UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	Chapter 11
TAYLOR, BEAN & WHITAKER	
MORTGAGE CORP.,	Case No. 3:09-bk-07047-JAF
REO SPECIALISTS, LLC, and	Case No. 3:09-bk-10022-JAF
HOME AMERICA MORTGAGE, INC.	Case No. 3:09-bk-10023-JAF
Debtors.	Jointly Administered Under Case No. 3:09-bk-07047-JAF
_____________________________________/	
APPLICABLE DEBTOR	Jointly Administered Under Case No. 3:09-bk-7047-JAF
TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,	Case No. 3:09-bk-07047-JAF
_____________________________________/	

DEBTOR'S RESPONSE AND OBJECTION TO MOTION OF SOUTH COMMONS PHASE I CONDOMINIUM ASSOCIATION TO MODIFY AND ANNUL THE AUTOMATIC STAY

COMES NOW TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION ("**TBW**" or the "**Debtor"**), and files its Response and Objection to Motion of South Commons Phase I Condominium Association to Modify and Annul the Automatic Stay (Dkt. No. 1929) (the "**Motion**") filed by South Commons Phase I Condominium Association (the "**Movant**"), on the following grounds:

Introduction

The Movant, a residential condominium membership association, seeks relief from the automatic stay to obtain possession of a condominium unit 1308 owned by the Debtor and located in the South Commons Phase I Condominium at 2901 South Michigan Avenue, Chicago, Illinois (the "Property") based on the Debtor's failure to pay

assessments in the amount of $284.78 per month. As further set forth below, the Motion should be denied.

Legal Argument

1. A party moving for relief under the automatic stay must first establish its *prima facie* case. Failure to prove a *prima facie* case requires denial of the requested relief. *Sonnax Indus., Inc. v. Tri Component Prods. Corp (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1285 (2d Cir. 1990). "Section 362(d)(1) requires an initial showing of cause by the movant . . . If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection." *Id.; In re Eatman*, 192 B.R. 386, 390 (Bankr. S.D.N.Y. 1995) ("While section 362(g) allocates the burden of ultimate persuasion, under either ground, the movant must still make a *prima facie* showing that it is entitled to the relief that it seeks."); *In re Elmire Litho, Inc.*, 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994). As further discussed below, the Movant cannot establish its *prima facie* case.

2. The only basis asserted by the Movant for relief from the automatic stay is that there has somehow been a failure of adequate protection and therefore "cause" exists to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1). The Movant bears the burden to show that it has an interest in property that is deserving of adequate protection. The only interest in the Property cited by the Movant is a statutory lien that apparently has not been perfected by recording or otherwise. Courts have denied a motion to lift the automatic stay in similar circumstances where a condominium association has failed to perfect its statutory lien. *See, e.g.*, *In re Cohen*, 279 B.R. 626, 635 (Bankr. N.D. N.Y. 2002).

3. Additionally, any argument by the Movant that "cause" exists because of postpetition defaults must fail because Movant's claims are all prepetition claims arising from a prepetition condominium association contract. *See In re Rosteck*, 899 F. 2d 694, 696-97 (7th Cir. 1990) (applying Illinois law in determining that the obligation to pay postpetition condominium assessments was contractual and therefore a prepetition debt); *In re Spencer*, 2010 WL 3909985 (Bankr. E.D. Mich. 2010) (applying the test from *In re Piper Aircraft Corp.*, 58 F. 3d 1573 (11th Cir. 1995) to conclude that the condominium association's dues, whether assessed prepetition or becoming due postpetition, are prepetition claims because they are based on a prepetition condominium declaration). In the present case, as evidenced by Exhibit A to the Motion, the governing document that provides for the payment of the fees is dated January 14, 1999. At most, the Movant is a general unsecured creditor not entitled to adequate protection.

4. Even if the Movant has an interest entitled to adequate protection, the Motion must fail because the Property is worth at least $25,000. The Movant asserts a claim of approximately $13,000, leaving an equity cushion of approximately 32%. The Courts have almost uniformly held that an equity cushion of 18% or more constitutes adequate protection. *See In re Senior Care Properties, Inc.*, 137 B.R. 527, 529 (N.D. Fla. 1992) (equity cushion of 18% held sufficient); *In re Ritz Theatres*, 68 B.R. 256, 260 (Bankr. N.D. Fla. 1987) (38% is adequate); *In re Mellor*, 734 F. 2d 1396 (9th Cir. 1984) (20% is adequate). Accordingly, the Motion should be denied.

WHEREFORE, TBW respectfully requests that this Court enter an order denying the Motion and granting such other and further relief as is just.

Dated this 4th day of November, 2010.

/s/ Edward J. Peterson, III
Russell M. Blain (FBN 236314)
rblain@srbp.com
Edward J. Peterson, III (FBN 014612)
epeterson@srbp.com
Stichter, Riedel, Blain & Prosser, P.A.
110 East Madison Street, Suite 200
Tampa, Florida 33602
Telephone: (813) 229-0144
Facsimile: (813) 229-1811
Attorneys for Debtor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via this Court's CM/ECF system and/or E-Mail on this 4th day of November, to:

Ronald B. Cohn, Esq.
Arnstein & Lehr LLP
302 Knights Run Avenue
Suite 1100
Tampa, FL 33602
Email: rbcohn@arnstein.com

David Sugar, Esq.
Arnstein & Lehr LLP
120 S. Riverside Plaza
Suite 1200
Chicago, IL 60606-3910
Email: dsugar@arnstein.com

/s/ Edward J. Peterson, III
Edward J. Peterson, III (FBN 014612)