UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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

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THE PLAN TRUSTEE'S OBJECTION TO CLAIM NUMBERS 3519, 3520 AND 3521 FILED BY SOVEREIGN BANK

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

This objection seeks to disallow your claims. 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 _____, 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 SET FORTH IN THIS OBJECTION.

Any written response must include the following: (i) the approved case caption and the title of the objection to which the response is directed; (ii) the name of the claimant and the official claim number; (iii) a description of the basis for the amount of its underlying proof of claim or scheduled claim; (iv) a concise statement setting forth the reasons why the Court should not sustain the objection, including, but not limited to, the specific factual and legal bases upon which the claimant will rely in opposing the objection; and (v) a telephone number, email address and other contact information. Any written response 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 Alisa Paige Mason, Esq., Berger Singerman LLP, 1450 Brickell Avenue, Suite 1900, Miami, FL 33131-3453.

Neil F. Luria, as Plan Trustee ("Plan Trustee") for the Taylor, Bean & Whitaker Plan Trust (the "Plan Trust")[1], by and through undersigned counsel and pursuant to Federal Rule of Bankruptcy Procedure 3007 and Local Rules 3007-1 and 2002-4, hereby objects to Claim Numbers 3519, 3520, and 3521 filed by Sovereign Bank in its various capacities ("Sovereign") against the estates of Taylor, Bean & Whitaker Mortgage Corp. ("TBW"), REO Specialists, LLC ("REO"), and Home America Mortgage, Inc. ("HAM"), respectively. The Plan Trustee states in support thereof:

I. BACKGROUND

1. On August 24, 2009, TBW filed a petition for relief under Chapter 11 of the Bankruptcy Code. On November 24, 2009, REO and HAM filed petitions for relief under Chapter 11 of the Bankruptcy Code (Case Nos. 3:09-bk-10022-JAF and 3:09-bk-10023-JAF). The bankruptcy cases of TBW, HAM and REO have been jointly administered since 2009. On July 21, 2011, the Court entered an order confirming the Plan, as that term is defined in footnote 1 and in the Plan.

2. On July 10, 2012, Ocala Funding, LLC ("Ocala Funding"), a wholly-owned subsidiary of TBW, filed a separate voluntary Chapter 11 petition (Case No. 3:12-bk-04524-JAF) (the "Ocala Funding Case"). The Ocala Funding Case was and still remains separate from the Chapter 11 cases of TBW, REO and HAM. On June 20, 2013, the Court confirmed Ocala Funding's Chapter 11 Plan of Liquidation [Ocala Funding Case, D.E. 313]. Prior to confirmation, Ocala Funding sued Sovereign to avoid and recover a fraudulent transfer (Adv.

[1] As of the Effective Date of the *Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors* [D.E. 3240] (the "Plan"), August 10, 2011, the Debtors and the Official Committee of Unsecured Creditors have been replaced, in most part and according to the terms of the Plan, by the Taylor, Bean & Whitaker Plan Trust. Capitalized terms in this objection not otherwise defined shall have the meaning set forth in the Plan.

Pro. 3:12-ap-00650) (the "Ocala Fraudulent Transfer Adversary").[2]

3. On May 14, 2013, Sovereign filed Claim No. 3519 against the estate of TBW. Claim No. 3519 purports to amend Sovereign's previously filed claim against TBW, Claim No. 1362. Sovereign explains in Claim No. 3519 that Claim No. 1362 (filed in the amount of $168,231,302.17 on April 2, 2010) had been previously reduced to $136,781,301.17 by virtue of a settlement agreement discussed in more detail below. Specifically, the $31,450,001.00 reduction of Claim No. 1362 was on account of certain payments received and reductions agreed to by Sovereign. Through the filing of Claim No. 3519, Sovereign now seeks, after applying the credit, to increase its claim against TBW to compensate for its unrelated decision to pay $9 million to Ocala Funding to settle the Ocala Fraudulent Transfer Adversary. In sum, Sovereign now claims $145,781,302.17 as a general unsecured claim against TBW's estate.

4. On May 14, 2013, Sovereign (as agent) filed Claim No. 3520 against the estate of REO. Claim No. 3520 amends Sovereign's previously filed claim against REO, Claim No. 1365. Sovereign explains in Claim No. 3520 that Claim No. 1365 (filed in the amount of $168,231,302.17 on April 2, 2010) had been previously reduced to $136,781,301.17 by virtue of a settlement agreement discussed in more detail below. Specifically, the $31,450,001.00 reduction of Claim No. 1365 was on account of certain payments received and reductions agreed to by Sovereign. Through the filing of Claim No. 3520 Sovereign now seeks, after applying the credit, to increase its claim against REO to compensate for its unrelated decision to pay $9 million to Ocala Funding to settle the fraudulent transfer claim asserted against Sovereign in the Ocala Fraudulent Transfer Adversary. In sum, Sovereign now claims $145,781,302.17 as a general unsecured claim against REO's estate.

5. On May 14, 2013, Sovereign (as agent) filed Claim No. 3521 against the estate of

[2] Ocala Funding commenced the Ocala Fraudulent Transfer Adversary against Sovereign by filing a complaint on October 5, 2012 pursuant to sections 544 of the Bankruptcy Code and sections 726.105(1)(A), 726.105(1)(B) and 726.106(1) of the Florida Statutes.

HAM. Claim No. 3521 amends Sovereign's previously filed claim against HAM, Claim No. 1366. Sovereign explains in Claim No. 3521 that Claim No. 1366 (filed in the amount of $168,231,302.17 on April 2, 2010) had been previously reduced to $136,781,301.17 by virtue of a settlement agreement discussed in more detail below. Specifically, the $31,450,001.00 reduction was on account of certain payments received by and reductions agreed to by Sovereign. Through the filing of Claim No. 3521, Sovereign now seeks, after applying the credit, to increase its claim against HAM to compensate for its unrelated decision to pay $9 million to Ocala Funding to settle the fraudulent transfer claim asserted against Sovereign in the Ocala Fraudulent Transfer Adversary. In sum, Sovereign now claims $145,781,302.17 as a general unsecured claim against HAM's estate.

6. Claim Numbers 3519, 3520 and 3521 (the "Claims") are identical in both factual bases and amounts. The Claims simultaneously acknowledge the terms of a settlement between TBW and Sovereign and also increase previously filed claims (Claim Nos. 1362, 1365 and 1366) (the "Original Claims") in an amount equal to the $9 million payment made to settle the Ocala Funding Fraudulent Transfer Action.

7. The allowed amounts of the Original Claims against REO, HAM and TBW are the product of previous settlement agreements and releases in connection with the estates of TBW, HAM, and REO. As a result of those settlements, discussed in more detail below, Sovereign released its right to increase the Original Claims. Sovereign also released claims against TBW and Ocala Funding under section 502(h) of the Bankruptcy Code as a result of the settlement with Ocala Funding of the Ocala Fraudulent Transfer Adversary. Therefore, the Court should sustain the Objection and disallow Claim Numbers 3519, 3520 and 3521.

II. SETTLEMENT HISTORY

8. On January 30, 2012, the Plan Trustee filed a *Motion to Approve Settlement Agreement by and among the Taylor, Bean & Whitaker Plan Trust and Sovereign Bank* (the "TBW Sovereign Settlement Motion") [D.E. 4828] in the jointly administered cases of TBW, HAM and REO.

9. In the TBW Sovereign Settlement Motion and accompanying settlement agreement (the "TBW Sovereign Settlement Agreement"), TBW and Sovereign resolved a number of disputes: (a) the adversary proceeding commenced against Sovereign by the Plan Trust to avoid certain preferential payments (Adv. Pro. No. 3:11-ap-00435-JAF); (b) Sovereign's objection [D.E. 2973] to a settlement between TBW and U.S. Bank National Association; (c) Sovereign's response [D.E. 2293] to a settlement relating to 12 different mortgage backed securities trusts serviced by Wells Fargo Bank, N.A.; and (d) the adversary proceeding commenced against Sovereign by TBW to determine the nature, scope and extent of Sovereign's security interest and related lien(s) (Adv. Pro. No. 3:10-ap-00644-JAF).

10. The Court entered an order granting the TBW Sovereign Settlement Motion on April 6, 2012. Although Sovereign alludes to the existence of a settlement between TBW and Sovereign when it acknowledges in the Claims that the Original Claims were reduced to $136,781,301.17 by virtue of certain payments made to Sovereign, Sovereign does not provide any meaningful factual background about the terms of settlement agreements governing Sovereign's Original Claims, as to do so would highlight that Sovereign waived its right to ever increase the original claims.

11. The TBW Sovereign Settlement Agreement provided for the payment of $15,750,000 to Sovereign (the "TBW Sovereign Settlement Payment). In Sections 1.2 and 1.3 of

the TBW Sovereign Settlement Agreement,[3] Sovereign agreed that, other than in certain limited exceptions that are inapplicable here, it shall only have allowed unsecured claims in TBW Class 8, REO Class 3, and HAM Class 3 in the amount of $136,781,302.17 and specifically did not recognize a right to ever increase the claim. However, those claims were subject to an obligation to recognize credits on account of certain recoveries, as more fully explained in the TBW Sovereign Settlement Agreement. Furthermore, should Sovereign argue in response to this objection a right to increase their Class 4 claim according to Section 1.2, such argument must fail because the TBW Sovereign Settlement Payment constituted the entire distribution to which Sovereign is entitled on account of its Class 4 Claim (as defined in the Plan) against TBW, with the exception of the Sovereign Allocation, the Sovereign MSR Participation, and any recovery it may receive in adversary proceeding number 3:10-ap-00243-JAF (the "Lloyd's recovery").

12. Section 1.2 of the TBW Sovereign Settlement Agreement does not provide any exceptions or allowances for Sovereign to increase its TBW Class 4 Claim for any other reason. As with Section 1.2, Section 1.3 provides no exceptions or allowances for Sovereign to amend the Original Claims (now reduced to $136,781,302.17 against HAM, REO and TBW and allowed pursuant to the TBW Sovereign Settlement Agreement), let alone attempt to increase the amount based on a settlement in a separate bankruptcy. In fact, Section 1.3 provides that the Original Claims must decrease by any amounts that Sovereign subsequently receives with respect to the Sovereign MSR Participation, the Lloyd's Recovery and by the amounts, if any, distributed with respect to the Sovereign MSR Participation, the Lloyd's Recovery and by the amounts, if any, distributed with respect to the REO Class 3 Claim and the HAM Class 3 Claim prior to or contemporaneous with the final TBW Class 8 distribution. Finally, Sovereign expressly released TBW, the Plan Trust, the Plan Trustee and other persons in Section 2.2 of the

[3] Capitalized terms in this paragraph not otherwise defined shall have the meaning provided for by the TBW Sovereign Settlement Agreement.

TBW Sovereign Settlement Agreement other than as to the obligations arising therein.

13. On January 7, 2013, Ocala Funding filed the *Debtor's Motion to Approve Settlement Agreement with Sovereign Bank, N.A.* (the "Ocala Sovereign Settlement Motion") [Ocala Funding Case, D.E. 216]. In the Ocala Sovereign Settlement Motion, which included a settlement agreement between Ocala Funding and Sovereign that resolved the Ocala Fraudulent Transfer Adversary (the "Ocala Sovereign Settlement Agreement"), Ocala Funding requested the Court's approval of a settlement whereby Sovereign agreed to pay $9 million to Ocala Funding. The Ocala Sovereign Settlement Motion was granted on February 14, 2013 [Ocala Funding Case, D.E. 254].

14. In the Ocala Sovereign Settlement Agreement, Sovereign agrees to release the Estate Parties[4] from

> all manners of action, causes of action, suits, debts, accounts, promises, warranties, damages and consequential damages, demands, agreements, costs, expenses, claims, or demands…(b) arising from, related to or in connection with payment of the Settlement Amount under this Settlement Agreement, whether arising under section 502(h) of the Bankruptcy Code or otherwise (the "Sovereign Released Claims"), whether known or unknown, liquidated or unliquidated, disputed or undisputed, contingent, inchoate or matured, in law or in equity….

Ocala Sovereign Settlement Agreement, § 6.

15. Notwithstanding the terms of the TBW Sovereign Settlement Agreement and the Ocala Sovereign Settlement Agreement, Sovereign Bank still filed the Claims in an attempt to increase the Original Claims against each of the Debtors based on Sovereign's $9 million settlement payment voluntarily made to Ocala Funding. The Claims should be disallowed by virtue of both the TBW Sovereign Settlement Agreement in which Sovereign agreed, with

[4] The Estate Parties are defined as the "Debtor, Neil Luria (in his capacity as Chief Restructuring Officer of the Debtor), Charles Sweet (in his capacity as special member of the Debtor), and TBW (solely in its capacity as a member of the Debtor), and the Debtor's current officers, agents, professionals, employees, legal representatives, predecessors, heirs, successors and assigns, each in its capacity as such, and each of the foregoing…." Ocala Sovereign Settlement Agreement, § 6.

prejudice, to fix the amount of its allowed claims against TBW, REO, and HAM (subject to a reduction mechanism) and the Ocala Sovereign Settlement Agreement in which Sovereign waived and released its section 502(h) claims against Estate Parties. Any adjustment of the Original Claims can only be downward, as provided for by the TBW Sovereign Settlement Agreement. The retention by Sovereign of its rights to "TBW Claims" under the terms of the Ocala Sovereign Settlement Agreement did not create a right by Sovereign to increase the agreed upon claims (including the Original Claims and Sovereign's Class 4 Claims) against HAM, REO and TBW.

III. LEGAL ARGUMENT

Sovereign and TBW reached a settlement in January 2012 which bound Sovereign to its Original Claims. The TBW Sovereign Settlement Agreement provided the exclusive mechanism for adjustment, if any, of the Original Claims and provided for retention by Ocala Funding of its right to pursue claims against Sovereign. In addition, the TBW Sovereign Settlement Agreement provides that Sovereign releases all claims the Plan Trustee, the Plan Trust, TBW and other enumerated parties, subject to certain carve-outs that are not applicable in the present matter. Thus, Sovereign not only agreed to an exclusive mechanism for the reduction of the Original Claims, but its release of TBW and the Plan Trust equates to a release of its right to amend the Original Claims. If it had been the intent of the parties that Sovereign had reserved a right to increase the Original Claims, that right would have been expressly provided for in the TBW Sovereign Settlement Agreement in either Section 1.2, 1.3 or as a carved out claim in the Section 2.2 Releases. Almost a year after the TBW Sovereign Settlement Agreement was approved by the Court, Ocala Funding settled the Ocala Fraudulent Transfer Adversary.

In the Claims, Sovereign, in essence, seeks an increase in the amount owed based on section 502(h) of the Bankruptcy Code, because they are essentially new claims asserted against

TBW, REO and HAM as a result of the voluntary payment of $9 million by Sovereign to Ocala Funding to settle the Ocala Fraudulent Transfer Adversary. Specifically, section 502(h) provides that:

> A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

After voluntarily paying $9 million to Ocala Funding to settle a fraudulent transfer claim, Sovereign now seeks to recoup that money as part of their general unsecured claims already on file against the estates of TBW, HAM and REO, bankruptcies which are separate.

The Ocala Sovereign Settlement Agreement specifically released the Estate Parties from all claims "whether arising under section 502(h) of the Bankruptcy Code or otherwise." The Estate Parties included TBW and Ocala Funding. Ocala Sovereign Settlement Agreement, § 7. However, Sovereign has no section 502(h) claims against Ocala Funding. If a transferee (in this case Sovereign) failed to give any value for the transfer made by Ocala Funding to Sovereign, then it is not entitled to a section 502(h) claim against Ocala Funding. *See In re Dreier LLP*, 08-15051 SMB, 2012 WL 4867376, *3 (Bankr. S.D.N.Y. Oct. 12, 2012). In *Dreier*, the Court held that:

> Section 502(h) is based on the principle of fraudulent transfer law that the return of a fraudulent transfer restores the parties to the *status quo*….The rule of restoration only applies, however, where the transferee gave consideration for the avoided transfer…. But if the transferee did not give any consideration for the fraudulent transfer, there is nothing to reinstate, and the return of the fraudulently transferred funds does not give rise to an allowable claim....Otherwise, a thief forced to return stolen property to the trustee would have a claim against the estate for the value of what he stole.

Id. See also, In re Gurley, 311 B.R. 910, 919 (Bankr. M.D. Fla. 2001) ("The mere reversal of a pre-petition transfer does not automatically cause a claim to 'arise' in favor of the disappointed

transferee. Congress enacted § 502(h) and its predecessor to protect creditors whose pre-petition claims were paid by pre-petition transfers that were later avoided or recovered by the Trustee or Debtor in Possession."); and *In re Toy King Distributors, Inc.*, 256 B.R. 1, 205 (Bankr. M.D. Fla. 2000) (holding that certain subsequent transferees of avoidable preferences did not have claims against the debtor under any theory of law because they were never creditors of the debtor; therefore, they could not assert claims against the debtor under section 502(h)).

In terms of Estate Parties, Sovereign only had a potential section 502(h) claim against TBW and therefore could agree to release only that claim. By including TBW in the Sovereign Released Claims section of the Ocala Sovereign Settlement Agreement, however, Sovereign agreed that it would not pursue a section 502(h) claim against TBW.[5] Even though HAM and REO are left out of the definition of Sovereign Released Claims, Sovereign has no viable section 502(h) claim against either HAM or REO for the same reasons it does not have a section 502(h) claim against Ocala Funding. If a transferee (in this case Sovereign) failed to give any value to HAM or REO for the transfer made by Ocala Funding to Sovereign (or otherwise were a pre-petition creditor of HAM or REO, then it is not entitled to a section 502(h) claim against HAM or REO for the reasons stated in *Dreier, Gurley* and *Toy King*.

The terms of the Ocala Sovereign Settlement Agreement and TBW Sovereign Settlement Agreement are clear. There was no right preserved in the TBW Sovereign Settlement Agreement to later increase the Original Claims, but rather there is both explicit language in the TBW Sovereign Settlement Agreement providing only for the decrease of the Original Claims and a general release of TBW, the Plan Trust and other parties set forth in Section 2.2. As a result, Sovereign released its right to amend the Original Claims. By extension, the Ocala Sovereign Settlement carves out the TBW claims as they exist, subject to the terms of the TBW

[5] The Ocala Sovereign Settlement Agreement's definition of Estate Parties purports to limit the definition of TBW to its capacity as a member of Ocala Funding. That distinction is of no import.

Sovereign Settlement Agreement, from claims that Sovereign releases as part of the resolution of the Ocala Fraudulent Transfer Adversary. Since there is no ambiguity in either settlement agreement, the Court must be governed by the terms of those agreements. *See Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1290 (11th Cir. 2004) ("As Norfolk points out, however, a settlement agreement is essentially a contract and is subject to the traditional rules of contract interpretation…. Where the plain meaning of an agreement is clear, we may not go beyond the four corners of the document to look for additional evidence of the drafters' intentions.").

WHEREFORE, the Plan Trustee respectfully requests that the Court (1) disallow Claim Nos. 3519, 3520 and 3521, as recommended by the Plan Trustee, on the grounds set forth in this Objection, without prejudice to the rights of the Plan Trustee or other interested parties to file further objections or to pursue avoidance actions or other causes of action, and (2) grant such other and further relief as is just and appropriate.

Dated: January 14, 2014

Respectfully submitted,

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