UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION,

Case No.: 3:09-bk-7047-JAF

Debtor.
_____/

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON AND LONDON MARKET INSURANCE COMPANIES, *etc*.

Plaintiffs,

v.

Adv. Pro. No. 3:10-ap-243-JAF

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION, FEDERAL HOME LOAN MORTGAGE CORPORATION, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, and SOVEREIGN BANK,

Defendants.
_____/

ORDER DENYING UNDERWRITERS' MOTION FOR SUMMARY JUDGMENT AGAINST FEDERAL HOME LOAN MORTGAGE CORPORATION AND DENYING FEDERAL HOME LOAN MORTGAGE CORPORATION'S RULE 56(d) MOTION FOR CONTINUANCE FOR TIME TO CONDUCT DISCOVERY AS MOOT

This proceeding is before the Court upon the Motion for Summary Judgment Against Federal Home Loan Mortgage Corporation ("Freddie Mac") (the "Motion for Summary Judgment") filed by Certain Underwriters at Lloyd's, London Market Insurance Companies[1] (collectively, the "Underwriters"). (Doc. 460). Freddie Mac filed the Opposition to the

[1] Unless otherwise noted, the term "Underwriters" refers to Plaintiffs, Certain Underwriters at Lloyd's, London and London Market Insurance Companies that subscribe to Certificate Nos. B0621PTAY00208, B0621PTAY00308, SUA 2896, B0621PTAY00207001, SUA 11239, B0621PTAY00408, SUA 11024, SUA 2664, P009560600, SUA 10837, SUA 2445, SUA 2387, P009560500, P009560501, SUA 10660, SUA 2251 and/or P00956004.

Underwriter's Motion for Summary Judgment (the "Opposition"), Declaration of James H. Smith in support of the Opposition, and a Rule 56(d) Motion for Continuance for Time to Conduct Discovery[2] ("Rule 56(d) Motion") (Docs. 478, 479, 481). Underwriters filed a Reply Brief in Support of their Motion for Summary Judgment against Freddie Mac (the "Reply") and an Opposition to Freddie Mac's Rule 56(d) Motion for Continuance for Time to Conduct Discovery, to which Freddie Mac filed a Reply (Docs. 496, 494, 507). Thereafter, Freddie Mac filed a Supplemental Brief in Support of Its Opposition to Underwriters' Motion for Summary Judgment and Rule 56(d) Motion for Continuance for Time to Conduct Discovery to which Underwriters filed a Reply. (Docs. 535, 541). For the reasons stated herein, Underwriters' Motion for Summary Judgment is denied, and Freddie Mac's Motion for Continuance for Time to Conduct Discovery is denied as moot.

I. Background

As a result of the dishonest acts of certain employees of Taylor, Bean & Whitaker Mortgage Corporation ("TBW") and Colonial Bank, TBW and other entities suffered extensive monetary losses. (Doc. 497 at 3). Accordingly, TBW filed claims with its insurers, seeking to recover its losses under the bonds and policies issued in August of 2008. (Doc. 497 at 3). On August 24, 2009, TBW filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, thereby commencing Case No. 3:09-bk-7047-JAF. Included in the assets of TBW's bankruptcy estate are fidelity bonds[3] and insurance policies that cover TBW and other affiliated entities for various types of losses attributable to its employees dishonesty (collectively, the

[2] Freddie Mac has requested through its Rule 56(b) Motion that - in the event that Court does not find a sufficient basis to deny Underwriters' Motion for Summary Judgment on the merits - the parties be given the opportunity to complete the remaining discovery relevant to Freddie Mac's reformation claim before the Court rules on the Underwriters' Motion for Summary Judgment. (Doc. 481).

[3] A fidelity bond is "[a] bond to indemnify an employer or business for loss due to embezzlement, larceny, or gross negligence by an employee or other person holding a position of trust." Black's Law Dictionary 250 (9th ed. 2009).

"Bonds").[4] On May 14, 2010, Underwriters initiated this multi-party adversary proceeding by filing a Complaint against, among other parties, TBW and Freddie Mac, seeking to confirm their rescission of the Bonds issued to TBW by Underwriters or, in the alternative, a declaration of no coverage.[5] (Doc. 1). Underwriters' rescission claim is based on the argument that TBW made material misrepresentations and failed to disclose material information while applying for the Bonds. (Doc. 184). In response, TBW filed a counterclaim against Underwriters asserting, *inter alia*, a breach of their respective insurance contracts for Underwriters' failure to cover TBW's losses. (Doc. 218).

For its part, Freddie Mac filed a Counterclaim[6] against TBW and Underwriters seeking, among other forms of relief, a reformation of the 2008 Primary Bond and a declaratory judgment with respect to the 2008 Primary Bond and the 2008 First Excess Bond. (Doc. 231). The 2008 First Excess Bond is a "follow form" policy to the 2008 Primary Bond, meaning the terms and conditions of the 2008 Primary Bond apply equally to the 2008 First Excess Bond, unless otherwise indicated. (Doc. 213 at 39).

Freddie Mac is a corporate instrumentality of the United States created for the purpose of increasing the funds available to homebuyers through the creation of a secondary mortgage market for the purchase and sale of conventional residential mortgage loans. (Doc. 213 at 25). To achieve this purpose, Freddie Mac purchases conventional mortgage loans from approved mortgage loan originators or seller/servicers (hereinafter servicers), pools those loans into mortgage-backed securities, and then sells those securities to investors. (Doc. 213 at 25).

[4] The Bonds provide base level, or primary, coverage and also the first level of excess coverage. (Doc. 184, Exs. 1-17). Subject to certain exceptions, the Bonds providing excess coverage mirror the terms of the primary Bonds. (Doc. 184, Exs. 1-17).

[5] The Complaint was subsequently amended by Plaintiffs' First Amended Complaint (Doc. 66) and by Underwriters' Second Amended Complaint (Doc. 184).

[6] Freddie Mac filed an Amended Counterclaim on September 25, 2013. (Doc. 560)

Freddie Mac maintains that the servicers agree to sell and service mortgages pursuant to the terms and conditions contained in certain purchase documents (collectively the "Purchase Documents") consisting of, among other documents, a purchase contract, Freddie Mac's Single Family Seller/Servicer Guide (the "Guide"), and various bulletins issued periodically by Freddie Mac to its servicers that supplement the parties' agreement as set forth in the Purchase Documents. (Doc. 213 at 25-26).

TBW was one of Freddie Mac's servicers and their business relationship was governed by, among other things, the Guide. (Doc. 213 at 26). Pursuant to the Guide, TBW was obliged to, among other things, obtain fidelity insurance coverage to "protect Freddie Mac, as an investor, against losses that Freddie Mac incurs in connection with dishonesty, theft, and/or fraud committed by any partner, sole proprietor or major shareholder of the . . . Servicer." (Doc. 213 at 27). Freddie Mac also asserts that the Guide further requires that the fidelity insurance give it the right to file a claim directly with the insurer for such losses, irrespective of whether the servicer tenders a claim under the bond. (Doc. 213 at 27). Freddie Mac claims that, consistent with the requirement of the Guide, TBW obtained and Underwriters provided fidelity insurance from 2004 to 2008. (Doc. 213 at 27).

Generally, the Bonds provide that they are for the sole use and benefit of the Assured [7] (TBW and certain of its subsidiaries) (see, e.g., Doc. 213-1 at 28). The Bonds provide an exception to this provision. Specifically, insuring Clause 6 grants certain loss payees, including Freddie Mac, the right to bring a direct claim under the Bonds; however, such loss payees may only bring a direct claim under the Bonds if the Assured "fails to pursue such [a] claim" (see e.g. Doc. 213-1 at

[7] The Bonds refer to the insured(s) as the "Assured" (see e.g., Doc. 213-1 at 24, 28).

28).[8] Freddie Mac asserts, however, that (consistent with the Guide) the 2004-2007 Bonds included an additional provision in favor of Freddie Mac ("Freddie Mac Endorsement") which, in certain instances, entitles Freddie Mac to directly pursue its claims for coverage under the 2004-2007 Bonds irrespective of whether TBW pursues any such claims. (see, e.g., Doc. 213-1 at 42-43).

According to Freddie Mac, Freddie Mac Endorsement was not attached to the 2008 Primary Bond because it was either lost, missing, or omitted by mutual mistake. (Doc. 213 at 34). For this reason, Count III of Freddie Mac's Counterclaim seeks reformation of contract to correct this mistake by including Freddie Mac Endorsement to the 2008 Primary Bond. (Doc. 213 at 42-44). By way of Count I of the Counterclaim, Freddie Mac seeks, *inter alia*, a declaration that the 2008 Primary Bond includes Freddie Mac Endorsement. (Doc. 213 at 30-40). Freddie Mac asserts that, since the 2008 Excess Carrier Bond is a follow-form of the 2008 Primary Bond, any such reformation and/or declaration would affect the 2008 Excess Carrier Bond and entitle Freddie Mac to directly pursue claims for coverage under the 2008 Excess Carrier Bond. (Doc. 213 at 39). Count II is a breach of contract claim, which alleges Underwriters breached the terms of the 2008 Bonds by denying coverage to Freddie Mac for its losses caused by the dishonest acts of TBW's employees. (Doc. 213 at 40-41). Underwriters filed a Motion for Summary Judgment against Freddie Mac's reformation claim. (Doc. 460). The Court will address Underwriters' and Freddie Mac's arguments in conjunction.

II. Analysis

[8] In general, insuring Clause 6 relates to theft or wrongful appropriation or sale of a Secondary Market Institution's money or collateral being held by, or otherwise entrusted to, the Assured (see, e.g., Doc. 213-1 at 18). The Bonds' definition of a "Secondary Market Institution" includes Freddie Mac. (see, e.g., Doc. 213-1 at 26, 28).

"[S]ummary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[9] Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (internal quotations omitted). "The moving party bears the initial burden to show . . . by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). A moving party discharges its burden on a motion for summary judgment by "'showing'- that is, pointing out . . . that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. In determining whether the movant has met this initial burden, "the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the nonmoving party." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1534 (11th Cir. 1992).

"Only when that burden has been met does the burden shift to the [nonmoving] party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark, 929 F.2d at 608. A nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Id. at 587.

[9] Federal Rule of Civil Procedure 56 is applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056. Granting summary judgment is appropriate if, based upon the materials in the record, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(a) and (c).

With these principles in mind, the Court addresses the issue at bar-whether Underwriters established there is no material issue of fact regarding Freddie Mac's reformation claim as to the 2008 Primary Bond and that they are entitled to judgment as a matter of law.

"[I]nsurance contracts must be construed in accordance with the plain language of the policy." Wash. Nat. Ins. Corp. v. Ruderman, 117 So. 3d 943, 950 (Fla. 2013) (internal quotations omitted). [10] "[A] court should not rewrite a contract of insurance extending the coverage afforded beyond that plainly set forth in the insurance contract." U.S. Fire Ins. Co. v. Morejon, 338 So. 2d 223, 225 (Fla. 3d DCA 1976). However, in Florida an intended third-party beneficiary to a contract may seek reformation of a contract so that it reflects the true intent of the contracting parties. See Royal Ins. Co. v. Smith, 29 So. 2d 244, 246 (Fla. 1947). "The right to the reformation of an instrument is not absolute, but depends on an equitable showing." Cont'l Cas. Co. v. City of Ocala, 127 So. 894, 895 (Fla. 1930) (internal quotations omitted). "It is well settled that when a policy of insurance as issued does not conform to the contract which it purports to evidence, and the insured accepts the policy in the belief that it does conform to his contract, a court of equity will reform the instrument. . . ." Id. at 856. But in reforming a policy of insurance, like that of any other written contract, the want of conformity to the agreement of the parties must be occasioned by a mistake which is mutual and common to both parties to the instrument. Id. A mistake on one side may be a ground for rescinding, but not for reforming, the contract. Id.

In the Motion for Summary Judgment, Underwriters assert that they are entitled to summary judgment on Freddie Mac's reformation claim because: 1) the contracting parties to the 2008 Bonds, Underwriters and TBW, both state that the 2008 Bonds accurately memorialize the

[10] The Bonds provide that "any dispute concerning interpretation" of the Bonds "shall be governed by the laws of Florida." (Doc. 184-6 at 54).

parties' agreement, 2) Freddie Mac never pled contrary facts, 3) Freddie Mac did not produce any evidence to support its claim for reformation, and 4) the discovery conclusively proves that TBW never asked Underwriters to attach Freddie Mac Endorsement to the 2008 Bonds and that Underwriters did not agree to attach Freddie Mac Endorsement to the 2008 Bonds. (Doc. 460 at 3-5). However, Underwriters' bare bones Motion for Summary Judgment oversimplifies the process of procuring 2008 Bonds, hardly establishes the facts necessary to compel the legal result, and required the Court to wade unguided through sparse evidence submitted with the motion.

The Court was able to decipher some facts relevant to determine the process of procuring the Bonds through its previous review of evidence attached to many other motions. The Court observed that the process of procuring the Bonds at issue is unusual to the American system. Lloyd's is essentially a marketplace where individual underwriters collect in groups, called syndicates, for the purpose of underwriting insurance. The process begins when an American assured contacts a United States broker referred to as a producing broker. Thereafter, the producing broker contacts a London based broker with a license to place business at Lloyd's. As a placing broker, the London broker contacts various underwriters at Lloyd's because the coverage under the bond is usually insured by more than one underwriter. The first underwriter to insure a certain percentage of the entire risk is called the lead underwriter. However, it is unclear as to 1) how the parties negotiated the scope of the Bonds and their terms, 2) when the Bonds were reduced to a writing, and 3) who was responsible for drafting the final language of the Bonds.[11]

[11] In their Motion for Summary Judgment, Underwriters claim that in 2008 Jon Brunning of Miller Insurance, a London based broker, "outlined the terms of the proposed bonds on a document referred to as a 'quote slip.' " (Doc. 460 at 10). However, in their Reply, Underwriters claim that they reduced the Bonds to a writing by explicitly stating "Underwriters prepared a 'quote slip' (a written document memorializing the terms on which Underwriters were willing to insure TBW)." (Doc. 496 at 20). In the same document, Underwriters again claim that Miller Insurance "actually prepared the quote slip." (Doc. 496 at 22). To add confusion, Freddie Mac claims that Daniel Gierek from Stateside Underwriting Agency typically prepared a "Primary Bond Proposal" and, even though Stateside refused to

It is undisputed that Underwriters issued the Bonds to TBW from 2004 to 2008 and that from 2004 to 2007 Stateside Underwriting Agency ("Stateside") bound the primary layer of coverage for the bonds issued to TBW on behalf of Underwriters. The Court determined that from 2004 to 2008, TBW was represented by a United States broker, Lee Brodski, from JMB Insurance, during the process of obtaining the Bonds and it stands to reason that Stateside was a London based broker.[12] (Doc. 479-18 at 3-4, 6-7). In 2008, Stateside declined to underwrite TBW's Bonds as the "risk was not deemed suitable for the binding authority in 2008." (Doc. 502-11 at 43). The 2008 Primary Bond was underwritten in the "open market" in London directly by Underwriters and the application for the Bonds was brought to Underwriters by Jon Brunning of Miller Insurance. (Doc. 479-16 at 14-15, Doc. 502-11 at 36). For this reason, it appears that in 2008 there were at least five separate parties involved in the process, and TBW communicated with Underwriters through two other entities. Furthermore, it is undisputed that: 1) the 2004-2007 Bonds included Freddie Mac Endorsement; 2) the 2008 Bonds did not include Freddie Mac Endorsement; 3) the same Underwriter syndicates participated in the 2007 Primary Bond including Freddie Mac Endorsement and the 2008 Primary Bond, which did not include Freddie Mac Endorsement.[13]

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underwrite the 2008 Bonds, Gierek again prepared the Primary Bond Proposal for the 2008 Primary Bond. (Doc. 535 at 2-3). Subsequently, Freddie Mac claims "Miller Insurance, drafted the 2008 Primary Bond using . . . Gierek's 2008 Primary Bond Proposal. . . ." (Doc. 535 at 3). Underwriters do not dispute these factual assertions. However, the Court is left without any guidance that would allow it to differentiate between the terms: a Primary Bond Proposal and quote slip or to draw any reasonable inferences regarding their effect on the parties' rights.

[12] Underwriters claim that a London based broker was TBW's agent, but they failed to submit any evidence to support their factual assertion. (Docs. 460, 496). Freddie Mac claims that the London based broker was Underwriters' agent. (Doc. 478 at 10).

[13] Freddie Mac claims that the Underwriters syndicates that participated in the 2007 and 2008 Primary Bonds were Canopius, Markel, Chaucer, Imagine, and Antares. (Doc. 535 at 3 n.6). Antares participated in the 2007 Primary Bond under its former name, Wurttembergische Versicherung AG. (Doc. 535 at 3 n.6). Underwriters do not dispute these factual assertions.

Nevertheless, even if the Court were to find that Underwriters satisfied their burden in the Motion for Summary Judgment by pointing to the absence of evidence establishing there was an agreement to incorporate Freddie Mac Endorsement to the 2008 Bonds and the burden shifted to Freddie Mac to produce such evidence, Freddie Mac has met its burden. See Celotex Corp., 477 U.S. at 322–23; see also Citizens Concerned About Our Children v. School Bd. of Broward Cnty., Fla., 193 F.3d 1285, 1294-95 (11th Cir. 1999) ("In this summary judgment context, when the defendant has pointed to the absence of evidence of discriminatory intent, it becomes the plaintiffs' job to produce such evidence.").

Freddie Mac presented evidence indicating that TBW wanted to include Freddie Mac Endorsement on the 2008 Primary Bond in order to remain in compliance with the Guide and had no reason to believe it would not be included. (Doc. 479-18 at 19-20). Lee Brodski testified during his deposition that JMB Insurance Agency, Inc. ("JMBI") represented TBW in procuring mortgage bankers bonds and professional liability policies between 2004 and 2009. (Doc. 479-18 at 3-4, 6-7). Brodski was in contact with Margaret Potter-Levane who was responsible for procuring insurance for TBW. (Doc. 479-18 at 4-5). Brodski presented the options regarding the policies, and TBW purchased the mortgage bankers bonds and professional liability policies from Underwriters. (Doc. 479-18 at 7). Brodski was familiar with the requirements of the Guide and whenever he represented Freddie Mac's servicer, he made certain that such client obtained coverage that met Freddie Mac's requirements. (Doc. 479-18 at 12-13). Brodski explained that Freddie Mac Endorsement was included when TBW "check[ed] the box" located on the bond application indicating that it does business with Freddie Mac. (Doc. 479-18 at 16). The 2007 and 2006 Primary Bonds included Freddie Mac Endorsement, and Brodski did not recall having any discussions regarding inclusion of this endorsement on these Bonds. (Doc. 479-18 at 15). Brodski

had no reason to believe the 2008 Primary Bond would not include Freddie Mac Endorsement. (Doc. 479-18 at 19-20). Underwriters never objected to the inclusion of Freddie Mac Endorsement on the 2008 Primary Bond. (Doc. 479-18 at 21). Furthermore, an inclusion of Freddie Mac Endorsement would not have an adverse impact on the premium. (Doc. 479-18 at 26). If Brodski knew that the 2008 Bonds did not include Freddie Mac Endorsement, he would have communicated it to TBW. (Doc. 479-18 at 23-24).

In the 2006, 2007, 2008 Mortgage Bankers Bond Supplemental Applications, TBW specifically indicated that it was selling loans to Freddie Mac by checking the "Yes" box to the answer to the following question: "Does the Applicant itself sell loans to any of the following . . . FHLMC [ ] Yes [ ] No." [14] (Doc. 479-28 at 10, Doc. 479-29 at 10, Doc. 479-30 at 19).

Brodski's deposition testimony is supported by the deposition testimony of Margaret Potter-Levane. Potter-Levane testified that she was employed by TBW since 1996 and had significant responsibilities at TBW that included bookkeeping, managing payroll, and taking care of bond applications for TBW. (Doc. 479-1 at 3). Potter-Levane was also the administrative assistant to the chairman of TBW, Lee Farkas (Doc. 479-18 at 4-5). Potter-Levane was in charge of "the application process for mortgage bankers bonds and professional liability policies" from 1997 to 2009. (Doc. 479-1 at 3-4). Potter-Levane indicated that she was responsible for filling out the application for the mortgage bankers bonds and professional liability policies and she reviewed "the [insurance] binders when they came in. . . ." (Doc. 479-1 at 6). Lee Farkas had the authority to accept the terms of the insurance binders; thus, when TBW received the insurance binders, she took them to Farkas and discussed the coverage TBW could receive for particular premiums. (Doc.

[14] FHLMC stands for Freddie Mac.

479-1 at 8). Farkas then would choose the best policy and instruct Potter-Levane to "go with the best thing." (Doc. 479-1 at 8, 10) (internal quotations omitted). Subsequently, Potter-Levane would contact TBW's insurance broker, Lee Brodsky. (Doc. 479-1 at 5, 8). Potter-Levane explained that TBW was a servicer for Freddie Mac and therefore the requirements of the Guide applied to TBW. (Doc. 479-1 at 11-12). Potter-Levane knew that TBW had to comply with Freddie Mac's requirements, and she always intended to comply with these requirements when she was obtaining the insurance coverage for TBW. (Doc. 479-1 at 16-17). If TBW did not comply with these requirements, Freddie Mac would cease doing business with TBW and Potter-Levane "would be without a job." (Doc. 479-1 at 17). Accordingly, TBW's Bonds for the period 2004 through 2009 had to include Freddie Mac Endorsement and it was her "understanding" that all of the policies during that period, including the policy for the 2008 through 2009 period, included Freddie Mac Endorsement. (Doc. 479-1 at 22).

Freddie Mac also asserts that in connection with the renewal of the 2007 Primary Bond for 2008-2009, JMBI issued an insurance coverage submission (the "2008 Submission") to Underwriters and Stateside. (Doc. 478 at 16). The 2008 Submission sets forth the 2007 Primary Bond's insurance coverage limits, deductibles and premiums, and changes in various underwriting factors between 2007 and 2008. (Doc. 479-9 at 2-3). Under the section entitled, "Current Endorsements," the 2008 Submission lists among others, Freddie Mac Endorsement. (Doc. 479-9 at 2). Freddie Mac claims that the 2008 Submission indicates that the "Current Endorsements" should be carried over from the 2007 Primary Bond to the 2008 Primary Bond. (Doc. 478 at 17). Underwriters do not challenge the factual accuracy of this assertion in their Reply. (Doc. 496). Thus, this Court will consider the fact undisputed for purposes of the Motion for Summary Judgment. See FED.R.CIV.P. 56(e)(2). Freddie Mac also asserts that JMBI made the same request

in its submissions for the 2006 and 2007 Primary Bonds by including Freddie Mac Endorsement under "Current Endorsements," and each year Freddie Mac Endorsement was included as an endorsement in the renewed policy. (Doc. 478 at 17, Doc. 479-32 at 2, Doc. 479-33 at 3).

Moreover, Steven Redding, a corporate representative of Antares, one of Underwriters, testified that while renewing the 2007 Bonds for 2008, certain modifications of the 2007 bond's language were "being proposed. . . ." (Doc. 479-11 at 4). Redding was aware that the modifications included "deletion of the reinstatement and the inclusion of the TILA exclusion . . . [a] significant increase in the deductible, and [a change of] the premium . . . ." (Doc. 479-11 at 4). Redding was not aware of any other modifications to the language of the 2007 bond. (Doc. 479-11 at 4-5). Redding did not inquire whether Freddie Mac Endorsement would be included in the 2008 Bond because he was not aware of the fact that it was included in any other bonds. (Doc. 479-11 at 7). Redding did not know about Freddie Mac Endorsement's existence until he needed to prepare for his deposition even though the 2007 Primary Bond included it. (Doc. 496-2 at 6). Another corporate representative of one of the Underwriters, Brian Everall of Chaucer, also admitted that he has never heard of Freddie Mac Endorsement until a week before his deposition. (Doc. 460 at 11). In addition, corporate representative of Underwriter Imagine, Bradley Knight, testified that he was not aware of Freddie Mac Endorsement and did not recall ever seeing it. (Doc. 460 at 12). This testimony creates a reasonable inference that Freddie Mac Endorsement was not intended to be excluded from the 2008 Primary Bond, but instead was omitted by mutual mistake.

Finally, Freddie Mac asserts that the deposition testimony of Gierek established that during Stateside's annual underwriting process, Gierek typically prepared a "Primary Bond Proposal" that identified certain, but not all, of the terms for each year's Primary Bond. (Doc. 535 at 2). Thus, Freddie Mac claims that although the 2007 Primary Bond Proposal did not reference Freddie Mac

Endorsement, the endorsement was included in the 2007 Primary Bond. (Doc. 535 at 2). Freddie Mac argues that Miller Insurance drafted the 2008 Primary Bond using Gierek's 2008 Primary Bond Proposal as a starting point. (Doc. 535 at 3). But because Gierek's 2008 Primary Bond Proposal did not specifically reference Freddie Mac Endorsement, Miller Insurance (lacking Stateside's historical knowledge of the underwriting process) mistakenly omitted the endorsement when drafting the 2008 Primary Bond. (Doc. 535 at 3). Again, Underwriters do not dispute these assertions. (Doc. 541).

It appears that in 2008 TBW intended to obtain the Primary Bond that included Freddie Mac Endorsement. TBW had an extensive prior course of dealings with Underwriters in obtaining the Bonds including Freddie Mac Endorsement, and in 2008 it acted in the same manner to obtain it as it had done in previous years. Freddie Mac also proved it was a standard provision in the Bonds issued to TBW. However, three Underwriters, did not even know about Freddie Mac Endorsement's existence until this litigation commenced even though it was attached to previous Bonds. These circumstances give rise to a reasonable inference that Freddie Mac Endorsement was mistakenly omitted from the 2008 Bonds. Consequently, Freddie Mac, at a minimum, created an issue of fact regarding the parties' mutual mistake. Underwriters' bare bones Motion for Summary Judgment did not convince the Court that the "facts are so established" that Underwriters must prevail as a matter of law. In re Stephenson, 12–00357–8–ATS, 2013 WL 5799006 at *1 (Bankr. E.D.N.C. Oct. 25, 2013).

Thus, Underwriters' Motion for Summary Judgment must be denied.

Accordingly, it is **ORDERED**:

1. Underwriters' Motion for Summary Judgment (Doc. 460) is denied

2. Freddie Mac's Rule 56(d) Motion for Continuance for Time to Conduct Discovery (Doc. 481) is denied as moot.

DATED this 27 day of March, 2014 in Jacksonville, Florida.

/s/_____
JERRY A. FUNK
United States Bankruptcy Judge

Attorney, Denise D. Dell-Powell, is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.