**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 FREDDIE MAC'S MOTION FOR LEAVE TO FILE AN AMENDED COUNTERCLAIM**

This proceeding is before the Court upon Federal Home Loan Mortgage Corporation's ("Freddie Mac") Motion for Leave to File an Amended Counterclaim (the "Motion"). (Doc. 480). Certain Underwriters at Lloyd's, London and London Market Insurance Companies ("Underwriters") filed an Opposition to Freddie Mac's Motion for Leave to File an Amended Counterclaim (the "Opposition") (Doc. 495), and Freddie Mac filed a Reply Brief in Support of its Motion for Leave to File an Amended Counterclaim (the "Reply") (Doc. 508). For the reasons that follow, the Court will grant Freddie Mac's Motion.

## I. Background

Freddie Mac is a corporate instrumentality of the United States of America created by Congress in order to increase 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, among other activities, purchases conventional mortgage loans from approved mortgage loan originators or "seller/servicers," pools those loans into mortgage-backed securities, and then sells those securities to investors. (Doc. 213 at 25). The capital from investors is then used to buy more mortgage loans, facilitating the flow of funds from investors to homebuyers. (Doc. 213 at 25). Freddie Mac purchases mortgage loans from seller/servicers and contracts with them to service those loans. (Doc. 213 at 25). The seller/servicers agree to sell and service mortgages pursuant to the terms and conditions contained in certain documents including Freddie Mac's Single-Family Seller/Servicer Guide (the "Guide"). (Doc. 213 at 25-26). Taylor, Bean & Whitaker Mortgage Corporation ("TBW") was one of Freddie Mac's seller/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 against losses that it incurs in connection with dishonesty, theft, or fraud committed by any partner, sole proprietor or major shareholder of TBW. (Doc. 213 at 27). The Guide further required that the fidelity insurance give Freddie Mac the right to file a claim for losses directly with the insurer, irrespective of whether the seller/servicer tenders a claim under the bond in connection with the events that give rise to Freddie Mac's claim, and that Underwriters name Freddie Mac a sole payee for losses recoverable under the bonds (the "Freddie Mac Endorsement"). (Doc. 213 at 27). Freddie Mac claims that Underwriters were familiar with these requirements. (Doc. 213 at 27). The 2004-2007 Primary Bonds obtained by

TBW and provided by Underwriters included the Freddie Mac Endorsement whereas the 2004-2007 Excess Bonds indicated that they provided TBW with insurance coverage "subject to the same terms, exclusions, conditions, and Definitions as the [Primary Bond[s]]." [1] (Doc. 213 at 28-32). Nevertheless, the Freddie Mac Endorsement was not included in the 2008 Primary Bond. (Doc. 213 at 34).

On or prior to August 3, 2009, TBW's financial condition deteriorated dramatically. (Doc. 213 at 26). On August 3, 2009, investigators from the Special Inspector General's Office for the Troubled Assets Relief Program, together with the FBI and the inspector general of the Department of Housing and Urban Development, raided TBW's offices in Ocala, Florida. (Doc. 213 at 26). On August 4, 2009, the Federal Housing Administration suspended TBW from making loans insured by the federal agency. (Doc. 213 at 26). Additionally, the Government National Mortgage Association ("GNMA") defaulted TBW's participation in its Mortgage-Backed Securities program and terminated TBW's GNMA loan servicing rights. (Doc. 213 at 26). On August 24, 2009, TBW filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. (Doc. 213 at 26). Included in the assets of TBW's bankruptcy estate were certain fidelity bonds and insurance policies that cover TBW and other affiliated entities for various types of losses attributable to its employees' dishonesty. Freddie Mac believes that it has sustained a loss of more than $500 million due to theft or fraud from custodial accounts maintained by TBW or other funds and collateral handled by TBW for Freddie Mac in connection with mortgage loans sold or serviced by TBW. (Doc. 213 at 35). Freddie Mac asserts that Underwriters refused to cover certain losses of Freddie Mac insured under the 2008 Bonds and have otherwise failed to acknowledge Freddie Mac's rights under these Bonds. (Doc. 213 at 36). Furthermore, Freddie Mac claims that before it or TBW could submit a final proof of loss,

[1] The Court will refer to the 2008 Primary Bond and the 2008 Excess Bond as the 2008 Bonds.

Underwriters initiated this adversary proceeding against, among other parties, TBW and Freddie Mac. (Doc. 213 at 36). Specifically, in the Second Amended Complaint, Underwriters seek to confirm their rescission of mortgage bankers bonds issued to TBW from 2004 to 2008 or in the alternative, a declaration of no coverage of claims of, among other parties, Freddie Mac under the 2008 Bonds. (Doc. 184 at 2-3, 14-32).

Thereafter, Freddie Mac filed its Answer to Underwriters' Second Amended Complaint, Affirmative Defenses, Demand for Jury Trial and Counterclaim ("Counterclaim"). (Doc. 213). Count III of Freddie Mac's Counterclaim seeks reformation of the 2008 Primary Bond by including the Freddie Mac Endorsement and claiming that it was not included in the 2008 Primary Bond due to mutual mistake by the two contracting parties, TBW and Underwriters. (Doc. 213 at 42-44). In the Motion, Freddie Mac seeks to amend its Counterclaim to include an alternative theory for reformation i.e., that the 2008 Primary Bond should be reformed to include the Freddie Mac Endorsement based upon TBW's unilateral mistake coupled with Underwriters' inequitable conduct. (Doc. 480 at 6). Underwriters oppose Freddie Mac's Motion for two reasons. First, Underwriters' claim that the Motion was filed with undue delay because the discovery Freddie Mac relies on to support its new theory for reformation was "produced years ago." (Doc. 495 at 3) (emphasis omitted). Second, Underwriters claim that allowing an amendment would unduly prejudice them because they would be forced to serve supplemental written discovery and re-depose each of Freddie Mac's Rule 30(b)(6) witnesses, as well as at least six of TBW's unspecified fact witnesses on the facts relating to Freddie Mac's new theory. (Doc. 495 at 4). The Court will address Underwriters' arguments in turn.

## I. Analysis

A decision whether to grant a motion for leave to amend a pleading is within the discretion of

the court. Vacation Break U.S.A., Inc. v. Mktg. Response Grp. & Laser Co., 189 F.R.D. 474, 477 (M.D. Fla. 1999). Federal Rule of Bankruptcy Procedure 7015 provides that Federal Rule of Civil Procedure 15 applies in adversary proceedings. A party may amend a pleading once as a matter of course within the time constraints set out by Rule 15(a)(1) and after that time, a party may amend its pleading "only with the opposing party's written consent or the court's leave." FED.R.CIV.P. 15(a)(1), (a)(2). "Rule 15 allows pleadings to be amended at any stage of the litigation." 3 James Wm. Moore, Moore's Federal Practice, et al., §15.02[1], p. 15-8 (10th ed. 2013); see also Minter v. Prime Equip. Co., 451 F.3d 1196, 1204 (10th Cir. 2006) ("Rule 15(a) does not restrict a party's ability to amend its pleadings to a particular stage in the action."). "During the pretrial phase, a court should allow amendments to ensure that all the issues are before the court." Moore, § 15.14[1] at 15-26. Specifically, Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Bell v. J.B. Hunt Transp., Inc., 427 Fed.Appx. 705, 707 (11th Cir. 2011) (internal quotations omitted). "This directive gives effect to the federal policy in favor of resolving cases on the merits instead of disposing of them on technicalities." Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 379 (4th Cir. 2012) (internal quotations omitted). Furthermore, "there must be a justifying reason, for a court to deny leave to amend." Vacation Break, 189 F.R.D. at 477 (internal quotations omitted). Accordingly, "a court should deny leave to amend a pleading only when: (1) the amendment would be prejudicial to the opposing party, (2) there has been bad faith or undue delay on the part of the moving party, or (3) the amendment would be futile." Id. (citing Forman v. Davis, 371 U.S. 178 (1962)).

Underwriters claim that Freddie Mac waited to file the Motion until it was faced with

Underwriters' motion for summary judgment[2] on its counterclaim and the discovery Freddie Mac relies upon in the Motion was produced "ages ago." (Doc. 495 at 2-6). Additionally, Underwriters claim that since discovery closed on June 28, 2013, Freddie Mac's undue delay in pursuing its new theory mandates denial of its motion. (Doc. 495 at 7). Freddie Mac responds that it filed the Motion after sufficient factual evidence for its alternative basis of reformation was uncovered through discovery, and that evidence of Underwriters' inequitable conduct was established after completion of all depositions of Underwriters. (Doc. 508 at 4). Freddie Mac explains that the last Underwriter syndicate, Markel, was not deposed until May 1, 2013, and the deposition of Stateside Underwriting Agency, Inc., which represented Underwriters' interests in the negotiation and issuance of the 2008 Primary Bond, did not take place until April 12, 2013. (Doc. 508 at 5). Freddie Mac claims that it filed the Motion less than two weeks after the last Underwriter's deposition.[3] (Doc. 508 at 5). It should be noted that the Court had extended the fact discovery period equally for all parties until August 27, 2013, and at the time of entering of this Order, the discovery period has already expired. (Doc. 503 at 2). Nevertheless, the parties' various motions to compel discovery and TBW's motion to extend discovery period for reasons unrelated to Freddie Mac's Motion are still pending before the Court. (Docs. 504, 497, 465, 537). The trial is also not scheduled to commence until March 3, 2014. (Doc. 429 at 1). Taking into consideration the complexity of the issues of this multiparty proceeding and the circumstances of the ongoing extensive discovery process, the Court finds that Freddie Mac did not file the Motion with undue delay. See e.g., Coca–Cola Bottling Co. of Elizabethtown, Inc. v. Coca–Cola Co., 668 F. Supp. 906, 922 (D. Del. 1987) (holding that filing a motion to amend six and a half years after the complaint was filed did not constitute undue delay because "[t]he long process

[2] Underwriters' Motion for Summary Judgment on Freddie Mac's Counterclaim is still pending before the Court. (Doc. 460).
[3] The Motion was filed on May 13, 2013.

involved in this litigation has finally brought plaintiffs' primary claim for relief to the forefront, and the delay cannot be traced to any intentional or negligent conduct on their part."); Atchinson v. Dist. of Columbia, 73 F.3d 418, 426 (D.C. Cir.1996) ("Consideration of whether delay is undue, however, should generally take into account the actions of other parties and the possibility of any resulting prejudice.").

Underwriters further claim that allowing an amendment would unduly prejudice them because they would be forced to serve supplemental written discovery and re-depose each of Freddie Mac's Rule 30(b)(6) witnesses, as well as at least six unspecified TBW fact witnesses on the facts related to Freddie Mac's new theory. (Doc. 495 at 4). Underwriters explain that the discovery has centered around Freddie Mac's claim for reformation based on mutual mistake, and that no discovery has been taken on Freddie Mac's new theory i.e., that the Freddie Mac Endorsement was omitted due to TBW's unilateral mistake and that Underwriters engaged in inequitable conduct. (Doc. 495 at 4, 7).

"The second, and most important, factor in deciding a motion to amend the pleadings, is whether the amendment would prejudice the nonmoving party." Minter, 451 F.3d at 1207. "Rule 15 . . . was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." United States v. Hougham, 364 U.S. 310, 316 (1960); see also Evans v. McDonald's Corp., 936 F.2d 1087, 1090–91 (10th Cir.1991) ("As a general rule, a plaintiff should not be prevented from pursuing a valid claim . . . provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits.") (internal quotations omitted). "Courts usually find prejudice only when the amendment unfairly affects the defendants 'in terms of preparing their defense to the amendment.'" Minter, 451 F.3d at 1208 (quoting Patton v. Guyer, 443 F.2d 79, 86 (10th Cir.

1971)). "Most often, this occurs when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues." Id.; see e.g., Hom v. Squire, 81 F.3d 969, 973 (10th Cir. 1996) (finding prejudicial a motion seeking "to add an entirely new and different claim to [the plaintiff's] suit [a] little more than two months before trial"); Gillette v. Tansy, 17 F.3d 308, 313 (10th Cir. 1994) (finding no evidence of prejudice when the "Petitioner's [amended] claims track the factual situations set forth in his [original] claims"); Childers v. Indep. Sch. Dist. No. 1, 676 F.2d 1338, 1343 (10th Cir. 1982) (ruling that the district court's refusal to allow an amendment was "particularly egregious in this case because the subject matter of the amendment was already alleged in the complaint"); R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749, 751–52 (10th Cir. 1975) (finding no prejudice when "[t]he amendments did not propose substantially different issues"). Moreover, "[a]ny prejudice to the nonmovant must be weighed against the prejudice to the moving party by not allowing the amendment." Bell v. Allstate Life Ins. Co., 160 F.3d 452, 454 (8th Cir. 1998).

Freddie Mac explains in its Reply that the counterclaim that is proposed to be added is merely an alternative theory for reformation based on the same facts that have been at issue from the beginning of this case i.e., the Freddie Mac Endorsement and its omission from the 2008 Primary Bond. (Doc. 508 at 3). Freddie Mac points out that Freddie Mac and TBW's witnesses have already provided the extent of their knowledge concerning Freddie Mac Endorsement and its omission from the 2008 Primary Bond, and that information regarding inequitable conduct by Underwriters is within the possession of Underwriters themselves. (Doc. 508 at 6). For this reason, Freddie Mac claims additional discovery is not needed. (Doc. 508 at 6). This argument is persuasive and "[i]n any event, the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading." U.S. For & on Behalf

of Mar. Admin. v. Cont'l Illinois Nat'l Bank & Trust Co. of Chicago, 889 F.2d 1248, 1255 (2nd Cir. 1989) (citing S.S. Silberblatt, Inc. v. East Harlem Pilot Block–Bldg. 1 Hous. Dev. Fund Co., 608 F.2d 28, 43 (2d Cir. 1979)). There is no convincing showing of significant prejudice to Underwriters, and the Court sees no reason to deny the Motion at this time as allowing this amendment will ensure that all of the issues will be before the Court. Minter, 451 F.3d at 1204 ("The purpose of the Rule [15(a)] is to provide litigants the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.") (internal quotations omitted).

Accordingly, it is **ORDERED**:

1. Freddie Mac's Motion for Leave to File an Amended Counterclaim is granted.

2. Freddie Mac will have seven days from the date of this Order to file its amended counterclaim.

3. Underwriters will have seven days from the date Freddie Mac files its amended counterclaim to file their answer to Freddie Mac's amended counterclaim.

**DATED** this 25 day of September, 2013 in Jacksonville, Florida.

/s/

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

Attorney, Kyle A. Lonergan, is directed to serve a copy of this order on interested parties and file a proof of service within three (3) days of entry of the order.