UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	Case No. 08-13555 (SCC)
Lehman Brothers Holdings Inc., et al.,	Chapter 11
Debtors.	Jointly Administered

ORDER ESTIMATING ALLOWED CLAIM
PURSUANT TO RMBS SETTLEMENT AGREEMENT

This Court having previously entered an *Order Approving RMBS Settlement Agreement And Including Certain Proposed Findings Of Fact And Conclusions Of Law* [Docket No. 55706] (the "9019 Order"), which granted the *Motion of Lehman Brothers Holdings Inc. Pursuant to Fed. R. Bankr. P. 9019 and 11 U.S.C. § 105(a) for Entry of Order (A) Approving RMBS Settlement Agreement, (B) Making Certain Required Findings Regarding Decision of RMBS Trustees and LBHI Debtors to Enter into RMBS Settlement Agreement, (C) Scheduling Estimation Proceeding to Determine RMBS Claims and Approving Related Procedures Regarding Conduct of Hearing, and (D) Granting Related Relief* [Docket No. 55232],[1] made by Lehman Brothers Holdings Inc. ("LBHI" and the "Plan Administrator"), as Plan Administrator under the *Modified Third Amended Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and Its Affiliated Debtors* (the "Plan"), on behalf of itself and the other affiliated debtors in the above-captioned cases (collectively, the "LBHI Debtors"); and this Court having found in the 9019 Order that it had jurisdiction over the Motion, and any objections to the Motion or RMBS Settlement Agreement having been resolved, overruled, or waived by the 9019 Order; and this

[1] Capitalized terms not defined herein have the same meanings ascribed to them in the Motion or the RMBS Settlement Agreement, as appropriate.

Court, having conducted an Estimation Proceeding pursuant to the 9019 Order in accordance with Exhibit G to the RMBS Settlement Agreement, as modified by the parties or the Court, during which the RMBS Trustees and the Plan Administrator presented evidence and argument regarding the value of the RMBS Claims; it is hereby:

ORDERED, ADJUDGED, AND DECREED THAT:

1. For the reasons stated in the bench decision dictated on the record on March 8, 2018, the transcript of which is attached hereto as Exhibit A, the Allowed Claim shall be estimated and allowed at $2,375,114,115.67, as such amount may be adjusted pursuant to, and in accordance with, Section 3.02 of the RMBS Settlement Agreement to reflect any Excluded Trusts.

2. The allocation and distribution of the Allowed Claim shall be conducted in accordance with the terms of the RMBS Settlement Agreement.

3. The terms and conditions of this Order shall be immediately effective and enforceable upon entry of this Order.

4. The Plan Administrator is authorized to take all action necessary or appropriate to give effect to the relief granted in this Order.

5. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: March 15, 2018
New York, New York

/S/ Shelley C. Chapman
THE HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-scc

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

- x

BENCH DECISION REGARDING ESTIMATION OF RMBS CLAIMS

PURSUANT TO RMBS SETTLEMENT AGREEMENT

As read into the record March 8, 2018

Sui generis: From the Latin. Of its own kind or class; unique or peculiar. Black's Law Dictionary (10th ed. 2014).

Before the Court is the request of Lehman Brothers Holdings Inc. ("Lehman" or the "Plan Administrator") to estimate and allow some seventy-two thousand five hundred breach of contract claims asserted by trustees (the "Trustees") acting on behalf of some 225 trusts that issued Residential Mortgage Backed Securities ("RMBS"). The trusts are issuers of certificates that are collateralized by pools of residential mortgage loans in securitizations that were sponsored by Lehman and/or certain of its affiliates. The Court assumes familiarity with the nature of RMBS put-back litigation generally and with the lengthy history of this RMBS litigation in particular. Nonetheless, a bit of history is in order to establish the context of this Decision and, in particular, to explain why this particular RMBS put-back litigation is sui generis – decidedly the only one of its own kind.

In the heady years leading up to the financial crisis of 2008, certain of the Lehman debtors, like many other sophisticated financial institutions, created and enjoyed a robust market in which they (i) acquired residential mortgage loans either originated or purchased by their subsidiaries or affiliates and (ii) securitized such loans. Securitization of the loans entailed the establishment of a trust or other special purpose vehicle to acquire the loans, hold the loans, and issue securities supported by proceeds of the loans. In connection with such securitizations, Lehman, or one of its affiliates, as sponsor, made certain representations and warranties regarding the quality and nature of the loans and/or the documents included in the applicable loan file. Each trust's Governing Agreements typically provide that the applicable trustee may seek repurchase of a loan by the sponsor in the event there occur breaches of such representations or warranties. In order to assert a repurchase claim, the Governing Agreements generally require a trustee to establish that: (i) a breach of a representation and warranty exists; (ii) the breach adversely and materially affects the value of the related mortgage loan; and (iii) prompt notice of the breach was provided to the sponsor.

Suffice to say that things did not exactly go as planned in the world of RMBS. When the sub-prime housing market collapsed beginning in 2007, RMBS securitizations plummeted headlong into the sinkhole created by the collapse, and threatened to pull the entire United States economy into the abyss as well.

On September 15, 2008, Lehman and certain of its affiliates filed for bankruptcy in the largest chapter 11 filing in U.S. history. Approximately one year after the bankruptcy filing, and pursuant to a court-established bar date, certain RMBS trustees representing approximately 400 trusts, including the Trustees herein, filed proofs of claims asserting approximately $37 billion in repurchase claims premised on allegations that certain of the Lehman Debtors, as sponsors: (i) breached various representations and warranties in the Governing Agreements regarding the quality and characteristics of hundreds of thousands of mortgage loans; and (ii) provided deficient mortgage loan files. The proofs of claim asserted broad claims relating to approximately 1.8 million mortgage loans in the aggregate. However, the claims themselves only specifically identified approximately 4,700 mortgage loans with alleged breaches entitling the Trustees to damages of approximately $209 million — a miniscule portion of the alleged $37 billion in claims. The claims did not provide documentation supporting the $37 billion number in alleged liability, as was required by Lehman's bar date order and the underlying Governing Agreements.

Treating the claims like any other claims asserted against the bankruptcy estate, Lehman filed an omnibus objection to the RMBS Claims on the basis that the Trustees had violated the bar date order by, among other things, not providing sufficient supporting documentation to allow the Plan Administrator to assess liability, and it sought "loan-level" proof of the asserted breaches and damages. Lehman's objection was filed almost seven years ago, on March 14, 2011. Little, if any, such proof was forthcoming; indeed, the Trustees were admonished by then presiding Judge James Peck and told they would indeed be "put to their proof" in order to have their claims ultimately allowed. (See June 30, 2011 Hr'g Tr. at 71:8-19 [Dkt. No. 18251]).

In 2012, the parties informed the Court that they had agreed to a $5 billion reserve for the RMBS Claims and that they had also agreed to mediate the dispute regarding the allowed amount of the claims. The mediation failed.

Between September 2012 and March 2014, unbeknownst to the Plan Administrator or the Court, the Trustees embarked on a statistical "sampling" exercise to create a random sample of 5,000 of the so-called Covered Loans (a subset of the total universe of loans comprising the RMBS Claims) that would be "re-underwritten" to produce a statistically significant estimate of overall breach rates. This sampling analysis was presented to the Court as the basis for the Trustees' August 2014 motion to (i) increase the reserve for the RMBS Claims to $12.143 billion and (ii) permit the Trustees to use statistical sampling to estimate and allow their claims without conducting a loan-by-loan review.

The Plan Administrator opposed the Trustees' motion, and filed a cross-motion [Dkt. No. 46526] (the "Cross-Motion") to establish a loan-level review process for the RMBS Claims (the "Protocol"). The Trustees, in turn, vigorously opposed the Cross-Motion. After a full-day evidentiary hearing on December 10, 2014, the Court denied the Trustees' motion to increase the reserve for the RMBS Claims and granted Lehman's Cross-Motion to establish the Protocol.

While acknowledging that statistical sampling had indeed been used successfully in many RMBS litigations around the country, the Court concluded that the Trustees' purported "sampling" methodology was deeply flawed; as such, it could not provide a basis for setting reserves on the Trustees' claims, nor could the proffered methodology provide a basis for allowance or estimation of the claims. And, while not ruling out the possibility that sampling could indeed be utilized at some later point in the resolution of the RMBS Claims, the Court concluded that the only viable alternative at that time was for the parties to embark upon the Protocol and, through its highly rigorous multi-step process, pare down the universe of claims that had been asserted. On December 29, 2014, the Court entered an order (the "Protocol Order") approving the multi-step

Protocol to reconcile the RMBS Claims on a loan-by-loan basis.

And so the Protocol commenced. Faced with the daunting task of reviewing hundreds of thousands of loan files in the 16-month time period allocated to Steps 0-1 of the Protocol before the Protocol's Claims Cut-Off Date of March 31, 2016, the Trustees set about assembling small armies of loan review firms and re-underwriting personnel. Specifically, the Trustees' firms reviewed approximately 171,000 loan files and, after finding alleged breaches in approximately 94,000 of such files, submitted them in the form of claim files for the Plan Administrator to review in Protocol Step 2. At the same time, upon receipt of the claim files from the Trustees, the Plan Administrator similarly embarked on the grueling task of reviewing such files and approving or rejecting the claims asserted.

What happened next is of particular significance here today. Following another mediation in January 2015 and after extensive negotiations, the Plan Administrator and certain large financial institutions who represented the Trusts' largest group of certificateholders (the "Institutional Investors") entered into a settlement in October 2015 pursuant to which the RMBS Claims would be settled for a total allowed claim of $2.44 billion (the "Institutional Investors Settlement"). The Institutional

Investors have successfully negotiated numerous other massive RMBS settlements; moreover, all of these prior settlements were achieved at certificateholder recovery levels substantially lower than that being sought by the Trustees herein. Among the Institutional Investors are some of the most sophisticated and profitable firms on Wall Street, including Goldman Sachs Asset Management, MetLife, BlackRock, Invesco, Western Asset Management Company, and PIMCO. The Trustees, for reasons that remain undisclosed, declined to support the Institutional Investors Settlement; the only insight into the Trustees' decision appears to be (i) information contained in expert reports prepared for the Trustees that have not been disclosed to the Plan Administrator and have not been admitted into evidence in the Estimation Proceeding and (ii) conclusory statements that the settlement would fail to garner enough support and be accepted by a sufficient number of Trusts. The Plan Administrator ultimately withdrew the Institutional Investors Settlement, and the parties continued on under the Protocol.

Although the objective of the Protocol had been to narrow the underlying pool of disputed loans in order to pave the way for resolution of the ultimate allowed claim on each loan file either through business-to-business negotiation, mediation, or, as a last resort, an evidentiary hearing before the Court, Steps 2 and 3 of the Protocol did not succeed in reducing the number of loans at issue substantially below 94,000. After over two years of work under the Protocol and with the parties being only halfway through its 5-step process, it was obvious to all that the Protocol had failed to achieve its objective.

Notwithstanding the failures of both the Protocol and the Institutional Investors Settlement, the Plan Administrator and the Institutional Investors continued to work toward a framework for resolving the RMBS Claims. On March 17, 2017, the Plan Administrator and the Institutional Investors entered into a modified settlement agreement (the "RMBS Settlement Agreement") that was presented (i) to the Trustees for their consideration and acceptance and (ii) to the Court as a settlement for which approval was sought pursuant to Bankruptcy Rule 9019. Pursuant to the RMBS Settlement Agreement, the Plan Administrator agreed to seek allowance, through an estimation proceeding before the Court (the "Estimation Proceeding"), of the RMBS Claims known as the "Covered Loan Claims" at $2.416 billion (or at a slightly different amount depending on the number of Trusts that accepted the settlement). Although the Trusts asserting the RMBS Claims largely accepted the settlement, a small number of Trusts opted out or collapsed, lowering the agreed-upon proposed estimation amount to $2.38 billion. On

July 6, 2017, the Court entered an order approving the RMBS Settlement Agreement, paving the way for the Estimation Proceeding.

The purpose of the Estimation Proceeding at the heart of the RMBS Settlement Agreement is "for the Court to estimate the allowed claim amount that would have resulted from the completion of the Protocol, and specifically to consider whether the Trustees have shown that they are entitled, under the Protocol, to an allowed claim greater than $2.38 billion." (Lehman PreTrial Br. at 3.) Thus, the Plan Administrator seeks estimation of the RMBS Claims in the amount of $2.38 billion (the "Lehman Proposed Claim Amount"), as an allowed class 7 general unsecured claim in these cases, and the Trustees have the right under the RMBS Settlement Agreement to seek estimation of the claims in a higher amount. If the Court estimates the claims at $2 billion or more, all parties to the settlement (including, upon their acceptance of the settlement, the Trustees) waive their rights to appeal the Court's decision.

Moreover, the RMBS Settlement Agreement specifically does not require the Court to issue findings of fact and conclusions of law if the Court estimates the claims at $2 billion or more. Given the complexity of the issues presented, the magnitude of the dispute, and the enormous effort expended by the parties, a thorough detailed decision is in order. Although it was originally contemplated that the Estimation Proceeding would conclude in early January of 2018, the occurrence of certain events beyond the parties' control resulted in the delay of the conclusion of the proceeding until mid-February. The tight timeframe in which a decision is required precludes the preparation of a more formal memorandum decision replete with detailed citations to the voluminous trial record. Nonetheless, the parties should be assured that the Court has reviewed and re-reviewed the record extensively in the preparation of this bench decision.

Given this backdrop and history, this has been a peculiar RMBS trial, the only one of its own kind. Among the additional unique features of this RMBS trial is what has and what has not been introduced into evidence. Pursuant to Exhibit G to the RMBS Settlement Agreement, the parties agreed specifically to permit the introduction into evidence of (i) the Institutional Investors Settlement and (ii) materials concerning other settlement agreements in disputes involving RMBS Claims. Notably, however, despite the introduction into evidence of millions of pages of loan files, there has been limited loan-level proof for the vast majority of loans at issue. While certain so-called "exemplar" loans were introduced into evidence and were the subject of detailed testimony, no sampling methodology was employed or adduced at trial. Moreover, not only have the loans and the loan files themselves been on trial but the processes by which each of the parties reviewed the loan files and breach claims have also been put on trial. As a result, the trial was dominated by testimony from each side's expert witnesses.

Accordingly, the decision that the Court is about to render, after some 22 days of trial, will bear little resemblance to the canon of RMBS decisions rendered by various courts in this District and across the country, all of which the Court has considered with a great deal of care.

I. BACKGROUND

A. The Governing Agreements

The parties' respective loan review processes during the Protocol were dictated by their interpretations of the Governing Agreements, which include, among others, Trust Agreements, Assignment and Assumption Agreements, Indentures, Mortgage Loan Sale and Assignment Agreements ("MLSAAs"), and other agreements governing or related to the Trusts.

In order to assert a claim against a Lehman sponsor under the Governing Agreements, the agreements specifically require the Trustees to prove for each mortgage loan: (1) a breach of a representation and warranty under the applicable MLSAA; (2) that the breach materially and adversely affects the value of the mortgage loan; and (3) that prompt notice of the breach was provided to Lehman. See Cross-Motion at ¶ 43 (citing to Ex. E (SASCO 2005-1 MLSAA) at § 1.04(d)).

Lehman or one of its affiliates, as the sponsor and seller of the loans, made numerous representations and warranties under the MLSAAs for the benefit of investors in the trust certificates. The most frequently asserted borrower breaches of reps and warranties asserted here are based on the so-called "no default" and "no untrue statement" reps and warranties, including breaches for misrepresentation of income, debt, and occupancy.

Under the "no default" rep and warranty under the MLSAA, Lehman promises that "[t]here is no default, . . . breach, violation or event of acceleration existing under the Mortgage or the Mortgage Note and no event which, with the passage of time . . ., would constitute a default." See Trustees' Pre-Trial Brief, p. 10 (citing LXS 2006-15 MLSAA § 1.04(c)(vii)). While the No Default Representation does not mention borrower misstatements, the underlying deed of trust typically provides that "[a] Borrower shall be in default if, during the Loan application process, Borrower . . . gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) . . . ." Id. at p. 10 (citing TRX

362, Deed of Trust at 7).

The "no untrue statement" rep and warranty under the MLSAA states, in pertinent part, that "[t]he documents, instruments and agreements submitted for loan underwriting were not falsified and contain no untrue statement of material fact or omit to state a material fact required to be stated therein or necessary to make the information and statements therein not misleading. To the best of Seller's knowledge, no fraud was committed in connection with the origination of the Mortgage Loan." (Lehman Post-Trial Brief p. 16 n.98 (citing SASCO 2006-S3 MLSAA at § 1.04(c)(v) (TRX 232)).)

Other breaches asserted by the Trustees during the Protocol and not based on the previously discussed breaches of reps and warranties were based on, among other things, (i) breaches of representations required by the applicable underwriting guidelines, (ii) breaches of regulatory requirements, and (iii) breaches of other mortgage covenants which required that certain documents be in the loan file at origination or otherwise. Such asserted breaches include, among others, failure to provide a final HUD-1, failure to provide a final TIL, failure to provide a right of rescission, and failure to obtain a qualified appraisal.

In order to assert a valid claim, the Trustees must demonstrate the existence of a breach pursuant to the

Governing Agreements and also must prove that the breach has a material and adverse effect on the value of the related mortgage loan (or, in a few of the at-issue MLSAAs, the "interests of the Depositor"). The parties refer to this requirement as "AMA" or "MAE," as the context requires, (and the Court will use the two terms interchangeably) but they disagree on the meaning of this requirement and the timing for determining whether it has been met for a particular loan. Specifically, the MLSSAs state, in pertinent part:

Upon discovery by either the Bank or the Depositor of a breach of any of the foregoing representations and warranties that adversely and materially affects the value of the related Mortgage Loan, that does not also constitute a breach of a representation or warranty of a Transferor in the related Transfer Agreement, the party discovering such breach shall give prompt written notice to the other party.

See Ex. 7 to Lehman Pretrial Brief at § 1.04(b) (MLSAA, dated Feb. 1, 2003).

After a party demonstrates the existence of a breach that materially and adversely affects the value of the related mortgage loan, the MLSAAs provide specific remedies pursuant to the so-called "repurchase provisions" of the MLSAAs governing each Trust. The MLSAAs contain substantially similar language, which sets forth specific procedures to cure a breach, stating, in pertinent part:

Within 60 days of the discovery of any such breach, Lehman . . . shall either (a) cure such breach in all material respects, (b) repurchase such Mortgage Loan or any property acquired in respect thereof from the Depositor at the applicable Purchase Price or (c) within the two year period following the Closing Date, substitute a Qualifying Substitute Mortgage Loan for the affected Mortgage Loan.

See Ex. 7 to Lehman Pretrial Brief at § 1.04(b) (MLSAA, dated Feb. 1, 2003). The Governing Agreements provide that any loans subject to repurchase must be repurchased at the "Purchase Price," which is generally defined as follows:

With respect to the repurchase of a Mortgage Loan pursuant to this Agreement, an amount equal to the sum of (a) 100% of the unpaid principal balance of such Mortgage Loan, (b) accrued interest thereon at the Mortgage Rate, from the date as to which interest was last paid to (but not including) the Due Date immediately preceding the related Distribution Date, (c) any costs and damages incurred by the Trust Fund with respect to such Mortgage Loan in connection with any violation of any federal, state or local predatory or abusive lending laws or other similar laws and (d) any unreimbursed Servicing Advances with respect to such Mortgage Loan.

Cross-Motion at ¶ 83 (citing to Ex. E (SASCO 2005-

1 MLSAA) at § 1.01).

B. The Protocol

The Protocol Order established the process by which the Trustees would collect, review, and present loan-level proof from which the parties – or the Court, if necessary – could reconcile the RMBS Claims and determine an allowed amount for such claims.

The steps of the Protocol were as follows:

Step 0: The Trustees were required to collect loan files from the servicers.

Step 1: By March 31, 2016, the Trustees were required to submit claim files to the Plan Administrator. Under the Protocol, an RMBS claim package was required to include: (i) the mortgage loan file; (ii) a statement describing either (a) the specific alleged defect and the representation or warranty violated or (b) the specific document allegedly missing; (iii) a statement of how the breach or defect entitles the Trustee to a claim under the applicable Governing Agreements and applicable law; (iv) a calculation of the purchase price; and (v) a statement describing any notice of breach given to the Lehman Debtors.

Step 2: Review of claim files by the Plan Administrator. The Plan Administrator reviewed the claim files and determined whether the Trustees proved a material breach. If it determined that a material breach was proven, the Plan Administrator approved the file and then either approved or recalculated the purchase price. If the file was not approved, the Plan Administrator prepared a statement explaining the basis for rejection of the claim.

Step 3: Non-binding negotiation procedure for rejected claims and disputed approved claims. During this step, the parties could negotiate regarding disputed claims in an effort to arrive at a mutually acceptable allowed claim. The Parties did not complete this step of the Protocol.

Step 4: Non-binding dispute resolution procedure to resolve claim file disputes. During this step, the Plan Administrator was to submit disputed claims remaining after Step 3 for resolution by one or more neutral claims facilitators. The Parties did not reach this step of the Protocol.

Step 5: Court review and approval of claim amounts. In this final step, agreed claim amounts were to be approved by the Court and disputed claims were to remain subject to objection by the Plan Administrator and allowance by the Court on a loan-by-loan basis. The Parties did not reach this step of the Protocol.

C. The Trustees' Protocol Process

The Trustees' loan review process under the Protocol was led by Mr. James Aronoff and Mr. Edmond Esses of Duff & Phelps ("D&P"); it was comprised of five stages: the Completeness Review; the Initial Loan Review; the Second Level Review; and two quality control reviews, referred to by D&P as QC1 and QC2. The first three stages of the review process were conducted by one of five forensic review firms hired by D&P (the "Loan Review Firms"), while QC1 and QC2 were conducted by D&P. The Loan Review Firms were DigitalRisk, The Oakleaf Group, CrossCheck Compliance, EdgeMac, and Opus Business Services Group.

During the "Completeness Review," the Trustees collected loan files from the servicers. Once the Trustees received the loan files, the Loan Review Firms endeavored to ensure that the loan files were complete. Each loan file was examined to determine whether it contained six origination documents that the Trustees determined were key to the review and provided an "indicia of completeness:" (i) the loan application, (ii) the origination credit report, (iii) the appraisal, (iv) the mortgage, (v) the note, and (vi) the HUD-1 (collectively, the "Trustee Critical Documents").

Next, in the "Initial Loan Review" of a loan file, a loan reviewer from one of the Loan Review Firms conducted what the Trustees characterize as a complete "re-underwriting" of each loan. In the "Second Level Review," a second loan reviewer purportedly conducted an independent re-underwriting of any loans with material breaches identified in the Initial Loan Review; loans that were not found to have a breach in the Initial Loan Review were not reviewed in the Second Level Review. In addition to utilizing documents typically found in the loan files, such as tax returns, Form W-2s, bankruptcy filings, credit reports, and hardship letters, the Loan Review Firms often utilized data and reports produced by third-party sources such as credit bureaus (that is, Equifax, Experian, and TransUnion); the Bureau of Labor Statistics ("BLS Data"); the Mortgage Electronic Registration System ("MERS"); DataVerify; LexisNexis; Accurint; and Salary.com. In addition, the Loan Review Firms sometimes conducted a verification of employment ("VOE"), generally done via a telephone call, email, or fax, to a borrower's former employer to inquire about the borrower's salary or employment as of the date of origination of the loan. The third-party data and VOEs were often obtained by the Loan Review Firms during their Protocol loan review process.

For each breach claim asserted after the completion of the loan review process, the Loan Review Firms identified the loan, the alleged breach finding, the representation and warranty relied upon, and the evidence supporting the alleged breach; the firms compiled such information in a "Claims Tracking Spreadsheet" to which the

Plan Administrator would eventually add its response. The Loan Review Firms also assembled a "Claim Package" consisting of all the documents upon which the Trustees relied to demonstrate the existence of the claimed breach.

After the Loan Review Firms conducted two levels of review, the Claim Package for any loan determined to have a breach was passed on to D&P for the two additional rounds of so-called "quality control," QC1 and QC2. Breach claims based on "Missing Documents," however, were not transmitted to D&P for QC1 or QC2 review; such claims were not further reviewed beyond the Second Level Review. In QC1, a D&P employee was instructed to check the accuracy of the breach narrative in the Claims Tracking Spreadsheet against the evidence in the Claim Package; unless D&P found an inconsistency, there was no D&P review of the full loan file during QC1.

At the QC2 level, Mr. Aronoff's team at D&P repeated the review conducted in QC1; in addition, the QC2 reviewer was tasked with (i) confirming that the breach finding was connected to one or more representations and warranties in the applicable MLSAA, (ii) addressing any questions raised during QC1, and (iii) analyzing the breach claim for AMA and making a final determination on the claims for submission to the Plan Administrator. Mr. Aronoff's QC2 team concluded that a defect had a material and adverse effect on the value of a loan if it met one of the following four criteria: (1) the defect increases the likelihood of default with respect to the loan, thereby increasing the credit risk associated with such loan; a breach causing an increase in credit risk is material and adverse to the value of the loan; (2) the defect increases the potential loss severity with respect to the loan, thereby increasing the credit risk associated with such loan; a breach causing an increase in credit risk is material and adverse to the value of the loan; (3) the defect increases the potential loss severity and the likelihood of default with respect to the loan, thereby increasing the credit risk associated with such loan; a breach causing an increase in credit risk is material and adverse to the value of the loan; and (4) pursuant to the related governing documents, the defect is material and adverse to the value of the loan (i.e., a "Deemed AMA"). See TRDX-173.

All breach claims that cleared every step of the Trustees' loan review process progressed to Step 2 of the Protocol in which they were submitted to the Plan Administrator for review. In submitting their breach claims, the Trustees provided the Plan Administrator with the Claims Tracking Spreadsheet, the Claim Package, the entire loan file as received from the servicer, and the "data tape" containing loan-specific information to calculate the purchase price for each loan.

D. The Plan Administrator's Protocol Process

The Plan Administrator's Protocol team consisted of (i) Lehman personnel who had experience with repurchase claims and operations management; (ii) Recovco Mortgage Management ("Recovco"), a loan review firm that reviewed individual claims; and (iii) Rollin Braswell Fisher LLC ("RBF"), attorneys for the Plan Administrator. The Plan Administrator's loan review process was overseen by Mr. Zachary Trumpp.

In reviewing the breach claims submitted by the Trustees, the Plan Administrator's team utilized a multi-step review process. The Plan Administrator's position is that, for the Trustees to meet their burden, they first were required to demonstrate the existence of a loan defect ("Threshold Fact") that constituted a breach of at least one representation and warranty in the applicable Governing Agreements for that Trust. During its review of each breach claim submitted by the Trustees, the Plan Administrator and its team reviewed not only the Claim Package but also the entire loan file in order to assess whether the Trustees had established a Threshold Fact sufficient to support a claim of breach on a loan file. The majority of the Trustees' claims were rejected at the Threshold Fact level review stage.

If the Plan Administrator confirmed the existence of a Threshold Fact supporting the Trustees' asserted breach claim, the Plan Administrator next examined whether such defect constituted a breach of the applicable representation and warranty under the Governing Agreements. For instance, if the Trustees relied on the "no untrue statement" representation and such representation required that a misstatement must be a "material fact," then the Plan Administrator would determine whether the Threshold Fact was material.

If the Plan Administrator determined there was a breach of a representation and warranty, it progressed to an evaluation of whether the breach was one that "adversely and materially affects" the value of the loan. The Plan Administrator's team conducted two levels of AMA review. First, Recovco would review the file; if a loan file was complicated or if Recovco disagreed with the Trustees, it would elevate the loan file to RBF, who would then reopen the loan file and conduct a review process. If all three components - the Threshold Fact, a breach of a rep and warranty, and AMA - were present, then the loan file was given a "pass" by the Plan Administrator and reviewed for a determination of damages. Mr. Trumpp testified at trial that, as of the time the Protocol was halted, the Plan Administrator had "passed" approximately 1,260 loans under the Protocol.

The Plan Administrator provided the Trustees with a formal response to each loan file detailing in 250 words or less its reasoning for accepting or rejecting claims on a loan file. Such response was input into the Claims Tracking Spreadsheet.

E. The "On-Hold" Loans

During Step 2 of the Protocol, the Plan Administrator placed over 30,000 loan files "on hold" following its determination that each such loan file was missing one or more of the following documents deemed to be "critical" to the Plan Administrator's review (collectively, the "PA Critical Documents"): (i) servicing notes, which are routinely compiled by the loan servicer and contain communications between the servicer and the borrower, including potential reasons for a borrower's default; (ii) payment history, which provides information on loan payments made by borrowers and how such payments are allocated to outstanding principal and interest; (iii) loss certifications, which provide a detailed calculation of the unpaid losses on a loan; and (iv) corporate expense logs, which record costs associated with servicing the loan and costs incident to the foreclosure process, including the dates such costs were incurred. The Plan Administrator asserts that, when PA Critical Documents were missing from a file, it made numerous requests for such information from the Trustees. In most cases, the Trustees did not obtain the requested documents and, as a result, the Plan Administrator never received them. During the Protocol, by an agreement among all parties, the Plan Administrator put aside all loan files missing one or more of the PA Critical Documents (Dkt. No. 53161; TRX-854, pp. 5-6) and it never reviewed such loan files unless it received the missing documents. The Plan Administrator argues that breach claims asserted on the "on hold" loans should be valued at zero. The Trustees disagree, and assert that such claims should be allowed in the full amount asserted. At trial, the number of "on-hold" loans was reduced to approximately 24,000 loan files as a result of collapsed trusts or withdrawn claims.

F. The Withdrawn Claims

During the Protocol, the Trustees asserted that a total of approximately 94,000 loan files contained material breaches. Subsequent to the termination of the Protocol and in connection with the Estimation Proceeding, the number of at-issue loan files was reduced to approximately 91,000 as a result of loans that had been paid in full, trusts that had terminated, and the parties' reconsideration of certain claims submitted during the Protocol. However, on June 1, 2017, the Trustees submitted the Expert Report of James Aronoff, which offered opinions on approximately 76,044 loans files. Throughout June and July of 2017, the Plan Administrator repeatedly requested that the Trustees provide information on the basis for their withdrawal from the Estimation Proceeding of approximately 72,088 breach claims (the "Withdrawn Claims"), which included the withdrawal of 15,107 disputed mortgage loan files in their entirety. The Trustees refused to provide any such information, asserting that the rationale surrounding their decision to withdraw certain loans from the Estimation Proceeding is protected by attorney-client privilege and as attorney work product. The Trustees have steadfastly maintained this position notwithstanding the Plan Administrator's assertion that the withdrawal of some 40% of the Trustees' breach claims profoundly undermines the integrity and validity of the Trustees' loan review process.

On July 27, 2017, the Plan Administrator submitted the Rebuttal Expert Report of Charles Grice, who opined that the Trustees' selection of the Withdrawn Claims appeared to have been done at random; particularly in the category of "Missing Document" claims asserted by the Trustees, certain Missing Document claims were withdrawn while others were not. As such, Mr. Grice argued that the loans and claims that had been withdrawn tended to confirm the Plan Administrator's position that the Trustees' loan review process was flawed. In his subsequent reply report, Mr.

Aronoff did not respond to Mr. Grice's opinion on the Withdrawn Claims.

The Trustees did comment on the Withdrawn Claims in footnote 7 of the Trustees' Pre-Trial Brief, stating that they withdrew the Withdrawn Claims to make the Estimation Proceeding more "focused and manageable." However, none of the Trustees' witnesses provided any additional explanation or insight into the Withdrawn Claims.

II. SUMMARY OF THE PARTIES' POSITIONS

A. The Plan Administrator

The Plan Administrator asserts that the Trustees have failed to meet their evidentiary burden to support an estimated allowed claim in an amount greater than $2.38 billion, much less the allowed claim of $11.4 billion sought by the Trustees. The Plan Administrator argues that the Trustees engaged in a fundamentally flawed loan review process, resulting in claims that were inappropriately framed and inadequately supported. Because the Trustees' loan review process suffered from multiple defects, the Plan Administrator maintains that the Trustees cannot carry their burden of proof by relying on an "exemplar loan" approach at trial.

Specifically, the Plan Administrator asserts, metaphorically, that "every loan is a snowflake" – that is, that every loan and every loan file is unique. Thus, in order to prove breaches of representations and warranties under the Governing Agreements, the Trustees have the burden to show, on a loan-by-loan basis, a Threshold Fact that constitutes a breach of a representation and warranty in the applicable MLSAA. Instead of making reliable and accurate determinations of Threshold Facts, the Loan Review Firms, argues the Plan Administrator, (i) relied on evidence insufficient in quality and/or quantity, (ii) ignored contradictory evidence, (iii) drew unsupported and conclusory inferences, and/or (iv) failed to weigh all of the relevant evidence when making their breach determinations. The Trustees' claims were often based on inconclusive evidence that was given more weight than the borrower's statements in the loan application itself. In contrast, the Plan Administrator contends that its own review process was reliable and that its responses to the Trustees' asserted breach claims were reasonable.

The Plan Administrator criticizes the Trustees' determination of AMA by breach type and further asserts that the Trustees did not prove AMA for each material breach asserted as they conflated the question of whether a misrepresentation was "material" with the separate determination of whether the breach, if proven, adversely and materially affects the value of the loan. By failing to analyze AMA with respect to each specific loan and instead matching a breach type to one of four types of AMA recitals, the Trustees effectively write the AMA requirement out of the Governing Agreements and render meaningless the requirement that AMA be assessed at the time of notice of the breach. Further, the Plan Administrator disagrees with the Trustees' "risk of loss" analysis of AMA, asserting instead that, in order to demonstrate AMA, the Trustees must show actual loss in value on the loan at issue rather than a material increase in the risk of loss that has yet to actualize. Even assuming the Trustees' standard is the correct one, the Plan Administrator points out that the Trustees made no effort to quantify a baseline risk of loss on any loan to determine whether the alleged breach had significantly increased it.

In support of its proposed estimated claim amount of $2.38 billion, and pursuant to Exhibit G of the RMBS Settlement Agreement, the Plan Administrator has highlighted that the Institutional Investors, who represent nearly 24% of all beneficial certificateholders and comprise some of the biggest names on Wall Street, had previously agreed to a settlement of the Covered Loan Claims for an allowed claim proportionately equal to $2.38 billion, which settlement the Institutional Investors presumably believed to be fair and reasonable. Additionally, the Plan Administrator has presented evidence of comparable settlements in large-scale

RMBS matters that involved (i) a number of the same Institutional Investors and (ii) similar claims, legal issues, and macro-economic context; the Plan Administrator argues that its proposed estimated claim amount of $2.38 billion is consistent with the range of such settlements, and is in fact at the high end of their recovery ratios. The Plan Administrator thus submits that the Institutional Investor Settlement and these comparable settlements lend further support to the reasonableness of Lehman's proposed allowed claim amount.

B. The Trustees

The Trustees characterize their claims as "straightforward breaches of contract" for which they seek damages of approximately $11.4 billion. They argue that Lehman made sweepingly broad representations and warranties in the Governing Agreements which were both standard in the RMBS market and critical to investors. Specifically, Lehman represented and warranted, as to each mortgage loan it securitized, that (i) the documents submitted for loan underwriting "contain no untrue statement of material fact or omit to state a material fact;" (ii) the borrower did not give "materially false, misleading or inaccurate statements to Lender" or "fail[] to provide Lender with material information;" (iii) there was no default under the mortgage; and (iv) the borrower's ratio of debt to income ("DTI") did not exceed a critical threshold. The Trustees submit that they have proven widespread breaches of these reps and warranties by providing Lehman evidence of breaches that they assert went largely unrebutted during the Protocol.

At trial, the Trustees sought to demonstrate that (i) the breach claims they asserted were the result of a reliable process conducted in accordance with industry standards and in a manner approved by other courts, (ii) the evidence types used by the Loan Review Firms are routinely relied on in the industry, and (iii) the standard they used to determine the existence of AMA is the same standard used in the industry and confirmed by courts.

The Trustees maintain that the burden of proof applicable to their breach of contract claims is "preponderance of the evidence" - whether a given fact is more likely to be true than not true - and that they have met that burden as to each and every claim they asserted. They criticize Lehman's review of their breach claims as being both overly dismissive of the Trustees' evidence and overly optimistic about a borrower's honesty in applying for a loan and his or her ability to fulfill obligations under a mortgage. The Trustees maintain that Lehman relies on a presumption of accuracy in the loan applications for which there is no basis and that its breach-level defenses rely heavily on speculation; indeed, the Trustees argue that

Lehman failed even to attempt to refute the Trustees' proof for the majority of loans submitted into the Protocol beyond asserting generic challenges to the types of evidence that the Trustees put forward.

With respect to the materiality of alleged breaches, the Trustees assert that if a misstatement or omission relates to any information about income, debt, or occupancy, then the "materiality" requirement is satisfied. The Plan Administrator, by contrast, argues that the question is not whether the category of information misstated may be material, but rather, whether, in context, the magnitude of the misrepresentation was material to the credit decision at origination of the loan.

The Trustees' position is that a breach materially and adversely affects the value of a loan if it increase the risk of loss on that loan or decreases the price that a purchaser would be willing to pay for it. Moreover, the Trustees assert that because each of the breaches identified by the Trustees during the Protocol increased the risk of loss on the subject loan, every such breach materially and adversely affected the value of the subject loan, thus satisfying the AMA requirement. The Trustees assert that (i) the term "materially affects" in the Governing Agreements means that the breach at issue would have altered the price that a willing purchaser would pay for the loan or otherwise changed the risk of loss on a loan; and (ii) the term "adversely affects" means that the impact would be detrimental to the financial interests of the certificateholders by either lowering the price or increasing the risk of the security. The Trustees submit that they need not show the claimed breach caused an actual loss on a loan because the Governing Agreements do not require that loss causation be demonstrated to assert a repurchase claim based on a breach of reps and warranties. In other words, in sum and substance, and according to their expert, Mr. Aronoff, the Trustees' interpretation of the Governing Agreements and applicable law is that every material breach has an adverse material effect on the value of the subject loan.

Notwithstanding the loan-by-loan review conducted during the Protocol and acknowledging that, at trial, they were not relieved of their loan-level burden of proof, the Trustees maintained that it would be impossible to demonstrate breaches on a loan-by-loan basis during the Estimation Proceeding. Instead, the Trustee sought to build up to their aggregate claim by bucketing allegedly breaching loans based on "breach type" and presenting exemplar loans for each of the most significant breach categories. The vast majority of the Trustees' claims fell into one of four buckets that they deemed the "Big Four" - borrower breaches of income, debt, occupancy, and DTI. Some 54,792 of the Covered Loans and approximately $9.1 billion of the Trustees' claims can be attributed to one of the Big Four breaches. The Trustees' intention was to provide the Court with the ability to extrapolate from the exemplar loans to the breach categories and then to the greater pool of Covered Loans based upon what the Trustees assert was a rigorous, multi-stage Protocol process. Significantly, the Trustees did not rely on any statistical sampling methodology to establish the amount of their claim.

The Trustees state that the express purpose of the Estimation Proceeding is to value the RMBS Claims as if the parties had adjudicated these claims in their entirety. Had the Trustees' claims proceeded to a full trial, the Trustees' burden would have been to show that an alleged breach "more likely than not" is valid, and they assert that they have submitted evidence that "provides a sound basis for the Court to make judgments concerning the probable outcome of a trial on the merits of the different breach claims and types of evidence." (Trustees' Post-Trial Brief, p. 2). Their position is that the most reliable approach to estimate the RMBS Claims is not to look at settlements in other cases but rather to look only at the evidence of breaches presented in this case.

III. APPLICABLE LAW

A. Estimation

Section 502(c)(1) of the Bankruptcy Code provides that "[t]here shall be estimated for purpose of allowance under this section . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case." The Bankruptcy Code provides no definitive guidance on how to estimate a claim. Without a specific methodology prescribed in section 502(c), a court's authority to estimate claims is only limited by "the legal rules that may govern the ultimate value of the claim" and "those general principles which should inform all decisions made pursuant to the [Bankruptcy] Code." In re Chemtura Corp., 448 B.R. 635, 648-49 (Bankr. S.D.N.Y. 2011). Bankruptcy courts have broad discretion in estimating claims, "so long as the procedure is consistent with the fundamental policy of Chapter 11 that a reorganization must be accomplished quickly and efficiently." In re Adelphia Commc'ns Corp., 368 B.R. 140, 278 (Bankr. S.D.N.Y. 2007) (citation omitted). Of particular note here is that Exhibit G to the RMBS Settlement Agreement sets forth the parameters of the evidence to be considered by the Court during the Estimation Proceeding; pursuant to Exhibit G, the parties agreed that the specified evidence is admissible, but left it to the Court to determine the weight to be afforded the evidence as presented at trial.

B. Burden of Proof

The Trustees' claims for breach of the MLSAAs are governed by New York law. See, e.g., Ex. 2 to Lehman Pretrial Brief, MLSAA, dated Dec. 1, 2002, at § 2.04. Under New York law, the Trustees bear the burden of proving each element of their claims by a fair preponderance of the credible evidence, including the amount, if any, of damages. PPX Enters., Inc. v. Fredericks, 94 F. Supp. 2d 477, 483 (S.D.N.Y. 2000). See also U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc., 205 F. Supp. 3d 386, 411-12 (S.D.N.Y. 2016) ("MARM III"). The Trustees bear this burden with respect to each alleged breach asserted for each loan as to which they seek relief. MARM III, 205 F. Supp. 3d at 412 (citation omitted). In considering a claim of breach for a loan, the Court must consider the "total mix" of evidence as to that loan. Id. at 477 ("The Court has considered the totality of the evidence relating to a loan in making findings on any specific issue relating to that loan. The evidence most directly applicable to the claimed breach has not been considered in isolation but in conjunction with the totality of the evidence concerning the loan."). The factfinder's "role is to separate what 'could have happened' from 'what the preponderance of the evidence shows most likely did happen.'" Reddy v. CFTC, 191 F.3d 109, 118 (2d

Cir. 1999).

C. RMBS Litigation Case Law – An Overview

In the wake of the collapse of the U.S. subprime real estate market in 2008, dozens if not hundreds of parties initiated RMBS litigation from which a substantial body of case law has developed, and continues to develop. Recently, the United States District Court for the Southern District of New York issued a decision in Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, No. 14-cv-03020 (KBF), 2018 WL 583116, 2018 U.S. Dist. LEXIS 12591 (S.D.N.Y. Jan. 25, 2018), in which the court acknowledged that a "large and growing body of law" has developed around RMBS litigation, and that

[u]nsurprisingly, given the fact-intensive nature of some issues and the lack of controlling precedent on others, that body of law contains disagreements large and small. It is impossible (and unnecessary) to reconcile every case, and reasonable minds can certainly differ on what the law should be for cases like this.

Id. at *10. So too here, particularly given the sui generis nature of this case. Even though this case is distinguishable from the cases that have preceded it in significant ways, a number of RBMS decisions have nonetheless aided the Court in assessing the provisions in the Governing Agreements. The following is a brief and by no means exhaustive summary of some of those decisions.

1. Timing of the AMA Determination

In MARM III, a decision heavily cited by each side in the instant case, US Bank, as trustee for three trusts (the "MARM Trusts"), sued UBS, the sponsor, for breaches of reps and warranties following UBS's refusal to repurchase purportedly defective loans in the MARM Trusts. Judge Castel looked closely at the AMA provisions under the documents governing the securitization of the RMBS into the MARM Trusts and engaged in a detailed loan-by-loan analysis of some 20 loan files, making specific findings on each with respect to the existence of a breach.

The documents governing the MARM Trusts contained repurchase provisions which are substantially similar to the repurchase provisions contained in the Governing Agreements in this case. The repurchase provisions stated that UBS was obligated to repurchase a loan only upon showing the existence of a material breach that "materially and adversely affects" the interest of the MARM Trust certificateholders. MARM III, 205 F. Supp. 3d. at 464. Interpreting the unambiguous present-tense use of the word "affects" and construing such language in the context of the contract as a whole, the court held that AMA is measured as of the date the repurchase demand is made, not the date that the representations and warranties were made, which was generally the “closing date” of the transaction. As Judge Castel explained,

it is reasonable for the parties to bargain for a limitation on the representations and warranties such that the repurchase obligation is triggered only where a material breach at the time of contracting continues to have a material adverse effect at the time the breach is noticed or discovered and a remedy is sought. To conclude otherwise would give the Trusts a unilateral ability to put back loans that, after many years of performance, may have had breaches even if those breaches no longer affect the Certificateholders’ interests.

Id. at 466. Judge Castel quite clearly contemplates the existence of breaches which would not have an AMA impact on the subject loans. He goes on to elaborate that

[a] breach at the time of origination or at the Closing Date may have an effect that carries on indefinitely, including up to the time of discovery or notice, but that need not always be the case. An intentional misrepresentation of income by a borrower, if known, would have resulted in the loan never having been approved, funded or sold; this is an effect that continues to the time of discovery or notice. In contrast, a failure of an underwriter to obtain a verification of one of two

jobs held by a borrower would be a breach of the Guideline Warranty but would have no continuing effect if, for example, the verification would have confirmed employment.

Id. at 466-67.

Providing further guidance, Judge Castel clarified that the materiality requirement contained in individual representations and warranties should be analyzed separately from AMA. If a warranty was breached - for example, if a borrower provided materially untrue information -then in order for a repurchase obligation to apply, the trustees must also prove that such breach "materially and adversely affects" the interests of the certificateholders. Id. at 467.

As will be discussed hereinafter, Judge Castel also provided extensive guidance in MARM III on a number of other critical issues, including the types of evidence admissible to prove breaches; the importance of considering, on a properly weighted-basis, all evidence in a loan file; and the limitations on the ability to equate the existence of a breach of a representation and warranty with the existence of AMA at the time of a repurchase demand.

2. Loss Causation and Proof of an Adverse Material Effect

Under New York law, a plaintiff can only recover damages for a breach of contract if the breach "directly and proximately caused" the damage. Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank, 392 F.3d 520, 525 (2d Cir. 2004). Damages must be "traceable to the breach, not remote or the result of other intervening causes." Id. at 526 (citations omitted).

Notwithstanding this fundamental principal of contract law, several RMBS decisions involving monoline insurance companies have held that, in order to mandate loan repurchase pursuant to applicable contracts, plaintiffs need not show that the alleged breaches caused the loans to default, but only that the breaches materially increased the plaintiffs' risk of loss. In Assured Guar. Mun. Corp. v. Flagstar Bank, FSB, Judge Rakoff observed that "causation is ordinarily an essential element of damages in a breach of contract action" but that "'causation' is far from a self-defining term, and raises all sorts of questions, such as whether the causation must be direct or indirect, transactional, proximate, risk-related, or whatever." 892 F. Supp. 2d 596, 601 (S.D.N.Y. 2012) ("Flagstar"). In Flagstar, Assured Guaranty Municipal Corporation ("Assured"), a financial guarantee insurer, brought an action against Flagstar Bank, FSB, an issuer of securities backed by home equity loans, alleging that the underlying loans were either materially fraudulent or the product of material underwriting defects. Because the Flagstar governing documents did not mention "cause," "loss," or "default" with respect to the defendants' repurchase obligations, and the court observed that sophisticated parties such as Flagstar and Assured would have expressed their intent in the written contracts, the court "conclude[d] that the contracts did not require the plaintiffs to show that the breaches caused the loans to default, but only that the breaches 'materially increased' the plaintiff insurer's risk of loss." Id. (citations omitted).

The Flagstar ruling relied heavily on the opinion of Judge Crotty in Syncora Guarantee Inc. v. EMC Mortg. Corp., 874 F. Supp. 2d 328 (S.D.N.Y. 2012), another RMBS case involving a monoline insurer. Syncora, a monoline insurer that issued policies covering certain RMBS securitizations, brought suit against EMC Mortgage Corporation, the sponsor of such securitizations, for breaches of representations and warranties under the applicable insurance and indemnity agreement. In Syncora, the court held that Syncora could establish a material breach of the insurance and indemnity agreement by proving that the alleged breach increased the insurer's risk of loss on the policy, irrespective of whether the breach actually caused the underlying loan to default. Id. at 339.

The courts in both Flagstar and Syncora relied on the protections afforded to New York insurers under New York insurance law, which defines warranty as "any provision of an insurance contract which has the effect of requiring . . . the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract." Flagstar, 892 F. Supp. 2d at 602 (citing N.Y. Ins. L. § 3106(a)); see also Syncora, 874 F. Supp. 2d at 339 (citing MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 936 N.Y.S.2d 513, 521-22 (Sup. Ct. N.Y. Cnty 2012)).

Outside of the insurance context, the prevailing standard applied by courts in this District is that a non-monoline RMBS plaintiff must prove only that a breach substantially increased the risk of loss to certificateholders, not that the breach caused an actual diminution in loan value. In MARM III, for example, the court rejected the notion that the AMA provision of the governing documents required the plaintiff trustee to prove that the breach caused an actual loss or default, or that any actual loss suffered was caused by the breach; rather, the court held that AMA is established when a breach increases the risk of loss to the certificateholders. 205 F. Supp. 3d at 467-68. However, despite the foregoing, the

MARM III court held that proof of increased risk of loss was only one of the ways (among several discussed) that a plaintiff could demonstrate that a breach materially and adversely affected the interests of certificateholders. In analyzing twenty different loan files in its decision, the court rarely focused on risk of loss. Instead, the court examined whether, for example, absent an alleged breach discovered at the time of origination, the loan would have been funded at all, or if funded, would have contained different terms.

Notably, Judge Castel declined to accept the entirety of the analysis and conclusions of the MARM Trusts' expert, Mr. Ira H. Holt, who testified that every material breach had a material and adverse effect on certificateholders' interests unless compensating factors showed otherwise. Mr. Holt only examined the materiality of the breaches asserted and did not appear to have performed a separate analysis of whether a breach materially increased the risk of loss to the lender or certificateholders or affected the interests of the certificateholders at the time the cure or repurchase obligation was triggered. The court stated that it

accepts Holt's conclusion that proven borrower deceit materially and adversely affects the interests of the Certificateholders. But in other instances, the Court has examined the nature of the breach in the context of the total mix of information to determine whether Holt's opinion that the breach materially and adversely affected the interests of the Certificateholders should be accepted.

Id. at 475. The MARM III court conducted its own analysis by examining each alleged breach to determine whether it was in fact a breach and, if so, whether it materially and adversely affected the interests of the certificateholders. Notably, after examining 20 of the over 9,000 loan files at issue and providing a detailed analysis as to those 20, Judge Castel stated that he would be turning the remaining files over to a Lead Master for the timely entry of findings of fact and conclusions of law relating to all loans not covered by his decision. MARM III did not address or award damages.

As in MARM III, other non-monoline cases in this District have held that demonstrating increased risk of loss is sufficient to trigger AMA repurchase conditions and that a showing of actual financial loss is not required. See, e.g., Wells Fargo Bank, N.A. v. JP Morgan Chase Bank, N.A., 2014 WL 1259630 at *4 (S.D.N.Y. Mar. 27, 2014) (concluding that "nothing in the contract's language suggests that an actual financial loss must precede a repurchase demand. A growing consensus among New York courts holds that [AMA] repurchase conditions are triggered when the plaintiff's risk of loss increases and not just when that risk actualizes."); Homeward Residential, Inc. v. Sand Canyon Corp., 298 F.R.D. 116, 131 (S.D.N.Y. 2014) (finding that the plaintiff did not have to prove that a particular loan defaulted in order to prove that a breach "materially and adversely affects the value" of the mortgage loans at issue); Wells Fargo Bank, N.A. v. Bank of Am., N.A., No. 10 Civ. 9584, 2013 U.S. Dist. LEXIS 44955, 2013 WL 1285289, at *10 (S.D.N.Y. Mar. 28, 2013) ("In keeping with other courts' approaches, the [c]ourt declines to equate ['material adverse effect'] with causing the loan to default.").

3. Sampling

Although there was no use of statistical sampling at trial, it is worth reviewing what courts in this District have observed about its use in RMBS cases. Such cases shed light on the potential availability of a practical solution to the problem of proof in large scale RMBS trials, as well as the problems with such an approach.

Recently, in Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, Judge Forrest engaged in a thorough analysis of statistical sampling and the propriety of its use in RMBS litigation. 2018 WL 583116, 2018 U.S. Dist. LEXIS 12591 (S.D.N.Y. Jan. 25, 2018) ("Deutsche Bank"). As the court stated:

Sampling is a statistical means of "estimat[ing], to specified levels of accuracy, the characteristics of a 'population' . . . by observing those characteristics in a relatively small segment, or sample of the population." Properly done, statistical sampling is not guesswork—it is a scientific method of making accurate inferences (to varying degrees of statistical certainty depending on the methodology employed) about a large population based on careful analysis of a representative subset of that population. As the Supreme Court has noted, statistical sampling "is a means to establish or defend against liability," and "is used in various substantive realms of the law." Additionally, "[i]n many cases, a representative sample is the only practicable means to collect and present relevant data establishing a defendant's liability." (all citations omitted).

Id. at *8. Citing to Flagstar and Syncora among other RMBS cases, the court stated that "[c]ourts applying New York law have repeatedly approved the use of statistical sampling [as] a means of proving liability and damages in RMBS cases" (Id. (collecting cases)) and reasoned that "proper statistical sampling is not a shot in the dark—it is a well-established and scientifically sound method of inferring (to varying degrees of certainty) how many individual loans in the pool contain material breaches." Id. at *15. While concluding that statistical sampling was appropriate in the Deutsche Bank case, the court noted that other courts in the Southern District of New York have disagreed with its use, reasoning that statistical sampling does not supply adequate or relevant proof regarding non-sample loans. Id. at *9 (citing Mastr Adjustable Rate Mortgages Tr. 2006-OA2 v. UBS Real Estate Sec. Inc., 2015 U.S. Dist. LEXIS 24988, 2015 WL 764665, at *10-11 (S.D.N.Y. 2015) ("MARM II"); Homeward Residential, Inc. v. Sand Canyon Corp., 2017 U.S. Dist. LEXIS 187265, 2017 WL 5256760, at *7 (S.D.N.Y. 2017) ("Homeward")). See also Royal Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n, (Case 1:15-cv-02144-LGS-SN) [Dkt. No. 314] (February 23, 2018).

In Homeward, Judge Torres analyzed the repurchase provisions and the definition of "purchase price" in the agreements governing the RMBS trusts therein, and determined that the plaintiff's request to use statistical sampling "to 'prove' that a loan is in breach without actually identifying the specific loan (and [the] specific breach)" was at odds with the "sophisticated remedial scheme" set forth under the governing agreements which were targeted to a specific underlying loan, not a group or category of loans. Homeward, 2017 WL 5256760, at *7.

In MARM II, Judge Castel rejected the MARM Trusts' use of statistical sampling to prove the trusts' theory of "pervasive breach" - that UBS, as the sponsor, had effective notice of widespread breaches throughout the loan pools even though, as of the conclusion of the statute of limitations period, UBS had only been provided loan-by-loan notice that 21% of the mortgage loans were allegedly in breach. Judge Castel reasoned that statistical sampling did not supply adequate or relevant proof regarding non-sample loans where (i) due to the requirement in the governing agreements that AMA must be demonstrated, not all breaches would have triggered a cure or repurchase obligation and (ii) the defined terms utilized in the repurchase remedies set forth in the governing agreements were loan-specific. Id. at *11.

In the most recent RMBS decision issued by the District Court for the Southern District of New York, Royal Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n, the plaintiff certificateholders requested permission to re-underwrite a sample of loans to (i) prove that the defendant, HSBC, as trustee of the trusts that issued the RMBS certificates, had constructive notice of pervasive breaches in the loan portfolios and (ii) measure damages. (Case 1:15-cv-02144-LGS-SN) [Dkt. No. 314] (February 23, 2018).) The defendant trustee opposed the plaintiffs' request to use sampling. Finding that the plaintiffs must prove that HSBC breached its contractual obligations on a loan-by-loan basis, Judge Schofield rejected the use of sampling, observing that "unavoidable fact that a sampling is just that, and by definition cannot provide loan specific information as to any loan outside the sample." Id. at 9. She continued:

Plaintiffs argue that sampling would enable "Plaintiffs' damages experts [to] use the extrapolated breach rate together with loan values and the trust's waterfall structure as components for calculating damages." But . . . "to successfully enforce repurchase of a specific loan after a defined EOD has occurred, HSBC would have needed to locate the individual breaching loans themselves rather than determine trust-wide breach rates." Sampling cannot prove damages for the same reason it cannot prove liability; it cannot identify the specific breaching loans outside the sample based on the existence and rate of defective loans within the sample.

Id.

Thus, as Judge Forrest observed, reasonable minds can and do disagree on the use of statistical sampling in RMBS litigation. Fortunately, as statistical sampling was not utilized in the Estimation Proceeding, the Court need not decide whether its use would have been appropriate here. One thing is clear from all of these decisions though – loan-by-loan proof is required, either directly or through a sound extrapolation methodology.

D. The MLSAAs are Rejected Executory Contracts and Thus the Trustees' Claims are Prepetition Breach Claims

Notwithstanding the canon of case law that has developed in the realm of RMBS litigation, none of these decisions dispositively addresses the challenge presented in this case: how to estimate, under section 502(c), tens of thousands of breach claims for which the Trustees seek damages, pursuant to the repurchase provisions of the MLSAAs, which are rejected executory contracts under a confirmed plan of reorganization. Prior to Lehman's bankruptcy filing on September 15, 2008, the Trustees failed to provide the contractually required notice of their repurchase claims or otherwise to seek Lehman's repurchase, replacement, or cure on the underlying loans. Now, enforcement is impossible of course; Lehman no longer has the ability to respond to a repurchase claim in any of the three standard ways prescribed under the Governing Agreements: cure, replace, or repurchase. Consequently, this is not a standard repurchase case akin to those cited by the parties, nor is it a monoline insurance put-back case. Indeed, the Trustees' expert, Mr. Aronoff, recognized that this is not a "straight-up putback case," rendering him unable to provide "any insight as to the appropriate remedy, the amount of that remedy, or anything else of that kind . . . ." (Dec. 18, 2017 Hr'g Tr. at 2806:20-2807:13).

The lens through which the Plan Administrator views the Trustees' claims is contract rejection, i.e., the Trustees have a contract rejection claim arising from Lehman's rejection of certain of the Governing Agreements as executory contracts under section 365 of the Code. The Court does not disagree. "If the contract is executory and the debtor rejects it, the non-debtor party is left with a pre-petition unsecured claim for breach of contract." In re Hawker Beechcraft, Inc., 486 B.R. 264, 277 (Bankr. S.D.N.Y. 2013). As counsel for the Plan Administrator conceded, the notional amount of damages incident to MLSAAs rejected in bankruptcy should not differ from the amount of damages which would be awarded pursuant to the MLSAAs outside of bankruptcy. The sole distinction is that the damage amount here will constitute the allowed amount of the Trustees' claims, and the Trustees, on behalf of their certificateholders, will receive from Lehman the distribution to which such allowed unsecured claims are entitled under the confirmed plan. The happenstance that these are bankruptcy claims does not provide a basis for applying concepts of loss causation that would not be applicable were these claims adjudicated in a non-bankruptcy forum, nor, on the other hand, does it provide a basis for allowing the claims in a larger amount to compensate for the fact that the claims will be paid in discounted bankruptcy dollars.

IV. THE TRIAL

Over the course of some 22 days of trial, the Court heard extensive testimony from two fact witnesses, ten expert witnesses, and one witness who provided both fact and expert testimony.

The Court heard live testimony from the following witnesses in the Plan Administrator's case in chief: (i) Mr. Zachary Trumpp, a Senior Vice President and manager of claims for the Plan Administrator who was chiefly responsible for managing the review of the Trustees' claims and the related valuation of damages pursuant to the Protocol; (ii) Professor Daniel R. Fischel, a professor at the University of Chicago Law School and the President of Compass Lexicon, who testified as an expert witness regarding comparable RMBS settlements and the relevance of the Institutional Investors Settlement to the Plan Administrator's proposed allowed amount for the Trustees' claim; and (iii) Mr. Charles Grice, an expert witness who testified regarding his independent assessment of the Plan Administrator's review of the breach claims submitted by the Trustees during the Protocol.

In the Plan Administrator's rebuttal case, the Court heard the testimony of Dr. Bradford Cornell, an expert witness who testified regarding damages and valuation. The Court also (i) viewed designated video deposition testimony and reviewed designations from the expert reports of Mr. Daniel I. Castro, Jr., an expert witness who was tendered as the Plan Administrator's AMA expert on the valuation of mortgage loans and the impact of certain breaches on the value of a loan; (ii) reviewed deposition designations from the deposition of Mr. Fiachra O'Driscoll, who was designated but not tendered by the Trustees as an expert witness regarding the materiality of the Trustees' breach claims and the meaning of applicable contract provisions within the securitization industry; and (iii) reviewed deposition designations from the deposition of Mr. John Burnett, who was designated but not tendered by the Trustees as an expert witness regarding servicing industry custom and practices.

The Court heard live testimony from the following witnesses in the Trustees' case in chief: (a) Mr. Edmond Esses, the Head of Investigations at Duff & Phelps who served as the Trustees' Project Manager under the Protocol and testified regarding the Trustees' loan review process; (b) Mr. James H. Aronoff, a principal at Baker Tilly who testified as both a fact witness regarding the Trustees' loan review process and as an expert witness regarding (i) the validity and materiality of the breach claims submitted by the Trustees and (ii) the validity and integrity of the Trustees' loan review process; (c) Mr. J.F. Morrow, an expert who testified regarding the validity and materiality of the breach claims submitted by the Trustees based on his review of a sample of such claims; in lieu of live cross-examination and re-direct examination of Mr. Morrow, the parties submitted deposition designations and designations of Mr. Morrow's rebuttal expert report; (d) Dr. G. William Schwert, an expert witness who testified regarding the methodology he used to select the loans reviewed by Mr. Morrow; (e) Dr. Karl N. Snow, an expert witness who testified regarding the net purchase price associated with the Trustees' breach claims; (f) Dr. Richard W. Ellson, an expert witness who testified regarding the value of non-liquidated loans subject to the Trustees' breach claims and whose valuation was utilized by Dr. Snow; (g) Hon. Robert S. Smith (Ret.), an expert witness who testified in rebuttal to Professor Fischel's opinions regarding comparable RMBS settlements and the Institutional Investors Settlement; and (h) Mr. James K. Finkel, an expert witness who also testified in rebuttal to Professor Fischel's opinions.

In addition, pursuant to Exhibit G to the RMBS Settlement Agreement, millions of pages of documentary evidence, including the parties' Claims Tracking Spreadsheets, as well as the voluminous loan files and other documents exchanged by the parties during the Protocol, were admitted into the trial record. The parties also utilized dozens of demonstrative exhibits in support of witness testimony, filed pre-trial and post-trial memoranda of law, and presented three days of opening and closing arguments.

Summaries of the testimony of the witnesses follow.

A. The Plan Administrator's Case in Chief and Rebuttal Case

1. Mr. Zachary Trumpp

Mr. Trumpp is a Senior Vice President and manager of claims for the Plan Administrator. He has worked for the Lehman estate since 2009. He manages all residential mortgage-related claims asserted against Lehman and has borne primary responsibility for carrying out the Plan Administrator's process of evaluating RMBS Claims submitted by the Trustees under the Protocol. From 1999 to 2008, Mr. Trumpp was an employee of Aurora Loan Services, LLC ("Aurora"), a Lehman subsidiary involved in mortgage loan origination and servicing. While at Aurora, he established and led a department that conducted due diligence on potentially breaching loans, issued repurchase demands, and litigated repurchase claims.

Mr. Trumpp's testimony over the course of three days included a discussion of the evidentiary standards the Plan Administrator applied to its review of the Trustees' claims during Step 2 of the Protocol. Mr. Trumpp testified at length to the Plan Administrator's documentary requirements when carrying out its review of the Trustees' submissions. Specifically, he described the four PA Critical Documents and the reasons the Plan Administrator required the presence of such documents in the loan file before it could conduct its review; without the PA Critical Documents, such loans were placed "on hold" by the Plan Administrator and not reviewed until the documents were provided to the Plan Administrator.

Mr. Trumpp also testified to the process the Plan Administrator followed when evaluating the Trustees' claims. He described the three-step process as follows: (i) Lehman examined the file for the existence of a Threshold Fact or defect, (ii) if a Threshold Fact was found, Lehman analyzed whether such defect was a breach of a rep and warranty, and (iii) if the first two steps had been satisfied, Lehman conducted an AMA analysis.

In describing the Plan Administrator's approach, Mr. Trumpp emphasized that Lehman did not assert all possible defenses to the Trustees' claims during the Plan Administrator's Step 2 review; rather, his goal was to make "fair assessments." Mr. Trumpp testified that Lehman examined the Trustees' Claim Package as well as the evidence in the loan file (beyond what the Trustees themselves referenced) to determine whether there was evidence sufficient to demonstrate a Threshold Fact or whether the evidence supplied was inconclusive. Mr. Trumpp emphasized that the Plan Administrator eschewed any "bright-line rule[s]" when conducting this holistic evaluation of each of the Trustees' claims. Mr. Trumpp testified that when determining whether the AMA standard had been met, the Plan Administrator considered a variety of "compensating factors" such as macroeconomic conditions at the time of alleged breach; the state of the job market; life events affecting the borrower's ability to pay; and the performance history of the loan. He expressed his view that not all losses and not all defaults arose out of breaches of representations and warranties, and that he believes the Trustees ignored this inquiry in making their claims submissions.

In discussing the Trustees' claims, Mr. Trumpp criticized, among other things, (i) the Trustees' use of "boilerplate" AMA assertions for the "materiality basis" of alleged breach claims, (ii) the Trustees' citation to incorrect guidelines in their breach claims, (iii) the Trustees' assertion of claims of misrepresentation of debt where the debt in question was incurred post-origination of the subject loan, and (iv) the Trustees' assertion of claims that overlooked contradictory evidence that the Plan Administrator found in the loan file. He was also surprised by certain types of claims the Trustees asserted, such as breach claims (a) based on missing documentation, (b) related to regulatory requirements, and (c) on active loans that were still performing over a decade post-securitization – all claims that would, in his view, typically not be pursued in RMBS put-back litigation.

On cross-examination, the Trustees sought to establish that Mr. Trumpp had applied more stringent evidentiary and documentary standards in the instant case than he had applied when seeking recovery on put-back claims on behalf of Lehman. Specifically, the Trustees adduced evidence relating to litigation between 2009 and 2012 in which Lehman and Aurora had written demand letters relying on what the Trustees characterize as sparse evidence of the type now rejected by the Plan Administrator for lack of sufficiency and accuracy.

On redirect examination, Mr. Trumpp explained that, in the cases emphasized by the Trustees, such demand letters and the piece of evidence attached thereto merely served the purpose of "opening a dialogue" on a subject loan. He testified that when repurchase claims were actually litigated, the evidence on which Lehman relied was more considerable, often including multiple types of evidence obtained through extensive discovery, which may have included deposition testimony obtained pursuant to Federal Rule of Civil Procedure 30(b)(6). In Mr. Trumpp's view, the Trustees did not support their claims nearly as thoroughly in the Estimation Proceeding. He testified that, of the approximately 70,000 claims of breach asserted in the Trustees' major breach categories, approximately 48,000 of such breach claims were supported by only one type of evidence. Finally, Mr. Trumpp distinguished prior cases highlighted by the Trustees during cross-examination on the grounds that (i) they involved the repurchase of whole loans, not securitized loans and (ii) the applicable agreements contained repurchase provisions different from those in the MLSAAs here.

Mr. Trumpp's testimony was generally credible and supported the Plan Administrator's assertions that its review of the Trustees' claims was detailed-oriented and thorough.

2. Professor Daniel R. Fischel

Professor Fischel is a Professor at the University of Chicago Law School and is also the president of Compass Lexicon, a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues. Through his many years of research, teaching, and consulting, Professor Fischel has amassed extensive experience analyzing lawsuits and settlements involving alleged breaches of representations and warranties in connection with the sale, servicing, and documentation of loans in RMBS trusts.

Professor Fischel analyzed the reasonableness of the Plan Administrator's proposed allowed claim amount of $2.38 billion and the Trustees' proposed allowed claim amount of approximately $11.6 billion. In his analysis, Professor Fischel compared the parties' proposed allowed claim amounts to (a) the amount of the Institutional Investors Settlement and (b) the recovery ratios for five comparable large global RMBS settlements referred to as the "Comparable Settlements." From such comparisons, Professor Fischel drew two primary conclusions: (i) the Institutional Investors Settlement supports estimating the Covered Loan Claims at $2.38 billion and (ii) a $2.38 billion allowed claim reflects a recovery ratio that falls at the higher end of the range of Comparable Settlements, while the $11.4 billion claim now asserted by the Trustees is far above that range.

Professor Fischel testified that, in his experience analyzing large RMBS settlements, it is routine to compare a proposed settlement to settlements in comparable cases to assess reasonableness. Here, Professor Fischel chose cases with characteristics similar to this proceeding: RMBS cases involving put-back claims for alleged breaches of representations and warranties in connection with loans originated in the years leading up to the housing crisis, and which involved a large number of trusts. He recognized that an exact comparison of the settlements would be difficult but opined that he could reach certain conclusions based on the Recovery Ratios.

Professor Fischel calculated a "Recovery Ratio" for the claims asserted in each of the Comparable Settlements. The Recovery Ratio for each of the Comparable Settlements and for the instant case is the ratio of (i) the consideration (both cash and non-cash consideration) and/or allowed claim received by the plaintiffs releasing their RMBS claims to (ii) the expected lifetime losses on such claims. Professor Fischel found that the Recovery Ratios for the Comparable Settlements ranged from 6.9% to 17.1%. (Expert Report of Daniel R. Fischel, pp. 29-30; P.A. Ex. 778). The Recovery Ratio for Lehman's proposed $2.38 billion allowed claim amount is 11.2% and is therefore well within the range of Comparable Settlements, and even at the high end of such range. The Recovery Ratio for the Trustees' proposed $11.4 billion claim, by contrast, is 55%, more than three times as high as the largest Comparable Settlement Recovery Ratio and more than four times Lehman's proposed allowed claim amount.

Professor Fischel examined illustrative factors relating to the size of settlement payments and found that certain factors tend to increase the size of a settlement (such as the availability of prejudgment interest), while other factors tend to reduce it (such as a legal or practical impediment to the plaintiff's claim). He evaluated nine principal factors: (i) the nature of the claims being released; (ii) non-cash considerations; (iii) practical impediments to the plaintiff's pursuit of claims such as the monetary cost of litigation or delayed recovery caused by litigation; (iv) legal impediments to the plaintiffs' pursuit of claims, such as a statute of limitations; (v) the ability of the potential defendant to pay a cash judgment; (vi) the differences in governing legal issues and standards; (vii) the differences in the underlying loans; (viii) the time period of the settlement; and (ix) incentives of the defendant to settle that go beyond avoiding costs of litigation, such as reputation. With the exception of the seventh factor, the difference in the underlying loans, the results of which were deemed inconclusive, all of the evaluation factors used by Professor Fischel were qualitative and not quantitative. Professor Fischel testified that many of the factors that tend to increase the size of a settlement payment are not present in this case.

On cross-examination, the Trustees successfully demonstrated that a number of the aforementioned factors that Professor Fischel believed would decrease settlement amounts were applicable to the Comparable Settlements but not applicable to this case. For instance, Professor Fischel admitted that a number of the Comparable Settlements related to claims that were subject to the assertion of statute of limitation defenses, another factor which also tends to lower settlement amounts. Professor Fischel acknowledged that many of the Comparable Settlements occurred pre-litigation and the Trustees elicited evidence suggesting that settlement amounts are more likely to increase as litigation advances. In the comparable case of Citigroup, Professor Fischel was shown evidence that certain trusts elected to opt-out of the Citigroup global settlement and to pursue litigation; after the lawsuit of the opt-out trusts progressed through the discovery stage, those opt-out trusts received a substantially higher settlement amount than the trusts that accepted Citigroup's global settlement offer. Professor Fischel admitted that pre-litigation settlements could result in lower settlement amounts because the parties desire to avoid litigation costs.

Professor Fischel also pointed to the sale of certain "collapsed trusts" as support for his assertion that the Covered Loan Claims should be estimated at $2.38 billion. He explained that the Governing Agreements allow the master servicer to exercise a "clean-up call option" when the outstanding principal balance of the remaining mortgage loans in the Trusts drops below a specified amount.

Prior to the Estimation Proceeding, the master servicer hired an independent appraiser for certain collapsed trusts. The Trustees for the collapsed trusts had the right to object to the selection of the appraiser but did not do so. For each of six collapsed trusts, the independent appraiser determined that the value of the trusts' claims was either equal to or substantially less than the Plan Administrator's requested allowed claim amount at the Estimation Proceeding (based on what would have been the collapsed trusts' allocable share of that amount). The applicable Trustees sold the trusts' claims using those values. Professor Fischel appears to have incorrectly assumed that the Trustees had a right to object to the purchase price for those claims and, building on that incorrect premise, further opined that Lehman's purchase price calculations must be acceptable to the Trustees. On cross-examination, Professor Fischel was unable to confirm (i) whether the appraiser had independently assessed the merits of the claims at issue or simply accepted Lehman's figures, or (ii) that the Trustees had any authority under the governing documents to reject the appraisal, which undermined his conclusions on this narrow point.

Other than eliciting Professor Fischel's general acknowledgment that the Comparable Settlements were achieved prior to full litigation of the claims in those cases and that, in certain cases, there may have been statute of limitation defenses asserted, the Trustees failed to meaningfully challenge the comparability of the Comparable Settlements to the RMBS Settlement.

3. Mr. Charles Grice

Mr. Charles Grice, an expert in mortgage loan underwriting and breach review processes, testified at trial regarding his independent assessment of the Plan Administrator's review of the breach claims submitted by the Trustees.

Mr. Grice described his qualifications in the areas of economics and banking at some length. He is currently employed by CRI Compliance LLC where he has done extensive consulting work for mortgage loan companies in connection with their underwriting and quality control processes. Serving his clients in this capacity, Mr. Grice has reviewed thousands of loan files. Mr. Grice's mortgage consulting work focuses on three areas in particular: (i) loan origination; (ii) assisting companies in purchasing loans for inclusion in securitization pools; and (iii) repurchase demands/breach demands.

Mr. Grice testified that his opinions were limited to the existence of Threshold Facts that allegedly give rise to a breach and that he was not offering any opinion on AMA issues. More specifically, he examined 1879 of the

Trustees' breach claims asserted on 1879 loan files, as reflected in his June 1, 2017 expert report. He reviewed one breach claim per loan file (even if the Trustees had asserted multiple claims as to that loan file) to determine whether the loan file had been correctly assessed by the Plan Administrator. Above all, Mr. Grice was seeking to ascertain if there was consistency to the way evidence in the loan file was evaluated by the Plan Administrator, and whether reasonable and stable results were generated. In addition, Mr. Grice responded to the expert reports of Messrs. Aronoff and Morrow, reviewing some 600 loans that included multiple breach claims.

The essence of Mr. Grice's opinion is that every loan file and every borrower is unique, and that in order to conduct a loan review properly, one must consider everything about the borrower. Mr. Grice identified numerous challenges presented by the loan files in this proceeding. First, he believes that a loan file is generally an incomplete depiction of the borrower. He also noted the inherent difficulty in completing the standard loan application form inasmuch as interpretations of its terms may differ from borrower to borrower. The standard application contains no definitions or instructions on how to complete it. Moreover, Mr. Grice pointed out, credibly, that loan files degrade over time and that this presents a particular challenge in reviewing loans that were originated as long ago as the subject loans, most of which were originated between 2002 and 2008 and are "older than average." In his words, "there is a challenge created by the passage of time" and "stuff goes missing in files. The more auditors, the more examiners, the more loans are subjected to inspection, investigation, photocopying, shipping, things come out of files." (Dec. 5, 2017 Hr'g Tr. at 1394:12-24). He testified that this is particularly true for liquidated loans, loans that have been paid off through foreclosure or otherwise. Mr. Grice vehemently disagrees with the assertion of Mr. Morrow, one of the Trustees' experts, that if it is not in the loan file, it did not happen or exist at origination.

Mr. Grice opined that the Plan Administrator's breach review process was both well-constructed and well-implemented; in contrast, he found fundamental and significant deficiencies in the Trustees' breach analysis. In addition, Mr. Grice opined that Mr. Aronoff is not independent with respect to his opinion regarding the quality of the Trustees' Protocol process, because he, Mr. Aronoff, was himself the architect and overseer of the process. In Mr. Grice's opinion, Mr. Aronoff is not in a position to opine on the robust nature of a process that he himself supervised.

Mr. Grice reviewed the various types of evidence cited by the Trustees in support of their breach claims, including origination credit reports; tax returns; BLS Data; audit credit reports; data from various third party aggregators such as Dataverify, Accurint, LexisNexis; bankruptcy documents; and VOEs. While he acknowledged that such evidence was generally used by re-underwriters in reviewing loan files, Mr. Grice highlighted numerous ways in which he believed such data was, at best, unreliable, and, at worst, of little or no probative value when used as evidence for the purpose of establishing a breach claim. During his testimony, Mr. Grice pointed out that the accuracy of such evidence depends considerably on whether the particular database product is used correctly, and he noted that disclaimers are present in certain of the products (such as BLS Data and data collected by the third-party aggregators) which specifically caution against using the product's data for any use other than the intended use. Mr. Grice also emphasized his view that the Loan Review Firms "placed a premium" on documents they collected during the Protocol "at the expense of documents collected at origination, such as the [loan] application." (Dec. 5, 2017 Hr'g Tr. at 1475:14-20).

During his testimony, Mr. Grice reviewed various loan files and gave compelling examples of ways in which, despite what a particular piece of data appeared to suggest regarding an income or debt breach, other evidence in the file contradicted or called into question reliance on that one piece of data to support a claim of breach, particularly if that piece of data itself was unreliable. For example, for the loan ending in 8407, the Trustees asserted a misrepresentation of income claim based on BLS Data which ostensibly indicated the borrower's income was much lower than the income stated on his loan application. Mr. Grice demonstrated that, while the BLS Data used by the Trustees was for a "sales representative in a construction trade," the evidence in the loan file indicated that the borrower was in fact the president of a construction firm. Mr. Grice also used this example to point out that using BLS Data as an income verification tool (i.e., not its intended use) can lead to extremely misleading results. He concluded that reliance on such data by the Trustees, particularly as the sole source of evidence of a breach claim, reflects flaws in the architecture of the Trustees' claims review process.

Mr. Grice also testified regarding what he termed "fundamental and significant deficiencies in the Trustees' breach analysis." Those included, in his opinion, the Trustees' (i) failure to give appropriate weight to information reflected in the loan application, including crediting what he viewed as less reliable information over information in the application itself; (ii) failure to include inconsistent or contradictory evidence from the loan file in the Claim Package submitted to the Plan Administrator in support of the breach claim; (iii) failure to consider the materiality of the breach in the context of the origination credit decision; and (iv) failure to submit reliable evidence in support of breach claims, as previously discussed.

Finally, Mr. Grice's direct testimony thoroughly, and quite credibly, criticized the Trustees' claims of breach based on missing documents. Mr. Grice noted that, in his experience, it was atypical to see such a large number of asserted breaches based on missing documents. Here, he understood that, in reviewing the missing document claims asserted by the Trustees, the Plan Administrator frequently found that the allegedly missing document was, in fact, (i) actually in the file, (ii) missing but had what he referred to as a "footprint" in the file, (iii) located in part, or (iv) not a document that was required to be in the loan file in the first place. With respect to the fourth category, Mr. Grice opined that many of the Trustees' claims of breach based on the failure to provide a final TIL form or based on a missing HUD-1 form were without merit because (a) the requirement to maintain such forms for a certain period of time (if such a requirement had even existed for that particular loan) had since elapsed or (b) contrary to the Trustees' assertions, such forms were not required to be signed or stamped. Additionally, Mr. Grice noted that, not only were many of the Withdrawn Claims based on missing documents, but there appeared to be no principled distinction between the missing document claims that were withdrawn and those that were not. Simply put, Mr. Grice was not able to arrive at any understanding of the basis for the Trustees' withdrawal of approximately forty percent of their breach claims prior to the Estimation Proceeding.

On cross-examination, Mr. Grice was shown several loan files he had reviewed and as to which he agreed with the Plan Administrator's determination to "fail" a breach claim asserted by the Trustees. After examining the evidence again, Mr. Grice was forced to concede that, upon further consideration, he would be inclined to change his conclusion on at least one of the files he was shown.

Overall, while Mr. Grice gave thoughtful and thorough testimony, his approach to the review of breach claims was aggressive. He often applied too high a standard in his analysis of whether a Threshold Fact had been established. Notwithstanding that, Mr. Grice was willing to reconsider or retract some of his prior determinations, but these concessions did not change his overall conclusions that (i) the Plan Administrator's process was well-run and

(ii) the Trustees did not meet their burden to prove their breach claims.

4. Dr. Bradford Cornell

Dr. Cornell is a Senior Consultant at Compass Lexicon, an international consulting firm. He was tendered as the Plan Administrator's expert in structured finance and valuation. Through his work as a professor at CalTech, as a consultant, and as reflected in his research and writing, Dr. Cornell demonstrated extensive knowledge of structured finance and the valuation of complex structured products, such as RMBS, in a variety of contexts, including RMBS litigation.

The Plan Administrator asked Dr. Cornell to perform an independent economic analysis to estimate the aggregate claim value of the Covered Loan Claims using the Trustees' Purchase Price calculations, which included both post-petition interest and post-rejection interest. Dr. Cornell was instructed to assume that the Purchase Price proffered by the Trustees was the correct measure of damages, and he made clear that he was offering no opinion on the appropriate measure of damages. Per the assumptions given to him by the Plan Administrator, Dr. Cornell also offered no opinion on the valuation of the non-liquidated loans or the On-Hold Loans. Dr. Cornell's work (like Dr. Snow's) was limited to the performance of certain mathematical calculations.

Dr. Cornell looked at the 1,263 loans which, as of September 28, 2017, the Plan Administrator had determined to "pass;" Dr. Cornell deems such claims "Compensable Claims." Using the Purchase Prices calculated by the Trustees' expert Dr. Snow, Dr. Cornell calculated a claim amount of $301.8 million for these Compensable Claims. Since such a claim amount for the Compensable Claims assumes that the Trustees would fail to succeed on 100% of the Covered Loan Claims in dispute (the "Disputed Claims"), the Plan Administrator asked Dr. Cornell to illustrate how often the Trustees would need to succeed on the Disputed Claims in order to achieve an aggregate claim amount of approximately $2.38 billion.

Dr. Cornell constructed four illustrative scenarios: (a) all Disputed Claims; (b) the Disputed Claims excluding the non-liquidated loans; (c) the Disputed Claims excluding the On-Hold Loans; and (d) the Disputed Claims excluding both the non-liquidated loans and the On-Hold Loans. For each of these four scenarios, Dr. Cornell then calculated the amount of the Disputed Claims assuming certain success rates (the "Presumed Success Rates") provided by the Plan Administrator to Dr. Cornell. The Presumed Success Rates included success rates for each of Mr. Aronoff's 12 breach claim categories, and were further bifurcated based upon the likelihood that the Trustees could prove (a) the existence of a material breach and (b) that such breach has an adverse material effect on the loan. The Presumed Success Rates ranged from 1% to 20%. Dr. Cornell did not provide any opinion on the accuracy or likelihood of the Presumed Success Rates; there was no testimony on how the Presumed Success Rates were selected. In his calculations, Dr. Cornell also assumed that there was no correlation between the success rates of multiple breach claims on the same loan and, therefore, he treated each breach claim as a "fresh bite at the apple." He explained that such an assumption was favorable to the Trustees because it statistically increased the Trustees' likelihood of success on a loan with multiple breach claims.

In each of the four illustrative scenarios, Dr. Cornell calculated the Trustees' aggregate claim amount for the Compensable Claims and the Disputed Claims assuming that the Trustees succeed in proving the Disputed Claims at rates of (a) 100%; (b) the Presumed Success Rates; and (c) 0%. A matrix presenting all of Dr. Cornell's calculations was provided to the Court in PA Exhibit 987. By way of example, for all Compensable Claims and all Disputed Claims excluding the non-liquidated loans, Dr. Cornell calculated the aggregate claim value to be (i) $8,875,425,539, assuming a 100% success rate on the Disputed Claims; (ii) $1,836,173,758, assuming the Presumed Success Rates on the

Disputed Claims; and (iii) $278,053,636, assuming a 0% success rate on the Disputed Claims.

Dr. Cornell was also asked to opine on certain opinions offered by Dr. Karl Snow, the Trustees' purchase price expert. With respect to the calculation of accrued interest, Dr. Cornell stated that he agreed with Dr. Snow's calculations and that he would have taken the same approach as Dr. Snow. Dr. Cornell offered no opinion as to the legal question of whether such interest may be included as a component of the Trustees' allowed claim.

5. Mr. Daniel I. Castro

Mr. Castro is the founder and president of Robust Advisors, Inc., an independent consulting company that focuses on structured finance products and markets, including RMBS; he has over 33 years of experience in the mortgage finance industry. Through designated portions of his expert reports and designated portions of his video deposition testimony, Mr. Castro was tendered as the Plan Administrator's expert on the valuation of mortgage loans and the adverse and material effect of breaches on the value of a mortgage loan. Specifically, the Plan Administrator elicited testimony from Mr. Castro on the approaches taken by the parties during the Protocol in determining whether an alleged breach satisfied the AMA standard.

Mr. Castro reviewed a sample of 380 alleged breaches and agreed with the Plan Administrator that the Trustees had failed to meet their burden to establish AMA on 378 of them. In large measure, because he agreed almost entirely with the Plan Administrator's breach determinations, Mr. Castro concluded that the Plan Administrator's AMA review process was reliable and was more likely than the Trustees' process to lead to an assessment of AMA that was consistent with industry standards. On the other hand, Mr. Castro stated that (i) the Trustees' position that the mere presence of a material breach standing alone proves AMA is contrary to industry custom and practice and (ii) the Trustees had conflated the question of whether there was a material breach with the question of whether such breach resulted in AMA.

Mr. Castro also opined that the Trustees' position with respect to the non-liquidated loans contradicts industry custom and practice. In his experience, repurchase claims (and, therefore, AMA determinations) are not typically made on performing loans because investors value a mortgage loan's ability to produce cash flows either through periodic mortgage and interest payments or through prepayment or liquidation. Instead, Mr. Castro stated that an investor would determine the existence of AMA based on whether a breach either (i) led to an actual default, delinquency, or other significant loss on a particular mortgage loan; or (ii) impeded the servicer's ability to enforce the terms of the mortgage loan in default. A breach that did not lead to an actual loss or affect foreclosure rights in the event of a default was not typically considered to be "material and adverse" and did not result in repurchase.

Mr. Castro further explained that, over time, as a mortgage loan becomes more seasoned, it becomes increasingly less likely that any error or defect at origination will have any bearing on the likelihood of there being a default on such loan. He stated that, as a loan ages, industry participants view its actual performance to be a better indicator of future performance than errors at origination. The Trustees cast some doubt on Mr. Castro's opinion on this point by introducing evidence of a study published by Fitch Ratings which found that certain loan attributes that are predictive of default at origination retain their relevance to default behavior over time. See TRX-1232, p. 31. Mr. Castro dogmatically refused to acknowledge that certain defects and loan modifications on non-liquidated loans could increase an investor's risk of loss on such loan. His testimony on this issue was not particularly thoughtful or credible.

Lastly, Mr. Castro disagreed with the Trustees' assertion that a breach has an adverse material effect on a mortgage loan if such breach increased the risk of loss on such loan. Although he stated that use of a "risk of loss" standard is inconsistent with RMBS industry practice, Mr. Castro nonetheless offered guidance on how AMA should be evaluated if one were to utilize this standard. In doing so, Mr. Castro criticized the Trustees for (i) overlooking numerous factors that contribute to the diminution in value of a loan, such as macro and micro economic factors, and (ii) not establishing a baseline risk of loss against which to measure the loss allegedly caused by the breach. Mr. Castro outlined a methodology for measuring risk of loss but his opinion on this point cannot be afforded any significant weight because he could not cogently or credibly explain the basis for his opinion during his deposition.

6. Mr. Fiachra T. O'Driscoll

Mr. O'Driscoll was the Trustees' designated expert witness regarding the materiality of the Trustees' breach claims and the meaning of certain contract provisions as a matter of custom and practice in the securitization industry. Although Mr. O'Driscoll prepared expert reports and provided deposition testimony, he was not called as a witness by the Trustees and did not testify at trial. As part of its rebuttal case, the Plan Administrator submitted into evidence designations of Mr. O'Driscoll's deposition testimony; in response, the Trustees submitted counter-designations.

At his deposition, Mr. O'Driscoll testified that it is possible to quantify the risk of loss on a particular loan using models that consider various factors including, for example, macro-economic scenarios. Although models can be used to measure risk of loss and he himself had helped develop such models, Mr. O'Driscoll stated that, in his experience in the securitization industry, he had never used, nor had it been suggested to him that he use, a model to assess the materiality of a breach in the RMBS repurchase context. (O'Driscoll Depo. Tr. 291:8-15.)

Mr. O'Driscoll acknowledged that the value of a loan and the risk of loss on a loan may be affected by a number of factors which are not loan-specific, such as supply and demand, interest rates, and economic market conditions. However, Mr. O'Driscoll also opined that (i) market conditions do not affect whether a breach significantly increases the risk of loss associated with a loan and (ii) in his experience, proof of loss causation was never a requirement for a put-back. In Mr. O'Driscoll's words, "no originator that [he] ever had any dealings with ever objected to a buy-back on the grounds of loss causation." (O'Driscoll Depo. Tr. 133:17-19.)

7. Mr. John Burnett

Mr. Burnett was the Trustees' expert witness regarding servicing industry custom and practice. Although Mr. Burnett prepared an expert report and provided deposition testimony, he was not called as a witness by the Trustees and he did not testify at trial. As part of its rebuttal case, the Plan Administrator submitted designations of Mr. Burnett's deposition testimony; in response, the Trustees submitted counter-designations.

At his deposition, Mr. Burnett testified that there are a multitude of reasons that could cause a borrower to stop making payments on a loan, including personal circumstances like a death in the family or various macro-economic events. Mr. Burnett agreed with Mr. Castro that a servicer would not typically undertake to investigate performing loans for breaches of representations and warranties. He noted, however, that the servicer could potentially notice "red-flags" in a loan file in the context of standard mortgage servicing which could cause the repurchase department of the servicer to investigate, and ultimately demand repurchase of, such loan. Mr. Burnett clarified that his opinion was based solely on his experience in the industry and not based on his interpretation of applicable law.

B. The Trustees' Case in Chief

1. Mr. Edmond Esses

Mr. Esses is the Head of Investigations at D&P and served as the Trustees' Project Manager for the Protocol. Mr. Esses was responsible for developing and overseeing the systems, processes, and personnel necessary to implement the Protocol for the Trustees. He worked under the supervision of Mr. James Aronoff until Mr. Aronoff left D&P in December 2015.

Mr. Esses testified extensively about the Trustees' five-step loan review process under the Protocol. Mr. Esses' testimony, although detailed, was not consistently credible. For example, on direct examination, Mr. Esses testified that D&P had a series of "written guidance that [they] provided to each of the [Loan Review Firms] to ensure there was a consistent playing field across the five review firms." (Dec. 11, 2017 Hr'g Tr. 1845:18-22). No evidence of the written guidance described by Mr. Esses was admitted into the record during the Estimation Proceeding.

Mr. Esses also testified that verbal guidance had been given to the Loan Review Firms, but his testimony lacked clarity on this topic. In describing his oversight of the project, Mr. Esses explained that D&P held a "kick-off" call with each Loan Review Firm during which D&P set certain parameters (e.g., that a borrower's salary should be compared against the 90th percentile of salaries reported by BLS) and variances (e.g., that only income variances above

5% of stated income should be reported). Mr. Esses also testified that D&P held weekly telephone calls with the Loan Review Firms to provide "real-time feedback." At the same time, Mr. Esses testified that he did not provide any instructions to the Loan Review Firms on the mechanics of how to conduct a forensic loan review. Instead, the Loan Review Firms were permitted to use their discretion and experience to review each loan file. In Mr. Esses' opinion, the Loan Review Firms were all well qualified and understood accepted industry practices, so D&P did not need to give them specific instructions. Mr. Esses' testimony on this subject was not particularly concrete. Notably, the Trustees did not present any testimony by any personnel employed by the Loan Review Firms who had reviewed the loan files at issue in this proceeding.

With respect to the "on-hold" loans, Mr. Esses testified that, while the Trustees had issued subpoenas to certain of the servicers in order to obtain Trustee Critical Documents not present in the loan files, the Trustees never issued subpoenas to attempt to obtain any of the PA Critical Documents not present in the files. Mr. Esses conceded that the Trustees did not ask the Court for any assistance in obtaining such documents from the servicers, stating his mistaken assumption that the Court "could have spoken up" if it felt it was necessary to get involved after hearing the

Trustees' status updates at court conferences. (Dec. 12, 2017 Hr'g Tr. 2061-2064).

Notwithstanding his apparent misunderstanding of the Court's role, Mr. Esses explained that, in attempting to obtain the PA Critical Documents, D&P was at times told that (i) the servicer had in fact provided one of the four PA Critical Documents but in a different form than the PA expected and/or (ii) the servicer did not have any PA Critical Documents. In such case, the Trustees ended the inquiry there. Mr. Esses testified that Lehman could have directly contacted the servicer (often, Aurora) instead of using the Trustees as a "conduit" for obtaining the PA Critical Documents, and Lehman did not do so. He acknowledged his understanding that the Plan Administrator sought the PA Critical Documents in order to audit the servicers' loss calculations.

Moreover, during his testimony, Mr. Esses confirmed his understanding that (i) before placing loans "on hold," the Trustees were warned by Lehman that if the PA Critical Documents were not obtained for each loan at issue, Lehman did not intend to review such loan files until the documents were received and (ii) as a result of Lehman's position, the Trustees agreed to place all loans missing PA Critical Documents "on hold" until the Trustees obtained the missing documents and that claims related to such loans would not be expunged but would be resolved "at a later time."

On cross-examination, Mr. Esses' testimony revealed myriad flaws in the Trustees' Protocol process, including the following: (i) Mr. Esses, as Project Manager, never personally reviewed a loan file except to understand the process; (ii) while the Loan Review Firms conducted two independent reviews of each loan file, D&P itself never reviewed the loan file during QC1 or QC2; (iii) in QC1, D&P only checked the accuracy of the breach narrative against the evidence in the Claim Package and did not look at the loan file itself for evidence that might contradict the Loan Review Firms' findings; (iv) when the Trustees asserted missing document claims, they did not check the loan files or any other source for the missing documents – in fact, missing document claims were not reviewed at all in QC1 or QC2; (v) the Trustees took no depositions, obtained no public records, got no records custodian affidavits, issued no records subpoenas, conducted no field reviews, and conducted no interviews of anyone involved in loan originations as support for their breach claims; and (vi) the Trustees generally did not consult the underlying underwriting guidelines or the product profiles to determine whether a breach met the AMA standard for a claim (and when they did, they apparently sometimes looked at the wrong guidelines). Mr. Esses also admitted that, with respect to the loan files themselves, he did not know what the originators' practices were in handling hard copy loan files, when or by whom the files were scanned, or whether any documents went missing from the files between the time of the closing of the loan and the review by the Loan Review Firms. He testified that it was not part of the Trustees' process to make sure that the contents of the loan file being reviewed were the same as the contents in the file that was on the closing table; the Trustees assumed for purposes of their review that the loan file under review was identical to the loan file at closing.

To arrive at a purchase price for each allegedly breaching loan, Mr. Esses testified that the Trustees simply transcribed the "realized loss" amounts directly from the master servicer data tapes onto the Claims Tracking Spreadsheet; the Trustees did not independently audit the components (such as fees and accrued interest) used by the master servicer to calculate the realized loss. Because the numbers were provided by the master servicer, who in many instances was Aurora, and because the same numbers were reported to investors in the servicers' remittance reports, Mr. Esses asserted his belief that such numbers were reliable. However, Mr. Esses admitted that the Trustees did not attempt to disaggregate which portions of the losses were attributable to Lehman and which were not, although he conceded that it was possible that losses to the Trusts could be caused by things completely unrelated to any conduct of Lehman. During his cross-examination, Mr. Esses also confirmed that the Trustees did not utilize a model to measure the risk of loss in connection with any loan, e.g., by setting a baseline and then quantifying an increase in the risk of loss.

2. Mr. James H. Aronoff

Mr. Aronoff, currently a Principal at Baker Tilly, has more than thirty years of experience in the structured finance industry, focusing on RMBS in particular. He was a managing director at Duff & Phelps at the time of implementation of the Protocol, left the firm in December 2015 during the Protocol, and was re-hired by the Trustees in May 2016 to continue to work on the Protocol, which had continued in his absence. Mr. Aronoff was tendered by the Trustees as an expert in loan origination, underwriting, and securitization; factors affecting the value of mortgage loans; the industry understanding of reps and warranties and AMA language; and methods and evidence customarily used in repurchase reviews.

Over the course of five days of the trial, Mr. Aronoff gave extensive testimony in support of the Trustees' case. He testified in two different capacities. As the principal architect and "boss" of the Trustees' loan review process during the Protocol, Mr. Aronoff described in detail (i) the Trustees' loan review process, (ii) the Trustees' Protocol review of approximately 171,000 loan files for breach and their assertion of breach claims on 94,566 loan files, (iii) the types of evidence relied upon by the Trustees to assert their breach claims, and (iv) the major categories of breach claims asserted by the Trustees. In addition to this fact testimony, Mr. Aronoff offered his expert opinion that the process he had designed, implemented, and overseen as its "boss" was thorough and rigorous. His overall opinion is that, because the Trustees' loan-level review was conducted by experienced professionals in a manner consistent with the way in which such loan reviews are conducted in the industry and in reliance on types of evidence customarily used in put-back cases, the Trustees' breach findings presented in his report are (i) valid, (ii) material, and (iii) material and adverse to the interests of certificateholders.

Mr. Aronoff's Fact Testimony

In describing the Protocol process, although he first attempted to suggest otherwise, Mr. Aronoff eventually conceded that his team provided no written guidance to the Loan Review Firms for their loan-by-loan review; rather, he stated, rather cavalierly, that because each of the firms that was retained was engaged in loan review as their primary business, there was not "much discussion or concern" about telling them how to conduct the review. (Dec. 13, 2017 Hr'g Tr. at 2341:20-2342:4). Mr. Aronoff and his team gave the firms guidance by telephone during the review process as questions arose. Regarding the types of evidence used by the loan review firms to support breach claims, a subject about which he gave detailed testimony, Mr. Aronoff opined that many of the types of evidence were "customary sources" widely used in the industry and deemed to be reliable.

While Mr. Aronoff designed and oversaw the Trustees' loan review process, he testified that (i) he did not know how the loans that were sent to each of the Loan Review Firms were selected; (ii) he had no role in deciding what documents would be requested from the servicers and did not know whether origination or servicing files were requested from any source other than the servicers; (iii) he did not believe there is a requirement that an additional layer of independent quality control is required to vet the results of a forensic loan review; (iv) he did not know how many claims were filtered out at each step of the Trustees' loan review or at what level of review a breach finding may have been rejected; (v) his QC team did not assess whether the loan file contained any information inconsistent with the breach claim because the QC reviewers did not look at the loan file itself; (vi) his QC team could not verify whether a missing document was actually in the loan file because missing document claims were not reviewed by the QC teams; and (vii) he himself did not review any loan file in its entirety. Not a single one.

During his direct examination, Mr. Aronoff described the major breach finding categories asserted by the Trustees and the reps and warranties "mapped" to each category. He began by providing background information regarding loan securitization and the loan-level reps and warranties made by a sponsor to investors purchasing trust certificates. In Mr. Aronoff's words, such reps and warranties enable the sponsor to market the certificates to investors at the price associated with the represented quality of the loans, and they allocate the risk of non-performance of materially breaching loans to the sponsor.

Mr. Aronoff testified that his interpretation and understanding of the word "material" (as such term was used in the context of identifying breaches) was based on what was material to the credit risk of the loan in the origination process vis-à-vis the investor; his statements regarding materiality focused solely on credit risk rather than on the potential effect a breach may have on the value of the loan. When questioned on this issue, Mr. Aronoff testified that, in his view, materiality, as such term is used both with respect to the materiality of breaches and in the AMA requirement, relates to credit risk (which he also described as "risk of loss") on a loan. If the defect that is the basis for the breach finding increases the risk of loss to the investor, the breach is material, and every material breach materially and adversely affects the value of the underlying loan by increasing the credit risk vis-a-vis the investor. Thus, he believes that the AMA requirement is satisfied for each and every of the 72,500 loans for which the Trustees asserted a material breach.

Mr. Aronoff testified that the Trustees made their breach determinations on a loan-by-loan basis but described how, in his expert report, he grouped similar types of breaches into categories (based on similar evidentiary bases and on similar reps across loan pools). He opined that this grouping, by breach type enabled him to illustrate that, because a certain breach type "will always have the same effect with respect to an investor" it will therefore "always, absent specific circumstances, have the same [AMA] with respect to that type of breach finding." (Dec. 13, 2017 Hr'g Tr. at 2313:18-2314:7). He testified that the reason that a loan defaults is irrelevant to his loan analysis. Accordingly, in submitting breach claims to the Plan Administrator, Mr. Aronoff and his team tied the alleged breach type to one of four "boilerplate" explanations of how the alleged breach may affect loan performance or loss severity. When asked at trial, Mr. Aronoff did not provide a single example of a loan as to which the Trustees asserted a material breach which he found did not have an adverse material effect on the value of the loan to investors; instead, his testimony demonstrated that, once a material breach was discovered, the Trustees concluded that the AMA requirement was met without any additional analysis being conducted. In other words, every material breach was effectively "deemed" to satisfy the AMA requirement.

On cross-examination, Mr. Aronoff remained steadfast in his view that 100 percent of the loans presented by the Trustees in the Estimation Proceeding contain a material breach which has an AMA on the value of the loan to certificateholders (assuming that the Threshold Fact that forms the basis for the breach is accurate). He eventually conceded that, for several dozen loans in which a mistake was made in the Trustees' process with respect to identification of the Threshold Fact that was the basis for the breach, such breach findings were no longer valid.

Mr. Aronoff's Expert Testimony

Mr. Aronoff disagreed with any suggestion that, by virtue of his role in designing and implementing the Trustees' loan review process, he was not in a position to give credible testimony about, in sum and substance, what a superlative job he had done. His views on that topic were crystal clear. With the exception of his acknowledgement of a few of the "errors" that were pointed out to him during cross-examination, Mr. Aronoff steadfastly held to his opinion that every single one of the breach claims submitted by the Trustees was valid. Since the Trustees elected not to question Mr. Aronoff about the Withdrawn Claims, which reduced the loan pool at issue in the Estimation Proceeding from over 91,000 to approximately 72,500 loans, there was no opportunity for the Plan Administrator to question Mr. Aronoff about why such "valid" claims were not presented at trial.

During his direct testimony, Mr. Aronoff was shown a handful of exemplar loans that Mr. Grice had reviewed. While Mr. Grice had concluded that, for each of the loans, the Trustees had failed to put forth evidence sufficient to support a claim of breach, Mr. Aronoff disagreed with all of Mr. Grice's conclusions. When shown exemplar loans as to which the Trustees had asserted claims for misrepresentation of income, Mr. Aronoff emphasized several times that his objective in reviewing loans and asserting income breach claims was not to determine a borrower's actual income but rather to determine whether it was more likely than not that the income stated by the borrower on his or her loan application had been misrepresented. Mr. Aronoff's testimony regarding several different exemplar loans revealed that, at times, certain assumptions had been made by the Loan Review Firms when concluding that a material breach had occurred. Moreover, a material breach finding was often predicated on one single type or piece of evidence with no secondary confirmatory source. On cross-examination, Mr. Aronoff was shown a number of exemplar loan files which revealed the subjective nature of the Trustees' loan review and, at times, the reviewers' disregard of contradictory evidence.

Mr. Aronoff's Expert Report

On cross-examination, Mr. Aronoff was shown Exhibits 4-13 to his expert report, which exhibits purported (i) to summarize the claims asserted by the Trustees in each of their twelve major breach categories and (ii) to demonstrate, through such summaries, the validity of each breach type and Mr. Aronoff's conclusion that each breach type met the Trustees' "materiality standard." When confronted with such exhibits, which Mr. Aronoff conceded he did not prepare, Mr. Aronoff was unable to explain the source of the data included. He subsequently admitted that the information came from a database (later identified as "TeamConnect") that had not been provided to the Plan Administrator; notwithstanding, he testified (but could not confirm) that the data he used in his report should match loan data from the Claims Tracking Spreadsheet used by the parties. However, during his examination, Mr. Aronoff was presented with myriad examples of data included in the exhibits that was inconsistent with data in the Claims Tracking Spreadsheet. He had no explanation for these errors, instead simply stating that, even if the "values were wrong, the conclusion doesn't change." (Dec. 18, 2017 Hr'g Tr. 2700:23-24).

Mr. Aronoff's testimony also revealed that the exhibits to his report may not be reliable because certain data reflected in the exhibits was not accurately presented. For example, Exhibit 4 to Mr. Aronoff's report, entitled "Misrepresentation of Income Breach Findings," purported to depict an enormous "Monthly Percentage Difference" between (i) a borrower's monthly income as represented on the loan application and (ii) the borrower's "actual" monthly income by listing these figures for each loan as to which the Trustees asserted a misrepresentation of income breach claim. As such, two columns on Exhibit 4 were entitled "Represented Monthly Income" and "Actual Monthly Income." When questioned on the meaning of such terms at trial, Mr. Aronoff testified that "Represented Monthly Income" may mean different things depending on the loan, such as (i) income from one job alone or (ii) income from multiple sources. He also conceded that the information contained in the "Actual Monthly Income" column was at times subjectively selected by the Trustees' loan reviewers from information in the loan file, with no consistent methodology employed. Admitting that perhaps the Trustees should not have used the term "Actual Income," Mr. Aronoff testified that the Trustees' objective was not to establish what a borrower's actual origination income was but instead to establish that, more likely than not, the income listed on the loan application had been misstated. He explained that, oftentimes, the number used as "actual income" was simply a number the Trustees felt comfortable using to recalculate DTI and to assert a breach of "Excessive DTI."

In addition, Mr. Aronoff's testimony illustrated that the "summaries" presented in his expert report were not, in fact, accurate summaries of underlying objective data. Indeed, the information purportedly summarized therein does not lend itself to being presented in summary form in the manner utilized by the Trustees. For example, Exhibit 4 contained a column entitled "Evidence Type" which listed the type of evidence relied upon by the Trustees to assert their claim of breach for a particular loan. Regarding this column, Mr. Aronoff acknowledged that (i) the type of evidence listed did not always match the evidence type actually relied upon by the Trustees in the Claims

Tracking Spreadsheet and (ii) at times, the type of evidence listed meant different things depending on the loan – for example, "tax return" may mean one tax return or multiple tax returns, from the year of origination, or from a year after origination. Mr. Aronoff admitted that, to ascertain this information, one would have to look at each loan file itself in order to understand the Trustees' claims as to such loan. When questioned further regarding this issue, Mr. Aronoff's response appeared to imply that the Plan Administrator should have known to go beyond the evidence listed by the Trustees in order to figure out the true basis for the claim.

Despite the fact that, upon close scrutiny, the exhibits to his report suffered from numerous flaws and inconsistencies, as well as discrepancies in information when compared with the Claims Tracking Spreadsheet, Mr. Aronoff refused to concede any errors whatsoever or concede that any such errors would skew or change his opinions.

3. Dr. G. William Schwert

Dr. Schwert is a professor of finance, economics, and statistics at the University of Rochester; he was tendered as the Trustees' expert in statistics. Dr. Schwert's assignment in this case was (i) to draw a statistically significant random sample of loans from the 76,044 mortgage loans reviewed by Mr. Aronoff (the "Aronoff

Loan Population"), which sample was to be analyzed by Mr. Morrow; (ii) to calculate how often Mr. Morrow agreed with Mr. Aronoff; and (iii) to evaluate whether or not the subsets of loans reviewed by Mr. Grice and Mr. Castro were representative of the Aronoff Loan Population.

Using a method known as a "simple random sampling," Dr. Schwert drew a sample of 600 mortgage loans from the Aronoff Loan Population (the "600 Sample Loans"). Dr. Schwert evaluated the 600 Sample Loans and determined that the sample was representative of 11 of the 12 most prevalent types of Breach Findings in Mr. Aronoff's report. Because the 600 Sample Loans were representative of the larger loan population, Dr. Schwert concluded that the sample could be used to extrapolate to conclusions regarding the entire Aronoff Loan Population. The 600 Sample Loans were then reviewed by Mr. Morrow, who found the presence of a breach in 556 of the 600 Sample Loans. Using the results of Mr. Morrow's review, Dr. Schwert calculated an "Agree Rate" of 92.7% for the 600 Sample Loans; extrapolating from the Agree Rate to the greater Aronoff Loan Population, Dr. Schwert determined that Mr. Morrow would have agreed with Mr. Aronoff's findings on 68,819 loan files in the Aronoff Loan Population.

At trial, Dr. Schwert addressed the opinions of the Plan Administrator's expert statistician Dr. Justin

McCrary. Although the Plan Administrator admitted his expert report into evidence, Dr. McCrary ultimately did not testify at trial. Among other criticisms, Dr. McCrary disapproved of Dr. Schwert's use of simple random sampling rather than stratified sampling, which Dr. McCrary argued would have yielded more precise and controlled estimates. Defending his position, Dr. Schwert argued that Dr. McCrary's positions were purely theoretical and that Dr. McCrary did not review the Aronoff Loan Population to draw a more precise sample, nor did he demonstrate that the 600 Sample Loans were not statistically representative of the Aronoff Loan Population.

Dr. Schwert's work provides scant support for the Trustees' claims. Most notably, Dr. Schwert was not asked to draw a representative sample of the entire pool of 94,566 allegedly breaching loans submitted by the Trustees through the Protocol prior to the reduction of the loan pool by the Withdrawn Claims. Dr. Schwert testified that he had no information about the Trustees' claim submission process nor did he design a sample specifically to test the reliability of the Trustees' process for submitting claims through the Protocol. Further, Dr. Schwert tested the representativeness of the 600 Sample Loans against Mr. Aronoff's breach categories but did nothing to determine whether Mr. Aronoff had properly sorted the loans into the correct breach categories. He did not sample the loans by the type of evidence used to support an alleged breach and he did not know whether the evidence types were proportionately represented in the 600 Sample Loans.

With respect to the Agree Rate, Dr. Schwert's calculation was purely mathematical; he engaged in no qualitative analysis of Mr. Morrow's conclusions. In fact, Dr. Schwert did not even consider whether Mr. Aronoff and Mr. Morrow agreed on the type of breach or whether they relied on the same evidence to determine that a loan file contained a material breach.

Dr. Schwert testified that the subsets of mortgage loans used by Mr. Grice and Mr. Castro to criticize Mr. Aronoff were not representative samples of Mr. Aronoff's top 12 Breach Finding categories; he therefore concluded that it was impossible to extrapolate from their subsets to the larger Aronoff Loan Population. On cross-examination, Dr. Schwert conceded that the subset of loans reviewed by Mr. Grice and Mr. Castro included more loans from the Trustees' "big four" breach categories than he would have expected if they had reviewed a representative sample of the Aronoff Loan Population. Dr. Schwert also admitted that he did not examine whether the samples used by Mr. Grice and Mr. Castro were representative of the larger population of loans that the Trustees initially submitted to the Protocol, nor did he consider the purposes for which Mr. Grice and Mr. Castro chose their samples.

4. Mr. J. F. Morrow

Mr. Morrow was the Trustees' mortgage loan origination and underwriting expert. His credentials were impressive. He has over 50 years of experience in all aspects of the loan industry including underwriting, re-underwriting, and selling pools of loans; reviewing loan portfolios; buying, selling, and pricing mortgage loans; evaluating the effects of breached representations and warranties on loans; and repurchasing loans. Mr. Morrow has also had extensive experience serving as an expert witness; he has previously worked alongside Dr. Cornell on behalf of Aurora and Lehman in other "put-back" cases.

Mr. Morrow was asked to conduct an independent review of the 600 Sample Loans identified by Dr. Schwert to assess the reliability of Mr. Aronoff's breach findings. Mr. Morrow assembled a support team from Investors Consulting Group ("ICG") to assist him with his review. He did not give ICG formal instructions, relying instead on ICG's experience and knowledge of market standards for re-underwriting loans. Mr. Morrow and his ICG team completed what he characterized as a re-underwriting of each of the 600 Sample Loans to determine whether a breach existed and, if it did, to determine whether such breach met the AMA standard. To ensure consistency between his loan determinations and those of ICG personnel, Mr. Morrow chose 15 of the 600 Sample Loans to “calibrate” the review process. Mr. Morrow did not elaborate on how the 15 sample loans were chosen or whether the sample was statistically significant; he testified that he and ICG arrived at conclusions on the 15 sample loans that were consistent with one another.

Mr. Morrow agreed with Mr. Aronoff on 831 of 897 of Mr. Aronoff’s breach findings, yielding an Agree Rate of 92.6%. He also agreed that 556 of the 600 Sample loans contained one or more breach findings, yielding an Agree Rate of 92.7%. Mr. Morrow stated that he disagreed with Mr. Aronoff on 14 loan files only because he located a document that Mr. Aronoff had claimed was missing from the file.

Mr. Morrow further concluded that each of the 831 breach findings met the AMA standard. He confirmed his view that a breach materially and adversely affects a loan if the breach “significantly increases the loan’s risk of loss,” as measured at the time of origination of the loan; he does not believe the performance of the loan is relevant to the AMA determination. Additionally, Mr. Morrow stated that the determination of whether a representation or warranty has been breached and whether that breach is material is entirely independent of whether a loan is in default or why.

Mr. Morrow's approach was consistent with that of Mr. Aronoff, and based on an Agree Rate of almost 93%, Mr. Morrow opined that the Trustees' review process was reliable and was performed according to mortgage lending and securitization industry standards.

Although Mr. Morrow and Mr. Aronoff agreed on nearly 93% of the 600 Sample Loans, the significance of this result is undermined by the fact that Mr. Morrow's review was not conducted on a blind basis. First, Mr. Morrow and his team were aware that all 600 Sample Loans were loans that the Trustees assert have breaches. Further, Mr. Morrow relied on the Claim Package compiled by the Loan Review Firms; Mr. Morrow and his team did not review the entire loan file unless they disagreed with the asserted conclusions. In fact, Mr. Morrow testified that his team would cease their review of a sample loan once they found one piece of evidence corroborating a breach and that they did not look for contradictory evidence in the loan file or otherwise. And even though Mr. Morrow and ICG regularly used third-party data to support a breach finding, they merely relied on evidence already in the Claim File and did not independently gather or verify such third-party data. Mr. Morrow's review of the 600 Sample Loans would have been more persuasive had he worked on a pool of sample loans containing both allegedly breaching and non-breaching loans, without knowing the "right" answer in advance.

Mr. Morrow was also asked to critique Mr. Grice's opinion that the Trustees' review process was deficient and produced unreliable results. Mr. Morrow opined that Mr. Grice's review was not done according to industry standards. In his view, Mr. Grice sought to contradict Mr. Aronoff using hypothetical scenarios and conjecture. As Mr. Morrow explained, "speculation has nothing to do with re-underwriting." His observations in this regard are sound.

Throughout his testimony, Mr. Morrow often justified his opinions and rebutted criticism by citing to "industry standards." For example, he explained that ICG did not attempt to contact the borrower or the originator because such a procedure was not typically employed in the industry - "the loan file stands alone." Mr. Morrow defended his use of BLS Data as standard even though his testimony revealed that BLS categories can be too broad or vague. Characterizing tax returns as "gospel," Mr. Morrow stated that tax returns and W-2s could reasonably be relied upon to re-calculate DTI in lieu of actual income. With respect to any "missing document claims," Mr. Morrow testified that the industry standard assumption was that "if it isn't in the file, it didn't exist at origination." As will be discussed in detail hereinafter, the Court is hard-pressed to agree with several of Mr. Morrow's sweeping conclusions.

In lieu of conducting a complete cross-examination of Mr. Morrow, the Plan Administrator submitted designations of Mr. Morrow's deposition testimony. In response, the Trustees submitted counter-designations of Mr. Morrow's deposition testimony and portions of Mr. Morrow's Rebuttal Expert Report. During his deposition, Mr. Morrow revealed that he applied an expansive definition of materiality. In his view, every misstatement or omission is intentional and every intentional misstatement or omission is material. Disagreeing with Judge Castel's decision in MARM III, which he characterized as a departure from industry custom and practice, Mr. Morrow stated that materiality "kicks in" at the time of origination of the loan and, if a breach is material, the effect of such breach continues to exist throughout the life of the loan. Additionally, Mr. Morrow adamantly expressed his opinion that neither changes to a borrower's circumstances nor the performance of a loan has any bearing on whether or not a breach materially and adversely affects the value of a loan – to him, "compensating factors do not make up for misrepresentations." Morrow Depo. Tr. 200:12-18.

Mr. Morrow's deposition testimony revealed certain shortcomings in his loan review process. In his opinion, it was not necessary to examine every document in a loan file in order to confirm or deny the existence of certain breaches, such as a misrepresentation of income or debt. If there was inconsistent information in the loan file, Mr. Morrow believed, incorrectly, that it was Mr. Grice's burden to address it. Further, even though he acknowledged that underwriting guidelines may determine whether or not a loan had been breached – for instance, underwriting guidelines may dictate whether photographs are required to be included in the appraisal of a subject property – Mr. Morrow admitted that he did not consult the underlying underwriting guidelines unless the MLSAAs contained a representation and warranty related to such guidelines.

5. Dr. Karl N. Snow

Dr. Snow was tendered as the Trustees' expert on the calculation of damages. Dr. Snow has over 25 years of experience working in the areas of finance, economics, and statistical analysis in academia and the private sector. He has served as a damages expert in several other RMBS litigations including MARM III, In re Residential Capital LLC, and Syncora. Dr. Snow was retained to calculate the "Purchase Price" for each Covered Loan and to disaggregate the accrued interest component of the Purchase Price for such loans. Dr. Snow did not review any of the loan files and offered no opinion as to whether the loans provided to him by the Trustees contained valid breach claims. Dr. Snow made it clear that he was not offering an opinion on damages generally; rather, his opinion was limited to how damages should be calculated under the Governing Agreements.

To determine how to calculate the Purchase Price, Dr. Snow reviewed the Governing Agreements, the Protocol Order, and Lehman's Second Objection to Certain RMBS Trust Claims and Motion to Disallow and Expunge Certain RMBS Trust Claims for Insufficient Documentation [Dkt. No. 53620]. Dr. Snow testified that the definition of Purchase Price was consistent among those documents and those he has reviewed in other RMBS cases in which he has served as an expert. Dr. Snow provided a detailed description of the three components that comprise the Purchase Price: (i) unpaid principal balance, (ii) unpaid accrued interest, and (iii) unreimbursed servicer advances. For each loan, Dr. Snow used information from the Master Servicer's monthly loan-level data tapes (the "Data Tapes"), as supplemented by data from subscription services such as Moody's and Intex where Data Tapes were not available; he also used trustee remittance reports (such data, collectively, the "Performance Data"). He explained that he did not independently verify or calculate any of the numbers in the Performance Data and expressed no opinion as to the accuracy of such data; however, based on his experience, he believes that the Performance Data is highly reliable because it is subject to a high level of scrutiny inasmuch as it is available to investors and relied upon to determine the amount of distributions they receive.

For liquidated loans, Dr. Snow did not calculate the Purchase Price based on the aforementioned formula. Instead, he adopted the realized loss value as reported by the servicer as a surrogate for the Purchase Price; he testified that such methodology was not inconsistent with the Governing Agreements. Dr. Snow calculated an aggregate Purchase Price of $9,282,204,782 for all liquidated Covered Loans. For non-liquidated Covered Loans, Dr. Snow calculated the Purchase Price using numbers from the Performance Data, and then subtracted the estimated current value of such loans (as calculated by Dr. Ellson) from the Purchase Price to calculate the "Net Purchase Price." Dr. Snow calculated an aggregate Net Purchase Price of $5,382,554,290 for all non-liquidated loans as of April 2017. Lehman did not dispute the mathematical accuracy of the calculations he performed based on the instructions he was given by the Trustees.

The Trustees also asked Dr. Snow to offer an opinion with respect to Dr. Cornell's views that (i) a reliable Purchase Price on a liquidated loan cannot be calculated without a loss certificate and corporate expense log and (ii) the Purchase Price for non-liquidated loans should automatically be zero based on Lehman's position that these loans will suffer no losses. With respect to Dr. Cornell's first contention, Dr. Snow testified that, in his years of experience, he has never reviewed a loss certificate because it has never been necessary to do so. Additionally, Dr. Snow reviewed loss certificates and corporate expense logs for 154 loans at issue here and compared them to the Performance Data on which he relied. He found that the loss certificates and corporate expense logs provided greater detail about the fees and expenses related to a loan but otherwise found no significant difference between these two data sets. Dr. Snow opined that Performance Data is more accurate than corporate expense logs and loss certificates because the latter two only provide a "snapshot in time." In his opinion, loss certificates and corporate expense logs, in contrast to Performance Data, do not reflect recoveries received or expenses incurred subsequent to liquidation. Dr. Snow did not review, nor did he give any opinion about, the need for loan payment history or servicer reports, which documents Lehman has also claimed are necessary to calculate the Purchase Price on a breaching loan.

With respect to Dr. Cornell's second opinion that the Purchase Price for non-liquidated loans should be zero, Dr. Snow testified that, in instances in which there have been loan modifications or if there is unpaid accrued interest, a performing loan could yield a net purchase price even if the market price of such loan was par, and therefore, Dr. Cornell is incorrect. Dr. Snow clarified that the Purchase Price under the Governing Documents, which measures the historical losses of a loan, is not identical to the market price of a loan, which measures future performance. He also effectively rebutted the Plan Administrator's argument that the Trustees' calculation of Purchase Price ignores interest payments that certificateholders have received on non-liquidated loans since the unpaid accrued interest for such loans, which is a component of the Purchase Price calculation, would be zero.

Lastly, Dr. Snow disaggregated the unpaid accrued interest of the Purchase Price for each loan into the following categories: (i) pre-petition and post-petition accrued and servicer-advanced interest; (ii) pre-rejection and post-rejection accrued and servicer-advanced interest; (iii) borrower accrued interest versus servicer-advanced interest; and (iv) liquidated loans with and without interest included in the Purchase Price. Dr. Snow testified that the Purchase Price for the majority of liquidated loans did not contain any interest.

6. Dr. Richard Ellson

Dr. Ellson was tendered by the Trustees as an expert on the valuation of mortgage loans. Through his work as a trader, portfolio manager, and researcher, Dr. Ellson has had extensive experience using and creating prepayment and valuation models for mortgage-backed securities. At Andrew Davidson & Company ("ADCo"), he was responsible for the development, testing, validation, and marketing of a product known as LoanKinetics. LoanKinetics was described as a sophisticated statistical and analytical whole loan residential mortgage system designed to provide analysis for residential mortgage loans. LoanKinetics is not itself a model; rather, it "calls upon" and utilizes proprietary models such as LoanDynamics, credit option adjusted spread models, housing price forecasting models, and term structure models. Dr. Ellson used LoanKinetics to calculate the estimated market value for 15,739 non-liquidated loans by first forecasting how each loan would perform in the future and then pricing each loan's future cash flow. He estimated the value of the non-liquidated loans at issue in this proceeding to be $3.018 billion in the aggregate, with an average estimated price of 72% of the current principal balance as reported by the servicer. The market values calculated by Dr. Ellson were used by Dr. Snow to calculate the Net Purchase Price of the non-liquidated loans.

Dr. Ellson testified extensively about the components, architecture, and reliability of LoanKinetics, and it was evident from his testimony that he had been heavily involved in its sale and marketing. Dr. Ellson demonstrated that he was familiar with how LoanKinetics worked and that he had worked closely with ADCo's modeling and financial engineering group, which developed the underlying models prior to his employment at ADCo. However, on cross-examination, he admitted that he was less familiar with, and was not involved with, the testing or validation of the underlying models that LoanKinetics utilizes. Dr. Ellson confirmed that he relied on ADCo to validate the underlying models; and the Trustees did not present any other testimony regarding the reliability or accuracy of LoanKinetics.

In response to the opinion of Mr. Castro that performing non-liquidated loans were inappropriately included in the Trustees' claim, Dr. Ellson stated that most of the non-liquidated loans are "re-performing." By "re-performing," he means that such loans were not performing under their original terms but rather performing pursuant to modified terms that resulted in, for example, a reduction in principal balance or applicable interest rate. Dr. Ellson argued that the credit risk associated with re-performing loans is substantially greater than the risk associated with loans that have never been modified. To highlight this risk, Dr. Ellson testified that, as of the time of his reply report, 11.13% of the non-liquidated loans at issue here were delinquent; 31.62% of the non-liquidated loans had been delinquent in the last year; 10.51% of the non-liquidated loans were in default; nearly 50% of the non-liquidated loans were sub-prime; and almost 40% of the non-liquidated loans were Alt-A. Dr. Ellson conceded, however, that he did not know why or under what terms any of the non-liquidated loans had been modified.

On cross-examination, the Plan Administrator attempted to establish that LoanKinetics was unreliable, as evidenced by data relating to the 804 non-liquidated loans that liquidated after Dr. Ellson issued his report. The realized losses on such loans were approximately $94 million, whereas Dr. Snow had calculated the Net Purchase Price for such loans to be $144 million, a $50 million difference. In response to this point, Dr. Ellson testified, unconvincingly, that the 804 non-liquidated loans had been terminated “ad-hoc” and that therefore those loans did not constitute a statistically significant sample that could support the conclusion that LoanKinetics was not reliable or accurate. He also stated that Lehman was not making an “apples to apples” comparison and that Lehman should have compared estimated losses as predicted by LoanKinetics (rather than the Net Purchase Price of the non-liquidated loans) to actual realized losses. Dr. Ellson explained how Lehman should have used the LoanKinetics data to calculate expected losses on liquidated loans, and then compared those values to the actual losses. Upon making such a comparison, Dr. Ellson found that LoanKinetics actually predicted smaller losses in the event of liquidation than the actual loans suffered on the 804 non-liquidated loans and that the estimated loss predicted by LoanKinetics was 92% accurate. Dr. Ellson offered no opinion, however, as to why the Net Purchase Price on non-liquidated loans is not equal to the amount of estimated losses for such loans.

7. Hon. Robert S. Smith (Ret.)

Over the objection of the Plan Administrator, the Trustees tendered the Honorable Robert S. Smith as an expert on the negotiation and evaluation of litigation settlements. Judge Smith testified that he has negotiated and overseen hundreds of settlements in his long career as a judge on the New York Court of Appeals, as an attorney in private practice, and as a mediator. Judge Smith was asked to opine solely on Professor Fischel's opinions that (i) the Institutional Investors Settlement supports estimating the Trustees' claims at $2.38 billion and (ii) an allowed claim of $2.38 billion reflects a recovery ratio that falls well within the range of recovery ratios in the Comparable Settlements. Based on his experience with settlement negotiations, Judge Smith was of the view that Professor Fischel had no basis for rendering the opinions set forth in his expert report because (a) Professor Fischel overlooked a number of key factors with respect to the Institutional Investors Settlement and (b) Professor Fischel did not perform a quantitative analysis of the facts underlying the Covered Loan Claims to determine whether the Covered Loan Claims have a lower or higher probability of success than the claims settled in the Comparable Settlements.

Judge Smith criticized Professor Fischel for making what he characterized as the unfounded assumption that the interests of the Institutional Investors and the Trustees are aligned, and for ignoring the behavior of the Trustees and Lehman. Although he conceded that the Institutional Investors were the "real parties-in-interest," Judge Smith views the Trustees as the "real plaintiffs." Judge Smith noted that the Trustees rejected the Institutional Investors Settlement because it was not accepted by a requisite number of Trusts. Further, since the Institutional Investors Settlement has been replaced with what he believes is a more favorable settlement – i.e., that Lehman had to "sweeten the deal for the Trusts" – Judge Smith infers from this that the Covered Loan Claims in fact have a higher value than the amount accepted by the Institutional Investors in the Institutional Investors

Settlement.

Judge Smith opined that the Institutional Investors were uninformed when they entered into the Institutional Investors Settlement because they had not performed a loan-by-loan analysis of their claims as the Trustees have here in connection with the Protocol and the Estimation Proceeding. He did acknowledge, however, that the Institutional Investors are all large, sophisticated financial institutions that are fully capable of making informed settlement decisions. In Judge Smith's opinion, the amount a litigant, particularly an uninformed litigant, is willing to accept in a settlement is not predictive of the outcome of a case. He believes that Professor Fischel improperly likened the amounts of the Comparable Settlements to a determination by this Court of the amount of the Covered Loan Claims after a full trial. In his experience, he has seen litigants in "good cases" settle for less than 50% of the amounts they sought; however, none of the specific examples Judge Smith provided was from an RMBS case nor did Judge Smith disclose sufficient substantive details about those cases to draw thorough comparisons. Judge Smith testified that he did not deem it relevant that the Institutional Investors were some of the same parties that negotiated the Comparable Settlements or that the parties negotiating the settlement amounts in the Comparable

Settlements had used Recovery Ratios to benchmark the reasonableness of such settlements.

With great respect to Judge Smith, his opinions cannot be afforded significant weight. As a threshold matter, and as urged by the Plan Administrator in objecting to his testimony, the standard for use of expert testimony under Rule 702(a) of the Federal Rules of Evidence requires that an expert witness's "specialized knowledge help the trier of fact understand the evidence or to determine a fact at issue;" as Judge Smith himself acknowledged, the Court is as well-positioned as Judge Smith to draw comparisons between the Institutional Investors Settlement and the Comparable Settlements, on the one hand, and the RMBS Settlement on the other hand. Moreover, as will be discussed hereinafter, it is untenable to posit that the Institutional Investors and the settling investors in the Comparable Settlements were uninformed and/or ill-advised when settling at the Recovery Ratios reflected in those settlements.

8. Mr. James K. Finkel

Mr. Finkel is a Managing Director and National Practice Leader for Financial Crisis Disputes at D&P. He has worked at a number of large financial institutions at which he gained experience valuing fixed income and complex securitized products. The Trustees tendered Mr. Finkel as an expert in financial models; specifically, Mr. Finkel was asked to critique Professor Fischel's calculation of the projected lifetime losses on non-liquidated loans using the same ADCo LoanDynamics Model that Professor Fischel had used. Although Mr. Finkel had not previously used LoanDynamics prior to his work in this case, he was able to reverse-engineer Professor Fischel's approach with only a 0.036% difference. After correcting what he considered to be certain errors committed by Professor Fischel, Mr. Finkel independently derived projected losses on the non-liquidated loans and calculated total lifetime losses (including historical and projected losses) of $21.115 billion, which is $49.86 million lower than the amount of losses calculated by Professor Fischel. Mr. Finkel stated that the effect of overstating lifetime losses would result in understated Recovery Ratios; he did not, however, calculate a different Recovery Ratio or state whether such difference was significant.

Mr. Finkel was also asked by the Trustees to compare the Recovery Ratio of the Lehman Proposed Claim Amount to the Recovery Ratios in six other RBMS put-back litigation settlements that were concluded between October 2015 and September 2016 (the "Finkel Comparable Settlements"). To draw such comparison, Mr. Finkel used the ADCo LDM toolkit with the modifications previously described and the reported realized losses for the trusts related to the Finkel Comparable Settlements to calculate the Recovery Ratios for those six settlements. Such Recovery Ratios ranged from 23% to 23.75%, higher than the 11.24% Recovery Ratio of the Lehman Proposed Claim Amount. Using the Recovery Ratios for the Finkel Comparable Settlements, Mr. Finkel derived benchmark settlement amounts for the Covered Loans that ranged from $2.477 billion to $2.668 billion higher than the Lehman Proposed Claim Amount of $2.38 billion.

Although Mr. Finkel's calculations were unchallenged, and, indeed, were unremarkable, his conclusions were of limited value. Mr. Finkel performed no analysis of and presented no rebuttal testimony on the Comparable Settlements and the Recovery Ratios for those settlements. Mr. Finkel did no qualitative analysis on the Finkel Comparable Settlements. He offered no opinion on how the Finkel Comparable Settlements did or did not compare to the Comparable Settlements. On cross-examination, Mr. Finkel admitted that he did not evaluate the similarities between the RMBS Settlement at issue here and the Finkel Comparable Settlements, which were settlements relating to individual RMBS trusts. In fact, he did very little analysis, if any, of the Finkel Comparable Settlements; he conceded that he did not analyze the default rates, the types of collateral, the vintage of the loans, who originated the loans, what portion of the settlement amount was allocated to attorneys' fees, or what motivated the settlement in each matter. Further, Mr. Finkel did not engage in any attempt to review any other comparable settlements and/or compare them to the RMBS Settlement; he only looked at the settlements that were provided to him by counsel to the Trustees. As was revealed on cross-examination, counsel for the Trustees had carefully curated the Finkel Comparable Settlements. The Trustees' counsel represented the plaintiffs in each such settlement; significantly, only settlements with higher Recovery Ratios were presented to Mr. Finkel and not, for instance, a settlement in which Trustees' counsel had represented HSBC and which had a Recovery Ratio of 12.7%. While Mr. Finkel testified truthfully and accurately performed the tasks that he was assigned, his opinions are of little value to the Court.

V. DISCUSSION

A. The Trustees Did Not Meet Their Burden of Proof With Respect to the Existence of Over 72,500 Material Breaches

Having reviewed at some length the voluminous evidence presented by the parties, the Court must now confront the question it has been asked by the parties to this Estimation Proceeding. Have the Trustees demonstrated, by a preponderance of the evidence, that they are entitled to an allowed claim against Lehman in some amount greater than $2.38 billion? They have not, for a host of reasons. Indeed, any of the shortcomings in the Trustees' proof that the Court is about to identify would in and of itself constitute a sufficient basis for denying the relief requested by the Trustees. That there are, in the Court's view of the record, multiple flaws, fallacies, and deficiencies in the proof bolsters the ultimate conclusion reached by the Court.

Before turning to a detailed discussion of the proof at trial, it is instructive to revisit what the parties set out to demonstrate. In their pretrial memorandum, the Trustees stated that their "proof, which is unrebutted for all but a tiny fraction of the loans at issue, will demonstrate by a preponderance of the evidence that Lehman breached the representations and warranties and that it did so repeatedly for tens of thousands of loans." (Trustees' Pretrial Brief at 5.) Even though at trial the Trustees did not present their proof pursuant to any sampling methodology, what the Trustees did present was, in essence, "sampling lite" - the use of so-called exemplar loans (and the so-called unrebutted "proof" in the Claims Tracking Spreadsheet) from which they would ask the Court to extrapolate to an aggregate claim amount. The Trustees urged that the Court could do so on a breach category by breach category basis because the Court would find that the Trustees' process was extremely reliable. The Trustees promised a roadmap that the Court could follow to arrive at an allowed claim amount. As it turned out, the roadmap presented required the Court to take too many shortcuts and to substitute conjecture for proof.

1. The Trustees' Loan Review Process Suffered from Numerous Flaws

The Trustees' loan review process suffered from numerous flaws and shortcomings. Notably, not one single loan reviewer from the five Loan Review Firms employed by the Trustees appeared as a witness at trial to testify regarding the review process; such testimony would have enabled the Court to evaluate and/or compare the processes undertaken by the firms. Rather, the Court was asked to rely on the general descriptions offered by Mr. Esses and Mr. Aronoff, neither of whom reviewed a single loan file in its entirety, in order to understand the review process undertaken by the Loan Review Firms. No uniform set of instructions given to the firms, in writing or otherwise, was introduced into evidence. No rosters of personnel listing qualifications and experience were offered into evidence. The totality of the proof on this point - the most fundamental level of proof on which the Trustees built their entire case – was Mr. Esses and Mr. Aronoff assuring the Court that the Loan Review Firms "knew what they were doing" and that what they were doing complied with "industry standards."

In MARM III, there was a similar absence of firsthand proof as to the underlying loan review process. Judge Castel noted that the backgrounds and professional experience of the MARM Trusts' individual loan reviewers – several hundred individuals employed by three different companies – were only "vaguely described." In addition, he observed that "[n]either party endeavored to show the extent to which the hundreds of individuals who worked on the loan review process were the same individuals employed in the process of underwriting subprime loans for other originators or institutions in the years leading up to the collapse of the financial markets in 2008." While Judge Castel stated that he would place "no weight on this undeveloped issue," 205 F.Supp. 3d at 403-04, this Court is troubled by the lack of foundational evidence on this critical issue.

Additionally, in MARM III, as here, testimony was elicited regarding the parties' failure to provide guidelines or parameters to the loan review firms. Judge Castel noted that UBS's expert testified that, for at least some portion of the loan reviewers, she provided no type of written or oral instruction, instead directing them to "use common sense;" inasmuch as "[t]hese were all experienced either underwriters or reunderwriters[,] I didn't feel that I needed to explain to them how to calculate a DTI or, you know, some of the basic tenets of reunderwriting. They all had that experience." Id. Judge Castel held that, "[t]he Court's findings are informed by the work of [the experts] and their vendors, but that does not mean that the opinions of either are accepted or rejected wholesale." Id. at 405. So too here. The Court will give appropriate weight to the evidence in the record regarding the Trustees' process, including the work of the Loan Review Firms.

In MARM III, Judge Castel also observed that the loan review process was presented as a "re-underwriting" process; it was not. Judge Castel noted that "[t]he underwriting process seeks to answer the question of whether an application should be approved and a loan funded. . . . [The Trusts'] team looked for potential breaches of representations and warranties and recorded them when, in the opinion of the reviewer and [the Trusts' expert], breaches were found. . . . Rather than traditional re-underwriting, these reviews were directed to the existence of potential breaches." 205 F. Supp. 3d at 403. Such is the case here as well; there was scant evidence of actual re-underwriting by the Loan Review Firms and ample evidence that the loan reviews were geared towards the discovery of just enough evidence to support the assertion of a breach.

Another notable shortcoming of the Trustees' process was a critical disconnect between the work performed by the Loan Review Firms and the so-called "quality control" review performed by D&P, a "QC" process which did little to correct any errors that may have been made by the Loan Review Firms while conducting their review of loan files in search of potential breaches. Once a Loan Review Firm finished its review of a loan file, it created a "Claim Package" of original and third-party source documents – sometimes only a single document – that it believed supported any breach it had identified. The entire loan file was never reviewed again for mistakes or inadvertent errors once the Claim Package left the Loan Review Firm and made its way to D&P for two rounds of quality control. In fact, the quality control process did not include any review by anyone at D&P of the entire loan file. Thus, if a loan reviewer mistakenly missed a critical document in the loan file, there was nothing in the QC1 or QC2 process conducted by D&P that would have caught the mistake. In fact, Mr. Esses, the Project Manager for the Trustees' loan review process, admitted at trial that when the Trustees asserted missing document claims, they did not even check their own mortgage files (or any other source) for the missing document before submitting the claim. Second, because the D&P QC team only reviewed the Claim Package, if contrary evidence existed in the loan file that was missed by the loan reviewer, the D&P QC team would not have found it. As Mr. Aronoff himself stated, D&P did not go "poking around in the loan files." (P.A. Ex 804, October 6, 2017 Aronoff Depo. Tr. at 262:21-22; Dec. 14, 2017 Hr'g Tr. at 20617:24-2618:2).

It would, of course, be impractical and unreasonable to suggest that D&P's QC process should have included a search of the entire loan file for every loan. But the QC process D&P employed adds little by way of support for the accuracy of the conclusions reached by the Loan Review Firms in the first instance. Notwithstanding the "re-underwriting" experience of the Loan Review Firms, a higher level of structure in the process and guidance and oversight by D&P would have been indicative of a more reliable process.

The significance of this flaw in the D&P QC process is further amplified by the Trustees' apparent application of the assumption that "if it is not in the loan file now it never was," the stated opinion of the Trustees' expert, Mr. Morrow. As Lehman's expert Mr. Grice testified, the loan files at issue here were generally old and their quality was poor, creating challenges surrounding the integrity of the contents of the loan file due to the passage of time. Even though the loans were originated at least 11 years ago and in some instances more than 15 years ago, the Trustees applied a presumption that a document that is missing now – in 2017 or 2018 – had not been in the loan file at origination. Further, no proof was presented as to originator or servicer document retention policies, digitization procedures employed by servicers, or any evidence relating to the chain of custody of the loan files. Mr. Esses admitted at trial that he did not know what the originators' practices were in handling hard copy loan files, when or by whom the files were scanned, or whether any documents went missing. Mr. Esses further testified that it was not part of the Trustees' process to make sure the loan file being looked at by the Loan Review Firms was the same as the loan file that left the closing table; instead, the Trustees assumed for purposes of their review that the file was identical. Indeed, the Trustees went so far as to ignore the fact that a closing checklist may have reflected the existence of a document at closing; even such evidence seemed to be insufficient to rebut the presumption that a missing document simply never existed. The apparent failure to "evaluate the total mix of information" in the loan file reflects poorly on the Trustees' loan review process. See MARM III, 205 F. Supp. 3d at 446 (declining to credit expert opinion that gave controlling or near-controlling weight to one document in the loan file and failed to evaluate the "total mix of information" in the file).

The next flaw in the Trustees' loan review process involves infirmities in certain of the data on which they rely for their assertion of breach claims. Without doubt, virtually all of the types of data cited by the Trustees have been cited approvingly by other courts in the context of put-back litigation and have been relied on to a certain extent by Lehman entities themselves. Nonetheless, the Court finds it exceedingly difficult to accept every type of evidence as to every alleged breach without there being a far more searching and particularized review of each loan, as was directed by Judge Castel in MARM III. As reflected in Mr. Trumpp's testimony, of the approximately 70,000 breach claims asserted in the Trustees' major breach categories, approximately 48,000 of such breach claims were supported by only one type of evidence, e.g., by a bankruptcy document or a MERS report. And while reliance on one type of evidence is not per se objectionable, the flimsiness of many of these types of evidence when used as support for a breach claim gives great pause.

At trial, the Plan Administrator's expert, Mr. Grice, described in detail the limitations surrounding the use of many of the types of evidence relied upon by the Trustees. During his cross-examination, Mr. Esses conceded that, both prior to and during the Trustees' loan review, he was familiar with such limitations and with the disclaimers included in a number of the data sources regarding their intended use. For example, (i) each of the three credit bureaus has issued a disclaimer regarding reliance on the accuracy or completeness of the information in its credit reports and (ii) MERS, Accurint, LexisNexis, and DataVerify have issued terms and conditions stating that any information obtained through them should be independently verified. The accuracy of such data depends on its use; Mr. Grice noted in his testimony that, while audit credit reports and information from third-party data aggregators may be reliable for some purposes, they are especially unreliable when used for purposes not intended, such as to support misrepresentation of occupancy claims. The Court agrees with Mr. Grice that the question of reliability is tied to context; evidence may be reliable or sufficient in one context but not in another.

For example, BLS Data, if used correctly, may be reliable as a highly generalized benchmark of the earnings of someone employed in a particular job category in a particular geographic area. But the evidence revealed that the Loan Review Firms did not always correctly match the actual job of a borrower with the correct BLS category. The Plan Administrator presented numerous examples during the trial of the foibles of BLS Data generally and as applied by the Trustees during the loan review process. The Plan Administrator presented evidence with respect to the limitations of BLS Data in that (i) it does not measure certain categories of compensation such as overtime, bonuses, or benefits and (ii) it is only conducted as a survey every three years. Notwithstanding, for many loans, the Trustees relied on BLS Data as the sole source of evidence of an alleged breach.

Another questionable type of evidence is a so-called audit verification known as a VOE. Audit VOEs, which were conducted by the Loan Review Firms by telephone, fax, or email some 10 to 15 years after origination, were shown through several examples to suffer from numerous flaws. Mr. Esses testified that he was unaware of any standard script of questions for the Loan Review Firms to utilize to verify job title, employer, or salary as compared to how the information was reflected in the loan application; there was no standard form to be filled out for the verification; and the VOE results were often relied on more heavily than the borrower’s statements in the loan application itself.

Another category of evidence relied upon by the Trustees which courts have concluded “must be treated with caution and cannot be accepted at face value" is bankruptcy filings. See MARM III, 205 F. Supp. 3d at 476. In MARM III, the MARM Trusts' expert testified that he assumed the truth of a borrower's statements in a bankruptcy filing, even when they were contradicted by other sources that he considered reliable, and he concluded that a bankruptcy filing was a more reliable source of a borrower's income than the stated income on the loan application itself. Noting that a borrower may have an incentive to overstate income on a loan application but also an incentive to understate income in a bankruptcy petition, Judge Castel rejected the notion advanced by the MARM Trusts' expert that a statement in a bankruptcy proceeding "trumps all other available data and per se proves a misstatement" and declined to credit the expert's opinions as to DTI ratio breaches based solely on a borrower's statement in bankruptcy documents. See id. at 446.

Here, the parties disagree on the weight to be given to statements in a borrower's loan application versus statements made by the borrower in bankruptcy filings and in other documents deemed reliable in certain circumstances. The Court declines to establish a per se rule that a particular data source is unreliable but instead observes that, particularly when relying on a sole source of evidence, the Trustees failed to exercise a certain degree of caution with respect to its use. As Judge Castel observed, when statements in bankruptcy documents were consistent with other information in the loan file, in those instances, such statements "are properly considered as part of the total mix of information that goes toward a borrower's income." Id. Instead of taking into account the "total mix of information in the loan file," including either corroborative or contrary evidence, however, the Trustees oftentimes relied on a sole type of evidence "accepted in the industry" as dispositive and sufficient proof of breach.

2. The Trustees' Proof at Trial Was Insufficient to Meet their Burden

a. Discussion of Several Exemplar Loans

At trial, each side offered approximately a dozen "exemplar loans" into evidence in connection with the direct testimony of its expert or the cross-examination of the other side's expert, presumably selecting the strongest exemplar loans they could find from the universe of 72,500 disputed loans. As counsel for the Plan Administrator pointed out in closing argument, the breach claims in the exemplar loans presented by the Trustees at trial by all accounts should have been "slam-dunk winners." This was not the case. Rather, as counsel observed, some of them "were at best jump balls." The Plan Administrator successfully challenged the Trustees' breach claims on many of their exemplar loans, raising serious doubts about the extent to which the Trustees' loan review process could generally be trusted. The exemplar loans presented by the Plan Administrator during Mr. Aronoff's cross-examination revealed (i) the subjective nature of the Trustees' loan review and the assumptions made by the Loan Review Firms during their review, (ii) the Trustees' frequent reliance on one, often insufficient, piece of data as support for their claims, and (iii) at times, the loan reviewers' disregard of contradictory evidence or evidence that raised questions regarding the Trustees' breach claims. Here are some specific examples of exemplar loans that did not withstand close scrutiny.

Loan Number 2979

The Trustees asserted a misrepresentation of income breach claim for Loan Number 2979, which loan was presented as an exemplar loan during Mr. Aronoff's direct examination. The borrower's 2006 loan application stated income of almost $8,000 per month, or approximately $96,000 per year, earned as a self-employed HVAC contractor. The Trustees used the borrower's tax returns from 2006, 2007, and 2008 to assert that the borrower allegedly earned between $2,166 and $4,000 per month for those years, less than half the amount stated in his loan application. Mr.

Aronoff explained at trial that, because the borrower was self-employed, the Loan Review Firm made certain of its own calculations using the numbers on the borrower's tax returns in order to come up with a monthly income amount for the borrower. The Court was presented with minimal explanation of the methodology employed and thus has no basis on which to conclude that such calculations reflect accurate monthly income amounts for this borrower. From the evidence presented, it was clear that the Loan Review Firms made mistakes, errors, and unsupported assumptions in deriving income levels from tax returns, particularly in the case of self-employed borrowers such as the borrower on this loan as to whom the concept of "monthly income" is murky at best.

In addition, the loan file for Loan Number 2979 also contains a 2008 hardship letter from the borrower stating that business was excellent until late 2007 but, due to (i) a difficult customer who monopolized his time and (ii) emergency surgery, the borrower had fallen behind in his payments after that. The Trustees do not appear to have considered this letter. Given that the Trustees elected to use this loan as one of their exemplar loans at trial, one would have expected the breach claims asserted to be virtually flawless and backed by solid, uncontroverted evidence. Not so here. The fact that the Trustees elected to present this particular exemplar loan causes the Court concern, highlighting as it does the subjective and conclusory manner in which the Trustees' loan review process appears to have proceeded with respect to this loan.

Loan Number 1955

The Trustees asserted a misrepresentation of income breach claim for Loan Number 1955, another exemplar loan presented during Mr. Aronoff's direct examination at trial. For this loan, the borrower listed income of $10,750 per month on his loan application in July 2006. The Trustees based their breach claim on (i) the borrower's 2006 tax return, which listed monthly income of $4050 per month and (ii) the borrower's 2006 W-2 form, which corroborated such amount. The borrower's tax returns, W-2s, and paystubs from 2007-2010 showed similar income of between $4055 and $4682 per month. The Plan Administrator disagreed with the Trustees' claim of breach. After re-reviewing this evidence from the loan file at trial, Mr. Aronoff testified that he was certain that it was more likely than not, given the evidence in the file, that monthly income of $10,750 was a misrepresentation.

The evidence presented on this exemplar loan included the clear and striking admission by Mr. Aronoff that the Trustees made no attempt to determine a borrower's actual income; rather, it was enough to find evidence that made it more likely than not that the borrower's represented income was inaccurate. Notwithstanding, as previously discussed, the Trustees presented as exhibits to Mr. Aronoff's expert report summary charts of (i) the magnitudes of income breaches by borrowers and (ii) recalculations of DTI as compared with origination DTI in order to show seemingly staggering magnitudes of breach. All of the calculations reflected in these magnitude of breach summaries are based on what the Trustees referred to as "actual" borrower income, a term that Mr. Aronoff declined to adopt when examined at trial.

Loan Number 1643

For Loan Number 1643, the borrower, a registered nurse, stated monthly income of $13,783 on her loan application in July 2006, which translates to annual income of $165,400. The Trustees claimed that the borrower misrepresented her income on her loan application, citing as the sole support for their claim BLS Data that indicated that registered nurses at the 90th percentile of income in the same geographic area at the same time earned annual income of $95,300. No other evidence was presented by the Trustees in support of their breach claim on this loan. During his direct examination, Mr. Aronoff testified to the existence of several "red flags" in the loan file that he stated would indicate that it is "more likely than not" that the borrower misstated her income. The red flags he identified were (i) that the borrower had $41,000 of credit card debt, which Mr. Aronoff opined should be unlikely if the borrower had over $11,000 of free cash every month that she could have used to pay off the debt, and (ii) that the borrower's bank account held $25,000, which was only approximately two months of free cash (based on her stated income).

When questioned about this loan file, Mr. Aronoff defended the Trustees' use of "red flags" to support BLS Data (as was done here), stating that their presence would indicate to the loan reviewer that the borrower's stated income "doesn't make sense for other reasons" and such red flags would be used "in reference to the totality of the file to support, based on a BLS income number, that it's more likely than not that income is misstated." (Dec. 14, 2017 Hr'g Tr. at 2478:7-20). But there was no testimony whatsoever indicating that the loan reviewer had actually identified these red flags, on this file or any others. In response to questioning during cross-examination, Mr. Aronoff conceded that such "red flags" would be based on the loan reviewer's subjective interpretation. He also acknowledged that BLS Data does not take into account overtime, bonuses, or other sources of income that may add to a borrower's total earnings. Indeed, on this particular loan, Mr. Aronoff was also shown a hardship letter from the borrower which the Trustees had not included in the Claim Package which revealed that the borrower had been supporting family members, her brother had been paying half the mortgage, and because he was moving out she was no longer able to pay the monthly payment in full. Based on the entirety of the evidence presented on this loan, it seems clear that the Trustees failed to prove that it is more likely than not that the borrower misrepresented her income in her loan application.

Loan Number 9621

The Trustees alleged a misrepresentation of income breach for Loan Number 9621. On the borrower's 2004 loan application, he listed income of $12,000 per month (or $144,000 per year) from his occupation as a self-employed realtor. The loan was issued in December 2004. As support for their claim of breach based on the borrower's alleged misrepresentation of income on his 2004 loan application, the Trustees relied on the borrower's 2005 tax return, which indicated income of $1923 per month for 2005. The Trustees did not include in the Claim Package any evidence of the borrower's income in 2004, and Mr. Aronoff testified at trial that he did not know how much the borrower earned in any month in 2004. Because there was no evidence in the file of the borrower's 2004 income, Mr. Aronoff stated that the Trustees elected to assert their breach claim based on information from the subsequent year. Relying on the borrower's subsequent year tax returns and on BLS Data indicating that the 90th percentile of realtors in his geographic area earn $93,000 per year, Mr. Aronoff testified that the Trustees concluded that it was more likely than not that the borrower had misrepresented his income on his loan application. When questioned at trial, Mr. Aronoff acknowledged, however, that ten percent of realtors in the area covered by BLS Data would in fact earn more than $93,000, and he also conceded that he did not know why the borrower had a decrease in income in 2005. The Trustees' conclusion as to misrepresentation of income for this loan is far too speculative to be sustained. It is not based on any evidence of the borrower's 2004 income, and it fails to acknowledge the variable nature of the income earned by the self-employed, particularly a self-employed realtor like the borrower on Loan Number 9621.

Loan Number 2963

The Trustees asserted a misrepresentation of employment breach claim for Loan Number 2963. They cited as the support for their claim (i) a VOE conducted at the time of origination of the loan and (ii) BLS Data. On the loan application, the borrower had listed his job title as "Senior Project Manager / Litigation." The VOE form, based on a phone call made at the time of origination, states that the borrower's position was "EDD Manager." At trial, the VOE form was introduced during Mr. Aronoff's cross-examination; it included what Mr. Aronoff conceded appeared to be a typed notation by the loan reviewer that the borrower's position was "Employment Development Dept (Human Resources/Recruiter)." No evidence was introduced as to why the loan reviewer appears to have concluded that the borrower worked in a human resources position other than speculation that "EDD" is an acronym for, among other things, a state agency in California, the Employment Development Department. Nevertheless, the Trustees, in support of their breach claim, cited BLS Data for a human resources position indicating that the 90th percentile of earners in the borrower's geographic area earned $89,400.

During his cross-examination, Mr. Aronoff reluctantly conceded that the Loan Review Firm had made a mistake on this loan with respect to its breach finding of misrepresentation of employment, the only claimed breach finding for this loan. This error was not caught during QC1 or QC2. When presented with evidence indicating that it was more likely than not that the borrower did not work in human resources, Mr. Aronoff testified that he had not been aware of such information. Among other things, however, the loan file contained a financial statement listing the borrower's occupation as "Director Data Services." A simple "Google" search for the name of the borrower's employer (which was listed in the loan file) revealed that the firm was a litigation consulting firm, and the term "EDD" likely meant "Electronic Data Discovery." In addition, the loan file contained a letter from the borrower's employer stating that, before raises, the borrower earned $120,000 per year. Notwithstanding all of this information, the Loan Review Firm selected an incorrect category of BLS Data for the borrower (human resources) and, based on the $89,400 number generated for a human resources position, asserted a claim of breach, ignoring the letter from the borrower's employer. At trial, Mr. Aronoff acknowledged that this loan was included on at least one of the exhibits to his expert report which purported to summarize categories of breach findings. The subjective and variable nature of the breach conclusions reached by the Loan Review Firms is highlighted by this exemplar loan and reveals that the Trustees' process was, at times, a daisy chain of unfounded inferences and faulty assumptions.

Although there were additional exemplar loan presented at trial that survived scrutiny by the Plan Administrator, the conclusion is inescapable that the exemplar loans were not, on the whole, exemplary. Moreover, as articulated in MARM III, while an exemplar loan "may have been selected to illustrate a single, isolated point," there is "no basis to conclude that the exemplar loans . . . are representative of the universe of loans" at issue. 205 F. Supp. 3d at 477.

b. The Withdrawn Claims

The Withdrawn Claims were the subject of countless disputes and discussions in the months leading up to the Estimation Proceeding and continuing into the Estimation Proceeding. Why, asks the Plan Administrator, were some 72,000 breach claims withdrawn from those presented for consideration to the Court? What is the difference between those claims that were withdrawn and those claims that were presented at trial? The Trustees have declined to provide direct answers to these questions, instead selectively revealing information to the Court regarding the withdrawal of certain claims. For example, the Trustees presented information to the Court which indicated that a majority of the breach claims that were withdrawn were "missing document" claims; however, there was no explanation of (i) why all missing document claims were not withdrawn and (ii) what distinguished those claims that were withdrawn from those that were not. These unanswered questions cast further doubt on the nature of the Trustees' loan review process and leave the Court with difficulty in understanding how the withdrawal of certain claims from the Estimation Proceeding fits into the larger picture.

All of this matters. The Withdrawn Claims have left a gaping hole in the landscape of the Trustees' claims, and their withdrawal on such a massive scale does little to support the proposition that the Trustees' loan review process should essentially be accepted, virtually without question, by the Court.

For all of the foregoing reasons, the Court finds that the Trustees have failed to meet their burden to demonstrate, by a preponderance of the evidence, the existence of a breach of a representation and warranty for each loan at issue in this proceeding.

B. The Plan Administrator's Breach Review Process Also Suffered from Flaws

The Trustees have criticized the Plan Administrator and its experts as "largely rel[ying] on claims of insufficiency of evidence and lack of 'certainty' predicated on speculation about what might have happened to a borrower after the loan was made." (Trustees' Post-Hearing Brief at 2.) Although this criticism is overstated, the Court nevertheless finds that, in many respects, the Plan Administrator's process of reviewing breach claims submitted by the Trustees was, at times, overly strict in evaluating breach claims and overly speculative in favor of the borrower. The "pass/fail" numbers provide support for this conclusion (i.e., the Plan Administrator only "passed"

1,263 loans out of the approximately 94,000 loans that went through Step 2 of the Protocol).

The parties have taken polar opposite views. The Plan Administrator criticizes the Trustees for, at times, ignoring corroborative evidence or giving more weight to third party evidence than to information in the loan application itself, essentially assuming that a borrower lied on his or her loan application. The Trustees fault the Plan Administrator for, at times, presuming the accuracy of loan applications that were filled out during a historic housing bubble that was due in no small part to the proliferation of so-called "liar loans." (Trustees' Post-Hearing Brief at 9.) There is some validity to both sides' positions.

As to the Plan Administrator's breach review process, the Court observes that the Plan Administrator relied too heavily on speculative alternative hypotheses that did not always provide a basis for discrediting the Trustees' proof of a breach. In addition, when rejecting the Trustees' breach claims, the Plan Administrator often responded with generalized, stock statements that did not provide particularized reasons for the rejection. Additional clarity surrounding the Plan Administrator's "fail" determinations may have led the Trustees to conduct additional review or may have fostered further dialogue regarding the Trustees' alleged claims.

During his cross-examination, Mr. Grice was shown several loan files he had reviewed and as to which he agreed with the Plan Administrator's determination to "fail" a breach claim asserted by the Trustees because he believed that the Threshold Fact giving rise to the alleged breach was supported by insufficient evidence. After examining the evidence again, he conceded that, upon further consideration, he would be inclined to change his conclusion on at least one of the files he was shown. Here are a few examples.

Loan Number 7599

The Trustees asserted a misrepresentation of occupancy claim for Loan Number 7599. In applying for a loan in 2005 to purchase an Arizona property, the borrower had represented that it would be his primary residence. The Trustees alleged that it was more likely than not that the borrower did not use the Arizona property as his primary residence.

At trial, Mr. Grice reluctantly conceded that, while it may be possible that a borrower employed in Washington, D.C. continued to tele-work for his Washington, D.C.-based employer from his new residence in Arizona, the evidence of (i) a 2012 letter in the loan file stating that the borrower used the Arizona property as a rental property and (ii) the Washington, D.C. address on his 2010 W-2 suggests that it is more likely than not that the borrower did not use the Arizona property as his primary residence between the time of origination in 2005 and 2012, as he had represented at origination. Notwithstanding this evidence in the Claim Package, however, Mr. Grice continued to raise hypotheses and possibilities that he had raised during his original review of the file, including (a) that the borrower's Washington D.C. employer could have had an Arizona office (a fact he admitted he had not investigated) and (b) the observation that there was no solid evidence put forth by the Trustees regarding 2005, the year of the borrower's alleged misrepresentation. On redirect examination, Mr. Grice was shown a letter from the borrower's Washington D.C. employer indicating that the borrower would be retaining his position upon his move to Arizona. Thus, as Mr. Grice observed, no one piece of evidence is necessarily dispositive. Nonetheless, Mr. Grice's analysis of this particular misrepresentation of occupancy claim seems overly aggressive.

Loan Number 3301

In another example shown to Mr. Grice on cross-examination, Loan Number 3301, the Trustees had asserted a misrepresentation of income claim. On his 2005 loan application, the borrower, a respiratory therapist, had stated income of $8900 per month (approximately $106,000 per year). In 2015, during the Protocol, a loan reviewer had conducted a telephonic VOE, and had written on the VOE form that the borrower's income "in 2005?" was $50,318. The borrower's tax returns for 2008 and 2009 indicated annual income of $70,000 and $78,000, respectively, and a paystub from 2010 indicated annual income of $80,000. The 2015 VOE, the 2008 and 2009 tax returns, and the 2010 pay stub were introduced as evidence supporting the Trustees' assertion that it was more likely than not that the borrower had misrepresented his income in his 2005 loan application. The Plan Administrator had rejected the Trustees' income breach claim, and, during his review, Mr. Grice stated in his written narrative that "there is nothing in the file that points to a misrepresentation of income."

At trial, Mr. Grice again questioned (i) the reliability of the tax returns included in the Claim Package because they were unsigned (even after conceding that it is common for paid preparers to e-file tax returns, in which case the returns would be unsigned), (ii) the reliability of the telephonic audit VOE conducted ten years after origination (which VOE included a handwritten question mark), and (iii) the Trustees' use of post-2005 documents to attempt to prove what the borrower's actual income may have been in 2005. Notwithstanding, Mr. Grice conceded that the

Trustees' evidence was sufficient to cast doubt upon the Plan Administrator's rejection of the Trustees' breach claim here and he reconsidered his prior determination on this file.

Mr. Esses was also questioned about this loan during his cross-examination, particularly with respect to questions surrounding the audit VOE conducted ten years after origination, which VOE included a question mark handwritten next to the borrower's alleged income. Mr. Esses testified that he did not know whether each of the five Loan Review Firms utilized a standard script to conduct telephonic VOEs. It is clear to the Court that there was little, if any, uniformity employed by the five different Loan Review Firms when they conducted audit VOEs, let alone evidence that they used a rigorous or standardized process. In addition to being an example of the flaws inherent in the use of audit VOEs by the Loan Review Firms, this exemplar loan also illustrates the overly stringent standards applied by the Plan Administrator, who rejected the Trustees' breach claim on this loan notwithstanding the presence of evidence which established by a preponderance of the evidence that it is more likely than not that this borrower misrepresented his income.

Overall, the Court concludes that the Plan Administrator's breach review process was rigorous to a fault. It seems clear that far more than 1263 loans should have been "passed" by the Plan Administrator's team and that the $300 million claim amount touted by the Plan Administrator in its pre-trial brief is considerably off the mark.

C. Analysis of the Requirement That a Breach "Adversely and Materially Affects" the Value of the Loan

Because the Court has concluded that the Trustees failed to meet their burden of proof to demonstrate that each of the loans presented by the Trustees in the Estimation Proceeding contains a breach, the Court need not reach the second step of the claim analysis – whether each of the alleged breaches adversely and materially affects the value of the subject loan. Notwithstanding, the AMA analysis necessitates a certain amount of discussion, as the Court finds that the Trustees' proof failed there as well. Even assuming the Trustees had proven, for each loan at issue, the existence of a breach of a representation and warranty in the Governing Agreements, the Trustees failed to demonstrate that each breach had a material and adverse effect on the value of the subject loan.

As a threshold matter, the parties disagree on certain legal issues embedded in the AMA analysis. First, the Plan Administrator asserts that the time as of when AMA is assessed is the time notice of a breach is provided. The

Trustees, relying on the opinion of Mr. Aronoff and sharply disagreeing with Judge Castel's holding in MARM III, contend that AMA should be assessed as of the time of origination of the subject loan. The Court agrees with Judge Castel; the timing of the AMA inquiry is, as the Plan Administrator argues, unquestionably as of the time of notice or discovery of a breach. As Judge Castel stated MARM III,

[I]t is reasonable for the parties to bargain for a limitation on the representations and warranties such that the repurchase obligation is triggered only where a material breach at the time of contracting continues to have a material adverse effect at the time the breach is noticed or discovered and a remedy is sought. To conclude otherwise would give the Trusts a unilateral ability to put back loans that, after many years of performance, may have breaches even if those breaches no longer affect the Certificateholders' interests.

205 F. Supp.3d at 466.

In addition, in MARM III, Judge Castel clarified that the materiality requirement contained in individual representations and warranties should be analyzed separately from AMA. While it is undisputed that the Governing Documents require that AMA be demonstrated for each and every material breach asserted, the Trustees in the instant case presented no proof whatsoever on this point. As previously discussed, Mr. Aronoff testified that every breach had an adverse material effect on the value of the subject loan. Therefore, once a material breach was discovered, the Trustees concluded that the AMA requirement was met without any additional analysis being conducted.

The Court agrees with the Plan Administrator that, by conflating the question of whether a misrepresentation was "material" with the separate determination of whether the breach, if proven, adversely and materially affects the value of the loan, the Trustees effectively write the AMA requirement out of the Governing Agreements and render meaningless the requirement that AMA be assessed at the time of notice of the breach. In MARM III, Judge Castel criticized the MARM Trusts' expert for explaining breaches on a loan-by-loan basis while omitting any discussion of the resulting effect on certificateholders, finding as a fact that the Trusts' expert "looked at the materiality of the breach but made no systematic and separate assessment of whether the breach had affected the interests of the Certificateholders at the time the cure or repurchase obligation was triggered." MARM III, 205 F. Supp. 3d at 473. The Trustees' approach here was no different.

As previously discussed, the Trustees grouped similar types of breaches into categories and asserted AMA based on breach type. In Mr. Aronoff's view, because a certain breach type "will always have the same effect with respect to an investor," it will therefore "always, absent specific circumstances, have the same [AMA] with respect to that type of breach finding." (Dec. 13, 2017 Hr'g Tr. at 2313:18-2314:7.) Mr. Aronoff testified that, because the overarching premise of securitization is homogeneity – enabling investors to assess risk by looking at a pool of loans – representations and warranties serve as the primary source of promises providing homogeneity and one can thus reach breach and AMA conclusions across groups of loans. The Court observes that Mr. Aronoff's views in this regard highlight the conflict between the premise of securitization and the need for loan-by-loan determinations to support putback claims.

Despite continuing to acknowledge that they were not relieved of their burden of proof on a loan-by-loan basis, the Trustees based their AMA proof on Mr. Aronoff's views and attempted to present exemplar loans for their largest "breach type" categories in order to provide the Court with the ability to extrapolate from the exemplar loans to the breach categories and then to the greater pool of Covered Loan Claims. Approximately $9.1 billion of the $11.4 billion claimed by the Trustees has been attributed to one of what the Trustees refer to as the "Big Four" breaches – borrower breaches of income, debt, occupancy, and DTI.

Exhibits annexed to Mr. Aronoff's expert report purported to demonstrate, in summary form, that the borrowers on the 72,500 loans at issue here made considerable misrepresentations regarding their income, debt, and/occupancy on their loan applications and that the magnitude of these massive misrepresentations could be quantified utilizing percentage amounts.

This "breach type" approach to AMA was unsuccessful. First, as the Court has found, the Trustees' exemplar loans were far from exemplary and, even if the Court were to determine that each such exemplar loan was a breaching loan, the Court has been provided with no basis on which it could apply a finding of breach on an exemplar loan to each of the loans in an entire breach category. Moreover, the summary analysis of breach type by magnitude (presented by the Trustees through the exhibits to Mr. Aronoff's expert report) is inadequate to prove intentional misrepresentations or misstatements by a borrower. This failure of proof is fatal to the Trustees' approach to AMA.

In MARM III, Judge Castel held that proof of a borrower's intentional misstatement of information, i.e., proven borrower deceit, suffices to prove AMA. 205 F. Supp. 3d at 470. The Trustees attempt to apply this holding to the instant case, arguing that

The facts here support the inference that the vast majority of the misrepresentations in the Trustees' core claims were intentional. A borrower does not mistakenly overstate her income by 20% of more; and a full 90% of the misrepresentation of income claims involves [stet] overstatements of that amount or greater. Nor does a borrower just happen to forget the existence of a mortgage on a property the borrower didn't bother to mention in his loan application. Whatever the motivations and concerns behind them, these sorts of misstatements are intentional, not innocent.

(Trustees' Pre-Trial Brief at 37.) The Trustees' position, in essence, is that for certain magnitudes of misrepresentation by a borrower, the Court should assume borrower deceit. The Trustees refer to such loans as "liar loans." As support for this view, the Trustees point to the "general understanding" that there was massive institutional wrongdoing by sponsors and pervasive lying by borrowers during the housing bubble that was created prior to the subprime crisis.

Intentional misstatements or deceit by particular borrowers, however, cannot be proven either by providing statistics as to the magnitude of breaches or by pointing to macroeconomic conditions and general behavior at the time of issuance of the subject loans. It is more complicated than that. First, the Court observes that, at the time of origination of the loans at issue here, the standard loan application contained no definitions or directions for the applicant. The ambiguities inherent in the loan application could easily contribute to a blurring of the line between intentional and unintentional misstatements by a borrower. It is also possible to conceive of situations in which a borrower had no intent to make a misrepresentation at the time of origination but, due to changed circumstances, the information stated in his or her loan application proves to be "untrue." In yet other instances, intent to deceive indeed may be inferred, but even in those cases, the criteria for evaluating intent is imprecise. Notwithstanding the court's holding in MARM III with respect to intent and AMA, proof of a borrower's intentional misstatement of information may not, in this Court's view, suffice to prove AMA in all circumstances. Most importantly, even if borrower intent to deceive can be proven, it would have to be demonstrated on a loan-by-loan basis and not on a category basis for a broad group of loans, as the Trustees attempt to do.

In addition, even assuming borrower intent could be inferred by examining magnitudes of alleged misrepresentation by borrowers – which the Court finds it cannot – the Trustees' proof in this regard suffered from significant shortcomings which preclude the Court from being able to determine the accurate percentage of income, debt, occupancy, and DTI breaches that would fall into this category. Simply put, the Trustees' "liar loan" theory of satisfying the AMA requirement must be rejected.

As the Court has discussed previously in connection with its observations regarding the testimony of Mr. Aronoff and the "breach type" summary exhibits to his expert report, the summary figures calculated by the Trustees and listed on such exhibits were computed based in part on flawed methodologies utilizing incomplete, incorrect, or subjective data. These exhibits purported to (i) summarize the claims asserted by the Trustees in each of their twelve major breach categories and (ii) demonstrate, through such summaries, the validity and materiality of each breach type, with particular emphasis in certain exhibits on the magnitudes of the alleged breaches. During his examination, Mr. Aronoff (a) conceded he did not prepare such exhibits, (b) was unable to explain the source of the data included, (c) admitted that the information came from a database (later identified as "TeamConnect") that had not been provided to the Plan Administrator, and (d) was presented with myriad examples of data included in the exhibits that were inconsistent with data in the Claims Tracking Spreadsheet. Additionally, the testimony raised serious questions regarding the reliability of the Trustees' breach category exhibits because certain data reflected in the exhibits was not accurately presented or was used in a misleading or incorrect manner. For example, Mr. Aronoff admitted that the "Actual Monthly Income" of a borrower listed was not actual income at all and that "Represented Monthly Income" may mean different things depending on the loan, such as (i) income from one job alone or (ii) income from multiple sources. The Trustees failed to lay a foundation through any witness that such exhibits were reliable. The Trustees attempted to utilize the exhibits to demonstrate the excessive nature of certain of the alleged breaches but, as a result of the exhibits' confirmed weaknesses, this "magnitude of breach" data cannot support the "liar loan" inference on which the Trustees rely to satisfy the AMA requirement for the vast majority of alleged breaches.

D. The Trustees' Calculator

Perhaps in an attempt to bridge some of the gaps in their proof, the Trustees presented at closing (over the objection of the Plan Administrator) a series of summaries pursuant to Federal Rule of Evidence 1006 which they urge the Court to utilize to "calculate" a damage amount based on whatever conclusions the Court reaches as to dozens of types and categories of proof. As described by the Trustees, "the calculator tool applies a series of filters on the Excel versions of the Aronoff exhibits submitted during the hearing." (Trustees' Post-Hearing Brief at 44.)

As an initial matter, the Court observes that the Trustees' suggested method of "subtracting" certain claim categories to end up with a proposed claim amount bears striking similarity to the methodology that the Trustees criticized in their pretrial brief. There, they stated that "Lehman also suggests that the Court could just apply various discounts to reach its proposed $2.3 billion estimate." (Trustees' Pre-Trial Brief at 43.) Yet, this is exactly how the Trustees, in closing argument, propose that the Court arrive at a damage claim, via the use of a so-called calculator. In essence, they urge the Court to apply various discounts based on the weight of the evidence and make a reasonable guess on an aggregate claim amount.

There are a variety of reasons that the so-called "calculator" cannot be used to sustain the Trustees' burden to prove breaches on a loan-by-loan basis. First and foremost, summaries of the sort contemplated by Rule 1006 are typically limited to a universe of objective data. Here, the Trustees' use of a "summary" to present the millions of pieces of data contained in some 72,500 loan files is not an appropriate use of Rule 1006. Next, as previously discussed, the summaries were prepared using the exhibits to Mr. Aronoff's expert report and the data therein; such summaries have been afforded little weight by the Court due to their reliance on incomplete, incorrect, or subjective data. In sum and substance, the Trustees have asked to Court to make significant leaps of faith to arrive a conclusion that the Trustees' loan process is entitled to an extraordinary degree of deference and that therefore, in essence, the Trustees can be relieved of the burden to prove their claim on a loan by loan basis. Neither the record nor applicable law supports such an approach. The Court declines the Trustees' invitation to use the calculator to guess at an allowed claim amount.

Because the Court has found that the Trustees have failed to meet their burden to demonstrate, by a preponderance of the evidence, the existence of a material breach of a representation and warranty for each loan at issue which materially and adversely affects the value of such loan, the Court does not reach the issue of purchase price calculation nor will it be addressed herein.

E. Estimating and Allowing the RMBS Claims at $2.38 Billion is Fair and Reasonable

While the stated purpose of the Estimation Proceeding was for the Court to estimate the allowed claim amount of the Trustees' RMBS Claims as if the parties had completed the Protocol, the Court was not presented with any methodology during the Estimation Proceeding which would enable it to estimate such amount on a loan-by-loan basis. As a result, the Court has determined that it must look to (i) the Institutional Investors Settlement and (ii) the Comparable Settlements in order to inform its determination of the allowed amount of the Trustees' RMBS Claims.

1. The Institutional Investors Settlement

The Institutional Investors Settlement in October 2015 encompassed a settlement of both the Covered Loan Claims and the Transferor Loan Claims (which, at the time, comprised a portion of the RMBS Claims) for $2.44 billion. Here, only the Covered Loan Claims are at issue, which results in a downward adjustment of the amount to $2.38 billion. There is no serious dispute that the Institutional Investors are all sophisticated economic actors. As such, with enormous amounts of their own capital and that of others at stake, they have strong incentives to maximize their returns and, conversely, minimize their losses. The Institutional Investors' willingness to settle their RMBS Claims against Lehman for $2.44 billion in 2015 is entitled to substantial weight in this proceeding.

While the Trustees attempted to demonstrate during the Estimation Proceeding that the behavior of the Institutional Investors is not aligned with the economic interests of the certificateholders represented by the Trustees herein, the Court finds otherwise. The

Institutional Investors collectively hold approximately $10.9 billion, or 24 percent, of the outstanding unpaid principal balance of all the Covered Loans. Although the Trustees attempted to suggest that the Institutional Investors' interests are not aligned with those of other certificateholders here because of the waterfall payment provisions, there was no evidence introduced that distinguishes the interests of the Institutional Investors from the interests of the other certificateholders. As the group holding the largest collective interests in this proceeding, the Institutional Investors unquestionably have an enormous incentive to seek the best possible economic outcome for themselves and their stakeholders. As the Trustees' expert Judge Smith conceded, the Institutional Investors are highly sophisticated financial institutions that collectively own or manage nearly $11 trillion in assets.

Moreover, as Judge Smith also acknowledged, the interests of the Trustees and the interests of the Institutional Investors are not aligned in certain respects. While it is true that the Trustees are indeed charged with protecting the economic interests of the certificateholders, they also act in their own economic interests, which interests may include concerns about exposure to liability. In contrast, the sole focus of the Institutional Investors is maximizing the return to their investors, and in so doing, preserving the value of the capital they have at risk and safeguarding their reputations as careful stewards of trillions of dollars of portfolios. The Court views their conduct as the single best barometer of the reasonableness of the Proposed Lehman Claim Amount here.

Finally, it bears noting that a number of the Institutional Investors have previously been involved in the Comparable Settlements analyzed by Professor Fischel, and that the trustees in such Comparable Settlements utilized Professor Fischel's analyses in those cases to arrive at the settlement amounts thereunder.

Accordingly, the Court concludes that the Trustees' RMBS Claims should be allowed in the amount of \$2.38 billion, the adjusted amount of the Institutional Investors Settlement for the Covered Loans at issue in the Estimation Proceeding.

2. The Comparable Settlements

The Plan Administrator, through the testimony of Professor Fischel, demonstrated that the Lehman Proposed Claim Amount of \$2.38 billion is well within the range of comparable settlements of RMBS put-back litigation. As previously discussed, Professor Fischel calculated the Recovery Ratios for five Comparable Settlements that involved sizeable put-back claims arising from similar legal and macroeconomic circumstances. The Recovery Ratios represent the ratio of the settlement consideration to the expected lifetime losses on the loans in the trusts that were releasing claims. The Recovery Ratios for the Comparable Settlements ranged from 6.9% to 17.1%, as follows: 7.1% for the JPMorgan settlement; 8.3% for the Citigroup settlement; 6.9% for the ResCap settlement; 13.2% for the Washington Mutual settlement; and a range of 7.9% to 17.1% for the Countrywide settlement. The 11.2% Recovery Ratio for the Lehman Proposed Claim Amount of $2.38 billion falls within the high end of the range of the Comparable Settlements. By contrast, the 55% Recovery Ratio for the Trustees' Proposed Claim Amount of $11.4 billion is more than three times greater than the highest Recovery Ratio of the Comparable Settlements. The Court is persuaded that the Comparable Settlements confirm the reasonableness of the Lehman Proposed Claim Amount of $2.38 billion.

To refute Professor Fischel's opinions, the Trustees attempted to (i) distinguish the Comparable Settlements from this case and (ii) establish that the Comparable Settlements do not accurately reflect RMBS put-back recovery rates. Although Professor Fischel conceded that the Comparable Settlements were achieved prior to full litigation of the claims in those cases and, in certain cases, there were statute of limitation defenses asserted, the Trustees did not meaningfully challenge the comparability of the Comparable Settlements to the RMBS Settlement. The Trustees argue that the Comparable Settlements are not comparable because they were entered into early in litigation and/or prior to a full loan review process, and the Trustees posit that, had the settlements occurred later in those cases, the settlement amounts would have been much larger. This argument must be rejected as a matter of common sense. To accept the Trustees' proposition would be tantamount to concluding that the trustees involved in the Comparable Settlements, many of whom are serving as Trustees herein, made decisions in those cases to abandon litigation claims that would have been worth three times more had they proceeded, at a minimum, through discovery, or to judgment. The Court finds this proposition wholly incredible. And while Judge Smith characterized the trustees in the Comparable Settlements as being "uninformed," this too flies in the face of common sense. Whatever else one might say about Goldman Sachs or BlackRock, "uninformed" is not a word that comes to mind.

Through the testimony of Judge Smith and Mr. Finkel, the Trustees also attempted to establish that the Comparable Settlements do not accurately reflect RMBS put-back recovery rates. Judge Smith criticized Professor Fischel's report because, in his opinion, it "contains virtually no analysis of the facts underlying, or the law applicable, to the Covered Loan Claims." (Smith Expert Report, ¶ 10.) With all due respect to Judge Smith, aspects of his report suffered from the same deficiencies – he provided no specific factual or legal bases on which to differentiate this case from the Comparable Settlements, nor did he provide any meaningful specific details about the cases he cited that purportedly demonstrate that settlement amounts are not predictive of case outcomes.

It is unremarkable and indeed not surprising that the Trustees found and presented, through the Finkel Comparable Settlements, other RMBS settlements that had Recovery Ratios greater than 11.2%. But, as previously discussed, the flaws in the Trustees' approach with respect to the Finkel Comparable Settlements were manifest, and many. The six RMBS put-back settlements presented to Mr. Finkel for calculation were selected, one might say "cherry-picked," by counsel to the Trustees; their Recovery Ratios ranged from 23% to 23.75% and counsel for the Trustees had represented the plaintiffs in each matter. The testimony revealed that Mr. Finkel did not review any settlements other than those provided to him by counsel. He was not provided with settlements with lower Recovery Ratios, such as the HSBC settlement introduced at trial, which had a Recovery Ratio of 12.7% and in which the Trustees' counsel had represented HSBC.

Moreover, as previously discussed, Mr. Finkel did no qualitative analysis of the Finkel Comparable Settlements; he did not analyze the default rates, the types of collateral, the vintage of the loans, who originated the loans, what portion of the settlement amount was allocated to attorneys' fees, or what motivated the settlement in each matter. Mr. Finkel also offered no opinion on how the Finkel Comparable Settlements did or did not compare to the Comparable Settlements and/or the Recovery Ratios for those settlements. Finally, the magnitude of the litigation involved in each of the Finkel Comparable Settlements was hardly akin to this multi-billion dollar case, and Mr. Finkel did not even attempt to draw a comparison.

If anything, Mr. Finkel's testimony demonstrated that the Recovery Ratios for the carefully curated Finkel Comparable Settlements did not approach the 55 percent Recovery Ratio sought by the Trustees here. The Trustees presented the Court with no basis upon which to conclude that the Finkel Comparable Settlements were the better set of comps, or why the Court should select a 23 percent Recovery Ratio when the Trustees seek an allowed claim that reflects a 55 percent Recovery Ratio.

Simply put, the Trustees have not only failed to demonstrate any basis on which the Court can conclude that the Comparable Settlements are not indeed comparable to the RMBS Settlement, but they have also failed to provide any evidence of any instance in the history of RMBS put-back litigation in which the Recovery Ratio has been anything approaching 55 percent. In their Post-Trial Brief, the Trustees noted that "the $2.38 billion figure proposed [by the Plan Administrator] is not a cash recovery – it is a claim allowance subject to the distribution percentage for allowed claims." (Trustees' Post-Trial Brief at 49.) As previously stated, that this case adjudicates a claim in a bankruptcy proceeding which will be paid in discounted dollars does not provide a basis for allowing the Trustees' RMBS Claims in an unsupportable inflated amount.

VI. CONCLUSION

For all of the foregoing reasons, the Court concludes that the Trustees' RMBS Claims at issue in the Estimation Proceeding shall be allowed in the amount of $2.38 billion. The parties are directed to submit an order consistent with the foregoing.