

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

www.flsb.uscourts.gov

In re:
TOUSA, INC., *et al.*,

Debtors.

Chapter 11 Cases

Case No. 08-10928-JKO

Jointly Administered

TOUSA, Inc.; Engle Homes Commercial Construction, LLC; Engle Homes Delaware, Inc.; Engle Homes Residential Construction, L.L.C.; Engle Sierra Verde P4, LLC; Engle/James LLC; LB/TE #1, LLC; Lorton South Condominium, LLC; McKay Landing LLC; Newmark Homes Business Trust; Newmark Homes Purchasing, L.P.; Newmark Homes, L.L.C.; Newmark Homes, L.P.; Preferred Builders Realty, Inc.; Reflection Key, LLC; Silverlake Interests, L.L.C.; TOI, LLC; TOUSA Associates Services Company; TOUSA Delaware, Inc.; TOUSA Funding, LLC; TOUSA Homes Arizona, LLC; TOUSA Homes Colorado, LLC; TOUSA Homes Florida, L.P.; TOUSA Homes, Inc.; TOUSA Homes Investment #1, Inc.; TOUSA Homes Investment #2, Inc.; TOUSA Homes Investment #2, LLC; TOUSA Homes Mid-Atlantic Holding, LLC; TOUSA Homes Mid-Atlantic, LLC; TOUSA Homes Nevada, LLC; TOUSA Investment #2, Inc.; TOUSA, LLC; TOUSA Mid-Atlantic Investment, LLC; TOUSA Realty, Inc.; and TOUSA/West Holdings, Inc.

Adv. Pro. No. 09-02281

Plaintiffs,

vs.

Federal Insurance Company; XL Specialty Insurance Company; Zurich American Insurance Company; The St. Paul Travelers Co., Inc.; National Union Fire Insurance Company of Pittsburgh, Pa; Arch Insurance Company; AXIS Reinsurance Company; XL Insurance (Bermuda) Ltd.; Westchester Fire Insurance Company; RSUI Indemnity Company; Allied World Assurance Company (U.S.) Inc.; and Beazley Insurance Company, Inc.

Defendants.

**MOTION OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF TOUSA, INC., ET AL. TO
INTERVENE ADVERSARY PROCEEDING No. 09-02281**

Pursuant to section 1109(b) of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 24 of the Federal Rules of Civil Procedure (the “Federal Rules”) (made applicable to these proceedings by Rule 7024 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), the Official Committee of Unsecured Creditors (the “Committee”) of TOUSA, Inc., et al. (collectively, the “Debtors”), by and through its undersigned counsel, hereby moves to intervene (the “Motion”) in Adversary Proceeding No. 09-02281-JKO (the “Coverage Action”) in support of the Debtors’ claims for declaratory judgment against the Debtors’ director and officer liability insurance carriers (collectively, the “Insurers”). In support of the Motion, the Committee respectfully states as follows.

PRELIMINARY STATEMENT

1. By the Motion, the Committee seeks to intervene in the Coverage Action. Prior to the commencement of the Coverage Action, the Court granted the Committee standing to prosecute, among other claims, the Fiduciary Duty Litigation (as defined below) against the Debtors’ current and former directors and officers. Although the issues raised in the Coverage Action and the Fiduciary Duty Litigation do not overlap, it is vital that the Committee be permitted to participate in the Coverage Action. First, the Committee must assure that its rights in the Fiduciary Duty Litigation are not prejudiced by relief sought in the Coverage Action. Second, given the Court’s recent decision to stay the Fiduciary Duty Litigation pending further events in the Coverage Action, the Committee has a clear interest in seeing that the Coverage Action is promptly and effectively litigated. Moreover, while the Committee will prosecute the Fiduciary Duty Litigation regardless of the outcome of the Coverage Action, should the

Coverage Action determine that the Insurers are obligated to cover the claims asserted in the Fiduciary Duty Litigation, the insurance proceeds would provide an additional, significant source of recovery for the estates and their unsecured creditors.

2. Pursuant to Bankruptcy Code section 1109(b), Bankruptcy Rule 7024 and Federal Rule 24, the Committee is entitled to intervene in the Coverage Action, unconditionally and as of right. Alternatively, the Committee's interests in the outcome of the Coverage Action justify it being allowed to intervene permissively. Accordingly, the Committee seeks entry of an order, in the form annexed hereto as Exhibit A, authorizing the Committee to intervene in the Coverage Action.

BACKGROUND

3. On February 27, 2009, the Committee filed a motion seeking standing (the "Standing Motion") to derivatively assert breach of fiduciary duty claims against certain of the Debtors' directors and officers (collectively, the "D&O Defendants"), as well as an aiding and abetting claim against Technical Olympic, S.A., TOUSA Inc.'s majority owner (Case No. 08-10928-JKO, D.E. #2506). The Debtors did not object to the Standing Motion, which was approved by the Court on June 1, 2009 (Case No. 08-10928-JKO, D.E. #2828).

4. Accordingly, on June 9, 2009, the Committee commenced an adversary proceeding (the "Fiduciary Duty Litigation") to pursue the claims against the Defendants set forth in the Standing Motion (Adversary Proceeding No. 09-01616-JKO, D.E. #1).

5. On November 5, 2009, the Debtors filed the Coverage Action against the Insurers seeking a determination of which of the director and officer liability insurance policies purchased by the Debtors cover the claims asserted in the Fiduciary Duty Litigation. The commencement

of the Coverage Action was necessary because the Insurers denied coverage of the claims made against the D&O Defendants in the Fiduciary Duty Litigation.

6. On October 30, 2009, the Debtors filed a motion to stay the Fiduciary Duty Litigation pending the outcome of the Coverage Action and the Debtors' appeals of this Court's October 13, 2009 order in the fraudulent conveyance litigation. On December 11, 2009, the Court entered an order staying the prosecution of the Fiduciary Duty Litigation pending further order of the Court (Adversary Proceeding No. 09-01616-JKO, D.E. #36).

ARGUMENT

A. The Committee satisfies all requirements for unconditional intervention as of right under Federal Rule 24(a)(1)

7. The Bankruptcy Rules incorporate, without change, the provisions of Federal Rule 24. *See* Bankruptcy Rule 7024 (“Rule 24 Fed. R. Civ. P. applies in adversary proceedings.”). Federal Rule 24(a) provides that, “[on] timely motion, the court must permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute.”

8. Bankruptcy Code section 1109(b) provides the Committee an unconditional right to intervene in the Coverage Action. The statute states that, “[a] party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or an indenture trustee may raise and may appear and be heard on any issue in a case under this chapter.” 11 U.S.C. § 1109(b).

9. Bankruptcy courts in this jurisdiction have held that a creditors’ committee may intervene as of right in any adversary proceeding filed by a debtor. *In re Golden Glades Reg'l Med. Ctr., Ltd.*, 147 B.R. 813, 815 (Bankr. S.D. Fla. 1992) (finding that an unsecured creditor had “the right to intervene pursuant to FRBP 7024(a)(1) and FRCP 24(a)(1)”; *In re Celotex Corp.*, 377 B.R. 345, 350 (Bankr. M.D. Fla. 2006) (holding that a “‘party in interest’ under

§ 1109(b)”, which includes creditors’ committees, “should be permitted to intervene [as of right] in this proceeding pursuant to Rule 24(a)(1)”.

10. Other courts have also have accepted the proposition that Bankruptcy Code section 1109(b) “gives a creditors’ committee an unconditional right to intervene in an adversary proceeding initiated by a trustee in a case under Chapter 11.” *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1232 (3d Cir. 1994) (citing to the seminal case on this issue, *In re Marin Motor Oil, Inc.*, 689 F.2d 445 (3d Cir. 1982)); *see also In re The Caldor Corp.*, 303 F.3d 161 (2d Cir. 2002); *In re Smart World Techs., LLC*, 423 F.3d 166 (2d Cir. 2005); *In re Overmyer*, 30 B.R. 123, 125 (Bankr. S.D.N.Y. 1983) (“where the trustee or debtor in possession has already initiated an adversary proceeding, the creditors’ committee has an absolute right to intervene as a party in interest under Code § 1109(b).”). The Committee’s Motion to intervene in the Debtors’ Coverage Action should, therefore, be granted.

B. The Committee satisfies all requirements for conditional intervention as of right under Federal Rule 24(a)(2)

11. While the Committee has the right to intervene as a party in interest under Federal Rule 24(a)(1), the Committee is also entitled to intervene as of right under Federal Rule 24(a)(2), which provides, in relevant part:

On timely motion, the court must permit anyone to intervene who: . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In order to intervene under Rule 24(a)(2), the Eleventh Circuit has held that the intervener must prove four factors, “a. the application must be timely; b. the applicant must have an interest relating to the property or transaction which is the subject of the action; c. the applicant must be so situated that disposition of this action, as a practical matter, may impede or impair his ability

to protect that interest; and d. the applicant must demonstrate that his interest is represented inadequately by the existing parties to the suit.” *In re Golden Glades*, 147 B.R. at 816 (citing *Athens Lumber Co. v. Fed. Election Comm’n*, 690 F.2d 1364, 1366 (11th Cir. 1982)).

12. With respect to the first element, the Coverage Action was filed on November 5, 2009. No date for trial has been set in the Coverage Action. Therefore, the Committee’s Motion is timely. *Id.* at 816 (holding that a motion to intervene was timely when “made well before the trial”).

13. Second, the Committee has a significant interest in the outcome of the Coverage Action. While the Committee will proceed with the Fiduciary Duty Litigation regardless of the outcome of the Coverage Action, should the Coverage Action determine that the Insurers are obligated to cover all or a portion of the claims asserted in the Fiduciary Duty Litigation, an additional, sizeable source of recovery for the estates and their unsecured creditors will be confirmed.

14. Third, in the Coverage Action, the Debtors and the Insurers will take positions and request various forms of relief from the Court, and the Court will be called upon to make various findings and conclusions. The Committee should be allowed to intervene to ensure that no legal arguments or findings prejudice the claims and arguments asserted by the Committee in the Fiduciary Duty Litigation.

15. Finally, while the Debtors may share the Committee’s interest in obtaining a finding that the claims asserted in the Fiduciary Duty Litigation are covered by insurance, the Debtors’ interests are not fully aligned with those of the Committee. Here, the Committee has a strong interest in ensuring that the Coverage Action is prosecuted promptly because the Fiduciary Duty Litigation is currently stayed until at least January 29, 2010 while the Coverage

Action proceeds (Adversary Proceeding No. 09-01616-JKO, D.E. #36). Thus, although the Debtors arguably share the Committee's interest in successful prosecution of the Coverage Action, they do not stand on the same footing with respect to the Committee's need for an expeditious resolution of the Coverage Action. The possibility of inadequate representation in the Coverage Action certainly exists. *See In re Golden Glades*, 147 B.R. at 816 ("Courts have held that the 'inadequate representation' requirement is met if the applicant shows that representation of his interest 'may be' inadequate, and the burden of making that showing should be treated as minimal." (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see also Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1259 (11th Cir. 2002) ("[T]he proposed intervenor has a minimal burden of showing that the existing parties cannot adequately represent its interest.")).

C. The Committee satisfies all requirements for permissive intervention under Federal Rule 24(b)

16. Although the Committee is entitled to intervene in the Coverage Action as of right for the reasons set forth above, if in the unlikely event the Court finds otherwise, the Committee should, in the alternative, be granted leave to intervene permissively under Federal Rule 24(b). Federal Rule 24(b)(1) provides that, "[o]n timely motion, the court may permit anyone to intervene who: . . . (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact."

17. While the Committee believes that Bankruptcy Code section 1109(b) provides the ability to intervene as of right, at the very least, the section provides the right to intervene permissively. *In re Golden Glades*, 147 B.R. at 815. Furthermore, the Committee's interest in the Coverage Action shares "common question[s] of law [and] fact."

18. Permissive intervention should be granted where neither delay nor prejudice will result. *In re Golden Glades*, 147 B.R. at 815-16 (“Courts considering whether intervention is proper pursuant to FRBP 7024(b) and FRCP 24(b) have held that Congress intended this subsection to be discretionary ‘with the primary consideration being whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.’” (citations omitted)).

19. Here, permitting the Committee to intervene in the Coverage Action will not cause delay or prejudice. Therefore, the Committee should be granted leave to intervene in the Coverage Action.

CONCLUSION

WHEREFORE, the Committee requests that the Court enter an order, substantially in the form annexed hereto as Exhibit A (i) granting the Committee leave to intervene in the Coverage Action, and (ii) providing the Committee such other and further relief as the Court may deem just, proper and equitable.

Dated: December 21, 2009

Respectfully submitted,

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

**STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.**

By: /s/ Patricia A. Redmond
Patricia A. Redmond (Florida Bar No. 303739)
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 789-3553
Facsimile: (305) 789-3395

-and-

We hereby certify that the undersigned attorneys are appearing pro hac vice in this matter pursuant to Court orders dated February 27, 2008, March 3, 2008 and November 9, 2009.

AKIN GUMP STRAUSS HAUER & FELD LLP

Daniel H. Golden (New York Bar No. 1133859)
Stephen M. Baldini (New York Bar No. 2428381)
Philip C. Dublin (New York Bar No. 2959344)
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002

Co-Counsel to the Official Committee of Unsecured Creditors of TOUSA, Inc., et al.

Certificate of Service

I CERTIFY that on December 21, 2009, a true and correct copy of the foregoing was served (i) by transmission of Notices of Electronic Filing generated by CM/ECF to those parties registered to receive electronic notices in this adversary proceeding as indicated on the attached Service List; and (ii) by undersigned counsel via first class mail postage prepaid upon all the parties as indicated on the attached Service List.

/s/ Patricia A. Redmond

PATRICIA A. REDMOND
Florida Bar No. 303739

TOUSA, Inc., Debtor, Case No. 08-10928-BKC-JKO;
TOUSA, Inc., et al., v. Federal Insurance Company, et la., Adv. Case No. 09-2281

SERVICE LIST

Electronic Service Via CM-ECF:

Christopher G Berga on behalf of Defendant Zurich American Insurance Company
cgb@lydeckerlaw.com, gh@lydeckerlaw.com

Laura Besvinick on behalf of Defendant Federal Insurance Company
lbesvinick@hhlaw.com

Michael Foster on behalf of Defendant RSUI Indemnity Company
michael.foster@kaplanzeena.com,
donna.sek@kaplanzeena.com;elizabeth.salom@kaplanzeena.com

Robert N Gilbert on behalf of Defendant National Union Fire Insurance Company of Pittsburgh,
PA
rgilbert@carltonfields.com, kdemar@carltonfields.com

Stephen C. Hunt on behalf of Defendant AXIS Reinsurance Company
shunt@arnstein.com, sch.ecfnotices@gmail.com;amroot@arnstein.com

Richard S Lubliner on behalf of Defendant Westchester Fire Insurance Company
rlubliner@melandrussin.com, ltannenbaum@melandrussin.com;mrbnefs@yahoo.com

Paul J McMahon on behalf of Defendant XL Specialty Insurance Company
pjm@pjmlawmiami.com

David A Ray on behalf of Defendant AXIS Reinsurance Company
daray@arnstein.com, amroot@arnstein.com

Peter D. Russin on behalf of Defendant Westchester Fire Insurance Company
prussin@melandrussin.com, ltannenbaum@melandrussin.com;mrbnefs@yahoo.com

Paul Steven Singerman on behalf of Plaintiff Engle Homes Commercial Construction, LLC
singerman@bergersingerman.com, efile@bergersingerman.com

Lea Souza-Rasile on behalf of Defendant Beazley Insurance Company
lrasile@shb.com

Conventional Service Via First Class Mail:

Richard L Allen
Solowsky & Allen PL
150 W Flagler St #2000
Miami, FL 33130

Ira S Bergman
Mound Cotton Wollan & Greengrass
101 NE 3 Ave #1500
Fort Lauderdale, FL 33301

Lewis K. Loss
1133 21 St NW #450
Washington, DC 20036

Joseph M. Smick
125 Broad St
New York, NY 10004

Jeffrey J. Ward
1133 21 St NW #450
Washington, DC 20036

Jeffrey Winn
125 Broad St
New York, NY 10004

Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

www.flsb.uscourts.gov

In re:
TOUSA, INC., *et al.*,

Debtors.

TOUSA, Inc.; Engle Homes Commercial Construction, LLC; Engle Homes Delaware, Inc.; Engle Homes Residential Construction, L.L.C.; Engle Sierra Verde P4, LLC; Engle/James LLC; LB/TE #1, LLC; Lorton South Condominium, LLC; McKay Landing LLC; Newmark Homes Business Trust; Newmark Homes Purchasing, L.P.; Newmark Homes, L.L.C.; Newmark Homes, L.P.; Preferred Builders Realty, Inc.; Reflection Key, LLC; Silverlake Interests, L.L.C.; TOI, LLC; TOUSA Associates Services Company; TOUSA Delaware, Inc.; TOUSA Funding, LLC; TOUSA Homes Arizona, LLC; TOUSA Homes Colorado, LLC; TOUSA Homes Florida, L.P.; TOUSA Homes, Inc.; TOUSA Homes Investment #1, Inc.; TOUSA Homes Investment #2, Inc.; TOUSA Homes Investment #2, LLC; TOUSA Homes Mid-Atlantic Holding, LLC; TOUSA Homes Mid-Atlantic, LLC; TOUSA Homes Nevada, LLC; TOUSA Investment #2, Inc.; TOUSA, LLC; TOUSA Mid-Atlantic Investment, LLC; TOUSA Realty, Inc.; and TOUSA/West Holdings, Inc.

Plaintiffs,

vs.

Federal Insurance Company; XL Specialty Insurance Company; Zurich American Insurance Company; The St. Paul Travelers Co., Inc.; National Union Fire Insurance Company of Pittsburgh, Pa; Arch Insurance Company; AXIS Reinsurance Company; XL Insurance (Bermuda) Ltd.; Westchester Fire Insurance Company; RSUI

Chapter 11 Cases

Case No. 08-10928-JKO

Jointly Administered

Adv. Pro. No. 09-02281

Indemnity Company; Allied World Assurance Company
(U.S.) Inc.; and Beazley Insurance Company, Inc.

Defendants.

**ORDER GRANTING THE MOTION OF THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS OF TOUSA, INC., ET AL.
TO INTERVENE IN ADVERSARY PROCEEDING No. 09-02281**

Upon the motion [D.E. # ____] (the “Motion”) of the Official Committee of Unsecured Creditors (the “Committee”) of TOUSA, Inc., et al. (collectively the “Debtors”) to Intervene in Adversary Proceeding No. 09-02281 pursuant to Rule 24 of the Federal Rules of Civil Procedure, incorporated by Rule 7024 of the Federal Rules of Bankruptcy Procedure, and 11 U.S.C. § 1109(b); and upon consideration of the Motion and all pleadings related thereto, and the Court having heard the statements of counsel regarding the relief requested in the Motion at a hearing before the Court on December __, 2009; and it appearing that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors and other parties in interest; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to all proper parties under the circumstances, and it appearing that no other or further notice need be provided; and any objections to the Motion having been withdrawn, resolved or overruled on the merits; and after due deliberation and sufficient cause appearing therefore, it is **ORDERED** that:

1. The Motion is GRANTED.

2. The Committee is granted the right to intervene in the Coverage Action and shall be deemed to so intervene.¹

3. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

###

Submitted by:

**STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.**

Patricia A. Redmond (Florida Bar No. 303739)
150 West Flagler Street
Miami, Florida 33130
Telephone: (305) 789-3553
Facsimile: (305) 789-3395

-and-

AKIN GUMP STRAUSS HAUER & FELD LLP

Daniel H. Golden (New York Bar No. 1133859)
Stephen M. Baldini (New York Bar No. 2428381)
Philip C. Dublin (New York Bar No. 2959344)
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002

*Co-Counsel to the Official Committee
of Unsecured Creditors of TOUSA, Inc., et al.*

Copies to:

Patricia A. Redmond

(Attorney Redmond shall upon receipt serve a copy of this Order upon all interested parties and file a certificate of service.)

###

¹ All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.