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United States Court of Appeals

for the

Second Circuit

IN RE FHFA COORDINATED SECURITIES LITIGATION

PETITION FOR A WRIT OF MANDAMUS RELATING TO DECISIONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK NOS. 11 CIV. 5201, 11 CIV. 6188, 11 CIV. 6189, 11 CIV. 6190, 11 CIV. 6192, 11 CIV. 6193, 11 CIV. 6195, 11 CIV. 6196, 11 CIV. 6198, 11 CIV. 6200, 11 CIV. 6201, 11 CIV. 6202, 11 CIV. 6203, 11 CIV. 6739, 11 CIV. 7010 (HONORABLE DENISE L. COTE)

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CORPORATE DISCLOSURE STATEMENT
(FEDERAL RULE OF APPELLATE PROCEDURE 26.1)

UBS

Petitioner UBS Americas Inc. states that it is a wholly owned subsidiary of UBS AG. UBS AG is a publicly held company, the shares of which are traded on the SIX Swiss Exchange and the New York Stock Exchange. No publicly-traded entity owns 10% or more of the stock of UBS AG. Petitioner UBS Real Estate Securities Inc. states that it is a wholly owned subsidiary of UBS Americas Inc. UBS Americas Inc. is a wholly owned subsidiary of UBS AG. No publicly traded entity owns 10% or more of the stock of UBS AG. Petitioner UBS Securities LLC states that its members are UBS Americas Inc. and UBS AG. No publicly traded entity other than UBS AG owns 10% or more of the stock of UBS Securities LLC.

JPMorgan

Petitioners JPMorgan Chase Bank, N.A., J.P. Morgan Mortgage Acquisition Corporation, J.P. Morgan Securities LLC (formerly known as J.P. Morgan Securities Inc.), J.P. Morgan Acceptance Corporation I, EMC Mortgage LLC, Bear Stearns & Co., Inc. (now known as J.P. Morgan Securities LLC), Structured Asset Mortgage Investments II Inc., Bear Stearns Asset Backed Securities I LLC, WaMu Asset Acceptance Corporation, WaMu Capital Corporation, Washington

Mutual Mortgage Securities Corporation and Long Beach Securities Corporation are each directly or indirectly wholly owned subsidiaries of JPMorgan Chase & Co. JPMorgan Chase & Co. is a publicly held company whose shares are traded on the New York Stock Exchange. It has no parent corporation, and no publicly held company owns more than 10% of JPMorgan Chase & Co.'s shares.

HSBC

Petitioners HSBC North America Holdings Inc., HSBC USA Inc., HSBC Markets (USA) Inc., HSBC Bank USA, National Association, HSI Asset Securitization Corporation and HSBC Securities (USA) Inc. are all wholly owned, indirect subsidiaries of HSBC Holdings plc. No publicly held corporation owns 10% or more of the stock of HSBC Holdings plc.

Barclays

Petitioners Barclays Bank PLC, Barclays Capital Inc., and Securitized Asset Backed Receivables LLC are each directly or indirectly wholly owned subsidiaries of Barclays PLC, which is a publicly traded corporation. Barclays PLC has no parent corporation, and no publicly held corporation holds 10% or more of the stock of Barclays PLC.

Deutsche Bank

Petitioners Taunus Corporation, DB Structured Products, Inc., Deutsche Bank Securities Inc., and MortgageIT Securities Corp. are each directly

or indirectly wholly owned subsidiaries of Petitioner Deutsche Bank AG, a publicly held corporation organized under the laws of Germany. Petitioner Deutsche Bank AG has no parent corporation and no publicly-held company owns more than 10% of its stock. Petitioner ACE Securities Corp. is wholly owned by Altamont Holdings Corp., a privately held corporation organized under the laws of Delaware.

First Horizon

Petitioner First Horizon National Corporation ("First Horizon") is a publicly held corporation. First Horizon has no parent, and no publicly held corporation beneficially owns 10% or more of First Horizon's stock. First Horizon is the parent company and 100% owner of the common stock of Petitioner First Tennessee Bank National Association. Petitioner First Tennessee Bank National Association is the parent company and 100% owner of Petitioner FTN Financial Securities Corp. and First Horizon Asset Securities, Inc.

Bank of America

Petitioner Bank of America Corporation is the ultimate corporate parent of all of the Bank of America Petitioners and their respective parent companies, other than itself, and owns 100% of their common stock. Bank of America Corporation is itself a publicly held corporation whose shares are traded on the New York Stock Exchange. Bank of America Corporation has no parent, and no public-

ly held corporation owns 10% or more of Bank of America Corporation's stock.

Citigroup

Petitioners Citigroup Global Markets Inc. and Citigroup Mortgage Loan Trust Inc. are wholly owned by Citigroup Financial Products Inc., which is wholly owned by Citigroup Global Markets Holdings Inc., which in turn is wholly owned by Petitioner Citigroup Inc. Petitioner Citigroup Global Markets Realty Corp. is wholly owned by Petitioner Citigroup Inc. Petitioner Citigroup Inc. is a publicly traded corporation that has no parent corporation. No publicly held corporation holds 10 percent or more of the stock of Petitioner Citigroup Inc.

Goldman Sachs

Petitioners Goldman, Sachs & Co., GS Mortgage Securities Corp., Goldman Sachs Mortgage Company and Goldman Sachs Real Estate Funding Corp. are each directly or indirectly wholly owned subsidiaries of The Goldman Sachs Group, Inc. ("GS Group"), which is a corporation organized under the laws of Delaware and whose shares are publicly traded on the New York Stock Exchange. GS Group has no parent corporation, and to the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

Credit Suisse

Petitioners Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc., Credit Suisse First Boston Mortgage Acceptance Corp., Asset Backed Securities Corporation, Credit Suisse First Boston Mortgage Securities Corporation and Credit Suisse (USA), Inc. are each directly or indirectly wholly owned subsidiaries of Credit Suisse Holdings (USA), Inc. Credit Suisse Holdings (USA), Inc. is a jointly owned subsidiary of (1) Credit Suisse Group AG, (2) Credit Suisse Group AG, Guernsey Branch, which is a branch of Credit Suisse Group AG, and (3) Credit Suisse AG. Credit Suisse AG has publicly registered debt securities and warrants in the United States and elsewhere. Credit Suisse AG is a wholly owned subsidiary of Credit Suisse Group AG, which is a corporation organized under the laws of the Country of Switzerland and whose shares are publicly traded on the SIX Swiss Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares.

Nomura

Petitioner Nomura Holding America Inc., a private company, is 100% owned by Nomura Holdings, Inc., a publicly held corporation. Petitioner Nomura Holding America Inc. is the parent company and 100% owner of Petitioner Nomura Securities International, Inc. Petitioner Nomura Holding America Inc. is also the parent company and 100% owner of Nomura America Mortgage Finance, LLC,

which is the parent company and 100% owner of Petitioner Nomura Asset Acceptance Corporation, Nomura Home Equity Loan, Inc., and Nomura Credit & Capital, Inc.

Merrill Lynch

Bank of America Corporation is the ultimate corporate parent of all of the Merrill Lynch Petitioners and their respective parent companies, and owns 100% of their common stock. Bank of America Corporation is itself a publicly held corporation whose shares are traded on the New York Stock Exchange. Bank of America Corporation has no parent, and no publicly held corporation owns 10% or more of Bank of America Corporation's stock.

SG Americas

Petitioner SG Americas, Inc. is a wholly owned subsidiary of Société Générale. Société Générale is a publicly held company whose shares are traded on the Euronext Stock Exchange. No publicly traded entity owns 10% or more of the stock of Société Générale. Petitioner SG Americas Securities Holdings, LLC is a Delaware limited liability company and is a wholly owned subsidiary of Société Générale. Petitioner SG Americas Securities, LLC is a Delaware limited liability company and is a wholly owned subsidiary of SG Americas Securities Holdings, LLC. Petitioner SG Mortgage Finance Corp. is a wholly owned subsidiary of SG Americas, Inc. Petitioner SG Mortgage Securities, LLC is a Delaware limited lia-

bility company and is a wholly owned subsidiary of SG Mortgage Finance Corp.

Morgan Stanley

Petitioners Morgan Stanley & Co. Incorporated (n/k/a Morgan Stanley & Co. LLC), Morgan Stanley Mortgage Capital Holdings LLC (d/b/a Morgan Stanley Mortgage Capital, Inc.), Morgan Stanley ABS Capital I, Inc., Morgan Stanley Capital I, Inc., Saxon Capital, Inc., Saxon Funding Management LLC f/k/a Saxon Funding Management, Inc., and Saxon Asset Securities Company, are all directly or indirectly wholly owned subsidiaries of Morgan Stanley, a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 7-1 Marunouchi 2-chrome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

GMAC Mortgage Group / Ally

Petitioners GMAC Mortgage Group, LLC and Ally Securities, LLC are direct, wholly owned subsidiaries of Petitioner Ally Financial Inc. No publicly held corporation owns 10% or more of the stock of Ally Financial Inc.

RBS Securities

Petitioner RBS Securities Inc., formerly known as Greenwich Capital Markets, Inc., is an indirect wholly owned subsidiary of The Royal Bank of Scotland Group plc, a public company whose stock is traded on the London Stock Ex-

change. The Royal Bank of Scotland Group plc has no parent corporation and no publicly held company owns more than 10% of its stock.

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STATEMENT OF JURISDICTION

This Court has authority to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651(a), because the underlying action is "within its appellate jurisdiction although no appeal has been perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966).

STATEMENT OF RELIEF SOUGHT

Petitioners are defendants in 15 separate actions (the "Actions")[1] commenced by the Federal Housing Finance Agency ("FHFA") as purported conservator for Fannie Mae and Freddie Mac (collectively, the Government Sponsored Entities or "GSEs"), the largest participants in the mortgage loan business. These Actions involve statutory and common law securities claims arising from the GSEs' purchase of approximately $200 billion in residential mortgage-backed securities ("RMBS") sold in approximately 500 securitizations, and represent perhaps the largest collection of securities litigations ever filed in the United States. The District Court denied Petitioners' motions to dismiss on the ground that

[1] *FHFA v. UBS Americas Inc.*, 11-cv-5201; *FHFA v. JPMorgan Chase & Co.*, 11-cv-6188; *FHFA v. HSBC North America Holdings, Inc.*, 11-cv-6189; *FHFA v. Barclays Bank PLC*, 11-cv-6190; *FHFA v. Deutsche Bank AG*, No. 11-cv-6192; *FHFA v. First Horizon National Corp.*, 11-cv-6193; *FHFA v. Bank of America Corp.*, 11-cv-6195; *FHFA v. Citigroup Inc.*, 11-cv-6196; *FHFA v. Goldman Sachs & Co.*, 11-cv-6198; *FHFA v. Credit Suisse Holdings (USA), Inc.*, 11-cv-6200; *FHFA v. Nomura Holding America, Inc.*, 11-cv-6201; *FHFA v. Merrill Lynch & Co., Inc.*, 11-cv-6202; *FHFA v. SG Americas, Inc.*, 11-cv-6203; *FHFA v. Morgan Stanley*, 11-cv-6739; *FHFA v. Ally Financial Inc.*, 11-cv-7010.

FHFA's core allegations of "pervasive and systematic breaches" of loan underwriting guidelines were "sufficient to render plausible FHFA's assertion that the mortgage originators serially deviated from their mortgage originating standards." (A-129, 151-52.)[2] However, the District Court has foreclosed discovery into the GSEs' extensive business dealings with those same originators and types of mortgages during the relevant time period. In so doing, the District Court has deprived Petitioners of their right to obtain evidence that the GSEs either knew the extent to which those mortgage originators had abandoned their guidelines or, more likely, had concluded that originators did *not* materially deviate from the guidelines disclosed in Petitioners' offering documents. The District Court has also barred discovery on other important issues – including statute of limitations, loss causation, the materiality of any alleged defects, the adequacy of Petitioners' due diligence, and justifiable reliance – on the grounds that any discovery beyond the business units that purchased the securitizations at issue is irrelevant and burdensome.

Initially filed as unrelated actions and randomly assigned, all of the Actions were transferred to the Honorable Denise L. Cote in December 2011. Judge Cote is an experienced jurist, and seeking mandamus relief is not something

[2] Citations to "A-__" are to the Appendix to this Petition. Citations to "CA-__" are to the Confidential Appendix to this Petition, which contains documents filed under seal in the District Court pursuant to the Protective Order governing the Actions, and which is being delivered to this Court only in hard copy. Petitioners have moved for leave to file the Confidential Appendix under seal.

Petitioners do lightly. But Petitioners are being forced to proceed under a series of gravely prejudicial rulings, some aimed at pressuring Petitioners to settle. This Petition does not seek to redress run-of-the-mill discovery rulings, but rather a grossly inequitable, clearly erroneous framework for litigation that deprives Petitioners of their basic due process rights to confront multi-billion dollar claims.

First, the District Court has denied multiple requests for critical discovery of the GSEs' "Single Family" business units. During the same period in which the GSEs' "Private Label Securities" or "PLS" units purchased RMBS whose offering materials FHFA alleges were misstated because of a "widespread abandonment of originators' reported underwriting guidelines,"[3] the GSEs' Single Family units competed with Petitioners to purchase, securitize. and guarantee hundreds of billions of dollars' worth of mortgage loans from the very same originators. These Single Family or other non-PLS units at times helped select the collateral backing the PLS at issue in these cases. They had first-hand knowledge about originators' lending practices and would have been aware of any widespread abandonment of underwriting guidelines by those originators. Conversely, if the Single Family units were *unaware* of any "pervasive and systematic breaches" of underwriting guidelines despite their extensive dealings with originators, that fact would undermine the fundamental premise of FHFA's claims. Either way, discovery into

[3] *See* No. 11-cv-6198, ECF No. 70, at ¶ 130.

the Single Family units is critical to nearly every element of FHFA's claims and Petitioners' defenses, including (i) statute of limitations, (ii) statutory knowledge, (iii) existence of misstatements, (iv) materiality, (v) adequacy of due diligence, (vi) loss causation, and (vii) justifiable reliance.

The District Court has prohibited discovery into the GSEs' Single Family or other non-PLS units based in part on the premise that only the knowledge of particular PLS traders concerning specific mortgages underlying each securitization is relevant for purposes of the Securities Act claims. This is legal error; the knowledge of non-PLS business units, including Single Family, counts as the knowledge of these enterprises. The District Court's unduly restrictive view also ignores that discovery of the Single Family or other non-PLS units would provide important evidence on issues other than knowledge. And the District Court has predicated its ban on Single Family discovery on purported findings of fact resting almost entirely on representations by counsel for FHFA as to material and disputed issues on the merits. These include what PLS employees knew – or could know – about the loans and originators involved in the securitizations at issue, and whether the GSEs' securitizations differed significantly from those securitizations. The District Court has credited FHFA's counsel's assertions in the face of compelling documentary evidence to the contrary. The District Court has thus foreclosed evidence on these issues from ever reaching a jury.

Second, the District Court has limited Petitioners to an aggregate total

of 20 depositions of the GSEs and FHFA, combined, across all 15 Actions – just over one deposition of FHFA and the GSEs per Action. The deposition limits apply to a sixteenth lawsuit filed by FHFA in a different district, which is being coordinated before Judge Cote as well.[4] By contrast, the District Court granted FHFA a total of more than *400* fact depositions: 20 depositions of each group of corporate defendants – or 320 depositions total – plus depositions of each of the more than 100 individual defendants. Under the collective 20-deposition cap on Petitioners, no Petitioner can decide for itself to take time to inquire of witnesses about issues unique to that Petitioner. Yet the District Court has opined, erroneously, that the statutory "knowledge" defense available to Petitioners under the Securities Act must be proved separately and specifically for each of the 500 securitizations at issue. Under the collective 20-deposition limit, such securitization-specific inquiries would be almost impossible.

The District Court justified its 20-deposition limit by stating that these are "document" cases (which does not explain the gross disparity in the number of depositions allowed to each side), but denied Petitioners relief even after learning that Freddie Mac had destroyed virtually all emails for the period in which it purchased the securities at issue.

Third, while acknowledging that its restrictive view of "knowledge"

[4] *FHFA* v. *RBS, et. al*, No. 11-cv-01383 (D. Conn.) (AWT).

does not apply to the element of justifiable reliance in the six Actions that include fraud and punitive damages claims, the District Court has held that Petitioners must meet a "higher threshold" of relevance to obtain discovery on those claims. The District Court based this ruling on its assessment that Petitioners will not proceed to trial unless they believe they can successfully defend against the Section 11 claim. This clear legal error would leave Petitioners *without* discovery needed to defend against the fraud and punitive damages claims.

Fourth, the District Court's one-sided approach to these Actions is not designed to foster fair and reasonable determination of the issues, but instead to pressure Petitioners to settle.[5] The District Court's rulings wrongly shield the GSEs and their varied but integrated business from scrutiny in colossal litigation brought on their behalf. The rulings prejudge facts a jury should decide based on a full evidentiary record. Neither a fair and reasonable compromise of FHFA's claims nor a fair determination of them at trial can come from placing the parties on such uneven footing. *See Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) ("Although the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlement through coercion.").

STATEMENT OF THE ISSUES

Whether the District Court clearly and indisputably abused its discre-

[5] Addendum A lists certain of the District Court's significant rulings.

tion or exceeded its power by (a) shielding the GSEs from proportionate and relevant document and deposition discovery, (b) making impermissible findings of fact on disputed material issues as predicates for erecting those shields, (c) applying the incorrect standard for determining an organization's knowledge, (d) erroneously ruling that Petitioners must meet a "higher threshold" for relevance to obtain discovery related to FHFA's fraud claims, and (e) improperly coercing settlement.

STATEMENT OF THE FACTS

A. Background

Starting in the 1990s, a number of institutions – including mortgage companies, banks, Wall Street securities firms *and the GSEs* – began issuing RMBS. (A-1485-92.) Over time, the GSEs not only participated in the market for RMBS, but also fueled its expansion by purchasing hundreds of billions of dollars of PLS and issuing even more of their own RMBS. *See Town of Babylon* v. *Fed. Hous. Fin. Agency*, 699 F.3d 221, 225 (2d Cir. 2012) ("The position held in the home mortgage business by [the GSEs] make them the dominant force in that market.").[6] Although the GSEs at one time purchased primarily high credit quality

[6] At the end of 2006, Fannie Mae had $1.9 trillion in outstanding mortgage-backed securities supported by single-family loans that Fannie Mae had securitized. Fannie Mae Form 10-K, dated Dec. 31, 2006, at 7, *available at* http://www.fanniemae.com/ir/pdf/sec/2006/form10k_120606.pdf. Similarly, at the end of 2006, Freddie Mac had issued nearly $1.5 trillion of its own mortgage-backed securities. Freddie Mac 2006 Annual Report at 22, *available at* http://www.freddiemac.com/investors/ar/pdf/2006annualrpt.pdf.

mortgage loans, they purchased substantial volumes of the subprime and "Alt-A" loans that back much of the PLS at issue in these Actions. (A-1485-92.)

In September 2008, the GSEs became insolvent and were purportedly placed under the conservatorship of FHFA. (A-99.) In 2011, FHFA sued nearly every institution that had sold RMBS to the GSEs between 2005 and 2007. Filed separately, the 15 Actions pending in the Southern District of New York were "co-ordinated" by the District Court for pretrial proceedings after Judge Cote "raised her hand" and "volunteer[ed]" to oversee them. (A-55.) FHFA claims tens of billions of dollars of losses from the GSEs' purchase of more than 500 different RMBS, alleging that the offering documents for each failed to disclose "widespread abandonment of originators' reported underwriting guidelines," while misstating loan-to-value ratios and percentages of underlying loans secured by owner-occupied properties. (*See, e.g.*, No. 11-cv-6188, ECF No. 99 at ¶ 358).[7] As FHFA has emphasized, each case is highly individualized, as each involves "(i) different securitizations, (ii) collateralized by different mortgage loans, (iii) underwritten by different loan originators . . ., (iv) according to different underwriting guidelines, (v) marketed and sold by different Petitioners, (vi) on different dates, (vii) by

[7] FHFA alleges violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(a)(2), 77o, as well as the blue-sky laws of Virginia, Va. Code Ann. § 13.1-522(A)(ii), (C), and/or the District of Columbia, D.C. Code § 31-5606.05(a)(1)(B), (c). FHFA asserts common law fraud claims in 11-cv-6188, 11-cv-6192, 11-cv-6198, 11-cv-6202, 11-cv-6739, and 11-cv-7010.

means of different registration statements and prospectus supplements, (viii) signed by different directors and officers and (ix) containing different representations." (A-3.)

Early in the proceedings, the District Court divided the Actions into four tranches, the first of which is FHFA's action against UBS. (A-189.) Discovery in that action is fast-tracked, with fact discovery closing on August 30, 2013. (A-2064.) Fact discovery in the remaining Actions closes on December 6, 2013. (A-1088-91.) The UBS trial is scheduled for January 2014, and trials for cases in the later tranches, most of which will be tried before different District Judges, are scheduled for June 2014, September 2014, and January 2015, respectively. (*Id.*)

Petitioners challenge FHFA's claims in their entirety, both on statute of limitations grounds and on the merits. First, Petitioners intend to show there were no material misstatements, based in part on evidence that the GSEs satisfied themselves that loan originators did not in fact systematically abandon their guidelines. Second, Petitioners seek to develop evidence about the GSEs' knowledge and notice of the alleged misrepresentations and omissions, the GSEs' assessments of whether they were material, and the standards for diligence conducted by the GSEs. Third, Petitioners seek to develop evidence showing that any losses the GSEs suffered were not caused by the alleged misrepresentations. Finally, Petitioners seek to develop evidence that FHFA's fraud claims fail because the GSEs did not reasonably rely on any alleged misrepresentations.

B. Facts and Proceedings Below

In an effort to pressure Petitioners to settle, the District Court has made numerous rulings that have systematically deprived Petitioners of evidence necessary to challenge FHFA's claims. At the preliminary hearing addressing case coordination, for example, the District Court indicated that it wanted to put the parties in a position to "settle [these cases] sooner rather than later." (A-74.) A few months later, days after denying in large part UBS' motion to dismiss,[8] the District Court inquired when the parties would be ready to begin settlement negotiations: "Is any case in this courtroom ready for settlement discussions now? Do we need document discovery? Do we need depositions? Do we need a few depositions, do we need all depositions?" (A-217.) At the following scheduling conference, the District Court pronounced: "I think this litigation should settle. I expect it will settle." (A-324.) As discussed more fully below, the District Court's campaign for settlement appears to have driven several denials of discovery, including discovery the Court deemed most pertinent to the fraud claims.

1. Discovery Denials and Impermissible Findings of Fact

a. The GSEs' Integrated Operations

The GSEs' loan purchasing, guarantee, and securitization businesses, including their Single Family units, are repositories of information relevant to sev-

[8] An interlocutory appeal of the District Court's denial of UBS' motion to dismiss is *sub judice* before this Court. *See* 12-3207-cv.

eral critical issues. One of the key defenses available under Section 11 is that the GSEs possessed knowledge, at the time of their purchases, that would have created "a reasonable inference" of any alleged misstatement or omission. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 43-44 & n.14 (2d Cir. 2006). Such knowledge is also directly relevant to materiality and compliance with the statute of limitations. For fraud claims, knowledge would also refute justifiable reliance. Beyond knowledge, discovery of the Single Family units would uncover evidence relevant to whether any originator had abandoned its loan underwriting standards, whether any defects in loan underwriting were material, the adequacy of Petitioners' due diligence, and whether market factors caused losses on RMBS.

To pursue these lines of defense, Petitioners have sought documents reflecting the GSEs' knowledge of the specific loans and loan originators at issue – wherever that knowledge resides within the GSEs – as well as documents and testimony about the extent to which that information was shared between employees involved in purchasing whole loans and employees involved in purchasing PLS. *Both* segments of each GSE necessarily evaluated relevant loans and originators, and knowledge possessed by either segment is attributable to the GSEs to trigger the statute of limitations and for other purposes.

With a few narrow exceptions, the District Court has foreclosed all

discovery directed at information within the GSEs' Single Family units.[9] The District Court denied Petitioners' request for a Rule 30(b)(6) deposition on the GSEs' policies and practices regarding the purchase of whole loans and to identify custodians with relevant information so that Petitioners could target further discovery. (A-489.) The Court then denied Petitioners' request for an opportunity to brief whether discovery should include the GSEs' Single Family units, particularly in light of evidence that Single Family or other non-PLS personnel had selected the collateral for at least some of the securitizations, and "given the gravity of these issues to the entire case and the defendants' ability to put on their defense." (A-390.)[10] The District Court rejected Petitioners' requests as too broad and Petition-

[9] *See* A-492 (denying request for documents related to Single Family); A-681-82 (refusing to reconsider ruling denying request for documents related to Single Family). FHFA belatedly agreed to produce originator reviews that resulted in a negative finding, but still refuses to produce reviews that approved of originators. (A-1184.) With respect to Fannie Mae, FHFA will produce no reviews unless they informed the decision-making of the PLS traders, their supervisors, and senior risk officers. (A-1505-10.) The District Court did order FHFA to assess whether it could produce studies of appraisal bias at particular originators. (*See* A-1156.) FHFA then agreed to produce such documents for Fannie Mae but maintained that no comparable bias studies exist at Freddie Mac. (A-1505-06.) The District Court later denied Petitioners' request to order FHFA to produce documents related to Freddie Mac's use of Home Value Calibrator to rank originators by their likelihood of mis-calibrated appraisals, an example of such a bias study that Petitioners identified after reviewing FHFA's production. (A-2071-72.)

[10] *See* A-491 (District Court stating that unsworn narrative description FHFA provided in lieu of corporate witness was "a much more reliable presentation . . . than could have been received in any Rule 30(b)(6) deposition"); A-389-90.

ers' proffers as too narrow, then predicted, without basis, that the document production undertaken by FHFA – though it included *no Single Family custodians* – should capture enough information maintained by Single Family. (A-490-92.) Even after it became clear that FHFA's production did not capture that information (CA-1-68, A-1013-80), the District Court continued to rule that discovery of "the other half of FHFA's business" is "not going to happen." (A-824-30.)[11] Although the District Court invited Petitioners to make "targeted, specific" requests for Single Family discovery (A-830), nearly all of those requests were denied too. (*See* A-833-36; A-1170; A-1335; A-1344-45; A-2005-10; A-2036-37.) In refusing Petitioners' requests for discovery to support their knowledge-based defenses, the District Court has permitted FHFA to shield entirely from discovery the side of the GSEs' businesses that interacted directly with the originators that FHFA alleges had abandoned their underwriting standards.

This strict compartmentalization was based on an error of law: that knowledge held by the Single Family units (or anywhere within the GSEs other than their PLS units) is not potentially probative of the GSEs' knowledge for purposes of a Section 11 defense. (A-489-91; A-826-29.) In implementing this legal-

[11] The District Court even prohibited discovery relating to Single Family when it was clear that such discovery posed no burden to FHFA. For example, Petitioners issued a subpoena to the SEC seeking relevant documents that Freddie Mac had already produced to the SEC. Despite the SEC's agreement to produce the documents, (A-838), the District Court ordered Petitioners to withdraw the subpoena. (A-898.)

ly erroneous standard, the District Court compounded its error by making several improper findings of fact. For example, the District Court found that "the PLS traders would not have had access to . . . information" about underlying loans that were reviewed by other GSE units (A-1155-56), and that "it would have been extraordinarily burdensome for a trader even if they legally had access to it to reach across to the other side of the business and try to identify something that might be relevant to a loan included in the supporting loan group underlying [a] securitization." (A-1148-49).[12] Neither finding had any evidentiary support.

The District Court also denied nearly all requests for Single Family discovery relevant to multiple issues aside from "knowledge," and therefore not even purportedly justifiable under the District Court's erroneous view about a Section 11 knowledge defense. For example, with respect to FHFA's fundamental allegation that originators had abandoned their underwriting guidelines, Petitioners sought discovery reflecting results of the GSEs' due diligence on pools of comparable subprime loans from the same originators. Some documents produced by

[12] *See also* A-1365 ("But for many reasons the FHFA PLS traders would not have known which of the loans in the supporting loan groups had previously been rejected by the FHFA whole loan business or the reasons for those rejections"). FHFA's counsel represented that the GSEs had policies in place that prevented the sharing of pertinent information between the different business units, but documents show substantial sharing occurred within both Fannie Mae and Freddie Mac, and that personnel outside of PLS routinely participated in selecting collateral for securitizations. *See* CA1-68, A-1013-1080; CA-399-401 (describing PLS traders' access to loan-level data notwithstanding purported information barriers).

FHFA had revealed that the GSEs' diligence had deemed the vast majority of these loans not materially defective. (CA-133-228, A-1515-79.) The District Court denied this request based on counsel for FHFA's conclusory assertions of burden and distinctions between diligence performed by the GSEs and Petitioners. (A-2007-10.) Similarly, with respect to FHFA's claims that Petitioners' due diligence was not "adequate and sufficient," No. 11-cv-6198, ECF No. 70 at ¶¶ 77-90, Petitioners presented documents showing that the GSEs applied virtually the same diligence practices and procedures when purchasing loans from originators. (CA 229-231, A-1736-39; A-1888-95.) The District Court nevertheless denied Petitioners' requests for documents evidencing the GSEs' diligence practices. (A-2015.)

In rejecting this discovery, the District Court made additional findings of fact based solely on representations by FHFA's counsel that had no support in the record and were contradicted by documentary evidence presented by Petitioners. The District Court found that "[t]here are simply too many differences in the due diligence programs conducted in that limited part of the GSEs' work, compared to the due diligence which will be before the jury at these trials for discovery of the third party due diligence on the Single Family side of FHFA to be helpful, probative or productive for our work here." (A-2007-08.) The District Court further found that these are "two different programs with two different standards." (A-2015.) In so finding, the District Court ignored materials submitted by Petitioners – including Complaints by the SEC against GSE executives – showing that

the GSEs had purchased hundreds of billions of dollars of loans that were comparable in credit quality to those that back the RMBS at issue (CA-85-132, A-1454-1498); that the GSEs applied almost exactly the same diligence procedures as Petitioners (*see* CA-229-398, A-1736-1775); and that, rather than applying different criteria to their purchases from subprime originators, the GSEs, like Petitioners, purchased loans according to the lenders' guidelines. (*see* CA-85-132, A-1454-1498; CA-229-398, A-1736-1775.)[13]

b. Evidence Related to Loss Causation

The District Court has also shielded FHFA from document discovery aimed at the causes of losses on RMBS, discovery relevant to Petitioners' "negative causation" defense under Sections 11 and 12 of the Securities Act and to the element of loss causation required to prove fraud. *See Laub v. Faessel*, 297 A.D.2d 28, 31 (1st Dep't 2002). The District Court has permitted FHFA to limit its production to documents that specifically mention losses on PLS, while denying Petitioners' requests for documents concerning losses on comparable loans or

[13] Further insulating FHFA's allegations of widespread abandonment from challenge, the District Court refused to require FHFA to produce the "forensic reviews" of loan files that served as the basis for allegations in its complaint that originators' loans contained high percentages of material guideline violations. Although the District Court explicitly relied on those "forensic reviews" to deny Petitioners' motions to dismiss, (*see* A-151) it held that those same reviews were privileged and that FHFA had neither waived work product protections nor placed them "at issue" in the litigation because "[n]ormally a jury never even sees a complaint, never even hears about a complaint." (A-951-52.)

pools in Single Family, or enterprise-wide losses. The few documents FHFA has produced, as well as the GSEs' own public statements, attribute enterprise-wide and Single Family losses solely to a "once in a century credit tsunami" and "macroeconomic events [that] unexpectedly tore through the U.S. economy," not to alleged misrepresentations or omissions in the offering materials. (A-1580-82.) Notwithstanding the obvious relevance of documents like these, the District Court refused to order FHFA to search for and produce them from Single Family sources. The District Court instead found – with no evidentiary basis – that Petitioners already had "generous discovery . . . with respect to loss causation," including discovery that would describe the GSEs' losses on both PLS and Single Family at a "very high level." (A-2005; A-1344.) These "high level" documents, however, do not contain the GSEs' detailed analyses concerning losses on mortgages originated by the originators whose lending practices are at issue.

2. Limitations on Defense Depositions

The District Court has ordered that Petitioners are collectively limited to a total of 20 shared fact depositions of employees from Fannie Mae, Freddie Mac and FHFA.[14] (A-191, A-1096-97.) Each of the 20 depositions is presumptively limited to two days, meaning that – if this time is divided evenly among the 15 Actions – each group of Petitioners has less than an hour to depose each wit-

[14] Even FHFA had agreed to significantly more than 20 depositions for Petitioners.

ness. Petitioners can devote less than four minutes of each deposition to each securitization at issue. To make matters worse, the District Court ruled that the 20-deposition limit includes *former* employees of Fannie Mae, Freddie Mac, and FHFA. (A-1096). FHFA has identified well over 100 individuals who are likely to have discoverable information it may use to support its claims, and FHFA has not denied that there is no set of 20 individuals that could have collective knowledge of the more than 500 unique securities at issue. (*See* A-275.) Because many former GSE employees reside beyond the subpoena power of the District Court, the only way to ensure their testimony will be presented to the jury is to depose them. The effect of the deposition limit is to deny Petitioners any opportunity to obtain and present to a jury information from the majority of witnesses identified by FHFA as having relevant knowledge, and to deny at least some Petitioners the chance to depose any witness on issues unique to their Actions.[15]

Significantly, the District Court did not impose similar limits on FHFA. The District Court ruled instead that FHFA may take up to 20 fact deposi-

[15] The District Court denied UBS' request that any depositions noticed by UBS in advance of FHFA's completion of document production not be counted against the deposition limit, forcing UBS to notice depositions to accommodate its expedited schedule and likely leaving no depositions to notice for Petitioners with later trial dates. (A-2061-62.) On Friday, March 22, 2013, after the non-UBS Petitioners wrote to the District Court to seek guidance on this issue, the District Court ordered Petitioners to "confer and design a process for selecting deponents" (A-2067) – a near-impossible task given the different fact issues in each of the separate Actions, which issues FHFA itself has recognized.

tions of each group of corporate defendants, in addition to a deposition for each of the more than 100 individual defendants. (A-1249.) Thus, FHFA can take more than 400 party depositions, while Petitioners collectively are limited to 20. This structure creates an extraordinarily uneven playing field that deprives Petitioners of the right to confront the claims against them, while giving FHFA a distinct advantage in developing those claims. Such an inequitable allocation is fundamentally unfair, improperly skews the evidentiary record, and deprives Petitioners of their due process rights.

These skewed ratios are especially prejudicial in these Actions. As discussed above, the GSEs are no ordinary claimants, but industry leaders engaged in the very activities that FHFA now calls unlawful. Moreover, Freddie Mac has admitted it routinely destroyed emails during the relevant period, heightening the potential importance of employee testimony. (A-1788-1823.) Rather than broaden discovery to account for this document destruction, as Petitioners requested, the District Court asserted that Petitioners "must be thrilled" by the document destruction because it allowed them to revert "to the pre-email world where we used to litigate with human beings being deposed." (A-1726-27.) Still, the District Court awarded no additional deposition time, and even denied discovery into sources of replacement email still available at Freddie Mac. (A-1935.)

3. Limitations on Discovery Related to the Fraud Claims

The District Court has also denied critical discovery necessary to de-

fend against the common law fraud claims. Those Petitioners sued for fraud intend to defend against FHFA's fraud claims by proving, *inter alia*, that the GSEs did not justifiably rely on the alleged misrepresentations and omissions in the offering documents. The GSEs' knowledge of appraisal variances, the unreliability of loan-to-value ratios, owner-occupancy data, and credit ratings, and allegations of widespread abandonment of underwriting standards all will bear directly on the fraud claim. Yet the District Court has denied Petitioners the opportunity to discover this information on the ground that it is irrelevant to FHFA's *Section 11* claims. (A1501-04.) The District Court reasoned that Petitioners will settle unless they can mount a highly specific "knowledge" defense to the Section 11 claims, making additional discovery unnecessary.[16] The District Court expressly stated that it is applying a "higher threshold" for relevance with respect to discovery related to the fraud claims than for discovery related to the Securities Act claims. (A-1364.) When Petitioners sought reconsideration of several discovery rulings that relied on that legally erroneous position, because "there is a single standard of relevance" under Rule 26(b)(1) and "there is no legal basis to depart from this standard based on expectations concerning hypothetical settlement dynamics," the District Court denied the request. (A-1501-04.)

[16] *See* A-827 (informing Petitioners that "[their] analysis of whether to take the case to trial is going to rise or fall on [their] ability to defend against the Securities Act claim").

The District Court's rulings demonstrate that its relevance hurdle for discovery related to fraud claims is nearly insurmountable. For example, Petitioners served an interrogatory requesting identification of the GSE employees who participated in purchasing the relevant securities. (A-1615-16.) In response, FHFA identified 42 individuals "who may have" participated in some fashion in evaluating or purchasing the more than 500 securities at issue, but refused to identify the individuals who actually read and relied on the offering documents, conducted due diligence, or authorized the purchase of any particular security. (*Id.*) The District Court refused to compel any further response, stating it would not be "efficient" for FHFA to provide more specific information. (A-1883-85.)

Even if it were appropriate for the District Court's views on settlement to influence its discovery rulings, it is not true that settlement is inevitable if Petitioners are unable to prevail on their knowledge defense to the Section 11 claims. The interlocutory appeal pending before this Court, if successful, would leave only the fraud claims to be litigated. Even if the appeal is unsuccessful and Petitioners do not prevail on their knowledge defense, they could substantially reduce or eliminate any Section 11 damages by showing that FHFA's alleged losses were caused by the housing and economic downturns. And because the District Court has ruled that FHFA may seek punitive damages in connection with its fraud claims, those claims expose Petitioners to separate and potentially greater liability than any potential Section 11 damages.

ARGUMENT

The All Writs Act "empowers this Court to issue a writ of mandamus directing a district court to correct an erroneous order." *Linde v. Arab Bank, PLC*, No. 10-4519, slip op. at 28 (2d Cir. Jan. 18, 2013), ECF No. 257. Petitioners must show that their "right to issuance of the writ is clear and indisputable," that they have "no other adequate means to obtain the relief [they desire]," and that "the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380-81 (2004). These three conditions are satisfied here.

I. This Court Should Issue a Writ of Mandamus

A. Petitioners Have a Clear and Indisputable Right to the Writ

A party has a clear and indisputable right to a writ of mandamus where a district court commits a "judicial usurpation of power or a clear abuse of discretion." *In re City of N.Y.*, 607 F.3d 923, 943 (2d Cir. 2010). A court abuses its discretion if its ruling (1) is based "on an erroneous view of the law," (2) is based "on a clearly erroneous assessment of the evidence," or (3) "cannot be located within the range of permissible decisions." *SEC v. Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010).

1. The District Court Abused Its Discretion by Depriving Petitioners of Discovery Necessary to a Meaningful Defense

While a district court has considerable latitude in determining the scope of discovery, it may not deprive a party of a "meaningful opportunity to establish the facts necessary to support [its] claim." *In re Agent Orange Prod. Liab.*

Litig., 517 F.3d 76, 103 (2d Cir. 2008). A court abuses its discretion when discovery "is so limited as to affect a party's substantial rights." *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 795 (2d Cir. 1985).[17]

The discovery limits the District Court has imposed on Petitioners are unprecedented. Petitioners collectively may depose no more than 20 employees or former employees from the two GSEs, FHFA, and FHFA's predecessor (OFHEO), combined. In contrast, the GSEs may take over 400 depositions of Petitioners. Likewise, the shield erected around the GSEs' Single Family units contrasts starkly with the absence of *any* meaningful limits on document productions required from Petitioners' several operating units, no matter how burdensome or indirectly involved. These one-sided rulings operate to excise from litigation what the GSEs knew about the mortgage underwriting and origination practices at the heart of FHFA's claims – and when they knew it – as well as GSE admissions about the existence and materiality of the alleged misrepresentations, the adequacy of Petitioners' due diligence, and loss causation. The rulings amount to a clear abuse of discretion and "easily establish" a "clear and indisputable right to the writ." *See City of N.Y.*, 607 F.3d at 929.

[17] *See also Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 474 (2d Cir. 1995) (abuse of discretion to deny documents "relevant, if not central" to party's case); *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir. 1990) (abuse of discretion to refuse to compel answer to interrogatory seeking information central to plaintiff's claim); *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 993-94 (7th Cir. 2002).

2. The District Court Abused Its Discretion By Making Findings of Disputed Material Fact as Predicates for Its Rulings

A district court may not make factual findings on disputed issues of material fact in jury trial cases, even as a predicate for its rulings before and after trial. *See, e.g.*, *Kerman v. City of N.Y.*, 374 F.3d 93, 120 (2d Cir. 2004); *accord Bridgeforth v. County of Rensselaer*, No. 1:08-cv-0779, 2012 U.S. Dist. LEXIS 96515, at *29-30 (N.D.N.Y July 12, 2012); *Am. Home Mortg. Corp v. Mortgage Gold, Inc.*, No. 06 Civ. 0668, 2007 U.S. Dist. LEXIS 28273, at *24 (S.D.N.Y. Apr. 18, 2007). Indeed, a district court's determination of issues of material fact violates the Seventh Amendment jury right. *See Kerman*, 374 F.3d at 117.

Here, the District Court's rulings are impermissibly based on findings of fact on material disputed issues unsupported by any record evidence, predicated on unsworn representations of counsel, and contrary to the limited record established to date. Contested and unsubstantiated factual findings include, for example, that "PLS traders would not have known which of the loans in the supporting loan groups had previously been rejected by [Single Family] . . ."; that these rejections or reviews have no bearing on claims over the loans that remained; and that there were "simply too many differences in the due diligence programs . . . for discovery of the third party due diligence on the Single Family side of FHFA to be helpful, probative or productive" for a jury to consider. *See supra* at 13-14. These are precisely the sort of factual questions a jury would need to consider to evaluate FHFA's allegations and Petitioners' defenses.

3. The District Court Abused its Discretion by Holding that the GSEs' Non-PLS Units' Knowledge Is Irrelevant

The District Court committed legal error by holding that the only relevant knowledge that could trigger the statute of limitations or provide a defense to FHFA's Section 11 claims was knowledge held by PLS traders. This clear misapplication of the law of agency has prejudiced Petitioners by depriving them of *virtually any* discovery from Single Family or other non-PLS operations. The Restatement (Third) of Agency provides that the knowledge of a corporation's employees in all of its divisions is imputed to the corporation unless the employee had a duty not to disclose the information; absent such a duty, "the fact that an organization has structured itself internally into separate departments or divisions" does not defeat imputation.[18] FHFA *has never* established by competent evidence that non-PLS employees had a duty *not* to share pertinent information with PLS traders. Such sharing indisputably took place. (A-479.) The District Court has also erroneously denied discovery into the GSEs' Single Family units that is relevant to important issues other than the GSEs' knowledge, once again relying on unsubstantiated assertions by FHFA of irrelevance and burden.

4. The District Court Abused Its Discretion by Applying a Heightened Standard of Discovery to Fraud Claims

The District Court erred by ruling that Petitioners must meet a higher rele-

[18] Restatement (Third) of Agency § 5.03 & cmt. c (2006); *see also George v. Equifax Mortg. Services*, 375 F. App'x 76, 78 (2d Cir. 2010) (employee's knowledge from employment imputed to corporation and all its departments).

vance threshold to obtain discovery related to FHFA's fraud claims. The Federal Rules of Evidence contain one standard for relevance: evidence is relevant if "it has any tendency to make a fact [that is of consequence] more or less probable than it would be without the evidence." Fed. R. Evid. 401; *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978). Since the scope of discovery under Rule 26(b)(1) extends to "any nonprivileged matter that is relevant to any party's claim or defense," Petitioners are entitled to discovery related to their fraud defenses unless the District Court has a permissible reason to limit such discovery. The District Court's subjective view that no defendant faced with a fraud claim will proceed to trial "unless it believe[s] it can defeat the strict liability claims," *infra* at 20, is not a permissible reason to impose a heightened standard.

5. The District Court's Rulings Attempt to Coerce Settlement

While "the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlements through coercion." *Kothe*, 771 F.2d at 669. A district court must not compel settlement "by arbitrary use of [its] power," and "all pressure tactics, whether directly or obliquely, to coerce settlement by litigants and their counsel" are disfavored. *Id.*; *see also Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1128 (3d Cir. 1990) ("[T]he court should never work to coerce or compel a litigant to make a settlement."). In its determined efforts to force settlement, the District Court has abused its discretion by issuing a series of orders that so severely limit Petitioners' ability to defend themselves as to rise to

the level of impermissible coercion.[19]

B. No Adequate Alternative Remedies Are Available to Petitioners

Mandamus is the only avenue by which Petitioners can obtain relief. Orders denying discovery generally are not immediately appealable. *See Barrick Grp., Inc. v. Mosse*, 849 F.2d 70, 72 (2d Cir. 1988). Although certification under 28 U.S.C. § 1292(b) is theoretically available for discovery rulings, that is not a meaningful option, because certification is only appropriate when immediate appeal "may materially advance the ultimate termination of the litigation." *City of N.Y.*, 607 F.3d at 933. And here, an appeal from final judgment will not provide Petitioners with adequate relief because of the coercive pressure to settle imposed by rulings severely limiting Petitioners' ability to develop their defenses. *See, e.g., Abelesz v. OTP Bank*, 692 F.3d 638, 652 (7th Cir. 2012) (granting writ where "[s]ettlement would mean that the district court order creating the pressure to settle . . . may never be reviewed"); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) (securities plaintiff has powerful leverage to force settlement "out of any proportion to [an action's] prospect of success at trial").

Furthermore, these coordinated Actions represent perhaps the largest collection of securities litigations ever filed in the United States, with approximate-

[19] Unlike *Linde v. Arab Bank, PLC*, No. 10-4519 (2d Cir. Jan. 18, 2013), ECF No. 257, the District Court here has so severely restricted Petitioners' access to relevant evidence as to rise to the level of impermissible coercion.

ly $200 billion of RMBS at stake. Counsel for FHFA has called certain decisions within these Actions "historic." (A-228-29.) If the District Court's rulings are not reviewed now, and these Actions proceed toward final judgments that will inevitably be reversed, the parties and the judiciary's time and resources would be wasted.

C. Issuance of the Writ Is Appropriate in the Circumstances

This Court considers several factors to determine whether issuance of the writ is appropriate, including whether the petition presents "a novel and significant question of law" or a "legal issue whose resolution will aid in the administration of justice." *City of N.Y.*, 607 F.3d at 939 (internal quotation marks omitted). This Court has also considered whether "there is extreme need for reversal of the district court's mandate before the case goes to judgment," *Am. Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 282 (2d Cir. 1967), and whether the writ is necessary "to see that justice is done between litigants before the court." *Padovani v. Bruchhausen*, 293 F.2d 546, 548 (2d Cir. 1961).

Issuance of the writ is warranted for several reasons. *First*, this petition raises novel and significant legal questions, namely (1) whether a district court may deny discovery regarding certain claims based on its predictions about settlement, (2) whether a district court may deny a party access to evidence needed to dispute the claims and prove its defenses in an effort to coerce settlement, and (3) whether a district court may deny discovery based on findings of fact that are material and disputed. Although the rule that a court may not coerce settlement is

well established, granting the writ would provide this Court with an opportunity to offer guidance to district courts regarding the extent to which it is permissible for their own views about settlement to inform discovery rulings.

Second, issuing the writ will aid the administration of justice by ensuring the fairness of any trial in these Actions. It hardly serves the ends of justice to require Petitioners in 15 separate cases to proceed to trial where, as here, they have been deprived through the rulings of a single judge in a coordinated proceeding of a fair opportunity to prepare their cases. *Cf. Int'l Bus. Machs. Corp. v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975); *Padovani*, 293 F.2d at 547.

Third, issuance of the writ is appropriate because most of these cases will be sent to other judges for trial. Judge Cote plans to preside over only the UBS and JPMorgan trials. (A-318-19.) If this Court does not reverse the District Court's rulings now, other Southern District judges will inherit more than a dozen cases that are fundamentally flawed due to erroneous pre-trial decisions, imposing a burden on judges not familiar with the discovery record in these cases to re-start the discovery process to correct those decisions.

This Petition does not concern mere "housekeeping matters." *American Express*, 380 F.2d at 284. Rather, Petitioners seek relief from a series of orders that would determine claims and defenses before evidence could be considered, as part of an expressed effort to pressure Petitioners to settle. *Cf. Inv. Prop. Int'l, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 707 (2d Cir. 1972). Although Judge Cote is

an experienced member of the judiciary, the open efforts in these Actions toward coercing settlement, combined with the repeated denial of Petitioners' basic due process rights to defend against these claims, are unprecedented. *See Haines v. Liggett Group Inc.*, 975 F.2d 81, 98 (3d Cir. 1992).

CONCLUSION

Petitioners respectfully request that this Court issue a writ of mandamus reversing the rulings discussed above and directing the District Court to provide appropriate relief with respect to the issues raised in this petition, specifically including providing (i) discovery from non-PLS business units, including the Single Family units, involved in the acquisition, guarantee or securitization of mortgage loans during the relevant period, regarding the GSEs' role in selecting collateral, the GSEs' knowledge about originators' practices, the GSEs' conduct of due diligence and the GSEs' losses and their causes; (ii) sufficient depositions of the GSEs and FHFA to allow Petitioners in each of the 15 Actions to develop their individual cases for trial, including obtaining testimony from at least the individuals FHFA or its document production identify as likely to have discoverable information FHFA may use to support its claims or Petitioners may use to prove their defenses, subject to coordination and adjustment in light of factors including the witness' role across Actions, proportionality, efficiency, and fairness; and (iii) identification of the GSE personnel involved in each purchase of a securitization at issue, on a securitization by securitization basis.

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Addendum A

Defendant Discovery Requests

Defendant Discovery Requests		
Defendant Request	**Date**	**Disposition**
50 interrogatories of FHFA per corporate defendant family rather than 50 overall (June 7, 2012 Defendant Joint Submission) (A-240)	June 13, 2012 (A-311-12)	Denied
50 depositions of plaintiff (as an initial matter) (June 7, 2012 Defendant Joint Submission) (A-235-38)	June 13, 2012 (A-313)	Denied
GSE loan-level ("forensic") reviews supporting allegations of high defect rates in securitizations (Ltrs. from J. Kasner to J. Cote of July 17 and November 14, 2012) (A-353-54; No. 11-cv-5201 (ECF No. 273))	July 19, 2012 (A-366-74) November 15 (A-948-49)	Denied unless FHFA relies upon the forensic reviews at trial, and only during expert discovery.
Permission to submit full briefing on the issue of justifiable reliance for the fraud claims (July 31, 2012 Conference) (A-507)	July 31, 2012 (A-507-08)	Denied
Order requiring Plaintiff to disclose, at least with respect to the overlapping loans in its sample and its initial forensic review, which loans are defective and the manner in which they are defective (July 31, 2012 Conference) (A-436-37)	July 31, 2012 (A-436-37)	Declined to Rule
30(b)(6) witness to testify about the GSEs' organizational structure and potentially relevant employees (Submission of July 31, 2012) (A-515) & July 31, 2012 Conference) (A-469)	July 31, 2012 (A-489)	Denied

Defendant Discovery Requests		
Defendant Request	**Date**	**Disposition**
Reconsideration of previous ruling that defendants bear the entire cost for production of loan files for loans in FHFA's statistical samples (October 15 Conference) (No. 11-cv-5201, ECF No. 223 at 32-33)	October 15, 2012 (No. 11-cv-5201, ECF No. 223 at 35-36)	Denied
Leave to submit full briefing (motion to compel) regarding whether the scope of discovery should include the GSEs' Single Family operations (Ltr. from P. Shane to J. Cote of November 5, 2012) (A-1013)	November 6, 2012 (A-824-25)	Denied
Request to extend date range of production for FHFA custodians earlier than July 1, 2005 (Ltr. from E. Bennett to J. Cote of October 26, 2012) (A-754-756)	November 6, 2012 (A-835-36)	Denied (except for one custodian for whom FHFA agreed to extend the date range to January 1, 2005)
Transcripts of testimony by FHFA current and former employees in RMBS litigations and investigations including on the single family side (as reciprocity for FHFA's granted request for such transcripts from defendants) (November 6, 2012 Conference (A-821)	November 6, 2012 (A-821-22)	Granted
Additional 10 FHFA custodians (November 6, 2012 Conference) (A-846-48)	November 6, 2012 (A-860)	Denied
Third-party subpoenas to the SEC, to which the SEC agreed to respond in full, at no burden to plaintiff (Ltr. from S. Cady to J. Cote of November 8, 2012) (A-900-01)	Order of November 9, 2012 (A-898)	Denied (Petitioners ordered to withdraw their subpoenas)

Defendant Discovery Requests		
Defendant Request	**Date**	**Disposition**
Witness statements described in a Special Litigation Committee Report reporting, among other things, a "consensus" among Freddie Mac officers and directors that Freddie's losses were caused by an "exogenous macro-economic event," *i.e.*, the "the unprecedented decline in the housing market," cited by Freddie Mac in support of a motion to dismiss derivative claims against Freddie Mac in *In re Fed. Home Loan Mortg. Corp. Deriv. Litig.*, No. 08 Civ. 773 (LMB/TCB) (E.D.Va.)	Order of November 9, 2012 (No. 11-cv-5201, ECF No. 249 at 1-3)	Denied
Sharing of costs for the review of the UBS loan files to identify correct loan numbers (Ltr. from R. Fumerton to J. Cote of November 19, 2012) (A-1081-87)	November 19, 2012 (A-2087)	Denied
Diligence results from GSEs for whole loan pools on which the GSEs bid but which were ultimately purchased and securitized by defendants in securitizations at issue in this case (Ltr. from P. Shane to J. Cote of December 7, 2012) (No. 11-cv-5201, ECF No. 194 at 1)	December 14, 2012 (A-1154)	Denied
GSE results and analyses from proprietary automated underwriting software for the loans at issue (Ltr. from E. Bennett to J. Cote of December 7, 2012) (No. 11-cv-5201, ECF No. 198 at 1-2), (Ltr. from P. Shane to J. Cote of December 7, 2012) (A-1371-72)	December 14, 2012 (A-1155)	Denied

Defendant Discovery Requests		
Defendant Request	**Date**	**Disposition**
Operational reviews and counterparty reports on originators at issue (Ltr. from P. Shane to J. Cote of December 7, 2012) (A-1371-72)	December 14, 2012 (A-1185)	Instruction to FHFA to assess burden
Reconsideration of prior ruling that UBS pay the entire cost of opening loan files in FHFA's sample sets of loans (Ltr. from R. Fumerton to J. Cote of December 12, 2012) (A-1110-12)	December 14, 2012 (A-1188)	Denied
Reports or evaluations reflecting that GSEs were aware of appraisal bias affecting the originators at issue (Ltr. from P. Shane to J. Cote of December 7, 2012 (A-1371-72) Application to compel a complete production of Freddie Mac appraisal bias reports or evaluations pursuant to December 14, 2012 ruling (Ltr. from E. Bennett to J. Cote of March 19, 2013) (A-2071-72)	December 14 (A-1156) Endorsed Letter Mar. 22, 2013 (A-2071-72)	Granted; Denied
Documents regarding GSEs' defect, waiver and pull-through rates for their purchases of subprime mortgage loans. (A-1380)	December 17, 2012 (A-1335) February 21, 2013 (A-2007-09)	Denied (with instruction to FHFA to determine whether documents exist in a database); Denied
Documents regarding the causes of company-wide losses that do not specifically mention PLS (Ltr. from R. Klapper to J. Cote of December 12, 2012) (A-1381)	December 17 (A-1344)	Denied

Defendant Discovery Requests		
Defendant Request	**Date**	**Disposition**
Copies of regular, statutorily required reports made to the GSEs' federal regulator, OFHEO, regarding mortgage fraud (Ltr. from P. Shane to J. Cote of Dec. 7, 2012) (A-1371-72)	December 14, 2012 (A-1186-87) December 17, 2012 (A-1356)	Denied
Responses to Defendants' Interrogatory No. 1 identifying individuals who, according to the District Court, "played critical roles in the decision to purchase the securitizations at issue," *i.e.*, individuals who relied upon the alleged misstatements at issue in these cases (Ltr. from R. Kopecky to J. Cote of February 5, 2013) (A-1616-17); *see also* Ltr. from P. Shane to J. Cote of February 6, 2013 (A-1618-19)	February 14, 2013 (A-1884-88)	Denied
Discovery as to the adequacy of Freddie Mac's document production (Ltr. of R. Fumerton to J. Cote of February 13, 2013) (A-1788-1837)	February 14, 2013 (A-1935)	Denied
Discovery of Freddie Mac statements made in other cases regarding its document retention policy and any litigation holds issued to custodians or proposed custodians (Ltr. of R. Fumerton to J. Cote of February 13, 2013) (A-1788-1837)	February 14, 2013 (A-1935)	Denied
Renewed 30(b)(6) testimony regarding Freddie Mac's email retention policies (Ltr. from P. Shane to J. Cote of February 6, 2013) (A-1618-19)	February 14, 2013 (A-1936)	Denied

Defendant Discovery Requests		
Defendant Request	**Date**	**Disposition**
Production from five additional Freddie Mac custodians to supplement for document loss or destruction (Ltr. from J. Kasner to J. Cote of February 20, 2013) (No. 11-cv-5201, ECF No. 429 at 2)	February 21, 2013 (A-2034-35)	Denied (except for e-mails of former Freddie Mac CEO Dick Syron to the extent they were previously produced to the SEC, hit on agreed-upon search terms, and are deemed relevant by FHFA)
Single Family due diligence policies (Ltr. from R. Klapper to J. Cote of February 13, 2013) (A-1736-37)	February 21, 2013 (A-2015)	Denied
GSE reviews of third party diligence providers that conducted due diligence on loans backing PLS (Ltr. from R. Klapper to J. Cote of February 13, 2013) (No. 11-cv-5201, ECF No. 413 at 1-2)	February 21, 2013 (A-2037)	Denied
Reports reflecting loan-level reviews of the Securitizations conducted or mandated by the GSEs at or around the time of the Securitizations (Ltr from P. Shane to J. Cote of February 13, 2013) (A-1776-77)	February 21, 2013 (A-2039)	Declined to Rule[1]

[1] The District Court stated that the issue of loan-level diligence reports was largely mooted by FHFA's agreement to produce these reports from the files of two employees, but that it would reconsider if Defendants determined that production to be inadequate. (A-2039)

Defendant Discovery Requests		
Defendant Request	**Date**	**Disposition**
30(b)(6) witness as to the GSEs' due diligence processes and practices for their purchases of mortgages and their own issuance of RMBS (Ltr. from R. Fumerton to J. Cote of February 15, 2013) (A-1943-44)	February 21, 2013 (A-1989-94)	Denied
30(b)(6) witness regarding information sharing and overlap between PLS and Single Family (Ltr. from R. Fumerton to J. Cote of February 15, 2013) (A-1943-44)	February 21, 2013 (A-1989-94)	Denied
Order to compel FHFA to designate additional persons to testify on 30(b)(6) topics for which previous designees were unprepared (Ltr. from P. Sechler to J. Cote of March 21, 2013) (A-2068-69)	Endorsed Letter March 22, 2013 (A-2068-69)	Denied (for failure to exhaust the meet and confer process)

Plaintiff Discovery Request

Plaintiff Discovery Requests[2]		
Plaintiff Request	**Date**	**Disposition**
Order that defendants be compelled to collect and produce "certain documents" through the September 2, 2011 filing date of the complaints. (October 9, 2012 Letter from P. Selendy to J. Cote)	October 15, 2012 (No. 11-cv-5201, ECF No. 223 at 70:1-4)	Granted with limitations
Request that Defendants be compelled to compile loan identification numbers for loans subjected to due diligence (Ltr. of P. Selendy to J. Cote of October 9, 2012) (No. 11-cv-5201, ECF No. 200)	October 15, 2012 (No. 11-cv-5201, ECF No. 223 at 27:4-6)	Granted
Transcripts of testimony taken in other actions involving present or former employees (Ltr. from P. Selendy to J. Cote of November 5, 2012) (A-757-767)	November 6, 2012 (A-821)	Granted
Compilations of data summarizing volume of loan purchases from originators (Ltr. from P. Selendy et al. to J. Cote of November 19, 2012, Exhibit A (Request "C" originally from Plaintiffs' Fourth, Fifth and Sixth Requests for Production)) (No. 11-cv-5201, ECF No. 284 at 2, 284-1 Ex. A at 6)	November 19, 2012 (A-2098)	Granted

[2] In some instances, certain Defendants agreed to provide some or all of the information requested by FHFA prior to the District Court's ruling requiring that other Defendants do the same.

Plaintiff Discovery Requests[2]		
Plaintiff Request	**Date**	**Disposition**
Documents and communications relating to (a) warehousing of mortgage loans and (b) internal portfolio or pool financing terms (Ltr. from P. Selendy to J. Cote of November 19, 2012, Exhibit A (Request No. 6 from Plaintiffs' Second Request for Production)) (No. 11-cv-5201, ECF No. 284-1 at Ex. A. at 1)	November 19, 2012 (A-2091)	Granted with limitations
Documents regarding the policies and procedures governing incentive-based compensation (Ltr. from P. Selendy et al. to J. Cote of November 19, 2012, Exhibit A (Request No. 35 from Plaintiffs' Second Request for Production)) (No. 11-cv-5201, ECF No. 284-1 at Ex. A. at 2-3)	November 19, 2012 (A-2096)	Granted
Disciplinary actions involving employees who worked on the securitizations, including employees who are not e-mail custodians (Ltr. from P. Selendy to J. Cote of December 13, 2012) (A-1121-23)	December 14, 2012 (A-1233)	Granted
Documents or custodians relevant to hedging (Ltr. from P. Selendy to J. Cote of December 13, 2012) (A-1121-23)	December 14, 2012 (A-1239)	Granted with limitations (ordered the parties to explore whether such individuals or desks existed)
Compensation information for custodians (Ltr. from P. Selendy to J. Cote of December 13, 2012) (A-1121-23)	December 14, 2012 (A-1232)	Granted

Plaintiff Discovery Requests[2]		
Plaintiff Request	**Date**	**Disposition**
Amendment to deposition protocol to clarify that depositions of individual defendants do not count against FHFA's 20 deposition per corporate family limit (Ltr. from P. Selendy to J. Cote of December 13, 2012) (No. 11-cv-5201, ECF No. 328 at 1-2)	December 14, 2012 (A-1202)	Granted
Documents concerning loss reserves for repurchase requests on RMBS (Ltr. from P. Selendy to J. Cote of December 13, 2012) (A-1121-23)	December 17, 2012 (A-1317)	Granted with limitations (Defendants must produce loss reserves tethered to the securitizations)
Request the Defendants be compelled to compile data regarding loans subjected to due diligence (Ltr. from C. Chung and K. Leung to J. Cote of February 1, 2013) (No. 11-cv-5201, ECF No. 379)	Order of February 27, 2013 (No. 11-cv-5201, ECF No. 455)	Granted

STATE OF NEW YORK)
) ss.: **AFFIDAVIT OF**
COUNTY OF NEW YORK) **PERSONAL SERVICE**

I, Barry Baron, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 26, 2013

deponent served the within: **Joint Petition for Writ of Mandamus**

upon:

Hon. Denise L. Cote
United States District Judge
Daniel Patrick Moynihan United States Courthouse
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the attorney(s) in this action by delivering **1** true copy thereof to said individual personally, and electronically, via e-mail. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me on March 26, 2013

/s/ Maryna Sapyelkina **/s/ Barry Baron**

Maryna Sapyelkina
Notary Public State of New York
No. 01SA6177490
Qualified in Kings County
Commission Expires Nov. 13, 2015

Job # 246351