

In The Matter Of:

US BANK v.

January 20, 2016

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Min-U-Script® with Word Index

1 SUPREME COURT OF THE STATE OF NEW YORK
 2 COUNTY OF NEW YORK CIVIL TERM PART 60
 3 -----X
 4 In the Matter of the Application of,
 5
 6 US BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK
 7 MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY,
 8 NA, WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW
 9 DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO
 10 BANK, NATIONAL ASSOCIATION, HSBC BANK USA, NA, and
 11 DEUTSCHE BANK NATIONAL TRUST (as Trustees under
 12 Various Pooling and Servicing Agreements and
 13 Indenture Trustees under various Indentures),
 14 AEGON USA Investment Management, LLC (Intervenor),
 15 BAYERISCHE LANDESBANK (Intervenor), Blackrock
 16 Financial Management, Inc. (Intervenor), CASCADE
 17 INVESTMENT, LLC (Intervenor), the Federal Home
 18 Loan Bank of Atlanta (Intervenor), The Federal Home
 19 Mortgage Corporation (Freddie Mac) (Intervenor), the
 20 Federal National Mortgage Association (Fannie
 21 Mae) (Intervenor), GOLDMAN SACHS ASSET MANAGEMENT,
 22 LP, (Intervenor), VOYA INVESTMENT MANAGEMENT, LLC,
 23 (F/k/a ING Investment) (Intervenor), INVESCO ADVISORS,
 24 INC., (Intervenor), Kore Advisors, LP, (Intervenor),
 25 LANDESBANK BADEN-WURTEMBERG, (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,

- against -

21 TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO
 22 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD.,
 23 (Intervenors), QVT FUND V LP, QVT FUND IV LP,
 24 QUINTESSENCE FUND, LP, QVT FINANCIAL LP,
 25 (Intervenors), AMBAC ASSURANCE CORPORATION,

CONTINUED ON NEXT PAGE...

Gloria Ann Brandon, Sr. Court Reporter

1 (Intervenor), INVESCO ADVISERS, INC., (Intervenor), KORE
 2 ADVISORS, LP, (Intervenor), LANDESBANK BADEN-WURTEMBERG
 3 (Intervenor), METROPOLITAN LIFE INSURANCE COMPANY
 4 (Intervenor), PACIFIC INVESTMENT MANAGEMENT COMPANY, LLC
 5 (Intervenor), SEALINK FUNDING LIMITED (Intervenor),
 6 TEACHERS INSURANCE and ANNUITY ASSOCIATION of AMERICA
 7 (Intervenor), THE PRUDENTIAL INSURANCE COMPANY OF
 8 AMERICA (Intervenor), THE TCW GROUP, INC., (Intervenor),
 9 THRIVENT FINANCIAL FOR LUTHERANS (Intervenor), WESTERN
 10 ASSET MANAGEMENT COMPANY (Intervenor)

11 FOR THE RESPONDENTS:
 12 FEDERAL HOME LOAN BANK of BOSTON, (Intervenor
 13 Respondent), TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME
 14 CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD. BY DAVID
 15 KO, DEREK W. LESTER, JOHN G. MOON, AMANDA F. PARSELS,
 16 CHARLES R. JACOB.

17 QVT FUND V LP, QVT FUND IV LP, QUINTESSENTIAL FUND, LP,
 18 QVT FINANCIAL LP & AMBAC BY DAVID WOLLMUTH, DANIELLE
 19 D'AQUILA, NIRAJ PAREKH.

20 W&L INVESTMENTS BY MICHAEL A. ROLLIN, MARITZA BRASWELL,
 21 DAVID S. PREMINGER, DONALD W. HAWTHORNE, MAGDALENA HALE
 22 SPENCER.

23 JP MORGAN CHASE & CO. BY DARRELL SCOTT CAFASSO, ROBERT
 24 A. SACHS.

25 AEGON USA INVESTMENT MANAGEMENT, LLC, BAYERISCHE
 LANDESBANK, BLACKROCK FINANCIAL MANAGEMENT, INC., CASCADE
 INVESTMENT, LLC, THE FEDERAL HOME LOAN BANK OF ATLANTA,
 et al, BY WARNER E. KENNETH.

Gloria Ann Brandon,
 Kathy Jones,
 Senior Court Reporters.

Gloria Ann Brandon, Sr. Court Reporter

1 And the SEGREGATED ACCOUNT OF AMBAC ASSURANCE
 2 CORPORATION (Intervenors), and W&L INVESTMENTS, LLC
 3 (Intervenor),

Respondents,

4 For an order, pursuant to CPLR 7701, seeking judicial
 5 instruction.
 6 -----X
 7 INDEX NUMBER 652382/14

60 Centre Street
 New York, New York
 January 20, 2016

9 B E F O R E:

10 HONORABLE MARCY S. FRIEDMAN,
 Supreme Court Justice.

11 A P P E A R A N C E S:

12 FOR THE PETITIONERS:

13 US BANK ASSOCIATION, THE BANK OF NEW YORK MELLON, THE
 14 BANK OF NEW YORK MELLON TRUST COMPANY, NA, WILMINGTON
 15 TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY
 16 OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION,
 17 HSBS BANK USA, NS, DEUTSCHE BANK NATIONAL TRUST COMPANY
 18 BY: KATHY PATRICK, ROBERT SCHNELL, WILLIAM MUNNO,
 19 ROBERT SACKS, KIRSTEN ROSE VOGEL, JOSEPH BRUSETT
 20 SCOVERS, ROBERT C. MICHELETTO, NIDHI YADAVA,
 21 CHRISTOPHER J. HOEPT, HARMAN DOUGLAS RUSSELL, MATTHEW D.
 22 INGBER, MICHAEL E. JOHNSON, CHRISTINA SPILLER, JAMES
 23 MATTHEW TOURANGEAU, WILLIAM M. MUNNO, DALE C.
 24 CHRISTENSEN, THOMAS R. HOOPER, MICHAEL KRAUSS, JEAN
 25 MARIE L. ATAMAIN, JAMES ANCONE, HOAH LIBEN, MATTHEW V.
 WARGIN, LAUREN AMBER JACOBSON, IAN JOSEPH ZACK, MICHAEL
 S. KRAUT, KURT W. RADEMACHER.

21 AEGON USA INVESTMENT MANAGEMENT, LLC (Intervenor),
 22 BAYERISCHE LANDESBANK (Intervenor), BLACKROCK FINANCIAL
 23 MANAGEMENT, INC. (Intervenor), CASCADE INVESTMENT, LLC,
 24 (Intervenor), THE FEDERAL HOME LOAN BANK OF ATLANTA
 25 (Intervenor), THE FEDERAL HOME MORTGAGE CORPORATION
 (Intervenor), THE FEDERAL HOME LOAN MORTGAGE
 CORPORATION, FREDDIE MAC (Intervenor), THE FEDERAL
 NATIONAL MORTGAGE ASSOCIATION, FANNIE MAE (Intervenor),
 GOLDMAN SACHS ASSET MANAGEMENT LP (Intervenor), VOYA
 INVESTMENT MANAGEMENT LLC (f/k/a) ING INVESTMENT LLC,

Gloria Ann Brandon, Sr. Court Reporter

1 THE COURT: Good morning.
 2 May I have counsels' appearances, please.
 3 MR. INGBER: Good morning, your Honor.
 4 Matthew Inger from Mayer Brown for the
 5 Defendant, the Bank New York Mellon.
 6 MR. SCHNELL: Good morning.
 7 Your Honor, Robert Schnell from Faegre,
 8 Baker, Daniels for Wells Fargo Bank.
 9 MISS PATRICK: Kathy Patrick for the
 10 Petitioners, Gibbs & Bruns.
 11 MR. MUNNO: William Munno from Seward &
 12 Kissel, for Law Debenture Trust Company of New York.
 13 MR. SACKS: Good morning, your Honor.
 14 Robert Sacks, for Sullivan & Cromwell, for JP
 15 Morgan.
 16 MR. WOLLMUTH: Good morning, your Honor.
 17 David Wollmuth for Ambac Insurance from
 18 Wollmuth, Maher & Deutsch.
 19 MISS D'AQUILA: Good morning, your Honor.
 20 Daniel D'Aquila also from Wollmuth, Maher &
 21 Deutsch also for Ambac.
 22 MR. PAREKH: Niraj Parekh from Wollmuth,
 23 Maher & Deutsch also for Ambac.
 24 MR. ROLLIN: Good morning, your Honor.

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1 Openings - Wollmuth
2 W&L Investments.
3 MISS BRASWELL: Good morning, your Honor.
4 Maritza Braswell from Rollin, Braswell &
5 Fisher, also for W&L investments.
6 THE COURT: Thank you.
7 We will hear opening statements first from
8 the objectors.
9 Mr. Wollmuth --
10 MR. WOLLMUTH: Good morning, your Honor.
11 May it please the Court, David Wollmuth for
12 Ambac.
13 Your Honor, at the time of the Country-Wide
14 proceeding, Article 77 had been used to seek approval
15 of a settlement of the size and scope of that one
16 never before.
17 Formally, Article 77 was Article 79, and it
18 was typically used for small matters related to the
19 routine administration of trusts, such as trust
20 accountings. Much has changed with the upholding of
21 Country-Wide's approval by the First Department, and
22 use of the Article 77 procedure has become much more
23 routine in a short time, and as use of Article 77
24 expands, it is likely and important that the rules
25 relating to such proceedings become even more
26 developed.

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1 Openings - Wollmuth
2 The First Department has established some
3 clear rules in its affirmance of Country-Wide.
4 First, the First Department held that an
5 Article 77 cannot second guess the reasoned and
6 reasonable judgments of the trustee, and reasoned and
7 reasonable will be my focus today, and I'm sure that
8 the Petitioners' focus will be deference, which is to
9 be awarded to those decisions in the absence of the
10 ability to second guess them, and we do not contest
11 any of that, but deference not afforded to trustees
12 if they are acting in bad faith, or in an abuse of
13 discretion. These standards turn the focus
14 principally on the process followed by the trustees,
15 which leads to their decision-making, and the focus
16 on the integrity of the process makes particular
17 sense in highly complex settlements by an indentured
18 trustee, rather than a common law trustee involving
19 billions of dollars, and of course, this is such a
20 case.
21 Here the process begins with Professor
22 Fischel who states that he cannot, he simply cannot
23 value the claims being released here because the
24 facts are so complex, and the outcome so uncertain.
25 In fact, he says it may be impossible to value the
26 claims. One of the things we'll show at trial is

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1 Openings - Wollmuth
2 that's not true at all, but that's aside from the
3 point. It's difficult, of course, from a financial
4 point of view for any Court to take on; is four
5 and-a-half billion enough? Should it be four billion
6 or six? And that's exactly what we understand the
7 Court is not trying to second guess here, and is not
8 allowed to second guess here, but if claims can't be
9 valued according to Mr. Fischel, how can the Court be
10 confident that investors are being treated fairly
11 by making sure the decision-making of the trustees is
12 not infected with bad faith, or exercise of
13 discretion outside of their powers. The standard
14 does not mean the trustee gets a free pass in its
15 decision-making. The words bad faith and abuse of
16 discretion stand for an established body of rules.
17 As set forth in our brief, a classic example
18 of bad faith is where a trustee exercises its
19 decision-making power when it has an interest in the
20 transaction.
21 The classic example for a common-law trust is
22 where the trustee bought the property that was being
23 sold. In an indentured trust like this with complex
24 instruments, many parties and billions of dollars,
25 the conflict is more nuanced, but it's far greater
26 than a trustee who wins the best price at an auction

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1 Openings - Wollmuth
2 and buys trust property, despite its interest. That
3 is a very transparent, potential conflict and some
4 Courts recognize even with that potential conflict,
5 the trustee may proceed, and the reason is there's
6 complete clarity on the process, if the property is
7 auctioned off and nobody bids more. This is not
8 remotely that kind of case.
9 As Professor Fischel recognizes, it's
10 intricate, it's complicated in fact and law, and I
11 won't belabor that because I know your Honor's knows
12 it, but if your Honor concludes here that the
13 trustees do have an interest in this transaction, or
14 if they otherwise have a conflict of interest, then
15 under First Department authority this Court is
16 without choice; it is mandated that the Court strip
17 the trustees of all deference, and purify the process
18 because it is the process, rather than the
19 recalculation of the numbers, or a second guessing of
20 the trustees' calculations that protects investors.
21 That, unlike financial spread sheets and vast amounts
22 of data, protecting the process is something the
23 Courts are very good at, and that is the only
24 assurance investors have.
25 Another thing has changed since Country-Wide
26 that has brought the trustees' vast conflicts here

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1 Openings - Wollmuth
2 into very sharp focus. As this Court knows, the
3 Court of Appeals decision in ACE2 has been a major
4 event. The decision meant millions of potential put
5 back claims that many market participants assumed
6 were alive, were, in fact, time barred. Investors
7 began to look more frequently at whether trustees
8 might be liable for allowing a statute of limitations
9 to run out on their claims.
10 The great fiction; we didn't know a thing.
11 And a wave of easily more than 150 billion
12 in damage claims were filed and continue to be filed
13 against these exact trustees. There's only about
14 six or seven major trustees for RMBS. They're in
15 every deal, in every case. It's not like the
16 sponsors where there's tens of them. There's six
17 trustees. Many of those cases have been filed by
18 the Institutional Investors in this case, including
19 Pimco, Blackrock, and a number of other leading
20 respected Institutional Investors. In fact, the
21 institutional investors have sued these very trustees
22 on over 1,000 RMBS mortgage trusts alleging facts and
23 conduct identical to the facts and conduct that the
24 evidence will show the trustees here are infected
25 with, and while the Institutional Investors have sued
26 on over a thousand trusts, there's some trusts they

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1 Openings - Wollmuth
2 have not sued on, and the absence of sued on those
3 trusts is telling.
4 They have not sued any trustee who has
5 supported a settlement sponsored by the institutional
6 investors, so the choice for a trustee is abundantly
7 clear, abundantly clear;
8 If institutional investors led by the group
9 here are supporting a settlement, a trustee has a
10 very difficult choice;
11 They can either approve the settlement, which
12 appears to be the path of least resistance, or
13 alternatively, they can accept the certainty that
14 they will be sued by some of these institutional
15 investors, and some of my clients for their
16 nonfeasance for years while the mortgage prices raged
17 on, and they easily could have sued long ago.
18 You know, Professor Fischel waxes on about
19 how, you know, the trustee has no power to act, and
20 litigation is very uncertain, so his opinion can be
21 fairly boiled down to, you know, a bird in a hand is
22 better than a bird in the bush, especially if the
23 bird in the bush is expensive.
24 Well, in fact, other investors have sued
25 some of these trustees on the very trust in this
26 proceeding, on these trusts, and those cases are

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1 Openings - Wollmuth
2 proceeding in Federal Court in New York.
3 Here as we will show at trial, the
4 institutional investors made these trustees feel the
5 full risk of suit against them. The trustees here
6 were far from impartial. They either approved the
7 settlement, or they would be sued, and in addition to
8 the threat of litigation, the trustees' impartiality
9 is also compromised by the enormous amount of
10 litigation they already face in the proceedings
11 brought by Miss Patrick's clients, by my clients, and
12 by many other lawyers' clients.
13 As I said, it has been a wave of litigation.
14 A principal defense in those cases is that the
15 trustees never had to do anything in those cases
16 because there was not an event of default, and the
17 bedrock of that false assumption is that the trustees
18 never had actual knowledge of any breach with respect
19 to the quality of any loan. They didn't know that
20 the trusts did not possess, which the trustees
21 themselves are supposed to possess, not the servicer,
22 not the master servicer, not the custodian; the
23 trustees in every trust, or their agents are to
24 possess the mortgage documents, which stand as the
25 collateral package for the mortgage loans that
26 investors bought, and that's just as important as the

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1 Openings - Wollmuth
2 quality of the mortgage loans.
3 But, the trustees even though they through
4 them and counted what documents they had and filed a
5 report, we have it. It's over an inch thick for a
6 single trust. Of all the documents they were
7 missing, they didn't know they were missing any
8 documents, so there is no event of default, and the
9 trustees repeat that over and over, but it is the
10 great lie, and it is not credible, and it depends on
11 conscious eye shutting, which the case law says is
12 the classic example of bad faith.
13 THE COURT: I didn't hear that word,
14 conscious --
15 MR. WOLLMUTH: I'm sorry, avoiding knowledge.
16 There's a phrase conscious eye shutting. If
17 I say --
18 THE COURT: Eye shutting?
19 MR. WOLLMUTH: If I say can you take a look at
20 this please --
21 THE COURT: I just didn't hear the word.
22 MR. WOLLMUTH: Fine. I won't digress. I
23 apologize, sometimes I can be a little low in tone.
24 The fact is, they've made movies about how
25 rife these trusts were with defective loans. Courts
26 have stated over, and over, and over that there are

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1 Openings - Wollmuth
2 plausible allegations of systemic problems with the
3 loans relating to substantially all trusts. Of
4 course, the trustees here had no idea there was any
5 problem with the trusts that are before your Honor.
6 I can speak for Ambac with respect to eight of them I
7 should have noted, and therefore, they never had to
8 do anything, and that fallacy is a key factor
9 underlying the trustees' lack of process in this
10 case. Here trustees assert that they had no duty to
11 act or it would be prudent to reject -- I'm sorry,
12 except the proposed settlement absent a direction and
13 indemnity from a group holding 25 percent or more of
14 the loans.
15 We will prove beyond doubt, your Honor, that
16 that is false. It is contrary to the expressed
17 language of the PSA's in at least two regards.
18 First, as I've been alluding to, the PSA
19 states explicitly that the trustees must exercise all
20 powers under the agreements if they have knowledge of
21 an EOD.
22 THE COURT: Of an --
23 MR. WOLLMUTH: I'm sorry, event of default
24 it's often referred to.
25 THE COURT: So, you can make that capital
26 EOD.

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1 Openings - Wollmuth
2 MR. WOLLMUTH: Thank you.
3 State explicitly that the trustees must
4 exercise all powers under the agreement if they know
5 of an event of default.
6 Given the pending litigation against them,
7 they can't afford to have their knowledge regarding
8 events of default examined and explored here by an
9 objective independent expert. If the documents or
10 the testimony that an objective independent expert
11 brought forth demonstrated that trustees knew of an
12 event of default as early as their failure to take
13 possession of the mortgage file, it would face I
14 believe over a hundred billion dollars of liability
15 in the pending cases filed by just Miss Patrick's
16 group and my clients.
17 Second, the event of default provision need
18 not even be reached here.
19 And, by the way, your Honor, the Petitioners
20 have not even tried to make a factual record that
21 there's no event of default. They put in, and I
22 invite your Honor to examine them, and we'll explore
23 them at trial, superficial affidavits of trustee
24 witnesses saying we looked at our file. To the best
25 of our knowledge, there's no event of default.
26 Do they really have any other choice? Are

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1 Openings - Wollmuth
2 they going to confess to liability in a hundred
3 billion plus worth of litigation because if they put
4 an affidavit that says there is an event of default,
5 there is no excuse for years of inaction by faithless
6 trustees.
7 THE COURT: Are you referring to servicer, or
8 master servicer events of default under all of the
9 governing agreements for the trusts in which Ambac
10 has an interest?
11 MR. WOLLMUTH: I am, your Honor.
12 THE COURT: Thank you.
13 MR. WOLLMUTH: The way it works, if there's
14 any lack of clarity, I think they're most easily
15 thought of together because the master servicer is
16 expressly charged with the duty to enforce the
17 obligations and compliance of the servicers beneath
18 it, be it monitoring is the word used in the PSA's,
19 so the master servicer has to monitor the servicers
20 and enforce their obligation to act prudently. Then
21 they certify to the trustees that that has all been
22 done, and those certifications are blatantly false,
23 which is a point I will come to.
24 But, beyond the event of default question,
25 and as I was saying, there's really no evidence this
26 Court could take as reliable that there has not been

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1 Openings - Wollmuth
2 one, they're knowledge qualified statements by
3 interested parties.
4 There is an express obligation under the
5 PSA's for the trustees to act, with respect to the
6 Ambac trust at least, and this is critical. These
7 PSA's are a little different than many I've seen,
8 your Honor. Usually, the trustee has substantially
9 nothing, other than ministerial obligations prior to
10 an event of default.
11 That is not the case here, your Honor.
12 The provision that applies to what the
13 trustees must do. We will present to your Honor at
14 trial, it says exactly what they say, the trustee
15 need not do anything, other than ministerial acts
16 prior to an event of default.
17 Conveniently, however, they ignore the
18 introduction to that limitation on their duty to act,
19 which is a few words that say, except as otherwise
20 set forth in this agreement, and here that exception
21 swallows the hole, and one of the few I would refer
22 your Honor to in my opening -- I only have two
23 provisions. I would point your Honor to directly
24 2.20B is an example, and if we could blow that up a
25 little bit, if you don't mind.
26 (Whereupon, Sr. Court Reporter Kathy Jones

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1 Openings - Wollmuth
 2 resumed.)
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Page 19

1 Openings - Wollmuth
 2 that.
 3 MR. WOLLMUTH: For sure. And I thought the
 4 power point meant something different.
 5 THE COURT: I understand. It's the same problem
 6 though. It's important language taken out of context.
 7 MR. WOLLMUTH: Your Honor, going forward, I will
 8 provide to your court clerk a copy of the PSAs if we're
 9 going to refer to it.
 10 THE COURT: We'll use our binders. If you just
 11 give us the volume number and the exhibit number, that's
 12 what we'll use. If you want to put these things on the
 13 screen for the benefit of the other counsel or the
 14 observers, that's fine with me.
 15 MR. WOLLMUTH: That's great, your Honor. We'll
 16 refer to it as volume number and exhibit going forward.
 17 THE COURT: Thank you.
 18 MR. WOLLMUTH: If we put it up, it's for the
 19 benefit of others and we understand that we won't ask the
 20 Court to rely on such power points.
 21 THE COURT: Thank you.
 22 MR. WOLLMUTH: Excellent.
 23 Getting back to the point and if your Honor
 24 would like us to provide a copy for this limited purpose.
 25 THE COURT: Let's just continue please.
 26 MR. WOLLMUTH: Sounds good to me.

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1 Openings - Wollmuth
 2 T2
 3 MR. WOLLMUTH: Yes, the last two, yes, exactly.
 4 Thank you.
 5 This relates to the document delivery failures I
 6 was referring to, your Honor, earlier. And I believe
 7 every PSA is substantially like this but this is BSMF --
 8 THE COURT: Which exhibit is this for the
 9 record?
 10 MR. WOLLMUTH: I was about to tell your Honor.
 11 It is RX 14.6 and we spoke to your court clerk about this.
 12 It's just a PSA, your Honor.
 13 THE COURT: Yes, I understand that. This is
 14 exactly why I don't like power point because I like to see
 15 this language in the context of the provision, not pulled
 16 out. So, I will look at it in the PSA itself.
 17 MR. WOLLMUTH: You can take it down.
 18 THE COURT: Thank you.
 19 MR. WOLLMUTH: Thank you, your Honor. Because
 20 the power point I usually think of as something different.
 21 THE COURT: Whatever this is, you are right,
 22 this technically is not a power point. It's a blowup. I
 23 don't like blowups either.
 24 MR. WOLLMUTH: It's good to know. So, your
 25 Honor --
 26 THE COURT: Well, I've been very clear about

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1 Openings - Wollmuth
 2 2.02 (b) of the exhibit we referred your Honor
 3 to provides expressly that the trustee shall enforce the
 4 obligation of repurchase with respect to mortgage files
 5 missing the mortgage documentation. There is no
 6 requirement that there be an event of default first. The
 7 trustee is charged as the primary actor. And these two
 8 points, the fact of allegations that they never knew
 9 anything and therefore there is no event of default and
 10 ignoring the provisions of the PSA require them to be the
 11 ones that enforce put-back obligations lead to one of
 12 their core arguments which is the bird in the hand here
 13 must be accepted because there can't be a better
 14 alternative unless a 25 percent investor group shows up
 15 and directs the trustee.
 16 That entire presumption that's how these things
 17 work from an economic point of view defies reality and it
 18 defies the charge to the trustees under these agreements.
 19 First, as to the charge under the agreements,
 20 I've already shown your Honor how that is true and
 21 Professor Fischel states that the trustee's first
 22 obligation under any examination of prudence is to make
 23 sure that the trustee has complied with its obligations
 24 under the agreement. That seems fairly basic.
 25 Second, that's not the bargain bondholders make
 26 when they buy a bond and indenture with a trustee.

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1 Openings - Wollmuth
2 If you or I buy a bond and pick a company with
3 vast fraud, Petrobras, and Petrobras has defrauded its
4 bondholders and they are issuer, am I expected to go find
5 25 percent of the holders and file a case? No. I have a
6 trustee that protects me and that is the economic
7 structure of these deals.
8 The trustee is first charged to protect
9 investors if there is a problem which is to find event of
10 default. Respectfully, the will of the majority, the
11 trustee duly ceases to become primary and becomes
12 secondary if a large group comes in and directs them to
13 take specific action.
14 THE COURT: Mr. Wollmuth, is this an argument
15 that you are making in the litigation that your client has
16 brought against the trustees?
17 MR. WOLLMUTH: I have not made that specific
18 argument in that litigation, no.
19 THE COURT: What is that litigation and where is
20 it?
21 Can you tell me a little bit about the claims
22 that are being made there?
23 MR. WOLLMUTH: I can.
24 We represent the U.S. government for one, the
25 FDIC, some other institutional investors, and I can get
26 your Honor a complete list if you would like in

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1 Openings - Wollmuth
2 allegations that are substantially parallel to the cases I
3 alluded to that Ms. Patrick's clients are bringing.
4 What they allege in substance, I mean, the
5 complaints are over a hundred pages long. So, please
6 don't hold me to this with precision is that the trustee's
7 inaction was unjustified under the PSAs, and they are all
8 a little different that are at issue in that case. That
9 certain specific information gave them actual knowledge of
10 events of default that triggered their duty to act and
11 that they may have had a duty to act in other
12 circumstances without event of default. That a failure to
13 act manifests itself in claims that may be asserted and
14 I'm not sure I'll get all the counts of the complaint
15 correct, your Honor, but the investors are
16 express-intended third-party beneficiaries of these trusts
17 and that gives them a breach of contract rights if their
18 trustee does not act in accordance with their contractual
19 obligations.
20 So, that's the bedrock of the claim. It's a
21 Rule 8 contract claim at bedrock but there are other
22 claims of equal validity that arise out of the PSAs
23 including negligence, breach of duty, negligent
24 misrepresentation and those are the counts fundamentally
25 of those cases.
26 Is there more I can answer for your Honor?

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1 Openings - Wollmuth
2 THE COURT: No. At this time that is
3 sufficient.
4 MR. WOLLMUTH: Thank you.
5 I think that those cases, and I was trying to
6 explain to your Honor, those cases that my clients are
7 bringing and Ms. Patrick's and others create a significant
8 problem for these trustees because unanimously the
9 substance of those allegations have survived motions to
10 dismiss, at least ten, and that means there are certainly
11 plausible which I would submit your Honor can take
12 judicial notice of as well as the problems, plausible
13 allegations of misconduct create for the trustees --
14 create for the trustees in this action and that is really
15 where I go next in my outline with your Honor's
16 permission.
17 First, under Section 3.16 (a) on page 81 before
18 your Honor is the requirement that the servicer and the
19 trustee shall deliver to the depositor which is JP Morgan
20 and for this trust the servicer is EMC Mortgage which is a
21 JP Morgan affiliate. And this is all on the cover.
22 Just to help your Honor with the defined terms.
23 EMC Mortgage is the servicer. Wells Fargo Bank is the
24 trustee and Structured Asset Mortgage Investments II known
25 as SAMI II, SAMI is the depositor and that's a JP Morgan
26 entity.

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1 Openings - Wollmuth
2 So, with that scorecard, it says here the
3 servicer EMC and the trustee Wells Fargo shall deliver to
4 the depositor JP Morgan not later than March 15 of each
5 calendar year beginning in 2007 an officer certificate
6 which is known as an Annual Statement of Compliance
7 stating as to each signatory, meaning the servicer and the
8 trustee, that, one, a review of the activities of such
9 party during the preceding calendar year in its
10 performance under this agreement has been made under such
11 officer's supervision; and two, to the best of such
12 officer's knowledge based on such review, each such party
13 has fulfilled all of its obligations under this agreement
14 in all material respects throughout the year.
15 Those certifications could not have been made
16 here in good faith, and in fact, they were false because
17 mortgage collateral documents were not ever properly
18 delivered at least as indicated by the final certification
19 produced by the trustee in this case which indicates that
20 vast numbers of mortgage documents were missing.
21 This statement of compliance is required by law.
22 It's not just a contractual requirement. It's called
23 Regulation AB and what it requires is set forth at 17 CFR
24 1122. This is all explored in our brief, your Honor,
25 which may make it easier if your Honor wants to refer to
26 it.

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1 Openings - Wollmuth
 2 The certification not only is false. It can't
 3 be made in good faith given as Judge Forest observed in
 4 the case against U.S. Bank. Once it becomes widely known
 5 that there are systemic problems with these mortgages, the
 6 trustee is not entitled to live under a rock regardless of
 7 what the PSAs say because implied in every PSA is the duty
 8 to act in good faith, and when you close your eyes to a
 9 problem that every other banker in the world knows about,
 10 you are not acting in good faith. And that particularly
 11 applies to trustees like Wells Fargo as they've recognized
 12 by seeking a separate trustee in the mortgage context
 13 because they are the biggest producer of mortgage loans I
 14 believe in the country and one of the biggest if not the
 15 biggest securitizer of those loans. Very difficult for
 16 them to say they had no idea that there were systemic
 17 problems with the mortgages when they are acting as
 18 trustee. That is just one example, your Honor.
 19 I'm about out of time but there are things to do
 20 when there is an appearance of conflict or an actual
 21 conflict to protect against the infection of decision
 22 making and the lost of deference. The things that you are
 23 to do are developed under New York Trust law which under
 24 the restatement commands impartial and informed trustee
 25 decision making, impartial and informed, and this again is
 26 set forth in greater detail in our brief and will be

Page 26

1 Openings - Wollmuth
 2 developed at trial. This is only meant as a preview.
 3 Impartial informed decision making. Both trust
 4 law and corporate law further flesh that out, and as we've
 5 said in our brief, New York law of trust looks to New York
 6 corporate law in part for matters of governance.
 7 The things they should do are first have an
 8 impartial decision maker in the context of the trust, what
 9 you do if you think you could have a conflict or the
 10 appearance of one. You should bring in a separate trustee
 11 as to that discreet issue under consideration such as
 12 evaluation of the settlement. That's why Law Debenture is
 13 in this case. Wells did it in certain context and not
 14 others. They said we would like an independent
 15 consideration of consideration by Law Debenture not by us
 16 because we may have a conflict.
 17 In the corporate context, things go to a vote of
 18 the majority of the disinterested board. Getting separate
 19 guidance from an impartial special trustee is like the
 20 disinterested board. Second, the protection from
 21 infection of decision making can be afforded by obtaining
 22 impartial counsel to advise the separate decision maker.
 23 Counsel here for every trustee -- your Honor,
 24 you had asked me about the cases that I had brought and
 25 Ms. Patrick had brought -- I am sorry. That is incorrect.
 26 They were brought by another counsel. I meant to say her

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1 Openings - Wollmuth
 2 clients are being defended by the exact same counsel in
 3 this case and they have a duty to vigorously defend the
 4 trustees in those litigations to make sure that they
 5 advance with force the arguments about why there is no
 6 event of default. That places them not in a conflict of
 7 interest in a disqualification sense necessarily. I'm not
 8 alleging they are doing anything improper but they are not
 9 independent counsel for the trustees within the meaning of
 10 the law. So, protection one is get an independent
 11 decision maker. They didn't do it.
 12 Protection two is get objective counsel who are
 13 not taking litigation positions that the settlement
 14 implicates. They failed to do it.
 15 Protection three is to have an independent
 16 financial advisor evaluate the prudence of the transaction
 17 and they didn't do that either. They used Mr. Fischel who
 18 is a serial witness for financial institutions and his
 19 opinion more importantly was guided by the advice of these
 20 conflicted trustee counsel.
 21 I will note for your Honor, we'll show it at
 22 trial but I won't explore it at length right now, that the
 23 matters that they did seek independent legal advice on,
 24 there is two submissions to your Honor, from the
 25 petitioners from Judge Carpinello and Professor Schwartz.
 26 They speak only to a couple of very discreet issues and

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1 Openings - Wollmuth
 2 the discreet issues that they support -- that they speak
 3 to exclusively support acceptance of this settlement.
 4 They do not explore anything beyond these discreet issues
 5 which only help demonstrate the advisability of this
 6 settlement choice but they make no attempt to explore any
 7 of the issues that Mr. Fischel would have needed if he was
 8 the purportedly independent financial advisor. He would
 9 have needed independent financial advice about how the
 10 PSAs work to do his job right. We'll show, he struggles
 11 with that in his deposition. We'll show it at trial. He
 12 says I was head of U of Chicago Law School but I'm not
 13 giving any legal opinions here but I do kind of have a
 14 view on how these things work, but he won't say even
 15 though we try and get him to how he got that view. Very
 16 clearly he says I have a general understanding because
 17 I've looked at some and I talked to some people. That's
 18 not remotely sufficient. These are serious matters.
 19 So, in conclusion and I have more but I don't
 20 have more time, it is the process that assures integrity
 21 for the investors here, not a second guessing of the
 22 number. That is not allowed.
 23 One final point that really drives home how
 24 infected this process was is you had asked me about this,
 25 your Honor, before at a pretrial conference. Your Honor
 26 called the trustees out a little bit in a City proceeding

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1 Openings - Wollmuth
2 how can I judge how if there is compliance with all the
3 governing agreements or not. Your Honor was on to
4 something there but it's bigger than that. They asked for
5 an absolute bar of claims. It goes beyond the release
6 that JP Morgan is getting. JP Morgan is released which is
7 set forth in the settlement confines itself to claims
8 arising under the Governing Agreement. That is all the
9 trustee possesses. They don't possess claims arising
10 outside of the Governing Agreement.
11 The Court of Appeals decision in a case we will
12 bring to your Honor's attention during the trial and is
13 discussed in our brief named Quadrant which has been
14 decided since Countrywide makes that abundantly clear they
15 do not have claims in the tort or statutory claims that
16 don't arise under the PSA. They arise at common law or
17 statutory law. They are not contract claims which is what
18 all that PSAs deals with. Nevertheless, the trustees
19 would have for themselves a release, a bar, not a release,
20 I will be corrected, a bar of all claims not only relating
21 to whether they abused their discretion under this
22 proposed settlement but claims arising under different
23 laws applying different standards that the trustees don't
24 have and are not settling.
25 That is a severe overreach, your Honor, and we will
26 show exactly how at trial. That overreach infects the entire

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1 Openings - Wollmuth
2 process as well because the trustees are bargaining for
3 themselves here, not objectively handing to the Court a
4 settlement and saying there was a property auction, nobody bid.
5 We bid a hundred dollars, a thousand dollars higher. It's all
6 right before you. Please let us go forward. It's not that,
7 your Honor.
8 Thank you for the time and we look forward to
9 proceeding with the trial.
10 THE COURT: Thank you. Mr. Rollin.
11 MR. ROLLIN: Thank you, your Honor.
12 Rather than me shuffling the well, I am
13 perfectly comfortable addressing the Court from here. If
14 the Court would like me to address you over there, I would
15 move over.
16 THE COURT: Whatever you prefer is fine.
17 MR. ROLLIN: Thank you, your Honor. I'll speak
18 from here.
19 Your Honor, my remarks will focus on the purpose
20 of the settlement agreement.
21 The purpose of the settlement agreement is to
22 compensate certificateholders for losses from breaches of
23 representations and warranties, not from losses suffered
24 by the trust or something else for all of the other
25 reasons this why trust might suffer such losses but
26 specifically to compensate for losses from breaches of

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1 Openings - Wollmuth
2 representations and warranties.
3 (Continued on next page)
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1 Openings - Rollin
2 MR. ROLLIN: And the governing agreements tell
3 the trustees exactly how to do that because the two
4 governing agreements that W&L has holdings in have
5 sole remedies provisions, and your Honor is aware of
6 the sole remedies provision. That is very often the
7 topic of repurchase litigation in this Court.
8 To explain the way the sole remedies
9 provision works, and why it matters very much to
10 insuring compliance both with the governing
11 agreements and the purpose of the settlement
12 agreements, it's important to understand that there
13 are two, generally, two kinds of losses, or two bases
14 for losses.
15 One, and in this demonstrative, loans go into
16 default for all kinds of reasons.
17 THE COURT: I obviously did not make my
18 views about demonstrative exhibits sufficiently
19 clear.
20 MR. ROLLIN: Thank you, your Honor.
21 It is a complex issue of understanding the
22 way the agreements work, and I will try to use it as
23 little as possible.
24 THE COURT: Well, I think we're a profession
25 that better works with words, especially when dealing
26 with complex issues, not pulling squares out of a

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1 Openings - Rollin
 2 chart.
 3 MR. ROLLIN: Very well. I'll be happy to
 4 proceed that way, your Honor.
 5 THE COURT: Thank you.
 6 MR. ROLLIN: There are two different reasons
 7 why trusts lose money. It all arises from loans
 8 that go into default, borrowers stop paying.
 9 But, there are two different circumstances.
 10 There are times when borrowers stop paying
 11 that has absolutely nothing to with the
 12 representations and warranties given by JP
 13 Morgan/Chase.
 14 THE COURT: Go ahead, Mr. Rollin, pull the
 15 squares out. Prove me wrong.
 16 MR. ROLLIN: That's okay, that's okay.
 17 THE COURT: Really, I'm curious.
 18 MR. ROLLIN: You're curious. Very well, I'll
 19 be happy to satisfy your Honor's curiosity.
 20 When a loan goes into default, it leaves a
 21 loss in the trust, there are times when a loan goes
 22 into default and leaves a loss that has nothing to do
 23 with anything that JP Morgan promised, said, or did.
 24 That is a risk that the investors bear.
 25 There are also times, however, that a loan
 26 suffers a loss because of a breach of a

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1 Openings - Rollin
 2 representation and warranty, and in those instances
 3 JP Morgan/Chase has a responsibility to replace that
 4 loss with cash flow, replaces the cash flow that was
 5 supposed to come from the loan with a cash payment
 6 that is called the purchase price, and that is the
 7 sole remedy under the governing agreements, and in
 8 order to give effect to the sole remedy under the
 9 governing agreement, that is the process that has to
 10 follow, and that is the process that is the trustees
 11 have to assure occurs.
 12 Under the governing agreements, there's a
 13 defined term called repurchase proceeds, and any
 14 money that is received by the trust as a result of
 15 breaches of representations and warranties is
 16 repurchase proceeds.
 17 There's another definition called subsequent
 18 recoveries. That's something else. That is what's
 19 used in the settlement agreement, not the repurchase
 20 proceeds, and the difference matters because it
 21 affects the timing of the repurchase payments.
 22 The repurchase proceeds, unlike subsequent
 23 recoveries, have to be paid as pre-payments. The
 24 loan comes out, the repurchase price goes in. It
 25 fulfills two purposes; one, in replacing the cash
 26 flow for the certificate that suffered the loss.

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1 Openings - Rollin
 2 That's the first goal. It replaces the cash flow for
 3 the certificate that suffered the loss, and it
 4 provides credit support for all of the senior
 5 certificates above it in the capital structure
 6 because that's the way these trusts worked, and
 7 that's what's necessary to meet the reasonable
 8 expectations of investors who invested on the basis
 9 of what was in the governing agreements, what the
 10 remedy was, the sole remedy was for breaches of the
 11 representations and warranties.
 12 The problem with the settlement agreements is
 13 that the losses from breaches of representations and
 14 warranties are suffered at the bottom of the capital
 15 structure by the junior certificates, but the payment
 16 is being made at the top of the capital structure to
 17 the senior certificates.
 18 Now, let me speak about that first part.
 19 First, how do we know that losses are
 20 suffered at the bottom of the capital structure?
 21 Well, we don't know it from the trustees
 22 because the trustees did not do anything in the
 23 course of evaluating, or approving the settlement to
 24 determine which losses were caused by breaches of
 25 representations and warranties as contrasted with the
 26 losses caused by something else that are not the

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1 Openings - Rollin
 2 subject of this settlement.
 3 THE COURT: Excuse me, can I have a read
 4 back on the last sentence, please?
 5 (Whereupon, record was read.)
 6 THE COURT: Okay, thank you. That's
 7 breaches of representations and warranties, okay.
 8 MR. ROLLIN: Thank you.
 9 There is one witness who has considered this
 10 issue, and that is Matthew Lewis from Newoak, one
 11 word, N E W O A K, the expert, who based on his
 12 industry expertise and experience provides the
 13 opinion, will provide in this Court the opinion that
 14 the losses from breaches of representations and
 15 warranties are overwhelmingly suffered in the first
 16 couple of years of the transaction, and therefore, by
 17 the junior certificates, and this makes perfect
 18 sense.
 19 The purpose of the representation and
 20 warranty is to establish the borrowers' ability and
 21 willingness to repay the loan and provide a remedy if
 22 they don't. If a borrower says that they make twice
 23 as much money than they do in order to get a loan,
 24 then they're not going to be able to pay it for very
 25 long, or if a borrower says I only have one mortgage
 26 when, in fact, they have four mortgages, then that's

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1 Openings - Rollin
2 a breach of a representation and warranty. Then
3 they're not going to be able to pay for very long.
4 So, the only person who analyzed this issue
5 is Mr. Louis, and that's his opinion;
6 Losses arising from the settled conduct for
7 breaches and representations and warranties are
8 suffered in the bottom tranches, in the junior
9 tranches, but the settlement agreement is clear that
10 the payment for that arm is paid into the top of the
11 waterfall, and never makes it down to the
12 certificates that are --
13 THE COURT: Is that because they use, the
14 settlement uses the subsequent recovery measures as
15 opposed to the repurchase proceeds?
16 MR. ROLLIN: Yes, your Honor, because the
17 repurchase proceeds are required to be paid as
18 pre-payments. The intent of the governing agreements
19 and the reasonable expectations of the investors is
20 that those payments would be made at or about the
21 time the loss occurs, or the subsequent recovery
22 simply comes into the trust whenever that money
23 happens to come into the servicer, and then is
24 distributed to the trust afterwards. That's after
25 foreclosure and liquidation, extra money comes in as
26 contrasted with the specific repurchase remedy that

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1 Openings - Rollin
2 is supposed to come in at or about the time of the
3 loss.
4 In order to give effect to the sole
5 repurchase remedy in the agreement, when the trustees
6 evaluated and approved the settlement agreement, what
7 they needed to do was to give effect to that
8 provision, and to make the junior certificate holders
9 to provide them the payment, so that they would
10 receive compensation for the harm that they suffered.
11 The settlement agreement, therefore, does not
12 follow the governing agreements, and is entirely
13 inequitable.
14 Your Honor, what I ask is, what we would like
15 your Honor to do is to direct the trustees to
16 distribute the allocable shares to the two W&L trusts
17 to both meet the purpose of the settlement agreement
18 and pay only compensation for losses caused by
19 breaches of representations and warranties, and not
20 something else, and to give effect to the repurchase
21 remedy under the governing agreement.
22 Thank you.
23 THE COURT: Thank you. We will take a true
24 five-minute break before I hear from the Petitioners.
25 (Brief recess taken.)
26 THE COURT: Back on the record.

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1 Openings - Ingber
2 MR. WOLLMUTH: Your Honor, if I could just
3 briefly, Mr. Chang is going to take the lead chair
4 here during the Petitioner's opening, if it's okay.
5 THE COURT: Mr. Ingber --
6 MR. INGBER: Thank you, your Honor.
7 May it please the Court, Matthew Ingber for
8 the Bank of New York Mellon. I'm going to be speaking
9 today on behalf of all the trustees.
10 Your Honor, a year-and-a-half ago the
11 trustees entered into a settlement that will pay
12 billions of dollars to investors now. That offers
13 certainty, instead of risk; finality, instead of
14 years of litigation.
15 They entered into that settlement after an
16 eight-month process that was at all times robust,
17 transparent, and most importantly for purposes of
18 this proceeding, reasonable, and carried out in good
19 faith, and as your Honor knows well, that's the
20 question in this proceeding; whether the trustees
21 acted in good faith, or bad faith, whether they acted
22 reasonably, or abused their discretion.
23 That standard has been applied for decades.
24 It was tested, challenged, and confirmed as the
25 standard by the First Department in the Country-Wide
26 case, and just weeks ago adopted by your Honor, by

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1 Openings - Ingber
2 this Court, as the standard in the Citibank matter.
3 It's not controversial, and I think at this point
4 it's not even disputed.
5 So, at the end of this hearing, we'll ask
6 your Honor to make a specific finding; that the
7 trustees acted in good faith and reasonably in
8 evaluating and entering into the settlement with
9 respect to each of the 309 trusts for which there's
10 no objection whatsoever, and for each of the ten
11 trusts for which there is.
12 We believe that after this hearing they'll
13 be no shortage of evidence for the Court to rely on.
14 It starts and really ends with the process that the
15 trustees followed. When your Honor considers the
16 process, some of steps may seem basic, some less so,
17 but they were all important to the goal of arriving
18 at a decision that the trustees in good faith
19 believed was in the best interest of the investors as
20 a whole, so I'd like to take the Court through the
21 process at a high level, then address briefly the
22 objections that we've heard in the pre-trial brief
23 and today, and then make a few closing points about
24 the proposed order and judgment that we have
25 submitted for your Honor's consideration.
26 So, starting with the process;

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1 Openings - Ingber
2 In the category of basic, but important, the
3 process starts with getting the right people
4 involved. It varied from trustee to trustee, but
5 generally speaking, the trustees had an in-house
6 working group of experienced corporate trust business
7 personnel, and in-house or outside counsel
8 experienced in analyzing complex settlements, and in
9 some cases, analyzing settlements of this very type,
10 global RMBS settlements. It, of course, continued
11 with a review of the proposed settlement agreement,
12 and recognition by the trustees that having
13 experienced running a corporate trust group doesn't
14 necessarily mean that they have subject matter
15 expertise to evaluate the reasonableness of a
16 settlement of this type. Administering trusts
17 doesn't equate to expertise applying complex
18 valuation methodology, or performing complex economic
19 analyses, or knowing the in's and out's of mortgage
20 loan servicing, or researching and analyzing legal
21 issues that fall outside of the scope of their
22 duties, and so, of course, your Honor, the process
23 continues with discussions among the trustee group
24 and their counsel about where they needed assistance,
25 multiple meetings and calls to discuss which expert
26 candidates to interview, what specific expertise was

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1 Openings - Ingber
2 required, and whether the sixteen or so candidates
3 who were identified as potential experts had any
4 disqualifying conflicts. That was followed by
5 meetings, meetings with candidates. There were two
6 meetings in particular to learn about the experts'
7 experience, their qualifications, and their approach
8 to analyzing the issues that were relevant to the
9 settlement;
10 One meeting before the settlement agreement
11 was even publicly disclosed, and then another after
12 it was disclosed and the experts had an opportunity
13 to read the agreement, and study it, and discuss in
14 depth their approach to the task.
15 Now then there was a process of selecting the
16 experts, and hiring them, and getting them to work.
17 So, who did the trustees hire?
18 They hired a valuation expert from NERA,
19 Faten Sabry, who had a Ph.D, has a Ph.D in business,
20 and whose qualifications as a valuation expert in the
21 Country-Wide case went unchallenged.
22 Miss Sabry calculated the allocable share of
23 the settlement for each trust, and she estimated
24 losses attributable to alleged record warranties
25 claims.
26 It was the servicing expert, Jerry Reifsnyder

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1 Openings - Ingber
2 from Boston Portfolio Advisors, which was a firm that
3 for decades was steep in the mortgage loan servicing
4 industry. Mr. Reifsnyder opined on various aspects
5 of the servicing components of the settlement,
6 including the potential losses associated with JP
7 Morgan servicing, and an estimate of the potential
8 benefit of the subservicing protocol.
9 And then, later in the process, and we have
10 laid this out in our brief, the trustees hired two
11 legal experts, Judge Carpinello, a retired Appellate
12 Division Judge, and a Yale Law Professor, a Professor
13 Alan Schwartz, and they looked at legal issues, in
14 particular, legal issues that fell outside the scope
15 of the trustees duties and responsibilities, the
16 applicable statute of limitations, the specific
17 meaning of tolling agreements, and the analyzing the
18 breathe of those tolling agreements, and whether they
19 applied to certain trusts, analyzing the ability of
20 the trustee to bring claims against JP Morgan in
21 third-party originator trusts, the extent of any JP
22 Morgan repurchase obligation arising out of
23 modifications of mortgage loans, so it was those
24 types of issues that the legal experts opined on.
25 And then, finally, your Honor, the trustees
26 hired an expert, Professor Daniel Fischel, from

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1 Openings - Ingber
2 Compass Lexecon, to consider all of the other expert
3 reports, to conduct his own economic analysis, and to
4 give his recommendations trust by trust, loan group
5 by loan group whether the settlement was reasonable.
6 Professor Fischel is a leading expert in
7 economics. He's taught classes, including as the
8 Dean of the University of Chicago Law School on
9 issues that are relevant to this settlement. He's
10 consulted the Government on a variety of economic
11 issues. He's been retained to provide expert
12 testimony in consulting in connection with RMBS
13 cases, and he's been retained and qualified as an
14 expert to opine on the reasonableness of settlements,
15 including as an expert in the Country-Wide matter, to
16 opine on the reasonableness of the eight and-a-half
17 billion dollar settlement, so this was a considered,
18 thoughtful decision by the trustees, but I don't
19 think it was a difficult one.
20 Now just continuing with the process, the
21 Court will hear -- perhaps, the Court has already
22 read through the written affidavits, testimony that
23 the trustees worked with the experts, through their
24 counsel worked with the expert almost every day
25 answering their questions, to a large extent, relying
26 on the experts to determine what information would be

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1 Openings - Ingber
 2 most useful to them, taking information requests,
 3 collecting information that was in the trustees'
 4 possession, and collecting, obtaining, and sending to
 5 the experts massive volumes of data and documents
 6 from JP Morgan.
 7 Your Honor, I mentioned at the outset the
 8 notion of transparency.
 9 The trustees reviewed, commented on, and sent
 10 out twelve notices to investors disclosing in
 11 December of 2013 the settlement agreement, updating
 12 them on the evaluation process, telling them that
 13 there was a settlement web site created for the
 14 purpose of keeping them up to date on the evaluation
 15 process, inviting them to contact the trustees with
 16 inquiries, or if they were planning to direct the
 17 trustees to accept or reject the settlement with
 18 respect to any particular trust, disclose the expert
 19 reports, and, of course, disclose the ultimate
 20 decision by the trustees at the end of the process,
 21 so investors had every opportunity to share their
 22 concerns, to tell the trustees how would they analyze
 23 the settlement, which was in the public domain since
 24 December of 2013. They had every opportunity if
 25 they didn't know how to analyze the settlement
 26 agreement themselves to go out and hire their own

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1 Openings - Ingber
 2 experts to help them analyze the settlement
 3 agreement, and share any of that with the trustees.
 4 The trustees wanted Professor Fischel to have
 5 this information, and to consider it, and that's why
 6 the trustees didn't hesitate to have meetings with
 7 investors groups, and their counsel to hear what they
 8 thought about the settlement, and the trustees didn't
 9 hesitate to turn over to Professor Fischel the
 10 investor correspondence that they received that
 11 touched on settlement issues.
 12 While all this was going on, the trustees as
 13 a group participated in regular calls about the
 14 settlement, the progress of the experts' work,
 15 questions or issues raised by the experts,
 16 communications with JP Morgan, and your Honor,
 17 updates by the trustees to more seniors trust
 18 personnel within each institution took place in the
 19 ordinary course.
 20 Trustees also made sure that the experts had
 21 enough time to do their work. There were deadlines
 22 baked into the settlement agreement, and the fact is
 23 the trustees had operate with those deadlines in
 24 mind, but they took advantage of the automatic
 25 extension from January to March, 2014, and extensions
 26 from -- they negotiated extensions from March to

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1 Openings - Ingber
 2 June, June to August, and then for a small subset of
 3 the trust to October. All told the experts had 7 to
 4 8 months to analyze these issues, and complete their
 5 work.
 6 Towards the end of the process, the trustees
 7 received preliminary reports from the financial and
 8 valuation experts, and they read them, of course, but
 9 they also wanted separate meetings with each of Faten
 10 Sabry from NERA, Professor Fischel from Compass
 11 Lexecon, and Jerry Reifsnyder from EPA. They wanted
 12 to read the reports and understand them, but they
 13 wanted to hear from each of the experts. They wanted
 14 the experts to walk them through the opinions. They
 15 wanted the ability to ask questions and push back, if
 16 necessary.
 17 That's exactly what happened as part of this
 18 process.
 19 I'm nearing the end of the process here.
 20 Once the trustees had all of the final
 21 reports and the final settlement agreement, they
 22 passed it all along to personnel within each
 23 institution that was making the ultimate decision,
 24 and each trustees followed its own process and
 25 practice for making the ultimate decision whether to
 26 accept or reject the settlement.

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1 Openings - Ingber
 2 For some trustees, it was formal trust
 3 committee meetings. For others, it was smaller
 4 working groups, but in all cases it was consistent
 5 with that trustees' practice.
 6 As your Honor now knows, after these
 7 deliberations, what's really the culmination of the
 8 process that I have just described, the trustee
 9 accepted the settlement for the vast majority of the
 10 trusts and loan groups, and rejected it for others,
 11 so that's the basics of the process, and it's all
 12 reflected in the sworn affidavits that your Honor has
 13 already received.
 14 We think it was intensive, thorough,
 15 disclosed, and again, above all, it was performed
 16 reasonably and in good faith, so that in our view
 17 begs the question:
 18 What are we fighting about?
 19 Well, I'd like to start with what we're not
 20 fighting about.
 21 There's 319 accepting trusts, and 794 loan
 22 groups. For 309 trusts, and 761 loan groups,
 23 there's no objection at all, no questions asked about
 24 the trustees' good faith, the reasonableness of the
 25 process. The experts retained the analyses. They
 26 applied the information they obtained, or the

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1 Openings - Ingber
 2 assumptions they made. No objections to the amount
 3 of the settlement, the servicing component of the
 4 settlement, or the allocation, or distribution
 5 methodologies.
 6 There's also no objection to the decisions of
 7 U.S. Bank, Deutsch Bank, and HSBC to accept the
 8 settlement on behalf of the trusts for which they're
 9 a trustee.
 10 So, that leaves ten trusts, 33 loan groups.
 11 After the eight month process that I've
 12 described, the 12 information notices that were sent
 13 to investors, the notice program ordered by this
 14 Court, the opportunity to intervene, and the massive
 15 discovery that the trustees produced, we're left with
 16 ten trusts subject to an objection, and two objectors
 17 for two trusts.
 18 W&L objects to the distribution
 19 methodologies. They are the only ones. No other
 20 investor, not even the holders of the same class of
 21 certificates has raised this distribution issue.
 22 And the same with Ambac, and it's a trust,
 23 and arguments about conflicts, and expert
 24 qualifications in trustee duties; they stand alone on
 25 these objections.
 26 And I'll address the specifics of the

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1 Openings - Ingber
 2 objections, but first I'd like to make just 1 or 2
 3 high level points, big picture points for your Honor
 4 to consider throughout this hearing.
 5 First, the objectors seem to disagree with
 6 each other. W&L doesn't join Ambac's argument that
 7 Professor Fischel is unqualified to give the opinions
 8 that he gave, and Ambac wouldn't join.
 9 THE COURT: You said does not join.
 10 MR. INGBER: Does not join as far as we can
 11 tell.
 12 Ambac does not join W&L's distribution
 13 objection. W&L won't touch it seems the conflict
 14 allegations raised by Ambac, or suggest that the
 15 duties are consistent with what Ambac has said, and
 16 so if these objectors can't agree with each other,
 17 and we have thousands of investors who won't join in
 18 any of these objections, and we have Institutional
 19 Investors with 24 billion dollars in holdings saying
 20 these objectors and these objections are wrong, then
 21 at the very least, at the very least, what the
 22 trustees did fell within a range of reasonableness.
 23 The second point, it's a related point; we
 24 can accept that if these objectors were evaluating
 25 the settlement, they may have done things different.
 26 Put a different group of trustees in a room and they

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1 Openings - Ingber
 2 may have done things differently, and I suspect we're
 3 going to hear lines of questioning that a different
 4 approach might have been better, or a shift of
 5 emphasis more appropriate, or a category of documents
 6 more relevant for the experts to consider, or even
 7 that there was an another way of looking at
 8 distribution issues.
 9 If we give the objectors every benefit of the
 10 doubt, if we ignore the pooling and servicing
 11 agreements, we ignore the case law, we give them
 12 every benefit of the doubt, at most, at most these
 13 issues are debatable, and if they're debatable,
 14 they're not black and white, and almost by definition
 15 what the trustees did was reasonable. The point is
 16 that someone has to make a judgment. Someone is
 17 assigned the task of making a judgment under these
 18 circumstances, and that task is assigned to the
 19 trustees, and that judgment by the trustees is
 20 entitled to deference.
 21 So, the specific objections; your Honor, let
 22 me just, if I may, make a few points about the
 23 specific objections.
 24 With respect to W&L's distribution objection,
 25 when they make an objection about distribution,
 26 they're not saying this is a bad settlement in the

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1 Openings - Ingber
 2 sense that it's not enough money; they just want a
 3 bigger piece of it.
 4 Now, I believe Miss Patrick is going to
 5 discuss the substance of what Mr. Rollin said in some
 6 detail, but from a process standpoint and from the
 7 trustees' perspective, this is very, we think very
 8 simple and straight forward;
 9 The distribution methodology is materially
 10 identical to the one in the Country-Wide case.
 11 It cannot be unreasonable we believe. It
 12 cannot be an exercise of bad faith to use the same
 13 distribution methodology used in other global RMBS
 14 settlements, and approved first by Justice Kapnick,
 15 and then by the First Department, and since then,
 16 actually by this Court in the Citibank matter.
 17 THE COURT: Was the distribution methodology
 18 at issue in Country-Wide?
 19 MR. INGBER: I don't believe the distribution
 20 methodology was at issue, but it was a distribution
 21 methodology that was submitted to the Court for
 22 consideration.
 23 The final order asked for approval of the
 24 settlement in all respects, and the settlement was
 25 approved, ultimately, approved in all respects, and
 26 the trustees' conduct in connection with that

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1 Openings - Ingber
 2 settlement was viewed as reasonable in all respects.
 3 (Whereupon, Senior Court Reporter Kathy Jones
 4 resumed.)
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1 Openings - Mr. Ingber
 2 MR. INGBER: Yes, absolutely.
 3 With your Honor's permission, I think if we
 4 finish openings and there is nothing else for us to
 5 discuss, then we will be ready to call Professor Fischel.
 6 Thank you.
 7 What he'll testify about most importantly, your
 8 Honor, is his analysis, his financial and economic
 9 analysis of the settlement and his ultimate methods for
 10 evaluating the reasonableness of the settlement on a trust
 11 basis and a loan group level.
 12 It's not simply that Professor Fischel was
 13 qualified to give the opinions that he gave. It's that
 14 his analysis which you will have an opportunity to hear
 15 were sound, it was thorough and it was -- it was more than
 16 plausible.
 17 So, like the trustees did, when they were
 18 thinking about Professor Fischel and whether they can rely
 19 on his report, your Honor will be able to see Professor
 20 Fischel and hear directly from him about his analysis and
 21 read his report and judge as the trustees did whether
 22 Professor Fischel was qualified to give the opinions that
 23 he gave and whether it would have been an exercise in bad
 24 faith for the trustees to rely on that opinion.
 25 AMBAC's second objection and I'm not necessarily
 26 going in any particular order here but the second

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1 Openings - Mr. Ingber
 2 T4
 3 MR. INGBER: So, then there is the AMBAC
 4 objections. Before I get into the objections, I would
 5 like to first point out that claims in at least five of
 6 the eight AMBAC Trusts are time barred. Statute of
 7 limitation has expired. So, if there is no settlement for
 8 these trusts, there is no prepurchase contract. We will
 9 be taking money out of the hands of investors.
 10 As for the objections, there is really multiple
 11 places to start but I suppose I'll start with the attack
 12 on Professor Fischel which we seen in the motion in limine
 13 that AMBAC wanted to file and a pretrial break and we
 14 heard it today in the opening. They said he's not
 15 qualified, that he relied on improper assumptions about
 16 trustees lead obligations. He didn't look at all the
 17 right materials.
 18 I can spend quite a bit of time talking about
 19 Professor Fischel and his qualifications and the analysis
 20 that he conducted but very shortly you will have a chance
 21 to hear from Professor Fischel directly. He'll testify
 22 about his qualifications, his retention, his course of
 23 dealing with the trustees, the information that he relied
 24 on and most importantly he'll testify --
 25 THE COURT: Excuse me. Are you expecting to
 26 call him today?

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1 Openings - Mr. Ingber
 2 objection as we see it and it's shared by no one else
 3 seems to be that the trustees were mistaken when they --
 4 when they told Professor Fischel that they had no
 5 knowledge of an Event of Default or it was improper for
 6 Professor Fischel to assume that the trustee had no
 7 independent duty to pursue to repurchase the claims absent
 8 the direction and an indemnity. So, I have a few points
 9 to make on this objection.
 10 First, this is what the trustees believed. This
 11 is what the trustees practiced. This is an area where
 12 they did in fact have subject matter expertise. This
 13 specifically fell within the scope of the trustees'
 14 duties. That's point one.
 15 Two, there are contracts that govern here. I'll
 16 just address a few points from these contracts.
 17 Mr. Wollmuth referred to 202 of one of the PSAs.
 18 There is also language in those PSAs that require a
 19 trustee to receive an adequate indemnity before it does
 20 anything, before it is obligated to do anything. There is
 21 no exception for Section 202. The trustees are entitled
 22 to an indemnity before they act and that makes perfect
 23 sense because, when you read these agreements as a whole,
 24 it is clear, crystal clear that the trustee has
 25 ministerial functions. Certainly before an event of
 26 default, the trustee has ministerial functions and only

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1 Openings - Mr. Ingber
2 ministerial functions. The trustees get paid a couple
3 thousand a year in these transactions. It wasn't
4 contemplated and it's clear from the agreement that there
5 is no obligation to go out of pocket to enforce
6 obligations without an adequate indemnity.
7 THE COURT: What do you mean the trustees earn a
8 couple of thousand dollars a year? What does that mean?
9 MR. INGBER: The trustees is a -- it is usually
10 calculated as basis points times the unpaid principle
11 amount. That adds up to, it varies, but we're talking
12 5,0000, 10,000, give or take on each deal a year. So,
13 when you have trustees --
14 THE COURT: What do you mean by each deal?
15 MR. INGBER: Each trust. Each trust.
16 THE COURT: Each trust.
17 MR. INGBER: Yes, each trust.
18 So, what Mr. Wollmuth is contemplating here is
19 that the trustees, even though they are getting paid much
20 like I said, it varies, but a few thousands a year to be
21 trustee and carry out their ministerial function, and when
22 I say ministerial, I don't mean to downplay the importance
23 of the trustee's role. There is a lot for trustees to do
24 and these are important functions that the trustee has but
25 the language -- the language of the contract is clear but
26 also the intent of the parties is clear based on the fact

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1 Openings - Mr. Ingber
2 that the intent of the parties is clear that the trustee
3 didn't have these expansive fiduciary type duties based on
4 the fact that they were being paid so little in terms of
5 trustee fees on this deal.
6 Mr. Wollmuth refers to event of defaults in
7 connection with mortgage loan files.
8 The obligation to deliver a mortgage loan file
9 is an obligation not of the servicer. It's an obligation
10 of usually the seller or the depositor. So, that doesn't
11 give rise to any sort of event of default which I'm going
12 to get to in a second which really stems from either a
13 master servicer breach or a servicer breach. So, it's
14 apples and oranges.
15 Let's talk about the event of default issue
16 because it is really -- there is several things that need
17 to occur before there is an event of default. An event of
18 default doesn't just happen. There is no -- it's not a
19 case that there is an event of default somewhere in the
20 air and the trustee just don't know about it. Certain
21 things need to happen before there is an event of default.
22 Three of the eight AMBAC trusts, there has to be
23 a material breach by the master servicer. It has to
24 materially affect the rights of certificateholders and it
25 has to materially affect their rights in that specific
26 trust. The breach by the master servicer has to be in

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1 Openings - Mr. Ingber
2 that specific trust. The master servicer isn't even JP
3 Morgan. It's not a JP Morgan entity. It's not affiliated
4 with any JP Morgan entity and Mr. Wollmuth can say, well,
5 it's sort of the same thing, the master servicer is
6 supposed to supervise the servicer, and if there is a
7 servicer breach, then there must be a master servicer
8 breach too, but you are piling the layer on top of layer
9 on top of layer.
10 The fact is that until Mr. Wollmuth spoke those
11 words in his opening, no one on the objector side has
12 alluded to the possibility of a master servicer breach.
13 The master servicer is not JP Morgan. It's some other
14 entity. So, that's dispositive we think with respect to
15 the three trusts.
16 Now, in all the AMBAC Trust and by the way I
17 should say in the other five, that's a servicer breach and
18 that is a JP Morgan entity but that leads to the next
19 point which is that in all of the AMBAC Trust servicer or
20 Master Service Trust, there has to be a notice of a
21 material breach and there has to be a 60 day cure period
22 and expiration of that cure period without a cure for
23 there to be any sort of event of default. There is no
24 notices here. There is no cure period. There is no
25 expiration of any cure periods. The objectors are not
26 going to submit evidence that any of this happened and we

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1 Openings - Mr. Ingber
2 think that is separately dispositive for all of the AMBAC
3 Trust.
4 Then in all the AMBAC Trust, this is something
5 that I believe the objectors will concede, the trustees
6 have to have actual knowledge of an event of default. And
7 it's not just knowledge of a servicer or master servicer
8 breach. It's actual knowledge of an event of default and
9 all of the conditions that lead up to that event of
10 default.
11 Your Honor, I do want to quote from one of the
12 trusts here. I have a copy that I can hand up to your
13 Honor. I can also bring it up on the screen or I could
14 just read it. You know what, I think I'm just going to
15 read it. It's from --
16 THE COURT: Where is it?
17 MR. INGBER: It's Exhibit 14. It's the SAMI
18 2005-AR7 Trust.
19 THE COURT: And what volume is that please?
20 MR. INGBER: It's in volume -- you know what,
21 your Honor, it was submitted separately as part of the CD
22 of all of the PSAs.
23 THE COURT: Then we'll take a copy if you show
24 it to opposing counsel and there is no objection.
25 MR. INGBER: I'll turn to the page that I'm
26 reading so it will be easier for your Honor. Thank you.

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1 Openings - Mr. Ingber
 2 So, it's section 9.01 iv. I've given you the
 3 page which has Romanette iv but if you want to go to the
 4 preceding page you can see where it starts.
 5 THE COURT: 9.01 iv?
 6 MR. INGBER: Romanette iv (d). (d) iv. Okay.
 7 Thank you.
 8 "The trustee shall not be required to take
 9 notice or be deemed to have notice or knowledge of any
 10 default or Event of Default unless a Responsible Officer
 11 of the Trustee's Corporate Trust Office shall have actual
 12 knowledge thereof." And what comes next is as important
 13 or perhaps even more important. "In the absence of such
 14 notice, the Trustee may conclusively assume there is no
 15 such default or Event of Default."
 16 So, that leads to my third point, your Honor,
 17 which is that the Court already has sworn testimony from
 18 the trustees that they had no knowledge whatsoever of any
 19 defaults in any of the AMBAC Trust or any of the
 20 Settlement Trusts.
 21 THE COURT: Are you saying that all of the AMBAC
 22 Trusts have the same or similar provision?
 23 MR. INGBER: My understanding is that they all
 24 have that provision.
 25 Now, what the Court won't hear is evidence that
 26 AMBAC ever sent its own notice of an Event of Default and

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1 Openings - Mr. Ingber
 2 on that score they join thousands of other investors who
 3 have never alleged an actual event of default in these
 4 trusts.
 5 On this event of default, your Honor, I would
 6 like to make just one final point. Reading through the
 7 pretrial brief, the objector seemed to complain that they
 8 didn't get enough discovery on this issue and that the
 9 Court should limit the bar order so that there could be a
 10 plenary litigation on this issue.
 11 Where have they been?
 12 Last summer your Honor practically invited the
 13 objectors to issue new document requests. They have
 14 received massive documents from the trustee. But they
 15 never sent a new document requests in response to your
 16 Honor's invitation. They never did that. They could have
 17 deposed any of the lawyers in this case about the process.
 18 They never did that.
 19 That's exactly what they did in the Countrywide
 20 case. If they wanted more information about these issues,
 21 more information about the communications with the
 22 experts, they had every opportunity to ask fact witnesses
 23 about these or request additional fact witness
 24 depositions.
 25 We hired a special master in anticipation of
 26 having discovery disputes about these issues. They never

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1 Openings - Mr. Ingber
 2 present any issue to the master servicer.
 3 The time to raise these issues is in this
 4 proceeding. It is not for some other what they describe
 5 as a plenary litigation. If they have an issue with
 6 respect to the settlement, now is the time to raise that
 7 issue.
 8 Now, in the end, your Honor, we don't think
 9 it's -- we don't think it's going to matter because
 10 Professor Fischel will testify that event of default or no
 11 event of default, his opinions would remain exactly the
 12 same.
 13 THE COURT: Can you just address Mr. Wollmuth's
 14 point under 3.16 (a) of the PSA, the officer's
 15 certificate.
 16 MR. INGBER: So, first of all, yes. Again, the
 17 exception report is not a servicer -- I am sorry. The
 18 delivery of the mortgage files is not a servicer function.
 19 But the trustee is entitled to receive attestations,
 20 attestations of compliance, and this agreement is crystal
 21 clear on this point. The trustees are entitled to rely
 22 conclusively on those statements attesting to compliance
 23 with obligations under the agreement. They don't need to
 24 look under the hood and study whether it's right or it's
 25 wrong. They need to look at the document. They need to
 26 figure out whether the document is genuine and that's

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1 Openings - Mr. Ingber
 2 where it ends from the trustee's perspective.
 3 Again, it goes back to how all of the parties
 4 understood the trustees' duties and the function and role
 5 of the trustee. It was not a fiduciary. It was not
 6 conducting investigation. There is language, again clear
 7 language in the PSAs that the trustee is under no
 8 obligation to conduct any investigation whatsoever absent
 9 direction from 25 percent or an indemnity.
 10 So, your Honor, if I've answered the question,
 11 that leaves the new conflict theory. I'll say new because
 12 we heard about these conflict theories for the first time
 13 on Tuesday morning when we read the pretrial brief. It
 14 wasn't part of their objections in the beginning of the
 15 case. Not part of the supplemental objection. It wasn't
 16 part of the hand-back letters that were sent
 17 presettlement. But really most importantly these
 18 theories, the way we see it, these theories are supported
 19 by no evidence at all.
 20 They say the trustees' counsel was conflicted.
 21 Now, not that the trustee was conflicted but trustee's
 22 counsel was conflicted because they previously represented
 23 the trustees. And on this issue, there is just a
 24 fundamental disconnect. They say that it was not
 25 appropriate for trustees' counsel who has knowledge of
 26 RMBS issues, knowledge with how these contracts operate,

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1 Openings - Mr. Ingber
2 knowledge of other global RMBS settlements, it was not
3 appropriate for trustees to hire this counsel. It was
4 just a disconnect.
5 We think that hiring experienced counsel -- the
6 trustee believed that hiring experienced counsel is
7 evidence of good faith and not bad. They say the
8 trustees -- this is from the brief. Mr. Wollmuth didn't
9 mention it today. They said trustees' incentive to settle
10 because they are liable for the acts of the servicer and
11 they go even further and they say the trustees are
12 actually aiders and abettors of servicer fraud. That's a
13 pretty serious charge but it's also one that as far as we
14 can tell has never been asserted against a trustee ever.
15 And that makes perfect sense to us at least because the
16 PSAs are unambiguous in the same contract, your Honor.
17 It's 9.01 (d) vii. It says "None of the Securities
18 Administrator, EMC or the Trustee shall be responsible for
19 the acts or omissions of the other, the Master Servicer or
20 the Servicer, it being understood that this Agreement
21 shall not be construed to render them partners, joint
22 venturers or agents of one another."
23 So, we'll litigate this issue, this legal issue
24 if need be, but on the process point we think it will be
25 impossible for AMBAC to prove that the trustees factored
26 this theory into their decision making. There is just no

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1 Openings - Mr. Ingber
2 evidence. They have no evidence because there is no
3 evidence of it.
4 Finally, on the conflict point, then I'm going
5 to finish up with the final order, AMBAC thinks that the
6 trustees had entered into a bad settlement because they
7 were scared of being sued by the institution investors.
8 On this you need to, frankly, just take a step
9 back. I think security agent trustees are smart enough to
10 know that whatever decision they make somebody is going to
11 be unhappy about it. So, they have every incentive to
12 make the right decision. They have every incentive to
13 make the good decision because perhaps more to the point
14 on this issue or for purposes of this proceeding it's one
15 thing to assert a theory. It's another thing to prove
16 that there is again no evidence of this and where does it
17 end?
18 Did Professor Fischel also have a conflict when
19 he issued his independent opinion? Was he looking to
20 protect the trustees? Was Jeremy Schneider from BBA or
21 Faten Sabry or Justice Carpinello, were they just crafting
22 opinions that had the goal of protecting trustees? It
23 just makes no sense to us.
24 You will hear, your Honor will hear a different
25 version of these events. No doubt what we say is good
26 faith they'll say is bad. What we say is reasonable,

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1 Openings - Mr. Ingber
2 they'll say is unreasonable. What we say is benign,
3 they'll just assume is nefarious.
4 There is a case that we've cited the Dabney
5 versus Chase, 1952. It's Judge Hand. We cited that I
6 don't think in our pretrial brief but certainly throughout
7 this litigation.
8 What Judge Hand said is, I think it's relevant
9 here, a possible conflict of interest can be conjured up
10 out of all sorts of situations in which persons of normal
11 scruple would feel no hesitation to go ahead. The law
12 ought not to make trusteeship so hazardous that
13 responsible individuals and corporations will shy away.
14 Mere vague or remote advantages to a trustee are not
15 sufficient to prove such an adverse interest as to bring
16 misconduct into question.
17 The objectors are trying to make it impossible
18 for the trustees to do of anything.
19 Finally, the final argument, Judge, I certainly
20 have more to say on the conflicts but I see I'm running
21 out of time. So, I'll move on. But thinking about the
22 pretrial briefs, thinking about these allegations, again
23 the trustees, discussions about the trustee duties, this
24 is really a perfect segue to a discussion about the final
25 order. Your Honor knows that the final order that we
26 submitted for the Court's consideration is materially

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1 Openings - Mr. Ingber
2 identical to the City order. I think the only two
3 disputed provisions under good faith are good faith and
4 reasonableness findings and the bar order.
5 On the first, I think I've laid out in this
6 opening, we've laid out through the written directs the
7 evidence of good faith and reasonableness and we think
8 that's extensive. If your Honor makes that finding, if
9 after all the evidence the Court agrees that we the
10 trustees acted in good faith and reasonably, we ask that
11 it issue an order barring claims against the trustees in
12 connection with the evaluation and entry into the
13 settlement and implementation of the settlement in
14 accordance with its terms. Here is why.
15 This is I think a very important point and one
16 that I'll close with. We hope your Honor will agree that
17 after all of this, if it issues a decision, that decision
18 will have res judicata affect. If the Court finds that we
19 acted reasonably, then an investor for example shouldn't
20 be able to claim in some other court at some other time
21 that the trustees acted unreasonably or negligently or in
22 bad faith in connection with the settlement. We think
23 that's correct. Your Honor may think that's correct. We
24 think the case law makes it clear that it's correct but
25 the investors might not see it that way, AMBAC may not see
26 it that way and this isn't hypothetical at all.

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1 Openings - Mr. Ingber
2 You asked Mr. Wollmuth about cases that he's
3 handling for other clients. One of those cases was filed
4 in state court in Ohio. It was filed on behalf of an
5 objector to the Countrywide Article -- to the Countrywide
6 eight and a half billion dollar settlement. That objector
7 intervened, that certificateholder intervened in a
8 Countywide case. That investor then hired Mr. Wollmuth
9 and filed a separate lawsuit in Ohio focusing in part on
10 the trustee's presettlement conduct which wasn't released
11 in that case and isn't released in this case but also
12 challenged the reasonableness of the eight and a half
13 billion dollar settlement and they just filed a brief
14 within the last two weeks. On page 1 of the brief this is
15 what they said. "The New York Court did not intend its
16 approval of the settlement to bar claims relating to the
17 Bank of New York's conduct concerning a settlement. Bank
18 of New York proposed a form of approval order that would
19 have expressly barred such claims but the New York Court
20 struck the proposed bar order from its final order and
21 thus deliberately left Western & Southern free to assert
22 settlement-related claims in this action.
23 This was filed after the trustee's conduct was
24 found to be reasonable in all respects after the First
25 Department ruled that it would have been unreasonable for
26 the trustees not to enter into that settlement.

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1 Openings - Ms. Patrick
2 I want to be clear about this.
3 All they want is another day in another court
4 that isn't this court to litigate issues, to raise issues
5 that are required to be raised in this proceeding in
6 connection with the settlement.
7 So, if and only if your Honor finds that we
8 acted in good faith and reasonably, we ask that the court
9 issue the bar order to make clear that this was the forum
10 to litigate the trustee's conduct in connection with the
11 settlement, not in federal court, not in some other state
12 court, not in a year but today in this court.
13 So, your Honor, now that I am truly closing, we
14 think the precedent for granting the relief that we're
15 seeking is clear from the Countrywide case and from the
16 City matter but we take nothing for granted.
17 We look forward to proving to this Court that
18 the trustees acted in good faith and reasonably and that
19 we are entitled to the full order and judgment that we've
20 submitted to the Court for your Honor's consideration.
21 Thank you for your time and thank you for
22 allowing me to go over of what I had anticipated.
23 THE COURT: Ms. Patrick.
24 MS. PATRICK: May it please the Court, Kathy
25 Patrick for the Institutional Investors.
26 You heard a lot of talk today about the

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1 Openings - Ms. Patrick
2 contract. One thing bears emphasis. Under the terms of
3 the agreement that govern every one of these trusts, every
4 certificate holder made an agreement with every other
5 certificate holder that they would be bound by the
6 reasonable and good faith decisions of the trustee. And
7 all of them agreed with the trustee that when the trustee
8 exercised its discretion reasonably and in good faith, the
9 trustee could not be sued for doing so.
10 Those provisions appear in the no-action clause
11 in the Pooling and Services Agreement and in the sections
12 governing the trust fees duties.
13 Our clients hold 32 percent of the outstanding
14 securities and they are here because they want to enforce
15 that bargain. They and all of the other
16 certificateholders, thousands of them, that do not object
17 to this settlement are entitled to the benefit of the
18 trustee's reasonable and good faith decision in the form
19 of an order sustaining the trustees exercise of its
20 judgment that this over 4 billion-dollar in cash and
21 servicing improvements is indeed in the best interest of
22 certificateholders.
23 The law it must be said favors settlement and
24 this extraordinary result is an example of why.
25 No one is here contending that JP Morgan did
26 everything perfectly in the origination of mortgage loans

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1 Openings - Ms. Patrick
2 in these trusts or in their servicing. It is axiomatic
3 that one does not pay four and a half billion dollars in
4 cash and agree to pay someone else to service loans
5 because one has done everything perfectly. But that is
6 not the issue in this case. Nor is it the issue in this
7 case that in some other court somewhere else on other
8 trusts some investors including some but not all of my
9 clients have sued the trustees.
10 It bears emphasis that none of our clients has
11 sued the trustees on these trusts and we are not aware of
12 any lawsuit filed against the trustees on these trusts
13 because the trustees have acted and achieved an
14 extraordinary result.
15 W & L is here and AMBAC is here but AMBAC is the
16 only investor contesting the reasonableness and the good
17 faith of the trustees' settlement judgment. W & L's
18 objection is not that there is something wrong with the
19 substantive terms of the settlement but rather that they
20 would like the Court to rewrite the settlement agreement
21 to direct all of the funds to W & L. That's in their
22 brief at page 18. But W & L has cited no provision of the
23 Pooling and Servicing Agreement, not one.
24 (Continued on next page)
25
26

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1 Openings - Patrick
2 MISS PATRICK: That would authorize, or
3 require the distribution of these settlement proceeds
4 to W&L.
5 In fact, under the terms of these pooling and
6 servicing agreements, at Section 6.01 repurchase
7 proceeds would flow in exactly the same way as a
8 subsequent recovery would flow. The only way in
9 which W&L can prevail on its objection is if it
10 persuades the Court to roll back the clock to some
11 undetermined date in the past, to treat the
12 settlement recovery as though it was received then,
13 rather than under the pooling and servicing
14 agreements, how it is treated when it is received
15 now.
16 Section 6.01 of the pooling and servicing
17 agreement, even if these were called repurchase
18 proceeds, would cause them to flow in exactly the
19 same way today when the settlement proceeds are
20 received.
21 Separate from the wholly flawed suggestion
22 that the Court can ignore and the rewrite the PSA's,
23 or rewrite the settlement agreements is that the
24 facts concerning W&L's objections are wildly
25 divergent from what is alleged in its objection.
26 Their argument relies on speculative

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1 Openings - Patrick
2 testimony of a purported expert witness, Matthew
3 Lewis, who arrived at his opinion based on a
4 methodology, we will demonstrate was not only flawed,
5 and untenable, but wholly speculative.
6 Mr. Lewis has not read the pooling and
7 servicing agreements. He has not read the settlement
8 agreement. He has not read W&L's objections, but the
9 one thing he did admit was that contrary to what you
10 heard today, based on the remittance reports on these
11 trusts, the records of how cash flowed, and how
12 losses were accrued, in these trusts, two-thirds of
13 losses were suffered not by W&L, but by the senior
14 tranches where the money will flow in this
15 settlement, and W&L whose certificates have
16 unquestionably been written off, can cite no
17 provisions of PSA, and nothing in the law to
18 demonstrate that the trustees acted unreasonable in
19 accepting a settlement where the proceeds would
20 flowed exactly as they flow under the pooling and
21 servicing agreement.
22 So, where does that leave Ambac, the other
23 objector you heard from?
24 THE COURT: Miss Patrick, what is the
25 evidence going to be that two-thirds of the losses
26 were suffered by the senior tranches?

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1 Openings - Patrick
2 MISS PATRICK: W&L's expert witness, Matthew
3 Lewis, testified at pages 99 and 142 of his
4 deposition, based on the remittance reports in the
5 trusts, that that was so. Those are the facts. I
6 don't think they're disputed. Their expert admitted
7 it.
8 So, on to Ambac; as the First Department
9 ruled in Country-Wide2, "A party challenging the
10 decision of a trustee who followed the advice of a
11 highly regarded specialist in the relevant area of
12 law can prevail only upon a showing that, based on
13 the particular circumstances, the reliance on such
14 counsel's assessment was unreasonable and in bad
15 faith."
16 That rationale, of course, extends to
17 reliance on highly qualified independent experts, as
18 well.
19 The trustees have come forward with evidence
20 that meets their burden that they did, in fact, rely
21 on the advice of highly qualified experts, and so it
22 is now Ambac's burden, Ambac's burden to demonstrate
23 the trustees' decision was unreasonable and was made
24 in bad faith.
25 The argument you heard today, and the
26 argument you read in Ambac's pre-trial brief filed

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1 Openings - Patrick
2 48 hours ago, is a tacid admission that the arguments
3 made in Ambac's original objection fail that test.
4 They fail that test. Ambac originally asserted the
5 settlement was, "too low." That is a difference of
6 opinion. It is not a demonstration that the
7 settlement was unreasonable, and certainly, does not
8 meet Ambac's burden to demonstrate bad faith when the
9 evidence is that the trustees relied on the advice of
10 Professor Fischel in their settlement decision.
11 Ambac represented to you that it would prove
12 that the approached trustees breached their duties,
13 but it is important to note that Ambac has identified
14 no witness on its witness list from Ambac, and has
15 offered no expert testimony of its own to come here
16 under oath and say that the terms of this settlement
17 were unreasonable, or were reached in bad faith.
18 None. No one.
19 Ambac's views about the results of its
20 unsuccessful litigation against JP Morgan in others
21 matters were presented to Professor Fischel in the
22 nine month evaluation process the trustees undertook.
23 Professor Fischel considered them, and he,
24 ultimately, concluded that the settlement should be
25 accepted. Part of his conclusion is based on the
26 fact that the repurchase claims as Mr. Ingber told

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1 Openings - Patrick
2 you are in five trusts time barred. You will not
3 hear evidence from Ambac disputing that Justice
4 Carpinello was unqualified to assess whether
5 litigation claims were time barred, and nor will you
6 hear any evidence that it was unreasonable for the
7 trustees to rely on advice from a prestigious Judge
8 to that effect.
9 And in Country-Wide2, the Court noted that it
10 would be, "unreasonable to decline to enter into the
11 settlement with the expectation of obtaining a much
12 greater judgment after years of litigation," when
13 there was no prospect of doing so.
14 The evidence here establishes that it would
15 have been unreasonable for the trustees to reject the
16 claims, the settlement for those five trusts, and the
17 only thing Ambac really has to point to are its
18 encoit assertions about servicing claims, claims it
19 never mentioned in its pre-settlement correspondence
20 with the trustees, and as to every single trust as to
21 which Ambac has lodged an objection, no other
22 certificate holder has objected.
23 Volume II of the exhibits, Exhibit 20 at
24 Schedule P is Professor Fischel's compilation of the
25 holdings of the objectors who support the settlement,
26 and those that oppose. When you review that

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1 Openings - Patrick
2 information, you will see that the settlement was
3 actively supported not only by our clients, but by
4 other investors not in our group, and that in every
5 instance, save one, the investors supporting the
6 settlement have a larger interest than Ambac, and as
7 to all of them, Professor Fischel recommended that
8 the trustees accept the settlement, and though Ambac
9 originally criticized the trustees for failing to act
10 in the face of what it called an event of default,
11 the argument has gotten much murkier today.
12 The Court asked the right question; are you
13 contending that there was an event of default by the
14 servicer, or the master servicer? And the
15 conversation veered off into a discussion of the
16 trustees' duties with regard to repurchase claims.
17 But, here's the key point;
18 Ambac, which has the means and ability to do
19 so, has never itself sent a notice of an event of
20 default on these trusts, never, and Ambac, though it
21 has the means and ability to do so, chose not to
22 direct and indemnify the trustees to reject the
23 settlement for these eight trusts, even though it did
24 direct on others.
25 So, what has Ambac done now?
26 Well, they've shifted ground. In the brief

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1 Openings - Patrick
2 they filed 48 hours ago, they thrown up a bunch of
3 new theories about alleged conflicts of interests on
4 the part of the trustees' counsel. None of that was
5 in their original stated objection, so the Court
6 would be justified in ignoring it.
7 But, if the Court were to consider these new
8 arguments, the facts and evidence the Court will hear
9 again will not support it.
10 First, the assertion that our clients somehow
11 created a conflict by pressing the trustees to accept
12 the settlement; that's nonsense.
13 Of course, the clients, our clients having
14 worked to achieve over four billion dollars in cash
15 and servicing improvements to be implemented at JP
16 Morgan's expense, and this independent servicing
17 monitor pressed the trustees to accept it. They
18 believed it is a good settlement. Are our clients
19 working hard now to ensure it is finalized? Of
20 course, they are.
21 Does that make the trustees conflicted as to
22 the settlement? Of course not, no more than the
23 trustees are rendered conflicted by the fact that
24 Ambac opposes it and threatens to sue them if they
25 accept.
26 The trustees have to do what is reasonable

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1 Openings - Patrick
2 and in good faith, and in the best interest of the
3 certificate holders, and in the evidence there is,
4 "no indication that any trustee was acting in its
5 self-interest, or the interest of JP Morgan, or
6 rather than the interest of certificate holders."
7 That's the language from Country-Wide2, and here, as
8 in Country-Wide2 and Citigroup, the trustees'
9 pre-settlement conduct, including Ambac's newly found
10 exception report theory, are not released in the
11 settlement agreement. They're simply not released,
12 and the order for relief is limited strictly to
13 lawsuits against the trustees. After the Court has
14 -- based on the settlement, based on the settlement
15 alone, and nothing more, if the Court finds that the
16 trustee acted reasonably in good faith. Trustees are
17 not receiving a penny of this settlement, and the
18 indemnity provided by JP Morgan is not a conflict.
19 It's the indemnity of the trustees were
20 otherwise entitled to under the pooling and servicing
21 agreement.
22 So, what is left are the same scurrilous
23 pattern of attacks on trustees' counsel that we saw
24 in Country-Wide; the assertion that the trustees'
25 counsel were somehow conflicted, and so disregarded
26 their professional obligation to provide the trustees

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1 Openings - Patrick
 2 with sound and independent advice.
 3 But, here's the thing, your Honor; none of
 4 the trustees is here asserting that they settled this
 5 claim based on the advice of their counsel. The
 6 affidavits to a person attest to the fact that the
 7 trustees here seek review of a decision that they
 8 made in reliance upon and based upon the advice of
 9 their independent experts, including Professor
 10 Fischel, and Justice Carpinello.
 11 That is the trustees' business judgment that
 12 is at issue here. They do not ask the Court to
 13 review the advice of their counsel.
 14 Separately, Ambac's argument about the
 15 trustees claimed duty to seek legal advice misstates
 16 the law.
 17 While the law gives the trustees a right to
 18 seek advice from independent experts, or lawyers in a
 19 matter that is outside their expertise, no Court has
 20 held they have an obligation to seek legal advice
 21 concerning a matter that is within their own
 22 knowledge and expertise.
 23 And, finally, a trustees' decision to retain
 24 its long-time counsel was held in Country-Wide2 to be
 25 evidence of prudence, not evidence of a conflict.
 26 There's simply no evidence of a conflict, so

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1 Openings - Patrick
 2 throughout this proceeding, the standard the Court
 3 should apply is the standard established by the First
 4 Department;
 5 The Court should grant the relief if it finds
 6 the trustees acted reasonably and in good faith.
 7 One word about the bar order; leaving the
 8 trustees exposed to collateral litigation about the
 9 settlement after the Court has found that the
 10 trustees acted reasonably and in good faith is
 11 injurious to the certificate holders and the trusts.
 12 Each of the PSA's requires the trusts to provide and
 13 indemnity to the trustee if they are alleged to have
 14 acted, if they are sued for actions they undertook
 15 reasonably and in good faith, so if the Court does
 16 not grant the bar order, all of the settlement
 17 benefits, the cash, could be dissipated -- not all of
 18 it, of course, but significant quantities could be
 19 dissipated to defend the trustees for the good faith
 20 and reasonable actions the Court has found they
 21 undertook.
 22 It is not only in the interest of trustees to
 23 have a bar order, and something they are entitled to
 24 in this Article 77 proceeding. After all, as the
 25 Court held in segregated account, the purpose of this
 26 proceeding to provide the trustees judicial

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1 Proceedings
 2 instruction before they take contested action, so
 3 that they cannot be sued afterward for having done
 4 so.
 5 So, the trustees are entitled to it, but on
 6 behalf of the investors I represent, we want that bar
 7 order to be entered, so that trust assets are not
 8 dissipated defending claims arising from the trustees
 9 good faith exercise of their settlement decision, and
 10 it is a narrow and carefully limited order.
 11 Based on the evidence that you have heard,
 12 and the evidence that you will hear in this
 13 proceeding, the trustees have met their burden of
 14 proof at the conclusion of this case, therefore, we
 15 will join them in asking the Court to enter the order
 16 for relief, so that the thousands of certificate
 17 holders, including Ambac, and W&L can receive the
 18 benefits of this settlement to which they are
 19 entitled, and if, as is true of W&L, they own
 20 certificates that are written off, there is no such
 21 entitlement, and there is no injury, and no valid
 22 objection.
 23 Thank you, your Honor.
 24 THE COURT: Thank you.
 25 We will take a very brief recess of
 26 approximately five minutes.

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1 Proceedings
 2 MISS PATRICK: Your Honor, after the recess,
 3 should we be prepared to begin with Professor
 4 Fischel?
 5 THE COURT: That's what I want to confer
 6 with my law clerk about.
 7 MISS PATRICK: Thank you, your Honor.
 8 (Brief recess taken.)
 9 THE COURT: Thank you.
 10 Back on the record.
 11 My law clerk is going to meet with you in the
 12 next few minutes to discuss the order in which
 13 witnesses will be presented and some other issues.
 14 I see from the last transcript from
 15 January 6th that the parties agreed to Direct
 16 testimony via affidavit. One of the things he'll
 17 discuss with you, for example, is whether there are
 18 going to be any objections to any of those
 19 affidavits. He will not discuss that with you at
 20 length, just enough so that I know what to expect
 21 when I hear from you on the record this afternoon,
 22 and issues of that sort, so I'm going to go off the
 23 record for the morning session, and we'll resume here
 24 at 2:15 sharp.
 25 Thank you.
 26 (Whereupon, luncheon recess was taken by all

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1 Proceedings
2 parties.)
3 THE COURT: On the record.
4 Good afternoon.
5 Is my understanding correct that the
6 Petitioners intend to call Mr. Fischel as their first
7 witness?
8 MISS PATRICK: That is correct, your Honor.
9 THE COURT: Is my further understanding
10 correct that there is a threshold issue that the
11 objector, or objectors wish to raise with respect to
12 Mr. Fischel's testimony?
13 MR. CHANGE: That is correct, your Honor.
14 We wish to reiterate the motion in limine we
15 made on January 6th.
16 THE COURT: Excuse me, before you do, Mr.
17 Change, would you please note your appearance and
18 state what your involvement is in this case?
19 MR. CHANG: Yes.
20 Vincent Chang, Wollmuth, Maher.
21 THE COURT: And you are -- well, Mr.
22 Wollmuth's firm is counsel of record.
23 MR. CHANG: Yes.
24 THE COURT: What is the role of your law
25 firm?
26 MR. CHANG: I'm with Mr. Wollmuth' firm.

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1 Proceedings
2 THE COURT: I didn't realize that.
3 I am going to make a disclosure to the
4 parties, and that is that Mr. Chang and I have sat as
5 members of the New York County Lawyers Association
6 Justice Center Board for many years, and perhaps, we
7 still do, although there hasn't been a meeting in
8 some time. I think actually there maybe a
9 conference call tomorrow. I don't believe that the
10 rules of judicial ethics require me to make this
11 disclosure. I always prefer to err on the side of
12 caution in areas of judicial ethics.
13 Does anyone wish to be heard on this issue?
14 Let me just say, I didn't realize until I
15 saw Mr. Chang today that he was, or his firm was
16 involved in this case, but that is all I have to say
17 about it.
18 Does anyone wish to be heard?
19 I'm not hearing anything, so we will proceed.
20 I will hear Ambac's issue.
21 MR. CHANG: Your Honor, I guess one threshold
22 question is whether we should do our motion orally,
23 or wait until after they have laid a foundation, or
24 attempted to lay a foundation in their presentation.
25 I'm happy to do it now if that's your wish.
26 THE COURT: Well, I am not going to give any

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1 Proceedings
2 advisory opinions. I have had not had -- I
3 believe I indicated in the last transcript that I was
4 not going to have written motions in limine.
5 If you have a motion in limine, now is the
6 time to put it on the record.
7 I have your letter, dated -- the parties'
8 joint letter, dated January 4th. I can mark a clean
9 copy of that into the record as Court's Exhibit I,
10 and if there's anything further you wish to say in
11 connection with this matter, you should put that on
12 the record.
13 MR. CHANG: Yeah, I do have a fairly extensive
14 presentation prepared, which I'm ready to make now if
15 you so desire.
16 THE COURT: Well, I will hear ten minutes
17 per side.
18 MR. CHANG: Okay.
19 THE COURT: Okay, off the record for a
20 moment.
21 (Brief pause.)
22 THE COURT: Back on the record.
23 MR. CHANG: Your Honor, to reiterate some of
24 points that Mr. Wollmuth raised in his opening, we've
25 got an unusual situation here.
26 We've got an expert who is opining on the

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1 Proceedings
2 fairness and the good faith of a settlement, yet he
3 admits that he's unable to opine, or unwilling to
4 opine in a way on whether the considerations being
5 provided for the settlement, i.e. the value of the
6 claims that are being released, he's unable to opine
7 what that valuation is. He says it's uncertain, and
8 I would admit that on the record that he has in front
9 of me, it is uncertain. That's because he didn't
10 conduct the kind of inquiry that would be necessary
11 to establish the requisite certainty. He doesn't
12 call CoreLogic and get an analysis of all the loans.
13 He didn't go through the files one by one as could
14 have been done. He didn't call the investors to
15 find out what their preferences were on the
16 settlement. None of these thing were done, so yes,
17 there is uncertainly. That uncertainly is of their
18 choosing is what our argument is.
19 A situation is like this; say that you had an
20 appraiser who was claiming there was uncertainty and
21 couldn't value, he couldn't value what the value of a
22 house was, but what he did was, he looked at what
23 other houses had sold for, but he couldn't value
24 those either he said. Would you hire that appraiser
25 to say whether or not the price that was being paid
26 for the house was fair, or unfair?

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1 Proceedings
 2 I would think not.
 3 But, what else is going on here is that they
 4 did hire him, and he came up with numbers, but he
 5 didn't say if those were the value of the comparable
 6 settlements, didn't say those were the valuations of
 7 the claims that were being released, and the simple
 8 fact that he could not come to a conclusion on either
 9 of those subjects, so which argue that he should be
 10 excluded on that ground.
 11 A few other points to raise;
 12 Mr. Fischel is, as Mr. Wollmuth mentioned, a
 13 hired gun who has been a notorious defender of
 14 notorious -- a defender of notorious defendants; such
 15 as, Charles Keating; Skilling, the President of
 16 Enron; Michael Milken, and the Courts said in other
 17 proceedings, have given no weight to Mr. Fischel's
 18 testimony.
 19 For example, in en re Pfizer, which is a case
 20 that was in the Southern District May 21st, 2014,
 21 Judge Swing ruled that Fischel cited no research
 22 reference, or peer review information to support his
 23 analysis.
 24 THE COURT: Excuse me, on an issue like
 25 that, if when the testimony is sought to be elicited
 26 you can show me that similar testimony was at issue

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1 Proceedings
 2 in our cases, I will consider those cases. I am
 3 just not going to consider the cases in a vacuum.
 4 MR. CHANG: Fair enough, your Honor.
 5 What I'll do is, I'll show he doesn't meet
 6 the legal standard that was articulated in those
 7 cases.
 8 THE COURT: Well, it depends. I don't know
 9 what you mean by the legal standards in those cases,
 10 and what the relevance of that is. We have our own
 11 legal standard in this case for the reliance on
 12 expert testimony, which I would venture to say was
 13 probably very different than the legal standards with
 14 respect to which testimony was being considered these
 15 other cases.
 16 If you can show me correspondence when I hear
 17 what testimony is going to be sought to be elicited,
 18 I will consider the opinions of other Judges'
 19 findings in the testimony.
 20 MR. CHANG: We're going to move on then, your
 21 Honor. I do have the testimony of other Judges.
 22 THE COURT: Excuse me, finding the testimony
 23 unworthy of belief.
 24 MR. CHANG: Sorry, your Honor.
 25 I do have several other opinions of that
 26 fact, but let me just move on to other points here,

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1 Proceedings
 2 and you know, the first point we would like to make
 3 is that he on opines that he subject matters on which
 4 he's not an expert.
 5 He doesn't have a degree in economics, and
 6 he admits the settlement decision in this case, in
 7 any event, turns not on economics, but on business
 8 judgment. That's in his report at paragraph
 9 seventeen.
 10 He conceded in his deposition that, among
 11 other things, his expertise not include the exercise
 12 of business judgment by RMBS trustees, does not
 13 include the valuation of litigation. Instead he
 14 tried to argue that his expertise that was being
 15 supplied here was on economic of principle agents
 16 relationships, but note that in his report itself as
 17 opposed to his deposition, there's no reference to
 18 principal agent issues, no citations on principle
 19 agent issues, and in any event, principle agent
 20 issues are irrelevant without contract analysis
 21 because contracts often control what the principle
 22 agent relationship is governed by as Mr. Fischel
 23 himself admits in some of the publications that he
 24 submitted in his attachment to his expert report.
 25 Time after time, Mr. Fischel admits that he
 26 cannot come to any conclusions on critical legal

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1 Proceedings
 2 issues relating to the contract, to damages issues,
 3 to the valuation of the litigation.
 4 Where did he get the information for these
 5 propositions from? He got them all from counsel for
 6 the trustees, and as Mr. Wollmuth pointed out in his
 7 opening, counsel for the trustees are conflicted in
 8 several senses.
 9 But, in any event, regardless of whether it's
 10 conflicted --
 11 THE COURT: I'm sorry, Mr. Chang, I really
 12 must ask you to slow down.
 13 MR. CHANG: I'm sorry, I was just so conscious
 14 of the limited time.
 15 THE COURT: I know, but if you want me to be
 16 able to follow what you're saying, you have to speak
 17 at a normal speed.
 18 MR. CHANG: Yeah. Sorry, I will. I will do
 19 so.
 20 There is no independent legal opinion here on
 21 things like damages, no independent legal opinion
 22 here on construction of the contract, and no legal
 23 opinion on the value of the claims, so these are huge
 24 issues on which there's a big vacuum.
 25 On that ground alone, we don't think that his
 26 opinion is probative of anything.

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1 Proceedings
 2 If you look at his deposition transcript at
 3 133, he admits many of the things that are lacking.
 4 He says my calculation of loans no matter
 5 what it is by itself does not tell you what
 6 recoverable tangible damages are. It doesn't tell
 7 you whether or not liability can be established. It
 8 does not distinguish between servicer conduct, and
 9 other possible cause of a loss, does not tell you
 10 even if something servicers did was responsible for a
 11 loss, whether that conduct was legally actionable, as
 12 I said, under the relevant contractual and legal
 13 standards, so we submit that any opinion on the
 14 principle agent relationship is devoid of content
 15 because it only has content within the context of the
 16 contract and damages analysis, and that cannot be
 17 done by Mr. Fischel, and at least wasn't done by him.
 18 Some of the other methodological problems;
 19 as Mr. Wollmuth mentioned, Mr. Fischel's opinion did
 20 assume there had been no event of default, and we
 21 showed in the opening that an event of default had
 22 occurred, and had occurred many times, and yet Mr.
 23 Fischel's opinion did not consider that possibility.
 24 His opinion also suffers from a flawed legal
 25 assumption that a trustee has no duty to act in the
 26 absence of a direction to act, and that is simply

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1 Proceedings
 2 refuted by, for example, Section 2.02 of some of the
 3 PSA's, and the Ambac decision in the First
 4 Department, which is 121 AD 3rd at 519.
 5 A few other issues;
 6 The payment; if you look at the comparable
 7 settlement, the comparable settlements, of course,
 8 are unreliably indicated as anything, unless there's
 9 a very close analysis of the claims that were being
 10 released in those comparable settlements. That just
 11 wasn't done here. No valuation was made.
 12 Reliance on certificate prices; that's in his
 13 report at paragraph 66 to 67, but he made no attempt
 14 to demonstrate that the certificate market was an
 15 efficient market during the relevant periods, and he
 16 doesn't make that determination. There is absolutely
 17 no value to that calculation.
 18 He failed to do any sort of survey of note
 19 holders to gauge whether or not they were in favor of
 20 the settlement.
 21 He failed to sample loan files to determine
 22 the valuation of those loan files and the damage
 23 claims associated with them, so over all, we think
 24 there are a lot of holes. We can establish them more
 25 in our cross-examination, and we would like the
 26 opportunity if your Honor would indulge us to,

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1 Proceedings
 2 perhaps, put in another letter, or a brief after all
 3 the testimony is in to summarize our further
 4 objections to him.
 5 THE COURT: Mr. Chang, do I understand when
 6 you met with my law clerk during the time before we
 7 broke this morning that you characterized this motion
 8 in limine as a Frye motion?
 9 (Whereupon, Senior Court Reporter Kathy Jones
 10 resumed.)

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 2 T6
 3 MR. CHANG: Yes, that is how we characterized
 4 it.
 5 THE COURT: Is there anything further?
 6 MR. CHANG: Nothing at this time.
 7 THE COURT: Thank you.
 8 Mr. Rollin, is it Rollin or Rollins?
 9 MR. ROLLIN: It's Rollin with no S, your Honor.
 10 THE COURT: Mr. Rollin, do you wish to be heard
 11 on this motion?
 12 MR. ROLLIN: I do not.
 13 THE COURT: Mr. Ingber?
 14 MR. INGBER: Thank you, your Honor.
 15 I will be brief and then if Ms. Patrick wants to
 16 weigh in, she can certainly do so.
 17 All of the argument that Mr. Chang just made he
 18 can make at the end of the trial and he can argue that and
 19 we think they are without merit.
 20 He can argue that Professor Fischel was not
 21 qualified to give opinions that he gave and he can argue
 22 that it was unreasonable for the trustees to rely on
 23 Professor Fischel. He just laid out the cross-examination
 24 outline. He can take Professor Fischel through that
 25 during the cross-examination.
 26 Professor Fischel is testifying here because he

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1 Proceedings
 2 gave opinions to the trustees. He's testifying factually
 3 about the work that he did, the course of dealing with the
 4 trustee and the opinions that he gave and the basis for
 5 those opinions. He is not offering those opinions to the
 6 Court in the sense that a litigation expert oftentimes
 7 takes the stand and offers opinions to the Court. He's
 8 testifying factually about the opinions that he gave to
 9 the trustee.
 10 Your Honor will have a chance to hear Professor
 11 Fischel, to hear him walk through, as I said in my
 12 opening, to hear him walk through everything from the
 13 beginning of his engagement to the end including the
 14 opinions that he offered to the trustees. He explains how
 15 those opinions are supported.
 16 It would be certainly premature at this point to
 17 rule on what is one of the key issues in the case which is
 18 whether the trustees were reasonable or acted in good
 19 faith in relying upon the report of Professor Fischel.
 20 It's similar to what happened in the Countywide
 21 matter. In the Countywide matter, there was an expert
 22 who was proffered to give opinions to the Court about the
 23 reasonableness of the settlement. That was Professor
 24 Fischel in the Countywide matter.
 25 We took the Court through his qualifications.
 26 There were no challenges to his qualifications. There was

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 2 no challenge to Professor Fischel's ability to evaluate
 3 the reasonableness of that eight and a half billion dollar
 4 settlement.
 5 We also called the experts who provided advice
 6 to the trustees in connection with the trustees' decision
 7 to enter into the settlement and those experts were --
 8 they didn't have to go through this Frye or Daubert
 9 process where they were qualified for the Court as an
 10 expert. They testified about the work that they did. The
 11 objectors in that case argued at the end that those
 12 experts weren't qualified to give the opinions that they
 13 gave on which the trustees relied and the Court ultimately
 14 disagreed and it said, no, that it was perfectly
 15 appropriate for the Court to rely on those opinions and
 16 that's for your Honor to determine.
 17 THE COURT: What is the purpose for which you
 18 are offering Professor Fischel's testimony at this
 19 hearing?
 20 MR. INGBER: In this hearing, we are calling
 21 Fischel, Professor Fischel because he was one of the
 22 experts who provided an opinion to the trustees concerning
 23 the reasonableness of the settlement on a trust by trust
 24 basis and loan group by loan group basis. So, we are
 25 calling Professor Fischel to describe the process from
 26 beginning to end from his engagement through the issuance

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 2 of his opinions and to describe the opinions that he gave
 3 to the trustees.
 4 THE COURT: And you are making a distinction
 5 then as to the offer of his testimony at Countywide and
 6 the offer here?
 7 MR. INGBER: I'm making a distinction. I mean,
 8 the opinions that he gave are similar opinions. He had to
 9 apply his --
 10 THE COURT: But you are offering them for
 11 different purposes?
 12 MR. INGBER: Yeah, absolutely.
 13 THE COURT: There you offered the opinions to
 14 the Court as to the reasonableness of the settlement. You
 15 are not offering his testimony for that purpose in this
 16 case. You are offering it only for the purpose for which
 17 I imagine you also offered it in Countywide, to show what
 18 opinions he gave to the trustee as to the reasonableness
 19 of the settlements.
 20 Do I have that right?
 21 MR. INGBER: So, yes, we are offering his
 22 opinions in this case to show the -- what opinions he gave
 23 to the trustee.
 24 In the Countywide case, he was offering opinions
 25 to the Court about the reasonableness of the settlement.
 26 THE COURT: Well, you certainly refined your

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 2 thinking since that trial, haven't you?
 3 MR. INGBER: No. I don't --
 4 THE COURT: I think there is a lot of creative
 5 thinking on both sides in the wake of the Countywide
 6 hearing. I'm hearing it over and over again.
 7 MR. INGBER: Well, your Honor, I'll just address
 8 that.
 9 Professor Fischel just played a different role
 10 because there were other experts hired to advise the
 11 trustee in connection with the settlement decision in that
 12 case.
 13 THE COURT: But this time you've decided you
 14 don't need to offer an expert to give the expert's
 15 opinions to the Court for the Court's benefit as to the
 16 reasonableness of the settlement. Let's characterize it
 17 for what it is.
 18 MR. INGBER: Absolutely. Here is why.
 19 THE COURT: I know why. It's because the
 20 standard that was articulated in Countywide. I just wish
 21 you would say what is actually happening here.
 22 MR. INGBER: Thank you, your Honor. That's
 23 exactly what I'm going to say.
 24 In the Countywide case, there was a dispute
 25 about what the standard was and whether we had to
 26 establish in that case whether this settlement was fair,

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1 Proceedings
 2 was reasonable by some objective standard. We argued in
 3 that case that the process is what's important. Did the
 4 trustees act in good faith and reasonably in entering into
 5 that eight and a half billion dollar settlement. The
 6 objectors in that case disagreed.
 7 I think we have color, much more color on what
 8 the standard is. So, I don't even think the objectors are
 9 going to present evidence in this case and that there was
 10 a different number that would have been more reasonable.
 11 They have no evidence that they can present to your Honor
 12 to show that the four and a half or so billion dollars was
 13 unreasonable.
 14 So, the purpose of this Article 77 proceeding is
 15 in part for the trustees to come in and demonstrate that
 16 they acted in good faith and reasonably -- in good faith
 17 and reasonably in entering into this settlement.
 18 THE COURT: Yes, but they still have to have
 19 acted within the bounds of reasonable judgment.
 20 MR. INGBER: Of course.
 21 THE COURT: And I will not go with you to the
 22 extent that you are going down the road that the merits
 23 are completely irrelevant.
 24 MR. INGBER: No.
 25 THE COURT: I'm not going to characterize it
 26 beyond that because it's a very sensitive issue.

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 2 MR. INGBER: Sure. I think the merits are
 3 bathed into Professor Fischel's opinion that he offered to
 4 the trustees and that is relevant to the trustees'
 5 consideration.
 6 The trustees -- the assignment to Professor
 7 Fischel was to evaluate the reasonableness of the
 8 settlement. He wasn't opining on the reasonableness of
 9 the process. That's something for your Honor to consider.
 10 He was analyzing, evaluating the reasonableness of the
 11 settlement and of course there are merits, determinations
 12 that go into that. So, the trustee was of course
 13 considering the reasonableness of the settlement in
 14 relying upon Professor Fischel's opinion.
 15 THE COURT: Let's make a little time for Ms.
 16 Patrick to weigh in on the issue.
 17 MR. INGBER: Sure.
 18 MS. PATRICK: Your Honor, to answer the question
 19 the Court asked is this a Frye issue, it is not.
 20 As the Court noted, the standard here is
 21 different than the standard for scientific evidence in the
 22 cases Mr. Chang cited. No Court has ruled that a trustee
 23 can only seek expert advice where the expert can for
 24 example cite a peer review study. Instead, as this Court
 25 recognized in Citigroup based on the ruling in Countywide,
 26 the issue is did the trustees -- was there trustee

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1 Proceedings
 2 reliance on plausible reports and advice of outside
 3 experts. That is significantly probative of prudence. If
 4 a trustee has selected counsel prudently and in good faith
 5 and has relied on plausible advice, that is probative of
 6 prudence and that is a different issue and standard than
 7 the standard Frye.
 8 Here in order to assess whether the trustees
 9 selected Professor Fischel prudently, formed a reasonable
 10 decision that he could assist them in the work they were
 11 asked to do and receive plausible reports, the Court needs
 12 to hear what Professor Fischel did and why he is
 13 qualified.
 14 So, the suggestion that a trustee can only
 15 consider the advice of an expert to support its reasonable
 16 decision making if it assures itself first that if its
 17 discretion were challenged it can demonstrate the expert
 18 would qualify as a judicial expert in a Frye test is
 19 simply wrong. That is not the law.
 20 The issue is was he reasonably qualified, did
 21 the trustees form a reasonable view and were his opinions
 22 plausible. On that standard, the Frye motion is misplaced
 23 and Professor Fischel should be permitted to testify.
 24 THE COURT: I am prepared to rule at this time.
 25 I have adhered to my ruling at the pretrial
 26 conference on January 6 that the issue of whether

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1 Proceedings
 2 Professor Fischel is qualified to give opinions on certain
 3 subject matter areas is an issue that must be decided at
 4 the hearing on the foundation laid at the hearing for the
 5 various opinions. I understand that he is not being
 6 offered at this hearing to give his opinion to the Court
 7 as to the reasonableness of the settlement but rather to
 8 testify as to the opinions he gave to the trustees as to
 9 the reasonableness of the settlement. Foundation must
 10 nevertheless be laid at this hearing for him having given
 11 those opinions to the trustees.
 12 Now, I will expect that to be done at this
 13 hearing. We will not wait until the end of the trial.
 14 If there is a claim of lack of foundation, I
 15 will hear it when the petitioners seek to qualify him,
 16 seek to have a determination that he was qualified to
 17 offer these opinions to the trustees.
 18 As to the Frye matter, I am entirely unpersuaded
 19 that the testimony of Professor Fischel presents a Frye
 20 issue. New York courts apply this Frye standard in
 21 determining the reliability of novel scientific evidence.
 22 The standard requires a determination of whether the
 23 "accepted techniques when properly performed generate
 24 results accepted as reliable within the scientific
 25 community generally." People v Wesley, 83 New York 2d
 26 417, 422, 1994, and Parker v Mobile Oil Corp., 67, New

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1 Proceedings
 2 York 3d 434, 446, 2006. The argument denied 8 New York 3d
 3 828 2007.
 4 The testimony is not being offered for a purpose
 5 for which a Frye determination would be required.
 6 We are ready to proceed.
 7 Mr. Ingber, you may call the petitioner's first
 8 witness.
 9 MR. INGBER: Thank you, your Honor.
 10 The petitioner calls Professor Daniel Fischel.
 11 Your Honor, I have a binder of a combination of
 12 exhibits to Professor Fischel's reports that Professor
 13 Fischel may refer to and there are demonstratives that we
 14 prepared for purposes of this examination and I've given
 15 notice -- I've sent the demonstratives to the objectors.
 16 I haven't heard any objection to the demonstratives.
 17 With your permission, I would like to hand to
 18 your Honor a binder of the documents that we intend to use
 19 with Professor Fischel. I'll give you a binder.
 20 THE COURT: Is there any objection?
 21 MR. CHANG: No objection, your Honor.
 22 MR. ROLLIN: None for us.
 23 THE COURT: You have also received the binder?
 24 MR. ROLLIN: I believe we have.
 25 MR. INGBER: I've sent the demonstratives. The
 26 binder includes not just demonstratives but exhibits to

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1 Fischel - Direct - Mr. Ingber
 2 Professor Fischel.
 3 DANIEL R. FISCHEL
 4 called as a witness on behalf of the
 5 Petitioner, having been first duly
 6 sworn, was examined and testified as
 7 follows:
 8 COURT CLERK: State your full name and business
 9 address for the record.
 10 THE WITNESS: My name is Daniel Robert Fischel,
 11 F-I-S-C-H-E-L and my business address is 332 South
 12 Michigan Avenue, Chicago, Illinois, 60604.
 13 THE COURT: Thank you.
 14 Good afternoon.
 15 THE WITNESS: Good afternoon, your Honor.
 16 THE COURT: You may inquire.
 17 MR. INGBER: Thank you, your Honor.
 18 DIRECT EXAMINATION
 19 BY MR. INGBER:
 20 Q Good afternoon, Professor Fischel.
 21 A Good afternoon.
 22 Q Professor, can you please tell the Court where you're
 23 employed?
 24 A I'm employed in two places, an economics consulting
 25 firm by the name of Compass Lexecon and I'm also employed at
 26 the University of Chicago.

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1 Fischel - Direct - Mr. Ingber
 2 Q What is Compass Lexecon?
 3 A As I said, Compass Lexecon is an economics consulting
 4 firm that specializes primarily in the application of economics
 5 to various legal and regulatory disputes. We have I think now
 6 17 offices all over the world. We have personnel that are
 7 primarily economists and people with related training, computer
 8 programmers, some accountants. We also have affiliates with
 9 leading academics around the world -- affiliations with leading
 10 academics around the world including several Nobel Peace Prize
 11 winners and other imminent authorities in their respective
 12 fields.
 13 Q Can you give us a sense of Compass Lexecon's clients?
 14 A Yes. We have a variety of different clients. We have
 15 very close relationships with the States Department of Justice
 16 and a number of other agencies of the federal government, state
 17 and local governments as well. Also companies, law firms,
 18 investors, non-profit groups, pretty much the gamut.
 19 Q What specifically do you do at Compass Lexecon?
 20 A I do two things. I am the chairman, the president of
 21 the firm. So, in some sense I'm responsible for the entire
 22 firm.
 23 I also personally have a very active consulting
 24 practice in my area of expertise which primarily relates to
 25 various aspects of the economics of financial markets.
 26 Q Professor Fischel, you also mentioned the University

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1 Fischel - Direct - Mr. Ingber
 2 of Chicago. What's your current position at the University of
 3 Chicago?
 4 A Currently, I'm the Lee and Brena professor of law and
 5 business emeritus at the University of Chicago Law School.
 6 Q Have you previously held any other academic positions
 7 there?
 8 A Yes. Well, obviously before I was emeritus, I held
 9 the same chair at the University of Chicago Law School.
 10 I've also served as a Dean of the University of
 11 Chicago Law School. I also had an appointment for a number of
 12 years at the graduate school of business at the University of
 13 Chicago. I also for many years was director of the law and
 14 economics program at the university which is a university wide
 15 program as the name suggests devoted to the intersection
 16 between law and economics.
 17 Q Can you describe your educational background please?
 18 A Yes. I grew up in New York. I went to Bronx High
 19 School of Science. Then I went to --
 20 THE COURT: And so did I.
 21 MR. INGBER: Well, then, he must be qualified.
 22 A Then I went to Cornell University where I got a
 23 Bachelor's degree in history and with a minor in economics.
 24 Then I spent a couple of years going to graduate school in
 25 history. I went to Brown University.
 26 After that I went to university of Chicago at the law

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1 Fischel - Direct - Mr. Ingber
 2 school.
 3 Q What did you do after law school?
 4 A After law school I served two years as a law clerk
 5 first for the Honorable Thomas Fairchild who was then the Chief
 6 Judge of the Seventh Circuit Court of Appeals in Chicago. And
 7 then I had the privilege of serving as a law clerk to the
 8 Associate Justice Potter Stewart of the United States Supreme
 9 Court. Then I practiced law for less than a year.
 10 Then I started my academic career originally at
 11 Northwestern University where I was there for a couple of
 12 years. Then I went back to the University of Chicago and I've
 13 also gone back a couple of times to Northwestern since but
 14 always much returned to the University of Chicago.
 15 Q And what types of courses have you taught as a
 16 professor either at the University of Chicago or Northwestern?
 17 A I've taught a number of different courses but I would
 18 say primarily courses in business organizations, corporate
 19 finance and a variety of advance courses in law and economics
 20 particularly ones focusing on financial markets.
 21 I've also took courses in the business school at
 22 Chicago when I had my appointment there and some joint courses
 23 even when I wasn't a professor -- didn't have an appointment as
 24 a professor at the business school.
 25 Q Did those business school classes cover the same sorts
 26 of topics that you just described?

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1 Fischel - Direct - Mr. Ingber
 2 A Yes.
 3 Q Professor, have you taught any courses that deal with
 4 the issues arising in this case?
 5 A Yes. A number of the subjects covered in my courses
 6 deal directly with the matters that I investigated in this
 7 case, the economics of voting particularly when votes are
 8 connected to economic interests and a contrast to let's say
 9 democratic voting, one person one vote, voting rule.
 10 I've taught about the economics of indemnification. A
 11 number of my courses deal with valuation.
 12 Also, as was alluded to in the argument that I just
 13 heard, I taught extensively about various aspects of different
 14 types of principal agent relationships, the relationship -- the
 15 difference between the economics of principal-agent
 16 relationships in different contexts and how those relationships
 17 can be modified by contrast.
 18 Q Professor, are you a member of any professional
 19 organizations?
 20 A Yes. I'm a member of the of American Economics
 21 Association and the American Finance Association.
 22 Q Do you have any other professional affiliations?
 23 A I am a governing member of the Brena Freeman Institute
 24 at the University of Chicago and former member of various
 25 organizations as well.
 26 Q Let's discuss publications. Have you authored any

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1 Fischel - Direct - Mr. Ingber
 2 publications?
 3 A Yes. I published several books and I think
 4 approximately 50 articles in leading legal and economics
 5 journals.
 6 Q I'm not going to ask you to run through each of those
 7 50 publications but can you give the Court a sense of what
 8 those publications covered?
 9 THE COURT: Excuse me. Where is the CV in the
 10 record or is it not?
 11 MR. INGBER: I believe it's attached to the
 12 report, Professor Fischel's report. It's at the end of
 13 his report and I'm happy to hand the report up to your
 14 Honor right now. I plan to offer it into evidence at some
 15 point.
 16 THE COURT: Is it not included in one of your
 17 binders?
 18 MR. INGBER: I am sorry. It's Trustees' Exhibit
 19 20 is the first report and then the supplemental report is
 20 Trustees' Exhibit 22 and Professor Fischel's CV is at the
 21 end of his written report and before the exhibits start.
 22 THE COURT: Thank you.
 23 MR. INGBER: If you would like copies of the
 24 report, your Honor, I have them right here.
 25 THE COURT: We can always use an extra copy of
 26 the report.

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1 Fischel - Direct - Mr. Ingber
 2 Let's make sure counsel are in the habit of
 3 showing each other what's being handed up.
 4 MR. CHANG: We have.
 5 THE COURT: I assume that if you plan to hand
 6 something up, either side, that you would have confirmed
 7 in advance and I will hear if there is any objection
 8 without having to ask.
 9 MR. INGBER: Thank you, your Honor.
 10 May I proceed?
 11 THE COURT: Please.
 12 MR. INGBER: Thank you.
 13 Q So, I was saying I'm not going to force you to go
 14 through each and every one of your 50 articles and describe
 15 what they were about but if you can just give the Court -- if
 16 you can just give the Court a sense of the topics that were
 17 covered in the articles?
 18 A Very similar subjects. I've written about the
 19 economics of voting, the role of indemnification and assurance.
 20 I've written extensively on valuation including statistical
 21 methodology for analyzing the affects of events and information
 22 on prices. I've written again extensively on different types
 23 of principal-agent relationships. I've written about trust
 24 relationships and how those trust relationships relate to the
 25 general economics of principal-agent relationships. I've also
 26 written about the meaning of the duty to be informed, the legal

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1 Fischel - Direct - Mr. Ingber
 2 duty to be informed in a situation where gathering more
 3 information is costly both because of the direct cost of
 4 getting additional information as well as the opportunity cost
 5 of what you might lose by getting additional information.
 6 So that generally subject of economics of information
 7 in connectin with the legal duty to be informed has been
 8 something I've both taught about and written about.
 9 Q Have any of your books and articles been cited by
 10 courts?
 11 A Yes, hundreds of times including numerous times by the
 12 United States Supreme Court and I think courts of every level
 13 at the federal and state level.
 14 Q And you may have covered this in a previous answer but
 15 just to make sure the record is clear, do any of your books or
 16 articles specifically cover the types of issues arising in this
 17 case?
 18 (Continued on next page)
 19
 20
 21
 22
 23
 24
 25
 26

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1 Fischel Direct - Ingber
 2 A Yes.
 3 I think all the subjects that I described a
 4 minute ago arise in one way other another in
 5 connection with the work that I've done in this case,
 6 and they're all part of the academic work, the
 7 scholarship that I've done.
 8 Q Has any of your research covered issues such as
 9 those relating to event studies?
 10 A Yes.
 11 I wrote an early article called The Use of
 12 Modern Finance Theory in Securities Fraud Litigation,
 13 which was a discussion of the use of regression
 14 analysis in event studies in litigation.
 15 That actually is part of my analysis in this
 16 case that I'm going to talk about.
 17 It's also one of the articles that was cited
 18 favorably by the United States Supreme Court, and
 19 I've written about it in other articles, as well.
 20 Q Is there any other research that you have
 21 performed that you think is particularly relevant to the
 22 issues arising in this case relating to the settlements?
 23 A Well, I think really all the different subjects
 24 that I mention, you know, maybe if I had to prioritize
 25 them, I'd say they're all relevant, but because this is a
 26 settlement decision, it directly implicates the economics

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1 Fischel Direct - Ingber
 2 of information and what it means to be sufficiently
 3 informed to make a reasonable business decision as
 4 opposed to the alternative of either giving up, in
 5 effect, a bird in the hand, the settlement that's
 6 presented to today, and taking the risk of gathering more
 7 information, which is costly, expensive, and may result
 8 in losing the bird in the hand as the settlement offer,
 9 so present, in many cases it might be worth to do it, but
 10 in order to analyze whether it's worth it or not, you
 11 have to analyze the full costs and benefits.
 12 That's what I've written about in my writing.
 13 Q Have you been invited to lecture to any types of
 14 audiences?
 15 A Yes.
 16 I've lectured extensively to various groups
 17 in conferences of Federal and State Judges, to
 18 business groups, legal groups.
 19 I've talked earlier this year, gave a talk at
 20 the Bar Association of the City of New York.
 21 I've spoken at many of the major universities
 22 in the country, and various more informal gatherings.
 23 Q Professor, have you ever served as consultant on
 24 economic issues to the Government, or to any regulatory
 25 agents?
 26 A Yes, many, many times. I've served as a

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1 Fischel Direct - Ingber
 2 consultants and/or expert witness to, certainly, the
 3 United States Department of Justice that I mentioned, the
 4 Securities and Exchange Commission, National Association
 5 of Securities Dealers, the Federal Trade Commission, all
 6 the banking regulatory agencies; New York Stock Exchange,
 7 the National Association of Securities Dealers, some of
 8 the Futures and Options Exchanges, as well.
 9 There may be others, but that's what comes to
 10 mind.
 11 Q You previously testified as an expert witness?
 12 A Yes, many times.
 13 Q Approximately, how many?
 14 A Oh, if I limit myself to trials and/or I guess
 15 arbitrations like trials, maybe 70 times over a 30-year
 16 period.
 17 Q Are there any instances in which you have not
 18 been qualified as an expert to give testimony?
 19 A No, never.
 20 Q Have you ever served as an expert in a judicial
 21 proceeding in which a settlement was being proposed and
 22 reviewed by a Court?
 23 A Let me just modify my answer because I don't want
 24 to overstate for the Court;
 25 There's one case that is actually currently
 26 on appeal in the Second Circuit. Again, I think it

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1 Fischel Direct - Ingber
 2 was mentioned in the argument, the Pfizer case, where
 3 a Court ruled that my testimony was inadmissible
 4 under doubt, but not for qualification reasons, but
 5 because in the Court's opinion, I did not adequately
 6 explain the calculation that I did modifying my
 7 original opinion after the Court's summary judgment
 8 opinion. That was argued in the Second Circuit eight
 9 months ago, will come down any day, but other than
 10 that, with that qualification, I would say.
 11 And, again, that was not a ruling on
 12 qualifications.
 13 So, in terms of qualifications, being an
 14 expert, I was qualified in every single proceeding
 15 I've ever appeared in.
 16 Q Thank you.
 17 So, back to the -- thank you for that
 18 clarification.
 19 Back to the question that I had asked; that
 20 is, whether you served as an expert in a judicial
 21 proceeding in which a settlement was being proposed
 22 and reviewed by a Court.
 23 A Yes.
 24 Well, again, Country-Wide proceeding has
 25 gotten a lot of attention. I was an expert in that
 26 proceeding, and was qualified there.

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1 Fischel Direct - Ingber
 2 There was also a case several years ago
 3 involving a class action settlement between a class
 4 and AIG. After the settlement was entered into, the
 5 settlement was challenged if I remember correctly by
 6 the New York Attorney General on the ground that one
 7 of the experts in the proceeding on which his
 8 analysis on which the settlement was based had some
 9 serious errors, and that was a basis for invalidating
 10 the settlement. I think the errors were pretty much
 11 conceded.
 12 And then, I was retained by the parties at
 13 the suggestion of the Court to advise the Court as to
 14 whether or not the methodological errors by the
 15 expert were sufficient to invalidate the settlement,
 16 and I analyzed the errors, again, the admitted
 17 errors, and the affect of those errors on the value
 18 of the settlement, submitted a report, concluded that
 19 the errors were not sufficient to invalidated the
 20 settlement.
 21 Ultimately, the Court agreed in part based on
 22 the report that I submitted.
 23 I've also had a lot of other experience with
 24 settlements in various forms.
 25 I was retained by the United States
 26 Department of Justice after the World Trade Center

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1 Fischel Direct - Ingber
 2 disaster here in New York to work with the Department
 3 of Justice to come up with valuation formulas to
 4 propose to victims of the World Trade Center in
 5 settlement of their potential claims as an
 6 alternative to litigation, so I did that.
 7 We're currently involved advising trustees in
 8 other proceedings as to whether or not particular
 9 settlements are reasonable, or what a reasonable
 10 settlement range would be.
 11 And then, I would just say more generally,
 12 I've been retained by insurance companies to analyze
 13 whether settlements that they've been asked to
 14 reimburse particular parties, or litigants, whether
 15 the settlements were reasonable. I've submitted
 16 reports in that area.
 17 And then, just more informally, I'm asked all
 18 the time in connection with the work that we do
 19 whether particular settlement offers that are either
 20 made, or proposed to be made, depending on which
 21 clients retained us, were numbers based on the
 22 context of the matter whether were ones that I would
 23 feel comfortable -- whether or not I would feel
 24 comfortable with, advise in favor of, or advise
 25 against.
 26 Q Thank you. Have you done work relating to

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1 Fischel Direct - Ingber
 2 mortgage bank securities for residential mortgage loans
 3 in other cases?
 4 A Yes, extensively. Again, there's the
 5 Country-Wide case. Obviously, I was also --
 6 Q And, Professor, let me just interrupt. I know we
 7 talked a lot about the Country-Wide case, and I've
 8 described for the Court the work that you performed in
 9 Country-Wide, but why don't you describe the work that
 10 you did in Country-Wide?
 11 A Yeah, and actually, it's a fair question because
 12 there are a lot of different Country-Wide cases, and I'm
 13 using Country-Wide as a shorthand to the previous Article
 14 77 proceeding that I was involved in.
 15 I was, as I think I heard in the argument, I
 16 was retained there, we were retained, and I was
 17 retained as an expert there after the settlement was
 18 entered into, so I had a different role than the role
 19 that I was asked to perform here, and there, there
 20 were various allegations; such as, the allegation
 21 that I know has recently been made in this case about
 22 various alleged conflicts of interest that the
 23 trustee and the law firms representing the trustee
 24 had.
 25 There were claims about comparable
 26 settlements, and generally, claims about the

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1 Fischel Direct - Ingber
 2 inadequacy of the settlement in light of the alleged
 3 potential recovery.
 4 I analyzed all those issues, testified as an
 5 expert witness there, and the Court heard my
 6 testimony and reached the conclusion that it did, but
 7 apart from that, I've had many other cases involving
 8 mortgage backed securities.
 9 I've been an expert a number of years ago for
 10 the, again, the United States Department of Justice,
 11 in a whole series of cases following the United
 12 States Supreme Court's decision in United States
 13 versus Winstar where all those cases involved
 14 analyzing the investment characteristics of mortgage
 15 backed securities as an investment alternative, so I
 16 testified extensively about that.
 17 Currently, a witness in another major case
 18 involving claims about modifications of mortgage
 19 backed securities, and the disclosures that were made
 20 in connection with those modifications.
 21 I've been involved in the litigation brought
 22 by the FHFA against a whole series of different
 23 financial institutions. That has been a major
 24 engagement for our firm, which all those cases
 25 involve the performance of mortgage backed
 26 securities, the relationship between defective,

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1 Fischel Direct - Ingber
 2 alleged defective underwriting in the housing crisis,
 3 and collapse of the value of mortgage loans, and
 4 again, also involved in a number of different
 5 matters, currently, involving retention by trustees
 6 to analyze issues relating to potential settlements
 7 of mortgage backed securities claims.
 8 Q Now, can you describe your experience in matters
 9 involving the entities in this case, including JP Morgan?
 10 A I've had a lot of experience in matters involving
 11 JP Morgan. I've been a witness in major litigation
 12 against JP Morgan.
 13 I've also been a witness in major litigation
 14 where we and I were retained on behalf of JP Morgan.
 15 That's generally true with many of the entities
 16 involved.
 17 I mentioned the FHFA, which is one of our
 18 major current clients.
 19 We've also had many matters adverse to the
 20 FHFA where I have been involved. It's true for I
 21 believe your client, the Bank of New York, worked
 22 adversely to the Bank of New York, as well as
 23 retained by the Bank of New York Mellon.
 24 It's also true for many of the other
 25 Institutional Investors, besides Fannie and Freddie.
 26 Many of them are involved in major litigation and we

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1 Fischel Direct - Ingber
 2 tend to be involved either on the same side or on the
 3 opposite side.
 4 Q Okay, thank you, Professor.
 5 I think I'd like to move on now to your
 6 retention in this case and your specific assignment.
 7 When were you first contacted in this matter?
 8 A I think sometime in late 2013. I think maybe in
 9 the November, '13 if I remember correctly.
 10 Q Okay. And what happened after you were first
 11 contacted?
 12 A I think we were invited to come to New York to
 13 attend a meeting with the trustees, and then shortly
 14 thereafter, invited again to come to New York and make a
 15 presentation to the trustees as to what we thought the --
 16 excuse me, what we thought the issues were that we could
 17 analyze in connection with providing guidance, or advice
 18 to the trustees on the reasonableness of the potential
 19 settlement.
 20 Q And at those two meetings, did the trustees and
 21 their counsel have an opportunity to ask you questions?
 22 A Yes.
 23 Q About anything ranging from your qualifications
 24 to your approach to the assignments?
 25 A Yes. They were very well attended meetings.
 26 There were a lot of representatives of different trustees

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1 Fischel Direct - Ingber
 2 that were there, and in both meetings there was extensive
 3 give and take about our ideas, questions about backing
 4 qualifications. I think it's fair to say we understood
 5 those meetings to be something of a competitive situation
 6 where the trustees were deciding who to hire. I don't
 7 think we were the only firm that was interviewed, if I
 8 remember correctly, and so I think there were probing
 9 questions about background qualifications, approach
 10 really, anything that was deemed to be relevant by the
 11 representatives of the trustees who were there.
 12 Q And at those meetings, did the trustees ever
 13 express a view on the merits of the proposed settlement?
 14 A No. Quite the opposite.
 15 The one thing that was emphasized over and
 16 over again by the representatives of the trustees who
 17 were there was that the trustees had no bias one way
 18 or the other in terms of approving the settlement, or
 19 not approving the settlement in whole, or in part,
 20 and that they wanted a completely objective analysis
 21 without any predetermined outcome in terms of what
 22 the trustee -- the outcome the trustees would like to
 23 see happen.
 24 Q What about after those meetings, did the trustees
 25 ever, or their counsel ever express to you any view on
 26 the merits of the proposed settlement?

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 2 A No.
 3 Through out, the refrain that was emphasized
 4 over, and over, and over again was that the trustees
 5 just wanted our objective opinion, and did not have a
 6 view one way or the other in terms of what outcome
 7 they, themselves, would prefer, or would like to see
 8 happen.
 9 Q So, about when you were engaged, formally
 10 engaged?
 11 A I think shortly after the second meeting we made,
 12 as I recall, a presentation. We had a set of materials
 13 that -- particularly, at the second meeting that we
 14 provided and discussed, and I think within a week or two
 15 after that second meeting, I think we were formally
 16 engaged.
 17 THE COURT: I hope it included a PowerPoint.
 18 MR. INGBER: We didn't hold it against them.
 19 THE WITNESS: I actually don't remember.
 20 Q And, Professor Fischel, what did you understand
 21 to be your assignment in the case?
 22 A Oh --
 23 Q Or in the matter?
 24 A To analyze the evidence, economic evidence and
 25 related evidence that was within our areas of expertise,
 26 to provide objective guidance to the trustees for their

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 2 consideration in terms of their ultimate decision about
 3 whether or not to accept the settlement in whole or in
 4 part.
 5 Q Was that on a trust basis?
 6 A It was originally on a trust basis, and then we
 7 were subsequently asked to supplement our analysis by
 8 performing the analysis not just on the trust basis, but
 9 on an analysis going -- supporting loan group by
 10 supporting loan group.
 11 Q What is a supporting loan group for the benefit
 12 of the Court?
 13 A Trusts, generally, have different loan groups,
 14 and sort of different levels of priority of certificate
 15 holders. Their rights are typically supported by one or
 16 more of the loan groups in a particular trust.
 17 Q All right. So, after you were retained,
 18 Professor, what type of interaction did you and your team
 19 have with the trustees?
 20 A You know, I'd say we had fairly continuous
 21 interaction. There was a lot of information that we were
 22 able to get on our own because of our own experience and
 23 familiarity with the issues that were involved, but we
 24 also needed a lot of information both from the trustees
 25 and from JP Morgan, as well, and so I would say, we had
 26 continual interaction about information.

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 2 And then, I would say as the process
 3 proceeded, we had information about deadlines,
 4 interaction with deadlines, possible extensions of
 5 deadlines, and also some, I would say, informal
 6 progress reports about where we were, and what we
 7 thought was possible within certain time tables,
 8 particularly before there were extensions.
 9 Q Did you get cooperation from the trustees in
 10 obtaining the information that you were looking for?
 11 A Yes.
 12 The trustees pledged at the outset that they
 13 would make themselves available to provide
 14 information that we needed, and also to ensure that
 15 we would have access to JP Morgan, to be able to get
 16 information from JP Morgan, as well.
 17 Q Did you or your team have direct dealings, direct
 18 interactions with JP Morgan?
 19 A Yes.
 20 We had, and again, when I say we, I'm not
 21 suggesting that I, myself, was on every single call
 22 with either the trustees, or JP Morgan because we had
 23 a team of people working on it, but there was
 24 information that we just needed that we couldn't get
 25 any other place, but from JP Morgan, and so we
 26 requested that information, and for the most part, we

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 2 got it.
 3 Q And can you describe, perhaps, at a high level
 4 the type of information that you needed and obtained from
 5 JP Morgan?
 6 A Well, for example, we wanted to know which loans
 7 were the subject of repurchase claims.
 8 We were also interested in the litigation
 9 that JP Morgan had with the GSE's, and we wanted to
 10 know the loan characteristics of the loans that were
 11 repurchased by the GSE's, and that information isn't
 12 available any other place, but from JP Morgan, so we
 13 requested it.
 14 We requested it, and we got it.
 15 Q What other types of information did you rely on
 16 in forming your opinions?
 17 A Well, there's a voluminous amount of information.
 18 I couldn't begin to describe it all, but generally
 19 speaking, from the trustees we needed governing
 20 documents. We needed information about tolling
 21 agreements. We needed guidance on the statute of
 22 limitations. We needed information on the holdings of
 23 supporters of the settlement, and the opposition to the
 24 settlement.
 25 We also on our own were able to collect
 26 information about other settlements, to do an

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 2 analysis of market evidence about how investors in
 3 JPM, and also certificate holders, whether the news
 4 about the settlement either was viewed favorably or
 5 unfavorably as sort of a market test of the
 6 reasonableness of the settlement.
 7 And we also, I would say, just generally,
 8 needed just a lot of detail about the trusts, the
 9 different supporting loan groups, the different
 10 certificate holders, their identities, etc., and we
 11 were able to collect all of that information.
 12 Q I know this is difficult, but can you try to give
 13 the Court a sense of the volume of all of the material
 14 that you received and considered?
 15 A Yeah.
 16 As I said, between the different sources what
 17 we got from the trustees from we got from JPM, what
 18 we collected on our own, I think we tried to compile
 19 a list. I think all the entries, if I remember
 20 correctly, was I think over 30 pages single-spaced,
 21 so a lot of information.
 22 Q Okay. Now, Professor, who made the decision
 23 about what information should be collected?
 24 A You know, I'd say it was a -- it was a
 25 combination. Certainly, a lot of the background
 26 information was just provided to us by the trustees, but

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 2 in terms of what information we needed to do our
 3 analysis, I think without exception we were the ones that
 4 asked for particular information, and as I said,
 5 typically got it.
 6 Q Do you believe that you and your team had enough
 7 information to be able to make a recommendation about the
 8 settlement on a trust and loan group level?
 9 A Yes.
 10 Again, obviously, because it's a settlement,
 11 and this is a big part of my report dealt with the
 12 subject, you're dealing with very incomplete
 13 information, and that's true in all settlements, but
 14 in terms of forming an opinion about the
 15 reasonableness of the settlement on a trust by trust
 16 basis, and on an SLG by SLG basis, I felt we did have
 17 enough information as a result of the analysis that
 18 we performed to make a recommendation to the
 19 trustees.
 20 Q And did you think you had enough time to complete
 21 your analysis?
 22 A Initially, I was nervous about it, but as a
 23 result of several extensions that were negotiated, I did
 24 feel we had enough time.
 25 Q Professor, did you meet again with the trustees
 26 after your initial set of meetings?

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 2 A Yes. I think the next face-to-face meeting that
 3 we had with the trustees was after we sent a preliminary
 4 draft of our initial report to the trustees. We had
 5 another face-to-face meeting in New York.
 6 Q What was the purpose of that meeting?
 7 A I think to present our analysis report and
 8 preliminary conclusions to the trustees for the trustees
 9 to understand what our approach was, what our conclusions
 10 were, at least on a preliminary basis, and allow the
 11 trustees to not just to hear it, but to probe it, to ask
 12 questions, and that's exactly what happened.
 13 Q I think you mentioned the supplemental report at
 14 some point in your testimony.
 15 Why did you submit a supplemental report to
 16 the trustees?
 17 A Oh, because we were told that the payments under
 18 the settlement agreement were based on the SLG level as
 19 opposed to the trust level, and therefore, in addition to
 20 our analysis on the trust level, it was desirable for the
 21 trustees, so they would be as informed as they felt they
 22 needed to be to get a recommendation from us on the SLG
 23 level, as well.
 24 THE COURT: What is SLG level?
 25 THE WITNESS: I'm sorry, your Honor;
 26 supporting loan group.

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 2 THE COURT: Thank you.
 3 THE WITNESS: It's in every trust.
 4 Not every, but trusts generally have more
 5 than one supporting loan group as part of the trust.
 6 Q Professor, did you do any work after you
 7 submitted your final report and supplemental report to
 8 the trustees?
 9 A Some. We were asked a couple I think loose-end
 10 questions about what our opinions were about the
 11 reasonableness of the settlement with a couple of trusts,
 12 or supporting loan groups that were left over where there
 13 was some dispute about, so we did that.
 14 And then, obviously, preparing for deposition
 15 and trial.
 16 (Whereupon, Senior Court Reporter Kathy Jones
 17 resumed.)
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 2 T8
 3 Q Before we get into the substance of your opinions,
 4 Professor, would it be helpful for you to have a copy of the
 5 report and the supplemental report?
 6 A Yes, if it's not too much trouble, I think it would.
 7 MR. INGBER: May I approach, your Honor?
 8 THE COURT: Let's just either have these marked
 9 and identified with specificity for the record exactly
 10 what is being handed up.
 11 MR. INGBER: Sure.
 12 We are handing up Trustee's Exhibit 20 which is
 13 the expert report of Daniel R. Fischel and Trustee's
 14 Exhibit 22 which is the supplemental expert report of
 15 Daniel R. Fischel.
 16 THE COURT: Professor, I would just --
 17 withdrawn. I don't think we're going to need to further
 18 identify these.
 19 You can continue with your questioning.
 20 MR. INGBER: We're going to get into the
 21 substance of the opinion, shortly.
 22 So, your Honor, the Trustees petitioner would
 23 offer into evidence Trustee Exhibit 20 and Trustee Exhibit
 24 22.
 25 MR. CHANG: Your Honor, we would object to the
 26 introduction in evidence of the reports. First of all,

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 2 they are hearsay. Secondly, we think that they would
 3 contravene the ruling you just made that the opinions have
 4 to be established -- foundation for them has to be
 5 established on an issue-by-issue basis and the report
 6 itself can only be used for the fact that it was
 7 introduced as something the trustee considered, not for
 8 the truth of the matters within the document.
 9 THE COURT: Mr. Rollin, do you have a position
 10 on these reports?
 11 MR. ROLLIN: Your Honor, we certainly have the
 12 position that they should be admitted for what was
 13 provided to the trustee in terms of their notice. We
 14 don't have a position at this time with respect to the
 15 truth of the matters asserted.
 16 MR. INGBER: Your Honor, I agree with Mr.
 17 Rollin. They should be offered not as hearsay but to show
 18 what the trustees received from Professor Fischel.
 19 THE COURT: They will be admitted into evidence
 20 for that limited purpose.
 21 MR. CHANG: Thank you, your Honor.
 22 (Trustee's Exhibits 20 and 22
 23 deemed marked in evidence)
 24 THE COURT: Now, we just have an issue with
 25 respect to getting exhibits marked. You may have to
 26 confine this procedure as time goes by but we don't need

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 2 to take the time right now.
 3 I will ask counsel to keep running lists of
 4 documents which have been marked into evidence to compare
 5 the list periodically throughout this hearing to make sure
 6 there are no disputes and to present them to me
 7 periodically.
 8 Right now 20 and 22 will be deemed marked into
 9 evidence for the limited purpose stated on the record.
 10 MR. INGBER: Thank you, your Honor.
 11 Q Okay. Professor, we'll get into the substance of your
 12 opinion in just a moment?
 13 A Can we start by having you summarize your ultimate
 14 recommendations. I would ask that we bring up tab one please.
 15 A Yes. This is the ultimate conclusion that we reached
 16 after the analysis, the extensive analysis that we performed.
 17 THE COURT: Excuse me. I would like you, if you
 18 put documents up, to tell me where they are in the
 19 exhibits.
 20 MR. INGBER: We are not offering these into
 21 evidence, your Honor. So, they are not marked as
 22 exhibits. This in particular is a demonstrative.
 23 THE COURT: Is this not part of the reports?
 24 MR. INGBER: This document, as I mentioned, the
 25 binder that I gave your Honor and that Professor Fischel
 26 has is a combination of two things. One is a

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 2 demonstrative. I believe there are seven demonstratives
 3 that we intend to use for purposes of this examination.
 4 And then we have other documents that are part of the
 5 report, separate exhibits that are attached to the report.
 6 So, for ease of reference during the examination, we
 7 compiled this binder. Each time I bring up something that
 8 has been introduced into evidence or something that we're
 9 seeking to introduce into evidence, I will note for the
 10 record what exhibit number it is.
 11 THE COURT: Well and good but the demonstratives
 12 that are being put up on the screen have not been marked
 13 for any purpose and there are no hard copies anywhere.
 14 MR. INGBER: We have hard copies with us and we
 15 can mark them. If your Honor would like them to be
 16 marked, we can certainly mark them as Professor Fischel's
 17 Demonstrative 1 for example.
 18 THE COURT: Have you conferred with objector's
 19 counsel about these demonstratives.
 20 MR. INGBER: We have sent the demonstratives to
 21 objectors' counsel. We asked if they had any objection to
 22 demonstratives.
 23 MR. CHANG: We have no objection provided the
 24 entry only for evidence of what the trustees received, not
 25 for the truth of the matter asserted on the slides.
 26 MR. ROLLIN: That's our position as well, your

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 2 Honor.
 3 THE COURT: We don't need to do this now but I
 4 certainly think that the hard copies should be marked for
 5 ID only. That's the way I usually mark demonstratives.
 6 In the future, if either side is going to use
 7 demonstratives that are going to be put up on the screen,
 8 they should be marked and you should be sure there are no
 9 objections before they are put up.
 10 MR. INGBER: Okay.
 11 THE COURT: Thank you.
 12 MR. INGBER: Thank you, your Honor.
 13 THE COURT: Let me just say we'll go for about
 14 another ten minutes. Then we'll take a ten-minute recess
 15 and then we will resume and go until about 4:45.
 16 MR. INGBER: Your Honor, if this has any bearing
 17 on the timing, Professor Fischel is just going to go
 18 through in about a minute the summary of his
 19 recommendations and then we are moving on to a different
 20 topic.
 21 THE COURT: So, you would prefer to have the
 22 break after.
 23 MR. INGBER: It may just be cleaner at that
 24 point.
 25 THE COURT: That's fine.
 26 MR. INGBER: Okay.

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 2 Q So, where were we, Professor?
 3 A I think I was about to say if you add up all of our
 4 recommendations in my two reports, you get these numbers in
 5 terms of my recommendations for whether the settlement should
 6 be accepted or rejected on a trust basis and on a supporting
 7 loan group basis.
 8 So, for the trusts, I recommended that the trustees
 9 accept the settlement for 314 trusts and reject the settlement
 10 for 16 trusts and for the supporting loan groups, and again
 11 that number is larger because trusts generally have more than
 12 one supporting loan group as part of them. There were 792
 13 supporting loan groups. I am sorry. There are 816 supporting
 14 loan groups. I recommended that the trustees accept the
 15 settlement for 792 of them and reject the settlement for 24 of
 16 them.
 17 MR. INGBER: Your Honor, I think this is
 18 probably --
 19 THE COURT: This is only one of seven right now?
 20 MR. INGBER: One of seven?
 21 Oh, one of seven demonstratives, yes. There
 22 will be several other demonstratives and exhibits as well.
 23 THE COURT: Okay. I think we can take a
 24 ten-minute break. It will be a real ten-minute break.
 25 THE WITNESS: Thank you, your Honor.
 26 THE COURT: Professor Fischel, you may step

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 2 down.
 3 THE WITNESS: Thank you, your Honor.
 4 (Witness excuse)
 5 (Recess taken)
 6 (Witness resumed the stand)
 7 THE COURT: Please resume.
 8 MR. INGBER: Thank you, your Honor.
 9 Q Professor, in your report, you discussed what you
 10 referred to as the economics of the settlement decision.
 11 Could you explain what that term means to Justice
 12 Friedman please.
 13 A Yes, it's basically an application of the economics of
 14 information under uncertainty that I referred to in my earlier
 15 testimony that a settlement offers the parties obviously
 16 resolution and end to the controversy but it also entails
 17 giving up a future outcome. A lot of times that future outcome
 18 is perceived to be likely better than the settlement offer in
 19 which case the settlement offer is rejected. That happens all
 20 the time.
 21 But the opposite also happens all the time because
 22 rejecting a settlement is costly. It's costly because if you
 23 go forward, obviously, there is going to be a lot of time and
 24 resources. That's costly in terms of going forward to litigate
 25 further. Those I would say are direct costs.
 26 There is also the possibility of a big opportunity

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 2 cost, namely, that the settlement offer that was available
 3 today might not be available a year from now or six months from
 4 now or whatever the relevant time period is. So, the issue in
 5 terms of evaluating whether to accept a settlement is whether
 6 the potential benefits from going forward outweigh the cost of
 7 going forward both in terms of the direct costs, the time and
 8 expense of litigating further and also taking the risks that
 9 going further won't improve the result, might result in a worse
 10 outcome and in the extreme case losing altogether, the
 11 settlement not being available any further, losing the case on
 12 motion by the Court, losing the case in front of a jury,
 13 whatever the situation happens to be in which case you get the
 14 worst of all worlds that you give up the settlement, you incur
 15 a lot of costs in terms of time and resources and you wind up
 16 with a worse outcome than you could have had if you had
 17 accepted the settlement.
 18 So, there is these tradeoffs between certainty and
 19 uncertainty which typically occur all the time and they are
 20 very hard to balance and they can -- you can reach different
 21 decisions. Even faced with the same information, sometimes
 22 different people will reach -- different entities will reach
 23 different decisions because it's inherently a process that has
 24 a lot of uncertainty associated with it.
 25 That's a summary of the various tradeoffs involved.
 26 Q What's the applicability of those principles that you

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 2 just described the facts and circumstances here in this case?
 3 A I think those principles have direct applicability to
 4 the facts and circumstances of this case because the
 5 uncertainty of going forward in a case like this is I would say
 6 particularly great. Not just in terms of the cost of
 7 litigating and who knows how many years it would be to litigate
 8 this case to a conclusion but the potential outcomes are very
 9 very uncertain.
 10 For one thing, a big part of my analysis is, as I'll
 11 get into, is how much support there was for the settlement
 12 versus how much support there was for rejecting the settlement.
 13 If there is not enough support for rejecting the settlement and
 14 therefore likely not enough support for litigating the claims,
 15 what could happen would be the settlement would be rejected,
 16 the \$4.5 billion, and the settlement improvements would be lost
 17 and the claims would never be litigated because the trustee
 18 would never go forward because there wasn't sufficient support
 19 on the part of the certificateholders to litigate and incur the
 20 cost of litigation. That would be a particularly bad outcome
 21 to trade \$4.5 billion for zero.
 22 Even assuming that that hurdle could be overcome that
 23 there would be sufficient support on the part of the
 24 certificateholders to direct and indemnify the trustee to
 25 litigate, the outcome was extremely uncertain. There is a
 26 legal opinion by Justice Carpinello that many of the claims

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 2 would be barred under the statute of limitations. So, no
 3 matter how meritorious, no matter how aggressively litigated,
 4 assuming that a court were to agree with Justice Carpinello,
 5 those trusts would wind up with nothing because their claims
 6 would be barred.
 7 There are similar uncertain issues about the
 8 relationship between economic factors and underwriting factors,
 9 what the causation standard would be, whether loan file reviews
 10 would be required or not required. If they were required, how
 11 long it would take, how much money would be required.
 12 So, the decision in this particular context to reject
 13 the settlement would be one that could be the right thing to
 14 do, but you would have to be very very careful and very
 15 confident that it was the right thing to do because I would say
 16 in this case more than most the uncertainties about future
 17 outcomes and particularly the possibility of future negative
 18 outcomes, if a large percentage of the claims for example were
 19 barred by the statute of limitations or never brought at all
 20 because there wasn't sufficient certificateholder interest in
 21 litigating and again the result of that would be giving up the
 22 bird in the hand, the \$4.5 billion and the servicing
 23 improvements.
 24 So, I think the general principles of the economics of
 25 the settlement decision have even greater applicability under
 26 the facts and of circumstances of this case than most because

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 2 of the uncertain possible future outcomes and particularly
 3 maybe greater probability of negative outcomes in the future as
 4 compared with the \$4.5 billion and the servicing improvements
 5 today.
 6 Q Thank you, Professor.
 7 You also explained in your report an economic rule for
 8 evaluating a settlement. Can you explain to the Court what
 9 that rule is?
 10 A Yeah, it's easy to state in principle but hard to
 11 apply.
 12 THE COURT: Excuse me. Can you please refer us
 13 to the part of the report which discusses this.
 14 MR. INGBER: Yes. It starts on page 7.
 15 THE COURT: Thank you.
 16 MR. INGBER: And continues.
 17 THE COURT: Before we look at that, Professor
 18 Fischel, is it your position that there is a body of
 19 academic literature on the economics of settlements or the
 20 economics of settlement decisions?
 21 THE WITNESS: Yes, your Honor, there is an
 22 extensive body of economic literature on that subject.
 23 THE COURT: Is it referenced in either of the
 24 reports?
 25 THE WITNESS: I don't think its specifically
 26 cited, no.

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 2 THE COURT: Can you give me an idea of where
 3 this literature is published.
 4 I'm not suggesting I'm going out to look at it
 5 and if I did I would tell you. It would be my ethical
 6 obligation to do so. I would like to have some sense of
 7 where this literature was developed and also whether it's
 8 been developed principally in the context of this RMBS
 9 litigation?
 10 THE WITNESS: You know, in candor, your Honor,
 11 it has not been developed in the context of the RMBS
 12 litigation. It's a more general literature. It started
 13 with a very famous article by a Preston Klein and it's
 14 been extended in a series of articles by among others
 15 Professors Shavell and Polinsky and it basically talks
 16 about the conditions under which parties because of their
 17 assessment of the possible future outcomes will come to an
 18 agreement on a settlement as opposed to the situations
 19 where their assessments of the possible outcomes are so
 20 different that there is not an effective bid that they can
 21 agree on.
 22 My discussion in my report really talks about
 23 this economic literature, at a very high general level but
 24 it's actually a very technical sophisticated literature,
 25 sort of almost a branch of economic literature all on its
 26 own because there's been so much written about it but to

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 2 the best of my knowledge, as I said, it really is
 3 literature that applies to all settlement decisions as
 4 opposed to this particular context but it would apply to
 5 this particular context.
 6 THE COURT: Can you tell me -- can you identify
 7 any of the types of settlements to which the literature
 8 has been directed?
 9 THE WITNESS: I think it's as I said, your
 10 Honor, general literature to any situation where there is
 11 a dispute between a plaintiff and a defendant. And they
 12 both at every point in time are assessing the tradeoff
 13 between settlement and litigation and particularly when
 14 their assessments of settlement versus litigation will
 15 converge, when they will both see the outcomes the same
 16 way so that they will reach agreement.
 17 The literature as I said, it's not addressed to
 18 a tort case or a contract case or this case. It's just
 19 any case.
 20 If the Court would like, I'm happy to provide
 21 citations to this literature that I just referred to.
 22 THE COURT: It would be best to let the lawyers
 23 weigh in on that rather than agree between ourselves.
 24 MR. INGBER: I'll follow-up on that and of
 25 course would ask if your Honor would like a list of the
 26 economic literature to which Professor Fischel can

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 2 provide.
 3 THE COURT: We can discuss that at a later time.
 4 Please continue.
 5 MR. INGBER: Your Honor, to be more specific
 6 than I was before, the economic rule that I believe
 7 Professor Fischel is about to describe is paragraph 15 of
 8 Trustee's Exhibit 20, page 8.
 9 Q Okay. So, go ahead, Professor, your economic rule.
 10 A Again, as I said, it's simple to state, hard to apply
 11 but a settlement is the ability to get economic consideration
 12 today. So, the decision about whether or not to accept that
 13 settlement today is a comparison of that consideration today
 14 versus the expected benefits from litigating, taking all costs
 15 and benefits into account and choosing the right discount rate
 16 to reduce those costs and benefits to present value so you get
 17 a number to compare to the settlement number which is a
 18 concrete number.
 19 It's actually a little bit more complicated than that
 20 because different participants as I state in my report have
 21 different attitudes towards risk. Some litigants are more
 22 willing to tolerate risk and uncertainty about the future than
 23 others. That can also affect the discount rate that litigants
 24 apply to come up with with a present value.
 25 In theory what you want to do is try and quantify the
 26 expected benefits from litigation and get a number today and

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 2 compare that with the number of the settlement consideration
 3 that's offered today.
 4 Q So, you said it's more difficult in the practice.
 5 Was it possible in this case to quantify precisely the
 6 expected net present value of accepting and rejecting a
 7 proposed settlement for each trust and supporting loan group?
 8 A I think in any meaningful way, it's impossible because
 9 there is so many uncertainties, so many unknowns and
 10 particularly when you are trying to analyze it on a trust by
 11 trust basis or on a supporting loan group by supporting loan
 12 group basis, when there are so many uncertainties about what
 13 the facts will show, what the legal rules will be as applied to
 14 the facts in the future.
 15 So, what I did was, when I get to this part of my
 16 report, try and use proxies for possible expected recovery in
 17 litigation and I had a chosen number for the cost of
 18 litigating. So, I tried to perform basically the same exercise
 19 without what I would call false precision of trying to say the
 20 value of litigating is this many dollars and this many cents
 21 which I don't think is defensible given all the future
 22 uncertainties particularly on a trust by trust or loan group by
 23 loan group basis.
 24 Q So, what was the structure of the analysis that you
 25 did conduct?
 26 A You know, I would say in terms of an overview there

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 2 was a two-part analysis that I conducted. The first part was
 3 an analysis of the reasonableness of the settlement based on
 4 factors that apply to every trust and then the second part was
 5 an analysis of the reasonableness of the settlement as applied
 6 to individual trusts and individual loan groups.
 7 Q So, you mentioned that you analyzed factors that apply
 8 to all of the trusts?
 9 A Correct.
 10 Q What were those factors?
 11 A There are three.
 12 Q If you can just say what those factors were and then
 13 we'll break them down.
 14 A Fine. There were three of them. The first was how
 15 the settlement compared with other settlements, comparable
 16 settlements.
 17 The second was the significance of the support of the
 18 settlement by the Gibbs & Bruns investors relative to at that
 19 time the objectors represented by Quinn Emanuel.
 20 Q Let me just interrupt for a second.
 21 When you say the Gibbs & Bruns investors, you mean the
 22 institutional investors represented by Ms. Patrick and her
 23 firm?
 24 A Yes, that's exactly what I mean.
 25 Q Then you said opposition is expressed by investors
 26 represented by I think you said the QE firm?

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 2 A Yes.
 3 Q What is the QE firm?
 4 A It's a well-known law firm headquartered in New York
 5 although they have offices other places. They sent a letter
 6 that was provided to us by the trustees with a presentation
 7 opposing the settlement giving reasons and also describing
 8 their holdings.
 9 Q So, by QE you mean Quinn Emanuel?
 10 A Correct.
 11 THE COURT: Excuse me. Do you remember
 12 approximately how many parties they were representing?
 13 THE WITNESS: I don't remember the number of
 14 parties. I remember and I think this is in my report.
 15 They had -- they represented certificateholders holding
 16 approximately I think a 4.5 percent interest in the trusts
 17 versus the Gibbs & Bruns certificateholders who
 18 represented I think a 32 percent interest in all the trust
 19 in terms measured by unpaid principle balance, monies that
 20 were owed and that's very important because the voting
 21 rule for support or opposition to the settlement was for
 22 the most part based on unpaid principle balance.
 23 Again, I cover this in my report, your Honor,
 24 but something that I had placed a fair amount of weight on
 25 was the disparity in terms of the certificateholders and
 26 the economic interest of the certificateholders supporting

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 2 the settlement versus the much lower economic interest of
 3 certificateholders represented by Quinn Emanuel who were
 4 opposing the settlement.
 5 Q So, Professor, we're talking about the factors that
 6 apply to all of the trusts. You said there were -- you
 7 mentioned comparable settlements as the first?
 8 A Correct.
 9 Q You mentioned the support of the Gibbs & Bruns
 10 investors and the opposition of the QE investors as the second?
 11 A Correct.
 12 Q I think you were about to describe the third.
 13 A The third was the market evidence, whether information
 14 about news of the settlement was perceived as beneficial or not
 15 beneficial by investors in JP Morgan and also
 16 certificateholders because there's a simple economic test that
 17 I wanted to apply, namely, there were claims particularly by
 18 the Quinn Emanuel certificateholder group that the settlement
 19 was grossly inadequate, that it was way too low.
 20 Well, in economic terms, that creates a testable
 21 proposition. If the settlement was perceived as being way too
 22 low, then that would have been a windfall for JPM. So, its
 23 value should have gone up as a result of the settlement or news
 24 about the settlement relative to expectations about what a
 25 reasonable settlement would be and the affect should have been
 26 the opposite on certificateholders. They should be very

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 2 disappointed because if the claims of the Quinn Emanuel group
 3 were correct, the value of those certificates should decrease
 4 in price because they would be disappointed because they would
 5 be getting lower than what they expected.
 6 I also looked at an analyst commentary. JPM is one of
 7 the most actively followed financial firms. I looked again,
 8 I'm sort of anticipating, maybe summarizing what I would
 9 normally get to later. We looked at 43 different analysts
 10 reports about JPM to see if there was any evidence in those
 11 analyst reports that the most sophisticated market participants
 12 who were aware of all the prior settlements, all the other
 13 considerations involved with the claims would view the proposed
 14 settlement as inadequate and I didn't provide -- I didn't find
 15 any support for it. So, that was a relevant factor to me as
 16 well.
 17 Q Okay. Thank you. That was a helpful summary of the
 18 three factors.
 19 Now I would like to actually dig into each of them.
 20 Let's start with the first factor that applied to all of the
 21 trusts and that is comparable settlements.
 22 Why, Professor, did you look at comparable
 23 settlements?
 24 A Well, first of all, it's something that's very
 25 commonly looked at. When I mentioned the 43 analyst reports
 26 about JP Morgan or for that matter analyst reports from firms

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 2 involved in other settlements, one of the criteria that's
 3 frequently mentioned described analyzed as whether the
 4 settlement looks favorable or unfavorable relative to other
 5 settlements. It's also a situation where other litigants are
 6 facing similar tradeoffs in terms of getting the money today in
 7 terms of the settlement versus the future uncertainties that go
 8 along with litigating further.
 9 So, to get some sense of how other sophisticated
 10 economic actors interpreted the same type of evidence in
 11 reaching a decision about whether to settle or at what level to
 12 settle at again is just widely considered to be a factor, a
 13 factor that has to be taken with a big grain of salt because
 14 not every situation is the same. There are different claims.
 15 There is different evidence. There is different parties.
 16 There is different times. So that it's not possible I think by
 17 saying that one settlement is higher or lower than another to
 18 say definitively that one settlement is good and another
 19 settlement is bad. But nevertheless I think it's relevant
 20 evidence which is why I looked at it.
 21 (Continued on next page)
 22
 23
 24
 25
 26

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 2 Q And how did you go about identifying comparable
 3 settlements?
 4 A Oh, because, well, first of all, because we as a
 5 firm are so active in this area, we follow settlements
 6 closely based on publicly available information, news
 7 reports, and again, this is another area where I think we
 8 got valuable information as a result of the cooperation
 9 from the trustees and JP Morgan.
 10 There was information about some JP Morgan
 11 settlements that we wanted to get, that we asked for
 12 and we got it. There are a few things that were
 13 subject to confidentiality restrictions, but not
 14 material ones for our purposes, and as a result of
 15 what we could get on our own, and the information
 16 that we got from trustees, and JP Morgan, I think
 17 we were able to compile a fairly full set of what we
 18 call comparable settlements, although in the report,
 19 discuss on how some of those settlements are more
 20 comparable than others.
 21 Q Let's actually talk about the report. I'd ask
 22 Malcolm to please bring up Tab 2 in the binder, which is
 23 Trustee Exhibit 20, Professor Fischel's initial report,
 24 Exhibit D to his report.
 25 A You know, I think it's better if we highlight the
 26 whole page as opposed to just the top two lines.

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 2 Q Sure.
 3 A Hopefully, people have hard copies, so if the
 4 print is too small, they can see.
 5 Q Here we go.
 6 A Good job.
 7 Q Can you see that? You have a hard copy, as well?
 8 A Yeah, I have a hard copy in front of me.
 9 THE COURT: Can you see the hard copy?
 10 THE WITNESS: Yes, I can.
 11 Q Okay. So, Professor --
 12 THE WITNESS: Less and less, your Honor, but I
 13 can still see it.
 14 Q This is Exhibit D to your initial report?
 15 THE COURT: Exhibit D, right.
 16 MR. INGBER: Exhibit D as in Daniel.
 17 Q So, is this your analysis of comparable
 18 settlements, Professor?
 19 A Oh, this is part of our analysis of comparable
 20 settlements. I would say, these are the most comparable
 21 because they are also RMBS settlements involving trust
 22 claims, and there's six of them, and of these, I would
 23 say, the first two -- well, the top line is this
 24 settlement, the one that's at issue in Court today.
 25 The next two, I would say, are the most
 26 relevant because they predated the settlement at

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 2 issue right now.
 3 The others are relevant because they're other
 4 RMBS settlements, but because they postdated the
 5 trustees' decision, obviously, they were not taken
 6 into account by the trustee at the time. The
 7 trustees at the time, they made the decision that
 8 they did, so that said, would you like me to explain?
 9 Q Yes. If you can, just continue, walk through
 10 Exhibit D for the benefit of the Court, please?
 11 A Okay, well, let's start with the top line, which
 12 is our analysis of this settlement, and so it starts,
 13 obviously, with proposed settlement, the date that the
 14 settlement was announced. Going across, the settlement
 15 covers breach and warranties claims, and servicing
 16 claims, the amount of cash involved in the settlement, a
 17 little bit less than 4.5 billion dollars;
 18 Subsequent exhibits that explain where this
 19 number comes from, expected lifetime losses of --
 20 Q Before you get there, I think you skipped over --
 21 A I'm sorry.
 22 Q That's okay.
 23 A I did.
 24 In addition to the cash, there is part of
 25 the settlement, which deals with servicing, and
 26 so-called subservicing protocol, which involves the

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 2 transfer of loans from JPM as servicer to other
 3 servicers presumably to improve the quality of the
 4 servicing.
 5 Then there is -- the next column is expected
 6 lifetime losses of a little bit less than \$64 billion
 7 dollars, and again, I'll explain a little bit later
 8 where that number comes from.
 9 The next column is the value in the
 10 settlement of servicing improvements, the
 11 subservicing protocol, and here we only attributed
 12 \$31 million dollars worth of value of the settlement
 13 to the servicing improvements as part of the
 14 settlement. Again, I think I'll come back to that
 15 later as to where that number comes from.
 16 But, I think it's worth noting that our
 17 calculation of \$31 million dollars was out of a
 18 possible number of 2.4 billion dollars, so we applied
 19 a very severe haircut to that number in ways that
 20 I'll explain later.
 21 Q So, you're talking about the benefit, or
 22 consideration associated with servicing a total number of
 23 2.4 billion, you did discounted for purposes of your
 24 analysis to 31 million?
 25 A Right, correct.
 26 Q Okay.

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 2 A So, in other words, the settlement has cash, as
 3 well as servicing. The cash part that's I think
 4 undisputed, what that is.
 5 The servicing part, we had to decide how much
 6 of the 2.4 billion dollars that could have been
 7 attributed as value of the settlement to servicing,
 8 and for reasons that I think I'll explain later, we
 9 haircutted that number drastically, and only credited
 10 \$31 million dollars of that 2.4 billion dollars to
 11 the servicing improvements.
 12 Q Okay, thank you. If you can just continue with
 13 the column, and we can talk about the other settlements.
 14 A I'm sorry?
 15 Q I said, if you can just continue, if there's
 16 anything else you want to add about the columns, and we
 17 can talk about the settlements, or whatever you prefer.
 18 A Well, the last two columns are, I would say, the
 19 common denominator services that can be compared against
 20 each other. First is the cash, the percentage of cash
 21 consideration in the settlement relative to expected
 22 lifetime losses. That's a simple matter of division as
 23 the little heading suggests, so that this particular
 24 settlement provided cash of the 4.5 billion dollars,
 25 almost \$4.5 billion dollars presented certificate holders
 26 with a cash recovery in the settlement of seven percent

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 2 of expected lifetime losses, and if you add the value of
 3 the servicing improvements as we calculated with the
 4 severe haircut, that seven percent number goes to
 5 7.1 percent.
 6 Q All right.
 7 A So, the Country-Wide settlement, which is the
 8 next item down, which there's been a lot of discussion
 9 about it already from what I've heard in Court today,
 10 this is a quantification of the terms of the Country-Wide
 11 settlement, which is in some sense the most comparable
 12 because it also involves reps and warranties claims, and
 13 servicing claims, and cash, as well as servicing
 14 improvements, and rather than going through all of the
 15 columns, unless anybody has any questions, if you just
 16 look at the last two columns, you see that the
 17 Country-Wide settlement provided certificate holders with
 18 cash consideration of somewhere between 7.9 percent and
 19 12.5 percent of expected lifetime losses, depending on
 20 how you calculated expected lifetime losses. That's a
 21 higher number than the seven percent of this settlement.
 22 And then, if you include the servicing part,
 23 the Country-Wide settlement goes up to 10.2 percent,
 24 to a range of 10.2 percent to 17.1 percent, which is,
 25 again, significantly higher than the 7.1 percent.
 26 And then, in the Q&E materials and other

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 2 materials, there's a lot of discussion about one
 3 reason that demonstrates that the proposed settlement
 4 was inferior should be rejected was it was lower than
 5 the Country-Wide settlement, and so what we also
 6 tried to do was take various other factors into
 7 consideration that can effect the outcome of
 8 settlements and --
 9 Q What types of factors?
 10 A And we did that both in terms of the context of
 11 those two different settlements, as well as what I think
 12 I come to later, the investors, the certificate holders
 13 that were involved in negotiating them, but for starters,
 14 there's several significant differences between the
 15 settlement at issue in this Court and the Country-Wide
 16 settlement somewhat cut in opposite directions.
 17 For one, there is a significant risk in this
 18 case for this settlement that many of the claims are
 19 going to be barred by the statute of limitations.
 20 That's going to significantly depress a settlement
 21 amount that a firm like JPM is going to be willing to
 22 pay if they think that they're ultimate exposure is
 23 going to be significantly reduced because many of the
 24 claims are going to be barred by statute of
 25 limitations.
 26 There's also a significant time difference in

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 2 when the Country-Wide settlement was negotiated and
 3 announced, and when this settlement was negotiated
 4 and announced more than two years later, so with that
 5 two-year period, you get a lot more information about
 6 what expected losses are going to be, and with a lot
 7 better information about what expected losses are
 8 going to be, because more of the losses have already
 9 occurred, you don't have to make as many predictions
 10 about what's going to happen in the future, you have
 11 it a better basis of negotiating an outcome, a
 12 settlement that takes into account the better
 13 information that you now have about what lifetime
 14 losses are going to be relative to the earlier
 15 settlement, so that's another factor that can explain
 16 why the proposed settlement is lower than the
 17 Country-Wide settlement.
 18 But, in fairness, there's also, I would say,
 19 a third factor, which cuts in the opposite direction,
 20 which is in the Country-Wide settlement, there was
 21 significant uncertainty as to the ability of
 22 Country-Wide to pay, and there was a big dispute
 23 about whether it was possible if Country-Wide was
 24 unable to pay the 8.5 billion dollars, whether it was
 25 possible to reach the assets of Bank of America,
 26 which was appearing either in some kind of veil

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 2 piercing theory, or because of the direct liability,
 3 alleged direct liability of Bank of America under a
 4 variety of different theories, so to the extent
 5 there's collectability issues, that would cause the
 6 Country-Wide settlement, all else equal, to be
 7 depressed relative to this settlement since I'm not
 8 aware there's any judgment-proof, or collectability
 9 issues with this settlement with JPM, but you can
 10 see, really see the importance of that factor if you
 11 look at the next settlement, the ResCap settlement,
 12 and again, look at the last two columns;
 13 ResCap settlement involved much higher
 14 lifetime losses than either the current proposed
 15 settlement, or the Country-Wide settlement, but there
 16 were severe collectability issues because ResCap was
 17 in bankruptcy, so if you look at the comparable
 18 numbers in the last two columns, you get numbers of
 19 0.6 percent of recovery of expected lifetime losses,
 20 which is much lower than the settlement amounts in
 21 the proposed settlement, obviously. Obviously, much
 22 lower than Country-Wide, and again, that's a factor,
 23 that's a function of the fact that every settlement
 24 occurs even if there are similarities because it
 25 involves trusts, and trust-holding residential
 26 mortgage backed securities.

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 2 There's a different factual background in
 3 context, different possible legal rules that apply,
 4 and so in ResCap when it was clear that there was
 5 going to be big collectability issues, the ultimate
 6 settlement was a small fraction of what the
 7 Country-Wide settlement was, and obviously, also a
 8 small fraction of the proposed settlement, and if you
 9 look at the remaining --
 10 Q Before you get into the remaining ones, those are
 11 the two comparable settlements that were entered into
 12 before the JP Morgan settlement was negotiated and
 13 signed.
 14 And then, the next three in your exhibit are
 15 ones that were entered into after that proposed
 16 settlement agreement was signed, but before the
 17 trustees' decision was made in this case.
 18 A That's right.
 19 Q Okay.
 20 A But, if you look at the two settlements involving
 21 trusts holding residential mortgage backed securities,
 22 two most similar settlements prior to the trustees'
 23 decision in this case, you see a huge range from
 24 0.6 percent to, looking at the last column to
 25 10.2 percent to 17.1 percent, and the actual settlement
 26 in the settlement amount in the proposed settlement is,

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 2 you know, somewhere in the middle of those two, and
 3 again, not surprising, because every settlement reflects
 4 the different circumstances, the bargaining position, the
 5 expected factual development, the relevant legal rules,
 6 the relative attitude of the parties towards risk, how
 7 much people want to get money faster, you know, all kinds
 8 of different considerations.
 9 But, I would say, that this settlement was
 10 clearly lower than Country-Wide, much higher than
 11 ResCap, somewhere in the middle of those two.
 12 If you look at all the settlements, the ones
 13 before the trustees entered into this settlement, and
 14 the ones after, you know, I think you can fairly
 15 conclude that this particular settlement, if you just
 16 compare numbers, percentage of recovery relative to
 17 expected lifetime losses, was a little bit on the low
 18 end, but in the middle of the two settlements that
 19 were entered into prior to the time the trustees made
 20 the decision here.
 21 Q Okay, thank you.
 22 THE COURT: Excuse me, these were not the
 23 only two settlements that were entered into before
 24 this current settlement, were they?
 25 THE WITNESS: No, your Honor.
 26 In fact, in my report I have a whole bunch of

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 2 other settlements, but these were the ones that
 3 involved trusts, trust claims involving residential
 4 mortgage backed securities.
 5 THE COURT: Were they the only two involving
 6 representations and warranties claims in connection
 7 with residential mortgage backed securities?
 8 THE WITNESS: In the context of trust claims
 9 as opposed to securities claims, there's all kinds of
 10 other types of claims, and I go through that in my
 11 report, as well, your Honor.
 12 I have other discussion of those other types
 13 of settlements, but many of those other settlements
 14 involved --
 15 You're right. What your Honor is saying is
 16 quite right; there are other settlements at earlier
 17 points in time, but they were --
 18 You know, for example, securities claims,
 19 securities fraud claims, not claims like the type of
 20 claims, the type of repurchase claims involving
 21 trusts that are at issue in this case, but I
 22 discussed them all in my report.
 23 THE COURT: So, there were only two
 24 involving trust claims based on alleged breaches of
 25 representations and warranties?
 26 THE WITNESS: Yes. That's my understanding.

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 2 That's where we could get data.
 3 THE COURT: And where did you get the
 4 information for these other two settlements about the
 5 expected lifetime losses and the other elements that
 6 you considered?
 7 THE WITNESS: I think they're generally part
 8 of the documentation of the settlements themselves
 9 that we collected as part of our analysis.
 10 THE COURT: Thank you.
 11 Q Okay. And, again, I just want to make sure the
 12 record is clear on this; settlements two and three on
 13 Exhibit D predated the December, 2013 entry into the
 14 proposed settlement agreement, and then 4, 5, and 6
 15 postdated that proposed settlement agreement, but
 16 predated the trustees' decision of August, 2014 to enter
 17 into the settlement with respect to the 319 trusts?
 18 A Correct, that's right.
 19 MR. INGBER: Okay.
 20 Should I continue, your Honor? I see --
 21 THE COURT: Yes.
 22 Q Okay, great.
 23 Professor Fischel, before we move to the next
 24 exhibit, is there anything else that you would like
 25 to offer on Exhibit D?
 26 A No.

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 2 Other than, you know, what I said, I think
 3 while the different contexts and circumstances of the
 4 different settlements have to be taken into account,
 5 I think a fair interpretation, a fair conclusion
 6 looking at this settlement as compared with other
 7 settlements, is that it tends to be on the lower
 8 side, and there's possible reasons for that, that I
 9 explained, but if you just look at the results, it is
 10 a little bit on the low side.
 11 Q Okay. Now, we can take this exhibit down, and
 12 I'd ask that you bring up Tab 3 in the binder, which is
 13 Trustee Exhibit 20 the initial report, and it's Exhibit
 14 H-2 to Professor Fischel's initial report, Trustee
 15 Exhibit 20.
 16 Professor Fischel, is this another exhibit
 17 that you prepared as part of your report?
 18 A Correct.
 19 Q Okay. How is this exhibit relevant to your
 20 opinion?
 21 A I think it's very relevant in terms of how to
 22 interpret the data on comparable settlements, so what
 23 this exhibit does is, it compares the Institutional
 24 Investors who expressed support for this settlement with
 25 the composition of the Institutional Investors who were
 26 involved in negotiating the Country-Wide settlement, and

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 2 the ResCap settlement, the two that I considered to be
 3 most comparable on the previous page, as well as the
 4 Citigroup settlement, another one of the settlements on
 5 the previous page, and if you look at the very bottom,
 6 bottom number, you see there's 21 Institutional Investors
 7 who were involved in negotiating and supporting the
 8 proposed settlement.
 9 Of those 21, 13 were involved in negotiating
 10 and supporting the Country-Wide settlement.
 11 14 were involved in negotiating and
 12 supporting the ResCap settlement, and 18 were
 13 involved in negotiating and supporting the Citigroup
 14 settlement.
 15 Now the reason why that's relevant, really
 16 important is because, as I said, it's not possible
 17 just to look at numbers of settlements and say one is
 18 good, and one is bad because there's all kinds of
 19 different factors that enter into the calculation of
 20 whether or not a settlement should be entered into,
 21 and if it is entered into, on what terms, and so, the
 22 fact that --
 23 Just to take the Country-Wide settlement,
 24 that a majority of the Institutional Investors who
 25 were involved in negotiating and supporting the
 26 proposed settlement were also involved in negotiating

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1 Fischel Direct - Ingber
 2 and supporting the Country-Wide settlement.
 3 To me, that's highly relevant information
 4 because if somebody were to make the claim as has
 5 been made, that the proposed settlement is too low
 6 because the Country-Wide settlement is higher, well,
 7 one of the things to take into account is that the
 8 same people were involved in negotiating both, and
 9 it's not just the same people. These are some of
 10 most sophisticated institutions in the world, and so
 11 if the same people were involved in negotiating both,
 12 then I think it's a reasonable inference that these
 13 same people thought there were sufficient differences
 14 between the two situations to decide that one level
 15 of the settlement was appropriate in one case, and
 16 the same people decided that a different level of
 17 the settlement was appropriate in the next case, and
 18 exactly the same thing is true with ResCap, and so
 19 this to me, as I said, creates an inference, really
 20 strong inference that you can't just look at the
 21 level of settlements in terms of percentage recovery
 22 relative to expected lifetime losses without taking
 23 into account the context, the facts and circumstances
 24 surrounding those settlements.
 25 Who is in a better position to take those
 26 circumstances into account than the sophisticated

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2 people who are negotiating the settlement?
3 And if it's the same people negotiating
4 different settlements, and they reach different
5 outcomes in terms of what level of settlement they're
6 willing to agree to, that tells me really, I think a
7 fair inference tells anybody, that those
8 sophisticated Institutional Investors thought they
9 were significant enough differences to justify a
10 lower settlement payment in the proposed settlement
11 relative to Country-Wide, and a much higher
12 settlement payment relative to ResCap, again, based
13 on their a assessment of the relevant facts and
14 circumstances.
15 You know, obviously, there's another party.
16 It's not -- the institutional investors can't
17 themselves just dictate what the settlement terms are
18 going to be. It has to be an agreement.
19 But, nevertheless, in order for the
20 settlement to occur, the sophisticated Institutional
21 Investors themselves have to agree, and the fact that
22 the same people are willing to agree to the
23 settlement at different numbers suggests that there's
24 facts and circumstances that are different between
25 the different situations that can explain the
26 different settlement amounts that are, ultimately,

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1 Proceedings
2 entered into.
3 Q Okay, thank you. Let's move on to some other
4 settlements, Professor.
5 Were you ever able to find settlement
6 involving mortgage loans that were sold by JP Morgan?
7 A Yes, and you know, when I said that I thought the
8 original trust settlements were the most comparable,
9 comparability is sort of a tricky term because things can
10 be comparable in different ways, so my exhibit that we
11 just looked at, that was comparable in the sense that
12 they were settlements involving trust claims for breach
13 and warranties, and breaches of warranties claims, and
14 also servicing claims, but those settlements, other than
15 the proposed settlements, did not involve JPM, so I
16 thought it was significant to also look at the
17 settlements involving JPM. That's what this particular
18 exhibit did. I --
19 Q I think we're going to bring that up.
20 THE COURT: Excuse me, Mr. Ingber, I think
21 we will stop at this point.
22 Professor Fischel, you may step down.
23 THE WITNESS: Thank you.
24 THE COURT: I'd like to discuss scheduling
25 briefly off the record, and I will close the record
26 for today's proceedings.

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1 Proceedings
2 (Whereupon, hearing adjourned to January 21,
3 2016.)
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8				
8 (4)				

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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-Wurtemberg (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,

-against-

AMBAC ASSURANCE CORPORATION,
THE SEGREGATED ACCOUNT OF AMBAC
ASSURANCE CORPORATION (intervenor), and W&L
INVESTMENTS, LLC (intervenor)

Respondents,

for an order, pursuant to CPLR § 7701, seeking judicial instruction, and approval of a proposed settlement.

Index No. 652382/2014

Part 60

The Hon. Marcy J.
Friedman, J.S.C.

Joint Errata Sheet for the Transcript of the Proceedings Held on January 20, 2016

The parties wish to make the following changes, for the following reasons:

<u>Page</u>	<u>Line(s)</u>	<u>Change From</u>	<u>Change To</u>	<u>Reason(s)</u>
30	12	shuffling the	Shuffling around the	TR
30	24	trust or something else for	trust for something else, for	TR
30	25	reasons this why	reasons why this	TR
30	25	losses but	losses, but	TR
32	10	insuring	ensuring	TR
34	4	flow replaces	flow. It replaces	TR
34	10	that is the trustees	that the trustees	TR
35	12	agreements	agreement	TR
36	19	the representative	each representative	TR
37	7	and representations	of representations	TR
37	10	arm	harm	SP
37	21	occurs or the	occurs, but the	TR
38	18	only compensation	compensation only	TR
38	20	something else and to give effect to the repurchase remedy under the governing agreement.	something else. That would give effect to the repurchase remedy under the governing agreements.	TR
63	2	master servicer	special master	TR
64	16	hand back	Ambac	TR
66	20	Schneider from BBA	Reifsnyder from BPA	TR

<u>Page</u>	<u>Line(s)</u>	<u>Change From</u>	<u>Change To</u>	<u>Reason(s)</u>
68	2	City	Citi	TR
70	16	City	Citi	TR
102	3	bathed	baked	TR

Reasons: TR = Transcription Error; SP = Spelling Error; CL = Clarification

Dated: February 25, 2016

New York, New York

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