

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

BERKLEY INSURANCE CO., et al.,

Plaintiffs,

v.

THE FEDERAL HOUSING FINANCE
AGENCY, et al.,

Defendants.

Case No. 1:13-cv-1053-RCL

IN RE FANNIE MAE/FREDDIE MAC
SENIOR PREFERRED STOCK
PURCHASE AGREEMENT CLASS
ACTION LITIGATIONS

Case No. 1:13-mc-1288-RCL

This document relates to:
ALL CASES

**PLAINTIFFS' MOTION REQUESTING AN ORDER OVERRULING
DEFENDANTS' IMPROPER OBJECTIONS CONCERNING
DR. JOSEPH MASON'S TESTIMONY ON JULY 27, 2023**

I. Introduction

Plaintiffs file this Motion to address (1) a pending objection to Plaintiffs' re-direct examination of their damages expert, Dr. Joseph Mason, and (2) an objection that the Court sustained during that re-direct examination that was lodged in violation of an explicit agreement between the parties.

First, in the pending objection, Defendants seek to prevent Plaintiffs from following up on questions that Defendants raised in cross-examination on the basis that the testimony was not affirmatively included in Dr. Mason's expert reports. The rule Defendants would propose is that Defendants may ask about areas beyond the scope of an expert's report, but then the expert should not be allowed to explain those answers on re-direct if he did not affirmatively include them in the report. This rule finds no support in the law. Plaintiffs should be allowed to ask a limited series of questions to respond to the questions Defendants asked on cross-examination.

Second, in the prior (sustained) objection, Defendants flagrantly violated the terms of a carefully negotiated agreement about the relevance of post-Net Worth Sweep price movements in Fannie Mae and Freddie Mac stock. The agreement barred certain lines of questioning and left others specifically on the table. The question that Plaintiffs' counsel asked Dr. Mason was drawn almost verbatim from the parties' agreement, which was memorialized via email and included in Plaintiffs' Pretrial Statement lodged with the Court. Defendants' objection to the question violated the agreement. Meanwhile, on cross-examination, Defendants compounded their violation by displaying two stock price charts showing the GSEs' post-Net Worth Sweep stock price movements, and asking Dr. Mason to confirm no less than six times within ten transcript pages whether the Net Worth Sweep happened "eleven years ago." Plaintiffs submit that the Court should give a curative instruction to the effect that post-Net Worth Sweep movements in the GSEs'

stock price are not relevant to damages. Defendants should be hard-pressed to oppose such an instruction, since the parties' agreement sought to memorialize this very point.

II. The Court Should Overrule Defendants' Improper Objection To Plaintiffs' Re-Examination Of Dr. Mason On Issues Raised In Defendants' Cross-Examination And Covered In Plaintiffs' Re-Direct At The Last Trial

Yesterday, during re-direct examination, Defendants improperly objected and sought to block Plaintiffs from re-examining their damages expert, Dr. Joseph Mason, Ph.D., on whether he considered an alternative cause of the August 17, 2012 stock drop. Defendants had just cross-examined Dr. Mason on whether the accelerated reduction of Fannie Mae and Freddie Mac's retained mortgage portfolio, which was also announced on August 17, 2012, might have been a cause of the GSEs' stock price declines. When Plaintiffs sought to ask Dr. Mason on re-direct examination why he believed that the Net Worth Sweep, rather than the accelerated reduction of the mortgage portfolio, was the true cause of the stock price drop, Defendants objected on the ground that Dr. Mason's answer to the question was not contained within his expert reports.

Plaintiffs should be allowed to ask Dr. Mason to explain his answer, elicited on cross-examination, that it was the Net Worth Sweep, rather than the accelerated reduction of the retained portfolio, that caused the GSEs' stock price declines. Defendants know what Dr. Mason's answer to the question will be, because he gave this exact testimony on re-direct examination in the last trial, with no objection by Defendants. The evidentiary rule that Defendants urge on this Court, meanwhile, would allow a party to ask an expert anything they wish, regardless of whether the opinions are found within the expert's report, but then bar the expert from elaborating on those same answers when being re-directed. Defendants' pending objection should be overruled. Plaintiffs will then only ask a short series of questions on this topic, which will amount to no more than five minutes of testimony.

A. Relevant Law: Parties Are Permitted To Re-Direct On Any Issues Raised In Cross-Examination

It is well-established that redirect examination is essential to “repl[y] to [a] new matter adduced on cross-examination” and, moreover, the ability to redirect is “deemed a matter of right.” *See, e.g.*, 1 Kenneth S. Broun *et. al.*, 1 McCormick on Evidence § 32 (7th ed. 2013). Re-direct examination can be necessary in many situations to cure prejudice, including attacks on credibility, resulting from defendants’ cross-examination questions. *Dobson v. United States*, 426 A.2d 361, 365 (D.C. 1981) (“[R]edirect examination is limited to matters which were first raised on cross-examination, to which the opposing party is merely responding on redirect.”) (quoting *Singletary v. United States*, 383 A.2d 1064, 1073 (D.C.1978)); *Hilton v. United States*, 435 A.2d 383, 389 (D.C.1981); *Copes v. U.S.*, 345 F.2d 723, 725 (D.C. Cir. 1964) (“[I]t was proper on redirect to explain and complete her testimony on cross-examination.”); *Lust v. Sealy, Inc.*, 383 F.3d 580, 587 (7th Cir. 2004) (collecting cases); *see also Josephs v. Harris Corp.*, 677 F.2d 985, 989–90 (3d Cir. 1982) (finding district court committed abuse of discretion by restricting plaintiffs' ability to conduct redirect examination to correct impression after cross-examination that plaintiffs' expert lacked support for opinion); *United States v. Marzano*, 160 F.3d 399, 402 (7th Cir. 1998) (finding that, when cross-examination revealed that witness had omitted mention of misdemeanor, it was error for district court to disallow explanation of that omitted misdemeanor on redirect; stating that if the witness had “been allowed to explain the nature of his conviction, the credibility of his testimony that he had forgotten it when he filled out the form would have been enhanced. We cannot think of any reason why he was not permitted to explain.”).

B. At The Last Trial, Dr. Mason Testified On Both Cross-Examination And Re-Direct Examination About The Impact Of The Accelerated Reduction Of The Mortgage Portfolio On The Enterprises' Stock Prices

At the last trial, Defendants' cross-examination of Dr. Mason focused heavily on whether the event study conducted by their expert (Dr. Attari) failed to account for the impact of the accelerated mortgage portfolio reduction. Defendants' questions on this topic span eight (8) of the twelve (12) pages of Mason's cross-examination from the Trial 1 transcript.¹ Dr. Mason told Defense counsel that the portfolio reduction acceleration was not the cause of the Enterprises' stock price declines. For example, in response to Defendants' question about whether "the event study" analyzed "the impact of the net worth sweep on the stock prices and any impact of the acceleration of the reduction of the retained mortgage portfolios," Dr. Mason testified that it was "not a potential cause of the decline."² Moreover, Dr. Mason confirmed that he *did* consider this exact issue, testifying for example that he "looked at other news" on the "day of the announcement of the Third Amendment."³

On re-direct of Dr. Mason, Plaintiffs addressed the same issue. In response, Defendants did not raise a single objection, acknowledging that Plaintiff was entitled to explore this issue on re-direct. There, Dr. Mason testified that the acceleration of the portfolio reduction was already known to the market—and thus could not have caused the stock price declines—and re-confirmed his opinion that it was the "net worth sweep" that "caused the GSE shares to lose half value in August of 2012."⁴

¹ Trial 1 Tr. 1526:17-1534:23.

² *Id.* at 1529:15-22.

³ *Id.* at 1531:7-17.

⁴ *See Id.* at 1538:3-1539:14.

Defendants also raised the mortgage portfolio reduction issue again in their examination of Dr. Mason during his April 26, 2023 deposition.⁵

C. At This Trial, Defendants Again Asked Dr. Mason About The Accelerated Reduction During Cross-Examination

At this trial, anticipating (correctly) that Defendants would yet again cross-examine on this same issue, Plaintiffs specifically asked Dr. Mason whether there is “any reason to believe that anything besides the net worth sweep could have caused the huge decline in stock price on August 17, 2012”—to which Dr. Mason testified “No.”⁶ Plaintiffs also asked Dr. Mason whether the portfolio reduction acceleration “caused the stock price declines” on August 17, 2012—to which Dr. Mason also testified “No.”⁷

As expected, Defendants’ cross-examination of Dr. Mason again focused on the purported impact of the acceleration in the portfolio reduction. For example, Defendants asked whether the event study tried “to analyze how much of the \$1.6 billion stock price drop may have been caused by the net worth sweep and how much of that drop may have been caused by this other acceleration of the reduction of the retained mortgage portfolios”—to which Dr. Mason replied “That’s right ... Defendants’ event study does not do that.”⁸

On re-direct, given Defendants’ cross-examination on this issue, Plaintiffs sought to conduct re-direct examination of Dr. Mason on the purported impact of the portfolio reduction acceleration. Unlike the last trial, however, Defendants objected and sought to block to Plaintiffs’

⁵ Dep. Tr. of Dr. Joseph Mason (Apr. 26, 2023) at 235:1-237:14.

⁶ Trial 2 Tr. (July 27, 2023, Afternoon Session) (“Trial 2 Tr.”) at 70:8-11.

⁷ *Id.* at 70:12-20.

⁸ *Id.* at 95:19-24.

efforts to fully and fairly re-direct Dr. Mason.⁹ Defendants' objection was improper and should be overruled.

D. Just Like Last Trial, Plaintiffs Should Be Permitted To Re-Direct On The Impact Of The Accelerated Reduction On Re-Direct

The law is clear. Because Defendants cross-examined Dr. Mason concerning the impact of the portfolio reduction acceleration on the Enterprises' stock prices, Plaintiffs are entitled to fully re-examine Dr. Mason on the same issue. *See, e.g., U.S. v. Smith*, 822 F.3d 755 (5th Cir. 2016) (finding that the district court properly allowed prosecutor's redirect examination of witness that was within scope of matters raised in cross-examination of witness); *U.S. v. Bright*, 630 F.2d 804 (5th Cir. 1980) (finding that where defense counsel implied in cross-examination that FBI was responsible for informant's death, state could redirect to ask witness about cause of informant's death); *U.S. v. Lehr*, 562 F. Supp. 366 (E.D. Pa. 1983), *aff'd*, 727 F.2d 1101 (3d Cir. 1984) (finding that defendant undermined motive on cross-examination, so prosecution could show on redirect that witness worked for government due to defendant's death threat); *U.S. v. Kroh*, 915 F.2d 326 (8th Cir. 1990); *Polk v. Yellow Freight System, Inc.*, 876 F.2d 527 (6th Cir. 1989) (holding that cross-examination hypothetical opened door to area of questioning in redirect examination); *U.S. v. Gutierrez*, 576 F.2d 269 (10th Cir. 1978) (finding that government agent was cross-examined about organizational structure of drug enforcement agency so redirect question eliciting description of drug rings was proper, although testimony would have been prejudicial in absence of cross).

⁹ *Id.* at 106:12-18 (Q. So what is your opinion about whether it was the net worth sweep or what we've just been talking about, this accelerated reduction, that actually caused Fannie and Freddie's preferred and common stock to fall by 50 percent on one day? MR. JONES: Objection, Your Honor. Could we be heard on this briefly?).

The decision in *C.P. Interests Inc. v. California Pools Inc.*, is instructive. 238 F.3d 690, 699 (5th Cir. 2001). There, the court confronted a situation where an expert witness had been cross-examined on issues beyond the scope of that expert's report. In light of the cross-examination, the court held that the expert was no longer confined to the scope of the report in redirect.

To be sure, this is what happened at the last trial—with no objection by Defendants. The same approach should be taken here—and Defendants have provided no basis for the Court to reverse course.

E. Plaintiffs Will Be Prejudiced if Precluded From Re-Examining On This Issue

If not permitted to re-direct, Plaintiffs will be prejudiced in at least two important ways. *First*, Plaintiffs will be deprived of their right to fully and fairly re-examine Dr. Mason on the same issues that Defendants chose to raise in their cross-examination. This is inherently prejudicial. *Second*, the jury will be left with the mistaken impression that Dr. Mason did not consider the impact of the portfolio reduction acceleration on the Enterprises' stock prices. This is incorrect given Dr. Mason's testimony in Trial 1—and Defendants know it. Moreover, it would be especially prejudicial to block Plaintiffs from re-examination on this issue (as Defendants have sought to do) given that Dr. Mason's testimony is Plaintiffs' only source of evidence regarding damages in this case.

In sum, Plaintiffs respectfully submit that Defendants' objection should be overruled.

III. Plaintiffs Seek a Curative Instruction About Supposed "Price Recovery" Evidence and the Ability to Inquire Into Why Damages Persist to Today

Plaintiffs hereby seek a curative instruction that events post-dating the Net Worth Sweep are not relevant to the question of damages. This exact topic was the subject of a carefully-negotiated agreement between the parties, which Plaintiffs included in their Pretrial Statement.

ECF No. 321 at 12-14. That agreement barred Defendants from presenting evidence or argument, through Plaintiffs' expert Dr. Mason or otherwise, that stock price movements after the Net Worth Sweep might be relevant to damages. *Id.* at 14. It also preserved for Plaintiffs the ability to inquire about specific designated topics. *Id.* at 13-14.

Yesterday afternoon, July 27, 2023, Plaintiffs attempted to ask a question on re-direct on one of those specifically-designated topics. The question would have been for Dr. Mason to explain what he meant by his testimony that the harm from the Net Worth Sweep persists today. Trial 2 Tr. at 102:25-103:3. The parties' agreement specifically reserved for Plaintiffs the ability to inquire as to (1) whether the \$1.6 billion in damages estimated at the announcement of the Net Worth Sweep applies today (ECF No. 276-2 (Mason Supplemental Report) at ¶7); and (2) whether Dr. Mason is of the opinion that there has not been a change in the Net Worth Sweep policy that would mitigate damages in the case. *Id.* at ¶9. Defendants' objection violated the clear terms of the parties' agreement.

At the same time, Defendants violated the same agreement between the parties by presenting two stock price charts to the jury that showed Fannie and Freddie's stock prices increasing in the months after the Net Worth Sweep. Trial 2 Tr. 84. While these stock charts sat before the jury, Defendants asked Dr. Mason a series of meaningless questions, not meant to elicit any relevant testimony, such as, "if you look at the blue [line], that's just adding the gray and orange lines together" and "[t]he blue is just mathematically the market value of the common and the junior preferred together. Right?" *Id.* at 91:6-9. Defendants also reminded the jury *six times* in ten pages of the trial transcript that the Net Worth Sweep was "eleven years ago." Trial 2 Tr. at 83-92.

Defendants' flagrant violation of the parties' agreement has caused substantial prejudice to Plaintiffs. Plaintiffs were not only prevented from having Dr. Mason explain *why* the damage suffered by Fannie and Freddie stockholders still persists today, but Defendants compounded this inequity by then parading irrelevant evidence of post-Net Worth Sweep stock price movements before the jury. Defendants' use of the parties' agreement as both a sword and shield should not be allowed to stand. A curative instruction is warranted. Defendants should be hard-pressed to oppose such an instruction, since it simply corroborates the spirit of the parties' prior agreement, namely, that post-Net Worth Sweep price evidence is irrelevant to the jury's consideration of damages.

Defense counsel have breached an agreement between the parties to not argue or present evidence to the jury of a supposed "recovery" in the prices of Fannie and Freddie stock. As discussed in detail below, during yesterday's proceedings, Defendants falsely accused Plaintiffs of violating the Parties' agreement on "price recovery" evidence, and then Defendants violated the agreement themselves.

A. Defendants' Objection to Questioning on *Why* Damages Persist to Today Should Not Have Been Sustained

Yesterday, Plaintiffs' counsel asked Dr. Mason in redirect about his testimony that "the damages from the net worth sweep still persist today" and if that was an accurate quote from his testimony. Trial 2 Tr. at 101:2-4. That straightforward question elicited an objection from Defendants, who claimed that the question was somehow outside the scope of the parties' agreement on supposed "price recovery" evidence. *Id.* at 101:11-20. Plaintiffs' counsel elaborated that he would seek to "go back to the direct testimony" where he had asked Dr. Mason "[d]oes this damage still persist today" and "ask him to explain what he meant by that." *Id.* at 102:25-103:3. The Court sustained Defendants' objection to that type of questioning. *Id.* at 103:21.

The parties' agreement barred Defendants from objecting to Plaintiffs' question. The Parties' "price recovery" agreement specifically allowed Plaintiffs to ask about why the damages from the Net Worth Sweep persist today. During the colloquy on this topic, defense counsel overstated the scope of the parties' agreement, claiming that Plaintiffs had categorically "agreed that they would not present testimony from Dr. Mason's supplemental report." *Id.* 101:11-17. To the contrary, the parties agreed that Plaintiffs were prohibited from eliciting testimony from Dr. Mason's supplemental report only from specific sections, namely:

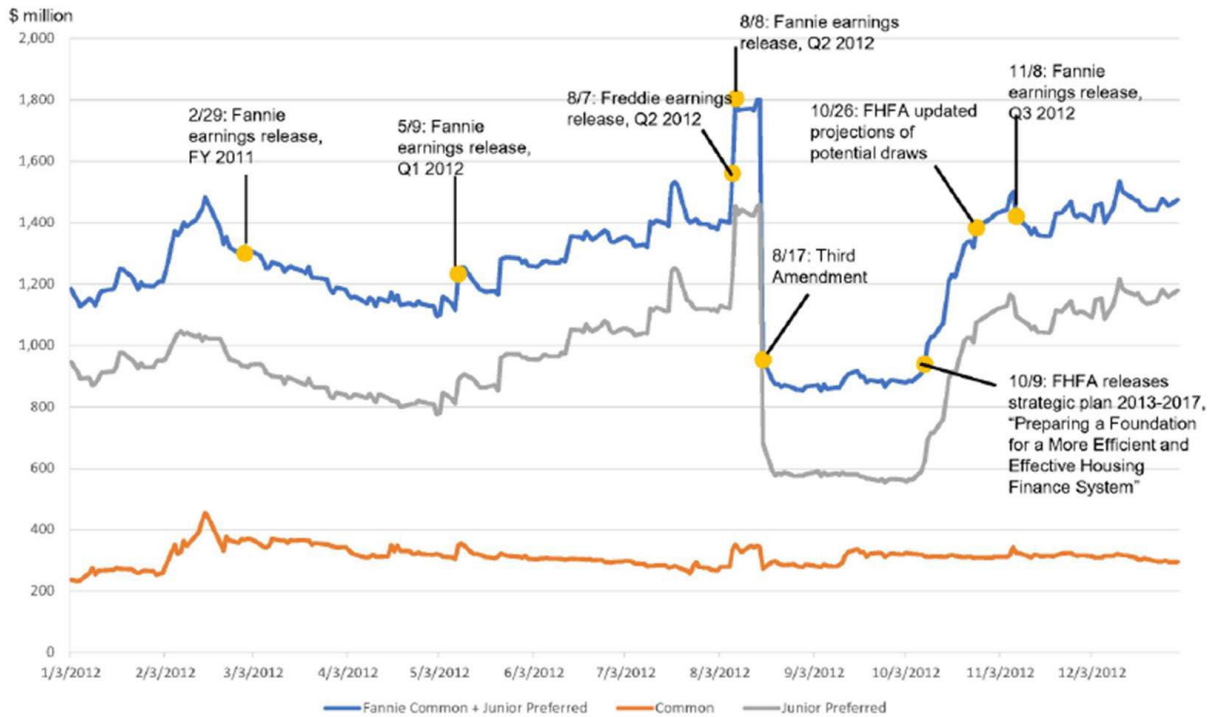
- Paragraph 7 (other than the first sentence)
- The last sentence of Paragraph 13
- The last sentence of Paragraph 14
- The last three sentence of Paragraph 15
- Paragraphs 16-18 in their entirety

As a result, there are several ways that Dr. Mason might answer Plaintiffs' intended questioning that are within the terms of the Parties' agreement. Those include that there has not been a change in the Net Worth Sweep policy (by which all profits generated by the GSEs accrue to the benefit of Treasury) that would mitigate damages in this case. Moreover, the post-Net Worth Sweep share price movement that Defendants characterize as a "recovery" is unrelated to any change in the Net Worth Sweep. Such testimony is not barred by the parties' agreement.

B. Defendants' Cross-Examination Violated the Parties' "Price Recovery" Agreement

Defendants' cross-examination of Dr. Mason violated the parties' agreement on the introduction of supposed "price recovery" evidence. During Defendants cross-examination of Dr. Mason, Defendants published to the jury two charts from Defendants' event study showing the existence of Fannie and Freddie stock price increases after August 17, 2012.

Common and Junior Preferred Stock: *Fannie Mae*



2 Privileged and Confidential
Prepared at the Request of Counsel

Preliminary Work Product
Draft – Subject to Revision

CRA Charles River
Associates

Protected Information To Be Disclosed Only In Accordance With Protective Order

FHFA-DDC-0119088

As the chart showing the prices increases were published to the jury, defense counsel reiterated *six times* that the Net Worth Sweep had occurred “11 years ago.” Trial 2 Tr. at 83-92.

This line of questioning included such pointless inquiries as:

And just to orient everyone, today is July 27th, 2023. So that means August 17, 2023, the day of this one-day decline in share prices, that was almost 11 years ago. Right?

Trial 2 Tr. at 83:6-9. This conveyed to the jury that stock price movements during the intervening 11 years between August 2012 and the present are somehow relevant here—all while Defendants kept the slide showing the September and October 2012 stock price movements published to the jurors.

This is the exact type of “price recovery” evidence that was the subject of the Parties’ original dispute at the first trial, and which formed the need for the parties’ agreement going forward—which Defendants then violated yesterday. At the first trial, on cross-examination of Dr. Mason, defense counsel elicited testimony from him about the supposed “recovery” in the prices of Fannie and Freddie stock in September and October of 2012. Specifically, defense counsel read to the jury a single sentence from Defendants’ expert’s event study which stated that the “Price of the common stock *recovered* in September 2012 and that of the junior preferred stocks *recovered* during October 2012.” Trial 1 Tr. at 1524:1-7 (emphasis added). Defense counsel then asked Dr. Mason, “Did I read that correctly?” *Id.* at 1524:6 (emphasis added). Defense counsel then asked whether “September 2012 was . . . the month after August 2012, when the Third Amendment was announced” (*id.* at 1524:11-14) and then whether “October 2012 was the month after that, the one right after September?” to which Professor responded affirmatively. *Id.* at 1524:15-17. This conveyed to the jurors the implication that the prices of Fannie and Freddie stock had “recovered” and thereby reduced Plaintiffs’ recoverable damages. This is the same playbook that Defendants followed yesterday in an attempt to introduce post-Net Worth Sweep price recovery evidence.

In Defendants’ closing argument during the first trial, defense counsel also commented on the purported price recovery, stating that “shareholders didn’t lose that one-day reduction in share price for 10 years, as plaintiffs claim. The share prices started to increase immediately in 2012.” *Id.* at 2688:3-8. On February 17, 2023, in advance of the second trial, and in an attempt to prevent a similar improper line of questioning from Defendants without being allowed the opportunity to provide an opinion on post-Net Worth Sweep stock price movements, Plaintiffs moved to serve on the Defendants a supplemental expert report from Dr. Mason. That proposed supplemental

report discussed why Fannie and Freddie stock price movements after the August 17, 2012 imposition of the Net Worth Sweep were not a “recovery” of lost value and therefore did not mitigate Plaintiffs’ damages. ECF No. 291. On June 2, 2023, this Court denied Plaintiffs’ motion. ECF No. 298.

On June 8, 2023, after the Court denied Plaintiffs’ motion, counsel for Plaintiffs and Defendants discussed by phone a potential agreement about the scope of Dr. Mason’s testimony at the second trial. That same evening, Plaintiffs’ counsel emailed Defendants’ counsel at 6:00 pm to memorialize the parties’ agreement on the issue of supposed “price recovery” questioning of Dr. Mason. Ex. 1 (Email dated June 8, 2023) at 2. Plaintiffs’ counsel wrote that he appreciated Defendants’:

confirmation that they *would not ask Dr. Mason any questions about a purported price recovery* in GSE shares following the NWS (*see, e.g.*, [First Trial] Tr. 1523:25-1524:17 (questions about a purported recovery in share prices in September 2012 and October 2012); *see also* Mason Supp. Dep. Tr. 66:6-78:18; 124:4-143:11;162:15-168:13 (questions about price recovery)); and that Defendants *will not otherwise argue to the jury* that the *share increases* after the Third Amendment *mitigated damages* (*see, e.g.*, Tr. 2687:24-2688:8) (emphasis supplied).

However, as Plaintiffs’ counsel also explicitly set forth in his email confirmation, “some portions of Dr. Mason’s supplemental report *refer to opinions that he previously expressed* in his expert report or during prior trial testimony,” and “this agreement will not foreclose Dr. Mason from providing testimony at the second trial similar to his testimony at the first trial.” *Id.* (emphasis supplied).

During the June 8 call, Defense counsel had asked Plaintiffs to provide Defendants with “specific portions of Dr. Mason’s supplemental expert report that he will not testify about at trial [].” *Id.* Accordingly, in Plaintiffs’ counsel’s June 8 email, Plaintiffs identified specific paragraphs of Dr. Mason’s Supplemental Report about which Dr. Mason would not testify, including,

“Paragraph 7 (*other than the first sentence*).” *Id.* (emphasis supplied). Plaintiffs thus thereby carved out of their agreement the first sentence of paragraph 7 of Dr. Mason’s supplemental report. That first sentence of Paragraph 7 states, and expressly allowed Dr. Mason to testify, that “[t]he opinion in my Reply Report regarding the \$1.6 billion in damages estimated at the announcement of the NWS *applies today*, as well as in 2012.” (Mason Supplemental Report) at ¶7 (emphasis supplied). Mr. Kravetz’s email asked Ms. Varma to “[p]lease let me know if this accurately describes the scope of our agreement.” Ex. 1 at 2. Ms. Varma responded the same evening that, “I write to confirm Defendants’ agreement on the terms in your emails of 6:00 pm and 10:27 pm today.” *Id.* at 1.

The parties also further confirmed and memorialized their understanding of this agreement in their respective Pretrial Statement filings with the Court. In Plaintiffs’ Pretrial Statement, they set forth for the Court that, among other things, “in connection with [their] agreement, Dr. Mason will not testify about the following paragraphs in his supplemental report: Paragraph 7 (*other than the first sentence*).” ECF 321 at 13. Emphasis supplied. Similarly, in Defendants’ Pretrial Statement, they represented that Defendants would “not ask Dr. Mason *any questions about a price recovery* in Enterprise shares following the Net Worth Sweep (*see, e.g.*, Trial 1 Tr. 1523:25-1524:17 (questions about a recovery in share prices in September 2012 and October 2012), and Defendants *will not otherwise argue* to the jury that the share price increases after the Third Amendment *mitigated damages*.” ECF No. 318 at 15 (emphasis supplied).

However, despite Plaintiffs’ diligence to attempt to avoid the same issues that the Defendants’ conduct raised in the first trial, yesterday defense counsel *once again* displayed to the jury evidence of a supposed price recovery in a clear effort to suggest to the jury the existence of mitigated damages. This was despite the parties’ clear agreement to explicitly prevent such an

outcome, and despite Defendants' lack of expert testimony that could support an assertion of mitigated damages.

C. Plaintiffs Seek a Curative Instruction, or in the Alternative, Additional Re-Direct of Dr. Mason

Defendants' violation of the parties' agreement has significantly prejudiced Plaintiffs' ability to respond to the stock price movements after August 2012 shown to the jurors. "Prompt curative instructions" can prevent prejudice "from rising to the high level required to warrant a mistrial or severance." *Morris v. Pruitt*, 308 F. Supp. 3d 153, 169 (D.D.C. 2018). Moreover, courts routinely find curative instructions wisely given twice. *See, e.g., Brages v. Superintendent of SCI Benner Twp.*, 2022 U.S. Dist. LEXIS 66854, at *38-39 (W.D. Pa. Apr. 11, 2022) (giving two curative instructions); *United States v. Johnston*, 620 F. App'x 839, 845 (11th Cir. 2015) (curative instructions, one given during the final jury charge); *United States v. Brooks*, 508 F.3d 1205, 1211 (9th Cir. 2007) (curative instructions given twice, one given at the end of trial); *United States v. Coffey*, 823 F.2d 25, 27 (2d Cir. 1987) (giving two curative instructions). Accordingly, Plaintiffs seek a curative instruction, one given today at the start of the day and one before jury deliberations, that:

I instruct you that any movements in the prices of Fannie Mae and Freddie Mac stock after August 17, 2012 are not relevant to your consideration of damages in this case. If you find that the Net Worth Sweep caused damages to Fannie Mae or Freddie Mac's stock prices on August 17, 2012, then I instruct you that anything subsequent to that date cannot have mitigated that damage because the Net Worth Sweep has never been undone.

In the alternative, Plaintiffs request the ability to question Dr. Mason about (i) what he meant by the fact that damages persist to today; (ii) how any stock price increases in 2012 after the Net Worth Sweep were in response to events unrelated to the Net Worth Sweep, and that (iii) since the FHFA did not undo the Net Worth Sweep in 2012, any stock price increases in 2012 do not reduce Plaintiffs' damages here.

Dated: July 27, 2023

/s/ Charles J. Cooper

Charles J. Cooper (Bar No. 24870)
David H. Thompson (Bar No. 450503)
Vincent J. Colatristano (Bar No. 429562)
Peter A. Patterson (Bar No. 998668)
Brian W. Barnes (*Pro Hac Vice*)
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, DC 20036
Tel: (202) 220-9600
Fax: (202) 220-9601
ccooper@cooperkirk.com

Counsel for Berkley Plaintiffs, et al.

Michael J. Barry (*Pro Hac Vice*)
GRANT & EISENHOFER, P.A.
123 Justison Street
Wilmington, DE 19801
Tel: (302) 622-7000
Fax: (302) 622-7100
mbarry@gelaw.com

Adam Wierzbowski (*Pro Hac Vice*)
**BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**
1251 Avenue of the Americas
New York, NY 10020
Tel: (212) 554-1400
Fax: (212) 554-1444
adam@blbglaw.com

Co-Lead Counsel for the Class

Respectfully submitted,

/s/ Eric L. Zagar

Eric L. Zagar (*Pro Hac Vice*)
**KESSLER TOPAZ
MELTZER & CHECK, LLP**
280 King of Prussia Rd.
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056
ezagar@ktmc.com

Hamish P.M. Hume (Bar No. 449914)
Samuel C. Kaplan (Bar No. 463350)
BOIES SCHILLER FLEXNER LLP
1401 New York Ave. NW
Washington, DC 20005
Tel: (202) 237-2727
Fax: (202) 237-6131
hhume@bsfllp.com
skaplan@bsfllp.com

Exhibit 1

From: Varma, Asim <Asim.Varma@arnoldporter.com>
Sent: Thursday, June 8, 2023 10:34 PM
To: Robert Kravetz; Hoffman, Ian S.; Jones, Stanton; skaplan@bsflp.com; Kenya K. Davis; Grant Goodhart; Eric Zagar; Lee Rudy
Cc: Stern, Jonathan L.; Bergman, David B.; mvergow@omm.com; MCIatti@kslaw.com
Subject: Re: Follow-up on Call [re Mason]

[External]

Thank you, Rocky.

I write to confirm Defendants' agreement on the terms in your emails of 6:00 pm and 10:27 pm today.

Thanks again, Asim

Get [Outlook for iOS](#)

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>
Sent: Thursday, June 8, 2023 10:27 PM
To: Varma, Asim <Asim.Varma@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; zzz.External.skaplan@bsflp.com <skaplan@bsflp.com>; Kenya K. Davis <kdavis@bsflp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>; Lee Rudy <lrudy@ktmc.com>
Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; zzz.External.mvergow@omm.com <mvergow@omm.com>; zzz.External.MCIatti@kslaw.com <MCIatti@kslaw.com>
Subject: RE: Follow-up on Call [re Mason]

External E-mail

Asim,

As a follow-on to the email below and our subsequent conversation, I wanted to represent the following:

1. Based on our conversations and the representations set forth below, Plaintiffs will not file a motion tomorrow to restrict the scope of cross-examination or argument regarding Dr. Mason's testimony.
2. Plaintiffs understand that Defendants reserve the right to object to any testimony or argument regarding any affirmative Plaintiffs' testimony or argument as to price recovery. Plaintiffs will inform Defendants in advance of opening statements or Dr. Mason's testimony if Plaintiffs seek to present any testimony or argument regarding price recovery so as to allow Defendants a reasonable opportunity to lodge an objection.

Thank you,
Rocky

From: Robert Kravetz
Sent: Thursday, June 8, 2023 6:00 PM

To: Varma, Asim <Asim.Varma@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>; Lee Rudy <lrudy@ktmc.com>
Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; mvergow@omm.com; MCIatti@kslaw.com
Subject: RE: Follow-up on Call [re Mason]

Asim,

Thank you for your email and for the courtesy of a phone call earlier this afternoon.

We appreciate your confirmation that Defendants will not ask Dr. Mason any questions about a purported price recovery in GSE shares following the NWS (*see, e.g.*, Tr. 1523:25-1524:17 (questions about a purported recovery in share prices in September 2012 and October 2012); *see also* Mason Supp. Dep. Tr. 66:6-78:18; 124:4-143:11; 162:15- 168:13 (questions about price recovery)); and that Defendants will not otherwise argue to the jury that the share increases after the Third Amendment mitigated damages (*see, e.g.*, Tr. 2687:24-2688:8). We also understand that Defendants will not present any testimony from Dr. Attari at trial regarding the equity event study.

We confirm that Dr. Mason will not testify that \$1.61 billion represents a “conservative” estimate of damages. Nor will Dr. Mason opine that the GSEs performance since 2012 makes the \$1.61 billion measure of damages reasonable. As we discussed earlier today, some portions of Dr. Mason’s supplemental expert report refer to opinions that he previously expressed in his expert report or during prior trial testimony. We understand that this agreement will not foreclose Dr. Mason from providing testimony at the second trial similar to his testimony at the first trial.

On that point, however, you asked for us to provide the specific portions of Dr. Mason’s supplemental expert report that he will not testify about at trial, consistent with our prior discussions about the scope of his testimony. Pursuant to our agreement, Dr. Mason will not testify about:

- Paragraph 7 (other than the first sentence)
- The last sentence of Paragraph 13
- The last sentence of Paragraph 14
- The last three sentences of Paragraph 15
- Paragraphs 16-18 in their entirety

Please let us know if that is consistent with your understanding, as well.

Finally, we understand this agreement relates only to Dr. Mason’s opinions regarding damages and does not foreclose Plaintiffs’ from seeking to introduce testimony or evidence through Dr. Mason in Plaintiffs’ case-in-chief or rebuttal case that is otherwise admissible. *See, e.g.* PX-444, PX-445 (admitted at trial without objection); Expert Report §§ V-VI & App. C; PX-442A; Rebuttal Report § IV.A-B (“Opinions on the Attari Report”). The parties reserve all rights to such testimony and evidence.

Please let me know if this accurately describes the scope of our agreement.

Best regards,
Rocky

From: Varma, Asim <Asim.Varma@arnoldporter.com>

Sent: Thursday, June 8, 2023 11:19 AM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart

<GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; mvergow@omm.com; MCiatti@kslaw.com

Subject: RE: Follow-up on Call [re Mason]

[External]

Rocky and Sam,

I write to memorialize the terms of proposed agreements we discussed yesterday, June 7, 2023, regarding the parties' potential filings on June 9, 2023.

I proposed that If Plaintiffs confirmed that Dr. Mason would not testify at trial as to any opinions disclosed in his supplemental expert report, Defendants would not file on June 9 a motion in limine seeking to exclude opinions in Dr. Mason's supplemental report. My understanding is that plaintiffs will provide the confirmation.

Plaintiffs proposed that if Defendants agreed not to ask Dr. Mason questions on "price recovery" or otherwise argue to the jury that the share price increases after the third amendment mitigated damages, Plaintiffs would not file on June 9 a motion seeking such relief.

I now confirm that Defendants agree not to ask Dr. Mason questions on "price recovery" or otherwise argue to the jury that the share price increases after the third amendment mitigated damages.

Please confirm Plaintiffs agree to the terms described above.

Thanks, Asim

From: Varma, Asim

Sent: Wednesday, June 7, 2023 10:22 AM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; z.z.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; z.z.External.mvergow@omm.com <mvergow@omm.com>; z.z.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call [re Mason]

Rocky,

In light of the Court's ruling denying plaintiffs' motion to serve Plaintiffs' experts' supplemental reports, we seek confirmation that Dr. Mason will not testify at trial as to any opinions disclosed in his supplemental expert report. If so, Defendants do not intend to file on June 9, 2023 a motion in limine regarding Dr. Mason's supplemental report.

Defendants believe that the parties may be able to reach agreement making it unnecessary for Plaintiffs to file a "motion to preclude certain cross-examination of Dr. Mason and argument as to damages" as indicated in your message below. We would appreciate if plaintiffs would identify the specific relief they would be seeking in the motion if they were to file it.

Feel free to call me if you would like to discuss further.

Thanks, Asim

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>

Sent: Friday, May 26, 2023 4:49 PM

To: Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; Varma, Asim <Asim.Varma@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; z.zz.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; z.zz.External.mvergow@omm.com <mvergow@omm.com>; z.zz.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call [re Mason]

External E-mail

Thank you, Ian, you have our consent to file.

From: Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>

Sent: Friday, May 26, 2023 4:31 PM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Varma, Asim <Asim.Varma@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; mvergow@omm.com; MCiatti@kslaw.com

Subject: RE: Follow-up on Call [re Mason]

[External]

Rocky et al. – Attached and copied below are a draft joint motion and proposed order. Once we have Plaintiffs' OK, we will get these on file. Thanks.

DRAFT

JOINT MOTION TO MODIFY THE SCHEDULING ORDER

Plaintiffs and Defendants ("the Parties") respectfully request that the Court modify the Scheduling Order submitted by the Parties and entered by the Court on March 10, 2023 (No. 1:13-cv-01053, ECF No. 292; No. 1:13-mc-01288, ECF No. 282), to extend by two weeks the deadline for motions in limine and *Daubert* motions for (1) Defendants' motion in limine regarding the scope of Plaintiffs' expert Dr. Joseph Mason, Ph.D.'s trial testimony, and (2) Plaintiffs' motion to preclude certain cross-examination of Dr. Mason and argument as to damages.

In support of this Motion, the Parties state:

Pursuant the March 10, 2023 Scheduling Order, any motions in limine and *Daubert* motions are currently due Friday, May 26, 2023, with oppositions due June 14 and replies due June 23.

The Parties request a two-week extension of these deadlines. Under this requested extension, Defendants' motion in limine regarding the scope of Dr. Mason's trial testimony and Plaintiffs' motion to

preclude certain cross-examination of Dr. Mason and argument as to damages would be due June 9, 2023, with oppositions due June 23 and replies due June 30.

The Parties respectfully submit that good cause exists for the requested extension. The Parties are continuing to meet and confer regarding these issues, and the requested extension would enable the parties to continue those discussions in a manner that may eliminate or reduce the need for further motions practice.

WHEREFORE, the Parties respectfully request that the Court modify the March 10, 2023 Scheduling Order, to extend the deadline for motions in line and *Daubert* motions as related to (1) Defendants' motion in limine regarding the scope of Dr. Mason's trial testimony, and (2) Plaintiffs' motion to preclude certain cross-examination of Dr. Mason and argument as to damages by two weeks, to June 9, 2023, with oppositions due June 23 and replies due June 30. A proposed order is being submitted along with this motion.

[PROPOSED] ORDER

Upon consideration of the Parties' Joint Motion to Modify the Scheduling Order, it is hereby:

ORDERED that the Motion is **GRANTED**. The deadline for (1) Defendants' motion in limine regarding the scope of Plaintiffs' expert Dr. Joseph Mason, Ph.D.'s trial testimony and (2) Plaintiffs' motion in limine to preclude certain cross-examination of Dr. Mason and argument as to damages is extended by two weeks, to June 9, 2023, with oppositions due June 23, and replies due June 30. The remaining deadlines set out in the March 10, 2023 Scheduling Order remain in effect.

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>

Sent: Friday, May 26, 2023 3:28 PM

To: Varma, Asim <Asim.Varma@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; zzz.External.skaplan@bsflp.com <skaplan@bsflp.com>; Kenya K. Davis <kdavis@bsflp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; zzz.External.mvergow@omm.com <mvergow@omm.com>; zzz.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call [re Mason]

External E-mail

Thanks, Asim, we'll review it promptly.

From: Varma, Asim <Asim.Varma@arnoldporter.com>

Sent: Friday, May 26, 2023 2:38 PM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; mvergow@omm.com; MCiatti@kslaw.com

Subject: Re: Follow-up on Call [re Mason]

[External]

Rocky,

Defendants will not be seeking an extension on their PX205 motion. One of us will circulate the draft joint motion for an extension on the Mason motions shortly.

Thanks, Asim

Asim Varma

Partner

Arnold & Porter Kaye Scholer LLP

601 Massachusetts Ave., NW | Washington, DC 20001-3743

T: +1 202.942.5180

asim.varma@arnoldporter.com | www.arnoldporter.com

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>

Sent: Friday, May 26, 2023 12:53:30 PM

To: Varma, Asim <Asim.Varma@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; zzz.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; zzz.External.mvergow@omm.com <mvergow@omm.com>; zzz.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call [re Mason]

External E-mail

Thank you, Asim, that reflects my understanding, as well.

From: Varma, Asim <Asim.Varma@arnoldporter.com>

Sent: Friday, May 26, 2023 12:40 PM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>;

mvergow@omm.com; MCiatti@kslaw.com

Subject: RE: Follow-up on Call [re Mason]

[External]

Rocky,

We are drafting the motion for the extension. We are going to propose 2 weeks for this extension too but we will call you after the holiday to discuss the scope of Mason's testimony.

Sam also called to tell me that PX584, which we would be receiving from Grant shortly, might affect when Defendants want to file their motion on PX205. Sam said Plaintiffs agreed that if defendants decide they do want an extension on PX205, we can fold in that extension into the same joint motion for extension on the Mason motions.

If I've got something wrong let me know.

Thanks, Asim

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>

Sent: Friday, May 26, 2023 11:49 AM

To: Varma, Asim <Asim.Varma@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; z.z.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Eric Zagar <ezagar@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; z.z.External.mvergow@omm.com <mvergow@omm.com>; z.z.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call [re Mason]

External E-mail

Asim,

We are fine with an extension as to we continue to make progress on a possible agreement. I just left a message for Stanton on his cell phone.

Can we please note in the motion that the extension request relates to (1) Defendants' motion regarding the scope of Dr. Mason's trial testimony; and (2) Plaintiffs' motion to preclude certain cross-examination of Dr. Mason and argument as to damages?

Today may be a bit hectic for everyone, but we should touch base on these topics shortly after the holiday weekend.

If we don't speak further, have a nice holiday weekend.

Thank you,
Rocky

From: Varma, Asim <Asim.Varma@arnoldporter.com>

Sent: Friday, May 26, 2023 11:13 AM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>

Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; mvergow@omm.com; MCiatti@kslaw.com

Subject: RE: Follow-up on Call [re Mason]

[External]

Hi Rocky,

Unfortunately, we don't have everyone on our end available.

I'm not sure whether you were suggesting that you had a motion in the works to file today or not. We are willing to continue negotiating on the scope of Dr. Mason's testimony.

We suggest that the parties agree to an extension on the motion in limine on Mason we were going to file today and any motion you have planned to see if we might be able to reach a compromise.

We can draft the joint motion quickly if plaintiffs agree.

Thanks, Asim

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>

Sent: Friday, May 26, 2023 11:06 AM

To: Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; zzz.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>

Cc: Varma, Asim <Asim.Varma@arnoldporter.com>; Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; zzz.External.mvergow@omm.com <mvergow@omm.com>; zzz.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call [re Mason]

External E-mail

Do you want to send a dial-in for 11:15 for whoever can join?

Thank you.

From: Jones, Stanton <Stanton.Jones@arnoldporter.com>

Sent: Friday, May 26, 2023 11:02 AM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>

Cc: Varma, Asim <Asim.Varma@arnoldporter.com>; Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; mvergow@omm.com; MCiatti@kslaw.com

Subject: RE: Follow-up on Call [re Mason]

[External]

Thanks Rocky. We do think a quick call would be helpful to see if we can come to ground on this. What's a good # to call you now?

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>

Sent: Friday, May 26, 2023 10:22 AM

To: Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>;

zzz.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>

Cc: Varma, Asim <Asim.Varma@arnoldporter.com>; Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; zzz.External.mvergow@omm.com <mvergow@omm.com>; zzz.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call [re Mason]

External E-mail

Ian,

As we evaluate your proposal, can you please provide an answer to the following (from an earlier email) which is relevant to your proposal regarding paragraph 13:

We have one additional question regarding Dr. Mason's testimony in the context of defense questioning (Tr. 1523:25-1524:18) and argument (Tr. 2687:21-2688:2). You have proposed that Dr. Mason not testify as to the last two sentences in paragraph 13, which state:

Since the stock price increases after August 17, 2012 have nothing to do with the NWS, they cannot in any way mitigate or offset damages in this matter. In addition, those stock price increases likely would have been larger had the NWS not attenuated the link (in particular the upside link) between the GSEs' cash flows and investor returns.

This section of Dr. Mason's report is in direct response to the series of cross-examination questions (Tr. 1523:25-1524:18) and argument (Tr. 2687:21-2688:2) from Defendants at trial. In particular, in their Closing Argument, Defendants argued:

The shareholder always had only a hope that Treasury's bailout of the enterprises would one day benefit them by keeping the enterprises, and therefore their shares, alive. The fact that the share prices dipped on August 17th, and then began to immediately go back up in late 2012, reflects that shareholders were hoping to gain from their ownership of the shares, other than through dividends.

Tr. 2687:21-2688:2. We cannot agree to your proposal regarding Paragraph 13 if Defendants are going to ask similar questions/advance similar arguments at Trial 2. Otherwise, we will (1) file a motion seeking to preclude the question and argument, as there is no factual basis in the record; and/or (2) seek Dr. Mason's testimony to explain why stock price increases after August 17, 2012 (through the date of the event study, Dec. 31, 2012, see PX-496-3) are unrelated to the NWS.

We understand your position regarding post-2013 events in relation to the last sentence of 2012, but the trial questions related to events in 2012 as captured by the event study. The statement in the last sentence of paragraph 13 relates specifically to the cross examination questions at trial.

Let us know if a quick call would be helpful to finalize.

Thanks,
Rocky

From: Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>

Sent: Friday, May 26, 2023 9:02 AM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>; skaplan@bsfillp.com; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>

Cc: Varma, Asim <Asim.Varma@arnoldporter.com>; Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; mvergow@omm.com; MCiatti@kslaw.com

Subject: RE: Follow-up on Call [re Mason]

[External]

Rocky – Below is Defendants’ counter proposal regarding Dr. Mason, which attempts to meet in the middle. With apologies for the timing, we request that you let us know Plaintiffs’ position on this by 5:00 p.m. ET today (Friday) as we intend to file our motion thereafter. Of course we would be happy to jump on a call today to discuss if that would be helpful.

- Your email does not mention Par. 7, which is in the intro to Dr. Mason’s report. Per our prior email below, we would need Plaintiffs to agree that Dr. Mason will not testify to any of Paragraph 7, except the first sentence.
- To reach agreement, we would need Plaintiffs to agree to drop the last sentence of Paragraph 13. (“In addition, those stock price increases likely would have been larger had the NWS not attenuated the link (in particular the upside link) between the GSEs’ cash flows and investor returns.”). That sentence says, in substance, that the \$1.6B damages calculation is conservative on a theory that share prices would have moved higher absent the Third Amendment. That is substantively identical to Dr. Mason’s opinion in Section II(C) (Par. 14-18).
- While we believe that Par. 14-18 should be excluded in their entirety, because they are all under a heading of – and connected to – the challenged “conservative” opinion, we would accept your proposal as a compromise with the exceptions that Dr. Mason would not testify to:
 - Footnote 25 in Par. 15. This is a quotation from a portion of Dr. Mason’s August 2021 report that already has been excluded by Judge Lamberth.
 - The third sentence of Par. 15 (“Instead, the benefits of the performance have accrued solely to Treasury as senior preferred shareholder with approximately \$330 billion of value accruing to Treasury from 2013 through Q2 2022.”) and the accompanying Footnote 26. This sentence contains the same information as the last sentence in Par. 14, which your proposal indicates you are prepared to drop.
 - The entirety of Par. 16, including Dr. Mason’s quotation from Judge Lamberth’s 2018 motion to dismiss decision. That Judge Lamberth used these words in an opinion does not make them admissible. Further, the substance of Par. 16, used in this way, tracks the same idea that \$1.6B is conservative.

Please let us know if Plaintiffs agree to this proposed compromise. Thanks.

Ian Hoffman
Partner | [Bio](#)

Arnold & Porter

601 Massachusetts Ave., NW
Washington, DC 20001-3743
T: +1 202.942.6406

Ian.Hoffman@arnoldporter.com

www.arnoldporter.com | [LinkedIn](#) | [Twitter](#)

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>

Sent: Wednesday, May 24, 2023 5:11 PM

To: Jones, Stanton <Stanton.Jones@arnoldporter.com>; zzz.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>

Cc: Varma, Asim <Asim.Varma@arnoldporter.com>; Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>;

[zzz.External.mvergow@omm.com](mailto:mvergow@omm.com) <mvergow@omm.com>; zgz.External.MCiatti@kslaw.com <MCiatti@kslaw.com>

Subject: RE: Follow-up on Call

External E-mail

Thank you, Stanton. Our confusion was the insertion of the bracket with the date of August 17, 2012 into the last sentence, which seemed to refer back to the prior sentence.

We would still have the same concerns about the last sentence. For example, during Dr. Mason's most recent deposition, he was asked about share price increases in September and October 2012. In providing an answer as to why those increases were "irrelevant to the harm," Dr. Mason explained that the stock price movement in October was unrelated to the NWS and that "had the Net Worth Sweep not been announced on - - on August 17th, then this stock price would be that much higher on October 9th. It would be expected to be \$1.6 billion higher, or thereabouts, on October 9th and would have risen, potentially even more on October 9th without a Net Worth sweep in [place] than it actually did no October 9th with the Net Worth Sweep in place." Mason Supp. Dep. Tr. 91:22-93:19; see also id. 199:1-200:7. We think that his testimony is a fair response to your question—which is why we posed the question below about related questions and argument at trial.

Happy to discuss further.

Thanks,
Rocky

From: Jones, Stanton <Stanton.Jones@arnoldporter.com>

Sent: Wednesday, May 24, 2023 4:31 PM

To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; skaplan@bsfllp.com; Kenya K. Davis <kdavis@bsfllp.com>; Grant Goodhart <GGoodhart@ktmc.com>

Cc: Varma, Asim <Asim.Varma@arnoldporter.com>; Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Bergman, David B. <David.Bergman@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>; mvergow@omm.com; MCiatti@kslaw.com

Subject: RE: Follow-up on Call

[External]

Rocky: Before we answer the question at the end of your email, we want to correct an apparent misunderstanding of our proposal. On paragraph 13, per my May 23 email below, we are challenging only the final sentence of that paragraph, which states: "In addition, those stock price increases likely would have been larger had the NWS not attenuated the link (in particular the upside link) between the GSEs' cash flows and investor returns." Contrary to your email below, we are not challenging the second-to-last sentence of paragraph 13, which states: "Since the stock price increases after August 17, 2012 have nothing to do with the NWS, they cannot in any way mitigate or offset damages in this matter." Our proposed agreement below would not preclude that second-to-last sentence, only the very last sentence of paragraph 13.

It appears that your concerns about Defendants' cross-examination questions etc. from the first trial relate to the second-to-last sentence of paragraph 13, which restates Dr. Mason's proposed opinion that the September/October share-price increases do not mitigate the alleged harm. In contrast, we believe that the last sentence of paragraph 13 is substantially similar to Dr. Mason's section II.C opinion that \$1.6 billion in damages is "conservative."

Can you please let us know if that clarification resolves the concerns you described below? We can then evaluate the rest of your proposal below (and thank you for sending it). We're happy to discuss, especially if there's any confusion about what we're proposing.

Thanks.

Stanton

From: Robert Kravetz <Robert.Kravetz@blbgllaw.com>

Sent: Wednesday, May 24, 2023 3:44 PM

To: Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>

Cc: zzz.External.skaplan@bsfllp.com <skaplan@bsfllp.com>; Kenya K. Davis <kdavis@bsfllp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Varma, Asim <Asim.Varma@arnoldporter.com>

Subject: RE: Follow-up on Call

External E-mail

Stanton et al:

Thank you for your email regarding an attempt to come to an agreement as to the scope of Dr. Mason's testimony at trial. Subject to these conditions, we propose the following compromise:

- Dr. Mason will not testify that \$1.61 billion represents a "conservative" measure of damages in this case.
- Dr. Mason will not testify as to any information in Section II.C except as to the following:
 - Dr. Mason may testify consistent with the first two sentences of Paragraph 14, which relate to then-existing conditions of the GSEs at the time of the Third Amendment.
 - Dr. Mason may testify as to the first three sentences in Paragraph 15, which restate his prior testimony and does not incorporate any reference to later GSE performance.
 - Dr. Mason may testify, consistent with Paragraph 16, that, in general, an investor would expect that additional available cash on hand may increase the value of underlying securities, but that the structure of the NWS eliminates the possibility of profits accruing in any way to their benefit. That general statement, not tied to any specific time period, is consistent with the Court's prior ruling and the trial evidence.
- Dr. Mason may testify as to any other information set forth in his supplemental expert report.

We have one additional question regarding Dr. Mason's testimony in the context of defense questioning (Tr. 1523:25-1524:18) and argument (Tr. 2687:21-2688:2). You have proposed that Dr. Mason not testify as to the last two sentences in paragraph 13, which state:

Since the stock price increases after August 17, 2012 have nothing to do with the NWS, they cannot in any way mitigate or offset damages in this matter. In addition, those stock price increases likely would have been larger had the NWS not attenuated the link (in particular the upside link) between the GSEs' cash flows and investor returns.

This section of Dr. Mason's report is in direct response to the series of cross-examination questions (Tr. 1523:25-1524:18) and argument (Tr. 2687:21-2688:2) from Defendants at trial. In particular, in their Closing Argument, Defendants argued:

The shareholder always had only a hope that Treasury's bailout of the enterprises would one day benefit them by keeping the enterprises, and therefore their shares, alive. The fact that the share prices dipped on August

17th, and then began to immediately go back up in late 2012, reflects that shareholders were hoping to gain from their ownership of the shares, other than through dividends.

Tr. 2687:21-2688:2. We cannot agree to your proposal regarding Paragraph 13 if Defendants are going to ask similar questions/advance similar arguments at Trial 2. Otherwise, we will (1) file a motion seeking to preclude the question and argument, as there is no factual basis in the record; and/or (2) seek Dr. Mason's testimony to explain why stock price increases after August 17, 2012 (through the date of the event study, Dec. 31, 2012, see PX-496-3) are unrelated to the NWS.

Please let us know your position as to our proposal and the above question. We are happy to discuss further.

Plaintiffs reserve all rights.

Thank you,
Rocky

From: Jones, Stanton <Stanton.Jones@arnoldporter.com>
Sent: Tuesday, May 23, 2023 1:55 PM
To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>
Cc: skaplan@bsfilp.com; Kenya K. Davis <kdavis@bsfilp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Subject: RE: Follow-up on Call

[External]

Thanks Rocky.

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>
Sent: Tuesday, May 23, 2023 1:48 PM
To: Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>
Cc: z.zz.External.skaplan@bsfilp.com <skaplan@bsfilp.com>; Kenya K. Davis <kdavis@bsfilp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Subject: RE: Follow-up on Call

External E-mail

This is helpful, thank you.

We will discuss this, as well as Ian's earlier email, and provide a response.

From: Jones, Stanton <Stanton.Jones@arnoldporter.com>
Sent: Tuesday, May 23, 2023 1:39 PM
To: Robert Kravetz <Robert.Kravetz@blbglaw.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>
Cc: skaplan@bsfilp.com; Kenya K. Davis <kdavis@bsfilp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Subject: RE: Follow-up on Call

[External]

Rocky: Thanks for following up on a possible agreement to obviate our motion directed to Dr. Mason's proposed supplemental testimony. Our motion will seek to exclude (i) all of subsection II.C of Dr. Mason's proposed supplemental report, titled "The GSEs' Performance Since 2012 Makes the \$1.6 Billion Measure of Damages Conservative"; (ii) paragraph 7 which summarizes section II.C, except for the first sentence; and (iii) the final sentence of section II.B, which states: "In addition, those stock price increases [*i.e.*, after August 17, 2012] likely would have been larger had the NWS not attenuated the link (in particular the upside link) between the GSEs' cash flows and investor returns." That last sentence of section II.B, like section II.C, conveys a view the \$1.6 billion damages calculation is conservative/understated on the theory that GSE share prices would have been higher in periods after August 17, 2012 in the absence of the Third Amendment.

To be clear, as you know we oppose Dr. Mason's proposed supplemental report in its entirety, per our opposition to the pending motion for leave to submit that report. But subject to resolution of that motion, we would be willing to forgo our forthcoming motion directed to Dr. Mason's proposed supplemental testimony if Plaintiffs agree that Dr. Mason will not testify to the opinions/analysis in section II.C and the accompanying summary of it in paragraph 7 (except for the first sentence of that paragraph) and the last sentence of II.B.

Please let us know if this is acceptable to Plaintiffs. We're also happy to discuss if helpful.

Best regards,
Stanton

From: Robert Kravetz <Robert.Kravetz@blbgllaw.com>
Sent: Tuesday, May 23, 2023 10:33 AM
To: Hoffman, Ian S. <ian.Hoffman@arnoldporter.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>
Cc: zzz.External.skaplan@bsfllp.com <skaplan@bsfllp.com>; Kenya K. Davis <kdavis@bsfllp.com>; Grant Goodhart <GGoodhart@ktmc.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Subject: RE: Follow-up on Call

External E-mail

Stanton/Ian,

So that we can get you a final decision from our side as to the scope of Dr. Mason's testimony, can you please provide us with the specific paragraphs that contain testimony that you would seek to preclude through your motion? You informed us that you will seek to preclude Section II.C of the report (paragraphs 14-18). Are there any additional paragraphs in the report that will be the subject of your motion? We want to have a final discussion with our team to determine if there is a possibility of an agreement as to the scope of Dr. Mason's testimony.

Thank you,
Rocky

From: Hoffman, Ian S. <ian.Hoffman@arnoldporter.com>
Sent: Friday, May 19, 2023 4:33 PM
To: Robert Kravetz <Robert.Kravetz@blbgllaw.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>
Cc: skaplan@bsfllp.com; Kenya K. Davis <kdavis@bsfllp.com>; Grant Goodhart <GGoodhart@ktmc.com>
Subject: RE: Follow-up on Call

[External]

Thanks Rocky.

Ian

From: Robert Kravetz <Robert.Kravetz@blbglaw.com>
Sent: Friday, May 19, 2023 4:07 PM
To: Jones, Stanton <Stanton.Jones@arnoldporter.com>; Hoffman, Ian S. <Ian.Hoffman@arnoldporter.com>
Cc: zzz.External.skaplan@bsfillp.com <skaplan@bsfillp.com>; Kenya K. Davis <kdavis@bsfillp.com>; Grant Goodhart <GGoodhart@ktmc.com>
Subject: Follow-up on Call

External E-mail

Stanton and Ian:

Following up on your questions on our call this morning:

- The Treasury/WH documents that may be the subject of our motion in limine include: PX 226, 274, 279, 270, 271, PX 582, and PX-500 (cover letter is UST00469357).
- Section IV of Dr. Dharan's August 2021 expert report (pages 60-81) includes the documents on our exhibit list that we discussed during our meet-and-confer.

Best,
Rocky

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>

This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.

For more information about Arnold & Porter, click here:
<http://www.arnoldporter.com>