

EXHIBIT "H"

071610 - TBW - BOA.txt

1

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER CASE NO: 09-07047-3F1
MORTGAGE CORP.,

Debtor.

_____ /

TRANSCRIPT OF PROCEEDINGS

Hearing re: Motion to Compel Freddie Mac to Provide and Execute Confidentiality Agreement, before the Honorable Jerry A. Funk, U.S. Bankruptcy Judge, to commence at 10:00 a.m., on Friday, July 16, 2010, at the United States Courthouse, Room 4D, 300 North Hogan Street, Jacksonville, Florida, as reported by Cindy Danese, Notary Public in and for the State of Florida at Large.

- - -

STATEWIDE REPORTING SERVICE
233 East Bay Street, Suite 606
Jacksonville, Florida 32202
(904) 353-7706

□

2

1
2
3

A P P E A R A N C E S

071610 - TBW - BOA.txt

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

RUSSELL BLAIN, ESQUIRE

Attorney for Debtor.

JASON JOHNSON, ESQUIRE

Attorney for Freddie Mac.

MICHAEL TESSITORE, ESQUIRE

Attorney for Bank of America.

ALAN WEISS, ESQUIRE

Attorney for BNP Paribas Bank.

- - -

□

3

T A B L E O F C O N T E N T S

1
2
3
4
5
6
7
8

PAGE

Motion to Compel Freddie Mac to Provide and
Execute Confidentiality Agreement

4

071610 - TBW - BOA.txt

- - -

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

0

4

1 P R O C E E D I N G S
2 July 16, 2010 10:00 a.m.

3 * * * * *

4 MR. BLAIN: Your Honor, that takes us up to
5 the last two categories on the calendar. The way
6 that we have broken these down for agenda purposes,
7 the first one are two motions that are what we have
8 called the contested document production matters.
9 These are issues based upon motions that have been
10 filed by Bank of America and by BNP Paribas. And
11 with respect to those, the debtor does not have a
12 position on either of those, and I would defer to

071610 - TBW - BOA.txt

13 Mr. Tessitore, who filed the first motion which is
14 docket number 1631.

15 MR. TESSITORE: Morning, Your Honor. Mike
16 Tessitore on behalf of Bank of America as
17 indentured trustee, collateral agent and custodian.

18 I have one document, Judge, that I'm going to
19 refer to during my argument, if I could approach
20 and pass it up to the Court.

21 THE COURT: You may.

22 MR. TESSITORE: Your Honor, the motion that
23 we're here on is the latest chapter in the saga of
24 Bank of America and the joining parties' efforts to
25 obtain access to documents that are being produced

5

1 by Freddie Mac to the debtor.

2 This motion, which is our motion to compel
3 Freddie Mac to enter into a confidentiality
4 agreement or to produce a confidentiality agreement
5 that's consistent with the same agreement that was
6 signed between the debtor and the committee, this
7 motion, if we get the relief we're seeking here,
8 will have the effect, I believe, of causing Mr.
9 weiss and BNP to withdraw the subsequent motion on
10 the calendar today; that is, I don't think there
11 will be a need for an in camera inspection of
12 documents if we can get this issue regarding the
13 confidentiality agreement resolved and get that
14 executed and begin this process of producing
15 documents that we've all been waiting on for so
16 long.

17 Obviously Mr. weiss can speak to that, but I

071610 - TBW - BOA.txt

18 believe that is his position.

19 It's really a bad news/good news situation,
20 Judge.

21 The bad news is that beginning back in
22 February, Bank of America and the joining parties
23 began their efforts to obtain access to these
24 documents. I believe it was in March that the
25 Court entered an order that authorized Bank of

6

1 America and the joining parties to participate in
2 the process, and just not to rehash everything,
3 Judge, but the process was that Freddie Mac would
4 produce documents to the debtor, the debtor would
5 then have those documents available to be passed
6 along to the joining parties who were permitted to
7 see those documents pursuant to that March order.

8 The exception was that, if Freddie Mac
9 designated any of those documents as confidential,
10 then the debtor was not authorized to pass those
11 documents along.

12 We haven't seen any of those documents still
13 to this day, so here we are mid July, process began
14 in February, and we've yet to have access to any of
15 the documents that were produced by Freddie Mac to
16 the debtor because they all have been designated as
17 confidential.

18 There's one minor exception, and that is there
19 was a document or two that the debtor had already
20 in its records and therefore it was authorized to
21 give us those two or three documents. Other than

071610 - TBW - BOA.txt
22 that, we've seen nothing. And I actually confirmed
23 with Mr. Dantzler yesterday that at this point he's
24 not authorized to share any documents with Bank of
25 America or the joining parties unless there is a

7

1 confidentiality agreement that's been executed.

2 The joining parties sought to deal with this
3 situation given the fact that the reconciliation
4 report was coming out, given the fact that I think
5 everybody agrees that the findings and the
6 conclusions and that report need to be analyzed and
7 tested by the stakeholders, including Bank of
8 America.

9 Given that situation, it seems that a fallback
10 position that made sense and that the Court has
11 discussed at various hearings and that the
12 committee has already -- relief that the committee
13 has already received, and that's attorneys-eyes-
14 only access to the documents. And so we filed a
15 motion, Bank of America did, to allow
16 attorney-eyes-only access to the documents so that
17 at least the lawyers for Bank of America could
18 start having access to the information that was
19 needed to test the conclusions of the
20 reconciliation report.

21 On June 18th, the Court ruled and granted that
22 motion for attorneys-eyes-only access. The hearing
23 was on June 18th. The order was actually entered
24 on July 7th, and that order provides, Your Honor,
25 that the documents that are identified as

071610 - TBW - BOA.txt

8

1 confidential may share, produce or transmit such
2 confidential documents to the lawyers of Bank of
3 America provided that BOA's counsel has signed a
4 confidentiality agreement.

5 So, just to be clear, Your Honor has already
6 ruled that the lawyers for Bank of America can have
7 access to those documents that are designated as
8 confidential as long as those lawyers execute a
9 confidentiality agreement.

10 There was already a confidentiality agreement
11 done. It was done between the committee and
12 Freddie Mac. The language of this order tracks the
13 very relief that was granted to the committee in
14 terms of attorneys-eyes access, and so it seems
15 like it would be a very simple proposition to
16 obtain an executed nondisclosure agreement,
17 confidentiality agreement with Freddie Mac. But,
18 as we've learned in this process, nothing is easy,
19 and we've been fighting tooth and nail with Freddie
20 Mac to get that document signed.

21 So that's the bad news, Judge.

22 The good news is we've narrowed our dispute
23 down to two issues in the confidentiality
24 agreement, and it's those issues that we'd ask the
25 Court to resolve today and, as I said, let us get

9

1 on with the process of Bank of America lawyers and
2 the lawyers for the joining parties doing the work
3 that needs to be done.

071610 - TBW - BOA.txt

4 Issue one, Your Honor, with regard to the
5 terms of the nondisclosure agreement can be found
6 on pages 6, 7 and 8. And what I'm referring to,
7 Judge, is the document that I handed you. This is
8 the latest draft of the nondisclosure agreement.

9 This document is agreeable to the parties
10 except for the two issues which I am going to be
11 addressing. And on pages 6, 7 and 8, you'll see
12 the revisions to the document that were made by
13 Freddie Mac which really constitutes the first
14 issue.

15 What is this issue? This is an issue by
16 Freddie to attempt to dictate which Bank of
17 America's lawyers have access to the documents.

18 MR. JOHNSON: Your Honor, are we arguing his
19 motion to compel the production of this document
20 right now, or are we just -- I mean, am I going to
21 get a chance to -- it seems to me that the motion
22 is moot. This is the remaining issue, Your Honor.

23 THE COURT: It's my understanding it's
24 basically he's modifying the motion that y'all have
25 agreed. Let me decide this one issue right here

□

10

1 today so that you can go on. You want him to wait
2 and file another motion?

3 MR. JOHNSON: No. I agree, Your Honor, and
4 that's why we've allowed Mr. Tessitore to hand over
5 to the Court what I think would otherwise likely
6 constitute settlement discussions. This is the
7 sole remaining issue, but I was just pointing out
8 that we've gone well beyond the scope of what his

071610 - TBW - BOA.txt

9 actual motion was, which was to compel us to
10 produce this document that he just handed over.

11 THE COURT: You've furnished it, but not one
12 acceptable to him.

13 MR. TESSITORE: Not one consistent with what
14 the committee signed, which is what we asked for in
15 our motion, Judge, a reasonable NDA consistent with
16 what the committee executed.

17 THE COURT: well, that's argument. Anyway,
18 just tell me what the issues are and then let's
19 argue those issues.

20 MR. TESSITORE: The first issue, Judge, as I
21 mentioned, is found on page 6, 7 and 8 of the
22 agreement, and that is Freddie has inserted a
23 provision that says that if a lawyer for Bank of
24 America or one of the joinder parties represents
25 Bank of America in any matter, current or

□

11

1 anticipated, that relates in any way to TBW other
2 than this bankruptcy case, that lawyer cannot have
3 access to the documents. So, I repeat, if a lawyer
4 represents Bank of America or a joinder party in
5 any matter that's related in any way or anticipated
6 matter connected to TBW other than this bankruptcy
7 case, it's denied access to the documents.

8 THE COURT: Where is that?

9 MR. TESSITORE: That is the effect of the
10 language that you see on page 6, bottom of page 6,
11 top of page 7 --

12 THE COURT: The blue?

071610 - TBW - BOA.txt

13 MR. TESSITORE: The blue, yes, Judge -- and on
14 page 8. And it would apply to lawyers and their
15 outside consultants. The agreement allows for
16 outside consultants to have access to the
17 information, it just puts them in the same camp as
18 these types of lawyers and denies access to the
19 information.

20 This provision, I think, is completely
21 inappropriate for a number of reasons.

22 One, it would deny Bank of America its right
23 to counsel in this case.

24 Two, it was not part of the Court's ruling on
25 June 18th. It is not part of the order that was

0

12

1 entered on July 7th. The order very clearly states
2 that the lawyers for Bank of America, period, can
3 have attorneys-eyes-only access if they sign a
4 confidentiality agreement. It's not in the
5 committee's confidentiality agreement.

6 And so for a number of reasons, just based on
7 the history of this case and Your Honor's rulings,
8 it makes no sense and it's inappropriate.

9 It also makes no practical sense. The effect
10 of this language, Judge, would be that the law
11 firms that are currently representing Bank of
12 America in this bankruptcy case, including my firm
13 and the Munger Tolles firm, would be precluded from
14 reviewing the documents and seeing the information
15 necessary to test the findings and the conclusions
16 of the debtor's final reconciliation report, which
17 would be, as I said, a ridiculous result.

071610 - TBW - BOA.txt

18 THE COURT: wait a minute. If I allow you to
19 see it, you get to see it.

20 MR. TESSITORE: Right. The effect of these
21 changes, these revisions in blue that you're
22 seeing, Your Honor, would preclude my firm and the
23 Munger Tolles firm, which are two of the main
24 counsel of record, from seeing --

25 THE COURT: Is that what you mean?

13

1 MR. JOHNSON: Your Honor, the intent of this
2 -- and I don't know how Mr. Tessitore says that it
3 would preclude his firm, but Freddie Mac is -- I'm
4 sorry. For the record, Jason Johnson for Freddie
5 Mac.

6 Freddie Mac has taken the position since this
7 issue first came up, Your Honor, that we don't want
8 parties litigating -- we don't want counsel
9 representing these parties in the New York
10 litigation to be able to gain access to this
11 information. They're not entitled to it. They
12 wouldn't be entitled to see it up in New York, they
13 haven't sought it in that proceeding, and they've
14 been trying to use the Rule 2004 process to gain
15 access to this information.

16 We've heard Bank of America and BNPP stand up
17 and say: That's not what this is about. We need
18 to see this information to test the debtor's
19 conclusions.

20 They both have counsel in this proceeding,
21 Your Honor, Mr. Tessitore and Mr. Weiss, who we all

071610 - TBW - BOA.txt

22 agree could be signatories to this document. I
23 don't believe Mr. Tessitore is representing Bank of
24 America in the Southern District of New York
25 litigation. If he is, then we of course have a

14

1 problem with that.

2 It is our understanding that Mr. Tessitore is
3 counsel for Bank of America in this bankruptcy
4 proceeding. We're ready, willing and able to turn
5 over the information to the counsel who have stood
6 up and argued these positions for Bank of America
7 and BNPP in this bankruptcy proceeding, but we are
8 not willing --

9 THE COURT: what about associates that help
10 them prepare these papers and paralegals that maybe
11 they would want to use to --

12 MR. JOHNSON: If they're at his --

13 THE COURT: -- organize this information in
14 some fashion? I mean, how far, you know --

15 MR. JOHNSON: Your Honor, I believe the
16 language of the document says that if they're at
17 his law firm, they're entitled to view it. But we
18 don't want them sharing it with counsel in the New
19 York litigation. And we've tried to restrict this
20 to people who are representing Bank of America and
21 the other joinder parties in actions related to
22 TBW.

23 Your Honor, under his proposed language, under
24 his argument, counsel that represent Bank of
25 America in a \$1,000 collection action in Boise,

071610 - TBW - BOA.txt

15

1 Idaho could demand from us to execute an NDA and
2 see this confidential information. Any counsel
3 representing Bank of America is his argument. If
4 you take that to its logical conclusion, then every
5 single lawyer in the world who represents Bank of
6 America on anything could demand that they execute
7 an NDA with Freddie Mac and see all this
8 information. That is absurd, Your Honor.

9 I think it was the Court's intention that the
10 counsel representing these joinder parties in this
11 bankruptcy proceeding be able to see the
12 confidential information that Freddie Mac is
13 producing related to the debtor's final
14 reconciliation report so they can test that theory.

15 Your Honor, we would like to restrict it to
16 those counsel representing the joinder parties in
17 this litigation or in this proceeding that are not
18 representing those same parties in other TBW-
19 related activities, including that New York
20 litigation. That's the sum and substance of this.

21 THE COURT: What's the second issue?

22 MR. TESSITORE: Your Honor, could I briefly
23 respond to that?

24 THE COURT: Let me hear the second issue
25 first.

16

1 MR. TESSITORE: The second issue is minor by
2 comparison, and that is on page 10 of the
3 agreement, Your Honor. The July 7th order provides

071610 - TBW - BOA.txt

4 that Bank of America will not share, produce, copy,
5 transmit such confidential documents, and that's
6 the --

7 THE COURT: What page?

8 MR. TESSITORE: I'm sorry. I'm letting Your
9 Honor know what the order says. This is the order
10 that governs the terms of confidentiality, and it
11 says that Bank of America shall not share, produce,
12 copy, transmit or otherwise disclose such
13 confidential information to anyone without the
14 agreement of Freddie Mac or an order of the Court.
15 That's the language from the order that says once
16 we get attorneys eyes only, we won't disclose it to
17 a third party.

18 The language of the confidentiality proposed
19 by Freddie is different. It says it will not
20 disclose, give, show, make available, discuss,
21 communicate the contents or substance of.

22 So, in our view, the language should be the
23 same, because if you change the language it's going
24 to create an ambiguity or confusion as to why the
25 language is different. And so we would prefer that

17

1 the language of the agreement simply track the
2 language of the order which obviously provides that
3 the confidential information will not be disclosed
4 to a third party without the consent of Freddie Mac
5 or an order of the Court.

6 So that's the second issue. That's merely us
7 saying let's have the agreement track the language
8 of the order.

071610 - TBW - BOA.txt

9 THE COURT: Problem?

10 MR. JOHNSON: Your Honor, this is really a non
11 issue. I don't think that the language of the
12 NDA --

13 THE COURT: Track the order. That part's
14 over. Now talk about the main thing.

15 MR. TESSITORE: Judge, what this is really
16 about is a repeat of the argument that's been made
17 at prior hearings by Mr. Johnson that they're
18 concerned that the lawyers involved in the New York
19 litigation will have access to the documents. I
20 stated --

21 THE COURT: will they have access to the
22 documents?

23 MR. TESSITORE: They will, but the --

24 THE COURT: That's what he doesn't want.

25 MR. TESSITORE: I understand that, Judge, he

□

18

1 doesn't want that. Those law firms are main
2 counsel in this bankruptcy case and the ones that
3 are capable of reviewing the documents and testing
4 its conclusions.

5 The agreement says that the information
6 disclosed will be used only for the purposes of
7 this bankruptcy case, so this concern about it
8 being used for some other purpose is not
9 legitimate. The lawyers are going to follow the
10 terms of the confidentiality agreement.

11 Mr. Weiss has stated on the record, I have
12 stated on the record, that that is our intent.

071610 - TBW - BOA.txt

13 This is not a disguised effort to get information
14 to use for the New York litigation.

15 But the main law firms who have the ability,
16 who have the consultants and who are going to be
17 the ones to review the findings and test the
18 findings in the reconciliation report would be
19 precluded, and so, Judge, we need those firms to
20 have access to this information for the purposes of
21 this bankruptcy case for purposes of doing what I
22 believe has been the intent all along, and that is
23 to let the stakeholders review the information that
24 the debtor relied on and to test its findings. And
25 I believe the debtor would even agree that that is

19

1 necessary so that each party can have input or at
2 least have a set of eyes go over that report and
3 reach a conclusion whether the report is accurate
4 or whether there's errors that need to be
5 addressed. And that process has not even begun
6 because --

7 THE COURT: So, if they look at it, that means
8 they cannot subpoena it now they know the name of
9 the document in that litigation, and it can't be
10 introduced in that litigation for any purpose
11 whatsoever, and it's excluded no matter relevancy
12 or not.

13 MR. TESSITORE: That's correct, it's not to be
14 used in that litigation.

15 THE COURT: It can never be used in that
16 litigation.

17 MR. TESSITORE: Not if it's obtained through
Page 16

071610 - TBW - BOA.txt

18 this process. The information obtained through
19 this process is for use in this bankruptcy case and
20 all of the assets and liabilities and financial
21 affairs of the debtor issues that we've been
22 working on in this bankruptcy case.

23 THE COURT: And any fruit that may grow from
24 that tree can't be used; is that correct?

25 MR. TESSITORE: I believe --

20

1 THE COURT: I just want to understand what
2 we're trying to do here so I can craft an order
3 that will get this thing moving.

4 MR. JOHNSON: Your Honor, I don't hear Mr.
5 Tessitore making the representation to the Court
6 the Court's asking for.

7 MR. TESSITORE: I'm trying to understand the
8 phrase "the fruit that grows from the tree."

9 THE COURT: It's not the poisonous tree.

10 MR. JOHNSON: Your Honor, the fact --

11 MR. TESSITORE: Your Honor, if I could, we
12 have a confidentiality agreement where the parties
13 have agreed already on how the information can be
14 used. They've already put the limitations on how
15 that information can be used.

16 THE COURT: And it cannot be used --

17 MR. TESSITORE: We can go through and read
18 their language, Judge, on what they proposed how
19 the information can be used.

20 THE COURT: And you have no problem with that.

21 MR. TESSITORE: We have no problem with that.

071610 - TBW - BOA.txt

22 MR. JOHNSON: Can't unring the bell once they
23 see it, Your Honor. Counsel for the New York
24 litigation, once they see it, you can't unring that
25 bell. That's been our argument since day one. All

21

1 the joinder parties have counsel that represent
2 them only in this bankruptcy proceeding. They've
3 said over and over it's for them to be able to test
4 the debtor's conclusions. They can hire their own
5 consultants and do that, paid for by the client,
6 they don't have to pay for it.

7 But, Your Honor, there's no reason that the
8 counsel in the New York litigation should be able
9 to see it.

10 They claim Munger, Tolles & Olson is the main
11 counsel for Bank of America in this bankruptcy
12 case. I don't think I've ever seen a Munger,
13 Tolles & Olson lawyer in this courtroom in one of
14 these hearings. I could definitely not identify
15 one by sight, and I would be surprised if the Court
16 could. I don't think anybody has argued on behalf
17 of Bank of America in this proceeding related to
18 Freddie Mac other than Mr. Tessitore.

19 There's no reason for them to see it, Your
20 Honor, and it's clear that when their name was
21 included at the bottom of that revised NDA, that
22 all of Freddie Mac's fears and claims were just
23 shown for what they really were, true, and that is
24 that this has been a ruse to be able to get the
25 information into the hands of the lawyers

071610 - TBW - BOA.txt

22

1 representing those joint parties in the New York
2 litigation.

3 MR. TESSITORE: There are no legitimate fears,
4 Judge. Their own agreement prescribes how the
5 information is going to be used. They're okay with
6 it being used in that fashion. The lawyers who are
7 going to do the work and who need to have access
8 are the Munger Tolles lawyers in this case,
9 otherwise we're not going to move forward.

10 This argument was made already, Judge. It was
11 made in the context of your initial ruling and you
12 rejected it, and I would ask that you do so again.

13 THE COURT: Mr. Weiss, you're on your feet.

14 MR. WEISS: Yes, Your Honor.

15 First, I just wanted to confirm Mr.
16 Tessitore's representation that to the extent the
17 Court will fashion an acceptable confidentiality
18 provision, we are prepared to withdraw our motion
19 for in camera inspection. We don't wish to burden
20 the Court with having to do that.

21 I also want to make it perfectly clear that
22 the intent for my client is for counsel in the New
23 York litigation, the Boies Schiller firm and their
24 professionals, to review the information that
25 Freddie has given to the debtor.

23

1 The Boies Schiller firm has been involved in
2 this analysis long before I got to this case. Your
3 Honor has known me long enough, and it's certainly

071610 - TBW - BOA.txt

4 not going out on a limb to say I could not begin to
5 do the analysis necessary to determine whether or
6 not Mr. Dantzler's and Navigant's analysis is
7 correct or incorrect. Those lawyers in New York
8 have the expertise necessary to do this work.

9 what Freddie is basically saying would have
10 been the same for Freddie to have said: Troutman
11 Sanders cannot look at the records, Russ Blain has
12 to. Let's let the bankruptcy lawyer look at the
13 transactional documents, not the experts.

14 That's absurd, Your Honor. The whole purpose
15 of this exercise was transparency. If there's
16 going to be transparency, the people who know and
17 understand the nature of these transactions, the
18 lawyers and the professionals who have the ability
19 to do the analysis, to look at the work that
20 Navigant has done, look at the work Troutman
21 Sanders has done, come to conclusions.

22 The debtor would be able to tell Your Honor
23 they welcome that review. For this case to go to
24 the next step, there has to be the stakeholders'
25 ability to review the information and, as Mr.

□

24

1 Dantzler said, the enormous amount of data that has
2 been compiled and reviewed and analyzed.

3 The debtor would tell you that the lawyers
4 from Boies Schiller have been at almost every
5 meeting when the asset reconciliation was being
6 discussed. They're the ones that have retained the
7 professionals that understand these Form 996s. I
8 have no clue what it even means.

071610 - TBW - BOA.txt

9 For Freddie to say that for those lawyers to
10 review the documents that Freddie has given in
11 order to test the validity, the conclusions and the
12 theories that the debtor has put in the
13 reconciliation report is absurd.

14 Those lawyers are going to be governed by the
15 confidentiality agreement. It provides that
16 everything that is confidential is to remain
17 confidential. They may not disclose it to BNP
18 Paribas. They may not disclose it to any third
19 parties. But they've got to review it in order to
20 tell BNP Paribas, to be able to tell Bank of
21 America: Dantzler was right, Dantzler was wrong,
22 either way, but they're not going to disclose
23 what's in those documents. But they're critical to
24 do the analysis to determine whether the analysis
25 is correct or not.

25

1 And if we can't get an agreement from Freddie
2 to allow that to happen, we're going to have to
3 have the Court go through 5,000 documents produced
4 thus far, determine whether or not they are
5 confidential initially, and, second, cull through
6 those documents and determine which of those
7 documents are going to be necessary to be reviewed
8 by competent counsel, competent experts, in order
9 to test the theories and conclusions of the debtor.
10 And that's just patently absurd.

11 We're talking about lawyers who will sign
12 documents agreeing to do what they're supposed to

071610 - TBW - BOA.txt

13 do, and that's the way this should happen. There
14 shouldn't be this squabble that says: Because
15 they're involved in the New York litigation, they
16 shouldn't get to see it.

17 To begin with, Your Honor, Freddie's not even
18 in that litigation. That lawsuit was brought my
19 client against Mr. Tessitore's client saying Mr.
20 Tessitore's client didn't do something right.
21 That's what that litigation is about. It has
22 nothing to do with the debtor's reconciliation.

23 That's all I have to say, Your Honor.

24 THE COURT: Mr. Johnson.

25 MR. JOHNSON: Your Honor, the money at issue

□

26

1 in the New York litigation is completely related to
2 Ocala Funding and Bank of America's activities or
3 what it did or didn't do there. It's completely
4 related to the debtor's final reconciliation report
5 and what that report says. To claim otherwise is
6 just hogwash.

7 Your Honor, it's not the lawyers up in New
8 York who are going to do this analysis of the
9 documents to see if the debtor's reconciliation
10 report was correct, it's going to be outside
11 consultants. And Holland & Knight in Jacksonville
12 and the Tessitore Law Firm in Orlando are perfectly
13 capable of hiring consultants to do that work and
14 presenting the lawyers with a report that the
15 lawyers can say: Okay, they either did or didn't
16 do it correctly.

17 Alternatively, Your Honor, the whole point of
Page 22

071610 - TBW - BOA.txt

18 the in camera inspection was that, if Freddie Mac
19 turned over documents -- and we're only talking
20 about confidential documents here. That if Freddie
21 Mac turned over documents marked confidential that
22 they thought probably shouldn't be marked
23 confidential, they could have the Court review
24 that.

25 An alternative relief here, Your Honor, is to

27

1 grant access to Mr. Tessitore and Mr. Weiss to
2 review those documents to make a determination on
3 their own whether they think we have marked
4 something properly or improperly as confidential.

5 If it's confidential, nobody gets to see it,
6 Your Honor. If they think it's not confidential
7 and it shouldn't be and their clients should be
8 able to see it, then they can petition the Court
9 and the Court can decide whether we were correct or
10 incorrect in our marking of the document.

11 But to say that all lawyers for the joinder
12 parties should be able to get access to this
13 confidential information is absurd, because it
14 allows anybody in the world who has ever
15 represented these joinder parties to demand from
16 Freddie Mac that it execute an NDA and turn over
17 this information.

18 I don't think that's what Rule 2004 was
19 intended to do, I don't think that's what the
20 Court's thought process was when it said: Let's
21 give attorneys the ability to review this on an

22 071610 - TBW - BOA.txt
attorney-eyes-only basis.

23 We have argued from the beginning that New
24 York counsel shouldn't be allowed to do it because
25 they haven't been able to do it in New York and

28

1 they shouldn't be able to misuse the Rule 2004
2 process to get that information here, Your Honor.

3 THE COURT: Mr. Tessitore.

4 MR. TESSITORE: Your Honor, just to clarify a
5 point I think that Your Honor inquired on, the
6 agreement provides -- and this is Freddie Mac's
7 proposed language -- persons gaining access to the
8 information can use it only for the purposes of
9 examination under Rule 2004 and for the purpose of
10 counsel's representation of its clients in the
11 proceeding, just defined as this bankruptcy case,
12 and shall not be given, shown, made available,
13 discussed or otherwise communicated in any form
14 except as authorized herein. Any lawyer who signs
15 this will be bound by those use restrictions.

16 MR. WEISS: One last comment, Your Honor.

17 The Boies Schiller firm, again, has the
18 knowledge to do what needs to be done. For Freddie
19 to try to impose upon a party in litigation their
20 choice of counsel in order to perform work for
21 another party is so far beyond the scope of
22 anything I have ever seen, I can't even begin to
23 say how absurd it is.

24 Any party that signs the confidentiality
25 agreement is bound by it. In essence, what Freddie

071610 - TBW - BOA.txt

29

1 is saying is: we don't believe the lawyers are
2 going to be bound by their code of ethics.

3 The lawyers are going to keep the information
4 confidential, plain and simple. If you sign that
5 document, you should be able to review what's been
6 produced, and if we're going to move this thing
7 along at anything other than a snail's pace, people
8 most able to digest, review and analyze that which
9 has been done have to be the lawyers and the
10 professionals that sign the NDA and move forward.

11 The NDA as Freddie has it drafted would also
12 preclude the very same professionals that the Boies
13 Schiller firm has engaged since the beginning of
14 this case that have been doing the analysis of the
15 records that they have access to from Ocala
16 Funding. Because those same professionals would be
17 the professionals in the New York litigation,
18 they're going to be precluded, so now we've got to
19 start with a whole new set of professionals.

20 This case needs to move forward. The debtor
21 recognizes it, the stakeholders recognize it.
22 Freddie shouldn't impede it.

23 THE COURT: Is that it?

24 MR. JOHNSON: Mr. Kobert?

25 Sorry. Just trying to add a little levity,

□

30

1 Your Honor.

2 THE COURT: That's okay. I figured he was
3 going to jump up. People talk too long, he gets

071610 - TBW - BOA.txt

4 antsy and has to say things.

5 (General laughter.)

6 THE COURT: I'm ruling on behalf of the moving
7 parties. I think they will be limited by the
8 confidentiality agreement.

9 If they try to show it to some attorney that
10 wants it, sends over an agreement and he's
11 obviously not related -- anybody that seeks to be
12 signed on has to notify you. If it's beyond the
13 scope of what's even reasonable, then you can come
14 in here and object or file something.

15 In other words, I assume you'll get copies of
16 whoever requests to look at it and a copy of the
17 agreement at the same time, and you'll be able to
18 deal with it.

19 But I think they've got to be able to do it.
20 The reconciliation is public record and the
21 documents that help -- at least public record as to
22 this case and parties involved, and the people have
23 to see the backup information as that comes to it.

24 So I think we need to put this matter to bed,
25 and I trust the attorneys that sign the

□

31

1 confidentiality agreement, and you've got plenty of
2 recourse if they violate that agreement.

3 Yes.

4 MR. JOHNSON: Your Honor, can I ask for a
5 point of clarification?

6 THE COURT: Yes.

7 MR. JOHNSON: You're really, it seems to me,
8 clarifying the order that you entered on Bank of

071610 - TBW - BOA.txt

9 America's original joinder motion, the committee's
10 clarification motion.

11 The reason I'm asking is there may be an
12 appeal of that order, and I'm wondering if we're
13 going to have to appeal that one or the order on
14 the --

15 THE COURT: Whatever I said in that order --

16 MR. JOHNSON: -- motion today.

17 THE COURT: -- that's what I figure the
18 language is supposed to be in this confidentiality
19 -- it said the attorneys for the debtor. Isn't
20 that what it said?

21 MR. TESSITORE: It said the lawyers for Bank
22 of America --

23 THE COURT: Lawyers for Bank of America --

24 MR. TESSITORE: -- and the joining parties.

25 THE COURT: -- and the joining parties.

□

32

1 That's what the confidentiality agreement should
2 say. And you have the limitation that's already in
3 the agreement, and that's satisfactory to me. That
4 covers what Mr. Johnson is concerned about.

5 MR. TESSITORE: I think we have the direction
6 from the Court. We need to get this signed today
7 or tomorrow, Judge.

8 THE COURT: That's up to you. Sign it as soon
9 as possible.

10 MR. TESSITORE: Exactly. Could we ask the
11 Court to leave this on as a status matter for the
12 next omnibus hearing just in case --

071610 - TBW - BOA.txt

13 THE COURT: I'll leave it on. I hope I don't
14 have to deal with it again. The next step is to
15 tell you to draw up an agreement you're satisfied
16 with, you sign it -- you're the parties to be bound
17 -- and you sign one.

18 MR. TESSITORE: Thank you, Your Honor.

19 THE COURT: I don't want that to happen.

20 MR. TESSITORE: I don't think it will happen,
21 but I just want to move it along, Judge.

22 * * * * *

23 THE COURT: Going back, Mr. Tessitore, your
24 motion as modified in open court was granted,
25 modified for clarification. Do an order, pass the

□

33

1 form of the order by Mr. Johnson. If you can't
2 agree on it, each of you send me what you think I'm
3 supposed to have ruled, and I'll take the two and
4 make an order, clear and understandable. I can
5 write better than I can articulate sometimes.

6 MR. JOHNSON: I can do it clear and
7 understandable, Your Honor.

8 THE COURT: I know, and he can too.

9 Mr. Weiss, I assume once that order is signed,
10 you'll withdraw your motion?

11 MR. WEISS: Correct, Your Honor.

12 THE COURT: Very well.

13 (Thereupon, at 11:20 a.m., the hearing was
14 concluded.)

15 - - -

16

17

071610 - TBW - BOA.txt

22

23

24

25