UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: Application Pursuant to 28 U.S.C. § 1782 of IKB DEUTSCHE INDUSTRIEBANK AG, Petitioner, - to take discovery of - Putnam Advisory Company, LLC, Respondent.	Case No. _____

MEMORANDUM OF LAW IN SUPPORT OF IKB DEUTSCHE INDUSTRIEBANK AG'S APPLICATION FOR ORDER TO TAKE DISCOVERY PURSUANT TO 28 U.S.C. § 1782

IKB Deutsche Industriebank AG ("IKB") respectfully submits this memorandum of law in support of its application pursuant to 28 U.S.C. § 1782 ("Section 1782") for an order directing Putnam Advisory Company, LLC ("Putnam") to produce certain documents and submit to deposition testimony in the District of Massachusetts.

PRELIMINARY STATEMENT

IKB's application relates to litigation it is defending in the High Court of Justice in London, England (the "U.K. Litigation"). French bank Calyon Crédit Agricole CIB ("Calyon") brought the U.K. litigation against IKB with respect to Calyon's participation in a transaction known as Havenrock II. Calyon claims in the U.K. Litigation that it incurred damages when it honored contractual commitments arising under a Put Option Agreement that IKB (allegedly) fraudulently induced Calyon to execute in connection with Havenrock II. In defending Calyon's allegations, IKB has raised defenses relating to—among other things—the

various risks Calyon knowingly assumed in executing the Put Option Agreement and other Havenrock II agreements. Among those risks are those associated with certain collateralized debt obligation ("CDO") assets that Calyon structured, arranged and marketed—many of which ultimately became the subject of Calyon's obligations under the Put Option Agreement. IKB now seeks discovery from an entity—Putnam—that acted as collateral manager for a portion of those same CDO assets. IKB believes Putnam had substantial dealings with Calyon regarding its CDO business, including the structuring of those CDO assets and the analysis of the risks inherent in such investments.

IKB's application meets all of the statutory and discretionary requirements necessary to obtain discovery under Section 1782. As to the statutory requirements, IKB seeks discovery (i) from an entity (Putnam) whose headquarters are located in this district, (ii) for IKB's use in defending a proceeding (the U.K. Litigation), (iii) that is pending in a foreign tribunal (London's High Court of Justice), (iv) in which IKB (as defendant) is an interested party. IKB's application also meets the discretionary factors enunciated by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* and its progeny: (i) Putnam is not a party to the U.K. Litigation; (ii) the English courts are receptive to—and actually encourage—discovery under Section 1782 and IKB's application is not an attempt to circumvent the High Court of Justice's proof-gathering requirements; and (iii) the discovery sought is neither unduly burdensome nor overly intrusive. Indeed, as set forth in the proposed order annexed to IKB's application, the discovery sought is limited to an eighteen-month period and involves only those Calyon-arranged CDO transactions in which Putnam and Calyon were involved. The testimony and documents IKB seeks will assist the High Court of Justice to assess, on a fully-developed factual record (i) the risks that Calyon willingly assumed when it agreed to participate in the Havenrock II transaction it claims to have been duped into entering into, and (ii) the extent and reasonableness of Calyon's alleged reliance on any representations by IKB, given Calyon's extensive experience in various roles in the CDO markets.

For all of these reasons, and others set forth more fully below, IKB respectfully submits that its application for discovery under Section 1782 should be granted.

FACTUAL BACKGROUND

The nature of the U.K. litigation for which IKB is seeking discovery—and Putnam's involvement in transactions relevant to that dispute—is described in detail in the English pleadings attached at Exhibits ("Exhs.") B through E of the Declaration of Conrad Walker ("Walker Decl."). Below is a brief summary of the background of that case and certain facts relevant to IKB's application here.

The U.K. Litigation

In the U.K. Litigation Calyon seeks to recover damages it allegedly suffered in connection with a transaction known as "Havenrock II." Calyon makes allegations against IKB in that action for breach of contract and the torts of deceit and negligent misstatement. Calyon contends—and IKB denies—that, among other things, (i) Calyon was fraudulently induced to participate in the Havenrock II transaction based on purported misrepresentations about IKB's financial statements, (ii) IKB failed to negotiate the Havenrock II transaction in good faith, and (iii) IKB failed to inform Calyon of purportedly deficient risk management and reporting structures as to the portfolio of investments associated with the Rhineland Programme. (*See generally* Exh. C [Calyon's Particulars of Claim])

In defending those allegations, IKB has challenged Calyon's assertions that it relied on IKB's creditworthiness in accepting a guarantee from an entity known as FGIC-U.K. Limited ("FGIC-U.K.") under a Commitment Agreement related to Havenrock II. IKB also placed into issue Calyon's knowledge of the risks associated with participating in Havenrock II as well as pointing to Calyon's own knowledge and experience in the areas of securitization and

structured credit and its involvement in developing structured products in relation to US sub-prime mortgage assets. IKB specifically identified Calyon's business relationship with Putnam (among others) and its relevance to Calyon's allegations made in the U.K. Litigation. IKB has emphasized that—as part of Havenrock II—Calyon executed a Put Option Agreement as part of and pursuant to Calyon's ambitions to become a significant player in the securitization and structured credit markets. IKB has also stressed the known market risks associated with Calyon's obligations under the Put Option Agreement. (Walker Decl. Exh. E [Summary of IKB's Defence] at ¶¶ 41, 44-45). Such risks included those associated with CDO assets—like the ones for which Putnam acted as the collateral manager—that Calyon arranged and sold to certain purchasing entities (which thereafter became subject to Calyon's obligations under the Put Option Agreement). Caylon cannot complain—as it does in the U.K. Litigation—about the poor quality of the assets it received under the Put Option Agreement, since Calyon knew, or should have known, about the quality of many of those assets based on its involvement in arranging and selling them. Indeed, Calyon itself sold $312.5 million of those CDOs that became subject to Calyon's obligations under the Put Option Agreement. (Walker Decl. Exh. D [Defence of IKB] at ¶ 26)

Calyon's Structured Finance Ambitions

In 2005, Calyon set ambitious goals to develop and significantly diversify its activities in (1) securitization and (2) structured credit. That year, Calyon participated in major asset backed securitization issues in the United States as well as participating in transactions involving asset backed commercial paper ("ABCP") conduits. Calyon's structured credit activity accelerated in the second half of 2005 with its involvement in CDOs and the diversification of its

product offering to include innovative structures. (Walker Decl. Exhs. E [Summary of IKB's Defence] at ¶ 16 & D [Defence of IKB] at ¶¶ 19-20)

By 2006, Calyon had substantial expertise and depth in securitization and structured credit. To gain that expertise, Calyon acted as the arranger, placing agent and underwriter in respect of hundreds of millions of dollars worth of asset backed security ("ABS") CDOs. (Walker Decl. Exh. D [Defence of IKB] at ¶¶ 21-22) Calyon also knew that IKB acted as the adviser to certain special purchasing entities that purchased a substantial number of tranches of ABS and CDOs. Accordingly, Calyon tried to develop a close relationship with IKB in order to sell CDOs to the purchasing companies IKB advised. (*Id.* at ¶ 23)

As part of the process of arranging and selling CDOs, Calyon developed a business relationship with United States firm Putnam. Putnam acted as collateral manager to certain Calyon-arranged CDOs, including Pyxis ABS CDO 2006-1 ("Pyxis-1"), which closed on October 3, 2006. Calyon introduced and marketed to IKB portions of certain CDOs Calyon arranged. (*Id.* at ¶ 24)

The Havenrock II Transaction

In early June 2007, Calyon and certain of the purchasing entities that IKB advised (the "Loreley Companies")[1] executed a series of agreements, collectively referred to as the

[1] The following Loreley Companies participated in Havenrock II: Loreley Financing (Jersey) No. 1 Limited; Loreley Financing (Jersey) No. 2 Limited; Loreley Financing (Jersey) No. 3 Limited; Loreley Financing (Jersey) No. 4 Limited; Loreley Financing (Jersey) No. 5 Limited; Loreley Financing (Jersey) No. 6 Limited; Loreley Financing (Jersey) No. 7 Limited; Loreley Financing (Jersey) No. 8 Limited; Loreley Financing (Jersey) No. 9 Limited; Loreley Financing (Jersey) No. 10 Limited; Loreley Financing (Jersey) No. 11 Limited; Loreley Financing (Jersey) No. 12 Limited; Loreley Financing (Jersey) No. 14 Limited; Loreley Financing (Jersey) No. 15 Limited; Loreley Financing (Jersey) No. 16 Limited; Loreley Financing (Jersey) No. 17 Limited; Loreley Financing (Jersey) No. 18 Limited; Loreley Financing (Jersey) No. 19 Limited; Loreley Financing (Jersey) No. 22 Limited; Loreley Financing (Jersey) No. 23 Limited; Loreley

"Havenrock II" transaction. One of those agreements was a Put Option Agreement, which provided the Loreley Companies with the option of putting to Calyon up to $2.5 billion in CDOs from Havenrock II's portfolio of assets (the "Havenrock II Portfolio"). In entering into that particular agreement, Calyon accepted the risk that, in the event the Loreley Companies were unable to obtain refinancing through the issuance of ABCP, those purchasing companies could put the Havenrock II Portfolio to Calyon at par. (Walker Decl. Exh. E [Summary of IKB's Defence] at ¶¶ 21-22)

Calyon attempted to mitigate that risk via (i) a Junior Credit Default Swap ("JCDS"), whereby Havenrock II agreed to make payments to Calyon (upon receiving notification of certain defined credit events) for up to $625 million in potential losses under the Put Option Agreement, and (ii) a Senior Credit Default Swap, whereby Havenrock II agreed to make payments to Calyon (upon receiving notification of certain defined credit events) for potential losses exceeding $625 million sustained under the Put Option Agreement. The JCDS was backed by two revolving loan agreements totaling $625 million from IKB and IKB International SA ("IKB SA"). The SCDS was backed by a Commitment Agreement provided by FGIC-U.K., which is a subsidiary of Financial Guaranty Insurance Company ("FGIC-NY") (FGIC-NY and FGIC-U.K. collectively shall be referred to as "FGIC"). Under that Commitment Agreement, Calyon was the approved beneficiary of an obligation to issue a "Master Financial Guarantee" to guarantee Calyon's losses exceeding $625 million arising from the assets put to Calyon under the Put Option Agreement. (*Id.* at ¶¶ 23-24)

Financing (Jersey) No. 24 Limited; Loreley Financing (Jersey) No. 25 Limited; Loreley Financing (Jersey) No. 26 Limited; Loreley Financing (Jersey) No. 27 Limited; Loreley Financing (Jersey) No. 28 Limited; Loreley Financing (Jersey) No. 29 Limited; Loreley Financing (Jersey) No. 30 Limited; Loreley Financing (Jersey) No. 31 Limited; and Loreley Financing (Jersey) No. 32 Limited.

Prior to entering into the Put Option Agreement on June 8, 2007, in the course of 2006 and 2007, Calyon marketed to IKB approximately $400 million and €100 million of CDOs. Calyon sold a significant number of CDOs that ultimately formed part of the Havenrock II Portfolio. Indeed, $70 million of the $312.5 million in Calyon-arranged assets that formed a part of the Havenrock II Portfolio consisted of CDOs for which Putnam was the collateral manager (*i.e.*, Pyxis-1). (Walker Decl. Exh. D [Defence of IKB] at ¶¶ 25-26)

Collapse of the ABCP Market

In July 2007, equity and capital markets experienced considerable volatility due principally to the instability of the US sub-prime mortgage market and changes made by the rating agencies in the methodology applied to rating ABS. By the beginning of August 2007, the market for ABCP started to collapse because of a loss of investor demand for such securities. In these market conditions, the Loreley Companies found it very difficult to refinance other than by invoking their rights under the Put Option Agreement. The Loreley Companies therefore exercised their rights under that contract and put $2.5 billion of assets to Caylon.

Calyon then sought payment from Havenrock II for its losses up to $625 million (which payments were financed by IKB and IKB SA under the two revolving loan agreements that backed the JCDS); IKB and IKB SA made those payments in full, thereby enabling Havenrock II to meet its payment obligations to Calyon under the JCDS. (Walker Decl. Exh. E [Summary of IKB's Defence] at ¶¶ 29-31)

For its anticipated losses above $625 million, Calyon, as beneficiary, sought payment from FGIC-U.K. as guarantor under the Commitment Agreement. Upon information and belief, FGIC-U.K. initially refused to make payment to Calyon, but—pursuant to a

settlement—Calyon accepted only $200 million from FGIC instead of the full $1.875 billion amount it was entitled to receive from FGIC. (*Id.* at ¶ 32)

Discovery in this District Relevant to the U.K. Litigation

The relevant evidence suggests that since approximately 2001, Putnam's principal place of business has been in Boston, Massachusetts. (*See* Exh. A) IKB also has reason to believe that, in connection with the various CDO assets sold to the Loreley Companies, Putnam had routine communications and regularly exchanged documents with Calyon. Putnam is believed to be in possession of information regarding, among other things, (i) Calyon's ambitions in the securitization and structured credit markets, (ii) Calyon's assessment of the risks associated with the pools of assets that were included in the investment portfolios of the CDOs it arranged and marketed to IKB, (iii) the hedge positions placed by CDO participants with respect to CDOs arranged and sold by Calyon, and (iv) the practices of Calyon in structuring and marketing the CDOs for which Putnam acted as collateral manager, including its involvement in asset selection and management of the CDO's portfolio. All of that information, which IKB seeks only as to an eighteen-month period, is for use in the U.K. Litigation.

ARGUMENT

IKB IS ENTITLED TO DISCOVERY FROM PUTNAM PURSUANT TO 28 U.S.C. § 1782

I. IKB's APPLICATION MEETS ALL OF THE STATUTORY REQUIREMENTS FOR RELIEF PURSUANT TO 28. U.S.C. § 1782

Section 1782 of the Judicial Code authorizes federal district courts to assist foreign litigants, and other interested parties, in gathering evidentiary materials for use in foreign legal proceedings. *See* 28 U.S.C. § 1782; *see also In re Microsoft Corp.*, No. 06-10061, 2006 U.S. Dist. LEXIS 32577, at *9 (D. Mass. Apr. 17, 2006) (citing *Intel Corp. v. Advanced Micro*

Devices, Inc., 542 U.S. 241, 262 (2004)). The statute provides that a district court may order such discovery in response to an application by a party with an interest in a foreign legal proceeding:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made . . . upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.

28 U.S.C. § 1782. An order for discovery under Section 1782 is permitted where "[1] the request is made by an interested party; [2] for material to be used in a foreign tribunal, and [3] the party for whom the request is made resides in the district in which the court sits." *In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *8-9 (citing *Intel*, 542 U.S. at 255). IKB's application easily meets these three statutory requirements.

A. IKB Is An "Interested Party"

IKB is an "interested party" within the meaning of Section 1782. As the Supreme Court recently held, litigants in the relevant foreign proceeding are "interested parties" under the statute. *Intel,* 542 U.S. at 256; *see also In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *9 ("As a litigant, Microsoft is an interested party."). In fact, as the *Intel* court noted, such litigants "may be the most common example of, the 'interested person[s]' who may invoke § 1782." *Intel*, 542 U.S. at 256. Accordingly, IKB—as the defendant in the U.K. Litigation—is an "interested party" within the meaning of Section 1782.

B. Discovery Sought Is "For Use In" A Foreign Tribunal

The documents and deposition testimony IKB seeks from Putnam are "for use in" the U.K. Litigation. Courts have held that the "for use in" provision "mirrors the requirements in Federal Rule of Civil Procedure 26(b)(1) and [refers to] discovery that is relevant to the claim or defense of any party, or for good cause, any matter relevant to the subject matter involved in the foreign action." *Fleischmann v. McDonald's Corp.*, 466 F. Supp. 2d 1020, 1029 (N.D. Ill. 2006). This requirement does not require "an applicant to show that discovery is reasonably calculated to lead to evidence admissible in the foreign proceeding." *Id.* Indeed, courts have emphasized that discovery sought pursuant to Section 1782 need not be admissible or even discoverable in the foreign or international tribunal. *Id.* at 1026-29 ("'[F]or use in' does not have a foreign-discoverability nor a foreign admissibility requirement."); *see also Intel*, 542 U.S. at 261 ("nothing in the text of § 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there"). Moreover, in considering Section 1782 applications, courts have stressed the need to keep in mind the "twin aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts . . . ." *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997) (internal quotations omitted).

The documents and deposition testimony IKB seeks from Putnam are relevant to the claims and defenses advanced in the U.K. Litigation and ordering their production will further the "twin aims" of Section 1782. As set forth above, Calyon alleges in that action that, among other things, it was fraudulently induced to participate in the Havenrock II transaction and that IKB failed to inform Calyon of purportedly deficient risk management and reporting structures as to the Loreley Companies' portfolio of investments. IKB's defense to those allegations has raised questions regarding (i) Calyon's ambitions to become a significant player in the securitization and structured credit markets, (ii) Calyon's knowledge and understanding of the risks associated with its participation in Havenrock II and the CDOs that were subject to the Put Option Agreement, (iii) the hedge positions placed by CDO participants with respect to CDOs arranged and sold by Calyon, and (iv) the practices of Calyon in structuring and marketing the CDOs for which Putnam was collateral manager, including Calyon's involvement in asset selection and management of the CDO's portfolio. The risks Calyon assumed included those associated with CDO assets—like the ones in which Putnam was collateral manager—that Calyon arranged and sold to certain of the Loreley Companies[2] in 2006 and 2007. Those same assets ultimately became subject to Calyon's obligations under the Put Option Agreement. In connection with those CDO assets, Calyon likely had routine communications with Putnam and regularly exchanged documents with Putnam. IKB has reason to believe that, in the course of those exchanges, Putnam came into possession of information regarding, among other things, Calyon's market ambitions, its assessment of the assets acquired in connection with the CDOs it arranged and thereafter marketed to IKB, and Calyon's practices in structuring and marketing those CDO deals. Such information is highly relevant to the issues in dispute in the U.K.

[2] The Loreley Companies that purchased CDO assets from Calyon which ultimately were subject to Calyon's obligations under the Put Option Agreement included: Loreley Financing (Jersey) No. 5 Limited; Loreley Financing (Jersey) No. 7 Limited; Loreley Financing (Jersey) No. 19 Limited; Loreley Financing (Jersey) No. 22 Limited; Loreley Financing (Jersey) No. 23 Limited; Loreley Financing (Jersey) No. 25 Limited; and Loreley Financing (Jersey) No. 27 Limited.

Litigation, including IKB's defense of that action. Moreover, as set forth above, ordering the production of such information will aid the participants in the U.K. litigation by allowing them to present a full factual record regarding several issues in dispute in that proceeding. In short, the discovery IKB seeks from Putnam is properly sought "for use in" the U.K. Litigation, a traditional judicial proceeding that falls squarely within Section 1782. *See* 28 U.S.C. § 1782. Accordingly, IKB's application meets the second statutory requirement, *i.e.*, that the discovery sought is for use in a foreign tribunal.

C. Putnam Resides And Can Be Found In The District Of Massachusetts

Putnam resides and can be found in the District of Massachusetts for purposes of Section 1782. In determining the location of an individual or entity from which discovery is sought pursuant to Section 1782, courts look to the place where the individual or entity resides. *See In re Minatec Finance S.Á.R.L.*, No. 1:08-cv-269, 2008 WL 3884374, at *4 (N.D.N.Y Aug. 18, 2008) (holding where a company "maintains its primary office within the Northern District of New York [it] obviously has been found within [its] jurisdiction"); *In re OXUS Gold PLC*, No. 06-82, 2007 U.S. Dist. LEXIS 24601, at *8-10 (D.N.J. April 2, 2007). A business is considered "found" within the district in which its headquarters are maintained. *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88, 2006 WL 3844464, at *4 (S.D.N.Y. Dec. 29, 2006); *see also In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *9 (respondent conceding it resides within federal district in which its headquarters were located). Putnam's principal place of business is in Boston, Massachusetts. (Walker Decl. at Exh. A) Putnam therefore maintains its headquarters in the District of Massachusetts, satisfying the third statutory element of Section 1782.

II. THE DISCRETIONARY FACTORS WEIGH IN FAVOR OF GRANTING IKB'S APPLICATION

If an applicant has met Section 1782's statutory requirements it is within the court's discretion to order the sought-after discovery. *Intel*, 542 U.S. at 255; *see also In re Microsoft*,

2006 U.S. Dist. LEXIS 32577, at *9. The Court's discretion must be exercised in light of the "twin aims" of the statute described above. *Intel,* 542 U.S. at 252. In deciding to exercise its discretion, courts consider: (i) whether the person from whom discovery is sought is a participant in the relevant foreign proceeding who is subject to discovery in that jurisdiction; (ii) the nature of the foreign tribunal, the character of the proceedings underway, and the receptivity of the foreign government, court or agency to federal-court judicial assistance, (iii) whether the Section 1782 application conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States; and (iv) whether the discovery requests are unduly intrusive or burdensome. *In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *9-10, 14 (citing *Intel,* 542 U.S. at 264-65). Application of those discretionary criteria here militates in favor of IKB's application.

A. Putnam Is Not A Participant In The U.K. Litigation

Putnam is not a participant in the U.K. Litigation, which weighs in favor of IKB's application. The need for Section 1782 discovery is more apparent when the person from whom discovery is sought is not a participant in the relevant foreign proceeding. *Intel*, 542 U.S. at 264. This discretionary factor recognizes that nonparties to a foreign proceeding, especially nonparties that are not found in the jurisdiction of the foreign proceeding, are often difficult for those proceedings to reach directly. *In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *9-10 (citing *Intel*, 542 U.S. at 264). Indeed, as the *Microsoft* court stressed, "[a] primary purpose of § 1782(a) is '[t]o assist foreign tribunals in obtaining relevant information that the tribunals may find useful but . . . they cannot obtain under their own laws.'" *In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *9 (citing *Intel*, 542 U.S. at 262). In short, it is appropriate for this court to exercise its discretion in favor of IKB's application because Putnam is a non-party to the U.K. Litigation.

B. **The U.K. Courts Are Receptive To Section 1782 Discovery**

The second discretionary factor supports IKB's application because United Kingdom courts are receptive to Section 1782 discovery and IKB is not attempting to circumvent any English proof-gathering restrictions. As noted above, the U.K. Litigation is currently pending in London's High Court of Justice, Queen's Bench Division, Commercial Court. The High Court of Justice is very similar to trial courts here in the United States, in that they have witness testimony and documentary evidence. *See In re Application of Guy*, No. M-19-96, 2004 WL 1857580, at *2 (S.D.N.Y. Aug. 19, 2004). Accordingly, the High Court of Justice is well-suited to receive the testimony and documents that IKB is seeking to obtain from Putnam via this application.

Courts customarily do not find a foreign tribunal to be unreceptive to judicial assistance from the United States, unless there is authoritative proof from the foreign tribunal that it would reject evidence obtained through Section 1782. *In re Euromepa S.A.*, 51 F.3d 1095, 1101 (2d Cir. 1995); *see also In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *13 (quashing § 1782 subpoena because "it [was] made vividly clear that the Commission [did] not want the aid of this court"). Here, there is no authority suggesting that the government of the United Kingdom would be unreceptive to discovery obtained through a Section 1782 application. *See, e.g., In re Guy*, 2004 WL 1857580, at *2 (finding no reason to believe that "the government of the United Kingdom would disfavor granting Applicants relief under § 1782.") Quite the contrary, the House of Lords, the then highest court of the United Kingdom, declared that even "nondiscoverability under English law did not stand in the way of a litigant in English proceedings seeking assistance in the United States under § 1782." *Intel*, 542 U.S. at 262 (citing *South Carolina Ins. Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] 1 A.C. 24.) Simply put, because the United Kingdom is receptive to judicial assistance from the United States under Section 1782, the second discretionary factor weighs in IKB's favor.

C. **IKB is Not Attempting To Circumvent Any English Proof Gathering Restrictions**

In assessing the third discretionary factor, courts in this district consider whether an applicant's Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies. *In re Microsoft*, 2006 U.S. Dist. LEXIS 32577, at *10. Absent bad faith on the part of a Section 1782 applicant, courts will not weigh this factor against granting the discovery sought. *In re Gemeinshcaftspraxis,* 2006 U.S. Dist. LEXIS 94161, at *20. Moreover, litigants are not required to seek discovery through the foreign tribunal prior to seeking it from the district court. *Id.* (citing *In re Euromepa,* 51 F.3d at 1098). The London court hearing the U.K. Litigation has taken no action to preclude IKB from seeking documents and testimony from Putnam. Moreover, IKB was not required to seek such discovery in London before making the instant application. And as noted *supra*, the English courts are receptive to Section 1782 discovery. In sum, the instant application is not an attempt by IKB to circumvent English discovery restrictions. Accordingly, the third discretionary factor favors IKB.

D. **The Discovery IKB Seeks Is Not Unduly Intrusive Or Burdensome**

The documents and deposition testimony sought from Putnam are not unduly intrusive or burdensome. "This factor directs the court to look at the requests in the aggregate to decide whether they are unduly intrusive or burdensome." *Fleischmann*, 466 F. Supp. 2d at 1032. (emphasis added). Courts simply look to whether the requests are "sufficiently tailored to the litigation issues for which production is sought." *In re Gemeinshcaftspraxis,* 2006 U.S. Dist. LEXIS 94161, at *20; *see also Fleischmann* 466 F. Supp. 2d at 1033 (finding materials sought were relevant to claims and defenses and could be collected without undue burden.); *In re Minatec*, 2008 WL 3884374, at *8 (requests for materials under Section 1782 not unduly intrusive or burdensome as they were "specifically and narrowly tailored to both [relevant] issues - tax liability and mislabeling"). The materials IKB seeks, as discussed *supra*, are relevant to IKB's defenses to Calyon's claims in the U.K. Litigation. (*See* supra, § I, B.) As explained in detail above, IKB seeks evidence from Putnam as to its knowledge of Calyon's ambitions in the securitization market, its CDO structuring and marketing activities, and its assessment of the

risks associated with CDO assets it arranged (many of which ultimately became subject to Calyon's obligations under the Put Option Agreement it is challenging in the U.K. Litigation). Moreover, the discovery sought is limited to testimony and documents from an eighteen-month period (January 2006 through June 2007) and pertains only to those CDO transactions in which Calyon and Putnam were involved. (Walker Decl. at Exh. F [proposed subpoenas]) IKB's application, therefore, is tailored to the litigation issues for which discovery is sought, *i.e.*, Calyon's market ambitions, its involvement with CDO assets that it ultimately received under the Put Option Agreement, and Calyon's understanding of the risks attendant to its Havenrock II obligations. Putnam, a sophisticated financial institution, should be able to—without any undue burden—collect the documents sought and provide testimony relevant to those issues and the relevant transactions in which it participated with Calyon. Accordingly, the fourth discretionary factor weighs in IKB's favor.

For all of the reasons set forth above, IKB's Section 1782 application satisfies both the relevant statutory and discretionary factors and should be granted.

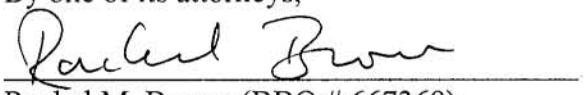
CONCLUSION

For the foregoing reasons, IKB respectfully requests that this Court grant IKB's application and enter IKB's proposed order directing Putnam to produce documents and submit to deposition testimony for use in the U.K. Litigation, as set forth in the accompanying subpoenas.

Dated: January 25, 2010

Respectfully submitted,

IKB Deutsche Industriebank AG
By one of its attorneys,



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