UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
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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 Case No. 3:09-bk-10022-JAF Case No. 3:09-bk-10023-JAF Jointly Administered Under Case No. 3:09-bk-07047-JAF

MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR DERIVATIVE STANDING TO PROSECUTE CERTAIN ACTIONS IN THE NAME OF THE DEBTOR

NOTICE OF HEARING
A hearing will be conducted on February 19, 2010, at 10:00 a.m. in Courtroom 4D, Bryan Simpson United States Courthouse, 300 North Hogan Street, Jacksonville, Florida, before The Honorable Jerry A. Funk, United States Bankruptcy Judge, to consider and act upon this Motion.

The Official Committee of Unsecured Creditors (the "Committee"), by and through its undersigned counsel, files this Motion for authorization to prosecute certain actions in the name of Debtor Taylor, Bean & Whitaker Mortgage Corp. (the "Debtor" or "TBW"), and in support thereof states:

1. On August 24, 2009, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

2. On September 11, 2009, the Office of the United States Trustee appointed the Committee.

3. The administration of this case and the reconciliation process have revealed a number of potential causes of action of the estate against several potential defendants. The Debtor's general bankruptcy counsel, Stichter, Riedel, Blain & Prosser, P.A., is taxed with overseeing the complex day-to-day administration of the Debtor's estate. The Debtor's special counsel, Troutman Sanders LLP, has conflicts or other concerns that make it unable or unwilling to prosecute certain of the potential causes of action on behalf of the estate. Under these circumstances, the Committee has requested that it be granted standing to prosecute certain of these actions on behalf of the estate and in the name of the Debtor. The Debtor has consented to the Committee's request and has joined in the relief requested by this Motion.

4. The Committee has analyzed and is prepared to proceed with the following potential claims:

(a) Claims against the Debtor's former chief executive officer, Lee B. Farkas, Coda Roberson III, and certain of their entities (to wit: 3201 Partnership; Uplead Technology, LLC; South Towne Capital Holdings, LLC; and Dine Design Group, Inc. and other affiliates), for money loaned to them by the Debtor;

(b) Collection actions against other former officers, directors and employees to collect on loans from the Debtor;

(c) A claim against Banc of America Securities, LLC, for turnover of money in the Debtor's account at that institution;

(d) A claim against Bank of America, N.A., for its failure to pay certain amounts held back from the purchase price (the "Holdback Amounts") for beneficial interests in pools of mortgages from the Debtor that have been used as collateral for securities and resold and for which Bank of America, N.A., has been paid in full.

The foregoing, together with the additional claims that may be added in accordance with paragraph 5 below, shall be collectively referred to as the "Colorable Actions List."

5. The Debtor and its legal and financial team are in the process of finalizing the servicing reconciliation and issuing a final report thereon and are working on the even more complex and rigorous asset reconciliation in conjunction with the Federal Deposit Insurance Commission. The Committee and the Debtor believe that further claims are likely to be identified as to which, subject to agreement between the Committee and the Debtor, it is appropriate that the Committee prosecute the underlying actions. The Debtor and the Committee have agreed to add such further claims to the Colorable Actions List with the intent to have the Committee prosecute such claims. The Committee is aware of the cost of hearings on serial motions for derivative standing and seeks Court approval of a procedure to add claims agreed to between the Committee and the Debtor to the Colorable Actions List by notice and to bring before the Court only those matters as to which an objection is filed. Therefore, as to those actions to be brought by the Committee and as to which the Debtor and the Committee subsequently agree, the Committee, joined by the Debtor, moves that the Committee be authorized to file one or more supplements to the Colorable Actions List, adding claims as to which derivative standing shall be deemed approved unless written objection is filed within five days after service of the Notice of Supplement to the Colorable Actions List.

6. Accordingly, the Committee, joined by the Debtor, suggests that the interests of the estate and its unsecured creditors would best be served if the Committee

were permitted to pursue the claims on the Colorable Actions List, as supplemented in the future.

BASIS FOR RELIEF

A. Standard for Derivative Standing

7. The Bankruptcy Code establishes a creditors' committee for the express purpose of protecting the rights of its constituents and similarly situated creditors. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977), U.S.C.C.A.N. 1978, p. 5787. In furtherance of this purpose, section 1103(c) of the Bankruptcy Code, which enumerates the statutory functions of a creditors' committee, authorizes creditors' committees to "perform such other services as are in the interest of those represented." 11 U.S.C. § 1103(c)(5).

8. To that end, section 1109(b) of the Bankruptcy Code provides, in pertinent part, that:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. § 1109(b). This general right to be heard would be rendered meaningless with respect to creditors' committees unless such committees are also given the right to act, on behalf of the estate, if a debtor in possession or trustee, who is explicitly granted the right to act, unjustifiably fails to act. *See In re iPCS, Inc.*, 291 B.R. 283, 290 (Bankr. N.D. Ga. 2003) ("[I]f a debtor has a cognizable claim, but refuses to pursue that claim, an important objective of the Code [the recovery and collection of estate property] would be

impeded if the bankruptcy court has no power to authorize another party to proceed on behalf of the estate in the debtor's stead."); *see also In re Joyanno Holitogs, Inc.*, 21 B.R. 323, 326 (Bankr. S.D.N.Y. 1982) (holding that the general right to be heard would be an empty grant unless those who have such a right are also given the right to do something where the debtors will not).

9. While the United States Court of Appeals for the Eleventh Circuit has not directly addressed the issue, courts within the Eleventh Circuit recognize that bankruptcy courts are empowered to confer standing upon creditors committees to bring precisely the type of claims and causes of action that the Committee seeks to initiate here. *See, e.g., Feltman v. Prudential Bache Sec.*, 122 B.R. 466, 475 (S.D. Fla. 1990) (stating that the law is well-settled that in certain circumstances a creditors committee should be given standing to file a suit on behalf of the debtor); *In re Harrold*, 296 B.R. 868, 874 (Bankr. M.D. Fla. 2003) (noting that "[i]n Chapter 11 cases there are occasions where creditor committees are permitted to bring avoidance actions."); *iPCS*, 297 B.R. at 288 (holding that "the combined effect of §§ 1103(c)(5) and 1109(b) is to grant a creditors' committee the right to pursue litigation on behalf of the estate when the debtor-in-possession fails to do so and it would be in the best interest of the estate."); *In re Florida Group, Inc.*, 123 B.R. 923, 924 (Bankr. M.D. Fla. 1991) (stating that "[t]his Court is convinced a creditors committee has a limited derivative right to institute a suit on a debtor's cause of action . . .").

10. The practice of conferring standing upon creditors' committees to pursue actions on behalf of a bankruptcy estate is a widely followed and accepted practice in

other jurisdictions as well. *See, e.g., The Official Comm. of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (holding that "the ability to confer derivative standing upon creditors' committees is a straightforward application of bankruptcy courts' equitable powers"); *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1397 (5th Cir. 1987) (stating that "[a] number of bankruptcy courts have held that in some circumstances a creditors' committee has standing under 11 U.S.C. § 1103(c)(5) and/or § 1109(b) to file suit on behalf of debtors-in-possession or the trustee."); *In re STN Enters.*, 779 F.2d 901 (2d Cir. 1985) (agreeing with those bankruptcy courts that have held that sections 1103(c)(5) and 1109(b) imply a qualified right for creditors' committees to initiate litigation with the approval of the bankruptcy court). *See also See Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1444 (6th Cir. 1995); *Tennessee Valley Steel Corp. v. B.T Commercial Corp. (In re Tennessee Valley Steel Corp.)*, 183 B.R. 795, 800-01 (Bankr. E.D. Tenn. 1995).

11. Courts have established that, subject to certain exceptions, four requirements must be satisfied before a committee can pursue claims on behalf of a debtor's estate: (a) a demand must have been made upon the trustee or debtor in possession to bring such action; (b) such demand must have been unjustifiably refused; (c) there must have been a *prima facie* demonstration of a colorable claim; and (d) the party seeking to bring the action must have obtained leave of the court. *See, e.g., Louisiana World Exposition*, 832 F.2d at 1397; *In re Lewis*, 1996 WL 33401163 *5 n.7 (Bankr. S.D. Ga. Jul. 22, 1996); *see also In re STN Enters.*, 779 F.2d at 905 (holding that the following similar requirements must be satisfied before a committee can pursue such

claims: (i) there must have been a colorable claim or claims for relief that on appropriate proof would support a recovery; (ii) the debtor must have unjustifiably failed to bring suit; and (iii) the court must determine whether an action asserting such claim(s) is likely to benefit the reorganization estate). As discussed below, a committee can be excused from making a demand as required by parts one and two of the derivative standing test if such a demand would be futile. *See, e.g., Official Comm. of Nat'l Forge Co. v. Clark (In re Nat'l Forge Co.)*, 326 B.R. 532, 543-44 (W.D. Pa. 2005). Moreover, it is only logical to conclude that the first two factors are satisfied if a debtor consents to the granting of derivative standing to a committee.

B. <u>The Committee Clearly Satisfies the Test for Derivative Standing</u>

Factors 1 and 2—Demand and Refusal

12. The Court need not consider the demand and refusal elements of the derivative standing test outlined above because the Debtor has consented to the granting of derivative standing to the Committee in this case.

Factor 3—Colorable Claims

13. The third element of the derivative standing test outlined above requires the Committee to demonstrate that colorable claims exist against the prospective defendants. The case law construing the requirement for "colorable" claims clearly provides that the requisite showing is a relatively low threshold to satisfy. *See, e.g., In re Adelphia Communications Corp.*, 330 B.R. 364, 376 (Bankr. S.D.N.Y. 2005) (holding that the requisite standard for presenting a "colorable" claim is relatively easy to meet); *In re Am.'s Hobby Ctr, Inc.*, 223 B.R. 275, 288 (Bankr. S.D.N.Y. 1998) (observing that

only if the claim is "facially defective" should standing be denied); *In re Colfor, Inc.*, 1998 WL 70718, *2 (Bankr. N.D. Ohio Jan. 5, 1998) (stating that consistent with the common meaning of "colorable," the claims to be asserted need only be "plausible" or "not without some merit"); *In re Midway Airlines, Inc.*, 167 B.R. 880, 884 (Bankr. N.D. Ill. 1994) (noting, in a different procedural context, that "[a] colorable claim (one seemingly valid and genuine) is not a difficult standard to meet"). Within the Eleventh Circuit, it has been held that in determining whether a colorable claim exists, the court must engage in an inquiry "much the same as that undertaken when a defendant moves to dismiss a complaint for failure to state a claim." *iPCS*, 297 B.R, at 291 (quoting *Am.'s Hobby Ctr*, 223 B.R. at 282); *see also In re Valley Park, Inc.*, 217 B.R. 864, 869 n.4 (Bankr. D. Mont. 1998) (holding that the committee "does not have to satisfy the quantum of proof necessary for a judgment in order to show a colorable claim").

14. In determining whether a claim is colorable, a court is not required to conduct a mini-trial. Instead, the court may "weigh the probability of success and financial recovery, as well as the anticipated costs of litigation, as part of a cost/benefit analysis" to determine whether the prosecution of claims is likely to benefit the estate. *iPCS*, 297 B.R. at 291 (citations omitted). Thus, the Committee is required to merely establish the existence of a plausible claim. At the very most, the Committee need only come forward with minimal evidence demonstrating that its contentions are not frivolous. *See iPCS*, 297 B.R. at 291 (when it is clear that "the claims lack any merit whatsoever" and when "allowing another party to pursue the claims at the expense of the bankruptcy would neither be in the best interests of the estate nor necessary and beneficial to the

efficient resolution of the bankruptcy proceedings," the relief requested should be denied).

15. Upon the Committee's information and belief, the claims against Farkas and Roberson and their entities and those collection actions against former officers and directors are colorable. Each of the persons and entities executed a note (or in some instances a mortgage or guaranty of another's note) in favor of TBW. Each of the notes is either a demand note or is now in default.

16. Upon the Committee's information and belief, the claim against Banc of America Securities, LLC, is also colorable. Banc of America Securities, LLC, was TBW's securities broker. Funds are held in TBW's account at Banc of America Securities, LLC, derived from TBW's sales of securities and from funds deposited therein to cover margin trading. Because the account and the funds it contain belong to the Debtor, it has a right to withdraw those funds subject to limited exceptions. No such exceptions exist. When the Debtor tried to withdraw the funds, Banc of America Securities, LLC, refused to deliver them to the Debtor.

17. Upon the Committee's information and belief, the claim against Bank of America, N.A., is also colorable. Bank of America, N.A., agreed, pursuant to a Mortgage Loan Participation and Sale Agreement, dated March 31, 2009, to purchase from TBW a 100% beneficial interest in pools of mortgage loans designated to be used as collateral for mortgage-backed securities and to pay up front 95% of the purchase price, with the 5% balance to be due upon the settlement of the trade of the related securities. As to each

purchase, the trade has occurred, but Bank of America, N.A., has failed to pay the 5% Holdback Amounts due.

18. Finally, the requirement that the Committee should obtain court approval prior to asserting claims on behalf of the estate is satisfied by the relief sought herein.

C. Additional Considerations

19. Granting the Committee standing to prosecute the claims on the Colorable Actions List is also salient to the Committee's proper discharge of its fiduciary duties. These duties include "perform[ing] such . . . services as are in the interest of those represented." 11 U.S.C. § 1103(c)(5). As the United States Court of Appeals for the First Circuit has previously explained, a court should be flexible in interpreting these duties in order to allow a committee to "pursu[e] whatever lawful course best serves the interests of the class of creditors represented." *Official Comm. of Unsecured Creditors v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1315 (1st Cir. 1993).

20. In connection with its fiduciary obligations, the Committee is now seeking standing to prosecute such claims on behalf of the estate. As one influential treatise notes, there is no difference for standing purposes between a committee's participation in a proceeding and a committee's initiation of a proceeding if the proceeding is essential to the exercise of the committee's fiduciary duties:

> [V]irtually every bankruptcy proceeding necessarily arises within the context of a bankruptcy case, and conversely, it is only through discrete proceedings that the case is administered and that issues may be raised and determined by the court. . . . Because every issue in a case may be raised and adjudicated only in the context of a proceeding of some kind, it is apparent that reference in section 1109(b) to 'any issue in a case' subsumes issues in a

> proceeding. Any other conclusion would render section 1109(b) meaningless because there is no such thing as an issue that arises exclusively in a 'case' and not in a proceeding.

7 COLLIER ON BANKRUPTCY ¶ 1109.04[l][a][ii] at 1109-25, 1109-26 (15th ed. rev. 2008).

21. The Committee is an appropriate party to prosecute the claims on the Colorable Actions List because its very purpose, like the Debtor's, is to defend the interest of the estate and to ensure that the assets of the estate are maximized. *See, e.g., In re Nationwide Sports Distrib., Inc.*, 227 B.R. 455,463 (Bankr. E.D. Pa. 1998) ("the purpose of such [unsecured creditors'] committees is to represent the interests of unsecured creditors and to strive to maximize the bankruptcy dividend paid to that class of creditors."). The unsecured creditors whom the Committee represents have a significant stake in the outcome of the litigation relating to such claims.

22. The Committee believes that the potential recovery from the claims on the Colorable Actions List represents a substantial pool of assets that may be used to satisfy the estate's liabilities to unsecured creditors. Moreover, the Committee does not expect that the costs and expenses to be incurred in connection with prosecuting such claims will be excessive in relation to the potential recovery for the estate. Indeed, the labor-intensive discovery process in connection with the reconciliation process is well on the way to being accomplished already. The Committee anticipates that the results of the reconciliation will be of significant assistance in much of the more high-ticket litigation. The prosecution of the claims and the concurrent litigation expense reflect a sensible expenditure of the estate's resources. *See In re Adelphia Communications Corp.*, 330 B.R. at 386. Here, where the potential benefits to the Debtor's estate and then unsecured

creditors are hundreds of millions of dollars, the benefits of prosecuting the claims clearly outweigh the anticipated costs incurred in connection therewith.

WHEREFORE, the Committee respectfully requests an Order of this Court: (1) granting this Motion; (2) authorizing the Committee to investigate and, if necessary, pursue causes of action on behalf of the Debtor, including the actions described above; (3) approving the Committee's and the Debtor's proposed procedure for adding to the Colorable Actions List as to all other matters to which the Debtor and the Committee subsequently agree; and (3) granting any further relief as the Court deems appropriate.

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CONSENT AND JOINDER

The Debtor consents to the relief requested by the Committee in the foregoing Motion and joins in the Motion for the purpose of expressing such consent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically via the Court's CM/ECF system to those parties registered to receive electronic notice service, and via U.S. Mail to all parties who are not on the list to receive electronic notice service as stated on the attached service list on February 9, 2010.

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