

# **EXHIBIT 8**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : CIVIL TERM : Part 60  
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In the matter of the application of  
  
U.S. BANK NATIONAL ASSOCIATION, THE BANK OF  
NEW YORK MELLON, THE BANK OF NEW YORK  
MELLON TRUST COMPANY, N.A., WILMINGTON TRUST,  
NATIONAL ASSOCIATION, LAW DEBENTURE TRUST  
COMPANY OF NEW YORK, WELLS FARGO BANK,  
NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and  
DEUTSCHE BANK NATIONAL TRUST COMPANY (as  
Trustees under various Pooling and Servicing  
Agreements and Indenture Trustees under various  
Indentures), AEGON USA Investment Management,  
LLC (intervenor), Bayerische Landesbank  
(intervenor), BlackRock Financial Management,  
Inc. (Intervenor), Cascade Investment, LLC  
(intervenor), the Federal Home Loan Bank of  
Atlanta (intervenor), the Federal Home Loan  
Mortgage Corporation (Freddie Mac) (intervenor)  
the Federal National Mortgage Association  
(Fannie Mae) (intervenor), Goldman Sachs Asset  
Management L.P. (intervenor), Voya Investment  
Management LLC (f/k/a ING Investment LLC)  
(intervenor), Invesco Advisers, Inc. (intervenor),  
Kore Advisors, L.P. (intervenor), Landesbank  
Baden-Wurttemberg (intervenor), Metropolitan Life  
Insurance Company (intervenor), Pacific Investment  
Management Company LLC (intervenor), Sealink  
Funding Limited (intervenor), Teachers Insurance  
and Annuity Association of America (intervenor),  
The Prudential Insurance Company of America  
(intervenor), the TCW Group, Inc. (Intervenor),  
Thrivent Financial for Lutherans (intervenor),  
and Western Asset Management Company (intervenor),

Petitioners,  
Index: 652382/2014

for an order, pursuant to CPLR § 7701, seeking  
judicial instruction, and approval of a proposed  
settlement.  
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60 Centre Street  
New York, New York 10007  
December 16, 2014

B E F O R E: HONORABLE MARCY S. FRIEDMAN, Supreme Court Justice

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(Appearances continued on the next page.)

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(Appearances continued on the next page.)

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Proceedings

THE COURT: Good morning. May I have the appearances of counsel who are seated at the table or are in the well.

MS. PATRICK: Yes, your Honor. Kathy Patrick with Gibbs & Bruns on behalf of the institutional investors, also in the well is our local counsel, Mr. Ken Warner, and my partner, Robert Madden.

MR. MICHELETTO: Good morning, your Honor. Robert Micheletto of Jones Day, on behalf of US Bank. Also with me in the well this morning is Matt Martel. Also from Jones day.

MR. INGBER: Good morning, your Honor. Matthew Ingber from Mayer Brown on behalf of the Bank New York Mellon and the Bank of New York Mellon Trust Company.

MR. LOESER: Good morning, your Honor. Derek Loeser, Keller Rohrback for Federal Home Loan Bank of Boston.

MR. ROLLIN: Good morning, your Honor. I'm Michael Rollin for Jones and Keller. I represent W&L Investments, LLC.

MR. WOLLMUTH: Good morning, your Honor. David Wollmuth from Wollmuth, Maher & Deutsch. I represent QVT Financial. And with me today is John Libra from the Korein Tillery firm. He represents the National Credit Union Administration branch of the US government.

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Proceedings

MR. LEDLEY: Michael Ledley, Wollmuth, Maher & Deutsch, for Ambac Insurance Corporation.

MR. JACOB: Charles Jacob of Miller and Wrubel for the Triaxx objectors. And with me today is my partner John Moon.

MR. MUNNO: William Munno of Seward & Kissel for Law Debenture Trust Company of New York.

MR. ATAMIAN: Good morning, your Honor. Jean Atamian from Mayer Brown on behalf of HSBC Bank.

MR. RADEMACHER: Good morning, your Honor. Kurt Rademacher from Morgan Lewis for Deutsche Bank National Trust Company.

MR. JOHNSON: Good morning, your Honor Michael Johnson from Alston & Bird for Wilmington Trust NA.

MR. SCHNELL: Good morning, your Honor. Robert Schnell from Faegre Baker Daniels for Wells Fargo Bank.

THE COURT: This is the first court appearance in this Article 77 proceeding. What I would like to do today is to hear, first, the trustees' and supporting intervenors' position in support of the settlement, and then I would like to hear the objectors' positions.

This is a preliminary hearing today and I am asking that you try to confine your statements to 15 minutes per side. There will be further opportunities to argue in support of the petition and in opposition at length. Today

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Proceedings - Mr. Ingber

we are just setting the stage, and I am asking Counsel just to highlight their most important points.

So, how will the trustees and supporting intervenors divide their time?

MR. INGBER: Thank you, your Honor. Matthew Ingber. I will be speaking on behalf of all of the trustees. I will do my best to speak on behalf of all those trustees for ten minutes, and then Ms. Patrick, on behalf the institutional investors, will speak for five.

THE COURT: This is a guideline. If you can't stay within the limits, then we'll extend a bit. When we finish hearing the initial statements, we'll take a brief break and then I'm going to have the same procedure with respect to discovery issues, so you needn't address the discovery in your initial statements.

Mr. Ingber.

MR. INGBER: Thank you, your Honor. And Mr. Micheletto is going to speak on the discovery issues, and I'll speak on the petition.

Your Honor, in August of this year, the trustees filed this Article 77 petition and presented to your Honor one issue, and that is whether the trustees, after an exhaustive evaluation process, acted within the bounds of reasonableness and in good faith in entering into a four-and-a-half billion dollar settlement with JP Morgan.



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2 Now, this filing in August was the culmination of a  
3 very lengthy process, and that process started with the  
4 negotiation of the economic terms of the settlement that was  
5 presented to the Court, and that negotiation was led by a  
6 group of institutional investors, 21 of the largest and most  
7 sophisticated institutional investors in the world,  
8 investors with fiduciary duties to their own clients; that  
9 negotiation lead to a settlement that was presented to the  
10 trustees in November of 2013, and that was the start of the  
11 process for the trustees, a process that spanned more than  
12 nine months, um, that process, involved six notices to all  
13 certificateholders in these trusts to update them on the  
14 progress of the trustees' evaluation process and to invite  
15 them to reach out to the trustees with relevant information.  
16 That process involved the trustees seeking four extensions  
17 of their deadline to either accept or not accept the  
18 settlement, and that was at the behest of experts who wanted  
19 to make sure that their consideration of the issues was  
20 careful and thoughtful and not rushed, and JP Morgan granted  
21 those extension requests. That process involved vetting of  
22 experts to opine on the key drivers of the settlement  
23 decision for the trustees.

24 Now, the trustees relied on experts for a number of  
25 reasons. Number one, trustees are not subject matter  
26 experts in the topics that were the subject of these expert

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2 reports. The trustees certainly have their duties and  
3 responsibilities under the PSA's, but they are not subject  
4 matter experts when it comes to servicing and it comes to a  
5 calculating potential repurchase -- losses associated with  
6 breaches of representations and warranties. So they looked  
7 to experts.

8 Now, they also look to experts because the PSA's  
9 that govern these trusts expressly contemplate that the  
10 trustees can, and should, rely on experts. And the  
11 restatement itself acknowledges that this is what a prudent  
12 trustee does, um, section 93 of restatement third. If a  
13 trustee has selected an advisor prudently and in good faith,  
14 has provided the advisor with relevant information and has  
15 relied on plausible advice on a matter within the advisor's  
16 confidence, this conduct provides significant evidence of  
17 the prudence of the trustees' action or inaction in the  
18 matter at issue. That is why the trustees retained and rely  
19 upon experts.

20 Now, as part of that process, the trustees supplied  
21 massive amounts of information to the experts, at their  
22 request, documents that Mr. Micheletto will explain shortly,  
23 will be produced to the objectors at their request. These  
24 five experts, experts on servicing, on law and economics, on  
25 -- a former judge to opine on contract interpretation, a  
26 Yale law professor to opine on another, um, contract

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2 interpretation issues. Experts who have extensive  
3 experience valuing repurchase damages.

4 These experts, these five experts issued nine  
5 expert reports, hundreds and hundreds of pages with hundreds  
6 and hundreds of pages of exhibits, and provided those  
7 reports to the trustees. The trustees made those expert  
8 reports available for all certificateholders in these trusts  
9 to see. They were posted on settlement website that was  
10 created right at the outset of this process to keep  
11 certificateholders up-to-date on what -- on the trustees'  
12 evaluation process. And these experts, in particular,  
13 Professor Fischel, who is the former dean of the University  
14 of Chicago Law School and an expert -- one of the foremost  
15 experts on law and economics, recommended to the trustees  
16 that they accept the settlement with respect to 319 of the  
17 330 trusts that were the subject of this agreement between  
18 the institutional investors and JP Morgan.

19 And it was based principally on the recommendation  
20 of these leading experts that the trustees entered into the  
21 settlement and decided that in lieu of litigation that could  
22 take many years and produce no certain outcome, they would  
23 enter into the settlement, get four-and-a-half billion  
24 dollars for investors today rather than go through the  
25 process of litigating these claims for many years through  
26 the appeal process and maybe, one day, getting

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2 four-and-a-half billion dollars or less, possibly more, but  
3 they decided not to roll the dice. They decided to take  
4 what was on the table based on the advice of their experts.

5 Now, after all of this process, the trustees filed  
6 this petition and implemented one of the largest notice  
7 programs ever. This is, as we understand it, one of the  
8 largest notice programs implemented by a vendor, by the name  
9 of Garden City Group, that gave notice to certificateholders  
10 through a number of publications, through the settlement  
11 website, through DTC and other forms of publication. And we  
12 are here today with eight objectors, eight groups of  
13 certificateholders coming forward and objecting to the  
14 settlement.

15 And so we are in a position now where we would like  
16 to proceed with this Article 77 proceeding, but we want to  
17 balance the interests of the objectors who certainly are  
18 entitled to information in this proceeding and are entitled  
19 to have their day in court, that's one of the reasons for  
20 the Article 77 proceeding, with the interest of the  
21 thousands of certificateholders who have decided not to  
22 object to the settlement, whose silence, we believe, can be  
23 interpreted as implicit support for the settlement, and also  
24 the interest of the institutional investors who account for  
25 32 percent of the holdings in these trusts.

26 Now, it's also relevant that there are more than

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2 100 trusts, by our account, as to which there is absolutely  
3 no objection. And so we are here, we are going to be  
4 talking about discovery in a bit, but we are here to talk  
5 about a process for this proceeding. And as I said, what we  
6 are trying to do is to give the objectors their day in  
7 court, but to balance that against the interests of all the  
8 certificateholders who want that four-and-a-half billion  
9 dollars today.

10 At bottom, the trustees are entitled to the relief  
11 that they requested because their evaluation process was  
12 robust. Their selection of the experts was the result of  
13 the significant vetting process. The experts were qualified  
14 to give the reports that they did. There is no objection  
15 whatsoever that the experts were not qualified to opine on  
16 the topics that were the subject of their expert reports.

17 It was reasonable for the trustee to rely on those  
18 experts, to take them into account and to follow the  
19 recommendations of Professor Fischel, who recommended  
20 acceptance with respect to 319 trusts, and to not consider  
21 -- well, they considered, but to reject the alternative,  
22 which is to reject the recommendations of these qualified  
23 experts and to embark on a process that, as I said before,  
24 could take many years with no certain outcome.

25 So, that's the fundamental reason why the trustees  
26 are entitled to this relief. They followed an exhaustive

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2 process. They relied on experts. Those experts recommended  
3 settlement with respect to 319 trusts. The trustees  
4 followed the recommendations of those experts.

5 There are objections, clearly, and I'll leave it to  
6 the objectors that actually are articulating those  
7 objections, and, um, in great detail, but I want to mention  
8 just one or two and respond very quickly, and then I'll turn  
9 the podium over to Ms. Patrick.

10 There is an objection that the trustees were  
11 conflicted, somehow conflicted because if they didn't  
12 exercise their rights and enter into this settlement, they  
13 might have been sued. That is not, in our view, a serious  
14 objection. The trustees carried out their rights that they  
15 had under the contract in entering into this settlement  
16 agreement. Their interests were aligned with the interests  
17 of the certificateholders. There is a conflict -- in order  
18 to -- in order to survive a motion to dismiss on a conflict  
19 theory, there has to be some allegation that the trustee  
20 benefitted financially from a decision at the expense of  
21 beneficiaries. There is no allegation here that the  
22 trustees benefitted financially at the expense of any of the  
23 certificateholders in these trusts. The trustees' interest  
24 and the certificateholders' interests were very much  
25 aligned.

26 The second conflict theory is that the trustees

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2 were indemnified by JP Morgan Chase. That is, JP Morgan  
3 paid the expenses of the trustees' experts and is paying for  
4 the legal fees associated with this process. That is --  
5 again, that is not a conflict as a matter of law. Judge  
6 Rakoff in the CFIP case in the Southern District ruled that  
7 trustees are not expected to go out-of-pocket, an indemnity  
8 is not, as a matter of law, a conflict. JP Morgan was  
9 required to provide indemnity under the contract -- under  
10 certain of the contracts here, and with respect to others  
11 where it had secondary responsibility for providing an  
12 indemnity, um, the -- um, the benefit was to the trust and  
13 not to the trustee, because the alternative would have been  
14 for the trustees to tap trust funds to pay that indemnity.  
15 So the conflict allegations we think are not serious. We  
16 think they wouldn't survive a motion to dismiss. We think  
17 they are not entitled to discovery on these issues.

18 The other issues really boil down to a challenges  
19 to the expert reports and the conclusions of the expert  
20 reports, and they draw distinctions between Professor  
21 Fischel and some of the other experts. But at bottom, this  
22 is just a challenge to the correctness of the expert  
23 reports. And it's not for this court to second guess the  
24 correctness of the expert reports. It's not --

25 THE COURT: I agree, but to what extent does the  
26 Court need to look at the merits in order to determine

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2 whether the trustee has appropriately exercised its  
3 discretion in accepting this settlement?

4 MR. INGBER: We think not at all. We believe that  
5 based on the standard of review, which was endorsed by the  
6 First Department in Haynes and by Justice Kapnick in the  
7 Countrywide Article 77 proceeding, the standard of review is  
8 whether the trustees acted reasonably and in good faith.  
9 That focus is on the process that the trustees followed to  
10 evaluate the settlement and ultimately accept the  
11 settlement.

12 Reasonable minds, I'm sure, can disagree about  
13 whether four-and-a-half-billion dollars is fair or not. We  
14 think, based on our expert recommendations, that this was  
15 eminently reasonable, um, but it's the process. It's the  
16 selection of the experts. It's the information that the  
17 experts requested and provided. It's the scope of the  
18 experts' assignment. It's the information that the trustees  
19 relied upon in deciding whether or not to enter into this  
20 settlement. It's a process-focused inquiry by the Court and  
21 not a litigation of the merits of the underlying dispute,  
22 because in order to assess the fairness of this settlement,  
23 in many respects it would require the very discovery that  
24 the trustees sought to avoid through years and years of  
25 litigation by entering into this settlement. It's not -- in  
26 our view, it's not the role of the court, or any settlement



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2 court, really, to relitigate those underlying issues. And  
3 that is essentially what the objectors, we believe, will be  
4 asking the Court to do, to relitigate those underlying  
5 issues to assess the substantive fairness of the settlement.

6 THE COURT: Thank you.

7 MS. PATRICK: May it please the Court. Kathy  
8 Patrick on behalf of the institutional investors.

9 First, your Honor, may I thank the Court for the  
10 courtesy of allowing me to appear pro hac vice. I  
11 appreciate it, as do my clients.

12 Let me begin with the question that you asked, just  
13 to amplify something that Mr. Ingber said, and then I'll  
14 walk through a little bit of the position of why we support  
15 the settlement.

16 Article 77 is, as the Court knows, a summary  
17 proceeding in which the Court's scope of review is limited  
18 to evaluating whether the trustees' conduct exceeded the  
19 scope of its reasonable discretion.

20 In that regard, we have afforded the Court the  
21 abundant law that says that the Court may not substitute its  
22 judgment for that of the trustees. Thus, the question in  
23 this proceeding is never whether the trustees were right or  
24 wrong or correct, instead it is whether their actions were  
25 within the range of reasonableness; that is the law in  
26 New York. And the two cases we have provided to you in re

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2 Clark's Will, which is 257 N.Y. at 136, and in re Cowles'  
3 Will, 22 AD2d 365.

4 In addition, we would commend to the Court the  
5 United States Supreme Court's elucidation of common-law  
6 trust principles in the case of Metropolitan Life against  
7 Glenn. Although that case is an ERISA case, it is found at  
8 554 U.S. 105. It reviews, at length, the common-law trust  
9 principles concerning a trustee's exercise of discretion,  
10 how a court reviews a trustee's exercise of discretion, and  
11 importantly, the significance vel non of claims of conflict  
12 and reliance upon experts. It is a very nice treatise and  
13 summary and we commend it to the Court.

14 Let me turn now to the question of how our clients  
15 and why they support the settlement. Our clients, as  
16 Mr. Ingber noted, are 21 large institutional investors,  
17 their names are disclosed. They have been part of the  
18 effort to try to remedy the profound problem of ineligible  
19 mortgages and improper mortgages services. They have been  
20 working to address these issues quite literally for years.  
21 They include PIMCO, BlackRock, Met Life, Fannie Mae, Freddie  
22 Mac, household names, who act for their shareholders, or on  
23 behalf of investment clients, to try to recover and remedy  
24 these problems. We are not late on the scene. Our clients  
25 and we have been working in this area for many years and  
26 have now obtained a number of very, very large settlements

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2 that will offer significant relief to certificateholders and  
3 to borrowers in the form of improved mortgage servicing,  
4 which reduces investor losses, and also makes modifications  
5 available more readily and on clearer criteria. It is a  
6 good thing.

7 New York favors settlements for a reason, because  
8 litigation is costly and uncertain, but in this context,  
9 settlement is particularly beneficial to the judicial  
10 system, to our clients and to the trust as a whole because  
11 of the uncertainties that surround these claims and because  
12 of the lengthy and uncertain prospect they face in  
13 litigation.

14 Now, our clients are very, very substantial holders  
15 of these trusts. They hold in over, um, nearly a third of  
16 the trusts. And they have holdings in the vast majority of  
17 the trust as to which no objection at all has been lodged.

18 So in the first instance, as it pertains to the  
19 objections, we believe the Court should, as it has done with  
20 regard to the mortgage brokers who sought to intervene,  
21 require evidence of standing. That is, the Court should not  
22 entertain objections on behalf -- sort of as private  
23 attorneys general, so to speak, on behalf of trusts where  
24 these certificateholders do not have holding. If they don't  
25 have holdings, they can't object to the settlement on that  
26 basis.

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2 THE COURT: Have any parties that do not have  
3 holdings sought to intervene in this proceeding?

4 MS. PATRICK: Your Honor, we think in two ways they  
5 have. You've dealt with the mortgage brokers that were in  
6 prison who sought to intervene and did not have holdings.

7 But my point in rising the issue was that the  
8 objectors would have the Court understand that they may  
9 explore their objections as to all trusts and are not  
10 limited to exploring their objections only as to the trusts  
11 where they have holdings. And our view is that their  
12 objections are constrained only to those trusts where they  
13 have standing. So that's one point.

14 Our clients favor the settlement, in addition,  
15 because the process the trustees used to evaluate it was  
16 robust and independent. This settlement is unlike -- let me  
17 repeat that, unlike the Countrywide settlement. This is not  
18 a settlement that the trustee negotiated and accepted before  
19 notifying certificateholders.

20 This is a settlement that our clients negotiated in  
21 the form of a binding offer that JP Morgan presented to the  
22 trustees for them to accept or reject based on their sound  
23 exercise of their judgment and discretion. The trustees  
24 were not involved in the negotiations, were not privy to  
25 them, have no information about them. And instead, what  
26 they did is once the settlement was presented to them, they

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1  
2 gave notice to certificateholders that the settlement offer  
3 was out there, invited certificateholders' views, and then  
4 retained independent experts. That's important in this  
5 context because the scope of relief that is sought here is  
6 narrower than the scope of relief that was at issue in the  
7 Countrywide proceeding.

8 For example, there is no request in this petition  
9 for relief for any form of finding regarding the settlement  
10 negotiations, because the trustees did not participate in  
11 those negotiations. Instead, there is a single claim for a  
12 finding. Did the trustees' conduct in evaluating and  
13 accepting the settlement comport with the governing  
14 agreement and applicable law. It is a trustee-focused  
15 inquiry. It begins at the point when the trustees received  
16 the settlement offer, and it ends there.

17 Why does it begin there? Because no part of the  
18 relief requested concerns, for example, the trustees'  
19 pre-settlement conduct. Their alleged action or inaction in  
20 failing to prosecute these claims is not at issue in this  
21 petition because the trustee seek no finding on that, that  
22 conduct is not released by the settlement, and there is no  
23 judgment requested on that.

24 The sole and narrow issue is, was the trustees'  
25 conduct in evaluating, accepting and then implementing the  
26 settlement reasonable and within their discretion. So, in

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2 light of that, does the Court need to litigate the merits of  
3 the claims or permit the objectors to do so? The answer is  
4 definitively no. The judgment you will be asked to --  
5 you've been asked to reach by the trustees does not concern  
6 the correctness of their judgment or their merits of the  
7 underlying claim. It concerns reasonableness.

8 THE COURT: If the settlement were to be approved  
9 or the trustees acceptance were to be found an appropriate  
10 exercise of their discretion, there would be no remaining  
11 viable claims against the trustees for failure to seek  
12 repurchase of the loans; isn't that the case?

13 MS. PATRICK: No, I don't believe it is, your  
14 Honor.

15 THE COURT: How would such an action be  
16 maintainable?

17 MS. PATRICK: The action would be maintainable, we  
18 believe, I mean, there is no -- if you look at the  
19 settlement agreement at the release sections, the trustees  
20 are not released from any claim for failure to prosecute  
21 these claims sooner, for allowing them to become  
22 time-barred, for anything. They are not released. They are  
23 simply not released.

24 THE COURT: But they would have settled the claims  
25 and would have acted on them and the Court would be making a  
26 finding that the settlement was reasonable. If I don't have

1 Proceedings - Ms. Patrick

2 the exact terminology refined at this very preliminary  
3 stage, bear with me on that --

4 MS. PATRICK: Sure.

5 THE COURT: -- but there would be some finding  
6 about the reasonableness --

7 MS. PATRICK: Yes.

8 THE COURT: -- of the settlement. So I don't see  
9 how claims against the trustees could be brought in the face  
10 of that.

11 MS. PATRICK: Your Honor, there are two things.  
12 First --

13 THE COURT: I'm not suggesting that such claims  
14 should be brought either.

15 MR. INGBER: Thank you for that, by the way.

16 THE COURT: I'm just trying to understand what your  
17 position is on the limits of the issues before me.

18 MS. PATRICK: Our clients' position is that those  
19 claims are not released and that a finding that the trustees  
20 acted within their reasonable discretion in settling them  
21 might give rise to a settlement credit against some other  
22 liability that the trustees have for failing to prosecute  
23 these claims, but the claims against the trustees are not  
24 extinguished in the settlement. They are not released. In  
25 fact, they are preserved. Individual certificateholders'  
26 securities claims are preserved, and claims against the

1 Proceedings - Ms. Patrick

2 trustees for anything other than settlement related conduct  
3 are not released.

4 And importantly, it is not for this court, in this  
5 proceeding, to decide the effect of the judgment it enters  
6 here on some other lawsuit that might have been filed in  
7 Federal Court elsewhere by other people. For example,  
8 there's a case involving -- filed by an entity called Park  
9 Royal, which concerns some of these trusts, I believe. The  
10 effect vel non of this judgment on that case would be for  
11 that judge to decide, not this court. The settlement that  
12 is presented does not release the trustees' claims. It  
13 categorically does not, and the trustees do not contend that  
14 it does.

15 So --

16 THE COURT: I'm afraid we are running past the time  
17 guidelines, but if you need mother few minutes --

18 MS. PATRICK: Yes.

19 THE COURT: -- to conclude your remarks, then I'll  
20 balance the time out for the objectors.

21 MS. PATRICK: There is one other point that I  
22 simply wanted to make, your Honor, with regard to the  
23 objection concerning the allocation formula. There is an  
24 objection lodged by W&L that the allocation formula in the  
25 settlement is not fair. That misapprehends the settlement  
26 agreement. Each trust, and indeed, in most instances, loan



1 Proceedings - Ms. Patrick

2 group by loan group, decisions were made as to whether the  
3 settlement was reasonable as to that trust. The trustees  
4 got a recommendation, not just trust by trust, by loan group  
5 by loan group. The reasonableness of the settlement for  
6 trust A, in no way turns upon what trust B gets.

7 Each of these trusts has been presented  
8 individually as an acceptance decision. Each trust is  
9 getting the allocation it gets. And the burden is not --  
10 the trustee doesn't have to justify the entire allocation  
11 formula because it looked at what flowed into each trust  
12 individually and made a judgment on that trust. And so the  
13 objection regarding the formula is not well taken because  
14 the trustees' decision is trust by trust.

15 THE COURT: Would you address the 90 percent  
16 discount.

17 MS. PATRICK: Yes. I would be glad to do that.  
18 Those structures are in JP Morgan multi-originator shells.  
19 Those are structures in which the originator -- and I know  
20 the court does a lot of mortgage back things, so you are  
21 familiar with what I'm talking. Those are aggregation  
22 shells where JP Morgan bought mortgages from other parties,  
23 from Harbor View or others, New Century, securitized them  
24 and sold them. In those trusts, the people that originated  
25 the mortgages make full reps and warranties.

26 JP Morgan's structural representation and warranty

## Proceedings - Ms. Patrick

1  
2 it that they will repurchase the mortgage if it is required  
3 and the primary obligor does not. It is in the nature of a  
4 guarantee. And importantly, as to this 90 percent discount,  
5 that discount was applied only as to obligors that were  
6 solvent. That is, that were able to front the reps  
7 themselves, and so, as a practical matter, step out of this  
8 context and into a repurchase claim. And let's just suppose  
9 on trust A, where Wells Fargo is the originator of the  
10 mortgage and makes the rep, and JP Morgan has this backstop  
11 representation, in that universe, if JP Morgan was sued on  
12 that representation, it would turn around and implead Wells  
13 Fargo as the primary obligor, which it has the right to do  
14 under that contract. And so, as a practical matter, in that  
15 circumstance, Wells Fargo would either pay the liability,  
16 because it is solvent, and JP Morgan would not. Or, the  
17 repurchase wouldn't be owed, because the primary obligor,  
18 they have -- they have to make demand on the primary obligor  
19 in those structures. So it's not as to all of the  
20 originators, there are 2,000 originators in that shell.  
21 It's as to a set of very large originators, Wells Fargo is  
22 one of them, where those people are solvent. There was a  
23 discount, because as a practical matter, if the trustees  
24 were directed to/did pursue those claims, the obligors would  
25 ultimately owe them, and so effectively what JP Morgan was  
26 settling into that context is the value, the reasonable

1 Proceedings - Mr. Loeser

2 value of the expected backstop liability that it had.

3 It is unique to those multi-originator structures  
4 whose PSA's are different, and the trustees' experts  
5 considered all of that.

6 Thank you, your Honor.

7 THE COURT: Thank you. How will the objectors  
8 divide their time? There will be a half hour, given that I  
9 extended the time for the trustee and the institutional  
10 investors. How many counsel will speak?

11 MR. WOLLMUTH: I'll just need three or four  
12 minutes.

13 MR. ROLLIN: Two or three minutes for me, your  
14 Honor.

15 THE COURT: There is no such thing.

16 ROLLIN: Less than five.

17 MR. LEDLEY: About five.

18 MR. JACOB: Ten minutes for Triaxx, your Honor.

19 THE COURT: There is no such thing.

20 MR. LOESER: So, your Honor, the overall answer is,  
21 limited, um, two or maybe up to five -- we'll see what  
22 really is the case -- for several of the objectors. And  
23 I'll have more general comments generally about the  
24 objections, and in an effort to respond to some of your  
25 Honor's questions and some of the things that have been  
26 said.

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Proceedings - Mr. Loeser

As I said, I'm Derek Loeser from Keller, Rohrback, and represent the Federal Home Loan Bank of Boston, which is a federally chartered institution with public admissions to support community lending and development.

The Federal Home Loan Bank of Boston purchased close to two billion dollars of triple A rated JP Morgan mortgage backed securities. The purpose of purchasing those securities was to help fund the public mission of the bank and, of course, those bonds have been a disaster. And frankly, there have been books written about how bad JP Morgan's conduct has been, the abusive practices that resulted in the creation of these trusts that are the subject of the settlement, and that were purchased by my client.

It goes without saying that obviously this is not a normal Article 77. This is not a dispute over a will. It's not two brothers arguing over their uncle's money. Instead, it's a proceeding that involves 319 trusts. As your Honor well knows, these are not small trusts. They have a billion or two billion dollars of assets in each of them. The trusts are not all the same. There is a variety of differences among the pooling and servicing agreements. There is an original face value of \$300 billion. By the trustees' experts own lights, the losses here exceed 60, or in some cases they say \$65 billion, um, and all of these

## 1 Proceedings - Mr. Loeser

2 losses have been reduced to a single seven cents on the  
3 dollar, pennies on the dollar settlement, at one time.

4 The settlement was not negotiated by the trustees,  
5 as Ms. Patrick has said. Unlike the Countrywide proceedings  
6 where the trustees', as it described, vigorous involvement  
7 in the negotiations helped insure the best interest of the  
8 certificateholders. Instead, the trustee was nowhere to be  
9 found. The trustee has obvious obligations as a fiduciary  
10 requirement, but they had no role in negotiating this  
11 settlement. Instead it was negotiated by the group of  
12 institutions, many with closer ties to JP Morgan.

13 Your Honor, BlackRock, for example, is the single  
14 largest shareholder of JP Morgan stock, so billions and  
15 billions of liability, close ties. These are not  
16 institutions that if this were a class action -- and there's  
17 several instances where they cite class action authority in  
18 their briefs -- these are not institutions that could be  
19 class plaintiffs. They could not be qualified as adequate  
20 plaintiffs because of the business relationships that exist  
21 here.

22 JP Morgan is paying for this entire show. They are  
23 paying for the institutional investors' legal fees. They're  
24 paying for the trustees' legal fees and they're each paying  
25 for the trustees' experts. So all roads lead to JP Morgan.

26 Now, the trustees, again, unlike the Countrywide

## Proceedings - Mr. Loeser

1  
2 proceedings with Justice Kapnick, currently face massive  
3 lawsuits for the damage they've caused to over 2,000  
4 mortgage backed securities trusts, just like these trusts,  
5 as a result of years of failure to appropriately protect the  
6 trust and pursue repurchase claims. And to make things  
7 stranger still, in several of Ms. Patrick's clients,  
8 BlackRock and PIMCO among them, who are bringing those  
9 lawsuits.

10 Those lawsuits allege, among other things, events  
11 of default, which are, you know, there's some discussion in  
12 the papers about how events of default are kind of a  
13 nonevent. They are a game changer in the trusts world.  
14 Events of default are huge. Events of default trigger  
15 obligations of the trustee which significantly enhance their  
16 duties and create a situation where they can't just sit on  
17 their hands anymore. They have to issue notice and they  
18 have to actually pursue the repurchase claims. So it's a  
19 big deal if there are events of default, or not.

20 Now, a baffling feature of this settlement, and  
21 again distinguishes it from the Countrywide settlement, is  
22 that the trustees' own chief expert, Mr. Fischel, who really  
23 is the decision maker here, um, he made these  
24 recommendations and assembled all of the information, um,  
25 Mr. Fischel, you could take his report and simply change the  
26 conclusion to say, and therefore the settlement should not

1 Proceedings - Mr. Loeser

2 be approved, and it would make a lot of sense.

3 He essentially concluded that this is a bad deal  
4 for 174 of the trusts because the compensation they'll  
5 receive under the settlement is worse than they would  
6 receive in a repurchase settlement. But he recommends that  
7 the settlement be approved anyway, because apparently, his  
8 understanding of the law is if the trustees either accept  
9 the settlement or do nothing, they could simply sit on their  
10 hands. But that really isn't a conclusion about the best  
11 interests of certificateholders; that's a conclusion about  
12 the trustees' duties. And, in fact, because of the events  
13 of default which BlackRock and PIMCO and others allege, the  
14 trustee can't sit on it's hands anymore. It has to be  
15 assertive.

16 Now, we see this settlement as a race to the  
17 bottom, an effort by the trustees to get out of their own  
18 liabilities, numbered by institutions with ties to JP  
19 Morgan, to just flush these massive losses down the drain.  
20 We don't have, and as we indicated in our preliminary  
21 objections, we don't have discovery, we don't have  
22 information about really what the trustee has done.

23 What we have are the expert reports. And we've  
24 read the reports and we've made objections based on what we  
25 know. And our concerns are primarily that the trustees  
26 engaged in an inadequate investigation regarding the value

1 Proceedings - Mr. Loeser

2 of the claims released and the adequacy of the settlement.  
3 We have expert reports that are inconsistent, um, Dr. Sabry  
4 seems to think this is the best settlement ever by a 100 to  
5 260 percent of the liability, which is remarkable, but  
6 Mr. Fischel seems to conclude that it's actually the worse  
7 settlement he could find.

8 We have trustee conflicts because of their own  
9 liability for the underlying losses, and we have trustee  
10 failure to take actions necessary or required as a result of  
11 events of default. Those are the general objections for  
12 which all of our discovery is geared at obtaining additional  
13 information.

14 Now, your Honor, in the pleadings, and again, here  
15 today, the petitioners have characterized our objections and  
16 tried to tell the Court what we are saying. And I think  
17 it's important for us to tell the Court what we really are  
18 saying and what we are really not saying.

19 We are not objecting based on hindsight. We are  
20 not saying that the Court -- that the trustees failed to  
21 consider information that only came to light later.  
22 Circumstances that not -- did not exist at the time the  
23 trustee made their decisions to accept the settlement. That  
24 is not at all what we are saying. We are saying that we  
25 need to figure out what the trustees new, because they were  
26 not strangers to these trusts. They had a tremendous amount



## Proceedings - Mr. Loeser

1  
2 of information about the repurchase and rep and warranty  
3 violations, and the servicing abuses. We need to know what  
4 the trustees knew, what the trustees relied on and what they  
5 chose not to rely on, and what they ought to have know,  
6 because the standard is not simply limited to looking and  
7 seeing, oh, the trustees hired experts, the experts did  
8 their thing. They have the information that they had.  
9 Instead, the standard involves exploring what the trustees  
10 knew and not what the trustees should have knew.

11 We are not saying there needs be a trial on the  
12 merits of JP Morgan's repurchase of service and reliability.  
13 We agree that an Article 77 is a special proceeding, but  
14 that does not mean it's a rubber stamp. It is far from a  
15 rubber stamp. As Justice Kapnick's proceeding in the  
16 Countrywide case demonstrated, the purpose of an Article 77  
17 is not just to make sure the trustee checked off the right  
18 boxes. There needs to be an evaluation of the facts and  
19 circumstances that a prudent trustee would consider when  
20 deciding to accept a settlement that resolves billions of  
21 dollars of liability on behalf of thousands of  
22 certificateholders. And we are not saying that the amount  
23 of the settlement by itself demonstrates the settlement  
24 should not be approved, but the idea that the amount is  
25 wholly irrelevant, as the petitioners have said in their  
26 papers and as they're saying now, is absurd. It cannot

1 Proceedings - Mr. Loeser

2 wholly irrelevant given the relief that they are asking this  
3 Court to find. It is a relevant circumstance to determining  
4 whether the trustees' decision to enter the settlement was  
5 reasonable.

6 Now, your Honor asked an important question, which  
7 is, does the Court need to consider the merits? And the  
8 answer really is provided by the relief that the trustees  
9 are seeking. And Ms. Patrick suggested that it's a single  
10 determination that really sounds abstract, just did the  
11 trustee act within its discretion. But actually, the  
12 trustees have come forward and asked for specific findings,  
13 and here's what they are:

14 Did the trustee accept the settlement based on a  
15 thorough and reasonable investigation of the claims proposed  
16 to be released and the settlement consideration?

17 Did the trustee make its decision in good faith?  
18 They are asking the Court to find that the decision was made  
19 in the best interest of beneficiaries of each trust, and  
20 they are asking the Court to find that the trustees complied  
21 with all applicable duties under the governing agreements  
22 and any other applicable law.

23 And this last finding is a broad one. It means  
24 finding the trustee did not negligently, complied with the  
25 duty of prudence, and acted loyally and without conflicts.  
26 So it's not a single issue. We're not looking -- they're

1 Proceedings - Mr. Loeser

2 not looking for an abstract determination. They're asking  
3 for specific findings. And to make those findings, the  
4 Court does need to consider what the settlement provides.  
5 The Court does need to consider what investigation was done.

6 Your Honor has heard a bit about the standard for  
7 this proceeding from Mr. Ingber, and it is not a box  
8 checking standard, and it's not a rubber stamp, and it's not  
9 just looking to see did the trustee higher the experts, and  
10 did the experts go to good schools. Did the expert  
11 generally have an understanding of what they are talking  
12 about. There is no case law, if you look at any case that  
13 any of them have cited, there's no case law that describes a  
14 review of the trustees in that manner. Instead what you see  
15 are things like in the restatement where the statements  
16 says:

17 "The Court will interpose if the trustee  
18 arbitrarily, or without knowledge of or inquiry into  
19 relevant circumstances, fails to exercise the discretion."

20 So there is an inquiry into relevant circumstances.  
21 That inquiry into, among other things, the value of the  
22 settlement, the merits of the settlement, things that the  
23 Court needs to consider when deciding if this in fact is in  
24 the best interest of the certificateholders.

25 In re Korn says:

26 "In determining whether a breach of fiduciary duty

1 Proceedings - Mr. Loeser

2 has occurred, the court must evaluate the fiduciary's  
3 actions along with relevant factors that affected or ought  
4 to have affected the fiduciary's decisions."

5 So again, it's not just a question of does the  
6 trustee come and say here's our process, refer to it, we are  
7 done. It's an examination of the process. These trustees  
8 are not strangers to these trusts. They are not strangers  
9 to the rep and warranty violations. They have knowledge of  
10 their own that needs to be evaluated. They also, as a  
11 result of events of default and as a result of their  
12 fiduciary duties, have an obligation to obtain the  
13 information one would need to figure out what really  
14 happened here, to figure out what does JP Morgan know about  
15 the degree to which these loans violate the rep and  
16 warranty, um, it's about the quality of loans, um, to figure  
17 out what does the trustee need to understand the relevant  
18 circumstances before deciding to accept the settlement.

19 Another statement, your Honor, that comes from an  
20 ERISA case, which is based on the Law of Trusts:

21 "A pure heart and empty head are not enough. A  
22 trustee must make reasonable investigations into the  
23 representations of interested parties, and where that  
24 investigation would have revealed evidence that the  
25 investment was unsound, the trustee can be held liable."

26 So again, it's not just box checking. There is a

1 Proceedings - Mr. Loeser

2 real examination that needs to occur here.

3 THE COURT: In how many instances has Article 77 or  
4 similar statutes been used for judicial approval of an RMBS  
5 or other settlement that might be analogous?

6 MR. LOESER: Your Honor, the only analogous  
7 proceeding that I'm aware of is the one that was initiated  
8 by Mr. Ingber on behalf of Bank of New York Mellon or Bank  
9 of New York Mellon on behalf of Mr. Ingber.

10 THE COURT: Justice Kapnick's case.

11 MR. LOESER: Yes.

12 THE COURT: Wasn't there one also in Federal Court.

13 MR. LOESER: There was a Res Cap proceeding in  
14 Bankruptcy Court, your Honor, um, which has a tremendous  
15 amount of information about what's involved in examining the  
16 underlying merits, the degree to which merits are  
17 irrelevant, um, the degree to which loan --

18 THE COURT: I really --

19 MR. LOESER: -- is irrelevant, but it was not an  
20 Article 77 --

21 THE COURT: I really think we need to take a look  
22 at a different universe of cases than I've been given in  
23 this briefing. Many of these are traditional proceedings  
24 for approval of trust accountings. This action, or this  
25 proceeding, rather, really differs in material respects.

26 I'm not going to hear from Mr. Ingber right now. I

1 Proceedings - Mr. Loeser

2 have always strictly adhered to a procedure from which I  
3 will only hear from one side at a time in oral arguments,  
4 and it's worked very well.

5 MR. INGBER: Sure.

6 THE COURT: But I will, of course, give you an  
7 opportunity to weigh in. I don't want anyone to leave this  
8 courtroom today worried about not having an adequate  
9 opportunity to put their positions on any of the many issues  
10 which we will have to deal with on the record.

11 All right. So we only know of Justice Kapnick's  
12 case and the Bankruptcy Court case.

13 MR. LOESER: Right. And Bankruptcy Law, um,  
14 trustees play a significant role in Bankruptcy Court, and  
15 there's an extensive amount of law that, again, describes  
16 what it is the trustee is required to do, um, what type of  
17 investigation the Court needs to have of the trustees'  
18 conduct, and, um, makes the sensible determination that --  
19 the question really is, um, did the trustee engage in the  
20 appropriate process, was the decision reasonable, um, but  
21 also questions of if a fairness exists as to whether the  
22 resolution is, in fact, in anybody's best interest as  
23 suggested by the trustee, such that the decision to accept  
24 the settlement is reasonable.

25 Now, another question your Honor had was about the  
26 extent to which this settlement will mark claims against the

1 Proceedings - Mr. Loeser

2 trustees. The trustees have made the statement that the  
3 release here will not bar someone from filing a claim. And  
4 that is certainly true. The question I think that your  
5 Honor rightly asked is, well, what's the effect? What does  
6 it mean? How could a claim proceed if the Court has found  
7 -- if the Court has provided all this relief, for example,  
8 if the Court concludes that the entry into the settlement  
9 was reasonable and represented what was in the best interest  
10 of certificateholders. And I do think that creates a real  
11 question as to what would happen in subsequent litigation.

12 But the larger point is the one of conflicts,  
13 because obviously if the trustee is conflicted, it cannot  
14 obtain a finding that satisfied its fiduciary duties, um,  
15 because we all know the trustee is not allowed to put its  
16 own interests ahead of certificateholders, and it's not  
17 allowed to operate under conflicts. And the trustees don't  
18 seem to think much of the conflict concerns that we have.  
19 But in their papers, um, and really here today, they haven't  
20 really addressed the primary concern, which is the presence  
21 of these massive cases against the trustees for conduct,  
22 that was identical to their conduct here. And what that  
23 means for the trustees' evaluation of what to do here.

24 Now, what we know about that conduct as alleged by  
25 BlackRock and PIMCO and others is that for years the  
26 trustees did not adequately protect the trusts, for so many

1 Proceedings - Mr. Loeser

2 years, in fact, that statutes of limitations may have run.  
3 And the trustees own experts, in fact, point out that one of  
4 the reasons why it's okay to accept the smaller settlement  
5 here than they could find in looking at any other RMBS  
6 settlement is that the value of the claims has been  
7 diminished by the failure to pursue claims on a timely  
8 basis.

9 Now, the trustees are here today presenting a  
10 settlement which they say is fair and adequate and in the  
11 best interests of the certificateholders, and yet their own  
12 expert is indicating that one of the reasons why a smaller  
13 settlement is justified is because of a time bar. So, the  
14 trustees are asking the Court to enter a settlement where  
15 it's their own conduct, according to some of the  
16 institutional investors themselves, that had resulted in a  
17 smaller settlement. That is a problem. That is a concern  
18 and it's important to figure out, did the trustees evaluate  
19 that, was part of their investigation to consider this  
20 really untenable position that they are in.

21 Problem number two here is that Mr. Ingber said  
22 that really all we are looking for is whether there is a  
23 benefit obtained by the trustees. But we do have real  
24 concerns about the benefits to the trustees. The trustees  
25 have been sued for over 2,000 trusts, and they are being --  
26 there's an effort to hold them liable for billions of



1 Proceedings - Mr. Loeser

2 dollars of losses of those 2,000 trusts. The only trust  
3 they are not being sued for are these ones. But their  
4 conduct is exactly the same. So, in accepting the  
5 settlement, they get a pass from the institutional investors  
6 who brought these claims on these massive claims. That's a  
7 concern. That is a concern that requires some  
8 investigation. We need to see what it is the trustees did  
9 to evaluate that, because, your Honor, it is not in the  
10 least bit unusual in the trustee world where there is a  
11 concern that the trustee is focused on its own liability or  
12 efforts to avoid its own liability, where a trustee finds  
13 itself in a position where it's difficult to figure out what  
14 the right thing to do is, for an independent fiduciary to  
15 get involved. Someone who is not facing liability. Someone  
16 who could investigate the merits of the settlement, whether  
17 it's in the people's best interest without any conflict.

18 But here's the third problem, your Honor --

19 THE COURT: Well, you are passing the time limit,  
20 so if you need to take another couple of minutes, please do  
21 that.

22 MR. LOESER: Okay, I will be -- quickly, just to  
23 finish out this point, your Honor, and then I'll pass along  
24 to others.

25 Now, the trustees' position is that the settlement  
26 doesn't stop people from suing the trustees for their

1 Proceedings - Mr. Loeser

2 pre-settlement conduct, and as we discussed, there's issues  
3 as to how that will work. But if someone does sue for  
4 pre-settlement conduct, and if they do get over these  
5 findings that they are asking the Court to find about the  
6 reasonableness, the amount the trustees presumably would be  
7 liable for is the difference between the value of the  
8 settlement with and without the impact of the trustees' own  
9 bad conduct. So the value of the settlement -- if not for  
10 the trustees' failure to act on a timely basis, this  
11 settlement could be worth X, because of their failure to act  
12 on a timely basis, the settlement is worth less than X; that  
13 would be the value of what's leftover to the trustees'  
14 claims.

15 The trustees have an incentive not to fairly  
16 evaluate the liability here because they are the ones who  
17 ultimately will be left holding the bag for the difference.  
18 And, your Honor, if you look at Dr. Sabry's report, that's  
19 exactly our concern. They've hired what's really the go-to  
20 defense firm, your Honor, to prepare a report, and Dr. Sabry  
21 concludes that miraculously JP Morgan has paid 100 to 260  
22 percent of the liability here, which is bizarre given that  
23 Mr. Fischel says that you can't find any settlement worse  
24 than this. Well, conveniently there is nothing left for the  
25 trustees, so the relief they are seeking would be to endorse  
26 a view of calculating liability that would leave nothing

1 Proceedings - Mr. Ledley

2 left in the event of a subsequent suit.

3 So with that, your Honor, I will pass to  
4 Mr. Ledley.

5 MR. LEDLEY: Good morning, your Honor. Michael  
6 Ledley for Ambac.

7 Ambac is not an investor in these trusts. It's  
8 differently situated, as your Honor may be aware. Ambac is  
9 a financial guarantee insurer and has provided guarantee  
10 insurance for numerous RMBS trusts, including seven of the  
11 trusts for which the trustees seek approval of the  
12 settlement in this proceeding. With respect to those  
13 trusts, Ambac has paid out over \$500 million in insurance  
14 losses to certificateholders. And for those trusts, the  
15 losses, in total, exceed \$2.7 billion.

16 Ms. Patrick mentioned that her clients are not  
17 newcomers here. Ambac also is not a newcomer. Ambac has  
18 been litigating with JP Morgan since 2008 with respect to JP  
19 Morgan's securitization misconduct, and with respect to the  
20 trusts that are at issue here since 2012. In the course of  
21 that litigation, Ambac has uncovered a wealth of evidence  
22 demonstrating JP Morgan's misconduct here;  
23 misrepresentations related to underwriting;  
24 misrepresentations relating to due diligence, um, a practice  
25 through which JP Morgan would enter into settlements with  
26 originators for defective loans that it securitized, but

## Proceedings - Mr. Ledley

1  
2 never bought the loans back from the trusts so that  
3 investors bore the losses while JP Morgan got the proceeds,  
4 um, through -- in large part, a significant part through the  
5 discovery that Ambac developed, um, others, including the  
6 federal government, began investigations with JP Morgan,  
7 which resulted, um, in among other things, a \$13 billion  
8 settlement with the Department of Justice, pursuant to which  
9 JP Morgan admitted making misrepresentations about the  
10 quality of the loans in its securitizations, among other  
11 admissions.

12 So, here, unlike a lot of cases, the question of  
13 did they do it, isn't really at issue. We know they did it.  
14 Everyone in the world knows they did it. The question is,  
15 what are the damages and what is required to compensate the  
16 trusts for the misconduct?

17 In particular here, Ambac, through its effort, its  
18 long-standing efforts, has obtained samples of loan files  
19 from the seven trusts that it insured, and has done  
20 re-underwriting on those loan files, um, just like you would  
21 in a put-back case or repurchase case, and has determined  
22 that the breach rates for those loans extend from a low of  
23 61 percent up to a high of 90 percent. And what Ambac is  
24 looking for here is an opportunity to bring to bear all of  
25 the work that its already done to present to the Court to  
26 demonstrate that the process that the trustee followed here,

## Proceedings - Mr. Ledley

1  
2 in terms of the information that it looked at, and most  
3 importantly, chose not to look at, and its overall judgment  
4 as to the acceptability of the settlement, is an abuse of  
5 discretion. Your Honor mentioned the standard, and I guess  
6 the \$4.5 billion question is to what extent is your Honor  
7 required to look at the merits of the settlement and the  
8 settlement amount.

9 Your Honor, the cases are very clear that it's an  
10 analysis that looks at both process and the reasonableness  
11 of the judgment overall. Ms. Patrick mentioned two cases.  
12 They are cases that I think are great because I think they  
13 demonstrate our point. The first is the in re Clark,  
14 Clark's Will, which is a Court of Appeals case in 1931.  
15 Ms. Patrick says that that supports the proposition that the  
16 Court isn't to look at any -- um, to look at the merits of  
17 the decision, simply the process.

18 To the contrary, on page 138 to 140 of the New York  
19 Reporter, the Court of Appeals made its own detailed  
20 evaluation of the merits of the conduct of the trustee in  
21 that case. There it was whether the trustee appropriately  
22 retained interests in certain sugar investments. And the  
23 Court evaluated the state of the sugar market, the various  
24 factors that impacted prices in the sugar market, the  
25 history of those price changes, did a very detailed analysis  
26 and ended up concluding, on the merits, that the decision of

## Proceedings - Mr. Ledley

1  
2 the trustee in that case was reasonable because it appeared,  
3 at the at the time of the decision, that the sugar  
4 investments were in the trough of the market and you could  
5 expect it to rebound. So the idea that in re Clark supports  
6 a process only approach to evaluating trustee conduct is not  
7 supported by the case itself.

8 Ms. Patrick mentioned another case called in re  
9 Cowles' Will, that's a First Department case from 1965.  
10 There, the decision -- the question was whether the trustee  
11 appropriately sold an investment it had in a closed  
12 corporation in return for another investment. And once  
13 again, there are -- there is language in there about the  
14 fact that the trustee appropriately got advice from experts,  
15 et cetera, but then -- so it followed and it looked at  
16 process, but then it looked at the overall reasonableness of  
17 the decision on the merits as well, and on page 376 of the  
18 Appellate Division Reporter, it looked at the substantive  
19 reasonableness of the decision to enter into the new  
20 investment, including the assets and liabilities of the  
21 company, its history of profitability, its history of  
22 dividends payments, and evaluated the price that the trustee  
23 paid for that investment and determined that it was less  
24 than book value so that it was a good deal. These are not  
25 process only cases.

26 THE COURT: I must say to all of the Counsel, if

1 Proceedings - Mr. Wollmuth

2 you want to have the opportunity to talk about discovery  
3 today, you will need to limit your preliminary presentations  
4 on the objections.

5 MR. LEDLEY: Your Honor, I'll come to a close  
6 quickly with that direction.

7 Even if you are to focus on process only and not  
8 the overall reasonableness of the decision, we will present  
9 a wealth of information that the trustees either disregarded  
10 intentionally, or were negligent in not considering, that  
11 demonstrates that the value of the settlement here is  
12 grossly, grossly deficient compared to the liabilities that  
13 they are releasing.

14 The final point I would make --

15 THE COURT: I think I must stop you.

16 MR. LEDLEY: Okay. Thank you, your Honor.

17 MR. WOLLMUTH: I'll try not to wear on the Court's  
18 patience.

19 THE COURT: It has nothing to do with patience.  
20 There are some very complicated discovery issues here and we  
21 need to reserve the time so that we can hear them.

22 MR. WOLLMUTH: Understood. I'll eliminate 90  
23 percent of the five minutes I have and focus on what I think  
24 impacts discovery today.

25 The extent that the institutional investors and  
26 trustees argue that all that's at stake here is an abusive

1 Proceedings - Mr. Wollmuth

2 discretion standard, that's wrong as a matter of law.

3 THE COURT: I am completely aware that the  
4 objectors are unified in rejecting that position of the  
5 trustees and the institutional investors. You could take it  
6 for granted that I understand that that is your position.

7 MR. WOLLMUTH: And the reason is, your Honor --  
8 which that was really just a preliminary comment -- the  
9 Trust Indenture Act imposes its own standard here, as does  
10 the New York corollary, the Street Act, as do the terms of  
11 the PSA's. Each one of those bodies of law require an  
12 affirmative investigation by the trustee, and the exercise  
13 of remedies by the trustee, as a prudent person would act in  
14 a similar situation. Those duties are triggered by an event  
15 of default, the question of which is a fact question here,  
16 and impacts discovery.

17 The only other comment I'll make is that our  
18 principal client -- my principal client here is QVT  
19 Financial. They are one of the trusts suffering from the 90  
20 percent discount your Honor noted. We tried, prior to this  
21 proceeding, to get information as to why the 90 percent  
22 discount was imposed on the trust that we own. US Bank  
23 would not provide it. We directed them to reject this  
24 settlement. We offered an indemnity. We own more than 25  
25 percent of the trusts, more than Ms. Patrick's group. They  
26 ignored our direction, and we hear for the first day it's



1 Proceedings - Mr. Wollmuth

2 because the underlying originator, in our case, WMC, is  
3 solvent. WMC is not even solvent. It's a shell company  
4 owned by GE. The other thing is -- your Honor, so we'll  
5 need discovery on things like solvency for the 90 percent  
6 discount. It's not a simple matter.

7 The other thing, your Honor, is the whole premise  
8 of the discount is that they could go pursue put-back claims  
9 against those originators. As your Honor knows, those  
10 claims are not timely anymore under Ace II. We have no  
11 rights against WMC as trust at this point. It's too late.  
12 The trustee waited too long, which is why these trustees are  
13 being sued for billions and billions of dollars and why this  
14 proceeding can't possibly let them off the hook.

15 So in closing, your Honor, you're quite right that  
16 this is ill-suited to any kind of Article 77 proceeding,  
17 though this is --

18 THE COURT: I did not --

19 MR. WOLLMUTH: -- hit on by B of A.

20 THE COURT: I did not say that this settlement was  
21 ill-suited to an Article 77 proceeding. I think there are  
22 issues about what the appropriate standards are given that  
23 this is not the traditional subject matter of an Article 77.

24 MR. WOLLMUTH: Fair enough. By no means did I mean  
25 to put words in the Court's mouth. We would love to brief  
26 those issues at the appropriate time.

## Proceedings - Mr. Rollin

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THE COURT: Thank you.

MR. ROLLIN: Thank you, your Honor. I do think I could keep it to two or three minutes, because W&L Investments has a very narrow issue. And it's not -- Ms. Patrick misunderstands what our objection is. We do not -- we have not interposed objections to the manner in which the settlement amount, the overall amount is allocated among the trusts, but rather the manner in which it is distributed among certificates within the trust. That is a provision that was negotiated by the institutional investors and was accepted by the trustees. The Court will not find an expert report in any of the exhaustive analysis that Mr. Ingber referred to that addresses that issue; that addresses whether the distribution methodology comports with the governing agreements and whether it effectuates the purpose of the settlement, which is to compensate those certificates which suffered losses from breaches of representations and warranties and poor underwriting and mis-servicing. So there is no expert report on that, it's not part of their analysis, and there's no expert report about whether the institutional investors, in negotiating that particular provision, sought or obtained a unique benefit based on their own self-interests, whether for themselves or for people for whom they are fiduciaries.

So as to us, W&L owns five classes of certificates

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2 in each of two of the accepting trusts, and those  
3 certificates are worth nothing because they were wiped out  
4 from the very misconduct that this settlement purports to  
5 compensate for, but it will receive none of the settlement  
6 payment. As I said, there is zero analysis on this in any  
7 of the work done by the trustees or their experts, and that  
8 is W&L's objection to the settlement. The \$11 million paid  
9 to those two particular trusts will not be paid to the  
10 certificates that suffered loss from the harm that was  
11 caused and that was supposed to be remediated through the  
12 settlement, but instead, to the top of the waterfall where  
13 far fewer or even no losses were suffered at all.

14 Thank you, your Honor.

15 MR. JACOB: Triaxx, your Honor. We join in the  
16 other concerns, and somewhat similar to Mr. Rollin's client,  
17 Triaxx, which purchased \$1.5 billion of these RMBS of the  
18 least risky ones before financial crisis started, and still  
19 holds those positions, objects to the allocation as  
20 unreasonable because different trusts that are subject to  
21 the settlement and different loan groups hold very different  
22 kinds of loans. Some were less risky and some were more  
23 risky, and similarly, some trusts or loan groups held loans  
24 subject to one kind of reps and warranties, others different  
25 and less robust reps and warranties, yet, in our view, the  
26 settlement does not take this into account. And so there is

1 Proceedings - Mr. Jacob

2 a problem that the settlement is unreasonable because it  
3 simply looks at gross losses and does not take into account  
4 that less risky tranches, if you will, that were supported  
5 by more robust reps and warranties should be entitled to  
6 greater relief than the tranches or trusts that held more  
7 risky mortgages subject to less robust reps and warranties.  
8 And that is our specific objection, which is some what  
9 similar to and a little bit different than W&L's.

10 We also have a question about loan modification  
11 claims and how those were taken into account, and we think  
12 that should be the subject of discovery as well.

13 Thank you, your Honor.

14 THE COURT: Thank you.

15 Anyone else? Let's take a ten minute recess and  
16 then we'll turn to discovery. We haven't had you hand up  
17 the draft discovery order. If you could do that at this  
18 time, that would be helpful. Thank you.

19 (Whereupon, a short recess was agreed upon and  
20 taken by all parties.)

21 THE COURT: Back on the record. I have reviewed  
22 the parties' proposed order and I see that the discovery  
23 that is being agreed to at this point is the discovery that  
24 was outlined in the trustees' memorandum of law regarding  
25 the appropriate scope of discovery.

26 As the objectors are requesting discovery that

1 Proceedings - Mr. Loeser

2 significantly exceeds that to which the trustees are willing  
3 to agree at this point, I will hear, first, from the  
4 objectors. You can assume familiarity with the papers that  
5 you submitted on this issue.

6 MR. LOESER: Thank you, your Honor.

7 So the first question, and really the question your  
8 Honor asked at the last hearing, is what is the proper scope  
9 of discovery? And the answer is fairly straight forward.  
10 Unlike other special proceedings in an Article 77,  
11 beneficiaries are entitled to full and complete discovery  
12 with regard to the action taken by the trustee. And putting  
13 all the papers together and trying to figure out, you know,  
14 where there is agreement, the petitioners have articulated a  
15 standard which is that you are entitled to discovery based  
16 on what is material and necessary, um, and we agree. That  
17 is the standard. It's just that their interpretation of  
18 what is material and necessary is obviously very different  
19 than ours.

20 Material and necessary is not an abstract concept.  
21 The case law is clear that it's defined by what is sought in  
22 the pleadings. The test of materiality should be the  
23 relevancy of the materials to the issues completed. So  
24 under the case law and the CPLR, Article 31 does apply here.  
25 The answer to what discovery is appropriate is what  
26 information is material and necessary for the relief sought

1 Proceedings - Mr. Loeser

2 by the trustees.

3 We talked earlier about what is that relief, and I  
4 won't go over that again, but your Honor knows it's a  
5 variety of the findings about the investigation and about  
6 the thoroughness of it, and about the best interest and  
7 about fiduciary duty. So that's the -- the petition itself  
8 is the relief that the trustees say that they want from this  
9 Court, um, defines what is material and relevant.

10 And the trustees didn't need to come here. They  
11 did not need to come to this court to settle this matter.  
12 They are here to get a release. If your Honor weren't  
13 involved, they would be out and they would be exposed to  
14 whatever they're exposed to, but they are here for a release  
15 and the release is based on these findings and that's what  
16 is material and necessary.

17 Now, one of the points that's made by the  
18 petitioners is that the standard of review determines the  
19 scope of discovery. And that's wrong. That conflates  
20 standard of review of scope of discovery. The standard of  
21 review cannot be determined until after discovery, because  
22 if discovery shows, for example, that there are conflicts,  
23 then the standard of review is completely different. If  
24 there are conflicts, the trustees get no discretion.

25 THE COURT: Can you address what discovery is  
26 critical to your thinking.

## 1 Proceedings - Mr. Loeser

2 MR. LOESER: Yes. The critical discovery is the  
3 information necessary to evaluate whether the investigation  
4 by the trustees was thorough and reasonable. It is an  
5 evaluation of the trustees' consideration of its own  
6 liability, and evaluation of whether the trustees had  
7 conflicts which they consider, um, or did not consider, but  
8 information relating to whether they have conflicts.

9 It's information sufficient to evaluate whether it  
10 was reasonable for the trustees to accept the expert  
11 recommendations that they received. It is discovery  
12 relating to whether there were events of default, and that  
13 matters because it completely changes the standard and the  
14 scope of duties of the trustees. Event of defaults, a  
15 settlement has real problems, so we need to understand, and  
16 their expert's conclusions of the results.

17 THE COURT: Can you explain what you mean by that,  
18 "event of default." What in particular are you referring  
19 to?

20 MR. LOESER: I'm referring to when there have been  
21 violations of representations and warranties, knowledge by  
22 the trustees and the failure to cure them.

23 THE COURT: You want to know when the trustees had  
24 knowledge of events of default.

25 MR. LOESER: Yes, and whether they've evaluated the  
26 occurrence of event of defaults, because these trustees are

1 Proceedings - Mr. Loeser

2 not strangers here. As your Honor knows, they are kind of  
3 at the center of it. They know when there are rep and  
4 warranty violations. Reports are prepared by them,  
5 evaluations are done. They have access to evaluations from  
6 the servicers. There is litigation. There's letters they  
7 received. There's information -- there's an abundance of  
8 information that they received about whether there are  
9 uncured breach of rep and warranty violations and breach of  
10 servicing obligations. So that's what I mean.

11 And we are not asking to litigate the underlying  
12 liability. We are just asking, what did the trustees look  
13 at? What did they consider, based on all of the information  
14 they have at ground zero in these trustees and all of the  
15 information that they received and have access to?

16 THE COURT: What is it in particular that you want?  
17 Give me some example, not every last document or piece of  
18 evidence, but can you specify what it is that you want that  
19 is not included in the materials that the trustees have  
20 already agreed to provide.

21 MR. LOESER: With regard to events of default, or  
22 just generally?

23 THE COURT: With regard to everything. You have  
24 outlined four or five categories just now. Let me have a  
25 flavor of what kinds of documents you are looking for.

26 MR. LOESER: Well, sure. On the event of defaults,



## Proceedings - Mr. Loeser

1  
2 the information that would provide the trustees of knowledge  
3 of uncured breaches, for example. This would be, um,  
4 notices they received from certificateholders. This would  
5 be the results of any investigation that they've done, um,  
6 results of investigations that have, um, been prepared by  
7 the servicers. Um, the ground level information that a  
8 reasonably prudent fiduciary when deciding are there events  
9 of default on the underlying liability for rep and warranty  
10 violations, as discussed, there is this multitude of claims  
11 and litigation against JP Morgan in which loan file reviews  
12 have already been done, reports are completed. The trustees  
13 can get this information. They could ask JP Morgan for it.  
14 They have information of their own. So we want information  
15 -- so if you're going to decide --

16 THE COURT: How many cases are there -- how many  
17 put-back cases have been brought against JP Morgan?

18 MR. LOESER: Ten or 15, I would think. Others  
19 could speak more to that, but my understanding from what I  
20 read in the materials is something around ten or 15  
21 different put-back cases. There is also the monoline  
22 (phonetic) cases that Mr. Ledley, um, with Ambac. There is  
23 a multitude of cases in which loan file re-underwriting has  
24 been done. There are securities cases for which loan file  
25 re-underwriting has been done. And they all -- it's been  
26 the same underlying fundamental issue. This is a mortgage

1 Proceedings - Mr. Loeser

2 repurchase put-back settlement writ large. There is nothing  
3 more than important to the trustees' evaluation than how bad  
4 are these loans. And we're not asking to go out and do a  
5 loan file re-underwriting. That has been done in other  
6 cases.

7 In the Res Cap matter that we talked about briefly,  
8 there was a loan file re-underwriting that was ordered by  
9 the court, and in the Article 77 with Justice Kapnick there  
10 was a lot of arguing about going out and doing the  
11 re-underwriting. We are not asking for that. We just want  
12 the results. These are reports. They're written. They're  
13 prepared. The trustees should have looked at them. You  
14 cannot release \$65 billion of liability for repurchase  
15 claims without looking at the reports that exist. They  
16 ought to have known information, if not known information by  
17 the trustees. That's what we are asking for. We are not  
18 asking for litigation of the underlying claims. We are not  
19 asking to go through loan file by loan file. We just want  
20 the easy stuff, the stuff that already exists.

21 THE COURT: Are there any other major categories of  
22 documents that you are looking for?

23 MR. WOLLMUTH: Your Honor, if I may.

24 THE COURT: We are only going to have one Counsel  
25 at a time.

26 MR. LOESER: Your Honor, let me just -- there are

1 Proceedings - Mr. Loeser

2 few other discrete categories, and then I'll move on, and  
3 perhaps Mr. Wollmuth can come back to this point.

4 Tolling agreements, for example, it's tremendously  
5 important for the trustees' evaluation that they believe  
6 that the claims are time-barred for a lot of these claims.  
7 And there are a variety of tolling agreements that are  
8 negotiated between the sponsors and originators that toll  
9 claims.

10 We don't know anything about what the trustee took  
11 into account when considering the presence of other tolling  
12 agreements. Tolling agreements other than the ones that  
13 Ms. Patrick and her clients entered into with the trustees  
14 and with JP Morgan. Other tolling agreements, they have a  
15 huge impact on the evaluation. That's a very discrete easy  
16 to identify category of information.

17 Information about conflicts. Now --

18 THE COURT: Information about?

19 MR. LOESER: About conflicts. I've been involved  
20 in a lot of trustee litigation, and when a trustee finds  
21 itself in a circumstance where it has conflicting loyalties  
22 to itself and to others, they often obtain counsel, for the  
23 benefit of the trusts, as to what they should do and whether  
24 they are conflicted. That is extremely important  
25 information. It's information beneficiaries are entitled  
26 to. It's information supposedly obtained on their behalf.

1 Proceedings - Mr. Loeser

2 THE COURT: You want to know if the trustees  
3 consulted counsel about potential conflicts?

4 MR. LOESER: Yeah, this is something that was the  
5 subject of a tremendous amount of briefing in Justice  
6 Kapnick's courtroom. There is a concept known as the  
7 "fiduciary duty exception." Ultimately Justice Kapnick  
8 granted access to some of the information. And it's very  
9 specific. It's when lawyers advise trustees regarding the  
10 scope of their duties, that is information that  
11 beneficiaries are entitled to because it was obtained for  
12 their benefit. And we can submit briefs on this at the  
13 right time and go over this, but that's a very discrete  
14 category that relates specifically to the occurrence of  
15 conflicts and the trustees' consideration of what it's  
16 supposed to do in the face of that information.

17 Your Honor, if I could address just a couple other  
18 points, um, generally, as to what it is we're being told we  
19 are entitled to by the petitioners and why we are entitled  
20 to something more than that.

21 THE COURT: I'm not going to hear any further  
22 general argument today on discovery.

23 MR. LOESER: Okay.

24 THE COURT: There will be adequate opportunities on  
25 it in the future or on a future occasion, or occasions.  
26 Today I will just like to conclude by getting a flavor of

1 Proceedings - Mr. Loeser

2 what the objectors are really looking for.

3 MR. LOESER: Okay. Let me -- with the Court's  
4 permission --

5 THE COURT: And I would like to hear the response  
6 to this.

7 MR. LOESER: Let me address a few specific  
8 categories of information then.

9 The bases of experts' conclusions. This is a  
10 settlement that is -- everything that we know about it is  
11 simply what's put in these expert reports and the trustees  
12 apparently deferred to these experts in deciding what is and  
13 what is not appropriate.

14 We've been told that any examination of whether the  
15 experts are right or wrong, their conclusions are justified  
16 or not, is completely off limits. All we get is the  
17 reports. And they're graciously now allowing us to see  
18 unredacted versions of reports.

19 The use of experts in trustee litigation, this is  
20 not some new area of the law. There is not -- it's not you  
21 just get experts and it doesn't matter what they say. There  
22 is a very specific standard that applies to the question of  
23 how experts are used and what their role is in trustee  
24 litigation. And what the case law says is that obtaining an  
25 expert record is not a complete defense to a charge of  
26 imprudence. What needs to be shown is that the fiduciary

1 Proceedings - Mr. Loeser

2 investigated the expert's qualifications, provided the  
3 expert with complete and accurate information --

4 THE COURT: You know, this is exactly what was in  
5 your brief, in one or more of your briefs. I am familiar  
6 with your argument. I want to know what in particular you  
7 want to enable you to evaluate the expert's report.

8 MR. LOESER: What we need --

9 THE COURT: There's been talk about methodologies.  
10 Can you particularize that?

11 MR. LOESER: Well, your example -- yeah, I can.  
12 Let's start with Fischel. Fischel, for example, as we  
13 talked about earlier, assumes there was not an event of  
14 default. There was no event of default that justifies his  
15 conclusion. We need information about whether there were  
16 events of default to evaluate whether it was reasonable for  
17 the trustees to rely on Mr. Fischel's conclusions. It's not  
18 possible to evaluate his report without that information.

19 Dr. Sabry describes and goes to great lengths to go  
20 through all the various methods she has of determining what  
21 the liability is to arrive at this kind of miraculous 100 to  
22 260 percent number, um, and it's hard to say exactly what  
23 you want because her entire report is redacted, but  
24 obviously we need to know what -- how did she crunch those  
25 numbers? What is the basis for those conclusions? Where  
26 does it come from?

## Proceedings - Mr. Loeser

1  
2           The there's an expert report about the presence of  
3 time bars. And again, we can't evaluate -- we can't decide  
4 and determine if it was reasonable for the trustees to rely  
5 on the law professor's report on time bars without having  
6 the information about the presence of tolling agreements.  
7 It can't be done. It's abstract legal brief on time bar.

8           There's another report that discusses whether loan  
9 modifications were proper, but it doesn't identify where or  
10 what PSA's the expert was relying on, so -- I mean, we could  
11 go through -- it's all identified in the various objections  
12 where we go through and try to give sort of a flavor of,  
13 look, we have his reports. That's great. But just having  
14 the reports does not satisfy the trustees' obligations. And  
15 the Court has to decide if it's reasonable for the trustee  
16 to rely on the reports. And nobody can do that without  
17 getting underneath the hood and getting the information,  
18 which we are more than happy to write down in great detail  
19 as to exactly what it is we want. And we've tried to do  
20 that in our discovery which goes through and identifies  
21 information we need for Dr. Sabry, information we need for  
22 Mr. Fischel, and down the list.

23           THE COURT: Now, I really will stop you and ask you  
24 to leave a little more time than we did earlier this morning  
25 for your fellow counsel.

26           MR. LOESER: Of course. Thank you, your Honor.

## Proceedings - Mr. Wollmuth

1  
2 MR. WOLLMUTH: Your Honor, I just like to touch on  
3 three buckets of information.

4 I think critical to determination of this case is  
5 the standard of care that the trustee had to use which turns  
6 on whether or not there is an event of default. Once there  
7 is, the trustee becomes a common-law trustee, not an  
8 indentured trustee. The exception reports, which the  
9 trustee does for every trust, show within 180 days after  
10 closing the extent to which the original mortgage notes and  
11 assignments of mortgage were not delivered to the trust.  
12 This resulted in the robo-signing scandal and contributed  
13 greatly to the losses suffered by investors. And we'll  
14 show, we'll show, your Honor, that for every one of these  
15 trusts, an event of default occurred within 180 days after  
16 closing.

17 Second, insolvency, we learned today for the first  
18 time, is the justification -- or solvency, I'm sorry -- for  
19 the 90 percent discount my client, QVT, took with respect to  
20 its sharing under the settlement. It is absolutely critical  
21 that QVT be able to test and understand the determination  
22 that, in our case, WMC mortgage is solvent. And I submit to  
23 the Court that it's not solvent. It has no assets. We need  
24 to understand how they concluded it was solvent.

25 And last, another factor that purportedly justified  
26 this 90 percent discount which we've been discussing is the



1 Proceedings - Mr. Rollin

2 right to put back the bad loans to the originators with  
3 JP Morgan standing only as a guarantor. Well, under Ace II,  
4 that's -- under Ace II, there is no right to put back loans  
5 at this point. It's time-barred under that decision. So to  
6 say that a client should have a 90 percent discount because  
7 of its ability to, today, put back loans to an insolvent,  
8 for WMC mortgage, um, is implausible and an abuse of  
9 discretion. And that's it, your Honor.

10 THE COURT: Thank you.

11 MR. ROLLIN: Thank you, your Honor. As I described  
12 earlier, the nature of our objection is very narrow, so as  
13 it applies to W&L, we seek only discovery that bears on the  
14 distribution methodology and whether the institutional  
15 investors negotiated that particular provision in their  
16 self-interests and in the interests of the other  
17 certificateholders who are going to be left out of the  
18 settlement by virtue of that methodology. So we ask for the  
19 communications just on those topics, on the analyses, the  
20 evaluations, any modeling, um, on those issues that is just  
21 for W&L.

22 Now, in the course of the respondents trying to get  
23 organized, I was tasked with the question about what  
24 discovery should be provided by the institutional investors,  
25 and so I'll comment on that very briefly.

26 The specific items that we are asking for are what

## Proceedings - Mr. Rollin

1  
2 are the positions that were taken and exchanged in the  
3 course of the negotiations where this settlement was  
4 created? And how do those positions support it by both  
5 sides, because that bears directly on the reasonableness of  
6 the trustee in deciding to rely on the institutional  
7 investors' support as a substantial component of its  
8 decision to accept the settlement, and a substantial  
9 component on the decision of its expert, and a substantial  
10 component of what they ask your Honor to do, and that is to  
11 accept the support of the institutional investors as  
12 evidence of the reasonableness of the trustees' conduct.

13 What happened in those negotiations goes directly  
14 to the reasonableness of the trustees' reliance and whether  
15 the Court should give these institutional investors' support  
16 any weight at all.

17 And I'll end with a quote from Professor Fischel at  
18 paragraph 56 of his report, and I think it's very  
19 illuminating. He says, "We lack adequate information about  
20 the process by which the proposed settlement was negotiated.  
21 This is in contrast to the Countrywide settlement where the  
22 trustee witnessed the negotiations and an extensive record  
23 in the form of documents and depositions was available to me  
24 that showed the negotiations were arms-length and the  
25 substantive issues were explored in depth. That is  
26 completely absent in this case."

## Proceedings - Mr. Ledley

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2 We believe the Court should be guided by the  
3 discovery permitted by Justice Kapnick where she allowed us  
4 to get into those negotiations, and the way the positions  
5 were stated and supported, what was given, what was taken  
6 away, what was left off the table. For example, loan  
7 modifications. The question of loan modifications came up  
8 in negotiations which we only learned because of that  
9 discovery. And Justice Kapnick found that by dropping that  
10 issue and by not evaluating that issue, the trustee, in that  
11 case of the Bank of New York Mellon, abused its discretion.  
12 But for that discovery, she never could have performed that  
13 analysis and reached that conclusion. I think that is  
14 precisely why the settlement proponents would rather that  
15 your Honor didn't look into those.

16 MR. LEDLEY: Your Honor, Michael Ledley for Ambac  
17 again. I'm going to address the discovery that we served on  
18 JP Morgan.

19 The big picture, your Honor, the discovery from JP  
20 Morgan, who is going straight to the horses mouth, as it  
21 were, is relevant to the question of did the trustee do an  
22 adequate investigation and seek out the known information  
23 that was available they could've asked for in evaluating the  
24 trust. Um, Ambac is in possession of a significant amount  
25 of information from its prior discovery. That can be  
26 produced in this case simply by JP Morgan saying we deem it

1 Proceedings - Mr. Ledley

2 produced in this case, subject to appropriate  
3 confidentiality which the parties are working out.

4 Other information that we requested on behalf of  
5 all objectors includes any re-underwriting information,  
6 re-underwriting results that JP Morgan has for the trusts at  
7 issue here, um, whether that it did itself or that trustees  
8 or investors provided to JP Morgan. Again, specific to  
9 these trusts here, and that goes directly to the question of  
10 how bad are the loans at issue in these trusts.

11 Other information we've asked for that is specific  
12 to or that is on behalf of all objectors is any notices that  
13 the trustee received of events of default, for reasons that  
14 my colleagues had mentioned it's a very significant issue,  
15 or notices of breaches of JP Morgan servicer affiliates  
16 obligations under the pooling and servicing agreements and  
17 the indentures here. And that's relevant, your Honor,  
18 because notices of those breaches, after a certain period of  
19 time, turned into an event of default. So again, the same  
20 issues that we talked about, that's very important. Now,  
21 that's just to try -- trying to prioritize and give you a  
22 flavor that you asked for of the specific information that  
23 we are asking for.

24 On behalf of Ambac in particular with respect to  
25 the Ambac insured trusts that are at issue here, we also  
26 have asked for certain information, targeted information

1 Proceedings - Mr. Ledley

2 that we know exists based on our prior discovery against JP  
3 Morgan; that goes directly to the issue of the quality of  
4 the particular loans at issue here. So, due diligence  
5 reports on the loans in the Ambac insured trusts. Um,  
6 quality control reports on the loans that are securitized in  
7 the Ambac insured trusts. And those reports, your Honor,  
8 are after JP Morgan securitized the loans. It had people go  
9 through them and look at samples and identify which loans  
10 should not have been included in the securitizations or  
11 which ones should be put back to the originators; that  
12 obviously goes directly to the issues here. The due  
13 diligence reports are prior to the securitization at the  
14 time of acquisition by JP Morgan. They do a similar review.  
15 Again, this is easily identifiable information and it's very  
16 targeted.

17 And the remaining information that we asked for is  
18 with respect to the Ambac insured trusts, documents from the  
19 database that we know exists that identifies the loans for  
20 which JP Morgan made repurchase requests to originators, um,  
21 and the amount that they received for those loans, and the  
22 amounts, if any, that they paid to the Ambac insured trusts  
23 in connection with those transactions. It's very targeted,  
24 your Honor, and each of those items goes directly to the  
25 question of what loans in these trusts breach  
26 representations and warranties, and which didn't.

1 Proceedings - Mr. Micheletto

2 And there's a few other things that we've asked  
3 for, but, your Honor, I don't think I need to detail each  
4 one of them, but that gives you a flavor of the kind of  
5 information we are seeking.

6 THE COURT: Thank you.

7 MR. JACOB: Your Honor, Triaxx.

8 Very briefly, we join in what the other objectors  
9 have requested, particularly what Mr. Rollin indicated as to  
10 how the allocation formula was arrived at here, um, is of  
11 particular interest because of the position we previously  
12 stated that the settlement operates very much in a  
13 one-size-fits-all manner where that is not reasonable.

14 And also with respect to the loan modifications,  
15 discovery, not just as to particular PSA's, but as to  
16 whether the trustees considered that JP Morgan had conflicts  
17 of interest in the loan modifications because they held  
18 different interests in the loans. They had second liens in  
19 some instances, and they have passed loan modification  
20 losses onto the trusts improperly. We would just like  
21 discovery as to whether the trustees considered that issue.  
22 We don't have to reinvent the wheel as to what happened with  
23 each modification.

24 MR. MICHELETTO: Good afternoon, now, your Honor.

25 I'm Bob Micheletto of Jones Day on behalf of US Bank.

26 I guess the place I would like to start is with the

## Proceedings - Mr. Micheletto

1  
2 proposed order that was submitted to your Honor at the last  
3 break. Just to clarify one point that your Honor has  
4 undoubtedly noted, um, that the draft originally provided  
5 that each trustee would produce one witness for deposition,  
6 and that that was struck out in the order that was handed up  
7 to your Honor. That's not because we have gone back on  
8 that. We stand by that. We will -- each trustee has agreed  
9 to produce one witness for deposition.

10 In addition, we've agreed to identify the witnesses  
11 with the most knowledge and information about the trustees'  
12 decision to accept the settlement. So from that list,  
13 presumably the objectors will be able to pick the person  
14 they think is most appropriate from each trustee, um, for  
15 deposition. Obviously, a lot of the information the  
16 objectors claim they need from the trustees can be asked of  
17 the trustees' witnesses during the course of the  
18 depositions.

19 Mr. Loeser indicated that the scope of discovery  
20 should be defined by what is sought in the pleadings, um,  
21 and that only information material and necessary to what is  
22 sought in the pleadings is appropriate. I guess we agree  
23 with that, your Honor, but we dispute, strongly, the  
24 objectors' characterization of what is actually sought in  
25 the trustees' pleadings. I think it's very clear and it is  
26 concisely stated, at paragraph 77 of the amended petition,

## Proceedings - Mr. Micheletto

1  
2 precisely the relief the trustees are seeking in this  
3 proceeding. In that paragraph 77, the trustees say,  
4 "Accordingly, the trustees request the declaration that  
5 their acceptance of the settlement on behalf of each of the  
6 accepting trusts comports with all applicable duties under  
7 the governing agreements and any other applicable law, and  
8 that the certificateholders are barred from asserting claims  
9 against any trustee with respect to such trustees'  
10 evaluations and acceptance of the settlement, and the  
11 implementation of the settlement in accordance with its  
12 terms has been memorialized in the settlement agreement."

13 So in other words, your Honor, the issue is, as  
14 Mr. Ingber indicated this morning, um, before this Court, a  
15 very narrow one, and that issue is whether or not the  
16 trustees reasonably, and in good faith, evaluated and  
17 accepted the settlement agreement. And we believe that the  
18 discovery we have agreed to produce, which is set forth in  
19 the proposed order, is all of the information that is  
20 necessary and material to that issue, and that no other  
21 discovery is necessary. We are not looking, contrary to the  
22 objectors' assertions, for a finding that we did an adequate  
23 investigation into repurchase claims or for breaches of  
24 misrepresentations of warranties, or any of that stuff. In  
25 fact, the purpose of the settlement was to avoid such  
26 lengthy and time-consuming and expensive investigation of



## Proceedings - Mr. Micheletto

1  
2 litigation into those very claims. And although they say  
3 they don't want to litigate the merits of the claims in this  
4 case, in fact, that is precisely what they want to do  
5 through the discovery they have sought.

6 They have propounded 60, 60 requests for production  
7 of documents seeking a wide, broad range of documents that  
8 would require us to produce mountains and mountains of  
9 documents over months and months. It would be exactly  
10 contrary to the purpose of this special proceeding, which is  
11 expeditious.

12 The notion that they need discovery into whether or  
13 not there has been an event of default, your Honor, is a red  
14 herring. Whether there is an event of default or not is  
15 irrelevant; that the standard is the same. Whether the  
16 trustee acted reasonably -- the trustees acted reasonably  
17 and in good faith in evaluating the settlement. Whether or  
18 not there was an event of default does not change that  
19 analysis one bit. They should not be permitted a fishing  
20 expedition into whether or not there was an event of  
21 default.

22 Same for the alleged conflicts. They haven't  
23 demonstrated or made a prima facie showing that there is any  
24 conflict of interest that warrants discovery. We talked  
25 this morning, and I won't go over it again, about whether or  
26 not the conflict is created by the settlement agreement,

## Proceedings - Mr. Micheletto

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2 because the trustees, according to the objectors, stand to  
3 be sued if a settlement agreement is approved. And  
4 Mr. Ingber disputed that, and I, too, dispute that  
5 characterization, but that is not a conflict. And that is  
6 certainly not a conflict that warrants a wide-open fishing  
7 expedition into all areas of the trustees' investigation and  
8 the like. And for the same reason, the information they  
9 seek with regards to an event of default is irrelevant. So  
10 too is the information they seek with regards to the  
11 conflicts.

12 Another part worth mentioning is when they were  
13 asked to specifically identify the documents they were  
14 looking for, I think at least some of what the objectors say  
15 they want is actually going to be produced to them pursuant  
16 to the proposed order we presented to your Honor. For  
17 instance, the -- there was repurchase data that they claimed  
18 to need and want. And that data was provided to the  
19 experts, and we've agreed to make available to the objectors  
20 all information that was provided to the experts, um, that  
21 they relied upon in coming up with their expert reports.

22 So in conclusion, your Honor, I think the standard  
23 of review does most definitely define the scope of discovery  
24 in this case. And without a determination the appropriate  
25 standard of review, it's difficult to characterize the  
26 appropriate scope of discovery. And again, our view is that

1 Proceedings - Ms. Patrick

2 the issue in this case is limited to whether or not the  
3 trustee reasonably, and in good faith, evaluated and  
4 accepted the settlement, and all the discovery we agreed to  
5 provide is all the information that is relevant to that  
6 issue, which is the sole issue before this Court.

7 THE COURT: Thank you.

8 MS. PATRICK: May it please the Court. I'm going  
9 to speak specifically about some of the arguments that are  
10 made about the waterfall, the allocation, and the settlement  
11 negotiations.

12 Let me begin by saying that, as Mr. Micheletto  
13 said, the scope of discovery here is defined by the Law of  
14 Trusts. There is not a different set of law for big trusts  
15 and little trusts. It is the Law of Trusts. There are four  
16 major securitization cases that have dealt with this issue:  
17 Res Cap, IBJ Schroder, the Countrywide decision, obviously,  
18 and the Second Circuit in the CAFA appeal, but the Law of  
19 Trusts defines the scope of discovery and what is relevant.

20 And let me begin with the expert evaluations. You  
21 asked them specifically, what do they want to evaluate the  
22 expert reports? And the answer was to do with the  
23 correctness of the expert reports, but Cruden said that was  
24 beyond the scope of discovery, and we've given you that law.

25 As it pertains to the waterfall, they want to  
26 understand how the waterfall works. The answer to that is,

1 Proceedings - Ms. Patrick

2 read the pooling and servicing agreements. The particular  
3 section of the settlement agreement that specifies the  
4 allocation is section 3.06. It says, "Each trusts'  
5 allocable share shall be deposited into the related trusts  
6 collection or distribution account pursuant to the terms of  
7 the governing agreements."

8 These agreements have a waterfall in them. And the  
9 waterfall says what it says and it does what it does. And  
10 the settlement agreement says that, um, if the Court  
11 determines that, um, that the waterfall says -- that the  
12 waterfall says something different, it's not the case, and  
13 let me be clear about this, the suggestion is that somehow  
14 our clients, who are a broad and diverse group of investors,  
15 somehow thought to advantage themselves with the  
16 distribution scheme that it embodied in the settlement offer  
17 that was presented to the trustees.

18 In fact, our clients take exactly and only the same  
19 thing every other similarly situated holder takes. The fact  
20 that a particular investor chose to buy junior tranches that  
21 were wiped out by losses, and that under the pooling and  
22 servicing agreement do not benefit from subsequent  
23 recoveries, is not a matter of discovery. It is a matter of  
24 the contracts. And to the Court's earlier point, these  
25 contracts do matter. There is an abundance of law about  
26 that. And so that issue of the waterfall is answered by

1 Proceedings - Ms. Patrick

2 looking at the pooling and servicing agreements.

3 Now, with regard to the negotiations, let us be  
4 perfectly clear. No information, at all, was provided to  
5 the trustees about these negotiations. None. They got no  
6 presentations. They got no information, nothing. And  
7 that's why Professor Fischel's report says he lacks adequate  
8 information about the negotiations, because none was  
9 provided.

10 What is the implication of that here? The trustees  
11 received this settlement. Like manna in the desert, it  
12 came. They did not know anything other than that it came  
13 and that our clients supported it. And from there, they  
14 decided what to do. And if you read the petition, which is  
15 the definition of the scope of what is relevant and  
16 material, there is no request for relief regarding the  
17 negotiations, whether or not they were at arms length, or  
18 their character; simply not placed an issue in this case,  
19 and therefore, it is not relevant.

20 Now, our response to that discovery is not yet due,  
21 when we respond, we will raise certain legal issues,  
22 including a California mediation statute that precludes the  
23 discovery of this information, and related New York law, but  
24 the Court need not reach those issues because they are not  
25 relevant because they are not placed in issue by the  
26 trustees' petition. This settlement came to the trustees as

## Proceedings - Ms. Patrick

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2 it was. It is reasonable or it is not reasonable. It is  
3 within the range of reason or it is not within the range of  
4 reason. How it got there is irrelevant to the relief the  
5 trustees seek.

6 Finally, I want to address a form of discovery that  
7 we have served and that we believe is highly relevant in  
8 this case. We have asked that the objectors be ordered to  
9 produce their holdings as of particular dates. And the two  
10 dates that are of particular interest to us is the day  
11 before the settlement offer was made public, and the day the  
12 settlement -- the settlement acceptance was announced.

13 Why do we believe that is relevant? Well, we have  
14 been through this process before in Res Cap and in  
15 Countrywide. And we have observed that certain people view  
16 these settlements as opportunities to try to extract  
17 idiosyncratic benefit for themselves by lodging objections.  
18 That is relevant in this context because the pooling and  
19 servicing agreements prohibit investors from invoking  
20 rights, including, we contend, the right to object by  
21 seeking individual benefits. And our view is that before  
22 the Court credits objections, it should know whether those  
23 holders bought with knowledge of the settlement or bought  
24 after it was accepted, which would create significant issues  
25 of estoppel waiver ratification, and otherwise, that might  
26 preclude those objections. So we have simply asked, tell us

## Proceedings

1  
2 the holdings as of those dates so that we can know whether  
3 you actually -- whether these objections conformed to the  
4 pooling and services agreements.

5 And with that, your Honor, unless the Court has  
6 particular questions, that's our view on discovery. We  
7 believe we need holdings as of those dates, negotiations are  
8 not relevant, and the waterfall issue is what it is.

9 THE COURT: Thank you. I would like to hear from  
10 just one of the counsel on the discovery that Ms. Patrick  
11 has just said is being requested.

12 MR. MICHELETTO: Your Honor, I apologize, I  
13 neglected to mention that Counsel for JP Morgan would  
14 appreciate an opportunity to address the Court in respect to  
15 the discovery sought with JP Morgan.

16 THE COURT: I can't do it given the timing. I'm  
17 sorry. There will be other opportunities.

18 MR. WOLLMUTH: Yes. QVT Financial objects to the  
19 request as to when they bought. It's irrelevant. The  
20 question is, did they own the certificates in time to issue  
21 a valid instruction to the trustee? It's undisputed they  
22 did. We are happy to provide that information. The trustee  
23 disobeyed the direction; that is legal consequences.

24 I won't speak to the other points, unless your  
25 Honor want me to.

26 MR. LEDLEY: I only have one other thing, your

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1  
2 Honor. That same argument was rejected by Justice Kapnick's  
3 decision.

4 MR. LOESER: With the Court's permission, I'll  
5 respond briefly. Points that were made -- I heard Mr. --

6 THE COURT: I'm just going to hear about the  
7 discovery that Ms. Patrick has indicated the institutional  
8 investors are requesting of the objectors. Do you have  
9 anything to say about that issue?

10 MR. LOESER: The only thing I have to say about  
11 that issue is that if we are talking about idiosyncratic  
12 concerns, there are objectors/respondents that have  
13 different holdings that bought at different times. My  
14 client purchased these bonds when they were issued, um, but  
15 we did have significant concerns about Ms. Patrick's  
16 clients' idiosyncratic interests, including that BlackRock  
17 and PIMCO were known to have purchased billions of dollars  
18 of distressed -- at distressed prices, but as to that  
19 discovery question itself, we are happy to talk to  
20 Ms. Patrick about what information our client should provide  
21 or should not provide.

22 THE COURT: Thank you. I think that less progress  
23 has been made here in reaching an agreement as to  
24 appropriate discovery than I would have hoped. I think the  
25 parties need to go back to the drawing board and to meet and  
26 confer in a very serious effort to reach as much agreement



## Proceedings

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2 as possible on appropriate discovery.

3 I agree with Mr. Micheletto that the standard of  
4 review determines the scope of discovery. I'm not going to  
5 make a ruling on that issue based on briefing that I've had  
6 thus far. I'm going to want further briefing on that issue.  
7 And that said, I am inclined to grant more discovery than  
8 what the trustees are offering to produce. And it seems to  
9 me that there should be a way to work out many of the  
10 discovery issues, perhaps not all, but many.

11 This discovery cannot be as extensive as the  
12 discovery that would be appropriate if the repurchase claims  
13 were to be litigated, and the ultimate hearing of this  
14 matter is not going to be a minitrial on the merits of the  
15 repurchase claims. I think everyone would agree, if not on  
16 the record at least in private, that that is not the proper  
17 result for this Article 77 proceeding, but certainly there  
18 should be some areas on which Counsel can reach agreement.

19 So before I start to become more deeply involved in  
20 discovery issues, I am going to request that Counsel meet  
21 and confer. I would recommend that you meet and confer in  
22 person in an effort to reach as much agreement as you  
23 possibly can. And we'll, in a moment, schedule a conference  
24 call, which I will do in January, to hear what the results  
25 are.

26 I would also like to ask Counsel set up process for

## Proceedings

1  
2 conferring on a confidentiality order that we can use in  
3 this litigation. I believe one of the Counsel mentioned you  
4 were already discussing this, so that is a good thing.

5 I do want you to consider retaining a special  
6 master for this litigation. As you know, State Court does  
7 not have the resources that Federal Court has for dealing  
8 with complex discovery issues. You may have read that we  
9 will have a pilot special master program using retired  
10 attorneys, but that program will not even be up and running  
11 until September, and this case is obviously going to be  
12 driven, at least in the near future, by discovery disputes.

13 If you are willing to retain a special master, we  
14 could talk further about what rulings I'm going to need to  
15 make about the scope of discovery, generally, or about the  
16 standard of review, in order for the special master to  
17 function effectively, unless, of course, you want to leave  
18 that issue to a special master, at least for purposes of  
19 making recommendations to me. I already see heads shaking  
20 in a way that signals "no" on that point.

21 Perhaps we need to have a liaison counsel. The  
22 last time we did a conference call, it worked very well, and  
23 I think counsel had decided amongst themselves who would  
24 take the lead in presenting the positions of other counsel,  
25 but perhaps you want to think about that for the future,  
26 because we have people coming in from out of town and there

## Proceedings

1  
2 may be efficiencies that will benefit all if we can do some  
3 of this work on conference calls.

4 That is really all I have to say today, other than  
5 that I will sign the proposed order that you have presented  
6 today on the discovery to which you have already agreed, and  
7 that discovery should proceed in advance of the January  
8 conference call. And I think it would also be very useful  
9 if Counsel conferred about an e-discovery protocol for use  
10 in this litigation.

11 My law clerk will come out and give you the date  
12 for the conference call after conferring with you about your  
13 schedules.

14 My law clerk is also going to talk with you about  
15 furnishing us a binder with certain discovery order in some  
16 of the cases that you have mentioned. I want to refine my  
17 thinking about the supplemental briefing on the standard  
18 before I request it, so I'm not going to request that today.

19 Well, thank you for a very interesting morning, and  
20 I wish you all very happy holidays.

21 MR. INGBER: Thank you, your Honor.

22 MR. MICHELETTO: Thank you, your Honor.

23 MS. PATRICK: Thank you, your Honor. Same to you.

24 MR. LOESER: Thank you, your Honor. Same to you.

25 MR. ROLLIN: Thank you, your Honor.

26 MR. WOLLMUTH: Thank you, your Honor.

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MR. LEDLEY: Thank you, your Honor.

MR. JACOB: Thank you, your Honor. Same to you.

\* \* \* \* \*

Certified to be a true and accurate transcript of  
the stenographic minutes taken within.

Michael Ranita  
Senior Court Reporter

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