UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	Chapter 11
TAYLOR, BEAN & WHITAKER MORTAGE CORP., REO SPECIALISTS, LLC, and HOME AMERICA MORTGAGE, INC.,	Case No. 3:09-bk-07047-JAF Case No. 3:09-bk-10022-JAF Case No. 3:09-bk-10023-JAF (jointly administered under Case No. 3:09-bk-07047-JAF)
Debtors.	
_____/	
TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,	Case No. 3:09-bk-07047-JAF
Applicable Debtor,	
_____/	

OBJECTION OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR PLATINUM COMMUNITY BANK, TO PLAN TRUSTEE'S MOTION TO APPROVE SETTLEMENT AGREEMENT BETWEEN NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA AND THE TAYLOR, BEAN & WHITAKER PLAN TRUST

The Federal Deposit Insurance Corporation, as Receiver for Platinum Community Bank ("FDIC-R"), hereby objects to the motion [Dkt. No. 6980] ("Motion") of Plan Trustee Neil F. Luria ("Plan Trustee") to approve the settlement agreement ("Agreement") between the Taylor, Bean & Whitaker Plan Trust and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). In support of this Objection, the FDIC-R respectfully represents as follows:

PRELIMINARY STATEMENT

The Motion improperly purports to impact the rights of the FDIC-R. The Plan Trustee, in exchange for the release of National Union's asserted administrative claim, is

stipulating to the rescission of an insurance policy which it has already conceded is *not property* of the Estate. Not only does the Plan Trustee lack the right to somehow "void" the Policy to which he holds no rights, but his attempt to do so would deprive several third-parties of their rights to the Policy without their consent and for no consideration.

The Motion and Agreement are improper and should not be approved because, among other things:

- The Agreement wrongfully attempts to eliminate the rights of non-settling third parties to proceeds of a National Union insurance policy that, as this Court has previously ruled, do not belong to the bankruptcy estate and should be available for claims the FDIC-R has against insureds under that policy (*see* page 5);

- The Agreement does not satisfy the standards for approval of settlements pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") (*see* page 6);

- By seeking to void the insurance policy as to all insureds, potential insureds, and potential claimants, the Plan Trustee and National Union are misusing these bankruptcy proceedings (*see* page 8);

- The Motion and Agreement attempt to do an end-run around the law and provide relief to National Union that would be unavailable if it had properly pursued a separate legal action to declare the insurance policy void (*see* page 9); and

- The Motion seeks relief against the FDIC-R and its assets that is barred by FIRREA for lack of jurisdiction under 12 U.S.C. §§ 1821(d)(3)-(13) and § 1821(j) (*see* page 13).

Accordingly, the Motion should be denied. In the alternative, the Agreement should be modified to limit the effect of the Agreement solely to TBW, and not to any other insureds, potential insureds, or potential claimants.

FACTUAL BACKGROUND

I. The National Union Insurance Policy and the FDIC-R's Claims

1. Prior to the commencement of these bankruptcy cases, National Union issued a Directors, Officers, and Private Company Liability Policy ("Policy") to Taylor, Bean &

Whitaker Mortgage Corp. ("TBW") covering the period from September 1, 2008 through September 1, 2009. *See* Dkt. 1534-1. In addition to providing coverage to TBW and its directors and officers, the Policy provided coverage for TBW's subsidiaries and their directors and officers, including Platinum Community Bank ("PCB") and Platinum Bancshares, Inc. ("PBI"). *See id.*

2. On September 4, 2009, the Office of Thrift Supervision ("OTS") closed PCB, a federally chartered thrift. PCB was wholly owned by PBI, a one-bank holding company, which, in turn, was a subsidiary of TBW. TBW owned 93 percent of PBI's shares and effectively was PCB's ultimate parent company.

3. On the same day, the OTS appointed the Federal Deposit Insurance Corporation as Receiver for PCB. By statute, the FDIC-R succeeded to all rights, titles, powers, and privileges of PCB and its shareholders, accountholders, and depositors, including, but not limited to, PCB's claims against the bank's former directors and officers and PBI. *See* 12 U.S.C. § 1821(d)(2)(A).

4. On April 21, 2010, the FDIC-R made a demand on certain former directors and officers of PCB for their various wrongful acts in the operation and direction of PCB. *See* Exhibit A. National Union received a copy of that demand letter, which constituted a timely claim under the Policy. *See* Exhibit B at 1, Exhibit C at 1, Exhibit D at 2.

5. On July 24 and 25, 2012, the FDIC-R supplemented its April 21, 2010 notice and provided National Union with additional timely notice of claims arising out of the same or similar wrongful acts of five of PCB's former directors and/or officers ("D&Os") and PBI, which resulted in damages at that time of at least $7 million. *See* Exhibit B at 1, Exhibit C at 1.[1]

[1] The July 2012 letters are not attached hereto because they were marked confidential for settlement purposes. If the Court wishes to review them, the FDIC-R will provide copies for *in camera* review.

6. In October 2012, National Union responded to the FDIC-R's July 2012 letters and declined coverage for the FDIC-R's claims. *See* Exhibits B, C. National Union argued that the Policy was void as a result of material misrepresentations by TBW's former Chairman, Lee Farkas, in the application for issuance of the Policy. *See* Exhibit B at 3, Exhibit C at 3. National Union claimed that Farkas' subsequent criminal conviction for engaging in a fraud relating to TBW's business since 2002 established that he in lied in the 2007 application by denying knowledge of any acts that could give rise to a claim under the proposed insurance policy. *See* Exhibit B at 3, Exhibit C at 3**.**

II. The Plan Trustee's Motion to Void the Policy

7. As discussed in the Motion, National Union asserted an administrative expense claim against TBW's estate in the amount of $992,568.63. In December 2012, the Plan Trustee and National Union entered into the Agreement in an effort to resolve this administrative claim.

8. On February 12, 2013, the Plan Trustee filed a motion in this matter requesting that the Court approve the Agreement between the TBW Plan Trust and National Union. *See* Dkt. 6980. In the Agreement, National Union and the Plan Trustee stipulated that National Union would not have an administrative claim and that "the Policy was and is void as to **all** Insureds, potential Insureds and potential claimants." *Id.* at 11-12 (emphasis added); *see also id.* at 4.

9. The Agreement reiterated National Union's belief that the Policy is void as a result of alleged misrepresentations by Farkas in the Policy application. *See id.* at 10.

10. The Plan Trustee entered into the Agreement "solely in his capacity as [TBW] Plan Trustee." *Id.* at 15. The D&Os and PBI, who are among a number of insureds other

than TBW under the Policy, are not parties to the Agreement. *See id.* at 9, 15. The D&Os and PBI also did not grant the Plan Trustee authority to act on their behalf with respect to voiding the Policy. *See id.* Likewise, the FDIC-R, who has claims against the D&Os and PBI under the Policy, was not a party to the Agreement, did not consent to the Agreement, and did not otherwise grant the Plan Trustee authority to act on its behalf. *See id.*

11. Rather, the Agreement provides that "all Individual Insureds who have reported a Claim or Notice of Circumstances under the Policy as well as the FDIC as Receiver for Platinum Community Bank" shall be given notice of the Motion and an opportunity to object to the Agreement. Dkt. 6890 at 11.

12. The FDIC-R accordingly is exercising its rights to submit this Objection.

OBJECTION

I. The Agreement Improperly Attempts to Eliminate All Rights to Policy Proceeds that Do Not Belong to the Bankruptcy Estate and that Should Be Available for the FDIC-R's Claims.

13. The Court should deny the Plan Trustee's request to approve the Agreement because it improperly attempts to eliminate all third-party rights to Policy proceeds, even though such proceeds are not property of TBW's bankruptcy estate and are not assets of the TBW Plan Trust. *See* Dkt. 1934. In particular, the bankruptcy estate and, as a result, the TBW Plan Trust, does not have any interest in the proceeds available under the Policy for the FDIC-R's claims against the D&Os and PBI. The Plan Trustee is thus seeking to eliminate an administrative claim by improperly attempting to eliminate property rights unrelated to the estate.

14. As this Court previously ruled in this matter more than two years ago, "[TBW has] no property interest in the proceeds available under [the Policy] . . . for [direct] claims

against . . . directors and officers." Dkt. 1934 at 5 (granting National Union's motion for relief from stay to advance defense costs under the Policy to TBW's former Chairman, Farkas, and TBW's former CEO, Paul Allen[2]). The Court also found that TBW has "no current viable claims to proceeds under the terms of the Policy." *Id*.

15. In so ruling, this Court recognized other bankruptcy court holdings that, although a debtor, like TBW, may own an insurance policy, the policy proceeds do not become part of the bankruptcy estate. *See In re CHS Elecs., Inc.*, 261 B.R. 538, 542 (S.D. Fla. 2001) ("where the liability coverage covers the exposure of the directors and officers of the Debtor, and only is payable for the benefit of those directors and officers, it is they, and not the estate, that have a property interest in the liability proceeds for bankruptcy purposes").

16. Now, however, without any factual or legal basis, National Union and the Plan Trustee completely disregard the Court's prior holding and wrongfully attempt to eliminate all rights, including rights of non-debtor third-parties, to potential insurance proceeds that do not belong to the bankruptcy estate. This misuse of the bankruptcy process should not be permitted. As the Court previously recognized, the Policy extends coverage beyond just TBW, and the Policy's proceeds should be available for those other insureds—including for the claims the FDIC-R has timely asserted against the D&Os and PBI.

II. The Agreement Does Not Satisfy the Standards for Approval Under Bankruptcy Rule 9019.

17. The Agreement is not fair and equitable, as required under Bankruptcy Rule 9019, because it improperly impacts the rights of non-settling third parties. The standard for

[2] In addition, Farkas was Chairman of PCB and PBI from July 11, 2008, through August 12, 2009. Allen was Executive Vice President ("EVP") of PCB from July 17, 2009 to August 7, 2009 and also functioned as a *de facto* officer of the PCB for many months prior to being named EVP.

review of a settlement agreement under Bankruptcy Rule 9019 is that the settlement be fair and equitable and in the best interests of the estate. *See In re Kay*, 223 B.R. 816, 819 (Bankr. M.D. Fla. 1998) ("The court should approve the settlement only when the settlement is fair and equitable and in the best interest of the estate."). The fairness of a proposed settlement "may not warrant its approval if the rights of others who are not parties to the settlement agreement are unduly prejudiced." *Eddy v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA (In re Med. Asset Mgmt., Inc.)*, 249 B.R. 659, 663 (Bankr. W.D. Pa. 2000). "Ignoring the effect of a proposed [settlement] upon the rights of third parties 'contravenes a basic notion of fairness.'" *Id.* (quoting *U.S. v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 298 (5th Cir. 1984)). Indeed, before endorsing any settlement, the Court "is obligated to make an examination of how the accord affects the rights of third parties." *In re Drexel Burnham Lambert Group, Inc.*, 995 F.2d 1138, 1146 (2d Cir. 1993).

18. The Agreement is not fair and equitable, and should not be approved under Bankruptcy Rule 9019, because it waives the rights of third-parties in and to the Policy and proceeds without their consent. *See Overton's, Inc. v. Interstate Fire & Casualty Ins. Co. (In re Sportstuff, Inc.)*, 430 B.R. 170, 178–79 (8th Cir. B.A.P. 2010) (finding a debtor's attempts through a settlement to waive the rights of third parties with respect to an insurance policy and its proceeds to be impermissible). In *In re Sportstuff*, the court found that because a settlement between a debtor and insurer and an injunction contained therein prohibiting third parties from pursuing the insurer under a policy "impair significant rights of third parties . . . without compensation or their consent, the Settlements are not fair and reasonable, and the bankruptcy court did not have jurisdiction to impose the Settlement Injunction." *Id.* at 179. The same reasoning applies here.

19. The Agreement unduly prejudices the rights of third parties, including the FDIC-R, by stripping them of their rights with respect to the Policy and proceeds. The Agreement is not fair and equitable as required under Bankruptcy Rule 9019 and, therefore, the Motion should be denied.

III. The Plan Trustee and National Union Do Not Have the Authority to Void the Policy in its Entirety Through this Bankruptcy Process.

20. The Court also should deny the Motion because the Plan Trustee and National Union are overreaching their respective authority in these bankruptcy proceedings.

21. In particular, the Plan Trustee does not have the authority to enter into such a broad agreement. The Plan Trustee was appointed in this matter for the limited purpose of acting on behalf of the reorganized TBW's bankruptcy estate. The Plan Trustee's effort to deny rights to other insureds, potential insureds, or potential claimants amounts to a substantial overreach of his authority. *See*, *e.g.*, *Official Comm. Of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150 (11th Cir. 2006) ("A bankruptcy trustee stands in the shoes of the debtor" but "there is no suggestion in the text of the Bankruptcy Code that the trustee acquires rights and interests *greater* than those of the debtor.") (emphasis in original).

22. Further, nothing in the Policy provides the Plan Trustee or National Union with the right to void the Policy as to all insureds, potential insureds, and potential claimants. Rather, Section 15 of the Policy, entitled "Notice and Authority," only provides TBW the limited ability to act on behalf of other insureds for the following purposes: (i) to give notice of a claim under the Policy, (ii) to give or receive notice of cancellation of the Policy, (iii) to pay or receive the return of Policy premiums, (iv) to receive and accept Policy endorsements, (v) to exercise or decline the right to tender the defense of a claim to the insurer, and (vi) to

exercise or decline the right to a Discovery Period or Reinstated Limit, as those terms are defined in the Policy. *See* Dkt. 1534-1.

23. Moreover, this bankruptcy case is not the appropriate forum for obtaining a declaration that the Policy is void. Rather, the proper legal procedure (as the Motion and Agreement recognize) is for National Union to file a separate declaratory judgment action where the issues could be properly litigated with all relevant parties present. *See* Dkt. 6980 at 5, 12 (indicating that, should National Union file a declaratory judgment action to obtain a ruling that the Policy is void, the Plan Trustee will not oppose it).[3] As described in the next section, substantial legal and factual questions exist regarding National Union's alleged right to obtain a declaration that the Policy void. The Court, therefore, should not permit National Union to short-circuit that process by means of the Agreement.

IV. The Agreement Improperly Attempts to Provide National Union with Relief that It Cannot Obtain under the Law.

24. As the Motion explains, "[i]n determining whether a settlement agreement should be approved under Bankruptcy Rule 9019, the [C]ourt must consider . . . probability of success in the litigation." Dkt. 6980 at 6 (citing *Wallis v. Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990)). The Motion, however, is completely silent as to National Union's likelihood of success in pursuing an action for a declaration that the Policy is void.

25. In fact, National Union has little chance of obtaining a determination in a separate declaratory judgment action that the Policy is void as to all insureds, potential insureds, and potential claimants. As is further discussed below, National Union: (i) has waived its right to assert that the Policy is void, (ii) is precluded from obtaining such a

[3] *See also Johnson v. Life Ins. Co. of Ga.*, 52 So.2d 813, 815 (Fla.1951) ("a forfeiture of rights under an insurance policy is not favored by the law, especially where, as here, a forfeiture is sought after the happening of the event giving rise to the insurer's liability").

declaration by the adverse interest exception to agency law, and (iii) is taking an incorrect position that conflicts with the plain language of the Policy.[4]

A. *Waiver*

26. National Union is not likely to succeed on a declaratory judgment claim because it has waived its right to claim that the Policy is void based upon misrepresentations in the Policy application. National Union did not timely assert that argument and acted in a manner recognizing the continued existence of the Policy. For example:

(i) National Union responded to the FDIC-R's April 21, 2010 notice on February 28, 2011 without asserting any issue regarding a misrepresentation in the Policy application, despite the fact that Farkas had been indicted months earlier. *See* Exhibit D.

(ii) National Union did not return to TBW the Policy premium that TBW paid. *See* Dkt. 6980 at 4, 10; *see also Wimberg v. Chandler*, 986 F. Supp. 1447, 1456 (M.D. Fla. 1997) ("[insurance company] waived its right to rescind the insurance policy . . . by accepting and retaining premiums").

(iii) National Union continued to defend Farkas and Allen (who are among the D&Os) under the Policy even after the insurance company had at least constructive notice, no later than June 15, 2010 when Farkas was indicted, that Farkas may have made misrepresentations in the Policy application. *See generally Farkas v. Nat'l Union Fire*, 861 F. Supp. 2d 716 (E.D. Va. 2012); *see also Zurich Specialties London Ltd. v. Vill. Of Bellwood, Ill.*, No. 07 CV 2171, 2011 WL 248444, at *13 (N.D. Ill. Jan. 26, 2011) (insurer waived right to void policy because its conduct in defending insured in 2010 was "inconsistent with an intent to rescind the contract based on alleged misrepresentations and concealment in 2000 and 2001").

(iv) National Union did not raise its misrepresentation argument in its litigation with Farkas to recoup defense costs previously advanced under the Policy. *See Farkas*, 861 F. Supp. 2d 716. National Union instead relied on other exclusions in the Policy that assumed the Policy was in effect and not void. *See id.*; *see*

[4] The FDIC-R does not attempt to conduct a mini-trial and provide the Court with an exhaustive analysis of all the reasons why National Union will not succeed on a declaratory judgment claim. Rather, the FDIC-R seeks to highlight several reasons why the Agreement's attempt to void the Policy is improper and to show that National Union has a low likelihood of prevailing on the issue. The FDIC-R reserves the right to assert additional arguments at a later time in this or other proceedings on the issue.

also Frisbie v. Carolina Cas. Ins. Co., 103 So. 3d 1011 (Fla. 5th Dist. Ct. App. 2010) (denying summary judgment for insurer who waited more than 18 months to assert rescission, during which time "the insurer defended the firm, settled another claim on the policy, and took other actions that were inconsistent with rescission").

(v) National Union did not raise its misrepresentation argument with the FDIC-R, the D&Os, and PBI until October 2012, even though the Policy period commenced September 1, 2008 and National Union had actual or constructive notice, no later than June 15, 2010 when Farkas was indicted, that there may have been misrepresentations by Farkas in the Policy application. *See* Exhibits B, C; *see also Landmark Am. Ins. Co. v. Green Lantern Roadhouse LLC*, No. 07–CV–0535–MJR, 2009 WL 413086, at *15 (S.D. Ill. Feb. 18, 2009) (insurance company waived its right to rescind policy by not acting promptly in accordance with that right).

B. *Adverse Interest Exception*

27. Even assuming, *arguendo*, that (i) National Union could overcome the fact that it waived its argument, and (ii) National Union then could prove that Farkas did make misrepresentations in the Policy application, National Union still could not obtain a declaration that the Policy is void in light of the adverse interest exception to agency law. That exception prevents Farkas' alleged misrepresentations in the Policy application from being imputed to the innocent insureds (including the innocent D&Os and PBI) and thereby prevents the Policy from being void as to those innocent insureds. *See Bancinsure v. U.K. Bancorp*, 830 F. Supp. 2d 294 (E.D. Ky. 2011).[5]

28. In *Bancinsure*, a federal court recently found that a president/CEO's knowledge relating to her embezzlement of funds from her company could not be imputed to the insured company in connection with answering its policy application. 830 F. Supp. 2d 294. The court explained that the president/CEO was acting adverse to the insured's interests when she lied on

[5] *See generally Dehres LLC v. Underwriters*, 826 F. Supp. 2d 1338, 1347-48 (S.D. Fla. 2011) (the acts of an agent will not be imputed to a corporation when those acts are adverse to the interests of the corporation); William Meade Fletcher, *Independent frauds against the corporation*, 3 FLETCHER CYC. CORP. § 826 (Sept. 2012) (same).

the application, and, if she had responded truthfully, her fraud would have been revealed, and she would not have been able to continue embezzling funds from the insured. *Id.* at 302.

29. The same analysis would apply here. If Farkas did make misrepresentations in the Policy application (a fact that National Union still must prove), Farkas was acting on his own behalf, and not on behalf of the innocent insureds, who were not aware of and were harmed by Farkas' wrongdoing. Thus, Farkas' adverse interest would prevent a court from declaring the Policy void as to all insureds, potential insureds, and potential claimants.

C. *Plain Language of Policy*

30. In addition, National Union cannot overcome the plain language of the Policy that precludes the Policy from being voided as to all insureds, potential insureds, and potential claimants, as the Agreement attempts to do, based upon alleged misrepresentations in the Policy application. Section 19 of the Policy specifically provides that misrepresentations in the Policy application cannot "void [the Policy] as to . . . Individual Insureds who are 'non-employee Directors' . . . who did not personally know the [Policy] statement or representation to be inaccurate or incomplete." Dkt. 1534-1.

31. For a court to find otherwise in a declaratory judgment action, and thus render the Policy completely void, would ignore this plain language of the Policy and run afoul to the basic principles of insurance contract interpretation. *See generally Fla. Polk County v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 (11th Cir. 1999) (courts should interpret contracts to "give[] a reasonable meaning to all provisions" and not "leave[] a portion of the [contract] useless, inexplicable or create[] surplusage"); *Axis Ins. Co. v. Farah & Farah, P.A.*, No. 3:10–cv–393–J–37JBT, 2011 WL 3156544, at *5 (M.D. Fla. July 26, 2011) (insurance

contracts should be construed in accordance with their plain language); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill.2d 90, 108 (1992) (same).

32. Accordingly, there are several reasons why National Union is unlikely to succeed in an action for a declaratory judgment that the Policy is void as to all insureds, potential insureds, and potential claimants. Accordingly, the Court should not provide National Union relief that it is not otherwise entitled to under the law and should not approve the Agreement stipulating that the Policy is entirely void.

V. The Requested Relief is Barred by FIRREA

33. The Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Public Law 101-73, 103 Stat. 183, was enacted "to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country." *Freeman v. FDIC*, 56 F.3d 1394, 1398 (D.C. Cir. 1998) (citation omitted). One set of pertinent FIRREA provisions, 12 U.S.C. §§ 1821(d)(3)-(13), "creates an administrative claims process for banks in receivership with the FDIC." *American Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1141 (D.C. Cir. 2011). Another pertinent provision, § 1821(j), "bar[s] courts from restraining or affecting the exercise of power or functions of the FDIC as a conservator or a receiver." *Freeman*, 56 F.3d at 1398 (internal quotation marks and citations omitted; ellipsis in original).

A. The Plan Trustee Cannot "Void" the FDIC-R's Property Rights Without Following the Administrative Claims Process.

34. By seeking to void the Policy as to all insureds, potential insureds, and potential claimants, National Union and the Plan Trustee are attempting to determine rights relating to the FDIC-R's assets—its claims to the Policy proceeds—in violation of the FIRREA administrative claims process. 11 U.S.C. § 1821(d)(2)-(d)(13).

35. By operation of law, the FDIC-R holds all rights, titles, powers, and privileges of PCB, an insured under the Policy, including PCB's claims against the D&Os and PBI. *See* 12 U.S.C. § 1821(d)(2)(A). The FDIC-R's statutory right to pursue the claims against the D&Os and PBI constitutes a legally protectable interest in the Policy that the FDIC-R would wrongfully be denied if the Agreement is approved by the Court. *See Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 682 (7th Cir. 1992) ("the victim of an insured's tort, even though he is not a third-party beneficiary of his injurer's insurance policy, has a legally protectable interest in that policy before he has reduced his tort claim to judgment").[6] Therefore, the Policy, as it relates to the PCB, and any proceeds under the Policy that may be paid in connection with the FDIC-R's claims (including for the claims against the D&Os and PBI), are the FDIC-R's assets.

36. Claims seeking a determination of rights with respect to the FDIC-R's assets must comply with the administrative claims process. *Lubin v. Skow*, 382 Fed. Appx. 866, 870 (11th Cir. 2010) (upon its appointment, the FDIC as receiver succeeds to all of the failed bank's rights, powers, and assets, including bank claims and causes of action); *Freeman v. Fed. Deposit Ins. Corp.,* 56 F.3d 1394, 1400 (D.C. Cir. 1995) (FIRREA requires "anyone bringing a claim against or 'seeking a determination of rights with respect to' the assets of a failed bank held by the FDIC as receiver to first exhaust administrative remedies by filing an administrative claim under the FDIC's administrative claims process.'") (citations omitted). If they do not, FIRREA provides a jurisdictional bar for bringing any such claims. 12 U.S.C. § 1821(d)(13)(D) ((Limitation on Judicial Review) "no court shall have jurisdiction over (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository

[6] Indeed, the Agreement itself recognizes that the FDIC-R has a significant interest in the Policy, by specifically indicating that the FDIC-R should be given notice of the Motion and the opportunity to object to the Agreement. *See* Dkt. 6890 at 11.

institution for which the [FDIC] has been appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.").

37. In effect, the jurisdictional bar provision and the claims procedures work together to impose a "statutory exhaustion requirement" that is "explicitly jurisdictional." *Rosa v. RTC*, 938 F.2d 383, 395 (3d Cir. 1991), *cert denied*, 502 U.S. 981 (1991); *see Freeman*, 56 F.3d at 1400 ("Section 1821(d)(13)(D) thus acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies.").

38. The Plan Trustee's and National Union's attempt to determine the FDIC-R's property rights is subject to the FIRREA administrative claims process. Because neither party filed an administrative claim with the FDIC-R seeking to void the Policy, the FDIC-R respectfully states that this Court does not have jurisdiction to do so through the Motion and it should be denied. 12 U.S.C. § 1821(d)(13)(D).

B. FIRREA Also Bars the Equitable Remedy Sought By the Movants.

39. 12 U.S.C. § 1281(j) (Limitation on Court Action) provides that "no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." This section has been described as "effect[ing] a sweeping ouster of courts' power to grant equitable remedies." *Freeman v. Fed. Deposit Ins. Corp.*, 56 F.3d 1394, 1399 (D.C. Cir. 1995); *see also Bank of America, N.A. v. Colonial Bank*, 604 F.3d 1239, 1243 (11th Cir. 2010) ("Congress expressly mandated that no court – at the behest of other parties – may take any action to restrain or affect the exercise of the FDIC's powers or functions as receiver."); *Island Reach Partners, Ltd. v. Resolution Trust Corp. (In re Island Reach Partners, Ltd.)*, 161 B.R. 310, 312 (Bankr.

S.D. Fla. 1993) ("Anti-injunction provisions like 12 U.S.C. § 1281(j) apply in bankruptcy proceedings notwithstanding 11 U.S.C. § 105 . . . and supersede the Court's general equitable powers under 11 U.S.C. § 105.") (citations omitted).

40. Although this jurisdictional ouster may "appear drastic, it fully accords with the intent of Congress." *Freeman*, 56 F.3d at 1398; *see also Sahni v. Am. Diversified Partners,* 83 F.3d 1054, 1058 (9th Cir. 1996) ("Essential to these enumerated powers is the FDIC's ability to carry out its basic functions as a receiver free from judicial restraint, pursuant to 12 U.S.C. § 1821(j)."); *Radian Ins., Inc. v. Deutsche Bank Nat'l Trust Co., et al*, Civ. Action No. 08-2993, 2009 WL 3163557, at *15 (E.D. Pa. Oct. 1, 2009) ("In Section 1821(j), Congress has expressed its clear intent to prohibit equitable or declaratory relief that may interfere with the FDIC's powers."). Moreover, the language in Section 1821(j) makes it "apparent that any equitable remedy against the FDIC . . . would restrain the FDIC's statutory power." *Jones-Boyle v. Washington Mutual Bank, F.A*., 2010 WL 2724287, at * 5 (N.D. Cal. July 8, 2010).

41. By requesting to "void" the FDIC-R's rights to the Policy proceeds, the Movants seek an equitable remedy that restrains and affects the power of the FDIC-R to, among other things, "collect all obligations and money due the institution" (§ 1821(d)(2)(B)(ii)), "preserve and conserve the assets and property of such institution" (§ 1821(d)(2)(B)(iv)), "proceed to realize upon the assets of the institution, have due regard to the conditions of credit in the locality" (§ 1821(d)(2)(E)), "liquidate the institution in an orderly manner" (§ 1821(c)(13)(B)(i)), and to exercise "such incidental powers" as shall be necessary to carry out those powers expressly granted by statute (§ 1821(d)(2)(J)(i)). Therefore, the requested relief is barred by 12 U.S.C. § 1281(j).

WHEREFORE, the FDIC-R respectfully requests that the Court enter an order denying the Motion.

Alternatively, the FDIC-R requests that the Court require National Union and the Plan Trustee to modify the Agreement to clearly provide that the Plan Trustee only stipulates that the National Union policy is void as to TBW, and not as to any other insureds, potential insureds, and potential claimants, including the FDIC-R.

Dated: March 13, 2013
Jacksonville, Florida

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EXHIBIT A

FDIC
Federal Deposit Insurance Corporation
3501 Fairfax Drive, Arlington, VA 22226-3500
Legal Division

April 21, 2010

VIA UPS OVERNIGHT AND
CERTIFIED MAIL – RETURN RECEIPT REQUESTED
TO ALL ADDRESSEES

Mr. Lee B. Farkas
480 SW 87th Place
Ocala, FL 34476

Mr. Paul Allen
6157 NE 25th Avenue
Ocala, FL 34479

Mr. Raymond E. Bowman
4999 SW Second Court
Ocala, FL 34474

Mr. William V. Leaming, Jr.
3110 SE 17th Terrace
Ocala, FL 34471

Mr. Michael J. Linsner
1063 Holly Circle
Lake Zurich, IL 60047

Mr. Jon L. Berndt
1 Wakia Court
Hawthorn Wood, IL 60047

Mr. Richard Lamz
2709 Majestic Oaks Lane
St. Charles, IL 60174

Mr. Jeff Polkinghorne
6 McKay Drive
Bridgewater, NJ 08807

Mr. John F. Kulczewski
1945 Dorset Drive
Wheaton, IL 60187

Mr. Michael C. Giambrone
24000 Erhart
Grayslake, IL 60030

Mr. John A. Skyrd
22 W. #70 Cheetah Lane
Estero, FL 33928

Mr. William L. Anderson
8 Margot Lane
Palos Heights, IL 60463

Re: Demand for Payment of Civil Damages
Platinum Community Bank – In Receivership (FIN #10115)
Continental Casualty Company
CNA Pro – Liability Policy Number: 282973341

Gentlemen:

As you know, on September 4, 2009, Platinum Community Bank (the "Bank") was closed by the Office of Thrift Supervision ("OTS"), and the Federal Deposit Insurance Corporation was appointed as Receiver ("FDIC-R"). This letter constitutes a claim by FDIC-R for the payment of civil damages from each of you as former directors, officers, or employees (collectively, the "Directors and Officers") of Platinum Bancshares, Inc. and/or its subsidiaries, including without limitation the Bank. The FDIC-R makes this demand based on your acts, errors, omissions, and breaches of duty ("Wrongful Acts"), including without limitation negligence, gross negligence, recklessness, and breaches of fiduciary duty, relating to the management and direction of the Bank and loans originated or funded by the Bank.

Although the exact amount of loss caused by the Wrongful Acts of the Directors and Officers is under investigation and, therefore, impossible to determine at this time, the FDIC-R estimates a loss of at least $12,127,888. As a result, the FDIC-R hereby demands that the

Directors and Officers, collectively, pay the FDIC-R the sum of $12,127,888. Because this investigation is ongoing, losses caused by Wrongful Acts, including loss in connection with the July 2009 loans and other loans identified in this letter, are subject to change.

Generally speaking, the Wrongful Acts of the Directors and Officers include the failure to manage the Bank's affairs properly, failure to maintain appropriate independence between the Bank and its direct and indirect corporate affiliates, failure to manage subordinate employees, and failure to provide appropriate management, administration, and oversight concerning the Bank's loan policies, approval process, loan administration, risk management, underwriting, and internal controls. The Wrongful Acts of the Directors and Officers for which this demand for civil damages is made are based on acts and omissions, including, by way of example and not limitation, the Wrongful Acts described below.

July 2009 Loans Funded With Escrow Deposits

During July 2009, the Directors and Officers approved a significant increase in funding of mortgage loans originated by the Bank's indirect corporate parent, Taylor, Bean & Whitaker Mortgage Corporation ("TBW"). Following TBW's initial investment in the Bank in 2008, the mission of the Bank was recast to provide a platform and expanded funding base to close mortgage loans for TBW. A new business plan for the Bank was prepared by TBW to carry out this vision, and the Directors and Officers allowed the Bank to be used to promote the business interests of TBW. The plan was accepted by the Bank's Directors and submitted to OTS, as the Bank's primary regulator, for approval. On or about July 2, 2009, before receiving OTS approval, the Directors and Officers commenced a greatly expanded loan financing operation that more than doubled the size of the Bank's loan portfolio. During July 2009, in addition to other funding sources, a total of $210 million was transferred to the Bank for this purpose by TBW, which was comprised entirely of funds from escrow accounts belonging to the Federal Home Loan Mortgage Corporation ("Freddie Mac").

These actions by Directors and Officers were in violation of restrictions imposed on the Bank by OTS with respect to the necessity of obtaining prior approval of the new business plan before departing significantly from the then authorized business plan. Shortly before the Directors and Officers embarked upon a massive increase in funding of loans for TBW with escrow deposits, OTS had reminded the Bank that only previously authorized activities were permitted without OTS approval. After discovering the Bank's significant expansion of loans, OTS ordered Bank Directors at the end of July 2009 to cease all further purchases of TBW loans until further notice. The Wrongful Acts of Directors and Officers also contravened Freddie Mac's requirements. In August 2009, Freddie Mac demanded return of its escrow funds, asserting that the use of escrow deposits to fund residential loans was a violation of Freddie Mac's guidelines. The Bank failed to honor the request because, having already disbursed the funds for loans, the Bank attempted to sell the loans but was unable to do so by the deadline set by Freddie Mac. Unable to satisfy its obligations to Freddie Mac, the Bank became insolvent, was closed by OTS, and was placed into receivership.

The Wrongful Acts by Directors and Officers with respect to the improper use of Freddie Mac escrow funds include, but are not limited to, the following:

- Failure to ensure proper management of the Bank's liquidity;
- Failure to put in place policies and procedures for managing escrow accounts and determining the soundness of investments made with such funds;
- Failure to properly control and oversee the Bank's concentration level of "hold for sale" loans;
- Failure to evaluate adequately the regulatory and economic risks associated with unprecedented increases in real estate loans, particularly those in the "hold for sale" portfolio;
- Failure to respond appropriately to regulatory criticisms and warnings, such as (without limitation) complying with Regulation W, particularly in transactions with TBW; obtaining OTS approval of the Bank's business plan; and reviewing the creditworthiness of borrowers prior to agreeing to fund loans;
- Failure to undertake sufficient due diligence before using escrow deposits to fund loans as demanded by TBW;
- Failure to seek appropriate information to evaluate the business plan put forward by TBW and to perform an independent assessment of the plan's potential effects on the Bank;
- Failure to maintain an appropriate measure of independence from affiliates and to prevent TBW from exercising unwarranted influence over the actions and decisions of Directors and Officers;
- Failure to comply with Freddie Mac guidelines regarding the use of escrow deposits;
- Failure to provide information needed by Directors and Officers in carrying out their duties with regard to transactions with TBW; and
- Violations of the Directors' and Officers' duties of loyalty and fiduciary duties.

Losses caused by the foregoing Wrongful Acts have not been, and cannot be, finally determined at this juncture, as certain facts necessary to make such a determination are presently unknown. Approximately 1,300 loans were funded with Freddie Mac escrow deposits. A number of the loans currently are past due, while other loans may become delinquent in the future. The losses associated with these loans are estimated by the FDIC-R at $9,781,223.

In addition, 85 of the loans, which were funded with $13,390,340 of the Freddie Mac escrow deposits, are currently in litigation, having been listed on the books of other institutions.

TBW's multiple selling of loans is currently the subject of the following civil lawsuits: *Bank of America, N.A. v. Colonial Bank, et al.*, U.S. District Court, S.D.Fla., No. 09-22384; *Deutsche Bank, AG v. Bank of America, N.A.*, U.S. District Court, S.D.N.Y., No. 09-cv-9784; and *BNP Paribas Mortgage Corp. v Bank of America*, U.S. District Court, S.D.N.Y., No. 09-9783; and also an ongoing ownership reconciliation process being conducting by TBW in its chapter 11 bankruptcy case, *In re Taylor, Bean & Whitaker Mortgage Corporation*, Bankr. M.D. Fla., Case No. 09-7047. The final dollar amount of the losses sustained by the Bank ultimately may be determined in the above-referenced litigation. The Directors and Officers failed to take appropriate steps and institute appropriate controls to detect such improprieties and avoid such losses.

Other Loans

Additional Wrongful Acts committed by the Directors and Officers also are responsible for losses in connection with various loans that were funded by the Bank prior to the events of July 2009 described above. Among them are the loans listed below, along with estimated losses attributed to them as of this date:

Loan Number	Original Loan Balance	Estimated Losses
150000960	$1,600,000	$1,291,038
150001029	$ 742,000	$ 344,186
150001045	$ 224,000	$ 711,441
150001053	$ 720,000	*
1409092426	$ 406,500	*
TOTAL	**$3,932,500**	**$2,346,665**

* Estimated losses are included in the $711,441 estimate shown above, given that all three loans were made to the same borrower.

Losses from problem loans, including those listed above, are expected to increase significantly.

The Wrongful Acts on which these estimated losses are based for other loans in the Bank's portfolio include without limitation those summarized as follows:

- Failure to establish appropriate procedures for, among other things, assessing concentration levels, performing stress testing, and assuring sound underwriting;
- Failure to supervise and manage the lending activities of the Bank in accordance with appropriate standards and in conformity with legal lending limits;
- Allowing the Bank to maintain excessive concentrations in stand-alone, second lien mortgages, exhibiting an inordinate level of delinquencies and charge-offs;
- Failure to adequately manage risk within the loan portfolio;
- Failure to establish and secure effective implementation of sound internal controls;

- Failure properly to supervise loan disbursals;
- Inadequate credit administration;
- Failure to review and monitor the overall quality of the loan portfolio;
- Failure to respond appropriately to regulatory criticisms and warnings;
- Approval and implementation of unsafe and unsound practices that impaired asset quality and weakened risk management;
- Failure to institute, in a timely manner, appropriate controls to mitigate the effects of a large real estate portfolio in a slowing real estate market;
- Failure to undertake sufficient due diligence before approving loans;
- Approval of loans outside the Bank's primary lending area without adequate due diligence, controls, and evaluation of credit risks;
- Failure to establish, monitor, and implement effective procedures for obtaining timely and accurate appraisals; and
- Failure to supervise compliance or comply with loan policies.

The FDIC-R is continuing to investigate this matter and reserves the right to modify, supplement, and both modify and supplement its demand for monetary damages.

The FDIC-R further demands that each of you preserve, and not discard, all documents and electronically stored information, documents, and data in your possession custody, or control, that pertain in any way to the Bank, any claim, fact, loan transaction, or other matter stated or referred to in this letter, or insurance coverage for claims made in this letter.

We are providing a copy of this letter to the Bank's and Platinum Bancshares, Inc.'s Directors' and Officers' Liability Policy insurer, Continental Casualty Company, and to their insurance agent, JMB Insurance Agency, Inc., by Overnight Delivery, Certified Mail – Return Receipt Requested, and facsimile, at the following addresses:

CNA Pro
C/O Claim Intake Manager
40 Wall Street – 8th Floor
New York, NY 10005
Fax: 212.440.3710
Phone: 212.440.3439

Mr. Lee Brodsky
JMB Insurance Agency, Inc.
900 N. Michigan Avenue – Suite 1500
Chicago, IL 60611
Fax: 312.915.2245
Phone 800.767.5150

We urge each of you also to immediately report this claim, in writing, to the insurer and agent at the above addresses and by facsimile.

Sincerely,

Thomas J. O'Brien
Counsel

cc: Via Overnight Delivery, Certified Mail – Return Receipt Requested, and facsimile:

CNA Pro
C/O Claim Intake Manager
40 Wall Street – 8th Floor
New York, NY 10005
Fax: 212.440.3710

Mr. Lee Brodsky
JMB Insurance Agency, Inc.
900 N. Michigan Avenue – Suite 1500
Chicago, IL 60611
Fax: 312.915.2245

EXHIBIT B

CARLTON FIELDS

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Steven J. Brodie
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October 15, 2012

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Chicago, Ill. 60661-4587

Justin T. Branford, Esq.
Carr, Morris & Graeff, P.C.
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Vienna, Va. 22182

Lee Farkas
Register #43560-018
FCI Buttner 2
P.O. Box 1500
Buttner, NC 27509

Re: **National Union Fire Insurance Company of Pittsburg, Pa. Directors, Officers and Private Company Liability Insurance Policy**
Policy No. 01-203-95-48 (the "Policy")
Insurer: National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union" or "the Insurer")
Insured: Taylor, Bean & Whitaker Mortgage Corp.
Claimant: FDIC, as Receiver for Platinum Community

Gentlemen:

We represent National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") and Chartis Claims, Inc. ("Chartis"). Chartis is the administrator handling insurance coverage arising under the above Policy. The purpose of this letter is to update and supplement our prior coverage positions. In particular, we refer to and incorporate Chartis' February 28, 2011 letter regarding the FDIC's letter of April 21, 2010, which originally asserted certain claims against officers/directors of Platinum Community Bank ("the Bank") and its holding company, Platinum Bancshares, Inc., attached as App. 1. Today's letter responding to the FDIC's letters of July 25, 2012, directed to Mr. Farkas and Mr. Allen, does not replace any of the prior coverage letters we or Chartis have sent to the Insureds, including Mr. Farkas and Mr. Allen, which are incorporated by reference. We will be responding to the FDIC's letters directed to Mr. Linsner, Mr. Leaming, and Mr. Giambrone in a separate letter in the near future.

On April 19, 2011, a Federal Jury convicted Lee Farkas, Taylor Bean's Chairman, of fourteen counts in a Federal Grand Jury indictment in the United States District of the Eastern District of

Virginia, Alexandria Division. The indictment included claims for conspiracy to commit bank fraud, wire fraud and securities fraud. Significantly, Count I of the indictment charged Mr. Farkas with conspiracy to commit these federal crimes beginning in early 2002. As a result of his conviction, Mr. Farkas was sentenced to 30 years in prison. Taylor Bean is the Named Entity on the above Policy.

In addition, on April 1, 2011, Mr. Allen, as the former CEO of Taylor Bean, pled guilty to a two-count criminal information charging him with one count of conspiracy to commit bank fraud, securities fraud and wire fraud and one count of false statements. Judgment was entered against Mr. Allen based on that guilty plea on June 21, 2011. Mr. Allen also signed a statement of facts in support of his plea which confirmed that the conspiracy to commit bank fraud began between 2003—2005 and directly implicated Mr. Farkas in this scheme to commit bank fraud. As a consequence, Mr. Allen is now serving a 40-month sentence, and has been ordered to make restitution of over $2 billion, including amounts to reimburse the FDIC for it losses from the Colonial Bank failure. The court specifically ruled in its restitution order that Mr. Allen was "well aware of TBW's improper practices" that led to the Colonial Bank failure.

Similarly, Taylor Bean's former President, Raymond Bowman, was sentenced on June 10, 2011, to 30 months in prison based on his March 14, 2011 guilty plea to one count of conspiracy to commit bank fraud and one count of false statements. He admitted that he and his co-conspirators engaged in an extensive scheme of bank fraud, massively overstating the value of Taylor Bean and hiding its financial problems from 2003-2009.

In addition, the conviction of Mr. Farkas confirmed the Government's assertions that Platinum Community Bank had been an instrument in the overall conspiracy to commit bank fraud, particularly Count 9 in Mr. Farkas' indictment, which involved an email from the Bank's CEO to the FDIC as one of the interstate wire communications that were used in the scheme to defraud. Further, as part of the scheme to defraud, the Government alleged and the jury found that Mr. Farkas and his co-conspirators used the Bank to mislead investors that a $300 million private capital contingency had been met by depositing sums into the Bank's escrow, which monies had been diverted from Ocala Funding. *See* Farkas Indictment at ¶¶41-42. Notably, these are the same basic facts that the SEC asserted against Mr. Allen in its Complaint in *SEC v. Allen*, Case No. 1:11CV657 LMB/JFA (E.D. Va. June 17, 2011).

Coupled with these facts that the guilty pleas and convictions have now established, the FDIC directly asserts in its recent letters that Mr. Farkas and Mr. Allen acted in a dual capacity as the CEO of Taylor Bean and an officer of the Bank, and caused transactions that preferred the interests of Taylor Bean over the Bank's interests by purchasing millions of dollars of Taylor Bean mortgage loans with Freddie Mac funds, considered an unsafe banking practice. These assertions demonstrate that Mr. Farkas' and Mr. Allen's actions were intertwined with their duties as officers/directors of Taylor Bean, positions that directly led to their criminal convictions.

Hence, the FDIC's allegations directly involve and relate to Taylor Bean's activities which form the very bases for the criminal convictions of Mr. Farkas, Mr. Allen and Mr. Bowman. As noted in the Audit Report of the Office of Inspector General, Department of the Treasury (Sept. 16, 2011), the Bank ultimately purchased $481 million in Taylor Bean mortgage loans largely with Freddie Mac funds, and Taylor Bean thus played a "significant role . . . in the failure of" the Bank. *Id.* at 4, 15.

Taylor Bean submitted an application dated May 23, 2007, and a supplemental application dated June 30, 2009, to National Union for Directors and Officers coverage. In addition, Taylor Bean provided other information in support of its applications, which were signed by Mr. Farkas in his capacity as Chairman of Taylor Bean. The original application required Mr. Farkas on behalf of Taylor Bean to disclose any knowledge or information of any act, error or omission that

might give rise to a claim under the proposed policy.

The guilty pleas of Mr. Allen and Mr. Bowman and the verdict against Mr. Farkas for federal crimes related to Taylor Bean's business beginning in about 2002 establish that the original application submitted to National Union in May, 2007 failed to fully disclose material information and made misrepresentations on which National Union relied in underwriting the Policy, therefore resulting in the Policy becoming void pursuant to its own terms. Mr. Farkas' conviction is now final as it has been affirmed on appeal, and the Fourth Circuit specifically found that the Taylor Bean multi-stage fraud began in 2002. *See United States v. Farkas*, 2012 WL 2335154 (4th Cir. 2010) (affirming Farkas' conviction for "multibillion dollar scheme to hide the financial difficulties of Taylor, Bean" and holding that the jury was amply justified in finding "Farkas and his co-conspirators engaged in a multi-stage fraud scheme between 2002 and 2009").

Clause 19 of the Policy states:

> [I]t is agreed that the insurer has relied upon the statements and representations contained in the application for this policy (including materials submitted thereto and, if this is a renewal application, all such previous policy applications for which this policy is a renewal) as being accurate and complete. All such statements and representations shall be deemed to be material to the risk assumed by the Insurer, are the basis of this policy and are to be considered as incorporated into this policy.
>
> With respect to such statements and representations, no knowledge or information possessed by any Individual Insured, *except for those person or persons who executed the application* [in this case, Mr. Farkas] shall be imputed to any other Individual Insured. If any person who executed the application knew that such statement or representation was inaccurate or incomplete, then this policy will be void as to all Insureds other than the Individual Insureds who are "non-employee" Directors of the Company and who did not personally know the statement or representation to be inaccurate or incomplete.... (e.s.)

Based on this provision, Mr. Farkas' knowledge about his criminal activities is imputed to all Insureds and all coverage is now void under the Policy for all Insureds (other than non-employee directors as defined in SEC Rule 16b-3, none of whom has sought coverage). Accordingly, National Union will decline to advance any further Defense Costs or Policy benefits. Moreover, National Union reserves the right to seek return of all funds advanced pursuant to the Order entered by the Bankruptcy Court in the Taylor Bean proceeding. National Union reserves all of its rights under the Policy including rights under Florida Statute §627.409 and common law to defend any claims for coverage based on fraud in the application and/or to rescind the Policy if claims for coverage are made.

In addition, it is also now apparent as to certain Individual Insureds (Mr. Farkas and Mr. Allen) that Exclusion 4(a) has now been triggered since the loss was in connection with a Claim made against the Insureds arising out of, based upon, or attributable to, the gaining in fact of any profit or advantage to which the Insureds were not legally entitled. Also, Exclusion 4(c) is now triggered by the guilty plea and guilty verdict, and all Claims are excluded as arising out of, based upon or attributable to the committing in fact of any criminal, fraudulent, or dishonest act, or any willful violation of any statute, rule or law. Since each of the Individual Insureds either entered guilty pleas or was convicted, these exclusions are now triggered by the substantiation of the Government's claims for bank fraud and other federal crimes, and none of these Insureds

is entitled to coverage under the Policy. Moreover, since these individuals were key officers in Taylor Bean, coverage for the Company or subsidiaries is likewise precluded for Claims arising out of any of this conduct. Judge Brinkema confirmed in her order that National Union's coverage position that these exclusions had both been triggered was correct, and that coverage was not available under the Policy. *See Farkas v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2012 WL 966577 (E.D. Va. 2012).

The Policy expired on September 1, 2009, but was subject to an extended reporting Endorsement 22, which authorized the "Named Entity" to report Claims first made during the Extended Reporting Period that were based on conduct prior to August 24, 2009. The FDIC letters, the first of which was sent in April, 2010, after the Policy expired, do not satisfy the extended reporting endorsement's requirements for reporting Claims under that special reporting provision, since only the Named Entity is permitted to give notice to National Union, and the FDIC as Receiver for Platinum Bank is not the Named Entity (Taylor Bean) and therefore cannot give adequate notice. Since the Extended Reporting Period expired on August 24, 2012, it is now too late for any Claims to be properly noticed by the Named Entity.

National Union reserves all rights to raise further defenses and exclusions, including but not limited to all those previously cited in its coverage letters, as well as Exclusion 4(i), the Insured v. Insured Exclusion, since the FDIC is acting both as a claimant and an insured in asserting its claim.

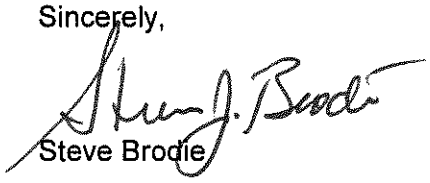
Further, National Union reserves its right to seek reimbursement from Mr. Farkas and Mr. Allen pursuant to their entering the Agreement to Advance Defense Costs in December, 2010, in which they specifically acknowledged that should it become evident that coverage was never available under the Policy, they would be responsible to repay the advanced Defense Costs to National Union. National Union also relies on Clause 8 which requires repayment of Defense Costs if the Insured was not entitled to coverage.

We have now reviewed the Continental Casualty Company policy directly covering Platinum Bancshares. Under the National Union Policy, this Continental policy is expressly primary, and provides coverage of $1 million; the National Union Policy is expressly excess to the Continental policy. Thus, until this primary policy is exhausted by defense costs or settlement payments, even if coverage could exist under the National Union Policy (which it cannot), it could not be triggered until after payments exhausted the Continental policy coverage.

National Union's position is based on information currently available to it. This letter is not, and should not be treated as, waiver of any terms, conditions, exclusions or other provisions of the Policy, any other policies of insurance issued by National Union, or any of its affiliates. National Union expressly reserves all of its rights under the Policy, including the right to raise additional defenses to any claims for coverage.

Should you have any additional information that you feel might affect our position, or assist us in our investigation of our coverage position, please advise us as soon as possible.

Sincerely,



Steve Brodie

CARLTON FIELDS, P.A.

EXHIBIT C

CARLTON FIELDS

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October 17, 2012

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VIA US MAIL

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VIA E-MAIL jgeorge@kattentemple.com

Re: National Union Fire Insurance Company of Pittsburg, Pa. Directors, Officers and Private Company Liability Insurance Policy
Policy No. 01-203-95-48 (the "Policy")
Insured: Taylor, Bean & Whitaker Mortgage Corp.
Insurer: National Union Fire Insurance Co. of Pittsburgh, Pa. ("the Insurer")
Claimant: FDIC, as Receiver for Platinum Community Bank

Gentlemen:

We represent National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union" or "the Insurer"), and Chartis Claims, Inc. ("Chartis"). Chartis is the administrator handling insurance coverage arising under the above Policy. The purpose of this letter is to update and supplement our prior coverage positions. In particular, we refer to and incorporate Chartis' February 28, 2011 letter regarding the FDIC's letter of April 21, 2010, which originally asserted certain claims against officers/directors of Platinum Community Bank ("the Bank") and its holding company, Platinum Bancshares, Inc., attached as App. 1. Today's letter responding to the FDIC's letters of July 25, 2012, does not replace any of the prior coverage letters we or

Chartis have sent to the Insureds, including Mr. Farkas and Mr. Allen, which are incorporated by reference. This letter responds to the FDIC letters directed to Mr. Linsner, Mr. Leaming, and Mr. Giambrone. We have previously responded to the FDIC letters directed to Mr. Farkas and Mr. Allen in a separate letter.

On April 19, 2011, a Federal Jury convicted Lee Farkas, Taylor Bean's Chairman, of fourteen counts in a Federal Grand Jury indictment in the United States District of the Eastern District of Virginia, Alexandria Division. The indictment included claims for conspiracy to commit bank fraud, wire fraud and securities fraud. Significantly, Count I of the indictment charged Mr. Farkas with conspiracy to commit these federal crimes beginning in early 2002. As a result of his conviction, Mr. Farkas was sentenced to 30 years in prison. Taylor Bean is the Named Entity on the above Policy.

In addition, on April 1, 2011, Mr. Allen, as the former CEO of Taylor Bean, pled guilty to a two-count criminal information charging him with one count of conspiracy to commit bank fraud, securities fraud and wire fraud and one count of false statements. Judgment was entered against Mr. Allen based on that guilty plea on June 21, 2011. Mr. Allen also signed a statement of facts in support of his plea which confirmed that the conspiracy to commit bank fraud began between 2003—2005 and directly implicated Mr. Farkas in this scheme to commit bank fraud. As a consequence, Mr. Allen is now serving a 40-month sentence, and has been ordered to make restitution of over $2 billion, including amounts to reimburse the FDIC for it losses from the Colonial Bank failure. The court specifically ruled in its restitution order that Mr. Allen was "well aware of TBW's improper practices" that led to the Colonial Bank failure.

Similarly, Taylor Bean's former President, Raymond Bowman, was sentenced on June 10, 2011, to 30 months in prison based on his March 14, 2011 guilty plea to one count of conspiracy to commit bank fraud and one count of false statements. He admitted that he and his co-conspirators engaged in an extensive scheme of bank fraud, massively overstating the value of Taylor Bean and hiding its financial problems from 2003-2009.

In addition, the conviction of Mr. Farkas confirmed the Government's assertions that Platinum Community Bank had been an instrument in the overall conspiracy to commit bank fraud, particularly Count 9 in Mr. Farkas' indictment, which involved an email from the Bank's CEO to the FDIC as one of the interstate wire communications that were used in the scheme to defraud. Further, as part of the scheme to defraud, the Government alleged and the jury found that Mr. Farkas and his co-conspirators used the Bank to mislead investors that a $300 million private capital contingency had been met by depositing sums into the Bank's escrow, which monies had been diverted from Ocala Funding. *See* Farkas Indictment at ¶¶41-42. Notably, these are the same basic facts that the SEC asserted against Mr. Allen in its Complaint in *SEC v. Allen*, Case No. 1:11CV657 LMB/JFA (E.D. Va. June 17, 2011).

Coupled with these facts that the guilty pleas and convictions have now established, the FDIC directly asserts in its recent letters that Mr. Farkas and Mr. Allen acted in a dual capacity as the CEO of Taylor Bean and an officer of the Bank, and caused transactions that preferred the interests of Taylor Bean over the Bank's interests by purchasing millions of dollars of Taylor Bean mortgage loans with Freddie Mac funds, considered an unsafe banking practice. Further, other officers/directors, including Mr. Leaming and Mr. Linsner, failed to take any actions to

prevent Taylor Bean's exploitation of the Bank. These assertions demonstrate that Mr. Farkas' and Mr. Allen's actions involving the Bank were intertwined with their duties as officers/directors of Taylor Bean, positions that directly led to their criminal convictions.

Hence, the FDIC's allegations (other than those involving Mr. Giambrone) directly involve and relate to Taylor Bean's activities which form the very bases for the criminal convictions of Mr. Farkas, Mr. Allen and Mr. Bowman. As noted in the Audit Report of the Office of Inspector General, Department of the Treasury (Sept. 16, 2011), the Bank ultimately purchased $481 million in Taylor Bean mortgage loans largely with Freddie Mac funds, and Taylor Bean thus played a "significant role . . . in the failure of" the Bank. *Id.* at 4, 15.

Taylor Bean submitted an application dated May 23, 2007, and a supplemental application dated June 30, 2009, to National Union for Directors and Officers coverage. In addition, Taylor Bean provided other information in support of its applications, which were signed by Mr. Farkas in his capacity as Chairman of Taylor Bean. The original application required Mr. Farkas on behalf of Taylor Bean to disclose any knowledge or information of any act, error or omission that might give rise to a claim under the proposed policy.

The guilty pleas of Mr. Allen and Mr. Bowman and the verdict against Mr. Farkas for federal crimes related to Taylor Bean's business beginning in about 2002 establish that the original application submitted to National Union in May, 2007 failed to fully disclose material information and made misrepresentations on which National Union relied in underwriting the Policy, therefore resulting in the Policy becoming void pursuant to its own terms. Mr. Farkas' conviction is now final as it has been affirmed on appeal, and the Fourth Circuit specifically found that the Taylor Bean multi-stage fraud began in 2002. *See United States v. Farkas*, 2012 WL 2335154 (4th Cir. 2010) (affirming Farkas' conviction for "multibillion dollar scheme to hide the financial difficulties of Taylor, Bean" and holding that the jury was amply justified in finding "Farkas and his co-conspirators engaged in a multi-stage fraud scheme between 2002 and 2009").

Clause 19 of the Policy states:

> [I]t is agreed that the insurer has relied upon the statements and representations contained in the application for this policy (including materials submitted thereto and, if this is a renewal application, all such previous policy applications for which this policy is a renewal) as being accurate and complete. All such statements and representations shall be deemed to be material to the risk assumed by the Insurer, are the basis of this policy and are to be considered as incorporated into this policy.
>
> With respect to such statements and representations, no knowledge or information possessed by any Individual Insured, *except for those person or persons who executed the application* [in this case, Mr. Farkas] shall be imputed to any other Individual Insured. If any person who executed the application knew that such statement or representation was inaccurate or incomplete,

> then this policy will be void as to all Insureds other than the Individual Insureds who are "non-employee" Directors of the Company and who did not personally know the statement or representation to be inaccurate or incomplete.... (e.s.)

Based on this provision, Mr. Farkas' knowledge about his criminal activities is imputed to all Insureds and all coverage is now void under the Policy for all Insureds (other than non-employee directors as defined in SEC Rule 16b-3, none of whom has sought coverage). Accordingly, National Union will decline to advance any further Defense Costs or Policy benefits.

In addition, as to Exclusions 4(a) and 4(c), Judge Brinkema confirmed in her order that National Union's coverage position that these exclusions had both been triggered as to Mr. Farkas and his co-conspirators such as Mr. Allen, was correct, and that coverage was not available under the Policy. *See Farkas v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2012 WL 966577 (E.D. Va. 2012). As to the other three officers/directors named in the FDIC letters (Messrs. Linsner, Leaming, Giambrone), National Union reserves its rights to assert these same exclusions if facts are developed to support the application of those exclusions to these other officers/directors.

The Policy expired on September 1, 2009, but was subject to an extended reporting Endorsement 22, which authorized the "Named Entity" to report Claims first made during the Extended Reporting Period that were based on conduct prior to August 24, 2009. The FDIC letters, the first of which was sent in April, 2010, after the Policy expired, do not satisfy the extended reporting endorsement's requirements for reporting Claims under that special reporting provision, since only the Named Entity is permitted to give notice to National Union, and the FDIC as Receiver for Platinum Bank is not the Named Entity (Taylor Bean) and therefore cannot give adequate notice. Since the Extended Reporting Period expired on August 24, 2012, it is now too late for any Claims to be properly noticed by the Named Entity.

As to Mr. Linsner and Mr. Giambrone, the FDIC raises an unrelated matter that these officers/directors made five loans during 2005-2006 without sufficient collateral or without sufficient proof the borrowers could repay the loans, costing the Bank $3 million due to these failures to conduct proper lending practices. Since all coverage is void based on the conviction and actions of Mr. Farkas, there is no coverage for these unrelated claims. Additionally, it is clear that these claims fall squarely with Exclusion 14, which excludes "Loss in connection with any Claim(s) made against any Insured(s) alleging, arising out of, based upon or attributable to any Insured(s)' performance of or failure to perform professional services for others for a fee, or any act(s), error(s) or omission(s) relating thereto." The alleged failures of these officers to perform their duties as loan officers and to properly qualify borrowers are the essential failures to perform professional services.

National Union reserves all rights to raise further defenses and exclusions, including but not limited to all those previously cited in its coverage letters, as well as Exclusion 4(i), the Insured v. Insured Exclusion, since the FDIC is acting both as a claimant and an insured in asserting its claim.

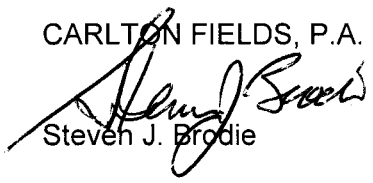
We have now reviewed the Continental Casualty Company policy directly covering Platinum Bancshares. Under the National Union Policy, this Continental policy is expressly primary, and provides coverage of $1 million; the National Union Policy is expressly excess to the Continental policy. Thus, until this primary policy is exhausted by Defense Costs or settlement payments, even if coverage could exist under the National Union Policy (which it cannot), it could not be triggered until after payments exhausted the Continental policy coverage.

National Union's position is based on information currently available to it. This letter is not, and should not be treated as, waiver of any terms, conditions, exclusions or other provisions of the Policy, any other policies of insurance issued by National Union, or any of its affiliates. National Union expressly reserves all of its rights under the Policy, including the right to raise additional defenses to any claims for coverage.

Should you have any additional information that you feel might affect our position, or assist us in our investigation of our coverage position, please advise us as soon as possible.

Sincerely,

CARLTON FIELDS, P.A.



Steven J. Brodie

SJB/bv

EXHIBIT D

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CHARTIS

Via Regular Mail and E-Mail (chorn@mayerbrown.com)

February 28, 2011

Charles M. Horn, Esq.
Mayer Brown LLP
1999 K Street NW
Washington, DC 2006-1101

Re: National Union Fire Insurance Company of Pittsburgh, Pa. Directors, Officers and Private Company Liability Insurance Policy

Policy No.: 01-203-95-48
Insured: Taylor, Bean & Whitaker Mortgage Corp.
Claimants: FDIC
Claim No.: 550-046528

Dear Mr. Horn:

Chartis Claims, Inc. is the claims administrator handling claims arising under insurance policy 01-203-95-48 ("Policy") issued to Taylor, Bean & Whitaker Mortgage Corp. ("TBW") by National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). I have been assigned the above claim file and request that you please address any correspondence regarding this matter to my attention and reference the above claim number.

We understand per your letter dated January 20, 2011, that you represents John Kulczewski, John Skryd, William Anderson and Michael Giambrone, former outside directors of Platinum Bancshares Inc. ("PBI") and its subsidiary, Platinum Community Bank (the "Bank"), in connection with this matter. The purpose of this letter is to provide you with National Union's coverage evaluation in connection with this matter. Should you have questions upon reading this letter, we welcome the opportunity to discuss our coverage position, or to consider any additional relevant information or documentation you wish to submit for our review.

In considering your request for coverage, we have reviewed the Policy and the correspondence provided. No other policies were considered. If you assert a right to

coverage under any other policy, please submit notice pursuant to the notice provisions contained in that policy.

By letter from you dated January 20, 2011, a letter from the Federal Deposit Insurance Corporation ("FDIC"), dated April 21, 2010 ("FDIC Letter"), addressed to twelve (12) persons asserted to be the former directors, officers or employees of PBI and the Bank, was reported to Illinois National and a copy of the FDIC Letter was provided. Based upon our review, the following sets forth a summary of the FDIC Letter.

The FDIC Letter states that on September 4, 2009, the Bank was closed by the Office of Thrift Supervision ("OTS"), and the FDIC was appointed as receiver. The FDIC Letter asserts that the receiver makes demand for the payment of civil damages from each of the named former directors, officers, or employees of PBI and the Bank (collectively, the "Directors and Officers"). It is asserted that this demand is based on the alleged acts, errors, omissions, and breaches of duty of the Directors and Officers including, without limitation, negligence, gross negligence, recklessness, and breaches of fiduciary duty, relating to the management and direction of the Bank and loans originated or funded by the Bank. It is asserted that, generally speaking, the alleged wrongful acts of the Directors and Officers include the failure to manage the Bank's affairs properly, failure to maintain appropriate independence between the Bank and its direct and indirect corporate affiliates, failure to manage subordinate employees, and failure to provide appropriate management, administration and oversight concerning the Bank's loan policies, approval process, loan administration, risk management, underwriting, and internal controls.

The FDIC Letter states that, by way of example of such acts, the Directors and Officers during July 2009 approved a significant increase in funding of mortgage loans originated by the Bank's indirect corporate parent, Taylor, Bean & Whitaker Mortgage Corporation ("TBW"). It is asserted that following TBW's initial investment in the Bank in 2008, the mission of the Bank was recast to provide a platform and expanded funding base to close mortgage loans for TBW. It is also asserted that a new business plan for the Bank was prepared by TBW to carry out this vision, and that the Directors and Officers allowed the Bank to be used to promote the business interests of TBW. It is further asserted that the plan was accepted by the Bank's directors and submitted to OTS, as the Bank's primary regulator, for approval. The FDIC Letter states that on or about July 2, 2009, before receiving OTS approval, the Directors and Officers commenced a greatly expanded loan financing operation that more than doubled the size of the Bank's loan portfolio. It is further asserted that during July 2009, in addition to other funding sources, a total of $210 million was transferred to the Bank for this purpose by TBW, which was comprised entirely of funds from escrow accounts belonging to the Federal Home Loan Mortgage Corporation ("Freddie Mac"). It is asserted that these actions by Directors and Officers were in violation of restrictions imposed on the Bank by the OTS with respect to the necessity of obtaining prior approval of the new business plan before departing significantly from the then authorized business plan. After discovering the Bank's significant expansion of loans, it is asserted that the OTS ordered Bank directors at the end of July 2009 to cease all further purchases of TBW loans until further notice. The FDIC Letter further alleges that the wrongful acts of Directors and Officers also

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contravened Freddie Mac's requirements with respect to the use of escrow deposits to fund residential loans. The FDIC Letter alleges that over 1300 loans were funded with Freddie Mac escrow deposits. It is asserted that the Bank failed to honor the demand of Freddie Mac for return of its escrow funds and, because it was unable to satisfy its obligations to Freddie Mac, the Bank became insolvent, was closed by the OTS, and was placed into receivership.

The FDIC Letter states that although the exact amount of loss caused by the acts of the Directors and Officers is under investigation, the receiver estimates a loss of at least $12,127,888 and demand is made of the Directors and Officers collectively to pay that sum to the receiver.

Capitalized terms used in this letter and not otherwise defined shall have the meanings given to them in the Policy.

Subject to its terms, conditions, and exclusions, the Policy provides certain coverage subject to an aggregate Limit of Liabilityof $5,000,000 for all Loss, including Defense Costs, and self-insured Retentions in the amounts of $1,000,000 for Regulatory Claims and $500,000 for Securities Claims and All Other Claims. The Policy is a "claims-made and reported" insurance policy providing certain coverage for claims that are first made against the Insured(s) and reported to the Insurer during the Policy Period of September 1, 2008 to September 1, 2009. Pursuant to Endorsement No. 22, the time period in which to report Claims that are first made after August 24, 2009 for alleged Wrongful Acts occurring prior to August 24, 2009, was extended until August 24, 2012. Specifically, that endorsement provides that the Named Entity shall have the right to a period of three years following August 24, 2009, in which to give written notice to the Insurer of Claim(s) first made against an Insured during said three year period for any Wrongful Act(s) occurring on or prior to August 24, 2009.

Coverage A, Individual Insured Insurance, provides, that the Policy, subject to its terms, conditions, provisions and exclusions, shall pay the Loss of each and every Director, Officer or Employee of the Company arising from a Claim first made against such Insureds during the Policy Period or Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of the Policy for any actual or alleged Wrongful Act in their respective capacities as Directors, Officers or Employees of the Company, except when and to the extent that the Company has indemnified such Insureds.

Coverage B, Private Company Insurance, provides, that the Policy, subject to its terms, conditions, provisions and exclusions, shall pay the Loss of the Company arising from a Claim first made against the Company or an Individual Insured, during the Policy Period and reported to the Insurer pursuant to the terms of the Policy, for any actual or alleged Wrongful Act, but, in the case of a Claim against an Individual Insured, only when and to the extent that the Company has indemnified the Individual Insured for such Loss pursuant to law, common or statutory, or contract, or the Charter or By-Laws of the Company duly effective under such law which determines and defines such rights of indemnity.

"Wrongful Act" pursuant to Clause 2(t) of the Policy, in relevant part, means, with respect to Individual Insureds, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by such Insureds in their respective capacities as such, or any matter claimed against such Insured solely by reason of their status as directors, officers or Employees of the Company.

National Union recognizes that the allegations asserted in the matter reported have not been proven at this time, and nothing in this letter should be construed as a suggestion that National Union considers any of the allegations to have any legal or factual merit. Nevertheless, as described below, National Union has identified certain potentially applicable exclusions, and/or other coverage limitations under the Policy, which appear to be implicated by such allegations. This analysis is not intended to be exhaustive or exclusive.

TBW is the Named Entity and a Company under the Policy. It is our understanding that PBI and the Bank are Subsidiaries of TBW. We ask that you please confirm with supporting documentation that each of PBI and the Bank are Subsidiaries of TBW under the Policy. Subject to such confirmation and with a full and complete reservation of rights, each would be a Subsidiary and a Company under the Policy. (See, Item 1 of the Declarations page and Clauses 2(l) and (c)). It is further our understanding that Messrs. Kulczewski, Skyrd, Anderson and Giambrone are former directors of PBI and the Bank. We ask that you please confirm with supporting documentation that each was a director of PBI and the Bank. Subject to such confirmation, and further subject to its terms, conditions, and exclusions and with a full and complete reservation of rights, each would be an Individual Insured (see, Clause 2(i)) under the Policy.

We note that, pursuant to Clause 2(t) of the Policy, Wrongful Act, in relevant part, means, with respect to Individual Insureds, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by such Insureds in their respective capacities as such, or any matter claimed against such Insured solely by reason of their status as directors, officers or Employees of the Company. To the extent that any of Messrs. Kulczewski, Skyrd, Anderson and Giambrone are not alleged to have engaged in any breach of duty, neglect, error, misstatement, misleading statement, omission or act by such Insureds in their respective capacities as such, or any matter claimed against such Insured solely by reason of their status as directors, officers or Employees of the Company, coverage under the Policy would be inapplicable. National Union expressly reserves all rights in this regard.

Pursuant to Clause 2(k) of the Policy, "Loss" means, in pertinent part, "damages, settlements, judgments (including pre/post-judgment interest on a covered judgment), and Defense Costs; however, Loss shall not include: (1) civil or criminal fines or penalties imposed by law; (2) taxes; (3) any amount for which the Insureds are not financially liable or which are without legal recourse to the Insureds; ... or (6) matters which may be deemed uninsurable under the law pursuant to which this Policy shall be construed." (Generally, loss stemming from intentional acts is not insurable as a matter of law). We note further that the FDIC Letter alleges that PBI and/or the Bank funded loans with escrow deposits belonging to Freddie Mac. We, therefore, must note National Union's

rights under certain case law, including the Level 3 Communications v. Federal Insurance Company decision of the U.S. Court of Appeals for the Seventh Circuit (272 F.3d 908) and Conseco, Inc. v. Illinois National Fire Insurance Company of Pittsburgh, Pa., 2002 WL 31961447 (Ind. Cir.), to the effect that a settlement or judgment that is "restitutionary in character" cannot constitute loss under an insurance policy. Similarly, the court in Reliance Group Holdings, Inc. v. Illinois National Fire Insurance Company of Pittsburgh, Pa., 594 N.Y.S.2d 20 at p. 24, has held that "one may not insure against the risk of being ordered to return money or property which has been wrongfully acquired. Such orders do not award 'damages' as that term is used in insurance policies." Accordingly, based upon our review, any coverage that might otherwise be available in connection with the matter is unavailable since the relief sought does not constitute Loss.

We also direct your attention to the exclusion contained in Endorsement 14 of the Policy, the Professional Errors and Omissions Exclusion. That Endorsement, states that "the Insurer shall not be liable to make any payment for Loss in connection with any Claim(s) made against any Insured(s) alleging, arising out of, based upon or attributable to any Insured(s)' performance of or failure to perform professional services for others for a fee, or any act(s), error(s) or omission(s) relating thereto." Since the FDIC Letter alleges, arises out of, is based upon or are attributable to PBI and/or the Bank's performance of mortgage origination and/or servicing of FHA insured mortgages, we are constrained to expressly reserve all rights with respect to Endorsement 14 of the Policy.

We further note that, pursuant to Clause 4(h), the Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an Insured alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the Company or any other Insured under any express contract or agreement. To the extent that the FDIC Letter alleges, arises out of, is based upon or attributable to any actual or alleged contractual liability of PBI and/or the Bank as a result of any express contract or agreement between it and the OTS, the FDIC, Freddie Mac (or related governmental entities) or it and third parties, including, without limitation, mortgage borrowers, then Clause 4(h) would preclude coverage in its entirety for those proceedings. Accordingly, we reserve all rights in that regard.

Next, we note that the exclusions contained in Clauses 4(a) and (c) may be applicable in connection with these matters. These Exclusions provide that the Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured:

(a) arising out of, based upon or attributable to the gaining in fact of any profit or advantage to which the Insured was not legally entitled;

(c) arising out of, based upon or attributable to the committing in fact of any criminal, fraudulent or dishonest act, or any willful violation of any statute, rule or law;

Based upon the allegations in the FDIC Letter of alleged gross negligence, recklessness, breaches of fiduciary duty and executing upon a new business plan without prior

approval of the OTS, Exclusions 4(a) and/or (c) may be applicable. In the event that there is an in fact finding that an Insured gained any profit or advantage to which the Insured was not legally entitled or there is an in fact finding that an Insured committed any criminal, fraudulent or dishonest act, or willful violation of any statute, rule or law, Exclusion 4(a) and/or (c) would be applicable and coverage to the Insured would be precluded in its entirety. Accordingly, we reserve all rights in this regard.

We note that Clause 8 of the Policy provides that National Union does not assume any duty to defend. Rather, the Insureds shall defend and contest any Claim made against them. However, Defense Costs are not a separate category of Loss and are included within the Policy's Limit of Liability and self-insured Retention and subject to its conditions, exclusions and other provisions, including the requirement of the written consent of the Insurer with regard to the incurring of fees and expenses covered by the Policy.

It is our understanding that the firm of Mayer Brown represents Messrs. Kulczewski, Skyrd, Anderson and Giambrone in connection with this matter. In this regard, we ask that such firm please provide us with copies of the biographies of the respective attorneys who are working on the matter, together with their rates. In addition, enclosed please find a copy of our Litigation Guidelines. Please note that these guidelines set forth the parameters of what generally are considered Defense Costs under the Policy.

Clause 8 of the Policy also provides that National Union shall have the right to effectively associate in the defense of any Claim that appears reasonably likely to involve National Union, including but not limited to, negotiating a settlement. Accordingly, only those settlements, stipulated judgments and Defense Costs which have been consented to by National Union may be recoverable as Loss under the terms of the Policy. Please, therefore, be advised that National Union must be apprised of any settlement overtures or discussions on a timely basis, and must be given the opportunity to actively participate in any such discussions to the extent that coverage under the Policy is being sought for such settlement.

We also direct your attention to the provisions of Clause 8 that provide that any advanced payments of Defense Costs by the Insurer shall be repaid to the Insurer by the Insureds or the Company, severally according to their respective interests, in the event and to the extent that the Insureds or the Company, shall not be entitled under the terms and conditions of the Policy to payment of such Loss. Please note that National Union expressly reserves all rights in this regard.

Please also note that pursuant to Clause 6 of the Policy, the Insurer shall only be liable under the Policy for the amount of Loss arising from a Claim which is in excess of the applicable self insured Retention (*i.e.*, $1,000,000 for Regulatory Claims, see Endorsement 11), such Retention amount to be borne by the Company or the Insureds and shall remain uninsured, with regard to all Loss under: (1) Coverage A or B(ii) for which the Company has indemnified or is permitted or required to indemnify the Individual Insureds ("Indemnifiable Loss"). Given that the Messrs. Kulczewski, Skyrd, Anderson and Giambrone are former directors/officers of PBI and/or the Bank and the subject proceeding may have been brought against them in connection with their capacity as such, it is our understanding that TBW, PBI or the Bank has indemnified

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them or is permitted or required to indemnify them for these matters pursuant to law, common or statutory, and/or contract or the Charter or By-laws of TBW duly effective under such law which determines and defines such rights of indemnity. TBW filed for Chapter 11 bankruptcy protection on August 24, 2009, in Jacksonville, Florida. Please be advised of the necessity that the appropriate motion be filed with the Bankruptcy Court that would permit it to indemnify its directors and officers for their Defense Costs within the Policy's self-insured Retention as administrative expenses. As a result, we expressly reserve all rights with respect to TBW's cooperation obligations and, in connection with this issue, including with respect to the Individual Insureds making such motion.

Moreover, given the automatic stay that resulted from TBW's bankruptcy filing, we note that an order modifying the automatic stay (*i.e.*, a "Comfort Order") to permit the payment of the Policy's proceeds will have to be obtained from the Bankruptcy Court before any payments of the Policy's proceeds for Defense Costs or otherwise can be made.

We further note that, pursuant to Endorsement 18 of the Policy, such insurance as is provided by this Policy is specifically excess to Epack Directors and Officers Liability Form G-129170-A issued to Platinum Bancshares, Inc. by Continental Casualty Company, and any renewal or replacement thereof, provided, however, that all terms and conditions of the Policy, not the Epack Directors and Officers Form G-129170-A policy, shall apply. We kindly ask that you please provide a copy of the Continental Casualty Company policy together with a copy of any coverage evaluation issued in connection with these matters.

Please also advise as to whether any of these matters have been referred to any other insurance carrier which may provide coverage for these matters. Also pursuant to Clause 14 of the Policy, as amended by Endorsement 18, the Policy applies only as excess over any other valid and collectible insurance and is specifically excess of any other policy pursuant to which any other insurer has a duty to defend a Claim for which the Policy may be obligated to pay Loss. Thus, if such coverage is available, then the Policy would provide only excess coverage. We ask that you please provide copies of any other such policies, including any errors and omissions policies. In addition, if you have not already done so, we also ask that it submit this matter under any other potentially responsive insurance policies, including, without limitation, any directors and officers or general liability insurers, and forward us copies of any such tender letters, along with the other insurers' responses to such tenders. We also ask that you please provide us with any other information or documents that you believe will cause National Union to revise the foregoing analysis.

Please keep us advised of all significant developments in these matters, and forward to my attention copies of all significant pleadings, motions, and other documents as they become available together with a litigation report as set forth in the Litigation Guidelines. It is especially important that we timely receive a copy of all scheduling orders, stipulations and agreements (whether formal or informal), as well as discovery demands, so that we may more effectively monitor this claim and copies of all defense counsel billings on a monthly basis as required by the Litigation Guidelines.

Finally, we note that other matters have been reported under the Policy and/or may be reported pursuant to Endorsement 22, *i.e.* the run-off endorsement. To the extent coverage is afforded for any such other matter, please note that that the Policy's aggregate Limit of Liability may be eroded thereby.

If you have, or should in the future obtain any information or documents that, in your view, might cause National Union to revisit the above coverage evaluations, please forward such information or documents to my attention at your earliest convenience.

National Union's coverage position is based on the information presently available to us. This letter is not, and should not be construed as, a waiver of any terms, conditions, exclusions or other provisions of the Policy, or any other policies of insurance issued by National Union or any of its affiliates. National Union expressly reserves all of its rights under the Policy, including the right to assert additional defenses to any claims for coverage, if subsequent information indicates that such action is warranted.

Should you have any additional information that you feel would either cause us to review our position or would assist us in our investigation or determination, we ask that you advise us as soon as possible. Also, if you are served with any additional demands or amended complaints or pleadings, please forward them to us immediately, so that we can review our coverage position.

In closing, we ask that you contact us should you have any questions or concerns regarding the contents of this letter.

Sincerely,

Daniel L. Wieneke

Daniel L. Wieneke

Copy: REngman@crcins.com