

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

Chapter 11

TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP., *et al.*,

Debtors.

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)

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO  
DEFENDANT'S MOTION FOR CLARIFICATION**

Plaintiff, Neil F. Luria, Trustee for the Taylor, Bean & Whitaker Plan Trust ("Plaintiff"), files this response in opposition to *Promontory Financial Group, LLC's Motion for Clarification of, or, in the Alternative, for Relief From or Reconsideration of Orders Granting the Trustee's Emergency Ex Parte Motions to Extend 11 U.S.C. § 546(a) Statute of Limitations* ("Motion") [ECF No. 5215] filed by Promontory Financial Group, LLC ("Promontory"), a defendant in a preference adversary proceeding brought by Plaintiff, 3:11-ap-00547-JAF (the "Adversary Proceeding"), and states:

1. Promontory seeks entry of an Order clarifying that the Ex Parte Orders<sup>1</sup> do not apply to it or, alternatively, that the Court relieve Promontory from or vacate those Ex Parte Orders.

2. The entire premise for the relief sought is Promontory's "understand[ing]" that the complaint initiating the Adversary Proceeding will be amended to add counts alleging fraudulent transfers. Motion at 2.

3. As an initial matter, Promontory neglects to advise the Court of the basis for its understanding. Plaintiff, however, will do so. The basis for Promontory's understanding is

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<sup>1</sup> All capitalized terms not defined herein shall have the same meanings ascribed to them in the Motion.

information relayed to it by Plaintiff as part of a settlement conference. It is, therefore, inappropriate for Promontory to disclose the contents of settlement discussions in a pleading filed in open court.

4. Putting aside the inappropriate use of settlement discussions, the Court should summarily deny the Motion as unripe for adjudication because, to date, Plaintiff has not filed an amended complaint alleging fraudulent transfers. In fact, Plaintiff may never do so.

5. In short, unless and until such an amended complaint is filed, the issue of whether fraudulent transfer claims would relate back under Rule 15 or be time-barred is indisputably premature.

6. Consequently, the Court should summarily deny the Motion as unripe for adjudication, as the Order Promontory seeks would constitute an advisory opinion, nothing more, nothing less. *See International Tape Manufacturers Ass'n v. Gerstein*, 494 F.2d 25, 27-28 (5<sup>th</sup> Cir. 1974); *Platt v. Carroll*, 452 F. Supp. 408, 409 (S.D. Fla. 1978).

7. Notwithstanding Promontory's request, Motion at 18, Plaintiff respectfully submits that there is no need for a hearing on the Motion which, again, can and should be denied summarily by the Court.

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Dated: May 29, 2012

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically via the Court's CM/ECF system upon Michael St. Patrick Baxter, Esq. and Joshua D. McKarcher, Esq., Covington & Burling LLP, Attorneys for Defendant, 1201 Pennsylvania Ave., NW, Washington, DC 20004-2401, email: [mxbaxter@cov.com](mailto:mxbaxter@cov.com) and [jmckarcher@cov.com](mailto:jmckarcher@cov.com); and Stephen D. Busey, Esq. and Leanne McKnight Prendergast, Esq., Smith Hulsey & Busey, Attorneys for Defendant, 225 Water Street, Suite 1800, Jacksonville, FL 32202, email: [sbusey@smithhulsey.com](mailto:sbusey@smithhulsey.com) and [lprendergast@smithhulsey.com](mailto:lprendergast@smithhulsey.com) on this 29<sup>th</sup> day of May, 2012.

/s/ Paul A. Avron  
Paul A. Avron