

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.
-----x

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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Michael Ranita
Senior Court Reporter

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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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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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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

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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

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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

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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

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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

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

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

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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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,

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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

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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

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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

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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

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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.

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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

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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

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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

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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.

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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

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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,

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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

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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

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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.

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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

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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

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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?

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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.

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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

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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

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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."

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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

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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

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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.

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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

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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,

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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

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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,

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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

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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,

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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

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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

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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

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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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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

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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

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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

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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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