IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

	Chapter 11
In re: TAYLOR BEAN & WHITAKER MORTGAGE CORP., Debtors.	Case No. 09-07047 JAF
NICHOLAS A. CALLAHAN, JULIE WHITEAKER, ERIC E. ANDERSON, CHRIS ESCANDON, CHARLES VAN HARTSELL III, DEBRA ORLANDO, DEZI TEIANN JESSOP, WILLIAM P. HICKEY III and TANJANIKA CARTER, on behalf of themselves and all others similarly situated, Plaintiffs, v. TAYLOR BEAN & WHITAKER MORTGAGE CORP., Defendant.	Adv. Case. No. 09-00439 JAF

TAYLOR, BEAN & WHITAKER MORTGAGE CORP.'S MOTION TO DISMISS ADVERSARY CLASS ACTION COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b), made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7012(b), Defendant TAYLOR BEAN & WHITAKER MORTGAGE CORP. ("TBW"), in lieu of filing an Answer to the Adversary Class Action Complaint (the "Complaint") and expressly reserving all defenses to the claims asserted in the Complaint, hereby moves this Court for an order dismissing all claims asserted by Plaintiffs NICHOLAS A. CALLAHAN, JULIE WHITEAKER, ERIC E. ANDERSON, CHRIS

ESCANDON, CHARLES VAN HARTSELL III, DEBRA ORLANDO, DEZI TEIANN JESSOP, WILLIAM P. HICKEY III and TANJANIKA CARTER ("Plaintiffs") against TBW. In support of its Motion to Dismiss ("Motion"), TBW respectfully represents as follows:

INTRODUCTION

1. Plaintiffs, for themselves and purportedly on behalf of former employees of TBW, allege that they formerly worked in various capacities for TBW or other related entities. They seek class certification and damages against TBW based upon the contention that Plaintiffs, and others similarly situated, were terminated by TBW as part of, or as the result of, mass layoffs or plant closings ordered by TBW on or about August 5, 2009 without 60 days advance written notice of termination as required by the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101 *et seq*. Plaintiffs seek to recover 60 days wages and benefits from TBW on behalf of the putative class pursuant to 29 U.S.C. § 2104. Plaintiffs also allege that their claims are entitled to administrative and/or priority status.

2. The Complaint should be dismissed because Plaintiffs have failed to satisfy the pleading requirements to certify a class and because their claim for damages is a pre- petition claim against TBW that should be addressed in the claims administration process rather than by way of an adversary proceeding.

ARGUMENT AND CITATION TO AUTHORITY

I. Plaintiffs Have Failed To Satisfy The Pleading Requirements To Certify A Class.

3. Bankruptcy Rule 7023 provides that Federal Civil Procedure Rule 23 regarding class actions applies in adversary proceedings. To satisfy Federal Civil Procedure Rule 23, a plaintiff must establish, in part, that "there are questions of law or fact common to the class," and

that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(2), (a)(4).

4. Here, the Complaint fails to satisfy the minimum pleading requirements necessary to establish the adequacy of representation of the putative class by the putative class representatives. For example, it is unclear from the Complaint whether any or all of the named class representatives were effected by an "employment loss" at a work site that would qualify under the WARN Act's single site requirements. Whether an "employment loss" is the product of a "plant closing" or a "mass layoff" is a function of the number of employees who are affected by the employment action. See 29 U.S.C. § 2101(a)(2). A "plant closing" occurs when, among other things, at least 50 employees are terminated at a single site of employment. See id. § 2101(a)(2). A "mass layoff" occurs when there is a reduction in force that is not the result of a plant closing; and that results in an "employment loss" at a single site (1) for at least 33 percent of the employees and at least 50 employees; or (2) at least 500 employees. See id. §§ 2101(a)(3), 2101(a)(8). Only when the requisite number of persons are employed at a single site must WARN Act notice be given.[1]

5. Plaintiffs fail to identify in the Complaint whether any of the facilities where the putative class members worked sustained an "employment loss" would qualify under the WARN Act's single site requirements. Therefore Plaintiffs have failed to satisfy the pleading requirements necessary seek certification of a class.

[1] The Department of Labor, which is charged under the WARN Act with issuing regulations and guidance for employers, has issued regulations providing that employees who have been employed for fewer than six of the preceding twelve months "are not counted in determining whether plant closing or mass layoff thresholds are reached." 20 C.F.R. § 639.6(b). An employee is considered "part-time" if he was employed for (1) an average of fewer than 20 hours per week or (2) fewer than six of the twelve months preceding the date on which notice is required. 29 U.S.C. § 2101(a)(8).

6. The U.S. Supreme Court stated in General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 158-159 (1982), that the class representative must plead facts sufficient to demonstrate that he is making a claim that would provide relief to all putative class members:

> Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants. If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.

Id.

7. Here, if the putative class representatives were not employed at facilities which independently qualify as a single site under the WARN Act, then the putative class representatives are not adequate representatives of the putative class and are in conflict with those they seek to represent. Accordingly, Plaintiffs have failed to satisfy the pleading requirements sufficient to sustain a claim for class action certification under the WARN Act. See id.; see also Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 550, 557 (2007) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'") (internal citations omitted)).

8. It is clearly within the Court's discretion to dismiss the adversary proceeding at this stage. For example, in the case of In re First NLC Financial Services, LLC, 410 B.R.

726 (Bankr. S.D. Fla. 2008), the plaintiffs' claims were raised as a class action adversary proceeding and the defendant was permitted to make its challenges to the class certification immediately rather than waiting to file an objection through the traditional proof of claims objection process. Id. at 730 ("the class certification issues can be brought before the Court now, without the necessity of waiting for an objection to be filed"). Here, since the putative class representatives have not provided allegations with sufficient specificity about the TBW facilities where they worked, TBW's challenge to class certification is appropriate and timely. Accordingly, this Court should apply the pleading requirements set forth above to the Complaint and dismiss the Complaint. See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1270 (11th Cir. 2009) (finding plaintiffs failed to satisfy pleading standard under Iqbal by pleading vague and conclusory allegations in Complaint; instructing district court to dismiss Complaint for failure to state a claim upon which relief may be granted); Jackson v. Wal-Mart Stores, Inc., No. 6:09-cv-777-Orl-28GJK, 2009 U.S. Dist. LEXIS 64939, at *5-6 (M.D. Fla. July 28, 2009) (granting motion to dismiss for failure to satisfy pleading standard imposed under Iqbal).

II. The Claims Process, Not an Adversary Proceeding, is the Appropriate Process for Adjudicating Plaintiffs' Claims

9. Section 101(5) of the Bankruptcy Code defines "claim" to include: "(A) right to payment, whether or not such right to payment is reduced to judgment, liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured or unsecured…." The definition of "claim" is broadly construed and applied. See Penn. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990) ("Congress chose expansive language" in defining "claim").

10. Courts have consistently held that damages under the WARN Act are a statutory form of severance pay based solely on lack of notice. See Henderson v. Powermate Holding

Corp. (*In re* Powermate Holding Corp.), 394 B.R. 765, 775 (Bankr. D. Del. 2008); Oil, Chemical, & Atomic Workers v. Hanlin Group, Inc. (*In re* Hanlin Group, Inc.), 176 B.R. 329, 344 (Bankr. D. N.J. 1995). Accordingly, an employee's right to such damages vests at the time of the termination (assuming the employee has a valid WARN Act claim). Id. Here, Plaintiffs claim that TBW terminated their employment on or about August 5, 2009. See Compl. at ¶ 26. Thus, according to the Complaint, Plaintiffs' alleged WARN Act claims vested on August 5, 2009. Plaintiffs' allegedly vested claim to back pay certainly falls under the broad definition of a pre-petition "claim" pursuant to § 101(5). Pursuant to § 501 of the Bankruptcy Code, Plaintiffs may of course file proofs of claim. All such proofs of claim can and will be resolved as part of TBW's claims administration process.

11. Rule 23(b)(3) of the Federal Rules of Civil Procedure requires that the court find "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Here, each alleged WARN Act plaintiff may bring their proof of claim in the claims administration process. Beyond bald assertions, the Complaint contains no allegation that the adversary class action proceeding is superior to the method provided by Congress under Section 501 of the Bankruptcy Code. See In re Bally Total Fitness of Greater New York, 411 B.R. 142, 145 (S.D.N.Y. 2009) (finding that the bankruptcy court "did not remotely abuse its discretion" by finding that the class treatment was neither "'superior to other available methods for fairly and efficiently adjudicating the controversy'" nor that "'the questions of law or common fact to class members predominate over any questions affecting individual members'"). In that case, a wage-and-hour case, the court stated:

> Regarding plaintiff's failure to show the superiority of class treatment, it bears emphasizing that where, as here, a bankruptcy proceeding "consolidates all claims in one forum and allows claimants to file proofs of claim without counsel and at virtually no cost," many of the perceived advantages of class treatment drop

> away. Individual creditors in bankruptcy proceedings "can participate in the distribution [of the estate] for the price of a stamp. They need only fill out and return the proof of claim sent with the Bar Date Notice," often avoiding discovery and fact-finding altogether. Moreover, these small claims are commonly "deemed allowed," without objection, under § 502(a) of the Bankruptcy Code, thus avoiding altogether the costs of discovery and fact-finding that, even in a class action, are considerable.

Id. at 145-46 (internal citations omitted).

12. Although some courts have allowed WARN Act claims to proceed by way of adversary proceedings, see, e.g., Cain v. Inacom Corp., 2001 Bankr. LEXIS 1299 (Bankr. D. Del. 2001), recent cases have found the claims process to be more efficient and appropriate. See Memo Opinion at 7, Mondragon v. Circuit City Stores, Inc. (*In re* Circuit City Stores, Inc.), No. 09-03073 (Bankr. E.D. Va. Jan. 7, 2010) ("the best place to adjudicate whether or not the Plaintiff is entitled to back pay under the WARN Act is in the bankruptcy claims allowance and disallowance process, rather than in the context of an adversary proceeding"); Binford v. First Magnus Fin. Corp. (*In re* First Magnus Fin. Corp), 403 B.R. 659, 664 (Bankr. D. Ariz. 2009) ("the adversarial process [is] duplicative of the normal bankruptcy claims procedure").

13. In the present case, an adversary proceeding is unnecessary because issues presented in the Complaint can and will be adjudicated in the claims process, which provides a comprehensive set of rules for adjudication similar to those of an adversary proceeding. See Fed. R. Bankr. P. 3001 – 07; see also Fed. R. Bankr. P. 9014 (providing for most of the service and discovery rules in the claims process that are applicable to an adversary proceeding).

14. Some courts have found that WARN Act claims may proceed as adversary proceedings if the claimants have been certified as a class. See Kettell v. Bill Heard Ent., Inc. (*In re* Bill Heard Ent., Inc.), 400 B.R. 795, 805 (Bankr. N.D. Ala. 2009); Grady v. Quantegy, Inc. (In re Quantegy Inc.), 343 B.R. 689, 693 (Bankr. M.D. Ala. 2006). Here, although interim

counsel has been appointed pursuant to Fed. R. Civ. P. 23(g), there has not been, and may never be, class certification. See Order, Docket Entry No. 26 (Jan. 11, 2010). When the action has not yet been certified as a class action, it is premature to conclude that an adversary proceeding is the most efficient form of claim resolution. See First NLC Financial Services (a motion to dismiss the adversary proceeding was properly brought pending the result of the class action certification); Burgio v. Protected Vehicles Inc. (*In re* Protected Vehicles, Inc.) 392 B.R. 633, 642 (Bankr. D. S.C. 2008)(stating that the ultimate answer to the most effective case management depends on the class certification outcome).

15. Inasmuch as the putative class in the present case is not certified and the claims may be resolved as part of TBW's claims resolution process, the Court should dismiss the adversary proceeding.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant TBW requests that this Court grant TBW's Motion to Dismiss Adversary Class Action Complaint, and grant such other relief as is just under the circumstances.

Respectfully submitted, this 20th day of January 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Motion to Dismiss Adversary Class Action Complaint* has been furnished by the Court's CM/ECF electronic mail system and/or by electronic mail to:

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This 20th day of January 2010.

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