BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: MORTGAGE LENDER FORCE-PLACED INSURANCE LITIGATION	MDL No. 2388

FEDERAL NATIONAL MORTGAGE ASSOCIATION'S OPPOSITION TO AMENDED MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1407

I. SUMMARY OF REASONS WHY THE PANEL SHOULD DENY THE MOTION FOR TRANSFER

Federal National Mortgage Association ("Fannie Mae") files this Opposition to urge the Panel to deny the Amended Motion to Transfer (the "Motion") filed by the *Barreto* Plaintiffs that seeks to consolidate dozens of putative class action cases they claim involve "force-placed insurance" against the nations' largest mortgage servicers and insurers. Of all of the class actions identified in the Motion, Fannie Mae is a defendant in only one – *Cannon et al. v. Wells Fargo N.A. et al.*, Case No. 3:12-cv-01376-EMC, pending in the Northern District of California – and was brought into the case by an Amended Complaint served recently on August 1, 2012. Fannie Mae is neither a servicer nor an insurer.

Transfer under § 1407 is appropriate only when it will "promote the just and efficient conduct" of the transferred cases. As stated in numerous oppositions to the Motion, filed by both plaintiffs and defendants in other cases, which Fannie Mae joins and incorporates herein by reference, transfer will not achieve that purpose here. The cases involving lender-placed insurance are at widely differing stages of development; some barely begun, others already fully adjudicated, and others at various stages in between.

The lender-placed polices at issue also vary. Flood insurance, the subject of the *Cannon* case involving Fannie Mae, is required and regulated by federal law, while non-flood insurance

is primarily regulated by state law which varies from state to state. The cases – particularly *Cannon* – which alleges a California-based unfair competition claim and seeks a California resident sub-class – also raise numerous state law based claims, better suited for resolution by the district judges in the states where the cases were filed. The attempt to consolidate these disparate cases will not provide greater efficiency and will likely increase inefficiency. Some of the plaintiffs agree with defendants on these points. "Such an unusual alignment of parties and counsel suggests the possibility of other considerations at play." *In re CVS Caremark Corp. Wage & Hour Employment Practices Litig.*, 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010).

As explained more fully below, consolidation of the *Cannon* case in particular, and consolidation of all the cases in general, would not promote just and efficient conduct of proceedings and would create inefficiencies, including discovery and case management difficulties. For these reasons, the Motion to Transfer should be denied.

II. MOVANTS HAVE FAILED TO SHOW THAT TRANSFER IS APPROPRIATE

A. Legal Standard

28 U.S.C. § 1407(a) provides that this Panel may transfer civil cases to any district court for consolidated pretrial proceedings upon a determination that: (a) the cases involve one or more common questions of fact; (b) the transfers would further the convenience of the parties and witnesses; and (c) the transfer will promote efficient and just conduct of the actions. "[T]he Panel must weigh the interest of all the plaintiffs and all the defendants, and must consider multiple litigations as a whole in light of purposes of the law." *In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L 1968). The burden of proving that transfer and consolidation are warranted is born by the party seeking transfer. *In re Raymond Lee Org., Inc., Sec. Litig.*, 446 F. Supp 1266, 1268 (J.P.M.L 1978). "Before transfer will be ordered, the

Panel must be satisfied that all of the statutory criteria have been met." *In re Highway Accident Near Rockville, Comm. On Dec. 30, 1972*, 388 F. Supp. 574, 575 (J.P.M.L. 1975). As discussed below, that is not the case here.

B. *Cannon* Should Not Be Transferred And Consolidated Because It Is The Only Case In Which Fannie Mae Is A Party

Of all the cases sought to be transferred, Fannie Mae is a defendant in only one, *Cannon*, and was added to the case and served with the Amended Complaint earlier this month. The *Cannon* case should not be included in any MDL for this reason alone. Moreover, with Fannie Mae a party in only one case, there is no risk of inconsistent judgments as to Fannie Mae. Further, not consolidating *Cannon* will have little impact on discovery in the other cases. Discovery efficiencies would not increase if *Cannon* is consolidated. Indeed, Fannie Mae would likely be burdened with increased litigation expenses and delay in defending itself in *Cannon* in the context of a much larger MDL proceeding. The Motion should be denied as to the *Cannon* case at a minimum, if not entirely.

C. The Cases Are At Varying Stages And Transfer Will Not Promote Efficiency

When cases have been pending for several years and have reached different stages of development, the Panel has often denied transfer under § 1407, finding that "alternatives to transfer exist that can minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings." *See, e.g., In re Qwest Commc'ns Int'l, Inc. Secs. & "ERISA" Litig.*, 395 F. Supp. 2d 1360, 1361 (J.P.M.L. 2005); *In re Master Settlement Agreement Antitrust Litig.*, 374 F. Supp. 2d 1355, 1356 (J.P.M.L. 2005). "Where there is such a significant procedural disparity among the subject actions, the Panel will take a close look at whether movants have met their burden of demonstrating that centralization will still serve the purposes

of Section 1407." *In re La. Pac. Trimboard Mktg., Sales Practices, & Prods. Liab. Litig.*, __ F. Supp. 2d __, 2012 WL 2175773, *1 (J.P.M.L., June 11, 2012).

Just such a disparity exists here. Several of the cases listed in the Motion have been pending for years.[1] Others are currently on appeal after motions to dismiss were granted.[2] Others have reached advanced states of pretrial development, have significantly advanced through discovery, or have class certification motions pending.[3] In one, a state class has already been certified.[4] Four of the cases are stayed pending mediation.[5] Meanwhile others, such as *Cannon*, have just been filed or had defendants added.

Because these cases are at substantially different stages, consolidation will only create inefficiencies, not resolve them. For that reason, the Motion should be denied. *See, e.g., In re La. Pac. Trimboard Mktg.*, 2012 WL 2175773 at *1 (denying centralization after considering "advanced stage" of litigation, substantial delay in ongoing discovery, and consideration involving trial scheduling); *CVS Caremark Corp*., 684 F. Supp. 2d at 1379 (denying transfer when action in different procedural postures, significant discovery had taken place in one case,

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[1] *See Resnick v. Bank of America* and *Berger v. Bank of America*, both pending in the District of Massachusetts. In *Berger*, a summary judgment motion is pending but not yet fully briefed. *See* Motion at 8; (D. Mass. Case No. 10-11583, D.I. Nos. 66-67.)

[2] *Kolbe v. BAC Home Loans Servicing, LLC,* (D. Mass. Case No. 11-10312, D.I. Nos. 28-30) (dismissed; appeal pending); *Lass v. Bank of America, N.A.*, (D. Mass. Case No. 11-10570, D.I. Nos. 23-24) (dismissed; appeal pending); *Gibson v. Chase Home Finance, LLC* (M.D. Fla. Case No. 11-01302, D.I. No. 112) (settled)). *See also LaCroix v. U.S Bank, N.A.*, (D. Minn. Case No. 11-03236, D.I. Nos. 33-38) (LPI case dismissed, appeal pending.). Movants have omitted these cases from their Amended Motion.

[3] *Morris v. Wells Fargo Bank, N.A.* (W.D. Pa. Case No. 11-00474, D.I. No. 70, 86) (discovery closed). *Kunzelman v. Wells Fargo Bank, N.A.* (S.D. Fla. Case No. 11-81373, D.I. 56, 62, 70, 80) (pretrial proceedings nearly complete, discovery closes in mid-September 2012, and class certification fully briefed and awaiting decision).

[4] In *Williams v. Wells Fargo Bank, N.A.* (S.D. Fla. Case No. 11-cv-21233), a class was certified. 280 F.R.D. 665, 81 F.R. Serv. 3d 1421 (S.D. Fla. 2012).

[5] Motion at 7 (citing *McNeary-Calloway*, *Gordon*, *Clements*, and *Scheetz*).

and certification motions were pending in another); *see also In re Property Assessed Clean Energy (Pace) Programs Litig.*, 764 F. Supp. 2d 1345, 1347 (J.P.M.L. 2011) (noting "varied procedural stages" in denying a § 1407 motion.); *In re Table Saw Prods. Liab. Litig.*, F. Supp. 2d 1384, 1384-85 (J.P.M.L. 2009) (denying centralization, in part, because a "significant number of the actions are substantially advanced, and, indeed, the fact discovery period will soon close in many of them" while "[o]ther actions were only recently commenced").

D. State Law Claims Are Better Suited For The Forums In Which They Were Filed

Centralization in a single district court is also inappropriate because the complaints in the listed cases allege primarily state-law claims. Such claims are more efficiently adjudicated by district courts in the states where the suits were filed due to the courts' greater familiarity with their own state's laws. The complaints allege state-law claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment, among others. *See* Motion at 12. These claims cannot be adjudicated under only one state's law. The listed cases have been filed in ten different states. Some of the cases allege nationwide or multi-state classes, while others seek to certify (as sub-classes) individual state classes. For example, the *Cannon* Amended Complaint asserts, in addition to two nationwide-classes, a California sub-class based on alleged violations of California's Unfair Competition Law, California Business & Professions Code §17200. As a result of the varying claims alleged by the plaintiffs, if consolidated, at least ten different states' laws must be applied to adjudicate these cases properly.

Differing state laws significantly diminish any efficiency that might otherwise be achieved by centralization of the cases. Differing state laws also lessen any need to centralize these cases to avoid inconsistent results. Different laws may call for different results even on the

basis of the same facts, let alone on the basis of the varying facts applicable to these cases on loans originated by many different entities.

For these reasons, in addition to those stated above, the Motion should be denied.

III. CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the other oppositions filed by both plaintiffs and defendants in the cases at issue, transfer and consolidation are not proper and the Motion should be denied.

Dated: August 31, 2012

FOLEY & LARDNER LLP

s/ Nancy L. Stagg

Nancy L. Stagg
402 West Broadway, Suite 2100
San Diego, CA 92101-3542
Telephone: 619.685.6454
Facsimile: 619.234.3510
e-mail: nstagg@foley.com
Attorney for Defendant Federal National Mortgage Association

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed on August 31, 2012 via CM/ECF with the United States Judicial Panel on Multi-District Litigation, which shall send notification of the filing to all counsel of record via the CM/ECF system.

s/ Nancy L Stagg
Nancy L. Stagg, Esq.