

In The Matter Of:

US BANK v.

January 21, 2016

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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...

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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

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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
 8
 9 60 Centre Street
 10 New York, New York
 11 January 21, 2016

12 B E F O R E:

13 HONORABLE MARCY S. FRIEDMAN,
 14 Supreme Court Justice.

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

16 FOR THE PETITIONERS:
 17 US BANK ASSOCIATION, THE BANK OF NEW YORK MELLON, THE
 18 BANK OF NEW YORK MELLON TRUST COMPANY, NA, WILMINGTON
 19 TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY
 20 OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION,
 21 HSBS BANK USA, NS, DEUTSCHE BANK NATIONAL TRUST COMPANY
 22 BY: KATHY PATRICK, ROBERT SCHNELL, WILLIAM MUNNO,
 23 ROBERT SACKS, KIRSTEN ROSE VOGEL, JOSEPH BRUSETT
 24 SCOVYERS, ROBERT C. MICHELETTO, NIDHI YADAVA,
 25 CHRISTOPHER J. HOUP, HARMAN DOUGLAS RUSSELL, MATTHEW D.
 INGBER, MICHAEL E. JOHNSON, CHRISTINA SPILLER, JAMES
 MATTHEW TOURANGEAU, WILLIAM M. MUNNO, DALE C.
 CHRISTENSEN, THOMAS R. HOOPER, MICHAEL KRAUSS, JEAN
 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,

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1 Fischel - Direct - Ingber

2 THE COURT: Is there anything before we resume

3 this morning with Professor Fischel's testimony.

4 MR. INGBER: Just one thing, your Honor. We

5 have Professor Fischel's demonstratives that have been

6 marked and I just wanted to ask if you wanted a copy of

7 the marked demonstratives.

8 THE COURT: Yes.

9 MR. INGBER: Thank you.

10 THE COURT: And again, I will assume they have

11 been shown to counsel and I will hear that they were and

12 if there are any objections.

13 MR. CHANG: Exactly.

14 THE COURT: Professor, will you resume your

15 place in the witness box please.

16 DANIEL R. FISCHEL

17 called as a witness on behalf of the

18 Petitioner, having been previously

19 sworn, resumed the stand and testified

20 as follows:

21 THE COURT: Good morning?

22 THE WITNESS: Good morning, your Honor.

23 THE COURT: You are reminded that you are still

24 under oath.

25 THE WITNESS: I understand.

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1 Fischel - Direct - Ingber
 2 THE WITNESS: Daniel Robert Fischel.
 3 THE COURT: You may inquire.
 4 MR. INGBER: Thank you, your Honor.
 5 Q Professor Fischel before we pick up where we left off
 6 yesterday, I just wanted to ask you to turn to your report. I
 7 see we need to get you another copy of that.
 8 A It was up here yesterday. It's not here now. So, I
 9 don't know.
 10 Q I just ask that when you receive it will you turn to
 11 the appendix in your first report and just confirm that that is
 12 a true and correct copy of your CV please.
 13 THE COURT: Excuse me one moment. Do we have
 14 all the same counsel at the table today.
 15 MS. PATRICK: Yes, your Honor.
 16 MR. CHANG: One substitution. Devika Persuad
 17 from Wollmuth Maher & Deutsch in place of Michael Ledley
 18 who was sitting here with me yesterday.
 19 THE COURT: That's fine. But if we have a new
 20 counsel at the table, when we open the record, please call
 21 that to my attention and put counsel's a name on the
 22 record.
 23 Let's continue with Professor Fischel.
 24 Q Professor, I just want you to take a look at your CV
 25 that is attached as an appendix to your report and confirm that
 26 that is a true and correct copy of your CV?

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1 Fischel - Direct - Ingber
 2 A It is.
 3 Q Okay. So, Professor, when we left off yesterday you
 4 were discussing the factors that applied to all of the trusts,
 5 the analyses that you did that apply to all of the trusts and
 6 you listed them as comparable settlements number one. Number
 7 two, the support of the G & B investors on the opposition of
 8 the QE investors and number three the market's reaction to the
 9 proposed settlement.
 10 Did I get that right so far?
 11 A Correct.
 12 Q And we were discussing the first analysis, the
 13 comparable settlements?
 14 A Correct.
 15 Q Do you recall that?
 16 A Yes, I do.
 17 Q And we had gone through a few exhibits in which you
 18 compared the settlement here to some comparable settlements and
 19 then I had asked you whether you were able to find settlements
 20 involving mortgage loans that were sold by JP Morgan.
 21 Do you recall that question?
 22 A I do.
 23 Q If you could just answer that questions and we'll move
 24 on from there, I would appreciate that.
 25 A Yes, a separate exhibit on situations where loans
 26 originated by JP Morgan was with the focus of litigation and

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1 Fischel - Direct - Ingber
 2 resulting settlements.
 3 Q So, let's bring up that exhibit. It's Trustee Exhibit
 4 20 which is the report, Exhibit E, to that report and it's tab
 5 four in the binder. Okay.
 6 Professor, if you walk the Court through Exhibit E to
 7 your initial report please.
 8 A Yes, this is a series of settlements, four
 9 settlements. One with NCUA, one with FHFA, one with Syncora
 10 and one with MisPers. I'm not sure what MisPers stands for.
 11 What's significant in addition to the fact that they
 12 are settlements involving JP Morgan, if you look at the third
 13 column assets at issue, these are sutures involving claims
 14 about defective disclosures in securities. So, presumably
 15 brought under securities law.
 16 As I mentioned yesterday that one of the issues in
 17 terms of comparability is that the legal context, the types of
 18 claims, the governing law is the same. In this particular
 19 case, there is comparability with respect to JP Morgan. There
 20 is no comparability with respect to the legal context, the type
 21 of assets at issue but then again if you look at the last
 22 column, you can see that it looks like the types of assets at
 23 issue, the fact that these are claims brought under the
 24 securities laws makes a big difference at least with respect to
 25 the first three of the other settlements because the estimated
 26 cash recovery on the lifetime losses ranges from a little over

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1 Fischel - Direct - Ingber
 2 48 percent to over 90 percent as compared to 7 percent which
 3 shows that again that context matters.
 4 The other thing I want to point out is the date of the
 5 other settlements. Again, for the most part these are all
 6 settlements that were announced after the time that the
 7 proposed settlement was entered into by the institutional
 8 investors before the time that the trustees formally approved
 9 the settlement but this was not information that was available
 10 to the parties themselves when they were negotiating the
 11 proposed settlement.
 12 Q So, Professor, we've now walked through a few of your
 13 exhibits relating to comparable settlements.
 14 What were your overall conclusions, your analysis of
 15 comparable settlements?
 16 A As I said yesterday that if you compare the recovery
 17 rate in the proposed settlement relative to the class of other
 18 settlements that I looked at, this particular settlement looks
 19 low, relatively speaking in terms of the recovery to
 20 certificateholders but there is reasons for it, such as the
 21 difficulty of recovering under the statute of limitations being
 22 an obvious one and the fact that there is such a significant
 23 overlap between the parties, particularly the institutional
 24 investors represented by Gibbs & Bruns that negotiated these
 25 different settlements reaching all of these different outcomes
 26 suggests that very sophisticated parties took the various

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1 Fischel - Direct - Ingber
 2 differences and factual circumstances, timing, background,
 3 legal rules into account in coming up with the numbers that
 4 they did.
 5 In that connection let me just point out can we just
 6 put this back on the screen, this Exhibit E because there is
 7 one thing I want to point out that I think is very significant.
 8 If you look at a third of these settlements, the FHFA
 9 settlement, that has the highest recovery of any settlement,
 10 90 percent, but if you look at the list of institutional
 11 investors who were supporting the proposed settlement, Fannie
 12 Mae is one of the investors who negotiated in supporting the
 13 settlement with a 7 percent recovery.
 14 So, in other words, the exact same entity that thinks
 15 the 7 percent recovery as a percentage of lifetime losses is an
 16 advantageous transaction, in this other transaction where they
 17 were the plaintiff negotiated a settlement where there was a
 18 recovery of over 90 percent. And the fact that you have the
 19 same party concluding that on different sides of the
 20 transaction, concluding that one settlement was in their best
 21 interest at a 7 percent recovery and another settlement was in
 22 their best interest at a 90 percent recovery, again, just
 23 highlights that comparing the rates of recovery and different
 24 settlements is relevant, it is important but it has to be
 25 interpreted in context in regard to the different factual and
 26 legal circumstances that dictate different terms in different

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1 Fischel - Direct - Ingber
 2 settlements.
 3 THE COURT: To what extent, Professor, did you
 4 make an effort to determine the extent to which the claims
 5 were barred for example by the statute of limitations in
 6 the other settlements that you looked at involving trusts
 7 in the breaches of representations and warranties claims.
 8 THE WITNESS: You Honor, I personally did not
 9 investigate that issue. I would say that particularly in
 10 the trust settlements that I was more familiar with,
 11 particularly Countywide, that I was very familiar with
 12 because I was involved in it myself, as to the best of my
 13 recollection there weren't any claims that a significant
 14 percentage of the claims were barred by the statute of
 15 limitations unlike this case. But I wasn't aware of any
 16 comparable analysis in any of the other settlements to the
 17 report that I got, for example, from Justice Carpinello in
 18 this particular case. I think at least in terms of what
 19 I'm familiar with because in the other cases there wasn't
 20 the same issue about the possible relevance of the statute
 21 of limitations.
 22 THE COURT: Thank you.
 23 MR. INGBER: Thank you, Professor.
 24 Q Okay. So, you think we now talked about the first
 25 factor that applies to all of the trusts and that is the
 26 comparable settlements but now let's talk about the second

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1 Fischel - Direct - Ingber
 2 factor which as you explained is the support of the G & B
 3 investors and the opposition of the QE investors.
 4 Why is the support of the Gibbs & Bruin investors
 5 relevant?
 6 A Well, for a number of reasons. As I said yesterday,
 7 they have a very large economic stake particularly as compared
 8 with the QE investors, and because they have a large economic
 9 stake, they have the most to gain for making the right decision
 10 about whether to accept the settlement on particular terms such
 11 as the proposed settlement here or reject the settlement and
 12 litigate because their interest are the largest of any of the
 13 groups that revealed their preference, and because they have
 14 the most to gain, they also have the best incentive to
 15 investigate potential recovery, potential relevance of the
 16 statute of limitations, the time and costs that would be
 17 involved in litigating the claims and the fact that the
 18 parties -- that the parties that have the most to gain by
 19 making the right decision and the most to lose by making the
 20 wrong decision is highly relevant information in my opinion
 21 from the perspective of the trustees who have to decide what is
 22 in the best interest of certificateholders. So, that's one
 23 point.
 24 Secondly, these are, if you look at who the
 25 institutional investors represented by Gibbs & Bruin are, they
 26 are among the most sophisticated financial institutions in the

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1 Fischel - Direct - Ingber
 2 world managing collectively trillions of dollars in assets.
 3 So, there is a reason not just because of their large economic
 4 stake but because of their involvement and sophistication in
 5 financial market transactions to again give considerable weight
 6 to their determination in this particular case to accept the --
 7 to negotiate and accept the proposed settlement.
 8 Finally, as I talked about yesterday, they've been
 9 involved in negotiating a lot of the big settlements that have
 10 been negotiated. So, they have a good sense if a particular
 11 outcome in one case should be a benchmark for what should
 12 happen in this case. They would be the ones to be in the best
 13 position to realize that because they've been big players in a
 14 lot of the major settlements that have been negotiated as I
 15 discussed yesterday.
 16 Q Am I correct that you prepared an exhibit showing the
 17 Gibbs & Bruin investors' stake in this matter?
 18 A I have.
 19 Q This is Trustee Exhibit 20, Professor Fischel's
 20 initial report Exhibit I to the report and it's I in the binder
 21 that your Honor has.
 22 Professor, if you could walk us through this exhibit
 23 and explain how it's relevant to your opinion?
 24 A Sure. This is an exhibit really illustrating the
 25 first point that I mentioned about why I think from the
 26 trustees perspective in terms of my advice to the trustees the

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1 Fischel - Direct - Ingber
 2 support of the of Gibbs & Bruin investors is highly relevant
 3 information.
 4 First of all, the first column is just a list of who
 5 these investors are that were represented by Gibbs & Bruin.
 6 And then in the right-hand column is the unpaid principal
 7 balance held as of October 31, 2013, which is the last date
 8 that I had data for.
 9 If you look at the very bottom, the Gibbs & Bruin
 10 investors held a little over that 24 billion dollars of
 11 certificates, of unpaid principal balance of the certificates
 12 that they held out of the total of just under 74 billion
 13 dollars. If you just do that simple math that the Gibbs &
 14 Bruin investors held 32.45 percent of all of the outstanding
 15 principle balance as of that time again demonstrating that they
 16 are collectively a very large -- they hold a very large
 17 percentage of the outstanding principal balance and again
 18 demonstrating that they have the most to gain by making a good
 19 decision and the most to lose by making a bad decision and also
 20 the most to gain by investigating, gathering information to
 21 allow them to make a decision about whether or not to accept
 22 the proposed settlement in order to in effect maximize their
 23 own recovery, maximize their own wealth, taking all costs and
 24 benefits into account.
 25 Q I believe you testified that the sophistication of the
 26 Gibbs & Bruin investors could be measured in part by the assets

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1 Fischel - Direct - Ingber
 2 that they managed, the amount of assets under management?
 3 A Correct.
 4 Q Did you prepare an exhibit demonstrating your analysis
 5 of that issue?
 6 A I did.
 7 Q Can we bring up tab six please, Malcolm.
 8 This is Trustee Exhibit 20, Exhibit J, again tab six
 9 in the binder.
 10 If you could go ahead and walk us through this exhibit
 11 please.
 12 A Yes. These are the same 20 institutional investors
 13 and then there is a date where we could access data for the
 14 assets owned or managed by these institutional investors.
 15 I think this point is obvious but if you look at
 16 the -- and at the far right, the number for the assets owned
 17 and managed.
 18 If you look at the bottom, really the total I think is
 19 the key entry that in total the Gibbs & Bruin investors owned
 20 or managed just under 17 trillion dollars in assets
 21 demonstrating their representation in the marketplace that
 22 other sophisticated market participants when deciding who to
 23 invest with made the decision to invest with these particular
 24 institutional investors. And I think just their very success
 25 and reputation in the market place is a kind of proxy or sort
 26 of an indirect way to measure their success and sophistication.

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1 Fischel - Direct - Ingber
 2 Q So, you may have touched on this already but can you
 3 tell us what weight you ultimately give to the support of the
 4 Gibbs & Bruin investors?
 5 A Well, particularly in comparison with the QE, the
 6 Quinn Emanuel opposition group which was information provided
 7 to me by the trustees at the time, I gave it a lot of weight
 8 because of the great disparity between the economic interest of
 9 the Gibbs & Bruin investors and the far lower economic interest
 10 of the Quinn Emanuel investors in addition to some other
 11 differences, such as we were given much greater information
 12 about the Gibbs & Bruin investors and the Quinn Emanuel
 13 investors refused to give us certain information that we wanted
 14 to get in order to make in effect an apples to apples
 15 comparison between the Gibbs & Bruin investors and the Quinn
 16 Emanuel investors. But even without that information, the
 17 economic disparities were so great.
 18 Again, if I think of what the trustees should be
 19 trying to evaluate in terms of my recommendations to them, they
 20 want to take a course of action that's consistent with the best
 21 interest of the certificateholders. And if I ask myself what
 22 action is more likely to represent the best interest of the
 23 certificateholders, supporters who hold 32 percent of the
 24 outstanding principal balance who are among the most
 25 sophisticated investors in the world who have all this
 26 experience negotiating not just this settlement but a number of

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1 Fischel - Direct - Ingber
 2 other major comparable settlements or this other group that has
 3 approximately one/eighth of the economic interest of the Gibbs
 4 & Bruin investors who doesn't have the same background and
 5 experience that the Gibbs & Bruin investors have, if I ask
 6 myself which group is more likely to represent the best
 7 interest of the certificateholders in terms of what I would
 8 recommend to the trustee, at least in my opinion it's not a
 9 close question. So, for that reason I attached significant
 10 weight to that difference.
 11 Q Thank you.
 12 Now, you started talking about why you gave less
 13 weight to the views of the Q & E investors, the Quinn Emanuel
 14 investors?
 15 A Correct.
 16 Q Professor, did you prepare a demonstrative that lists
 17 the reasons why you gave less weight to the QE investors?
 18 A I did.
 19 Q Can we bring up tab seven please. This is a
 20 demonstrative. It's not a part of Professor Fischel's report
 21 and it's Trustees Exhibit 361. Okay.
 22 Professor, if you could elaborate on the reasons why
 23 you gave less weight to the QE investors than to the Gibbs &
 24 Bruin investors?
 25 A Again, just to be clear why this demonstrative is not
 26 in my report, all these factors are discussed at length in my

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1 Fischel - Direct - Ingber
 2 report.
 3 Q Understood?
 4 A Well, just take a look at the first factor.
 5 First number one on this exhibit just illustrates the
 6 point one of the points that I was just making, that the
 7 investors represented by Quinn Emanuel held 4.65 percent of the
 8 unpaid principal balance while the Gibbs & Bruin investors held
 9 more than 32 percent. So, that's a eight to one difference in
 10 terms of size of stake. So, that itself is extremely
 11 significant without more.
 12 But as I said, there were some other factors that I
 13 also took into consideration which are listed at the numbers
 14 two, three and four that we were told that at least as of the
 15 time of my report, at least one of the Quinn Emanuel investors
 16 had switched their position and was not supporting the
 17 settlement. We requested information as to who that was and we
 18 were not given it.
 19 Similarly, we were not be given information about the
 20 identity of the Quinn Emanuel investors. So, we could not
 21 compare their sophistication and reputation in the marketplace
 22 as compared with the Gibbs & Bruin investors.
 23 Then particularly significantly is number four that we
 24 were told that the Gibbs & Bruin -- I am sorry -- the Quinn
 25 Emanuel investors did not oppose the proposed settlement for
 26 every single trust and that's very significant from my

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1 Fischel - Direct - Ingber
 2 perspective because we were doing an analysis on a trust by
 3 trust basis. So, to just have a number of size of stake in
 4 opposition without knowing whether that size of stake, how that
 5 related to individual trust, and after requesting that
 6 information and not being given it, again that was significant
 7 as compared to the complete access to information that we got
 8 from the trustees about the institutional investors represented
 9 by Gibbs & Bruin.
 10 Q When you say that you requested but didn't receive
 11 that information, you're not suggesting that the trustees stood
 12 in the way of you getting that information?
 13 A No. Maybe I wasn't clear. We told the trustees we
 14 wanted to get this information. We were told the trustees
 15 requested the information from Quinn Emanuel and Quinn Emanuel
 16 refused to provide the information.
 17 Q Thank you.
 18 So, on this fourth point, Professor, the lack of
 19 information about the trusts for which the QE investors opposed
 20 the proposed settlement, how did you address that lack of
 21 information in your report?
 22 A We just made the assumption that they opposed the
 23 settlement for every trust where they had holdings.
 24 Q So, this 4.65 percent opposition number you applied
 25 across all of the trusts?
 26 A Right because we didn't have any choice given the

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1 Fischel - Direct - Ingber
 2 refusal to provide information as to which trust the Quinn
 3 Emanuel investors opposed and which ones they didn't, the
 4 settlement for.
 5 Q And what affect did that have on your recommendations?
 6 A Well, it gave more weight to our calculation of the
 7 opposing certificateholders than would be warranted if we had
 8 more accurate information about which trusts the Quinn Emanuel
 9 investors were opposing the settlement for and which ones they
 10 weren't.
 11 Q Was there a similar issue for the Gibbs & Bruin
 12 investors?
 13 A No, because as I said, we were given complete access
 14 to all information that we requested about the Gibbs & Bruin
 15 investors.
 16 Q So, Professor, let's move on to the third factor that
 17 applied to or that applies to all of the trusts and that is the
 18 market reaction to the settlement.
 19 Why do you look at the market reaction to the proposed
 20 settlement?
 21 A Well, again, because as I think I mentioned briefly
 22 yesterday, the claims that the settlement is grossly
 23 inadequate, claims that were being made by the Quinn Emanuel
 24 investors in a submission that was given to us, there are a lot
 25 of different ways to analyze that claim but one way is to look
 26 at what I described as the market evidence, meaning to look at

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1 Fischel - Direct - Ingber
 2 the information about the settlement as it was revealed on the
 3 affect of security prices for JP Morgan, on investors for JP
 4 Morgan, to look at the affect on the value of the certificates
 5 themselves held by certificateholders and also to look at the
 6 commentary and analysts' reports who were following in JP
 7 Morgan and advising their clients about the affect of the
 8 settlement on their opinions about the investment desirability
 9 in JP Morgan. So, we did all three of those things.
 10 Q How did you go about -- specifically, how did you go
 11 about analyzing the reaction of JP Morgan stock to the proposed
 12 settlement?
 13 A We identified a couple of public disclosures about
 14 first the rumor or the expectation about what the settlement
 15 might be and then the announcement that a proposed settlement
 16 had been reached. There were two different public disclosures.
 17 They contain somewhat different information and we looked at
 18 the affect of those disclosures on the value of JPM Securities
 19 particular stock values and then we did a very sophisticated
 20 statistical analysis on those stock prices or regression
 21 analysis commonly known as an event study to analyze in a
 22 statistical more scientific way what the affect of disclosures
 23 about the settlement is, what affect that had on JP Morgan
 24 security prices.
 25 Q And we'll get to that exhibit of the event study in a
 26 moment.

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1 Fischel - Direct - Ingber
2 Can you explain in a little more detail what an event
3 study is and what type of analysis you conduct in an event
4 study. You mentioned a regression analysis. Perhaps you can
5 elaborate a little more on that.
6 (Continued on next page)
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1 Fischel Direct - Ingber
2 conclusion because you would be ignoring the fact
3 that there's this sort of worldwide collapse in the
4 financial markets in the last few days, so what a
5 regression analysis does as the background of an
6 event study is, it creates a statistical model for
7 controlling for the affect of market and industry
8 information on a stock price on a particular day, and
9 so that in my example that I just gave, if you're
10 doing an event study for a stock in the last couple
11 of days, you wouldn't just look at the change in
12 price; you would control for what was going on in the
13 overall market price, what was going on in the
14 particular industry segment that the firm was a part
15 of.
16 There's an extremely well-known statistical
17 methodology for doing that, something that I, myself,
18 have written about extensively and have implemented
19 in, I don't know, thousands of cases and studies
20 overtime, and it's just a simple regression analysis
21 to control for market and industry conditions based
22 on what's known as a beta, the volatility of a stock
23 price movement relative to what's going on in the
24 overall market, and the industry segment that it's a
25 part of, and that's what I did in connection with the
26 particular disclosures at issue that I was measuring,

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2 A Well, what an event study is, is to try and
3 determine the relationship between some information, an
4 event, and the affect of that event on security prices,
5 so one thing, the simplest thing to do is look at the
6 event, and then look at whether JP Morgan's stock price
7 went up or down on that day.
8 The problem with that is, that we know that
9 price movements for any company are not just affected
10 by events relating to that company, but by what's
11 going on in the overall market place, what's going on
12 in the industry that they're part of, and if you
13 don't take those things into account, you can get the
14 wrong answer, so sadly, the last few days in our
15 financial markets are a good illustration of why you
16 can't just look at a change in price; you have to do
17 the statistical analysis that I'll describe in a
18 second because in a situation where the stock market
19 is crashing virtually every day, if you just looked
20 at a news item about a firm and saw that the security
21 price of that firm, the stock price, was falling, and
22 you then reached the conclusion that whatever the
23 event was, the story in the newspaper, whatever it
24 was, was responsible for the fall of the stock price
25 of that particular firm, you might be getting the
26 wrong conclusion. You might draw the wrong

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2 and that's what my exhibit that's in my report
3 attempts to demonstrate.
4 Q Thank you.
5 Let's bring up that exhibit, which is Tab 8
6 in the binder and it's Trustee Exhibit 20, and it's
7 Exhibit L to Professor Fischel's initial report.
8 Professor, if you can just walk us through
9 this exhibit, I would appreciate it.
10 A Sure.
11 Q Thank you.
12 A Well, first, there's two particular disclosures
13 that we're analyzing in this exhibit.
14 In October 22nd, 2013 disclosure prior to the
15 time that the 4.5 billion dollar settlement was
16 announced, but in this particular story in the Wall
17 Street Journal on-line edition, the report was that
18 investors were seeking at least 5.75 billion dollars
19 from JP Morgan in the context of this particular
20 dispute, that where the parties were negotiating a
21 potential outcome, and going across, there's,
22 basically, two sets of columns for actual return, and
23 then residuals, and T statistics, so the actual
24 return is just the change in price.
25 In day zero is the day of the announcement.
26 Day one is the day after the announcement, and day

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 2 two is two days after the announcement, and what it
 3 shows is that on the day of the announcement, JP
 4 Morgan's stock price fell by 1.2 percent.
 5 The next day it fell by 1.62 percent, and the
 6 second day it fell by 2.8 percent, but again, that
 7 doesn't control for market and industry factors, and
 8 that's what the next three columns do; residuals, and
 9 T statistics, and so the three numbers going across,
 10 instead of 1.2 percent, you get a decline of
 11 1.34 percent. Instead of a raw return decline of
 12 1.62 percent, you get a decline of 0.85 percent. And
 13 then, instead of a negative 2.8 percent, you get
 14 negative 2.18 percent.
 15 And then, the numbers below the residuals are
 16 what's referred to as T statistics.
 17 T statistics are a measure of statistical
 18 significance, and what the T statistics attempt to
 19 measure is, for any given stock price movement, stock
 20 prices can bounce around for no reason, and so what
 21 the T statistic attempts to measure is, is the stock
 22 price movement, the residual return controlling for
 23 market and industry factors to be large enough, so
 24 that it's highly unlikely that a stock price movement
 25 of that size to just be attributable to random
 26 movements as opposed to something that is

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 2 sufficiently unusual, not random, that in this
 3 particular case it's likely to be caused by the
 4 information that's being disclosed, and if you look
 5 at the two-day number negative 2.81 (sic) percent,
 6 that's in dark, slightly dark type, and the reason
 7 for that is --
 8 Q Is that negative 2.18 percent?
 9 A 2.18 percent, correct.
 10 And the reason for that is, that number is
 11 sufficiently large to have a T statistic of negative
 12 2.19, which is -- would be considered to be
 13 statistically significant, so that one could conclude
 14 in this particular case that the disclosure of a
 15 possible settlement at a level of \$5.75 billion
 16 dollars was viewed negatively by JP Morgan investors,
 17 that that number was higher than what they expected
 18 in light of all the market information, previous
 19 settlements, and everything else, so that that was
 20 negative information from the perspective of JPM
 21 investors.
 22 But, then if you look at the next
 23 announcement, which is the announcement of the actual
 24 settlement agreement of the \$4.5 billion number --
 25 I'm not going to repeat going through all
 26 the columns again.

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 2 Q Sure.
 3 A But, if you just look at very last one, you see
 4 all the way to the right you see a positive 2.12 percent
 5 residual return with a T statistic of 2.07, again, which
 6 would be large enough to be considered statistically
 7 significant in a positive direction, so that investors,
 8 in a reasonable inference, a reasonable conclusion would
 9 be after investors were told that the settlement might be
 10 5.75 billion dollars, or reacted negatively, when they
 11 were told that the actual settlement agreement was
 12 4.5 billion dollars, they reacted positively.
 13 And then, if you look at the very bottom, the
 14 total again, without going through all the columns,
 15 if you just look at both announcements together, the
 16 announcement reaction to the possible \$5.7 billion
 17 settlement number, and the reaction to the
 18 \$4.5 billion actual number that was agreed to both,
 19 the -- if you combine them both, the actual
 20 returns and the residual returns were close to zero.
 21 There is no statistically significant reaction, which
 22 if you just combine all that data, and ask what's the
 23 most logical way to interpret it, it's that the
 24 actual settlement was perceived as, basically, what
 25 investors expected. It was neither too high, nor
 26 too low. It was not a windfall for JP Morgan as the

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 2 QE investors were claiming that the settlement was,
 3 should have been much higher, and therefore, a huge
 4 benefit to JP Morgan.
 5 There's no evidence of that based on this
 6 analysis, and similarly, it was not too high either
 7 in the sense that the JP Morgan investors didn't
 8 interpret the information adversely. It's basically
 9 consistent.
 10 When I say JPM investors, again, that's all
 11 the investment analysts that are following JP Morgan
 12 trying to target that what a reasonable settlement
 13 would be, so the investor reaction is, basically,
 14 consistent with the actual number that was negotiated
 15 by the parties in terms of what the settlement number
 16 should be.
 17 Q Okay. Professor, I think you said earlier that
 18 you also analyzed the reaction of the prices of
 19 certificates issued by the trusts.
 20 Did I get that right?
 21 A Correct.
 22 Q Why did you do that?
 23 A Well, again, it's the same exercise, but it's the
 24 other side of the coin.
 25 If QE investors, Quinn Emanuel investors,
 26 were correct that the settlement was much lower than

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 2 it should have been, much lower than what is fair,
 3 then when there was information about the settlement
 4 that was disclosed to certificate holders, the price
 5 of certificates should have plummeted because
 6 certificate holders would then think the settlement
 7 was unfair, it was unreasonable. We're getting much
 8 less than we deserve, and that would be observable in
 9 the price of certificates, so again, it's just
 10 another economic test of the claims of the Quinn
 11 Emanuel investors that the settlement was far too
 12 low.
 13 Now, as I discussed at length in my report,
 14 the data on certificate prices is not as available as
 15 the data on stock prices of JP Morgan, and so it's
 16 more difficult to conduct the exact same type of
 17 analysis, but we did the best we could using the data
 18 that we had available about certificate prices, and
 19 the affects of disclosures about the settlement on
 20 certificate prices, and we concluded that certificate
 21 prices, if anything, reacted positively to
 22 disclosures about the settlement, again, with a
 23 number of caveats because of the difficulties of
 24 interpreting the data.
 25 But, what that indicates, again, is that
 26 there's no evidence in the economic data, no evidence

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 2 analyzing the reaction of certificate holders, the
 3 beneficiaries of the settlement, that the actual
 4 beneficiaries consider that, consider the settlement
 5 to be too low. If anything, with a number of
 6 caveats because of the difficulty of looking at the
 7 appropriate data, it looks like the certificate
 8 holders reacted slightly positively to the
 9 settlement, again, suggesting that the actual people
 10 who are going to be directly affected by the
 11 settlement did not agree with the claims of Quinn
 12 Emanuel that the settlement was too low. If
 13 anything, they thought they were better off as a
 14 result of the settlement.
 15 Q Okay, thank you. You know, one last question
 16 about the event study. Could we just go back for one
 17 second; you mentioned the \$5.75 billion number in one of
 18 those first reports.
 19 A Correct.
 20 Q Was it reported that that number included claims
 21 against a JPM affiliate that isn't part of this
 22 settlement?
 23 A Yes, yes.
 24 Again, before the settlement was announced,
 25 nobody knows, nobody knew exactly what was going to
 26 be in the settlement. There was litigation going on

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 2 at this time involving Washington Mutual, and there
 3 was speculation that the \$5.75 billion settlement was
 4 also going to include a resolution of the disputes
 5 involving Washington Mutual. That was the
 6 explanation for why the \$5.75 billion number was what
 7 it was.
 8 Q Okay.
 9 A That's what investors reacted negatively to.
 10 And then, it was made clear that the
 11 settlement was not going to include claims involving
 12 Washington Mutual, investors reacted positively when
 13 they got more accurate information.
 14 Q Thank you.
 15 So, we talked about the event study. We
 16 talked about the reaction of the prices of
 17 certificates.
 18 I believe you also said that in analyzing
 19 market reaction, you looked at -- you may have said
 20 it today, you certainly said it yesterday, you looked
 21 at analyst reports, as well, correct?
 22 A Correct. I did say it, and I think I mentioned
 23 yesterday also because another market reaction is the
 24 reaction of, again, sophisticated market participants who
 25 have no stake in this particular dispute.
 26 In other words, they're not litigants.

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 2 They're not going to get any money from the
 3 settlement. They're not going to get anything from
 4 the settlement either accepted or rejected, but their
 5 job is to analyze all factors effecting the value of
 6 JP Morgan in order to provide their clients with
 7 their own interpretation, their own recommendations
 8 about the value of JPM in light of all kinds of
 9 different information, but in this particular case,
 10 including the settlement, so what I looked for was to
 11 see if there was any sense, any consensus on the part
 12 of investment analysts who were analyzing the
 13 settlement in light of all the information, not just
 14 about the settlement, but of all previous comparable
 15 settlements, all other factors that the analysts
 16 could take into account.
 17 As I think I said yesterday, I looked at
 18 forty-three different analyst reports. Again, it's
 19 discussed in my report.
 20 There was some mention that the settlement
 21 was lower than the Country-Wide settlement, as I have
 22 discussed yesterday, but there was no discussion,
 23 certainly no consensus discussion that the settlement
 24 was unfair, that it was too low, that there was some
 25 reason to doubt that the settlement was negotiated at
 26 arm's length, and again, that was just more

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 2 supporting evidence that the claims by the Quinn
 3 Emanuel investors that the settlement was grossly
 4 inadequate, those claims were not shared by investors
 5 in JPM. Those claims were not shared by the
 6 certificate holders themselves, and those claims were
 7 not shared by the investment analysts who followed JP
 8 Morgan.
 9 Again, I thought that market evidence
 10 cumulatively was quite significant in terms of
 11 analyzing whether or not there was any basis to the
 12 claims looking at market evidence, that there was any
 13 reason to believe that the settlement was far lower,
 14 was too low relative to what it should have been in
 15 the eyes of investors, certificate holders, or
 16 investment analysts.
 17 Q Is that the conclusion that you drew overall in
 18 light of your analysis of the market reaction, that is
 19 the event study, the price of certificates, and the
 20 analyst reports?
 21 A Yes.
 22 Q Okay. I think we can move on to the factors
 23 that you applied to the individual trusts and loan
 24 groups.
 25 A Okay.
 26 Q So, Professor, you said that after you analyzed

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 2 the factors that affected all of the trusts, you analyzed
 3 each of the trusts, and loan groups individually, and
 4 determined whether to recommend the proposed settlement
 5 on a trust basis and a loan basis, is that correct?
 6 A That's right.
 7 Q Okay. Have you prepared a demonstrative that
 8 summarizes the analysis that you did at the trust level?
 9 A I did.
 10 Q Okay. Can we bring up Tab 9, please, and this
 11 is Trustee Exhibit 362.
 12 Professor, is this the demonstrative that you
 13 prepared?
 14 A Yes.
 15 Q Can you walk us through it, please?
 16 A Yes.
 17 I wanted to go beyond the analysis that I
 18 just went through, which sort of applied to the
 19 settlement in the aggregate to perform an analysis to
 20 determine what my recommendations would be to the
 21 trustees both on a trust level and on a supporting
 22 loan group level, and so I came up with these three
 23 criteria that in my opinion needed to be satisfied
 24 for me to recommend that the trustees reject a
 25 settlement for any particular trust, and in my
 26 analysis, as I explained in my report and I'll

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 2 explain now, I require that all three of these
 3 criteria must be satisfied in order to recommend
 4 rejection.
 5 And so the first criteria is as stated that
 6 the -- I require that holders of a substantial
 7 portion of the certificates have expressed opposition
 8 to the proposed settlements, proposed settlements,
 9 and holdings must exceed those of certificate holders
 10 who expressed support for the proposed settlement.
 11 My second criteria is there's an indication
 12 that the expected recovery from litigation would be
 13 greater than the value of the settlement
 14 consideration.
 15 In other words, there's a reason to think
 16 that its certificate holders will do better by
 17 litigating than by settling on a trust basis.
 18 And the third is that the possible claims on
 19 a trust basis won't be barred by the statute of
 20 limitations, or with respect to the servicing claims,
 21 which would not, we were advised, be barred by the
 22 statute of limitations, that the value of the
 23 servicing claims would be greater than the amount
 24 that would be received on a trust basis as a result
 25 of the settlement, and if all three of those criteria
 26 were satisfied, I recommended that the settlement be

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 2 rejected on a trust basis, and if any of the three
 3 were not satisfied, I recommended that the trustees
 4 except the settlement on an individual trust basis.
 5 (Whereupon, Senior Court Reporter Kathy Jones
 6 resumed.)
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 2 T3.
 3 Q Okay. So, having gone through that framework, let's
 4 drill down on the first criterion.
 5 Can you explain your rational for the first criterion.
 6 A Sure. Well, in part again in terms of my advice to
 7 the trustees, my focus is what action should the trustees take
 8 in terms of either accepting or rejecting the settlement that's
 9 in the best interest of certificateholders.
 10 THE COURT: Give me one moment. The statements
 11 on this demonstrative exhibit are statements that you made
 12 in your report; is that correct.
 13 A Come directly out of my report, your Honor.
 14 THE COURT: Can you give us the page, please.
 15 THE WITNESS: Sure. I just have to find my
 16 report.
 17 THE COURT: I think counsel can get that for me.
 18 MR. CHANG: Paragraph 29, your Honor.
 19 THE COURT: Pardon?
 20 MR. CHANG: Paragraph 29.
 21 THE COURT: Please continue.
 22 A Thank you, your Honor.
 23 Q So, I think you were describing the rational for the
 24 first criterion?
 25 A Right. So, the first criteria focusing on what action
 26 is going to be in the best interest of certificateholders based

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 2 on the certificateholder as themselves whether there is
 3 significant support or opposition to the settlement and more
 4 specifically in order for the settlement to be rejected or at
 5 least for me to recommend rejection, I required that there be
 6 as I said a substantial portion of certificates who oppose the
 7 settlement and that that number be greater than the number of
 8 certificates who supported the settlement. Again, let me just
 9 put some context on that.
 10 Q Sure.
 11 A After the settlement was negotiated, there were a
 12 whole series of notices that went out to certificateholders
 13 giving them an opportunity to express support or opposition to
 14 the settlement where the certificate -- where the notices
 15 disclosed that there was this very substantial block of
 16 certificateholders who had negotiated the settlement and who
 17 had supported the settlement. So, in addition to what I knew
 18 about the Quinn Emanuel investors, there was multiple
 19 opportunities for certificateholders to express opposition when
 20 they were given notice after notice after notice of the support
 21 of the Gibbs & Bruin investors in negotiating the settlement.
 22 And in addition to that, after my initial report was submitted
 23 to the trustee, it was posted online and again the
 24 certificateholders were given notice of it.
 25 It was another opportunity for the certificateholders
 26 who disagreed with my analysis or whatever to express

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 2 opposition.
 3 So, I felt I had a very good sense of how much
 4 opposition there was to the settlement based on everything that
 5 had occurred and all the repeated notices that were given to
 6 certificateholders to give them an opportunity to object.
 7 I knew that there was very significant support for the
 8 settlement. So, if there wasn't significant opposition to the
 9 settlement and there was significant support for the
 10 settlement, that was very significant to me.
 11 In addition to that, I understood from the governing
 12 agreements, the Pooling Servicing Agreements, that as a general
 13 matter, in order for certificateholders to direct the trustee
 14 to litigate a claim, there had to be 25 percent of the
 15 certificateholders who were aligned in making that direction to
 16 the trustee. And to the extent that the opposition to the
 17 settlement was less than that number, that was also relevant to
 18 me as I described in my report and particularly relevant if it
 19 was not only less than that number but it was also less than
 20 the number of the amount of certificateholders who supported
 21 the settlement. So, that's a basic shorthand of the rational
 22 for my first criteria.
 23 Q Okay. Did you prepare an exhibit showing how you
 24 applied this first criterion to the trust?
 25 A I did.
 26 Q Malcolm, can we bring up tab ten please. This is

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 2 Trustee Exhibit 20, Exhibit P.
 3 Professor, if you could just walk us through Exhibit
 4 P.
 5 A Yes. This is calculations that I performed on a trust
 6 by trust basis of the support and opposition to the proposed
 7 settlement by certificateholders. And there is basically two
 8 sets of numbers. The numbers for those certificateholders who
 9 opposed the proposed settlement and those certificateholders
 10 who support it the proposed settlement.
 11 So, let me start with the opposing certificateholders.
 12 There is an entry for QE investors and then there is an entry
 13 for others.
 14 Now, one of the problems that I had as I described
 15 before is that I did not know who the QE investors were. So, I
 16 had no way of knowing whether the same investors who were
 17 entered as opposing the settlement under the QE column was also
 18 entered as opposing the settlement in the other column. So,
 19 just to give a concrete example.
 20 Q Yes.
 21 A If there was a QE investor who opposed the settlement
 22 and that I didn't know the identity of who those QE investors
 23 were and that hypothetically that same QE investor also wrote a
 24 letter to the trustees opposing the settlement, that QE
 25 investor would be double counted because they would be counted
 26 in the QE column and they would be counted in the other column

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 2 because the trustees gave us all the letters that were
 3 submitted either supporting the settlement or opposing the
 4 settlement. We had no way of knowing how much double counting
 5 there was and we just recognized that and that's just a
 6 limitation in our data because of the lack of information that
 7 we were provided.
 8 Q So, you may have been double counting a QE investors'
 9 opposition in calculating overall opposition?
 10 A Correct.
 11 Q And you also were counting as QE opposition I think it
 12 was 4.6 of 5 percent of every trust of every trust
 13 notwithstanding the fact that the QE investors may not have --
 14 A Right. I was just going to say that there is another
 15 sort of bias in this exhibit. Because of the lack of
 16 information that we had, we counted the QE investors as
 17 opposing every trust even though we knew from what we were told
 18 that they in fact were not opposing every trusts but we have no
 19 way of knowing which ones they were opposing and which ones
 20 they weren't opposing. There were none of those limitations in
 21 our calculation of the supporting certificateholders.
 22 Q Right.
 23 A But with those limitations which in a sense create a
 24 bias in terms of demonstrating or indicating more or at least
 25 potentially more opposition than there in fact was relative to
 26 the amount of support among the certificateholders, you can

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 2 just go down the list trust by trust and look at the amount of
 3 opposition and the amount of support.
 4 So, for example, for the first trust, BALTA 2005-1, if
 5 you look at the total, there is 6.04 percent of the
 6 certificateholders' based on unpaid principal balance or
 7 opposing the proposed settlement and 11.46 percent of the
 8 certificateholders who are supporting the proposed settlement.
 9 If you look at the last column, that just is an
 10 indication that there are no -- there is no demonstration that
 11 there are opposing certificateholders with substantial
 12 opposition which I defined for this purpose as greater than
 13 15 percent. That's greater than the amount of support for the
 14 proposed settlement. If you look at the next trust, BALTA
 15 2005-10 the opposition to the settlement is 1.8 percent.
 16 THE COURT: Excuse me. Would you finish that
 17 sentence and then I'll ask you.
 18 A And the support for the settlement is 72.51 percent.
 19 You can just go down for every single trust and just compare
 20 the opposition to the settlement and the support for the
 21 settlement and make a determination on a trust by trust basis
 22 whether my criteria one for rejecting the settlement was
 23 satisfied or not satisfied.
 24 THE COURT: Were you given a reason as to why
 25 the Quinn Emanuel investors would not identify the trust
 26 with respect to which they were opposing settlement?

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 2 THE WITNESS: I was not. As far as I know,
 3 there was no reason, but regardless, nothing was
 4 communicated to me and we did request that information.
 5 Q Okay. Is there anything else, Professor, that you
 6 want to add about Exhibit P to your report or should we move on
 7 to the loan group?
 8 A Yes. I think you can just look at the last column,
 9 the nos and the yeses and you see that for the overwhelming
 10 majority of trusts there isn't significant opposition to the
 11 settlement and certainly not significant opposition to the
 12 settlement that's greater than support for the settlement.
 13 In other words, the support for the settlement among
 14 certificateholders on a trust level is overwhelming and that
 15 was very significant to me in forming my opinions and
 16 recommendations to the trustees.
 17 Q Okay. Let's bring up Trustee Exhibit 362, the next
 18 demonstrative, Malcolm, please.
 19 THE COURT: I think we just did 362, didn't we.
 20 MR. INGBER: I am sorry. 363. Thank you, your
 21 Honor. This is tab 11 in the binder.
 22 THE COURT: And the report is?
 23 MR. INGBER: It's supplemental report which is
 24 Trustee Exhibit 22 and it starts on page 2.
 25 THE COURT: Thank you.
 26 Q Professor, is this the demonstrative that you

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 2 prepared?
 3 A Yes.
 4 Q Can you walk us through it please.
 5 A Yes. This is the criteria for recommending rejection
 6 of the settlement at the supporting loan group level and it's
 7 basically identical in terms of criteria one to the criteria
 8 for requiring -- for my requiring rejection at the trust level
 9 with one difference and that difference is number two on this
 10 demonstrative.
 11 The reason is -- the reason that I gave a minute ago
 12 that the governing documents generally provided there needed to
 13 be 25 percent of certificateholders at the trust level in order
 14 to direct the trustee to investigate and pursue litigation and
 15 it's possible, in fact likely that there could be instances
 16 where for a particular supporting loan group there could be
 17 15 percent of certificateholders who opposed the settlement.
 18 But because there might be multiple loan groups, 15 percent of
 19 a single supporting loan group would not be 15 percent at the
 20 trust level which is what I required to demonstrate substantial
 21 opposition. And even that 15 percent is significantly less
 22 than the 25 percent that the governing documents required.
 23 So, these criteria are identical except that there
 24 also has to be for any supporting loan group a demonstration
 25 that there is almost substantial opposition at the trust level
 26 that that supporting loan group is a part of. Otherwise, it's

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 2 identical to the criteria at the trust level.
 3 Q How did you go about measuring holdings of the
 4 opposition at the comparing trust level?
 5 A Basically the same way.
 6 Q Can we bring up tab 12, Malcolm.
 7 This is Trustee Exhibit 22, supplemental report. It's
 8 Exhibit B to the supplemental report.
 9 Professor, is this your analysis of criteria one and
 10 two as it applies to the SLGs?
 11 A Yes. Well, the criteria numbers are getting a little
 12 confusing. It's my criteria one for rejection of the
 13 settlement as applied at the SLG level.
 14 Q Fair enough.
 15 A And it's identical in terms of its format to the
 16 previous exhibit at the trust level but this is now done at the
 17 SLG level.
 18 Again, if you look at the last column, the nos versus
 19 yeses, the number of nos swaps the number of yeses meaning at
 20 the SLG level as well as at the trust level the lack of
 21 opposition to the settlement among certificateholders at the
 22 SLG level is dramatic as compared to the support for the
 23 settlement among certificateholders at the SLG level which is
 24 overwhelming.
 25 Q I think we can take down that exhibit. Thank you.
 26 So, Professor, we just walked through your application

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 2 of the first criterion which was part of the framework that you
 3 described previously. Let's move onto the second criterion.
 4 If we could bring up tab nine. Let's bring it back
 5 up. Okay.
 6 So, this was the criteria required to recommend reject
 7 at a trust level. We just went through criterion one.
 8 Now let's focus on criterion two. There is an
 9 indication the expected recovery from litigation would be
 10 greater than the value of the settlement consideration?
 11 A Correct. So, again there is a relationship between
 12 these three which is why I require all three to be satisfied.
 13 So, the first criteria is basically at both a trust
 14 and an SLG level. Is there significant enough opposition to
 15 the settlement to recommend rejection at either the trust or
 16 the SLG level for me to the trustee.
 17 The second criteria is there a reason to believe that
 18 if the settlement is rejected there is at least a possibility
 19 of recovery of an amount that would be greater than what
 20 certificateholders would receive either at the trust level or
 21 the SLG level, then they would receive for the settlement.
 22 So, that requires basically a two-part analysis. The
 23 first part of the analyses in terms of the second criteria is
 24 to calculate how much each certificateholder would receive from
 25 the settlement at the trust level and at the SLG level and as
 26 I'll describe certain calculations and assumptions have to go

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 2 into that analysis. Secondly, once we have a benchmark of how
 3 much each certificateholder would receive from the settlement
 4 at the trust and the SLG level, that number has to be compared
 5 with how much they could potentially receive if the settlement
 6 is rejected and litigation were to be pursued and only if
 7 certificateholders either at the trust level or the supporting
 8 loan group level would do better by litigating than by what
 9 they receive from the settlement would the second criteria for
 10 the rejection of the settlement be satisfied.
 11 Q Now, before we get into the details of what you just
 12 described, I want to take one small step back and ask why you
 13 couldn't stop after criterion one. That is, why do you think
 14 meeting your first criteria for the trust was not enough to
 15 recommend rejecting the settlement?
 16 A Well, you know, to me as I said it by itself is highly
 17 significant but I also didn't want to just rely on the
 18 expressions of either support or opposition by the
 19 certificateholders. I also wanted to do some independent
 20 analysis of what I thought the relationship was between the
 21 settlement consideration and the possible recovery from
 22 litigation.
 23 Again, there is a relationship between these two
 24 because to the extent that certificateholders generally believe
 25 that they would be better off by settling than by litigating,
 26 then criteria one wouldn't be satisfied and criteria two

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 2 wouldn't be satisfied either because if it were obvious that
 3 there would be huge gains available from litigating as opposed
 4 to settling, then presumably certificateholders would be --
 5 much higher percentage of certificateholders would be in favor
 6 of rejection and there would be also strong indications that
 7 the recovery from litigating would be much greater than the
 8 recovery from settling. So, these are interrelated criteria
 9 but as I said, I wanted to do an independent analysis not just
 10 rely on the expressions of support or opposition from
 11 certificateholders as important as I thought those indications
 12 were.
 13 Q Okay. Thank you.
 14 Now, going back to the second criteria. You said it
 15 started with a calculation of the settlement consideration?
 16 A Correct.
 17 Q Correct?
 18 A Yes.
 19 Q Did you prepare a demonstrative that summarizes your
 20 analysis of the settlement consideration that each trust would
 21 receive?
 22 A I did.
 23 Q Actually, this isn't a demonstrative. This is part of
 24 your report.
 25 Can we bring up Trustee Exhibit 20 Exhibit O to the
 26 report and that's tab 13 please.

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 2 Can you walk us through the exhibit please.
 3 A Yes. Again, this is in some sense what you could call
 4 the benchmark. This is my analysis of what each
 5 certificateholder would receive from the settlement on a trust
 6 basis.
 7 Now, as I started to explain yesterday, the trust --
 8 excuse me -- the proposed settlement has a cash component.
 9 That doesn't require a lot of analysis. Some slight tinkering
 10 as I will explain when I go through this analysis.
 11 There is also a servicing component to the settlement,
 12 a benefit of the settlement to certificateholders and I had to
 13 place some value on that servicing component in the settlement
 14 and that was not so easy.
 15 So, what I did as I started to explain yesterday and
 16 I'm sure I'll explain again now was to take the possible
 17 benefit that was at least suggested by the servicing expert
 18 whose report I looked at and relied on.
 19 That number, the possible servicing benefit from the
 20 settlement was I think approximately \$2.4 billion but for
 21 reasons that I couldn't -- that I explain in detail in my
 22 report that I couldn't basically confidently rely on it in
 23 terms of that servicing benefits from the service would be
 24 \$2.4 billion or anything close to it.
 25 Just to recognize that there was a servicing benefit
 26 in the settlement, I had to place a value on it but I have

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 2 dramatically reduced the \$2.4 billion number as a benefit to
 3 certificateholders from the settlement to \$31 million.
 4 So, I almost discarded the entire number, again, just
 5 to have a number that I thought was defensible even though I
 6 recognized the actual number in terms of the servicing benefit
 7 from the settlement might be much larger.
 8 THE COURT: Excuse me. Can you explain what you
 9 understood to be the servicing component of the
 10 settlement?
 11 THE WITNESS: Yes, your Honor. That as a result
 12 of the settlement, a number of loans, first and second
 13 lien loans originated from JP Morgan which were being
 14 serviced by JP Morgan were then transferred to our
 15 servicers with the expectation that those other servicers
 16 would perform in a more skillful and efficient way and
 17 would minimize the amount of losses that
 18 certificateholders were experience on a going-forward
 19 basis.
 20 THE COURT: And why were you unable to rely with
 21 any confidence on the \$2.4 billion figure?
 22 That figure was put on it by another expert?
 23 THE WITNESS: Well, let me just explain, your
 24 Honor, just to be clear. And again this is explained in
 25 detail in my report. But the -- again, the \$2.4 billion
 26 number, your Honor, is quite right comes from another

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1 Fischel - Direct - Ingber
 2 expert. But that expert calculated servicing benefits
 3 from transferring first liens and second lien loans. And
 4 when I looked at the evidence, most of, virtually all of
 5 the first lien loans were already transferred prior to the
 6 settlement. So, even if there was a big benefit to
 7 certificateholders from transferring those first lien
 8 loans to superior servicers, it was difficult for me to
 9 attribute that to the settlement when the timing of the
 10 transfers occurred prior to the settlement. So, I wasn't
 11 willing to count that potential benefit as causally
 12 related to the settlement even though I recognized the
 13 possibility that those transfers might have been in
 14 contemplation of the settlement or the settlement made it
 15 more likely that those loans would stay with the different
 16 servicers as opposed to being transferred back to JPM.
 17 But as I explain in detail in my report, I could not
 18 confidently attribute those benefits calculated by a
 19 different expert to the settlement because they occurred
 20 prior to the settlement.
 21 THE COURT: Is that the main factor that comes
 22 to mind of your confidence in the number?
 23 THE WITNESS: Yes, not confidence in the number
 24 but confidence that the number was attributable to the
 25 settlement.
 26 Then with respect to the second liens, again

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 2 again there was a timing problem in that many of -- much
 3 of the calculated benefit by the other expert for the
 4 transfer of the second lien loans again hadn't occurred at
 5 the time that the servicing expert assumed or claimed that
 6 they would occur. So, I had to make an adjustment to that
 7 number as well. But most of my discount was because of
 8 the disconnect in terms of timing of the transfer of the
 9 first lien loans which was the large, by far the largest
 10 percentage of the benefits from servicing that the other
 11 expert calculated.
 12 (Continued on next page)

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 2 THE COURT: And can you also tell me what
 3 your understanding was of the functions or the tasks
 4 that the new servicers would perform, and what tasks
 5 they would be performing that, allegedly, had not
 6 been performed by the JP Morgan entities?
 7 THE WITNESS: Well, let me just say, it's a
 8 little bit beyond my expertise, your Honor, because
 9 I'm not a servicing expert.
 10 THE COURT: I understand, but you did have
 11 to have some understanding.
 12 THE WITNESS: And I think I do have some
 13 understanding.
 14 It's monitoring the documentation for the
 15 loans, whether the documentation is accurate, making
 16 decisions about when loans are not performing,
 17 whether to restructure the loans, whether to -- in
 18 situations where there's a request to refinance the
 19 loans, whether to agree to that, whether to be in a
 20 position to agree to repurchase loans if there are
 21 material breaches, and basically, also to service the
 22 loans, to take the payments that are being made and
 23 ensure that there's orderly distribution of the
 24 payments to the trusts, so they can be distributed
 25 pursuant to the waterfall provisions of the
 26 certificates.

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 2 THE COURT: Thank you.
 3 Mr. Ingber --
 4 MR. INGBER: Thank you, your Honor.
 5 Q On this topic of the potential benefit of the
 6 subservicing protocol of \$2.4 billion, on this exhibit,
 7 the 7.1 percent, that does not include \$2.4 billion in
 8 settlement consideration, correct?
 9 A Correct.
 10 Q Okay. And that number would be higher I assume
 11 if you take into account a \$2.4 billion benefit of
 12 subservicing protocol?
 13 A It would be much higher.
 14 I included, basically, a \$31 million number
 15 of that \$2.4 billion. You can see that in Column I
 16 of my report.
 17 Q Yes.
 18 A So, the effect of this adjustment by me, all else
 19 equal, was to make the settlement much less, make the
 20 settlement much lower, and in terms of monetary benefit
 21 to the certificate holders, and all else equal, if the
 22 settlement is lower, that affects a lot of different
 23 things. It affects how the settlement compares to
 24 comparable settlements.
 25 For example, it makes it look worse relative
 26 to comparable settlements than if the \$2.4 billion

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 2 number were used, and it also makes, all else equal,
 3 it makes rejection, my advise for rejection more
 4 likely because as the settlement number gets lower,
 5 the possible benefits from not settling become more
 6 attractive, and so again, all else equal, this
 7 particular adjustment that I made, while I think it
 8 was appropriate to do it, creates a bias in my
 9 analysis in favor of rejection as opposed to
 10 acceptance.
 11 Q And if you eliminated the servicing benefit
 12 altogether; that is, you replaced the 31 million with
 13 zero, would that have affected your recommendation in any
 14 way?
 15 A No, because then the 7.1 percent as we saw from
 16 my exhibits yesterday would go to seven percent.
 17 Basically, nothing would change in terms of my ultimate
 18 recommendations.
 19 The possible change would be if I went in the
 20 other direction and used the \$2.4 billion number.
 21 Q Okay. So, that was where we started talking
 22 about Exhibit O, and so I'd ask now --
 23 MR. INGBER: I don't know if your Honor wants
 24 to take a break. It's not a new topic.
 25 THE COURT: Do you want to take a break?
 26 MR. INGBER: I am happy to go straight

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 2 through, but Professor Fischel may, you may, and
 3 others may.
 4 THE COURT: Well, I had in mind to go for
 5 another five minutes, so we had a nice even number on
 6 the clock, but we can stop now.
 7 We'll take a 15-minute break, a true
 8 15-minute break.
 9 When I say that, it is because the Court day
 10 is so short, so I'm trying to start really promptly
 11 in the morning, and to really limit the brakes.
 12 MR. INGBER: We appreciate that, your Honor.
 13 Thank you.
 14 THE COURT: All right, Professor, you may
 15 step down.
 16 THE WITNESS: Thank you, your Honor.
 17 (Brief recess taken.)
 18 THE COURT: Back on the record.
 19 Continuing Direct Examination of Professor
 20 Fischel.
 21 MR. INGBER: Thank you, your Honor.
 22 CONTINUED DIRECT EXAMINATION
 23 BY MR. INGBER:
 24 Q Professor, you were about to walk the Court
 25 through Exhibit O to your report.
 26 Can you go ahead and do that, please?

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 2 A Sure.
 3 Again, this is my calculation of the benefit
 4 to certificate holders from the settlement on a trust
 5 basis given the adjustment that I made to the
 6 benefits of the subservicing protocol as part of the
 7 settlement, which as I indicated I think they're real
 8 benefits that were pointed out by the servicing
 9 expert, but I couldn't quantify them, so I made the
 10 adjustment that I made.
 11 But, with that background, again, just going
 12 across in the columns, look at the heading; the total
 13 is the entire settlement, and I think many of the
 14 numbers, certainly the beginning numbers, are not
 15 controversial. The original principle balance, the
 16 historic losses, the projected future losses, that's
 17 a calculation that we performed based on certain data
 18 sources that we utilized based on the characteristics
 19 of the loans that were still outstanding.
 20 The lifetime losses is just the sum of the
 21 losses that have been realized to date from
 22 foreclosures, and other losses, and projected future
 23 losses, and that number is almost \$64 billion.
 24 And then, there's the next column is
 25 something I haven't talked about yet, adjusted trust
 26 losses, and you see that number is approximately

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 2 fifty-nine and-a-half billion dollars. That's a
 3 different number from the lifetime losses, and
 4 there's a reason for that, and that is;
 5 In the settlement agreement there's a
 6 provision that loans that were originated by a
 7 particular list of originators that are identified in
 8 the settlement agreement, that those loans are --
 9 the possible recovery on those loans are ten percent
 10 of what they otherwise would be, absent the haircut.
 11 In other words, a 90 percent downward
 12 adjustment on the amount of losses attributable to
 13 those loans because they were originated by different
 14 originators than JPM, and those originators are
 15 listed, so we try to apply that provision of the
 16 settlement agreement as best that we could because of
 17 that 90 percent haircut, the adjusted trust losses
 18 number is lower than the lifetime losses number.
 19 Then the next column --
 20 THE COURT: Excuse me, that number was
 21 adjusted because the originators were bankrupt, or
 22 --
 23 THE WITNESS: No. I think, your Honor, I
 24 think it's the opposite, that it was my understanding
 25 is that the rationale for that haircut --
 26 THE COURT: Because they were still

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 2 available?
 3 THE WITNESS: Still available, other sources
 4 of possible recovery.
 5 A And so, the next column is just the \$4.5 billion
 6 number.
 7 The next column is, again, something I
 8 haven't talked about that -- how that \$4.5 billion is
 9 adjusted downward slightly because of payments that
 10 were made to certificate holders after the time of
 11 the settlement agreement, the proposed settlement
 12 agreements, because those sums have been recovered by
 13 certificate holders already, the total settlement
 14 payment in cash. The cash part of it is the
 15 \$4.5 billion, minus the almost \$14 million number, so
 16 in round numbers, it's still almost \$4.5 billion.
 17 But, this is a precise calculation taking
 18 into account the post-agreement payments to
 19 certificate holders.
 20 And then, you see the same seven percent
 21 number, the percentage of time losses recoverable in
 22 cash in the settlement.
 23 Then this adjustment that I made to
 24 \$2.4 billion subservicing protocol is part of the
 25 settlement, the reduction that I made to \$30 million
 26 recognizing the actual number might be much greater,

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 2 but in terms what I felt comfortable for purposes of
 3 my calculation, I have this \$30 million number.
 4 The total value of the settlement; again,
 5 it's just adding the subservicing benefit and cash
 6 benefit;
 7 And then, the total settlement value as a
 8 percentage of lifetime losses, the 7.1 percent that
 9 you have seen in multiple exhibits.
 10 In everything else on this exhibit is that
 11 exact same analysis applied on a trust level, and you
 12 see because of the differences in which trusts
 13 experience benefits from subservicing, which trusts
 14 are affected by the 90 percent haircut.
 15 If you go down the last column, you see a lot
 16 of different numbers in terms of what the value of
 17 the settlement is on individual trust basis. You
 18 see a lot of 7.6 numbers, 7.6 percent numbers, and
 19 7.5 percent numbers, 7.4, 6.5, and then it gets all
 20 the way down to much lower numbers.
 21 For example, if you take a look -- I don't
 22 know if you can pull it up with the page USB
 23 00037630.
 24 Q That's page 6 of this exhibit.
 25 A Those numbers are a little bit fuzzy.
 26 Q That's okay. Let's focus on the hard copy.

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 2 A Yeah.
 3 If you look at, look at the very top of those
 4 particular trusts, and you see that you get a number
 5 of 0.8 percent of the benefit of the settlement to
 6 them.
 7 Again, because of this difference of which
 8 trusts benefit from the subservicing protocol, and
 9 which trusts are affected by the 90 percent haircut
 10 because loans are originated by other originators, so
 11 it is important to analyze the settlement on a
 12 trust-by-trust basis because the settlement does not
 13 affect each trust in the same way, and that's a
 14 reason why it wasn't sufficient to just look at the
 15 factors that affected the settlement overall, but
 16 important to look at the affect of the settlement on
 17 a trust-by-trust basis because the affect of the
 18 settlement differs dramatically on a trust-by-trust
 19 basis.
 20 Q Did you also look at the effect of the
 21 settlement; that is, the settlement consideration on a
 22 loan group basis?
 23 A Yeah. I did the exact same analysis, but on a
 24 loan group basis.
 25 Q Let's bring up Tab 14, please. This is Trustee
 26 Exhibit 22, Professor Fischel's supplemental report, and

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1 Fischel Direct - Ingber
 2 it's Exhibit A to Professor Fischel's supplemental
 3 report.
 4 Can you explain this exhibit, please?
 5 A So, the top column total is exactly the same, but
 6 now it's broken down not just on a trust basis, but on a
 7 supporting loan group basis, and everything else is
 8 identical in terms of the interpretation of the columns,
 9 and the differential effect of the settlement on
 10 certificate holders on a supporting loan group basis, if
 11 you analyze the affect of the settlement, not just on
 12 certificate holders, on a trust basis, but also on a
 13 supporting loan group basis.
 14 Q Okay.
 15 THE COURT: Professor, how many of the
 16 trusts, if you can say, were affected by the
 17 90 percent haircut?
 18 THE WITNESS: You know, I could get the
 19 answer to that, your Honor, but I don't know as I sit
 20 here.
 21 I think you can probably figure it out by
 22 just looking at -- you can make a very good educated
 23 guess by looking at which trusts, or supporting loan
 24 groups got consideration from the settlement
 25 significantly less than seven percent.
 26 THE COURT: Okay.

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 2 THE WITNESS: But, I haven't calculated that
 3 number.
 4 THE COURT: All right, that's fine.
 5 Are any of the objectors here objectors based
 6 on the haircut?
 7 MR. ROLLIN: Not that we know, your Honor.
 8 MR. CHANG: No, your Honor.
 9 Q Okay. I think we can take down Exhibit A.
 10 Thank you.
 11 So, Professor, you said that you started
 12 with settlement consideration, and then you also
 13 looked at indications of potential recovery in
 14 litigation, correct?
 15 A Correct.
 16 Q Okay. How do you analyze potential recovery in
 17 litigation?
 18 THE COURT: Before we do that, I understand
 19 that this is a very technical process, but can you
 20 tell me, can you explain generally how you projected
 21 future losses?
 22 THE WITNESS: Yes, your Honor.
 23 THE COURT: And it was your firm that
 24 actually formed that analysis, is that correct?
 25 THE WITNESS: It's a combination, your Honor,
 26 of what our firm did, and the data sources that we

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 2 used. It's actually described in the notes to the
 3 exhibit, but basically, there is something called a
 4 risk model in a data vendor called CoreLogic, and
 5 what we did is, we took the characteristics of the
 6 loans that were still outstanding, and we plugged
 7 them into this risk model from CoreLogic, and that
 8 risk model allows you to predict based on the
 9 characteristics of the loans what the likelihood
 10 there's going to be of future losses, so it's what
 11 our firm did, but using sophisticated software that
 12 is -- that we utilized from a recognized data
 13 vendor.
 14 THE COURT: Where was the information coming
 15 from about the characteristics of the loans?
 16 THE WITNESS: Again, that comes from another
 17 data source. I think it's also CoreLogic data source
 18 that describes what the loans are, what the relevant
 19 characteristics of the loans are in terms of what can
 20 be inputted into this risk model in order to predict
 21 future losses.
 22 THE COURT: Can you give me some examples?
 23 I'm not expecting a comprehensive answer in response
 24 to my question;
 25 Some examples of what the relevant
 26 characteristics were considered to be?

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 2 THE WITNESS: Yes.
 3 You know, for example, if a loan is more
 4 than 90 days behind, you know, that would be, you
 5 know, a classic example of a loan that you would have
 6 a high likelihood of expecting future losses, even if
 7 it hasn't been foreclosed on yet.
 8 That would be a perfect example.
 9 THE COURT: Were you also considering other
 10 characteristics?
 11 THE WITNESS: Yes.
 12 THE COURT: Such as owner occupancy, or loan
 13 to value?
 14 THE WITNESS: Yes.
 15 In fact, we have a whole separate analysis of
 16 that in my exhibit coming up, your Honor.
 17 THE COURT: Okay, thank you.
 18 Please --
 19 MR. INGBER: Thank you, your Honor.
 20 Q So, I think we left off with a question about how
 21 you analyzed potential recovery in litigation.
 22 A Correct.
 23 Q You were starting to talk about that.
 24 A Right. So, again, what we did, we looked at six
 25 different criteria that provided information about
 26 potential recovery in litigation, including one that was

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 2 specifically addressed by your Honor, but those six are
 3 described in a demonstrative exhibit.
 4 Q Okay. And was there also a servicing piece of
 5 the analysis?
 6 A Yes.
 7 Q Okay.
 8 A Yes.
 9 Q Let's --
 10 A So, there's two parts of the -- six different
 11 possible material breaches, or measures of material
 12 breaches.
 13 Q Right.
 14 A Of representations and warranties, including
 15 owner occupancy, and whether there was a second lien on
 16 the property, as your Honor just asked about.
 17 And also, again, we had to make assumptions
 18 about possible recovery in litigation from servicing
 19 damages, servicing damages.
 20 Q Okay. Let's start with servicing, and then we
 21 could go to the indications of potential recovery from
 22 material breaches.
 23 A Okay.
 24 Q What analysis did you do for claims related to
 25 servicing?
 26 A Well, okay.

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 2 Again, we started with the servicing expert's
 3 report, and the servicing expert had an analysis of
 4 what, in his opinion, the amount of avoidable losses
 5 were if there had been superior servicing in the
 6 past, and that number was, approximately, four
 7 billion dollars.
 8 Now, again, we had a problem in terms of
 9 quantifying, using that number as a basis for
 10 quantifying what possible recoverable damages would
 11 be in litigation because what the servicer calculated
 12 was avoidable losses, not recoverable damages, and
 13 because we did not --
 14 THE COURT: Did you say avoidable losses, or
 15 voidable?
 16 THE WITNESS: Avoidable, meaning losses that
 17 could have been prevented if there had been superior
 18 servicing.
 19 A But, because we did not understand the potential
 20 liability of services to be a strict liability offense,
 21 there's not a one-for-one correlation between losses and
 22 damages that could be recovered against the servicer, so
 23 we did not want to assume that all of the losses that the
 24 servicing expert concluded could be avoided had there
 25 been superior servicing would be recoverable as damages,
 26 and so we, basically, had two choices, two extreme

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 2 choices of treating four billion dollars as damages, even
 3 though the servicing experts, specifically, described how
 4 he wasn't calculating damages, or just discounting the
 5 number entirely to zero because there's no basis to know
 6 what damages were, and so for purposes of our analysis,
 7 we chose a mid-point.
 8 We assumed that there would be \$2 billion of
 9 recoverable damages from servicing breaches based on
 10 the \$4 billion number that the servicing expert
 11 calculated for avoidable losses.
 12 Q Okay. So, just going back, the potential, or
 13 the settlement consideration that you assigned to the
 14 subservicing protocol was \$31 million.
 15 The assumptions that you made with respect to
 16 potential recovery relating to servicing was
 17 \$2 billion, correct?
 18 A Correct.
 19 Q That was fifty percent of the four billion, okay.
 20 Professor, what would have happened if you
 21 assumed that it was the full four billion,
 22 notwithstanding the fact that the servicing expert
 23 said he wasn't calculating damages?
 24 A Oh, it would have made the alternative of
 25 litigation even more attractive relative to the
 26 alternative of settlement, and the opposite would be true

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 2 if I assumed zero.
 3 Q Would it have affected your recommendations to
 4 this criteria?
 5 A I actually looked at that, and the way it turned
 6 out, it wouldn't have affected our recommendations
 7 because of the interaction between the second criteria,
 8 and the first, and the third criteria, and particularly
 9 with respect to the second criteria, which is the one
 10 that we're measuring now. If it turns out that every
 11 trust where there was substantial opposition to the
 12 settlement in excess of the support for the settlement,
 13 for everyone of those trusts, even at the \$2 billion
 14 number, the indications of possible recovery exceeded the
 15 possible benefit from the settlement, so that because
 16 criteria two was satisfied for every trust that criteria
 17 one was satisfied for, if I changed the number from two
 18 billion to four billion, it would still be satisfied, but
 19 by a larger amount.
 20 Q You also, Professor, talked about indications of
 21 potential recovery for material breaches. Why don't we
 22 move on to that now, and I think you alluded to a
 23 demonstrative that you prepared.
 24 If we could bring up Tab 15, please, and this
 25 is Trustee Exhibit 364.
 26 MR. INGBER: Your Honor, these are summaries

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 2 of sections of Professor Fischel's initial report,
 3 which is Trustee Exhibit 20, and it's pages 66 to 76.
 4 THE COURT: Thank you.
 5 MR. INGBER: You're welcome.
 6 Q Okay. Professor, can you walk us through this
 7 demonstrative, please?
 8 A Yes.
 9 What I did was, I came up with six different
 10 possible material breaches, and what I did for
 11 purposes of my analysis for this second criteria for
 12 rejection is; I analyzed whether any single one of
 13 these six produced indications of a recovery likely
 14 greater than the settlement consideration on a
 15 trust-by-trust and supporting loan group basis, and
 16 if any one of the six produced that result, likely
 17 benefit from -- a potential benefit from litigation
 18 greater than the settlement amount, then I concluded
 19 that this, my second criteria was rejection of the
 20 settlement was satisfied.
 21 And if you go down the list, first is breach
 22 rates from loan file reviews.
 23 The second is exactly what the Court was
 24 asking me about a minute ago, discrepancies in
 25 reporting about whether a particular residence was
 26 owner occupied or not, or whether or not there was a

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 2 second lien on the property, whether there was
 3 incorrect reporting on those two factors, what the
 4 Court asked about.
 5 The third was the amount of early payment
 6 defaults because early payment defaults are an
 7 indicator of a material breach.
 8 Four is a statistical analysis that we did
 9 from JPM's experiences with the GSE data based on
 10 data that JPM provided to us.
 11 The fifth was our analysis of potential
 12 breaches based on outstanding repurchase claims that
 13 had been presented to JPM.
 14 And the sixth was just a ten percent number
 15 based on our analysis of comparable settlements.
 16 We did a quantification analysis for each one
 17 of these six criteria, and as I said, if any one of
 18 the six, combined with the potential recoverable
 19 damages that we assumed from servicing breaches,
 20 adjusted, I should say, reduced by \$1 million, which
 21 we just assumed even as a very conservative as the
 22 cost of litigation going forward, if any of those six
 23 measured in that way produced a number greater than
 24 the settlement consideration, then that would result
 25 in a recommendation of rejection of the settlement
 26 for that trust, or supporting loan group.

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 2 (Whereupon, Senior Court Reporter Kathy Jones
 3 resumed.)
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 2 T5
 3 Q So, just a few follow-ups. Why just one indication of
 4 the material breach. Why was just one sufficient to satisfy
 5 this criterion?
 6 A Well, for a couple of reasons.
 7 One, for a number of these criteria we had very
 8 insufficient data. So, for example, for the loan file review,
 9 the first one, we only had allegations of breaches based on
 10 loan file reviews for a small minority of the trust. So,
 11 that's one reason.
 12 But secondly, as I said, there was a lot of
 13 uncertainty about what the potential recovery would be. This
 14 was a settlement before any breach, before any merits,
 15 discovery, without knowing what theories that could be advanced
 16 if the settlement was rejected and the case went to litigation.
 17 So, I tried to look at all of the different possible
 18 sources that I could think of where there was data available
 19 where there could be a claim that could be litigated in terms
 20 of what possible sources of recoverable damages there were.
 21 Both in terms of material breaches of representations that were
 22 made as well as breaches of servicing obligations.
 23 So, I thought under any of the theories that I could
 24 imagine, any of the possible sources of recoverable damages, if
 25 there was any theory that I could come up with based on the
 26 data that I had available that produced a number taking into

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 2 account my assumption about servicing damages and my very
 3 conservative assumption about the cost of litigation that
 4 produced a number in excess of the settlement amount that each
 5 trusts or SLG would receive, that would satisfy my second
 6 criteria for rejection.
 7 Q So, you mentioned potential recovery for servicing
 8 claims and also potential recovery for material breaches as two
 9 separate pieces.
 10 A Correct. I added them together.
 11 Q Do you know, Professor, whether a trust can recover on
 12 the same loan for both; that is, material breaches and
 13 servicing?
 14 A Yeah, I thought about that.
 15 I don't know particularly if a loan were repurchased
 16 and certificateholders were paid in full doesn't seem logical
 17 to me that they could recover more but I didn't make any
 18 assumption about that, about basically the double counting
 19 between recovery for breaches and recovery for servicing. I
 20 added the two of them together.
 21 Q So, there is a potential for double counting?
 22 A At least an opinion but I didn't form an opinion on it
 23 one way or the other.
 24 Q How would that affect your recommendations?
 25 A Well, again to the extent there is double counting,
 26 that would make the litigation potential alternative more

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 2 attractive relative to the possible alternative of accepting
 3 the settlement because the double counting would increase the
 4 potential damages recoverable in litigation.
 5 So, there would be a higher number to be compared
 6 against the recovery from the settlement that
 7 certificateholders would get either on a trust by trust basis
 8 or supporting loan group by supporting loan group basis.
 9 Q So, let's focus on these indications.
 10 THE COURT: Excuse me. Can we just interrupt
 11 this for a moment. I'm going to put this question to
 12 AMBAC and W & L. Which are the AMBAC Trust on Exhibit O
 13 to Exhibit 20?
 14 You know what, we can do this at the break which
 15 is coming up soon and maybe I will just send out a copy
 16 for counsel to circle the consultation with counsel for
 17 the petitioners. So, we're sure there is no dispute.
 18 MS. PATRICK: Your Honor, if it would be helpful
 19 I'm sure we can extract from the exhibit a one-page sheet
 20 that has the data for the trust for which there are
 21 objections if that would be easier.
 22 THE COURT: I would just like to have my copied
 23 circled.
 24 MS. PATRICK: Okay. Fair enough.
 25 THE COURT: I appreciate the offer though.
 26 Excuse me for the interruption. Please

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 2 continue.
 3 MR. INGBER: No problem at all.
 4 THE COURT: You know I like my own exhibits.
 5 MS. PATRICK: We do.
 6 MR. SACKS: And no power points.
 7 THE COURT: These are my equivalent of power
 8 points. They haven't been unhelpful particularly given
 9 that there has been no objections to them. That's the
 10 problem usually.
 11 MR. INGBER: We gave advance notice and this all
 12 comes from Professor Fischel's report.
 13 THE COURT: Thank you.
 14 Q Okay. The first indication of material breach breach
 15 rates from loan file reviews reported in complaints.
 16 Professor, how did you use loan file reviews in your
 17 analysis?
 18 A What we did was we again with the assistance of
 19 trustees in JPM were able to contain complaints where there
 20 were allegations against JPM based on breaches that were
 21 alleged to be determined from loan file reviews, breaches of
 22 reps and warranties that were determined from loan file reviews
 23 but we only were able to obtain complaints for a handful, small
 24 minority of all of the trust. But where we were able to obtain
 25 complaints, we took the percentage of alleged material breaches
 26 based on loan files that were conducted by the plaintiffs in

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 2 those particular litigations and did as I said a quantitative
 3 analysis of what those alleged breaches based on loan file
 4 reviews would produce in combination with our assumption before
 5 servicing damages and our assumption about the cost of
 6 litigation if the settlement was rejected.
 7 Q Okay. Can we bring up tab 16 please. This is trustee
 8 Exhibit 20, Exhibit Q-1.
 9 Professor, is this your analysis of the work that you
 10 performed with respect to the loan file reviews?
 11 A Yes. We did a quantitative analysis for each of the
 12 six different possible ways to measure material breaches where
 13 this is the first. So, if you look at the column close to the
 14 beginning breach rate from complaints, that's what I was
 15 referring to. You see a lot of NAs. That's because we didn't
 16 have complaints for those trusts.
 17 But towards the bottom of the page you see an
 18 84 percent and an 88 percent. And what that means is that for
 19 these particular trusts, there were allegations that 84 and
 20 88 percent of the lifetime losses were blamed on material
 21 breaches that were attributed or obtained from a loan file
 22 review according to the plaintiffs in those cases.
 23 So, just focusing on those two numbers on the first
 24 page.
 25 The next number is total losses. And then we
 26 multiplied the total losses for these particular trusts by the

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 2 84 percent and the 88 percent to get the number in the next
 3 column, the dollar value from breaches based on loan file
 4 reviews and you know in some sense all the zeros don't matter
 5 because we're doing this on a trust by trust basis.
 6 So, what's relevant is the analysis for these
 7 particular trusts and any other trusts where we have data about
 8 breach rates from loan file reviews.
 9 Then just going across, the rest of the numbers I
 10 think should be familiar because I've already discussed them.
 11 So, that number then gets added to the 50 percent of the
 12 servicing expert's calculation of avoidable losses in the past
 13 for that particular trust.
 14 Then there is a subtraction of the cost of litigation
 15 if that settlement were not accepted and litigation were to go
 16 forward based on a claim of the breach rate from loan file
 17 reviews.
 18 Then the next column is the key, the total potential
 19 expected recovery and as the little algebra formula at the top
 20 indicates, that's just a sum of the different possible sources
 21 of recovery from breach rates and servicing minus our
 22 assumption about the cost of litigation.
 23 The next entry is the estimated trust settlement
 24 payment, what the trust would receive from the settlement.
 25 Then there is an entry for whether we attribute any benefit to
 26 that trust from the sub servicing protocol.

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 2 Then there is a total for -- a total benefit to the
 3 trust from the settlement. So, that's a comparison of the
 4 total settlement number from the -- as compared with the total
 5 potential recovery.
 6 So, for this particular trust measured as a number
 7 derived as a breach rate from loan file reviews, taking that
 8 number servicing into account minus the cost of litigation as a
 9 potential benefit of \$54 million from litigating a little bit
 10 less than \$5 million from accepting the settlement. Obviously,
 11 the \$54 million is greater than a number a little bit less than
 12 \$5 million.
 13 So, based on this criteria, this criteria two for this
 14 particular trust measured in this way, that satisfies my
 15 criteria two for rejection of the settlement.
 16 Since I started with the assumption that if any of my
 17 six measures of material breach produce a result greater than
 18 what that trust would receive from the settlement, that
 19 satisfies my second criteria for rejection. So, at least for
 20 these two trusts and any other trusts where the same result
 21 applies, I don't need to do any further analysis because I know
 22 already that at least one of my six bases for material breaches
 23 produce a result based on the assumptions that I used greater
 24 than the settlement considering that's available from the
 25 settlement to that trust.
 26 So, based on my criteria two, I would recommend

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 2 rejection of the settlement for that trust.
 3 THE COURT: Professor, why is the benefit of the
 4 sub servicing protocol zero for those two trusts?
 5 THE WITNESS: You know, again, your Honor, that
 6 is based on the analysis of the servicing experts
 7 calculations of which trusts would benefit from the sub
 8 servicing protocol. But again --
 9 THE COURT: So, are you saying that for these
 10 two trusts with the 84 percent rate on page 1, the
 11 servicing expert did an analysis which indicated that
 12 there would be no benefit of the sub servicing protocol
 13 and the servicing expert's analysis was different say for
 14 the trust about two thirds of the way down, the 90 percent
 15 breach rate on page 2?
 16 THE WITNESS: Not necessarily, your Honor. What
 17 I am saying is that you know, as I indicated before, if
 18 for example, the entire -- according to the servicing
 19 expert, if the entire benefit from the sub servicing
 20 protocol was the transfer of first liens from JPM to
 21 what's assumed to be any superior servicer and when I
 22 looked at that data, all those transfers occurred prior to
 23 the time of the settlement, even though I know that there
 24 is a lot of aspects to the sub servicing protocol which
 25 are considered to be benefits in the settlement agreement,
 26 I couldn't quantify them. So, I have a number of zero

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 2 which is not what the sub servicing expert concluded. I
 3 just for purposes of my analysis didn't feel that I could
 4 quantify any benefit for this particular trust if
 5 according to the sub servicing expert all the benefit was
 6 the result of the transfer of first liens that occurred
 7 prior to the time of the settlement.
 8 So, in that sense, my zeros do not reflect the
 9 calculations of the servicing expert, just the measure of
 10 what I felt I could quantify in terms of benefits to
 11 particular trusts.
 12 Again, I was very conservative in my analysis of
 13 if I didn't feel that what the sub -- what the servicing
 14 expert calculated that I could fairly attribute to the
 15 settlement, I didn't do it. I had a zero even though the
 16 servicing expert number might be very different for this
 17 particular trust.
 18 THE COURT: Where did the information come from
 19 that when loans transferred to servicing. Forgive me if
 20 you already answered that.
 21 THE WITNESS: That's in the servicing report.
 22 THE COURT: That is in the report. You can stop
 23 here if you want or we'll go for another five or ten
 24 minutes. It's up to you.
 25 MR. INGBER: Let me ask just one follow-up to
 26 your Honor's question and one or two questions about the

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 2 loan file reviews and then that would probably be about
 3 five minutes and we could end there.
 4 Q Just to follow-up on Justice Friedman's question about
 5 the benefit and I think you may have mentioned this in your
 6 answer to Justice Friedman, but how did this affect your
 7 recommendations?
 8 That is, assuming there was either no benefit or
 9 virtually no benefit to the sub servicing protocol, how did
 10 that affect your recommendations.
 11 A Well, again, all else equal, that would create a bias
 12 in favor of rejection of the settlement because it depresses
 13 the value of the settlement to certificateholders and makes the
 14 option of rejecting the settlement in favor of litigation more
 15 attractive.
 16 Q Okay. And I just want to be clear. You weren't
 17 testifying that there were no benefits to the sub servicing
 18 protocol. It's just a question of whether you were comfortable
 19 quantifying them?
 20 A I know that there are benefits in terms of locking in
 21 the transfer of the loans to superior services, requiring
 22 independent appraisals, providing incentive fees for successful
 23 servicing. There is a list of benefits of the settlement in
 24 terms of the servicing protocol but there is no real way for
 25 me, not as an expert in servicing, to quantify those benefits.
 26 What I potentially could quantify were the or not what

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 2 I could be confident in not quantifying were again the transfer
 3 of loans that occurred prior to the time of the settlement
 4 where there are clearly benefits still because those loans are
 5 now locked into the new servicers. The benefits that I just
 6 mentioned occurred but because of the disparity in timing, I
 7 wasn't comfortable quantifying any benefit associated with
 8 that.
 9 Q Okay. I just want to clarify one or two things on the
 10 loan file reviews.
 11 These were alleged breach rates asserted by plaintiffs
 12 in complaints; is that correct?
 13 A Correct.
 14 Q Professor, do you have a view as to whether loan file
 15 reviews are a reliable guide as to what can be recovered in a
 16 litigation?
 17 A Well, you know, that's a difficult question to answer
 18 because having seen enough cases involving loan file reviews
 19 typically because of all the subjective judgments associated
 20 with loan file reviews, different experts typically reach
 21 widely divergent results based on their review of loan files.
 22 If I had to generalize --
 23 THE COURT: Did you say widely or wildly?
 24 THE WITNESS: Widely and wildly, both.
 25 Again, without may be being overly cynical,
 26 plaintiffs experts tend to find the huge breach rates

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 2 in loan file reviews. Defendants experts tend to find
 3 very low breach rates from loan file reviews.
 4 In order to figure out who's right or whether
 5 some other number is right involves a very lengthy and
 6 again subjective process depending on how many loan files
 7 are involved. And there is also typically disputes about
 8 whether every single loan file has to be reviewed or
 9 whether there could be statistical sample of loan files
 10 that are sufficiently reliable that can be used as a proxy
 11 for all the loan files.
 12 So, I would say this whole area of loan files
 13 and the reliability of loan file reviews is something
 14 that's frequently undertaken.
 15 I don't want to suggests that it's usual to
 16 consider loan file reviews but it's frequently extremely
 17 contentious with very little convergence among the
 18 different parties or experts about what loan files show
 19 and depending on how many loan files need to be reviewed.
 20 You know, I've seen calculations, in fact I
 21 myself have performed calculations in other matters.
 22 To review every single loan file literally could
 23 take years if there are sufficiently large number of loan
 24 files. So, it is an indicator but I think it is important
 25 to recognize this is a plaintiff-driven indicator and it
 26 should be used and interpreted in that way.

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 2 Q The last question before the break, did you include in
 3 Exhibit Q-1 or were you able to find in your analysis any
 4 breach rates asserted by defendants in litigations or does this
 5 just include plaintiff-alleged breach rates?
 6 A This just includes plaintiff's-alleged breach rates.
 7 MR. INGBER: We can take a break. I guess we
 8 can have lunch.
 9 THE COURT: Step down.
 10 (Witness excused)
 11 THE COURT: We will close the record but we'll
 12 discuss scheduling for a moment off the record.
 13 (Lunch recess taken)
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 2 THE COURT: Back on the record.
 3 Good afternoon.
 4 We will resume with Direct Examination of
 5 Professor Fischel.
 6 Mr. Ingber --
 7 MR. INGBER: Thank you, your Honor.
 8 CONTINUED DIRECT EXAMINATION
 9 BY MR. INGBER:
 10 Q Okay, Professor Fischel, when we left off we were
 11 talking about the six indications of material breaches,
 12 right, and the context of discussing a potential recovery
 13 in a litigation as compared to settlement consideration,
 14 correct?
 15 A Correct.
 16 Q Okay. And we were focusing on the first
 17 indication of potential recovery, which was material
 18 breaches, and I believe you testified that you pulled
 19 alleged breach rates in plaintiff's complaint, and then
 20 conducted an analysis based on those brief rates?
 21 A Correct.
 22 Q We talked a little bit about loan file review. I
 23 wanted to start by asking you, Professor, why you didn't
 24 your own loan file review as part of your analysis in
 25 this case?
 26 A Well, the reasons are, basically, the ones that I

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 2 have already described;
 3 It would be extremely time consuming. There
 4 was some time pressure to reach an opinion in terms
 5 of advising the trustees about whether to accept the
 6 settlement or reject it on a trust-by-trust and
 7 supporting loan group basis.
 8 I don't think it would have been possible to
 9 do a loan group review, a loan file review for every
 10 single loan file compatible with the time period that
 11 was available.
 12 Second, I'm not sure what it would accomplish
 13 even if it could be done for all the reasons that I
 14 described. In terms of all of the subjective
 15 judgments that go into a loan file review, it would
 16 also be extremely expensive, and beyond that, because
 17 I already had data from the plaintiffs' complaint
 18 about what was alleged to be the breach rate from
 19 loan file reviews, and I had all these other
 20 criteria, that was sufficient for my purposes,
 21 particularly since, as I think I said before lunch,
 22 all of the trusts and supporting loan groups that
 23 satisfied my first criteria; meaning, that there was
 24 enough opposition to the settlement, the small
 25 minority of trusts and supporting loan groups where
 26 that condition was satisfied.

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 2 Also, approved, satisfied my second condition
 3 for rejection, so I wouldn't have gotten any
 4 additional information from taking the time and
 5 expense to do a loan file review, and I'm not sure
 6 what it could have accomplished, in any event.
 7 THE COURT: In your view, do you have the
 8 experience and the expertise that would have enabled
 9 you to do a loan file review if you had felt it
 10 necessary to do so?
 11 THE WITNESS: Not without assistance, your
 12 Honor.
 13 THE COURT: And what kind of training or
 14 experience is necessary to do that kind of review?
 15 THE WITNESS: You know, there's a group of
 16 underwriting experts who specialize in analyzing all
 17 the different representations and warranties that are
 18 made in loan files, and checking them for accuracy,
 19 and also determining whether or not any discrepancies
 20 are material, or not material. There is a -- the
 21 reason why I said I couldn't do it without
 22 assistance, if I were entrusted to do that task, or
 23 to supervise that task, I would want to use an
 24 underwriting expert, but I wouldn't stop by --
 25 I wouldn't just accept the underwriting
 26 expert's conclusions by themselves because there's

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 2 also, again, an economic literature on the
 3 significance of different types of
 4 misrepresentations; which are important, which are
 5 not important, which affect the value of loans, which
 6 don't affect the value of loans, which are important
 7 in predicting defaults, which are not important in
 8 predicting defaults.
 9 Typically, underwriting experts do not have
 10 that background to interpret their results through
 11 that prism, whereas I think we do, I do, so if I had
 12 to do it, which again, to be clear, I didn't do it at
 13 all in this particular case, that would be the basic
 14 approach that I would follow.
 15 THE COURT: Thank you.
 16 MR. INGBER: Thank you, your Honor.
 17 Q Okay, let's go back to Tab 15, please. This is
 18 the demonstrative that you prepared with the indications
 19 of material breaches.
 20 THE COURT: This is 364, is that right?
 21 MISS PATRICK: Yes.
 22 MR. INGBER: That's correct, your Honor.
 23 Q Okay, and let's focus now the second indication
 24 of material breaches that you list on this demonstrative;
 25 discrepancies between information relating to the
 26 borrower and property given to the trusts, and that given

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 2 to credit bureaus.
 3 Professor, how did you determine the rate of
 4 these discrepancies?
 5 A Okay, what -- well, first let me say that, these
 6 are the exact same criteria that are input into the risk
 7 model to determine lifetime losses as the Court asked
 8 about before, and the reason why they're input into the
 9 model for determining future expected losses is because
 10 there's reason to believe that where there are
 11 discrepancies, they are significant; they turn out to be
 12 material breaches.
 13 And for this second criteria, we looked at
 14 whether there were disclosure discrepancies on the
 15 owner occupied criteria, and also on whether or not
 16 there was a second lien on the property, and what we
 17 did -- again, there's another data source. I think
 18 it's called Equifax that collects all of the
 19 different disclosures that were made to the trusts,
 20 and we compared the information about what was
 21 accurate in Equifax to the disclosures that were made
 22 to the trust to form at least an estimate of material
 23 breach rate on the disclosures about what properties
 24 were owner occupied, and what properties did not have
 25 a second lien on them.
 26 Q Okay. And there's an exhibit to your report

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 2 that shows your analysis of this second indication of
 3 material breach, is that right?
 4 A Correct.
 5 Q Okay. Can we bring up tab 17, please?
 6 MR. INGBER: Your Honor, this is Trustee
 7 Exhibit Number 20, and it's Exhibit Q-2 to
 8 Exhibit 20, and it's tab 17 in the binder.
 9 THE COURT: Would it interest you to know
 10 that I have different exhibit tab numbers in my copy?
 11 MR. INGBER: It would interest me to know
 12 that.
 13 THE COURT: Some heads will be rolling.
 14 It's QT --
 15 MR. INGBER: What's that?
 16 THE COURT: Can you say it again.
 17 MR. INGBER: I have Q-2, Exhibit Q-2, and in
 18 my binder, which I really hope is the same as your
 19 binder, it is tab 17.
 20 THE COURT: 17. I think mine is probably
 21 19. Mine is 17, too. Some of them I think have
 22 been different.
 23 MR. INGBER: Okay.
 24 So, again, this is Exhibit Q-2 to Professor
 25 Fischel's initial report, which is Trustee
 26 Exhibit 20.

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 2 Q Okay, Professor Fischel, can you walk us through
 3 this exhibit, please?
 4 A Yes.
 5 Again, a lot of reasons I think the exhibits
 6 are confusing is because they all look very similar.
 7 So, this exhibit is identical to the previous
 8 exhibit about breaches from loan file reviews, except
 9 that it has a different breach rate in the A column
 10 where -- these are breaches as a result of
 11 discrepancies about disclosures about owner occupancy
 12 and whether or not there is a second lien.
 13 And then, after that, it's exactly the same
 14 process of multiplying that number by total losses to
 15 get a dollar value associated with this measure of
 16 breach rates, then adding the damages from servicing
 17 claims, subtracting the million dollars for expected
 18 litigation costs, and then comparing that number to
 19 the ultimate amount that the certificate holders
 20 would expect to receive on a trust-by-trust basis.
 21 So again, just to help the interpretation of
 22 the exhibit, just take the top line;
 23 There are 6.7 percent of the total losses in
 24 this Trust, Balta 2005-1. There's a 6.74 percent
 25 breach rate as a percentage of all loans, total
 26 losses. Again, this is going to be identical to the

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 2 previous exhibit of approximately fifty-nine million,
 3 a little more than fifty-nine and-a-half million.
 4 The dollar from that breach rate is just a
 5 multiplication of 6.64 percent times the total losses
 6 to get a dollar value of a breach rate of a little
 7 more than four-million dollars. That's added to the
 8 servicing damages number for this trust, which is for
 9 this particular trust zero.
 10 There's estimated cost of litigation, again,
 11 of a million dollars.
 12 You add the two sources of recovery, subtract
 13 the million dollars, and then you compare that number
 14 with the trust settlement consideration, and in this
 15 particular case the numbers are relatively close, but
 16 they're still a greater expected recovery from the
 17 settlement than there is from litigating based on
 18 this theory of breach rate for this particular trust,
 19 and so in the final column, there's the entry for no;
 20 in other words, for the second criteria, there is not
 21 a benefit to litigating as opposed to accepting the
 22 consideration provided by the settlement at the trust
 23 level for this trust.
 24 Q Okay, thank you.
 25 MR. INGBER: And, your Honor, I think I may
 26 have figured the source of confusion.

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 2 The tab numbers that I'm referring to are the
 3 tab numbers in the binder that we prepared for
 4 purposes of this examination.
 5 There's also tabs in the expert report of
 6 Professor Fischel, and it may be -- I don't know, it
 7 may be that you are looking at Professor Fischel's
 8 report, and I'm referring to tabs in the binder that
 9 we prepared for the examination.
 10 THE COURT: It's fine. It hasn't been a
 11 problem.
 12 Excuse me, just one minute.
 13 MR. INGBER: Sure.
 14 (Brief pause.)
 15 THE COURT: Off the record for a moment.
 16 (Whereupon, a discussion was held off the
 17 record.)
 18 THE COURT: Back on the record.
 19 Please, continue.
 20 MR. INGBER: Thank you.
 21 Q Can we please bring up Tab 15 again, the
 22 demonstrative. Thank you.
 23 Okay, so Professor, I don't think I'm going
 24 to ask you to walk us through each of the exhibits
 25 that you prepared with respect to each of the
 26 indications of material breaches, but I do want to

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 2 address the other indications of material breaches
 3 applicable.
 4 The third one is early payment defaults.
 5 What is an early payment default, and why did you use
 6 early payment defaults as an indication of a material
 7 breach?
 8 A Okay, so we know from experience, and again, from
 9 the economic literature in this area that there's a high
 10 correlation between loans which default very quickly
 11 after origination, generally, figure what's typically
 12 used is 90 days, and the existence of material breaches
 13 in the disclosures with those loans made to the trusts,
 14 so we performed exactly the same analysis as I just went
 15 through with the first two indications of material
 16 breaches just measuring the existence of material
 17 breaches by the existence and number of early payment
 18 defaults on loans that were transferred from JPM,
 19 ultimately, to the trusts.
 20 Q And you know what, Professor, I would ask you
 21 just to take a look at your report, which you should have
 22 there, and it's exhibit Q-3 to your report.
 23 MR. INGBER: Which, your Honor, is tab 17 to
 24 the report.
 25 THE COURT: I have it.
 26 MR. INGBER: Okay.

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 2 Q And I said I wasn't going to make you go through
 3 each and every one of these exhibits.
 4 Let's go through this one for a minute. If
 5 you can, walk the Court through this exhibit, and how
 6 this exhibit reflects the analysis that you performed
 7 with respect to early payment defaults.
 8 A Sure. Just let me get it.
 9 Q Sure.
 10 A Okay, I have it now.
 11 So, again, I don't know if everybody is
 12 looking at this exhibit, but again, it's identical to
 13 the other exhibits. It just has a different number
 14 for a breach rate based on the assumption that an
 15 early payment default is a good proxy, and a good
 16 indicator of a likely material breach.
 17 So, using the same approach, just with that
 18 different number, again, if you look at the top trust
 19 Balta 2005-1, now the assumed breach rate is 1.22
 20 percent. Everything else is the same.
 21 Again, that produces a potential recovery in
 22 this case, a negative potential recovery because the
 23 cost of litigation exceeds the potential recovery
 24 using this measure of breach rate, and so obviously,
 25 the last column is going to have a no, meaning that
 26 for this particular trust using this particular

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 2 indicator of breach rates, the trust is better off by
 3 -- the certificate holders in the trust are better by
 4 accepting the settlement than by rejecting the
 5 settlement and litigating.
 6 Q Okay. So, back to this demonstrative here for an
 7 indication of material breach predicted repurchase rate
 8 from GSE data.
 9 What do you mean by that?
 10 A Okay, this, again, is an area where we wanted to
 11 investigate where we did not have the data we needed, to
 12 get this data from JP Morgan.
 13 Q And you did get that data?
 14 A And we did get it, and the data that we wanted
 15 was the repurchase rate, the loans, the repurchase rate
 16 of loans that JPM repurchased from the GSE's, and the
 17 characteristics of those loans that JPM repurchased from
 18 the GSE's, and we were provided with that data by JPM,
 19 and once we were in possession of that data, we did our
 20 own statistical analysis. We created a statistical
 21 model, basically, asking the question given the loans
 22 that were repurchased by JPM from the GSE's, what
 23 characteristics of those loans were predictors of which
 24 loans would be repurchased by JPM from the trusts, and
 25 once we had that, once we did that model, then the
 26 predicted repurchase rate that we were able to ourselves

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 2 estimate based on this other data that we got from JPM,
 3 we can use that for the estimated material breach rate,
 4 and then, again, the analysis was exactly the same on a
 5 trust level.
 6 I would say, our report talks about a number
 7 of caveats and the difference between the two
 8 situations, but nevertheless, that was one of the
 9 ways that we tried to estimate the frequency of
 10 material breaches, and the implications of that
 11 frequency for whether or not any particular trust was
 12 better off -- the certificate holders in that trust
 13 were better off by either accepting the consideration
 14 offered in the settlement, or litigating based on
 15 this theory.
 16 Q And that analysis is reflected in Q-4 of your
 17 report, is that correct?
 18 A Correct, that's right.
 19 Q And so, if we look at Q-4, which is the exhibit
 20 to Trustee Exhibit 20, which is your initial report, the
 21 third column is the predicted repurchase rate?
 22 A Hold on.
 23 Yeah, the third column is the predicted
 24 repurchase rate where we had available data, and then
 25 it's multiplied straight through the same way that I
 26 have already described for all the other indicators

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 2 of material breaches.
 3 Q Okay. Your fifth measure of, or your fifth
 4 indication of a material breach is the amount of losses
 5 on mortgage loans where there are outstanding repurchase
 6 claims?
 7 Can you describe what that means?
 8 A Yes.
 9 Well, any time where there's an outstanding
 10 repurchase claim, there's at least an allegation of a
 11 material breach, and so that, again, was a measure
 12 of, potential measure for the frequency of material
 13 breaches.
 14 On the other hand, we also knew that not all
 15 repurchase claims are meritorious, or successful, so
 16 we applied a discount to the number of repurchase
 17 claims, again, based on the JPM, GSE data, and again,
 18 came up with an estimated material breach rate based
 19 on the adjusted frequency of repurchase claims.
 20 Q Where did you obtain the data regarding
 21 outstanding repurchase claims?
 22 A Again, from the trustees in JPM.
 23 Q Am I correct that Q-5 reflects your analysis of
 24 this issue?
 25 A Yes.
 26 Q And it's multiplied throughout --

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 2 A Exactly the same.
 3 Q -- as Q-1, Q-2, Q-3 and Q-4?
 4 A Correct.
 5 Q The last indication of material breach is ten
 6 percent of losses based on comparable settlements.
 7 Professor, why did you do that analysis?
 8 A Again, that's just a catch-all.
 9 We know, as I said before, the reason why you
 10 look at other settlements is because other parties
 11 have faced similar conditions, similar issues about
 12 what breach rates are, and what settlements to reach
 13 based on those breach rates, so this is in some sense
 14 a compilation of everything based on other
 15 settlements, and ten percent was just a number, which
 16 was a little higher than the proposed settlements in
 17 this case given the big haircut that we applied to
 18 the subservicing protocol. It's about halfway
 19 between the Country-Wide number, and this number, so
 20 we chose ten percent.
 21 And then, again, applied exactly the same
 22 analysis using that ten percent as a material breach
 23 rate.
 24 Q Okay. So, you were just assuming a ten percent
 25 recovery, ten percent of losses recovery, and then
 26 comparing that to the settlement consideration?

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 2 A Exactly ten percent as a material breach rate,
 3 multiplying that by the lifetime losses, and then, adding
 4 the servicing damages, subtracting a million dollars for
 5 litigation expenses, and on a trust-by-trust basis, and
 6 then comparing that number with the settlement
 7 consideration that any trust expected to receive.
 8 Q Okay. That is reflected in Exhibit Q-6, correct?
 9 A Correct.
 10 Q Okay. Professor, am I correct that you prepared
 11 a demonstrative that summarizes the application of your
 12 second criteria at the trust level?
 13 A We did.
 14 Q Can we have 18?
 15 MR. INGBER: Your Honor, this is Trustee
 16 Exhibit 365.
 17 Q This is the demonstrative you prepared?
 18 A Yes, it is.
 19 Q Okay. Can you walk us through it, please?
 20 A Yes.
 21 This is a summary exhibit for all six of the
 22 different ways that we attempted to measure material
 23 breach rates as a way of analyzing whether the
 24 particular trust would be better off under criteria
 25 two by litigating as opposed to accepting the
 26 consideration that they would get in a settlement,

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 2 and remember, as I testified before lunch, the way I
 3 set up the exercise was that if any one of the six,
 4 any one of the six different theories of material
 5 breaches, combined with the servicing damages, minus
 6 the litigation expenditures, assumptions produced a
 7 higher number than the settlement consideration that
 8 each trust would receive given the big haircut that I
 9 applied to the subservicing protocol, that that would
 10 be enough to satisfy my second criteria for the
 11 rejection, so what this does, this exhibit, it goes
 12 trust-by-trust, and it answers the question for each
 13 of the six different theories of material breaches,
 14 or ways to measure material breaches, whether the
 15 potential recovery under that theory is greater than
 16 the amount that each trust would expect to receive
 17 under the settlement.
 18 A "no" means that the consideration under the
 19 settlement exceeds the expected recovery under a
 20 particular theory of, a particular measure of
 21 material breaches, and a "yes" means the opposite,
 22 that the trust would be, at least based on this
 23 analysis, and under my second criteria, would be
 24 better off by litigating, potentially better off by
 25 litigating than accepting the settlement, and you see
 26 no's and yes's for every trust under each of the six

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 2 different measures.
 3 And then, the last column, number of factors
 4 indicating high recovery where high recovery is
 5 defined as a potential recovery in excess of the
 6 expected amount that each trust would receive under
 7 the settlement.
 8 So, again, just taking the top line for Balta
 9 2005-1, there's only one factor that I calculate, one
 10 measure of material breaches, which would make this
 11 particular trust better off by rejecting the
 12 settlement than accepting the settlement, but the way
 13 I've set up the experiment, one factor is enough
 14 because any one of the six factors is sufficient.
 15 Q Right.
 16 A For the second trust, there's four factors that
 17 looked like -- at least based on the analysis that I
 18 performed, that the potential recovery would be greater
 19 than the amount that would be received under the
 20 settlement, and then you can just go down the list for
 21 every single trust, look at how many of my six indicators
 22 of material breaches produce a potential recovery in
 23 excess of the settlement amount that each trust would
 24 receive, and then look at the last column and see how
 25 many of the six satisfy that criteria where based on the
 26 way I have set up the experiment, any one -- as long as

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 2 there's one or more, my second criteria for rejection of
 3 the settlement is satisfied.
 4 (Whereupon, Senior Court Reporter Kathy Jones
 5 resumed.)
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 2 T7
 3 Q Thank you.
 4 Now, this was this analysis of your work at the trust
 5 level. Did you prepare a demonstrative showing your analysis
 6 at the loan group level as well?
 7 A Yes, because the six different calculations for the
 8 six different measures of material breaches that we did at the
 9 trust level, we did the exact same thing at the supporting loan
 10 group level. And analysis is identical except it's at the
 11 supporting loan group level as opposed to the trust level. And
 12 this is a --
 13 MR. INGBER: Before you get into that, just for
 14 the record, your Honor, this is Trustee Exhibit 366.
 15 Q Go ahead, Professor.
 16 A This exhibit that's now on the screen is the identical
 17 summary exhibit but now just based on supporting loan groups as
 18 opposed to trusts.
 19 If you look at the second column for supporting loan
 20 group, you see all the different supporting loan groups. Any
 21 time you see the entry total pool, that means there is just one
 22 supporting loan group for that particular trust.
 23 Q Now, there is a list of five indications of material
 24 breach there, correct?
 25 A Correct.
 26 Q What happened to the sixth?

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 2 A The sixth, on the second measure of material breach
 3 and discrepancies in disclosures, there just wasn't data for
 4 that because the disclosures were made on a trust level. So,
 5 we only used five measures as opposed to six for the supporting
 6 loan group analysis.
 7 Q Okay. Can you bring up tab nine please.
 8 So, Professor, I would like to move onto the third
 9 criterion required to recommend a reject at a trial level.
 10 Can you describe for the court again what this third
 11 criterion is please?
 12 A Yes. This third criteria that I require to be
 13 satisfied for rejection in combination with the first two, it's
 14 a two-part criteria.
 15 The first part is whether the repurchase claims are
 16 barred by the statute of limitations based on the analysis that
 17 we received from Justice Carpinello. And the second part of
 18 this third criteria is whether the potential recovery for
 19 servicing damages which we were instructed is not subject to
 20 the same statute of limitations as the claims for material
 21 breaches. So, whether the claim for the amount of potential
 22 recovery for servicing damages is greater than the amount of
 23 expected payment that each trust and supporting loan group
 24 would receive under the settlement.
 25 Again, let me just point out the logic between these
 26 three different criteria.

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 2 Q Sure.
 3 A Because I require that all three need to be satisfied
 4 and the reason for that is the logic among the three. The
 5 first criteria is there has to be sufficient support for
 6 rejecting the settlement. If there is sufficient support for
 7 rejecting the settlement, I also analyze whether there's
 8 sufficient expectation of a recovery, potential recovery in
 9 excess of the amount that is expected under the settlement.
 10 And if the first two are satisfied, there is a lot of support
 11 for rejection. There is a basis to believe that if there is
 12 rejection, the amounts that could be recovered are in excess of
 13 the amounts that will be received under the settlement.
 14 And the third criteria is that basically that those
 15 claims will be allowed to go forward as opposed to being barred
 16 under the statute of limitations.
 17 So, there is a logic, there is an interrelationship
 18 among the three. In the way that I did my analysis, you need
 19 to satisfy all three because of that interrelationship at both
 20 the trust level and the supporting loan group level in order
 21 for me to conclude to advise the trustees to reject the
 22 settlement for either any individual trust or any individual
 23 supporting loan group.
 24 Q Professor, how did you determine which trust had
 25 claims that were subject to a statute of limitations problem?
 26 A Again, that's purely a legal conclusion. I wasn't

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 2 making any legal conclusions in any part of my analysis. In
 3 any event, I wouldn't have any way of answering that question
 4 even if I did attempt to answer it.
 5 So, I relied entirely on the memorandum that we
 6 received prepared by Justice Carpinello that was provided to us
 7 by the trustees.
 8 Q And you took that memorandum from Justice Carpinello
 9 and applied it to each trust?
 10 A Correct.
 11 Q And is there an exhibit to your report that summarizes
 12 your analysis of the statute of limitation issue?
 13 A Yes, there is.
 14 Q Can you bring up tab 20.
 15 MR. INGBER: Your Honor, this is Trustee Exhibit
 16 20, Exhibit R-1 which in the report is tab 18.
 17 Q Professor, can you walk the Court through Exhibit R-1
 18 please.
 19 A I think the title is self explanatory. It's Judge
 20 Carpinello's interpretation of the statute of limitations for
 21 any trust where the potential initial date for instituting
 22 litigation is more than six years after the closing date for
 23 that particular trust adjusted by any tolling agreement that
 24 existed where the tolling agreements that had been agreed to
 25 again were provided to us by the trustees, that for any of
 26 those trusts, the claims would be barred by the statute no

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 2 matter what the potential recovery would be in the absence of
 3 the statute of limitations.
 4 That's the answer according to Justice Carpinello's
 5 interpretation, the third to last column, the claims likely to
 6 be barred.
 7 There's also two more columns, days to possible bar
 8 and date claims likely to be barred.
 9 Let me just briefly explain what those two columns
 10 represent.
 11 Justice Carpinello advised us that there is a
 12 possibility that even claims that were not barred based on the
 13 six-year date might still be barred if there is a necessary
 14 cure period that particular trusts had for remedying any
 15 material breaches and if the statute of limitations expired
 16 during that cure period there might be additional claims that
 17 might be barred for trusts.
 18 But Justice Carpinello further explained that there
 19 might be situations where even if the statute of limitations
 20 expired during the cure period, it still wouldn't bar the claim
 21 if certain conditions were satisfied, if there was sufficient
 22 knowledge by all parties about the existence of the material
 23 breaches.
 24 So, for purposes of our analysis, we just ignored
 25 these last two columns and only considered the third to last
 26 column of when claims were likely to be barred under Justice

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 2 Carpinello's analysis which had the affect of making fewer
 3 claims barred under the statute that might in fact be barred
 4 because of this possibility that existing claims would be
 5 barred if there was a cure period and the statute ran during
 6 that cure period. We ignored that possibility.
 7 Q How did that affect your recommendations?
 8 A It affected the recommendations by causing us to
 9 conclude that fewer claims by trusts would be barred by the
 10 statute of limitation and made it more likely all else equal
 11 that we reach a conclusion to advise the trustees that more
 12 trusts should reject the settlement because their claims would
 13 not be barred under our assumptions even though in fact there
 14 was a chance that they might be barred this reality.
 15 Q Understood.
 16 Now, you alluded to this earlier. I believe you said
 17 that criteria three could still be satisfied if the claims are
 18 likely to be barred by the statute of limitations.
 19 A Correct.
 20 Q Can you elaborate on how that's so?
 21 A Yes, because again we were advised that the possible
 22 claims for servicing damages were not subject to the same
 23 statute of limitations rules, statute of limitations
 24 limitations. So, in our analysis when we looked at the
 25 servicing claims, basically the statute of limitations became
 26 irrelevant and the only relevant issue is whether the possible

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 2 servicing damages that any trust could recover or any
 3 supporting loan group could recover, whether that amount was
 4 greater than the expected amount that would be received under
 5 the settlement for each trust and each supporting loan group.
 6 And if the possible servicing damages recovery for any trust or
 7 any supporting loan group was greater than what they would
 8 expect to receive under the settlement, again that would be a
 9 basis for rejecting the settlement for that trust or supporting
 10 loan group even if their material breach claims were barred by
 11 the statute of limitations.
 12 Q Thank you.
 13 Can you bring up 20 please.
 14 Professor, we're going to bring up Exhibit 20 -- I am
 15 sorry, Exhibit R-2 to your initial report which is Exhibit 20
 16 in the witness binder.
 17 I believe this is an exhibit to your initial report
 18 that summarizes your analysis of criteria three at the trust
 19 level; is that correct?
 20 A That's right.
 21 Q Can you walk us through it please.
 22 A Yes. There is some confusing labeling in this because
 23 there is some double negatives. So, I want to make sure that
 24 everybody understand what's meant.
 25 So, column A is repurchase claims not likely barred by
 26 statute of limitations under Carpinello's analysis.

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 2 So, what that -- the way to interpret that is asking
 3 whether the claims are allowed under the stature of
 4 limitations, whether they are not barred in effect by the
 5 statute of limitations and in no means the claims would not be
 6 allowed, meaning that they would be barred by the statute of
 7 limitations. That's the way to interpret this particular
 8 entry.
 9 And then it's a very similar analysis to everything
 10 that we've done already. There is an analysis of possible
 11 recovery for servicing damages. There is -- that's columns B
 12 and C. There is estimated cost of litigation, the assumption,
 13 the \$1 million assumption that we made.
 14 Then there is an entry total recovery from the
 15 servicing claims. That's the combination of loan modification,
 16 recovery for loan modification claims. I actually don't think
 17 I've explained that before. It's relatively minor but it's
 18 based on Justice Carpinello's analysis. It's the loans that
 19 were modified in lieu of refinancing.
 20 Q Is this Justice Carpinello's analysis or Professor
 21 Schwartz's analysis?
 22 A You tell me. Maybe I'm confusing the two.
 23 Q Go ahead, describe the analysis to your understanding.
 24 A It's one of the two of them.
 25 Q Fair enough.
 26 A In other words, it's a legal opinion that we received.

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 2 And the opinion was that JPM had an obligation to repurchase
 3 certain loans that the servicer modified in lieu of refinancing
 4 the loans. But again it's a very minor entry in the exhibit.
 5 The next entry is the servicer damage entry that's
 6 been in many of the other previous exhibits and then just going
 7 across you get the total potential recovery from servicing
 8 claims that just adds the two different sources of servicing
 9 claims, recovery minus the \$1 million.
 10 Then there is the calculation of the settlement
 11 consideration that each trust would receive. Again, that's
 12 duplicated from many previous exhibits.
 13 Then you get the final column which asks whether
 14 either the repurchase claims can proceed notwithstanding the
 15 statute of limitations or whether the recovery for servicing
 16 damages exceeds the amount expected to receive based on the
 17 payment under the settlement for each who trust.
 18 Again, no means that neither of those is accurate,
 19 meaning that the claims are both barred and the amount of
 20 servicing damages are not greater than the expected recovery
 21 that each trust would receive under the settlement. So, in the
 22 last column every time there is a no, that means that both
 23 things are true. Namely, that the claims are likely to be
 24 barred as well as that the servicing damages are not likely to
 25 be greater than -- the recoverable servicing damages are not
 26 likely to be greater than the amount that is likely to be

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 2 received under the settlement and therefore that would suggests
 3 by itself accepting the settlement.
 4 Wherever there is a yes, the opposite would be true.
 5 Those are situations where either the repurchase claims can
 6 proceed consistent with the statute of limitations or that the
 7 servicing damages by themselves exceed the amount expected to
 8 be received under the settlement for particular trusts. That
 9 analysis is you can see for every single trust in this exhibit.
 10 Q I take it you did the same analysis at the loan group
 11 level?
 12 A Correct, separate exhibit for that.
 13 Q Can we bring up 22 please.
 14 This is Trustee Exhibit 22 and it's Exhibit D-2 to
 15 Professor Fischel's supplemental report.
 16 Professor, can you walk us through this exhibit. In
 17 particular, just tell us if there is anything that is different
 18 than the exhibit that you just showed us other than the
 19 difference between trust and loan groups?
 20 A The only difference is there is more entries because
 21 there is more loan groups than there are trust but the last
 22 column interpreted the nos and yeses in exactly the same way.
 23 Q Professor Fischel, you have an exhibit to your report
 24 that summarizes your evaluation or your recommendations at the
 25 trust level; is that correct?
 26 A Correct.

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 2 MR. INGBER: Your Honor, that's trustee Exhibit
 3 20. It's Exhibit T.
 4 Q This is the exhibit that you prepared.
 5 A Yes.
 6 Q Can you walk us through it please.
 7 A Yes. So, as I said, there are three different
 8 criteria. They are all interrelated and I require all three to
 9 be satisfied to recommend rejection for the reasons that I
 10 explained because of their interrelationship.
 11 So, what this particular exhibit does, it has one
 12 column, first column is whether or not there is existing
 13 litigation against JPM that's relevant for background. And
 14 what assumptions we make about statute of limitations.
 15 The real crux of the exhibit is are the next three
 16 columns which are a summary of the results under each three of
 17 the criteria that we analyze and under my analysis require each
 18 one to be satisfied in order to recommend rejection. So,
 19 again, this is just a summary of everything that we've
 20 discussed.
 21 Q Summary of each of the three criteria as applied at
 22 the trust level?
 23 A Correct.
 24 Q And then a recommendation based on the application of
 25 those three criteria?
 26 A Correct, that all three have to be satisfied. If all

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 2 three are satisfied, the entry is reject and if all three are
 3 not satisfied, the entry in the last column is accept.
 4 Q Thank you, Professor.
 5 MR. INGBER: Your Honor, in light of some of the
 6 questions you asked earlier about the specific trusts that
 7 are subject to an objection, during the break we prepared
 8 a demonstrative that takes out of this summary exhibit
 9 just the objector trusts. We've showed the demonstrative
 10 to the objectors. They have no objection to our use of it
 11 now.
 12 If I may, I would like to hand it up. We did
 13 this at the trust level and at the loan group level. I
 14 have copies for your Honor.
 15 THE COURT: Thank you.
 16 Q The first one I would like to bring up is trustee
 17 Exhibit 368 please.
 18 A Could I get a hard copy.
 19 Q Yes, you can.
 20 Take your time. We're going to look at 368 first, at
 21 the trust that are subject to an objection. And if you can
 22 just explain to Justice Friedman what this demonstrative is?
 23 A All right. So --
 24 Q She'll appreciate that. Thank you.
 25 A This exhibit is exactly the summary exhibit that we
 26 just looked at.

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 2 MR. INGBER: I am sorry, one second.
 3 Your Honor, do you have a copy of it?
 4 THE COURT: He is just having copies made. Do
 5 you have more?
 6 MR. INGBER: I do have more.
 7 Q Okay. Go ahead.
 8 A All right. So, this exhibit is exactly the same as
 9 the exhibit that we just looked at on the trust level but
 10 it's -- it focusing on the trust that my understanding is are
 11 related to AMBAC in a way that these are the trust that AMBAC
 12 is objecting to.
 13 Q Yes, AMBAC and W & L?
 14 A Correct. Based on whatever interest they have in
 15 these trust, particularly AMBAC because it's not an owner of
 16 the trust. It's just an insurer. But to the extent as an
 17 insurer they stand in the shoes of an owner, we treated them
 18 that way for purposes of this exhibit.
 19 And it goes through the exact same three criteria that
 20 I require for rejection. And at the trust level you can just
 21 look at column B and I would recommend acceptance of the
 22 settlement for I'll call them the AMBAC and WL trust just based
 23 on column B because there is no significant support among
 24 certificateholders for rejecting the settlement. And much
 25 greater support among certificateholders for accepting the
 26 settlement.

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 2 Again, if the goal of what at least in my view what
 3 trustees should be focused on is whether the action of
 4 litigating versus settling is in the best interest of
 5 certificateholders based on this analysis, I conclude that
 6 certificateholders themselves have not expressed sufficient
 7 desire to reject the settlement as opposed to the support for
 8 accepting the settlement. So, by this criteria alone since all
 9 criteria, all three have to be satisfied.
 10 Q While we're on this one, let me ask you a question
 11 about an objection that was raised in this case.
 12 Would it matter to you, Professor, if there was in
 13 fact an event of default as at least AMBAC has alleged?
 14 A No, as I think I've said before, for purposes of my
 15 analysis, it would make no difference. Obviously, I'm not
 16 giving any legal opinion about whether there is or is not an
 17 event of default but from my perspective whether it's an event
 18 of default or not or whatever duties trustees have or don't
 19 have, the ultimate question is still what's in the best
 20 interest of security holders.
 21 And to the extent that certificateholders either don't
 22 want to litigate, prefer the settlement to litigation to the
 23 extent that there isn't sufficient prospect of recovery that's
 24 not barred by the statute of limitations, at least for purposes
 25 of my analysis it doesn't matter what duty exists, whether
 26 there is an event of default or not default, even if there is

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 2 the ability to litigate, that doesn't mean that litigation is
 3 the right thing if it's not in the best interest of
 4 certificateholders.
 5 And ultimately the question to me regardless of what
 6 the legal standard is apply to the trustee's conduct, the
 7 ultimate question is are the certificateholders that the
 8 trustees are there to try and benefit, are those
 9 certificateholders benefited by accepting the settlement or by
 10 rejecting the settlement and litigating.
 11 To me the exact same considerations that I analyzed
 12 about whether or not certificateholders themselves express
 13 support or opposition to the settlement, whether there is
 14 anything comparable to the massive support for the settlement
 15 expressed by the Gibbs & Bruin investors and the other
 16 certificateholders who have expressed support for the
 17 settlement relative to the relatively trivial opposition to the
 18 settlement at least viewed in the aggregate, whether or not
 19 claims are -- how large they are likely to be, whether or not
 20 they are barred by the statute of limitations. It doesn't
 21 matter to me what duties exist whether it's an event of default
 22 or not an event of default.
 23 In answering the question of what is the right course
 24 for me to recommend to the trustees, I view that question as
 25 what's in the best interest of the certificateholders. That's
 26 really the key question to me. And the same factors that

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 2 determine what's in the best interest of certificateholders in
 3 my opinion apply regardless of what duties the trustees has
 4 regardless of whether it's an event of default or not an event
 5 of default. It may matter for other reasons but to me in terms
 6 of whether it matters in terms of the recommendations that I
 7 would give to the trustee and that I gave to the trustees, it
 8 doesn't matter at all for the reasons that I've stated.
 9 Q I digress from your analysis of this chart. So, let's
 10 go back. You were talking about criteria one and how it
 11 applies to the objector of trust and I think you were going to
 12 move on to the second and the third.
 13 If you could just touch on those and then we'll move
 14 on.
 15 A The second suggests that, column C suggests that there
 16 is a number of potential measures of material breaches that
 17 would produce recovery greater than the settlement amount. But
 18 in column D, there are a number of those trust whose claims
 19 would be barred by the statute of limitations every time there
 20 is a no. So, combining the results of columns B, C and D given
 21 my analysis which requires all three to be satisfied, under my
 22 analysis for every single AMBAC or WL trust I would recommend
 23 to the trustees that the settlement be accepted.
 24 Q Okay. Thank you.
 25 Now, could we bring up tab 24 please, Malcolm.
 26 Professor, I show you an exhibit right before this

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 2 demonstrative that summarized your recommendations as a whole
 3 at the trust level. You prepared an exhibit at the loan group
 4 level as well?
 5 A I did.
 6 MR. INGBER: Your Honor, that is Exhibit F to
 7 trustee Exhibit 22. So, Exhibit F to Professor Fischel
 8 supplemental report.
 9 Q Is this the exhibit, Professor Fischel?
 10 A Yes, this is the exhibit.
 11 Q Is there anything you would like to add with respect
 12 to the loan group exhibit?
 13 A There is one difference and that's column E that
 14 opposing certificate holdings at the trust level exceed
 15 15 percent and that's because of my understanding of the
 16 governing documents that there needs to be 25 percent of
 17 certificateholders at the trust level to direct the trustee to
 18 litigate and/or at least to consider litigation. And because
 19 15 percent at the supporting loan group level may not translate
 20 into 15 percent at the trust level, if there is more than one
 21 supporting loan group because of my understanding of the
 22 governing agreements, I also introduced this additional column
 23 although it's important to note that I didn't use the
 24 25 percent number which is the actual number that generally is
 25 required at least based on my understanding. I used a lower
 26 number 15 percent again in a way that in some sense biases my

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 2 results in favor of rejection as opposed to having a strict
 3 interpretation of the 25 percent.
 4 Q Can you bring up 367 please.
 5 Professor Fischel, Trustee Exhibit 367 is a
 6 demonstrative that you prepared showing this loan group
 7 analysis for the objector trust; is that correct?
 8 A Correct.
 9 Q Can you just walk us through this demonstrative.
 10 A Yes. In this there is at least one supporting loan
 11 group where this additional criteria for my recommendation for
 12 acceptance or rejection really matters for supporting loan
 13 groups.
 14 So, again, if you start with column D that opposing
 15 certificateholders have a greater than 15 percent interest and
 16 the opposition is greater than supporting certificateholders,
 17 at the trust level, every single entry was no. Again, for
 18 purposes of my analysis even though I analyzed everything else,
 19 but in terms of my recommendations because I require all three,
 20 that would end the analysis.
 21 But here there is one supporting loan group, BSMF
 22 2006-AR 2 which satisfies this criteria at the supporting loan
 23 group level which is why there is a yes, but it doesn't satisfy
 24 this criteria at the trust level because when you combine this
 25 supporting loan group with other supporting loan groups in this
 26 trust, the amount of opposition to the settlement is less than

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 2 15 percent by definition, also less than the 25 percent that's
 3 generally required.
 4 So, even for this single supporting loan group, the
 5 ultimate conclusion that I reached in terms of the
 6 recommendation that I would make to the trustees about this
 7 AMBAC or WL trust is to accept the settlement even though if
 8 you keep going across there are very high number or factors
 9 which suggests a higher recovery than the settlement expected
 10 amount to be received. And it looks like the claims either
 11 will not be barred or that the servicing damages exceed the
 12 amount expected to be received under the settlement.
 13 So, I would say of everything that I've looked at, at
 14 least certainly in terms of AMBAC, W & L, this is the closest
 15 case, this one supporting loan group. But even that does not
 16 satisfy my criteria for rejection because the amount of
 17 opposition at the trust level is too low relative to the much
 18 greater support for the overall settlement as opposed to
 19 litigation.
 20 (Continued on next page)
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1 Fischel Cross - Rollin
 2 MR. INGBER: Okay, thank you, Professor.
 3 I have no further questions at this time.
 4 THE COURT: We will take a 15-minute recess
 5 before the cross-examination begins.
 6 Is there any request for an instruction to
 7 the witness?
 8 MR. ROLLIN: Not from us.
 9 MR. CHANG: Well, your Honor, out of abundance
 10 of caution, I reiterate what I understood to being
 11 operating regime going in, which is that he received
 12 as a witness, and the counsel, that he looked at,
 13 received the documents to demonstrate what was shown
 14 to the trustees, and not for purpose of expert
 15 opinion in this case.
 16 THE COURT: That's not really what I was
 17 inquiring about.
 18 MR. CHANG: I misunderstood.
 19 THE COURT: I think Professor Fischel can
 20 talk with his counsel. The cross-examination has
 21 not yet begun, and we'll see if at a later point
 22 there's a question for an instruction.
 23 You may step down, Professor.
 24 THE WITNESS: Thank you, your Honor.
 25 MR. INGBER: Thank you, your Honor.
 26 THE COURT: And we will take 15 minutes.

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1 Fischel Cross - Rollin
 2 Thank you.
 3 (Brief recess taken.)
 4 THE COURT: Back on the record.
 5 Mr. Fischel, will you return to the witness
 6 box, and we will have cross-examination now.
 7 We will begin with examination Mr. Rollin on
 8 behalf of W&L.
 9 MR. ROLLIN: Yes, your Honor.
 10 With your Honor's permission --
 11 THE COURT: Please.
 12 MR. ROLLIN: Thank you.
 13 CROSS-EXAMINATION
 14 BY MR. ROLLIN:
 15 Q Good afternoon, Professor Fischel.
 16 A Good afternoon.
 17 Q Would you please turn to your initial report,
 18 which is Trustee Exhibit 20, and to Schedule Q-3?
 19 A Q-3?
 20 Q Yes.
 21 A Can you tell me what tab that is behind?
 22 Q That is not behind one of the tabs that was
 23 previously prepared by trustee counsel. That is in your
 24 report.
 25 A Mine has tabs.
 26 MR. INGBER: It's 17.

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1 Fischel Cross - Rollin
 2 THE WITNESS: 17.
 3 A Q-3?
 4 Q Yes, sir.
 5 A Okay, I got it.
 6 Q Okay. Professor Fischel, Schedule Q-3 to your
 7 initial report is the schedule that you prepared with
 8 respect to your analysis concerning early payment
 9 defaults in each of the trusts, correct?
 10 A That's correct.
 11 Q Okay. Will you please turn to page five of nine
 12 within that schedule.
 13 A Okay, I have it.
 14 Q And on that page 8 or 9 rows down is the row for
 15 Chase 2007 A-3. Do you see that?
 16 A I do.
 17 Q Just to orient ourselves, the estimated
 18 settlement payment for that trust is found in the fourth
 19 column in from the end, correct?
 20 A Correct.
 21 Q And that number is \$4,265,048, correct?
 22 A That's right.
 23 Q And if you look over to the left, about the fifth
 24 column in from the left, that is the dollar value breach
 25 rate for early payment defaults for that same trust,
 26 Chase 2007 A-3?

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1 Fischel Cross - Rollin
 2 A Correct.
 3 Q And can you please explain how you derive the
 4 dollar value breach rate?
 5 THE COURT: Can I assume this is a W&L
 6 Trust?
 7 MR. ROLLIN: Yes.
 8 A I multiplied the early payment default rate times
 9 the total losses.
 10 Q And that number is \$1,513,493, is that right?
 11 A That's right.
 12 Q And that is the amount of loss that you attribute
 13 in your analysis to early payment defaults, correct?
 14 A For this particular trust, correct.
 15 Q And early payment defaults that you define as
 16 loans that go 90 days delinquent or more within the first
 17 12 months of securitization, is that right?
 18 A Correct.
 19 Q If you look several rows down, I'll direct you to
 20 another W&L Trust, that's Chase 2007 S-6.
 21 A Okay.
 22 Q And the estimated trust settlement payment for
 23 that trust is \$7,123,979, right?
 24 A That's right.
 25 Q And the dollar value breach rate for early
 26 payment default for that trust is \$1,430,522, is that

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1 Fischel Cross - Rollin
 2 right?
 3 A I think 552.
 4 Q Thank you, 552. I appreciate that.
 5 A Correct.
 6 Q Now, is it your position that there are no
 7 material breaches after year one of the securitization?
 8 A No. I didn't make an assumption about that one
 9 way or another.
 10 Q Is it your belief based on your analysis that
 11 that are, in fact, material breaches after year one?
 12 A Very possible, and many of them may have been
 13 picked up by various different criteria, other than early
 14 payment defaults, which particularly focuses on the early
 15 period, but the other ones do not.
 16 Q Do you believe based our research and analysis
 17 that material breaches decrease, the likelihood of
 18 material breach decreases in time after securitization?
 19 A Yeah.
 20 I'm not sure I would express a general
 21 opinion about that. It might depend on which type
 22 of material breach you are talking about, but I'm not
 23 sure I want to answer at such a general level.
 24 Q Well, is it your view that losses arising from
 25 material breaches decreases over the life of the trust?
 26 A I think that's logical, but I've never really

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1 Fischel Cross - Rollin
 2 studied it.
 3 Again, I wouldn't want to express an
 4 definitive opinion one way or another.
 5 Q It is logical to you based on your research and
 6 study, but you don't have an opinion about that today?
 7 A I don't have a definitive opinion because I have
 8 not studied it, but there's a certain intuitive appeal to
 9 that assumption.
 10 Q I'd like to direct your attention to -- can we
 11 show Tab 15, please.
 12 A Tab 15 of what, there are different documents
 13 with different tabs?
 14 Q I was speaking to the gentleman that was --
 15 A I'm sorry.
 16 Q We have been speaking about number three, early
 17 payment of default judgments.
 18 I would like to direct your attention to
 19 number one.
 20 A Okay.
 21 THE COURT: Mr. Rollin, you need to say for
 22 the record when you put up a document what it is, and
 23 you need to say it using the numbers that we have
 24 been using, so this is I guess one of the
 25 demonstrative exhibits that was used on the -- we
 26 had the number 364.

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1 Fischel Cross - Rollin
 2 MR. ROLLIN: That's right, your Honor.
 3 THE COURT: Can we try to keep going with
 4 the same numbering to avoid confusion?
 5 MR. ROLLIN: I will do that. I apologize,
 6 your Honor.
 7 Q I am directing your attention to demonstrative
 8 Exhibit Trustee Number 364. We have been speaking about
 9 number three, early payment default, right?
 10 A Correct.
 11 Q Directing your attention to number one, that is
 12 breach rates from loan file reviews reported in
 13 complaints.
 14 A I see.
 15 Q You testified about that extensively on Direct?
 16 A I did.
 17 Q Are those complaints containing loan level
 18 allegations in breach, correct?
 19 A Yes.
 20 Q And they provide loan identifying information,
 21 such as a loan number, correct?
 22 A I think that's correct.
 23 Q And for each of the two trusts, I'll direct your
 24 attention now to Trustee Exhibit 20, schedule Q-1 --
 25 A Okay, I have it.
 26 Q And you have calculated a dollar value breach

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1 Fischel Cross - Rollin
 2 rate based on your analysis of those loan level
 3 allegation and complaints for each of the two W&L Trusts;
 4 that is Chase 2007 A-3, and Chase 2007 S-6, correct?
 5 A Oh, I'm not -- maybe I'm not following you. I'm
 6 not sure what I'm looking at, what you are describing,
 7 but go ahead.
 8 Q I'll direct you to your schedule Q-1 of your
 9 initial report.
 10 A I am --
 11 Q Would you look to page 5 of that report?
 12 A Okay, I'm looking at page 5.
 13 Q Thank you.
 14 Do you see 6 or 7 rows down Chase 2007 A-3?
 15 A I do.
 16 Q And you have calculated a dollar value breach
 17 rate based on the information you have in complaints?
 18 A You know, again, what I'm looking at, I have an
 19 NA, meaning that we didn't perform any calculation
 20 because we didn't have a complaint with an allegation.
 21 Q Very well.
 22 A So, I'm not sure what you're talking about.
 23 Q Let me ask you more generally; when you have a
 24 complaint that identifies the loan level breaches, is it
 25 your expectation that the date on which the loss was
 26 realized by the applicable trust for each loan in the

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1 Fischel Cross - Rollin
 2 complaint, that that date is available in the records of
 3 the trustee?
 4 A I don't know.
 5 Q What about in the records of the servicer?
 6 A I don't know.
 7 Q You don't know whether they have that
 8 information?
 9 A I don't.
 10 Q Okay, thank you.
 11 Back to Trustee Exhibit 364, please, that's
 12 tab -- this is Trustee Exhibit 364. Just to
 13 orient, we're directing your attention now to number
 14 two, discrepancies between information relating to
 15 the borrower and the property given to the trusts,
 16 and given to credit bureaus.
 17 Do you see that?
 18 A I do.
 19 Q Is that also loan level information?
 20 A Oh, well, it's borrower level information, so as
 21 a result, I think it would also be loan level
 22 information.
 23 Q Thank you. Professor Fischel, would you please
 24 turn to your supplemental report, which is Trustee
 25 Exhibit Number 22?
 26 A Okay, I have it.

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1 Fischel Cross - Rollin
 2 Q And Exhibit B to that document, schedule B?
 3 A Behind Tab 2, investors holdings.
 4 Q Yes.
 5 A Okay, I have it.
 6 Q Is this the document on which you identify the
 7 holdings of any opposing certificate holders?
 8 A Yes.
 9 Q Will you please turn to page 9 of that document.
 10 A Okay, I have it.
 11 Q Do you see the three rows for Chase 2007 A-3 at
 12 the bottom?
 13 A I do.
 14 Q And there are three loan groups for that trust?
 15 A Correct.
 16 Q And you note zero opposing certificate holders in
 17 both the Quinn Emanuel Group and another group?
 18 A That's correct.
 19 Q Correct. Does that mean that you have not been
 20 made aware of any objecting certificate holders in that
 21 trust?
 22 A Oh, if I remember correctly, and I want to make
 23 sure we're talking about the same thing, I was informed
 24 that for those trusts, W&L insisted on confidentiality.
 25 It would not release the number of objectors, if any, to
 26 the settlement.

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1 Fischel Cross - Rollin
 2 With respect to those trusts, I think that's
 3 what I was told.
 4 Q You said W&L. Are you referring to QE, Quinn
 5 Emanuel?
 6 A No, I'm not.
 7 Q Your belief is that W&L -- let me ask you this,
 8 were you made aware at any time by the trustee, in
 9 particular Bank of New York Mellon, that W&L had sent
 10 correspondence objecting to certain aspects of the
 11 settlement?
 12 A You know, again, I want to make sure we're
 13 talking about the same thing, but I think there was some
 14 discussion of this at my deposition, if I remember
 15 correctly, where there was some exchange, and I think
 16 what was said -- and, again, if what I'm relaying is not
 17 responsive to your question, tell me because I'm basing
 18 what I'm saying on my recollection from my deposition,
 19 but I think I was told that W&L refused to provide an
 20 indemnity at the time of -- as of the time of my report,
 21 and also insisted on confidentiality as to whether they
 22 were aware of any objectors to the settlement with
 23 respect to the W&L Trusts.
 24 Q It could have been that you are confusing W&L and
 25 QVT?
 26 A It is possible. It's possible.

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1 Fischel Cross - Rollin
 2 Q If you did receive notice of an objection by a
 3 certificate holder, would you have indicated that on the
 4 document that we're speaking of now, Exhibit B to your
 5 supplemental report?
 6 A Oh, if the criteria for entry were satisfied;
 7 namely that there was an identified objection, and the
 8 other requirements that I understood were applicable,
 9 such as the direction and indemnity were also satisfied.
 10 Q Does that mean that if there's an objection from
 11 a certificate holder that you would not list it in the
 12 percentages reflected on Exhibit B to your supplemental
 13 report, unless it met the threshold of 25 percent of the
 14 certificates and an offer of indemnity?
 15 A Well, there's no 25 percent requirement anywhere
 16 in my analysis.
 17 As I said, I have an understanding that is
 18 the requirement, the general requirement in the
 19 governing document, but I didn't apply a 25 percent
 20 threshold.
 21 But, with respect to any objectors who claim
 22 to be part of a 25 percent group, I did apply, at
 23 least my understanding, that there also had to be a
 24 direction and an indemnity.
 25 Q So, may I go back to my question; that is, what
 26 were the criteria for under what circumstances might you

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1 Fischel Cross - Rollin
 2 become aware of an objection by a certificate holder, but
 3 that objection would not be reflected on Exhibit B to
 4 your supplemental report?
 5 A Oh, if there was a publicly identified objector
 6 as a result of being part of the QE Group, or somebody
 7 who produced a letter to the trustees objecting to the
 8 settlement, putting aside the issue of a direction to the
 9 trustee, that would be reported. It should be reported.
 10 Q Provided that the trustee gave you that
 11 correspondence?
 12 A Well, I had to be aware of it, obviously, in
 13 order to include it.
 14 Q And you were reliant, dependent on the trustee to
 15 make you aware of any correspondence from investors?
 16 A Correct.
 17 Q Would you mind flipping the page, please,
 18 Professor?
 19 A Yes, I have it.
 20 Q Do you see several rows down, eight rows down,
 21 two loan groups for Chase 2007?
 22 A I'm sorry, which page are you talking about now?
 23 Q Sure. I'm referring to page 10.
 24 A I got it.
 25 Q Do you see 7 or 8 rows down Chase 2007 S-6?
 26 THE COURT: I'm sorry, are we on the same

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1 Fischel Cross - Rollin
 2 exhibit?
 3 MR. ROLLIN: We are on the same exhibit.
 4 THE COURT: And you are on page 10?
 5 MR. ROLLIN: It's ten of 19 at the bottom,
 6 your Honor.
 7 THE COURT: So, it's at the top of the page,
 8 yes?
 9 MR. ROLLIN: I have them at the bottom of the
 10 page. The Bates number, if that's helpful, ends in
 11 770.
 12 I'm sorry, 769.
 13 A That's why I'm confused. My exhibit, which I
 14 think is the only exhibit, it's at the top of the page,
 15 unless I'm missing something.
 16 Q Let's see if we can orient ourselves, so that we
 17 can all be on the same page.
 18 The document I'm looking at, Trustee Exhibit
 19 22, Exhibit B thereto, page 10 of 19, which has on it
 20 Chase 2007 S-6.
 21 A Okay, I have it.
 22 Q Thank you.
 23 MR. ROLLIN: Your Honor, have I directed you
 24 to it, as well?
 25 THE COURT: It's at the top of the page.
 26 THE WITNESS: My top, as well.

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1 Fischel Redirect - Ingber
 2 MR. ROLLIN: Okay.
 3 THE COURT: That's why you need those
 4 PowerPoints.
 5 MR. ROLLIN: Maybe I should use a board, your
 6 Honor.
 7 Q For Chase 2007 S-6, there are two loan groups,
 8 correct?
 9 A Correct.
 10 Q And you reflect awareness of no opposing
 11 certificate holders with respect to those two loan groups
 12 in the trust?
 13 A That's right.
 14 MR. ROLLIN: Thank you.
 15 I have no further questions, your Honor.
 16 REDIRECT EXAMINATION
 17 BY MR. INGBER:
 18 Q Professor Fischel, might there be circumstances
 19 under which you would have holdings at the trust level,
 20 but not the loan group level?
 21 A There should not be I don't think because every
 22 loan group's part of a trust, so if there's something at
 23 the trust level, it also should appear in one or more of
 24 the loan groups.
 25 Q Professor, if you could turn to Exhibit 20, your
 26 report to Exhibit P, which I believe is behind tab 16.

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1 Fischel Redirect - Ingber
 2 A Okay, I have it.
 3 Q Page 4 of seven, please.
 4 A Okay.
 5 Q If you go 4 lines down to Chase 2007 A-3 --
 6 A Okay, I see that.
 7 Q If you look across to other, you see
 8 10.6 percent?
 9 A I do.
 10 Q Okay. Now, it's showing 10.6 percent here,
 11 correct?
 12 A Correct.
 13 Q It's not showing opposition holdings at the loan
 14 group level in the exhibit that Mr. Rollin showed you,
 15 correct?
 16 A Correct.
 17 Q So, is it true that your analysis at the trust
 18 level does account for the holdings of opposing
 19 certificate holders?
 20 A It should, yes.
 21 Q And that's reflected here in Exhibit P?
 22 A Correct.
 23 Q With respect to the W&L Trust?
 24 A Correct.
 25 Q Which Mr. Rollin and I will represent is Chase
 26 2007 A-3?

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1 Fischel Recross - Rollin
 2 A Correct.
 3 Q If you look down the page to Chase 2007 S-6, do
 4 you see opposing certificate holders, other 8.4 percent?
 5 A I do.
 6 Q Okay. So, you were accounting here for the
 7 holdings of certificate holders, other certificate
 8 holders who opposed the settlement, correct?
 9 A Correct.
 10 Q Okay. And as it applies to criteria one,
 11 criteria one was not satisfied because those holdings
 12 didn't rise to the level of 15 percent, correct?
 13 A That's right.
 14 MR. INGBER: I have no further questions.
 15 MR. ROLLIN: May I Recross a couple of
 16 questions?
 17 THE COURT: I will allow it, but counsel
 18 have to be aware that the preparatory questions
 19 should be asked on the appropriate examination, and
 20 it really -- this would only be for something that
 21 was new material.
 22 MR. ROLLIN: Your Honor, this is new material
 23 directly responsive to those questions by Mr. Ingber.
 24 RECROSS-EXAMINATION
 25 BY MR. ROLLIN:
 26 Q Professor Fischel, can you explain the

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1 Proceedings

2 discrepancy between the identification of opposing

3 certificate holders at the trust level, but not at the

4 loan group level?

5 A Well, if there is a discrepancy, it could be

6 because of way that the objectors recorded their

7 objections.

8 Q You don't know that for sure with respect to

9 these two trusts?

10 A I don't not as I sit here.

11 Q And do you know who the objectors are reflected

12 in Exhibit P that Mr. Ingber just asked you about?

13 A Not from memory, no.

14 Q Do you recall receiving letters sent by W&L to

15 Bank of New York Mellon as trustee?

16 A Oh, not, specifically, but we requested and my

17 understanding received all letters by all certificate

18 holders either expressing support, or opposition to the

19 settlement.

20 Q Do you recall having done any analysis of the

21 issues set forth in W&L's letters?

22 A You have to tell me what analysis you are

23 referring to.

24 Q Analysis concerning the distribution methodology,

25 and the settlement?

26 THE COURT: I'm sorry, I didn't hear the end

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1 Proceedings

2 of that sentence.

3 Q I'm sorry, your Honor, analysis concerning the

4 distribution methodology set forth in the settlement

5 agreement.

6 MR. INGBER: Your Honor, this is going beyond

7 the scope I think at this point.

8 THE COURT: I'm going to allow it.

9 A Oh, I saw it now that you focused me on what it

10 is that you are referring to, and I thought about it.

11 Q Did you put an opinion about it in any of your

12 reports?

13 A No.

14 MR. ROLLIN: Thank you.

15 No further questions.

16 THE COURT: Do you want anything further?

17 We won't keep doing this, but everything has been

18 very restrained.

19 MR. INGBER: I have no questions.

20 THE COURT: Okay, thank you.

21 Now, you have concluded your

22 cross-examination.

23 We are now going to begin cross-examination

24 by AMBAC, and we have Mr. Wollmuth back.

25 MR. WOLLMUTH: And, your Honor, may I ask the

26 Court's preference?

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1 Proceedings

2 We have discussed the next several days

3 scheduling with everyone, and I can either start and

4 work to the end, or what we had thought was, we would

5 start tomorrow morning first thing.

6 THE COURT: We still have a half hour of the

7 Court day, and given that it is so short, I would

8 like to begin.

9 I do understand that counsel have conferred,

10 and there's not so much concern about the storm

11 reports, that counsel do not want to proceed tomorrow

12 and Monday, so we will resume at the usual time also

13 tomorrow.

14 MR. WOLLMUTH: Okay. Thank you, your Honor.

15 And, your Honor, before we start, I will be

16 referring only in this next half hour to Mr.

17 Fischel's report, which I understand is marked as

18 Trustee Exhibit 20, is that correct, and I don't

19 think it's been moved into evidence yet, or has it?

20 MISS PATRICK: It has.

21 MR. WOLLMUTH: It has, 20 in evidence.

22 And with that --

23 THE COURT: It has been deemed marked into

24 evidence, however, and I am marking it into evidence

25 at this time, along with 22, which was also deemed

26 marked.

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1 Fischel Cross - Wollmuth

2 It is being marked into evidence at this

3 time for the purposes stated on the record yesterday.

4 MR. WOLLMUTH: And I am going to refer to line

5 and page, and not project it, unless any one would

6 prefer that I have it projected.

7 CROSS-EXAMINATION

8 BY MR. WOLLMUTH:

9 Q Mr. Fischel, could you please turn to page 2 of

10 your report, please.

11 A Okay, I have it.

12 Q Paragraph 6, line 1, do you see that?

13 A I do.

14 Q It states my general understanding of the

15 relevant factual background is as follows, and then

16 there's certain footnote citations.

17 Could you tell me in our own words how you

18 developed your understanding of the factual

19 backgrounds here?

20 A Oh, combination of conversations that I had with

21 trustees' counsel, documents that I reviewed,

22 conversations that I had with other personnel at my firm

23 that were working with me on this engagement.

24 That's what I would say.

25 Q Which trustee counsel did you speak with?

26 A Oh, well, as I mentioned, there were a number of

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1 Fischel Cross - Wollmuth
 2 meetings with a number of -- significant number of
 3 trustee counsel, and then I would say, there were
 4 conversations with a minority of trustee counsel.
 5 I think we had a number of conversations with
 6 Matt Martel, with Mr. Ingber, I think with Mike
 7 Johnson.
 8 I'm sure there were others, but that's what I
 9 recall.
 10 (Whereupon, Senior Court Reporter Kathy Jones
 11 resumed.)
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1 Fischel - Cross - Wollmuth
 2 T9
 3 Q So, I would like to unpack that a little bit if we
 4 could.
 5 A Sure.
 6 Q Which particular counsel do you recall speaking with?
 7 The one you mentioned was Mr. Martel. And who else do you
 8 recall if anyone?
 9 A Mr. Ingber, Mr. Johnson and I think also a lot of
 10 conversations based on the ongoing work that we did that I had
 11 with individuals at my firm who were working with me on this
 12 project.
 13 Q I understand that. We'll come to that.
 14 I'm not asking about the people that were working with
 15 you?
 16 A Okay.
 17 Q Professor Fischel?
 18 A Got it.
 19 Q How do you like to be called Professor or Dean, what
 20 is most appropriate?
 21 A Your preference. Whatever you like, I'm good with
 22 almost anything.
 23 Q So, I have nothing better than Mister. I'll give you
 24 Professor if that's okay.
 25 So, Mr. Ingber, Mr. Johnson, Mr. Martel. Any others
 26 that you recall?

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1 Fischel - Cross - Wollmuth
 2 A I am sure there were others but those are the ones
 3 that I recall.
 4 Q And is it your understanding that such counsel also
 5 had either meetings or conversations with members of your team?
 6 A I think there were a number of conversations with
 7 members of our team, yes. That is my understanding.
 8 Q And I am sorry --
 9 THE COURT: I guess you didn't like your
 10 colleague's note?
 11 THE WITNESS: I should have sat it down more
 12 gently. No I didn't particularly care for it.
 13 THE COURT: Let's try to keep this civil.
 14 MR. WOLLMUTH: I didn't mean to toss my note.
 15 Q But back to there were a number of conversations you
 16 had with members of your team?
 17 A Correct.
 18 Q And whether with your team or with yourself --
 19 THE COURT: Mr. Wollmuth, you are practically
 20 whispering. That always worries me because when a lawyer
 21 does that, I know that it's at some point I'm going to
 22 hear yelling and I don't want that in my courtroom.
 23 So, let's just have questioning in a normal
 24 volume that we can all hear.
 25 MR. WOLLMUTH: I'll try to hold my voice up,
 26 your Honor.

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1 Fischel - Cross - Wollmuth
 2 THE COURT: Thank you. That's much better.
 3 MR. WOLLMUTH: The microphone is not close
 4 enough.
 5 Q Would you like the last question read back?
 6 THE COURT: No, that will not be necessary. Put
 7 another question.
 8 Q Okay. Whether with yourself or with your team, do you
 9 recall approximately when those meetings and discussions with
 10 counsel for the trustees began?
 11 A Well, yes. I remember exactly when they began. The
 12 two meetings in November of 2013, if I remember correctly, and
 13 then after that I would say there was continual interaction
 14 with counsel for the trustees whenever there was a need to have
 15 interaction and whenever there was a request for information,
 16 whenever the trustees had a question of us, questions about
 17 schedules, being informed by the trustees about materials that
 18 we were getting, when we would get them, what they were doing
 19 to get them, things of that nature.
 20 Q And from their commencement, was there a period of
 21 activity and then a period where activity stopped for awhile or
 22 not?
 23 A I don't really think so, no.
 24 Q Okay.
 25 A It was certainly intermittent based on needs but I
 26 don't think it would be accurate to say that there was a period

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1 Fischel - Cross - Wollmuth
 2 of activity followed by a period of inactivity.
 3 Q Okay. And was there a point where you concluded the
 4 principal work on your assignment, was it when you delivered
 5 your supplemental report or some other time?
 6 A No, I think I described this in my testimony that we
 7 delivered a preliminary report, draft, a preliminary report of
 8 our conclusions to the trustees and then we had a face-to-face
 9 meeting I think some time in July if I remember correctly.
 10 Q And other than counsel for the trustees who attended
 11 the face-to-face meeting in July --
 12 A I think another individual from my firm, an individual
 13 by the name of Jerry Lumer and possibly some clients who
 14 trustee counsel were representing.
 15 Q And you had testified there was a significant number
 16 of meetings with trustee counsel and then a number of meetings
 17 of a smaller group. Was that correct or did I not understand
 18 your testimony?
 19 A Not correct.
 20 Q Can you recall the testimony I'm referring to?
 21 A I recall my own testimony.
 22 Q That's what I'm referring to.
 23 A I think there were these number of face-to-face
 24 meetings, large face-to-face meetings that I described and then
 25 a series of what I would call continual contact that we had
 26 with trustee counsel and with others too in the course of

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1 Fischel - Cross - Wollmuth
 2 preparing these reports.
 3 Q And who are the others that you are referring to in
 4 that answer?
 5 A I think there was some conversations with JP Morgan
 6 directly. There was some conversations with patient servicing
 7 expert. That's what I recall.
 8 Q And your report relies on the legal advice provided to
 9 you in the affidavits, the expert reports of Justice Carpinello
 10 and Professor Schwartz; is that correct?
 11 A That's right.
 12 Q I believe also you testified in your deposition you
 13 didn't form any of your own legal opinions with respect to the
 14 matters before you but you have a general understanding of how
 15 these things work. Is that a fair statement or not?
 16 A Well, it's a bit of a vague question.
 17 It is accurate to say that I did not form any
 18 independent legal opinions on any issue whether the subjects
 19 opined on by Justice Carpinello or Professor Schwartz or any
 20 other issue. My reports are not intended to be legal opinions
 21 and I did not form any legal opinions. But if you're asking
 22 did I understand the subject matter of what I was provided
 23 about legal opinions, I think generally speaking, yes, I did.
 24 Q And did trustees' counsel provide you any legal
 25 guidance as to any of the matters at issue in this case or that
 26 were impacted in preparation of your report beyond what was

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1 Fischel - Cross - Wollmuth
 2 provided to you by Justice Carpinello and Professor Schwartz?
 3 A You know, I would say background documents for
 4 interpreting the legal opinions but not any legal guidance by
 5 itself that I recall was ever provided to me by the trustees or
 6 their counsel.
 7 Q So, the trustees provided you some documents relating
 8 to the legal opinions of Professor Schwartz and Justice
 9 Carpinello but provide you none of their own legal views?
 10 A Basically, correct. So, for example, we needed to get
 11 the tolling agreements to understand how to apply Justice
 12 Carpinello's interpretation of the statute of limitations. So,
 13 we requested those documents. So, we got them.
 14 Q And I believe at the time of your deposition, you
 15 testified a fair amount about the process that you used with
 16 your team in preparing your analysis.
 17 Could you describe for me the work that you did on
 18 your own and what you delegated to members of your team?
 19 A I think as I said in my deposition, it's not really a
 20 meaningful description of what we did. This was a significant
 21 project. There was a huge amount of data that we processed, a
 22 lot of analysis that we did, huge amount of information that we
 23 reviewed. There was a theme that we had with to some extent
 24 different people focusing on different parts of the analysis.
 25 It was a I would say a cooperative working process from
 26 beginning to end with the work obviously done under my

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1 Fischel - Cross - Wollmuth
 2 supervision to form the opinions that I reached that I
 3 communicated to the trustees.
 4 Q And leaving aside work done under your supervision,
 5 Professor Fischel, can you tell me what your principal task
 6 that you personally performed in connection with your
 7 assignment here were?
 8 A It's hard for me to answer that question. I was
 9 involved in every aspect of the two reports. There are a lot
 10 of issues of data gathering, conversations with the trustees
 11 and particularly that some of those I was involved in, some of
 12 those I was not involved in.
 13 I did not personally do the numerical calculations
 14 that are in the report. So, it's clear that I could not have
 15 done this on my own without the help and contributions of the
 16 members of our team.
 17 But I wouldn't say there is any obvious separation or
 18 distinction between what I did and what other members of our
 19 team and our firm did. It was as I said a cooperative and
 20 interactive process.
 21 Q Fair enough. So, I take it you can't identify any
 22 parts that particularly stand out as your responsibility with
 23 respect to the opinions you delivered here other than the
 24 opinions themselves?
 25 A Well, no, I consider the whole analysis my
 26 responsibility in terms of what the opinions are, what evidence

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1 Fischel - Cross - Wollmuth
 2 and analysis and calculations to provide in support of the
 3 opinions but as I said, a lot of that work was done in
 4 combination with others that I was working with.
 5 Q And if you could turn the page for a moment. We're on
 6 page two paragraph six and it would be over to three and
 7 paragraph six.
 8 Do you have that Professional Fischel?
 9 A I have that.
 10 Q Mr. Rollin had asked you a question or two about your
 11 understanding of how these things work and I wanted to ask you
 12 a couple of questions myself.
 13 It says the trust typically acquired portfolios of
 14 residential mortgages from an entity known as the depositor.
 15 Could you explain how that works based on your general
 16 understanding?
 17 A Not beyond what's stated in this sentence that there
 18 is an intermediate entity called a depositor which acquires the
 19 loans from JP Morgan and then sells the loans to the trusts
 20 where the payment by the trusts is financed by the issuance of
 21 certificates at different levels of seniority.
 22 Q And is the depositor a JP Morgan entity or otherwise?
 23 A I don't know. I would have to check.
 24 Q But whoever that entity is then acquires loans from JP
 25 Morgan; is that right?
 26 A Correct.

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1 Fischel - Cross - Wollmuth
 2 Q Now, these certificates that you were mentioning that
 3 fund the acquisition, those are separate securities issued by
 4 the trust?
 5 A Correct.
 6 Q And those certificates represent what?
 7 A They represent among other things rights to receive
 8 cash flows from the loans under what's generally referred to as
 9 waterfall provisions in the certificates.
 10 Q And I think you testified again in this general
 11 understanding. Do you know how those cash flows are derived,
 12 what factors other than obvious payments on the mortgage loans,
 13 what other factors affect the cash flows that are received?
 14 A I'm not sure I understand that question. There is a
 15 servicer. The servicer has the responsibility to collect
 16 principal and interest payments and those payments -- to make
 17 other decisions. And those payments are then passed on to the
 18 trustee who then distributes the funds pursuant to the, as I
 19 said, the terms of the certificates which are generally
 20 understood as the waterfall provisions of the certificates so
 21 that senior certificates which typically are supported by a
 22 single supporting loan group are paid first, going down to the
 23 most junior of the seniority certificateholders who are
 24 generally paid from a combination of the different supporting
 25 loan groups if there is such funds to first pay off the senior
 26 certificateholders under the waterfall provisions.

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1 Fischel - Cross - Wollmuth
 2 Q That's a good explanation of how RMBS works in
 3 general. I didn't want to cut you off but I do understand
 4 that.
 5 My question was more specific. There is an amount of
 6 cash flow that is available for distribution to holders under
 7 each and every one of these PSAs and the starting point for
 8 that cash flow as I understand it is the money collected on the
 9 mortgage loans. Is that fair, Mr. Fischel?
 10 A I think that is fair based on my understanding.
 11 Q Okay. So, what my question was about and at the
 12 bottom of that is what I would refer to as cash flow available
 13 for distribution. Would you know what I was referring to
 14 there?
 15 A I think it's what I just said unless you have some
 16 understanding different from what I said.
 17 Q I understood you to say that's the money available for
 18 distribution to investors, correct?
 19 A Correct.
 20 Q So, my question about the cash flow is between the
 21 time it comes into the trust from the collection of the
 22 mortgage payments to the time distributions are made to
 23 investors.
 24 Isn't it true that there is an extensive series of
 25 rules set forth in the PSA that say what gets paid out of the
 26 cash flows before there is a net remaining for the security

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1 Fischel - Cross - Wollmuth
 2 holders?
 3 A I think that's correct.
 4 Q Could you name for me all of the rules that you recall
 5 that affect what amount of cash flow would be available for
 6 security holders?
 7 A No, I can't remember.
 8 Q You can't?
 9 A I can't.
 10 Q Now, in collecting those mortgage payments which are
 11 then going to create the cash flows that we were talking about,
 12 who is that done by under these RMBS structures?
 13 A My understanding that's done by the servicer.
 14 Q And what are the responsibilities with respect to
 15 collecting those cash flows?
 16 A I think I gave a general understanding of this in my
 17 testimony that the servicer has to make a determination about
 18 what to do in a situation where payments are delinquent in
 19 terms of whether to foreclose the loan, whether to modify the
 20 terms of the loan, whether to restructure the loan in lieu of
 21 financing. That's generally my understanding of what the
 22 servicer does.
 23 Q Okay. And in performing that function, is any
 24 measurement made as to whether the servicer is performing
 25 adequately or not?
 26 A I don't understand the question.

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1 Fischel - Cross - Wollmuth
 2 Q Okay. The servicer works for the trust. Isn't that
 3 fair to say?
 4 MR. INGBER: I'm going to object on the grounds
 5 that that calls for a legal conclusion.
 6 THE COURT: I am going to allow questioning
 7 about this.
 8 A I am sorry. What was the question, sir.
 9 THE COURT: Madam reporter, will you read it
 10 back please.
 11 (Whereupon, the last question was read back by
 12 the reporter)
 13 A I don't want to express a legal opinion but the trust
 14 and the certificateholders in some sense are the beneficiaries
 15 of what the servicer does.
 16 Q Okay. And there are servicing -- my question is there
 17 are servicing criteria by which the performance of the servicer
 18 is measured. Isn't that correct?
 19 A Again, I'm not sure what you mean.
 20 Q By servicing criteria, I mean do the PSAs provide
 21 either in their texts or by cross reference to law an
 22 identifiable set of factors that you look at to see if the
 23 servicer is doing their job or not?
 24 MR. INGBER: Objection, calls for a legal
 25 conclusion, requires interpretation of the PSAs.
 26 THE COURT: There had to have been some

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1 Fischel - Cross - Wollmuth
 2 understanding here without the development of a formal
 3 legal opinion as to how the servicers operated and what
 4 the PSAs and other governing documents provided for. And
 5 there are statements reflecting Professor Fischel's
 6 knowledge of such matters working knowledge.
 7 So, I am going to allow some questioning. If it
 8 gets too far afield, you can renew the objection.
 9 MR. INGBER: That's fine, your Honor. Thank
 10 you.
 11 A Can I see a Pooling and Servicing Agreement.
 12 Q I don't have one here. All I have -- all I have time
 13 to examine you today is on your report I'm asking for your
 14 understanding because you said you had a general understanding
 15 of how these things work and I don't need you to read me the
 16 PSA. I'm asking for your general understanding that you
 17 testified about.
 18 A My general understanding is what I already stated.
 19 Q That they collect the money?
 20 A Well, they have obligations not just to collect the
 21 money but to make determinations about foreclose, pure
 22 decisions about restructuring decisions, about refinancing
 23 decisions and those are the important functions that the
 24 servicer performs to try and minimize losses in a situation
 25 where there are losses, to make a timely decision about whether
 26 to either foreclose or to restructure a loan or to insist on

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1 Fischel - Cross - Wollmuth
 2 payment according to the original terms in terms of what the
 3 role, the economic function of the servicer is. That's my
 4 general understanding.
 5 Q Okay. Fair enough.
 6 And my last question because we had a little bit of
 7 the colloquy with the lawyers.
 8 So, if I could just refresh you, Mr. Fischel, within
 9 every Pooling and Servicing Agreement is it true that there is
 10 a set of criteria by which I mean standards regarding the
 11 performance of the servicer which must be met?
 12 A I just don't recall one way or another without looking
 13 at the Pooling and Servicing Agreements.
 14 Q Do you know if there is government regulations that
 15 apply at the federal level, I'm not asking you about all the 50
 16 states, to the performance criteria which servicers must meet?
 17 A No, I don't, not without investigating that question.
 18 Q So, we talked about the borrowers and what they do
 19 which is mostly pay and the servicers. I'm going to move back
 20 to your description of the economic function that they perform.
 21 It is their responsibility to deal with defaults on
 22 the individual mortgage loans. Isn't that fair to say?
 23 A I think that's what I said. That's my understanding.
 24 Q Okay. And sometimes after a foreclose on those
 25 mortgage loans, correct?
 26 A That's one of the decisions they have to make, that's

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1 Fischel - Cross - Wollmuth
 2 correct.
 3 Q When they foreclose, they do so in the name of the
 4 trustee, correct?
 5 A Again, I don't know that one way or the other.
 6 Q You don't know?
 7 A I don't know what in the name of the trustee means.
 8 Q It would mean in my parlance here for clarity the
 9 trustee -- the servicer is responsible for preparing the
 10 foreclosure papers and getting them signed but when they are
 11 filed they say at the top Deutsche Bank, Bank of New York, HSBC
 12 whoever is the record title holder to the mortgages. Is that
 13 how it works or not, Mr. Fischel?
 14 A I don't know what is stated at the top of the
 15 foreclosure notice.
 16 Q But in any event, whether you know whether they are
 17 asking in the name of the trustee or not, these PSAs all
 18 provide that when the servicer is acting in the name of the
 19 trustee, whenever that might occur, the servicer is acting as
 20 the trustee's agent; isn't that true?
 21 MR. INGBER: Objection.
 22 THE COURT: Overruled.
 23 You may answer if you know.
 24 A I don't have an opinion. To me, the servicer is
 25 acting on behalf of the certificateholders in terms of economic
 26 function. The trustee is not receiving payments from loans.

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1 Fischel - Cross - Wollmuth
 2 The certificateholders are receiving payments. So, based on my
 3 understanding, the issue is not what name is at the top of the
 4 document. The issue is who is the real party in interest based
 5 on the performance of the servicer and I would say that's the
 6 certificateholders.
 7 Q So, I know you've done this before. So, politely, I
 8 won't move to strike that testimony. But I wasn't asking you
 9 what the economic affect was in your view.
 10 My question was very clearly do the documents say
 11 they're acting as their signature.
 12 If you don't know, that's fine but please try, Mr.
 13 Fischel, to answer my question because speeches unrelated to my
 14 question, I have a right to move to strike that. I'll try not
 15 to do that?
 16 THE COURT: Let's not have any speeches like
 17 this please.
 18 MR. WOLLMUTH: Yes, your Honor.
 19 THE COURT: You do have a right though to move
 20 to strike. You've been very restrained on your objections
 21 and both counsel will need to think about that as this
 22 examination goes forward. It has not escaped my notice
 23 that there has been signs on a number of occasions when
 24 Mr. Ingber was ready to move to strike or to move to
 25 object to testimony. You both have that right but when
 26 counsel exercises that right, when both sides exercise

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1 Fischel - Cross - Wollmuth
 2 that right, they can often find nobody can get any
 3 testimony into evidence. So, it's up to you if you decide
 4 that they're going to be a lot of objections and motions
 5 to strike, I will do my job and I will rule on them.
 6 Please just take it under advisement.
 7 We're about to stop if you need one or two more
 8 questions to reach the end of the court day.
 9 If you need something else before we stop, you
 10 can go ahead.
 11 MR. WOLLMUTH: I'm virtually done with this
 12 unit. So, maybe two questions.
 13 Q Without asking you to provide any opinion that's
 14 applicable to this case, just general knowledge from being a
 15 commercial lawyer, isn't it true that general principal is
 16 reliable for the unlawful acts and damages of its agent?
 17 MS. PATRICK: Okay, I object. That is a pure
 18 legal conclusion.
 19 MR. WOLLMUTH: It is.
 20 THE COURT: All right. I'll sustain the
 21 objection to that question.
 22 Q As a business matter if the servicer is acting in the
 23 name of the trustee purely as a commercial matter, matter of
 24 reputation, you would think the trustee would be concerned that
 25 they act in an appropriate way. Isn't that fair?
 26 A I think it's certainly fair that the trustee would

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1 Fischel - Cross - Wollmuth
 2 care a lot about everything that affects the best interest of
 3 the certificateholders including the behavior of and the
 4 performance of the servicer.
 5 Q Just as a matter of their own self interest, they have
 6 a duty to be concerned about reputational risk to their
 7 company, do they not?
 8 A Well, again, I'm not sure what you mean by duty but I
 9 think it is fair to say that these are significant financial
 10 institutions that are always concerned about their reputation
 11 and everything that they do.
 12 Q So, you would expect them to at least do enough
 13 oversight of the people that use their name to make sure that
 14 there name is not besmirched, would you not, as a commercial
 15 matter?
 16 MR. INGBER: Objection. I object to the
 17 reference of using their name. It hasn't been established
 18 that the servicer uses the trustees' name. That's the
 19 basis for my objection.
 20 THE COURT: Sustained. You can rephrase the
 21 question tomorrow morning. We are going to have to break
 22 for the day.
 23 Professor, you may step down.
 24 THE WITNESS: Thank you, your Honor.
 25 (Witness excused)
 26 THE COURT: Is there a request that the

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 2 Professor be directed not to confer with counsel.
 3 MR. WOLLMUTH: I think that would be advisable,
 4 yes, there is such a request, your Honor.
 5 THE COURT: Do you want to be heard on that, Mr.
 6 Ingber?
 7 MR. INGBER: No, that's fine, your Honor. We
 8 don't needed to speak to Professor Fischel.
 9 THE COURT: All right. Professor Fischel, you
 10 are directed not to confer with counsel while your
 11 cross-examination is in progress.
 12 THE WITNESS: I understand that, your Honor.
 13 Can I ask you a clarifying question so I act consistently
 14 with the Court's or the order.
 15 THE COURT: I would expect nothing less than to
 16 be cross-examined at the end of the day when there is no
 17 ventilation in the courtroom.
 18 THE WITNESS: Certainly not cross-examination.
 19 I just want to understand the Court's order.
 20 Am I permitted to talk to people from my firm
 21 overnight?
 22 THE COURT: Is any one else getting called as a
 23 witness here?
 24 No, you should not discuss the contents of your
 25 testimony while we are undergoing cross-examination.
 26 THE WITNESS: I understand, your Honor. I will

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follow. Thank you.
THE COURT: You can discuss the weather. The
record is closed for today's proceedings.
(Whereupon, the trial was adjourned to Friday,
January 22, 2016, at 10:00 a.m.)

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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 21, 2016

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

Page	Line	Change From	Change To	Reason(s)
176	16	Persuad	Persaud	SP
176	21	counsel's a name	counsel's name	TR
178	10	MisPers	MissPers	SP
178	13	sutures	settlements	TR
182	25 (and throughout)	Gibbs & Bruin	Gibbs & Bruns	SP
186	10 (and throughout)	Quinn Emamuel	Quinn Emanuel	SP
188	19	not be given	not given	TR
194	20	overtime	over time	SP
207	4	except	accept	TR
226	3	advise	advice	SP
255	15	usual	unusual	TR
257	20	brief	breach	TR
271	19	Country-Wide	Countrywide	SP
283	3	stature	statute	SP
298	15	And early payment defaults that you define as	And you define early payment defaults as	TR
299	10-11	analysis that that are	analysis that are	TR
299	16	our	your	TR
302	3	allegation	allegations	TR
312	10	don't	do	SP

Page	Line	Change From	Change To	Reason(s)
321	6	patient	a	TR

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

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February 25, 2016

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