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

In re: TAYLOR BEAN & WHITAKER MORTGAGE CORP., *et al.,* Debtors.	Chapter 11 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 RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Taylor Bean & Whitaker Mortgage Corp. ("Taylor Bean")[1] hereby responds to Plaintiffs' Motion for Class Certification ("Motion") and shows the Court as follows[2]:

INTRODUCTION

For the reasons set forth below, Plaintiffs' Motion for Class Certification should be denied. The scope of class the Named Plaintiffs seek to represent is overly broad and fails to satisfy the requirements of Fed. R. Civ. P. 23 because it includes (1) employees of entities other than Taylor Bean and (2) employees who reported to work locations with fewer than 50 employees during the relevant time period. Even if the Court grants Plaintiffs' Motion for Class Certification, Plaintiffs' proposed Notice should not be approved for the reasons set forth below.

PROCEDURAL HISTORY

This case arises under the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 et seq. Plaintiffs claim that their employment was terminated on or about August 5, 2009, as part of a mass layoff or plant closing without advance notice allegedly required by the WARN Act.

On August 24, 2009, Taylor Bean filed for Chapter 11 bankruptcy protection. The same day, Plaintiffs filed their Adversary Class Action Complaint ("Complaint").

[1] Taylor Bean is improperly identified in Plaintiffs' Complaint as Taylor Bean d/b/a Maslow Insurance Agency, LLC, d/b/a Security One Valuation Services, LLC d/b/a Platinum Community Bank and other related entities.

[2] Taylor Bean's Motion to Dismiss is currently pending before the Court. Taylor Bean continues to assert the defenses raised in that Motion and does not waive them by responding to Plaintiff's Motion. Taylor Bean will not repeat in this brief the arguments raised in its Motion to Dismiss. Taylor Bean does, however, incorporate by reference into this brief the argument raised therein that Plaintiffs can and should be required to file a proof of claim, in lieu of proceeding with this adversary proceeding.

Taylor Bean filed a Motion to Dismiss Plaintiffs' Complaint on January 20, 2010. Taylor Bean's Motion to Dismiss is pending before the Court.

Taylor Bean has not yet answered Plaintiffs' Complaint and the formal discovery period applicable to this case has not yet commenced. Nonetheless, on March 25, 2010, Plaintiffs filed a Motion for Class Certification. Plaintiffs' Motion is accompanied by nine (9) nearly identical declarations, one from each Named Plaintiff. The Named Plaintiffs claim that, when their employment was terminated, they reported to the following work locations:

- 315 NE 14th Street, Ocala, Florida (Plaintiff Callahan);
- 9085 E. Mineral Circle, Suite 160, Centennial, Colorado (Plaintiff Escandon);
- 237 W. Evans Street, Florence, South Carolina (Plaintiff Van Hartsell);
- 6875 South 900 East, Midvale, Utah (Plaintiff Jessop);
- 1760 The Exchange, Suite 200, Atlanta, Georgia (Plaintiff Orlando);
- Crowne Point Place, Cincinnati, Ohio (Plaintiff Anderson);
- 315 NE 14th Street, Ocala, Florida (Plaintiff Whiteaker);
- 1 S. Summit Avenue, Suite 204, Oakbrook Terrace, Illinois (Plaintiff Carter); and
- 35 S. Braintree Hill Office Park, Suite 402, Braintree, Massachusetts (Plaintiff Hinkey).

The Named Plaintiffs' declarations do not discuss any facts pertaining to the declarant's relationship with employees at other work locations. Nor do these declarations discuss any facts that bear on Taylor Bean's alleged control over its subsidiaries (including

Maslow Insurance Agency, LLC ("Maslow"); Security One Valuation Services, LLC ("Security One"); or Platinum Community Bank ("PCB")). Instead, the declarations simply (and erroneously) cross-reference a definition of Taylor Bean that appears in Plaintiffs' Complaint as including these subsidiaries. See Declarations of each Named Plaintiff at n.1.

ARGUMENT

I. CLASS CERTIFICATION SHOULD BE DENIED.

Plaintiffs seek certification of a class and appointment of the 9 Named Plaintiffs (Nicholas Callahan, Julie Whiteaker, Eric Anderson, Chris Escandon, Charles van Hartsell III, Debra Orlando, Dezi Jessop, William Hinckley and Tanjanika Carter) as class representatives. Plaintiffs' Motion, based on their proposed class, should be denied because it is overly broad.

A. Legal Standard

The initial burden of proof to establish the propriety of class certification rests with the advocate of the class. Rutstein v. Avis Rent-A-Car Sys. Inc., 211 F.3d 1228, 1233 (11th Cir. 2000); Danielson v. DBM, Inc., No. 1:05-cv-2091-WSD, 2007 U.S. Dist. LEXIS 18609 (N.D. Ga. Mar. 15, 2007).

> [W]hile it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements. . . . [E]vidence pertaining to the requirements embodied in Rule 23 is often intertwined with the merits, making it impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation.

Danielson, 2007 U.S. Dist. LEXIS 18609 (N.D. Ga. Mar. 15, 2007) (quoting Cooper v. Southern Co., 390 F.3d 695, 712 (11th Cir. 2004)).[3]

To maintain this case as a class action, Plaintiffs must satisfy, at a minimum, all requirements of Federal Rule of Civil Procedure 23(a). See Danielson, 2007 U.S. Dist. LEXIS 18609, at *7-8. The requirements of Rule 23(a) are:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. These four requirements "are designed to limit class claims to those 'fairly encompassed' by the named plaintiffs' individual claims." Piazza v. Ebsco Indus., Inc., 237 F.3d 1341, 1346 (11th Cir. 2001). As discussed below, Plaintiffs have failed to satisfy those requirements.

B. The Evidence Does Not Establish That The Proposed Class Consists of 3,000 Employees.

Rule 23(a)(1) requires that the class be so "numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs claim that the proposed class

[3] When and if Taylor Bean is required to answer Plaintiffs' Complaint, it anticipates raising as a defense to the Complaint the unforeseen business circumstances defense to WARN Act liability provided in 29 U.S.C. § 2102(b)(2), among other defenses. However, consistent with the applicable standard for class certification, Taylor Bean will not discuss the merits of these defenses in responding to Plaintiffs' Motion for Class Certification. See Danielson, 2007 U.S. Dist. LEXIS 18609, at *6-7.

consists of an estimated 3,000 employees. (Plaintiffs' Motion for Class Certification ("Pls. Mot.") at 7.) However, Plaintiffs cite no evidence in support of this argument. The Named Plaintiffs' declarations, which are attached to Plaintiffs' Motion for Certification, are silent as to any facts that would establish that the class of employees in this case consists of approximately 3,000 employees.[4]

Plaintiffs' estimate that 3,000 employees would be part of this class action is unreasonable. In reaching this number, Plaintiffs have apparently attempted to guess how many employees were employed, during the relevant time period, by either:

- Taylor Bean;
- Maslow;
- Security One;
- PCB; or
- "other related entities" (which Plaintiffs do not define).

See Pls. Mot. at n.1 (referencing this definition of "Defendant"). However, neither Plaintiffs' Complaint nor their Motion for Class Certification cites, as it must, any legal theory under which Taylor Bean is supposedly responsible for the action of those entities.[5] See U.S. v. Bestfoods, 524 U.S. 51, 68 (2003) (discussing general principle that corporation is not liable for acts of its subsidiaries); see also Pearson v. Component Tech.

[4] Plaintiffs' Complaint states that the undersigned counsel at that time was retained to represent 600 former employees of Taylor Bean and its subsidiaries.

[5] Plaintiffs have not named Maslow, Security One, PCB or any other entity as a Defendant in this case. Rather, the only Defendant in this case is Taylor Bean & Whitaker Mortgage Corp. Taylor Bean denies that it is responsible for the actions of those entities.

Corp., 247 F.3d 471, 484 (3d Cir. 2001) ("mere ownership of a subsidiary does not justify the imposition of liability on the parent"). Accordingly, there is no legal basis for Plaintiffs' claim that employees of these entities should be counted along with Taylor Bean's employees for purposes of determining whether the numerosity requirement is satisfied.

Further, Plaintiffs appear to be speculating as to the total number of all employees of Taylor Bean and other entities, regardless of whether those employees worked at single sites of employment with 50 or more employees. To recover under the WARN Act, the employee must, among other requirements, have been employed at a "single site of employment" with 50 or more employees during the relevant time period. See 29 U.S.C. § 2101(a)(2), (3) (defining terms "plant closing" and "mass layoff" under WARN Act). Employees who worked at a "single site of employment" with fewer than 50 employees during the relevant time period have no right to recover under the WARN Act. See id. Thus, those employees should not be included in determining whether the numerosity requirement is satisfied. See Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1280 (8th Cir. 1996) ("workers who suffer an employment loss at another single site of employment are not counted in determining whether plant closing or mass layoff coverage thresholds are met"). For those reasons, Plaintiffs' Motion, as presented, is not sufficient to establish the numerosity requirement. See Morrison v. Booth, 763 F.2d 1366, 1371 (11th Cir. 1985) (bare allegations not sufficient to establish requirements of Rule 23); Grillasca v. Hess Corp., No. 8:05-cv-1736-T-17-TGW, 2007 U.S. Dist. LEXIS 53356, at *24-26 (M.D. Fla. July 24, 2007) (bold assertions and mere speculation are

insufficient to meet numerosity requirement of F.R.C.P. 23(a)); Kuehn v. Cadle Co., 245 F.R.D. 545, 549-50 (M.D. Fla. 2007) (same); Access Now, Inc. v. Walt Disney World Co., 211 F.R.D. 452, 454 (M.D. Fla. 2001) (same).

C. Plaintiffs Have Failed to Establish That the Claims and Defenses of the Representative Parties Are Typical of the Claims or Defenses of their Proposed Class.

Plaintiffs have failed to satisfy the typicality requirement. Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).

Here, the Named Plaintiffs are all former employees of Taylor Bean. The Named Plaintiffs' declarations provide no facts to establish that they were employed by Maslow, Security One, PCB, or the "other related entities." Instead, they consist of only a conclusory allegation that Taylor Bean does business as those entities. This allegation is insufficient and should be disregarded. See Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1228 (11th Cir. 1999) (rejecting conclusion contained in affidavit for failure to state supporting facts); Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("This court has consistently held that conclusory allegations without specific supporting facts have no probative value."); cf. Simpkins v. Pulte Home Corp., No. 6:06-CV-1789-ORL-18KRS, 2008 U.S. Dist. LEXIS 64270, at *8-9 (M.D. Fla. Aug. 21, 2008) (collecting cases in which courts have denied motion for certification based on conclusory affidavits of a few employees).

According to their declarations, the Named Plaintiffs worked at the following work locations:

- 315 NE 14thStreet, Ocala, Florida (Plaintiff Callahan);
- 9085 E. Mineral Circle, Suite 160, Centennial, Colorado (Plaintiff Escandon);
- 237 W. Evans Street, Florence, South Carolina (Plaintiff Van Hartsell);
- 6875 South 900 East, Midvale, Utah (Plaintiff Jessop);
- 1760 The Exchange, Suite 200, Atlanta, Georgia (Plaintiff Orlando);
- Crowne Point Place, Cincinnati, Ohio (Plaintiff Anderson);
- 315 NE 14th Street, Ocala, Florida (Plaintiff Whiteaker);
- 1 S. Summit Avenue, Suite 204, Oakbrook Terrace, Illinois (Plaintiff Carter); and
- 35 S. Braintree Hill Office Park, Suite 402, Braintree, Massachusetts (Plaintiff Hinkey).

Yet, these Named Plaintiffs seek to represent a potentially nationwide class of individuals (including non-Taylor Bean employees, such as employees of Maslow, PCB, and Security One) and employees who reported to work locations with fewer than 50 employees during the relevant time period and have no viable WARN Act claim in this proceeding.

Simply put, the Named Plaintiffs' claims are not typical of all of the employees they seek to represent. For example, Plaintiff Callahan's claim against Taylor Bean is unlike the claim of an employee of Maslow who was terminated in another part of the country ("Employee X"). In fact, unlike Plaintiff Callahan, to recover from Taylor Bean, Employee X would have to establish a legal theory upon which to hold Taylor Bean responsible for his employer's alleged violation of the WARN Act. Further, if Employee

X worked at an office with less than 50 employees during the relevant time period, Employee X would have no claim against Taylor Bean at all, thereby further making his claim atypical of Plaintiff Callahan's claim. The Named Plaintiffs' claims, therefore, are not typical of the claims of the broad class of persons they seek to represent. Thus, Plaintiffs' proposed class, as defined, fails to satisfy the typicality requirement, and Plaintiffs' Motion should be denied on this ground. See Butler-Jones v. Sterling Casino Lines, L.P., No. 6:08-cv-01186-Orl-35DAB, 2008 U.S. Dist. LEXIS 102256, at *6 (M.D. Fla. Dec. 18, 2008) (denying motion for class certification in WARN Act case where proposed class definition was inadequate and overly broad and could potentially include individuals who were terminated for reasons not covered under the WARN Act).

D. Plaintiffs Have Failed to Establish That the Representative Parties Will Fairly or Adequately Protect the Interests of Their Proposed Class.

To fairly and adequately protect the interests of the proposed class, the Court must determine that the named class representatives "are free from conflicts of interest with the class they seek to represent." Amchem Prods. v. Windsor, 521 U.S. 591, 625 (1997). An antagonistic interest need not actually exist between the representative and the class for class certification to be inappropriate; a potential antagonistic interest is enough. Almonor v. Bankatlantic Bancorp, Inc., 261 F.R.D. 672, 676 (S.D. Fla. 2009).[6]

[6] The Named Plaintiffs' declarations all state (in Paragraph 12), "I have no conflict of interest with other class members." These conclusory statements are not sufficient to establish this fact. In fact, courts routinely disregard affidavits and declarations which contain conclusory statements. See Simpkins, 2008 U.S. Dist. LEXIS 64270, at *8-9 (collecting cases in which courts have denied motion for certification based on conclusory affidavits of a few employees).

Here, the Named Plaintiffs cannot adequately represent the interests of the entire scope of employees who worked at work locations with fewer than 50 employees during the relevant time period, as those employees clearly have no right to recover under the WARN Act. See Auto Ventures v. Moran, No. 92-436-CIV-KEHOE, 1997 U.S. Dist. LEXIS 7037, at *12-13 (S.D. Fla. Apr. 3, 1997) (class certification of present and former Toyota franchisees denied where the "class collapses into distinct groups of winners and losers"). Further, Plaintiffs have no incentive to prove that those employees should recover in the same manner as the Named Plaintiffs. See Presser v. Key Food Stores Co-Operative, Inc., No. 01-CV-8059, 2006 U.S. Dist. LEXIS 50755, at *39-40 (E.D.N.Y. July 25, 2006) (finding employee had no incentive to prove issues that must be litigated for other employees' WARN Act claims, but not their own, to be addressed). Accordingly, Plaintiffs have not established that they are free from conflicts of interests with the persons they seek to represent, and their Motion for Class Certification should be denied. See Danielson, 2007 U.S. Dist. LEXIS 18609, at *21-22 (motion for class certification denied where Plaintiffs failed to demonstrate that they would adequately represent the purported class).[7]

II. THE NAMED PLAINTIFFS' PROPOSED NOTICE SHOULD NOT BE ISSUED.

If the Court grants Plaintiffs' Motion for Class Certification (which it should not, because it is overly broad), the Court should not issue the Notice of Class Action

[7] In addition, it is Taylor Bean's position that any employee who is found to have engaged in fraud or criminal misconduct should not share in any recovery under the WARN Act.

("Notice") proposed by Plaintiffs because it is likewise overly broad for the reasons discussed below.

A. The Notice Poorly Identifies the "Defendant" in this Proceeding.

Plaintiffs' proposed Notice should not be approved, as drafted, because the Notice does not clearly identify the scope of the proposed class. Plaintiffs' proposed Notice refers to "Taylor, Bean & Whitaker Mortgage Corp. and affiliated entities" as the "Defendant" (singular). This is inaccurate and misleading. Taylor Bean is the only entity that has been served with a Complaint and summons in this proceeding. No subsidiaries of Taylor Bean are proper parties to this case. Plaintiffs' Notice improperly implies, as stated in their brief, that Taylor Bean does business through its subsidiaries. Plaintiffs have not set forth any legal theory in their Complaint or their Motion for Class Certification upon which Taylor Bean is liable for the actions of its subsidiaries. Nor do Plaintiffs propose informing any prospective class members of any supposed theories under which Taylor Bean may supposedly be held liable for the actions of its subsidiaries or otherwise liable to the proposed class of Plaintiffs who never worked for Taylor Bean.

A reasonable former employee of Maslow, PCB, and any other subsidiary of Taylor Bean who receives a Notice of Class Action in this case has a right to know whether the appointed class counsel has any viable legal theory or argument upon which former employees of a Taylor Bean subsidiary may (arguably) be allowed to recover from Taylor Bean in this case. Indeed, this information would be important to know before a former employee of a Taylor Bean subsidiary attempts to make an informed decision on whether or not to: (a) do nothing and be bound by the resolution of the

instant proceeding or (b) submit the attached Exclusion Form and/or seek recovery for his or her claims through other means. Yet, Plaintiffs' proposed notice provides no such information.

B. The Scope of the Class Is Overbroad in Its Geographic Scope and Its Inclusion of Non-Employees.

The attached Notice is also overly broad in its reference to "persons" who worked at or reported to Taylor Bean's facilities. Such description would improperly encompass non-employees, such as independent contractors. Further, the Notice contains no geographic scope and is not reasonably tailored to those single sites of employment with 50 or more employees. See 29 U.S.C. § 2101(a)(2), (3) (defining terms "plant closing" and "mass layoff" under WARN Act). Accordingly, Plaintiffs' proposed notice should not issue as drafted. Instead, (if notice is issued to a class in this case) such notice should be more transparent with respect to the supposed basis for imposing liability on Taylor Bean for the actions of its subsidiaries and should be reasonably tailored to persons who may conceivably have WARN Act claims in this case (as opposed to former non-employees and employees who reported to locations with 50 employees during the relevant time period).

CONCLUSION

As demonstrated above, the scope of Plaintiffs' proposed class is inappropriate and will pose serious obstacles to the management of a Rule 23 class action. "[W]here the court finds, on the basis of substantial evidence as here, that there are serious problems *now appearing*, it should not certify the class merely on the assurance of

counsel that some solution will be found." In re Hydrogen Peroxide Antitrust Litigation, No. 07-1689, 2008 U.S. App. LEXIS 26871, at *38-39 (3d Cir. Dec. 30, 2008) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 191 (3d Cir. 2001)). For that reason, and for the reasons discussed herein, the Court should **DENY** Plaintiffs' Motion for Class Certification either with or without prejudice.

Respectfully submitted, this 26th day of April 2010.

By: /s/ Jeffrey W. Kelley
Jeffrey W. Kelley
Georgia Bar No. 412296
jeffrey.kelley@troutmansanders.com
Michael D. Kaufman
Georgia Bar No. 409195
michael.kaufman@troutmansanders.com
TROUTMAN SANDERS LLP
Bank of America Plaza
600 Peachtree Street, NE
Suite 5200
Atlanta, GA 30308-2216
Telephone: 404.885.3000
Facsimile: 404.885.3900

Attorneys for Defendant
TAYLOR BEAN & WHITAKER
MORTGAGE CORP.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **TAYLOR BEAN & WHITAKER MORTGAGE CORP.'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** has been furnished by the Court's CM/ECF electronic mail system and/or by electronic mail to:

Jason B. Burnett, Esq.
Kenneth B. Jacobs, Esq.
GRAY ROBINSON, P.A.
1100 Bank of America Tower
50 North Laura Street
Jacksonville, Florida 32202
jburnett@gray-robinson.com

Jack A. Raisner, Esq.
Rene S. Roupinian, Esq.
OUTTEN & GOLDEN LLP
3 Park Avenue, 29th Floor
New York, New York 10016
rroupinian@outtengolden.com

This 26th day of April 2010.

/s/ Jeffrey W. Kelley
Jeffrey W. Kelley