UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,

Debtor.
_____/

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

Chapter 11

OBJECTION OF FEDERAL HOME LOAN MORTGAGE CORPORATION TO MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR DERIVATIVE STANDING TO PROSECUTE CERTAIN ACTIONS IN THE NAME OF THE DEBTOR

Federal Home Loan Mortgage Corporation ("Freddie Mac"), by and through its undersigned counsel, files this, its objection to *Motion of the Official Committee of Unsecured Creditors for Derivative Standing to Prosecute Certain Actions in the Name of the Debtor* (the "Motion") (Doc. No. 1020), and says as follows:

1. On February 9, 2010, the Official Committee of Unsecured Creditors (the "Committee") filed the Motion, requesting that the Court enter an Order authorizing the Committee to investigate and pursue causes of action in the name of the Debtor.

2. Additionally, the Committee requested that the Court authorize the Committee to utilize an abbreviated procedure to expand the scope of its investigations and prosecutions to other matters not related to those matters which are specifically before the Court in this Motion.

3. Freddie Mac is the single largest creditor in this case, and requests that the Committee's Motion be denied for the reasons hereafter stated.

DISCUSSION

Section 1107 of the Bankruptcy Code gives to the debtor-in-possession the powers of a trustee, which include the right to bring court actions on behalf of the estate. Section 1103 specifically grants certain separate powers to committees appointed pursuant to Section 1102 of the Bankruptcy Code, but does not specifically grant to a committee the power to bring actions on behalf of the debtor's estate.

The Committee admits in the Motion that the United States Court of Appeals for the Eleventh Circuit has not ruled on the issue of whether a committee has standing to bring an action on behalf of the debtor's estate. See Motion at ¶ 9. Of perhaps greater significance, the United States Supreme Court has also not ruled on the issue and, in fact, *expressly* sidestepped the issue of whether "a bankruptcy court can allow other interested parties to act in the trustee's stead" in Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 14, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000), noting that the statutes at issue in that case mentioned only the trustee, as do the statutes involved in this case.

Nevertheless, the Committee is correct in its statement that the decisions of other courts, which are not binding on this Court, have allowed a committee to sue in the name of the debtor, in very limited circumstances. Those circumstances are not present in this case, however, and the Motion should be denied.

1. The Motion should be denied because the Committee has not satisfied the preconditions that the Committee make demand upon the Debtor to bring the actions, and that the demand was unjustifiably refused.

The Committee admits that one of the requirements even of the non-controlling cases which allow a committee to bring actions in the name of a debtor is that the

committee must show that the committee has made demand upon the debtor to bring the action, and that the debtor has unjustifiably refused to do so. See Motion at ¶ 11. The Committee argues that it is not required in this case to satisfy that precondition because the Debtor has consented to the Committee bringing the claims on behalf of the estate. See Motion at ¶ 12.

The mere consent of the Debtor, however, does not logically satisfy the requirement. By making this argument, the Committee effectively seeks to circumvent the requirement that the Committee show that the Debtor's decision not to pursue the action be "unjustifiable." The Debtor apparently has consented to the Committee pursuing the action, but it did not refuse to pursue the action itself. Additionally, no reason—justifiable or not—has been offered for why the Debtor should not bring these actions itself.

In fact, the Committee has offered its own reason for why the Debtor should not be trusted to bring these actions—namely that the Debtor's Special Counsel has a conflict, and the Debtor's primary bankruptcy counsel is too busy. See Motion at ¶ 3. That explanation, however, does not justify the Committee's desire to act on behalf of the Debtor. The Debtor can simply hire another attorney, if such is the case, as it is not the Debtor's counsel who is being asked to bring these actions, but rather the Debtor itself. There is no indication that the Debtor has refused to do so, much less that it has offered an *unjustifiable* reason for its refusal.

Further, while the Committee states that the Debtor has consented to its derivative standing, the Committee's argument glosses over the fact that it is also asking the Court to approve an abbreviated process to consider expansion of this derivative standing to

other unspecified actions, which are apparently unknown at this time. How the Debtor could have consented to the Committee's derivative standing in such unknown actions is curious and remains unanswered in the Motion. Certainly, if the Debtor has offered such *carte blanche* consent, that would, in itself, be inconsistent with its duty to act as Trustee on behalf of the estate. See 11 U.S.C. § 704, as incorporated by 11 U.S.C. § 1107 Similarly, such *carte blanche* consent would be inconsistent with 11 U.S.C. § 1103, which provides the Committee with authority to "consult with the trustee or debtor in possession concerning the administration of the case," "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor," and "participate in the formulation of a plan." Section 1103 does not provide the Committee with blanket authority to act on behalf of the estate to "collect and reduce to money the property of the estate," which authority is expressly granted instead to the trustee and debtor-in-possession. 11 U.S.C. § 704(a)(1). Yet that is precisely what the Motion seeks by authorizing the Committee to bring (i) "[c]laims against the Debtor's former chief executive officer…..for money loaned," (ii) "[c]ollection actions……to collect on loans," (iii) "[a] claim……for turnover of money," and (iv) "[a] claim……for…..failure to pay certain amounts." See Motion at ¶ 12. The Motion at paragraph 5 goes on to state that "[t]he 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." Given that these future actions are not even known, it is unclear how the Committee could have satisfied the preconditions that it make demand upon the Debtor and show that the demand was

unjustifiably denied. The cases relied upon by the Committee neither allow nor contemplate such a result.

The Motion—and particularly that portion which seeks to provide an abbreviated procedure for future expansions of the Committee's derivative standing—suggests that the Debtor and the Committee have agreed upon a general course of proceeding which would allow the Committee to take over primary responsibility for important parts of the case from the Debtor, essentially at will. As discussed above, such an arrangement is not contemplated by the Bankruptcy Code or by the case law. The bankruptcy estate's creditors have a right under the applicable statutes to insist that the Debtor take responsibility for bringing these actions, except in the most unusual of circumstances, which are not present in the facts before this Court. Certainly, there should be no general procedure for the Debtor to assign to the Committee responsibility for bringing such actions whenever it feels that it wants to do so, nor should the Committee be permitted to simply assert derivative standing whenever it so desires.

2. The Motion should be denied because the Committee has not shown that that the exercise of derivative standing by the Committee would be "in the best interest of the estate."

The cases relied upon by the Committee require that as a prerequisite to approving derivative standing, the Court find that derivative standing would be "in the best interest of the estate." See Matter of iPCS, Inc., 297 B.R. 283, 298 (Bankr. N.D. Ga., 2003).

As noted above, the only excuse offered by the Committee for why the Committee should bring this action rather than the Debtor is that the Debtor's main

counsel is too busy, and its Special Counsel has a conflict. These are difficulties that are easily addressed simply by appointing additional special counsel for the Debtor or by appointment of a trustee or examiner pursuant to 11 U.S.C. § 1106. Accordingly, it remains to be seen why the Committee should bring these actions instead of the Debtor.

More importantly, the iPCS court stated:

> [T]o determine whether the exercise of derivative standing by a Committee would be in the best interest of the estate, 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 conducted to determine whether pursuit of the colorable claims are likely to benefit the estate.

See iPCS, 297 B.R. at 298.

Yet, the Committee makes no effort whatever to persuade the Court of the merits of the claims which it seeks to commit the Debtor to prosecute or of the likelihood of collection. Further, in this case, the Committee is not only asking the Court to approve derivative standing in connection with specific litigation, but is also asking the Court to approve an abbreviated process for obtaining approval to expand the scope of the Committee's derivative standing to other matters which are currently unknown. Thus, the Committee seeks to circumvent the prerequisites for asserting derivative standing, and to expose the estate to open-ended liability for the cost of litigation that the Debtor apparently does not even want to bring. This is not in the best interest of the estate.

WHEREFORE, Freddie Mac requests that the Court sustain this objection and deny the relief requested in the Motion. Alternatively, Freddie Mac requests that the Court make clear that any allowance for the payment of attorneys' fees and costs in connection with such investigation and litigation shall be limited to the benefit provided to the estate by such litigation. Further, Freddie Mac asks that the Committee's request

for approval of an expedited process for considering future expansions of derivative standing be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 17th day of February, 2010, the foregoing *Objection of Federal Home Loan Mortgage Corporation to Motion of the Official Committee of Unsecured Creditors for Derivative Standing to Prosecute Certain Actions in the Name of the Debtor* was filed and served via the Court's ECF/Electronic Filing System, and to the extent that the foregoing was not served electronically via the CM/ECF System, I caused a copy of same to be served via first class mail postage prepaid to: **Counsel for the Committee:** James D. Gassenheimer, Berger Singerman, P.A., 200 South Biscayne Boulevard, Suite 1000, Miami, Florida 33131; **Debtor**: Taylor, Bean & Whitaker Mortgage Corp., 315 N.E. 14th Street, Ocala, Florida 34470; **Counsel for Debtor**: Edward J. Peterson, III, Stichter, Riedel, Blain & Prosser, PA, 110 East Madison Street, Suite 200, Tampa, FL 33602; **Special Counsel for Debtor**: J. David Dantzler, Esq., Troutman Sanders, LLP, 600 Peachtree Street, NE Suite 5200, Atlanta, Georgia 30308-2216; **United States Trustee**: Kenneth C. Meeker, Assistant U.S. Trustee, 135 West Central Boulevard, Suite 620, Orlando, Florida 32801; and the parties listed on the Local Rule 1007-2 Parties in Interest List attached hereto.

/s/ Jason Ward Johnson
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