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.	

_____/

PLAN TRUSTEE'S CLOSING ARGUMENT OPPOSING THE MOTION FOR LIMITED MODIFICATION OF §524 INJUNCTION TO PERMIT ACTION TO RECOVER AGAINST DEBTOR'S SURETY (INSURANCE) COMPANY

Neil Luria, in his capacity as Plan Trustee ("Plan Trustee") for the Taylor, Bean & Whitaker Corp. Plan Trust (the "Plan Trust"), submits his closing argument opposing the *Motion for Limited Modification of §524 Injunction to Permit Action to Recover Against Debtor's Surety (Insurance) Company* (the "524 Motion") [ECF No. 8208] filed on behalf of several individuals (collectively, the "Movants"),[1] and states:

PRELIMINARY STATEMENT

Movants attempt to obfuscate the economic loss to the estate that would result from the relief they seek. Modifying the post-confirmation injunction which has never been modified (and after distributions have begun) will result in an indemnification claim against the estate which will impact the recovery of other creditors. The Court should deny the Motion.

INTRODUCTION

1. On February 19, 2015, Movants filed their 524 Motion. [ECF No. 8208].

[1] Each of the Movants have a pending lawsuit in various West Virginia courts; 524 Motion, ¶5; however, only Jon Staats filed a Proof of Claim (Claim No. 474) in TBW's chapter 11 case based on his lawsuit. TBW's objection to that claim was sustained and Mr. Staats' claim was disallowed. [ECF No. 6331].

2. On March 26, 2015, Plan Trustee, filed his *Plan Trustee's Response in Opposition to Motion for Limited Modification of §524 Injunction to Permit Action to Recover Against Debtor's Surety (Insurance) Company* (the "524 Response"). [ECF No. 8229].

3. On April 6, 2015, Plan Trustee, filed his *Notice of Filing Records Custodian Declaration* (the "Records Custodian Decl.") [ECF No. 8236] submitted by Kathy Alves in her capacity as Claims Specialist – Commercial Surety Claims for Zurich American Insurance Company ("Zurich"). Through her Records Custodian Declaration, Ms. Alves verified the following documents: General Agreement of Indemnity by and between Taylor, Bean & Whitaker Mortgage Corp. and Zurich, American Insurance Company and its subsidiaries and affiliates dated April 18, 2003 (the "Indemnity Agreement") [Exhibit 2]; West Virginia Division of Banking, Mortgage Lender Bond No. 08606897 between Taylor, Bean & Whitaker Mortgage Corp., as principal, and Fidelity and Deposit Company of Maryland, as surety, dated November 1, 2001 (the "Bond") [Exhibit 3]; Fidelity and Deposit Company of Maryland, Rider to Bond No. 8606879 dated July 14, 2009 (the "Rider"[2]) [Exhibit 4]; and Zurich Claim Summary Spreadsheet (with attached screenshots from which the summary was prepared) (the "Claim Summary Spreadsheet") [Exhibit 5], all of which have now been stipulated to as admissible evidence in connection with the 524 Motion and 524 Response. *See Joint Stipulation to the Admission of Evidence in Connection with Motion for Limited Modification of § 524 Injunction to Permit Action to Recover Against Debtor's Surety (Insurance Company) [ECF No. 8208]* (the "Joint Stipulation") [ECF No. 8257, ¶2].

4. On April 14, 2015, the Bankruptcy Court conducted a preliminary hearing on the 524 Motion and, after considering record and argument by counsel for the Plan Trustee and Movants, expressed its inclination to deny the 524 Motion based on the impact on the estate due

[2] The Rider increased the amount of the Bond from $100,000 to $250,000. Turner Dep. at 18; Alves Dep. at 19.

to Zurich's indemnification rights; nevertheless, and in light of Movant's objection at the preliminary hearing to the admissibility of certain of the Plan Trustee's evidence, authorized both parties to conduct discovery, compile a record, and submit written closing arguments in lieu of a final evidentiary hearing. *See* Joint Stipulation, ¶¶3-4. The Plan Trustee conducted discovery; the Movants elected not to do so.

5. On June 16, 2015, Plan Trustee filed *Notice of Filing Transcript of Deposition of Karen Lee Turner* [ECF No. 8254], which deposition was taken on May 14, 2015.

6. Also on June 16, 2015, Plan Trustee filed *Notice of Filing Transcript of Deposition of Mary Kathleen Alves Turner* [ECF No. 8255], which deposition was taken on May 14, 2015.

7. On June 17, 2015, Plan Trustee filed the *Plan Trustee's Exhibit List*, comprised of the following exhibits: Proof of Claim No. 3508 filed by Zurich American Insurance Company on May 17, 2012 and all attachments (the "Zurich POC")[3] [Exhibit 1]; the Indemnity Agreement [Exhibit 2]; the Bond [Exhibit 3]; the Rider [Exhibit 4]; and the Claim Summary Spreadsheet [Exhibit 5]. [ECF No. 8256].

8. On June 18, 2015, Plan Trustee, and the Movants filed the Joint Stipulation [ECF No. 8257] through which they "stipulate that the below listed evidence is stipulated into evidence to be considered by the Court on the [524] Motion and [524] Response: (i) the Records Custodian Declaration Pursuant to 28 U.S.C. § 1746 [ECF No. 8236] (the "Declaration") filed in support of the [524] Response and attachments; (ii) the Depositions of Karen Lee Turner and Mary Kathleen Alves together with all exhibits marked at the depositions [ECF Nos. 8254 and 8255, respectively] (collectively, the "Depositions") filed with the Court; and (iii) the exhibits contained in the Exhibit

[3] The Zurich POC asserted a general unsecured claim for "$799,786.11+Unknown (See Addendum)." Zurich POC.

List [ECF No. 8256] (the "Exhibits") filed with the Court. Other than the Declaration, the Depositions and the Exhibits, the parties will not submit any further documents, depositions or live testimony for consideration by the Court in connection with the [524] Motion and [524] Response." Joint Stipulation, ¶2.

FACTUAL BACKGROUND

9. On August 24, 2009, Taylor, Bean & Whitaker Mortgage Corp. ("TBW") filed a petition for relief under Chapter 11 of the Bankruptcy Code (Case No. 3:09-bk-07047-JAF) in the Jacksonville Division of the United States Bankruptcy Court for the Middle District of Florida (the "Bankruptcy Court").

10. On November 24, 2009, REO Specialists, LLC ("REO") and Home America Mortgage, Inc. ("HAM") (collectively, and together with TBW, the "Debtors") filed petitions for relief under Chapter 11 of the Bankruptcy Code, also with the Bankruptcy Court. The bankruptcy cases of HAM and REO are jointly administered under Case No. 3:09-bk-07047-JAF.

11. The deadline to file a proof of claim against the TBW estate, unless otherwise extended for subsequently identified creditors, was June 15, 2010 (the "Claims Bar Date").

12. Pursuant to an order entered by the Bankruptcy Court on July 21, 2011 (the "Confirmation Order") [ECF No. 3420], the Bankruptcy Court confirmed the Plan. The Plan became effective on August 10, 2011 (the "Effective Date").

13. The Plan created a liquidating trust for the Debtors' assets, the Plan Trust, in respect of which 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. Article 6(G) of the Plan also provides that the "[t]he Plan Trustee shall be deemed the

Estates' representative 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)…."

14. In accordance with 11 U.S.C. § 1141, the Confirmation Order specifically enjoins creditors from commencing or continuing in any manner any action or other proceeding against TBW. The Confirmation Order specifically provides:

> INJUNCTION. Except as otherwise expressly provided in the Plan, the documents executed pursuant to the Plan, or this 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) are 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 Trustee Exculpated Party, the Plan Trust, 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, attaching, executing, collecting, or recovering in any manner any judgment, award, decree, or attaching any properties 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) taking any part, in any manner, in any place whatsoever, that does not confirm to, comply with, or that is inconsistent with any provision of the Plan. Any Person injured by any willful violation of such injunction may recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages from the willful violator. . .

Confirmation Order, ¶56.

BACKGROUND OF THIS MATTER

15. Prior to the filing of this chapter 11 case, TBW obtained a performance bond (the "Bond"), with Fidelity and Deposit Company ("Fidelity"), which was issued by Zurich[4] in connection with TBW's service as a mortgage loan originator in West Virginia..

16. In its Proofs of Claim (No. 3508),[5] Zurich asserts that, based on the issuance of the Bond in favor of TBW, Zurich has a dollar for dollar right of indemnification for any amounts it has, and will, pay out to third parties, that is, Movants in connection with the actions they filed in West Virginia, and to the firm of Eckert Seamans Cherin & Mellot, LLC ("Eckert Seamans") which has been representing, and continues to represent, Zurich here. It is this dollar for dollar right of indemnification which serves as the principal basis for the opposition advanced in the 524 Response.

MODIFYING INJUNCTION WILL HARM THE ESTATE

A. Testimony of Turner, Zurich's Outside Counsel, Supports Debtor's Position

17. Turner, Zurich's outside bankruptcy counsel who signed the Zurich POC, Turner Dep. at 7-8, 13, testified that the Zurich POC is the operative document through which Zurich seeks to recover "*all* amounts to which Zurich would be entitled under the indemnity agreement." *Id.* at 8 (Italics added). In other words, "as between the surety company and Taylor, Bean, the surety company relies on the indemnity agreement and common-law principles of indemnity that Taylor, Bean will reimburse it *dollar for dollar, anything that it needs to pay on*

[4] Zurich includes its subsidiaries Federal and Deposit Company of Maryland, Colonial American Casualty and Surety Company, and American Guarantee and Liberty Insurance Company. *See* Turner Dep. at 18-19 (Zurich POC filed for Zurich and its family of companies).

[5] Claim 3508 amended Claim 3507. In turn claim 3507 amended claim 3501. Claim 3501 in turn amended claim 3475. Claim 3475 amended claim 3301. Claim 3301 amended claim 539. Claim 3508 is an unliquidated claim for attorney's fees and indemnification regarding the lawsuits that are the subject of the 524 Motion. *See* Zurich POC. The Plan Trust is currently in negotiations with Zurich to attempt to resolve a dispute over how this claim should be classified. Turner Dep. at 22-23. Should the parties be unable to settle this matter, it will be brought before the Court as a contested matter.

that surety bond plus its expenses." *Id.* at 11 (Italics added). This is consistent with statements made by Zurich in the Addendum to the Zurich POC which states, in relevant part, that "[p]ursuant to an indemnity agreement, the Debtor is obligated to indemnify Zurich with respect to *any liability and loss* on the Surety Bonds issued thereon or thereafter by Zurich on behalf of the Debtor or its subsidiaries or affiliates. Furthermore, pursuant to common law principles of indemnity, the Debtor is obligated to indemnify Zurich with respect to any liability and loss on the Surety Bonds issued where the Debtor is listed as principal." Zurich POC, Addendum (Italics added).

18. Turner further testified that, through the Zurich POC, Zurich is making a claim under the Indemnity Agreement for reimbursement of amounts it has advanced and will continue to advance on account of claims on bonds issued for TBW. As of the filing of the Zurich POC, Zurich was out-of-pocket $799,786.11. Turner Dep. at 11; Zurich POC. Turner also testified that Zurich intends to further amend its claims once all unliquidated amounts are liquidated and final, *id*. at 12, and that the "SECOND" paragraph of the Indemnity Agreement which provides that TBW is due "[t]o indemnify the surety firm against *any and all liabilities*, lost cost damages, attorneys' fees and expenses of whatever kind or nature hereof or hereinafter," was the legal basis for the Zurich POC. *Id.* at 14-15 (Italics added). As an additional legal basis for Zurich's POC, Turner also noted the "FOURTH" paragraph of the Indemnity Agreement which provides that TBW is to "pay to the surety upon demand in amounts sufficient to discharge *any* claim made against the surety or any bond or bonds" *Id.* at 15 (Italics added).

19. Turner testified that the Claim Summary Spreadsheet included fees that Zurich's bankruptcy counsel, the Eckert Seamans firm had, as of the date of the Records Custodian Decl.—April 6, 2015—incurred, and that Zurich's position was that all amounts asserted, and to be asserted once liquidated, should be allowed claims against TBW's bankruptcy estate. *Id.* at 20-23. Turner further testified that if the Court were to grant the 524 Motion, Zurich would seek a dollar-for-dollar

recovery for every dollar it pays out in losses (to Movants) or for expenses (that is, legal fees to counsel defending Movants' West Virginia actions and counsel representing Zurich in TBW's bankruptcy case). *Id.* at 29.

20. On cross-examination, Turner testified that, unlike with insurance, "there is no risk transfer [in the surety context], because the surety has the legal right – but for the bankruptcy and issues of their insolvency, … to recover everything back from Taylor, Bean." *Id.* at 37-38. Finally, Turner confirmed there was no collateral securing the Bond, and that Zurich's "basis for recovery is the General Agreement of indemnity," which "obligates Taylor, Bean to indemnify [Zurich] against *any* losses…." *Id.* at 41 (Italics added).

B. <u>Testimony of Alves, Zurich's Claim Specialist, Supports Debtor's Position</u>

21. Alves, employed by Zurich and Fidelity as a "claims specialist," Alves Dep. at 8-9, testified that it is the general practice of Zurich and subsidiaries, like Fidelity, to require companies on whose behalf bonds are issued to execute the form General Agreement of Indemnity. *Id.* at 13-14. Alves further testified that the amounts Zurich is seeking through the Zurich POC are comprised of attorney's fees incurred by counsel defending the West Virginia actions instituted by Movants, any additional amounts that might be incurred in defense of those actions, as well as fees incurred by Eckert Seamans in its representation of Zurich in these cases. *Id.* at 32. Alves further testified that the Indemnity Agreement is the "only" form of recovery as against TBW. *Id.* at 40. Like Turner, Alves testified that it is Zurich's intention to pursue its indemnity-based claim against TBW's estate to the fullest extent allowed by law. *Id.* at 45-46.

C. <u>Evidence and Legal Authorities in Support of Maintaining Injunction</u>

22. Movants seek modification of the post-confirmation discharge injunction; they move pursuant to Bankruptcy Code section 524(a) and *In re Jet Florida Systems, Inc.,* 883 F.2d 970 (11th Cir. 1989). Movants represent that they will only seek a judgment against TBW "to

enable recovery against TBW's statutory bond, held by Fidelity and Deposit Company of Maryland," and not seek to collect against TBW directly. 524 Motion, ¶8.

23. Movants rely principally on *Jet Florida Systems*, in which an individual was allowed to proceed with a civil action for defamation against the chapter 11 corporate debtor whose debts had been discharged in bankruptcy, to establish liability to enable the debtor to recover from the debtor's insurance company. Here, however, no insurance policy is involved and while recovery may be had against the Bond "only" by Movants, there will necessarily be a claim for indemnification by Zurich against TBW's estate for every dollar Zurich ends up paying the Movants on account of any judgment entered against TBW, *see* Turner Dep. at 11-15, 20-22, 29 and 41; Alves Dep. at 32, 45-46; Zurich POC; a critical fact conveniently ignored by the Movants and otherwise conspicuously absent from their 524 Motion. Accordingly, Movants' reliance upon *Jet Florida Systems,* which *presumes* no economic harm will be visited upon the debtor by modification of the post-confirmation discharge injunction is misplaced, 883 F.2d at 974, 976 (discussing cases standing for the proposition that neither the debtor nor its property was subject to personal liability; presuming the insurance company would defend the contemplated action with only a "remote" chance that the debtor would have to pay for defense costs). Here there will, in fact, be "economic loss" suffered by the Debtor's estate in the form of an increased indemnification claim by Zurich – the Zurich POC – and, therefore, the Court should deny the relief requested. *See Perez v. Cumberland Farms, Inc.,* 213 B.R. 622, 624 (D. Mass. 1997) ("*Any* economic loss to the Debtor would…result in the violation of the statutory injunction of 11 U.S.C. § 524(a).") (Italics added).

24. For the same reasons, Movants' reliance upon *Fidelity and Deposit Co. of Maryland v. James*, 764 S.E.2d 351 (W. Va. 2014), is equally misplaced. This case merely

stands for the unremarkable proposition that, before recovery can be had against a surety, a judgment must first be obtained against the debtor as a nominal party. *Fidelity* does *not* address the existence, let alone the impact, of indemnification claims asserted against a chapter 11 debtor, which result from recovery on the bond. That is precisely the type of harm against which the post-confirmation discharge injunction provided by Bankruptcy Code section 524 is intended to protect. *See Landsing Diversified Properties-II v. First Nat'l Bank & Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.),* 922 F.2d 592, 600, 601 and (10th Cir. 1990) (recognizing the proposition that "the 'fresh start' injunctive provision of 11 U.S.C. § 524(a), which basically prevents anyone from pursuing the debtor on a discharged debt, *including third parties … who may seek reimbursement from the debtor through indemnification, contribution, subrogation, etc., for their satisfaction of the same debt*" and "the discharge injunction provided for in section 524(a) already frees the debtor *from potential derivative claims, such as indemnification or subrogation, that might arise from the creditor's post-confirmation attempts to recover the discharged debt from others*.") (Italics added); *see also Shearson Lehman Bros. Inc., Inc. v. Munford, Inc. (In the Matter of Munford, Inc.),* 97 F.3d 449, 455 (11th Cir. 1996) (affirming district court's ruling that Code § 105(a) and Fed. R. Civ. P. 16 authorized a bankruptcy court to permanently enjoin non-settling defendants from asserting contribution and indemnification claims against a defendant consulting firm when the permanent injunction was integral to the debtor's settlement with the consulting firm and the bar order was fair and equitable).

25. The evidence before the Court is unrebutted. Zurich, through the Zurich POC, has asserted a claim based on the Indemnity Agreement, the liquidated portion of which is $799,786.11. *See* Zurich POC. Both Turner and Alves testified that Zurich fully intended to assert claims for *all* monies that Zurich has paid out (and will pay out) in connection with

defense of the actions instituted by the Movants in West Virginia actions, as well as all fees incurred by Zurich's bankruptcy counsel. The contractual and common law rights to indemnification held by Zurich are reflected not only in Turner's and Alves' deposition testimony, but in the Zurich POC, are the types of economic harm that has compelled courts to deny requests for modification of the post-confirmation discharge injunction like that sought by the Movants in the 524 Motion. Movants' assertion that they will not file any claim against the estate is of no moment when Zurich has already done so.

CONCLUSION

Based on the foregoing, the Court should deny the 524 Motion in its entirety.

Dated: July 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically upon all parties registered to receive electronic notice as listed on the attached Electronic Mail Notice List and via U.S. Regular Mail, postage prepaid, and electronic transmission upon Lynn Drysdale, Esq. (lynn.drysdale@jaxlegalaid.org), and Clayton Miller, Esq. (clayton.miller@jaxlegalaid.org), Jacksonville Area Legal Aid, 126 West Adams Street, Jacksonville, FL 32202 on this 31st day of July, 2015.

/s/ James D. Gassenheimer
James D. Gassenheimer