

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

Chapter 11

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,

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

Debtor.

Emergency Relief Requested

**DEBTOR'S EMERGENCY MOTION FOR TURNOVER,
APPROVAL OF PROCEDURES FOR THE MAINTENANCE AND USE OF
BORROWER PAYMENTS, AND IMMEDIATE RESOLUTION OF RELATED ISSUES**

A hearing on this Motion will be held on September 11, 2009, at 10:00 a.m. in Courtroom 4D, Bryan Simpson United States Courthouse, 300 North Hogan Street, Jacksonville, Florida 32202, before the Honorable Jerry A. Funk, Bankruptcy Judge.

Taylor, Bean & Whitaker Mortgage Corp. (the “**Debtor**” or “**TBW**”), by and through its undersigned counsel, hereby files its Emergency Motion for Turnover, Approval of Procedures for the Maintenance and Use of Borrower Payments, and Immediate Resolution of Related Issues (the “**Motion**”), and requests the entry of an order requiring the Federal Deposit Insurance Corporation (“**FDIC**”) to turn over certain TBW assets to the Debtor estate and approving the procedures set forth below. In support of its Motion, the Debtor respectfully represents the following:

Jurisdiction and Venue

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested herein include 11 U.S.C. §§ 105, 362, 363, 541, and 542.

3. As described more fully below, the relief sought by this Motion is essential to TBW's ability to undergo an effective reorganization or orderly liquidation.

Chapter 11 Filing

4. On August 24, 2009, (the "**Petition Date**"), TBW filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

5. Prior to filing, TBW restructured its board of directors and management so that the affairs and ongoing operations of the company are under the direction and control of new directors and a Chief Restructuring Officer ("**CRO**"), all of whom are independent from TBW's prior business activities and from its previous directors and members of management.

6. As more fully described in TBW's Case Management Summary, TBW was not in financial distress prior to August 3, 2009. As a result of actions taken by various agencies of the federal government and others, however, much of TBW's ability to function as a business was destroyed over the course of a very few days, resulting in the filing of this bankruptcy case.

7. TBW continues to operate its remaining business and manage its property as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

8. No trustee or examiner has been appointed in this case and no official committee has been appointed pursuant to Section 1102 of the Bankruptcy Code.

TBW's Mortgage Servicing Operations

9. Until very recently, TBW was the largest independent (*i.e.* non-depository owned) mortgage lender in the United States. Headquartered in Ocala, Florida, TBW employed approximately 2,400 people across the country. The largest offices were in Ocala, Florida; Atlanta, Georgia; and Tampa, Florida. TBW's principal business was comprised of:

- Origination, underwriting, processing, and funding of conforming conventional and government-insured residential mortgage loans;

- Sale of mortgage loans into the “secondary market” to government-sponsored enterprises such as the Federal Home Loan Mortgage Corporation (“**Freddie Mac**”) or the Government National Mortgage Association (“**Ginnie Mae**”); and
- Mortgage payment processing and loan servicing.

10. In short, mortgage servicing involves the collection of monthly mortgage payments from individual borrowers and, in turn, the appropriate disbursement of those funds. In general, the principal and interest portion of each payment is paid to the owner of the related mortgage, net of a servicing fee paid to TBW. The tax and insurance portions of mortgage payments are paid into an escrow distribution account paid to the appropriate insurers and taxing authorities.

11. Prior to the events that resulted in the filing of this bankruptcy case, TBW’s mortgage servicing operations were substantial, employing approximately 400 people. As of June 30, 2009, TBW serviced approximately 488,000 mortgage loans (primarily first-lien, fixed-rate mortgages), having a combined “unpaid principal balance” (“**UPB**”) in excess of \$80 billion. These mortgages ultimately were owned by various “investors.” The primary investors (constituting approximately 95% of the total UPB) were Freddie Mac and Ginnie Mae. TBW also serviced loans (roughly 5% of total UPB) that were owned by “private label” mortgage investors, such as Wells Fargo and US Bank. Finally, TBW serviced mortgages for its own portfolio, and those of related entities, such as Platinum Community Bank (“**Platinum Bank**”).

Banking and Cash Management Associated with Servicing

12. TBW’s principal banking relationship was with Colonial Bank (“**Colonial**”). In addition to maintaining operating accounts at Colonial, TBW maintained numerous other

custodial accounts necessary to its mortgage servicing operation and the appropriate disbursement of mortgage payments on behalf of borrowers and investors.

13. In general, borrowers make mortgage payments to TBW in one of the following ways:

- By check, made payable to TBW, delivered directly to TBW;
- By check, made payable to TBW, delivered to a “lock box” maintained by Colonial;
- By third party vendors; or
- By Automated Clearing House (“ACH”) transfer - *i.e.*, electronic draft/transfer from the borrower’s bank account into TBW’s Custodial Funds Clearing Account located at Colonial, which can be initiated by:
 - Recurring draft on the 1st, 5th, 10th, or 15th of each month;
 - Bank-by-phone payment;
 - One-time internet banking where customers authorize TBW to draft funds from their accounts to investor custodial accounts at Colonial by bank-by-phone payment;
 - TMP-Taylor Made Payments, which are made by borrowers through local banks; or
 - E-Status payments, which are another form of one time internet payment.

14. Until very recently, the vast majority of borrower payments were initially deposited into a single Colonial bank account commonly referred to as the “Custodial Funds Clearing Account.”

15. From the Custodial Funds Clearing Account, monies were disbursed to various custodial accounts, commonly known as custodial P&I (Principal and Interest) and T&I (Taxes and Insurance) accounts maintained at Colonial on behalf of the various “investors” – *i.e.*, owners of the mortgages. Monies also were transferred to other TBW accounts at Colonial and

other banks in payment of mortgage servicing fees and for use in making borrowers' real estate tax and insurance premiums payments. Tax and insurance excess balances were returned to borrowers.

16. The calculation of the amounts to be disbursed into the sub-accounts and other TBW accounts was performed by TBW, in conjunction with Colonial, using TBW's Financial Industry Computer Systems ("FICS") servicing system. TBW has various software systems such as EDW, MyBI, Mortgage Accountant, Mortgage Servicer, TBW Rules, LS Ware, and other systems to process loan origination, mortgage payment collection, and other servicing functions.

Bank Account Freeze

17. Without warning or explanation, on or about August 6, 2009, Colonial unilaterally denied TBW (as well as some or all of its mortgage investors) access to TBW's bank accounts and the monies maintained therein. As described in more detail below, Colonial's unilateral and unauthorized action had the immediate effect of crippling TBW's ability to collect, deposit, and process mortgage payments, and to distribute the proceeds of those payments to investors and others, including making borrower tax and insurance payments.

18. Following the unilateral freeze on its accounts, TBW requested information regarding the basis for the freeze. Because the freeze covered all of its accounts, including custodial accounts holding literally thousands of borrowers' mortgage payments, TBW also promptly and repeatedly attempted to gain cooperation from Colonial in clearing and depositing checks, processing wires, moving funds to the respective investor custodial accounts, processing principal and interest payments due to be remitted to the investors, and in processing tax and insurance premium payments and the release of escrow funds. Colonial refused to provide the

necessary information or access to the funds held in the custodial accounts to allow TBW to process borrowers' payments, remit principal and interest payments to investors, or remit tax and insurance payments on behalf of borrowers.

19. On August 11, 2009, five days after Colonial's freeze of all of TBW's Colonial accounts, the Federal Deposit Insurance Corporation ("FDIC") issued a Temporary Order to Cease and Desist requiring Colonial to obtain "prior written approval from the Regional Director of the Atlanta Regional Office of the FDIC . . . before engaging in any transaction with [TBW] or its affiliates or related entities."

20. Three days later, on August 14, 2009, Colonial was closed by order of the Alabama State Banking Department, and the FDIC was appointed as its receiver. The FDIC, as the receiver of Colonial, is responsible for the management of Colonial's assets and liabilities.

21. The pre-receivership decisions by Colonial and the FDIC to freeze TBW's Colonial bank accounts has had a devastating effect on TBW's ability to service mortgages and has caused enormous harm, not only to TBW, but also to many individual borrowers and the investors that purchased the mortgages. In effect, Colonial and the FDIC have made it impossible for TBW to process mortgage payments and make necessary disbursements to and on behalf of borrowers and investors.

22. Moreover, with limited exceptions not relevant here, Colonial and the FDIC have denied TBW access to information regarding its bank accounts, so that TBW has been unable to determine what has occurred in connection with any of its Colonial bank accounts since August 6, 2009.

23. The actions of Colonial and the FDIC have resulted in borrower payments being held in several forms and in several locations, rather than all borrower payments being

centralized with TBW for processing, reconciliation, and disbursement to the appropriate parties.

Specifically, borrower payments are spread out over the following:

- TBW believes that tens, maybe hundreds, of millions of dollars in borrower payments currently are being held by the FDIC in the Custodial Funds Clearing Account and in various other custodial accounts (the “**Colonial Account Funds**”).¹
- TBW and its counsel have been informed that approximately 50,000 borrower checks made payable to TBW have been delivered to the Colonial lock box, but have not been deposited to the Custodial Funds Clearing Account (the “**Lock Box Checks**”). The Lock Box Checks are made payable to TBW and cannot be deposited or otherwise processed without TBW’s endorsement.
- TBW has received more than 30,000 checks from borrowers for payments due in August. As an interim measure, TBW deposited some of these checks into an account at Wachovia Bank (“**Wachovia**”) in order to, among other things, ensure that such checks did not go “stale” as a result of TBW’s inability to deposit such checks in the Colonial accounts.
- Since filing its Petition, TBW has opened accounts at Regions Bank (“**Regions**”) that “mirror” – on a simplified basis – the structure of TBW’s frozen Colonial accounts. TBW is in the process of depositing previously collected borrower checks and ACH drafts for mortgage payments due to be paid to TBW into the Regions clearing account, as well as transferring borrower payment funds from the Wachovia account (“**Regions Account Funds**”). A chart depicting the organization of the Regions accounts established by TBW is attached hereto as Exhibit “A.”

24. Though TBW has been able to deposit the Regions Account Funds, borrowers still cannot effect automated payments over the internet or telephone, both of which would result in additional deposits into the Regions Account.

25. Exacerbating this terribly difficult circumstance, on August 20, 2009, TBW learned that transfers had not been made from Colonial to an escrow distribution clearing account maintained at Platinum Bank prior to the freeze. As a result, Platinum Bank refused to honor the checks that had been written to pay real estate taxes and insurance premiums on behalf

¹ Colonial Account Funds does not include depository accounts, such as operating accounts, maintained by TBW at Colonial Bank.

of borrowers (as well as refunds due to certain borrowers because of overpayment of escrow amounts). TBW believes that the cumulative amount of these checks exceeds \$4 million.

Transfers to Other Servicers

26. Beginning on August 4, 2009, TBW has received various notices from investors purporting to terminate their respective servicing contracts with TBW.

27. The virtually simultaneous receipt of these notices, coupled with certain “self-help” measures employed by certain investors, has created further upheaval at TBW.

28. Despite concerns or disputes about the propriety and manner in which some of these servicing contracts were terminated, TBW has cooperated in transferring servicing of various investors’ mortgage portfolio’s while reserving rights to compensation for those servicing rights.

29. As these transfers are completed, TBW implemented processes by which borrower checks received by TBW are accounted for, endorsed by TBW, and transmitted to the transferee-servicer. This is a transitional process, but TBW expects that within a matter of weeks, virtually all servicing transfers will be complete and any related mortgage payments subsequently received by TBW will be remitted to the transferee-servicer in the manner described in this paragraph.

Harm to Borrowers and Others

30. Numerous individual borrowers have been harmed and continue to be harmed as a result of the freeze of TBW’s Colonial bank accounts.

31. TBW’s inability to access funds necessary to make tax and insurance premiums payments on behalf of borrowers is especially damaging to individual borrowers. For example:

- As a result of insurance premiums not being paid, certain borrowers (as well as the owners of the underlying mortgages) are at risk that their houses are without

homeowners' insurance coverage. In fact, TBW has been informed that some borrowers' homeowners policies have been cancelled because premium payments are not being paid. This is an untenable situation for all borrowers, but is a very focused concern of borrowers in coastal regions – such as Louisiana and Florida – with the onset of the hurricane season.

- Certain borrowers pay mortgage insurance premiums either to private companies or to federal agencies such as the Federal Housing Administration and Veterans Administration. To the extent that these borrowers' mortgage payments are not being processed, not only do the borrowers suffer harm, but the investors in the mortgages (and investors in any mortgage-related securities) also are at risk because their credit insurance is jeopardized.
- Real estate taxes are not being paid, which results in some borrowers being placed in delinquent status and exposed to interest and penalties. For example, New Jersey's tax payments were due on August 1, 2009. Because TBW has not been able to make these payments, all of its borrowers in New Jersey are delinquent in their tax payments.

32. TBW's inability to process mortgage payments has created confusion and concern for borrowers regarding the status of their loans. For example:

- Borrowers who make their mortgage payment via internet or telephone (or some other automated process, including bi-weekly electronic payments) have been unable make a mortgage payment since August 6, 2009.
- Borrowers who make their mortgage payments by check sent to the Colonial lock box have not seen their August payment clear their account.
- Apparently, there are instances where checks from an insurer regarding a claim were made payable to both the borrower and TBW, endorsed by the borrower and sent to TBW with the expectation that the funds would be returned to make payments for repairs. These transactions are also caught in the freeze, leaving borrowers and their contractors without access to the insurance proceeds.

33. Obviously, the bounced checks described in Paragraph 25, above, will aggravate these circumstances.

34. In addition, since August 5, 2009, numerous state regulators have instituted administrative proceedings against TBW seeking various types of relief from TBW (and, in some cases, certain of its employees). As a result, counsel for TBW has been in ongoing

communication with the states. The harm being caused to individual borrowers is an issue that has been continuously raised and pressed by the regulators.

35. Simply stated, the harm being caused to individual borrowers cannot be ameliorated or rectified without immediate relief by the bankruptcy court to allow TBW to process mortgage payments and make necessary disbursements to and on behalf of borrowers and investors.

Reconciliation Efforts and Related Issues

36. In addition to resolving the pressing issues related to making necessary disbursements on behalf of borrowers, it is imperative that TBW account for and reconcile monies and other assets that ultimately will benefit mortgage investors and other creditors of this bankruptcy estate.

37. Mortgage payments in the possession of TBW must be allocated among the various investors, tax and insurance escrows, and other uses. In addition, the same reconciliation and allocation must be done with respect to the Colonial Account Funds and Lock Box Checks.

38. TBW controls and is in possession of residential real properties obtained as a result of foreclosures and similar activities (commonly referred to as “**REO**” for “real estate owned”) having a cumulative value well in excess of \$500 million. These REO properties are collateral for thousands of mortgages owned by various investors. It is TBW’s intention that these properties will be maintained and sold during the course of this bankruptcy case, with the sale proceeds being accounted for and allocated appropriately.

39. In connection with the failure of Colonial and collapse of TBW, issues have been raised regarding TBW’s historical management of and accounting for mortgage assets sold to investors. It appears that Colonial, through the FDIC as receiver, and other investors contend

that they own the same mortgage (or related REO) asset due to the double pledging of the asset. (See, e.g., Limited Objection of Federal Deposit Insurance Corporation, as Receiver for Colonial Bank, to Debtor’s Motion for Orders Authorizing Use of Cash Collateral (“**FDIC’s Objection to Cash Collateral Motion**”) [Dkt. 38].)²

40. Obviously confusion of ownership presents an urgent issue that must be resolved as part of the reconciliation process. TBW is the only party that has the systems, expertise, and institutional knowledge required to perform these reconciliation and allocation activities, including the resolution of the alleged “double pledging.” Given the substantive and procedural safeguards attendant to this Court’s jurisdiction, coupled with TBW’s new governance and management structure, TBW is well positioned to perform the reconciliation and allocation work that is required in order for investors and other creditors to realize the value of their assets and/or claims. In order to meaningfully address any of these issues, however, TBW must be granted access to its custodial, corporate, and clearing accounts at Colonial. Upon receipt of this information and direction from the Court, TBW is prepared to conduct a Funding and Asset Transfer Reconciliation (described more fully in Paragraph 86 below), which will benefit all interested parties.

Servicing Advances

41. In the ordinary course of servicing mortgages, TBW made “advances” to the investors’ custodial accounts in the event that the mortgage borrowers failed to make payments

² Uncertainty regarding ownership of loans also has affected servicing and caused confusion among borrowers. For example, TBW believes that the successor servicer selected by the FDIC has contacted as many as 20,000 mortgage borrowers in connection with loans that were at one time funded on Colonial’s “warehouse” financing facilities; however, TBW’s records show that as many as half of these loans were appropriately sold to other investors and that these loans now may be funded within pools underlying Ginnie Mae and Freddie Mac securities. Individual borrowers now are being asked to remit payment both to Ginnie Mae’s or Freddie Mac’s successor servicers and the FDIC’s successor servicers. Understandably, these borrowers are confused and upset by this situation.

or maintained insufficient escrow balances for taxes and insurance. As of the Petition Date, TBW's advances included approximately \$104.2 million in tax and insurance escrow payments and \$70.1 million in deficient principal and interest payments. Additionally, TBW, as servicer, advanced approximately \$52.1 million on behalf of certain investors for expenses related to foreclosure, borrower bankruptcy, and attendant property preservation.

42. In connection with the transfer of servicing from TBW to successor servicers, TBW is entitled to recover these advances from the investors on whose behalf they were made and/or their respective successor servicers. It is critically important to TBW and its creditors that these advances – totaling more than \$220 million – be reconciled, recovered, and administered in this bankruptcy.

Mortgage Servicing Rights

43. TBW's rights as a servicer under its agreements with various investors, known as mortgage servicing rights (“MSR's”) were assets of TBW.

44. The cumulative value of TBW's MSR's exceeded \$750 million prior to August 4, 2009.

45. Ginnie Mae, Freddie Mac, and other investors have endeavored to terminate TBW as a servicer and to transfer servicing to successor servicers without compensating TBW for the value of the MSR's.

46. TBW has appealed Freddie Mac's decision to terminate its mortgage servicing agreement with TBW. TBW also expects to appeal the decision by the U.S. Department of Housing and Urban Development (“HUD”) to suspend TBW's lending and underwriting activities, as well as the related decision by Ginnie Mae to terminate its mortgage servicing agreement with TBW.

47. As a part of the administration of this bankruptcy, TBW will review and analyze all issues arising from and related to the termination and transfer of all mortgage servicing agreements and pursue recovery, as appropriate, of the value of the MSR's.³

48. The recovery of the value of the MSR's owned by TBW prior to August 4, 2009 would have a significant impact on the outcome of this bankruptcy.

The FDIC Receivership of Colonial

49. The FDIC's receivership of Colonial is authorized and governed by the provisions of the Federal Deposit Insurance Act. By operation of law, the FDIC succeeded to all rights, title, powers, privileges and liabilities of Colonial Bank with respect to the institution and the assets of the institution pursuant to 12 U.S.C. § 1821(d)(2)(A)(i).

50. Since on or about August 6, 2009 – prior to the receivership and TBW's Petition – TBW has sought information from Colonial and the FDIC regarding the status of the Custodial Funds Clearing Account, as well as the other accounts maintained and managed by TBW. To date, no information has been provided regarding the status of these accounts.

51. Despite the unilateral freeze of TBW's accounts, including the T&I custodial accounts, and the failure to fund the Platinum Bank tax and insurance payments made by TBW, the FDIC now seeks to blame TBW for this untenable situation. In truth, there should be money available in custodial accounts to fund all of the due and owing tax and insurance payments that have gone unpaid since the asset freeze was implemented on August 6, 2009.

52. Moreover, as evidenced by its filings in this case, the FDIC asserts that its jurisdiction extends to monies and other assets under TBW's control and, at the same time, that

³ As will be addressed in TBW's response to the FDIC's Motion for Relief from Stay [Dkt. 64], TBW believes that it remained the servicer at the Petition Date under at least some of its servicing agreements with Colonial.

this Court (as well as all other courts) is without jurisdiction to limit or otherwise affect its efforts. (*See, e.g.*, FDIC’s Objection to Cash Collateral Motion [Dkt. 38]; FDIC’s Motion for Relief From Stay [Dkt. 64].)

53. Even so, TBW has endeavored to find ways to resolve the issues associated with paying the tax and insurance payments that are due to be paid on behalf of individual borrowers. However, the FDIC’s position regarding its jurisdiction and other issues regarding these payments has made agreement difficult as of the filing of this motion.

54. TBW has offered to provide information to the FDIC regarding the due and owing tax and insurance payments so that the harm to borrowers caused by the bank account freeze can be remedied as other issues between TBW, the FDIC, and other parties in this case are being addressed, resolved, and/or adjudicated. TBW remains willing to provide this information to the FDIC, subject to appropriate conditions and reservations of rights.

55. The FDIC’s actions since taking over as receiver for Colonial have been wholly inconsistent with its stated priority of protecting the interest of borrowers, as well as other stakeholders. Prior to establishing a formal claims process and, apparently, without reconciling all TBW accounts, the FDIC has begun disbursing funds to certain of TBW’s mortgage investors. Upon information and belief, the FDIC has released over \$340 million to Ginnie Mae and Freddie Mac.

56. The statutes and regulations governing the FDIC as receiver require the FDIC to act in a manner that protects the rights of all claimants, which includes TBW. *See Resolution Trust Corp. v. MacKenzie*, 60 F.3d 972, 977 (2d Cir. 1995) (stating that in “realizing upon the assets of the institution in receivership for purposes of liquidation or other appropriate resolution,” the receiver “is obligated to protect the creditors and depositors of the institution”).

57. In asking this Court to lift the automatic stay so that it can seize all funds and data now under TBW's control [Dkt. 64], the FDIC, in effect, seeks to neuter TBW and prevent it from performing the important work that is necessary to realize the value of the assets of this bankruptcy estate and to effect significant recoveries that will benefit TBW and its creditors.

58. The FDIC's attempts to bring the entire Debtor's estate into the Colonial receivership belie Colonial's (and the FDIC's) actual interest in the outcome of TBW's bankruptcy. In comparison to other investors, Colonial had only a relatively minor servicing portfolio with TBW. Of the \$80 billion in UPB, only approximately \$3.5 billion related to mortgages serviced for Colonial. Most of these mortgages were serviced on an interim basis until the mortgages were sold to other investors. Moreover, notwithstanding the FDIC's recent attempts to administer TBW's bankruptcy estate in the Colonial receivership, Colonial is not a mortgage servicer and does not have the expertise or capacity to take on new lines of business now.

Relief Requested

59. The current circumstances are untenable. Borrowers already are suffering potentially irreparable harm. While TBW has been deprived of its own funds and property, the FDIC, without any process has released hundreds of millions of dollars from the Colonial Account Funds to Ginnie Mae and Freddie Mac.

60. ***Taxes and Insurance.*** TBW's first priority is to make certain that all current and past due tax and insurance premiums are paid on behalf of borrowers. To that end, TBW requests that the Court enter an order permitting TBW to distribute the net allocated portions of tax and insurance monies from the Regions Account Funds. Notwithstanding the relief requested below, TBW is willing to provide information to the FDIC so that similar payments can be made

from the Colonial Account Funds or so that TBW can direct the transfer of the net amounts of individual borrowers' tax and insurance escrow accounts to the accounts of the mortgage investors' successor servicers (to the extent that successor servicers have provided information to TBW regarding the appropriate bank accounts for the transfers). TBW and the FDIC are in continuing discussions regarding this issue.

61. **Regions Account Funds.** The Regions Account Funds are in the possession, custody, and control of TBW. Accordingly, they are part of the bankruptcy estate and within the jurisdiction of this Court. *See, e.g., In re N.E.W. New Entm't World*, 159 B.R. 625, 631 (D.N.H. 1993); *In re Tamposi*, 159 B.R. 631, 637 (Bankr. D.N.H. 1993) ("bankruptcy courts have primary, core, *in rem* subject matter jurisdiction over assets actually or constructively in the possession of a debtor's bankruptcy estate").

62. Though the FDIC has never had possession of the Regions Account Funds, it seeks to strip this Court of jurisdiction over the funds – and, effectively, over the administration of the Debtor's estate – by arguing that it has exclusive jurisdiction over the Regions Account Funds. (*See* FDIC's Objection to Cash Collateral Motion [Dkt. 38].)

63. The bankruptcy court, not the FDIC, has jurisdiction over all assets within the actual or constructive possession of the debtor. *In re N.E.W. New Entm't World*, 159 B.R. at 631; *In re Tamposi*, 159 B.R. at 637; *see also In re Purcell*, 141 B.R. 480, 481 (Bankr. D. Vt. 1992) (denying FDIC's motion to dismiss for lack of subject matter jurisdiction and holding that the Federal Institutions Reform, Recovery and Enforcement Act ("**FIRREA**")'s administrative claims procedure does not apply when FDIC receiver asserts a claim to assets of bankruptcy estate); *In re All Season's Kitchen*, 145 B.R. 391, 395 (Bankr. D. Vt. 1992) (holding that § 1821(d)(13)(D) applies only to claims to assets of receivership). Moreover, recognizing the

bankruptcy court's exclusive jurisdiction over the Regions Account Funds does not implicate or conflict with 12 U.S.C. § 1821(d)(13)(D), because the policy behind section 1821(d)(13)(D) "is not served and need not be served where, as here, the contested assets are not part of the receivership estate but are assets of the bankruptcy estate." *In re Tamposi*, 159 B.R. at 637.

64. ***Colonial Account Funds.*** Though TBW has been denied any access to the Colonial Account Funds, TBW believes that a substantial portion of those monies represent borrower payments. The Colonial Account Funds also include TBW operating accounts that were wrongfully frozen by Colonial on August 6, 2009, over a week before the FDIC became receiver for Colonial.

65. The FDIC has asserted that it has jurisdiction over all of the Colonial Account Funds by virtue of its status as the receiver for Colonial. The custodial accounts that TBW maintained at Colonial Bank, however, clearly were special accounts, established by TBW for the benefit of TBW and its investors and, in the case of tax and insurance escrows, its borrowers.⁴ *See Merrill Lynch Mortgage Capital, Inc. v. Federal Deposit Insurance Corp.* 293 F. Supp.2d 98, 103 (D.D.C. 2003). Therefore, TBW's custodial accounts at Colonial are not part of the Colonial receiver estate and not within the jurisdiction of the FDIC. *See id.* at 103; *In re: Tamposi Family Investment Properties*, 159 B.R. at 637 (holding that only assets of the FDIC receiver estate are subject to FIRREA and its claims procedures).

66. TBW, not the FDIC, has the right to direct the disposition of the Colonial Account Funds to any FDIC insured bank. Accordingly, the FDIC's refusal to turn over those funds is an unlawful exercise of control not only over the funds in the custodial accounts but also over TBW's right to select a proper bank and direct the funds to that bank. As such, the FDIC's

⁴ TBW understands that its own operating (*i.e.*, depository) accounts are assets of Colonial Bank and, therefore, subject to the jurisdiction of the FDIC receivership and administered through that insolvency proceeding.

actions are a violation of the automatic stay. *See* 11 U.S.C. §362(3) (staying any act to exercise control over property of the estate).

67. Regardless of the FDIC's interest in the Colonial Account Funds, however, it is both necessary and appropriate for this Court to protect the interests of all those entitled to share in or receive the benefit of those monies – *i.e.*, borrowers, investors, and TBW's creditors. *See In re: All Seasons Kitchen, Inc.* 145 B.R. at 394 and 399 (noting that the FDIC's assertion of control over the assets of the bankruptcy estate would “strip debtors and creditors caught up in the web of insolvency of their statutory rights under the Bankruptcy Code,” and that ceding control to the FDIC “impacts more than just the debtor, especially in a reorganization case, because it threatens to vitiate the interests of other creditors, and hamstringing the debtor's rehabilitation”).

68. Unless this Court takes immediate action, the FDIC's actions – including the more than \$300 million in payments the FDIC apparently already has made to Freddie Mac and Ginnie Mae without notice to other interested parties – will preclude the proper accounting and reconciliation of all borrower payments in the Colonial Account Funds, effectively preventing the fair and equitable reorganization or liquidation of TBW under the supervision of this Court.

69. Therefore, this Court should enter an order requiring the FDIC to turn over the Colonial Account Funds as assets under the constructive control of TBW and subject to the jurisdiction of this Court.

70. In addition, this Court should require the FDIC to provide bank account and transaction information to TBW regarding the Colonial Account Funds and all activities in or related to all TBW accounts maintained at Colonial, particularly since the commencement of the bank account freeze on or about August 6, 2009.

71. ***The Lock Box Checks.*** With each passing day, more and more of the Lock Box Checks become stale. Therefore, it is imperative that these checks be processed immediately.

72. The checks in the Colonial lock box, which are made payable to TBW and require the endorsement of TBW prior to depositing or processing, are the property of TBW. Thus, contrary to the FDIC's assertions, this Court, not the FDIC, is vested with jurisdiction over the Lock Box Checks as part of the Debtor estate.

73. By its very nature, the lock box is a custodial device used by Colonial for the benefit of TBW. No action can be taken with respect to the Lock Box Checks without TBW's endorsement. Accordingly, the Lock Box Checks are wholly without value and growing stale in the Colonial lock box, but the funds derived therefrom would be a valuable asset to the Debtor's estate if transferred to TBW. No interested party, including the FDIC, derives any benefit from the current status of the Lock Box Checks.

74. The vast majority of the Lock Box Checks are payments for loans owned by Ginnie Mae or Freddie Mac, the servicing of which already has been transferred to other entities.

75. To date, the FDIC has refused to turn over the Lock Box Checks to TBW.

76. To allow TBW to process the Lock Box Checks, this Court should make clear that the Lock Box Checks are part of the bankruptcy estate subject to the jurisdiction of this Court and to order the FDIC to turn them over to TBW.

77. Upon receipt of the Lock Box Checks, TBW will deposit the checks into its custodial clearing account at Regions and administer the funds from the checks in accordance with the procedures set forth herein. Alternatively, TBW can endorse the checks and process them so that payments on loans that have been transferred will be forwarded to the successor servicers, while payments on other loans will be deposited into the Regions clearing account for

application to appropriate subaccounts and forwarding to investors, insurers, and other appropriate parties.

78. TBW, as servicer, is contractually entitled to a portion of each payment received. Both proper accounting and the ordinary course of mortgage servicing include allocating a portion of each check's interest payments to TBW as a servicing fee. The servicing fees are an asset of TBW and, ultimately, inure to the benefit of TBW's creditors under the supervision of this Court. Identifying and segregating TBW's servicing fees – both pre and post-petition and pre and post-dates of servicing release to successor servicers – is an integral and appropriate part of any Servicing Reconciliation described in Paragraph 86.

79. ***Reconciliation of Borrowers' Funds and Investor Assets.*** The proper reconciliation of the Debtor's estate requires, among other things, a reconciliation of Colonial Account Funds, the Lock Box Checks, and the Regions Account Funds.

80. Though it has no right or ability to perform a reconciliation, the FDIC, as receiver for Colonial, seeks to retain the Colonial Account Funds and the Lock Box Checks, and, at the same time, as a creditor of TBW (competing with claims of other creditors) seeks the turnover of effectively all of the assets in the bankruptcy estate. If it is successful in these efforts, the FDIC will be the ultimate arbiter of its claims, as well as the claims of TBW's investors and creditors, as well as TBW – *i.e.*, the FDIC seeks to act as both claimant and judge. This approach is untenable and would effectively convert this bankruptcy case into an FDIC receivership even though the FDIC has no jurisdiction over TBW or the bankruptcy estate. *See In re All Season's Kitchen*, 145 B.R. at 393 (rejecting FDIC's theory that its claims to assets of bankruptcy estate are within sole jurisdiction of FDIC-Receivership "because we believe that the new legal theory being advanced by FDIC and RTC [Resolution Trust Company] in Bankruptcy Courts threatens

the efficient functioning of the federal Bankruptcy system”).

81. Here, TBW is uniquely situated to perform the reconciliation. First and foremost, TBW has the information regarding the origination, funding, and ownership of the mortgages at issue, as well as the breakdown of the principal and interest portion due to investors and the escrows, taxes, and insurance premiums due to be paid on behalf of borrowers, both of which are necessary to perform the reconciliation. Moreover, TBW is in possession of the REO assets and all information related to their acquisition and disposition. Finally, TBW has the systems, including its FICS servicing system, as well as other systems such as EDW, MyBI, Mortgage Accountant, Mortgage Servicer, TBW Rules, LS Ware and other systems, to track and calculate the amounts to be disbursed into the sub-accounts and other TBW accounts, and to process loan origination, funding operations, mortgage payment collection, and other servicing functions.

82. TBW is now under the control and supervision of a new, independent Board of Directors, and under the management of a new, independent CRO. TBW’s CRO has implemented new cash management systems and controls and will control and supervise the reconciliation, which will be performed in large part by personnel from Navigant Capital Advisors (“**Navigant**”), under the ultimate supervision of this Court. Moreover, the Navigant team has control over the servicing and cashiering functions of TBW.

83. To further ensure the integrity of the reconciliation, individuals who are under any cloud of suspicion due to their association with Colonial Bank will not participate in the process. The FDIC already has provided to Navigant and TBW the names and functions of certain of these individuals, many of whom no longer work at TBW.

84. In sum, TBW’s post-petition team includes independent personnel with a thorough knowledge of servicing, mortgage “warehouse” borrowing, accounting, and capital

markets activities related to funding, transfer, sales, and servicing of mortgage loans. As such, TBW is uniquely qualified to perform the reconciliation.

85. Not only is TBW the only party that can perform the reconciliation adequately, this Court is the only neutral arbiter of disputes arising in connection with and as a result of the reconciliation.

86. Therefore, TBW requests that the Court expressly authorize TBW to reconcile the Colonial Account Funds, the Lock Box Checks, the Regions Account Funds, the REO, and other mortgage-related assets as necessary to reconcile servicing amounts for the benefit of borrowers, investors, and TBW's creditors. Specifically, TBW proposes the following reconciliation process:

- TBW will conduct a thorough reconciliation of all monies and assets in TBW's possession, as well as assets financed by and sold to various parties, including Colonial. TBW will perform the reconciliation in two parts: (1) a servicing reconciliation (the "Servicing Reconciliation"), and (2) a funding and asset transfer reconciliation (the "Funding and Asset Transfer Reconciliation") of monies and assets sold and exchanged between TBW and various creditors and investors to fund and purchase loans and balance sheet holdings of TBW.
- Based on a review of TBW's records and servicing system and information provided by the FDIC, the Servicing Reconciliation will include a tabulation and accounting of (1) the Colonial Account Funds, Regions Account Funds, and other monies held by Colonial and TBW; (2) amounts in TBW's servicing-related corporate bank accounts; (3) the Lock Box Checks, ACH Drafts, and other amounts in transit or unprocessed due to Colonial's and the FDIC's actions; (4) amounts transferred from Colonial by FDIC as receiver, including the over \$300 million that the FDIC transferred to Ginnie Mae, and Freddie Mac; and (5) amounts conveyed by TBW to successor servicers as directed by Freddie Mac, Ginnie Mae, and other investors. Based on the Servicing Reconciliation, TBW will be able to determine, for all interested parties, the following data at an individual borrower (loan) level: the principal, interest, taxes, insurance, servicing fees, servicing advances, and other relevant amounts;
- TBW will conduct the Funding and Asset Transfer Reconciliation with respect to Colonial's and other lenders' provision of funds to TBW and TBW's affiliated entities to fund loans and financial assets, and the subsequent sale by TBW of those assets. The Funding and Asset Transfer Reconciliation will: (1) determine the timing and amounts of exchanges of monies; (2) determine accounting and legal events affecting transfer of said assets; and (3) examine the contemporaneous recording of

legal title or security interest in said assets. Upon conclusion of the Funding and Asset Transfer Reconciliation, this Court will be able to address the alleged “double-pledging” and other related issues.

Basis for Relief

87. Section 363 of the Bankruptcy Code provides that this Court may, after notice and a hearing, authorize the Debtor to “use, sell, or lease, other than in the ordinary course of business, property of the estate ...” *See* 11 U.S.C. § 363(b)(1). Section 363 of the Bankruptcy Code is supplemented by Section 105(a) of the Bankruptcy Code which gives this Court the authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). As a court of equity, this Court “has a duty to protect whatever equities a debtor may have in property for the benefit of creditors as long as that protection is implemented in a manner consistent with the bankruptcy laws.” *In re Cooper Properties Liquidating Trust Inc.*, 61 B.R. 531, 537 (Bankr. W.D. Tenn. 1986).

88. This Court, as a court of equity, has the authority to approve the procedures proposed by the Debtor, as set forth below, to resolve these issues. *See In re Calpine*, 356 BR, 585 (S.D.N.Y. 2007) (affirming bankruptcy court order permitting debtor, under sections 363(b) and 105(a), to make large payment on note in order to stop unnecessary loss of funds from debtor’s estate).

89. The relief requested herein is in the best interests of the Debtor, its estate, and all interested parties, and is necessary and appropriate to carry out the provisions of the Bankruptcy Code. Therefore, the Debtor requests that the Court grant this Motion and grant the relief and approve the procedures outlined above.

90. The granting of the relief requested herein is consistent with and in furtherance of this Court’s jurisdiction and in no way interferes with the FDIC’s performance of its authorized duties as receiver for Colonial.

91. For these reasons, the Debtor requests the entry of an order:
- a. Exercising jurisdiction over the Regions Account Funds, the Colonial Account Funds, and the Lock Box Checks;
 - b. Requiring the FDIC to turn over all Colonial Account Funds and Lock Box Checks to TBW to be administered as assets in this bankruptcy;
 - c. Requiring the FDIC to deposit with Platinum Bank funds sufficient to cover the dishonored tax and insurance payments made by TBW;
 - d. Permitting TBW immediately (or as soon as reasonably possible under the circumstances) to make tax and insurance payments from the Regions Account Funds;
 - e. Authorizing TBW to reconcile, account for, and allocate the Colonial Account Funds, the Lock Box Checks, along with the REO and other mortgage-related assets; and
 - f. Granting such further and other relief that the Court deems appropriate.

Dated this 31st day of August, 2009.

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