UNITED STATES BANKRUPTCY COURT
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 (Jointly Administered Under Case No. 3:09-bk-07047-JAF)
Debtors. _____/	
TAYLOR, BEAN & WHITAKER MORTGAGE CORP.	Case No. 3:09-bk-07047-JAF
Applicable Debtor. _____/	

MOTION TO STRIKE CLAIM NO. 3513 FILED BY CHARLES TANNER AND JONI COX-TANNER AS (A) UNTIMELY FILED AND (B) FILED IN VIOLATION OF THE PLAN INJUNCTION

Neil F. Luria, Plan Trustee for the Taylor, Bean & Whitaker Plan Trust, on behalf of Debtor Taylor, Bean & Whitaker Mortgage Corp., respectfully requests the Court enter an Order striking Claim No. 3513 (the "Claim") filed by Charles Tanner and Joni Cox-Tanner on the basis that the Claim is untimely filed and is filed in violation of the injunction provided for by the confirmed *Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors* (the "Plan") [D.E. 3240]. The Plan Trustee states in support thereof:

I. INTRODUCTION

1. On August 24, 2009, Taylor, Bean & Whitaker Mortgage Corp. (the "Defendant" or "TBW") filed a petition for relief under Chapter 11 of the Bankruptcy Code.

2. On November 24, 2009, REO Specialists, LLC ("REO") and Home America Mortgage, Inc. ("HAM") (collectively, and together with the entity listed in paragraph 1, the "Debtors") filed petitions for relief under Chapter 11 of the Bankruptcy Code.

3. On January 21, 2010, TBW filed its *Motion of Debtor, Taylor, Bean & Whitaker Mortgage Corp., for Approval of Protocol to Resolve Borrower Issues* [D.E. 927] (the "Borrower Protocol"). The Court approved the Borrower Protocol in an Order [D.E. 1079] entered on February 24, 2010.

4. Creditors were required to file proofs of claim against the TBW estate by June 15, 2010 (the "Claims Bar Date"), unless they were subsequently identified creditors allowed to file proofs of claim at a later date.

5. Pursuant to an order dated July 21, 2011 (the "Confirmation Order") [D.E. 3420], the Court confirmed the Plan. The Plan became effective on August 10, 2011.

6. The Plan created a liquidating trust for the Debtors' assets, the Taylor, Bean & Whitaker Plan Trust (the "Plan Trust"), whereby Neil F. Luria was appointed as Plan Trustee. Article 6(B) of the Plan provides that the Plan Trustee shall be deemed the sole director and officer of each of the Debtors for all purposes.

7. Article 6(G) of the Plan also provides that the "The Plan Trustee shall be deemed the Estates' representatives in accordance with § 1123(b) of the Bankruptcy Code and shall have all powers, authority and responsibilities specified in this Plan and the Plan Trust Agreement, including, without limitation, the powers of a trustee under §§ 704, 1106 and 108 of the Bankruptcy Code and Rule 2004 of the Bankruptcy Rules (including commencing, prosecuting or settling Causes of Action, enforcing contracts, and asserting defenses, offsets and privileges)."

8. Further, Article 11, Section A of the Plan enjoins actions brought by creditors of or claimants in the Debtors' estates in connection with their claims. As a result of the

confirmation of the Plan and its effective date as of August 10, 2011, no creditor may bring a lawsuit or any other action against any of the Debtors in an attempt to recover monies allegedly owed by the Debtors. The purpose of this injunction is simple—the Plan Trustee has to be able to properly administer the assets of the Plan Trust and make payments to the Debtors' respective creditors, which he would be unable to do if a creditor could bring a lawsuit or pursue another action against the Debtor after the effective date of the Plan.

9. Charles Tanner and Joni Cox-Tanner (the "Claimants") filed Claim No. 3500 in the amount of $1,000,000 on November 28, 2011 and Claim No. 3352 in the amount of $507,975.82 on March 28, 2011. The Plan Trustee filed an objection (the "Objection") [D.E. 5877] to Claim Nos. 3352 and 3500 on a number of grounds, including, but not limited, to the fact that the Claim No. 3352 should be disallowed because it was amended by Claim No. 3500, the claims relate to an adversary proceeding commenced by the Claimants and other *pro se* plaintiffs that the Court dismissed, and the two claims are wholly unsupported and baseless. Further, Claim Nos. 3352 and 3500 are untimely filed, as the deadline to file proofs of claim was June 15, 2010.

10. The Claimants subsequently filed a notice [D.E. 6118] withdrawing Claim No. 3500, but filed a Response (the "Response") [D.E. 6119] in opposition to the Objection. The Response is largely incomprehensible.

11. On September 6, 2011, the Claimants filed Claim No. 3513 in the amount of $15,464,526.12. Without any additional supporting data other than conclusory allegations as to TBW's acts of fraud allegedly damaging each member of the Claimants' family to the tune of $5 million, the Claimants have increased the amount of their claim by over $15 million.

12. By way of additional background, the Claimants have filed objections to many motions in the Debtors' bankruptcy cases and they have previously commenced two baseless

lawsuits against TBW on a *pro se* basis along with a group of other plaintiffs, both of which lawsuits purported to be class actions suits.

13. In the first lawsuit commenced by the Claimants against TBW on June 21, 2011 (Adv. Case No. 3:11-ap-326-JAF) (the "Purported Class Action"), the Court dismissed the Purported Class Action with prejudice and ordered that the Claimants, along with the other plaintiffs, were barred from bringing any more actions for damages against the Debtors under the terms of the confirmed Plan.

14. In the second lawsuit commenced by the Claimants against TBW on January 31, 2012 (the "Second Purported Class Action") (Adv. Case No. 3:12-ap-109-JAF), the Court dismissed the Second Purported Class Action *sua sponte* and reiterated its rulings from the Purported Class Action. In the Order dismissing the Second Purported Class Action, the Court repeated to the plaintiffs, which included the Claimants, that they were enjoined from continuing the Second Purported Class Action by the express terms of the Plan. The Court reminded the Claimants, along with the other plaintiffs, that they could be sanctioned.

15. The Claimants recently filed a Motion Requesting Resolution [D.E. 5641] with many of the same plaintiffs involved in the Purported Class Action and the Second Purported Class Action, which the Court also struck on the basis that the movants, including the Claimants, are barred from bringing any more actions for damages against the Debtors under the terms of the confirmed Plan.

16. The Claimants indicate in their recently filed Claim No. 3513 that they are intending to amend Claim No. 3352. Claim No. 3513 now includes claims for "administrative costs" for 62 hours of work apparently done by the Claimants for every single month since March of 2008. Further, the Claimants seek approximately $29,700 in "miscellaneous expenses" seemingly related to their filing of pleadings with the Court. A number of other amounts were

included within the Claim for which the Claimants seek reimbursement, such as forced insurance, modification claim, etc. Finally, the Claimants also seek the entire principal amount of their mortgage loan and $5 million in damages for each of the three members of their household.

17. The Claim should be disallowed on a number of grounds. The Claim is not actually an amendment to Claim No. 3352, but is simply a thinly veiled attempt to escape from the restrictions of the Plan on lawsuits or other actions against the Debtors. Moreover, the Claim is untimely filed because it was filed more than two years after the Claims Bar Date. Even if the Claimants were subsequently identified creditors, they were required to file claims by July 26, 2011. The activity of the Claimants from 2010 and onwards is a clear indication that they had notice of the TBW bankruptcy.

18. Since the Claim is not an actual amendment to Claim No. 3352, it constitutes an improper action against the TBW estate, essentially in the form of a lawsuit, to recover on a claim in violation of the injunction provided for by the confirmed Plan.

19. Finally, the Claimants lack grounds to seek an administrative expense claim against the TBW estate because they did not provide any benefit to the TBW estate and there was no postpetition transaction between the Claimants and TBW. In addition, all claims for administrative expenses were required to be filed by September 12, 2011. To the extent that the Claimants were entitled to seek an administrative expense, the deadline to do so has long passed. To the extent the Claimants simply seek a general unsecured claim for their "costs" associated with participating in the Debtors' bankruptcy cases, they are not entitled to recover those costs either for a number of reasons, including but not limited to the fact that their alleged representation of the *pro se* claimants was not approved by the Court and they have no other contractual right to recover such costs.

20. To date, the Plan Trustee has not sought sanctions against the Claimants for any violations of the Plan Injunction, but continues to reserve his rights to seek appropriate relief if the Claimants continue to violate the terms of the confirmed Plan.

II. AUTHORITIES AND ARGUMENT

A. Claim No. 3513 Does Not Amend Claim No. 3352

The Claimants assert Claim No. 3352 for alleged servicing fraud and wire fraud; however, adequate documentation was not attached. The Claimants merely attach a number of proofs of claim filed by persons other than the Claimants, a motion filed by HAM opposing a motion requesting a hearing continuance filed by the Claimants [D.E. 2723], a document request filed by the Claimants in March 2011, and a collection of account statements, correspondence and other documents apparently relating to the Claimants' mortgage. However, the documents attached to Claim No. 3352 do not indicate how the Claimants were damaged by any alleged servicing or wire fraud, nor does Claim No. 3352 at all indicate that the Claimants would seek an administrative expense claim for their "services" provided to a group of *pro se* plaintiffs.

Further, the Claimants increase the initial claim of approximately $500,000 to over $15 million by the filing of Claim No. 3513. The increase itself, in addition to the fact that the Claimants rely on completely new theories as a basis for the Claim, indicates that the Claim does not actually amend Claim No. 3352, but is both an entirely new claim and an attempt to bypass the Court's bar on the Claimants from initiating litigation against the Debtors. The Court in *In re Marineland Ocean Resorts, Inc.,* 242 B.R. 748, 753-54 (Bankr. M.D. Fla. 1999) reasoned that

> to be within the scope of a permissible amendment, the amended claim should not only be of the same nature as the original, but also reasonably within the amount to which the original claim provided notice….[h]owever, if the initial proof of claim does not 'give fair notice of the conduct, transaction or occurrence that forms the basis of the claim asserted in the amendment', then the amendment

asserts a new claim and will not be allowed.

In *Marineland*, the Court determined that the claim at issue was in fact a new claim, as opposed to an amendment, because the claimant had added separate and distinct claims for royalties, liquidated damages calculated under a franchise agreement, treble damages for allegedly unauthorized use of marks under a franchise agreement, etc. *Id.* at 754. Similarly, the Claimants in this case have added entirely new theories to their case and have included a treble damage component. Nothing in the original claim, Claim No. 3352, indicated that the Claimants would seek an administrative expense claim for the monies they expended, that they would seek the entire principal balance of their mortgage, that the damages suffered by each member of the Claimants' family mysteriously increased to $5 million per person over a period of a year, etc.

Certain instances may arise in which a Court might consider the claim as properly amending a previously filed claim, as opposed to filing an entirely new claim. In the 11th Circuit, Courts apply a discretionary five-part balancing test to determine whether to allow an untimely filed proof of claim as amending a prior claim:

> (1) whether the debtors and creditors relied upon the [creditor's] earlier proofs of claim or whether they had reason to know that subsequent proofs of claim would be filed pending the completion of an audit;
> (2) whether other creditors would receive a windfall by the court's refusing to allow amendment;
> (3) whether the [creditor] intentionally or negligently delayed in filing its proof of claim;
> (4) the justification for failure of the [creditor] to file for a timely extension to the bar date; and
> (5) whether equity requires consideration of any other factors.

In re Full Gospel Assembly of Delray Beach, Inc., 05-BK-23067-JKO, 2007 WL 1423613 (Bankr. S.D. Fla. May 9, 2007) (citing *In re International Horizons, Inc.,* 751 F.2d 1213 (11th Cir.1985)). On its face, Claim No. 3513 does not satisfy any of the above stated factors and should not be allowed as an amendment of Claim No. 3352. First, Claim No. 3352 does not

indicate that the Claimants continue to investigate further claims against the Debtor, that the Claimants plan to amend or otherwise increase their claim, or that Claim No. 3352 will be amended at a later date. The attempted amendment would substantially impact the Debtor's creditors and would actually further dilute the creditors' recovery. *See In re Marineland*, 242 B.R. at 755. The Debtor, the Plan Trust and the Debtor's creditors, of which there are many, have relied on the Claimants' original claim asserted as only a few thousand dollars, as opposed to over $15 million. TBW's creditors would certainly not receive a windfall if the Court refused to accept the Claimants new $15 million claim.

The Claimants have also failed to explain why they waited approximately two years to amend Claim No. 3352 and have not provided a single justification for such a failure. The chapter 11 plan of liquidation has been effective since August 2011 and the Claimants' recent filing of Claim No. 3513 in an attempt to increase their claim by over $15 million is significant. Indeed, the Claimants have not, to date, sought to extend their deadline to file a proof of claim. Finally, no equitable considerations exist to allow the Claimants to file a grossly untimely claim cloaked as a purported amendment to a totally unrelated claim for a significantly lesser amount.

In sum, the Plan has been effective for over a year, Claim No. 3352 has been on file for over two years without any amendments, the Plan Trust and the Debtor had no indication that Claim No. 3352 would be amended, and the Claims Bar Date passed over two years ago. According to the Court in *In re George,* 426 B.R. 895, 899 (Bankr. M.D. Fla. 2010), "'amendment [of a claim] is less appropriate with passing milestones in the case such as the claims bar date and plan confirmation'…. '[a]fter confirmation, amendment to a claim should only be allowed for compelling reasons because…amendment post-confirmation…runs the risk of rendering the plan infeasible or altering the distribution to other creditors.'" (citing *In re Winn–Dixie Stores, Inc.,* 414 B.R. 764, 769 (M.D.Fla.2009)). Nothing in equity or otherwise

supports allowing the Claim as a valid amendment to Claim No. 3352, especially in light of the orders enforcing the Plan Injunction against the Claimants.

B. Claim No. 3513 was Untimely

The deadline to file proofs of claim against the estate of TBW was June 15, 2010. The deadline for person to file proofs of claim against the estates of REO Specialists, LLC and Home America Mortgage, Inc. was May 24, 2010. There were, however, special bar dates set for subsequently identified creditors. The first special claims bar date was June 24, 2011. The second special claims bar date was July 26, 2011. The Claimants were not identified as subsequently identified creditors.

Claim 3513 was filed more than two years after the June 15, 2010 Claims Bar Date. As previously described in section II(A), the Claim is not a valid amendment of Claim No. 3352. Therefore, since the Claim is not an amendment to Claim No. 3513 and was asserted more than two years after the applicable Claims Bar Date, the Claim is untimely and should be disallowed. Even if the Claimants were subsequently identified creditors, they were required to file claims by July 26, 2011.

C. Claimants Lack any Basis for an Administrative Expense Claim

No basis exists for an administrative expense claim by these Claimants. Nevertheless, the Claim seeks amounts of $25/hour for 62 hours a month, apparently based on the expenses for the Committee and the Debtor's counsel, supposedly in connection with the Claimants' "participation" in the TBW bankruptcy case. Yet, the purpose behind administrative expenses and their priority over prepetition claims is to "facilitate the rehabilitation of insolvent businesses by encouraging third parties to provide those businesses with necessary goods and services." *Nat'l Union Fire Ins. Co. v. VP Bldgs., Inc.,* 606 F.3d 835, 838 (6th Cir. 2010) *cert. denied*, 131

S. Ct. 1602, 179 L. Ed. 2d 516 (U.S. 2011). The Claimants' activities in this case do not fall into the category of necessary goods and services provided to the Debtor.

Specifically, a debt "qualifies as an 'actual, necessary' administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate.'" *In re Baby N' Kids Bedrooms, Inc.,* 06-15314, 2007 WL 1218768 (E.D. Mich. Apr. 24, 2007) (citing *Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.),* 126 F.3d 811, 816 (6th Cir.1997)) (emphasis supplied). In respect of a transaction with the bankruptcy estate, the Claimants did not represent the Official Committee of Unsecured Creditors at any point, nor did the Claimants represent any ad hoc committee of creditors, or other party entitled to payment of fees pursuant to the Plan. The Debtors, the Committee, or the Plan Trust have never sought Bankruptcy Court approval for the Claimants' services. The Claimants were simply part of a group of *pro se* litigants attempting to commence class action lawsuits against the Debtors. To the extent the Claimants incurred expenses due to the time they devoted each month to the TBW bankruptcy, which often consisted of sending letters to the Court or filing lawsuits against the Debtors, those costs should be borne by them or by the so-called "class" and not by TBW or the Plan Trust.

The Claimants have conferred absolutely no benefit, much less a direct and substantial benefit, to the Debtors' estates linked to the Claimants' actions that would give rise to a claim for an administrative expense against the Debtors' estates. Quite the contrary in fact, the Debtor and Plan Trust have expended a considerable amount of resources responding to the various motions, lawsuits and other inquiries from the Claimants.[1]

D. The Filing of Claim No. 3513 Violates the Plan Injunction and the Court's Orders Enforcing the Plan Injunction

[1] Notwithstanding all the foregoing, the deadline to file an administrative expense claim was September 12, 2011, or over a year ago.

Article 11, Section A ("Plan Injunction") of the Plan provides that:

> **Except as otherwise expressly provided in this Plan, the documents executed pursuant to this Plan, or the Confirmation Order, on and after the Effective Date, all Persons who have held, currently hold, or may hold Claims against or Interests in the Debtors or the Estates that arose prior to the Effective Date (including all Governmental Authorities) shall be permanently enjoined from, on account of such Claims or Interests, taking any of the following actions, either directly or indirectly, against or with respect to any Debtor, any Estate, any Chapter 11 Protected Party, any Plan Trust Exculpated Party, the Plan Trust, or any Plan Trust Entity, or any of their respective properties: (i) commencing or continuing in any manner any action or other proceeding of any kind; (ii) enforcing, executing, collecting, or recovering in any manner any judgment, award, decree, or order, or attaching any property pursuant to the foregoing; (iii) creating, perfecting, or enforcing any Lien or encumbrance of any kind; (iv) asserting or effecting any setoff, recoupment, or right of subrogation of any kind against any Claim or Cause of Action; (v) enjoining or invalidating any foreclosure or other conveyance of a Plan Trust Asset or Asset of any Debtor; and (vi) taking any act, in any manner, in any place whatsoever, that does not conform to, comply with, or that is inconsistent with any provision of this Plan.**

The Plan Injunction enjoins the Claimants from filing a lawsuit or commencing any other action against the Debtor to recover a claim, other than properly amending Claim No. 3352. To properly request the relief they seek, the Claimants must request a modification of the Plan Injunction. A modification of a plan injunction may be appropriate under some circumstances, but the Claimants here fail to sufficiently plead a basis for a modification of the Plan Injunction in order to allow them to pursue the Claims. Courts will often apply the same principles of cause derived from a request for relief from the automatic stay to the context of a request for relief from a plan injunction. *See In re WorldCom, Inc.,* 02 13533 AJG, 2007 WL 841948, *5 (Bankr. S.D.N.Y. Mar. 12, 2007) (citing *In re Curtis,* 40 B.R. 795 (Bankr. D.Utah 1984)). For example, the Court in *WorldCom* found that the resolution of the claimant's claim was directly connected with the bankruptcy proceeding and that cause did not exist for the modification of the plan injunction.

In the Purported Class Action, the Second Purported Class Action, and the main bankruptcy case, the Bankruptcy Court entered orders specifically enforcing the Plan Injunction in connection with dismissing the class actions or striking the Claimants' pleadings. The Bankruptcy Court has cautioned the Claimants that they need to abide by the terms of the Plan and the Plan Injunction. However, the filing of Claim No. 3513 is a clear violation of the Court's prior orders and the Plan Injunction.

The purpose of the Plan Injunction is to provide some finality to the Debtors' cases so that the Plan Trustee can administer the assets of the Plan Trust and pay the Debtor's creditors. The Plan Trustee continues to have to expend Plan Trust assets in connection with the actions of the Claimants, which deplete funds available to all the Debtors' creditors. If any person was allowed to assert a claim against the Debtor at any point, especially in such a large and unsupported amount as $15 million, then the Plan Trust would be unable to carry out the aforementioned duties and the finality of the confirmation process for the chapter 11 plan of liquidation would be thwarted.

III. CONCLUSION

WHEREFORE, Neil F. Luria, Plan Trustee for the Taylor, Bean & Whitaker Plan Trust, on behalf of Debtor Taylor, Bean & Whitaker Mortgage Corp., requests the Court enter

an order striking Claim No. 3513 and granting such other and further relief the Court deems proper.

Dated: January 14, 2013

Respectfully submitted,
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