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 GRANTING IN PART AND DENYING IN PART FEDERAL HOME LOAN MORTGAGE CORPORATION'S MOTION FOR PROTECTIVE ORDER

This proceeding is before the Court on Federal Home Loan Mortgage Corporation's ("Freddie Mac") Motion for Protective Order to Quash 5,597 Requests for Admission served upon it by the Underwriters[1] on January 16, 2013 (Doc. 440-4, the "Motion"). The Underwriters filed a response in opposition to the Motion (Doc. 445, the "Response") to which Freddie Mac filed a reply brief (Doc. 447, the "Reply").[2] The matter is now ripe for the Court's

[1] Unless otherwise noted, the "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.

[2] On March 6, 2013, Freddie Mac filed an unopposed motion to extend the time to file the Reply (Doc. 446). This motion is granted; therefore, the Reply (Doc. 447) is deemed timely filed.

determination. For the reasons stated below, the Motion is granted in part and denied in part as provided herein.

I. Background

On August 24, 2009, Taylor, Bean & Whitaker Mortgage Corporation ("TBW") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, thereby commencing the underlying case (3:09-bk-7047-JAF). Included in the assets of TBW's bankruptcy estate are certain fidelity bonds and insurance policies (collectively, the "Bonds"), which cover various types of losses attributable to, *inter alia*, errors and omissions by TBW's employees. The Underwriters provide coverage under the Bonds.[3]

The Requests relate to Freddie Mac's claim under Insuring Clause 9(c) of the Bonds. The claim is based upon TBW's purported failure to: (1) obtain private mortgage insurance on certain residential property loans; or (2) maintain premium payments thereon (Doc. 440-4 at 4). The claim pertains to 461 residential loans for which Freddie Mac asserts it has suffered losses due to the aforementioned errors and/or omissions of TBW's employees. The unpaid principal balance of the 461 loans is in excess of $70 million.

On June 15, 2012, Freddie Mac served on the Underwriters an amended interrogatory response that identified the loans subject to Freddie Mac's claim. The amended interrogatory response attached an Exhibit A that was later updated in a second amended interrogatory response dated July 2, 2012. Exhibit A is a detailed spreadsheet with multiple columns of

[3] The Bonds are more particularly described in the Second Amended Complaint (Doc. 184 at 2-3). The Underwriters brought the complaint, in part, to have the Bonds declared void *ab initio* or, in the alternative, to determine that coverage is nonetheless not afforded under the Bonds unless a loss covered thereunder can be proven (*see* Doc. 184 at 29).

information related to each of the 461 loans that form the basis of Freddie Mac's claim. Exhibit A contains, among other things, the following information regarding each loan: (1) the unpaid principal balance of the loan; (2) the loan status (*e.g.*, performing, defaulted, or in foreclosure); (3) the rate of private mortgage insurance coverage that was supposed to be placed on the loan; (4) the amount of any claim filed under the mortgage insurance policy; and (5) the date and reason for any cancellation of the private mortgage insurance (Doc. 440-4 at 4).

On January 16, 2013, the Underwriters served on Freddie Mac the subject Requests concerning the loans identified in Exhibit A and the information provided therein. The Requests seek admissions regarding facts bearing on each of the 461 loans for which Freddie Mac demands payment. For 329 of the loans, the Underwriters propounded 13 requests per loan (totaling 4,277 requests). For the remaining 132 loans, the Underwriters propounded 10 requests per loan (totaling 1,320 requests). The "Instructions" portion of the Requests provides, in pertinent part, as follows: "In the event that Freddie Mac . . . denies any Request or portion of a Request, it must state the reasons." (Doc. 440-5 at 4).

II. Analysis

Rule 26 of the Federal Rules of Civil Procedure (made applicable by Rule 7026 of the Federal Rules of Bankruptcy Procedure) provides that the Court may, "for good cause, issue an order to protect a party . . . from annoyance . . . oppression, or undue burden or expense." Fed. R. Civ. P 26(c)(1). The burden is on the movant to show the necessity of the protective order.

Freddie Mac asserts two primary bases in support of its motion for protective order to quash the 5,597 Requests. First, Freddie Mac asserts that the sheer number of requests is abusive and unreasonable, and that the Requests can be, and already have been, obtained more

efficiently through other means (Doc. 440-4 at 7-8). Second, Freddie Mac maintains the Requests are simply not permitted as they are being used as a discovery device, call for legal conclusions, and concern central facts that are in dispute (*id*. at 8-9). For the reasons that follow, the Court is only partially persuaded by Freddie Mac's arguments.

Rule 36(a) of the Federal Rules of Civil Procedure (made applicable by Rule 7036 of the Federal Rules of Bankruptcy Procedure) permits a party to serve on another party a written request to admit the truth of any matters within the scope of Rule 26(b)(1) relating to, *inter alia*, "facts, the application of law to fact, or opinions about either." FED. R. CIV. P. 36(a)(1). Rule 26(b)(1) provides, in pertinent part, that a party may obtain discovery regarding any non-privileged matter that is relevant. Moreover, the information need not be admissible at trial so long as the discovery appears reasonably calculated to lead to the discovery of admissible evidence. FED. R. CIV. P. 26(b)(1).

With respect to Freddie Mac's first argument (*i.e.*, that the sheer number of requests is abusive and unreasonable), the Court would note that there is no presumptive limit as to the number of requests for admissions a party may propound, and that courts typically "consider whether the discovery sought is proportionate to the complexities of the lawsuit." *Lockheed Martin Corp. v. L-3 Commc'ns. Corp.*, No. 1:05-CV-902-CAP, 2007 U.S. Dist. LEXIS 101872, at *6 (N.D. Ga. Oct. 10, 2007).

To establish coverage under Insuring Clause 9(c), the Underwriters maintain that Freddie Mac must minimally prove, with respect to each of the 461 loans, that: (1) TBW suffered a direct financial loss; (2) by reason of a claim first made against TBW during the Bond period; (3) for direct financial loss sustained by Freddie Mac; (4) as a result of an error or omission on the part

of TBW; (5) in failing to obtain private mortgage insurance (or pay the premiums thereon) (Doc. 445 at 4-5).

Attached to Freddie Mac's Reply brief is a declaration of Scott L. Walker, Freddie Mac's Associate General Counsel (Doc. 447-1 at 3-4, the "Declaration"). In the Declaration, Mr. Walker states that responding to the 5,597 Requests will require Freddie Mac to expend a substantial amount of time, possibly 186 hours or more (*id*. at 3). As an initial matter, good cause for issuance of a protective order is not established by a mere showing of inconvenience and expense. *Lockheed Martin Corp.*, 2007 U.S. Dist. LEXIS 101872, at *6. Moreover, in *Lockheed Martin Corp.*, the court found the potential expenditure of 117 hours in responding to 5,016 requests for admission was not necessarily disproportionate to the complexities of the case. *Id*. at *7; *see also Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, Case No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 80182, at *15-16 (D. Kan. Oct. 29, 2007) (finding the potential expenditure of 226 attorney hours in responding to requests for admission was not unreasonable in light of the issues in the case and the amount at stake).

Here, Freddie Mac has asserted a multi-million dollar claim, involving 461 separate loans for which Freddie Mac demands payment from the Underwriters. Consequently, the Court finds 10 to 13 requests per loan (for a total of 5,597 requests) is not *per se* abusive or unreasonable given the complex nature of the matter and the amount in controversy. *See, e.g.*, *Lockheed Martin Corp.*, 2007 U.S. Dist. LEXIS 101872, at *3-8 (permitting 5,016 requests for admission in a complex lawsuit).

Freddie Mac additionally contends the Requests can be, and already have been, obtained more efficiently through other means. The Court disagrees. As an initial matter, the Requests

seek admissions regarding the information provided to the Underwriters by Freddie Mac. Even if the accuracy of the facts contained in the spreadsheet have been sworn to by Freddie Mac, an interrogatory response and an admission are not one and the same. *See Whitaker v. Belt Concepts of Am., Inc. (In re Olympia Holding Corp.)*, 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995). Thus, the Court finds the Underwriters may seek admissions regarding the factual information contained in the spreadsheet.

The Court would note, however, that the "Instructions" portion of the Requests, insofar as it directs Freddie Mac to explain its reason(s) for any denial, is improper. *Id.* (request for admission requiring party to explain basis for denial of request amounts to an interrogatory and "[r]equests for admissions and interrogatories are not interchangeable procedures"). A request for admission, "except in a most unusual circumstance, should be such that it could be answered yes, no, the answerer does not know, or a very simple direct explanation given as to why he [or she] cannot answer[.]" *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 968 (3d Cir. 1988) (internal quotation marks omitted). Based on the foregoing, the Court will enter a protective order relieving Freddie Mac of any obligation to explain its reason(s) for a denial.

With respect to Freddie Mac's argument that a deposition of Freddie Mac's authorized representative would be a more efficient means by which the Underwriters may obtain the admissions, the Court is strained to see how a deposition would be more efficient than Freddie Mac simply admitting or denying the Requests.

Freddie Mac next claims the Requests are improper because they purportedly implicate conclusions of law, and are targeted at discovering facts related to Freddie Mac's claim.

A review of the Requests reveals that the Underwriters seek admissions related to Freddie Mac's claim and the information provided by Freddie Mac in the subject spreadsheet, *supra*. Specifically, for each loan, the Underwriter's seek admissions regarding: (1) whether Freddie Mac suffered a loss; (2) the percentage of the loan covered by private mortgage insurance; (3) the maximum loss compensable under the mortgage insurance; (4) whether TBW knew it failed to obtain the required mortgage insurance; (5) whether the Underwriters were informed of TBW's failure to procure or maintain private mortgage insurance prior to the inception of the Bonds; (6) whether Freddie Mac brought a civil action against TBW related to a loss it sustained from a lack of private mortgage insurance; (7) whether TBW has been adjudicated liable for any loss sustained by Freddie Mac; and (8) whether TBW made any effort to obtain, reinstate, or replace any private mortgage insurance (Doc. 440-5 at 5-6).

Rule 36 was promulgated for the express purpose of expediting trials by establishing certain facts without necessitating formal proof at trial. *See* Advisory Committee Notes (1970 Amendment) (requests for admission serve two purposes: "first, to facilitate proof with respect to issues that cannot be eliminated from the case; and second, to narrow the issues by eliminating those that can be"). Freddie Mac states the Underwriters improperly seek admissions, or denials, regarding contested facts and/or conclusions of law (Doc. 447 at 3-4). Rule 36, however, contemplates that requests for admission will address matters alleged in a complaint. *See* FED. R. CIV. P. 36(a)(5) (A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it).

Further, "[a]s a general rule requests for admission are not objectionable even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case." *Heartland Surgical Specialty Hosp., LLC*, 2007 U.S. Dist. LEXIS 80182, at *17 (internal quotations omitted). The Court finds that to the extent the Underwriters seek admissions regarding conclusions of law, such are related to the facts of the case. Freddie Mac additionally maintains that the amount of its damages under Insuring Clause 9(c) will be the subject of expert testimony. "It is insufficient, however, for a responding party to . . . simply state that its expert will provide the requested information . . . ." *Id*. at *19. Freddie Mac will therefore be required to respond as to whether it suffered a loss.

To the extent the Requests seek admissions concerning the knowledge and actions of other parties, Freddie Mac may, after making "reasonable inquiry," assert lack of knowledge or information as a basis for failing to admit or deny the request. *See* FED. R. CIV. P. 36(a)(4). Courts have noted that "reasonable inquiry" is limited to persons and documents within the responding party's control, "and does not require the responding party to interview or subpoena records from independent third parties in order to admit or deny a request"). *Heartland Surgical Specialty Hosp., LLC*, 2007 U.S. Dist. LEXIS 80182, at *21.

III. Conclusion

Requests for admission are useful in that they establish uncontroverted facts without the need for formal proof at trial. At some point during the trial of this case, or during dispositive motion practice, the parties will have to address the facts at issue. Upon review of the Requests, the argument(s) of the parties, and the relevant case law, the Court finds the Requests are appropriately aimed at reducing the need for formal proof at trial. For the reasons provided

herein, the Court finds Freddie Mac has failed to establish the requisite good cause to have the Requests for Admissions quashed.

Accordingly, it is **ORDERED**:

1. Federal Home Loan Mortgage Corporation's Motion for Protective Order to Quash 5,597 Requests for Admission (Doc. 440-4) is granted in part and denied in part.

2. Federal Home Loan Mortgage Corporation shall respond to the 5,597 Request for Admissions, served upon it by the Underwriters on January 16, 2013, within forty-five (45) days of the date of this Order. Federal Home Loan Mortgage Corporation, however, is not required to provide its reason(s) for any denials.

DATED this 8th day of April, 2013 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

All interested parties