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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, et al.,	Chapter 11
Debtors.	Jointly Administered

RESIDENTIAL CAPITAL, LLC, et al.,	Case No. 12-ap-01671 (MG)
Plaintiffs,	Bankruptcy Case No. 12-12020 (MG)
v.	Jointly Administered
ALLSTATE INS. CO., et al.,	
Defendants.	

DEBTORS' REPLY IN SUPPORT OF THEIR MOTION TO EXTEND THE AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR INJUNCTIVE RELIEF ENJOINING PROSECUTION OF CERTAIN LITIGATION AGAINST DEBTORS' DIRECTORS AND OFFICERS AND NON-DEBTOR CORPORATE AFFILIATES

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Debtors respectfully submit this Reply in response to Defendant Federal Housing Finance Agency's "Memorandum of Law (I) in Support of FHFA's Motion to Dismiss the Complaint for Lack of Jurisdiction and (II) in Opposition to Debtors' Motion to Extend Automatic Stay and to Enjoin Litigation against Non-Debtors" (Doc. 47) ("FHFA Opposition").

INTRODUCTION

In an effort to avoid a limited stay in its MBS Action against the Non-Debtor Affiliates (the "FHFA Litigation") and continue with its aggressive plan to force millions of dollars of discovery costs on the Debtors, the Federal Housing Finance Agency ("FHFA") filed (1) a motion to withdraw the reference from the Bankruptcy Court and (2) an opposition that purports to be both an opposition to the Stay Motion and a memorandum of law in support of a motion to dismiss that the FHFA has yet to file.[1]

The arguments proffered by the FHFA in opposition to the Stay Motion do not alter or undermine the arguments made in the Stay Motion. FHFA first asserts that this Court lacks the jurisdiction to grant the Debtors' requested relief in light of the anti-injunction provision of the Housing and Economic Recovery Act. A limited stay of litigation—like that the Debtors request here—does not "restrain or affect" the FHFA's exercise of its powers of functions. As the Supreme Court has held, a minor delay is not a sufficient "restraint" to violate the statute. *See Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 574-77 (1989).

FHFA also asserts that the Debtors have failed to establish any distraction to key personnel resulting from the burden that discovery would pose. But FHFA's only arguments are unsupported, bald assertions. Namely, FHFA claims that documents are easy to produce. Not so. As the declarations of Mr. Lipps make clear, the loan files and electronic materials requested

[1] Capitalized terms not defined herein refer to the defined terms in the Stay Motion.

in these MBS Actions are voluminous and impose substantial burdens on the Debtors. Nonetheless, FHFA speculates that the documents it seeks may have been available in a data room during the sales process, and that the same documents will have to be produced to the Unsecured Creditors' Committee or the Examiner. Neither of those are true. The loan files and loan tapes were not made available in the dataroom, nor were they sought in the Committee's Rule 2004 discovery requests. And given the Examiner's charge of investigating transactions between the Debtors and their Non-Debtor Affiliates, it is unlikely—indeed implausible—that the Examiner would request loan files or other relevant documents.

FHFA further argues that the Debtors have failed to establish any depletion of insurance policies that are an asset of the estate. FHFA does not and cannot contend that there is no insurance coverage for its claims. To the contrary, the E&O policies provide coverage for FHFA claims. FHFA next contends that there is no risk of depletion of any insurance policies because there is no real possibility of an adverse judgment during these bankruptcy proceedings. They do not deny, however, that there will be motion to dismiss briefing and voluminous document production during that time—all of which will result in substantial defense costs to the Non-Debtor Affiliates that will draw down the insurance policies that, the Debtors submit, are a shared asset of the estate.

ARGUMENT

I. FHFA's Purported Motion to Dismiss Is Without Merit.

FHFA's Opposition purports to be not only an opposition to the Stay Motion, but a "Memorandum of Law [] in Support of FHFA's Motion to Dismiss the Complaint for Lack of Jurisdiction." (Doc. 47.) Setting aside the procedural deformities in FHFA's motion to dismiss, its substantive arguments for dismissal are without merit. FHFA argues that the anti-injunction provision in the Housing and Economic Recovery Act of 2008 ("HERA") prevents the Court

from granting the Debtors' requested relief. (FHFA Opp'n at 15.) This is not correct. HERA's anti-injunction provision does not require the Court to deny the Debtors' request for a temporary stay of the FHFA Lawsuit against the Non-Debtor Affiliates because (1) an extension of the automatic stay would not "restrain or affect" FHFA's exercise of its powers or functions, as required for application of HERA's anti-injunction provision and (2) the anti-injunction provision does not override the automatic stay of 11 U.S.C. § 362(a).

A. A Stay of the FHFA Litigation Does Not Restrain or Affect the FHFA's Powers or Functions.

A temporary stay does not "restrain or affect" FHFA's exercise of its powers or functions. It does not prevent or even delay FHFA's ultimate prosecution of its claims against the Non-Debtor Affiliates, as that trial is not scheduled to occur until 2015. (*See* FHFA Pretrial Scheduling Order at 4.) Nor does it prevent or delay FHFA's ability to obtain a judgment in the FHFA Lawsuit, as FHFA concedes that "no adverse judgment could possibly be rendered against any defendant prior to 2014 at the earliest." (FHFA Opp'n at 3.) At most, the temporary stay that the Debtors seek would slow the time for the Non-Debtor Affiliates to brief a motion to dismiss and to produce documents—but that would not prohibit FHFA's ability to ultimately obtain fact or expert discovery, as that window does not close until December 6, 2013. (*See* FHFA Pretrial Scheduling Order at 3.)

That minor delay in the initial phases of a lawsuit not set for trial for three years is not a restraint on FHFA's ability to exercise its powers. In evaluating a substantially similar anti-injunction provision (applicable to the Federal Savings and Loan Insurance Corp.), the Supreme Court has indicated that a minor delay is not a sufficient "restraint" to violate the statute. *See Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 574-77 (1989) (holding that judicial resolution of claims against insolvent savings and loan

association would not "*restrain or affect* the exercise of powers or functions of a conservator or receiver" even though it would delay the FSLIC's receivership functions).

B. HERA's Anti-Injunction Provision Does Not Override the Automatic Stay of § 362(a) Which Applies to FHFA's Claims Against the Non-Debtor Affiliates.

The language of HERA's anti-injunction provision and settled law also make clear that the provision is inapplicable where the stay is automatic pursuant to § 362(a), as is the case here. By its terms, the anti-injunction provision only prohibits "court … action." 12 U.S.C. § 4617(f). It does not bar a stay that is automatic pursuant to statute—and, as the Stay Motion make clear, the FHFA Litigation is subject to the automatic stay of § 362(a). FHFA does not even argue that HERA's anti-injunction provision trumps the automatic stay afforded the Debtors. Similarly, HERA's anti-injunction provision does not prohibit stays of lawsuits against non-debtors that are automatic pursuant to § 362(a), as are FHFA's claims against the Non-Debtor Affiliates in the FHFA Lawsuit. "Section 362 of the Bankruptcy Code is an 'automatic stay' provision." *Sunshine Dev. v. FDIC*, 33 F.3d 106, 113 (1st Cir. 1994). Lawsuits that fall within its enumerated subparagraphs are automatically stayed, even lawsuits against non-debtors. *See In re 48th St. Steakhouse*, 835 F.2d 427, 430-31 (2d Cir. 1987); *Queenie*, 321 F.3d at 288. (*See also* Stay Motion at 21–38.)

The Second Circuit's decision in *In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992), is directly on point. There, the Court considered whether the anti-injunction provision of FIRREA prohibited the automatic stay of a lawsuit against non-debtors. A year after Colonial Realty filed for bankruptcy protection, the FDIC filed a lawsuit in Florida seeking to recover funds allegedly transferred by the debtors to non-debtors. *Id.* at 127–28. "Neither the Debtors nor the Bankruptcy Trustee were named in the Florida Action …." *Id.* at 128. The bankruptcy trustee moved for an order "that the Florida Action violated the automatic stay provision of the

Bankruptcy Code … and enjoining the FDIC from continuing that action." *Id.* The FDIC "argued that the bankruptcy court lacked jurisdiction to make any determination of the Trustee's motion in view of … 12 U.S.C. § 1821(j)," the anti-injunction provision of FIRREA. *Id.* at 129. The Bankruptcy Court rejected the FDIC's argument, finding that the Florida Action against non-debtors was subject to the automatic stay and therefore FIRREA's anti-injunction provision "did not prevent entry of an injunction to enforce the stay." *Id.* On appeal, the Second Circuit affirmed, and held that the Florida Action against non-debtors was subject to the automatic stay of § 362(a). The Second Circuit also considered whether FIRREA's anti-injunction provision trumped the automatic stay of § 362(a) and barred the bankruptcy court's injunction to enforce that stay. Because "the automatic stay is imposed by Congressional mandate and not by court order," the Second Circuit found that FIRREA's "ban upon '*court* … action …' does not inhibit the operation of the automatic *statutory* stay" of the Florida Action against non-debtors. *Id.* At 133; 137.[2]

So too here. FHFA's claims against the Non-Debtor Affiliates are subject to the automatic stay of § 362(a), pursuant to both § 362(a)(3) and § 362(a)(1). The plain language of HERA's anti-injunction provision, and the case law interpreting it, make clear that it does not override the automatic stay applicable to FHFA's claims against the Non-Debtor Affiliates.

II. The FHFA Litigation Should Be Stayed Pursuant To The Automatic Stay.

In the Stay Motion, the Debtors established that the automatic stay should be extended to the Non-Debtor Affiliates in the MBS Actions, including the FHFA litigation.

[2] The fact that the Debtors' structured their Adversary Complaint and Stay Motion, and their requested relief, as a prospective extension of the automatic stay, rather than simply waiting and moving to enforce the automatic stay once violated, is of no moment. As *Colonial Realty* makes clear, the "stay imposed by § 362(a) is automatically 'applicable to all entities' without any need for the intervention of any court or ruling." 980 F.2d at 137.

A. The Risks of Evidentiary Prejudice, Collateral Estoppel, *Stare Decisis*, and Law of the Case Are Real.

The FHFA dismisses the threats of evidentiary prejudice, collateral estoppel, *stare decisis*, and law of the case because they claim that "there is minimal risk that a final judgment could be entered" during the pendency of the requested stay. (FHFA Opp'n at 26.) This argument ignores the possibility that opinions, rulings, and judgments on a wide range of issues may be made during the requested stay, and the Debtors should not be bound by those decisions (or forced to litigate them) while they are restructuring. For example, the Non-Debtor Affiliates are scheduled to file their motion to dismiss the FHFA litigation on July 13, 2012 and that matter is scheduled to be fully briefed by September 28, 2012. An adverse ruling on that motion as to the Non-Debtor Affiliates could have harmful effects on the Debtors. Moreover, rulings on discovery disputes and other motion practice and any evidence obtained before the Debtors emerge from bankruptcy may also be prejudicial. *See In re Johns-Manville Corp.*, 40 B.R. 219, 225 (S.D.N.Y. 1984) (affirming extension of stay because "other claimants and cross-claimants who are after [debtor's] assets, would be entitled to use the product of such discovery").

FHFA points to the Second Circuit's decision in *Queenie* to support its claim that risks of collateral estoppel *alone* would not justify a stay. (FHFA Opp'n at 26.) But the Debtors do not rely on the risks of collateral estoppel, res judicata, *stare decisis*, and evidentiary prejudice alone. The Debtors instead point to those risks as just one reason among many why the FHFA Litigation should be stayed. *See, e.g.*, *In re Calpine Corp.*, No 06-1757 (BRL), 2007 WL 1302604, *3 (Bankr. S.D.N.Y. Apr. 30, 2007) (extending stay, in part because facts relevant to non-debtor litigation were identical to facts that would be relevant in determining debtor's liability); *In re Calpine*, 354 B.R. 45, 50 (Bankr. S.D.N.Y. 2006) (extending stay, in part due to risk of collateral estoppel), *aff'd* 365 B.R. 401 (S.D.N.Y. 2007).

B. The Costs and Burdens of Discovery Justify a Stay of the FHFA Litigation.

FHFA contends that the substantial discovery in the FHFA Litigation does not warrant a stay because (1) "the Debtors and Affiliate Defendants could produce the documents without much burden or expense," (FHFA Opp'n at 29), and (2) "the automatic stay does not shield the Debtors from discovery." (*Id.* at 28). Both arguments miss the mark.

i. The Discovery Costs and Burdens Will Be Substantial.

FHFA baldly asserts—without support—that the Debtors can "produce the documents without much burden or expense." (*Id.* at 29.) That is incorrect. In the FHFA Litigation alone, there are over 105,000 mortgage loan files potentially at issue. (*See* Supplemental Declaration of Jeffrey A. Lipps (the "Suppl. Lipps Decl.") ¶ 14.) Each loan file consists of hundreds of pages, and in some cases the Debtors have to produce multiple loan files in connection with a single loan. (*See id.*) Further, discovery of those loan files says nothing of the other voluminous documents that the FHFA has requested, including documents concerning the twenty-one separate securitizations at issue, the underwriting parameters, and the emails. (*See id.* ¶¶ 14–16.) None of those materials are "easily accessible to compile [for] production." (FHFA Opp'n at 29.)

The cost of those discovery efforts is substantial, as the Debtors have learned firsthand in the two lawsuits by MBIA Insurance Corporation—the two MBS cases furthest along at the time of the Debtors' bankruptcy filing. The costs of processing, hosting, and bates-numbering the electronic materials *not* including the mortgage loan files exceeded $2.3 million. (*See* Supp. Lipps. Decl. ¶¶ 18.) The costs for reviewing those materials was more than $500,000 for just the first-level initial review by contract attorneys. (*See id.* ¶ 19.) The additional costs to collect and produce the loan files has averaged approximately $25 per file—so in the FHFA Litigation alone, the costs of producing the loan files would likely exceed $2.5 million before ever

approaching the costs of producing other electronic materials. (*See id.* ¶¶ 13–14.)

The FHFA nonetheless asserts—without any basis—that "[t]he Debtors have already compiled some of all of the relevant documents in connection with the sales process." (FHFA Opp'n at 29.) This is incorrect, as FHFA knows. Prior to filing its opposition, FHFA questioned whether the "loan files and loan tapes are in the data room . . . provided to potential purchasers." (Supplemental Declaration of Joel C. Haims (the "Supp. Haims Decl.") Ex. 10.) In response, the Debtors made clear that, "No, those loan tapes are not available in the data room." (*Id.*)

In a similar vein, FHFA asserts that the burden is minimal because "the Debtors may be required to provide many of these documents to the Committee (in response to its 2004 motion) and/or to the Examiner." (FHFA Opp'n at 30.) Again, there are no facts to support the FHFA's assertion. FHFA notably does not cite to the Committee's Rule 2004 discovery requests. For good reason. The Rule 2004 discovery requests from the Committee do not seek mortgage loan files, loan tapes, underwriting guidelines, or email correspondence relating to the origination and underwriting of mortgage loans. Although the Examiner has not served discovery requests, its task is to investigate potential claims the estate has against the Non-Debtor Affiliates; requesting millions of pages of documents concerning the Debtors' underlying business is unlikely.

Finally, FHFA asserts that the massive discovery it is demanding will pose no distraction to the Debtors' restructuring efforts because there is no "real risk that key personnel will be deposed in the FHFA Case during the pendency of the Bankruptcy Case." (FHFA Opp'n at 30.) FHFA's argument, however, ignores the fact that current employees critical to the restructuring will be relied upon heavily for the identification and collection of documents and data for the FHFA Litigation. (*See* Supp. Lipps Decl. ¶¶ 31–32; Lipps Decl., May 24, 2012, Doc. 6 ¶ 73; Janiczek Decl., May 24, 2012, Doc 8 ¶¶ 5-6, 20; *see also Hawaii Structural Ironworkers Pension*

Trust Fund v. Calpine, 2006 WL 3755175, at *5 (S.D.N.Y. Dec. 20, 2006) (affirming extension of stay to section 11 and 12(a)(2) claims against debtor's former directors and underwriters due to discovery burden on debtor).

FHFA also asserts that "Debtors identify only two" key employees who are likely to distracted by the MBS Litigation. (FHFA Opp'n at 31.) Yet, FHFA blatantly ignores the Debtors' evidence in support of their Stay Motion, which explicitly cited three employees that are merely *examples* of the many employees burdened by the MBS Actions. (*See, e.g.*, Janiczek Decl. ¶¶ 5-6.) When contrasted against FHFA's ability to put forward only conjecture and speculation regarding the burden and distraction of ongoing discovery in the MBS Actions, the proof that the Debtors have offered is sufficient to stay the FHFA Litigation.

ii. FHFA Cannot Avoid the Automatic Stay by Seeking Third Party Discovery.

FHFA further argues that staying the FHFA Litigation against the Non-Debtor Affiliates will not protect the Debtors from discovery—and even "the automatic stay does not shield the Debtors from discovery." (FHFA Opp'n at 28.) Regardless of the outcome of this Stay Motion, discovery directly from the Debtors during the pendency of the bankruptcy case would violate the automatic stay. *See In re Johns-Manville*, 40 B.R. 219, 223-226 (S.D.N.Y. 1984) (recognizing that, while the automatic stay might not automatically ban *all* third-party discovery requests to debtors, "such requests should be upheld *only* when such discovery will not interfere significantly with the Debtor's reorganization efforts," and affirming bankruptcy court's denial of third-party discovery); *see also In re Penn-Dixie Industries, Inc.*, 6 B.R. 832, 836 (Bankr. S.D.N.Y. 1980) (refusing to lift stay to allow plaintiff to pursue discovery from debtors because "[i]nterference by creditors in the administration of the estate, no matter how small, through the continuance of a preliminary skirmish in a suit outside the Bankruptcy Court is prohibited").

The cases that FHFA cites are of no help. It fails to cite any case law from the Second Circuit or the Southern District of New York that overrule *Johns-Manville* or *Penn Dixie*. Instead, FHFA points to a Ninth Circuit bankruptcy appellate panel decision, *In re Miller*, 262 B.R. 499 (9th Cir. B.A.P. 2001), involving discovery of information that would not affect the debtor or property of the debtor—a far different scenario than the FHFA Litigation which seeks documents that would affect the Debtors' estate.

Most tellingly, FHFA already seeks to circumvent that automatic stay. Earlier this week, FHFA sent a letter to Judge Cote requesting that it be allowed to file a motion to compel the production of loan tapes and loan files. (Haims Decl. Ex. 9.) Those materials, however, are in the possession, custody and control of the Debtors. (*See* Supp. Lipps ¶ 6.) FHFA's effort to obtain discovery from the Debtors during this bankruptcy is a direct attack on the automatic stay that the Debtors are afforded and highlights the importance of staying the FHFA Litigation.

C. The Debtors' Indemnification Obligations to Non-Debtor Affiliates Will Affect the Bankruptcy Estate.

FHFA contends that the Debtors indemnification obligations do not warrant a stay because "there is no risk of indemnification of any judgment during the period of the proposed stay" and because "[i]t is against public policy to indemnify for securities violations" like those "alleged in the FHFA Case." (FHFA Opp'n at 32, 33, 35.)

i. The Debtors' Indemnification Obligations Arise before any Judgment Is Rendered.

FHFA's arguments that "there is no risk of indemnification of any judgment" during the stay period fails to acknowledge that the Debtors obligations are not limited to indemnification for judgments rendered against the Non-Debtor Affiliates. (FHFA Opp'n at 32.) The Debtors are obligated to pay the Non-Debtor Affiliates' defense costs long before any judgment is rendered. (Whitlinger Decl. Ex. A, § 18(d)(i).) FHFA recognizes as much, but incorrectly

contends—without any support—that those costs "should not be substantial." (*Id.*) That is false. During the stay period, the FHFA Litigation will involve motions to dismiss FHFA's 138-page complaint and burdensome document production. The document production alone will result in substantial expenses—and thus, indemnification obligations—as production of the loan files could exceed $2.5 million before ever spending a dime to produce other electronic materials. (*See* Suppl. Lipps Decl. ¶¶ 13-14.)

ii. The Fact that FHFA Asserts Violations of Securities Laws Does Not Bar Indemnification of the Non-Debtor Affiliates

FHFA argues that its claims against the Non-Debtor Affiliates will not create any indemnification obligations because courts bar indemnification for violations of securities laws as a matter of public policy. (FHFA Opp'n at 33–34.)

First, while public policy may bar indemnification for securities law violations based on fraud, it is far from clear that the bar extends to securities law violations based on negligence or strict liability. *See In re CitiSource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1078 n.15 (S.D.N.Y. 1988) (noting "[t]here is some support" for the position that indemnification is permissible for negligent violators of the Securities Act); *Adalman v. Baker, Watts & Co.*, 599 F. Supp. 752, 754–55 (D. Md. 1984) (refusing to rule out indemnification of a party not actively engaged in any wrongdoing under Section 12(a) where liability attaches as a matter of law). That makes sense: after all, indemnification is typically unavailable for intentional torts, but that same prohibition does extend to acts of negligence. *Compare United Orient Bank v. Green (In re Green)*, 207 B.R. 762, 763 (S.D.N.Y. 1997) ("New York law prohibits indemnity for one's own intentional tort."), *with Margolin v. N.Y. Life Ins. Co.*, 32 N.Y.2d 149, 153 (N.Y. 1973) ("It has long been recognized that a party may protect itself from losses resulting from its liability for negligence by means of an agreement to indemnify.").

FHFA's reliance on *Credit Suisse* is misplaced. (FHFA Opp'n at 33.) There, the Court refused to allow a defendant to amend its answer to include a "violation of public policy" defense because the indemnitee had successfully defended itself in the underlying securities suit. (*Credit Suisse First Boston, LLC v. Intershop Communications AG*, 407 F. Supp. 2d 541 (S.D.N.Y. 2006). While the decision in *Credit Suisse* did cite approvingly to the general rule that indemnification is not permissible for securities laws violations, it nonetheless held that defense costs incurred during the successful defense of such a suit were indemnifiable. *Id.* ("no court has extended *Globus* to preclude indemnification where . . . the claims against the party seeking indemnification have been dismissed with prejudice. . .").

Second, a bar of the Debtors' indemnification obligations does not prohibit the Non-Debtor Affiliates from seeking contribution from the Debtors. Indeed, the case FHFA points to for its assertion that public policy bars indemnification, *Globus, Inc. v. Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), confirms as much. There, the underwriter defendant, having paid plaintiffs the full amount of the judgment, brought a separate lawsuit in district court seeking contribution from the other defendants. *See Globus v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970). The district court granted the underwriter's motion and ordered the other parties to pay contribution. *Id.* at 958.

D. Continuation Of The FHFA Litigation Will Deplete Insurance Policies And Proceeds That Are An Asset Of The Estate.

FHFA asserts that the E&O "policy documents provided by the Debtors do not establish the alleged coverage" because FHFA's claims were asserted in 2011 and the policy the Debtors' attached to Mr. Whitlinger's declaration only covers the period December 31, 2007 to December 31, 2008. (FHFA Opp'n at 36.) FHFA's argument is misplaced. The primary E&O insurer, Chubb, issued a letter setting forth its "preliminary coverage position" (the "Coverage Letter")

that makes clear that its in its opinion, the 2007–2008 policy provides the coverage for claims filed after December 31, 2001, such as FHFA's claims. Chubb's Coverage Letter states that, "pursuant to Section 7(a) of the relevant policies, all Loss associated with the MBS actions 'shall be deemed one Loss' and such Loss shall be deemed to have originated during the 07–08 BPL Policy"—*i.e.*, the policy attached to Mr. Whitlinger's declaration. (*See* Coverage Letter (attached as Ex. 8 to Suppl. Haims Decl.) at 10.) In any event, the Debtors have produced the subsequent E&O policies, including the policy covering 2011. (*See* 2011 Policy (attached as Ex. 6 to Suppl. Haims Decl.).)

Further, the FHFA Litigation falls within the scope of the insurance provided in those policies, as Chubb's Coverage Letter indicates with respect to other similar MBS Actions. The Coverage Letter states: "the MBS Actions trigger coverage under the Broker-Dealer Services Liability Clause of the 07–08 BPL Policy, because they are civil proceedings 'brought by or on behalf of a Broker-Dealer Customer against an Insured for a Broker-Dealer Wrongful Act.'" (*See* Supp. Haims Decl., Ex. 8 at 13.) Though the Coverage Letter dealt only with those MBS Actions brought by private investors that had been tendered as of its date, the exact same basis for coverage applies to the FHFA Litigation, which was filed only a month after the Coverage Letter was issued.

FHFA's argument that "there is no reasonable likelihood that any policy proceeds will be accessed by the Affiliate Defendants" is similarly wrong. (FHFA Opp'n at 36.) As set forth above and in the Supplemental Lipps Declaration, the Debtors and Non-Debtor Affiliates have incurred substantial costs and fees defending the MBS Actions to date. (*See* Suppl. Lipps Decl. ¶ ¶ 11–30.) The continuation of those lawsuits will continue to generate substantial fees and expenses to be covered by insurance. (*See id.*) In light of these costs and fees, the E&O policy's

$25 million retention is not sufficient protection against depletion of the insurance that is an asset of the estate. The risk that the shared policies will be drawn down during the bankruptcy warrants a stay of the FHFA Litigation. *See In re The 1031 Tax Grp.*, 397 B.R. at 684 (staying litigation against debtor's affiliates in part because continued litigation would draw down the E&O policies that were an asset of estate).

III. The FHFA Litigation Should Be Enjoined Pursuant To Section 105.

For the reasons set forth above and in the Debtors' Stay Motion, continued prosecution of the FHFA Litigation poses an imminent and irreparable harm to the Debtors' estate and their ability to restructure successfully. In contrast, FHFA claims that a temporary stay would cause it "overwhelming" prejudice. (FHFA Opp'n at 20.) That harm, it asserts, would be the inability to follow Judge Cote's "carefully orchestrated schedule that ensures that all [sixteen of the FHFA's] actions can be resolved efficiently." (*Id.*) FHFA's alleged harm presumes that the FHFA Litigation proceeds on a parallel track to FHFA's fifteen other lawsuits, although it is not set for trial for another three years. A temporary delay of the FHFA Litigation would not impair FHFA's ability to pursue its fifteen other lawsuits in the least. Indeed, the only impact to FHFA is a delay in the schedule for motion to dismiss briefing and document production. That delay has no impact on FHFA's other lawsuits, and any delay in FHFA's ultimate ability to obtain a judgment against the Non-Debtor Affiliates is insufficient harm to deny an injunction *See In re Calpine Corp.*, 365 B.R. at 413 ("The inability of [the defendant] to obtain a hypothetical recovery sooner … is not a harm—and is certainly not an irreparable harm sufficient to outweigh the irreparable harm that [the debtors] will suffer if the … litigation were permitted to proceed.")

Finally, the public interest is served by enjoining the FHFA Litigation. As this Court has recognized, "in the context of bankruptcy proceedings, the 'public interest' element means the promotion of a successful reorganization." *In re OMC, Inc.*, 2010 WL 4026097, at *5 (Bankr.

S.D.N.Y. Oct. 13, 2010) (quoting *In re Am. Film Techs.*, 175 B.R. at 849); *accord In re Calpine Corp.*, 365 B.R. at 413; *Haw. Structural*, 2006 WL 3755175, at *6. The only public interest that FHFA can conjure is that it seeks "recoveries [that] would benefit Freddie Mac's stakeholders, including the U.S. Treasury and, therefore, the U.S. Taxpayer."[3] (FHFA Opp'n at 24.) FHFA completely ignores that the Stay Motion seeks only a temporary stay that would not prohibit FHFA from ultimately pursuing its claims against the Non-Debtor Affiliates. The public interest therefore weighs in favor of an injunction.

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[3] It is also notable that the FHFA's assertions that its goal of collecting money for taxpayers are paramount is somewhat ironic since the Non-Debtor Affiliates it is seeking to collect that money from are also owned, in large part, by the U.S. Treasury and, therefore, the U.S. Taxpayer.