

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

CHAPTER 11

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,

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

RE: DOCKET ENTRY 1531

Debtor

BANK OF AMERICA’S REPLY TO OBJECTION OF FREDDIE MAC (1) TO BANK OF AMERICA’S MOTION FOR AN ORDER AUTHORIZING AND DIRECTING EXAMINATION OF FEDERAL HOME LOAN MORTGAGE CORPORATION PURSUANT TO RULE 2004 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND TO JOINDER BY BNP PARIBAS IN BANK OF AMERICA’S MOTION FOR ORDER AUTHORIZING 2004 EXAMINATION OF FEDERAL HOME LOAN CORPORATION AND JOINDER BY DEUTSCHE BANK AG IN BANK OF AMERICA’S MOTION FOR ORDER AUTHORIZING 2004 EXAMINATION OF FEDERAL HOME LOAN CORPORATION; AND (2) TO BANK OF AMERICA’S MOTION TO JOIN MOTION OF CREDITORS COMMITTEE FOR CLARIFICATION OF ORDER AUTHORIZING RULE 2004 EXAMINATION OF FEDERAL HOME LOAN MORTGAGE CORPORATION

Bank of America, National Association, successor in interest by merger to LaSalle Bank, National Association and LaSalle Global Trust Services, in its capacity as Collateral Agent, Indenture Trustee, Custodian, and Depositary (“BofA”) with respect to Ocala Funding, LLC (“Ocala”), by and through its undersigned counsel, hereby files this reply (the “Reply”) to the Objection of Freddie Mac (1) to Bank of America’s Motion for an Order Authorizing and Directing Examination of Federal Home Loan Mortgage Corporation (“Freddie Mac”) Pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure [Docket # 1317, “BofA 2004 Motion”] and to Joinder by BNP Paribas (“BNP”) in Bank of America’s Motion for Order Authorizing 2004 Examination of Federal Home Loan Corporation [Docket # 1362] and Joinder by Deutsche Bank AG (“DB”) in Bank of America’s Motion for Order Authorizing 2004

Examination of Federal Home Loan Mortgage Corporation [Docket # 1368] (together, the “BofA Joinder Motions”); and (2) to Bank of America’s Motion to Join Motion of Creditors Committee (“Committee”) for Clarification of Order Authorizing Rule 2004 Examination of Federal Home Loan Mortgage Corporation [Docket # 1513, “Clarification Joinder Motion”]. In support of this Reply, Bank of America states as follows:

INTRODUCTION

1. On numerous occasions, the Debtor has informed the Court and other parties in interest that one of the biggest challenges in this case will be sorting out the competing claims to cash and other assets that flowed through the Debtor’s accounts prior to the bankruptcy filing. Indeed, it appears as though many loans and other mortgage-related assets have been double- and even triple-pledged to various constituencies. According to the Debtor, the largest single source of disputed funds—more than \$548 million according to the Debtor’s Second Interim Reconciliation Report—relates to Freddie Mac. Indeed, BofA believes that there were improper diversions of Ocala loans and assets from TBW to Freddie Mac, and Ocala may have valid ownership claims with respect to a substantial portion of assets that relate to Freddie Mac. Accordingly, there can be little doubt that BofA, in its representative capacities with respect to Ocala, has a valid and pressing need for information regarding Freddie Mac’s extensive relationship with the Debtor, which is directly relevant and necessary to evaluate the Debtor’s property, liabilities, and financial condition.

2. In just a few weeks, the Debtor intends to file an Asset Reconciliation Report that will identify with greater specificity (but, importantly, not resolve) the remaining issues with respect to ownership rights. As a result, the need for BofA to gain access to documents in Freddie Mac’s possession has become particularly urgent. Among other things, BofA needs to

obtain documents from and examine witnesses at Freddie Mac to (1) evaluate competing claims against the estate, (2) test the assumptions contained in the Asset Reconciliation Report, and (3) examine Freddie Mac's claim of ownership with respect to certain mortgage assets and its custodial arrangements with Colonial Bank for those assets. Despite these time sensitivities, Freddie Mac has so far blocked BofA's ability to obtain any of this information, including those documents that have already been produced to the Debtor and counsel for the Committee. In its objection, Freddie Mac goes to great lengths to characterize the BofA 2004 Motion as overly burdensome, massively expensive, improperly motivated, and generally disruptive to the ongoing discovery between the Debtor and Freddie Mac. Even if such arguments had any merit under the circumstances (which they do not), the simple fact remains: nearly three months after the Court entered its order on the Debtor's Rule 2004 motion authorizing and directing examination of Freddie Mac, BofA has not been able to review a single document produced by Freddie Mac.¹ Because Freddie Mac's circumvention of the discovery process envisioned by the Court threatens to substantially prejudice BofA's ability to exercise any rights it may have in its representative capacities with respect to Ocala, the BofA 2004 Motion should be granted.

- First, Freddie Mac contends that granting the BofA 2004 Motion would disrupt the orderly process of discovery taking place between the Debtor and Freddie Mac. This argument completely misses the mark. Although Freddie Mac has recently provided documents to the Debtor, it has frustrated the discovery protocol established by the Court by designating its entire production as confidential or privileged. As a result, BofA has been unable to review any of the documents produced thus far. In other words, although the Court originally

¹ In fact, the only documents that BofA has been able to review that relate to Freddie Mac are those documents independently produced by the Debtor from its own databases.

intended for certain third parties to “ride the coattails” of the Debtor’s discovery efforts, Freddie Mac has impaired BofA’s ability to do so and now seeks to foreclose any opportunity for BofA to obtain critical information with respect to certain loans and assets that may be in the possession of Freddie Mac.

- Second, Freddie Mac asserts that the BofA 2004 Motion represents an improper effort to obtain discovery from Freddie Mac for use in separately pending litigation in the Southern District of New York. Freddie Mac’s position appears to stem from a fundamental misunderstanding of BofA’s interest in pursuing discovery from Freddie Mac. BofA, in its representative capacities with respect to Ocala, has a direct interest in pursuing any and all information that may relate to the improper diversion of Ocala loans and assets from TBW to Freddie Mac. This interest exists irrespective of litigation among BNP, DB and BofA pending in the Southern District of New York. In other words, the rights of BofA to obtain relevant information about Freddie Mac’s possession of Ocala loans and assets are independent of such litigation. Moreover, even to the extent information discovered through this process bears some relevance to the separate litigation, it is not the basis upon which it is being sought, and Freddie Mac has failed to identify a single case in which a court denied a legitimate request to conduct discovery pursuant to Rule 2004 simply because information produced through such process may bear some secondary relevance to a separate proceeding to which the examinee is not even a party.
- Third, Freddie Mac contends that granting the BofA 2004 Motion would impose an enormously expensive undertaking—estimated to cost at least \$10 million—

that would ultimately be borne by the American taxpayers because Freddie Mac is presently under a conservatorship. Notwithstanding the lack of evidence for this estimate, this argument misses the mark. As an initial matter, BofA seeks the identical scope of discovery that the Court previously authorized pursuant to the Debtor's motion for examination of Freddie Mac. So, Freddie Mac is essentially asking the Court to revisit an issue that it already decided in late March. In any event, if the Court grants the BofA 2004 Motion, Freddie Mac would still have an opportunity to object to specific document requests and witness subpoenas as being unduly burdensome or overly broad. Indeed, just as the Debtor has not pursued the full scope of discovery authorized by the Court, granting the BofA 2004 Motion would certainly not preclude an agreement among the parties to a reasonably tailored discovery protocol that focused on obtaining only information from Freddie Mac that is most relevant to BofA in its representative capacities with respect to Ocala.

3. Tellingly, Freddie Mac has not limited its objection to the BofA 2004 Motion but also challenges BofA's access to *any* information that Freddie Mac has already produced or may produce to the Debtor, even if such access is restricted to attorney's eyes only and subject to a confidentiality agreement. During the May 7th hearing, Freddie Mac represented to the Court that it needed a full evidentiary hearing to adequately address the issues raised in the BofA 2004 Motion. Based on this representation, the Court specifically instructed Freddie Mac to adduce evidence as to why BofA's counsel should not have access to documents produced to the Debtor and Committee's counsel. Instead of producing witnesses or other evidence, Freddie Mac used the additional time to submit an objection that largely repeats accusations already alluded to at

the previous hearing regarding BofA's motivations for seeking discovery and offers only speculative estimates of the cost burden. It appears that such additional briefing on these issues has served only one purpose: to further delay the flow of information to BofA. At a minimum, it is appropriate for BofA's counsel to have access to any non-privileged documents produced by Freddie Mac to the Debtor in the same manner as the Committee's counsel. Such access would impose no additional burden on Freddie Mac because the documents would need to be produced to the Debtor only once and then, following execution of appropriate non-disclosure agreements by BofA, would be shared with BofA's counsel on an "attorney's eyes only" basis. Indeed, although the Court specifically requested at the last hearing that Freddie Mac provide reasons for not sharing information on this basis, Freddie Mac has failed to establish any good cause for preventing BofA's counsel only to access to documents labeled as confidential in the same manner as Committee's counsel. Without at least this level of review, BofA may be forced to seek relief from this Court unnecessarily as it has no means to evaluate Freddie Mac's basis for designating every single document produced to date as "confidential." Accordingly, even if the BofA 2004 Motion is denied, the Court should grant the relief requested in the Clarification Joinder Motion.

BACKGROUND

4. On June 30, 2008, Ocala, a special-purpose commercial paper and financing conduit, agreed to purchase certain mortgage loans and related loan documents (collectively, "Ocala Loans") from the Debtor pursuant to a Second Amended and Restated Mortgage Loan Purchase and Servicing Agreement (the "MLPSA").

5. Ocala funded its purchase of the Ocala Loans under the MLPSA by issuing subordinated notes and commercial paper, for which BofA served as Indenture Trustee,

Collateral Agent, Depositary, and Custodian. Among other things, on June 30, 2008, Ocala issued notes pursuant to a Second Base Indenture between Ocala, as issuer, and BofA, as Indenture Trustee (as amended and supplemented, the “Second Base Indenture”).

6. On June 30, 2008, Ocala also entered into an Indenture Agreement and Restated Security Agreement with BofA whereby Ocala, to secure its obligations under the Second Base Indenture, pledged to BofA, as Collateral Agent, among other things: (a) the Ocala Loans; (b) the principal and interest paid under the Ocala Loans; (c) any proceeds from the sale of the Ocala Loans to investors; and (d) the servicing rights relating to the Ocala Loans.

7. As of the date hereof, the outstanding balance of commercial paper and subordinated notes issued by Ocala, and for which BofA serves in a representative capacity, is approximately \$1.75 billion. Because this \$1.75 billion outstanding balance gives rise to claims against the Debtor’s estate, BofA, in its representative capacities with respect to Ocala, has a pressing need to obtain information regarding, among other things, the extensive pre-petition relationship and transactions between and among the Debtor and Freddie Mac, which bear directly on the assets, liabilities and financial affairs of the Debtor.

THE RULE 2004 EXAMINATION OF FREDDIE MAC

8. According to the Debtor, the Debtor and the Freddie Mac have had an extensive business relationship dating back to about 2002. By August 2009, the Debtor was one of Freddie Mac’s largest sellers, with annual sales to Freddie Mac of billions of dollars in mortgages in recent years. Freddie Mac purchased mortgages directly from the Debtor, as well as from Ocala. The Debtor reports that by August 2009 it was one of Freddie Mac’s largest mortgage servicers, servicing over 295,000 mortgages for Freddie Mac.

9. As a result of extensive and prolonged business relationship with the Debtor, Freddie Mac possesses a substantial amount of documents and information that is directly relevant to the assets, liabilities and financial affairs of the Debtor. On February 18, 2010, the Debtor filed a motion for an order authorizing and directing the examination of Freddie Mac pursuant to Rule 2004 [Docket # 1046, "Debtor 2004 Motion"].

10. On March 26, 2010, the Court entered an order authorizing the Debtor and certain parties who filed joinders to the Debtor 2004 Motion, including BofA and the Committee (collectively, the "Joining Parties"), to conduct a Rule 2004 examination of Freddie Mac and to obtain documents from Freddie Mac in connection with the examination [Docket # 1247, "Rule 2004 Order"].

11. Under the procedure set forth in the Rule 2004 Order, the Debtor is permitted to subpoena categories of documents from Freddie Mac, and Freddie Mac is permitted to assert objections to categories of documents requested in the subpoena. To the extent Freddie Mac does not object or to the extent an objection is overruled, Freddie Mac is required to produce the responsive documents to the Debtor. The Debtor is then required to share all such documents with the Joining Parties, unless Freddie Mac designates the documents as confidential and produces a corresponding log of all documents so designated. The Debtor is not permitted to share any documents designated as confidential with the Joining Parties unless the Joining Parties file a motion and obtain an order compelling production of the documents.

12. The Committee filed its Motion for Clarification of Order Authorizing Rule 2004 Examination of Federal Home Loan Mortgage Corporation [Docket # 1283, the "Clarification Motion"] seeking immediate access for the Committee's counsel to all documents produced by Freddie Mac to the Debtor irrespective of any confidentiality designation. In the Clarification

Motion, the Committee argued that providing documents to counsel on an “attorney’s eyes only” basis and with a customary non-disclosure agreement in place would effectively eliminate Freddie Mac’s concern about any potential harm of sharing information with competitors. The Court agreed with the Committee’s contention and ordered that the Committee’s counsel be granted access to documents identified as Confidential Documents by Freddie Mac subject to the execution of a confidentiality agreement [Docket # 1437, the “Clarification Order”]. Specifically, with respect to documents labeled as Confidential Documents under the previous Rule 2004 Order, the Clarification Order provides that:

[T]he Debtor and/or its counsel or representative may share, produce, copy, and transmit such Confidential Documents on an ‘eyes only’ basis to the lawyers of the Committee counsel’s firm, provided that Committee counsel has first signed a confidentiality agreement and provided that Committee shall not share, produce, copy, transmit, or otherwise disclose such Confidential Information to anyone (including, but limited to, members of the Committee) without the agreement of Freddie Mac or further order of this Court.

Clarification Order at ¶ 2.

13. Freddie Mac contends that certain documents should be kept confidential so that sensitive proprietary information in the documents is not shared with Freddie Mac’s competitors. Despite the intent of the Rule 2004 Order to allow the Joinder Parties to “ride the coattails” of the Debtor’s discovery, Freddie Mac has designated *all* of the documents that have been produced to date as confidential. If Freddie Mac is permitted to shield the entire production through such confidentiality designations, the Joining Parties, such as BofA, will have no ability to gain access to these documents, which are properly the subject of examination and have already been shared with the Debtor and the counsel for the Committee.

14. These confidentiality designations will also cause significant further delay to the proceedings. Under the Rule 2004 Order, the Debtor may not obtain documents until the

objections, if any, raised by Freddie Mac are resolved. Then, to the extent Freddie Mac has designated such documents as confidential, the Debtor may not share the documents with BofA until a motion to compel is filed and resolved in favor of BofA. This process of resolving objections and confidentiality designations will unnecessarily burden the Court, which will be called on to evaluate the propriety of such designation, and further delay the production. The process would undoubtedly take many weeks if not months to complete. Such delay and burden on the Court could be avoided if BofA's counsel were to have access to the documents as soon as they are produced to the Debtor and the Committee's counsel.

ARGUMENT

I. FREDDIE MAC HAS FAILED TO ESTABLISH ANY VALID BASIS UPON WHICH THE COURT SHOULD DENY THE BOFA 2004 MOTION.

With the Asset Reconciliation Report set to be filed in a few weeks, the Debtor's case will begin to focus on untangling the issues that remain with respect to resolving competing claims of ownership over cash and other assets. Because such a substantial portion of these assets relate to Freddie Mac, it is critical that BofA be allowed to commence long-overdue discovery on Freddie Mac. Notwithstanding the foregoing, Freddie Mac posits a series of arguments that, if accepted by the Court, would exclude one of the Debtor's largest creditors from any meaningful participation in this process and, more broadly, create an unreasonable obstacle to progress in this case.

A. BofA's request to conduct its own Rule 2004 discovery on Freddie Mac will not disrupt the production to the Debtor that is already in process.

15. Throughout its objection, Freddie Mac characterizes BofA's request for a separate Rule 2004 examination as unduly disruptive to the orderly discovery underway between the Debtor and Freddie Mac pursuant to the Rule 2004 Order. According to Freddie Mac, it has already produced documents responsive to the Debtor's ongoing asset-reconciliation process.

Indeed, BofA understands that the Debtor intends to file the Asset Reconciliation Report in early July 2010. So, it does not appear as though BofA's request to conduct its own discovery with respect to Freddie Mac will in any way delay this progress. Moreover, any disruption to the discovery process is entirely the result of Freddie Mac's refusal to allow BofA to access any documents that have been produced to date. Contrary to Rule 2004 Order that expressly provides for certain third parties (such as BofA) to "ride the coattails" of the Debtor's discovery, Freddie Mac has completely blocked the ability of such third parties to access these coattails by designating the entirety of its document production as "privileged" or "confidential." In essence, Freddie Mac has transformed the discovery protocol under the Rule 2004 Order from a "shield" designed to protect against an overly burdensome and expensive process to a "sword" wielded by Freddie Mac to deny any legitimate access by third parties to critical information.

16. As an initial matter, it bears mention that the Court did not preclude BofA from filing its separate motion for Rule 2004 examination against Freddie Mac. Freddie Mac seems to argue that the Rule 2004 Order imposed some sort of blanket prohibition on BofA's ability to seek its own discovery. *See* Objection at ¶ 9. This is not the case. In fact, it is clear that the restriction applies *only* to BofA's right to issue subpoenas, propound document requests, or otherwise file or seek their own discovery from Freddie Mac "under authority of this Order." Rule 2004 Order at 3. Indeed, the Rule 2004 Order was expressly issued "without prejudice to the right of the Joinder Parties to seek discovery from Freddie Mac *other than under authority of this Order.*"² *Id.* at 4. At the time BofA filed its own Rule 2004 motion, despite nearly a month having passed since entry of the Rule 2004 Order, Freddie Mac had not produced a single

² This is also consistent with the Court's statements at the hearing on March 17, 2010. In fashioning the Rule 2004 Order, the Court expressly noted that "[t]his is without prejudice to anybody, after this is said and done, to seek further discovery or whatever, and that will be a fight between them and Freddie Mac, either this forum or some other forum." March 17, 2010 Hearing Tr. at 33:24-25-34:1-2.

document. As a result, BofA's right to "ride the coattails" of the Debtor's discovery had been rendered essentially hollow.

17. In an effort to demonstrate that the Rule 2004 Order has been functioning smoothly, Freddie Mac points to the fact that it has made four separate productions of documents to the Debtor for the purpose of facilitating the completion of the asset-reconciliation process. Objection at 7. Again, this argument misses the mark in two important respects. First, Freddie Mac fails to note that even these limited productions did not commence until the eve of the May 7th hearing on the BofA 2004 Motion, so BofA had no knowledge that any documents had been or would be produced when it filed the BofA 2004 Motion. Second, BofA has not received a single one of these documents because Freddie Mac has taken the position that each of these documents is confidential. Put simply, the fact that Freddie Mac has been producing documents to the Debtor and counsel for the Committee to assist with the asset-reconciliation process in no way addresses the central issue before the Court: whether BofA's inability to gain access to Freddie Mac's production provides a basis for granting the separate BofA 2004 Motion.

18. The objection also notes that BofA has not approached Freddie Mac to discuss the production or specific documents that have been produced to the Debtor. *Id.* This is simply untrue. For example, Freddie Mac provided a "production log" to BofA on or about May 28, 2010 that failed to sufficiently identify documents so that BofA could determine whether there was a legal basis for withholding certain documents. Upon receipt of this deficient production log, counsel for BofA wrote a letter to counsel for Freddie Mac on June 1, 2010, requesting that Freddie Mac provide additional information to allow counsel for BofA to evaluate the basis for withholding the documents. To address this problem, Freddie Mac provided a revised "production log" that included additional descriptive information. Upon review of the updated

log, BofA harbors serious doubts as to the legitimacy of the confidentiality designations. Unless counsel for BofA is able to review the underlying documents, however, it will have no recourse but to ask the Court to evaluate the validity of such designations. This exchange serves to highlight the manner in which Freddie Mac has used the Rule 2004 Order as a means to block BofA's access to its entire production.

19. Accordingly, the Court should grant the BofA 2004 Motion to avoid substantial prejudice to one of the largest creditors in this case.

B. The separately pending litigation in the Southern District of New York does not restrict BofA's independent right to conduct an examination of Freddie Mac in the TBW bankruptcy case.

20. Freddie Mac asserts that the BofA 2004 Motion represents an improper effort to obtain discovery from Freddie Mac for use in pending lawsuits initiated by DB and BNP against BofA in the Southern District of New York (the "New York Litigation"). Objection at ¶¶ 22, 27. Freddie Mac's position mistakenly ignores the fact that BofA, in its representative capacities with respect to Ocala, has a direct and substantial interest—which exists regardless of the New York Litigation—in pursuing any and all information that may relate to the improper diversion of Ocala loans and assets from TBW to Freddie Mac. The economic stakes are significant. According to the ongoing reconciliation effort, the Debtor has identified more than \$548 million in "Gross" Affected Funds related to Freddie Mac. *See* Debtor's Second Interim Reconciliation Report [Docket # 776] at ¶ 6. Importantly, however, the Debtor has not determined which entity is the rightful owner of the underlying mortgage assets. *Id.* Because Ocala may have valid ownership claims with respect to a substantial portion of these and other assets in the possession of Freddie Mac, there can be little doubt that BofA would have pursued discovery against Freddie Mac even if BNP and DB had not commenced the New York Litigation. Moreover, this independent interest in Freddie Mac is further underscored by the fact that DB and BNP joined in

support of the BofA 2004 Motion. Although obviously adverse in the New York litigation, BofA's interests are aligned with those of DB and BNP with respect to gathering information about Freddie Mac's possession of Ocala loans and assets.

21. BofA also understands that the forthcoming Asset Reconciliation Report will only identify—rather than resolve—the disputed claims of ownership among the various parties in interest. With this limited purpose in mind, it stands to reason that the Debtor may not have an interest in pursuing the full scope of information that the Court authorized under the Rule 2004 Order. More specifically, despite the worthwhile efforts of the Debtor in preparing the Asset Reconciliation Report, BofA still needs to conduct additional discovery on Freddie Mac to, among other things, (1) evaluate competing claims against the estate, (2) test the assumptions contained in the Asset Reconciliation Report, and (3) examine Freddie Mac's claim of ownership with respect to certain mortgage assets and its custodial arrangements with Colonial Bank for those assets. Importantly, by granting the BofA 2004 Motion—which is identical in scope to the Debtor 2004 Motion—the Court would not be allowing any broader discovery than what was previously authorized in the Rule 2004 Order.

22. Even in the event information discovered through this process were relevant to the New York Litigation, Freddie Mac has failed to identify a single case in which a court has denied a legitimate request to conduct discovery pursuant to Rule 2004 simply because information produced through such process may bear some secondary relevance to a separate proceeding to which the purported examinee is not a party. To be sure, there is no such restriction in the plain language of Rule 2004, which expressly authorizes the bankruptcy court, upon a motion made by “any party in interest,” to order the examination of “any entity.” FED.R.BANKR.P. 2004(a). Courts have found that Rule 2004 examinations may be used to gain information from creditors

and third parties who have had a significant relationship or other dealings with the debtor. *See In re Recoton Corp.*, 307 B.R. 751, 756-57 (Bankr. S.D.N.Y. 2004) (permitting Committee to conduct Rule 2004 discovery against debtor’s former directors and officers); *In re Hughes*, 281 B.R. 224, 226 (Bankr. S.D.N.Y. 2002) (“[A] third party who has a relationship with the debtor may be subject to a Rule 2004 examination in order to aid in discovery of assets.”). Because substantial issues remain with respect to determining ownership related to Freddie Mac’s purchase of Ocala assets, there can be little doubt that BofA, in its representative capacities with respect to Ocala, has a legitimate interest in pursuing a separate Rule 2004 examination of Freddie Mac.³

23. Quoting selectively from the complaints filed by DB and BNP and the pending motion to dismiss filed by BofA in the New York Litigation, Freddie Mac also attempts to draw favorable inferences about its role in purchasing loan assets from TBW. Based on its review of these pleadings, Freddie Mac makes the following unwarranted conclusions:

- “The information provided in the New York Litigation appears to establish that TBW *did* sell mortgage loans to Freddie Mac. BofA makes clear that it was *intended* and *agreed* by the parties that the Debtor would be able to sell mortgage loans to Freddie Mac free of BofA’s security interest, with the security interest attaching to the proceeds. Objection at ¶ 29.

³ In light of BofA’s legitimate interest in conducting its own Rule 2004 examination of Freddie Mac, the question then becomes whether the entirely separate New York Litigation between BofA and DB/BNP should restrict its ability to do so. It should not. Pursuant to the “pending proceeding” rule, once an adversary proceeding or contested matter has been commenced, discovery must be made pursuant to the bankruptcy rule governing discovery, rather than by a Rule 2004 examination. *See In re Washington Mutual, Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009). However, this rule does not apply because BofA has not commenced an adversary proceeding or any other litigation against Freddie Mac that relates in any way to the BofA 2004 Motion. *See In re Int’l Fibercom, Inc.*, 283 B.R. 290, 292 (Bankr. D. Ariz. 2002) (“[W]hen the Rule 2004 examination relates not to the pending adversary litigation, but to another matter, the ‘pending proceeding’ rule does not apply.”); *In re M4 Enters., Inc.*, 190 B.R. 471, 475 n.4 (Bankr. N.D. Ga. 1995) (declining to apply the “pending proceeding” rule where the Rule 2004 examination did not relate to the pending proceeding); *In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 275 (D. Colo. 1991) (noting that “entities not affected by the adversary proceeding do not require the greater protections afforded under the Federal Rules” and remain subject to Rule 2004 examination). Because Freddie Mac has not been sued by BofA and is not a party to the New York Litigation, it cannot seek refuge in the protections of the “pending proceeding” rule.

- “There is no allegation [in the New York Litigation] that Freddie Mac acted improperly in its purchases of these mortgage loans.” Objection at ¶ 30.
- “Even more importantly, BofA admits in its Dismissal Memorandum that Ocala and TBW had BofA’s contractual approval to sell the mortgage loans at issue to Freddie Mac.” Objection at ¶ 34.

As an initial matter, the fact that the parties to the New York Litigation have not specifically focused on whether Freddie Mac is the rightful owner of mortgage loans serves only to underscore the hollowness of Freddie Mac’s opposition to BofA 2004 Motion. Because Freddie Mac is not a party to the New York Litigation, such issues are, at best, indirectly connected to the claims raised in those lawsuits. In any event, it is erroneous for Freddie Mac to draw any conclusions from these pleadings given the procedural posture of the New York Litigation. As Freddie Mac is undoubtedly aware, the facts contained in the complaints have not yet been tested through formal discovery and, if necessary, a trial. Moreover, the arguments presented in BofA’s motion to dismiss must be interpreted in the context of the applicable legal standard. On a motion to dismiss, a parties necessarily *assume* the facts contained in the complaint to be true. *See* FED.R.CIV.P 12(b)(6). In essence, Freddie Mac’s arguments cannot overcome the indisputable fact that BofA, in its representative capacities with respect to Ocala, has a legitimate interest in conducting its own Rule 2004 examination of Freddie Mac.⁴

⁴ Curiously, Freddie Mac also contends that “BofA’s insistence that it may have an interest in those mortgages is belied by the fact that BofA is apparently unable even to identify the mortgages in question without having Freddie Mac first provide the information to BofA by means of a Rule 2004 examination.” Objection at ¶ 34. This makes no sense and, in fact, highlights one of the reasons that BofA is seeking the Rule 2004 examination in the first place. If Ocala’s interest was fraudulently cut off by certain transfers by TBW of Ocala’s assets, Freddie Mac may have possession of loan assets and mortgages that actually belong to Ocala.

C. **Freddie Mac's concerns about the overall cost of complying with BofA's scope of discovery are premature and cannot form the basis for denial of the BofA 2004 Motion.**

24. Finally, Freddie Mac objects to the BofA 2004 Motion on the grounds that, given the sheer volume of information covered under the scope of discovery, it could cost around \$10 million to comply with BofA's discovery requests. Objection at ¶ 26. Freddie Mac contends that this expense that would ultimately fall on American taxpayers because Freddie Mac is presently under a conservatorship. *Id.* If the Court grants the BofA 2004 Motion, Freddie Mac contends that BofA should be forced to bear the expense of such discovery. *Id.* at ¶ 46. This argument fails for at least two reasons. First, as previously discussed, BofA seeks the identical scope of discovery that the Court previously authorized pursuant to the Debtor's motion for examination of Freddie Mac. So, Freddie Mac is essentially asking the Court to revisit an issue that it already decided in late March.

25. Second, putting aside the issue of what constitutes a reasonable scope of examination, Freddie Mac's argument proceeds from a fundamentally flawed premise. If the Court grants the BofA 2004 Motion, Freddie Mac would still have an opportunity to object to specific document requests and witness subpoenas as being unduly burdensome or overly broad. Indeed, just as the Debtor has not pursued the full scope of discovery authorized by the Court, granting the BofA 2004 Motion would certainly not preclude an agreement among the parties to a reasonably tailored discovery protocol that focused on obtaining only information from Freddie Mac that is most relevant to BofA's interests. Therefore, Freddie Mac's concerns about the prospective costs of future discovery do not constitute a valid basis for blanket denial of the BofA 2004 Motion as these issues are simply not ripe for adjudication until BofA propounds formal discovery.

II. EVEN IF THE COURT IS INCLINED TO DENY OR LIMIT THE SCOPE OF RELIEF SOUGHT IN THE BOFA 2004 MOTION, BOFA'S COUNSEL SHOULD BE GRANTED ACCESS THE DOCUMENTS ON AN "ATTORNEY'S EYES ONLY" BASIS.

26. At a minimum, BofA's counsel should be able to review documents that Freddie Mac designates as confidential. Otherwise, Freddie Mac will have succeeded in completely preventing BofA from meaningfully participating in the discovery process with the Debtor and Committee. As discussed below, allowing access to these documents on an "attorney's eyes only" basis adequately protects Freddie Mac against the risk that its proprietary information would be disclosed to competitors.

27. The Clarification Order strikes the appropriate balance between the competing interests at issue here. As an initial matter, the Clarification Order is entirely consistent with Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, which authorizes the court to issue protective orders that direct the disclosure of commercially sensitive information in certain circumstances. FED. R. CIV. P. 26(c)(1)(G) (providing that a court may, for good cause, issue a protective order requiring that proprietary information "be revealed only in a specified way"). Indeed, courts have broad discretion to fashion appropriate relief that ensures relevant information is produced while still protecting confidential or proprietary information. *See Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426, 429 (M.D. Fla. 2005) ("The decision to enter a protective order is within the court's sound discretion and does not depend on a legal privilege.") (citing *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985)); *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D. Fla. 1985) (noting that the "[d]etermination of whether the need [for discovery] outweighs the harm of disclosure [of proprietary information] falls within the sound discretion of the trial court"). By requiring the Committee to enter into a confidentiality agreement and limiting its access to "attorney's eyes

only” for confidential documents, the Clarification Order duly considered the competing interests and provided a practical procedure for third parties to gain access to essential documents in Freddie Mac’s possession without undermining Freddie Mac’s countervailing interest to protect against the risk of divulging confidential or proprietary information.

28. The rationale underlying the Clarification Order applies with equal force to BofA’s efforts to obtain documents from Freddie Mac. As an initial matter, Freddie Mac has not satisfied its initial burden of demonstrating that the information being withheld actually contains trade secrets or is otherwise confidential or proprietary in nature. *See Kaiser v. Phosphate Engineering*, 153 F.R.D. 686, 688 (M.D. Fla. 1992) (noting that Rule 26 of the Federal Rules of Civil Procedure requires that the party seeking to protect information has the burden to establish the confidential or proprietary nature of the information so that the court may fashion an appropriate protection); *Mackle*, 108 F.R.D. at 326 (“In order to resist discovery of . . . confidential information, a party must first establish that the information sought is indeed confidential and then demonstrate that its disclosure might be harmful.”). In any event, Freddie Mac’s purported concern of sharing proprietary information with competitors is not implicated if the documents are made available to BofA’s counsel on an “attorney’s eyes only” basis and with a confidentiality agreement in place.

29. Moreover, providing documents to BofA’s counsel at the same time such documents are shared with the Committee’s counsel will not increase the burden of the discovery process on Freddie Mac at all and will avoid further delay. Conversely, if BofA’s counsel cannot gain access to these documents, there is a substantial risk that its significant stake in the Debtor’s case could be irreversibly damaged without any corresponding benefit to Freddie Mac. Stated differently, the fact that disclosure to BofA’s counsel on an “attorney’s eyes only” basis will not

cause delay or prejudice to any party weighs heavily in favor of granting the relief requested herein.

30. Finally, there is ample authority to guide the Court in fashioning an appropriate order that both furthers the legitimate ends of the Rule 2004 discovery process and protects Freddie Mac's interests in avoiding disclosure of certain information to its competitors. Several courts have approved of the use of "attorney's eyes only" provisions as an appropriate means for allowing document productions pursuant to valid discovery requests without infringing the producing party's right to protect confidential or commercially sensitive information. *See, e.g., Covelo Clothing, Inc. v. Atlandia Imports, Inc.*, 2007 WL 4287731, at *1-2, Civ. Action No. 07-cv-02403, (D. Colo. 2007) (denying motion to quash third-party subpoena based on appropriate level of protection afforded under provision limiting access to attorney's eyes only); *Official Unsecured Creditors Comm. Of Media Vision Tech., Inc. v. Jain*, 215 F.R.D. 587, 589-90 (N.D. Cal. 2003) (granting Committee's motion to compel production of Ernst & Young's audit manuals on an "attorney's eyes only" basis to protect against disclosure of certain trade secrets contained in the manuals to competitors); *Plant Genetic Systems, N.V. v. Northrup King Co., Inc.*, 6 F.Supp.2d 859, 862 (E.D. Mo. 1998) (denying third-party motion to quash subpoena for production of documents, in part, because protective order restricted access to documents designated as confidential to outside legal counsel); *Quodron Systems, Inc. v. Automatic Data Processing, Inc.*, 141 F.R.D. 37, 40 (S.D.N.Y. 1992) ("Protective orders that limit access to certain documents to counsel and experts only are commonly entered in litigation involving trade secrets and other confidential research, development, or commercial information.") (citing *United States v. Davis*, 131 F.R.D. 391, 400 (S.D.N.Y. 1990); *Culligan v. Yamaha Motor Corp.*,

110 F.R.D. 122, 125-26 (S.D.N.Y. 1986); *Stillman v. Vassileff*, 100 F.R.D. 467, 468 (S.D.N.Y. 1984)).

31. Perhaps tacitly acknowledging that limiting access in these ways would adequately address any lingering concerns about disclosing any confidential and/or proprietary information with BofA, Freddie Mac also objects to BofA's access on a purely technical ground. Specifically, Freddie Mac argues that BofA's request for clarification should be denied as an untimely motion for reconsideration. Objection at ¶¶ 38-39. This is simply not the case. BofA did not file a separate motion for reconsideration because it sought the same relief as set forth in the Committee's Clarification Motion. The Court considered the Committee's Clarification Motion at the previous hearing on May 7th, granting the Committee's counsel access to Freddie Mac's documents on an "attorney's eyes only" basis but expressly deferring a ruling on BofA's Clarification Joinder Motion until the June 18th hearing. Notwithstanding Freddie Mac's attempt to invent a procedural deficiency in BofA's filing, the following colloquy from the May 7th hearing confirms that the Court fully intended to hear the merits of BofA's Clarification Joinder Motion at the June 18th hearing:

MR. JOHNSON (Freddie Mac's counsel): Can we have clarification, Your Honor? I believe you're in essence granting the committee's clarification motion. There was a BOA joinder to that where they want access as well.

THE COURT: The way I understood Mr. Tessitore, all he wanted was to join to say the committee's lawyers should get it. Are you looking for you to get it, too?

MR. TESSITORE (BofA's counsel): Bank of America's lawyers have attorneys eyes only access subject to the same nondisclosure agreement.

THE COURT: I'm only giving it to the committee. You have the right to seek that, and we'll have an evidentiary hearing on that.

MR. TESSITORE: That will be set for an evidentiary hearing at the same time.

THE COURT: We'll set that as an evidentiary hearing together with the motions for 2004.

MR. TESSITORE: Thank you.

THE COURT: I would expect Mr. Johnson and his crowd to show me good cause why attorney eyes only shouldn't be allowed, but I'll give them that opportunity to get that information and any statutory authority that stops me from doing what I'm doing because you've got a conservator in there.

May 7, 2010 Hearing Tr. at 33:25–34:1-25. Instead of complying with the Court's express instruction to show "good cause" for denying access to BofA's counsel, Freddie Mac has relied on a technical argument that the Clarification Joinder Motion should be treated as an untimely motion for reconsideration. For the reasons discussed above, this argument should be rejected by the Court.

32. Based on the foregoing, the Court may enter an order authorizing counsel for BofA to access and review documents designated by Freddie Mac as "confidential" subject to an executed confidentiality agreement.

WHEREFORE BofA respectfully requests the entry of an order (1) granting the BofA 2004 Motion, (2) allowing BofA's counsel to have immediate access to all documents already produced and that may be produced by Freddie Mac irrespective of any confidentiality designation on an "attorney's eyes only" basis and subject to a confidentiality agreement executed between Freddie Mac and BofA, and (3) granting such further relief as the Court deems just and proper.

Dated: June 16, 2010.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been served either electronically or by United States Mail on the 16th day of June 2010 to the following:

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