UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,

Debtor.

Case No.: 3:09-BK-07047

Chapter 11

FEDERAL HOME LOAN MORTGAGE CORPORATION'S
OBJECTION TO DEBTORS' JOINT DISCLOSURE STATEMENT

Federal Home Loan Mortgage Corporation in conservatorship ("Freddie Mac"),[1] by and through its undersigned counsel, files this Objection to the Disclosure Statement (the "Disclosure Statement") of the Debtors, Pursuant to Section 1125 of the Bankruptcy Code, with Respect to Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors (the "Committee"). Freddie Mac respectfully requests that the Court deny approval of the Disclosure Statement unless it is modified to rectify the deficiencies identified in this Objection. In support of its Objection, Freddie Mac states as follows:

INTRODUCTION

1. Freddie Mac is one of the largest creditors of the Taylor, Bean & Whitaker Mortgage Corp. ("TBW" or the "Debtor") estate, having asserted a claim in the amount of $1.78 billion. Freddie Mac's claim constitutes approximately 20% of all filed claims, according to the Debtor's Disclosure Statement. Consequently, Freddie Mac is particularly interested in ensuring that the Debtor's Disclosure Statement provides adequate information regarding the Joint Plan of Liquidation (the "Plan").

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[1] On September 6, 2008, the Director of the Federal Housing Finance Agency ("FHFA" or "Conservator") placed Freddie Mac into conservatorship pursuant to express authority granted to him in the Housing and Economic Recovery Act of 2008 to preserve and conserve Freddie Mac's assets and property.

2. The Disclosure Statement omits material information necessary to allow parties to cast an informed vote regarding the proposed Plan. As discussed below, the Disclosure Statement lacks necessary disclosures regarding, among other things, (1) the FDIC settlement, (2) the distribution of funds identified in the Debtor's Final Reconciliation Report, (3) the Debtor's anticipated asset recoveries, (4) the proposed Plan Trust and its operations and governance, (5) the separate classification and disparate treatment of trade creditors, and (6) the determination of distribution reserves. Moreover, the Disclosure Statement fails to address priority status for Freddie Mac's claim pursuant to 12 U.S.C. § 4617(b)(15), much less address how Freddie Mac's claim impacts Plan feasibility or the ultimate distributions to other creditors.

3. The Disclosure Statement and the proposed Plan fail to recognize that the FHFA, as Freddie Mac's Conservator, is not subject to any restrictions on its powers and functions sought to be imposed by the proposed Plan. *See* 12 U.S.C. § 4617(f) ("[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or receiver.").

4. Unless the Debtor revises the Disclosure Statement to provide adequate information as requested below, including the carve-out of any restraints on the actions of FHFA, as Freddie Mac's Conservator, the Court should deny approval of the Disclosure Statement.

ARGUMENT AND AUTHORITIES

A. The Standard for Approval of the Disclosure Statement

5. Pursuant to Section 1125 of the Bankruptcy Code, a plan proponent must provide holders of impaired claims with "adequate information" regarding a debtor's proposed plan of reorganization. In that regard, Section 1125(a)(l) of the Bankruptcy Code provides:

> "Adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a)(l). A debtor's disclosure statement must, as a whole, provide information that is ''reasonably practicable" to permit an "informed judgment" by creditors entitled to vote on the plan. *See In re E. Redley Corp.*, 16 B.R. 429, 430 (Bankr. E.D. Pa. 1982) ("The requirement that a disclosure statement contain adequate information serves to present the parties entitled to vote on the plan with an opportunity to independently evaluate the merits of the proposed plan."); *In re Civitella*, 15 B.R. 206, 208 (Bankr. E.D. Pa. 1981) ("'The congressional concern [underlying section 1125 of the Bankruptcy Code] was to require the debtor to furnish to the electorate to the confirmation process sufficient financial and operating information to enable each participant to make an "informed judgment" whether to approve or reject the proposed plan." (*quoting In re Northwest Recreational Activities, Inc.*, 8 B.R. 10, 11 (Bankr. N.D. Ga. 1980)). The fundamental requirement of a disclosure statement is that it "must clearly and succinctly inform the average creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16,19 (Bankr. D.N.H. 1991).

6. A disclosure statement should contain information regarding available assets and their value, any financial information, valuations, or projections that would be relevant to creditors' determinations of whether to accept or reject the plan, a liquidation analysis setting forth the estimated return that creditors would receive under chapter 7, and information regarding claims against the estate. *See, e.g., In re Phoenix Petroleum Co.*, 278 B.R 385,393 n.6 (Bankr. E.D. Pa. 2001); *In re Oxford Homes, Inc.*, 204 B.R. 264, 269 (Bankr. D. Me. 1997); *In re Scioto*

Valley Mortgage Co., 88 B.R. 168, 170-71 (Bankr. S.D. Ohio 1988); *In re Metrocraft Publ'g Servs., Inc.*, 39 B.R 567,568 (Bankr. N.D. Ga. 1984).

B. Freddie Mac's Objections to the Disclosure Statement

7. The Debtor's Disclosure Statement fails to satisfy the requirements of Section 1125 in the following respects and thus should not be approved in its current form.

Inadequate Disclosure regarding Freddie Mac's Claim

8. As a threshold matter, the Disclosure Statement fails even to mention Freddie Mac's $1.78 billion claim, much less classify it. The Disclosure Statement describes Class 8 General Unsecured Claims as including the claims of "any institutional or non-institutional investor in mortgage loans (or related debt or equity securities)." *See* Disclosure Statement at 75. Freddie Mac presumes, from this description, that the Debtor seeks to classify and treat Freddie Mac's claim as a Class 8 Claim. Freddie Mac, however, asserted priority status for its claim pursuant to 12 U.S.C. § 4617(b)(15).[2] The Debtor should disclose how it intends to classify and treat Freddie Mac's claim, in whole or in part, in light of this statute, state whether and in what amount it intends to reserve distributions in favor of Freddie Mac, in FHFA conservatorship,

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[2] Section 1145(a) of the Federal Housing Finance Regulatory Reform Act of 2008, Pub. L. No. 110-289, amended section 1367 (12 U.S.C. § 4617) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, provides, in pertinent part, as follows:

> (A) IN GENERAL. The Agency, as conservator or receiver, may avoid a transfer of any interest of an entity-affiliated party, or any person determined by the conservator or receiver to be a debtor of the regulated entity, in property, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Agency was appointed conservator or receiver, if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the regulated entity, the Agency, the conservator, or receiver.
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> * * *
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> (D) RIGHTS UNDER THIS PARAGRAPH. The rights under this paragraph of the conservator or receiver described in subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under title 11, United States Code.

See 12 U.S.C. § 4617(b)(15)(A) & (D). Freddie Mac is a "regulated entity" for purposes of this statute.

pending resolution of any claim classification dispute, and address the impact on Plan feasibility and distributions to other creditors (including secured, administrative, and other priority claimants) of the classification of Freddie Mac's claim.

The Proposed FDIC Settlement

9. The Plan seeks approval of the settlement reached between the Debtor, the Committee and the FDIC, as receiver of Colonial Bank ("Colonial"). The Disclosure Statement, however, fails to provide adequate information regarding the following material parts of the proposed settlement.

10. The Amount of the FDIC's Allowed Unsecured Claim. The Plan provides that the FDIC shall be granted an Allowed General Unsecured Claim in the amount set forth in Section 1.9 of the FDIC Settlement Agreement. *See* Plan at Art. 6(E)(4). Yet the Settlement Agreement does not provide an "amount" but instead provides a formula for calculating the amount: $3,253,622,510.30 "less (i) the unpaid balance of the COLB Loans as of September 9, 2009 and (ii) any amounts realized or received by the FDIC-R from (or pursuant to) the AOT Waterfall and the Overline Waterfall." *See* First Amendment to Settlement Agreement at Section 1.9. There is no disclosure (in the Settlement Agreement, the Disclosure Statement, or the Plan) of the FDIC's proposed allowed unsecured claim. Without this disclosure, parties are unable to determine whether to object to the proposed claim amount. Further, because Plan balloting, distributions to unsecured creditors, and claim reserves are all to be calculated, in part, based upon the FDIC's allowed claim, this number must be known prior to the deadline for Plan voting and the assertion of Plan objections.

11. The Disclosure Statement should therefore identify the proposed amount of the allowed claim to be provided to the FDIC and explain the Debtor's calculation of that amount.

The Disclosure Statement should disclose the basis for determining all components of the claim calculation, including the COLB Loan balance and the calculation of amounts anticipated to be recovered under the AOT and Overline waterfalls. Notably, one element of the waterfall analysis is the AOT Balance, which is defined as "the outstanding balance advanced as of August 24, 2009 under the AOT Agreements." *See* Settlement Agreement at Section 1.3(a). The AOT Balance should be disclosed, and the Debtor should describe how it was calculated or determined.

12. Distribution of Funds on Deposit at Colonial Bank. The Disclosure Statement provides, "By the Effective Date, all custodial accounts relating to TBW's servicing operations at Colonial and TBW's operating accounts at Colonial will be distributed in accordance with the Reconciliation Report." *See* Disclosure Statement at 66. The Settlement Agreement states, apparently with reference to the same funds, that the "Debtor acknowledges and agrees that the timing and manner of distribution of the [Colonial Bank] Deposit Accounts is within the exclusive jurisdiction and discretion of the FDIC-R." *See* Settlement Agreement at Section 1.7. These disclosures raise several points that must be clarified. First, will all of the funds held at Colonial Bank by the FDIC be distributed by the Plan Effective Date? If not, which funds will be disbursed and which will not? More specifically, will the "Net Affected Funds" identified in Exhibit E to the Final Reconciliation Report be distributed to the parties in the amounts set forth in Exhibit E, as it pertains to the Colonial accounts? To what parties and in what amounts will funds on deposit to Colonial be distributed prior to the Effective Date?

13. Release of Claims against the FDIC. The Plan provides for a wide-ranging release of individual creditor claims against the FDIC. *See* Plan at Art. 10(C). The FDIC, however, is only releasing claims against the Debtor, the Committee, and their respective

professionals. *Id*. at Art. 10(D). The Disclosure Statement fails to describe the consideration provided by the FDIC for the proposed release to be granted by Freddie Mac and other creditors. Nor does the Disclosure Statement describe why the release is unilateral, in that the FDIC is seeking to obtain a release of all creditor claims but is not releasing its claims against those creditors. Additional disclosure regarding the justification for the proposed release in favor of the FDIC is necessary.

14. Further, because 12 U.S.C. § 4617(f) provides that a Court may not restrain or affect the operations of the Conservator, the proposed Plan release of any claims held by the Conservator against third parties, including the FDIC, is prohibited.

Distribution of Funds Identified in Final Reconciliation Report

15. As noted above, the Disclosure Statement indicates that funds held in various accounts at Colonial will be distributed prior to the Plan Effective Date. Additional disclosures regarding those distributions are required, as previously discussed. In addition, the Final Reconciliation Report identifies funds on deposit at Regions Bank, as of April 30, 2010. *See* Final Reconciliation Report at 36-37 (Table 3) and Exhibit E. Neither the Disclosure Statement nor the Plan appears to disclose when and how the funds on deposit at Regions Bank will be distributed or whether they will be distributed to the parties in the amounts identified in the Final Reconciliation Report. The Disclosure Statement and the Plan should state how, when, in what amounts, and to whom the funds at Region Bank (and any other banks at which TBW maintained accounts) will be distributed.

16. The Plan and Disclosure Statement also fail to provide a mechanism or procedure for parties to contest the findings of the Final Reconciliation Report or otherwise object to the distribution of funds in accordance with the Report.

The Debtor's Anticipated Asset Recoveries

17. In the Liquidation Analysis, attached as Exhibit C to the Disclosure Statement, the Debtor identifies several anticipated asset recoveries. The Disclosure Statement, however, fails to explain sufficiently the nature of, or basis for, the expected recoveries. In particular, the Debtor identifies a range of approximately $104 million - $110 million in "FDIC Confirmation Related Cash Recoveries." In a footnote, the Debtor reveals that this includes amounts anticipated to be received by the Debtor at confirmation "related to the FDIC Settlement Agreement from REO and certain Colonial bank accounts." *See* Disclosure Statement, Exhibit C at fn. A. These recoveries comprise approximately half of the forecasted asset recoveries, but the Disclosure Statement provides virtually no detail regarding them. The Debtor should identify the basis of its estimates and describe with greater particularity the source(s) of the funds and also identify any risks to recovery of the amounts projected. Further, the Debtor should explain, as noted above, whether the funds from "the Colonial bank accounts" are different than those expected to be distributed to parties in accordance with the Final Reconciliation Report. There is a lack of disclosure or clarity regarding the funds that the Debtor anticipates to receive from the FDIC and when, in what amounts, and to which parties those funds are to be distributed.

18. Additionally, the Liquidation Analysis identifies "Unpaid Advance Reimbursements" as "asset recoveries" in the range of $90 million - $250 million. *See* Disclosure Statement at Exhibit C. The footnotes to the Liquidation Analysis indicate that the recovery figures "do not include any potential avoidance actions . . . or any other potential litigation matters." *Id*. at fn. B. It is unclear how, from whom, and when the Debtor anticipates recovering the Unpaid Advance Reimbursements. The extremely wide range of potential recoveries suggests that there is significant uncertainty regarding their ultimate collection. The

Debtor should provide additional disclosures regarding the source(s) of the recoveries, the risks of non-recovery, and any assumptions made by the Debtor in its projections. Further, the Debtor should explain how the amounts identified as Unpaid Advance Reimbursements in the Liquidation Analysis correspond, if at all, to the Unpaid Advances and Unpaid Service Fees identified in Table 5 to the Final Reconciliation Report.

The Proposed Plan Trust

19. The Plan provides for the transfer of the Debtor's assets to the Plan Trust. The Plan Trust will operate pursuant to the Plan Trust Agreement, under the direction and control of the Plan Trustee and the Plan Advisory Committee. Although the Disclosure Statement provides a summary of certain Plan Trust provisions, the Plan Trust Agreement (which will establish the rights, powers, and obligations of the Plan Trust and the Plan Trustee) will not be provided to parties in interest until the Debtor files its Plan Supplement, possibly as late as three days prior to the confirmation hearing. Because the Plan Trust will effectively exercise all of the rights and powers of the Debtor, including asserting claim objections, pursuing post-confirmation litigation, and distributing estate assets to creditors, the Plan Trust Agreement is of vital importance. Accordingly, the Debtor should be required to disclose the Plan Trust Agreement in conjunction with the Disclosure Statement or, at the latest, a week prior to the deadline to file objections to Plan confirmation and cast ballots.

20. Further, the Disclosure Statement indicates that the three-person Plan Advisory Committee shall be appointed from current members of the Committee. *See* Disclosure Statement at 85. The Disclosure Statement should identify the percentage of the aggregate unsecured claims pool held by the current members of the Committee and should explain why only members of the Committee are permitted to serve on the Plan Advisory Committee. The

Disclosure Statement should also explain what reporting will be provided by the Plan Trustee to creditors who are not members of the Plan Advisory Committee. Currently, it appears that there will be no such required reporting. If true, the Debtor should disclose how Freddie Mac, as a holder of a $1.78 billion claim, which is likely many multiples of the aggregate claims held by to-be-appointed members of the Plan Advisory Committee, can obtain information regarding the activities, obligations, and assets of the Plan Trust. The members of the Plan Advisory Committee should also be disclosed at least one week prior to the deadline to file confirmation objections and cast Plan ballots.

The Classification and Treatment of Trade Creditors

21. Although general unsecured creditors are grouped in Class 8 of the TBW Plan, the Debtor and the Committee propose to classify separately a subset of unsecured creditors--the Trade Creditors--in Class 9. The apparent purpose of this separate classification is to favor Trade Creditors over other unsecured creditors by allowing them, and them alone, to receive up to $15 million pursuant to the FDIC Settlement. The Trade Creditors will also participate, pro rata, in distributions available to general unsecured creditors. *See* Disclosure Statement at 75-76.

22. The Debtor and the Committee have apparently not yet designated who will be entitled to this favorable treatment; that determination is promised to be posted online upon service of the Plan ballots. *Id*. at 76. In light of the proposed discrimination among unsecured creditor classes, the Debtor should make additional disclosures. Namely, it should disclose (1) the justification for separately classifying and disparately treating the Trade Creditors, including the benefits received by, or accruing to, the Debtor as a consequence, (2) the necessity and propriety of preferentially treating Trade Creditors in the context of a liquidating plan, (3) whether the Committee participated in the determination of the FDIC's proposed allowed claim

(the amount of which directly impacts recoveries to Trade Creditors and, consequently, other unsecured creditors), (4) the estimated amount of the aggregate allowed Trade Creditor claims, (5) the percentage of the total unsecured claims comprising Trade Creditor claims, and (6) a comparison of the estimated recovery to Trade Creditors versus the estimated recovery to Class 8 General Unsecured Creditors. Without apparent justification, the Trade Creditors are potentially receiving a significant (but undisclosed) recovery on their unsecured claims, while General Unsecured Creditors are expected to receive 3-4% of their claims. The Disclosure Statement must, therefore, provide additional detail regarding the proposed disparate treatment.

23. Further, as noted above, the Committee is expected to appoint all three members to the Plan Advisory Committee. The Disclosure Statement should also indicate whether those parties will be Trade Creditors.

The Determination of Distribution Reserves

24. The Plan provides for the creation of distribution reserves relating to disputed claims. As for disputed Priority Claims, the Plan Trustee is required to reserve funds equal to the lesser of (1) the amount set forth in the claimant's proof of claim, and (2) the estimated amount of the claim for distribution purposes, as determined by the Bankruptcy Court. *See* Plan at Art. 7(C)(2). Yet the Plan also provides that the amount of the Priority Claims Reserve "shall be based on the Plan Trustee's good faith estimate of the amount necessary to pay all present and anticipated . . . Priority Claims." *Id.* The latter provision creates uncertainty regarding the Plan Trustee's powers (again emphasizing the need for disclosure of the Plan Trust Agreement). Presumably, the Plan Trustee's "good faith estimate" will not override the foregoing Plan provision setting forth the parameters of the Priority Claims Reserve. The inconsistency, however, should be clarified.

25. Similarly, with regard to the reserve for disputed unsecured claims, the Plan requires that the Plan Trustee reserve the amount that would be distributed on account of a disputed claim if the claim were an allowed claim in the lesser of (1) the amount set forth in the creditor's proof of claim, and (2) the estimated amount of the claim for distribution purposes, as determined by the Bankruptcy Court. *See* Plan at Art. 7(C)(3). The Plan, however, also creates uncertainty with regard to the unsecured claim reserves by apparently allowing the Plan Trustee to "decrease the amount allocated to any Reserve for any Estate as the Plan Trustee determines is appropriate." *Id*. at Art. 7(C)(4). This discrepancy regarding the means for establishing and maintaining adequate claim reserves should be clarified.

26. If the Debtor intends for the Plan Trustee to have the discretion to unilaterally modify disputed claim reserves, then the Disclosure Statement should describe the standards applicable to that determination, what notice will be provided of the proposed modification, and whether Court review or approval will be permitted. The failure to establish adequate reserves may result in the denial of property rights to creditors with disputed claims. The Debtor should explain whether and, if so, why the Plan Trustee is intended to be granted the ability to deny a party's property rights without notice and Court approval.

Proposed Compensation of Plan Trustee and Trust Professionals

27. The Disclosure Statement should identify the compensation to be provided to the Plan Trustee. Further, the Liquidation Analysis projects that the Plan Trust professionals will be paid approximately $20 million. The Disclosure Statement should describe the basis for this expense estimate.

Limitation on Court Action

28. In its capacity as Conservator, FHFA is vested with broad statutory powers to "preserve and conserve the assets and property of [Freddie Mac]." *See* 12 U.S.C. § 4617(b)(2)(B)(iv). To provide the Conservator with the broadest possible latitude to preserve and conserve Freddie Mac's assets, Congress expressly barred courts from taking "any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." *Id*. at § 4617(f).

29. Thus, any attempt to enjoin or restrain the Conservator in the exercise of its powers relating to Freddie Mac, in FHFA conservatorship, is barred. *See Esther Sadowsky Testamentary Trust v. Syron*, 639 F. Supp.2d 347, 350 (S.D.N.Y. 2009). Indeed, courts interpreting section 4617(f) have uniformly recognized that "[t]he court lacks jurisdiction to adjudicate matters which may restrict the FHFA's ability to exercise [its] powers"[3] and that "[t]his ban [on judicial interference] is an essential part of HERA's comprehensive scheme for conservatorships and receiverships." *Sadowsky*, 639 F. Supp.2d at 351.[4]

30. Section 4617(f) bars courts from taking an action that restrains or affects the exercise of the powers or functions of the Conservator, even if that action is directed at a third party and not at the Conservator directly. That is, "[a] court action can 'affect' a conservator

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[3] *Kuriakose v. Fed. Home Loan Mortgage Corp.*, No. 08-cv-7281, 2009 WL 4609591, at *9 (S.D.N.Y. Dec. 7, 2009). *See also In re Fed. Nat'l Mortgage Ass'n. Secs., Derivative, and "ERISA" Litig.*, 629 F. Supp. 2d 1, 4 n.4 (D.D.C. 2009) ("HERA explicitly prohibits" courts from "tak[ing] action that would 'restrain or affect' FHFA's discretion" (quoting 12 U.S.C. § 4617(f))); *In re Fed. Home Loan Mortgage Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 799 (E.D. Va. 2009) ("HERA provides that 'no court may take any action to restrain or affect the exercise of power or functions of the [FHFA] as a conservator or a receiver.'" (alteration in original) (quoting 12 U.S.C. § 4617(f))).

[4] The Housing and Economic Recovery Act ("HERA"), Public Law No. 110-289, 122 Stat. 2654 (2008), titled the Federal Housing Finance Regulatory Reform Act of 2008.

even if . . . the litigation is not directly aimed at the conservator itself." *See In re Federal Home Loan Mortgage Corp. Deriv. Litig.*, 643 F. Supp.2d at 799.

31. Accordingly, the proposed Plan cannot be confirmed without specifically exempting the Conservator from provisions seeking to restrain or affect the Conservator's ability to act. This includes, but is not limited to, the Plan Injunction, the Non-Transferability of Distributions, and the release of claims against third parties, including the FDIC. *See* Disclosure Statement at 100-03 & 113-14.

RESERVATION OF CONFIRMATION OBJECTIONS

32. Freddie Mac reserves all objections to the Debtor's Plan, including those unrelated to the issues raised in this Disclosure Statement Objection.

CONCLUSION

Freddie Mac requests that the Court deny approval of the Disclosure Statement unless the Debtor provides the additional disclosures and clarifications requested in this Objection, including addressing the limitations imposed by 12 U.S.C. § 4617.

Dated: November 2, 2010

Respectfully submitted,

/s/ Jason Johnson
Gary R. Soles
Florida Bar No.: 0616149
Jason Ward Johnson
Florida Bar No.: 0186538
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
450 South Orange Avenue, Suite 800
Orlando, Florida 32803
Telephone: (407) 843-4600
Facsimile: (407) 843-4444
e-mail: jason.johnson@lowndes-law.com

-and-

/s/ George Kielman
George Kielman,
Managing Associate General Counsel
Kenton W. Hambrick,
Associate General Counsel
Soha Mody, Associate General Counsel
Federal Home Loan Mortgage Corporation
8200 Jones Branch Drive - MS 202
McLean, Virginia 22102
Telephone: (703) 903-2640
Facsimile: (703) 903-3691

-and-

/s/ Hugh Ray
Hugh Ray
Texas Bar No: 16611000
Paul D. Moak
Texas Bar No. 00794316
McKool Smith, P.C.
600 Travis Street, Suite 7000
Houston, Texas 77002
Telephone: (713) 485-7300
Facsimile: (713) 485-7344

Kyle Lonergan
New York Bar No: 3978533
McKool Smith, P.C.
One Bryant Park, 47th Floor
New York, New York 10036
Telephone: (212) 402-9425
Facsimile: (212) 402-9444
e-mail: klonergan@mckoolsmith.com

Attorneys for Federal Home Loan Mortgage Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 2nd day of November 2010, I electronically filed the foregoing pleading with the Clerk of Court by using the Case Management/Electronic Case Filing ("CM/ECF") system which will send a notice of electronic filing, and I will complete service of the foregoing as required by Rule 5, Federal Rules of Civil Procedure, made applicable by Rule 7005, Federal Rules of Bankruptcy Procedure, to all parties indicated on the electronic filing receipt.

/s/ Paul D. Moak
Paul D. Moak