
21 was and is used for administering the REO
22 properties, paying the bills -- I've mentioned the
23 taxes and insurance, maintenance and so forth --
24 that system reflects that TBW owns these 1,969
25 properties.

1 In the final analysis, there's going to be due
2 diligence. The debtor recognizes it can't sell
3 what it doesn't own, and should it turn out there's
4 a handful of these that the title comes back bad on
5 them, or more than a handful, whatever it turns
6 out, we obviously can't sell it.
7 The debtor reasonably believes and knows from
8 the system that it owns this collateral. The REO,
9 I should say.
10 Your Honor, beginning very shortly after the
11 petition date, the debtor, through the CRO and his
12 supporting staff at Navigant, initiated a rigorous
13 process to identify a potential stalking horse
14 bidder for the REO assets and to reach a definitive
15 agreement with that bidder.
16 In identifying the entity to provide the
17 stalking horse bid, the debtor contacted over 25
18 active investors in REO properties. The debtor
19 received term sheets from 10 different entities for
20 the bulk purchase of the REO portfolio and held
21 extensive discussions with multiple parties,
22 including Mr. Pulignano's client.
23 The debtor narrowed that down to just a couple
24 of what seemed to be the most credible,
25 sophisticated, solid offers, negotiated heavily

1 with those two, and ultimately settled on Selene as
2 the one to negotiate the definitive contract.
3 So the debtor in its business judgment
4 selected Selene as a result of this rather large,
5 rigorous process.
6 During the various discussions with all these
7 entities, Your Honor, it quickly became apparent
8 that it would be necessary for the debtor to offer
9 and seek Court approval of bid protections for the
10 entity that was ultimately selected.
11 Bid protections are necessary in this
12 situation because of the significant expense, time
13 and effort that's going to be involved in assessing
14 the condition, value, title issues and so forth
15 with respect to so many widely disbursed properties
16 throughout the United States.
17 In short, whichever entity was ultimately
18 willing to put its name on the dotted line is
19 committing itself up front to substantial time and
20 expense, and would require that it be compensated
21 for its costs and time that we're going to need for
22 other opportunities to put into this massive
23 effort.
24 The factors, Your Honor, that the debtor took
25 into account in selecting the proposed stalking

1 horse bidder included, number one, evaluating the
2 formula that the potential bidder proposed to use
3 at arriving at a firm bid, and, second, the
4 debtor's judgment as to whether the entity would be
5 able to close the transaction.
6 Your Honor, the reason we need a formula is
7 what I referred to earlier, neither the bidders nor
8 the debtor at this point in time have current
9 valuation of the properties, and that's a very
10 expensive process to undertake. So valuation will
11 come during the due-diligence process, and there's
12 a formula for setting the bid and the contract that
13 I'll summarize in a moment.
14 Your Honor, during the debtor's vetting
15 process of potential stalking horse bidders,
16 several of the potential bidders, aware of the
17 debtor's liquidity issues, discussed with the
18 debtor the concept of a pre 363 sale DIP loan
19 secured by some of the REO property in order to
20 alleviate liquidity issues.
21 Six bidders, including Selene, offered DIP
22 loan term sheets on the condition that they be
23 selected as the proposed stalking horse bidder. We
24 did get a couple of proposals from nonbid-related
25 providers of DIP loans, but those were far more

1 costly to the debtor than the ones provided by the
2 bidders. In other words, the bidders provided
3 better terms for this DIP loan.
4 The upshot of those discussions is the DIP
5 loan motion, which is on for hearing later today,
6 the DIP loan motion seeking to approve an affiliate
7 of Selene as the DIP lender.
8 Your Honor, among the factors considered by
9 the debtor in selecting Selene were, first, that
10 Selene provided a pricing mechanism, that is, a
11 formula that I referred to earlier, that provided a
12 very competitive floor valuation for our auction.
13 Second, the bid protection features of
14 Selene's offer were very attractive relative to the
15 other proposals, including Centurion, because,
16 number one, the breakup fee of $1 million, with an
17 expense reimbursement capped at $750,000, is below
18 the other proposals that were made that were above
19 two percent, sometimes approaching three percent.
20 This one is going to be, in all likelihood, below
21 two percent.
22 Importantly, the Selene breakup fee and cost
23 reimbursement goes away entirely, Your Honor, there
24 is none, if its bid falls below the threshold.
25 That's the $133 million number Your Honor referred

1 to. If its bid under this formula falls below that
2 threshold, there will be no bid protection in terms
3 of breakup fee or cost reimbursement payable
4 Selene.
5 Another reason we went with Selene, Your
6 Honor, for the stalking horse position is that
7 Selene was willing to share due-diligence data with
8 other bidders, more open about the process than
9 some of the other prospects.
10 Another factor was, Your Honor, that Selene
11 was willing to allow TBW's input into the selection
12 of the vendors who are going to be doing the
13 valuations that will provide the basis to be
14 plugged into this formula in the contract. And
15 Selene was willing to allow TBW to jointly approve
16 the valuation protocol, the directions, if you
17 will, that are sent out to these valuation vendors.
18 Finally, as I've mentioned -- not finally, but
19 the next point is, as I've mentioned, Selene was
20 willing to provide DIP financing on the most
21 competitive terms in connection with its stalking
22 horse offer.
23 The final factor, Your Honor, is Selene is a
24 very experienced purchaser of residential mortgages
25 and REO, with substantial capital. Their

1 experience, credibility, resources, and the good-
2 faith dealings that we had with them through our
3 negotiations, the debtor feels in its best judgment
4 maximizes the chance for the debtor to complete a
5 competitive sales process as quickly as possible
6 with a good, solid foundation of this floor bid
7 provided by Selene.
8 Your Honor, after several days of intense
9 negotiations -- I can attest to that -- the result
10 was the agreement and the bid protections before
11 the Court, as well as the related DIP motion. It's
12 a condition of the DIP loan that the bid procedures
13 motion be granted. It's, of course, not a
14 condition of the DIP loan that Selene be the
15 successful bidder at the auction. They don't have
16 to win. We still get the loan if they don't win at
17 the auction.
18 The debtor believes that the stalking horse
19 contract with Selene provides the debtor with the
20 best opportunity to realize the maximum value from
21 these assets for the following reasons:
22 The contract, as I'll go through in a minute,
23 provides for a competitive and transparent auction
24 process. All interested parties will be provided
25 access to a virtual data room containing the latest

1 information available that Navigant's going to put
2 into the data room on this portfolio of assets.
3 Your Honor, this data room is already up and
4 running. At last count, there are 38 entities that
5 have either been granted access or been given the
6 nondisclosure agreements that they're required to
7 sign before they're granted access to get a
8 password to get into the data room to start looking
9 at the due-diligence information already there.
10 Those parties include Centurion, as I previously
11 mentioned.
12 So the data room is already up and running.
13 More information will be added to it during the
14 process, as I'll get to in a moment.
15 Another reason we think this process gives us
16 the best way to realize the value is that all
17 bidders are going to be required to conform to the
18 same purchase contract. There's going to be an
19 auction open to qualified bidders. Importantly,
20 this contract will provide the estate and
21 interested buyers with independent current
22 valuations of the REO properties through what are
23 called broker price opinions or BPOs. I'll get to
24 that in a minute.
25 The BPOs are going to include internal and

1 external inspections with pictures of each of these
2 widely disbursed properties. That may sound
3 trivial, but it's a big undertaking, with so many
4 properties disbursed so widely.
5 To avoid any systematic bias in the valuation
6 of the properties, these valuations are divided
7 amongst five separate independent BPO venders.
8 Each BPO when completed is then going to be
9 reviewed by a licensed vendor from another vender,
10 who will have the authority to make any final
11 reconciling adjustments.
12 And, importantly to the estate, the
13 substantial cost of the BPO valuation process will
14 not be funded out of the operating cash flow of the
15 estate.
16 Your Honor, as a high level summary of the
17 contract itself, which is again tab 1 in the
18 notebook, as I've alluded to and will become
19 apparent, many of the terms of the contract,
20 including the pricing terms, are necessitated by
21 the uncertainty of what the parties are going to
22 find during the BPO and due-diligence process.
23 There is to be under the contract a 15-
24 business-day inspection period, due-diligence
25 period, if you will, following the entry of the

1 order approving the bid procedures, if Your Honor
2 enters that order, and bid protections, during
3 which Selene will, among other things and at
4 significant experience, probably in the range of
5 $750,000 to $1 million, go through the valuation,
6 title and other due diligence set forth in the
7 agreement.
8 This process must be completed in order to set
9 the aggregate purchase price -- that's a defined
10 term under the agreement -- for the properties
11 which will be the floor against which other bidders
12 make a bid.
13 The procedure for determining and setting the
14 purchase price may be summarized as follows. It's
15 obviously the subject of many pages in the
16 agreement.
17 The value for each of the approximately 1,969
18 properties will be initially derived from these
19 unaffiliated vendor BPOs. BPO is a term of art in
20 the REO business. It's, in my words, a simplistic
21 appraisal for the purpose of valuing REO for sale.
22 BPOs are not more expensive full-blown appraisals.
23 All of these BPOs are then going to be
24 reviewed, reconciled and, if necessary, adjusted
25 by, as I mentioned, a different unaffiliated

1 appraiser mutually agreed upon -- and the parties
2 have agreed upon these vendors -- in order to
3 arrive at what is called in the contract the
4 reconciled BPO value for each of the 1,969
5 properties.
6 The agreement provides that there's an out if
7 we don't agree, but, as I mentioned, Selene and the
8 debtor have already agreed upon the BPO venders and
9 the reviewing vendors to use, so that's not an
10 impediment, just going forward. It's my
11 understanding that Selene -- Mr. Shuker's here and
12 the Selene business representative is also here
13 today. It's my understanding they're ready to
14 start tomorrow, pulling the switch and getting
15 these BPO venders disbursed throughout the country
16 and getting this valuation process and due-
17 diligence process started.
18 The BPOs and reconciled BPO values are going
19 to be delivered simultaneously to Selene and the
20 debtor as each is completed. Selene has agreed to
21 make a reasonable effort to have all the reconciled
22 BPO values completed to themselves and the debtor
23 by the end of the inspection period, which I
24 mentioned is 15 business days.
25 Your Honor, this is one of the tweaks I

1 mentioned. The agreement and the bid procedures
2 order as filed provided for a potential delay
3 before the reconciled BPO values will be placed in
4 the data room. But as a result of feedback from a
5 couple of the other bidders, one of whom is
6 represented by Mr. Emanuel, and feedback from the
7 creditors committee, the bid procedures order will
8 be revised to reflect that the debtor will place
9 these reconciled BPO values into the data room as
10 soon as practical on a rolling basis as they are
11 received. As I mentioned, Selene is
12 responsible for all the significant fees and
13 expenses related to the BPOs and the reconciled BPO
14 values subject to its cost reimbursement rights if
15 they are due under the bid protections order.
16 Now, in order to set the amount -- I'll dwell
17 a little bit on that just to try to explain that;
18 it's a complicated provision in the contract -- in
19 order to set the amount of the Selene bid, the
20 debtor and Selene first agreed on a benchmark
21 valuation for the REO portfolio. This benchmark
22 was derived by taking the original appraised value
23 of each loan back when the loan was made, before it
24 became REO, and adjusting that original value for
25 changes according to a widely used index, which is

1 the Case-Shiller index for property.
2 This analysis, this Case-Shiller application
3 to the original appraised value, produced a total
4 appraised value for all of the 1,969 REO
5 properties, adjusted for these declines and
6 according to this index, of about $331 million.
7 The benchmark values for each of the 1,969
8 properties are itemized on Exhibit A to the
9 agreement. That's tab 2 in the book. On Page 50
10 of tab 2, you would see the total benchmark figure
11 of this $331 million number.
12 Now, Exhibit E to the contract is really the
13 heart of how one sets the price. That's tab 3 in
14 the notebook. That shows, Your Honor -- I'll wait
15 until you turn to that. It's Exhibit E, the chart
16 for aggregate purchase price formula.
17 THE COURT: I've got it.
18 MR. KELLEY: That shows that Selene has agreed
19 to bid 63 percent of the aggregate value of the
20 reconciled BPOs subject to the following:
21 As the aggregate BPO value declines, or in the
22 trade as I've learned, as it fades away from the
23 $331 million benchmark number -- in other words,
24 these BPO venders are going to go out there and see
25 what's really going on in these properties, and

1 that process is going to happen -- as the
2 reconciled BPO value fades away from this benchmark
3 $331 million number, the percentage that Selene is
4 willing to bid declines from 63 percent and
5 traunches down to 53 and a half percent, depending
6 on the amount of the fade.
7 The reason for that, Your Honor, is that there
8 are fixed costs with regard to REO, no matter what
9 the value is, and it becomes less valuable to the
10 bidder, if you will. The lesser the value becomes
11 less value because the fixed costs don't decline
12 even though the values decline.
13 So if the aggregate -- according to this
14 chart, Your Honor, as you'll see, if the aggregate
15 BPO value is more than 30 percent, has faded more
16 than 30 percent off the $331 million benchmark,
17 that's the point where elsewhere in the agreement
18 Selene will not receive reimbursement of its costs
19 and will not be eligible for the $1 million breakup
20 fee that's provided elsewhere in the contract.
21 The contract provides that Selene can exclude
22 any uninhabitable property from calculation.
23 There's a definition of what that means, but it's
24 essentially uninhabitable property. We're likely
25 to find some when this process is done that have

1 been pretty badly beat up. This REO portfolio is
2 probably not in the greatest of shape, Your Honor,
3 as you might imagine.
4 If properties with more than a total adjusted
5 appraised value of over $70 million are excluded
6 because they're deemed uninhabitable, Exhibit E no
7 longer applies. That's no longer governing the
8 price. At that point, Selene can provide a
9 purchase price for each property, which the debtor
10 may accept or reject. If the debtor accepts, that
11 would then be the floor against which other bidders
12 must bid.
13 All of this, adjustments and data, Your Honor,
14 is going to be put into the virtual data room so
15 the potential bidders are going to have
16 transparency to see the adjustments that are going
17 on.
18 Selene and the debtor agree in the contract to
19 enter into an amendment to update the property
20 schedule. The property schedule includes the final
21 price that Selene is going to pay for all the
22 properties, and that amendment will also be placed
23 into the virtual data room.
24 Now, with respect to the issue of ownership
25 and title searches, the contract provides that on

1 or prior to the beginning of the inspection period
2 -- which we hope is tomorrow if Your Honor will
3 grant the motion and get the order entered --
4 Selene must order title reports on each property.
5 The cost to Selene of doing this will be reimbursed
6 to Selene if it receives the cost reimbursement
7 under the requested bid protections. Like the
8 reconciled BPOs, Your Honor, and contrary to what
9 the agreement says, the agreement had a provision
10 that might have had a potential delay that was
11 unintended, but another tweak will be that, as the
12 title reports come in, they're going to be placed
13 in the virtual data room for all interested parties
14 to see, including, Your Honor, not only potential
15 bidders but the FDIC, Freddie Mac, B of A,
16 interested parties to see what the title reports
17 look like that are coming back on each of these
18 properties. That's going to be put in the data
19 room.
20 I've been to it. You get a password. It's
21 like a website, and you can click and look at
22 whatever documents you want to look at.
23 If a title report comes back on a particular
24 property reflecting a noncommitted exception, such
25 as a recorded mortgage, or TBW doesn't own it, then

1 TBW must either cure the objection or the contract
2 provides that the property is going to be withdrawn
3 from the sale. We're not going to try to sell what
4 we don't own, Your Honor.
5 Selene is responsible for any broker fees
6 under this contract.
7 As to a deposit, within one business day after
8 debtor's approval of the property schedule, which
9 will contain again Selene's bid, Selene is required
10 to deposit 10 percent of the aggregate purchase
11 price into escrow, subject to adjustments. And
12 I've discussed with counsel for the committee and
13 counsel for Wells Fargo the fact that, yes, this
14 account will be subject to Section 345 protections,
15 this account and all accounts from other bidders
16 who also are required to put up 10-percent
17 deposits.
18 Under defined circumstances, this deposit can
19 be forfeited. An important provision of the
20 agreement for the debtor, Your Honor, is that if
21 the contract is terminated under circumstances
22 where Selene is entitled to have the deposit
23 returned, it's not entitled to that deposit until
24 the debtor has received the BPOs and the title
25 reports, which will be valuable to the estate to

1 have that information.
2 As to termination of the contract, among other
3 reasons, either party can terminate if an order
4 approving the sale of the property has not been
5 entered by the 60th day following the end of the
6 inspection period. If all goes according to
7 schedule, Your Honor, that outside day would be
8 about January 20th of 2010. It should give us
9 time, if things go according to schedule.
10 Obviously another reason for either party to
11 terminate is if somebody else is a successful
12 bidder.
13 And another reason I'll mention is, if that
14 condition that I mentioned previously occurs, where
15 the value has faded so far away that Exhibit E no
16 longer applies and the parties are unable to reach
17 agreement on the alternative bid, then either party
18 can terminate the contract.
19 Selene can terminate the contract, among other
20 reasons, at any time prior to the end of the
21 inspection period, the due-diligence process, if it
22 doesn't like what it's seeing out there, if it's so
23 bad.
24 The debtor may terminate, among other reasons,
25 if Selene fails to deliver a completed property

1 schedule with its price within five days after the
2 end of the inspection period.
3 What I'd like to do now is just summarize
4 briefly how the breakup fee and cost reimbursement
5 structure works. I've already alluded to this, but
6 I want to do it in a little bit more detail.
7 If Selene's bid developed into that formula is
8 above a certain threshold and Selene is not the
9 successful bidder, it will be entitled to a breakup
10 fee of $1 million and cost reimbursement capped at
11 $750,000. That's cost related to its due
12 diligence.
13 If Selene's bid falls below that threshold, as
14 I've said a couple of times already, there's no
15 breakup fee, no cost reimbursement. The threshold
16 is that $133 million number that Your Honor
17 mentioned earlier. It's shown at the lower right
18 on Exhibit E.
19 The debtor's estimate, Your Honor, is the $1
20 million breakup fee plus the maximum $750,000 cost
21 reimbursement as a combined percentage of the
22 aggregate purchase price, the debtor's judgment is
23 that that likely percentage will not exceed two
24 percent of the bid, which the debtor believes is
25 well within the range of this type of bid

1 protection.
2 As to bid procedures, the debtor asks the
3 Court -- those are set forth, of course, in the
4 proposed order. We're going to tweak it a little
5 bit. All known interested potential purchasers
6 were served with the motion the day after it was
7 filed. It wasn't served the day it was filed
8 because I filed at 11:45 at night, not
9 intentionally but that's just the way it worked
10 out. It was served on several other parties as
11 they surfaced.
12 As I've mentioned, all potential bidders who
13 will sign a confidentiality agreement are given
14 access to this virtual data room to review the due
15 diligence as it's placed, reconciled BPO values,
16 title reports, insurance, aggregate purchase price,
17 et cetera.
18 Selene's bid is going to be and is subject to
19 higher and better offers at an auction to be
20 conducted at our offices at Troutman Sanders in
21 Atlanta at 10:00 a.m. on December 11th. Selene,
22 the committee, the debtor obviously, and other
23 qualified bidders will be allowed to attend the
24 auction and participate.
25 The debtor intends to seek approval of the

1 sale to the highest bidder at a hearing to be
2 conducted on December 15th, I think the
3 preliminarily cleared time on Your Honor's calendar
4 for that.
5 The bid procedures provide in summary that, in
6 order to become a qualified bidder, the party must
7 deliver to debtor's counsel, with a copy to the
8 committee, two days before the auction, among other
9 things:
10 An executed purchase and sale agreement
11 substantially in the form of the Selene contract;
12 a red line against the Selene contract;
13 a deposit in the amount of 10 percent of the
14 bid -- again, the deposit will be held by the
15 debtor under Section 345 protocols;
16 demonstration of ability to close;.
17 a bid in the amount that's at least $750,000
18 more than the sum of Selene's bid plus the breakup
19 fee and maximum cost reimbursement;.
20 and, at the suggestion of the creditors
21 committee yesterday and as cleared by Mr. Shuker
22 this morning, an affidavit regarding disclosure of
23 arrangements with any other potential bidders. We
24 don't want that, but we want disclosure of whether
25 that's gone on by these people who wish to become

1 qualified bidders.
2 At the auction of these qualified bidders --
3 hopefully there will be many of them -- the first
4 bid must exceed the highest aggregate purchase
5 price established by any qualified bid by at least
6 $500,000. Again, this is lower than other bid
7 protections suggested by others, including
8 Centurion, I might add.
9 Each successive must exceed the previous bid
10 by at least $500,000.
11 After conclusion of the auction, the debtor in
12 consultation with the committee will identify the
13 highest or otherwise best offer and will seek
14 approval at the December 15th hearing, with the
15 closing to occur as soon as possible thereafter.
16 Our hope is get it closed before year end,
17 Your Honor.
18 If that bidder fails to close, there's
19 somewhat normal provisions. The next highest
20 bidder has five days to close. Selene has reserved
21 its option to keep -- an option in its contract to
22 keep its bid open as a backup bid.
23 I'm nearing the end of this, Your Honor. I
24 know it's gone on a long time. But by way of
25 continued proffer the testimony that Mr. Luria

1 would give if called as a witness, it's the
2 debtor's business judgment that the breakup fee,
3 cost reimbursement and overbid protections are
4 necessary and are a necessary enhancement of the
5 bidding process that will maximize the value of the
6 REO for the estate.
7 It's also the debtor's business judgment that
8 the bid protections are reasonable, appropriate and
9 attractive in comparison to market standard in
10 light of the size of this transaction and the
11 somewhat complicated nature of the transaction.
12 The bid protections are necessary to assure
13 that Selene will continue to pursue this
14 transaction. Selene is not willing to commit to
15 significant expense, loss of other opportunities
16 and time necessary to pursue this transaction
17 without these bid protections.
18 It's crucial to the debtor's effort to
19 maximize the value that Selene agree to hold open
20 its bid through the auction and thus provide a
21 credible floor bid that others must top.
22 Again, Selene is unwilling to do that without the
23 bid protections under consideration by the Court.
24 The negotiation of the agreement and the bid
25 procedures was conducted at arm's length and in

1 good faith, with many long and spirited negotiating
2 sessions. Selene was well represented in the
3 stalking horse negotiations by the Sonnenchein law
4 firm in New York, and now is represented by Mr.
5 Shuker is well.
6 There was no attempt in this process to give
7 unfair advantage to Selene in the bidding process.
8 The debtor's hope and belief is that the process
9 will generate many higher and better offers.
10 Your Honor, for all these reasons the debtor
11 asks that the Court grant the motion, enter an
12 order substantially in the form of that attached as
13 Exhibit C -- I will revise it slightly today --
14 approve the sale notice -- the sale notice is the
15 forms attached. It will be disseminated and served
16 by the debtor to all known interested parties as
17 specified in the order, and will also be published
18 in the Wall Street Journal and the New York Times.
19 That concludes the debtor's proffer and
20 presentation.
21 THE COURT: Thank you very much.
22 MR. KELLEY: Well, Your Honor, Mr. Singerman
23 reminds me, just as housekeeping, will Your Honor
24 accept my proffer into evidence?
25 THE COURT: There being no objection, it's

1 accepted.

2 Anybody want to say anything before the Court

3 rules?

4 MR. PULIGNANO: Your Honor, Nick Pulignano on

5 behalf of Centurion.

6 The only thing I notice is the objections must

7 be filed by 4:00 p.m. on December 11 on the

8 proposed order four days before the hearing, which

9 is kind of a short time. I would ask the Court to

10 give a few more days to file objections.

11 MR. WEITNAUER: Your Honor, Kit Weitnauer on

12 behalf of Wells Fargo.

13 I may have heard these magic words in Mr.

14 Kelley's presentation. The original escrow

15 agreement did not require the money that was placed

16 with the escrow agent to be kept in accordance with

17 345 of the Bankruptcy Code. We think that would be

18 appropriate and ask that that be changed.

19 MR. SINGERMAN: Your Honor, I was hoping I

20 could go next, and assume that that meant no one

21 wanted to speak in opposition to the relief sought

22 by the debtor.

23 The committee has been meaningfully involved

24 in the process leading up to the relief sought by

25 debtor in the sale and bid procedure motion. The

1 committee unqualifiedly supports the relief sought,
2 and believes that the debtor's business judgment,
3 as evidenced by the proffer of evidence of Mr.
4 Luria, is sound.
5 We support the relief sought and ask Your
6 Honor to enter an order forthwith in order to
7 commence the due-diligence process.
8 MR. EMANUEL: Your Honor, very briefly, John
9 Emanuel of the Fowler White firm on behalf of Arch
10 Bay Capital, which is one of the prospective
11 bidders. We were in the running to be the stalking
12 horse, but didn't quite get there.
13 We had been working with debtor's counsel and
14 committee counsel in regards to the bid procedures
15 and the form of order. I noted with debtor's
16 counsel this morning that the order may have a
17 small internal inconsistency. I think we're going
18 to work on that with them, and a provision that was
19 added yesterday may conflict with the timing period
20 in the middle of the order, but I believe we can
21 work with debtor's counsel to resolve that issue.
22 Thank you, Judge.
23 THE COURT: Thank you.
24 MR. BLAIN: Your Honor, may we have just one
25 minute?

1 THE COURT: Certainly.
2 MR. KELLEY: Your Honor, as to what has been
3 stated so far with Mr. Pulignano, we picked
4 December 11th, because it is a Friday, as the
5 objection cutoff deadline. I understand electronic
6 filings can occur over the weekend. If we wait
7 until the following Monday, then we're getting
8 pretty close to the hearing, and the debtor frankly
9 would like to have ample opportunities to review
10 objections.
11 So we think December 15th under the
12 circumstances -- that's over a month from now -- it
13 will be, granted, only a couple of days after the
14 auction. That's what we've suggested, and this is
15 what we think works. I haven't heard anybody else
16 raise that point.
17 We obviously have no problem with what Mr.
18 Weitnauer said. I think I said during the
19 presentation that Section 345 protections will
20 apply to the deposits.
21 THE COURT: All right. I assume that there is
22 no fee or expense reimbursement to Selene if they
23 ultimately after the bidding end up as the
24 successful bidder. They don't get a credit of $1.7
25 million or anything like that. That's clear.

1 MR. KELLEY: That's correct.
2 THE COURT: Additionally, in my court, when I
3 have a stalking horse and he's getting reimbursed
4 for expenses, he has to furnish every bit of that
5 to any prospective bidder. Whether it's through
6 the virtual room, or they want copies of whatever,
7 of appraisals, surveys, and other type information
8 that he's looking to get reimbursed for, he has a
9 duty, because they're paying for it whether they
10 bid or not.
11 You said it, but I want to make sure it's
12 perfectly clear I expect everything.
13 Mr. Shuker, you understand.
14 MR. SHUKER: Yes.
15 THE COURT: Good.
16 MR. BLAIN: Your Honor, may we have just one
17 minute?
18 THE COURT: Oh, yes.
19 MR. EMANUEL: Your Honor, I don't know if
20 that's exactly true. I think there are some items
21 right now, the way the procedures are set up, that
22 are not shared with all the other bidders that I
23 think the other bidders would like to see.
24 One example off the top of my head, I think as
25 the original broker price opinions come in, those

1 are not disseminated to the other bidders, only the
2 reconciled ones are.
3 There are other examples I'm sure I'm not
4 thinking of right now, but I think there are in
5 fact items of information that the other bidders in
6 fact would be paying for that aren't going to be
7 shared under current procedures.
8 MR. SINGERMAN: May it please the Court, Your
9 Honor. Paul Singerman for the committee.
10 May I respond to that point?
11 THE COURT: Yes.
12 MR. SINGERMAN: Thank you, Your Honor.
13 I'm very surprised to hear Arch Bay make that
14 point, and to the extent it's an objection it ought
15 to be overruled.
16 This point was the subject of extensive
17 discussions between Arch Bay, the committee and the
18 debtor.
19 The rationale for not in realtime providing
20 the broker price opinions was explained to Arch
21 Bay. I thought that we had an express agreement,
22 we were past that. It's not a bidding advantage
23 that is sought to be advanced by Selene.
24 To the contrary, after consultation with
25 Navigant, the CRO and Navigant's staff about the

1 thinking on posting the initial BPOs, the committee
2 was persuaded that there was a prospect of
3 confusion that could lead to later objection.
4 And this has been, as I've indicated, Your
5 Honor, discussed with Arch Bay, and I thought
6 subject of an express agreement. And I don't
7 think, with respect, Your Honor, that it's that
8 type of data that could be ultimately injurious to
9 the process to which the Court referred.
10 Selene is agreeing, after it pays, to make the
11 BPOs and the reconciled BPOs, as described or
12 defined in the motion, available and in the data
13 room, and has in fact agreed to make that data
14 available earlier than the signed asset purchase
15 agreement would otherwise provide.
16 MR. EMANUEL: Judge, Mr. Singerman and I did
17 have discussions on this point. I'm not backing up
18 on a deal or anything else, I was simply responding
19 to a question presented by Your Honor, and the
20 question was: Are all the materials that are in
21 essence going to be paid for by the other bidders
22 going to be provided to the other bidders? I was
23 trying to provide an answer to that.
24 Mr. Singerman is correct with regards to the
25 discussions we had. I was simply responding to

1 Your Honor's question.
2 THE COURT: The stalking horse bid is
3 determined by the ultimate BPOs and the reconciled
4 BPOs. That's their bid. That's what they're
5 bidding on. And they can't bid less than whatever
6 that figure is, no matter what the BPOs were. If
7 they were less and then they were reconciled up,
8 they're stuck with the higher amount per unit.
9 Isn't that correct?
10 MR. KELLEY: That's right. Yes, Your Honor.
11 THE COURT: And if they choose not to bid
12 beyond that, that's based on because they looked at
13 something. Is that a detriment to the other
14 bidders?
15 MR. KELLEY: Well, obviously based on
16 discussion with Arch Bay, our conclusion was, no,
17 it was not, because we discussed this specific
18 point, and the reconciled BPO values is what they
19 want as quickly as possible.
20 THE COURT: What other type information is
21 Selene going to be getting for due diligence?
22 Title surveys, tax appraisals from the various
23 counties? Any of that type of stuff has to be
24 conveyed if they have it, if they spend money on
25 it.

1 MR. KELLEY: It's the type of information
2 that's normally included in a title search, Your
3 Honor.
4 THE COURT: I know what's in a title search.
5 MR. KELLEY: You know better than I do,
6 probably. That's going to be in the data room.
7 THE COURT: Yeah, I probably do.
8 (General laughter.)
9 MR. SHUKER: The information is the reconciled
10 BPOs and then the title reports, and those will
11 both be in the data room and made --
12 THE COURT: And the titles normally reflect
13 county assessments, liens, and all that kind of
14 stuff that's been put on the property. That will
15 all be part of the title work, and that will be
16 furnished to each and every interested bidder; is
17 that right?
18 MR. KELLEY: Yes, Your Honor.
19 THE COURT: And surveys if you have them. I'm
20 not saying new ones, if they spend money on
21 surveys --
22 MR. KELLEY: Yeah, if the survey's included in
23 the title report, obviously it will be there --
24 THE COURT: If the purchaser has surveys done
25 and is looking to get reimbursed, he'll furnish

1 them. He doesn't have to go get stuff that's not
2 part of whatever he wants to do for due diligence,
3 and the other people can spend their own money.
4 I'm not stopping them from that.
5 I just want to make sure that I don't end up
6 here on an objection that they didn't get something
7 and here we go.
8 So I expect everything to be transparent.
9 MR. KELLEY: I do need to mention a couple of
10 things with respect to Freddie, Your Honor.
11 THE COURT: Freddie?
12 MR. KELLEY: Freddie Mac.
13 THE COURT: Oh.
14 MR. KELLEY: I'm sorry for the vernacular.
15 Freddie wants me to make it clear that they will be
16 granted access to the data room. And they will be.
17 And also, as a resolution of the objection
18 that the FDIC filed to the DIP loan motion and that
19 Freddie may have filed to the DIP loan motion,
20 which I'll announce in more detail during the next
21 presentation, we've agreed to give a period of two
22 weeks to Freddie and the FDIC to come to us with
23 specific, I'll use the word objections, to title of
24 any of the properties involved, both in the DIP
25 loan process. And it does have impact in Freddie's

1 mind on the sale process as well.
2 So I did want to announce that there is, as
3 part of the resolution of the objection that the
4 FDIC filed to the DIP loan process, which we'll get
5 to in a moment, there will be some added language
6 in the proposed DIP loan order to reflect a two-
7 week period for Freddie and the FDIC to come to us
8 with concerns or issues about properties, number
9 one, to be included in the DIP loan collateral, and
10 Freddie wants to say also properties to be included
11 in the sale.
12 As I think I said several times, we know we
13 can't sell what we don't own. We think we can work
14 through those issues. But, nevertheless, Freddie
15 and the FDIC both have asked for a little bit more
16 time to discuss with us those issues.
17 MR. KOBERT: Your Honor, if I could. Roy
18 Kobert on behalf of U.S. Bank. We'd like that same
19 courtesy.
20 We did get the reconciliation that Mr. Blain
21 referred to at the beginning of the hearing, and if
22 you look at that interim reconciliation, pointed
23 out to the lenders like myself and the Court,
24 Paragraph 62, the debtor acknowledges rightfully
25 that the REO assets that are subject to the sales

1 procedures today and to the DIP financing, that the
2 debtor still has to do additional research and
3 analysis to confirm that it actually owns what it's
4 selling. We've heard twice counsel from Atlanta
5 say that: We're only going to sell what we own.
6 We want to give that certainty not only to the
7 lenders, but also to the buying community. So we'd
8 like that same two-week opportunity. Now that we
9 know the universe of the 1,969 loans that are REO
10 assets that are being sold and as acknowledged by
11 Paragraph 62 to participate and work with the
12 debtor in that two-week period that they're giving
13 Freddie Mac to get that resolved so we have
14 finality this month before the auction in December.
15 THE COURT: You will have it. The title work
16 says who owns it. That's really --
17 MR. KELLEY: What we resolved, Your Honor, was
18 an objection filed by the FDIC and an objection
19 that was stated that was going to be filed by
20 Freddie Mac, and we frankly would resist trying to
21 open it up to the world.
22 I think Your Honor had stated there's going to
23 be title searches and reports done. We're not
24 going to sell what we don't own. Wells Fargo and
25 Mr. Kobert's client can have access to the data

1 room. They'll know what's going on in a
2 transparent fashion.
3 We reached this two-week arrangement
4 specifically because of an objection that was filed
5 and one that was going to be filed. We didn't hear
6 from these other parties until just now when they
7 heard of this resolution.
8 THE COURT: The debtor in Chapter 11 doesn't
9 warrant anything. You're selling the debtor's
10 interest in these assets, whatever that may be, and
11 that's why you do due diligence on the buyer to
12 make sure they know what they're buying. It's not
13 the debtor's responsibility, it's the buyer's to
14 check those things out, and all you're selling is
15 youre interest. If the interest is nothing, you
16 got nothing. That's a nonissue.
17 MR. KELLEY: Your Honor, the debtor would
18 propose that we move the objection deadline from
19 Friday, the 11th, to the following Monday in order
20 to give parties more time to -- since the
21 auction --
22 THE COURT: I was going to say Saturday at
23 midnight, but Monday, if that's agreeable to the
24 debtor, that's fine with me.
25 MR. KELLEY: How about noon on Monday, Your

1 Honor?

2 THE COURT: Noon on Monday to give people time

3 to digest it. They should be able to object by

4 then if they worked all weekend on it. Okay,

5 sounds good to me.

6 The amendment's announced in open court, the

7 Court will grant the motion and approve the bidding

8 procedures. And any things you've worked out, put

9 it in the order that you submit.

10 Mr. Shuker, y'all get busy. Now that you got

11 some time on your hands, you can get busy.

12 (General laughter.)

13 MR. SHUKER: I'll be here as the one with the

14 checkbook.

15 THE COURT: That concludes that matter.

16 The next item on the agenda is?

17 MR. KELLEY: Well, Your Honor, I believe that

18 we have resolved the two Centurion matters, the

19 Centurion motion to assume --

20 THE COURT: Oh, I'm sorry. For the record, I

21 overrule their objection to the extent applicable.

22 And what was the other item?

23 MR. KELLEY: They filed a motion to compel us

24 to assume or reject their contract, and we filed a

25 motion to reject their contract.

1 THE COURT: And that motion is granted. Their
2 motion to assume is denied.
3 You'll prepare orders on that, Mr. Kelley, or
4 somebody on your team.
5 MR. KELLEY: Thank you, Your Honor. I'll do
6 that.
7 THE COURT: What's the next item for me to
8 decide?
9 MR. KELLEY: The next item, Your Honor, is a
10 motion, which I believe is number 14 on the docket.
11 Again, there are items in the second half of the
12 hearing notebook I gave Your Honor, items of public
13 record that relate to that as well.
14 This is a motion seeking final approval for
15 the debtor to obtain, pursuant to Section 364, from
16 Selene Residential Mortgage Opportunity Fund, LP,
17 an affiliate of the Selene stalking horse bidder, a
18 DIP loan.
19 Unlike perhaps most DIP loan motions that come
20 before Your Honor, the debtor has not waited until
21 it's nearly out of cash before coming before you on
22 an emergency interim basis. Instead, the debtor is
23 acting now, prudently, it believes, in order to
24 avoid the inevitable emergency later caused by a
25 looming liquidity crisis. And in the process of

1 doing that, we're avoiding one of those dreaded
2 requests for an emergency hearing on short notice.
3 This one was filed with the time period with enough
4 advance notice so we're allowed to do, I submit, a
5 final presentation on the DIP loan hearing today.
6 Three objections, I think, were filed to --
7 three limited -- they're all termed limited
8 objections, I believe. One was filed by Sovereign
9 Bank. That's been resolved.
10 One has been filed by the FDIC. That's been
11 resolved in a way that I'll get to in a moment. It
12 involves basically this two-week period for the
13 FDIC to look at the properties that we're offering
14 up into the eligible collateral base pool to make
15 sure they know what we think we're doing with
16 respect to 183 particular properties that they
17 listed on an exhibit to their objection. But the
18 point is that's been resolved, and there will be
19 some language in the proposed DIP loan order that
20 will address that.
21 Likewise, as I mentioned already, Freddie Mac
22 through Mr. Johnson raised a similar concern with
23 us yesterday, so they're included within that
24 two-week period, a two-week deal, if you will.
25 And then we have -- the only unresolved

1 objection is a limited objection filed by Bank of
2 America, which as Mr. Singerman stated, he will
3 address. I'm not in a position to address Bank of
4 America's objection.
5 As I mentioned during the hearing on the bid
6 procedures motion, one of the conditions precedent
7 to the DIP loan is that the bid procedures order
8 shall be entered in a form acceptable to Selene.
9 It appears, Your Honor, that as a result of Your
10 Honor's ruling that will happen.
11 By way of proffer of the testimony of Mr.
12 Luria, if he were called as a witness, the DIP
13 facility in question is to be up to a $25-million
14 loan secured pursuant to 364(c)(2) of the Code.
15 That is by property not otherwise subject to a
16 lien, by a first priority lien, on up to 797 REO
17 properties.
18 The potential REO properties are identified on
19 a schedule to the DIP loan agreement. The DIP loan
20 agreement, I think, is tab 6 in the notebook, and
21 the 797 properties are identified in tab 7 of the
22 notebook.
23 These REO properties that are potential
24 collateral of the DIP are a subset of the 1,969 REO
25 properties that are subject of the overall sale.

1 The DIP lender, Your Honor, is to also be
2 granted a Section 364(c) superpriority claim with
3 respect to the amounts outstanding on the DIP
4 facility.
5 It's anticipated, Your Honor, that borrowing
6 on the DIP loan will be paid in full from the
7 proceeds of the proposed 363 sale. Proceeds of the
8 sale are expected to greatly exceed the maximum
9 amount that could be borrowed under this loan. If
10 the sale process proceeds on schedule and closes by
11 around year end, the borrowing under the DIP loan
12 could be in the range of about $5.7 million. That
13 number can be seen if one looks at the October 28th
14 budget that was just filed last week, and that's
15 actually in the notebook as well. It shows a
16 deficit of around $5.7 million by the end of the
17 year.
18 But if the sale process is delayed, the
19 debtor's projection is that it could need a DIP
20 loan of this size in order to provide the liquidity
21 necessary in the next six months to carry this REO
22 which has not been sold because the process has
23 been delayed, complete the servicing
24 reconciliation, complete the asset reconciliation
25 and otherwise fund the administrative expenses

1 necessary for this case to proceed as an orderly
2 liquidation.
3 Taking the analysis of the debtor's ownership
4 of the 1,969 properties that I mentioned during the
5 hearing on the bid procedures motion, taking that
6 one step further, the CRO and the Navigant support
7 staff working with him have conducted a multistage
8 process to identify REO assets it believes it owns
9 free and clear to be used as this proposed DIP
10 collateral.
11 Navigant began this process with a list, kept
12 in the ordinary course of TBW's business, of all
13 REO assets managed by TBW and believed to be owned
14 by TBW. Then as its initial step, Navigant
15 compared the total list of TBW REO to a daily
16 funding report kept in the ordinary course of TBW's
17 business, a report given on a daily basis to
18 Colonial Bank. These daily funding reports would
19 list all loans in REO outstanding under each of the
20 warehouse lines as of that particular date.
21 The report that Navigant used for this process
22 for comparison was the last one produced by TBW
23 before the world caved in. It's the one dated
24 August 5th, 2009. That's the day that Colonial
25 froze TBW's accounts.

1 In the interest of caution, Navigant removed
2 any REO that was outstanding under any warehouse
3 line due to concerns that the warehouse lender may
4 claim an interest in the collateral.
5 Navigant then tested the TBW REO assets
6 against the list of REO provided by Colonial
7 Bank/FDIC in which Colonial claimed it had an
8 interest, and also removed from the list any
9 properties appearing on the Colonial list. The
10 debtor is not admitting it had to remove those
11 properties, but it just did so to avoid an
12 unnecessary confrontation with the FDIC. And
13 confrontation is too strong of a word. I believe
14 that the FDIC and the debtor have been working as
15 collaboratively as possible on this process.
16 The point is, we didn't have to use that. We
17 believe we have substantial enough properties to
18 collateralize the DIP loan without getting into
19 that issue with the FDIC.
20 The result of that process was, Your Honor,
21 the 797 properties that dropped out and are shown
22 as proposed DIP collateral in the DIP loan
23 agreement.
24 As a second step, Your Honor, Navigant
25 reviewed copies of the deeds that it could find in

1 the TBW system. There's some disarray, as you
2 might imagine, within TBW, but it reviewed copies
3 of deeds and other indicia of ownership, which by
4 that I mean evidence that TBW had purchased or
5 repurchased the loan or the REO from the
6 appropriate party as their evidence of that
7 purchase, the search of those records.
8 This is not intended as a substitute for the
9 DIP lender's title search, which will be done if
10 the loan is approved. The purpose was to identify
11 again potential issues regarding TBW's ownership
12 and title to the collateral.
13 And as part of the proffer, Your Honor, I
14 would like to present to the Court what I've marked
15 as Debtor's Exhibit 1. Copies of this have been
16 disseminated around the courtroom prior to the
17 hearing.
18 THE COURT: Any objection?
19 (No response.)
20 THE COURT: It's admitted as Debtor's 1.
21 (Whereupon, the document previously marked as
22 Debtor's Exhibit 1 for identification was received
23 in evidence.)
24 MR. KELLEY: It's a Federal Rule of Evidence
25 1006 summary prepared by Navigant of voluminous

1 records, the deed records, evidence of the
2 purchase. Basically it shows who the titleholders
3 are based on investigation to date of what
4 Navigant's been able to find. We found 529 deeds
5 right off the bat in Taylor, Bean & Whitaker's
6 name. That doesn't mean that there aren't more,
7 that's just what we were able to find on our
8 system.
9 It shows that as to -- where we haven't found
10 deeds, it's shown who the other titleholders are,
11 but then it demonstrates under the Payment
12 Validated Column that Navigant has been able to
13 validate, for example, 49 of the 50 of the Freddie
14 ones shown on the top as a loan that was purchased
15 or repurchased by Taylor, Bean & Whitaker and we
16 believe the quitclaim process that was part of this
17 dealing with Freddie Mac is in process and needs to
18 be completed.
19 There are 211 properties located at -- noted
20 at the bottom of the first part of the chart.
21 Deeds haven't been located. Records search done.
22 We found 152 under the Freddie column alone where
23 we can demonstrate that we paid for the loans, and
24 you can see the results for the other entities.
25 The actual bottom-line result of what this

1 chart is intended to demonstrate is expressed at
2 the top of the chart. It says that: Based on
3 review to date, TBW -- that's Mr. Luria and the
4 Navigant professionals and his support staff --
5 have identified these or evidence of purchase for
6 all of the REO DIP collateral, all 797, other than
7 33 properties as to which review continues.
8 Your Honor, on each of the properties where a
9 title issue is ultimately identified during this
10 DIP due-diligence process, TBW's choice will be
11 either to rectify the title issue or to remove that
12 particular piece of property from the collateral
13 pool.
14 As another test, TBW, and with a lot of help
15 from the committee -- the committee basically
16 handled Florida and TBW handled other states --
17 conducted online searches of mortgage records.
18 That's not available in every state and it's not a
19 perfect system, but it certainly doesn't cost
20 anything as compared to title searches.
21 And so we did at least 13 states, including
22 Florida, Georgia, Nevada, Arizona, Alabama and
23 North Carolina. Some of those are the biggest
24 states in question in terms of where these DIP loan
25 properties are located.

1 And this online search revealed no recorded
2 mortgages in favor of Colonial on the DIP
3 collateral. We did find some, a handful, less than
4 10, I think, in Florida -- the creditors committee
5 can report with more accuracy on their results in
6 Florida -- a handful of mortgages in favor of
7 Colonial from TBW in the preference period, in
8 other words, less than 90 days prior to the
9 petition date. They don't appear to be on the DIP
10 collateral, though, Your Honor.
11 But, again, that's all going to come out in
12 the wash of the DIP lender's title search. But the
13 reason we did this was to give ourselves assurance
14 that we weren't teeing up 797 properties that have
15 already been mortgaged to somebody else.
16 Part of the FDIC's objection was -- and, Your
17 Honor, we have Article 9 UCCs filed against this,
18 and I'm not going to argue that because we've
19 resolved it, but I think it's basic, the way you
20 get a perfected secured interest on real estate is
21 by filing a recorded mortgage, not by an Article 9
22 UCC filing.
23 Based on as much due diligence as the debtor
24 is able to do without the expensive, full-blown
25 title searches, the debtor concludes that, with a

1 handful of exceptions still under review, it should
2 have title to the proposed DIP collateral.
3 We don't believe we've granted mortgages to
4 anybody on this DIP collateral, and we don't
5 believe it's necessary to offer adequate protection
6 to anybody with respect to this collateral. We
7 think we own it. But, again, the title searches
8 are going to reflect that.
9 As part of this process, Your Honor, and it
10 also relates to the sale, the same data room is
11 going to be used. The results of the DIP lender's
12 title searches on this subset will necessarily be
13 placed into the data room, because it's also
14 included in the sale package, and interested
15 parties such as Freddie, FDIC, Wells, Bank of
16 America will be granted access to the data room to
17 see these title searches as they are placed in the
18 data room.
19 Your Honor, as part of the continuing cash
20 collateral process and the DIP loan process, the
21 debtor developed a 13-week cash-flow forecast. A
22 copy of that was attached as the DIP budget. It's
23 attached to the motion as the DIP budget. That's
24 tab 8 in the notebook. A slightly revised version
25 that Mr. Blain referred to a moment -- earlier --

1 not moment ago; I've been talking a long time --
2 was filed last week as part of the final cash
3 collateral order. A copy of that appears at tab 9
4 of the book.
5 Here's the point. That October 28th budget
6 demonstrates that, in order to maintain a minimum
7 cash availability of $2.5 million -- and that's to
8 make sure that there's available cash on hand to
9 deal with accrued administrative expenses this in
10 case, Your Honor; the debtor believes it's prudent
11 to try to keep a minimum of $2.5 million -- the
12 debtor will need to start borrowing about one month
13 from now, before the sale process is completed
14 under its current schedule, and that assumes that
15 the debtor will be continued to be able to use this
16 otherwise free cash, which apparently we've now
17 been granted the right to do under the cash
18 collateral order that's been entered on a final
19 basis today.
20 In sum, this DIP facility is needed because
21 the debtor's financial analysis and projections
22 make clear that the debtor's current cash on hand,
23 regardless of whether it's cash collateral -- and
24 that's disputed -- together with cash generated
25 from other sales of assets will be insufficient to

1 complete the reconciliation process, assets and
2 servicing, so on and so forth, the admin cost of
3 the orderly liquidation.
4 In terms of alternatives to this DIP loan,
5 Your Honor, a DIP loan such as this -- and this is
6 a continuing part of the proffer -- is the only
7 source of additional liquidity available to the
8 debtor. Not surprisingly, the debtor cannot obtain
9 credit on an unsecured basis. The only source of
10 additional liquidity is via a party such as Selene,
11 which is already familiar with the REO and is
12 willing to make a loan against it prior to the
13 completion of the sale.
14 The debtor could not locate a party, including
15 the proposed DIP lender, who would lend solely on
16 the basis of a superpriority administrative claim.
17 The first lien that is the subject of our motion, a
18 first lien under 364(c)(2), is necessary in order
19 to get this loan.
20 In terms of the process that the debtor went
21 through in selecting Selene, the debtor selected
22 the terms of a DIP loan, such as the one proposed
23 with multiple parties, received written terms
24 sheets from seven different potential lenders or
25 bidders. There were a couple provided by more

1 traditional lenders who were not associated with
2 the bidding process, but they were not competitive.
3 By far and away, the best terms that were offered
4 were from potential bidders in the sale process.
5 Each of those term sheets from the bidders
6 indicated that the DIP facility was contingent on
7 the lender being named the stalking horse bidder on
8 the proposed bulk sale of the property. After a
9 thorough review, vetting and comparative analysis,
10 the debtor in its business judgment concluded that
11 the terms offered by the proposed DIP lender here,
12 the Selene affiliate, as subsequently negotiated
13 further, were the best available.
14 During the extensive and rigorous negotiations
15 with the DIP lender, the debtor was able to get the
16 DIP lender to make several key concessions that
17 include limiting the deliverables required by the
18 debtor to close the loan; limiting representations,
19 warranties and covenants compared to those
20 ultimately proposed by the DIP lender; and granting
21 the debtor more flexibility in the use of the
22 proceeds without onerous budgetary or reporting
23 requirements.
24 The committee has also been able to obtain
25 additional concessions yesterday, and either I or

1 Mr. Singerman will summarize those in a moment.
2 As to the terms, in the debtor's business
3 judgment the terms -- including the interest rate,
4 which is LIBOR plus eight percent, and the
5 three percent or $750,000 closing fee payable by
6 the debtor on the effective date -- are reasonable.
7 It's the debtor's business judgment that the
8 $750,000 closing fee -- and that number is set
9 regardless of how much is ever borrowed; it's
10 three percent of the total amount that could be
11 borrowed, so that's three percent of $25,750,000 --
12 it's the debtor's business judgment that that's a
13 prudent expenditure by the estate in exchange for
14 in effect the insurance that the debtor will
15 receive that it will have the liquidity necessary
16 to bring this case to an orderly conclusion.
17 Some other terms, there's a floor on the LIBOR
18 rate of one percent. There's no unused line fee in
19 this loan. There's no minimum yield requirement.
20 That was proposed by several of the others but not
21 Selene. There's no exit fee, which almost all the
22 other proposals required. There's no prepayment
23 fee, there's no repayment premium.
24 The maturity date is essentially the earlier
25 of the closing of the bulk sale or 180 days after

1 entry of the financing order. So it's a six-month
2 loan, in essence.
3 As to the borrowing base formula -- and I
4 don't have a whole lot more, Your Honor; maybe I
5 shouldn't promise too much -- as I mentioned
6 previously, the lender will conduct due diligence
7 on each property, including obtaining a BPO and
8 title report. And, by the way, there's not going
9 to be a double reimbursement of expenses. To the
10 extent the lender gets reimbursed related to the
11 loan regarding this due diligence on these 797
12 properties, it doesn't get them again as part of
13 the cost reimbursement; there's no double payment
14 there.
15 Only properties that come back clean, other
16 than permitted encumbrances, are eligible to go
17 into the borrowing base. Eligible real estate is
18 then available to be advanced against in the amount
19 of 35 percent of the value minus the carveout.
20 I'll talk about the carveout in a minute.
21 It's the CRO's business judgment and
22 experience that this borrowing base formula is
23 reasonable.
24 With respect to the negotiation process, the
25 DIP loan agreement was the result of good-faith,

1 arm's-length negotiations, with all parties
2 represented by counsel. The DIP lender was and is
3 represented by the Herrick Feinstein law firm
4 located in New York, and now Mr. Shuker as well.
5 The CRO believes that the terms of the DIP
6 loan are fair and reasonable under the
7 circumstances, and the DIP lender is entitled to
8 the benefits of 364(e) of the Bankruptcy Code.
9 With respect to the carveout -- this is
10 actually the last issue I'm going to address -- in
11 order to ensure payment of legal fees and expenses
12 to the professionals retained by the debtor and the
13 creditors committee, the order provides for a
14 carveout from the DIP superpriority claim and the
15 DIP liens in an amount not to exceed $2.5 million
16 in the aggregate for the payment of, number one,
17 unpaid fees of the clerk of this court; unpaid fees
18 of the United States Trustee; up to $50,000 for
19 unpaid fees, including reasonable attorneys fees
20 for a Chapter 7 trustee should one be appointed in
21 this case; and subject to certain exceptions up to
22 $2.4 million in the aggregate for the payment of
23 allowed unpaid fees and expenses to the debtor's
24 and the creditors committee's professionals.
25 Your Honor, I mentioned a moment ago that the

1 creditors committee had some discussions with
2 Selene yesterday about some changes to the bid
3 procedures order, and I actually forgot to -- and
4 actually this is actually changes to the financing
5 order. My notes are confused. And I'll go ahead
6 and restate my understanding of these additional
7 provisions, and Mr. Singerman or Mr. Shuker can
8 correct me or amplify.
9 Number one, as to enforcement of remedies, as
10 filed there was an automatic lift stay if the
11 debtor didn't come before the Court and get a
12 hearing within a certain amount of time after
13 default. That's going to be changed in the
14 proposed order, so there's no burden on the debtor
15 to seek hearing to avoid the automatic stay relief
16 in the event of default under the DIP loan.
17 Instead, there must be a hearing before the stay is
18 lifted, with the hearing, subject to the Court's
19 calendar, of course, to be conducted on five days'
20 notice, five business days' notice.
21 Secondly, there will be no lien or super-
22 priority claim on avoidance actions or the proceeds
23 thereof under this DIP loan.
24 Finally, the DIP loan itself is not
25 conditioned on lack of any appeal from the bid

1 procedures order. There was a provision in there
2 that, if somebody appealed the bid procedures
3 order, the DIP lender wouldn't have the loan.
4 That's now been removed. Instead, the bid
5 procedures order must be stayed by somebody in
6 order for the DIP loan to not proceed.
7 Finally, Your Honor, a condition of the loan
8 is that the Court enter an order substantially in
9 the form of the proposed order attached, with
10 revisions to reflect what I just said, and
11 revisions to reflect a resolution that we've
12 reached with Freddie and the FDIC, which I'll
13 elaborate on in a moment.
14 The debtor submits that the proposed order is
15 standard for a loan like this and, based on all the
16 evidence proffered, respectfully ask that the
17 motion be granted.
18 Now, with respect to the FDIC and Freddie --
19 and I've alluded to this before -- the FDIC and
20 Freddie will be granted a two-week period of time
21 to present to the debtor, I won't use the word
22 evidence, but an itemization of what their claims
23 are with respect to the proposed DIP collateral to
24 make sure that -- and the debtor will discuss it
25 with them and see if we can resolve any problems.

1 With respect to the FDIC, it's limited to the
2 183 properties that they listed on their objection.
3 The debtor is aware of those properties, was aware
4 when it filed the motion, thinks that it has the
5 right to offer those as DIP collateral, so it did
6 not come as a surprise to see those 183 properties
7 listed. We know what they are. We know why we
8 think we have them free and clear, but we want to
9 give the FDIC some opportunity to have further
10 dialogue with us about that, even though there's
11 also this protective system -- there's going to be
12 title searches before any of this stuff gets added
13 to the borrowing base anyway.
14 Similarly, same thing with respect to Freddie.
15 Freddie would like to have the same two-week
16 period to present to us their statements as to what
17 they think might be problems with the DIP loan
18 collateral and property otherwise subject to the
19 sale. We'll look at that and try to resolve any
20 issues. From the debtor side, we're not expecting
21 big issues. Maybe there will be handful of them,
22 but we'll see. They want more time to look. They
23 didn't want to feel like this happened too quickly
24 for them, so we'll put that in the DIP loan order.
25 We have asked and we've received a commitment,

1 I think, from both the FDIC counsel and Freddie
2 counsel, that they will make a good-faith effort to
3 try to get this report to us, if you will, prior to
4 two weeks, but the outside date is two weeks.
5 If we can't reach agreement on that, then
6 we'll set a hearing. I think Mr. Blain's been in
7 contact with Mr. Headdick on that issue for the
8 Court to resolve those issues.
9 THE COURT: Thank you.
10 Yes.
11 MR. ZARON: Good afternoon, Your Honor. Andy
12 Zaron for Bank of America as indentured trustee,
13 collateral agent and custodian for the Ocala
14 investors.
15 Your Honor, we just have a few objections that
16 we'd like to raise to the DIP financing motion.
17 The first is we think that the $750,000 fee is
18 a relatively high fee and what we perceive is the
19 debtor's cash needs before a sale of the property.
20 Mr. Kelley mentioned that by the end of this
21 year, according to the cash collateral budget, the
22 debtor would need approximately $5 million. The
23 budget that I am looking at that I believe Mr.
24 Blain circulated about five days ago says that the
25 cash needs are closer to $3.2 million.

1 Whether the cash needs are $3.2- or $5
2 million, it seems to us that a fee of $750,000 is
3 high. And the reason it's that high is that the
4 line of credit is $25 million and the fee is
5 three percent of the $25 million.
6 So if the loan -- if the amount they're
7 borrowing is only going to be $5 million because
8 there's a sale by the end of the year, we don't
9 think that three percent should apply to the full
10 $25 million.
11 The bigger problem we have, Your Honor, is
12 something that we've alluded to throughout these
13 proceedings, and that is that we're in these
14 proceedings where the entire basis for the
15 bankruptcy, as we understand it, is at this point
16 for Navigant and the debtor and now along with the
17 FDIC and hopefully other investors to reconcile who
18 owns what. There's a massive asset reconciliation
19 effort that needs to happen here.
20 The debtor filed on October 30th its first
21 interim reconciliation report. Within the
22 reconciliation report, they provide that they've
23 had this whole servicing reconciliation
24 methodology, and they spent the bulk of their time
25 on the servicing reconciliation.

1 As I read the reconciliation report, they
2 still have not come up with a full methodology for
3 doing the asset reconciliation, which is, I
4 believe, at issue here.
5 Mr. Kelley has come up here today, Your Honor,
6 and mentioned that he believes or the debtor
7 believes that it owns the 797 loans that are being
8 provided as collateral to the DIP lender under the
9 DIP loan facility.
10 However, if you look at the reconciliation
11 report which was filed just -- I believe that was
12 five days ago as well, on October 30th, there's
13 specifically a disclaimer as to the information
14 that the debtor has. And just reading verbatim
15 from the reconciliation report, the debtor states
16 that the information contained in this report,
17 including the tables and exhibits, is subject to
18 change, and is neither intended to be nor should it
19 be construed as an opinion or assurance of any
20 lawyer, accountant or other professional involved
21 in the reconciliation process.
22 As I read this disclaimer, the findings of the
23 debtor to date could change, and I think the reason
24 for that is set forth further on in the
25 reconciliation report where the debtor sets out on

1 Page 30 the various challenges that it faces in
2 doing the asset reconciliation.
3 Among the various challenges that the debtor
4 faces, the debtor states that it has not had access
5 to certain key employees, that there's no
6 comprehensive inventory asset management system,
7 that there is no comprehensive cash management in
8 the accounting system, that much of the record-
9 keeping regarding uses of cash and the management
10 and sale of mortgage assets was done by multiple
11 employees who did not necessarily communicate with
12 each other using Microsoft Excel spreadsheets, and
13 that TBW has identified more than 10,000 such
14 electronic files that could be relevant.
15 They also state that there are many relevant
16 records in the possession of third parties that are
17 necessary for purposes of performing the asset
18 reconciliation.
19 So taking everything that I've heard and read
20 into consideration, my understanding is that the
21 debtor really isn't certain that it owns these 797
22 loans.
23 Now, Mr. Kelley brought up to you, I believe
24 -- I think it was marked as Exhibit A -- a list of
25 loans based on -- this is the language on the chart

1 -- based on a review, quote, unquote, to date.
2 When I read that in combination with the
3 reconciliation report, I believe that the review to
4 date is subject to change and that nobody on this
5 side of the podium is really willing to give an
6 opinion or stand by what has been found to date.
7 And I think one of the most notable aspects of
8 this chart is that nowhere on here is there listed
9 the possibility that the FDIC owns 183 or may own
10 183 loans, notwithstanding what the FDIC is
11 asserting, and we believe that Ocala may in fact
12 own certain of the REO properties. And when I said
13 the FDIC, if I said the loan, I should have said
14 the REO properties.
15 We believe that certain properties may belong
16 to the Ocala facility. I don't think it's a secret
17 that TBW has had financial problems for quite some
18 time, and I've also mentioned throughout the course
19 of these proceedings that the Ocala facility is
20 short close to $1.75 billion. We don't think it's
21 a stretch to say that it's very possible that some
22 of our money was used for purposes of repurchasing
23 loans that ultimately led to the debtor's alleged
24 ownership of the REO properties that are the
25 subject of the DIP financing motion.

1 Mr. Kelley has stated, in connection with the
2 bid procedures motion, that the debtor cannot sell
3 what it does not own, and we believe the same thing
4 applies to the DIP financing motion. The debtor
5 cannot use property that it does not own for
6 purposes of providing collateral to a DIP lender.
7 Now, one of the main things that Mr. Kelley
8 has stated as a basis for asserting the debtor's
9 ownership is that they're looking at deeds, they're
10 performing title searches to show that the debtor
11 owns the property. But we know that that doesn't
12 necessarily mean -- when I say "that," the fact
13 that the debtor's name may be on the title of the
14 property does not necessarily mean that the debtor
15 has beneficial ownership of certain property.
16 And just by way of simple example, Deloitte,
17 the auditor of the debtor, would not give the
18 debtor a clean audit because, among other reasons,
19 the debtor was carrying REO properties on its books
20 even though it didn't have beneficial ownership in
21 the REO properties. And so, if the debtor's name
22 shows as the titleholder, that could just be
23 because the debtor was servicing certain loans and
24 ultimately the title went to the debtor. The
25 beneficial holder may be some other party.

1 And in connection with Ocala, as I mentioned,
2 we think that some of our money might have been
3 used to purchase loans or to originate loans that
4 ultimately led to the REO properties that are
5 showing on the books and records of the debtor.
6 THE COURT: You got somebody here to testify
7 to that today?
8 MR. ZARON: No, we don't, Your Honor.
9 THE COURT: Do you have somebody anywhere to
10 testify to that?
11 MR. ZARON: Not as of now, Your Honor. And I
12 understand your question, Your Honor, but our point
13 is, it's not just a matter of do we have somebody
14 here to testify -- and the point really is, is that
15 the asset reconciliation process is a difficult
16 one, and that's what's set out in the
17 reconciliation report. I don't think anybody here
18 can get up here and say that it's going to be an
19 easy task to figure out who owns what or what
20 happened to all this money, and the tracing is
21 going to take a long time. So the fact that we
22 don't have somebody here today to testify that we
23 can show some of our money actually went towards
24 these REO properties shouldn't be a reason to grant
25 a third party a lien on those properties.

1 Now, having said that, Your Honor, we are
2 willing to agree to the financing because we
3 recognize that the debtor needs money to do the
4 reconciliations, and so we don't want to prevent
5 this whole thing from happening. But the thing
6 that we would like is what we've asked for before,
7 is adequate protection, and we don't think that
8 that's an extraordinary request.
9 What we want is that if some of our property
10 -- if it turns out that some of the property that's
11 being pledged to the DIP lender turns out to be
12 property that belongs to Ocala, we should get
13 adequate protection for that. It's not a stretch,
14 it's not something that's unheard of in bankruptcy,
15 and, especially in this case, it's not something
16 that we should have to prove up today when there's
17 this massive asset reconciliation that's going on.
18 If it turns out that we don't own any of the
19 property that's being pledged, there's no harm to
20 the debtor, there's no prejudice. If they're right
21 and the debtor actually owns these properties, we
22 don't get anything. No harm, no foul. But, if it
23 turns out that we do own some of that property, we
24 are prejudiced if we don't get adequate protection.
25 And all we're seeking, really, Your Honor, is

1 a replacement lien on unencumbered assets of the
2 debtor to provide us with the protection that we
3 deserve.
4 Again, this is a long process. There's a lot
5 of asset reconciliation that needs to go on here.
6 I don't believe that any full tracing has been done
7 to find out the origin of the funds that led to the
8 ultimate alleged ownership of the REO properties by
9 the debtor.
10 And in this particular case and under these
11 circumstances where that's the case and where
12 there's absolutely no prejudice to the debtor that
13 I've heard by giving us a replacement lien or a
14 substitute lien on unencumbered assets of the
15 debtor if our assets are used, we don't understand
16 why we can't get that adequate protection.
17 Thank you, Your Honor.
18 THE COURT: Thank you.
19 Does anybody else want to speak before Mr.
20 Singerman speaks?
21 MR. KELLEY: Housekeeping matter, Your Honor.
22 This is Jeff Kelley.
23 I'd like to tender the proffer that I made
24 into evidence. I'm reminded that I forgot to do
25 that.

1 THE COURT: Once again, it's admitted.
2 MR. KELLEY: And I want to apologize to Mr.
3 Readdick for mispronouncing his name.
4 THE COURT: Mr. Singerman.
5 MR. SINGERMAN: May it please the Court, Your
6 Honor. Paul Singerman for the committee.
7 Your question, Your Honor, to Mr. Zaron
8 regarding whether his client had a witness present
9 in the courtroom to testify is where I'll start,
10 and undertake a little bit of record housekeeping,
11 too.
12 The Court should note that we're before the
13 Court, as Mr. Kelley indicated, on a final hearing
14 on the debtor's request for DIP financing pursuant
15 to Rule 4001. 15 days or more notice has been
16 given. No one has objected to the adequacy of
17 notice, and not even Bank of America in its
18 objection to the financing raised the notice issue.
19 Mr. Zaron on behalf of his client has been
20 candid with the Court, as I would expect. He's a
21 good lawyer and an honest man. The pleadings that
22 his firm has filed on behalf of his client have
23 honestly, too, expressed Bank of America's
24 uncertainty regarding what claims it might have in
25 the future.

1 And Mr. Zaron today, I think, was more candid
2 on this point than the record will reflect at prior
3 hearings. I think his words were, quote, Bank of
4 America might be short $1.75 billion, and what I
5 think that means is that perhaps there's no
6 collateral or substantially inadequate collateral
7 to repay the advances that the principal for which
8 Bank of America acts as agent expects pursuant to
9 advances it's made.
10 So Bank of America as agent has a very
11 understandable problem. It acted as agent for two
12 principals, Deutsche Bank and BNP Paribas, who
13 presumably, very frankly, are looking to it for an
14 explanation of where the $1.75 billion in mortgages
15 is and how it came to be that their funds were used
16 and there may be this, quote, short.
17 So Bank of America has to do what it has to do
18 more to protect itself, I would submit, Your Honor,
19 than to advance the case, and I think the record
20 reflects that point.
21 To date, Your Honor, Bank of America has filed
22 two objections to the debtor's use of cash
23 collateral, docket entry 37, docket entry 373.
24 Bank of America has filed four notices of appeal in
25 these proceedings: First, docket entry 426 to the

1 approval between the debtor and Freddie, docket
2 entry 428 appealing the Court's approval of the
3 stipulation with the debtor and FDIC, docket entry
4 520 appealing the final order approving the
5 stipulation between the debtor and the FDIC, and
6 docket entry 521 approving the debtor's stipulation
7 with Wells Fargo.
8 In addition, Your Honor, Bank of America has
9 filed other objections to relief sought by the
10 debtor in the debtor's effort to advance the case
11 to resolution: docket entry 186, Bank of America's
12 objection to the FDIC stay relief motion; 201 to
13 Bank of America's motion for -- that was the motion
14 for reconsideration of Your Honor's order approving
15 the transfer of servicing; docket entry 258 to the
16 proposed stipulation, objection to the proposed
17 stipulation with the FDIC; and docket entry 266 to
18 the amended -- Bank of America's amended objection
19 to stay relief filed by Sovereign, Wells Fargo and
20 Natixis.
21 So I think, Judge, and maybe it's just going
22 to be the way the case proceeds, that for reasons
23 extraneous to advancing the case and more focused
24 on the uncomfortable position that Bank of America
25 finds itself in, we're going to hear these

1 objections perhaps to all the relief the debtor
2 seeks or the relief the committee seeks.
3 The objection today is particularly
4 unfortunate. In the objection, at Paragraph 18 on
5 Page 5, Bank of America lays out three specific
6 bases for objection. Mr. Zaron alluded to these,
7 and I want to come back to them. And I'm doing so,
8 Your Honor, not only hopefully to assist in the
9 debtor's efforts to get an order approving this DIP
10 financing, but maybe by taking the time to explain
11 the facts and the law just a little bit, Your Honor
12 can send a message about how we're going to proceed
13 and Bank of America's predisposition to object in
14 respect to future relief.
15 The first of the three objections, Paragraph
16 18 on Page 5, the debtor has not carried its burden
17 in respect to ownership. I respectfully disagree
18 with counsel's argument that Exhibit 1, admitted
19 into evidence with no objection, and the proffer of
20 Mr. Luria admitted into evidence with no objection,
21 is inconsistent with or in derogation of the
22 testimony of Mr. Luria that Your Honor accepted
23 through proffer regarding the efforts that the
24 debtor, Navigant and its professionals undertook to
25 establish ownership in respect of the proposed DIP

1 collateral. That evidence is before the Court.
2 It's unrebutted.
3 I would note, Your Honor, that pursuant to the
4 terms of DIP loan agreement, if in fact it turns
5 out through the title reports that you've heard Mr.
6 Kelley explain are going to be conducted both in
7 conjunction with the DIP and the real property sale
8 the debtor doesn't own a piece of property that's
9 proposed in its DIP collateral, it won't be
10 eligible for borrowing and no third party will be
11 imperiled by the relief sought by the debtors here.
12 So I think the debtor has carried its burden
13 in respect to establishing a prima facie case that
14 it owns the proposed DIP collateral.
15 The second objection in Paragraph 18 is that
16 the debtor didn't establish that the financing is
17 necessary. I think that's wrong. I think the
18 evidence before the Court this morning and now this
19 afternoon confirms that that's wrong.
20 Separate from the fact that the projections
21 show that we would be cash negative by the end of
22 the year, two points: One, those are just
23 projections. I'm not suggesting that they're not
24 the debtor and Navigant's best-faith efforts to
25 project to the Court and the parties its future

1 cash position, but, Judge, stuff happens, and the
2 committee would rather have the estate having the
3 benefit of the security of a DIP financing in place
4 in the event stuff happens than not.
5 Part of this objection that BOA advances, the
6 second objection, the failure to establish
7 necessity for the financing, is that the debtor
8 could borrow less than the fees. The proffer of
9 evidence accepted without objection indicates that
10 this is the best financing that the debtor was able
11 to attract, seven term sheets considered.
12 And finally at the end of the day, Judge, I
13 guess the acid test is, certainly on behalf of the
14 committee, we would support financing on better
15 terms should BOA wish to provide it, and we've not
16 heard that today.
17 The last is adequate protection. Judge, what
18 I heard Mr. Zaron say is: Adequate protection is
19 not uncommon in bankruptcy cases. Well, I agree
20 with that. And then Mr. Zaron said: We should
21 have it. What I didn't hear and what the written
22 objection doesn't include is any law to support the
23 entitlement of Bank of America to adequate
24 protection in these circumstances.
25 So adequate protection is a statutory

1 creature. It's in Section 361 of the Code. And
2 the prologue to 361 says: When adequate protection
3 is required by Section 362, 363 or 364, then, and
4 then the statute enumerates what adequate
5 protection might be. But the first word is "when."
6 Two points. Mr. Zaron's client in its
7 pleading has never pointed to what provision of
8 362, 363 or 364 it relies upon to get to the "when"
9 to make it entitled to adequate protection.
10 Secondarily, Your Honor, it is abundantly
11 clear that BOA is not alleging, let alone seeking
12 to prove today at the final hearing on the DIP
13 financing, that it does in fact have ownership of
14 or a lien in any of the proposed DIP collateral.
15 What the objection says, Paragraph 18 at the
16 bottom of Page 6, is, quote, BOA may have equitable
17 liens, constructive trusts or other interest by
18 virtue of the debtor's conversion of their
19 collateral or otherwise.
20 That is unquestionably plainly speculation.
21 But speculation won't suffice to give Mr. Zaron's
22 client the adequate protection which apparently it
23 thinks is appropriate or fair, and it won't suffice
24 because the law couldn't be clearer in Section
25 363(p) that the burden to establish the entitlement

1 to adequate protection is on the movant. The
2 statute says that the entity asserting an interest
3 in property has the burden of proof on the issue of
4 the validity, priority or extent of such interest.
5 And you've heard BOA today say it has no
6 evidence to present. That's the record before the
7 Court.
8 BOA's limited objection cites to two cases.
9 The first case is 495 Central Park Avenue, 136 BR
10 626, an opinion of the bankruptcy court for the
11 Southern District of New York in 1992. First in
12 that case a creditor objected to a debtor's effort
13 to get a priming lien, and the ruling and holding
14 in the case was that the creditor's objection was
15 overruled.
16 In that case, the debtor was an office
17 building or commercial building, and the debtor
18 sought to borrow money on a priming basis in order
19 to build out more tenant space to generate more
20 rent to better service the debt of the objecting
21 creditor.
22 Importantly in that case, the objecting
23 creditor had a mortgage lien which was not disputed
24 by the debtor. Those are not our facts. In any
25 event, the Court overruled the objection of Hancock

1 to the priming lien.
2 The second case, the final case cited by BOA
3 in its objection, is Whitehall Jewelers, an opinion
4 of the bankruptcy court from the District of
5 Delaware from last year, 2008, and that case
6 presumably is cited for the proposition that it's
7 the debtor's burden to establish the ownership of
8 the property which it wishes to sell.
9 That's not a borrowing case, that's a sale
10 case. It might have been relevant for purposes of
11 the bid procedure and sale motion that Your Honor's
12 already granted. And there in Whitehall the debtor
13 was doing a going-out-of-business sale and sought
14 to include -- or it was perceived that it sought to
15 include jewelry that it had in its stores on
16 consignment.
17 We don't have those facts. And, in any event,
18 again, Your Honor, the record before the Court is
19 clear that the debtor has carried at least its
20 prima facie case in respect of ownership for the
21 DIP collateral, and that's through the Exhibit 1
22 and Mr. Luria's testimony.
23 And, finally, two points. The first is the
24 practical one -- Mr. Kelley's referred to it once,
25 I have, I won't do it again after this -- if the

1 debtor doesn't own the collateral, it's not
2 eligible to be lent against. No third party,
3 including Bank of America, will be prejudiced.
4 Secondly, Judge, I think in addition to
5 holding Bank of America to its evidentiary burden
6 under the statute, as I respectfully suggest the
7 Court must, I think that the Court is well served
8 and can, and we would suggest should, hold Bank of
9 America to the burden to provide the Court
10 authority for its requests or entreaties that it's
11 entitled to adequate protection, because it has not
12 done so, and, frankly, I don't believe, Your Honor,
13 it can in light of the clear provisions of 363(p).
14 So for those reasons, Your Honor, we urge the
15 Court to overrule the objection of Bank of America
16 to grant the financing sought by the debtor in the
17 DIP financing motion.
18 And while I'm up, with Your Honor's
19 permission, I will accept Mr. Kelley's invitation
20 to clarify the arrangements which the committee
21 negotiated with Selene in respect to the DIP
22 financing.
23 Mr. Kelley predictably got it all right, but
24 in fairness to Selene, the agreement in respect of
25 no automatic stay relief and the requirement that

1 Selene come before the Court on not less than five
2 business days' notice for stay relief also includes
3 a feature that in that interim period between the
4 declaration of default by Selene and Your Honor's
5 ruling on whether there was a default and Your
6 Honor's ruling on whether Selene is entitled to
7 stay relief, Selene will not be obligated to make
8 additional advances provided that it has afforded
9 the debtor the notice as required under the credit
10 agreement and the applicable opportunities to cure,
11 if any.
12 Otherwise, Your Honor, the arrangements which
13 the committee negotiated with Mr. Shuker on behalf
14 of Selene were accurately described by Mr. Kelley.
15 Thank you, Your Honor.
16 THE COURT: Thank you.
17 MR. ZARON: Your Honor, I'd just like to make
18 a couple of points in response, and Mr. Robson of
19 my office I believe wants to clarify a few facts
20 for the record. I don't think it will take very
21 long.
22 THE COURT: Go right ahead.
23 MR. ZARON: Thank you, Your Honor.
24 First of all, the chart that was handed up, it
25 was my understanding, was for illustrative

1 purposes. It wasn't for purposes of showing as an
2 evidentiary matter that in fact the debtor owns the
3 797 loans. And to the extent that it does purport
4 to support that proposition, we would object to its
5 introduction. I don't think see anything on here
6 that outlines the basis for any of the findings or
7 gives any background as to the facts.
8 Furthermore, Your Honor, Mr. Luria's proffer
9 that the debtor owns the property is clearly belied
10 by the reconciliation report that was filed on
11 October 30th that said their findings are subject
12 to change, and that also says that none of the
13 professionals, presumably including Mr. Luria,
14 would be willing to give an opinion that anything
15 in the reconciliation report is in fact true
16 because it's subject to change.
17 If it's subject to change, we don't know what
18 the answer is going to be at the end of the day.
19 With regard to the burden of proof issue on
20 adequate protection -- I didn't bring my Code up,
21 Your Honor, but under 364(d)(2) of the Bankruptcy
22 Code --
23 (Mr. Singerman hands document to Mr. Zaron.)
24 MR. ZARON: Thank you. And, by the way, Mr.
25 Singerman is also an excellent lawyer, probably

1 better than I am, and more of a gentleman, and he
2 handed me up the Code. And under 364(d)(2) of the
3 Code, on the issue -- in any hearing under Section
4 364, the trustee has the burden of proof on the
5 issue of adequate protection. So it's our belief
6 that it's not in fact our burden to show -- we
7 don't have the burden of proof on the issue of
8 adequate protection. We believe it's the debtor's
9 burden.
10 And to the extent we do have a burden to show
11 that we're entitled to it, we think we've shown it
12 under the circumstances of this particular case,
13 given all the question marks about who owns what,
14 and given the fact that there really is no
15 prejudice to giving us this replacement lien,
16 because, if the debtor is right, as I mentioned,
17 and we don't own anything, there's no harm to the
18 debtor.
19 And with regard to the burden of proof to
20 establish ownership, the Whitehall Jewelers case,
21 while it was a sale case, involved the use of
22 property by the debtor, and we think that the
23 proposition set forth in Whitehall Jewelers applies
24 here because the debtor is attempting to use
25 property for the purpose of pledging it to the DIP

1 lender under the DIP facility.
2 And so for these reasons, Your Honor, we would
3 ask the Court to either deny the DIP financing
4 motion, or, more appropriately, to include a
5 provision within the DIP order that we're entitled
6 to adequate protection.
7 And then, finally, Your Honor, go through the
8 provision just memorializing what both Mr. Kelley
9 and Mr. Singerman said, which is that, if in fact
10 the debtor does not own certain property, that
11 property can't be pledged as collateral to the DIP
12 lender.
13 And now Mr. Robson is just going to clarify a
14 couple of the factual issues.
15 MR. ROBSON: Your Honor, Patrick Robson. I'm
16 admitted pro hac vice to this Court on behalf of
17 Bank of America. I'm also counsel of record on
18 behalf of Bank of America in the action pending in
19 the Southern District of Florida before Judge
20 Jordan, which Your Honor is aware.
21 I just wanted to address briefly the initial
22 comments made by Mr. Singerman to the effect that,
23 notwithstanding the fact that my colleague, Mr.
24 Zaron, is an excellent lawyer and excellent person,
25 there may be some subtext to why Bank of America

1 has been making the objections it has made.
2 The fact of the matter is, is Bank of America
3 does not find itself in any awkward position
4 standing between the goals of the debtor and the
5 interest of investors in the Ocala Funding
6 facility.
7 Bank of America -- and these facts are set
8 forth in our pleadings in the Southern District of
9 Florida, and we'll be happy to provide a copy of
10 those to Mr. Singerman if he hasn't already
11 reviewed them.
12 The fact of the matter is, is Bank of
13 America's service here is a ministerial function on
14 behalf of Ocala Funding LLC. Ocala Funding LLC was
15 managed by Taylor Bean. Upon the events in early
16 August when Taylor Bean was essentially shut down,
17 Ocala Funding entered in an event of default, and
18 at that time Bank of America was asked to step in
19 and wear additional hats, including the hat of
20 working to recover claims on behalf of the
21 facility.
22 Bank of America was never an investor in the
23 facility, and Bank of America is not subject to any
24 claims for monies lost by the facility.
25 So insofar as Mr. Singerman may be mistaken in

1 suggesting that there are other interests on behalf
2 of the bank in pursuing the claims here, I think
3 that may be due to the fact that he's not aware of
4 exactly how we operate and how this facility
5 functions.
6 Insofar as the Court has any questions in its
7 mind as to what Bank of America's role in this
8 facility is, we'll be happy to answer those
9 questions now or submit supplemental pleadings.
10 THE COURT: Thank you.
11 MR. ROBSON: Thank you, Your Honor.
12 MR. SINGERMAN: May it please the Court. Very
13 briefly, Your Honor.
14 First, I think the record is abundantly clear
15 that, when Mr. Kelley tendered Debtor's 1, Mr.
16 Kelley said that it was, pursuant to Rule 1006 of
17 the Federal Rules of Evidence, a summary or a
18 compilation of underlying records that were
19 voluminous. Again, that was admitted into
20 evidence, it was not an illustrative exhibit, as
21 Debtor's 1. It is in evidence. It is in evidence
22 without objection.
23 Secondly, as to the apparent or alleged
24 inconsistency between the servicing reconciliation
25 which was filed and how Mr. Blain opened the

1 hearing by reporting to Your Honor that it was
2 timely filed, and the substance of Exhibit 1, I
3 don't think there's any inconsistency at all.
4 I can tell Your Honor that yesterday alone in
5 preparation for this hearing, myself and my law
6 partner, Mr. Berger, and a number of debtor
7 advisors and Navigant professionals spent hours
8 confirming the diligence that Navigant did to
9 support Exhibit 1, and Mr. Luria's testimony, also
10 admitted without objection and unrebutted in any
11 evidentiary manner, that this collateral, the
12 proposed DIP collateral, is in title, except as
13 noted on Debtor's 1, in the debtor. That is
14 evidence of the debtor's ownership, again,
15 unrebutted, that unquestionably trumps the
16 disclaimer in the servicing reconciliation.
17 So I guess, Your Honor, I'm going to end where
18 Your Honor started when Bank of America presented
19 its argument. I'd urge Your Honor again to invite
20 Bank of America to answer Your Honor's question:
21 Does it have a witness -- does it have competent
22 evidence to support its position. If not, we would
23 ask Your Honor to overrule the objection. There
24 has been no law cited whatsoever to support a
25 request for replacement liens.

1 364(d)(2) to which Bank of America through Mr.
2 Zaron referred goes to the debtor's burden to prove
3 the adequacy of adequate protection proposed. The
4 adequacy of the adequate protection. That does not
5 come into play until Bank of America proves it is
6 entitled to adequate protection. It has failed to
7 do so.
8 Thank you, Your Honor.
9 THE COURT: Yes, sir.
10 MR. MARTINO: Phillip Martino on behalf of the
11 FDIC.
12 Just not to get lost in the sauce, there is a
13 deal -- we have raised an objection with respect to
14 183 properties. Counsel has talked about it. I
15 just want to put a little bit more information in
16 front of the Court.
17 We believe that we have an interest in 183
18 properties. We're in the process of gathering
19 information and exchanging it with the debtor that
20 we hope will result in either an agreement or a
21 narrowing of issues for this Court to ultimately
22 decide.
23 We've heard lots of argument about ownership
24 and title and all the rest, all of which is
25 particularly relevant to everything except those

1 183 properties.

2 Our deal with the debtor is that between now

3 and when this Court enters an order, either we've

4 withdrawn our objection, they've removed those 183

5 properties, or this Court has determined that we

6 don't have a superior interest in those 183

7 properties. The order that this Court may or may

8 not enter today with respect to the financing will

9 not involve those 183 properties as part of the

10 collateral base for the loan.

11 THE COURT: Thank you.

12 We're here on a motion for postpetition

13 financing. The debtor has found a lender to lend

14 $25 million, if necessary, to the debtor to

15 continue its operations, and it is being secured by

16 the debtor's interest, if any, in real properties

17 that it owns.

18 The limited objection to the motion relates as

19 to -- I think articulated very well by Mr. Zaron --

20 that his client may have an interest in some of

21 these properties and he feels he's entitled to

22 adequate protection. I think he's got to show more

23 than that. He has to have some evidence, before

24 he's entitled to adequate protection, other than

25 they may have some interest in the collateral.

1 He also raised the issue of the fee being too
2 high, $750,000, when the debtor may only need
3 $5,000 or $10,000 and is going to pay it back in
4 January as soon as the deal closes. That seems to
5 bother me, but the only evidence before the Court
6 through Mr. Luria's proffer is this is the best
7 deal they could get. They checked other terms
8 which wanted even more, and there's no evidence
9 that there's anything out there that's any better
10 than this, and I think that's all the Court can
11 deal with, is this in the better interest or the
12 business judgment of this particular debtor.
13 This lender apparently is squeezing less than
14 the others. You know, when you have somebody down
15 you squeeze, and this one didn't quite squeeze them
16 that hard.
17 All that being said, I think it's appropriate
18 to grant the motion, and the Court will do so and
19 look to you guys for the appropriate order.
20 Include in the order any modifications from the
21 original motion that you've agreed to with
22 appropriate parties.
23 As to the objections, they are overruled.
24 And this matter is concluded.
25 Thank you.

1 MR. MARTINO: Your Honor, you said "the
2 objections." That does not include the FDIC
3 objection, I take it, because of the stipulation we
4 have.
5 THE COURT: It's overruled subject to whatever
6 the stipulation is.
7 MR. MARTINO: Well, that's the issue, Your
8 Honor. The FDIC's objection is not being addressed
9 today. We're going to raise that in two weeks or
10 so when we have another hearing if we can't reach a
11 deal. So our objection is still there.
12 The order that would be granted, the order
13 that would be modified and submitted, would exclude
14 until further order of the Court our 183
15 properties.
16 THE COURT: Somebody better respond to that.
17 MR. KELLEY: Your Honor, we have agreed that
18 the 183 properties will not be put into the
19 borrowing base until we resolve the issue on the
20 183 properties.
21 THE COURT: Is that going to affect the amount
22 of the loan or the funding of the loan?
23 MR. KELLEY: It would affect the funding of
24 the loan, but by the time we resolve this issue in
25 the two-week process, we're not going to need that

1 much money in the next two weeks.
2 THE COURT: Well, then it's not appropriate
3 for me to approve it. Until you know what the loan
4 is, why should I approve a loan that may not even
5 come to fruition? They're not going to fund it in
6 the full amount if they don't have those properties
7 included. That's what I'm getting. Is that
8 correct?
9 MR. MARTINO: Your Honor, you may recall they
10 only have a need for approximately $5 million
11 between now and the end of the --
12 THE COURT: I haven't heard Selene say that
13 we're going to fund any of it unless we get all of
14 it. Are they going to fund it partially?
15 MR. MARTINO: That's for the debtor to
16 resolve, but we have no problem with an order being
17 entered excluding --
18 THE COURT: I understand you don't have a
19 problem.
20 Mr. Shuker, if you're only going to be exposed
21 to $15,000, why should you get a $750,000 fee?
22 And now the whole thing is upside down until
23 this is resolved, in my mind. Can't the fee be
24 adjusted downward if they can't fund the full
25 amount of the loan? They're not sitting in a

1 position to do that.
2 MR. SINGERMAN: May I be heard, Your Honor?
3 THE COURT: Certainly.
4 MR. SINGERMAN: Thank you. Obviously there's
5 a little bit of a dynamic process, and the debtor
6 has been working collaboratively with the FDIC.
7 The committee's been keeping apprised of those
8 negotiations and discussions.
9 It is and was my understanding always that the
10 result of the arrangement to accommodate the FDIC's
11 request for a little bit more time to look into
12 these properties, the 183 properties, was that an
13 order would be entered today approving the DIP
14 financing as requested, and that we would agree,
15 the estate would agree, the debtor and the
16 committee would agree to say what the credit
17 agreement already says, which is: If it turns out
18 that the debtor doesn't own the property, then
19 pursuant to the terms of the credit agreement it's
20 not eligible collateral and the debtor can't use it
21 to support the borrowing. And we've agreed to give
22 the FDIC and now Freddie until two weeks from
23 yesterday to submit this statement or report of
24 their respective positions regarding whether either
25 of them claimed to own or have some other interest

1 in the proposed DIP collateral that would make it
2 ineligible as borrowing collateral, period.
3 It would be, to the committee's way of
4 thinking, Your Honor, an unfortunate and terribly
5 undesirable outcome if an order weren't entered
6 today so providing, and an order so providing would
7 protect and not prejudice Freddie or the FDIC in
8 respect of properties it claims to own or have an
9 interest in that would render that property
10 ineligible collateral.
11 And lastly, Judge, I understand the Court's
12 concern about the fee and whether or not the fee
13 should be adjusted if this property never makes it
14 into the borrowing base. And I would submit on
15 behalf of the committee, Your Honor, that we, too,
16 have kept apprised of the debtor's efforts to
17 obtain financing, and what we know for sure is, if
18 we don't get the financing approved from the
19 stalking horse, we believe there's no prospect of
20 financing on terms anywhere near as good or as
21 favorable as these terms.
22 So we would ask Your Honor to take that into
23 consideration and to enter an order today, or as
24 soon as we can submit it, that does reflect the
25 arrangement Mr. Martino has described to give the

1 FDIC and Freddie two weeks from yesterday to
2 provide their statement of interest in the proposed
3 collateral. And I believe, Judge, that that
4 satisfies everyone's interest.
5 THE COURT: Mr. Shuker?
6 MR. SHUKER: Thank you, Your Honor.
7 I don't know whether we've closed the
8 evidence, and I don't know that it was -- I didn't
9 get up at the time because I didn't hear any
10 objection, but I'd like to proffer the testimony of
11 Mr. Reedy -- and he's available -- on the issue
12 you've raised regarding the fee and the borrowing.
13 May I do that?
14 THE COURT: Certainly.
15 MR. SHUKER: Thank you.
16 Your Honor, the way the loan works, it is a
17 borrowing base loan. So even if the 183 properties
18 come out of it, we're still going to lend up to $25
19 million based on the collateral. And we have to do
20 all the due diligence, whether it's 797 or 797 less
21 183, on these properties to come up with the value
22 that we then advance 35 percent of.
23 In the initial negotiations with the debtor,
24 the request to do this loan was a fee of $1
25 million. It was not three percent, it was not a

1 sliding amount. So to suggest that this was based
2 on the amount of the commitment is incorrect. It
3 was based on the amount of time and due diligence
4 it's going to take, whether the loan is $5 million
5 or $25 million, to get comfortable with this
6 collateral to make the funds available to lend to
7 this debtor.
8 We also have to reserve the money so that we
9 can advance it.
10 And I would note, Your Honor, that the initial
11 request was $1 million. We agreed upon further
12 negotiation to move it down to $750,000. That 750
13 would have been whether we're lending $5 million,
14 $10 million or $15 million, because it reflects the
15 amount of work done to get comfortable with this
16 collateral, the risk of this collateral and the
17 risk of this loan in general.
18 I think that combined with the fact, Your
19 Honor, that the interest rate is below market.
20 Your Honor approved in Bray & Gillespie a loan from
21 Wachovia at LIBOR plus 12 percent. This is LIBOR
22 plus eight percent. And, as noted by Mr. Kelley,
23 there is no unused line fee, which was in the other
24 proposals, there is no prepayment fee, which was in
25 several proposals, and there is no exit fee.

1 THE COURT: That's fine. I just want to hear
2 from you that you want to go ahead with this even
3 if those 183 are removed.
4 MR. SHUKER: We will.
5 THE COURT: Subject to the terms of the
6 agreement.
7 MR. SHUKER: Thank you, Your Honor.
8 THE COURT: Mr. Meeker, final word.
9 MR. MEEKER: We have not been involved. The
10 committee has taken the role of dealing with these
11 issues on a day-to-day basis and really getting the
12 nuts and bolts.
13 But I would ask for a clarification, maybe
14 just for my personal purposes when we look at the
15 order down the road, but it sounds as if the same
16 due diligence is taking place on this commitment as
17 on the proposed purchase. And is there a double
18 billing or some way if the due diligence as far as
19 establishing good title is paid for out of this
20 750, is it also going to be a credit on the 750 on
21 the sale price, or is it going to be another
22 charge?
23 THE COURT: My understanding from the previous
24 testimony, and you can correct me if I'm wrong,
25 this is the fee for making the loan.

1 MR. SHUKER: Correct.
2 THE COURT: There's a 750 due diligence
3 reimbursement if they're not successful in the
4 bidding. There is no 750 on the other side if
5 Selene is the successful purchaser, either at the
6 initial price or they bid it on up, as long as they
7 get it.
8 I think that was all dealt with on direct, and
9 I'm satisfied that that's not the situation, and,
10 accordingly, the Court will grant the motion
11 subject to whatever stipulations have been made
12 between the debtor and FDIC and Freddie Mac.
13 Who's got the order?
14 MR. KELLEY: Your Honor, I've got the order.
15 This is Jeff Kelley. We'll take it back to the
16 conference room at the Omni and get it finalized
17 and presented to the Court today.
18 THE COURT: Okay. This matter is concluded.
19 We've got something else on the calendar?
20 MR. BLAIN: Your Honor, just as a housekeeping
21 matter -- and this is something that doesn't have
22 to be dealt with in open court -- but the Court has
23 just heard a description of the stipulations
24 reached with the FDIC and Freddie Mac with regard
25 to determining in the eligible collateral

1 calculation whether there are properties that are
2 not -- that they have interest in that would not be
3 constituting eligible collateral, and part of our
4 agreement is that they would let us know, as Mr.
5 Singerman indicated, within two weeks from
6 yesterday, give us a report of any of those
7 properties. We would attempt to resolve that.
8 But given the timing of this loan and the
9 circumstances of the bidding procedures, we have
10 agreed among ourselves, subject to Your Honor
11 agreeing to do this, that if there is an issue or a
12 dispute over these properties, that we would need
13 to come back to Your Honor sometime within the week
14 following that final date for giving us that
15 report.
16 And that is a difficult time of year. It's
17 the prior week before and the week of Thanksgiving.
18 And we can deal in chambers after that, but I did
19 want to bring that to the attention of the Court.
20 It would be only on this limited matter, and it
21 would not be an open hearing for other things to be
22 said, but just on the issues with regard to any
23 dispute over the ownership interest or lien
24 interest in the property that is being used as
25 collateral.

1 The date that has been established that they
2 would give us this report is Wednesday, which I
3 believe is November 18th, which is the date that is
4 two weeks from yesterday. So, if it's possible at
5 some point for there to be some time set aside to
6 determine any dispute that might be determined,
7 subject to Your Honor's convenience on your
8 schedule, within the two days following that of
9 that week or the three days the following week that
10 leads up to Thanksgiving.
11 And I realize this is a difficult thing, and
12 we're probably imposing on the Court, and I
13 apologize for that. But to the extent that this
14 issue needs to be resolved in order for the other
15 pieces of the puzzle to go forward, we would ask
16 Your Honor's assistance in that.
17 THE COURT: Thank you. I'm aware of that, and
18 we'll take that into consideration when you call.
19 All right. I've got a couple of things. In
20 that financing agreement, seven days instead of
21 five days for me to set a hearing.
22 MR. SHUKER: That's fine.
23 THE COURT: We have stay hearings every
24 Monday, and that way I can always stick it right on
25 that date. That's no problem.

1 Another thing I have concerning the sale order
2 or the procedure order was the data room. It's got
3 to be very user friendly. I don't want to hear
4 people filing objection saying they got in there
5 and they couldn't find the information. You have
6 to make sure that's very easily -- any other
7 bidders can get in there and find their way around
8 and get the information they need.
9 Move on.
10 MR. KELLEY: Yes, sir. I was able to get into
11 the room and use it. So, if I can, I think almost
12 anybody can.
13 THE COURT: I don't know. You may one of
14 those hotshots.
15 MR. KELLEY: I'm not.
16 I think there's one item left on the calendar,
17 Your Honor, and that is number 15, docket number
18 537. That's the motion to approve debtor's
19 contract with an interim servicing agent and so
20 forth. I believe there is a limited -- I don't
21 know if it's called a limited objection or not --
22 by Freddie that has not been totally resolved as to
23 one aspect of that motion, so I'd like to go ahead
24 and present that motion if I could.
25 THE COURT: How long is this going to take?

1 MR. KELLEY: It will probably take five to
2 10 minutes.
3 THE COURT: Are you going to articulate your
4 objection?
5 MR. JOHNSON: Yes, Your Honor. We filed an
6 objection yesterday afternoon.
7 THE COURT: I probably didn't get it yet. I
8 assume it's here, I just haven't had a chance to
9 look it over.
10 MR. JOHNSON: I'm happy to present Your Honor
11 with a copy of it, if you'd like to read it.
12 THE COURT: I'll look at it. How long is it
13 going to take you to articulate your side?
14 MR. JOHNSON: Not long, five minutes.
15 MR. WEITNAUER: I agree with him.
16 THE COURT: All right, let's go ahead with it.
17 MR. JOHNSON: Should I present it, Your Honor?
18 THE COURT: Give me a copy of yours, if you
19 could pass it up. I can be reading the objection
20 while Mr. Kelley is articulating.
21 MR. KELLEY: I think I might have one that's
22 not marked on, Your Honor.
23 THE COURT: Hand it up here.
24 Proceed.
25 MR. KELLEY: Your Honor, on October 28th, the

1 debtor executed, subject to Bankruptcy Court
2 approval, a Selene interim financing, interim
3 servicing agreement, with Selene Finance LP.
4 Now, let me explain the Selene connection
5 there, since that name's been used several times.
6 Prior to the time that Selene was selected as
7 the stalking horse bidder, the debtor was already
8 well down the road, and it's somewhat coincidental,
9 with negotiating this unrelated deal that has to do
10 with interim servicing of loans owned by TBW. So
11 that's the Selene connection here.
12 That agreement was executed on October 28th.
13 Under the agreement, the debtor is going to
14 transfer to Selene the servicing of approximately
15 1,185 mortgage loans presently serviced by the
16 debtor, owned by the debtor, in addition to 23
17 reverse mortgage loans owned by the debtor and
18 presently subserviced by Celink. These mortgage
19 loans have an approximate unpaid principal balance
20 of approximately $152 million, and the reverse
21 mortgage loans have a current outstanding principal
22 balance of about $2.7 million.
23 The debtor, Your Honor, as is clear from
24 previous hearings, wishes and intends to extricate
25 itself from the loan servicing business. At its

1 peak the debtor prepetition serviced approximately
2 500,000 individual residential loans. These loans
3 that are the subject of this motion are among the
4 last remaining loans serviced by the debtor and
5 will be transferred solely for servicing purposes.
6 Ownership of these loans is going to remain with
7 Taylor, Bean & Whitaker.
8 Finally, consistent with the transfer -- and
9 this is the portion that I believe Freddie objects
10 to -- finally, consistent with the transfer of the
11 interim servicing of the loans, the debtor seeks
12 authorization to transfer borrower funds currently
13 on deposit in the debtor's accounts at Regions Bank
14 related to these loans, traceable to these loans,
15 to Selene to transfer -- to facilitate the payment
16 of borrower taxes and insurance and a payment of
17 servicing fees related to these loans.
18 The current amount of the funds that will be
19 transferred to Selene is approximately $617,000.
20 Your Honor, the debtor's status as a Chapter
21 11 debtor impedes its ability to properly service
22 these loans. The debtor does not have access to
23 the tax and insurance payments made on the loans,
24 and thus is unable to transfers the funds to the
25 appropriate parties.

1 The transfer of this servicing contemplated by
2 this agreement will allow TBW to stabilize the
3 servicing of these almost 1,200 loans, so it's to
4 maximize the value of those loans and to ensure
5 that the underlying consumers are properly
6 protected.
7 There's a provision of the agreement that
8 requires an initial deposit by the debtor of
9 $300,000 into an operating account to be
10 established under the agreement to enable Selene to
11 carry out its duties.
12 Prior to -- and this is by way of proffer by
13 Mr. Luria, Your Honor. Prior to entering into the
14 agreement, the debtor undertook a review of
15 competitive pricing to ensure that Selene's fees
16 were appropriate. Based on discussions with two
17 other interim servicers, the debtor believes in its
18 reasonable business judgment that the Selene
19 proposal is price competitive. There's a high
20 delinquency rate on these loans, and they're not
21 the best loans in the world to be able to try to
22 service, is what I'm trying to say.
23 The debtor believes it has executed the
24 agreement in the ordinary course of its business,
25 but in an abundance of caution, to the extent that

1 entering into the agreement is deemed outside the
2 ordinary course of business, the debtor seeks
3 Bankruptcy Court approval under 363(b) of the Code.
4 The legal test is that the Court must find
5 some articulated business justification. We've
6 cited the cases for that.
7 The transfer of the loans have several
8 advantages. Among them, ensuring that the debtor
9 satisfies state regulators with respect to consumer
10 protection issues.
11 Additionally, the agreement benefits consumer
12 borrowers in that Selene will have access to the
13 T and I funds and the ability to make the funds
14 available to the appropriate parties, thus
15 relieving consumers of any servicing issues related
16 from the debtor's inability to access the tax and
17 insurance funds.
18 This is particularly important given the fact
19 that we're entering into the fall season, and
20 property taxes are due in many jurisdictions at
21 this time.
22 The objection, as I understand it, goes to the
23 aspect of the motion relating to the transfer of
24 $617,000 from the Regions account to Selene.
25 Again, Your Honor, this money is not leaving

1 the estate. The money is going to an agent, under
2 this agreement, an agent of the debtor. This money
3 is directly traceable to these particular loans.
4 The whole purpose of this motion is to
5 stabilize and, in effect, preserve the value of
6 these loans for all constituencies. In essence,
7 you could say, Your Honor, that the debtor is
8 moving this money from its left pocket to its right
9 pocket. Again, it's not leaving the estate.
10 This is not the same as other constituencies
11 coming in and saying: Give me my money out of the
12 Regions account, where the money leaves the estate
13 never to be seen again. It's going to be
14 self-contained, kept within the estate.
15 THE COURT: It's going to be used, though, to
16 pay taxes and insurance on individual properties;
17 is that correct?
18 MR. KELLEY: Yes, Your Honor, that's correct.
19 THE COURT: Now, these funds, when they're
20 transferred, are they already earmarked per case?
21 In other words, each one goes with a particular
22 file?
23 MR. KELLEY: Yes, they're traceable
24 specifically to specific --
25 THE COURT: They're not going to a fund to

1 start paying everybody's taxes out of these funds,
2 are they?
3 MR. KELLEY: Pardon me, Your Honor. May I
4 ask --
5 THE COURT: These are individual debtor's
6 escrow monies.
7 MR. KELLEY: Yes, they're individual
8 borrower's escrow monies. The use of it will be
9 pooled by Selene, but it's directly traceable to
10 the borrowers who are in these 1,185 loans and 23
11 reverse mortgages. It's a pooled aggregate sum
12 directly traceable to these 1,185 loans, is what
13 I'm trying to say.
14 THE COURT: You pay some taxes, that
15 particular borrower is $500 short this year, then
16 you bill him for that shortage in his escrow
17 account. That's what you're talking about, in
18 normal business --
19 MR. KELLEY: Yes, Your Honor, that's correct.
20 THE COURT: That's what they normally do.
21 They advance it and bill the borrower for it, if
22 the account is current, I guess.
23 MR. KELLEY: That's right. But what we're
24 talking about here is we know we've got earmarked
25 funds in the Regions Bank account that relate

1 directly to these loans, and we're simply asking
2 that we transfer it from one place under the
3 control of the debtor to another place where it's
4 going to be used in conjunction with these
5 particular loans.
6 THE COURT: I understand. I'm going to listen
7 to the articulated objections.
8 MR. KELLEY: So I don't get another note from
9 my colleagues, I would ask that my proffer of Mr.
10 Luria's testimony be accepted.
11 THE COURT: It will be accepted. He's here to
12 be recalled on cross-examination if somebody wants
13 to call him.
14 MR. JOHNSON: Now good afternoon, Your Honor.
15 THE COURT: Good afternoon.
16 MR. JOHNSON: It's after 1:00. Jason Johnson
17 for Federal Home Loan Mortgage Corporation, Freddie
18 Mac.
19 I think Your Honor was hitting on one of the
20 salient points, and that was with respect to the
21 make-whole provision. The debtor is really acting
22 in its capacity as an investor, like Freddie Mac or
23 Ginnie Mae or Wells Fargo or some of the other
24 investors in this case. It has loans that it can
25 no longer service, and so it wants to transfer the

1 servicing to an interim servicer, and it wants to
2 give its borrower funds related to those loans to
3 the interim servicer.
4 The difference is, what the debtor is
5 proposing to do is pool all of those funds, and, to
6 the extent there are shortfalls on one loan,
7 they're going to take the P and I proceeds from the
8 other loans and pay the shortfall on loan two. And
9 to the extent that Loan A from which they're
10 pulling P and I funds may not constitute the
11 debtor's actual property, that money has no longer
12 gone from the right pocket to the left pocket, it's
13 gone, for the purposes of pulling that money back
14 to the actual owner of that loan.
15 The first point of my limited objection, Your
16 Honor, was that the debtor has been screaming since
17 day one that the borrower funds that its holding
18 for the investors, it can't release those because
19 -- you know, it just can't do it until the asset
20 reconciliation is complete and they're sure who
21 owns what. First it was the servicing
22 reconciliation, now it's the asset reconciliation.
23 If they can't do it for everybody else, Your Honor,
24 they can't do it for themselves.
25 I understand the Court is likely to allow it

1 to happen to protect the interests of the
2 borrowers. But, Your Honor, to the extent that the
3 monies are transferred to this interim servicer and
4 they're pulled from the P and I account of one
5 borrower to pay for the T and I shortfall of
6 another borrower, there needs to be a make-whole
7 provision, Your Honor, to protect whatever investor
8 it turns out owns those after the asset
9 reconciliation is complete.
10 And I wouldn't call it an adequate protection
11 relief, I'd call it relief under Section 105 that
12 this Court is authorized to grant. And I think
13 it's appropriate, we've asked for it, it was
14 denied, but I think it's appropriate relief given
15 that these monies are going to be flowing out and
16 may potentially be gone forever, Your Honor.
17 The limited objection is pretty simple. To
18 the extent they can't release everybody's borrower
19 funds, they shouldn't be able to release their own.
20 And if they can release their own, they ought to
21 release everybody else's. To the extent they're
22 going to go out the door, there needs to be a make-
23 whole provision, like Freddie Mac has provided,
24 like Ginnie Mae has provided, and like I know some
25 of the other investors are contemplating providing,

1 and frankly are likely to provide, in my opinion.
2 So to the extent the Court lets the monies go
3 out, we would request that under Section 105 the
4 Court include a make-whole provision in the order
5 requiring that, at the end of the asset
6 reconciliation, if it turns out that TBW does not
7 own these loans, that whatever investor does own
8 these loans gets the loans back and gets whatever
9 proceeds that are attributable to those loans back
10 as well, Your Honor.
11 MR. WEITNAUER: Your Honor, Kit Weitnauer on
12 behalf of Wells Fargo as master servicer.
13 Me, too. More specifically, Mr. Kelley's
14 point was that these monies are directly traceable
15 to these loans. If that's true, then perhaps the
16 servicing reconciliation or the profit
17 reconciliation is complete as to that. And that
18 might be fine once that's been transparently given
19 to everybody and we know that. It could well be
20 that some loans or pockets of loans or some
21 deposits are worked out, resolved, and perfectly
22 traced, and none of us could complain about them
23 going out the door because it's all been done.
24 But our last report from the debtor was they
25 haven't finished that process, and so we don't

1 think that this package, this set of money on
2 deposit, should go out the door when we haven't
3 heard about this process being finished or anyone
4 else getting their money either.
5 Thank you.
6 MR. TESSITORE: Your Honor, Mike Tessitore on
7 behalf of Bank of America as indentured trustee,
8 custodian and collateral agent.
9 In many of the arguments I've made before the
10 Court in prior hearings we've asked for a make-
11 whole agreement to the extent that somebody is
12 receiving the beneficiary of the transfer of loan
13 servicing or of loan proceeds. So Mr. Johnson's
14 request for a make-whole agreement, we believe, is
15 consistent with that and we support that request.
16 MR. KOBERT: Your Honor, very quickly. Roy
17 Kobert on behalf of U.S. Bank.
18 Just to be consistent with the debtor acting
19 as a transfer of servicing, yes, we want to focus
20 on taxes and insurance, but to the extent of any
21 shortfall, what all the servicers have done is
22 either advance the money to make up for that
23 shortfall, but not touch the P and I money that is
24 still subject of a bone fide dispute.
25 T and I is the most important issue, but we

1 shouldn't be raiding P and I to make up for that
2 shortfall. All of our servicers are advancing that
3 to the extent it needs to be advanced as part of
4 the agreement they have with the lender themselves,
5 and we're not getting from the debtor the P and I
6 money at this time.
7 There's no reason for special treatment for
8 this debtor, because in fact they are in the role
9 that we're all performing under at the same time.
10 I realize it's a small universe, that the
11 focus should be on the T and I issues -- which is
12 important to this Court and to your Chapter 13
13 debtors -- without having to raid at this point in
14 time -- which the debtor doesn't have total
15 confidence in the underlying P and I money that it
16 has for these loans they allegedly own.
17 MR. SINGERMAN: May it please the Court, Paul
18 Singerman on behalf of the committee. Your Honor,
19 I will be brief, just a few points.
20 The arguments being advanced first by Freddie
21 and then by the others admittedly are facially
22 attractive, but I think the attraction ends there
23 and doesn't withstand any meaningful analysis.
24 The difference between the relief sought by
25 the debtors in this motion, which the committee

1 supports, is that these loans, these mortgages and
2 the few reverse mortgages, are owned by the debtor.
3 They are owned by the estate. That is the debtor's
4 position. There's nothing before the Court that
5 indicates that's wrong.
6 And to the extent that funds are used to
7 advance P and I -- T and I for one borrower from P
8 and I payments of another, the estate's interest in
9 this pool of mortgages is preserved. Because if it
10 later turns out that any of these objectors in fact
11 adduces proof that Your Honor finds to be
12 compelling and establishes in favor of any other
13 party an ultimate interest in these mortgages, then
14 no one is harmed. The estate has preserved the
15 mortgages for the benefit of either itself and all
16 general unsecured creditors, or any creditor who
17 later may prevail in a claim of ownership.
18 And, frankly, Judge, it's no different, even
19 though I guess the argument's shifting, since the
20 adequate protection argument that Bank of America
21 failed again, Freddie has abandoned that and is now
22 relying on 105. There are no cases cited in its
23 objection, no law has been offered to you other
24 than: Maybe in the future we'll prove something
25 that would justify retrospectively granting that

1 relief. That's inadequate.
2 We'd ask that Your Honor overrule the
3 objection, grant the relief sought by the debtor.
4 THE COURT: Explain to me again. The money in
5 this account consists of four things: you got your
6 taxes and insurance amount, then you got your
7 principal and interest amount.
8 These are the debtor's loans.
9 MR. SINGERMAN: Yes, sir, the debtor's loans.
10 THE COURT: If the debtor chooses to take some
11 of his money, the P and I, and pay taxes for one of
12 his borrowers, you're saying he can do that, even
13 though he's in bankruptcy and those are assets,
14 that that part is an asset of the estate. Is that
15 what you're saying?
16 MR. SINGERMAN: Yes, sir, because, Judge, I --
17 THE COURT: It's not a prepetition debt, I
18 guess. I'm trying to figure out --
19 MR. SINGERMAN: Well, Judge, this debtor's
20 business was servicing, and in this limited
21 instance it's servicing for its own account. This
22 is what it did.
23 THE COURT: Right.
24 MR. SINGERMAN: And by paying those taxes, it
25 would avoid the ultimate risk of, at least in

1 Florida, a tax deed and the estate's loss of the
2 property. That would benefit nobody.
3 THE COURT: I understand. But they're not
4 just transferring the tax and insurance amount over
5 to the servicer to take care of these things,
6 they're transferring P and I money also, although
7 the borrowers have each gotten credit for making
8 the payment.
9 MR. SINGERMAN: Right. And essentially, Your
10 Honor, it's the debtor using -- because the debtor
11 has the interest in those funds. Nobody has pled
12 or certainly proven a perfected interest in these
13 funds that the debtor is due in respect of
14 mortgages it owns. And it's in the ordinary course
15 of the debtor's business as a servicer to spend
16 money in this case servicing --
17 THE COURT: Or to advance money for taxes.
18 MR. SINGERMAN: Yes, sir.
19 THE COURT: Okay.
20 MR. JOHNSON: Your Honor, Jason Johnson again
21 for Freddie Mac.
22 It's important to remember that the debtor is
23 essentially acting as an investor in this regard.
24 It owns these loans, it can't service it anymore,
25 it's got to get somebody to service them, so it's

1 transferring the servicing to somebody else. It's
2 transferring the loans, and it wants to transfer
3 the monies that go along with it.
4 But it's not going to hold the P and I and
5 T and I, every payment from every borrower, in, for
6 lack of a better expression, a little segregated
7 pot per loan. It's going to pool it all. And to
8 the extent there are shortfalls --
9 THE COURT: It's the debtor's money. He can
10 use it in the operation of its business.
11 MR. JOHNSON: Well, Your Honor, if it's the
12 debtor's money, that must mean that the asset
13 reconciliation is complete. They must know for
14 sure that these are theirs, and the only way they
15 can know that is if the asset reconciliation is
16 complete. And, if that's complete, then release
17 our borrower funds to us.
18 THE COURT: Thank you.
19 The objection is overruled. The motion is
20 granted. The Court reserves the right to enter
21 findings of fact and conclusions of law if
22 necessary.
23 MR. SINGERMAN: Thank you, Your Honor.
24 MR. BLAIN: Thank you, Your Honor.
25 THE COURT: Somebody do the order.

1 (Thereupon, at 1:20 p.m., the hearing was
2 concluded.)
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1 C E R T I F I C A T E

2 STATE OF FLORIDA)

3 COUNTY OF DUVAL)

4 I, Cindy Danese, Notary Public, State of
5 Florida at Large, do hereby certify that the attached
6 represents the proceedings before the United States
7 Bankruptcy Court, Middle District of Florida,
8 Jacksonville Division, before the Honorable Jerry A.
9 Funk, Bankruptcy Judge, in the matter of In Re:
10 Taylor, Bean & Whitaker; such transcript is an accurate
11 recordation of the proceedings which took place. A
12 transcript of this proceeding has been produced on
13 November 25, 2009.

14

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16 STATEWIDE REPORTING SERVICE

17

18 ______________________________
19 CINDY DANESE

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