

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION**

In re:

TWG CAPITAL, INC.,

Debtor.

Case No. 12-11019-BHL-11

Chapter 11

**LIMITED OBJECTION OF FIFTH THIRD BANK, N.A., TO MOTION TO SELL**

Fifth Third Bank, N.A. (“Fifth Third”) submits this limited objection to the Motion to Sell [Docket No. 14] (the “Sale Motion”) of Debtor TWG Capital, Inc. (the “Debtor”).<sup>1</sup> In support of its Objection, Fifth Third respectfully states as follows:

**FACTS**

1. Fifth Third and the Debtor, among others, entered into that certain Insurance Commission Receivables Facility Agreement (the “Facility Agreement”) dated as of July 12, 2007.
2. Pursuant to the Facility Agreement, the Debtor acted as the servicer and originator for and on behalf of Fifth Third for the portfolio of assets known as the “IR 7 portfolio.”
3. Fifth Third, the Debtor, and Inservico, Inc. (“Inservico”) entered into that certain Back-up Servicing Agreement (the “Back-Up Servicing Agreement”) dated as of May 13, 2008.
4. On August 13, 2010, the Debtor was terminated as the servicer under the Facility Agreement, and Fifth Third appointed Inservico as the new servicer under the Facility Agreement.

---

<sup>1</sup> The Debtor consented to the extension of the objection deadline to the Sale Motion through November 6, 2012 for Fifth Third.

5. On September 13, 2012, the Debtor and Inservico entered into that certain Subservicing Agreement (the “Subservicing Agreement”), whereby Inservico disputed that it was the new servicer under the Facility Agreement and the Debtor agreed to act as subservicer under the Facility Agreement.

6. On September 14, 2012, the next day, the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code.

7. On September 14, the Debtor filed the Sale Motion, seeking to sell substantially all of the Debtor’s assets. Of note, the Debtor specifically seeks to assume and assign to Carmel Funding, LLC (the “Buyer”) the Subservicing Agreement and all of the Debtor’s rights and interest under it.

8. 221 Partners is the parent entity of the Debtor, Inservico, and the Buyer.

**ARGUMENT**

9. Fifth Third objects to the Sale Motion on three separate grounds.

**A. No insider increase of servicing expenses under the Facility Agreement.**

10. To the extent that the sale transaction and order approving it purport to modify the economic aspects of the servicing arrangements for the IR 7 portfolio, they cannot be approved. The servicing fees for the IR 7 portfolio are set forth in the Facility Agreement and related documents. The Subservicing Agreement purports to provide the Debtor, as “servicer,” with a right to receive a monthly servicing fee of \$80,000, a “transitional fee” of \$265,000.00, and reimbursement of its expenses. That Subservicing Agreement is not binding on Fifth Third and cannot be used to impair, dilute, diminish, or otherwise alter in any way the payments otherwise required to be made under the waterfall provisions set forth in the Facility Agreement. Irrespective of what the Subservicing Agreement purports to provide in Schedule I or otherwise,

any right to payment for servicing under the Facility Agreement should be determined solely by the terms of the Facility Agreement and transaction documents to which Fifth Third is a party and not by the Subservicing Agreement devised by the common owners of Inservico and the Debtor on the eve of the Debtor's bankruptcy filing. In its current form, the Subservicing Agreement purports to condition the servicer's cooperation in connection with a transition of servicing upon being paid the extortionate fees referenced in Schedule I of the Subservicing Agreement. These fees are significantly greater than the transition fees contracted for under the Facility Agreement. The imposition of these fees proposed in the Subservicing Agreement impermissibly burdens the IR 7 portfolio in contravention of Fifth Third's rights under the Facility Agreement and other related transaction documents. Allowing the sale to proceed, and indirectly accepting the proposed fee structure under the Subservicing Agreement, would sanction an impermissible end-run around the requirements of Section 365 and interpretive case law that an executory contract be assumed with all of its benefits and burdens.

**B. No impairment of rights, claims or causes of action against non-debtor/third parties.**

11. The Debtor should not be allowed to exploit the provisions of Section 365 to protect the interests of its insiders who have potential liability to Fifth Third. Specifically, 221 Partners, which is the owner of Inservico as well as the direct or indirect owner of the Debtor and the Buyer, is obligated under a performance guaranty. Nothing in the assumption and assignment of the Subservicing Agreement should be deemed to adversely impact in any way whatever rights and claims Fifth Third may have against 221 Partners. Similarly, the Subservicing Agreement is not a binding agreement on Fifth Third and cannot be used to impair or adversely impact its right to terminate Inservico as the current servicer under the Facility Agreement. Inservico is not in bankruptcy and Fifth Third never approved, let alone signed, the

Subservicing Agreement; nor could it since it was only executed on the eve of bankruptcy. The Facility Agreement, which the Debtor does not attempt to assume and assign, is in default and presently entitles Fifth Third, at its discretion, to terminate Inservico as servicer at any time. As it is, Inservico already has given its advance notice of resignation and appears from the recitals in the Subservicing Agreement to dispute its responsibility to service the IR 7 portfolio under the Facility Agreement. *See, e.g.*, Subservicing Agreement § 17 (rejecting any obligation of Inservico under the Facility Agreement). Inservico and the Buyer are owned by the same entity—221 Partners—which should not be able to hide behind the purported Subservicing Agreement to avoid an immediate termination of Inservico if that is what Fifth Third elects to do.

C. **No impairment of Fifth Third’s right to assert any claims it has against TWG unrelated to Subservicing Agreement.**

12. The Debtor contends there are no “cure amounts” due with respect to its request to assume and assign the Subservicing Agreement. Given that this purported agreement was entered into the day before the bankruptcy case was filed this is not surprising. However, the assumption by the Debtor and assignment of this purported agreement to the insider Buyer should not enable the Debtor to avoid any liabilities it has or may have to Fifth Third under the Facility Agreement and other related transaction documents. Putting aside the fact that the Subservicing Agreement is neither binding nor enforceable on Fifth Third, the mere assumption and assignment of it should not impair any prepetition claims that Fifth Third may have against the Debtor based upon its origination of IR 7 assets, which are serviced under the Facility Agreement, and/or relating to the Debtor’s obligations under the Facility Agreement and other related transaction documents.

WHEREFORE, and for all of the foregoing reasons, Fifth Third respectfully prays that its Objection be sustained, and that the Sale Motion be denied.

Dated: November 6, 2012

Respectfully submitted,

*/s/ Michael K. McCrory* \_\_\_\_\_  
Michael K. McCrory (#9829-49)  
Jonathan D. Sundheimer (#29505-29)  
BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, IN 46204  
Phone: (317) 236-1313  
Fax: (317) 231-7433  
Email: michael.mccrory@btlaw.com  
jsundheimer@btlaw.com

*Attorneys for Fifth Third Bank, N.A.*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically this 6th day of November, 2012. I hereby further certify that I caused a copy of the foregoing to be served via U.S. Mail, First Class, Postage Pre-Paid upon parties that are not registered to receive notice by operation of the Court's electronic filing system at their respective addresses listed on the electronic filing receipt on November 7, 2012. Parties may access this filing through the Court's electronic filing system.

*/s/ Jonathan D. Sundheimer*  
\_\_\_\_\_  
Jonathan D. Sundheimer