

**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.

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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.

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**ORDER DIRECTING TAYLOR, BEAN & WHITAKER MORTGAGE CORP. (“TBW”)  
TO GIVE STATESIDE UNDERWRITING AGENCY INC. (“STATESIDE”) NOTICE OF  
TBW’S MOTION FOR LEAVE TO TAKE A DEPOSITION IN EXCESS OF SEVEN  
HOURS FROM STATESIDE, WHICH IS PENDING BEFORE THE COURT**

This proceeding is before the Court upon Taylor, Bean & Whitaker Mortgage Corp.’s (“TBW”) Motion for Leave to Take a Deposition in Excess of Seven Hours from Stateside and Incorporated Memorandum of Law (the “Motion”). (Doc. 497). Certain Underwriters at Lloyd’s, London and London Market Insurance Companies (“Underwriters”) opposed the Motion by filing a Response to TBW’s Motion to Compel a Further Deposition of Stateside (the “Response”) (Doc. 509). Subsequently, Sovereign Bank filed a Joinder to TBW’s Motion (Doc. 514), and Federal Home Loan Mortgage Corporation (“Freddie Mac”) filed a Partial Joinder to

TBW's Motion. (Doc. 515). TBW filed an unopposed Motion to extend the Deadline to File its Reply in Support of Its Motion (the "Motion to Extend"). (Docs. 516, 517). Thereafter, TBW filed its Reply in Support of its Motion for Leave to Take a Deposition in Excess of Seven Hours from Stateside (the "Reply"). (Doc. 523). After careful consideration of the record and the parties' respective pleadings, the Court concludes that the Motion to Extend should be granted and it will treat TBW's Reply as timely filed. Nevertheless, the Court concludes that the Court may not reach the merits of TBW's Motion because it seeks relief affecting Stateside, a non-party to this proceeding, which did not receive notice of the Motion. The Court concludes that Stateside has a right to be heard and, for this reason, the Court orders TBW to give Stateside notice of the Motion pending before the Court.

## **1. Background**

As a result of the dishonest acts of certain employees of 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 May 14, 2010, Underwriters initiated this multiparty adversary proceeding by filing a Complaint seeking to confirm their rescission of the primary mortgage bankers bonds, first excess bankers bonds, and other liability insurance policies issued to TBW by Underwriters or, in the alternative, a declaration of no coverage.<sup>1</sup> (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 and policies. (Doc. 497 at 3). The parties relevant to this motion, TBW, Federal Home Loan Mortgage Corporation ("Freddie Mac"), Sovereign Bank and a non-party, Stateside, all

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<sup>1</sup> The Complaint was subsequently amended by Plaintiffs' First Amended Complaint (Doc. 66) and by Underwriters' Second Amended Complaint (Doc. 184).

participated in the discovery process. (Doc. 497 2-6, Doc. 497-1 at 9-10). Stateside is a separate corporation, which under a facility agreement between Stateside and Underwriters, analyzed the risk and issued insurance policies and bonds on behalf of Underwriters to several companies in the United States. (Doc. 523 at 11, Doc. 497 at 3, Doc. 497-1 at 29-31). The facility agreement sets forth the parameters of Stateside's authority to "underwrite the policies" on behalf of Underwriters.<sup>2</sup> (Doc. 497-1 at 30). As Stateside was the managing underwriter of TBW's mortgage banker bonds in 2004, 2005, 2006 and 2007 and assisted with the negotiation and placement of the 2008 bonds in the "open London market," the parties deposed Stateside's corporate representative. (Doc. 497 at 3-4). For this reason, Stateside was subpoenaed to designate its Rule 30(b)(6)<sup>3</sup> corporate representative to provide testimony regarding the topics indicated in the subpoena. (Doc. 509-1 at 1-4). Pursuant to the subpoena issued by the United States Bankruptcy Court for the Northern District of Illinois, Stateside produced its corporate representative, Richard P. Nowell, for the deposition that took place on April 12, 2013, in Chicago, Illinois. (Doc. 497-1 at 2, Doc. 509-1 at 1-2). During the deposition, Nowell was questioned by Mark Miller, an attorney representing Sovereign Bank, and Yusuf Rangwala, an attorney representing Freddie Mac, for over 6 hours. (Doc. 497-1 at 10-217, 217-313). Subsequently, the following exchange took place:

MS. JAMES<sup>4</sup>: Can I ask a housekeeping question? About how much longer do you have because I haven't had a turn yet.

MR. RANGWALA: No, I understand. I think I can wrap this up pretty shortly here. I would like to speak to Kyle<sup>5</sup>. Maybe we could just take a five-minute break.

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<sup>2</sup> For instance, the deposition testimony established that Stateside makes "pricing decisions based upon pricing models that they [had] giv[en] us," but Stateside uses its own "underwriting experience to look at the risk and examine it and then make underwriting decisions." (Doc. 497-1 at 30).

<sup>3</sup> FED.R.CIV.P. 30(b)(6).

<sup>4</sup> Elaine Johnson James appeared on behalf of TBW. (Doc. 497-1 at 4).

<sup>5</sup> Kyle Lonergan, an attorney, appeared on behalf of Freddie Mac. (Doc. 497-1 at 3).

MS. JAMES: Well, I mean I can't finish in a half an hour and it's almost 5:00 and this gentleman's been testifying since 9:00 this morning. I just -- you can finish if you want. It just seems to me that when you reach a natural stopping point, we should just stop because we've got issues with documents that weren't produced. We've got issues with documents that were improperly -- in our view improperly redacted of which we've got to get full copies before we can, you know, adequately examine Stateside's corporate rep.

So I'm just wondering how much longer it makes sense to go today knowing that we've got to come back another time.

MR. MARMOR<sup>6</sup>: We don't agree.

MS. JAMES: I understand. And I'm absolutely going to bring that up with Judge Funk and we'll see what he says.

MR. MARMOR: I understand.

MS. JAMES: You don't agree that the documents were improperly withheld or improperly redacted or what?

MR. MARMOR: And that he will have to come back another day. He's here for his seven hours.

MR. MILLER: How late would you want him to go?

MR. MARMOR: Well, he's already gone almost six hours so we have another hour.

MS. JAMES: But if he said it once, he said ten times that he wasn't prepared to answer the questions that he was subpoenaed by Freddie Mac to say because he doesn't have his documents with him. So if you want to take the position that we're done after seven hours, that's fine, but we'll take that up with Judge Funk.

MR. MARMOR: That's our position. I don't agree with your characterization of his testimony.

MS. JAMES: Well, the record will say what it says. Why don't you mark the subpoena as an exhibit and then --

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MR. RANGWALA: I can go ahead and mark the subpoena and then I would like to talk to Kyle for five minutes before we wrap up even before today if that's okay.

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<sup>6</sup> Randall Marmor appeared on behalf of Underwriters and the witness. (Doc. 497-1 at 9).

MS. JAMES: There's fine with me.

...

MR. RANGWALA: Okay. I'm going to go ahead and pass the witness. I am adjourning the deposition and not closing it for all of the reasons that Ms. James spoke about earlier. Go ahead.

MS. JAMES: We will question the witness when we reconvene assuming that Judge Funk gives us permission to do so.

MR. MARMOR: Right, we don't agree.

MS. JAMES: I understand completely.

MR. MARMOR: I understand your position, but he's here for the seven hours. You have 45 minutes or thereabouts. And you're welcome to question him. If you decline, that's fine.

MS. JAMES: No problem.

MR. MARMOR: Okay. Very good.

MS. JAMES: I'll question him when he's been prepared and has produced the documents that he should have produced.

MR. MILLER: As well Sovereign reserves the right to continue questioning if and when the missing documents are produced.

MR. RANGWALA: Freddie Mac agrees.

(Doc. 313-16, 330-332).

The deposition was adjourned at 5:07 p.m. (Doc. 497-1 at 332). Subsequently, TBW filed the Motion requesting the Court enter an "order permitting it to take a deposition in excess of seven hours from the Rule 30(b)(6) corporate designee of [Stateside], so that it can subpoena Stateside to (i) appear again for deposition, (ii) respond to questions for which its corporate designee was not prepared to respond at its prior deposition, and (iii) produce complete copies of documents, which Underwriters' counsel improperly redacted or withheld based on meritless

assertions of attorney-client privilege<sup>7</sup>, and electronically stored information, for which Stateside previously failed to search.” (Doc. 497 at 2). Underwriters filed the Response emphasizing that they feel compelled to respond because of the costs they would be forced to incur if TBW prevails even though the Motion did not seek relief against them. (Doc. 509 at 3). Underwriters also brought to the Court’s attention that Stateside is a nonparty to this proceeding and that “TBW did not give notice to Stateside of this [M]otion, nor did it file the [M]otion in the jurisdiction where the subpoena was issued and Stateside resides.” (Doc. 509 at 2). Accordingly, the Court will first determine whether Stateside should receive a notice of the Motion.

## **2. Analysis**

“[A] subpoena<sup>8</sup> is necessary to compel someone who is not a party to appear for the taking of a deposition or for a hearing or trial.” U.S. v. Santiago-Lugo, 904 F.Supp. 43, 46 (D.P.R. 1995). “[A] deposition subpoena shall be obtained from the court in the district where the deposition is to be taken.” In re Digital Equip. Corp., 949 F.2d 228, 231 (8th Cir. 1991). “The geographical area in which a deposition may be taken is limited to ‘within 100 miles from the place where [the witness] resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.’” Id. (quoting FED.R.CIV.P. 45(d)(1)). “The service of subpoena on a nonparty will often represent the first notice of the witness’s involvement in the action.” 9 James Wm. Moore, *Moore’s Federal Practice*, et al., §45.10[1], p. 45-38 (10th ed. 2013). “Because subpoenas are frequently issued by a court other than the one in which the action is pending, a court whose only connection to the action is the issuance of the subpoena will sometimes be called on to resolve a discovery dispute.” Id. at §45.03[1], p. 45-25. For instance, Federal Rule of Civil Procedure 45(c)(3)(B) provides that “[t]o

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<sup>7</sup> TBW’s Motion to Compel Underwriters to Produce Documents (Doc. 465) is still pending before the Court.

<sup>8</sup> “A civil subpoena is a mandate issued in the name of a court, traditionally by the Clerk of Court thereof, but, under current practice, may be lawfully issued by attorneys.” Santiago-Lugo, 904 F.Supp. at 46.

protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena . . . .”

Here, TBW seeks leave to take a deposition in excess of seven hours of Stateside’s corporate representative. (Doc. 497 at 7). TBW supports its request by arguing that 1) Stateside did not adequately prepare Nowell to testify on its behalf and failed to provide him with the documents he needed in order to testify, 2) Stateside and Underwriters have withheld material documents from production based on meritless assertions of attorney-client privilege, and 3) the lack of preparation and knowledge of Stateside’s corporate representative, and its counsel’s improper withholding and redaction of documents have materially impeded TBW’s ability to conduct the fact discovery needed to rebut Underwriters’ allegations. (Doc. 497 at 1-7). TBW claims that “Stateside should be ordered to pay TBW, Freddie Mac, and Sovereign Bank for the attorney’s fees and costs they incurred to attend the April 12, 2013 deposition of Stateside” and that Underwriters should be ordered to cause Stateside to reappear for deposition in this District.” (Doc. 497 at 14). TBW admits that Stateside is a separate corporation. (Doc. 523 at 11). TBW does not challenge Underwriters’ assertion that Stateside did not receive the notice of the Motion and does not offer any argument that such notice was not necessary. (Doc. 523 at 11). Instead, TBW argues that Stateside is Underwriters’ managing agent and that “[t]here is no doubt that Underwriters could cajole Stateside into giving a deposition in Florida.” (Doc. 523 at 11). It stands to reason that TBW attempts to infer that providing notice of the Motion to Underwriters should suffice as Stateside is their “managing agent.” (Doc. 523 at 11). However, the Court is not persuaded by this argument because the parties utilized a subpoena to depose Stateside’s corporate representative instead of utilizing a notice of deposition<sup>9</sup>. “If [a party] wishes to

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<sup>9</sup> Federal Rule of Civil Procedure 30(b)(6) provides that a party can notice a deposition of an organization, and the “organization must then designate one or more officers, directors, or managing agents, or designate other persons

compel the testimony of a non-party witness who lives in Illinois . . . [the party] must request a subpoena with the appropriate court in that district.” Simms v. Ctr. for Corr. Health & Policy Studies, 272 F.R.D. 36, 41 (D.D.C. 2011) (“The named potential witnesses are therefore no longer ‘parties’ to the action, because they no longer serve on CCHPS’s board of directors. To compel these non-party witnesses to testify, therefore, plaintiff must subpoena them to testify. She cannot rely on a notice of deposition to compel them to testify.”)

Furthermore, as mentioned above, TBW seeks leave to take a deposition in excess of seven hours<sup>10</sup> in this District of Stateside’s corporate representative pursuant to “Federal Rules of Civil Procedure 30, 37, and 45, as incorporated by Federal Rules of Bankruptcy Procedure 7030, 7037 and 9016, respectively. . . .” (Doc. 497 at 1). Pursuant to Rule 37(a)(1) “[o]n **notice** to other parties and all affected persons, a party may move for an order compelling . . . discovery.” FED.R.CIV.P. 37(a)(1)(emphasis added). It is undisputed that Stateside is an entity affected by the relief requested and that Stateside did not receive notice. TBW also seeks imposition of sanctions under Rule 37(d)(3) against Stateside. (Doc. 497 at 14). Rule 37(d)(1)(A)(i) gives courts authority to impose sanctions if “a person designated under Rule 30(b)(6) . . . fails . . . to appear for that person’s deposition . . . .” Rule 37(d)(3) further provides that, “[i]nstead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees caused by the failure. . . .” TBW claims that “producing an unprepared Rule 30(b)(6) witness is sanctionable as nonappearance under . . . Rule . . . 37(d)(1)(A)(i)” and for this reason Stateside should pay TBW,

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who consent to testify on its behalf.”

<sup>10</sup> Federal Rule of Civil Procedure 30(d)(1) provides that “a deposition is limited to 1 day of 7 hours.” This limitation can be extended as Federal Rule of Civil Procedure 26(b)(2)(A) indicates that “[b]y order, the court may alter the limits in these rules on . . . the length of depositions under Rule 30.” However, Federal Rules of Civil Procedure do not provide whether the court issuing the subpoena or the court before which the case is pending should address such a motion.



Freddie Mac and Sovereign Bank attorney's fees and costs incurred in attending the deposition at issue. (Doc. 523 at 13-14). In an abundance of caution, the Court will not address the merits of TBW's motion until Stateside receives proper notice of the Motion and is given an opportunity to be heard.

Accordingly, it is **ORDERED**:

1. TBW's Motion to extend the Deadline to File its Reply in Support of Its Motion (Doc. 516) is granted.
2. TBW is directed to give Stateside notice that its Motion for Leave to Take a Deposition in Excess of Seven Hours from Stateside (Doc. 497) is pending before the Court.
3. Stateside may file a response to the Motion within fourteen days from the date of this Order.
4. If Stateside files a response, TBW will have seven days from the date Stateside files the response to file a reply.

**DATED** this 20 day of September, 2013 in Jacksonville, Florida.

/s/

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**JERRY A. FUNK**  
United States Bankruptcy Judge

Attorney, Elaine Johnson James, is directed to serve a copy of this order on interested parties and a nonparty, Stateside, and file a proof of service within three (3) days of entry of the order.