

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP.,  
REO SPECIALISTS, LLC, and  
HOME AMERICA MORTGAGE, INC.,

Debtors.

Chapter 11

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

**ORDER ESTABLISHING PROTOCOL TO  
RESOLVE BORROWER ISSUES**

This case came before the Court for hearing on February 19, 2010, at 10:00 a.m. upon the Motion of Debtor Taylor, Bean & Whitaker Mortgage Corp., for Approval of Protocol to Approve Borrower Issues (the “**Borrower Protocol Motion**”) (Doc. No. 927). In response to the Borrower Protocol Motion, the Federal Home Loan Mortgage Corporation, Bank of America, National Association, in its capacity as Indenture Trustee, Custodian and Collateral Agent with respect to Ocala Funding, LLC, Wells Fargo Bank, National Association and Bayview Loan Servicing, LLC et al. filed limited objections (Doc. Nos. 1039, 1042, 1043 and 1055) ( the “**Objections**”). At the hearing, the Court received the unopposed proffers of the testimony of Neil F. Luria, the Debtors’ Chief Restructuring Officer, and Fergal Stack of Navigant Capital Advisors, LLC. Having considered the relevant facts and law, including the argument of counsel, this Court finds that the Borrower Protocol Motion should be GRANTED and the proposed Borrower Resolution Protocol<sup>1</sup> approved in accordance with the terms of this Order.

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<sup>1</sup> Capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Borrower Protocol Motion.

Most of the issues raised in the Objections are resolved in this Order in the manner suggested in the Objections; the remainder of the Objections are OVERRULED.

### I. Findings of Fact

1. Prior to August 2009, Taylor, Bean & Whitaker Mortgage Corp. (“**TBW**” or “**Debtor**”) was the largest independent (*i.e.*, non-depository owned) mortgage lender in the United States. A significant component of TBW’s business was its mortgage servicing operation. As of August 3, 2009, TBW serviced approximately 512,000 mortgage loans having a combined unpaid principal balance (“**UPB**”) in excess of \$80 billion. These mortgages ultimately were owned by various investors, including the Federal Home Loan Mortgage Corporation (“**Freddie Mac**”) and the Government National Mortgage Corporation (“**Ginnie Mae**”), which together accounted for approximately 95% of the total UPB, as well as “private-label” mortgage investors, such as Wells Fargo and Bayview, which collectively accounted for approximately 5% of the total UPB. Finally, TBW serviced mortgages for its own portfolio and those of related entities, such as Platinum Community Bank (“**Platinum**”).

2. TBW’s principal banking relationship was with Colonial Bank, N.A. (“**Colonial**”). TBW maintained approximately 90 custodial accounts at Colonial, which were part of its servicing operation, plus approximately 10 operating and cash accounts.

3. Historically, borrowers’ mortgage payments were initially deposited into a single TBW bank account maintained at Colonial known as the “Custodial Funds Clearing Account.” The vast majority of the monies deposited into the Colonial Custodial Funds Clearing Account were transferred to various custodial accounts commonly referred to as “P&I” (Principal and

Interest) and “T&I” (Taxes and Insurance) accounts maintained on behalf of the various investors, which are the owners of the mortgages.

4. Payments of real estate taxes and insurance premiums as well as other escrow-related payments were made from TBW’s Escrow Disbursement Clearing Account maintained at Platinum (the “**Platinum EDCA**”). Refunds to borrowers of T&I “escrow balances” were also made from this account.

5. Funds necessary to pay taxes, insurance, and certain related borrower refunds were accumulated into a single EDCA account at Colonial as part of a daily sweep of the Colonial T&I accounts and then transferred to the Platinum EDCA account, from which disbursements were made, typically on a daily basis, by checks and wire transfers.

6. During August and September 2009, each of TBW’s investors demanded that the servicing of its respective mortgage assets be transferred to a different service provider. As more fully described in the Debtor’s First and Second Interim Reconciliation Reports, mortgage servicing operations have been transferred to the investors’ selected new servicers (the “**Subsequent Servicer(s)**”), and the transfer process is substantially complete.

7. On or about August 5, 2009, a hold was placed on TBW’s accounts at Colonial, including those used in the mortgage servicing operations. Subsequently, pursuant to an order of the Alabama State Banking Department dated August 14, 2009, Colonial was closed and the FDIC was appointed as receiver. TBW’s Chapter 11 filing followed 10 days later.

8. The combination of these events resulted in myriad problems for borrowers and TBW, including the following:

- a. Thousands of borrower checks delivered to the Colonial lock box were not deposited.
- b. Electronic payments were not completed as scheduled.
- c. Borrowers were not credited with timely mortgage payments.
- d. Tax and insurance payments due on behalf of borrowers were not made when due.
- e. Approximately \$31.3 million in checks written on the Platinum EDCA prior to August 21, 2009, were not honored by Platinum because the sweep and transfer from custodial accounts and the EDCA at Colonial ceased on August 5, 2009.
- f. The custodial accounts and other accounts under TBW's control were not reconciled and amounts due to be transferred from the Colonial Custodial Funds Clearing Account were not allocated to the appropriate custodial account.
- g. Certain mortgage payoffs—*i.e.*, in each such instance, the payment of the outstanding mortgage balance—were not processed completely.
- h. Certain insurance proceeds received by TBW on behalf of borrowers for damage or destruction to the borrowers' homes were not remitted to applicable borrowers.

9. These circumstances created significant confusion and problems for borrowers and became the focus of regulatory actions filed by more than 40 states.

**A. Borrower Issues**

10. Identifying and resolving problems encountered by individual borrowers has required significant time and effort by the Debtor's professionals and remaining employees. While the Debtor has made progress on several other issues, the Debtor has identified four borrower issues that remain prevalent and require resolution. These issues have been identified by the Debtor as:

- Issue 1: Insurance Proceeds (“Loss Drafts”)
- Issue 2: Tax and Insurance Escrow Refunds
- Issue 3: Bounced Checks Written on the Platinum EDCA
- Issue 4: Net-Funded Loans

**Issue 1: Insurance Proceeds (“Loss Drafts”)**

11. In the ordinary course of its business, TBW received money from property insurance companies in payment of individual borrowers’ claims for loss or damage to property resulting from causes such as fire or storm damage. These insurance payments are referred to as “loss drafts.” In the normal course, these funds were then turned over or made available to the borrower to make payments to contractors for repairs and other damages covered by the subject claim.

12. After the administrative hold was imposed on its Colonial accounts on August 5, 2009, TBW was unable to transfer to the affected borrowers the loss drafts on hand as of that date, as well as those received afterwards. This situation has imposed obvious hardships on the affected borrowers, who have been required to pay for – or delay – repairs to damaged properties. Even so, the borrowers have been required to continue to make their mortgage payments despite not having access to the loss drafts which should be available to pay for repairs. In addition to creating difficulties for the borrowers, these circumstances also increase the risk of mortgage default for investors.

13. The vast majority of loss drafts on hand at the time the hold was placed on TBW’s accounts had been accounted for and allocated to specific investors’ custodial T&I accounts at Colonial. The total loss draft amount in investors’ T&I accounts as of August 5, 2009, was \$11,063,118.

14. TBW continued to receive additional loss drafts after August 5, 2009. Of the amounts received, a balance of \$447,218 is on deposit in the Colonial Custodial Funds Clearing Account, a balance of \$781,367 is on deposit in the Regions Reconciliation Accounts, funds in the amount of \$264,408 were forwarded by TBW to the Subsequent Servicers, and a balance of \$7,000 is on deposit in the Colonial EDCA Account.

15. Cumulatively, approximately 900 individual borrowers are owed \$12,563,111 in loss drafts, payable now or as repairs and replacements are completed.

**ISSUE 2: TAX AND INSURANCE ESCROW REFUNDS**

16. In the ordinary course of its business, TBW collected tax and insurance payments from borrowers, which were typically included as part of borrowers' monthly mortgage payments. Any unused escrow amounts were returned to borrowers at the time the mortgages were paid off or when required escrow amounts were re-calculated (and an excess deposit was on hand).

17. After the implementation of the Colonial administrative hold on August 5, 2005, TBW was unable to make escrow refunds to borrowers who had paid off their mortgages or who subsequently did so. As of the filing of this Motion, approximately 3,000 borrowers are owed \$3,959,940 in escrow refunds.

**ISSUE 3: BOUNCED CHECKS WRITTEN ON PLATINUM ESCROW DISBURSEMENT CLEARING ACCOUNT**

18. Real estate taxes and insurance-related payments, including refunds and other payments to borrowers, were made in the ordinary course of TBW's business from the Platinum EDCA based on specific information related to each borrower. Funds for these payments were

deposited into the Platinum EDCA account as a result of a series of transfers within Colonial and then from Colonial to the Platinum EDCA. Funds on deposit in the various investors' custodial T&I accounts at Colonial were initially transferred to the Colonial EDCA. As stated in paragraph 5, the monies were then transferred from the Colonial EDCA to the Platinum EDCA on a daily basis using automated sweep and funds transfer processes. .

19. After the implementation of the administrative hold on August 5, 2009, the sweep and transfer processes stopped, but TBW continued to write checks on the Platinum EDCA until August 20, 2009.

20. After August 4, 2009, Platinum honored checks only to the extent that there were funds available in the Platinum EDCA. As a result, numerous escrow disbursement checks bounced. As a further complication, there was no correlation between the checks that were honored and the source of individual borrowers' monies used to fund the payment of those checks. Thus, even though funds had been deposited into the Platinum EDCA based on specific borrower information up to and through August 3, 2009, some of those funds were used to honor checks written after that date. Conversely, checks written to borrowers on or before August 3, 2009 bounced if they were presented after available funds were depleted. Approximately 30,500 checks written on the Platinum EDCA were not honored, purportedly due to an insufficiency of funds.

21. The majority of these bounced checks were made payable to taxing authorities and insurance companies, and the resulting missed payments to those entities are the responsibility of the Subsequent Servicers as servicing advances. However, more than 11,000 of these bounced checks, totaling \$9,113,367, were made payable to individual borrowers.

**ISSUE 4: NET-FUNDED LOANS**

22. In connection with the refinancing of certain mortgages, TBW followed a practice referred to as “net-funding.” Rather than paying off the old loan at the closing of the refinancing, the funding of the new loan and the payoff of the old loan were “net-settled” so that little additional funding was actually required to fund the closing of the new loan. In practice, TBW would pay off the original loan when the new loan was sold and the proceeds of the sale realized by TBW.

23. When TBW’s business collapsed in August 2009, there were about 788 of these net-funded loans that had been closed, in each such case without the prior loan being paid off. Based on currently available information, it appears that 751 of the new loans have not been sold to an investor, while 37 have been sold. Consequently, each of the 788 borrowers has two mortgages on that borrower’s property—the old loan, which is being serviced by the Subsequent Servicer for the investor who owns it, and the new loan, which the borrower believes is the operative loan. Of those not sold to a new investor, 746 are currently being serviced by TBW and five are being serviced by RoundPoint. The 37 loans that were sold to investors are currently being serviced by the Subsequent Servicer for the purchasing investor.

24. The vast majority of the net-funded loans involve the refinancing of original mortgage loans owned by Freddie Mac or guaranteed by Ginnie Mae.

25. Understandably, this circumstance has created much confusion and concern among both borrowers and investors. In many cases, borrowers are delinquent on one or both of the mortgages, negatively impacting the borrowers’ credit reports and scores.



**B. Monies Available to Fund the Borrower Protocol**

26. As of August 5, 2009, there were substantial amounts of money on deposit in the TBW-related custodial accounts at Colonial. Subsequent to August 5, 2009, monies on deposit in certain Freddie Mac, Ginnie Mae and 21<sup>st</sup> Mortgage Corp. custodial accounts were transferred to those three investors by Colonial and/or the FDIC-Receiver. Included in these transfers were relatively large amounts on deposit in Freddie Mac's custodial T&I accounts and in Ginnie Mae's custodial T&I accounts.

27. After the commencement of this Chapter 11 case, the Debtor, under new management, established bank accounts at Regions Bank ("Regions"). The Regions accounts on a much-simplified basis mirror the previous account structure at Colonial.

28. Pursuant to the Stipulation with the FDIC-Receiver (Doc. Nos. 202 and 222) approved by this Court, the Debtor is performing a "Servicing Reconciliation," the methodology and current results of which are fully set forth in the Debtor's Reconciliation Reports. While the reconciliation process is ongoing, TBW at this point has been able to allocate among the investors more than \$800 million in borrower-related funds that were frozen as a result of the events of August 2009. These funds include funds held in custodial accounts owed to borrowers.

29. The total amount of cash required to resolve Issues 1, 2 and 3 is \$25,636,418 (the amount due and owing to borrowers affected by these issues). Table 1, below, provides the allocation of this \$25,636,418 among the investors that own the affected mortgages.

<b>TABLE 1</b>						
Amounts Required To Resolve Borrower Issues Allocated by Investor						
Investor	Loss Draft Balances	T&I Balances for Previously Paid Off Loans	Bounced Platinum EDCA Borrower Checks	Total Borrower Balances to be funded		
	[A]	[B]	[C]			
Ginnie Mae	\$ 4,569,422	\$ 1,619,178	\$ 2,923,703	\$ 9,112,302		
Freddie Mac	6,135,120	2,018,669	5,926,530	14,080,320		
Wells Fargo	807,013	213,158	171,908	1,192,079		
Bayview Loan Servicing LLC	302,767	8,410	8,087	319,264		
21st Mortgage Corp	27,416	1,080	881	29,378		
Bank of America	3,913	37,549	1,457	42,919		
Cole Taylor	-	-	1,646	1,646		
Colonial - FDIC	497,520	10,949	43,053	551,522		
Platinum Community Bank - FDIC	2,349	-	-	2,349		
Seaside	18,218	-	-	18,218		
TBW	180,092	39,600	15,604	235,297		
Urban Trust Bank	19,280	-	1,282	20,562		
BB&T	-	8,262	5,723	13,985		
Mercantile Bank	-	1,018	-	1,018		
MountainView	-	860	2,186	3,046		
Wachovia	-	1,205	-	1,205		
US AmeriBank	-	-	1,165	1,165		
MGC Mortgage	-	-	2,064	2,064		
Central Mortgage (CMC)	-	-	1,604	1,604		
Bank of Camden	-	-	941	941		
Bank of the Internet	-	-	403	403		
Five Mile Capital	-	-	283	283		
UMS	-	-	3,394	3,394		
Ocala Funding	-	-	1,453	1,453		
<b>Total</b>	<b>\$ 12,563,111</b>	<b>\$ 3,959,940</b>	<b>\$ 9,113,367</b>	<b>\$ 25,636,418</b>		

30. This \$25,636,418 was “on hand” at TBW as of early August 2009 due to: (a) funds provided by borrowers at the time that the mortgage loan was initially made by TBW; (b) mortgage payments made by borrowers over time; and (c) loss draft payment(s) made by insurance companies. However, the Debtor is able to identify only \$20,160,592 in currently available funds that are directly related and tied to the borrowers affected by Issues 1, 2 and 3. These currently available funds are comprised of: (a) deposits in Colonial investor custodial accounts; (b) deposits in the Colonial Custodial Funds Clearing Account; (c) deposits in the Regions Reconciliation Accounts; and (c) borrower funds held that were transferred to Freddie Mac and Ginnie Mae from Colonial T&I custodial accounts during August 2009.

31. The difference between the amount required to resolve Issues 1, 2 and 3 and the amount of currently available monies totals \$5,475,826. This difference is result of checks being written on the Platinum EDCA after the transfers from the Colonial EDCA ceased on or about August 5, 2009. (See paragraph 19, above.)

32. The Debtor, in conjunction with the FDIC-Receiver, has proposed in the Motion that the fairest and best way to fund the remaining \$5,475,826 needed to resolve Issues 1, 2 and 3 is to use other borrower funds on deposit in the Colonial EDCA as of August 5, 2009. These are funds that, but for the administrative hold, would have been transferred to the Platinum EDCA to fund payments to or on behalf of borrowers. The Colonial EDCA has a current account balance of \$8,414,181.

## **II. Conclusions of Law**

33. This Court, as a court of equity, has the authority to approve the procedures proposed by TBW, as set forth in this Motion, to resolve these issues. *See In re Calpine Corp.*, 356 B.R. 585, 593-94 (S.D.N.Y. 2007).

34. The Borrower Resolution Protocol, which allows for funds to be paid to the borrowers affected by Issues 1, 2 and 3, as well as establishing a basis for the resolution of the Net-Funded Loans (Issue 4), is in the best interests of TBW, its Chapter 11 estate, the FDIC-Receiver, Ginnie Mae, Freddie Mac, and other investors, borrowers/consumers, and all other interested parties, and is necessary and appropriate to carry out the provisions of the Bankruptcy Code as applied to the facts and circumstances and this Chapter 11 case.

Accordingly, **IT IS HEREBY ORDERED:**

35. Each investor identified in Table 1, above, shall, within 10 days of the entry of this Order, notify the Debtor and the FDIC-Receiver by email (the “**Election Notice**”) as to whether it will participate in and be bound by the terms of the Protocol for Issues 1, 2 and 3. Each investor that chooses and elects to participate in and be bound by the Protocol shall be referred to as an “**Electing Investor(s)**.” Electing Investors may not alter any of the terms of the Protocol; they may only elect to participate in the Protocol “as is” or elect not to participate. Any investor who does not provide a timely Election Notice shall be deemed to have elected not to participate in the Protocol. Election Notices shall be provided by e-mail as follows: (a) to TBW: addressed to Neil F. Luria at [nluria@navigantcapitaladvisors.com](mailto:nluria@navigantcapitaladvisors.com), with a copy to Jeffrey W. Kelley at [jeffrey.kelley@troutmansanders.com](mailto:jeffrey.kelley@troutmansanders.com), and (b) to FDIC-Receiver: addressed to Jeffrey E. Schmitt at [jschmitt@FDIC.gov](mailto:jschmitt@FDIC.gov), with a copy to Richard Hans at [richard.hans@dlapiper.com](mailto:richard.hans@dlapiper.com).

**Borrower Resolution Protocol for Issues 1, 2 and 3**

36. Payments to the affected borrowers shall be made by the Subsequent Servicers for the investors who own or, in the case of paid off mortgages, previously owned the mortgages of the affected borrowers.

37. Payments in resolution of Issues 1, 2 and 3 shall be funded from specified monies on deposit at Colonial or at Regions, plus from the T&I monies previously transferred to Freddie Mac, Ginnie Mae and 21<sup>st</sup> Mortgage Corp. More specifically, the sources of the funds that are or will be available to each investor to fund payments are identified in Table 2, below:

Investor	Total to be funded from Colonial EDCA account [A]	Amounts to be funded from Regions account [B]	Checks forward to subsequent servicers [C]	Borrower Funds in Investor Custodial Accounts at Colonial [D]	Borrower Funds in Investor Custodial Accounts Previously Distributed [E]	Borrower Funds in Colonial Collections Clearing Account [F]	Total Funds [G]
Ginnie Mae	\$ 1,570,670		\$ 202,905		\$ 7,288,222	\$ 50,506	\$ 9,112,303
Freddie Mac	3,682,620	675,312	61,503		9,406,573	254,311	14,080,319
Wells Fargo	141,089	66,272		984,719			1,192,080
Bayview Loan Servicing LLC	5,859			313,405			319,264
21st Mortgage Corp	379				28,999		29,378
Bank of America	1,457			41,462			42,919
Cole Taylor	-			1,646			1,646
Colonial - FDIC	46,071	28,366		477,085			551,522
Platinum Community Bank - FDIC	-	2,349					2,349
Seaside	-	9,068		9,150			18,218
TBW	11,431			81,466		142,400	235,297
Urban Trust Bank	1,282			19,280			20,562
BB&T	-			13,985			13,985
Mercantile Bank	1,018						1,018
MountainView	3,046						3,046
Wachovia	1,205						1,205
US AmeriBank	-			1,165			1,165
MGC Mortgage	2,064						2,064
Central Mortgage (CMC)	1,604						1,604
Bank of Camden	941						941
Bank of the Internet	403						403
Five Mile Capital	283						283
UMS	3,394						3,394
Ocala Funding	1,010			443			1,453
<b>Total</b>	<b>\$ 5,475,826</b>	<b>\$ 781,367</b>	<b>\$ 264,408</b>	<b>\$ 1,943,806</b>	<b>\$ 16,723,794</b>	<b>\$ 447,217</b>	<b>\$ 25,636,418</b>

[A] The FDIC will release this amount to each Electing Investor from the Colonial EDCA Account  
[B] The amounts in the Regions Account will be made available by TBW to each Electing Investor.  
[C] The Investors have received these amounts when the checks were forwarded to each respective successive servicer.  
[D] FDIC will remit these amounts from the Investor Custodial Accounts to each Electing Investor.  
[E] These balances were borrower amounts previously released from the Colonial Custodial Account balances to the Investor. Therefore the Investor has the funds to address these borrower issues.  
[F] Amounts specifically identified in the Collection Clearing Account that will be remitted by the FDIC to each Electing Investor.  
[G] The total amount of funds required to be provided to each borrower affected by the borrower issues addressed in this motion.

38. Upon receipt of written notice of its election to participate in and be bound by this Protocol, the Debtor shall disburse to each Electing Investor that investor's allocation of the \$781,367 on deposit in the Regions Reconciliation Account (as allocated in Table 2), to be used and administered by that Electing Investor in accordance with the Protocol.

39. Upon receipt of written notice of its election to participate in and be bound by this Protocol, the FDIC-Receiver has agreed to disburse to each Electing Investor that investor's allocation in accordance with Table 2 from the following amounts on deposit at Colonial:

- a. \$1,943,806 from the respective investor custodial T&I accounts;
- b. \$447,217 from the Colonial Custodial Funds Clearing Account allocated to affected investors in connection with these borrower issues; and

- c. \$5,475,826 from the Colonial EDCA to fund the balance required to resolve these issues.

40. Any Electing Investor that receives (or has previously received) funds from TBW and/or the FDIC-Receiver in accordance with this Borrower Resolution Protocol shall be obligated (effective upon receipt of the total amount of its allocation of funds identified in paragraphs 38 and 39 above), and is hereby ordered (effective upon receipt of the total amount of its allocation of funds identified in paragraphs 38 and 39 above), to use and administer those monies to pay affected borrowers the amounts specified below on Issues 1, 2 and 3 identified above. Specifically, each Electing Investor shall, based on the information provided by TBW, and to the extent it has not already advanced funds to the affected borrower:

- a. pay or make available to each affected borrower the loss draft balance applicable to such borrower (or make such amount available to such borrower in accordance with standard and customary servicing protocols),
- b. pay each affected borrower the T&I refund due to each affected borrower, and
- c. pay each affected borrower the face amount of the bounced Platinum check that relates to such affected borrowers;<sup>2</sup>

provided, however, that no Electing Investor shall be required by this Order to fund any payments in excess of the funds identified with respect to such Electing Investor in Column G of Table 2 above.

41. To the extent it has not already done so, the Debtor shall furnish to the Subsequent Servicer for each Electing Investor all information reasonably necessary to implement the obligation of the Electing Investor to make such payments to borrowers, including all information that would have been provided had the loan in question been transferred to and

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<sup>2</sup> These payments will equal the amount of the bounced checks, but will not reimburse borrowers for other expenses incurred, such as bank fees. Borrowers may file a claim for any such expense in TBW's Chapter 11 case.

boarded by interim servicers when TBW's eligibility to be a servicer was terminated. With respect to loans that were paid off before servicing was transferred, the Debtor shall provide the requisite information to the appropriate Subsequent Servicers so that payments can be made to these individuals.

42. The Debtor shall continue to work with the FDIC-Receiver and each Electing Investor to resolve specific information issues or discrepancies in calculations necessary to affect the purposes of this Borrower Resolution Protocol.

43. Using TBW's Website at [www.taylorbean.com](http://www.taylorbean.com), the Debtor will, as soon as reasonably practicable, provide affected borrowers with contact information for the Subsequent Servicer responsible for making payment to that borrower.

**Borrower Resolution Protocol for Issue 4 (Net-Funded Loans)**

44. An investor who elects to participate in the Protocol for Issues 1, 2 and 3 may, within a reasonable time, also elect to participate in the following Protocol for Issue No. 4 (Net-Funded Loans). An investor electing to participate in the Protocol for Issue No. 4 may do so for any or all of the Net-Funded Loans for which it owns the original mortgage.

45. Subject to the provisions of paragraph 47, as to each investor that elects to participate in the resolution of any or all of the Net-Funded Loans for which it owns the original mortgage:

- a. To the extent that the refinanced mortgage loan is currently owned by TBW, the Debtor is authorized to convey the refinanced mortgage loan to the Electing Investor that owns the original mortgage without further order

of this Court if the Electing Investor commits to TBW in writing to cancel the original mortgage with the refinanced mortgage.

- b. To the extent that the refinanced mortgage loan is currently owned by TBW, the Debtor is authorized to convey the refinanced mortgage to the Electing Investor without the commitment required in subparagraph a, above, if the Electing Investor gives notice in writing to TBW and FDIC-Receiver in the manner set forth in paragraph 35 of this Order that there are (i) defects in the refinanced mortgage (or the perfection of same) that would result in the Electing Investor not having a perfected, first priority lien on the underlying real property or (ii) other circumstances or deficiencies exist that would warrant the Electing Investor retaining the original mortgage in lieu of the refinanced mortgage.
- c. With respect to any refinanced mortgage conveyed by the Debtor pursuant to subparagraphs a or b, above, the Electing Investor shall promptly deal directly with the affected borrower to cancel the original mortgage (if electing under subparagraph 45(a)) or modify either the original or the refinanced mortgage (if electing under subparagraph 45(b)) so that the borrower will be liable for payments pursuant to the terms of only one mortgage loan.

46. With respect to the 37 refinanced mortgages sold to investors (see paragraph 23 above), any Electing Investor that owns or guaranties any of the original loans and that elects to participate in the resolution of the subject net-funded loans shall promptly cancel the original



mortgage unless the Electing Investor certifies in writing to TBW and FDIC-Receiver in the manner set forth in paragraph 35 of this Order that there are defects in the refinanced mortgage (or the perfection of same) that would result in the electing Investor not having a perfected, first priority lien on the underlying real property, and identifies the nature of the defect, in which case the Electing Investor shall promptly deal directly with the affected borrower to cancel either the original or the refinanced mortgage so that the borrower will be liable for payments pursuant to the terms of only one mortgage loan.

47. Any investor that is impacted by Issue 4 shall not be limited to the provisions of paragraph 45 of this Order to resolve the problems caused by Net Funded Loans, but shall also be authorized to resolve same on any terms as may be mutually agreed to by the Electing Investor and the affected borrower, or by order of any court having jurisdiction over any dispute between the Electing Investor and the affected borrower.

48. To the extent that there are Net-Funded Loans still under the control of the Debtor 90 days after the date of the entry of this Order, the Debtor may file another motion with this Court setting forth its proposed resolution of those loans.

### **Other Protocol Provisions**

49. In granting the Borrower Protocol Motion, to the extent it has jurisdiction and authority to do so, it is the Court's intention and ruling that neither TBW nor FDIC-Receiver shall be subject to duplicative claims concerning the disbursements made by the Debtor or FDIC-Receiver pursuant to the Protocol and this Order and that such disbursements by the Debtor and FDIC-Receiver shall be the entire extent of the Debtor's and FDIC-Receiver's responsibility and liability to any party-in-interest with respect to such funds.

50. Nothing in this Order is intended or shall be construed as a finding that any party-in-interest's claim of ownership to specific mortgage assets is superior to the claim of any other party-in-interest to such assets. The Court makes no ruling on jurisdiction over parties or assets or on burdens of proof. Furthermore, nothing in this Order shall be deemed to abridge the rights of creditors to assert claims against TBW's estate.

51. Nothing in this Order shall be deemed to contravene any of the provisions of the Amended Order Granting & Extending Preliminary Injunction dated September 8, 2009 in the case styled *Bank of America, National Association v. Colonial Bank, et al.*, Case No. 09-22384-Civ-Jordan/McAlliey, United States District Court for the Southern District of Florida.

52. Nothing in this Order shall be deemed to confer any private right of action against any Electing Investor, and borrowers shall not, by virtue of this Order, have any such private rights of action against any Electing Investor.

53. Any investor that elects to become an Electing Investor shall not by such election have (or be deemed to have) waived, released or otherwise impaired any right it has or may have to recover, whether by recoupment, setoff or filing a proof of claim or other pleading in this Court, any costs, expenses, loss or damages suffered by such investor in performing its obligations under the Protocol, whether incurred as a result of the obligation to administer funds

disbursed to it pursuant to the Protocol or to otherwise resolve any of the four issues identified in the Motion.

DATED: February \_\_\_\_\_, 2010, in Jacksonville, Florida.

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HON. JERRY A. FUNK

Copies furnished to:

Local Rule 1007-2 Parties in Interest List