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

In re:	Chapter 11
TAYLOR, BEAN & WHITAKER MORTGAGE CORP., REO SPECIALISTS, LLC, and HOME AMERICA MORTGAGE, INC.,	Case No. 3:09-bk-07047-JAF Case No. 3:09-bk-10022-JAF Case No. 3:09-bk-10023-JAF
Debtors.	Jointly Administered Under Case No. 3:09-bk-07047-JAF
TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,	Case No. 3:09-bk-07047-JAB
Applicable Debtor,	
v.	
CENTURION ASSET PARTNERS, INC.	
Claimant.	

OBJECTION TO CLAIM NO. 3229
FILED BY CENTURION ASSET PARTNERS, INC.

IMPORTANT NOTICE TO CREDITOR:
THIS IS AN OBJECTION TO YOUR CLAIM

This objection seeks to disallow your claim. Please read this objection carefully to identify which claim is objected to and what disposition of your claim is recommended.

If you disagree with the objection or the recommended treatment, you must file a written response WITHIN 30 DAYS from the date of service stated in this objection, explaining why your claim should be allowed as presently filed, and you must mail a copy to the undersigned attorneys OR YOUR CLAIM MAY BE DISPOSED OF IN ACCORDANCE WITH THE RECOMMENDATION IN THIS OBJECTION.

Any written response must contain the case name and case number, and must be filed with the Clerk of the United States Bankruptcy Court, Bryan Simpson United States Courthouse, 300 North Hogan Street, Suite 3-350, Jacksonville, FL 32202 with a copy to Jeffery W. Cavender, Esq., Troutman Sanders LLP, 600 Peachtree Street N.E, Suite 5200, Atlanta, GA 30308-2216.

Neil F. Luria, as Plan Trustee ("Plan Trustee") for the Taylor, Bean & Whitaker Plan Trust (the "Plan Trust"), by and through undersigned counsel, hereby files this objection (the "Objection") pursuant to 11 U.S.C. § 502, Rule 3007 of the Federal Rules of Bankruptcy Procedure, and Local Rule 3007-1. As addressed in more detail below, the Plan Trustee objects to Claim No. 3229 (the "Claim") filed by Centurion Asset Partners, Inc. ("Centurion"). In support of his Objection, the Plan Trustee respectfully shows as follows:

THE HISTORY OF THIS CLAIM

1. On or about August 21, 2009—three days prior to the commencement of the Chapter 11 bankruptcy case by Taylor, Bean & Whitaker Mortgage Corp. ("TBW" or "Debtor") and two days prior to the resignation of Debtor's prepetition officers and directors, the appointment of Debtor's new board of directors and the appointment of Neil Luria as the Debtor's Chief Restructuring Officer (the "CRO")—the Debtor (through one of its prepetition and now-resigned and incarcerated officers) allegedly entered into three related contracts: (1) that certain Real Estate Purchase and Sale Agreement with Centurion (the "Real Estate Agreement"); (2) that certain related Master Fee Agreement (the "Fee Agreement"), and (3) that certain related REO Bulk Package Sale/Escrow Instructions (the "Escrow Instructions," which collectively with the Fee Agreement and the Real Estate Agreement is called the "Agreement," and is attached hereto as Exhibit A).

2. The Agreement states that the Debtor agreed to sell to Centurion, and Centurion agreed to buy from the Debtor, approximately 3,900 real estate owned properties (the "Properties"), which sale was to be completed and closed on September 15, 2009. Agreement, §§ 2.1, 4.1. Under the purported Agreement, Centurion was to pay $548,482,206.60 (the "Purchase Price") for the Properties. The agreed list price was $806,591,333.35 (the "List Price")

[Id. § 2.2.], and the Purchase Price was purported to represent 68% of the List Price for the Properties. Id. Importantly, the CRO and his staff discovered shortly after the petition date that the Debtor did not own or have authority to sell approximately 2,000 of the Properties (the "Wells Fargo Properties"). [Dckt. No. 532, p. 6]. Instead, the Wells Fargo Properties were owned by various securitization trusts, of which Wells Fargo was the Master Servicer, and for which TBW acted as servicer prior to the termination of its servicing rights. TBW was not in a position to offer the Wells Fargo Properties for sale.

3. The Agreement also provided that TBW had agreed to pay 3.5% of the Purchase Price to Kyle Randsom, Brett Miles, Bryan Kofford, and Rob McFadden (the "Intermediaries") for so-called "Intermediary Fees" in connection with the sale of the property (the "Intermediary Fees").

4. The Agreement also contained purported warranties by TBW and, if closed, would have purported to place repurchase and indemnity obligations upon the Debtor. Id. Art. III and §§ 7.1, 7.2.

5. Finally, for purposes of this summary, the Agreement provided for a division of the Intermediary Fees among certain fee representatives designated in the contract as follows: 2.5% of the Purchase Price going to Centurion's representatives; 0.5% of the Purchase Price going to the Intermediaries; and 0.5% of the Purchase Price going to TBW's representative. Fee Agreement, § 1.B. The Parties to the Agreement also specified the use of a specific escrow agent and a specific facilitator with respect to the transaction. Id. § 1.C. The escrow agent and facilitator are identified in the Escrow Instructions as Mr. Caelo T. Marroquin, an attorney who was apparently a sole

practitioner in California, and Clear Title of Florida, a company having ties to TBW's former Chairman and majority shareholder, Lee Farkas.

6. Upon learning of the existence of the Agreement on or about the petition date, the CRO, through his representatives, while skeptical of the origins and legitimacy of the Agreement, contacted Centurion in order to explore converting the Agreement into a stalking horse contract for an asset sale under § 363 of the Bankruptcy Code. The Debtor made it clear to Centurion early in the postpetition discussions that the form of the Agreement, including but not limited to the Intermediary Fees, the warranties, repurchase obligations and indemnifications by Debtor, the selection of the escrow agent and facilitator and the agreement to sell Properties the Debtor had no right to sell, was unacceptable and would need to be renegotiated to a standard purchase and sale agreement, subject to Bankruptcy Court approval. Moreover, during the course of those discussions, the amount that Centurion indicated that it might be willing to pay for the Properties dramatically decreased. As the discussions progressed, the Debtor learned that Centurion's funding sources (which were not parties to the Agreement), not Centurion, controlled whether and how much funding Centurion would be able to produce at any closing. The Debtor thus concluded, in its business judgment, that Centurion would not voluntarily pay anything close to the Purchase Price for the Properties and could not be compelled to specifically perform an agreement to purchase without the consent of its non-party funding sources, even if the other issues identified above could be resolved.

7. On October 9, 2009, Centurion filed a Motion to Compel Assumption or Rejection of Executory Contract [Dckt. No. 427], requesting that the Debtor elect whether to assume or reject the Agreement.

8. On October 27, 2009, the Debtor filed its Motion to Reject Executory Contracts With Centurion Asset Partners, Inc. [Dckt. No. 532] seeking to reject the Agreement.

9. The Debtor's Motion to Reject, while opposed by Centurion [Dckt. No. 576], was granted by the Bankruptcy Court by an order entered on November 10, 2009 [Dckt. No. 623].

10. Following extensive discussions with numerous interested parties—including Centurion—the Debtor ultimately selected Selene RMOF REO Acquisition II LLC ("Selene") as stalking horse bidder for the Properties that the Debtor owned and had authority to sell. Pursuant to sale procedures approved by the Bankruptcy Court, the Debtor conducted an auction of 1,046 of the Properties on December 11, 2009, and Selene was the highest bidder for the Properties at the auction. [Dckt. No. 766]. Despite ample opportunity to qualify for the auction and to submit competing bids for the Properties, Centurion did not submit any bids or otherwise participate in the auction. On December 17, 2009, the Bankruptcy Court entered an order approving the sale of certain of the Properties to Selene for the purchase price of $81,222,849.00. [Dckt. No. 802]. In approving the sale, the Bankruptcy Court specifically held that the sales process used by the Debtor "afforded interested purchasers a full, fair and reasonable opportunity to make an offer to purchase the [P]roperties" and further held that the sale to Selene "(i) is fair and reasonable; (ii) is the highest and best offer for the Properties, and (iii) will provide a greater recovery for the Debtor's creditors than would be provided by any other practical, available alternative." Id. at pp. 3 and 5.

THE CLAIM

11. On June 15, 2010, Centurion filed its Claim alleging damages in the amount of $144,393,609.01. The detail attached to the Claim provides a rough breakdown of the Claim;

Centurion seeks $141,153,483.34 for alleged lost profits and $3,240,125.67 for purported costs of due diligence. For the reasons set forth below the Plan Trustee objects to the Claim in its entirety and seeks the entry of an order disallowing the Claim.

THE OBJECTIONS

A. The Claim Should be Disallowed Because It Relates to an Unenforceable Agreement Executed Under Highly Suspicious Circumstances

12. As an initial matter, the Claim should be disallowed because it is based on an unenforceable agreement which was executed under highly suspicious circumstances on the eve of TBW's bankruptcy case. TBW ceased substantially all of its operations on August 5, 2009, two days after a raid of its corporate headquarters by the Federal Bureau of Investigations and the Department of Justice. All of the company's senior officers, except for the company's in-house general counsel, resigned immediately prior to the bankruptcy filing, and all of the members of the Debtor's board of directors resigned and were replaced by a new, independent board of directors at approximately the same time.

13. The Agreement was purportedly executed on August 21, 2009, three days prior to TBW's bankruptcy filing on August 24, 2009, by Paul Allen, the Debtor's former chief executive officer, who resigned his position with the company on or about August 23, 2009. Mr. Allen is currently incarcerated in the Federal Bureau of Prisons, having pled guilty to conspiring to commit bank fraud, wire fraud and securities fraud, and making false statements in connection with his role as chief executive officer of TBW. *See* Judgment from United States of America v. Paul Richard Allen, attached hereto as Exhibit B and incorporated herein by reference.

14. In addition, the party who purported to sign the agreement on behalf of Centurion, Tara Bonelli, is herself currently the subject of a federal indictment in the United States District

Court for the Northern District of California. Ms. Bonelli is accused of twenty-two counts of wire fraud, mail fraud, and participating in money transactions involving criminally derived property. Importantly, Ms. Bonelli's indictment specifically relates to her involvement in companies that offer a variety of real estate and financial services, including the purchase of distressed properties like the Properties at issue here. *See* Indictment of Tara Denise Bonelli, attached hereto as Exhibit C and incorporated herein by reference.

15. TBW's prepetition board of directors did not review or approve the Agreement, and neither TBW's in-house counsel nor its outside counsel approved TBW's execution of the Agreement. The Plan Trustee is informed and believes that the only other member of TBW's former senior management involved in discussions with Centurion relating to the Agreement was Lee Farkas, TBW's former Chairman and majority shareholder, who likewise is currently incarcerated in the Federal Bureau of Prisons after he was convicted of fourteen counts of conspiracy to commit bank fraud, wire fraud and securities fraud in connection with his activities as Chairman of TBW. *See* Conviction of Lee B. Farkas, attached hereto as Exhibit D and incorporated herein by reference.

16. In addition to these facts, the Agreement purports to commit TBW to sell approximately 3,900 Properties in forty-six states and the District of Columbia, and close each of those transactions within a twenty-five day period. TBW did not have title to or the ability to sell approximately 2,000 of those Properties—the Wells Fargo Properties—and the Plan Trustee submits that it would have been impossible to close the transactions under the timetable set forth in the Agreement, even if TBW had owned all of the Properties.

17. The Agreement provides that it "shall be governed by, construed and enforced in accordance with the laws of the State of California without reference to the choice of law principles thereof." Agreement, § 8.7.

18. The California Civil Code provides that when a contract provides for consideration which appears to be possible, but which in fact is impossible, the impossible provision is void. Cal. Civil Code § 1613.

19. Because the timetable for the sale contemplated under the Agreement was impossible, and because TBW did not have the title or ability to sell the Wells Fargo Properties, the Agreement is void and unenforceable. *See* County of Yuba v. Mattoon, 160 Cal. App. 2d 456, 458 (Cal. App. 3d Dist. 1958). Any damage claim asserted based on such void and unenforceable Agreement must be disallowed.

20. Likewise, given the nature and circumstances surrounding the Agreement's purported execution, the Court should require strict proof of the Agreement's validity and enforceability. In the absence of such proof, any damage claim based on the Debtor's rejection of the Agreement should be disallowed in its entirety.

B. Even if the Agreement Is Enforceable, Centurion Is Still Not Entitled to Recover the Rejection Damages that Form the Basis of the Claim.

21. Even if the Court determines that the Agreement was enforceable at the time it was rejected, the Plan Trustee respectfully submits that Centurion is not entitled to the damages it asserts in its Claim.

22. "[W]hen an executory contract is rejected, the amount and validity of a claim for damages is determined as of the date of the breach in accordance with state law, 'to the extent state

law does not contravene the Bankruptcy Code.'" Bank of Montreal v. Am. HomePatient, Inc. (In re Am. HomePatient, Inc.), 414 F.3d 614, 619 (6th Cir. 2005) (quoting In re Independent American Real Estate, Inc., 146 B.R. 546 (Bankr. N.D. Tex. 1992)). *See also* WNS N. Am., Inc. v. Aaron (In re First Magnus Fin. Corp.), 2010 Bankr. LEXIS 5023, n. 5 (B.A.P. 9th Cir. Aug. 31, 2010). Therefore, damages are to be determined by state law.

23. California contract law provides that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civil Code § 1636. In a written agreement, those intentions are "to be ascertained from the writing alone, if possible . . . ." Cal. Civil Code §§ 1639, 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").

24. Accordingly, any terms of the contract which limit a party's remedies must be given full effect. Where, as in this case, the parties expressly limited their remedies under the Agreement, the parties are bound by those limitations. Culbertson v. Cizek, 225 Cal. App. 2d 451, 472 (Cal. App. 1st Dist. 1964) ("Under normal circumstances, . . . whether either party may recover from the other depends upon a determination of their rights and liabilities according to the terms of the . . . contract entered into between them . . . ."); Budget Finance Plan v. Sav-On Food Club, Inc., 44 Cal. 2d 565, 568 (Cal. 1955) ("[I]t is the contract between plaintiff and defendant . . . which must be looked to in deciding the remedies which plaintiff can pursue against defendant."); Ravizza v. Budd & Quinn, Inc., 19 Cal. 2d 289, 293-294 (Cal. 1942) ("[T]he rights and liabilities of the parties to a . . . contract are controlled by the terms of the particular contract involved."); Bastian v. British American Assurance Co., 143 Cal. 287, 289 (Cal. 1904) ("Defendant had the right to limit its liability by the terms of the contract it made with plaintiff.").

25. Centurion asserts two measures of damages in its Claim: $141,153,483.34 for alleged lost profits and $3,240,125.67 for costs of due diligence it allegedly incurred. It is entitled to recover neither of these amounts from TBW under the express terms of the Agreement.

The Agreement Limits the Parties' Remedies to Repurchase and Indemnification

26. The Agreement provides that Centurion's "sole remedies" for a breach are set forth in §§ 7.1 (Indemnification by Seller) and 7.2 (Cure or Repurchase of Assets regarding defect in title or ownership). The Agreement further provides: "In no event will [the Debtor] be liable for any additional damages, including consequential, punitive or exemplary damages, with respect to any breach." Agreement, § 7.2, final paragraph.

27. Because the Agreement specifically excludes consequential damages, such as lost profits, as a remedy, Centurion's claim for lost profits should be disallowed.

The Agreement Provides that Each Party is Responsible for Its Own Due Diligence Costs

28. Likewise, Centurion is not entitled to the recovery of its due diligence costs under the Agreement because the Agreement specifically provides to the contrary. The Agreement expressly contemplates that each Party will "bear their respective expenses incurred in connection with the preparation, execution and performance of th[e] Agreement and the transactions contemplated [t]hereby, including all fees and expenses of their agents, representatives, counsel and accountants." Agreement, § 6.4(a).

Centurion's Claim Is, in Any Event, Limited by California Law

29. Even if the Agreement itself did not expressly prohibit recovery of the damages that form the basis of the Claim, which it clearly does, California law limits damages on real estate transactions to "the price paid, and the expenses properly incurred in examining the title and

preparing the necessary papers, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly incurred in preparing to enter upon the land, consequential damages according to proof, and interest." Cal. Civil Code § 3306.

30. Centurion's Claim offers no evidentiary support for its recovery of any measure of damages under the above-cited statute. Indeed, Centurion's calculation of damages, which equates the fair market value of the Properties to the List Price indicated in the Agreement, is wholly inconsistent with § 3306 and cannot be supported by appropriate evidence. *See* Fara v. Wells, 156 Cal. App. 2d 322, 329 (Cal. App. 1957) (holding that the fair value of the property, not the list price, was to be used in determining damages pursuant to California Civil Code § 3306).

31. Similarly, Centurion's damage calculation based on alleged lost profits it would have earned from a purported future disposition of the Properties is likewise directly inconsistent with § 3306 which limits damages to the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach. *See* Horning v. Shilberg, 130 Cal. App. 4th 197 (Cal. App. 2005) (holding that trial court properly refused to award buyer lost resale profits because unambiguous language of § 3306 did not authorize damages based on value of property at time of trial). In this case the results of the auction demonstrated that the fair market value of the Properties at the time of the breach was substantially less than what Centurion purportedly agreed to pay under the Agreement. As a result, Centurion would be entitled to no damages for the difference.

32. Centurion likewise fails to provide any support to establish that it incurred and paid due diligence fees and expenses of $3,240,125.67, so that portion of its Claim should be disallowed on that ground as well.

Centurion Failed to Mitigate Any Alleged Damages

33. Centurion's claim contemplates a Purchase Price of $548,482,206.60. Centurion alleges that it could have sold the Properties for $766,261,766.69. The 1,046 Properties to which TBW held title (the "TBW Properties") sold at auction for $81,222,849.00 (the "Auction Price"). The Auction Price was 15% of Centurion's Purchase Price. If Centurion had truly been ready, willing, and able to purchase the Properties at the Purchase Price, it could have bid on the Properties at the auction and could have purchased them at or near the Auction Price.

34. Centurion's failure to bid on the Properties at the Auction precludes Centurion from asserting damages due to breach of contract. California courts apply the "avoidable consequences doctrine" when determining contract damages. The avoidable consequences doctrine provides that a plaintiff cannot recover for harm that it could have foreseen and avoided by reasonable effort and without undue expense. Henrici v. South Feather Land & Water Co., 177 Cal. 442, 449 (Cal. 1918) ("'The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him.'") (quoting 1 Sutherland on Damages, 4th ed., sec. 88) (listing cases); State Dept. of Health Services v. Superior Court, 31 Cal. 4th 1026, 1043 (Cal. 2003) ("Under the avoidable consequences doctrine as recognized in California, a person injured by another's

wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.") (listing cases).

35. Because Centurion could have mitigated its damages (and theoretically earned a great deal more profit on the resale) by bidding at the auction, its Claim is barred under California law by the avoidable consequences doctrine.

NON-WAIVER AND RESERVATION OF RIGHTS

36. By filing this Objection, the Plan Trustee does not waive, and expressly reserves its right to amend, modify, or supplement this Objection and to file additional objections to the Claim, including, but not limited to objections to the amount of the Claim. The Plan Trustee further expressly reserves its right to bring affirmative claims against Centurion via the initiation of an adversary proceeding, including, but not limited to claims arising under Chapter 5 of the Bankruptcy Code, state law, and/or common law.

CONCLUSION

For the reasons set forth above, the Debtor respectfully requests that Centurion's Claim be disallowed in its entirety.

This 1st day of February 2012.

/s/ Jeffrey W. Kelley
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CERTIFICATE OF SERVICE

This is to certify that I have this day served the following parties with a copy of the foregoing Objection to Claim No. 3229 Filed by Centurion Asset Partners, Inc. via United States, first class mail, postage prepaid and/or by the court using the CM/ECF system, which will send an electronic e-mail notification to the following:

Centurion Asset Partners, Inc.
c/o Nicholas V. Pulignano, Jr.
P.O. Box 447
Jacksonville, FL 32201

This 1st day of February 2012.

/s/ Jeffrey W. Kelley
Jeffrey W. Kelley (GA Bar 412296)
TROUTMAN SANDERS, LLP