

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,

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

Chapter 11

Debtor.

**OBJECTION OF FREDDIE MAC TO
TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION'S
MOTION FOR AN ORDER AUTHORIZING AND DIRECTING EXAMINATION
OF THE FEDERAL HOME LOAN MORTGAGE CORPORATION PURSUANT
TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 2004 AND OBJECTION
TO BNPP'S, FDIC RECEIVER'S AND THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS' MOTIONS TO JOIN**

Federal Home Loan Mortgage Corporation ("Freddie Mac"), by and through its undersigned counsel, files this objection to *Taylor, Bean & Whitaker Mortgage Corporation's Motion for an Order Authorizing and Directing Examination of the Federal Home Loan Mortgage Corporation Pursuant to Federal Rule of Bankruptcy Procedure 2004* (the "Rule 2004 Motion") (Doc. No.: 1046), and *Objection to BNPP's, FDIC Receiver's and the Official Committee of Unsecured Creditors' Motion to Join* (Doc. No.'s: 1123, 1129 and 1163, respectively) and states:

BACKGROUND

1. On August 24, 2009 (the "Petition Date"), Taylor, Bean & Whitaker Mortgage Corp. ("TBW" or "Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). TBW is operating its business as a debtor-in-possession, pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. Through approximately August 4, 2009, TBW had the conditional, non-delegable right to service certain single-family mortgages (the “Servicing”) that were owned by Freddie Mac pursuant to and in accordance with the provisions of the Freddie Mac Single Family Seller/Servicer Guide (the “Guide”).

3. On or about September 11, 2009, TBW and the Federal Deposit Insurance Corporation (the “FDIC”) entered into that certain *Stipulation Between Debtor Taylor, Bean & Whitaker Mortgage Corp. and Federal Deposit Insurance Corporation, As Receiver for Colonial Bank* (the “FDIC Stipulation”) that sought to provide a comprehensive reconciliation process, comprised of a servicing reconciliation (the “Servicing Reconciliation”) and an asset reconciliation (the “Asset Reconciliation”) (together, the “Reconciliation Process”) seeking, *inter alia*, to resolve the issues surrounding the existence, ownership, location and rights in and to the property and contracts of TBW. An order approving the FDIC Stipulation was entered by the Court on September 29, 2009 (the “FDIC Stipulation Order”) (Doc. No.: 348). A true copy of the FDIC Stipulation and the FDIC Stipulation Order are attached hereto as Composite Exhibit “A.”

4. On or about October 30, 2009, TBW filed that certain *Debtor Taylor, Bean & Whitaker Mortgage Corp. ’s First Interim Reconciliation Report*.

5. On or about December 15, 2009, TBW filed that certain *Debtor Taylor, Bean & Whitaker Mortgage Corp. ’s Second Interim Reconciliation Report*.

6. TBW has indicated that the Reconciliation Process will be concluded by April 30, 2010.

THE RULE 2004 MOTION

7. On February 18, 2010, TBW filed its *Motion for an Order Authorizing and Directing Examination of the Federal Home Loan Mortgage Corporation Pursuant to Federal Rule of Bankruptcy Procedure 2004*, seeking an Order authorizing an extensive production of documents and witnesses by Freddie Mac.

8. Subsequently, BNP Paribas (“BNPP”), the FDIC, in its capacity as receiver for Colonial Bank, and the Official Committee of Unsecured Creditors filed separate Motions to Join TBW’s Rule 2004 Motion (the “Joinder Motions”). (Doc. Nos.: 1123, 1129, and 1163, respectively).

9. TBW seeks, *inter alia*:

(a) to conduct, within the next nineteen (19) days—as of the date of this objection—oral examinations of twelve (12) specifically named witnesses (Rule 2004 Motion ¶ 16); and

(b) to conduct, within the next three (3) days, an oral examination of a Freddie Mac designated representative (Rule 2004 Motion ¶ 17), who is charged with knowledge of an exhaustive list of matters (Rule 2004 Motion Exhibit “A”), including:

(i) all of Freddie Mac’s mortgage purchases from TBW and Ocala Funding, LLC (“Ocala”) since January 2005, including all communications between Freddie Mac and LaSalle Bank, LaSalle Global Trust Services, ABN Amro or Bank of America with regard to the same (Rule 2004 Motion Exhibit “A,” Nos. 2 & 3); and

(ii) all activities related to the P&I and T&I accounts, including every withdrawal since August 1, 2008 (Rule 2004 Motion Exhibit “A,” No. 6); and

(iii) all information regarding the management, administration and use of the P&I accounts since January 1, 2005 (Rule 2004 Motion Exhibit “A,” No. 4);

(c) Freddie Mac to produce, within the next three (3) days—as of the date of this objection—a voluminous number of documents, including:

(i) every document and communication that evidences or relates to Freddie Mac’s purchase of over 7,883 mortgages from Ocala (Rule 2004 Motion Exhibit “B,” No. 1); and

(ii) every document and communication that evidences or relates to Freddie Mac's purchase of mortgages from TBW or Ocala since January 1, 2008 (Rule 2004 Motion Exhibit "B," No. 3 and 4); and

(iii) every document and communication that relates to any activity in the P&I and T&I custodial accounts maintained by TBW on behalf of Freddie Mac at Colonial Bank since August 1, 2008 (Rule 2004 Motion Exhibit "B," No. 7); and

(iv) every document and communication generated since January 1, 2005 that evidences or relates to Freddie Mac's internal assessments and reviews of TBW's or Ocala Funding's performance as a seller or servicer and/or its financial condition (Rule 2004 Motion Exhibit "B," No. 8, 9, 11, 21 and 22); and

(v) every document and communication generated since January 1, 2005 evidencing or relating to the processing and resolution of disputes between Freddie Mac and TBW (Rule 2004 Motion Exhibit "B," No. 12, 13 and 23); and

(vi) every document and communication generated since January 1, 2005 evidencing or relating to TBW's granting of a security interest in its mortgage servicing rights and the value thereof (Rule 2004 Motion Exhibit "B," No. 14 and 15); and

(vii) every document and communication evidencing or relating to Freddie Mac's review of TBW's relationship with Platinum Community Bank or Colonial BancGroup (Rule 2004 Motion Exhibit "B," No. 17 and 18).

10. The Rule 2004 Motion simply states that TBW "must obtain information from Freddie Mac in order to be able to complete the Asset Reconciliation and develop a plan and disclosure statement." (Rule 2004 Motion ¶ 10). Additionally, TBW concedes that the purpose of a Rule 2004 examination is to determine "the nature and extent of the bankruptcy estate, revealing assets, examining transactions and assessing whether wrongdoing has occurred" (Rule 2004 Motion ¶ 11). With regard to the Asset Reconciliation, the FDIC Stipulation provides that TBW "will work with . . . creditors, to resolve and reconcile issues regarding ownership and other rights in mortgages, REOs

and other related assets that were serviced, maintained and controlled by [TBW] as of August 3, 2009.” (FDIC Stipulation ¶ 8).

11. The Rule 2004 Motion, however, provides *no explanation* as to why the requested information is needed for TBW to complete its tasks, or how the requested information relates to the proper purposes of a Rule 2004 examination. A Rule 2004 examination of the proposed depth and breadth would be an extraordinarily burdensome mode of discovery to obtain such information, and the request far exceeds the scope of the reason articulated by TBW for the 2004 examination.

OBJECTIONS TO DEBTOR’S MOTION

12. TBW’s request for documents and examinations from Freddie Mac should be denied because: (1) TBW cannot establish good cause for the requested discovery, (2) it is overbroad and unduly burdensome in the extreme, (3) it exceeds the scope of inquiry permitted by Rule 2004 of the *Federal Rules of Bankruptcy Procedure*, and (4) it exceeds the scope of discovery needed in order for TBW to complete the Asset Reconciliation, and develop a plan and disclosure statement.

A. THE MOTION SHOULD BE DENIED BECAUSE TBW HAS NOT AND CANNOT ESTABLISH “GOOD CAUSE”

13. TBW has the affirmative duty to show good cause for its requested discovery. Freeman v. Seligson, 405 F.2d 1326, 1336 (D.C. Cir. 1968). “Generally, good cause is shown if the examination is *necessary* to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner undue hardship or injustice.” In re Dinubilo, 177 B.R. 932, 943 (Bankr. E.D. Cal. 1993) *citing* Boeing Airplane v. Coggeshall, 280 F.2d 654, 670 (D.C. Cir. 1960); Matter of Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) (emphasis added).

14. TBW's Rule 2004 Motion fails to explain how the requested discovery is *necessary* in order for it to complete Asset Reconciliation or to develop a plan or a disclosure statement. With regard to Asset Reconciliation, TBW agreed to resolve "issues regarding ownership and other rights in mortgages . . . that were serviced, maintained and controlled by [TBW]." With respect to TBW's analysis of loans that *it controlled and owned*, TBW should already possess all of the materials that it needs to complete said reconciliation, and should not require Freddie Mac to expend its time and resources to determine TBW's rights.

15. The Rule 2004 Motion asks for production of numerous documents that TBW should have in its possession, including, *inter alia*:

- (a) documents relating to the management and use of the P&I and T&I accounts that were *maintained by TBW* (Rule 2004 Motion Exhibit "B," Nos. 5 & 7); and
- (b) documents relating to Freddie Mac's mortgage *purchases from TBW or Ocala* (Rule 2004 Motion Exhibit "B," Nos. 1, 3 & 4); and
- (c) documents that set forth the terms that governed the business relationship *between Freddie Mac and TBW* (Rule 2004 Motion Exhibit "B," No. 2); and
- (d) all financial statements that were *provided to Freddie Mac by TBW or Ocala* (Rule 2004 Motion Exhibit "B," No. 10).

TBW was equally a party to, if not the creator of, the aforementioned documents. It is anomalous that TBW should ask Freddie Mac for documents that TBW itself created. Additionally, with regard to information concerning the P&I and T&I accounts, TBW is in the best position to produce such documentation, where it managed these accounts. As such, it is inappropriate to require Freddie Mac to expend its time and resources to produce documents that TBW should already possess or can more easily obtain from another party, such as the institutions in which the P&I and T&I funds were deposited.

16. Several of the requests within the Rule 2004 Motion pertain to documentation of audits, approvals and assessments conducted by Freddie Mac of TBW's and/or Ocala's financial condition and performance as a seller and servicer. For example:

(e) all documents that evidence or relate to Freddie Mac's assessment and analysis of COL B and AOT facilities from Colonial Bank in favor of TBW (Rule 2004 Motion Exhibit "B," No. 6); and

(f) all documents that evidence or relate to formal or informal audits, assessments, and/or reviews by Freddie Mac of TBW's and/or Ocala Funding, LLC's performance as a seller since January 1, 2005 (Rule 2004 Motion Exhibit "B," No. 8); and

(g) all documents that evidence or relate to formal or informal audits, assessments, and/or reviews by Freddie Mac of TBW's performance as a servicer since January 1, 2005 (Rule 2004 Motion Exhibit "B," No. 9); and

(h) all documents that evidence or relate to formal and informal audits, assessments, and/or reviews by Freddie Mac of TBW and/or Ocala Funding's financial condition since January 1, 2005 (Rule 2004 Motion Exhibit "B," No. 11); and

(i) all documents that evidence or relate to formal or informal appraisals, evaluations, assessments and/or reviews of TBW's mortgage servicing rights since January 1, 2005 (Rule 2004 Motion Exhibit "B," No. 14); and

(j) all documents that evidence or relate to Freddie Mac's approval of Ocala as a servicer (Rule 2004 Motion Exhibit "B," No. 16); and

(k) all documents that evidence or relate to Freddie Mac's decision to terminate TBW as an authorized seller and servicer (Rule 2004 Motion Exhibit "B," No. 19).

"It is clear that Rule 2004 may not be used as a device to launch into a wholesale investigation of a non-debtor's private business affairs." In re Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985). Moreover, TBW's incredibly broad and burdensome request for production, of essentially all of Freddie Mac's internal analyses of TBW's and Ocala's performance, is an extreme invasion into Freddie Mac's strategic, internal business procedures. TBW's request effectively constitutes an impermissible "wholesale investigation" of Freddie Mac's business affairs. Additionally, Freddie Mac's privileged

and confidential *opinion* of various aspects of TBW's performance is irrelevant to either the completion of the Reconciliation Process or TBW's formulation of a disclosure statement and plan. Central to the development of a plan and disclosure statement are the claims which have been filed by creditors in TBW's case and the assets that TBW has available to satisfy those claims. Furthermore, Freddie Mac's *opinion* of TBW and Ocala, as *servicers*, certainly does not aid TBW in its determination of the rightful owner of particular mortgages. TBW's Rule 2004 Motion provides no explanation as to why the audit documents, which contain Freddie Mac's internal analysis of various aspects of TBW's and Ocala's *performance*, are even plausibly helpful to assist TBW in its stated purposes. Such a brazen request by a debtor of one of its largest creditors is contrary to the purposes of a Rule 2004 examination.

17. Courts have imposed restrictions on the scope of examinations permitted under Rule 2004. A Rule 2004 examination should not be utilized as a mechanism to harass the producing party nor should the examination drift into matters irrelevant to the basic inquiry. In re Pan American Hosp. Corp., 2005 WL 2445907, *2 (Bankr. S.D. Fla. Feb. 25, 2005); *See also* In re Mitcco, Inc., 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984). Several of TBW's requests concern matters that are completely irrelevant to TBW's stated purposes. For example, Number 1 of Exhibit "A" to the Rule 2004 Motion requests that Freddie Mac produce a deponent aware of the history of the business relationship between TBW and Freddie Mac and of Freddie Mac's opinion or approval of TBW's performance. Personal accounts of the foundation of the business relationship are completely immaterial to TBW's determination of ownership of certain mortgages, and have no bearing on TBW's ability to form a plan or draft an adequate disclosure

statement. Additionally, Numbers 14 and 15 of Exhibit “B” to the Rule 2004 Motion request Freddie Mac to produce documentation relating to valuation of TBW’s mortgage servicing rights and Freddie Mac’s acknowledgement or consent to TBW’s grant of security interests in these rights. Valuations that are up to five (5) years old and Freddie Mac’s *opinion* of TBW’s grants of its servicing rights will shed no light on who is the rightful owner of the disputed mortgages, nor aid in TBW’s ability to formulate a plan and disclosure statement. Numbers 17 and 18 of Exhibit “B” request information relating to Freddie Mac’s “review and analysis” of TBW’s relationship with Platinum Community Bank and proposed investment in Colonial BancGroup (which investment does not appear to have been ultimately made). Again, Freddie Mac’s view of these relationships or failed relationships is irrelevant to the Reconciliation Process, plan or disclosure statement.

18. Thus, where TBW’s Rule 2004 Motion makes no explanation as to how the requested discovery is *necessary* to its completion of the Reconciliation Process and development of a plan and disclosure statement, and where many of the documents requested by TBW should already be within TBW’s possession or are completely irrelevant to TBW’s stated purposes, the Rule 2004 Motion should be denied.

19. Further, where the production of documents would be unduly burdensome, good cause does not exist if the information can be obtained by other means. Freeman, 405 F.2d at 1337 (holding that a determination of good cause necessitates that *all practical alternatives* be explored). As aforementioned, TBW should already possess documents relating to mortgages that it sold and serviced, the P&I and T&I accounts that it maintained, the financial statements that it provided to Freddie Mac, among others.

Thus, alternative methods exist, and the information should be obtained internally without imposing a crippling task on Freddie Mac, one of TBW's largest creditors. Additionally, information relating to loans which TBW sold to Freddie Mac, in some cases years ago, is irrelevant to TBW's efforts to complete the Asset Reconciliation or prepare a plan and disclosure statement. As a result, where production of a massive amount of documents and several witnesses within the unattainable timeframe set by the Rule 2004 Motion would utilize a countless number of man-hours, and TBW's oppressive discovery request is not the only method by which it may obtain the information that it needs, TBW has not established good cause for its request and thus its Rule 2004 Motion should be denied.

20. “[E]ven if the discovery is within the bounds of Rule 2004, discovery is not permitted where the cost and burden of disclosure outweigh the interest of the party requesting such discovery.” In re Hammond, 140 B.R. 197, 201 (Bankr. S.D. Ohio 1992) (quoting In re Drexel Burnham Lambert, Inc., 123 B.R. 702, 712 (Bankr. S.D. N.Y. 1991); In re Texaco, Inc., 79 B.R. 551, 553 (Bankr. S.D. N.Y. 1987)). “Furthermore, discovery is not limitless and should ‘not be so broad as to be more disruptive and costly to the [producing party] than beneficial to the [requesting party].’” Hammond, 140 B.R. at 201 *quoting* In re Texaco, Inc. 79 B.R. at 553. Similarly, case law establishes that motions to vacate a Rule 2004 order should be decided by “balancing the competing interests of the parties, weighing the relevance of and necessity for the information sought by the examiner against the extent of inconvenience and intrusion to the witness.” In re Kreiss, 46 B.R. 164 (Bankr. E.D. N.Y. 1985).

21. The Rule 2004 Motion currently requires the production of a vast amount of documents, communications, including emails, and records within three (3) days and the oral examination of at least thirteen (13) people within nineteen (19) days. Such a request is unreasonable and unnecessarily burdensome on Freddie Mac, as it requires production of, *inter alia*:

(l) all documents relating to Freddie Mac's *purchases of 7,883 specific mortgages* from Ocala (Rule 2004 Motion Exhibit "B," No. 1); and

(m) all documents relating to Freddie Mac's purchases of mortgages from either TBW or Ocala since January 1, 2008 (Rule 2004 Motion Exhibit "B," Nos. 3 & 4); and

(n) all documents relating to the P&I and T&I accounts since August 1, 2008, and more specific documents since January 1, 2005 (Rule 2004 Motion Exhibit "B," Nos. 5 & 7); and

(o) all documents relating to formal or informal audits by Freddie Mac of TBW or Ocala as a seller or servicer since January 1, 2005 (Rule 2004 Motion Exhibit "B," Nos. 8 & 9).

Initial estimates obtained by Freddie Mac indicate that the document production will take at least one hundred twenty to one hundred eighty (120-180) days and cost in excess of Two Million Dollars (\$2,000,000.00). Moreover, aside from its cursory statement that the discovery information is needed to "complete the Asset Reconciliation and develop a plan and disclosure statement," TBW makes no substantive claim as to *how* its huge request is necessary in order to achieve its stated purpose. Thus, in "balancing the competing interests of the parties," where the Rule 2004 Motion does not adequately establish that such a sweeping request is reasonably necessary, the Court should deny TBW's Rule 2004 Motion.

B. ALTERNATIVELY, THE SCOPE OF DISCOVERY SHOULD BE LIMITED AND PROTECTIVE MEASURES IMPLEMENTED

22. Courts have imposed restrictions on the scope of examinations permitted under Rule 2004. Such limits include examinations that are used to harass the producing party and drift into matters irrelevant to the basic inquiry. In re Pan American Hosp. Corp., 2005 WL 2445907, *2 (Bankr. S.D. Fla. Feb. 25, 2005); *See also* In re Mitco, Inc., 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984). The examination may not be used to “launch into a wholesale investigation of a non-debtor’s private business affairs.” In re Wilcher, 56 B.R. 428, 433 (N.D. Ill. 1985).

23. The incredibly broad and burdensome discovery requests propounded by TBW effectively constitute a “wholesale investigation” of Freddie Mac’s business affairs. Moreover, TBW’s request for production of essentially all of Freddie Mac’s internal analyses of both TBW’s and Ocala Funding, LLC’s performance is an extreme invasion into Freddie Mac’s strategic, internal business procedures. Such a brazen request by a debtor of one of its largest creditors is contrary to the purposes of a Rule 2004 examination.

24. If discovery is to be permitted of Freddie Mac, which it should not be, the scope must be narrowly limited to distinct areas of inquiry where there is at least some likelihood that documents will be found which are necessary to TBW’s completion of Asset Reconciliation and development of a plan and disclosure statement. Additionally, Freddie Mac must be given a reasonable amount of time to comply with said request.

25. Due to the large volume of documents requested by TBW, if the Court grants discovery, although it should not, Freddie Mac requests that it be permitted to make the documents within the scope of ordered discovery available to TBW at Freddie Mac's offices in Virginia for TBW's inspection and review. Additionally, Freddie Mac respectfully requests that this Court require TBW to bear the costs of production of any court-ordered discovery.

26. If discovery is permitted, Freddie Mac requests that any information obtained or produced in accord therewith is filed under seal, so that the contents of the documents are available only to TBW. Other parties to this action, as well as the general public, will obtain no benefit from reviewing produced documents and thus should not be permitted such access. TBW will ultimately file a publicly accessible Asset Reconciliation Report, reorganization plan, and disclosure statement, all of which will contain any material information obtained or produced under this Motion.

**C. OBJECTION TO BNPP'S, FDIC'S AND
OFFICIAL COMMITTEE OF UNSECURED CREDITORS'
JOINDERS TO TBW'S MOTION FOR RULE 2004 EXAMINATION**

27. Freddie Mac objects to the Joinder Motions filed by BNPP, the FDIC, in its capacity as receiver for Colonial Bank, and the Official Committee of Unsecured Creditors. The information requested by TBW in its Rule 2004 Motion is sought "in order [for TBW] to be able to complete the Asset Reconciliation and develop a plan and disclosure statement." (Rule 2004 Motion ¶ 10). BNPP, the FDIC and the Committee of Unsecured Creditors are not directly participants in the Asset Reconciliation or preparation of the Debtor's plan and disclosure statement; they do not require access to any documents that Freddie Mac is required to produce.

28. Furthermore, on November 25, 2009, BNPP filed suit against Bank of America N.A. in the United States District Court in the Southern District of New York for breach of contract and indemnification of damages related to the mortgage warehousing facility TBW used for short-term liquidity. The funds in dispute in that suit and those subject to the TBW Reconciliation Process may overlap. BNPP's Joinder Motion appears to be an improper attempt to conduct discovery for the benefit of its New York litigation. Denial of BNPP's Joinder Motion by this Court does not prejudice BNPP.

29. In short, this Court should deny the Joinder Motions because TBW's Asset Reconciliation report, the results of which will be fully accessible by BNPP, the FDIC and the Committee of Unsecured Creditors, will contain all relevant information that may be produced in connection with this Rule 2004 Motion and no other justification for allowing the Joinder Motions exists.

CONCLUSION

For the foregoing reasons, Freddie Mac requests that this Court enter an Order denying the Rule 2004 Motion. Alternatively, Freddie Mac respectfully requests that the examination and production of documents requests be, as applicable: (i) stricken and barred, (ii) limited in scope, (iii) produced and filed under seal. Further, Freddie Mac

requests that it be permitted to make any documents produced available to TBW for TBW's inspection and review, and that all costs and expenses of court-ordered discovery be borne by TBW. Lastly, Freddie Mac requests that this Court deny the Joinder Motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 12th day of March 2010, I electronically filed the foregoing *Objection to Taylor, Bean & Whitaker Mortgage Corporation's Motion for an Order Authorizing and Directing Examination of the Federal Home Loan Mortgage Corporation Pursuant to Federal Rule of Bankruptcy Procedure 2004 and Objection to BNPP's, FDIC Receiver's and the Official Committee of Unsecured Creditors' Motion to Join* with the Clerk of Court by using the Case Management/Electronic Case Filing ("CM/ECF") system which will send a notice of electronic filing, and I will complete service of the foregoing as required by Rule 5, Federal Rules of Civil Procedure, made applicable by Rule 7005, Federal Rules of Bankruptcy Procedure, to all parties indicated on the electronic filing receipt.

/s/ Jason Ward Johnson

Jason Ward Johnson