

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

In re:

**TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,**

Debtor.

Chapter 11

Case Nos. 3:09-bk-07047-JAF

**DEBTOR'S (1) MOTION FOR ORDER AUTHORIZING
REJECTION OF EXECUTORY CONTRACTS WITH
CENTURION ASSET PARTNERS, INC. ET AL. AND (2) RESPONSE
TO MOTION TO COMPEL ASSUMPTION OR REJECTION OF
EXECUTORY CONTRACT BY CENTURION ASSET PARTNERS, INC.**

Taylor, Bean & Whitaker Mortgage Corp., as debtor and debtor-in-possession (the “**Debtor**,” “**TBW**” or “**Taylor Bean**”), respectfully submits this (1) Motion for Order Authorizing Rejection of Executory Contracts with Centurion Asset Partners, Inc. and the other named Respondents (the “**Motion**”) and (2) Response (the “**Response**”) to Motion to Compel Assumption or Rejection of Executory Contract by Centurion Asset Partners, Inc. (Doc. No. 427) filed October 9, 2009. In support of the Motion and the Response, the Debtor shows the Court as follows:

Jurisdiction

1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. § 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are Sections 365(a) and 105(a) of the Bankruptcy Code.

Background

2. On August 24, 2009 (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

3. The Debtor continues to operate its business and manage its property as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

4. No trustee or examiner has been appointed in this case.

5. On September 11, 2009, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors.

6. Until very recently, TBW was the largest independent (i.e. non-depository owned) mortgage lender in the United States. Headquartered in Ocala, Florida, TBW employed approximately 2,400 people across the country. The largest offices were in Ocala Florida; Atlanta, Georgia; and Tampa, Florida. TBW’s principal business was comprised of:

- origination, underwriting, processing and funding of conforming conventional and Government-insured residential mortgage loans;
- sale of mortgage loans into the “secondary market” to government-sponsored enterprises such as the Federal Home Loan Mortgage Corporation or the Government National Mortgage Association; and
- mortgage payment processing and loan servicing.

7. Following the precipitous events of early August, the members of TBW’s board of directors and the company’s corporate officers, including the Chairman, Vice Chairman, Chief Executive Officer, and Chief Financial Officer, resigned. New, independent members have been appointed to the board and the new board has appointed Neil F. Luria as the company’s Chief Restructuring Officer (“**CRO**”). The business and

financial affairs and ongoing operations of the company are now under the direction and control of the new board and the CRO.

8. For a detailed description of the Debtor's business operations and the reasons for this bankruptcy filing, please see the description contained in the Debtor's Emergency Motion for Entry of Interim and Final Orders Authorizing Use of Cash Collateral and Granting Replacement Liens Pursuant to 11 U.S.C. §§ 105(a), 361, 363, and 541 and 552 and Bankruptcy Rule 4001 (Doc. No. 5).

9. On or about August 21, 2009, which was prior to the Petition Date and prior to the resignation of Debtor's pre-petition officers and directors, the appointment of Debtor's new board of directors and the appointment of Debtor's CRO, Taylor Bean (through one of its pre-petition and now-resigned officers) allegedly entered into three related contracts: (1) that certain Real Estate Purchase and Sale Agreement with Centurion Asset Partners, Inc. ("**Centurion**") (a copy of which is attached hereto as Exhibit A, hereinafter, the "**Centurion Agreement**"); (2) that certain Master Fee Agreement (a copy of which is attached hereto as Exhibit B, hereinafter, the "**Fee Agreement**") and (3) that certain REO Bulk Package Sale/Escrow Instructions (a copy of which is attached hereto as Exhibit C, hereinafter, the "**Escrow Instructions**").

10. In addition to Taylor Bean and Centurion, the following persons, named as Respondents in this contested matter, are also parties to the Fee Agreement: (1) John Anderson and Ryan Chabot of Fusion Partners ("**Centurion's Representatives**"); (2) Kyle Ransom, Brett Miles, Bryan Kofford, and Rob McFadden ("**Intermediaries**"); and (3) Joe Ellis ("**Taylor Bean's Representative**") (Centurion's Representatives, the

Intermediaries, and Taylor Bean's Representative are collectively referred to herein as the "**Fee Representatives**"). Taylor Bean and Centurion are the only parties to the Escrow Instruction but the following, named as Respondents, may claim some interest therein: Caelo T. Marroquin and Clear Title of Florida.

11. The Centurion Agreement states that Taylor Bean agreed to sell to Centurion certain listed foreclose property ("**REO Properties**"), with a closing date of September 15, 2009. (Centurion Agreement §§ 2.1, 4.1) The stated purchase price to be paid by Centurion for the REO Properties was \$548,482,206.60 (the "**Purchase Price**"). The agreed list price of the REO Properties was \$806,591,333.35 (the "**List Price**"). (*Id.* § 2.2). (The Purchase Price was to represent 68% of the List Price for the property. (*Id.*))

12. The Centurion Agreement also states that Taylor Bean had agreed to pay the sum of 3.5 % of the Purchase Price for so-called "Intermediary Fees" in connection with the sale of the property (the "**Intermediary Fees**"). (*Id.*).

13. The Centurion Agreement contained purported warranties by Taylor Bean and, if closed, would purport to place repurchase and indemnity obligations upon Taylor Bean. (*Id.* Art. III and §§ 7.1, 7.2).

14. The Fee Agreement provided for a division of the Intermediary Fees among the Fee Representatives 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 Taylor Bean's Representative. (Fee Agreement § 1.B). The parties to the Fee Agreement also agreed to utilize a certain escrow agent and facilitator with respect to the Transaction (*Id.* §1.C.). The escrow agent and

facilitator are identified in the Escrow Instruction as Respondents Marroquin and Clear Title of Florida.

15. Upon learning of the existence of the Agreements on or about the Petition Date, the CRO, through his representatives, contacted Centurion in order to explore converting the Centurion Agreement into a stalking horse contract under Section 363 of the Bankruptcy Code. From the beginning of those discussions, Centurion expressed concern about the validity of the List Price (which formed the basis of the Purchase Price), and during ensuing discussions the amount that Centurion indicated that it might be willing to pay for the REO Properties dramatically decreased. The Debtor also concluded that, even if it decided to assume the Centurion Agreement (notwithstanding the unrealistic closing date and the warranties, indemnities and repurchase obligations purportedly placed upon the Debtor in the Centurion Agreement), Centurion's funding sources (which are not parties to the Centurion Agreement), not Centurion, controlled whether and how much funding Centurion would be able to produce at closing. The Debtor thus concluded, in its business judgment, that Centurion would not voluntarily pay anything close to the Purchase Price for the REO Properties and could not be compelled to specifically perform the Centurion Agreement without the consent of its non-party funding sources.

16. During its discussions with Centurion, Debtor also made it clear to Centurion that the Fee Agreement must be voluntarily rescinded, and if not the Debtor would reject it. Taylor Bean's Fee Representative (Respondent Joe Ellis) in fact executed an Affidavit and Acknowledgment renouncing and waiving any rights under the Fee

Agreement. (A true and correct copy of Mr. Ellis' Affidavit and Acknowledgement is attached hereto as Exhibit D). None of the other Fee Representatives have delivered such waivers to the Debtor. The Debtor also made it clear to Centurion during the discussions that the Debtor would not agree to use the escrow agent and facilitator identified in the Escrow Instruction.

17. Following extensive discussions with numerous interested parties in addition to Centurion, the Debtor ultimately selected Selene RMOF REO Acquisition II LLC as stalking horse bidder for its REO Properties. (*See* Debtor's Motion for an Order, Pursuant to Sections 105 and 363 of the Bankruptcy Code and Rules 2002, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (I) Approving Bidding Procedures and Terms of Auction for the Sale of Certain of Debtor's "REO" Property Free and Clear of All Liens, Claims and Interests, (II) Setting Hearing Date for Approval of Sale of Property, (III) Fixing Deadline for Objecting to Proposed Asset Sale, (IV) Approving Form and Manner of Sale Notice, and (V) Approving Bid Protections; (VI) Authorizing Debtor to Sell REO Property Free of Liens, Claims and Interests, and (VII) Granting Related Relief (the "**363 Motion**")¹ (Doc. No. 495) filed October 21, 2009.

18. On October 9, 2009, Centurion filed its Motion to Compel Assumption or Rejection of Executory Contract by Centurion Asset Partners, Inc. (Doc. No. 427) (which

¹ The REO Properties which are the subject of the Sale Motion do not include approximately 2000 REO Properties that were listed in the Centurion Agreement (the "**Omitted Properties**"). The Omitted Properties were those as to which Wells Fargo was the Master Servicer, and the Debtor is not in a position to offer the Omitted Properties for sale. The Stipulation Between Taylor, Bean & Whitaker Mortgage Corp., Debtor, and Wells Fargo Bank, National Association (Doc. No. 412)

has been scheduled for a hearing on November 5, 2009), requesting that the Debtor elect whether to assume or reject the Centurion Agreement. As set forth in this Motion and the 363 Motion, it is obvious that the Debtor has elected to seek to reject the Centurion Agreement.

Relief Requested

19. The Debtor requests that this Court enter an order authorizing and approving the rejection of the Centurion Agreement, the Fee Agreement, and the Escrow Instruction (the “**Agreements**”). The Debtor does not admit that the Agreements created valid and binding obligations, and the Debtor reserves all of its rights and defenses to any attempt to enforce the terms of the Agreements against it, including all objections and defenses to any claims for rejection damages that may be asserted in the future with respect to the Agreements.

Basis for Relief

20. Section 365 of the Bankruptcy Code provides, in pertinent part, that a debtor in possession, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). Providing a debtor with the ability to eliminate financial burdens to the estate, a debtor in possession’s right to reject executory contracts and unexpired leases is a fundamental component of the bankruptcy process. In re Sun City Investments, Inc., 89 B.R. 245, 248 (Bankr. M.D. Fla. 1988).

21. Courts evaluate a debtor’s decision to assume or reject an executory contract or unexpired lease under the “business judgment” standard. See In re Gardinier,

Inc., 831 F.2d 974, 976 n.2 (11th Cir. 1987); Sharon Steel Corp. v. Nat'l Fuel Gas Distr. Corp., 872 F.2d 36, 40 (3rd Cir. 1989); In re Wells, 227 B.R. 553, 564 (Bankr. M.D. Fla. 1998); Sundial Asphalt Co. v. V.P.C. Investors Corp., 147 B.R. 72 (E.D.N.Y. 1992). A debtor satisfies this standard by determining that, in the debtor's business judgment, the rejection of the subject executory contract or unexpired lease would likely benefit the estate. See Sharon Steel, 872 F.2d at 39-40; In re Bicoastal Corp., 125 B.R. 658, 667 (Bankr. M.D. Fla. 1991); In re Kong, 162 B.R. 86 (Bankr. E.D.N.Y. 1993). Absent a finding of bad faith or carelessness, courts generally will not disturb a debtor's business decision to reject an executory contract or unexpired lease. See Lubrizol Enter. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1047 (4th Cir. 1985); In re Prime Motor Inns, 124 B.R. 378, 383 (S.D. Fla. 1991); In re Federal Mogul Global, Inc., 293 B.R. 124 (D. Del. 2003); In re III Enter., Inc. V, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994).

22. In the Debtor's business judgment, the Agreements are a burden to the Debtor's bankruptcy estate and should be rejected. Specifically, instead of selling the REO Properties pursuant to the terms of the Agreements, the CRO intends to sell the REO Properties under the 363 Motion on a final, "as is" basis to a purchaser who has made the highest and best offer, without liability placed upon Debtor's estate for "Intermediary Fees," warranties, repurchase obligations or indemnities.

23. Accordingly, the Debtor requests that the Court approve rejection of the Agreements under Section 365(a) of the Bankruptcy Code as a sound exercise of its business judgment.

Conclusion

WHEREFORE, the Debtor respectfully requests entry of an order, in the form attached hereto, granting the relief requested, and granting Debtor such other and further relief as may be just.

DATED this 27th day of October 2009.

/s/ Edward J. Peterson, III

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SPECIAL COUNSEL FOR DEBTOR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **DEBTOR'S (1)**
MOTION FOR ORDER AUTHORIZING REJECTION OF EXECUTORY

CONTRACTS WITH CENTURION ASSET PARTNERS, INC. ET AL. AND (2)
RESPONSE TO MOTION TO COMPEL ASSUMPTION OR REJECTION OF
EXECUTORY CONTRACT BY CENTURION ASSET PARTNERS, INC. has been
furnished either electronically via this Court's CM/ECF system or by U.S. Mail to:

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L.B.R. 1007-2 Parties in Interest List

on this 27th day of October, 2009.

/s/ Edward J. Peterson, III
Attorney

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