

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

In re:) **Chapter 11**
)
TWG CAPITAL, INC.,) **Case No. 12-11019-BHL-11**
)
Debtor.)

**RESPONSE OF TWG CAPITAL, INC. TO LIMITED
OBJECTION OF FIFTH THIRD BANK, N.A. TO MOTION TO SELL**

TWG Capital, Inc. (the "Debtor"), debtor and debtor-in-possession, responds to the Limited Objection of Fifth Third Bank, N.A., To Motion To Sell (the "Objection"), as follows:

Summary

1. Fundamentally, Fifth Third Bank, N.A. ("Fifth Third") confuses, conflates, and in the process invents non-existent problems arising from two sets of documents. The first set of documents consist of agreements between and among Fifth Third, the Debtor (prior to its termination, as explained in paragraphs 3 and 4 herein), Insurance Receivables 7, LLC ("IR 7"), Inservico, Inc. ("Inservico") and 221 Partners Fund, L.P. ("221 Partners") (the "IR 7 Documents"). The other "set" of documents consists of a Subservicing Agreement by and between Inservico and the Debtor. Generally, the objection is a recitation by Fifth Third of an unfounded fear that the assumption by the Debtor and assignment to Carmel Funding, LLC ("Carmel Funding") of the Subservicing Agreement will somehow jeopardize the rights of Fifth Third under the various IR 7 Documents.

2. Fifth Third does not identify any provision of the Motion For Entry Of An Order (I) Approving Asset Purchase Agreement; (II) Authorizing The Sale Of Substantially All Of The Debtor's Assets Free And Clear Of All Liens, Claims And Encumbrances; And (III)

Authorizing The Assumption And Assignment Of Leases And Contracts (the "Sale Motion") filed by the Debtor that purports to seek any relief that would give rise to any foundation for their fears. Fifth Third does not identify any term or provision in the Purchase Agreement¹ attached to the Sale Motion, or the Sale Order attached to the Sale Motion, that purports to grant any relief that would provide any foundation for their fears. Fifth Third does not cite any statutory predicate or case law precedent to establish that their fabricated concerns arise by operation of law. For these reasons, the Objection should be overruled, and the Sale Motion approved.

Facts

3. The facts set forth in paragraphs 1 through 8 of the Objection are essentially correct. For purposes of this response, they can be summarized (and in part, corrected or elaborated upon) as follows:

a. The Debtor, Fifth Third and others entered into a Facility Agreement related to the IR 7 portfolio of insurance commission receivables;

b. The Debtor originally acted as both originator of the portfolio, and servicer of the portfolio assets;

c. On May 13, 2008, the Debtor, Lion Financial Services, Inc. (dba U.S. Bank Portfolio Services (and not Inservico, as represented by Fifth Third) entered into a Backup Servicing Agreement;

¹ Terms not otherwise defined herein shall have the same meaning ascribed to them in the Sale Motion or the Objection.

d. On May 15, 2010, a letter agreement purported² to appoint Inservico as a successor backup servicer under the Backup Servicing Agreement;

e. On August 13, 2010, the Debtor was terminated as the servicer under the Facility Agreement;

f. On August 13, 2010, Fifth Third directed its Collateral Agent to purportedly appoint Inservico as successor servicer under the Backup Servicing Agreement;

g. Inservico, lacking the platform, or employees to perform any servicing of the IR 7 portfolio, engaged the Debtor as subservicer to provide the servicing to the IR 7 portfolio under an informal arrangement;

h. In advance of the filing of this bankruptcy case, and in anticipation that its subservicing rights would be a potentially valuable asset by assumption and assignment, the Debtor formalized its informal arrangement with Inservico by the negotiation and execution of the Subservicing Agreement;

i. By the Sale Motion, the Debtor proposes to assume the Subservicing Agreement between it and Inservico, and assign it to Carmel Funding.

Argument

4. Fifth Third is not a party to the Subservicing Agreement. Fifth Third has no right or ability to compel the Debtor, or any successor of the Debtor, to provide servicing to Inservico for the IR 7 portfolio. Fifth Third has no right or ability to dictate to the Debtor, or any successor of the Debtor, the fees that the Debtor wishes to charge Inservico in return for servicing the IR 7 portfolio. By the same token, the Debtor is no longer a party to the IR 7

² Fifth Third complains in the Objection that recitals in the Subservicing Agreement suggest that Inservico disputes some aspects of its relationship with Fifth Third and/or the enforceability of some or all IR 7 Documents. The Debtor is a stranger to any such disputes but has observed that Fifth Third, Inservico and 221 do have differences among them as to the interpretation and effect of these documents.

Documents (having been terminated by Fifth Third and its Collateral Agent as servicer). The Debtor only has rights against its contracting party, Inservico. Neither the Debtor, nor any successor of the Debtor, can affect the legal rights of Fifth Third under the IR 7 Documents, including the limitations on Fifth Third's payment obligations under the Facility Agreement, and the rights that Fifth Third may have against Inservico or 221 Partners.

5. The Objection is really a string of statements by Fifth Third that the assumption and assignment of the Subservicing Agreement should not affect its rights under the IR 7 Documents. The Debtor agrees. What is mystifying to the Debtor is the source of Fifth Third's concern. Where, in the Sale Motion, the Purchase Agreement, the Sale Order, or by operation of law, is this feared impact requested, granted, or would otherwise arise? The answer is that these concerns are completely invented by Fifth Third and have no foundation in the Sale Motion, the Purchase Agreement, the Sale Order, or by operation of law.

6. In paragraph 10, Fifth Third complains that the Subservicing Agreement provides the Debtor with a right to certain fees that Fifth Third finds objectionable. Fifth Third states that the Subservicing Agreement is not binding upon it and cannot alter in any way the payment obligations that it has under the waterfall provisions set forth in the Facility Agreement. The Debtor agrees. The fees under the Subservicing Agreement are a contractual agreement between the Debtor and Inservico. The extent to which those fees can be passed through to IR 7 is determined by the Facility Agreement and the other IR 7 Documents. Those documents are not being affected or impaired. To the extent Fifth Third goes beyond this proposition to imply that that it has the ability to somehow modify the Subservicing Agreement in order to control, limit or restrict fees that the Debtor has contracted to receive from Inservico, its objection is misplaced. Just as the Debtor is a stranger to the IR 7 Documents and has no ability, in or

outside of the Chapter 11 case, to affect the contractual rights of Fifth Third under agreements to which the Debtor is a stranger, Fifth Third has no right or ability to affect the Debtor's rights to negotiate a fee structure for its services in a contract to which Fifth Third is a stranger. The Debtor agrees with Fifth Third's proposition that Section 365 and interpretive case law tell us that an executory contract must be assumed with all of its benefits and burdens, and cannot be unilaterally modified. The IR 7 Documents are not Debtor documents and are not even being purported to be assumed or assigned. There simply is no foundation for Fifth Third's fear that the IR 7 Documents are somehow being changed by the assumption and assignment of the Subservicing Agreement. By the same token, Fifth Third cannot, by its Objection, attempt to modify the Subservicing Agreement, which is being assumed and assigned, with all of its benefits and burdens.

7. In paragraph 11, Fifth Third makes reference to a certain performance guaranty with 221 Partners. Fifth Third states that the assumption and assignment of the Subservicing Agreement should not be deemed to adversely impact whatever rights and claims Fifth Third may have against 221 Partners. The Debtor agrees. Nothing in the Sale Motion, the Purchase Agreement, the Sale Order, or by operation of law would create such an impairment. Fifth Third also makes reference to its right to terminate Inservico as "the current servicer" under the Facility Agreement. Again, the Debtor agrees. Nothing in the Sale Motion, the Purchase Agreement, the Sale Order, or by operation of law would create such an impairment.

8. Fifth Third states in paragraph 12 of its Objection that the assumption and assignment of the Subservicing Agreement should not affect any right or claim Fifth Third may have against the Debtor under the IR 7 Documents. The Debtor agrees. Nothing in the Sale

Motion, the Purchase Agreement, the Sale Order, or by operation of law would create such an impairment.

Conclusion

9. In short, the Objection is really not an objection at all. It is an expression of fears which have no foundation in the relief requested in the Sale Motion, in the Purchase Agreement, in the language tendered under the Sale Order, or that would arise by operation of law.³ The Objection should be overruled, the Sale Motion granted, and the Debtor granted all other proper relief.

Respectfully submitted,

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³ When considered under that filter, Fifth Third is probably just scratching the surface of fears or concerns that are not raised in the Sale Motion, the Purchase Agreement, the Sale Order or by operation of law. Among other things, the Debtor also does not purport to reverse the results of last night's elections, or to cause a "super storm" to descend upon New Albany, Indiana.

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2012, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

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