

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
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**MOTION OF THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS FOR CLARIFICATION OF THE  
COURT’S RULING ON TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP.’S MOTION AUTHORIZING AND DIRECTING  
EXAMINATION OF THE FEDERAL HOME LOAN MORTGAGE  
CORPORATION AND RELATED JOINDERS THERETO**

The Official Committee of Unsecured Creditors of Taylor Bean & Whitaker Mortgage Corp. (the “Committee”), by and through its undersigned counsel, files this Motion for Clarification (the “Clarification Motion”) of this Court’s ruling on Taylor, Bean & Whitaker Mortgage Corp.’s motion for an order authorizing and directing examination of the Federal Home Loan Mortgage Corporation (“Freddie Mac”) pursuant to Federal Rule of Bankruptcy Procedure 2004 (the “Rule 2004 Motion”) [D.E. #1046] filed by Taylor Bean & Whitaker Mortgage Corp. (the “Debtor”), and in support thereof, states:

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*Boca Raton Fort Lauderdale Miami Tallahassee*

### **Background**

1. On March 17, 2010, the Court heard argument from the Debtor, Freddie Mac and the joinder parties including the Committee on the Rule 2004 Motion.

2. During the hearing on the Rule 2004 Motion, the Court identified three types or “buckets” of documents that will potentially be identified or produced by Freddie Mac to the Debtor. These three buckets of documents include: 1) documents that contain competitive or proprietary information<sup>1</sup> that would be restricted to the debtor in accordance with a confidentiality agreement, 2) documents that may be shared by the Debtor with all parties in interest, and 3) documents that Freddie Mac deems privileged and not subject to production.<sup>2</sup> *See* Transcript at 34-35 [D.E. #1220].

3. At the hearing, counsel for the Committee identified for the Court that the Committee’s constituents are not competitors with Freddie Mac.<sup>3</sup> Transcript at 37:22-23.

4. In an effort to avoid litigating potentially unnecessary issues, counsel for the Committee proposed they, and not their clients, be given access to confidential documents under the terms of the confidentiality agreement entered into by the Debtor and Freddie Mac. Transcript at 38:1-6.

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<sup>1</sup> The Committee reserves the right to object to any designation by Freddie Mac as to the claimed proprietary information.

<sup>2</sup> Documents identified by Freddie Mac as confidential and/or privileged must be adequately logged such that a party in interest may bring a motion to compel, if necessary. Transcript at 39:5-13.

<sup>3</sup> Even though the concerns expressed by Freddie Mac with respect to the Committee are not correct, in that there are no competitors of Freddie Mac who are members; to accommodate expedient resolution of this issue, counsel has filed this motion and reserves for a later date whether members of the Committee should have access to all documents produced in this case.

5. As the Court stated, the entry of an order which permits only Committee counsel to review documents without disclosure to clients and/or competitors, in order to protect a party's confidential information is a practical solution. Transcript at 37:24-5, 38:1-6.

6. Despite the Committee's counsel's willingness to execute the same confidentiality agreement as the Debtor and to include a provision that counsel will not disseminate the confidential information to the Committee, Freddie Mac continues to rebuff the Committee's counsel's request that all documents produced to the Debtor be produced to the Committee's counsel, subject to an appropriate confidentiality agreement and accompanying court order.

7. The basis for Freddie Mac's argument is supposedly that counsel for the Committee is ethically obligated to share any documents it receives with its clients. There is no such obligation when an order of the court provides otherwise.

8. This Court has already recognized that provided Committee counsel signed the confidentiality agreement and the Court order required Committee counsel not to divulge the confidential information to the members of the Committee, Freddie Mac was adequately protected.

"You sign the same confidentiality agreement ... We do that all the time.

I think there's some rules, if you [Committee's counsel] sign it and I require that you can't divulge specific information to certain members, then you can't - -" Transcript at 37:21 to 38:2.

**Legal Authority**

9. The Court's understanding of the rules was correct. An attorney's review of documents and withholding of the same from his clients does not create a conflict with the attorney-client relationship under the ABA Model Rules of Professional Conduct. Under the ABA Model Rules of Professional Conduct, Rule 1.4, which governs "Communications" under the "Client-Lawyer Relationship":

a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*ABA Model R. of Prof. Conduct 1.4 (2004)*

10. This obligation is not abrogated by entering a confidentiality agreement and accompanying order approving the agreement which would allow the Committee's counsel to review documents determined to be "confidential" or subject to an attorneys-eyes only designation. In fact, Comment [7] to Rule 1.4, titled "Withholding Information", states:

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. **Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.**

*Id.* (emphasis added).

11. The decision to grant the relief requested herein is within the Court's discretion. *See Auto-owners Ins. Co. v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426, 429 (M.D. Fla. 2005) (citing *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985)); *see also, Kaiser v. Phosphate Engineering*, 153 F.R.D. 686, 688 (M.D. Fla. 1992) (Rule 26 requires that the party seeking to protect information has the burden to establish that such information contains trade secrets or is otherwise confidential or proprietary and for the Court to fashion an appropriate protection). Here, the Court's ruling on the Rule 2004 Motion, allowing only Committee counsel and not its clients, access to the confidential documents, allows Freddie Mac's interest in labeling proprietary information as "confidential" to be adequately protected. Permitting counsel for the Committee to review documents identified as "confidential" will not jeopardize Freddie Mac's confidential or proprietary information.

12. Fashioning such an order complies with the Federal Rules of Civil Procedure, Rules 26(c)(1)(E) and (G), which state that "[t]he court may, for good cause,

issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(E) designating the persons who may be present while the discovery is conducted;

...

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; ...”

Fed. R. Civ. P. 26(c)(1)(E), (G).

13. Accordingly, there is no prohibition against an order from the Court authorizing counsel for the Committee to access and review documents identified by Freddie Mac as “confidential” pursuant to a confidentiality agreement.

14. Committee counsel have shared both the ABA model rule and the transcript with counsel for Freddie Mac, who persist in their position that the Court did not grant Committee counsel access to the Confidential Documents and that the model rule and an order from this court would not protect Freddie Mac, thus necessitating this motion.

WHEREFORE, the Committee respectfully requests an Order of this Court: (i) Clarifying this Court’s ruling on the Motion and (ii) for an order authorizing and directing the production of or access to documents identified by Freddie Mac as “confidential” to the Committee subject to an Order from this Court restricting access to attorney’s eyes only.

Respectfully submitted,

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By:                   /s/ James D. Gassenheimer                    
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on April 12, 2010, the *Motion of the Official Committee of Unsecured Creditors for Clarification of the Court's Ruling on Taylor, Bean & Whitaker Mortgage Corp.'s Motion for Authorizing and Directing Examination of the Federal Home Loan Mortgage Corporation and Related Joinders Thereto* was electronically filed 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.

By:     /s/ James D. Gassenheimer      
James D. Gassenheimer  
Florida Bar No. 959987

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