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 WITHOUT PREJUDICE MOTION TO COMPEL DISCOVERY RESPONSE TO INTERROGATORY NO. 17

This proceeding is before the Court upon the Motion to Compel Defendant Taylor Bean & Whitaker Mortgage Corporation ("TBW") to Respond to Interrogatory No. 17 (Doc. 259, Motion to Compel), filed by Plaintiffs Certain Underwriters of Lloyd's, London and London Market Insurance Companies (collectively, the "Underwriters"). TBW filed a response in opposition (Doc. 262). The Underwriters filed a Reply brief to TBW's response in opposition (Doc. 264). For the reasons stated herein, the Motion to Compel (Doc. 259) will be denied without prejudice.

Background

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 certain fidelity bonds and insurance policies that cover TBW and other affiliated entities for various types of losses attributable to employee dishonesty (collectively, the "Bonds").[1] The Underwriters' Bonds provided base level, or primary, coverage and also the first level of excess coverage (Doc. 184, Exs. 1-17).

In this Adversary Proceeding, the Underwriters contend, *inter alia*, that TBW, in its initial applications for coverage under the Bonds, failed to disclose to the Underwriters the conduct upon which TBW relies to establish coverage (Doc. 184 at 2-3, 30). In Paragraph No. 111 of the Second Amended Complaint (Doc. 184), the Underwriters assert the following: "The 2007 Applications contain fraudulent and false statements, misrepresentations and omissions. These misrepresentations, concealments, and/or omissions regarding the nature of th[e] risk are material to the risk TBW sought to insure." (Doc. 184 at 24, ¶ 111).[2] Thus, the Underwriters seek, among

[1] The Bonds are more particularly described in the Second Amended Complaint (Doc. 184 at 2-3). The Underwriters subscribe to the Bonds.

[2] On June 15, 2010, Lee B. Farkas, TBW's former Chairman, was indicted by the federal government for conspiracy, bank fraud, wire fraud, and securities fraud (Doc. 184-8 at 2-31). *See also United States v. Farkas*, Case. No. 1:10-CR-200-LMB (E.D. Va. June 15, 2010). On April 19, 2011, Mr. Farkas was found guilty of fourteen (14) counts related to conspiracy, bank fraud, wire fraud, and securities fraud (Doc. 184-8 at 72-76). Mr. Farkas is presently incarcerated.

other forms of relief, a declaration that TBW's alleged material misrepresentations and omissions void the Bonds and/or preclude coverage (Doc. 184 at 28-33).

In its Answer and Affirmative Defenses (Doc. 217), TBW makes a blanket denial of the allegations set forth in Paragraph No. 111, *supra* (Doc. 217 at 8, ¶ 111). In addition, by way of its Fourth Affirmative Defense, TBW asserts the following: "The Underwriters are not entitled to the relief requested under any theory by operation of the adverse interest exception. At all material times, Lee Farkas was acting adversely to TBW and therefore any knowledge he has of any bad acts occurring at TBW do not impute to TBW." (Doc. 217 at 11).[3]

On January 19, 2011, TBW served its Answers to Underwriters' First Set of Interrogatories (Doc. 259, Ex. 1). In said document, TBW objects to Interrogatory No. 17 as: (1) being improperly designated as an interrogatory when the request is better couched as one for an admission; (2) being overly broad and unduly burdensome; (3) being premature as a contention interrogatory (which would typically require a response only after the completion of substantial discovery); and (4) improperly seeking subjective information known only to persons whom TBW no longer controls (Doc. 259 at 27).

Interrogatory No. 17 provides in its entirety:

> Are the answers to questions (i) 23 (at p. 4 of 6), 27-29 (at p. 5 of 6), and 35 (at p. 5 of supplemental application) in the Interest Application marked as Ex. A to Dkt. #66; and (ii) 18 (at p. 3 of 7), 38 (at p. 5 of 7), 39-40 (at p. 6 of 7), and 35 (at p. 5 of supplemental application) in the Insurance Application marked as Ex. E to Dkt. #66 truthful, accurate, correct and complete? If so, please state all facts that support that contention. If not, please state all facts regarding the answers to the

[3] The "adverse interest exception" to the general corporate-agent imputation rule provides that a corporation is not imputed with the "knowledge of an agent in a transaction in which the agent secretly is acting adversely to the [corporation] and entirely for his own or another's purposes." *F.D.I.C. v. Shrader & York*, 991 F.2d 216, 223 (5th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

> above-referenced questions in the Insurance Applications that are not truthful, accurate, correct and/or complete, and explain why you believe they are not truthful, accurate, correct and/or complete.

(Doc. 259 at 27, ¶ 17).

Legal Standard

Motions to compel discovery under Rule 37 of the Federal Rules of Civil Procedure (made applicable by Rule 7037 of the Federal Rules of Bankruptcy Procedure) are committed to the sound discretion of the trial court. *Commercial Union Ins. Co. v. Westrope*, 730 F.2d 729, 731 (11th Cir. 1984). The trial court's exercise of discretion regarding discovery orders will be sustained absent a finding of abuse of that discretion to the prejudice of a party. *Id.*

The overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore, embody a fair and just result. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958). Discovery is intended to operate with minimal judicial supervision unless a dispute arises and one of the parties files a motion involving judicial intervention. "The rules require that discovery be accomplished voluntarily; that is, the parties should affirmatively disclose relevant information without the necessity of court orders compelling disclosure." *Bush Ranch, Inc. v. E.I. DuPont De Nemours & Co.*, 918 F. Supp. 1524, 1542 (M.D. Ga. 1995), *rev'd on other grounds*, 99 F.3d 363 (11th Cir. 1996). The party objecting to discovery generally bears the burden of persuasion to show that the information called for is in some way improper. *Luey v. Sterling Drug, Inc.*, 240 F. Supp. 632, 634 (W.D. Mich. 1965).

Discussion

Interrogatory No. 17 asks whether the answers to several discrete questions included in the application(s) for the Bonds were "truthful, accurate, correct and complete" (Doc. 259 at 27). In addition, Interrogatory No. 17 requests "all facts" regarding the answers thereto (*Id.*). The questions in the application(s) for the Bonds, to which Interrogatory No. 17 refers, ask the "Applicant" to disclose certain information related to, *inter alia*: (1) whether any investor, regulatory agency, or professional liability complaints had been lodged against the Applicant (or an officer or employee of the Applicant); (2) whether any governmental agency investigations had been conducted with respect to the Applicant (or an officer or employee of the Applicant); (3) whether any investor funds had been commingled; (4) whether the Applicant operated in states requiring that a Mortgage Broker or Mortgage Correspondent be licensed; (5) whether the Applicant had a written procedural manual, or a formalized training program for new hires; and (6) whether the Applicant, any predecessor in business, or any past or present officers or employees, had any reasonable basis to believe (or were aware) of any breach of professional duty, or any circumstances that may result in a claim being filed under the Bonds (Doc. 66-1 at 7-8; Doc. 66-5 at 3-6).

The application(s) for the Bonds define the "Applicant" as "Taylor, Bean & Whitaker Mortgage Corp. **& Attached List**" (Doc. 65-5 at 1; Doc. 66-1 at 1) (*emphasis added*). The "Attached List" with respect to the Insurance Application marked Exhibit A delineates ten (10) corporate entities (Doc. 66-1 at 10). One of which is TBW and six appear to be wholly owned by TBW; however, two are owned 100% by Lee Farkas as an individual, and one is owned by Lee Farkas (51%) and Kevin Cunningham (49%) (Doc. 66-1 at 10). The "Attached List" with respect to the Insurance Application marked Exhibit E delineates twenty (20) corporate entities (Doc. 66-5

at 8-9). One of which is TBW and fourteen (14) appear to be wholly owned by TBW; however, four are owned 100% by Lee Farkas as an individual, and one is owned by Lee Farkas (51%) and Kevin Cunningham (49%) (Doc. 66-5 at 8-9).

Based on the foregoing, the Court finds Interrogatory No. 17 (as phrased) to be overly-broad on its face since it would require TBW to answer on behalf of corporate entities that are not a party to the instant Adversary Proceeding. As more comprehensively set forth below, however, the Underwriters will be permitted to amend certain portions of Interrogatory No. 17. The Underwriters are encouraged to phrase any amendments to Interrogatory No. 17 in a more targeted fashion that would permit TBW to respond appropriately.

Regarding the merits of TBW's remaining objections, the Court would note that it does not find TBW's objection that Interrogatory No. 17 would be better phrased as a request for admission to be persuasive. Specifically, under the Federal Rules of Civil Procedure, interrogatories and requests for admission are similar in that they both provide for responses concerning facts, and opinions that apply law to facts. *See* Fed. R. Civ. P. 33; Fed. R. Civ. P. 36. Thus, both discovery devices may be used to obtain like information.

With respect to TBW's objection that Interrogatory No. 17 is a premature contention interrogatory, the Court agrees in part. More particularly, Rule 33 of the Federal Rules of Civil Procedure (made applicable by Rule 7033 of the Federal Rules of Bankruptcy Procedure) provides that otherwise appropriate interrogatories involving "an opinion or contention that relates to fact or the application of law to fact" are not necessarily objectionable. Fed. R. Civ. P. 33(a)(2); Fed. R. Bankr. P. 7033. The Court, however, may order that the interrogatory "need not be answered until

designated discovery is complete. . . ." Fed. R. Civ. P. 33(a)(2). Here, the discovery deadline is presently set for July 16, 2012 (Doc. 251 at 1).

This proceeding concerns the misappropriation and theft of many millions of dollars attributable to a fraudulent scheme that involved a multitude of actors (*see* Doc. 184). TBW's Fourth Affirmative Defense concerning the adverse interest exception to corporate-agent imputation is fact intensive, and it directly relates to the actions and/or omissions of Lee Farkas. While a corporation necessarily acts through its agent(s), in such a complex case, requiring TBW to answer Interrogatory No. 17 prior to the completion of substantial discovery could potentially prejudice TBW.

For instance, subsequently discovered facts could render TBW's answers damaging—especially with respect to matters that would necessarily require TBW to take a position on what Lee Farkas either knew or believed when he signed the subject insurance applications. *See Leumi Fin. Corp. v. Hartford Accident & Indem.*, 295 F. Supp. 539, 543 (S.D.N.Y. 1969). Thus, the Court finds the questions that concern the subjective beliefs of Lee Farkas and/or others would be more appropriately propounded after the completion of substantial discovery (*see* Doc. 66-1 at 8, Question No. 29; Doc. 66-5 at 6, Question No. 40). Such questions concern whether the "Applicant," any predecessor in business, or any past or present officers or employees, had any reasonable basis to believe (or were aware) of any breach of professional duty, or any circumstances that may result in a claim being filed under the Bonds (Doc. 66-1 at 8, Question No. 29; Doc. 66-5 at 6, Question No. 40).

Lee Farkas signed the instant application(s) for the Bonds (Doc. 66-1 at 19; Doc. 66-5 at 7). Lee Farkas is TBW's former chairman who is presently incarcerated due to various criminal

convictions related to the facts that underlie this proceeding. The burden of proof with respect to the Underwriters' bond recession claim(s), however, remains on the Underwriters. *See, e.g., Ahern v. Fid. Nat'l Title Ins. Co.*, 664 F. Supp. 2d 1224, 1229 (M.D. Fla. 2009). By asking TBW to provide "all facts" that relate to Question Nos. 29 and 40, *supra*, the Underwriters are essentially asking TBW to write a significant portion of their trial for them. *See Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989) ("Courts are loathe to require a party to 'write basically a portrait of their trial for the other parties.") (*internal citations and quotations omitted*). Thus, the Court finds Interrogatory No. 17 is premature with respect to Question Nos. 18(d), 23(d), 29, and 40.

The Court additionally finds the questions that concern whether investor funds were ever commingled would be more appropriately propounded after the completion of substantial discovery (*see* Doc. 66-5 at 3, Question No. 18(d); Doc. 66-1 at 7, Question No. 23(d)).

On the other hand, the Court finds the questions regarding Interrogatory 17 that do not involve the knowledge or beliefs of Lee Farkas and/or others may be answered prior to the completion of discovery. For example, many of the Bond application questions concern documents that should be readily available to TBW. For instance, the portions of Question Nos. 18 and 23 that do not involve the commingling investor funds ask, *inter alia*: (1) whether the TBW operated in states that require specific professional licensing; (2) whether TBW had been investigated by any state agency or other authority; and (3) whether TBW had any written employee procedural manuals, or formalized training program for new hires (Doc. 66-5 at 3-4, Question No. 18; Doc. 66-1 at 7, Question No. 23). TBW should either already possess, or have access to, the information required to answer these questions. Furthermore, the Court finds answers to these questions may streamline the case and narrow the issues for trial.

Likewise, the Court finds Question Nos. 27, 28, 38, and 39 can be answered prior to the completion of discovery. These questions ask, *inter alia*: (1) whether any investor, regulatory agency, or professional liability complaints had been lodged against TBW (or an officer or employee of TBW); and (2) whether any governmental agency investigations had been conducted with respect to TBW (or an officer or employee of TBW) (Doc. 66-5 at 5-6, Question Nos. 38 and 39; Doc. 66-1 at 8, Question Nos. 27 and 28). TBW should either already possess, or have access to, the information required to answer these questions. In addition, the answers to these questions may narrow the issues for trial.

Conclusion

For the reasons stated herein, it is **ORDERED**:

1. The Motion to Compel Defendant Taylor Bean & Whitaker Mortgage Corporation to Respond to Interrogatory No. 17 (Doc. 259) is denied without prejudice.

2. Plaintiffs Certain Underwriters of Lloyd's, London and London Market Insurance Companies may propound amended interrogatories that are more narrowly tailored as to Question Nos. 18, 23, 27, 28, 38, and 39 (except that, for the time being, Defendant Taylor Bean & Whitaker Mortgage Corporation shall not be required to respond to Question Nos. 18(d) and 23(d)).

3. **Thirty (30) days after the completion of discovery**, Plaintiffs Certain Underwriters of Lloyd's, London and London Market Insurance Companies may propound amended interrogatories that are more narrowly tailored as to Question Nos. 18(d), 23(d), 29, and 40.

DATED this 7th day of October, 2011 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

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