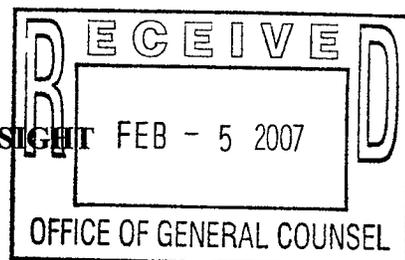


UNITED STATES OF AMERICA  
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT



**In the Matter of:**

**FRANKLIN D. RAINES,  
J. TIMOTHY HOWARD, and  
LEANNE G. SPENCER,  
Respondents.**

**Notice No. 2006-1**

**Judge William B. Moran**

**RESPONDENT FRANKLIN D. RAINES'S MEMORANDUM CONCERNING THE  
REQUIREMENTS OF 12 U.S.C. § 4633(a)(2)**

In response to the Court's invitation at the off-the-record telephonic status conference held on January 31, Respondent Franklin D. Raines respectfully submits this memorandum to set forth the reasons why, pursuant to 12 U.S.C. § 4633(a)(2), the hearing in this matter must commence by February 16, 2007.

The statute requires that the hearing commence within 60 days of the service of the notice of charges unless the respondent requests a later date, which none of the Respondents has done in this case. That the statute imposes such a requirement is not merely Mr. Raines's position. It is what OFHEO itself has recently recognized, in a motion filed in other litigation. In seeking an extension of filing deadlines in an action pending in the U.S. District Court for the District of Columbia, OFHEO urged that it be given additional time because 12 U.S.C. § 4633(a)(2) requires that the hearing in this matter be held within 60 days of December 18, 2006 unless the respondents request a later date. *See* Ex. 1. Directly quoting from the statute, OFHEO specifically stated that the "hearing 'shall be fixed for a date not . . . later than sixty days' after

OFHEO serves the Notice of Charges,” and that “[t]he statutorily prescribed time for holding the administrative hearing *only* may be altered ‘at the request of the party served.’” *Id.* at 2 (quoting 12 U.S.C. § 4633(a)(2)) (emphasis added). As noted, none of the Respondents has requested that the 60-day period be altered. Accordingly, pursuant to the plain language of the statute and pursuant to OFHEO’s own recognition that the statute means what it says, the hearing must commence within 60 days of the service of the Notice of Charges, i.e., by February 16, 2007.

### **BACKGROUND**

Following a Special Examination that began three years ago, *see* Declaration of Alex G. Romain, OFHEO filed and served the Notice of Charges on December 18, 2006. The Notice of Charges seeks relief pursuant to 12 U.S.C. §§ 4631 and 4636 and gives notice that a hearing will be held pursuant to 12 U.S.C. § 4633.

On January 17, counsel for Mr. Raines received correspondence from counsel for OFHEO indicating that this Court had been assigned to adjudicate the matter. On January 19, Mr. Raines requested a scheduling conference pursuant to 12 C.F.R. § 1780.33(a) and made clear his position that any hearing must commence by February 16, 2007:

The hearing in this matter must be fixed for a date not later than sixty days after the service of the notice of charges, unless the party served requests a later date. *See* 12 U.S.C. § 4633(a)(2). We will not, on behalf of Mr. Raines, request a later date. The notice of charges in this matter was served December 18, 2006. Under our reading of the statute, the hearing in this matter must therefore commence by February 16, 2007.

Ex. 2.

On January 24, in a motion filed in a case brought by Respondent Howard in district court, OFHEO itself took note of the mandate of 12 U.S.C. § 4633(a)(2). OFHEO told the court:

Under the Act, a hearing “shall be fixed for a date not earlier than 30 days nor later than 60 days” after OFHEO serves the Notice of Charges. 12 U.S.C. § 4633(a)(2). *The statutorily prescribed time for holding the administrative hearing only may be altered “at the request of the party served.” Id.*

Ex. 1, at 2 (emphasis added).

Despite OFHEO’s own acknowledgment that the 60-day period may be altered only at the request of the party served, and despite the fact that none of the Respondents has requested a hearing beyond the 60-day period, earlier this week OFHEO submitted a proposed schedule that contemplates a hearing, at the earliest, *in 2008*. See Ex. 3. OFHEO seeks an interval between the notice of charges and the hearing of over a year—*more than six times* the 60-day period prescribed by Congress. OFHEO’s submission makes no mention of § 4633(a)(2).

In the off-the-record telephonic status conference held on January 31, the Court questioned whether the requirements of the statute would be satisfied if the scheduling conference were held within 60 days of the Notice of Charges. Counsel for OFHEO took the position that that would satisfy the statute. Counsel for Respondents took the position that it would not. The Court invited the parties to submit memoranda by February 2 setting forth their positions concerning the scheduling of the hearing in this matter.

## ARGUMENT

Respondent Franklin D. Raines respectfully submits that the Federal Housing Enterprises Financial Safety and Soundness Act, 12 U.S.C. §§ 4501-4641, entitles him to a hearing, commencing within 60 days of the service of the charges against him, on the merits of the allegations set forth in the Notice of Charges.

As the Supreme Court has recently emphasized, “[w]hen the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (internal quotation omitted). “[A]bsent a clearly expressed legislative intention to the contrary, the words of the statute are conclusive.” *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 28 (1989) (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); accord, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (“[W]here, as here, the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

The foregoing principle controls the timing of the hearing in this matter.

Three statutory provisions are relevant. The first, 12 U.S.C. § 4631(c)(1), provides:

Each notice of charges under this section shall contain a statement of the facts constituting the alleged conduct or violation and shall fix a time and place at which a hearing will be held to determine on the record whether an order to cease and desist from such conduct or violation should issue.

The second, 12 U.S.C. § 4636(c)(1), provides in pertinent part:

The Director shall establish standards and procedures governing the imposition of civil money penalties under subsections (a) and (b) of this section. Such standards and procedures—

....

(B) shall provide for the imposition of a penalty only after the enterprise, executive officer, or director has been given an opportunity for a hearing on the record pursuant to section 4633 of this title; . . . .

The third, 12 U.S.C. § 4633(a), provides in pertinent part:

(1) Venue and record

Any hearing under section 4631 or 4636(c) of this title shall be held on the record and in the District of Columbia.

(2) Timing

Any such hearing shall be fixed for a date not earlier than 30 days nor later than 60 days after service of the notice of charges under section 4631 of this title or determination to impose a penalty under section 4636 of this title, unless an earlier or a later date is set by the hearing officer at the request of the party served.

In this case, OFHEO has sought relief pursuant to both § 4631 and § 4636.

Where OFHEO proceeds under either of those provisions, the timing of a hearing is controlled by § 4633(a)(2). And the meaning of § 4633(a)(2) is plain: A hearing to determine whether to grant the relief sought by OFHEO shall be set for a date between 30 and 60 days after service of the notice of charges, unless the party served requests an earlier or a later date.

In a motion discussing the very Notice of Charges filed in this case, OFHEO itself has recognized that this is what the statute means:

Under the Act, a hearing “shall be fixed for a date not earlier than 30 days nor later than 60 days” after OFHEO serves the Notice of Charges. 12 U.S.C. § 4633(a)(2). The statutorily prescribed time for holding the administrative hearing only may be altered “at the request of the party served.” *Id.*

Ex. 1, at 2.

It is equally clear that neither Mr. Raines nor any of the other Respondents has requested that the hearing commence more than 60 days after December 18.

OFHEO’s recent proposal that the hearing be postponed until 2008 is properly construed as a request for a waiver of the requirement that the hearing commence within 60 days of service of the notice of charges. The statute could not be more plain that OFHEO may not compel such a waiver. And Respondents have made clear that they will not provide such waivers.

In the telephonic status conference earlier this week, the Court raised the question whether § 4633(a)(2) can be construed to require only that a scheduling conference be held within 60 days of the service of the Notice of Charges. It is respectfully submitted that that would not be a permissible construction of the statute. By its terms, § 4633(a)(2) addresses when the “hearing” must commence, not the date of any scheduling hearing or conference. Section 4631(c)(1) confirms that the hearing to be held pursuant to that provision is “to determine on the record whether an order” granting the relief sought by OFHEO “should issue,” not simply to determine matters relating to scheduling.

Because the statutory language is clear, there is no need to consult anything else.

But OFHEO's regulations confirm that a scheduling conference is separate from a hearing and takes place before the hearing:

Within 30 days of service of the notice or order commencing a proceeding or such other time as the parties may agree, the presiding officer shall direct representatives for all parties to meet with him in person at a specified time and place *prior to the hearing* or to confer by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a "scheduling conference." The identification of potential witnesses, the time for and manner of discovery and the exchange of any *prehearing* materials including witness lists, statements of issues, stipulations, exhibits and any other materials may also be determined at the scheduling conference.

12 C.F.R. § 1780.33(a) (emphases added). In providing that the scheduling conference shall occur "*prior to the hearing*" (emphasis added), the regulation clearly contemplates that the scheduling conference is an event separate and apart from the hearing. Similarly, in providing that the time for and manner of discovery and the exchange of "*prehearing* materials including witness lists" (emphasis added) may be determined at the scheduling conference, the regulation again clearly contemplates that the status conference is to occur before the hearing and is not part of the hearing.

Thus, it is apparent from both the statute and the regulation that the requirement that the hearing begin within 60 days of the notice of charges is not met merely by holding a scheduling conference within 60 days of the notice of charges. The hearing to determine on the record whether the relief sought in the Notice of Charges will be granted must commence during that period.<sup>1</sup>

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<sup>1</sup> In the recent off-the-record telephonic status conference, the Court requested that Respondents submit proposed scheduling orders. Mr. Raines's proposed scheduling order accompanies this Memorandum.

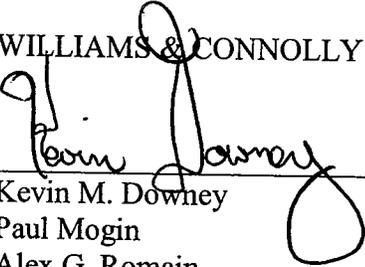
**CONCLUSION**

For the foregoing reasons, the hearing of this matter should begin by February 16, 2007.

Dated: February 2, 2007

Respectfully submitted,

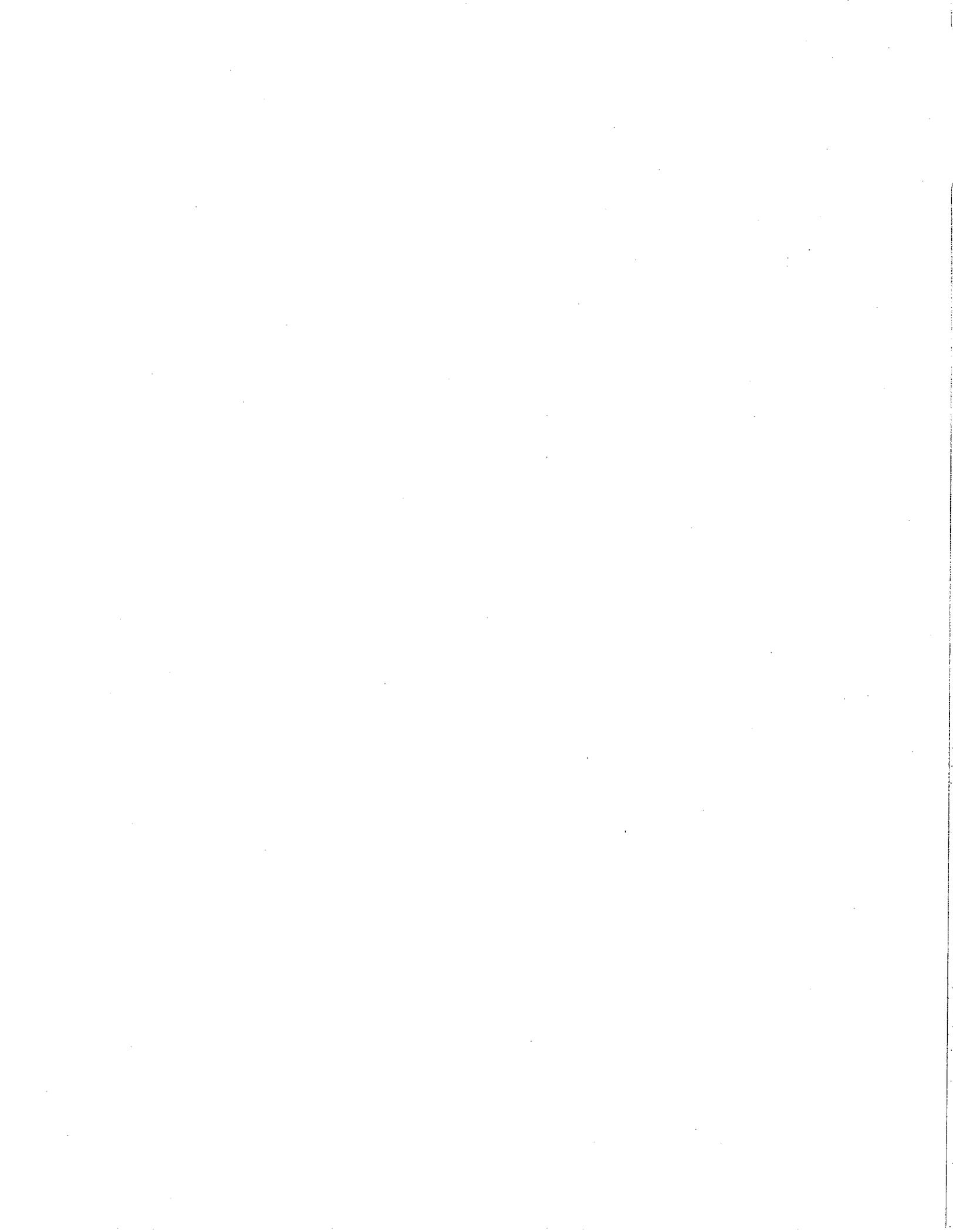
WILLIAMS & CONNOLLY LLP

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Kevin M. Downey  
Paul Mogin  
Alex G. Romain  
Joseph M. Terry

725 Twelfth Street, N.W.  
Washington, DC 20005  
(202) 434-5000  
(202) 434-5029 (facsimile)

*Counsel for Respondent Franklin D. Raines*



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

J. TIMOTHY HOWARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case Number: 1:07-ms-00020
	)	
JAMES B. LOCKHART, III,	)	Hon. Richard J. Leon
DIRECTOR, OFFICE OF	)	
FEDERAL HOUSING	)	
ENTERPRISE OVERSIGHT,	)	
	)	
Defendant.	)	
	)	

**MOTION FOR EXTENSION OF TIME TO RESPOND  
TO PLAINTIFF'S MOTION TO REQUIRE OFHEO  
TO PURSUE NOTICE OF CHARGES IN DISTRICT COURT**

The Office of Federal Housing Enterprise Oversight (OFHEO) , by undersigned counsel, respectfully requests a 45-day extension of time to respond to plaintiff's Motion to Require OFHEO to Pursue Notice of Charges in District Court ("Motion to Require") filed in the above-captioned case. OFHEO's response is due to be filed on January 26, 2007, but for the reasons stated below, the agency is unable to respond on that date and requests an extension of time until March 12, 2007.

1. Plaintiff's motion, in effect, asserts a new cause of action against an agency of the federal government, for it seeks to compel the Court to order injunctive relief regarding OFHEO's exercise of authority under the Federal Housing Enterprises Safety and Soundness Act of 1992 (the Act), 12 U.S.C. § 4501, *et seq.*, and the implementing regulations, promulgated at 12 C.F.R. Part 1780. Indeed, even the caption of the Motion to Require denotes that, with respect to this matter, J. Timothy Howard is appearing as a "plaintiff" and that he has filed a claim for relief against the Director of OFHEO as "defendant."

2. Other than in the context of the instant motion, these two individuals have not appeared in such capacities in either this matter or any other pending litigation. Although OFHEO has appeared in the related *Fannie Mae Derivative Litigation*, Consolidated Civil Action No. 1:04-cv-01783

(RJL), as a third-party subpoena respondent, neither OFHEO nor any other government agency has entered an appearance as a party in that case. Therefore, in essence, plaintiff's "motion" initiates a new cause of action against the federal government. In cases where new civil actions are filed against a federal agency, the government normally has 60 days to file an answer or otherwise respond to a complaint. Fed. R. Civ. P. 12(a)(3)(A).

3. Plaintiff's Motion to Require raises novel jurisdictional issues with respect to the Act. Further, one of plaintiff's co-defendants in the *Fannie Mae Derivative Litigation*, Franklin D. Raines, filed a petition for issuance of a writ of mandamus in the Court of Appeals for the District of Columbia on January 17, 2007 (No. 07-1011), which contends, as does plaintiff's "motion" here, that the District Court should be compelled to exercise jurisdiction over the administrative proceedings resulting from OFHEO's issuance of its Notice of Charges. Because both plaintiff and Mr. Raines seek the same relief and raise similar arguments, undersigned counsel must coordinate and consult with other offices within the Department of Justice in drafting a response to plaintiff's "motion." Such coordination not only cannot be accomplished by the current deadline for the government's response of January 26, 2007, but also requires ample time for review and discussion.

4. OFHEO served a Notice of Charges against Mr. Howard on December 18, 2006. Although he does not claim surprise or otherwise offer an explanation for delay, plaintiff waited almost a month before filing the Motion to Require. Under the Act, a hearing "shall be fixed for a date not earlier than 30 days nor later than 60 days" after OFHEO serves the Notice of Charges. 12 U.S.C. § 4633(a)(2). The statutorily prescribed time for holding the administrative hearing only may be altered "at the request of the party served." *Id.* To date, in the administrative proceedings, Mr. Howard has filed discovery requests and has not requested that the hearing date be moved in order to allow this Court sufficient time to resolve the Motion to Require. Indeed, by filing the Motion to Require while at the same time moving forward in the administrative proceedings, plaintiff herein appears to be engaged in a deliberate effort to stymie an orderly and cohesive resolution of the forum

issue.

5. In addition, undersigned counsel first learned of this motion and the related derivative litigation on January 18, 2007. The requested extension also is necessary in light of a number of deadlines and commitments in several other cases and matters to which counsel is assigned.

6. Government counsel spoke with plaintiff's attorney, Eric Delinsky, on January 22, 2007. Mr. Delinsky advised the undersigned that plaintiff opposes this motion.

#### CONCLUSION

For the foregoing reasons, the Court should grant the defendant's motion for an extension of time, to and including March 12, 2007, in which to file defendant's response to plaintiff's "motion."

Submitted: January 24, 2007

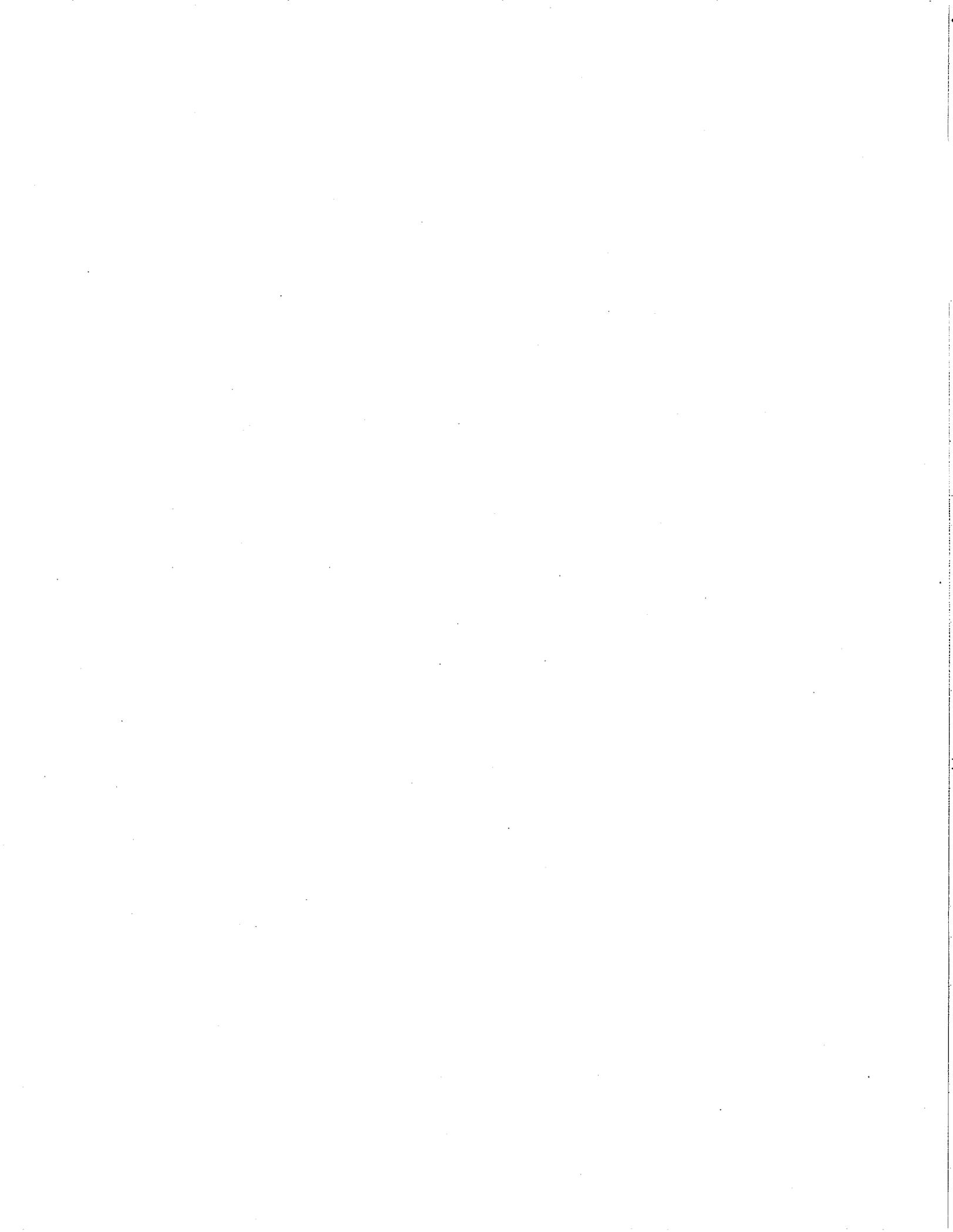
Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

JEFFREY A. TAYLOR  
United States Attorney

/s/

ARTHUR R. GOLDBERG (D.C. Bar # 80661)  
CARLOTTA WELLS  
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**UNITED STATES OF AMERICA  
OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT**

**In the Matter of:**

**FRANKLIN D. RAINES,  
J. TIMOTHY HOWARD, and  
LEANNE G. SPENCER,  
Respondents.**

**Notice Number 2006-1**

**Judge William B. Moran**

**RESPONDENT FRANKLIN D. RAINES'S  
REQUEST FOR A SCHEDULING CONFERENCE**

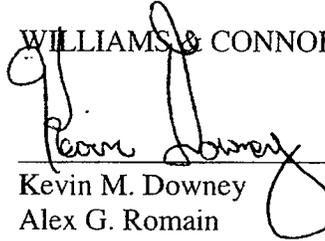
Respondent Franklin D. Raines respectfully requests that the Court hold a scheduling conference in the referenced action, in accordance with the requirements of 12 C.F.R. § 1780.33(a).

The hearing in this matter must be fixed for a date not later than sixty days after the service of the notice of charges, unless the party served requests a later date. *See* 12 U.S.C. § 4633(a)(2). We will not, on behalf of Mr. Raines, request a later date. The notice of charges in this matter was served December 18, 2006. Under our reading of the statute, the hearing in this matter must therefore commence by February 16, 2007.

Dated: January 19, 2007

Respectfully submitted,

WILLIAMS & CONNOLLY LLP

A handwritten signature in black ink, appearing to read "Kevin M. Downey", is written over a horizontal line. The signature is stylized and cursive.

Kevin M. Downey  
Alex G. Romain  
John E. Clabby

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(202) 434-5000  
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*Counsel for Respondent Franklin D. Raines*

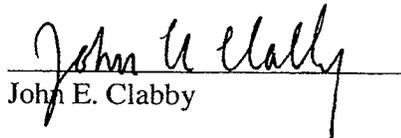
**CERTIFICATE OF SERVICE**

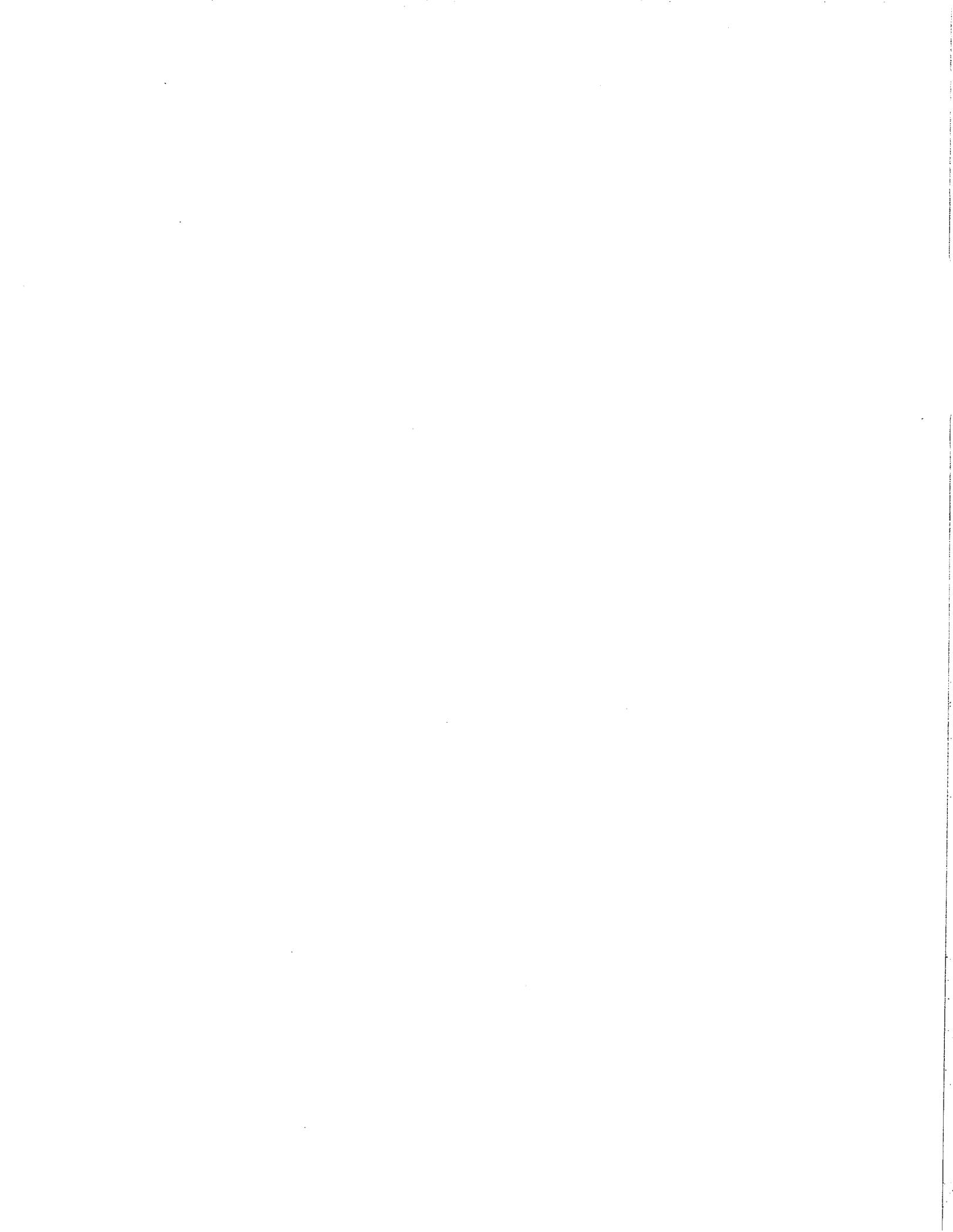
I hereby certify that on this 19th day of January, 2007, I caused to be served by hand delivery true and correct copies of Respondent Franklin D. Raines's Request for a Scheduling Conference on:

Mr. David A. Felt, Esq.  
Deputy General Counsel  
Office of Federal Housing Enterprise Oversight  
1700 G Street N.W.  
Washington, D.C. 20552

Mr. Steven M. Salky, Esq.  
Zuckerman Spaeder LLP  
1800 M Street, N.W., Suite 1000  
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*Counsel for Respondent J. Timothy Howard*

Mr. David S. Krakoff, Esq.  
Mayer, Brown, Rowe & Maw LLP  
1909 K Street, NW  
Washington, DC 20006-1101  
*Counsel for Respondent Leanne G. Spencer*

  
John E. Clabby





Replies to responses to motions to compel 15 days after response

Deadline for final production of de-privileged documents (De-privileged documents to be produced on a rolling basis) October 1, 2007

### *Experts*

OFHEO to notify Respondents of the names of its planned expert witnesses and the subject areas to be addressed by its experts' reports July 2, 2007

Respondents to notify OFHEO of the names of their expert witnesses and the subject areas to be addressed by their experts' reports July 16, 2007

OFHEO to provide names of any additional expert witnesses necessary to address any subject areas first identified by Respondents on July 16, 2007 July 30, 2007

### *Dispositive Motions*

Deadline for filing of dispositive motions: October 1, 2007

Deadline for filing oppositions to dispositive motions: November 1, 2007

Deadline for replies in support of dispositive motions: November 15, 2007

### *Pretrial and Trial Schedules*

Identify and exchange list of witnesses, along with short summary of expected testimony from each witness. November 30, 2007

Exchange all documents to be introduced at hearing Proposed exhibits shall be numbered as: OFHEO, Raines, Howard and Spencer, as appropriate. Each page is to have a Bates-stamp number and be single-sided; for example, "Raines Ex. 1." December 7, 2007

Pretrial statements filed December 14, 2007

Representations of demonstrative exhibits exchanged December 21, 2007

Evidentiary hearing \_\_\_\_\_

Having considered OFHEO's proposed schedule, and it appearing to the Court that it should be entered, it is this \_\_\_\_ day of \_\_\_\_\_, 2007, hereby

ORDERED that proceedings in this matter shall conform to this schedule.

\_\_\_\_\_  
Honorable William B. Moran  
United States Administrative Law Judge