

**UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

TAYLOR BEAN &
WHITAKER MORTGAGE
CORP.,
et al.

Chapter 11
Case No 09-bk-07047-JAF

Debtors

**MOTION FOR RELIEF FROM THE AUTOMATIC STAY, TO THE EXTENT
APPLICABLE, TO PERMIT INSURER TO ADVANCE DEFENSE COSTS AND
PAYMENT OF SETTLEMENT OF EMPLOYMENT DISCRIMINATION CLAIM**

Lloyds of London ("Lloyds of London") hereby moves for entry of an order granting relief from the automatic stay pursuant to Section 362(b)(1) of the Bankruptcy Code, to the extent applicable, to permit Lloyds of London, as Debtor's insurer, to follow the express terms of Debtor's insurance policy and advance Defense Costs (as defined in the subject policy) and pay an employment discrimination claim on behalf of the Debtors. In support of this motion, Lloyds of London respectfully represents as follows:

Background

1. Prior to the Petition Date, Lloyds of London issued an Employment Practices Liability Insurance Policy ("the Policy") to Taylor, Bean & Whitaker Mortgage Corp. ("Debtor"), covering the Policy Period from September 1, 2008, through September 1, 2009. Attached hereto as **Exhibit "A"** is a true and correct copy of the Policy.

2. The Policy provides for a maximum of \$5 million in insurance coverage for Claims (as defined in the Policy) asserted against the Debtor for, among other things, a "Wrongful Employment Practice" or "Third Party Discrimination".

3. Prior to the Petition Date, Kimberly Kelly ("Kelly"), a former employee of the Debtor, filed a Complaint (the "Discrimination Complaint") against the Debtor for, among other things, "Disability Discrimination" with the Massachusetts Commission Against Discrimination ("MCAD"). A true and correct copy of the Complaint is attached hereto as **Exhibit "B"**.

4. The Discrimination Complaint asserts claims that are covered by the Policy.

5. As the claims set forth in the Discrimination Complaint were covered by the Policy, Lloyds of London, as the Insurer, had a duty to defend the Claims and, as such, retained Littler P.C. as counsel to defend the Claims. A true and correct copy of the Rebuttal Statement filed by the Debtor is attached hereto as **Exhibit "C"**.

6. On August 19, 2010, MCAD issued a "Probable Cause Finding" requiring Kelly and the Debtor to appear on November 15, 2010 for a "Conciliation Conference" in Massachusetts. A true and correct copy of the Probable Cause Finding is attached hereto as **Exhibit "D"**.

7. The undersigned understands that the MCAD would not stay the Discrimination Complaint notwithstanding the filing of the Debtor's Chapter 11 case.¹

8. As a result of negotiations between the parties, a settlement agreement was reached which requires the Debtor, through Lloyds of London as Insurer, to pay \$40,000 (the "Settlement Amount") to Kelly in complete and full satisfaction of any claims made through the Discrimination Complaint or otherwise against the Debtor. A true and correct copy of the Settlement Agreement is attached hereto as **Exhibit "E"**.

9. While Lloyds of London does not believe the Policy proceeds are technically property of the Estate, the Settlement Agreement is expressly subject to approval of the

¹ In addition, the docket does not reflect that a motion for relief from stay was filed by any party to the Discrimination Complaint.

Bankruptcy Court and Lloyds of London files this motion in the abundance of caution seeking relief from the automatic stay to permit Lloyds of London to pay Defense Costs and the Settlement Amount based on the terms of the Policy.

Jurisdiction

10. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

11. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

12. The relief requested in this motion may be granted under §§ 105(a), 362(d)(I), and 541 of title 11 of the United States Code (the "Bankruptcy Code").

Argument

Cause Exists to Grant Relief from the Stay to Permit Lloyds of London to Advance Defense Costs and Pay the Settlement Amount

Under 11 U.S.C. § 362(d)(1), an automatic stay may be modified "for cause." "Cause" is not defined under the Code. *See In re Bogdanovich*, 292 F.3d 104, 110 (2d Cir. 2002). Accordingly, courts determine whether "cause" exists on a case-by-case basis, examining the totality of the circumstances. *See, e.g., In re Mack*, No. 6:06-CV-1782ORL-19, 2007 WL 1222575, at *2 (M.D. Fla. Apr. 24, 2007). When deciding whether to lift the automatic stay, courts will take into consideration the impact of the stay on the parties, and the balance of harm that may result if the stay is lifted. *See In re Aloisi*, 261 B.R. 504, 508 (Bankr. M.D. Fla. 2001). "In determining whether to lift the automatic stay, the courts have generally considered the prejudice to the debtor's reorganization efforts, conservation of judicial resources, and prejudice to the movant." *Murray Indus.*, 121 B.R. at 636-37 (citations omitted).

Here, a consideration of all of the pertinent factors militates in favor of granting stay relief. First, granting stay relief will not impact on the Debtor's ability to reorganize or liquidate

as the Debtor is not the one paying the defense costs or settlement amount, its Lloyds of London through the Policy. Thus, the Debtor is getting what it paid for from its premium payments to Lloyds of London, ie. insurance coverage. Second, the resolution of this claim will save on judicial resources by not having the Bankruptcy Court get involved with an employment practices claim, which claim is not normally adjudicated in a bankruptcy court anyway. Last, there will be finality in Ms. Kelly's claim against the Debtor as based on the Settlement Agreement, she waives any other claims against the Debtor other than the \$40,000 settlement payment. Thus, Lloyds of London believes that "cause" exists to allow for the payment of Defense Costs and the Settlement Amount.

WHEREFORE, the Lloyds of London, respectfully request this Honorable Court to enter an order granting the relief sought in this Motion, and such other and further relief as this Court deems just and proper.

Respectfully submitted,

AKERMAN SENTERFITT

By: /s/ Steven R. Wirth

Steven R. Wirth

Florida Bar Number: 0170380

Email: steven.wirth@akerman.com

50 North Laura St., Suite 2500

Jacksonville, FL 32202

Telephone: (904) 798-3700

Facsimile: (904) 798-3730

and

D. Brett Marks
Florida Bar No.099635
AKERMAN SENTERFITT
350 E. Las Olas Blvd., Suite 1600
Ft. Lauderdale, Florida 33301
Tel: 954-463-2700
Fax: 954-463-2224
E-mail: brett.marks@akerman.com

Attorneys for Lloyds of London

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished either by electronic notification or by United States Mail, postage prepaid and properly addressed, this 20th day of December, 2010, to:

Taylor, Bean & Whitaker Mortgage Corp.
315 N.E. 14th St.
Ocala, FL 34470

Edward J. Peterson, III, Esq.
Stichter, Riedel, Blain & Prosser, PA
110 East Madison Street, Suite 200
Tampa, FL 33602

Jeffrey W. Kelley, Esq.
Troutman Sanders LLP
600 Peachtree Street
Suite 5200
Atlanta, GA 30308-2216

Elena L. Escamilla, Esq.
Office of the United States Trustee
135 West Central Blvd., Suite 620
Orlando, FL 32801

Paul S. Singerman, Esq.
Berger Singerman PA
200 South Biscayne Boulevard
Suite 1000
Miami, FL 33131

and the parties listed on the attached Local Rule 1007-2 Parties in Interest List.

/s/ Steven R. Wirth
Attorney

Label Matrix for local noticing
113A-3
Case 3:09-bk-07047-JAF
Middle District of Florida
Jacksonville
Mon Dec 20 14:14:23 EST 2010

Joh Crain
PO Box 13
Melbourne, FL 32902-0013

Land Settlement Services, Inc.
107 S. 4th Street
Lebanon, PA 17042-6108

Onewest Bank FSB
c/o Scott Weiss
1800 NW 49th Street Suite 120
Fort Lauderdale, FL 33309-3092

American Home Mortgage Servicing, Inc.
c/o Anila Rasul
Kahane & Associates
8201 Peters Road, Ste 3000
Plantation, Florida 33324-3292

John A. Crain
PO Box 13
Melbourne, FL 32902-0013

Michael C. Cabassol
c/o Donald R. Kirk, Esq.
and David W. Barrett, Esq.
Fowler White Boggs P.A.
P.O. Box 1438
Tampa, FL 33601-1438

End of Label Matrix
Mailable recipients 9
Bypassed recipients 0
Total 9

Bank of the Ozarks as Successor*
c/o Patti W. Halloran, Esq.
Gibbons, Neuman et al.
3321 Henderson Blvd.
Tampa FL 33609-2921

Land Settlement Services
c/o Barry Jay Warsch
100 Southeast 2nd Street, 36th Floor
Miami, Florida 33131-2134

Michael C. Cabassol
c/o Donald R. Kirk
Fowler White Boggs P.A.
P.O. Box 1438
Tampa, FL 33601-1438

EXHIBIT A



Lloyd's Certificate

*Taylor,
Dean
Whitaker*

This Insurance is effected with certain Underwriters at Lloyd's, London.

This Certificate is issued in accordance with the limited authorization granted to the Correspondent by certain Underwriters at Lloyd's, London whose syndicate numbers and the proportions underwritten by them can be ascertained from the office of the said Correspondent (such Underwriters being hereinafter called "Underwriters") and in consideration of the premium specified herein, Underwriters hereby bind themselves severally and not jointly, each for his own part and not one for another, their Executors and Administrators.

The Assured is requested to read this Certificate, and if it is not correct, return it immediately to the Correspondent for appropriate alteration.

All inquiries regarding this Certificate should be addressed to the following Correspondent:

ARCH INTERMEDIARIES LIMITED

81 Gracechurch Street,
London EC3V 0AU
England

CERTIFICATE PROVISIONS

1. **Signature Required.** This Certificate shall not be valid unless signed by the Correspondent on the attached Declaration Page.
2. **Correspondent Not Insurer.** The Correspondent is not an Insurer hereunder and neither is nor shall be liable for any loss or claim whatsoever. The Insurers hereunder are those Underwriters at Lloyd's, London whose syndicate numbers can be ascertained as hereinbefore set forth. As used in this Certificate "Underwriters" shall be deemed to include incorporated as well as unincorporated persons or entities that are Underwriters at Lloyd's, London.
3. **Cancellation.** If this Certificate provides for cancellation and this Certificate is cancelled after the inception date, earned premium must be paid for the time the insurance has been in force.
4. **Service of Suit.** It is agreed that in the event of the failure of Underwriters to pay any amount claimed to be due hereunder, Underwriters, at the request of the Assured, will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. It is further agreed that service of process in such suit may be made upon the firm or person named in item 6 of the attached Declaration Page, and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.
The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.
Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Assured or any beneficiary hereunder arising out of this contract of insurance, and hereby designate the above-mentioned as the person to whom the said officer is authorized to mail such process or a true copy thereof.
5. **Assignment.** This Certificate shall not be assigned either in whole or in part without the written consent of the Correspondent endorsed hereon.
6. **Attached Conditions Incorporated.** This Certificate is made and accepted subject to all the provisions, conditions and warranties set forth herein, attached or endorsed, all of which are to be considered as incorporated herein.
7. **Short Rate Cancellation.** If the attached provisions provide for cancellation, the table below will be used to calculate the short rate proportion of the premium when applicable under the terms of cancellation.

Short Rate Cancellation Table For Term of One Year.

Days Insurance in Force	Per Cent of one year Premium	Days Insurance in Force	Per Cent of one year Premium	Days Insurance in Force	Per Cent of one year Premium	Days Insurance in Force	Per Cent of one year Premium
1	5%	66 - 69	29%	154 - 156	53%	256 - 260	77%
2	6	70 - 73	30	157 - 160	54	261 - 264	78
3 - 4	7	74 - 76	31	161 - 164	55	265 - 269	79
5 - 6	8	77 - 80	32	165 - 167	56	270 - 273 (9 mos)	80
7 - 8	9	81 - 83	33	168 - 171	57	274 - 278	81
9 - 10	10	84 - 87	34	172 - 175	58	279 - 282	82
11 - 12	11	88 - 91 (3 mos)	35	176 - 178	59	283 - 287	83
13 - 14	12	92 - 94	36	179 - 182 (6 mos)	60	288 - 291	84
15 - 16	13	95 - 98	37	183 - 187	61	292 - 296	85
17 - 18	14	99 - 102	38	188 - 191	62	297 - 301	86
19 - 20	15	103 - 105	39	192 - 196	63	302 - 305 (10 mos)	87
21 - 22	16	106 - 109	40	197 - 200	64	306 - 310	88
23 - 25	17	110 - 113	41	201 - 205	65	311 - 314	89
26 - 29	18	114 - 116	42	206 - 209	66	315 - 319	90
30 - 32 (1 mos)	19	117 - 120	43	210 - 214 (7 mos)	67	320 - 323	91
33 - 36	20	121 - 124 (4 mos)	44	215 - 218	68	324 - 328	92
37 - 40	21	125 - 127	45	219 - 223	69	329 - 332	93
41 - 43	22	128 - 131	46	224 - 228	70	333 - 337 (11 mos)	94
44 - 47	23	132 - 135	47	229 - 232	71	338 - 342	95
48 - 51	24	136 - 138	48	233 - 237	72	343 - 346	96
52 - 54	25	139 - 142	49	238 - 241	73	347 - 351	97
55 - 58	26	143 - 146	50	242 - 246 (8 mos)	74	352 - 355	98
59 - 62 (2 mos)	27	147 - 149	51	247 - 250	75	356 - 360	99
63 - 65	28	150 - 153 (5 mos)	52	251 - 255	76	361 - 365 (12 mos)	100

Rules applicable to insurance with terms less than or more than one year:

- A. If insurance has been in force for one year or less, apply the short rate table for annual insurance to the full annual premium determined as for insurance written for a term of one year.
- B. If insurance has been in force for more than one year:
 1. Determine full annual premium as for insurance written for a term of one year.
 2. Deduct such premium from the full insurance premium, and on the remainder calculate the pro rata earned premium on the basis of the ratio of the length of time beyond one year the insurance has been in force to the length of time beyond one year for which the policy was originally written.
 3. Add premium produced in accordance with items (1) and (2) to obtain earned premium during full period insurance has been in force.

ARCH INTERMEDIARIES LTD.

THIS IS A CLAIMS MADE AND REPORTED POLICY WITH DEFENSE COSTS INCLUDED IN THE LIMIT OF LIABILITY. PLEASE READ THE ENTIRE POLICY CAREFULLY.

DECLARATIONS

EMPLOYMENT PRACTICES LIABILITY INSURANCE

Insurance is provided by:	POLICY NUMBER:	AY001670G
Various Insurers as per attached Schedule	Renewal of:	AY001670F

NOTICE: THIS IS A CLAIMS MADE POLICY THAT APPLIES, SUBJECT TO ITS TERMS, ONLY TO "CLAIMS" FIRST MADE DURING THE "POLICY PERIOD," OR, IF PURCHASED, ANY EXTENDED REPORTING PERIOD, AND REPORTED WITHIN THE TIME SPECIFIED IN THE NOTICE PROVISIONS. THE LIMIT OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS WILL BE REDUCED BY "DEFENSE COSTS" AND "DEFENSE COSTS" WILL BE APPLIED AGAINST THE SELF-INSURED RETENTION. THESE DECLARATIONS, THE COMPLETED, SIGNED APPLICATION, AND THE POLICY WITH ENDORSEMENTS SHALL CONSTITUTE THE CONTRACT BETWEEN THE UNDERWRITERS AND THE INSURED.

ITEM 1. INSURED COMPANY:

Name: TAYLOR BEAN & WHITAKER MORTGAGE CORPORATION
Address: 315 NE 14th Street, Ocala, Florida 34470, USA

ITEM 2. POLICY PERIOD:

(a) Inception Date: 1st September 2008
(b) Expiration Date: 1st September 2009
at 12.01 a.m. both dates at the Principal Address in ITEM 1

ITEM 3. LIMIT OF LIABILITY (inclusive of Defense Costs):

(a) USD 5,000,000 Maximum Limit of Liability for each Claim.
(b) USD NIL Third-Party Discrimination Limit of Liability.
(c) USD 5,000,000 Punitive, exemplary, and multiple damages Limit of Liability.
(d) USD 5,000,000 Maximum aggregate Limit of Liability for all Claims
(e) USD NIL Defense-Only Limit of Liability.

ITEM 4. SELF-INSURED RETENTION:

USD 150,000 Each and Every Claim

ITEM 5 PRIOR AND PENDING DATE:

1st September 2002

ITEM 6. PREMIUM:

USD 85,000

ITEM 7. NOTIFICATION OF CLAIMS TO:

Julianna Ryan, Kaufman Borgeest & Ryan LLP,
99 Park Avenue, New York, NY 10016
jryan@kbrlaw.com
(212) 980-9600 (phone)
(212) 980-9291 (fax)

ITEM 8. SERVICE OF SUIT:

Mendes & Mount, 750 Seventh Avenue, New York, New York 10019-6829

Additional Clause(s) and Endorsement(s) applicable to this Policy and attached:

Application Dated: 25th August 2008

Endorsement Number 1

Choice of Law Clause - 623AFB00113

Nuclear Incident Exclusion Clause - Liability - Direct - Broad NMA 1256

Radioactive Contamination Exclusion - Liability - Direct - NMA 1477

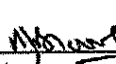

War and Terrorism Exclusion - NMA 2918

US Terrorism Risk Insurance Act of 2002 as amended New and Renewal

Business Endorsement - LMA 5091

Insured Education Document - ARCH001

Dated in London: 11th September 2008

	
_____ Authorised Signature Arch Intermediaries Limited (Correspondent)	_____ Authorised Signature Julianna Ryan

ARCH INTERMEDIARIES LIMITED

IMPORTANT NOTE: THIS IS CLAIMS MADE AND REPORTED COVERAGE. PLEASE READ THIS POLICY CAREFULLY.

THIS POLICY IS WRITTEN ON A CLAIMS MADE BASIS AND COVERS ONLY CLAIMS: 1. FIRST MADE DURING THE POLICY PERIOD OR THE EXTENDED REPORTING PERIOD IF EXERCISED; AND 2. REPORTED WITHIN THE TIME SPECIFIED IN THE NOTICE PROVISIONS. THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS SHALL BE REDUCED BY DEFENSE COSTS. DEFENSE COSTS AND LOSS PAYMENTS SHALL BE APPLIED AGAINST THE SELF-INSURED RETENTION.

**EMPLOYMENT PRACTICES
LIABILITY INSURANCE**

ARCH INTERMEDIARIES LIMITED
EMPLOYMENT PRACTICES LIABILITY INSURANCE

Various provisions in this **Policy** restrict coverage. Read the entire **Policy** carefully to determine rights, duties, and what is and is not covered.

Throughout this **Policy** the words "you" and "your" refer to the **Insured Company** shown in the Declarations. The words "we", "us", and "our" refer to the Underwriters providing this insurance.

The word "**Insured**" means any person or organization qualifying as such under the definition of **Insured** in SECTION III.F.

Other words and phrases that appear in **bold** have special meaning as described in SECTION III.

In consideration of payment of the premium and in reliance upon the statements made in the **Application**, which is made a part of and deemed attached to this **Policy** and subject to the Declarations and the limitations, conditions, provisions, and other terms of this **Policy**, the Underwriters and the **Insureds** agree as follows:

I. INSURING AGREEMENT

We will pay all **Loss** that the **Insureds** become obligated to pay as a result of **Claims** first made against any **Insured** during the **Policy Period**, or the Extended Reporting Period if applicable, and reported in accordance with the notice provisions in Section V.B.1, for **Wrongful Employment Practices** or **Third-Party Discrimination**.

II. DEFENSE AGREEMENT

We will defend the **Insureds** against all **Claims** to which this **Policy** applies in accordance with the defense provisions in Section V.A.

III. DEFINITIONS

A. **Application** means all applications, including attachments and submitted materials, for this **Policy** or for any policy of which this **Policy** is a direct renewal or replacement. All such applications, attachments, and materials are deemed attached to and incorporated into this **Policy**.

B. **Claim** means:

1. a written demand for monetary damages or non-monetary relief, or written notice of an intention to hold an **Insured** responsible, for a **Wrongful Employment Practice** or **Third-Party Discrimination**;
2. a charge, complaint or other notice of commencement of federal, state, or local administrative proceedings by or before any agency with authority over the **Insured Company's** employment practices;
3. the filing of a civil lawsuit or arbitration proceeding; or
4. the filing of a criminal lawsuit or the institution of criminal proceedings; provided, however, that the decision to consider such lawsuit or proceedings a **Claim** shall be in the sole discretion of Underwriters and must be agreed to by the **Insured Company**.

A **Claim** is deemed first made when it is received by an **Insured**.

For the purposes of this Policy, all **Claims** arising out of the same **Wrongful Employment Practices** or **Third-Party Discrimination** and all **Interrelated Claims** shall be deemed one **Claim**, and such **Claim** shall be deemed to be first made on the date the earliest of such **Claims** is first made, regardless of whether such date is before or during the **Policy Period**.

- C. **Defense Costs** means reasonable and necessary fees, costs, and expenses incurred by counsel, experts or investigators appointed or pre-approved by us in the investigation, defense and appeal of any **Claim** pursuant to DEFENSE AGREEMENT Section II; but **Defense Costs** do not include any wages, salaries, fees, or expenses of any **Insured**. **Defense Costs** will include legal and investigation fees necessary to respond to potential **Claims** identified under Section V.B.2, if incurred at our request and direction.
- D. **Employee** means any individual whose labor or service is engaged by and directed by the **Insured Company**, including volunteers and all staff members, whether part-time, full-time, seasonal, or temporary, and including **Leased Employees**. Independent contractors will also be considered **Employees**.
- E. **Financial Impairment** means the status of the **Insured Company** resulting from the appointment by any state or federal official, agency or court of any receiver, trustee, examiner, conservator, liquidator, rehabilitator or similar official to take control of, supervise, manage or liquidate the **Insured Company**.
- F. **Insured** means the **Insured Company** and individuals who are your current or former principals, partners, officers, directors, trustees, shareholders, members of the Board of Managers, management committee members, in-house general counsel and those **Employees** for whom you request coverage at the time of the **Claim**, acting in their capacities as such. If, at any time during the **Claim**, you no longer want us to provide coverage for any such **Employee(s)**, you shall send us written notice requesting that coverage for the **Employee(s)** be withdrawn. Coverage for the **Employee** shall cease as of the date we receive such notice.
- G. **Insured Company** means the organization(s) listed in Item 1 of the Declarations, whether as a corporation, partnership, joint venture, association, or otherwise, and any **Insured Subsidiary**.
- H. **Insured Subsidiary** means any organization more than 50% owned by the **Insured Company** listed in Item 1 of the Declarations. Subject to the provisions contained in Section V.O of this Policy, **Insured Subsidiary** shall also include any organization acquired by the **Insured Company** listed in Item 1 during the **Policy Period**; *provided, however*, that: 1. such acquired organization is more than 50% owned by the **Insured Company**; 2. the total number of the acquired organization's employees does not exceed 50% of the total number of the **Insured Company's Employees** as of the inception date of this Policy; and 3. coverage for such acquisition shall only apply to **Loss**, including **Defense Costs**, arising from **Wrongful Employment Practices** or **Third-Party Discrimination** taking place after the acquisition.
- I. **Interrelated Claims** means all **Claims** arising from **Wrongful Employment Practices** and **Third-Party Discrimination** that have as a common nexus any fact, circumstance, situation, event, transaction, or series of related facts, circumstances, situations, events, or transactions.
- J. **Leased Employee** means any **Employee** who is leased to you to perform work at and for the **Insured Company** and over whom you control the means and manner of their work.
- K. **Loss** means damages, judgments, settlements, verdicts, and awards, including compensatory damages, back pay, front pay, statutory attorneys' fees, pre-judgment and post-judgment interest, statutory liquidated damages and **Defense Costs** in excess of the Self-Insured Retention. Punitive, exemplary, and multiple damages are also **Loss** if such coverage is purchased and indicated by an

amount appearing in Item 3(c) of the Declarations, and to the extent insurable under the law of any applicable jurisdiction most favorable to insurability.

Loss does not include: 1. fines, penalties, or taxes; 2. any amount for which the Insured is absolved from payment; 3. stock options or amounts reflecting the value of stock options; 4. amounts owed under employment contracts, partnership, stock or other ownership agreements, or any other type of contract; 5. severance pay; 6. disability, social security, workers' compensation, medical, insurance, retirement or pension benefits, or settlement amounts representing benefits payments; 7. the cost to modify any premises or provide any accommodation to any disabled person; 8. the cost of instituting or conducting any program, procedure, or training; 9. the cost of instating or reinstating employment, or providing any non-monetary relief; or 10. any relief, whether pecuniary or injunctive, imposed or agreed to in connection with criminal lawsuits or proceedings.

- L. **Policy** means, collectively, the Declarations, the Application, this form, and any endorsements.
- M. **Policy Period** means the period of time specified in Item 2 of the Declarations, subject to any prior cancellation described in Section V.R of this Policy.
- N. **Third-Party Discrimination** means any actual or alleged discrimination, including harassment, or civil rights violation by an Insured against any non-Employee.
- O. **Wrongful Employment Practice** means any actual or alleged
 - 1. violation of any federal, state, local or common law, prohibiting any kind of employment-related discrimination;
 - 2. harassment, including any type of sexual or gender harassment as well as racial, religious, sexual orientation, pregnancy, disability, age, or national origin-based harassment and including workplace harassment by non-employees;
 - 3. abusive or hostile work environment;
 - 4. wrongful discharge or termination of employment, whether actual or constructive;
 - 5. breach of an implied employment contract;
 - 6. wrongful failure or refusal to hire or promote, or wrongful demotion;
 - 7. wrongful failure or refusal to provide equal treatment or opportunities;
 - 8. employment terminations, disciplinary actions, demotions or other employment decisions that violate public policy or the Family Medical Leave Act or similar state or local law;
 - 9. defamation, libel, slander, disparagement, false imprisonment, misrepresentation, malicious prosecution, or invasion of privacy;
 - 10. wrongful failure or refusal to adopt or enforce adequate workplace or employment practices, policies or procedures;
 - 11. wrongful, excessive or unfair discipline;
 - 12. wrongful infliction of emotional distress, mental anguish, or humiliation;
 - 13. retaliation, including retaliation for exercising protected rights, supporting in any way another's exercise of protected rights, or threatening or actually reporting wrongful activity of an Insured such as violation of any federal, state, or local "whistle blower" law;

14. wrongful deprivation of career opportunity, negligent evaluation or failure to grant tenure;
15. violations of the Uniformed Services Employment and Reemployment Rights Act; or
16. negligent hiring or negligent supervision of others, including wrongful failure to provide adequate training, in connection with 1 through 15 above,

but only if employment-related and claimed by or on behalf of an **Employee**, former **Employee**, or applicant for employment, and only if committed or allegedly committed by any of the **Insureds** in their capacity as such.

IV. EXCLUSIONS

We are not obligated to defend, or pay **Loss**, including **Defense Costs**, on account of any **Claim**:

1. for an actual or alleged violation of the Fair Labor Standards Act (except the Equal Pay Act), the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act, the Employee Retirement Income Security Act of 1974, any workers' compensation, unemployment insurance, social security, or disability benefits law, other similar provisions of any federal, state, or local statutory or common law, including any actual or alleged violations of any federal, state or local wage and hour laws or regulations, whether or not such allegations are made in connection with any governmental or administrative proceedings *provided, however*, 1. this exclusion will not apply to any **Claim** of any actual or alleged retaliatory treatment on account of the exercise of rights pursuant to any such law; and 2. in the event such **Claim** also alleges **Wrongful Employment Practices** otherwise covered by this **Policy**, notwithstanding the provisions of DEFENSE AGREEMENT Section II, Underwriters agree to pay **Defense Costs** and/or **Loss** but solely for that portion of the **Claim** involving such **Wrongful Employment Practices** allegations and subject to all other terms, conditions and exclusions contained in this **Policy**;
2. based upon, arising out of, or attributable to any fact, circumstance, or situation
 - (i) that was the subject of written notice given under any prior policy of which this **Policy** is a renewal and/or replacement;
 - (ii) that was the subject of any written demand for monetary damages, administrative or arbitration proceeding or civil or criminal litigation against any **Insured** as of the Prior and Pending Date identified in Item 5 of the Declarations, or the same or substantially the same fact, circumstance, or situation underlying or alleged in the prior matter; or
 - (iii) that was identified in any summary or statement of claims or potential claims submitted in connection with the **Application**;
3. arising out of, based upon, or attributable to, the adjudicated criminal action the part of any **Employee** provided, however, that the criminal act of one **Employee** shall not be imputed to any other **Insured** for purposes of this exclusion;
4. based upon, arising out of, or attributable to, liability of others assumed by any **Insured** under any contract or agreement, except to the extent any **Insured** would have been liable in the absence of the contract or agreement;
5. based upon any wrongful act or omission of any **Insured** serving in any capacity other than as your principal, officer, director, trustee, or **Employee**; or
6. by a non-**Employee** for bodily injury including assault and battery.

V. GENERAL CONDITIONS AND LIMITATIONS

A. Defense and Settlement

We have the right and duty to defend any **Claim** covered by the **Policy** and such obligation is limited to amounts constituting **Defense Costs**.

Our duty to defend any **Claim** will end once the Limit of Liability, as stated in Item 3(a) of the **Declarations**, is exhausted by the payment of **Loss**, including **Defense Costs**. If our duty to defend ends with respect to any **Claim**, we will notify you so that you can arrange to take control of the defense of the **Insureds**. We will take whatever steps are necessary to avoid a default judgment during a transfer of control of the defense of any such **Claim**. If we do so, you agree to repay the reasonable expenses incurred by us during the transfer and further agree that, in undertaking the steps necessary to avoid a default judgment during the transfer, we have not waived any rights under the **Policy**.

We may, with your consent, settle any **Claim** for any monetary amount that we consider reasonable. If you do not give your consent to such settlement, then our liability for all **Loss**, including **Defense Costs**, on account of such **Claim**, will not exceed: 1. the amount for which we could have settled the **Claim** plus **Defense Costs** incurred as of the date we proposed such settlement; plus 2. 80% of covered **Loss** excess of the proposed settlement as long as 20% is borne by the **Insured** at its own risk and uninsured. This provision shall not apply unless the total **Loss**, including the proposed settlement, would exceed the applicable Self-Insured Retention.

The **Insureds** will not incur any **Defense Costs**, settle, or offer to settle any **Claim**, assume any contractual obligation, admit liability, voluntarily make any payment or confess or otherwise consent to any damages or judgments with respect to any **Claim** covered by this **Policy**, if, with regard to settlement, the total **Loss**, including **Defense Costs**, would exceed the Self-Insured Retention, without our prior written consent, which will not be unreasonably withheld. We will not be liable for any **Defense Costs**, settlement, assumed obligation, admitted liability, voluntary payment, or confessed damages or judgments to which we have not consented.

The **Insureds** will provide full cooperation and all information and particulars that we may request to conduct an investigation, defend a **Claim**, or to reach a settlement of the **Claim**. The **Insureds** agree that in the event of a **Claim**, they will do nothing that may prejudice our position or rights of recovery.

B. Notice Provisions

1. Notice of Claim

The **Insureds** will, as a condition precedent to their rights under this **Policy**, give our Authorized Representatives, as identified in the **Declarations**, written notice of any **Claim** made against the **Insureds** as soon as practicable, but in no event later than sixty (60) days after the end of the **Policy Period**. Along with the notice of **Claim**, the **Insureds** will provide our Authorized Representatives, as identified in the **Declarations**, with copies of all documentation comprising the **Claim** as well as all authorization, cooperation, or assistance as we may require throughout the duration of the **Claim**.

Under no circumstances shall Underwriters pay any **Defense Costs** incurred prior to **Claim** notification.

2. Notice of Potential Claim

Solely at the **Insured's** option, the **Insured** may within the **Policy Period** or within the Extended Reporting Period, if purchased, provide us with notice of circumstances that could give rise to a

Claim for Wrongful Employment Practices or Third-Party Discrimination. Such notice shall include the identity of the person(s) involved and the reason the Insured believes a **Claim** may be made. If such notice is received by us or by our Authorized Representative within the **Policy Period**, or within the Extended Reporting Period, if purchased, then any **Claim** subsequently arising from such circumstances shall be deemed made on the date such notice was received.

C. Limit of Liability

1. Our maximum liability for **Loss** and **Defense Costs** combined on account of each **Claim** first made during the **Policy Period** shall be the Limit of Liability set forth in Item 3(a) of the Declarations. Our maximum liability for **Loss** and **Defense Costs** combined on account of all **Claims** first made during the same **Policy Period** shall be the Limit of Liability for the **Policy Period** set forth in Item 3(d) of the Declarations.
2. Item 3(b) of the Declarations reflects our maximum liability for **Claims** of **Third-Party Discrimination**. Item 3(c) of the Declarations reflects our maximum liability for punitive, exemplary, and multiple damages. The amounts indicated in Item 3(b) and Item 3(c) of the Declarations will not operate to increase the per **Claim** Limit of Liability indicated in Item 3(a) of the Declarations or the aggregate Limit of Liability indicated in Item 3(d) of the Declarations.
3. The Limit of Liability for the Extended Reporting Period, if exercised, shall be part of and not in addition to the Limit of Liability for the **Policy Period**. The purchase of the Extended Reporting Period shall not increase or reinstate the Limit of Liability set forth in Item 3(d) of the Declarations, which shall be our maximum liability for all **Loss**, including **Defense Costs**, on account of all **Claims** first made during such **Policy Period** and Extended Reporting Period, combined.
4. **Defense Costs** shall be part of, and not in addition to, the Limits of Liability set forth in Items 3(a)-3(d) of the Declarations, and **Defense Costs** shall reduce the Limits of Liability. Notwithstanding the other provisions of this Section V., if purchased and indicated in Item 3 (e) of the Declarations, an additional Limit of Liability shall apply for coverage of **Defense Costs** only (referred to as the "Defense-Only Limit"). This Defense-Only Limit shall apply to **Defense Costs** in the first instance, leaving the original Limit of Liability as indicated in Items 3(a)-3(d) of the Declarations to apply second to: 1. **Defense Costs** incurred in excess of, and after exhaustion of, the Defense-Only Limit and/or 2. any other **Loss**, such as damages, judgements, settlements, verdicts, and awards, until the original Limit of Liability is exhausted.

In no event shall the Defense-Only Limit apply to **Loss** other than **Defense Costs**, and in no event shall we be obligated to pay more than the original Limit of Liability indicated in Items 3(a)-3(d) of the Declarations toward **Loss**, other than **Defense Costs** within the Defense-Only Limit.

In no event shall our obligations under the **Policy** exceed the combination of the original Limit of Liability in Item 3(a) of the Declarations plus the Defense-Only Limit indicated in Item 3(e) of the Declarations. If a Defense-Only Limit is purchased, references in other parts of Section V to "Limit of Liability" shall refer to the combination of the original Limit of Liability and the Defense-Only Limit, subject to all other limitations and conditions of coverage.

Purchase of the Defense-Only Limit shall not alter your Self-Insured Retention obligations.

D. Self-Insured Retention

1. Our liability with respect to **Loss**, including **Defense Costs**, arising from each **Claim** shall apply only to that part of **Loss**, including **Defense Costs**, in excess of the Self-Insured Retention amount set forth in Item 4 of the Declarations and that Self-Insured Retention amount will be the

Insured Company's uninsured responsibility. We shall have no responsibility to make any payment unless the Self-Insured Retention has been exhausted or unless the **Insured Company** is unable to meet its uninsured responsibility on account of **Financial Impairment**.

2. The Self-Insured Retention amount applies to each **Claim** or **Interrelated Claims**, regardless of the number of claimants.
3. If, prior to the termination of any **Employee**, the **Insured** obtains and adopts the written advice of legal counsel recommended or approved by us as respects such termination, then the Self-Insured Retention amount stated in Item 4 of the Declarations shall be reduced by 25% for any **Claim** commenced by that **Employee** arising from the events of the termination.
4. If the **Insured** consents to a settlement of a **Claim** within twenty (20) days of the first request by Underwriters to consent and the settlement is accepted by the claimant, then the applicable Self-Insured Retention shall be retroactively reduced by ten percent (10%). Any consent to the same or another settlement after such time shall not reduce the Self-Insured Retention.
5. In the event of: 1. a determination of No Liability of all **Insureds**; or 2. a dismissal or a stipulation to dismiss a **Claim** without prejudice and without payment by any **Insured**, then the applicable Self-Insured Retention shall be retroactively reduced by an amount up to twenty-five percent (25%) or \$100,000, whichever is less; provided, however, that in the case of 2, any amounts to be returned shall be returned ninety (90) days after the date of dismissal or stipulation as long as the **Claim** is not reinstituted (or any other **Claim** which is subject to the same single Self-Insured Retention according to Section V.D is not brought) within that time, and further subject to an undertaking by the **Insured Company** in a form acceptable to Underwriters that such amounts shall be paid back to Underwriters in the event the **Claim** (or any other **Claim** which is subject to the same single Self-Insured Retention according to Section V.D) is brought after such 90-day period and before the expiration of the statute of limitations for such **Claim**.

"No Liability" for purposes of this provision means: 1. a final judgment of no liability obtained prior to trial, in favor of all **Insureds**, by reasons of a motion to dismiss or a motion for summary judgment, after the exhaustion of all appeals; or 2. a final judgment of no liability obtained after trial in favor of all **Insureds**, after the exhaustion of all appeals. In no event shall the term "No Liability" apply to a **Claim** made against an **Insured** for which a settlement has occurred.

E. Other Insurance

Unless expressly written to be excess over other insurance, this **Policy** is intended to apply as primary insurance for **Wrongful Employment Practice Claims** covered by this **Policy**. As to coverage for **Claims** against **Leased Employees**, this **Policy** applies excess of all indemnification and insurance available to any **Insured** from or through the leasing company. As to coverage for **Claims** for **Third-Party Discrimination**, this **Policy** applies excess of all indemnification and insurance that may otherwise be available to any **Insured**. Nothing in this provision shall prevent Underwriters or the **Insureds** from seeking contribution or coverage from any other insurer or indemnitor.

F. Spousal Extension

If a **Claim** against an **Insured** includes a claim against the lawful spouse or domestic partner of such **Insured** solely by reason of (a) such spousal or domestic partner status, or (b) such spouse's or domestic partner's ownership interest in property or assets that are sought as recovery for **Wrongful Employment Practices** or **Third-Party Discrimination**, any such **Claim** shall be deemed to be a **Claim** against an **Insured**.

All terms and conditions of this **Policy**, including the Self-Insured Retention, will be applicable to such **Claim**.

The extension of coverage afforded by this Section V.F shall not apply to the extent the **Claim** alleges any wrongful act or omission by such spouse.

G. Representations and Severability

In issuing this **Policy**, we relied upon the statements and representations in the **Application**. The **Insureds** represent that all such statements and representations are true and deemed material to the acceptance of the risk or the hazard assumed by us under this **Policy**.

The **Insureds** agree that in the event any such statements or representations are untrue, this **Policy** will not afford any coverage with respect to any of the following **Insureds**:

1. any **Insured** who knew the facts that were not truthfully disclosed in the **Application**, and
2. the **Insured Company**, if the individual(s) who executed the **Application** knew the facts that were not truthfully disclosed.

No knowledge possessed by any **Insured** shall be imputed to any other **Insured**.

H. Authorization Clause

By acceptance of this **Policy**, you agree to act on behalf of the **Insureds** with respect to the giving and receiving of notice of **Claim** or cancellation, the payment of premiums, and the receiving of any return premiums that may become due under this **Policy**, the agreement to and acceptance of endorsements and the giving or receiving of any notice provided for in this **Policy** and the **Insureds** agree that you will act on their behalf.

I. Subrogation

In the event of any payment under this **Policy**, we will be subrogated to the extent of such payment to all of your and the **Insured's** rights of recovery. You and the **Insureds** will execute all required papers and do everything necessary to secure and preserve such rights.

J. Alteration and Assignment

This **Policy** cannot be changed, modified, or assigned without our written, signed endorsement.

K. Territory

Coverage under this **Policy** will extend to **Wrongful Employment Practices and Third-Party Discrimination** taking place and **Claims** made anywhere in the world.

L. Action Against Underwriters

No action shall lie against us unless, as a condition precedent thereto, there shall have been full compliance with all terms of this **Policy**. No person or organization shall have any right under this **Policy** to join us as a party to any action against **Insureds** to determine the **Insured's** liability nor shall we be impleaded by the **Insureds** or their legal representatives.

M. Arbitration

It is agreed that any dispute, controversy, or claim arising out of or relating to this **Policy** or its breach, termination, or invalidity, will be submitted either: 1. to final and binding arbitration; or 2. to non-binding mediation, whichever the **Insured** shall select, pursuant to such rules and procedures as the parties may agree. If the parties cannot agree, the arbitration or mediation shall be administered by the American Arbitration Association in accordance with its then prevailing commercial

arbitration/mediation rules and such arbitration or mediation shall take place in New York. In the event of arbitration, the panel shall consist of one arbitrator selected by you, one arbitrator selected by us, and a third independent arbitrator selected by the first two arbitrators. In any arbitration or mediation, each party will bear its own legal fees and expenses.

N. Service of Suit

In the event that any non-binding mediation selected by the **Insured** in accordance with Section V.M does not resolve disputes arising out of or related to this **Policy**, we agree, at your request or the request of any **Insured**, to submit to the jurisdiction of a court of competent jurisdiction within the United States and we will comply with all requirements necessary to give such court jurisdiction. Nothing in this Section V.N constitutes or should be understood to constitute a waiver of our rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States. It is further agreed that service of process in such suit may be made upon the firm shown under Item 8 of the Declarations, and that in such suit instituted against any of the Underwriters of this **Policy**, we will abide by the final decision of such court or of any appellate court in the event of an appeal.

The firm shown under Item 8 of the Declarations is authorized and directed to accept service of process on our behalf in any such suit and/or, upon the request of any **Insured**, to give a written undertaking to such **Insured** that they will enter general appearance upon our behalf in the event such a suit is instituted.

Further, pursuant to the statute of any state, territory, or district of the United States which makes provision therefore, we hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his or her successor or successors in office, as their true and lawful attorney, upon whom may be served any lawful process in any action, suit, or proceeding instituted by or on behalf of any **Insured** or any beneficiary of this **Policy**, and hereby designate the firm shown under Item 8 of the Declarations as the firm to whom the said officer is authorized to mail such process.

O. Changes in Exposure

1. If, during the **Policy Period**, the total number of your **Employees** increases by more than 50% as a result of your merger(s) with or acquisition(s) of any other entity, the **Insured Company** must give us notice of such increase as soon as practicable but in any event within ninety (90) days. We will be entitled to impose such amended coverage terms and adjust the premium as we may require.
2. Neither death, bankruptcy nor insolvency of any **Insured**, nor dissolution of the **Insured Company**, will relieve us of any obligations under the **Policy**.
3. If, during the **Policy Period**, you acquire 50% or more ownership in an organization and the number of acquired employees exceeds 50% of the total number of the **Insured Company's Employees** as of the inception date of this **Policy** then that organization shall be considered an **Insured Subsidiary** but only if you give us notice of such acquisition as soon as practicable but in any event within ninety (90) days after such acquisition. Coverage for such **Insured Subsidiary** shall only apply to **Loss**, including **Defense Costs**, arising from **Wrongful Employment Practices** and **Third Party Discrimination** taking place after the merger or acquisition.
4. If, during the **Policy Period**, you merge with another entity such that you are no longer the surviving entity or if more than 50% of your outstanding securities representing the present right to vote for the election of directors is acquired by any person or entity, this **Policy** will continue until its natural Expiration Date as set forth in Item 2(b) of the Declarations but only with respect

to any **Wrongful Employment Practices** and **Third Party Discrimination** committed before the date of the merger or acquisition.

P. Extended Reporting Period

In the event of non-renewal or cancellation of this **Policy**, you shall have the right, upon payment of an additional premium of 100% of the annual premium charged for the non-renewed or cancelled **Policy**, to an extension of the coverage available under this **Policy** for a period of twelve (12) months following the effective date of such non-renewal or cancellation, or 120% for a twenty-four (24) month extension, or 140% for a thirty-six (36) month extension, but only with respect to **Claims** otherwise covered by this **Policy** and only for **Wrongful Employment Practices** or **Third-Party Discrimination** taking place prior to the effective date of such non-renewal or cancellation.

A written request for the Extended Reporting Period must be received by us within thirty (30) days from the effective date of the non-renewal or cancellation. The premium due for the Extended Reporting Period must be received by us within forty-five (45) days of such effective date. The entire premium for the Extended Reporting Period shall be deemed fully earned and non-refundable upon payment.

Q. Non-Renewal

If we decide not to renew this **Policy**, we will mail or deliver to the **Insured Company** written notice of non-renewal not less than sixty (60) days before the expiration date. If the notice is mailed, proof of mailing will be sufficient notice of non-renewal.

R. Cancellation

You may cancel this **Policy** by mailing written notice to us stating when thereafter such cancellation shall be effective. We may cancel this **Policy** only for non-payment of premium, by mailing written notice to you at the address shown in the Declarations, stating when, not less than ten (10) days thereafter, such cancellation shall be effective. The mailing of such notice shall be sufficient proof of notice. Delivery of such written notice shall be equivalent to mailing. The effective date and hour of cancellation as stated in the notice shall become the end of the **Policy Period**.

If you cancel, earned premium shall be computed in accordance with the standard short rate table, but in no event will earned premium be less than twenty-five percent (25%) of the total premium indicated in the Declarations. If we cancel, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

S. Liberalization Clause

In the event the identical unendorsed policy form is amended by us subsequent to the inception date of this **Policy** such that the coverage under such identical unendorsed policy form is broader as a result of the amendments, this **Policy** shall be construed to include the broadened coverage.

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ADDITIONAL CLAUSES AND ENDORSEMENTS

ENDORSEMENT NUMBER 1

It is hereby understood and agreed that wherever the word "Policy" appears herein same shall be deemed to read "Certificate".

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED

CHOICE OF LAW CLAUSE

It is hereby understood and agreed by both the Insured and Underwriters that any dispute concerning the interpretation of this Policy shall be governed by the laws of New York, U.S.A.

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ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED

NUCLEAR INCIDENT EXCLUSION CLAUSE-LIABILITY-DIRECT (BROAD) (U.S.A.)

For attachment to insurances of the following classifications in the U.S.A., its Territories and Possessions, Puerto Rico and the Canal Zone:

Owners, Landlords and Tenants Liability, Contractual Liability, Elevator Liability, Owners or Contractors (including railroad) Protective Liability, Manufacturers and Contractors Liability, Product Liability, Professional and Malpractice Liability, Storekeepers Liability, Garage Liability, Automobile Liability (including Massachusetts Motor Vehicle or Garage Liability),

not being insurances of the classifications to which the Nuclear Incident Exclusion Clause-Liability-Direct (Limited) applies.

This Policy* does not apply:

- I. Under any Liability Coverage, to injury, sickness, disease, death or destruction:
 - (a) with respect to which an insured under the Policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
 - (b) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the insured is, or had this Policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
- II. Under any Medical Payments Coverage, or under any Supplementary Payments Provision relating to immediate medical or surgical relief, to expenses incurred with respect to bodily injury, sickness, disease or death resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.
- III. Under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if:
 - (a) the nuclear material (1) is at any nuclear facility owned by, or operated by or on behalf of, an insured or (2) has been discharged or dispersed therefrom;
 - (b) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or
 - (c) the injury, sickness, disease, death or destruction arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (c) applies only to injury to or destruction of property at such nuclear facility.

IV. As used in this endorsement:

"hazardous properties" include radioactive, toxic or explosive properties; "nuclear material" means source material, special nuclear material or by-product material; "source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act 1954 or in any law amendatory thereof; "spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclear reactor; "waste" means any waste material (1) containing by-product material and (2) resulting from the operation by any person or organization of any nuclear facility included within the definition of nuclear facility under paragraph (a) or (b) thereof; "nuclear facility" means:

- (a) any nuclear reactor,
- (b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,
- (c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,
- (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations; "nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material. With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

It is understood and agreed that, except as specifically provided in the foregoing to the contrary, this clause is subject to the terms, exclusions, conditions and limitations of the Policy to which it is attached.

* NOTE: As respects policies which afford liability coverages and other forms of coverage in addition, the words underlined should be amended to designate the liability coverage to which this clause is to apply.

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RADIOACTIVE CONTAMINATION EXCLUSION CLAUSE-LIABILITY-DIRECT (U.S.A.)

For attachment (in addition to the appropriate Nuclear Incident Exclusion Clause-Liability-Direct) to liability insurances affording worldwide coverage.

In relation to liability arising outside the U.S.A., its Territories or Possessions, Puerto Rico or the Canal Zone, this Policy does not cover any liability of whatsoever nature directly or indirectly caused by or contributed to by or arising from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel.

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WAR AND TERRORISM EXCLUSION ENDORSEMENT

Notwithstanding any provision to the contrary within this insurance or any endorsement thereto it is agreed that this insurance excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any of the following regardless of any other cause or event contributing concurrently or in any other sequence to the loss;

1. war, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power; or
2. any act of terrorism.

For the purpose of this endorsement an act of terrorism means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This endorsement also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to 1 and/or 2 above.

If the Underwriters allege that by reason of this exclusion, any loss, damage, cost or expense is not covered by this insurance the burden of proving the contrary shall be upon the Assured.

In the event any portion of this endorsement is found to be invalid or unenforceable, the remainder shall remain in full force and effect.

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**U.S. TERRORISM RISK INSURANCE ACT OF 2002 AS AMENDED
NEW & RENEWAL BUSINESS ENDORSEMENT**

This Endorsement is issued in accordance with the terms and conditions of the "U.S. Terrorism Risk Insurance Act of 2002" as amended as summarized in the disclosure notice.

In consideration of an additional premium of USD 1 paid, it is hereby noted and agreed with effect from inception that the Terrorism exclusion to which this Insurance is subject, shall not apply to any "insured loss" directly resulting from any "act of terrorism" as defined in the "U.S. Terrorism Risk Insurance Act of 2002", as amended ("TRIA").

The coverage afforded by this Endorsement is only in respect of any "insured loss" of the type insured by this Insurance directly resulting from an "act of terrorism" as defined in TRIA. The coverage provided by this Endorsement shall expire at 12:00 midnight December 31, 2014, the date on which the TRIA Program is scheduled to terminate, or the expiry date of the policy whichever occurs first, and shall not cover any losses or events which arise after the earlier of these dates. The Terrorism exclusion, to which this Insurance is subject, applies in full force and effect to any other losses and any act or events that are not included in said definition of "act of terrorism".

This Endorsement only affects the Terrorism exclusion to which this Insurance is subject. All other terms, conditions, insured coverage and exclusions of this Insurance including applicable limits and deductibles remain unchanged and apply in full force and effect to the coverage provided by this Insurance.

Furthermore the Underwriter(s) will not be liable for any amounts for which they are not responsible under the terms of TRIA (including subsequent action of Congress pursuant to the Act) due to the application of any clause which results in a cap on the Underwriter's liability for payment for terrorism losses.

21/12/2007

LMA5091

Form approved by Lloyd's Market Association

INSURED EDUCATION DOCUMENT

ARCH INTERMEDIARIES, LTD.

EMPLOYMENT PRACTICES LIABILITY INSURANCE

SOME IMPORTANT TIPS FOR ALL POLICYHOLDERS

The Policy is your insurance contract with Underwriters. To ensure you receive the full benefits of the insurance contract you have purchased, you should read the Policy carefully. What follows is intended to be advisory in nature only. If you have any questions about any of the Policy's terms, conditions, provisions and/or exclusions, or if you have any questions about how the Policy operates, please contact your broker immediately.

Q. WHAT IS A CLAIM?

- A. Please take some time to review the definition of "Claim" found in the Definitions Section of your Policy. As you will see, a "Claim" can be many things and is more than just a lawsuit. A "Claim" can be:
- a) the filing of a civil lawsuit or arbitration proceeding;
 - b) the filing of a criminal lawsuit or the institution of criminal proceedings;
 - c) an EEOC or DFEH proceeding or other similar federal, state or local administrative proceeding;
 - d) a written demand for monetary damages or non-monetary relief;
 - e) a written notice that one of your employees intends to hold you responsible for a Wrongful Employment Practice; or
 - f) a written notice that a non-employee, such as a customer or client, intends to hold you responsible for Third-Party Discrimination;

Q. WHAT SHOULD WE DO IF WE RECEIVE A CLAIM?

- A. In the event you receive a Claim, you must immediately notify Underwriters' Authorized Representatives. The contact details for Underwriters' Authorized Representatives appear on the Declarations Page of your Policy and are noted below as well. You should make certain that those individuals in your company who are responsible for receiving notifications of Claims are aware of the procedures to follow in the event of a Claim. These procedures are set forth in detail in the notice provisions of your Policy. Please take some time and review these provisions. Failure to comply with the Policy's provisions as respects proper and timely notice of Claims may jeopardize your rights to coverage.

Julianna Ryan, Esq. or Judith Fisher, Esq.
Kaufman Borgeest & Ryan LLP
99 Park Avenue
New York, NY 10016
jryan@kbrlaw.com
jfisher@kbrlaw.com
(212) 980-9600 (phone)
(212) 980-9291 (fax)

Q. CAN WE APPOINT DEFENSE COUNSEL OURSELVES IF WE RECEIVE NOTICE OF A CLAIM?

- A. No. Please do not appoint defense counsel yourselves. Pursuant to the terms of the Policy, Underwriters have the right to either appoint counsel or, in some instances, approve your choice of counsel. Under no circumstances, however, should you assign the Claim to counsel without first speaking to Underwriters' Authorized Representatives. Underwriters will not pay for any costs incurred by counsel: 1) prior to receipt of Claim notification by Underwriters' Authorized Representatives; and 2) unless that counsel has been appointed or pre-approved by Underwriters.

Q. ARE WE ALSO REQUIRED TO NOTIFY UNDERWRITERS ABOUT INCIDENTS/POTENTIAL CLAIMS?

- A. You have the option of notifying Underwriters of incidents that do not rise to the level of Claims. Perhaps your employee has made just a verbal complaint and is threatening to file a lawsuit. Or perhaps someone in your company tells you they have witnessed discrimination and/or harassment. While these are not technically "Claims," Underwriters may consider them notice of potential Claims. You do not have to give Underwriters notice of these potential Claims, although it is usually prudent to do so. Any Claims arising from potential Claims will be deemed first made on the date notice is given. Notices of potential Claims are given to Underwriters' Authorized Representatives in the same way notices of Claims are provided.

Q. CAN WE SETTLE CASES WITHOUT OBTAINING UNDERWRITERS' CONSENT?

- A. No. Underwriters will not pay any settlement amounts in connection with settlements to which they have not expressly consented.

Other Responsibilities

Q. WHAT SHOULD WE DO IF OUR COMPANY MERGES WITH OR ACQUIRES ANOTHER COMPANY?

- A. There is a "Changes in Exposure" clause in your Policy that addresses these situations. You have automatic "free" coverage for newly acquired companies during the policy period if the number of employees you acquire does not exceed 50% of the total employee number at the beginning of the policy period (as noted on the application or renewal application). Should the employee count exceed 50%, you will need to inform Underwriters via your broker and your premium may be adjusted accordingly.

Q. WHAT SHOULD WE DO IF WE NEED TO CANCEL THE POLICY?

- A. While the Policy is non-cancelable by Underwriters except for non-payment of premium, you may cancel the Policy at any time by giving Underwriters written notice via your broker.

Q. WHAT SHOULD WE DO IF WE WANT TO INVOKE THE EXTENDED REPORTING PERIOD?

- A. In the event of non-renewal or cancellation, you have the right to purchase an Extended Reporting Period upon payment of additional premium as outlined in your Policy. Underwriters will require a written request for the Extended Reporting Period within 30 days from the effective date of the non-renewal or cancellation. That request should be made via your broker. The additional premium is payable to Underwriters within 45 days. Any Extended Reporting Period additional premium is deemed fully earned upon payment.

Q. WHAT SHOULD WE DO IF WE ARE PLANNING TO HAVE A REDUCTION IN FORCE?

- A. A reduction in force is obviously a very stressful time for your company and an event that may affect EPL insurers as well. Underwriters will provide coverage for the usual types of Claims that arise in connection with and/or are associated with a reduction in force but Underwriters ask that you exercise caution before laying off any employee by consulting with a lawyer who specializes in labor and employment law. Please let your broker know if you need a recommendation for a labor and employment firm in your area. You may also consult with your in-house counsel if he/she has experience in labor and employment law.

Q. WE NEED/WANT LOSS CONTROL SERVICES. WHAT SHOULD WE DO?

- A. In order to assist Insureds who strive to be fully compliant with federal, state and local employment laws, Underwriters will, at their own expense, provide you with the services of a top quality local employment lawyer to review your company's employment policies/procedures. The attorney will discuss with you the current state of EPL law and also provide sensitivity training for your staff and managers who deal with personnel issues. Underwriters will provide this assistance upon request to both new and renewal clients. If you are interested in these loss control services, please let your broker know so that appropriate arrangements may be made and the loss control may be scheduled.

Q. HOW CAN OUR RETENTION BE REDUCED WHEN WE HAVE CLAIMS FOR WRONGFUL TERMINATION CLAIMS?

- A. Underwriters agree to reduce your Retention by 25% if you obtain and adopt the written advice of a labor and employment law firm recommended or approved by Underwriters prior to the termination of an employee. In the unfortunate event your company is notified of wrongful termination Claim as respects events arising from that employee's termination, the Retention that applies to that Claim will be reduced by 25%. Please let your broker know if you need a recommendation for a labor and employment firm in your area. If you already have a firm that you wish to consult with, please let your broker know the name of that firm. Please do not seek advice from any firm without first obtaining Underwriters' consent.

The above noted tips do not change or replace your Policy in any way and you should read your entire Policy, not just these tips. If you have any questions or concerns with regard to your Policy please contact your broker immediately.

ARCH001

ARCH INTERMEDIARIESRENEWAL APPLICATION FOR
EMPLOYMENT PRACTICES LIABILITY INSURANCE
WITH THIRD-PARTY DISCRIMINATION COVERAGETHIS IS A RENEWAL APPLICATION FORM FOR A CLAIMS MADE POLICY**INSTRUCTIONS:**

1. Answer all questions (if not applicable, show N/A) and attach all additional information/explanations as required.
2. Application must be signed and dated.
3. "Applicant" refers to the company, its predecessors, and all proposed Insureds, including Subsidiaries.
4. PLEASE READ STATEMENT AT END OF APPLICATION CAREFULLY.

I. General Information

- A. Name and address of Applicant: Taylor, Bean & Whitaker Mortgage Corp.
315 NE 14th Street
Ocala, FL 34470
- B. Person to contact: Margaret A. Potter-Levane
 (name, title, telephone)
- C. ☒ Corporation ☐ Professional Corporation ☐ Partnership ☐ Other
 (Please specify)
- NAIC 5222 SIC 6162
- N.A.I.C Code or SIC Code (If N.A.I.C Code is Unknown)
- D. Any change in the nature or locations of business operations over the ☒ Yes ☐ No
 last year? (If Yes, please explain)
February 15, 2008 moved to newly constructed Global Headquarters
- E. Does the Applicant seek coverage for Subsidiaries (50% or more ☒ Yes ☐ No
 owned and wholly controlled by the entity identified in "A" above)?
 (If Yes, please identify Subsidiaries on a separate sheet and all
 Application information should include information for each Subsidiary).
- F. Any change in management during the last year? ☒ Yes ☐ No
 (If Yes, please explain) Stuart Scott, COO See Attached State document
- G. In the past twelve (12) months, has your total number of employees decreased by more
 than ten percent (10%) or five (5) employees, whichever is greater, through any
 reduction in force, systematic lay-off or by closure of any division, office or facility that
 you own or operate? ☒ Yes ☐ No
 (If Yes, please complete the Reduction in Force supplement (G))

- H. In the next twelve (12) months, do you anticipate a decrease by more than ten percent (10%) or five (5) employees, whichever is greater, through any reduction in force, systematic lay-off or by closure of any division, office or facility that you own or operate? ☐ Yes ☒ No
(If Yes, please complete the Reduction In Force supplement (H))

- I. If, during the next 12 months, circumstances of which you are currently unaware make it necessary for you to decrease the number of your Employees by ten percent (10%) or five (5) Employees, whichever is greater, through the implementation of any reduction in force, systematic lay-off or by closure of any division, office or facility that you own or operate (with any such reduction, lay-off or closure not known, anticipated or planned by you as of the date of this Application), do you agree that you will consult with, and adopt the advice of, a lawyer who specializes in labor and employment law (may include in-house counsel, but only if that counsel is qualified and experienced in the practice of labor and employment law) as respects the implementation of such reduction, lay-off or closure? ☒ Yes ☐ No

- J. Does the Applicant anticipate any merger, acquisition, or addition of any operations that would comprise a twenty five percent (25%) or ten (10) employees, whichever is greater, increase over the current number of employees? ☐ Yes ☒ No
(If Yes, please provide full details on a separate sheet)

- K. Has any insurer ever canceled or non-renewed the Applicant or its predecessor for this type of coverage? ☒ Yes ☐ No
(If Yes, please provide details on a separate sheet) Philadelphia Insurance denied renewal September 2007 because of potential EPL claim.

II. Financial Information

- A. Please answer the following four (4) questions for the Insured Company, including its subsidiaries, for the most recent fiscal year end: 4-30-07

- i) What are the Applicant's total assets? \$ 4,570,660,000.
- ii) What are the Applicant's total gross revenues? \$ 185,585,000.
- iii) Does the Applicant currently have: Net Income ☒ or
Net Loss ☐
Amount \$ 43,358,000.
- iv) Does the Applicant currently have: Positive Cashflow ☐ or
Negative Cashflow ☒
Amount \$ (329,635,000.)

- B. Has an auditor in the previous two (2) fiscal years recommended a "going concern" opinion of the financial information for the Applicant? ☐ Yes ☒ No
(If Yes, please provide details on a separate sheet)

Page 2 of 8

III. Employees (including Subsidiary employee information on a separate sheet)

- A. Number of employees: Full Time: 2,373 Part Time: 415

Period Beginning 5/01/07 to 4/30/08

- B. Salary ranges (including bonuses, dividends and commissions):
- | | (Number of full time employees) | Number of part time employees |
|------------------------|---------------------------------|-------------------------------|
| \$ 50,000 or less | 1,847 | 415 |
| \$ 50,001 to \$100,000 | 468 | 0 |
| \$100,001 and over | 57 | 0 |
- C. Does the Applicant use seasonal or temporary employees? ☐ Yes ☒ No
 If so, when and how many? _____
 Are these employees included in A and B above? ☐ Yes ☐ No
- D. Does the Applicant use leased workers? ☐ Yes ☒ No
 If yes, how many have been retained by the Applicant in the past 12 months? _____
 Are these employees included in A and B above? ☒ Yes ☐ No
- E. Does the Applicant use independent contractors? ☒ Yes ☐ No
 If Yes, how many work solely for the Applicant? 1
- F. How many employees are covered by collective bargaining or other union agreements? None
- G. In the past 12 months, how many officers have left your employ? None
 Of the above, how many were terminated? None
- H. In the past 12 months, how many other employees have left your employ? See Attached
 Of the above, how many were terminated? _____

IV. Human Resources

- A. Have the Applicant's managers and/or supervisors attended training and education programs/seminars on sexual harassment and other types of discrimination within the last 12 months? ☒ Yes ☐ No
 If Yes, who has attended? Supervisory level and above
 If Yes, who conducts the sessions? Karey Holland, HR Director

- B. When were the Applicant's employment policies/procedures/handbook last reviewed by labor or employment counsel? June 2007

V. Third-Party Information

- A. Estimated number of employees with customer/client contact: 702
- B. Has the Applicant conducted staff training on client and customer relations issues such as avoiding discriminatory behavior within the last 12 months? ☒ Yes ☐ No
- C. Is the Applicant in compliance with Title III of the Americans with Disabilities Act (building and premises requirements)? ☒ Yes ☐ No

VI. Loss History

- A. Has the applicant reported all claims to underwriters or underwriters' representatives? ☒ Yes ☐ No

(If not, Please complete the attached supplement).

VII. Other Material Facts

- A. Please declare any other Material Facts on a separate sheet. ☒ None ☐ See attached
(If there are no other Material Facts, please check "None")

A Material Fact is one likely to influence assessment of this risk, the premium charged or the terms and conditions imposed by Underwriters. If you are in any doubt as to whether a fact would be considered material, you should disclose it. All the information requested in this proposal is material.

Please also ensure that any additional information is attached where applicable.

The Applicant warrants after full investigation and inquiry that the statements set forth herein are true and include all material information.


The Applicant on behalf of all proposed Insureds further warrants that if the information supplied on this renewal application changes between the date of this renewal application and the inception date of the Policy, it will immediately notify Underwriters of such change. Signing of this renewal application does not bind Underwriters to offer, nor the Applicant to accept, insurance, but it is agreed that this renewal application shall be the basis of the insurance and will be attached and made a part of the Policy should a policy be issued.

6/27/08
Date


Signature of Applicant's Authorized Principal or Officer

Chairman
Title


6/27/08
Date


Signature of Applicant's Authorized Human Resources Representative

HR Mgr
Title

(PLEASE NOTE THAT BOTH DATED SIGNATURES ARE
REQUIRED)

8/25/08



Chairman

8/25/08



Director HR

SUPPLEMENTAL CLAIM INFORMATION

Claimant(s): See Attached

Position/Title(s): _____

Defendant(s): _____

Position/Title(s): _____

Claim status: Incident Claim Suit

Venue:
(Court or Agency) _____

Date of act(s) causing claim / incident: _____

Date claim / incident reported to the applicant: _____

Nature of Claim and allegations:

Name of defense attorney and law firm: _____

Name of plaintiff attorney and law firm: _____

If Closed, total paid (defense and loss): _____

If Open:

1. Claimant's demand: _____

2. Insurer's defense and/or loss reserves: _____

3. Defense costs incurred to date: _____

4. Applicant's settlement offer: _____

5. Applicant's estimate of settlement: _____

Remedial action taken to prevent a similar claim:

Reduction In Force Supplement (G)

- A. How many employees were laid off? 16 since July 2007
- B. What date(s) did the lay-off's take place? July 2007 to current
- C. Did you consult with and follow the recommendations of a lawyer who specializes in labor and employment law as respects the implementation of such reduction, lay-off or closure? ☒ Yes ☐ No
- D. Were severance packages offered to all laid-off employees? ☒ Yes ☐ No
- E. Were signed releases gained from all laid-off employees? ☒ Yes ☐ No
- F. Were exit interviews completed with all laid-off employees? ☒ Yes ☐ No
- G. Did any of the laid off employees express that they were considering bringing any sort of complaint or claim? ☐ Yes ☒ No
- H. Please provide available details on the above.

Reduction In Force Supplement (H)

A. How many employees will be laid off?

N/A

B. What date(s) will the lay-off be effective?

C. Do you agree to consult with and follow the recommendations of a lawyer who specializes in labor and employment law as respects the implementation of such reduction, lay-off or closure?

☐ Yes ☐ No

D. Will severance packages be offered to all laid-off employees? ☐ Yes ☐ No

E. Will signed releases be gained from all laid-off employees? ☐ Yes ☐ No

F. Will exit interviews be completed with all laid-off employees? ☐ Yes ☐ No

G. Please provide available details on the above.

SECURITY DETAILS

ATTACHING TO CERTIFICATE NUMBER: AY001670G
ATTACHING TO AUTHORITY REFERENCE NUMBER: AE011050G

HEREON: 100%

SECURITY: CERTAIN UNDERWRITERS AT LLOYD'S

PROPORTION

SYNDICATE

19.00%

AFB 623

81.00%

AFB 2623

LLOYD'S

One Lime Street London EC3M 7HA

EXHIBIT B

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

KIMBERLY KELLY,
Complainant

v.

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION,,
Respondent



COMPLAINT

1. Complainant Kimberly Kelly lives at 1838 E. South Mountain Ave, Phoenix AZ 85042.
2. Respondent Taylor Bean and Whitaker Mortgage Corporation (hereafter "TBW") at all relevant times has had a principal place of business at 25 Braintree Office Park, Braintree Ma. At all relevant times, TBW employed 6 or more employees.
3. In this Complaint, Ms. Kelly asserts claims of DISABILITY DISCRIMINATION and RETALIATION.
4. Ms. Kelly began working for TBW on July 21, 2003. At the time of her unlawful termination on September 16, 2008, she held the position of Senior Loan Underwriter.
5. In that position, she reviewed and evaluated loan application documentation and determined whether the requested loans should be granted or denied. She was assigned to underwrite loans almost exclusively for one TBW customer, Poli Mortgage Group (hereafter "Poli").
6. Before she took a leave of absence to undergo cancer treatment in March of 2008, Ms. Kelly was one of the most productive of TBW's loan underwriters. She usually ranked first or second in the number of loans she underwrote each month. Both TBW and Poli, the customer for whom she primarily worked, were pleased with her performance and productivity.
7. At the time of her termination, TBW had set a quota of 7 loans it wanted each loan underwriter to underwrite each day. Underwriters who during the course of a month on average exceeded that amount earned a monetary bonus. Ms. Kelly earned bonuses almost every month. In her last few months of employment at TBW, for example, she often far exceeded 7 loans per day. When she underwrote fewer than 7 loans per day, it was often because Poli did not have as many as 7 loans available for her.
8. In April, 2008, Ms. Kelly, although just 37 years old, was diagnosed with breast cancer.
9. From May 2-July 25, 2008, Ms. Kelly took Family and Medical Leave Act Leave (FMLA) leave to undergo cancer surgery and treatment. Her treating doctor cleared her to return to work at the end of her leave but requested that to minimize stress, she work no more than 8 hours per day.
10. Ms. Kelly's job description contained no specific schedule or number of daily hours she was required to work. She had been told that her position allowed her to set her

own schedule of hours. She generally worked during regular business hours but she worked on her own, independently, at home, on her own schedule.

11. On or about July 29, 2008, TBW Benefits Administrator Jennifer Wright called to say that the company was not willing to accommodate her in an 8 hour per day schedule. She said that they would approve another 6 month leave of absence but if she still needed to work 8 hours per day at the end of that six month leave, she would be terminated.
12. Ms. Kelly told Ms. Wright that she wanted to return to work, that she did not want to be terminated, and that she was able to return to work now. Despite all of Ms. Kelly's efforts to persuade Ms. Wright to allow her to return to work, working eight hours per day, which would have allowed her to meet and exceed the seven loan quota, Ms. Wright remained adamant and unlawfully refused to allow her to return to work. Ms. Wright said that they would soon would be mailing out the paperwork that would allow Ms. Kelly to take an additional 6 month leave of absence.
13. On or about August 14, 2008, another TBW Benefits Administrator, Rina Rivera called to follow up on the leave of absence paperwork, which she said had been mailed out, although Ms. Kelly had never received it.
14. Ms. Kelly tried again to convince Ms. Rivera to allow her to return to work. Ms. Kelly pointed out again that her doctor had cleared her to return to work. She also stated that based on her past performance of often exceeding the daily 7 loan quota, there was no legitimate reason to assume that she could not meet the quota working 8 hours per day. Ms. Rivera continued to refuse to allow Ms. Kelly to return to work or to grant her a reasonable accommodation.
15. On or about September 16, 2008, Ms. Kelly received a call from Ms. Rivera who again stated that TBW definitely would not allow her to work on a schedule of 8 hours per day. Ms. Kelly then asked when the 6 month leave of absence TBW had insisted she take would end. Ms. Rivera responded "today", saying that they were letting her go as of that day.
16. Ms. Rivera then said that she wanted Ms. Kelly to talk to the TBW HR Manager, and transferred the call to a conference call in which Ms. Rivera, Ms. Wright and the TBW HR Manager all participated.
17. The HR Manager reiterated what Ms. Rivera had said about Ms. Kelly being terminated as of that day. In response to Ms. Kelly trying to persuade them to let her return to work, the HR Manager unlawfully responded that TBW wasn't willing to allow her to work 8 hours per day because "all underwriters have to be treated the same".
18. Ms. Kelly said again that they were just making an assumption that she wouldn't be able to meet the seven loan quota. She also said that she hadn't called in sick in four years, and that it was unfair to push her out now that she had a serious illness. She said that there was no reason to assume that her work performance would be affected by her cancer. The HR Manager stated that they had no issues with her work performance, and that her work performance wasn't the reason she was being terminated.
19. When nothing Ms. Kelly said persuaded them to change their decision to terminate her, Ms. Kelly asked why they were terminating her now, when they had originally said that she should take a six month further leave of absence. Ms. Wright said that she

had only said that such a further leave might be possible, which was not what she had said at the time.

20. Ms. Kelly asked why she was being terminated. The HR Manager unlawfully responded that she was being terminated "because your FMLA leave is exhausted".
21. In terminating Ms. Kelly, TBW destroyed a career which she had built up through 15 years of hard work, in which she had been able to earn a good living, despite having no college education. Although she has tried to find another comparable mortgage underwriting position, she has been unable to do so. Her income has greatly decreased as a result of her unlawful termination from TBW.
22. Being suddenly fired and deprived of her career of 15 years, while she was already dealing with cancer at a very young age, was extremely distressing to Ms. Kelly.
23. Ms. Kelly's distress was compounded when a few days after her termination, Ms. Rivera sent her a letter demanding about \$1900 in reimbursement for the health insurance premiums TBW had paid during her FMLA leave of absence.
24. Jennifer Wright, Rina Rivera and the HR manager all exercised supervisory authority over Ms. Kelly, including deciding whether she could return to work after a leave of absence, and whether she was to be fired. All three of them are employees for whose conduct Respondent is legally responsible.

COUNT I DISABILITY DISCRIMINATION

25. Ms. Kelly, as person being treated for breast cancer, had an impairment which substantially limited her in one or more of her daily life activities.
26. Ms. Kelly was a qualified disabled person, able to perform the essential functions of her position.
27. TBW unlawfully terminated Ms. Kelly, based on stereotyped assumptions about what she would or would not be able to do.
28. TBW unlawfully refused to grant her a reasonable accommodation, based on the unlawful excuse that they did not want to treat her differently from other employees. In fact, the duty to provide reasonable accommodations that allow disabled employees to perform the essential functions of their positions requires that disabled employees be treated differently from nondisabled employees.
29. TBW unlawfully terminated one of their most proficient and productive underwriters because they regarded her as disabled, and feared that she would need more time off for cancer treatment and/or for possible cancer recurrences.
30. TBW unlawfully terminated her because she had a record of having, and being treated for, cancer.
31. TBW unlawfully failed to engage in the "interactive process" required by disability discrimination law.
32. As a result of TBW's unlawful disability discrimination, Ms. Kelly has suffered harm, including emotional distress, lost income and earning capacity.

COUNT II FAILURE TO ENGAGE IN INTERACTIVE PROCESS

33. TBW failed to comply with its statutory duty to engage in a good faith "interactive process", to try to keep Ms. Kelly in her job, and to determine whether a reasonable

FROM : JURISFAX

PHONE NO. :

May. 19 2009 02:30 PM ET

PF

- accommodation would allow her to perform the essential functions of her position.
34. As a result of TBW's unlawful conduct, Ms. Kelly has suffered harm, including emotional distress, lost income and earning capacity.

COUNT III RETALIATION: VIOLATION OF MGL c. 151B s.4(4)

1. TBW discriminated and retaliated against Ms. Kelly because she exercised protected rights, including taking leave for treatment of a disability, and seeking a reasonable accommodation.
2. As a result of TBW's unlawful conduct, Ms. Kelly has suffered harm, including emotional distress, lost income and earning capacity.

**I HAVE READ THIS COMPLAINT AND THE FACTS DESCRIBED IN IT ARE TRUE
TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION**

Signed under the penalties of perjury.

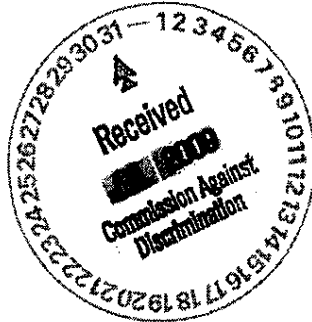

KIMBERLY KELLY

COMMONWEALTH OF MASSACHUSETTS
Commission Against Discrimination
One Ashburton Place, Boston, MA 02108
Phone: (617) 994-6000 Fax: (617) 994-6024

INSTRUCTIONS FOR SUBMITTING DOCUMENTS,
PLEADINGS AND ATTACHMENTS

1. Do not use binders of any sort.
2. No double sided pages.
3. Do not punch holes in any documents.
4. **Do not use any staples or tabs within your documents.** However, clips of any style are acceptable.
5. Separate each answer with colored paper marked with the exhibit number.
6. Each question **MUST** be answered fully and without redaction of information. If you have concerns about the information to be provided, please contact the investigator prior to the due date.
7. Do not use legal sized paper. Documents and pleadings should be submitted on paper that is 8.5"X11".
8. Because scanned documents become illegible, do not highlight text. If there is information on the page that you wish to point out, place a colored, *removable* tab on the page itself by the information or otherwise identify the information in your materials.
9. For clearest scanning resolution, use a print font that is at least 12 point. All other written materials must be legible.
10. Please make sure that your documents are clearly referencing the assigned case docket number.

EXHIBIT C



Littler Mendelson, P.C.
One International Place
Suite 2700
Boston, MA 02110

COPY

July 30, 2009

Michael Mankes
617.378.6006 direct
617.378.6000 main
617.737.0052 fax
mmankes@littler.com

BY HAND DELIVERY AND FACSIMILE (617-994-6024)

Mr. Keith Healey
Administrative Assistant
Massachusetts Commission Against Discrimination
One Ashburton Place, 6th Floor
Boston, MA 02108

Re: Kimberly Kelly v. Taylor, Bean & Whitaker Mortgage Corporation
MCAD Docket Number: 09BEM01305

Dear Mr. Healey:

Respondent Taylor, Bean & Whitaker Mortgage Corporation ("TBW" or the "Company"), submits this Position Statement in response to the Charge of Discrimination ("Charge") filed by Complainant Kimberly Kelly ("Complainant")¹ in the above-referenced action. Complainant alleges that TBW discharged her because of her disability (breast cancer) and in retaliation for requesting an accommodation. These allegations are entirely without merit.

Following Complainant's FMLA leave, TBW accommodated her by allowing her to take additional time off. Complainant was eventually cleared to return to work by her physician, but permanently restricted to working no more than 8 hours per day. As Complainant was an exempt employee, TBW informed her that she could set her own hours, so long as she met her production goals. Complainant refused, however, contending that she could not perform her job in less than 8 hours a day. As a result, she was separated from employment.

The record evidence reveals that TBW did not exhibit any discriminatory or retaliatory animus toward Complainant, and accordingly, TBW requests that the Charge be promptly dismissed.

I. FACTUAL BACKGROUND

A. TBW

TBW is an independent mortgage company with offices located across the country. TBW engages in the residential mortgage lending business, and as such, originates, acquires, sells

¹ During her tenure with TBW, Complainant went by both Kimberly Kelly and Kimberly Zeller.

Mr. Keith Healey
July 30, 2009
Page 2

and services residential mortgage loans through a network of mortgage brokers, community banks, and loan correspondents.

TBW recognizes the value that a diverse workforce brings to the way it delivers these services. This commitment to diversity is applied company-wide to every facet of employment. While employed at TBW, Complainant received a copy of the Employee Manual, which contains TBW's statement on at-will employment, Equal Employment Opportunity ("EEO") Policy and Americans with Disabilities Act ("ADA") Policy. See Policies, *Exhibit 1*. TBW's commitment to ADA compliance is prominently highlighted at the beginning of its Manual, where it states that it "will not discriminate against any qualified employee or job applicant with respect to any terms, privileges or conditions of employment because of a person's physical or mental disability" and, where circumstances dictate, will "make reasonable accommodations wherever necessary for all employees or applicants with disabilities." See id. To encourage reporting of conduct that violates its EEO policy, TBW prohibits retaliation against any individual who invokes the protections of those policies or participates in any activity protected by state or federal anti-discrimination laws. Complainant signed a form acknowledging that she received a copy of the Employee Manual and understood TBW's policies and procedures. See Acknowledgement, *Exhibit 2*.

B. TBW's Leave of Absence Policies

TBW offers to its employees a generous leave policy. Although not legally required to comply with the Family Medical Leave Act ("FMLA") since it has less than 50 employees in Braintree, TBW offers FMLA-comparable leave, allowing employees who meet the time-of-service requirements under the FMLA a total of 12 weeks of protected, unpaid leave during a 12-month period. See FMLA Policy, *Exhibit 3*. TBW's procedures for requesting leave are also set forth in its FMLA Policy. See id.

C. Complainant's Employment History With TBW And Her Essential Job Functions

Complainant commenced her employment with TBW on July 21, 2003 as a full-time Senior Underwriter at TBW's Braintree, Massachusetts office. Her direct supervisor was Patricia Hatton, the Underwriting Manager in Braintree. At all times, Complainant's employment with TBW was at will. For a time prior to her leave, Complainant supervisor permitted her to carry out her underwriting responsibilities remotely from her home in Arizona.

Another unique feature of Complainant's employment was her exclusive working relationship with TBW's client, Poli Mortgage Group. Complainant worked with Poli to underwrite conventional and private label loans. As an underwriter, Complainant's duties included, without limitation, interpreting and applying credit policy guidelines and investor guidelines to specific loan files, issuing approvals and declinations after determining the best program fit for

Mr. Keith Healey
July 30, 2009
Page 3

mortgage applicants, providing no less than 95% accuracy and compliance ratio on approved loans and maintaining Company-set goals of underwriting a designated number of loans per day. See Job Description, *Exhibit 4*. Complainant was responsible for satisfying daily production quotas of underwriting 5 loans (for government-only loans) and 7 loans (for a combination of conventional and non-conforming loans). See id. Indeed, *meeting quota is listed as an essential function of an underwriter's job*. See id. Underwriters are also required to work under pressure and meet deadlines, respond to e-mails and phone messages within 2 hours of receipt and to sit, stand, stoop or bend for an extended period (8 hours). See id.

D. Complainant's Absence From Work

On April 21, 2008, shortly after learning that she had been diagnosed with breast cancer, Complainant requested information from Rina Rivera, TBW's Benefits Administrator, about the Company's FMLA and disability policies. Rivera provided Complainant with general information about the FMLA, and copies of TBW's FMLA Policy, Leave of Absence Request and Medical Certification forms and a Short Term Disability packet. Rivera also instructed Complainant to complete and sign the Leave of Absence Form as soon as possible and have her physician complete the Medical Certification by May 5, 2008.

On May 7, 2008, Heidy Gonzalez of TBW's Benefits Department followed up with Complainant to remind her about completing the FMLA paperwork. She also sent duplicate copies of TBW's Medical Certification and Leave Request forms to Complainant by e-mail and overnight mail. Gonzalez informed Complainant that she would extend the Medical Certification deadline to May 12, 2008.

On May 12, 2008, Complainant told Rivera that she would fax the completed forms to TBW. Complainant also informed Rivera that she was currently on vacation, "as of May 2nd or 3rd," and intended to use her available vacation days while taking time off for medical reasons. Rivera explained that pursuant to TBW's FMLA Policy, Complainant would be required to use her accumulated, unused vacation time concurrent with her otherwise unpaid medical leave.

Complainant submitted her completed Medical Certification and Request for Leave forms to TBW on May 13, 2008, and TBW approved Complainant's request for leave. See Forms, *Exhibit 5*. Since Complainant's physician had indicated that Complainant's leave had commenced on May 2, 2008, TBW informed Complainant that her 12-week leave entitlement would expire on July 24, 2008, despite her expected return date of September 2, 2008. See Employer's Response, *Exhibit 6*.²

² TBW followed up with and sent reminder letters to Complainant on May 29, 2008 and July 3, 2008, reiterating that Complainant's FMLA leave was set to expire on July 24, 2008. TBW also instructed Complainant that she was required to submit a Return to Work form at least two days prior to her return date and enclosed copies of this form for her convenience.

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E. Complainant's Medical Restrictions and Inability to Perform the Essential Functions of Her Job

Complainant submitted a completed Return to Work Certification Form on July 23, 2008, a day before her FMLA leave ended. Complainant's physician noted on this form that Complainant was able to perform all the functions of her job and released her to return to work on July 25, 2008, subject to the following "permanent" restrictions: (1) to work no more than 8 hours daily; (2) not to lift more than 5 pounds; and (3) to keep mental stress levels under control. See Return to Work Certification, *Exhibit 7*. TBW informed Complainant that it needed to consider her restrictions. Since Complainant had exhausted her FMLA leave at this point, TBW permitted her to remain on an excused absence while considering her physician's recommended restrictions.

In reviewing Complainant's medical restrictions, TBW determined that it could not be responsible for "keep[ing] [Complainant's] stress levels under control," and assumed this restriction was directed at Complainant, not the Company. TBW did not foresee any problems with Complainant's other restrictions; Complainant's job did not require the lifting of more than 5 pounds, and as an exempt employee, Complainant was able to determine her own hours of work, so long as she achieved TBW's loan quotas. When TBW informed Complainant of this, Complainant maintained that she was unable to meet her quota in 8 hours a day (contending that it took her 15 hours a day to satisfy her production targets) and, under these circumstances, she could not return to work.

To further assist Complainant, TBW suggested the possibility of extending her leave. To determine whether to grant an extended leave of absence accommodation, TBW needed additional information from Complainant's physician about her restrictions. On July 29, 2008, Rivera sent the Medical Inquiry forms to Complainant, instructing her to return them by August 12, 2008. Complainant, however, failed to send any documentation by this date.

On August 14, 2008, Rivera reminded Complainant about submitting the Medical Inquiry form and extended the deadline to August 19, 2008. Complainant missed the second deadline. On August 27, 2008, during a telephone conversation initiated by the Company, Complainant requested permission to submit the Medical Inquiry form on August 29, 2008, since she had a doctor's appointment that day. TBW agreed to this extension and emphasized that August 29th was the absolute drop deadline. During this conversation, TBW explained that if Complainant failed to provide documentation to support her need for an extended leave, then the Company would treat her as having resigned.

On September 2, 2008, Complainant faxed her completed Medical Inquiry form to TBW, but it did not list any additional information about Complainant's restrictions. See Medical Inquiry Form, *Exhibit 8*. Rather, the Form acknowledged that Complainant's "job requires days in excess of 8 hours frequently," and that Complainant was permanently restricted from meeting

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this requirement. See id. As Complainant agreed that she could not meet her production goals and her restrictions were permanent in nature, effective September 16, 2008, after nearly five months on leave, TBW separated her employment.

II. LEGAL ANALYSIS

Far from treating Complainant differently because of her medical condition or due to retaliatory animus, TBW applied its generous leave policy to Complainant, allowing her far more time off than required under state or federal leave laws, while ignoring numerous lapses of procedure. After an extensive leave, TBW eventually separated Complainant's employment after she confirmed that her permanent restrictions prevented her from performing the essential functions of her job.

A. **TBW Did Not Discriminate Against Complainant On The Basis Of Her Disability**

As a general principle, employers are required to provide a qualified handicapped employee a reasonable accommodation that enables the employee to perform the essential functions of her position, or that enables the employee to enjoy the same privileges and benefits of employment as are enjoyed by non-handicapped employees. The ADA defines an essential function as a "fundamental job duty of the position at issue." 29 C.F.R. § 1630.2(n). When responding to an employee's request for a reasonable accommodation, an employer is not obligated to remove one of the job's essential functions. See Kvorjak v. Maine, 259 F.3d 48, 57 (1st Cir. 2001) ("[t]he law does not require an employer to accommodate a disability by foregoing an essential function of the position") (internal citation omitted).

Here, TBW fully complied with its legal obligations in its treatment of Complainant. TBW provided Complainant with an extended leave of absence, despite Complainant's exhaustion of her FMLA leave. Complainant's physician ultimately set forth as a "permanent" restriction that Complainant would not be able to work more than 8 hours per day. TBW was willing to allow Complainant to limit her work to 8 hours a day so long as she could continue to maintain her production quota. Complainant took the position, however, that such restriction would not allow her to perform the essential function of her job to make quota. Indeed, the Medical Inquiry Form Complainant provided makes clear Complainant's own view that her job frequently "requires" work days in excess of 8 hours, and that she was not able to fulfill such a requirement. See Exhibit 8. TBW acted well within its legal rights in holding Complainant to her quota, as the law is firmly established that an employer need not lower its production standards to accommodate a disabled employee. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compliance Manual (Oct. 17, 2002) (establishing that employers need not lower standards of production, whether qualitative or quantitative, to accommodate individuals with a disability); Mulloy v. Acushnet Co., 460 F.3d 141, 147-148 (1st Cir. 2006) (stating that the

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inquiry into essential functions “is not intended to second guess the employer or to require the employer to lower company standards”) (internal citation omitted). Given that the 8-hour restriction was permanent, and Complainant herself acknowledged that she could not perform the essential functions of her position given this restriction, TBW acted lawfully in terminating Complainant’s employment.³ In other words, because Complainant could not perform an essential function of her position and there existed no reasonable accommodation that would allow her to do so, she is not “qualified” for the underwriter position with TBW.

Complainant’s allegation that TBW failed to engage in an “interactive process” with her to identify an appropriate accommodation is frivolous. The “interactive process” is intended to be “informal” and a means of uncovering “*potential* reasonable accommodations” that could overcome the employee’s disability. See 29 C.F.R. §1630.2(o)(3) (emphasis added). The facts of this case illustrate that this is not an instance where the employer simply rejected any request for accommodation without further discussion. Here, there was not only a great deal of discussion about Complainant’s medical restrictions, but significant action on the part of Company management. TBW provided Complainant with multiple accommodations, including granting her an extended leave of absence and allowing multiple extensions of the deadlines for Complainant to submit necessary medical documentation. TBW further agreed to permit Complainant to work less than 8 hours a day provided that she could meet her production requirements. Complainant rejected this offer without proposing any alternative reasonable accommodation. See Phelps v. Optima Health, Inc., 251 F.3d 21, 28 (1st Cir. 2001) (stating that when an employee rejects a reasonable accommodation offered by her employer, as Complainant did here, she is precluded from recovering under the ADA for her employer’s alleged failure to provide a reasonable accommodation). Under the circumstances, TBW cannot be viewed as having failed to engage in the interactive process.

B. TBW Did Not Retaliate Against Complainant

Complainant further asserts that TBW retaliated against her “because she exercised protected rights, including taking leave for treatment of a disability, and seeking a reasonable accommodation.” There is clearly no evidence of retaliatory animus. Indeed, if anything, TBW provided Complainant with preferential treatment, allowing her to remain on leave nearly two months beyond her expected return date and the exhaustion of her FMLA leave, for a total of *five months* of leave. This was despite the fact that Complainant consistently failed to

³ Complainant’s proposed accommodation is *per se* unreasonable because her request to be excused from achieving quota “in essence requires not an accommodation but a redefinition of [her] job.” See Mulloy, 460 F.3d at 153-154. With respect to Complainant’s restriction “to keep stress levels under control,” such an accommodation has been deemed unreasonable as a matter of law. See Marino v. U.S. Postal Serv., 25 F.3d 1037 (1st Cir. 1994) (citing Pesterfield v. Tennessee Valley Auth., 941 F.2d 437, 442 (6th Cir. 1991)) (“It would be unreasonable to require that [the employer] place plaintiff in a virtually stress-free environment and immunize him from any criticism in order to accommodate his disability.”).

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meet deadlines for providing necessary medical documentation. That TBW extended Complainant these considerations is inconsistent with any suggestion of retaliatory motive. As explained above, Complainant's employment was terminated because *Complainant* did not feel that she could perform the essential functions of her job given her medical restrictions. There is simply no evidence of retaliation.

In short, Complainant's conclusory allegations of retaliation, unsupported by specific facts, are insufficient to support a probable cause finding on her retaliation claim.

AFFIRMATIVE DEFENSES

In addition to TBW's assertion of the defenses set forth above, TBW asserts the following affirmative defenses: Complainant (i) fails to state a claim upon which relief may be granted by failing to state the elements of a claim for discrimination based on disability under state or federal law; (ii) failed to mitigate any damages she may claim in this matter; (iii) fails to show that the damages she claims were actually or proximately caused by acts or omissions for which TBW is responsible; and (iv) asserts claims that are barred, in whole or in part, by the doctrines of laches, estoppel and waiver. With respect to Complainant's claim under Title VII, TBW asserts that Complainant failed to avail herself of TBW's fair and adequate internal grievance procedure for complaints of discrimination, thereby barring her recovery under Title VII.

III. CONCLUSION

For the forgoing reasons, TBW respectfully requests that the Commission enter a Lack of Probable Cause finding and dismiss Complainant's Charge in its entirety. Should you need any additional information to assist with your investigation, please let us know.

Very truly yours,

A handwritten signature in black ink that reads "Michael Mankes/jbm". The signature is fluid and cursive, with the initials "jbm" written at the end.

Michael Mankes

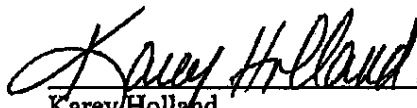
MM/jbm
Enclosures

cc: Leslie Lockard, Esq., Counsel for Complainant (by first class mail, w/enc.)

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AFFIRMATION OF RESPONDENT TAYLOR, BEAN & WHITAKER

The facts in this Position Statement, submitted on behalf of Respondent, Taylor, Bean & Whitaker, in response to the Charge of Discrimination filed by Kimberly Kelly, MCAD Docket No. 09BEM01305, are not based on the personal knowledge of any single individual. They are based on information obtained from the records of Respondent and from various employees thereof. To the extent that I, Karey Holland, have personal knowledge of these facts, I verify and affirm under the pains and penalties of perjury that the facts contained in this Position Statement are true.


Karey/Holland
Director, Human Resources
Taylor, Bean & Whitaker

Dated: July 30th, 2009

EXHIBIT 1



Taylor, Bean & Whitaker
Mortgage Corporation

Employee Manual
2007

Notice

Taylor, Bean & Whitaker has a long standing record of employment and opportunity without regard to race, color, religion, creed, national origin, sex, age, ancestry, marital status, disability, veteran or draft status or other protected status pursuant to law.

It is the policy of Taylor, Bean & Whitaker to:

- * comply with all the relevant and applicable provisions of the Americans with Disabilities Act ("ADA"). Taylor, Bean & Whitaker will not discriminate against any qualified employee or job applicant with respect to any terms, privileges, or conditions of employment because of a person's physical or mental disability.
- * make reasonable accommodations wherever necessary for all employees or applicants with disabilities, provided that the individual is otherwise qualified to safely perform the duties and assignments connected with the job and provided that any accommodations made do not require significant difficulty or expense.
- * thoroughly investigate instances of alleged discrimination and take corrective action if warranted;
- * be continually alert to identify and correct any practices by individuals that are at variance with the intent of the Equal Opportunity Employer Policy.

All employment and compensation with Taylor, Bean & Whitaker is "at will" which means that employment can be terminated with or without cause, and with or without notice, at any time, at the option of either Taylor, Bean & Whitaker or the employee, except as otherwise provided by law.

The policies in this Manual are to be considered as guidelines. Taylor, Bean & Whitaker, at its option, may change, delete, suspend or discontinue any part or parts of the policies in this Manual at any time with or without prior notice. Any such action shall apply to existing as well as future employees with continued employment being the consideration between the employer and employee. Employees may not accrue eligibility for monetary benefits that they have not earned through actual time spent at work. Employees shall not accrue eligibility for any benefits, rights, or privileges beyond the last day worked. No one other than the Chairman of Taylor, Bean & Whitaker may alter or modify any of the policies in this Manual. No statement or promise by a supervisor, manager, or department head may be interpreted as a change in policy nor will it constitute an agreement with an employee.

Should any provision in this Employee Manual be found to be unenforceable and invalid, such finding does not invalidate the entire Employee Manual, but only the subject provision.

This manual replaces (supercedes) all previous manuals for Taylor, Bean & Whitaker as of March 2007.

EXHIBIT 2



ACKNOWLEDGMENT OF RECEIPT OF EMPLOYEE MANUAL

The Employee Manual is an important document intended to help employees become acquainted with Taylor, Bean & Whitaker. The Manual will serve as a guide; it is not the final word in all cases. Individual circumstances may call for individual attention.

- * I understand that the policies, rules and benefits described in the manual are subject to change at the sole discretion of Taylor, Bean & Whitaker at any time. I understand that this manual replaces (supercedes) all other previous manuals for Taylor, Bean & Whitaker.
- * I understand that this manual is not a contract; neither expressed nor implied and imposes no legal obligation of any kind upon Taylor, Bean & Whitaker. I understand that Taylor, Bean & Whitaker is an "at will" employer. My employment is terminable at will, either by myself or by Taylor, Bean & Whitaker, regardless of the length of my employment or the granting of benefits of any kind. No circumstances arising out of my employment will alter my "at will" employment relationship.
- * I am aware that during the course of my employment confidential information will be made available to me, i.e., marketing strategies, customer lists, pricing policies and other related information. I understand that this information is critical to the success of Taylor, Bean & Whitaker and must not be given out or used outside of Taylor, Bean & Whitaker's premises or with non-Taylor, Bean & Whitaker employees. In the event of termination of employment, whether voluntary or involuntary, I hereby agree not to utilize or exploit this information with any other individual or company.
- * I understand that, should the content of the manual be changed in any way, Taylor, Bean & Whitaker may require an additional signature from me to indicate that I am aware of and understand any new policies.
- * I understand that my signature below indicates that I have received the manual and read and understand the above.

Kimberly Kelly
Employee's Printed Name

HR Representative

Kimberly Kelly
Employee's Signature

6-25-07
Date

EXHIBIT 3

Family and Medical Leave (FMLA)

Taylor, Bean & Whitaker complies with the FMLA (Family and Medical Leave Act of 1993). Employees, who have been employed for at least twelve (12) months herein, and for at least 1,250 hours during the preceding 12-month period, may be eligible for family and medical leave. Employees will be returned to the same or equivalent position upon their return from leave, in accordance with applicable law.

Family and medical leave will be unpaid leave. However, employee must use all of his or her accumulated, but unused, sick/personal and vacation leave (if available).

Reasons for Leave

Employees who meet the time-of-service requirements may be granted a total of twelve (12) weeks of unpaid family leave during a 12-month period for the following reasons:

- the birth of the employee's child and in order to care for the child;
- the placement of a child with the employee for adoption or foster care;
- to care for a spouse, child, or parent who has a serious health condition; or,
- a serious health condition that renders the employee incapable of performing the functions of his or her job.

The entitlement to leave for the birth or placement of a child for adoption or foster care will expire twelve (12) months from the date of the birth or placement. Spouses employed by the same employer are permitted to take only a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the birth or placement of a son or daughter or to care for a parent with a serious health condition. For his or her own serious health condition, or to care for his or her spouse or son or daughter, each spouse would be entitled to 12 weeks of leave during any 12-month period.

FMLA—The Twelve-Month Period

Eligible employees may take up to twelve weeks of leave during a twelve-month period as specified herein under FMLA. We use a rolling twelve- (12) month period measured backwards from the date the employee uses FMLA leave when available FMLA is calculated.

Intermittent Leave

An employee may take leave on an intermittent basis when medically necessary to care for a spouse, child or parent, or because of the employee's own serious health condition.

Procedure for Requesting Leave

In all cases, an employee requesting leave must complete a Leave of Absence application and return it to his or her supervisor. The completed application must state the reason for the leave, the duration of the leave, and the starting and ending dates of the leave.

An employee intending to take family or medical leave because of an expected birth or placement, or because of a planned medical treatment, must submit an application of leave at least thirty (30) days before the leave is to begin. If leave is to begin within thirty (30) days, an employee must give notice to his or her supervisor as soon as the necessity for the leave arises.

Medical Certification

An application for leave based on the serious health condition of the employee or the employee's spouse, child or parent must also be accompanied by a "Medical Certification Statement", completed by a health care provider. The certification must state the date on which the health condition commenced, the probable duration of the condition, and the appropriate medical facts regarding the condition. If the employee has a serious health condition, the certification must state that the employee cannot perform the functions of his or her job. Taylor, Bean & Whitaker has the option of requesting a second opinion.

If the employee is needed to care for a spouse, child, or parent, the certification must so state, along with an estimate of the amount of time the employee will be needed.

Subsequent Medical Re-Certification

Taylor, Bean & Whitaker has the option of requesting periodical medical re-certifications.

Fitness for Duty Certificate

Employees who request leave because of a health condition will be required to submit certification from the health care provider that the employee is able to resume work without restriction.

Benefits Coverage During Leave

During a period of family or medical leave, employees who are covered by a health plan may be retained on his or her health plan under the same conditions that applied before leave commenced. To continue health coverage, the employee must continue to make any contributions that he or she made to the plan before taking leave. If the employee chooses not to continue coverage during the leave, he or she may elect to reinstate coverage (without a waiting period) upon return from leave.

Taylor, Bean & Whitaker will continue to pay its share of insurance premiums for employees for a maximum of three (3) months while an employee is on a FMLA leave of absence. However, the employee will still be responsible for his or her portion of the premium. The payment method will be discussed in detail upon commencement of the leave.

Employees continue to accumulate service and vacation (if vacation is offered) while on family or medical leave. However, employees do not continue to accumulate sick days while on family or medical leave. An employee who takes family or medical leave will not lose any employment benefits that accumulated before the date the leave began.

Restoration to Employment Following Leave

An employee eligible for family and medical leave will be restored to his or her former position or to an equivalent position. Taylor, Bean & Whitaker cannot guarantee that an employee will be returned to his or her original job.

All applicable leaves will be applied towards FMLA leave. FMLA does not supersede any state or local law that provides greater family or medical leave rights.

EXHIBIT 4



Taylor, Bean & Whitaker

Job Description Form

Division/Department: Underwriting

Location: Nationwide

Job title: Underwriter

Reports to: Underwriting Manager/Chief Credit Officer

☒ **Full-time**
☐ **Part-time**

☒ **Exempt**
☐ **Nonexempt**

Essential Duties and Responsibilities:

Reviews and makes a collateral decision on all levels of Conventional and/or Government and/or Non-conforming loans. Goal is 5 loans per day for Government only and 7 for combo underwriting of Conventional and Non-conforming.

- Interpret credit policy guidelines and investor guidelines and apply them to specific loan files to perfect for sale on secondary marketplace.
- Effectively and quickly communicate any areas of concern with a loan file to Banks, Brokers, Account Executives and Internal TBW staff.
- Issue approvals and declinations after first searching all avenues via multiple programs to determine the best program fit for the applicant.
- Maintain a goal for underwriting of designated number of loans per day
- Maintain a not more than 48 hour turn time on new loans.
- Maintain a not more than 24 hour turn time on conditions.
- Provide no less than a 95% accuracy and compliance ratio on approved loans.
- Must be able to work under pressure and meet deadlines while maintaining a positive attitude and providing exemplary customer service.
- Respond to e-mails and phone messages within 2 hours of receipt.
- Maintain a knowledge base of credit policy, company programs, regulations and company policies.
- Be available for continuing education as provided by TBW.
- Contact immediate supervisor whether Team Leader or Underwriting Manager with underwriting concerns.
- Perform related duties as assigned by supervisor

Education and/or Work Experience Requirements:

- Minimum 7+ yrs Underwriting exp
- Excellent oral communication skills, including ability to effectively communicate with internal staff and external customers
- Detail oriented
- Ability to work independently and to carry out assignments to completion within parameters of instructions given, prescribed routines, and standard accepted practices
- In depth knowledge of automated underwriting systems.
- Knowledge of basic computer software programs to include Windows, Microsoft Word and Excel, Internet and Microsoft Outlook
- High school diploma or GED

Physical Requirements

- Must be able to sit, stand, stoop or bend for an extended period (8 hours).
- Must be able to lift and carry up to 10 lbs.
- Must be able to listen and speak clearly on telephone.

Approved by:

Title:

Employee signature:

Date:

EXHIBIT 5

05/13/2008 15:54 6028838887

THE UPS STORE #1850

Attn: Rina Rivera

352-732-9413

**Leave of Absence Request Form**

The Family & Medical Leave Act is a federal regulation that allows eligible employees to take job-protected, unpaid leave for up to a total of 12 workweeks in a rolling 12-month period due to an FMLA-qualifying reason. This request must be completed on each occasion that an employee notifies Taylor, Bean & Whitaker of the need for FMLA leave including leave due to a serious health condition¹ covered by worker's compensation. Only one such request is required in cases of intermittent or reduced schedule leaves, unless the circumstances regarding the leave change. In the event of unforeseen leave, this Request will be provided to the employee by mail or otherwise as soon as possible.

Section 1 - To Be Completed By Employee**A. Employee Information**

Employee's Name - Printed Kimberly Kelly Mailing Address 2012 W. Harwell Rd Phoenix AZ 85041 Contact # 602-882-6596
 Employee's Department & Office Location Braintree, MA Immediate Supervisor Name & Extension Patty Hutton 781-952-1706 Supervisor's Signature _____

B. Expected Leave Dates

My leave is expected to begin 5/13/08 and end on 9/1/08 for a total duration of 16² weeks.
 Date - mm/dd/yr Date - mm/dd/yr

Request is for: ☒ Continuous leave ☐ Intermittent leave ☐ Reduced Schedule
 Requested intermittent or reduced work schedule _____

C. Reason for Leave

Leave Requested (Check all that applies):

☒ FMLA ☐ California Family Rights Act ☐ California Pregnancy Disability Leave ☐ Massachusetts Maternity Leave Act
☐ Other _____

Requested leave of absence is due to the following qualifying event:

- ☒ Due to my serious health condition¹ that renders me unable to perform one or more essential functions of my job
☐ Birth of my child
☐ The placement with me of a child for adoption or foster care
☐ To care for my child within the first twelve months following birth or placement
☐ Because I am needed to care for my ☐ spouse (as defined by state law), who has a serious health condition;
☐ parent (excluding in-law), who has a serious health condition; or
☐ child (under age 18, unless he or she is incapable of self-care because of a mental or physical disability), who has a serious health condition.

D. Pay Status During Leave

Per TBWS Leave of Absence policy, you must exhaust all available, unused sick/personal time & unused vacation time concurrent with FMLA leave. If employee has no available time, the leave of absence will be unpaid.

E. Employee Acknowledgement and Consent

I acknowledge that I have received a copy of the FMLA Notice. I acknowledge that it is my responsibility to ensure that my contact information (i.e., address and phone number) is updated and accurate (see your Human Resources Organizational Chart).

I authorize Taylor, Bean & Whitaker's through a Human Resources Representative to contact my or my family member's health care provider for purposes of obtaining clarifying information and authenticity of the FMLA Medical Certification, if needed.

Employee's Signature Kimberly Kelly Application Date 4/24/08

An employee who fraudulently obtains FMLA leave will be subject to disciplinary action, up to and including termination.

¹ For the FMLA definitions Refer to the "serious health condition" included with the Medical Certification.
 Rev. Jan 08

received
 5/13/08

05/13/2008 15:54 6028898887

THE UPS STORE #14850

Form 1000



Certification of Health Care Provider (Family & Medical Leave Act) FMLA Medical Certification for

This form must be completed when requesting Family Medical Leave along with the leave of Absence Request Form. Taylor, Bean & Whitaker reserves the right to request additional information to verify medical certification. This information is to be retained and not be kept in an employee personnel file.

Section I - To Be Completed By Employee

Employee's Name: Kimberly Kelly Contact Number: 602-882-4596

Reason for leave: Medical treatment

By signing below, I authorize the health care provider to release the following medical information for the purpose of determining compliance with the Family and Medical Leave Act.

Employee's Signature: Kimberly Kelly Date: 4/21/08

An employee who fraudulently obtains FMLA leave will be subject to disciplinary action, up to and including termination.

Section II - To Be Completed by Health Care Provider

All questions must be answered and all information completed for FMLA approval to be granted.

1. Does the patient's condition qualify under any of the Family Medical Leave Act categories described on Page 3? If so, please check the applicable category

(1) ☒ Hospital Care (4) ☐ Chronic Conditions (6) ☒ Multiple Treatments (Non-Chronic)

(2) ☐ Absence Plus Treatment: Office Visits Date/s: mm/dd/yy mm/dd/yy mm/dd/yy

(3) ☐ Pregnancy (5) ☐ Permanent/Long-term Conditions ☐ none of the categories listed

As FMLA certification, briefly describe the medical facts and state how the medical facts meet the criteria of an FMLA qualifying serious health condition:

Intraductal Carcinoma Left Breast requiring surgery.
Radiation therapy and chemotherapy to follow

2. Date the serious health condition began or date seen for this condition: 4-22-08
a. If Maternity related, estimated date of delivery: _____

3. Is the employee able to perform work of any kind?
(Please refer to the attached job description and list of restrictions below).

No ☒ If no, the employee will not be permitted to work until a Taylor, Bean & Whitaker's Return to Work Form (Medical release) is provided by the health care provider.

Please indicate the restrictions that makes the employee unable to perform the essential functions of the position. (DOES NOT APPLY FOR MATERNITY)

Cancer surgery and post surgical tx

Yes ☐ If yes, are there any restrictions regarding performance of the essential functions of the position?

Check applicable restriction(s) affecting major life activities and/or performance of the essential functions of the position:

<input type="checkbox"/> caring for self	<input type="checkbox"/> listen/talk	<input type="checkbox"/> sitting	<input type="checkbox"/> work soiled only
<input type="checkbox"/> concentrating	<input type="checkbox"/> no bending	<input type="checkbox"/> reaching	<input type="checkbox"/> standing
<input type="checkbox"/> hearing	<input type="checkbox"/> no driving	<input type="checkbox"/> seeing	<input type="checkbox"/> walking
<input type="checkbox"/> interact with others	<input type="checkbox"/> no twisting/climbing	<input type="checkbox"/> perform manual tasks	<input type="checkbox"/> no squatting, kneeling or crawling

☐ no lifting, carrying, pushing or pulling greater than ____ lbs

☐ other (explain) _____

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THE UPS STORE #4858

PAGE 04/05

Certification of Health Care Provider (Family & Medical Leave Act)
FMLA Medical Certification for Employee
Page 1

Statements given below as "unknown" will be returned for clarification. Please give estimates.

- ④ Determine the type of leave necessary as a result of the employee condition:

☒ Continuous - Unable to work from 4/28/08 through 9/1/2008
MM/DD/YY MM/DD/YY

☐ Intermittent - Probable Duration: _____ (i.e. for 2 weeks, 3 months)
(Attach schedule of treatments/office visits)

How many hour(s) per day? _____ How many day(s) per week(s)? _____

☐ Reduced work schedule - Probable Duration (Date Range) From _____ through _____
MM/DD/YY MM/DD/YY
How many hour(s) per day? _____ How many day(s) per week(s)? _____

For intermittent or reduced work schedule:

(a) provide an estimate of the probable number treatments (i.e. 5 treatments) _____ and

(b) interval between such additional treatments (i.e. every two weeks) _____

5. If the condition is a chronic condition: Is the patient presently incapacitated? ☐ No ☐ Yes

(a) if yes, indicate the likely duration: (i.e. two hours) _____ and

(b) frequency of episodes of incapacity: (i.e. daily, twice a week) _____

- ⑥ If additional treatments will be required for the condition:

(a) provide an estimate of the probable number of treatments. (i.e. 3, 7) 99

If any of these additional treatments will be provided by another provider of health care services (i.e. specialist, physical therapist, center) please state the nature of the treatments: _____

If a regimen of continuing treatment by the patient is required under your supervision, provide a general description of such regimen (e.g., prescription drugs, physical therapy). _____

Richard J. Walker 5/8/08
Signature of Health Care Provider Date
5130 W Base Line St 102 602-737-0039 OB/GYN
Address Telephone Number Type of Practice
LAVEN, AZ 85359

¹ "Incapacity," for purposes of FMLA, is defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore or recovery there from.

EXHIBIT 6

Employer's Response

Section II - To Be Completed by HR RepresentativeEmployee Name: Kimberly KellyA. FMLA Request/Initiation☒ Employee requested leave ☐ Department initiated leave due to employee's absenceLeave will or has commenced on 05/02/2008 and is expected to end on or about 09/01/2008B. Preliminary Leave Designation☒ Employee has been employed by Taylor, Bean & Whitaker for at least 12 months (consecutive or non-consecutive)☒ Employee has worked at least 1250 actual work hours in past 12 months (excluding paid leaves).☒ Rolling year allotment of FMLA (12 workweeks) has not been exhausted.

Note: This does not indicate final approval of leave. Human Resources will make the final determination once all appropriate documentation has been received.

☐ Employee is provisionally eligible for FMLA leave.☒ Employee is eligible for FMLA leave.☐ Employee is not eligible for FMLA leave. Reason:☐ Employee has been employed by Taylor, Bean & Whitaker for less than 12 months (consecutive or non-consecutive)☐ Employee has not worked at least 1250 actual hours in past 12 months (excluding paid leaves)☐ Rolling year allotment of FMLA (12 workweeks) has been exhausted☐ Did not provide employer with at least 30 days notice.C. Available Paid time balances as of 05/14/2008 (date)Sick/Personal time balance: 0 Vacation balance: 24 hrsD. First date without pay (if applicable): 05/21/2008E. Medical Certification required ☒ Yes ☐ NoDate required _____ (date)
(At least 15 days after you are notified of this requirement)F. Insurance☒ During paid leave, insurance premiums will be deducted from employee's paycheck. In the event of unpaid leave, the following payment option will apply:☐ Employee will pay premiums the 1st of every month in which premiums are due in the amount of \$ _____
(You will have a 30-day grace period in which to make a payment. If payment is 30 days late, your coverage may be cancelled)☒ Employee will schedule a re-payment plan upon return to employment☐ Employee currently does not have insurance deductions through Taylor, Bean & Whitaker.G. Return-To-Work StatementEmployee (select one) ☒ will ☐ will not be required to provide a return-to-work statement certifying that he or she is able to return-to-work prior to being restored to employment. (See Section VIII for an explanation).H. Department CertificationI certify that, on 04/21/2008 (date), the FMLA Rights Notice was (select one):☐ hand-delivered ☐ mailed ☐ faxed ☐ inter-officed ☒ e-mailedRina Rivera
HR Representative's Signature352-690-9413
Phone Numberrrivera@taylorbean.com
E-mail Address05/14/2008
Date

Employer's Response

Employee Name: Kimberly Kelly

Section III - To Be Completed by HR Representative

A. Key Employee Designation. Check only if applicable. ☐ Employee is a key employee (as defined by FMLA regulation 1.610) ☐ have ☐ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us as discussed in Section 825.218 of the Family and Medical Leave Act

B. FMLA Request/Notice, ☒ Received 5/13/08

C. Medical Certification, ☒ Received 5/13/08

D. Re-Certification required ☐ Yes ☒ No ☐ every _____ days for continuous leave
☐ every _____ days for intermittent leave

E. Adoption/Foster Care Documentation, ☐ Received _____ ☐ Completed _____

Comments: _____

F. Leave Approval

☒ Your leave of absence is approved and will be counted against your FMLA leave entitlement

☐ Your leave of absence will not be counted against your FMLA leave entitlement.

Reason: ☐ Not a qualifying reason for FMLA. ☐ Medical certification not provided.

☐ Adoption/foster care documentation not provided.

☐ Does not meet the eligibility requirements for FMLA

☐ Other _____

Comments: _____

Rina Rivera

AK

352-690-8413

05/14/2008

Human Resources Signature

Phone Number

Date

Except as explained above, you have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period for the reasons listed above. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work for us. You must be reinstated to the same or an equivalent position with the same pay, benefits, and terms and conditions of employment on your return from leave. If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.



EXHIBIT 7

07-23-08 11:44 FROM-

T 324 PRACTICAL

This Return to Work Form should be submitted at least two (2) days prior to the returning date. For more information, please contact the Department of Health Services, 1115 NE 14th Street, Ocala, FL 34470 or by email: hr@cityofoccala.com, or the Director of Health Services.



TBW

Return to Work Certification Form

EMPLOYEE

Employee Name:

Last

Kelly

First

Kimberly

Department:

602-282-4501

Department Contact:

Telephone:

602-282-4501

602-282-4501

PLEASE COMPLETE THE FOLLOWING AND RETURN DIRECTLY TO THE DEPARTMENT PRIOR TO THE RETURN TO WORK DATE.

Please review the attached job description. Is the employee able to perform all the functions of his or her job?

☒ Yes☐ No☐ Yes, with restrictions or accommodations

Please list any restrictions or describe accommodations which the department should consider:

- (1) At to work no more than 8 hours daily
- (2) Not to lift more than 5 pounds
- (3) Please keep mental stress levels under control.

HEALTH

CARE

PROVIDER

Are there restrictions:

☒ Permanent☐ Temporary, until (date):

Will additional treatments be required? (e.g. doctor appointments, physical therapy)

☒ Yes☐ No

Provide schedule of treatments or visits (e.g. 1x a week for 6 weeks, 2x a month for 6 months):

2 treatment periods still required - 1, 10 day period & 1, 5 day to be completed between 7/25 and 9/1/08

Comments:

Employee is released to return to work effective (date): 7-25-08

Name of Health Care Provider:

Richard J. Waldrop, DO

Address:

5130 W. Broadway, Ste. 102, Ocala, FL 34470

Address of Health Care Provider:

5130 W. Broadway, Ste. 102, Ocala, FL 34470

Signature of Health Care Provider

7/23/08

Date

7/23/08

EXHIBIT 8

09/02/2008 12:06

488--893-0793

FEDEX KINKO'S 2313

PAGE 01

Attn: Kina Kivera

MEDICAL INQUIRY FORM IN RESPONSE TO AN ACCOMMODATION REQUEST

A. Questions to help determine whether an employee has a disability.

A person has a disability under the ADA if the person has an impairment that substantially limits one or more major life activities. The following questions may help determine whether an employee has a disability:

Does the employee have a physical or mental impairment? Yes ☒ No ☐

What is the impairment?

Limitation use of Arm
20 to cancer surgery.

Is the impairment long-term or permanent? Yes ☒ No ☐

If not permanent, how long will the impairment likely last?

Uncertain

Is the employee substantially limited in one or more major life activities? Yes ☒ No ☐

If yes, what major life activity(ies) is/are affected?

<input type="checkbox"/> Caring For Self	<input type="checkbox"/> Walking	<input type="checkbox"/> Hearing	<input checked="" type="checkbox"/> Lifting	<input checked="" type="checkbox"/> Other: (describe)
<input type="checkbox"/> Interacting With Others	<input type="checkbox"/> Standing	<input type="checkbox"/> Seeing	<input checked="" type="checkbox"/> Sleeping	Working greater
<input checked="" type="checkbox"/> Performing Manual Tasks	<input checked="" type="checkbox"/> Reaching	<input type="checkbox"/> Speaking	<input type="checkbox"/> Concentrating	than 8 hours
<input type="checkbox"/> Breathing	<input type="checkbox"/> Thinking	<input type="checkbox"/> Learning	<input type="checkbox"/> Reproduction	daily
<input type="checkbox"/> Working	<input type="checkbox"/> Toileting	<input checked="" type="checkbox"/> Sitting		

Please describe how the limitations affect the major life activity(ies)?

Difficulty in use of Arm in some tasks requiring repetition or strength. Unable to work greater than 8 hrs/day

B. Questions to help determine whether an accommodation is needed.

An employee with a disability is entitled to an accommodation only when the accommodation is needed because of the disability. The following questions may help determine whether the requested accommodation is needed because of the disability:

What limitation(s) is interfering with regular attendance and/or job performance?

None

What job function(s) is the employee having trouble performing because of the limitation(s)?

Working greater than 8 hours daily.

How does the employee's limitation(s) interfere with his/her ability to perform the job function(s)?

Job requires days in excess of 8 hours frequently

09/02/2008 12:06

488--893-0793

FEDEX KINKO'S 2313

PAGE 02

(Page 2 of 2)

MEDICAL INQUIRY FORM IN RESPONSE TO AN ACCOMMODATION REQUEST**C. Questions to help determine effective accommodation options.**

If an employee has a disability and needs an accommodation because of the disability, the employer must provide a reasonable accommodation, unless the accommodation poses an undue hardship. The following questions may help determine effective accommodations:

Do you have any suggestions regarding possible accommodations? If so, what are they?

8 hour work days

How would your suggestions be beneficial to the employee or improve the employee's job performance?

Work in accordance with health issue qualifications and control of stress

D. Comments.

Accommodating this individual's request for an 8 hour workday cannot be as detrimental to a corporation as being diagnosed with a life threatening illness and undergoing surgery and treatment is to the patient!

Richard J. Alden
Medical Professional's Signature

8/29/08
Date

MESSAGE CONFIRMATION

JUL-30-2009 05:20 PM THU

FAX NUMBER :
NAME :

NAME/NUMBER : 16179946024
PAGE : 31
START TIME : JUL-30-2009 04:54PM THU
ELAPSED TIME : 25'44"
MODE : STD ECM
RESULTS : [O.K]

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July 30, 2009

To: Mr. Keith Healey, Admin. Assistant Fax: (817) 994-8024 Phone:
MCAD

Fax #(s) verified before sending (initial):

From: Michael Manke Fax: 617.737.0052 Phone: 617.376.6006

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Littler
Employment & Labor Law Solutions Worldwide
FACSIMILE COVER SHEET

July 30, 2009

To: Mr. Keith Healey, Admin. Assistant Fax: (617) 994-6024 Phone:
MCAD

Fax #(s) verified before sending (initial):

From: Michael Mankes Fax: 617.737.0052 Phone: 617.378.6006

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EXHIBIT D

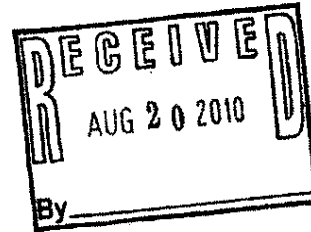
**The Commonwealth of Massachusetts
Commission Against Discrimination
One Ashburton Place, Boston, MA 02108
Phone: (617) 994-6000 Fax: (617) 994-6024**

AUG 19 2010

Kimberly Kelly
1838 E. South Mountain Avenue
Phoenix, AZ 85042

Leslie Lockard Esq.
The Law Office of Leslie Lockard, P.C.
1500 Providence Highway, Suite 33
Norwood, MA 02062

Michael Mankes
Littler Mendelson P.C.
One International Place Suite 2700
Boston, MA 02110



**RE: Kimberly Kelly v. Taylor, Bean & Whitaker Mortgage Corporation
MCAD Docket Number: 09BEM01305
EEOC/HUD Federal Charge Number: 16C-2009-02547**

PROBABLE CAUSE FINDING

Dear Parties/Counsel:

You are hereby notified that I have found probable cause to credit the allegations in the above-referenced complaint. A copy of the disposition is enclosed.

The Commission is charged by statute (G.L.c.151B, § 5) to try to enforce compliance with the Commonwealth's anti-discrimination laws without resort to a public hearing. To this end, parties and counsel are required to attend a conciliation conference at the Commission's office on November 15, 2010 at 1:00 p.m.

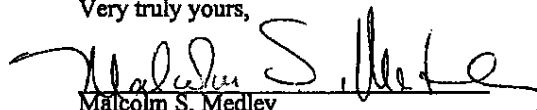
Conciliation is difficult or impossible unless persons with authority to settle the case are present. The officer designated to appear for a business or other entity must be familiar with the case and authorized to offer an appropriate settlement.

Complainant's counsel should send a written proposal of settlement to Respondent's counsel not less than 10 days before the scheduled meeting. We also require that parties hold preliminary settlement discussions at least five days before the conciliation date.

Be prepared to spend one to two hours at the conciliation session. Failure to attend the session may result in immediate certification to public hearing and/or imposition of sanctions for costs incurred by the Commission and the opposing party. Furthermore, Complainant's failure to attend may result in dismissal of the case.

No continuances will be granted except upon written motion to the Conciliation Clerk with notice to the opposing party and upon a showing of good cause. Please direct correspondence to Vanessa Davila via fax at (617) 994-6024.

Very truly yours,


Malcolm S. Medley
Investigating Commissioner

INVESTIGATIVE DISPOSITION

Case Name: Kimberly Kelly v. Taylor, Bean & Whitaker Mortgage Corporation¹
MCAD Docket No.: 09BEM01305
EEOC Docket No.: 16C-2009-02547
No. of Employees: 15+
Investigator: Pamela Myers
Recommendation: Probable Cause

Introduction

On May 20, 2009, Complainant filed the instant complaint alleging that Respondent failed to provide her with a reasonable accommodation for her disability (cancer), terminated her on the basis of her disability and retaliated against her for requesting an accommodation in violation of M.G.L. c. 151B, §§ 4 (4) and (16).

Complainant's Allegations

On July 21, 2003, Respondent hired Complainant as a Senior Loan Underwriter. Complainant alleges that her goal was to underwrite at least seven loans. She alleges that she earned a bonus almost every month for exceeding her quota. If she did not earn a bonus, she alleges it was because her client had less than seven loans available for her.

In April, 2008, Complainant was diagnosed with breast cancer. From May 2, 2008 to July 25, 2008, Complainant took an FMLA leave of absence to undergo surgery and treatment. Complainant alleges that her doctor cleared her to return to work but requested that she minimize stress and work no more than eight hours a day. She alleges that in the past, she had no set hours or specific schedule so she generally worked during regular business hours and then at home on her own schedule.

On July 29, 2008, Complainant alleges that Jennifer Wright, Benefits Administrator notified her that she would not accommodate her request to work eight hours a day. She alleges that Ms. Wright told her that she could take a six month leave of absence but if she needed to work eight hours a day upon her return, she would be terminated. Complainant alleges that she told Ms. Wright she wanted to work but Ms. Wright refused to allow her to work with her accommodation. On August 14, 2008, she alleges that she tried to convince Rina Rivera, Benefits Administrator, to allow her to return to work but to no avail.

On September 16, 2008, Complainant alleges that Ms. Rivera confirmed that she could not work eight hours a day and terminated her. Complainant alleges that she then participated

¹ On August 24, 2009, Respondent filed a Voluntary Petition under Chapter 11 in the United Bankruptcy Court for the Middle District of Florida, Jacksonville Division.

in a conference call with Ms. Rivera, Ms. Wright and Karey Holland, Human Resources Director. She alleges that the Ms. Holland reiterated that she was terminated as of that day and stated that Respondent "wasn't willing to allow her to work eight hours a day because all underwriters have to be treated the same." Complainant alleges that Respondent denied approving a six month leave of absence for her. She alleges that Ms. Holland informed her that she was being terminated because she had exhausted her FMLA leave.

Respondent's Position

Respondent denies failing to provide Complainant with a reasonable accommodation, retaliating against her and terminating her because of her disability. Respondent hired Complainant as a Senior Underwriter in its Braintree office. Her direct supervisor was Patricia Hatton, Underwriting Manager. Prior to her leave, Ms. Hatton permitted Complainant to work remotely from her home in Arizona. As an underwriter, Complainant's duties included interpreting and applying credit policy guidelines and investor guidelines to specific loan files, issuing approvals and declinations after determining the best program fit for mortgage applicants, providing no less than 95% accuracy and compliance ratio on approved loans and underwriting a quota of loans a day.

On April 21, 2008, after being diagnosed with breast cancer and upon her request, Ms. Rivera provided Complainant with copies of Respondent's FMLA Policy, Leave of Absence Request and Medical Certification forms and a Short Term Disability packet. Ms. Rivera also instructed Complainant to complete the Leave of Absence Form as soon as possible and have her doctor complete the Medical Certification by May 5, 2008.

On May 7, 2008, Heidy Gonzalez followed up with Complainant about the paperwork. Ms. Gonzalez extended the Medical Certification deadline to May 12, 2008. On May 12, 2008, Complainant told Ms. Rivera that she would fax the forms and that she was on vacation, intending to use her vacation days while taking time off for medical reasons. Ms. Rivera explained that pursuant to Respondent's FMLA Policy, Complainant would be required to use her accumulated, unused vacation time concurrent with her unpaid medical leave. On May 13, 2008, Complainant submitted her Medical Certification and Request for Leave forms to Respondent and her request for leave was approved. Because Complainant's doctor indicated that her leave commenced on May 2, 2008, Respondent notified her that her twelve week leave entitlement would expire on July 24, 2008, despite her expected return date of September 2, 2008.

Complainant submitted a completed Return to Work Certification Form on July 23, 2008 in which her doctor noted that she was able to perform all the functions of her job and released her to return to work on July 25, 2008. Complainant's doctor also included "permanent" restrictions, specifically that she could not work more than eight hours a day, not to lift more than five pounds and to keep mental stress levels under control. Since she had exhausted her FMLA by this time, Respondent allowed her to remain on an excused absence while considering her doctor's restrictions.

Respondent alleges that her job did not require the lifting of more than five pounds and she already determined her own work hours so as long as she achieved the loan quota, Respondent had no issue with her accommodations. Respondent alleges that Complainant maintained that she could not meet her quota in eight hours a day (contending that it took her fifteen hours a day to satisfy her production targets) so she could not return to work.

Respondent suggested the possibility of extending her leave. To determine whether to grant an extended leave of absence, Respondent needed information from her doctor about her restrictions. On July 29, 2008, Ms. Rivera sent the Medical Inquiry forms to Complainant, instructing her to return them by August 12, 2008. Complainant failed to do so. On August 14, 2008, Ms. Rivera reminded her about submitting the forms and extended the deadline to August 19, 2008. Respondent alleges that Complainant missed this deadline. On August 27, 2008, Complainant asked to submit the forms on August 29, 2008 to which Respondent agreed and also explained to her that if she failed to provide the documentation then Respondent would treat her as having resigned.

On September 2, 2008, Complainant faxed her completed Medical Inquiry form to Respondent but it did not list any additional information about her restrictions. Instead, the Form acknowledged that her "job requires days in excess of 8 hours frequently" and she was permanently restricted from meeting this requirement. Respondent alleges that Complainant agreed that she could not meet her production goals and her restrictions were permanent in nature. Therefore, Respondent terminated her effective September 16, 2008.

Summary of Investigation and Analysis

Failure to provide a reasonable accommodation

For Complainant to establish a prima facie case that her employer failed to reasonably accommodate her handicap, she must prove that she was a qualified handicapped individual; she needed a reasonable accommodation due to her handicap to perform her job; the employer was aware of the handicap, and was aware that Complainant needed reasonable accommodation to perform her job; the employer was aware of a means to reasonably accommodate the handicap, or the employer breached a duty, if any, to undertake reasonable investigation of a means to reasonably accommodate the handicap; and the employer failed to provide the employee the reasonable accommodation.

A handicapped individual under MGL 151B has a physical or mental impairment, has record of such impairment or is regarded as having an impairment that substantially limits one or more of the individual's major life activities and/or functions. Investigation reveals that Complainant suffered from breast cancer that substantially limited her ability to lift, sit and sleep.

While Complainant submits sufficient evidence at this stage to show that she may have suffered from a disability, a genuine issue of material fact exists as to whether Complainant was a "qualified handicapped" individual who was or would have been capable of performing the essential functions of her job with or without reasonable accommodations. Investigation reveals that one of Complainant's essential functions of her job was to underwriting a quota of loans a day or specifically, seven loans a day. Investigation reveals that Complainant set her own work hours and worked from her home in Arizona. Therefore, whether Complainant would have been capable of performing the essential functions of her job as an underwriter with the accommodation of working eight hours daily is a material issue in dispute.

Investigation reveals that Complainant needed reasonable accommodations, whether they involve a leave of absence or working eight hours days, due to her handicap to perform her job. Investigation reveals that Respondent was aware of Complainant's cancer and was aware that Complainant needed some reasonable accommodation to perform her job.

A genuine issue in dispute exists as to whether Respondent failed to provide Complainant with a reasonable accommodation. Investigation reveals that Respondent and Complainant both make distinct and contrary allegations concerning Complainant's request for a particular accommodation, an eight hour work day. Complainant alleges that she could not work more than eight hours a day whereas Respondent alleges that Complainant complained that she could not reach her quota within an eight hour work day so she could not return to work on July 25, 2008. Complainant alleges that due to her request for an eight hour work day, Respondent refused to allow her to return to work. Respondent alleges the direct opposite and alleges that it wanted her to return and offered her the possibility of extending her leave of absence.

Investigation reveals that Complainant submitted the necessary documents to Respondent with the expectation that she would return to work on July 25, 2008, so long as Respondent granted her the workplace restrictions requested by her doctor. Investigation reveals a lack of direct, credible evidence that it was Complainant who requested an extension of her leave of absence beyond July 25, 2008. Investigation reveals that the Respondent expressed concern over Complainant's ability to work no more than eight hours a day and impliedly reach her daily quota. Respondent asserts that it had no problem with Complainant working an eight hour work day so long as she fulfilled her quota.

Investigation reveals that on May 29, 2008, Ms. Rivera sent a letter to Complainant stating, "In reference to your question regarding the possibility of working a reduced schedule of 8 hours; due to the nature of your job position you schedule your own working hours. If the doctor orders you to return...on a reduced working schedule, once we revised the indications of the doctors we will instruct you on how to proceed with the hours work." Investigation reveals that on July 23, 2008, Respondent received from Complainant a Return to Work Certification Form. On this form, Complainant's doctor released her to return to work on July 25, 2008 with restrictions. Investigation reveals that the restrictions

were Complainant was not to work more than eight hours daily, refrain from lifting more than five pounds and "keep mental stress levels under control." Complainant alleges that since Respondent refused to allow her to return, she was forced to submit a request to extend her leave of absence and evade termination. Investigation reveals that on August 29, 2008, Respondent received from Complainant a Medical Inquiry Form in Response to an Accommodation Request. On this form, Complainant's doctor again repeated her need for an eight hour work day. The parties dispute the reason(s) Complainant did not return to work following the submission of the medical inquiry form.

Therefore, whether Respondent failed to provide Complainant with a reasonable accommodation of an eight hour work day is a genuine issue of material fact in dispute suitable for a fact finder to determine at public hearing.

Termination

For Complainant to establish a prima facie case of discrimination based on her disability, she must first establish that she is a "qualified handicap" individual by showing that she is "handicap" (substantial impairment of a major life activity) or has a record of a handicap and is capable of performing the essential functions of the job or would be capable of performing the essential functions of the job with or without a reasonable accommodation and terminated under the circumstances that gives rise to an inference of discrimination.

As stated above, a genuine issue of material fact exists as to whether Complainant is a "qualified" handicapped individual under M.G.L. c. 151B and would have been capable of performing the essential functions of her job with or without a reasonable accommodation. Investigation further reveals that a genuine issue of material fact exists as to whether Complainant was terminated under circumstances that gives rise to an inference of discrimination. Complainant alleges that Respondent terminated her "based on stereotyped assumptions about what she would or would not be able to do" and Respondent "regarded her as disabled, and feared that she would need more time off for cancer treatment and/or for possible cancer recurrences." Respondent asserts that Complainant refused to return to work after she exhausted her approved medical leave of absence; and therefore, it considered her to have resigned her position effective September 16, 2008.

Retaliation

In order for a Complainant to make a prima facie case of retaliation, she must show that she engaged in conduct protected under M.G.L. c. 151B, her employer was aware of her protected activity, she suffered an adverse employment action; and, a causal connection existed between the protected conduct and adverse employment action.


Investigation reveals that Complainant engaged in conduct protected when she requested a leave of absence and accommodations for her disability. Investigation reveals that Respondent was aware of her protected activity as evidenced by the correspondence

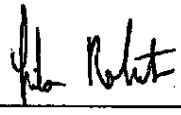
exchanged between Respondent's agents, servants and employees and Complainant. Investigation reveals that Complainant suffered an adverse employment action when Respondent terminated her effective September 16, 2008.

Whether a causal connection exists between the protected conduct and adverse employment action exists or whether Respondent terminated Complainant because of her disability and alleged "stereotyped assumptions" or because she requested reasonable accommodations is genuine issue of material fact in dispute

Conclusion

A finding of Probable Cause is recommended against Respondent for discrimination based on Complainant's disability and retaliation.


Pamela Myers
Investigator


Lila Roberts
Enforcement Advisor

Disposition

Pursuant to section 5 of M.G.L. c. 151B of the Massachusetts General Laws, and in conformity with the foregoing findings, I have this day determined that **Probable Cause** exists for crediting the allegations of the complaint against Respondent. Pursuant to Section 5 of M.G.L. c. 151B, the parties will be afforded an opportunity to participate in a conciliation conference at the Commission.


Malcolm S. Medley
Investigating Commissioner

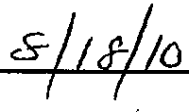

Date

EXHIBIT E

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release ("Agreement") is hereby entered into by and between Taylor, Bean & Whitaker Mortgage Company ("TB&W") and Kimberly Kelly ("Kelly"), for good and valuable consideration. (TB&W and Kelly are herein collectively referred to as the "Parties.")

WHEREAS, Kelly filed a Charge against TB&W with the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission, *Kimberly Kelly v. Taylor, Bean & Whitaker Mortgage Company*, MCAD Docket No. 09BEM1305; EEOC No. 16C-2009-02547, alleging disability discrimination and retaliation (the "Charge");

WHEREAS, TB&W ceased a majority of its business operations on or about August 5, 2009, and has declared and filed for bankruptcy in the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division, Case No. 3:09-bk-07047-JAF ("Bankruptcy Court"), and Kelly has filed a claim with the Bankruptcy Court.

WHEREAS, TB&W has denied and continues to deny that it or its employees engaged in any form of unlawful employment discrimination or retaliation, or engaged in any form of wrongdoing against Kelly;

WHEREAS, the Parties have agreed that it is in their mutual interest, in order to avoid the costs of litigation, to resolve fully and finally all of their disputes, including the claims and charges concerning, relating to, or arising out of Kelly's employment with TB&W, upon the terms and conditions more fully set forth hereinafter;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Non-Admission of Liability.** The Parties agree that TB&W enters into this Agreement solely for the purpose of avoiding the burdens and expenses of litigation. This Agreement shall not in any way be construed as an admission by TB&W of any liability or any act of wrongdoing whatsoever against Kelly. TB&W specifically disclaims any liability or wrongdoing whatsoever against Kelly.

2. **Settlement Benefits.** Counsel for Kelly shall provide a fully executed form of this Agreement to counsel for TB&W. Upon receipt of the Agreement by counsel for TB&W, and within twenty-one (21) days of the Bankruptcy Court approving this Settlement (as referenced in Section 6 below), TB&W, or the insurer acting on its behalf, shall deliver to Leslie Lockard, counsel for Kelly, the following payments totaling FORTY THOUSAND DOLLARS (\$40,000.00) (hereinafter "Settlement Benefits"):

(a) One check in the total amount of TWENTY-SIX THOUSAND SIX HUNDRED SIXTY-SIX DOLLARS AND SIXTY-SEVEN CENTS (\$26,666.67) made payable to "Kimberly Kelly" [less all deductions and withholdings that are determined to be required for tax purposes].

(b) One check in the total amount of THIRTEEN THOUSAND THREE HUNDRED THIRTY-THREE DOLLARS AND THIRTY-THREE CENTS (\$13,333.33) made payable to "Leslie Lockard," counsel for Kelly. This check represents Kelly's attorneys fees and costs. Attorney Lockard will provide counsel for TB&W with her Tax ID number.

3. **Tax Treatment.** The entire value of the payments set forth in Sections 2(a) and 2(b) shall be reported to federal and state taxing authorities on Form 1099. Kelly and TB&W agree that this allocation shall not affect the scope of the general release of claims by Kelly in Section 4. Nothing in this Agreement shall be construed to require TB&W to make any payments to compensate Kelly for any adverse tax effect associated with any payments or benefits or for any deduction or withholding from any payment or benefit. The allocation and characterization of the payments and benefits to Kelly set forth in Section 2 do not in any way affect Kelly's independent obligation and primary responsibility to determine and make proper judgments regarding the payment of taxes under applicable law.

4. **General Release of Claims.**

(a) In exchange for the benefits set forth in Section 2, Kelly, for herself, her representatives, heirs, assigns, and/or any other person or entity claiming by, through or under her, agrees to release, waive, acquit and forever discharge TB&W, its divisions, subsidiaries, affiliates, parents, predecessors and successors, and their respective shareholders, owners, directors, officers, agents, representatives, servants, managers, employees, trustees, insurers and attorneys, past or present (collectively, the "Releasees") from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, Charges, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred), of any nature whatsoever, known or unknown ("Claim" or "Claims"), that Kelly now has, owns, or holds, or claims to have, own, or hold, or that Kelly at any time had, owned, or held, or claimed to have had, owned, or held against each or any of the Releasees. This release shall include, without implication of limitation, express or implied, all Claims made or that could or should have been made in connection with the Charge; all Claims made with the Bankruptcy Court; all Claims of defamation or damage to reputation; all Claims of breach of express or implied contract; all Claims for restitution; all Claims of wrongful termination of employment whether in contract or tort; all Claims of constructive discharge; all Claims of intentional, reckless, or negligent infliction of emotional distress; all Claims of discrimination, harassment or retaliation under any federal, state or local statute or ordinance, including without limitation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., the Equal Pay Act, 29 U.S.C. § 206, the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B, §1 et seq., as amended, the Massachusetts Civil Rights Act, M.G.L. c. 12, §§11H and 11I, the Massachusetts Equal Rights Act, M.G.L. c. 93, §102 and M.G.L. c. 214, §1C, the Massachusetts Equal Pay Act, M.G.L. c. 149 § 105A, the Massachusetts Labor and Industries Act, M.G.L. c. 149, § 1 et seq., the Massachusetts Privacy Act, M.G.L. c. 214, §1B, all as amended; all Claims for reinstatement; all Claims for punitive damages; and all Claims for attorneys' fees and costs. This shall be a full and final release of all claims known or unknown, foreseen and unforeseen, which have accrued to Kelly against Releasees up to and including the date of this Agreement, regardless of the adequacy of the compensation or the extent or character of her injuries and/or damages, known or unknown. Kelly expressly acknowledges and assumes all risk, chance, or hazard that any

injuries and/or damages resulting from her employment or assignment with TB&W may become permanent, progressing, greater, or more extensive than is known, anticipated or expected. Kelly understands and agrees that the claims released in this Section include not only claims presently known to her, but also include all unknown or unanticipated claims, rights, Charges, actions, obligations, liabilities, and causes of action, of every kind and character that would otherwise come within the scope of the released claims as described in this Section. Kelly understands that she may hereafter discover facts different from what she now believes to be true, which if known, could have materially affected this Agreement, but she nevertheless waives any claims or rights based on different, unknown or additional facts. This release does not include any claim which, as a matter of law, cannot be released by private agreement.

(b) Notwithstanding the generality of the foregoing, nothing herein is intended to or shall preclude Kelly from cooperating with any appropriate federal, state or local agency in the performance of its duties. Nonetheless, Kelly acknowledges that she shall not be entitled to receive any relief, recovery, or monies in connection with any complaint or charge brought against TB&W, without regard as to who brought said complaint or charge.

5. **Affirmations.** Kelly further affirms that she has been paid and/or has received all compensation, wages, bonuses, commissions and/or expense reimbursements to which she may be entitled and that no compensation, wages, bonuses, commissions and/or expense reimbursements are due to her, beyond those provided in this Agreement.

6. **Approval of Bankruptcy Court.** TB&W, or the insurer acting on its behalf, agrees to seek permission from the Bankruptcy Court to pay the Settlement Benefits referenced in Section 2 above. All terms of this Agreement, including but not limited to payment of the Settlement Benefits, dismissal of the Charge, and the general release of claims, are conditioned upon the Bankruptcy Court's approval of payment of the Settlement Benefits to Kelly.

7. **Dismissal of Charge and All Claims.** Kelly agrees to dismiss with prejudice all claims and complaints against TB&W and or the Releasees, including but not limited to the Charge and any claim or complaint filed with the Bankruptcy Court. Kelly further represents and warrants that neither she nor her representative(s) shall cause or authorize suit against the Releasees for any matter that was, or might have been, included in any of the Claims referenced in Section 4 above.

8. **Confidentiality.** Except as set forth in Section 4(b) above, Kelly acknowledges that this Agreement, and its terms, and all documents generated in connection with the Charge, and their terms, and all matters described in conjunction with the Charge, are strictly confidential, and that such confidentiality was a critical consideration for TB&W in entering into this Agreement. Kelly, whether directly or indirectly, whether personally or through other persons or entities, will not disclose to any third party (1) the documents or information generated or discussed in conjunction with the subject matter of this Agreement or (2) this Agreement, or its terms, or the fact that a large or small monetary amount, or any monetary amount at all, is included in the settlement, except that Kelly may disclose such information to her spouse, accountant, professional tax advisor or attorney, or as required by law or legal process. Except for the above-listed individuals, in response to any inquiries, Kelly will state that "the matter has been resolved" only, and nothing more.

9. **No Assignment of Claims to Third-Parties.** Kelly represents that she has not heretofore assigned, subrogated or transferred, or purported to assign, subrogate or transfer to any person or organization, any Claim released herein, or any part or portion thereof, and she agrees to indemnify and hold harmless TB&W and all other Releasees from and against any claim, Charge, damage, debt, liability, account, reckoning, obligation, cost, expense (including payment of attorneys' fees and costs actually incurred, whether or not litigation is commenced), lien, action, and cause of action, based on, in connection with, or arising out of any such assignment, subrogation or transfer, or purported assignment, subrogation or transfer.

10. **No Reliance.** Kelly represents and acknowledges that in executing this Agreement she does not rely and has not relied upon any representation or statement made by any of the Releasees or by any of the Releasees' agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement, other than the promises and representations made in this Agreement.

11. **Governing Law, Jurisdiction and Venue.** This Agreement shall be deemed to be made and entered into in the Commonwealth of Massachusetts, and shall in all respects be interpreted, enforced and governed under the laws of said Commonwealth, without giving effect to the conflict of laws principles of said Commonwealth. Each of the undersigned hereby consents to the personal jurisdiction of the state and federal courts in the Commonwealth of Massachusetts, for purposes of any action to enforce, or for a breach of, this Agreement. The parties also agree that venue shall be proper only in the Commonwealth of Massachusetts.

12. **Binding Nature of Agreement.** This Agreement shall be binding upon each of the Parties and upon the heirs, administrators, representatives, executors, successors and assigns of each of them, and shall inure to the benefit of each party and to the heirs, administrators, representatives, executors, successors, and assigns of each of them.

13. **Entire Agreement.** This Agreement is intended by the Parties as a final expression of their agreement and as a complete and exclusive expression of its terms. This Agreement, which shall be deemed to be a contract under seal, shall supersede all prior discussions, promises, representations or understandings, oral and written, among the parties in connection with the subject matter hereof; provided, that nothing in this Agreement shall modify, alter, cancel or supersede any and all confidentiality obligations owed by Kelly to TB&W.

14. **Cooperative Drafting and Construction.** The language of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties, it being agreed that all Parties (including by and through their respective attorneys) have participated in the preparation of all provisions of this Agreement. Thus, this Agreement shall not be construed against any Party on the basis that such Party was the drafter.

15. **Severability.** In the event that any one or more of the provisions of this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not be affected or impaired thereby. This Agreement shall survive the performance of the specific arrangements contained herein.

16. **Modification.** This Agreement may be amended, revoked, changed, or modified only upon a written agreement executed by all Parties. No waiver of any provision of this Agreement will be valid unless it is in writing and signed by the Party against whom such waiver is charged.

17. **Costs.** Except as set forth in Section 2(b), each party hereto will bear her or its own costs, expenses and attorneys' fees, whether taxable or otherwise, incurred or arising out of or in any way related to the Charge, this Agreement or the circumstances underlying them

18. **Counterparts.** This Agreement may be executed and delivered (a) in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument, and/or (b) by facsimile and/or electronically, in which case (i) the instrument so executed and delivered shall be binding and effective for all purposes, and (ii) the Parties shall nevertheless exchange substitute hard copies of such facsimile and/or electronic instruments as soon thereafter as practicable (but the failure to do so shall not affect the validity of the instruments executed and delivered by facsimile or electronically).

19. **Advice of Counsel; Time to Consider.** Kelly represents and agrees that TB&W has encouraged her to carefully read and fully understand all of the provisions of this Agreement, that she has had an adequate opportunity to carefully consider the terms of this Agreement, and that she has executed this Agreement knowingly, voluntarily, and without undue influence or duress. Kelly understands and acknowledges that she has been advised to consult with an attorney prior to signing this Agreement, and it is TB&W's understanding that she has done so. Kelly's decision whether to sign is her own voluntary decision, made with full knowledge that she has been advised to consult with an attorney.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND RELEASE HAVE IMPORTANT LEGAL CONSEQUENCES.

IN WITNESS WHEREOF, the Parties have each executed this Agreement, signed as a sealed instrument, as of the last date written below.

TAYLOR, BEAN & WHITAKER
MORTGAGE COMPANY

By: _____

Title: _____

Date: _____

KIMBERLY KELLY

Date: _____

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EXHIBIT "E"

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release ("Agreement") is hereby entered into by and between Taylor, Bean & Whitaker Mortgage Company ("TB&W") and Kimberly Kelly ("Kelly"), for good and valuable consideration. (TB&W and Kelly are herein collectively referred to as the "Parties.")

WHEREAS, Kelly filed a Charge against TB&W with the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission, *Kimberly Kelly v. Taylor, Bean & Whitaker Mortgage Company*, MCAD Docket No. 09BEM1305; EEOC No. 16C-2009-02547, alleging disability discrimination and retaliation (the "Charge");

WHEREAS, TB&W ceased a majority of its business operations on or about August 5, 2009, and has declared and filed for bankruptcy in the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division, Case No. 3:09-bk-07047-JAF ("Bankruptcy Court"), and Kelly has filed a claim with the Bankruptcy Court.

WHEREAS, TB&W has denied and continues to deny that it or its employees engaged in any form of unlawful employment discrimination or retaliation, or engaged in any form of wrongdoing against Kelly;

WHEREAS, the Parties have agreed that it is in their mutual interest, in order to avoid the costs of litigation, to resolve fully and finally all of their disputes, including the claims and charges concerning, relating to, or arising out of Kelly's employment with TB&W, upon the terms and conditions more fully set forth hereinafter;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Non-Admission of Liability.** The Parties agree that TB&W enters into this Agreement solely for the purpose of avoiding the burdens and expenses of litigation. This Agreement shall not in any way be construed as an admission by TB&W of any liability or any act of wrongdoing whatsoever against Kelly. TB&W specifically disclaims any liability or wrongdoing whatsoever against Kelly.

2. **Settlement Benefits.** Counsel for Kelly shall provide a fully executed form of this Agreement to counsel for TB&W. Upon receipt of the Agreement by counsel for TB&W, and within twenty-one (21) days of the Bankruptcy Court approving this Settlement (as referenced in Section 6 below), TB&W, or the insurer acting on its behalf, shall deliver to Leslie Lockard, counsel for Kelly, the following payments totaling FORTY THOUSAND DOLLARS (\$40,000.00) (hereinafter "Settlement Benefits"):

(a) One check in the total amount of TWENTY-SIX THOUSAND SIX HUNDRED SIXTY-SIX DOLLARS AND SIXTY-SEVEN CENTS (\$26,666.67) made payable to "Kimberly Kelly" [less all deductions and withholdings that are determined to be required for tax purposes].

(b) One check in the total amount of THIRTEEN THOUSAND THREE HUNDRED THIRTY-THREE DOLLARS AND THIRTY-THREE CENTS (\$13,333.33) made payable to "Leslie Lockard," counsel for Kelly. This check represents Kelly's attorneys fees and costs. Attorney Lockard will provide counsel for TB&W with her Tax ID number.

3. **Tax Treatment.** The entire value of the payments set forth in Sections 2(a) and 2(b) shall be reported to federal and state taxing authorities on Form 1099. Kelly and TB&W agree that this allocation shall not affect the scope of the general release of claims by Kelly in Section 4. Nothing in this Agreement shall be construed to require TB&W to make any payments to compensate Kelly for any adverse tax effect associated with any payments or benefits or for any deduction or withholding from any payment or benefit. The allocation and characterization of the payments and benefits to Kelly set forth in Section 2 do not in any way affect Kelly's independent obligation and primary responsibility to determine and make proper judgments regarding the payment of taxes under applicable law.

4. **General Release of Claims.**

(a) In exchange for the benefits set forth in Section 2, Kelly, for herself, her representatives, heirs, assigns, and/or any other person or entity claiming by, through or under her, agrees to release, waive, acquit and forever discharge TB&W, its divisions, subsidiaries, affiliates, parents, predecessors and successors, and their respective shareholders, owners, directors, officers, agents, representatives, servants, managers, employees, trustees, insurers and attorneys, past or present (collectively, the "Releasees") from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, Charges, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred), of any nature whatsoever, known or unknown ("Claim" or "Claims"), that Kelly now has, owns, or holds, or claims to have, own, or hold, or that Kelly at any time had, owned, or held, or claimed to have had, owned, or held against each or any of the Releasees. This release shall include, without implication of limitation, express or implied, all Claims made or that could or should have been made in connection with the Charge; all Claims made with the Bankruptcy Court; all Claims of defamation or damage to reputation; all Claims of breach of express or implied contract; all Claims for restitution; all Claims of wrongful termination of employment whether in contract or tort; all Claims of constructive discharge; all Claims of intentional, reckless, or negligent infliction of emotional distress; all Claims of discrimination, harassment or retaliation under any federal, state or local statute or ordinance, including without limitation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., the Equal Pay Act, 29 U.S.C. § 206, the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B, §1 et seq., as amended, the Massachusetts Civil Rights Act, M.G.L. c. 12, §§11H and 11I, the Massachusetts Equal Rights Act, M.G.L. c. 93, §102 and M.G.L. c. 214, §1C, the Massachusetts Equal Pay Act, M.G.L. c. 149 § 105A, the Massachusetts Labor and Industries Act, M.G.L. c. 149, § 1 et seq., the Massachusetts Privacy Act, M.G.L. c. 214, §1B, all as amended; all Claims for reinstatement; all Claims for punitive damages; and all Claims for attorneys' fees and costs. This shall be a full and final release of all claims known or unknown, foreseen and unforeseen, which have accrued to Kelly against Releasees up to and including the date of this Agreement, regardless of the adequacy of the compensation or the extent or character of her injuries and/or damages, known or unknown. Kelly expressly acknowledges and assumes all risk, chance, or hazard that any

injuries and/or damages resulting from her employment or assignment with TB&W may become permanent, progressing, greater, or more extensive than is known, anticipated or expected. Kelly understands and agrees that the claims released in this Section include not only claims presently known to her, but also include all unknown or unanticipated claims, rights, Charges, actions, obligations, liabilities, and causes of action, of every kind and character that would otherwise come within the scope of the released claims as described in this Section. Kelly understands that she may hereafter discover facts different from what she now believes to be true, which if known, could have materially affected this Agreement, but she nevertheless waives any claims or rights based on different, unknown or additional facts. This release does not include any claim which, as a matter of law, cannot be released by private agreement.

(b) Notwithstanding the generality of the foregoing, nothing herein is intended to or shall preclude Kelly from cooperating with any appropriate federal, state or local agency in the performance of its duties. Nonetheless, Kelly acknowledges that she shall not be entitled to receive any relief, recovery, or monies in connection with any complaint or charge brought against TB&W, without regard as to who brought said complaint or charge.

5. **Affirmations.** Kelly further affirms that she has been paid and/or has received all compensation, wages, bonuses, commissions and/or expense reimbursements to which she may be entitled and that no compensation, wages, bonuses, commissions and/or expense reimbursements are due to her, beyond those provided in this Agreement.

6. **Approval of Bankruptcy Court.** TB&W, or the insurer acting on its behalf, agrees to seek permission from the Bankruptcy Court to pay the Settlement Benefits referenced in Section 2 above. All terms of this Agreement, including but not limited to payment of the Settlement Benefits, dismissal of the Charge, and the general release of claims, are conditioned upon the Bankruptcy Court's approval of payment of the Settlement Benefits to Kelly.

7. **Dismissal of Charge and All Claims.** Kelly agrees to dismiss with prejudice all claims and complaints against TB&W and or the Releasees, including but not limited to the Charge and any claim or complaint filed with the Bankruptcy Court. Kelly further represents and warrants that neither she nor her representative(s) shall cause or authorize suit against the Releasees for any matter that was, or might have been, included in any of the Claims referenced in Section 4 above.

8. **Confidentiality.** Except as set forth in Section 4(b) above, Kelly acknowledges that this Agreement, and its terms, and all documents generated in connection with the Charge, and their terms, and all matters described in conjunction with the Charge, are strictly confidential, and that such confidentiality was a critical consideration for TB&W in entering into this Agreement. Kelly, whether directly or indirectly, whether personally or through other persons or entities, will not disclose to any third party (1) the documents or information generated or discussed in conjunction with the subject matter of this Agreement or (2) this Agreement, or its terms, or the fact that a large or small monetary amount, or any monetary amount at all, is included in the settlement, except that Kelly may disclose such information to her spouse, accountant, professional tax advisor or attorney, or as required by law or legal process. Except for the above-listed individuals, in response to any inquiries, Kelly will state that "the matter has been resolved" only, and nothing more.

9. **No Assignment of Claims to Third-Parties.** Kelly represents that she has not heretofore assigned, subrogated or transferred, or purported to assign, subrogate or transfer to any person or organization, any Claim released herein, or any part or portion thereof, and she agrees to indemnify and hold harmless TB&W and all other Releasees from and against any claim, Charge, damage, debt, liability, account, reckoning, obligation, cost, expense (including payment of attorneys' fees and costs actually incurred, whether or not litigation is commenced), lien, action, and cause of action, based on, in connection with, or arising out of any such assignment, subrogation or transfer, or purported assignment, subrogation or transfer.

10. **No Reliance.** Kelly represents and acknowledges that in executing this Agreement she does not rely and has not relied upon any representation or statement made by any of the Releasees or by any of the Releasees' agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement, other than the promises and representations made in this Agreement.

11. **Governing Law, Jurisdiction and Venue.** This Agreement shall be deemed to be made and entered into in the Commonwealth of Massachusetts, and shall in all respects be interpreted, enforced and governed under the laws of said Commonwealth, without giving effect to the conflict of laws principles of said Commonwealth. Each of the undersigned hereby consents to the personal jurisdiction of the state and federal courts in the Commonwealth of Massachusetts, for purposes of any action to enforce, or for a breach of, this Agreement. The parties also agree that venue shall be proper only in the Commonwealth of Massachusetts.

12. **Binding Nature of Agreement.** This Agreement shall be binding upon each of the Parties and upon the heirs, administrators, representatives, executors, successors and assigns of each of them, and shall inure to the benefit of each party and to the heirs, administrators, representatives, executors, successors, and assigns of each of them.

13. **Entire Agreement.** This Agreement is intended by the Parties as a final expression of their agreement and as a complete and exclusive expression of its terms. This Agreement, which shall be deemed to be a contract under seal, shall supersede all prior discussions, promises, representations or understandings, oral and written, among the parties in connection with the subject matter hereof; provided, that nothing in this Agreement shall modify, alter, cancel or supersede any and all confidentiality obligations owed by Kelly to TB&W.

14. **Cooperative Drafting and Construction.** The language of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties, it being agreed that all Parties (including by and through their respective attorneys) have participated in the preparation of all provisions of this Agreement. Thus, this Agreement shall not be construed against any Party on the basis that such Party was the drafter.

15. **Severability.** In the event that any one or more of the provisions of this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not be affected or impaired thereby. This Agreement shall survive the performance of the specific arrangements contained herein.

16. **Modification.** This Agreement may be amended, revoked, changed, or modified only upon a written agreement executed by all Parties. No waiver of any provision of this Agreement will be valid unless it is in writing and signed by the Party against whom such waiver is charged.

17. **Costs.** Except as set forth in Section 2(b), each party hereto will bear her or its own costs, expenses and attorneys' fees, whether taxable or otherwise, incurred or arising out of or in any way related to the Charge, this Agreement or the circumstances underlying them

18. **Counterparts.** This Agreement may be executed and delivered (a) in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument, and/or (b) by facsimile and/or electronically, in which case (i) the instrument so executed and delivered shall be binding and effective for all purposes, and (ii) the Parties shall nevertheless exchange substitute hard copies of such facsimile and/or electronic instruments as soon thereafter as practicable (but the failure to do so shall not affect the validity of the instruments executed and delivered by facsimile or electronically).

19. **Advice of Counsel; Time to Consider.** Kelly represents and agrees that TB&W has encouraged her to carefully read and fully understand all of the provisions of this Agreement, that she has had an adequate opportunity to carefully consider the terms of this Agreement, and that she has executed this Agreement knowingly, voluntarily, and without undue influence or duress. Kelly understands and acknowledges that she has been advised to consult with an attorney prior to signing this Agreement, and it is TB&W's understanding that she has done so. Kelly's decision whether to sign is her own voluntary decision, made with full knowledge that she has been advised to consult with an attorney.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND RELEASE HAVE IMPORTANT LEGAL CONSEQUENCES.

IN WITNESS WHEREOF, the Parties have each executed this Agreement, signed as a sealed instrument, as of the last date written below.

TAYLOR, BEAN & WHITAKER
MORTGAGE COMPANY

By: _____

Title: _____

Date: _____

KIMBERLY KELLY

Date: _____

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