

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,
REO SPECIALISTS, LLC, and
HOME AMERICAN MORTGAGE, INC.,

Debtors.

APPLICABLE DEBTOR

HOME AMERICA MORTGAGE, INC.
(Case No. 3:09-bk-10023-JAF)

Chapter 11

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)

Jointly Administered Under
Case No. 3:09-bk-07047-JAF

**SECOND EMERGENCY EX PARTE MOTION
TO EXTEND 11 U.S.C. § 546(a) DEADLINE**

Neil F. Luria, as Trustee for the Taylor, Bean & Whitaker Plan Trust files this *Second Emergency Ex Parte Motion to Extend 11 U.S.C. § 546(a) Deadline* as to Home America Mortgage, Inc., and states:

1. On November 25, 2009, the Debtor filed for relief under Chapter 11 of the United States Bankruptcy Code.
2. On July 21, 2011, the Bankruptcy Court entered its order confirming the *Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors* (the "Plan") [Order, D.E. #3420].
3. On August 10, 2011, the Plan became effective and created the Taylor, Bean & Whitaker Plan Trust, with Neil F. Luria as Trustee.
4. Pursuant to 11 U.S.C. § 546(a), the deadline for the Trustee to file certain avoidance actions was November 25, 2011.

5. On November 29, 2011, the Court entered its *Order Granting Emergency Ex Parte Motion to Extend 11 U.S.C. §546(A) Deadline* [D.E. #4546], which extended the deadline to file avoidance actions to March 23, 2012, and allowed the Trustee the right to seek a further extension.

6. Courts, scholars and practitioners throughout the nation are wrestling with the possible ramifications of the June 23, 2011, Supreme Court decision in *Stern v. Marshall*, 131 S.Ct. 2594 (2011), on the jurisdiction of bankruptcy courts. Various courts have reached differing results; however, as of this date, neither this Court nor the Eleventh Circuit has issued any order that applies or construes *Stern* regarding the jurisdiction of this Court to preside over and adjudicate avoidance actions brought pursuant to 11 U.S.C. §§ 544, 547, 548, and 550. Therefore, it is now unclear whether a lawsuit filed in the Office of the Clerk of the Bankruptcy Court, pursuant to general orders of reference of bankruptcy matters, for recovery of transfers avoidable under chapter 5 of the Bankruptcy Code suffice for purposes of the section 546 deadline if the Bankruptcy Court is later determined to lack subject matter jurisdiction over such actions.

7. It is the Trustee's view that a complaint filed in the office of the Clerk of the Bankruptcy Court is filed in the District Court, as the Bankruptcy Court is, for administrative purposes at the very least, a unit of the District Court. *See* 28 U.S.C. § 151.

8. Nevertheless, at least one court, in the wake of *Stern*, appears to have decided that a complaint under chapter 5 of the Bankruptcy Code filed in the Bankruptcy Court should be dismissed outright- a proposition with which the Trustee's undersigned counsel respectfully but forcefully disagrees. Such reasoning does not address the reasonable alternative espoused by other courts that, instead of dismissing a complaint that properly alleges a cognizable cause of

action and is filed within the Bankruptcy Court unit of the District Court, the district judge should simply withdraw the reference or direct the parties to seek such relief.

9. One of the ramifications of the *Stern* decision has been the filing of motions for withdrawal of the reference by Defendants, on the basis of *Stern*, in certain of the adversary proceedings instituted in this case to recover preferential or fraudulent conveyances. In fact, Federal District Judge William Terrell Hodges has scheduled a hearing on April 10, 2012, on the motions to withdraw the reference filed in the following adversary proceedings: 3:11-ap-566-JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. RLI Insurance Company); 3:11-ap-674-JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. James Gregory Hicks); 3:11-ap-976-JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. James Gregory Hicks); and 3:11-ap-800-JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. American Express Bank, FSB and American Express Travel Related Services Company, Inc.) (collectively, the “Motions to Withdraw the Reference”).¹

10. The Trustee requests that the Court extend the § 546 deadline through and including 10 days following a ruling by Judge Hodges on the above Motions to Withdraw the Reference.

11. The Trustee submits that cause exists to extend the deadline in order to protect the estate from rulings on new jurisdictional and administrative issues arising in the wake of the *Stern* decision.

12. Authority exists for such an extension. Pursuant to *In re International Administrative Services, Inc.*, 408 F.3d 689 (11th Cir. 2005), the Bankruptcy Court has the

¹ The Trustee and the above referenced Defendants have agreed to move to continue the hearing currently set for April 10, 2012, but, at the time of the filing of this request for extension, the hearing has not yet been continued.

authority to extend the time within which a trustee or other estate representative can commence avoidance actions pursuant to 11 U.S.C. § 546(a). Rule 9006(b) states:

[W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause may at any time in its discretion ... order the period enlarged.

13. In *International Administrative Services*, the court held that, “although ‘by these rules ... or by order of court’ does not explicitly encompass statutory timeframes, it does bring all of the Federal Rules of Bankruptcy Procedure under its umbrella. Not surprisingly, this would include Rule 7001, which defines an adversary proceeding as one ‘to recover money or property’ and Rule 7003, which governs the commencement of adversary proceedings.” The court held that to read a jurisdictional bar into § 546(a) would lead to absurd results. Therefore, the court determined that Section 546(a) is indeed a statute of limitations, subject to waiver, equitable tolling, and equitable estoppel. *See also In re Rodriguez*, 283 B.R. 112, 116-18 (Bankr. E.D.N.Y. 2001) (holding Section 546(a) to be a true statute of limitations, subject to enlargement by court order, rather than a statute of repose or jurisdictional bar); *In re National Gold Exchange, Inc.*, Case No. 8:09-bk-15972-MGW (D.E. 687)(Bankr. M.D. Fla. 2011) (J.Williamson)(Order Granting Trustee’s Motion to Extend 11 U.S.C. § 546 Deadline); *In re DM Industries, Ltd.*, Case No. 09-15533-BKC-LMI (D.E. 469)(Bankr. S.D. Fla. 2011)(J. Isicoff) (Order Granting Joint Motion of Debtor and the Official Committee of Unsecured Creditors to Extend 11 U.S.C. § 546 Deadline); *In re Jaferi*, Case No. 08-23903-BKC-PGH (D.E. 508)(Bankr. S.D. Fla. 2010)(J. Hyman)(Order Granting Trustee’s Motion to Extend 11 U.S.C. § 546 Deadline).

WHEREFORE, the Trustee respectfully requests the Court to enter an *ex parte* order, in the form attached hereto as Exhibit A, extending the 11 U.S.C. § 546(a) deadline as to Home

America Mortgage, Inc. through and including 10 days from the entry of an order on the Motions to Withdraw the Reference.

Dated: March 23, 2012

Respectfully submitted,

BERGER SINGERMAN LLP
1450 Brickell Avenue, Ste. 1900
Miami, FL 33131
Telephone: (305) 755-9500
Facsimile: (305) 714-4340

By: /s/ Kristopher Aungst

Paul Steven Singerman
Florida Bar No. 378860
singerman@bergersingerman.com
Kristopher Aungst
Florida Bar No. 055348
kaungst@bergersingerman.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically via the Court's CM/ECF system upon all parties authorized to receive electronic service in this case on this 23rd day of March, 2012.

/s/ Kristopher Aungst
Kristopher Aungst

Exhibit A

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

Chapter 11

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,
REO SPECIALISTS, LLC, and
HOME AMERICAN MORTGAGE, INC.,

CASE NO.: 3:09-bk-07047-JAF
CASE NO.: 3:09-bk-10022-JAF
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Debtors.

_____ /

APPLICABLE DEBTOR

(Jointly Administered Under
CASE NO.: 3:09-bk-07047-JAF)

HOME AMERICA MORTGAGE, INC.
(Case No. 3:09-bk-10023-JAF)

_____ /

ORDER GRANTING SECOND EMERGENCY *EX PARTE*
MOTION TO EXTEND 11 U.S.C. S 546(A) DEADLINE

This case came before the Court upon the *Second Emergency Ex Parte Motion to Extend 11 U.S.C. § 546(a) Deadline* [D.E. ____] (the "Motion"). The Motion seeks to have the Court extend the § 546(a) deadline in order to protect the estate from possible rulings on new jurisdictional and administrative issues arising in the wake of Stern v. Marshall, 131 S.Ct. 2594 (2011). Section 546 is a statute of limitations subject to waiver, equitable tolling and equitable estoppel, and a bankruptcy court has the authority to enlarge the period for commencing avoidance actions. In re Int'l Admin. Servs., 408 F.3d 689, 699 (11th Cir. 2005). It is

ORDERED:

1. The Motion is GRANTED.
2. The deadline imposed under 11 U.S.C. § 546(a) as to Home America Mortgage Corp. is hereby extended through and including 10 days from the entry of an order on the motions to withdraw the reference filed in the following adversary proceedings: 3:11-ap-566-

JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. RLI Insurance Company); 3:11-ap-674-JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. James Gregory Hicks); 3:11-ap-976-JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. James Gregory Hicks); and 3:11-ap-800-JAF (Neil F. Luria, Trustee for the Taylor, Bean Whitaker Plan Trust v. American Express Bank, FSB and American Express Travel Related Services Company, Inc.).

3. All parties in interest shall have twenty-one (21) days from the date of this Order within which to seek reconsideration of this Order. Upon receipt of a motion for reconsideration, together with a supporting memorandum, the Court may schedule a hearing on the motion for reconsideration. If a party fails to file a motion seeking reconsideration within twenty-one days of the date hereof, any objection to the relief sought in the Motion, and granted by this Order, will be deemed waived.

DATED this ____ day of _____, 2012, in Jacksonville, Florida.

JERRY A. FUNK
United States Bankruptcy Judge

Copy to:
Kristopher Aungst, Esq.