

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 FREDDIE MAC TO
NOTICE OF SECOND AMENDMENT TO THE COLORABLE ACTIONS LIST
FILED PURSUANT TO THE ORDER GRANTING MOTION OF THE
OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR DERIVATIVE
STANDING TO PROSECUTE CERTAIN ACTIONS IN THE NAME OF THE
DEBTOR, ADDING CLAIMS BY CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON AND LONDON MARKET INSURANCE COMPANIES, ET AL.**

Federal Home Loan Mortgage Corporation ("Freddie Mac"), by and through its undersigned counsel, objects to the *Notice of Second Amendment to the Colorable Actions List Filed Pursuant to the Order Granting Motion of the Official Committee of Unsecured Creditors for Derivative Standing to Prosecute Certain Actions in the Name of the Debtor, Adding Claims by Certain Underwriters at Lloyd's, London and London Market Insurance Companies, Et Al.* (the "Second Amendment Notice") (Doc. No. 1433), as an overreaching attempt to improperly enlarge the Committee's powers as defined in the Derivative Standing Order, and says as follows:

BACKGROUND

1. On February 9, 2010, the Official Committee of Unsecured Creditors (the "Committee") filed its Motion of the Official Committee of Unsecured Creditors for Derivative Standing to Prosecute Certain Actions in the Name of the Debtor (the "Derivative Standing Motion") (Doc. No. 1020), requesting that the Court enter an Order

authorizing the Committee to investigate and pursue causes of action in the name of the Debtor.

2. On March 2, 2010, the Court entered its Order Granting Motion of the Official Committee of Unsecured Creditors for Derivative Standing to Prosecute Certain Litigation in the Name of the Debtor (the “Derivative Standing Order”) (Doc. No. 1108), ruling in part that:

[t]he Committee is authorized and empowered to act in the name and place of the Debtor, and on behalf of the Debtor’s estate, to **investigate, commence and prosecute** any additional claims: (a) added to the Colorable Action List, with the consent of the Debtor, without order of this Court, provided the Committee files one or more supplements to the Colorable Action List and no objection is filed within 14 days after service of the supplement; and (b) that may be authorized by the Court after notice and a hearing.

Derivative Standing Order ¶3 (emphasis added)

3. On May 18, 2010, the Committee filed its Second Amended Notice, purporting to amend the Colorable Action List to include the following:

The Defense of TBW in a certain adversary proceeding styled: Claims by Certain Underwriters at Lloyd’s, London and London Market Insurance Companies, et al., for declaratory judgment relating to four insurance policies: Mortgage Bankers Bond bearing Certificate No. SUA 2896, Excess Mortgage Brokers Bond Bearing Certificate No. B0621PTAY00308 and/or Excess Mortgage Brokers Bond bearing Certificate No. B0621PTAY00208, under Adv. No. 3:10-ap-00243-JAF and any affirmative claims TBW may have in respect of the referenced Bonds.

(the “Lloyd’s Action”)

**THE DERIVATIVE STANDING ORDER DID NOT CONFER THE REQUESTED
POWERS UPON THE COMMITTEE AND THE AMENDMENT SHOULD BE
DENIED**

4. The Second Amended Notice seeks to improperly amend the Colorable Action List to allow the Committee to defend the Lloyd's Action on behalf of the Debtor, despite the lack of a grant of such defense powers in the Derivative Standing Order. The relief sought and awarded in that Order was limited to allowing the Committee to “investigate, commence and prosecute any additional claims.” (emphasis added).

5. The Committee fails to cite any authority for this attempted expansion of its powers under the Derivative Standing Order; moreover, the undersigned was unable to find any case law pursuant to which a committee is authorized to defend actions against the debtor and discussing under what circumstances.

6. Section 1107 of the Bankruptcy Code gives the debtor-in-possession the powers of a trustee, which include the right to bring court actions on behalf of the estate. Section 1103 grants certain separate powers to committees appointed pursuant to Section 1102 of the Bankruptcy Code, but does not grant the power to bring actions on behalf of the debtor's estate, or to defend actions brought by other interested parties against the debtor or its estate. Although the United States Supreme Court has 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), numerous lower courts have ruled that such standing may be authorized in certain *limited* circumstances. These cases generally deal with the committee acting in lieu of the debtor to prosecute matters on the debtor's behalf.

7. The Committee offers no reason why it should be authorized to defend the Lloyd's Action in the place of the Debtor other than the Committee's vague, unsupported claim that it would be in "the interests of the estate."

8. Based upon conversations with the Debtor's special counsel, Freddie Mac understands that Troutman & Sanders LLP has a conflict in representing the Debtor in the Lloyd's Action. However, no such conflict apparently exists for Debtor's primary bankruptcy counsel. In any event, a conflict by either counsel for the Debtor provides no basis to delegate the defense in an adversary proceeding to the Committee. If necessary, alternative special counsel can be retained to represent the Debtor in the Lloyd's Action.

9. Beyond the seemingly baseless attempt to delegate the Lloyd's Action to the Committee, the Committee's involvement in the Lloyd's Action may act to prejudice the Estate.

10. The Lloyd's Action is a multimillion dollar lawsuit brought by Lloyd's of London and certain of its underwriters, seeking a declaration that the Debtor made misrepresentations to it in connection with the issuance of certain Bonds and policies (together, called the "Bonds") in which Freddie Mac and the other Defendants have an interest as loss payee or as additional insureds, and that such misrepresentations render the Bonds void, or vitiate the coverage to which the Defendants would otherwise be entitled.

11. Plainly, the Lloyd's Action is a significant matter, is material to the Debtor's reorganization and the prospect for recovery by its creditors, and should be handled in the manner that is most likely to achieve a favorable outcome.

12. Neither the Committee, nor its counsel, is in the best position to defend the Lloyd's Action, or to prosecute counterclaims that may be necessary to enforce the Bonds. The Debtor has possession of all critical and material information, not the Committee. Further, should the Debtor be required to regularly consult with the Committee on the Lloyd's Action, the Debtor's own interest may become imperiled, including jeopardizing the Debtor's privileges and confidentialities which cannot be shared with the Committee or its counsel without prejudicing the Estate. The Debtor has its own strategies, fiduciary obligations, and concerns that may not align with those of the Committee or its members.

13. Inevitably, in order to safeguard the interests of the Estate, it will be necessary for the Debtor's counsel to act as a go-between in all communications and to act as gatekeeper with respect to documents and witnesses, burdening the Debtor and adding further expenses to the Estate.

14. Moreover, to the extent that Debtor and its counsel cannot provide the information needed by the Committee and its counsel, the prosecution and the defense of the Lloyd's Action would be prejudiced, to the detriment of the Estate and its creditors, including Freddie Mac.

15. The ultimate effect of this proposed delegation of powers would be to require the involvement of two sets of attorneys (the Committee's and the Debtor's) and increase the cost and expense to the Estate, while at the same time undermining the quality of the defense and prosecution of counterclaims in the Lloyd's Action.

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WHEREFORE, Freddie Mac requests that the Court deny the Committee's request to amend the Colorable Actions List.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 1st day of June, 2010, the foregoing *Objection of Freddie Mac to Notice of Second Amendment to the Colorable Actions List Filed Pursuant to the Order Granting Motion of the Official Committee of Unsecured Creditors for Derivative Standing to Prosecute Certain Actions in the Name of the Debtor, Adding Claims by Certain Underwriters at Lloyd's, London and London Market Insurance Companies, et al.* 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 on June 2, 2010 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/ David E. Peterson

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Label Matrix for local noticing
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