

Exhibit C

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**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

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-scc

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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

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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

1 loans. Securitization of the loans entailed the
 2 establishment of a trust or other special purpose vehicle to
 3 acquire the loans, hold the loans, and issue securities
 4 supported by proceeds of the loans. In connection with such
 5 securitizations, Lehman, or one of its affiliates, as
 6 sponsor, made certain representations and warranties
 7 regarding the quality and nature of the loans and/or the
 8 documents included in the applicable loan file. Each
 9 trust's Governing Agreements typically provide that the
 10 applicable trustee may seek repurchase of a loan by the
 11 sponsor in the event there occur breaches of such
 12 representations or warranties. In order to assert a
 13 repurchase claim, the Governing Agreements generally require
 14 a trustee to establish that: (i) a breach of a
 15 representation and warranty exists; (ii) the breach
 16 adversely and materially affects the value of the related
 17 mortgage loan; and (iii) prompt notice of the breach was
 18 provided to the sponsor.

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

25 On September 15, 2008, Lehman and certain of its

1 affiliates filed for bankruptcy in the largest chapter 11
2 filing in U.S. history. Approximately one year after the
3 bankruptcy filing, and pursuant to a court-established bar
4 date, certain RMBS trustees representing approximately 400
5 trusts, including the Trustees herein, filed proofs of
6 claims asserting approximately \$37 billion in repurchase
7 claims premised on allegations that certain of the Lehman
8 Debtors, as sponsors: (i) breached various representations
9 and warranties in the Governing Agreements regarding the
10 quality and characteristics of hundreds of thousands of
11 mortgage loans; and (ii) provided deficient mortgage loan
12 files. The proofs of claim asserted broad claims relating
13 to approximately 1.8 million mortgage loans in the
14 aggregate. However, the claims themselves only specifically
15 identified approximately 4,700 mortgage loans with alleged
16 breaches entitling the Trustees to damages of approximately
17 \$209 million – a miniscule portion of the alleged \$37
18 billion in claims. The claims did not provide documentation
19 supporting the \$37 billion number in alleged liability, as
20 was required by Lehman's bar date order and the underlying
21 Governing Agreements.

22 Treating the claims like any other claims asserted
23 against the bankruptcy estate, Lehman filed an omnibus
24 objection to the RMBS Claims on the basis that the Trustees
25 had violated the bar date order by, among other things, not

1 providing sufficient supporting documentation to allow the
2 Plan Administrator to assess liability, and it sought "loan-
3 level" proof of the asserted breaches and damages. Lehman's
4 objection was filed almost seven years ago, on March 14,
5 2011. Little, if any, such proof was forthcoming; indeed,
6 the Trustees were admonished by then presiding Judge James
7 Peck and told they would indeed be "put to their proof" in
8 order to have their claims ultimately allowed. (See June
9 30, 2011 Hr'g Tr. at 71:8-19 [Dkt. No. 18251]).

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

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

1 review.

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

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

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

3 And so the Protocol commenced. Faced with the
4 daunting task of reviewing hundreds of thousands of loan
5 files in the 16-month time period allocated to Steps 0-1 of
6 the Protocol before the Protocol's Claims Cut-Off Date of
7 March 31, 2016, the Trustees set about assembling small
8 armies of loan review firms and re-underwriting personnel.
9 Specifically, the Trustees' firms reviewed approximately
10 171,000 loan files and, after finding alleged breaches in
11 approximately 94,000 of such files, submitted them in the
12 form of claim files for the Plan Administrator to review in
13 Protocol Step 2. At the same time, upon receipt of the
14 claim files from the Trustees, the Plan Administrator
15 similarly embarked on the grueling task of reviewing such
16 files and approving or rejecting the claims asserted.

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

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

21 Although the objective of the Protocol had been to
22 narrow the underlying pool of disputed loans in order to
23 pave the way for resolution of the ultimate allowed claim on
24 each loan file either through business-to-business
25 negotiation, mediation, or, as a last resort, an evidentiary

1 hearing before the Court, Steps 2 and 3 of the Protocol did
2 not succeed in reducing the number of loans at issue
3 substantially below 94,000. After over two years of work
4 under the Protocol and with the parties being only halfway
5 through its 5-step process, it was obvious to all that the
6 Protocol had failed to achieve its objective.

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

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

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

20 Moreover, the RMBS Settlement Agreement
 21 specifically does not require the Court to issue findings of
 22 fact and conclusions of law if the Court estimates the
 23 claims at \$2 billion or more. Given the complexity of the
 24 issues presented, the magnitude of the dispute, and the
 25 enormous effort expended by the parties, a thorough detailed

1 decision is in order. Although it was originally
2 contemplated that the Estimation Proceeding would conclude
3 in early January of 2018, the occurrence of certain events
4 beyond the parties' control resulted in the delay of the
5 conclusion of the proceeding until mid-February. The tight
6 timeframe in which a decision is required precludes the
7 preparation of a more formal memorandum decision replete
8 with detailed citations to the voluminous trial record.
9 Nonetheless, the parties should be assured that the Court
10 has reviewed and re-reviewed the record extensively in the
11 preparation of this bench decision.

12 Given this backdrop and history, this has been a
13 peculiar RMBS trial, the only one of its own kind. Among
14 the additional unique features of this RMBS trial is what
15 has and what has not been introduced into evidence.
16 Pursuant to Exhibit G to the RMBS Settlement Agreement, the
17 parties agreed specifically to permit the introduction into
18 evidence of (i) the Institutional Investors Settlement and
19 (ii) materials concerning other settlement agreements in
20 disputes involving RMBS Claims. Notably, however, despite
21 the introduction into evidence of millions of pages of loan
22 files, there has been limited loan-level proof for the vast
23 majority of loans at issue. While certain so-called
24 "exemplar" loans were introduced into evidence and were the
25 subject of detailed testimony, no sampling methodology was

1 employed or adduced at trial. Moreover, not only have the
 2 loans and the loan files themselves been on trial but the
 3 processes by which each of the parties reviewed the loan
 4 files and breach claims have also been put on trial. As a
 5 result, the trial was dominated by testimony from each
 6 side's expert witnesses.

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

12 I. BACKGROUND

13 A. The Governing Agreements

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

21 In order to assert a claim against a Lehman
 22 sponsor under the Governing Agreements, the agreements
 23 specifically require the Trustees to prove for each mortgage
 24 loan: (1) a breach of a representation and warranty under
 25 the applicable MLSAA; (2) that the breach materially and

1 adversely affects the value of the mortgage loan; and (3)
2 that prompt notice of the breach was provided to Lehman.
3 See Cross-Motion at ¶ 43 (citing to Ex. E (SASCO 2005-1
4 MLSAA) at § 1.04(d)).

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

13 Under the "no default" rep and warranty under the
14 MLSAA, Lehman promises that "[t]here is no default, . . .
15 breach, violation or event of acceleration existing under
16 the Mortgage or the Mortgage Note and no event which, with
17 the passage of time . . ., would constitute a default." See
18 Trustees' Pre-Trial Brief, p. 10 (citing LXS 2006-15 MLSAA §
19 1.04(c)(vii)). While the No Default Representation does not
20 mention borrower misstatements, the underlying deed of trust
21 typically provides that "[a] Borrower shall be in default
22 if, during the Loan application process, Borrower . . . gave
23 materially false, misleading, or inaccurate information or
24 statements to Lender (or failed to provide Lender with
25 material information) . . ." Id. at p. 10 (citing TRX

1 362, Deed of Trust at 7).

2 The "no untrue statement" rep and warranty under
 3 the MLSAA states, in pertinent part, that "[t]he documents,
 4 instruments and agreements submitted for loan underwriting
 5 were not falsified and contain no untrue statement of
 6 material fact or omit to state a material fact required to
 7 be stated therein or necessary to make the information and
 8 statements therein not misleading. To the best of Seller's
 9 knowledge, no fraud was committed in connection with the
 10 origination of the Mortgage Loan." (Lehman Post-Trial Brief
 11 p. 16 n.98 (citing SASCO 2006-S3 MLSAA at § 1.04(c)(v) (TRX
 12 232)).)

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

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

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

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

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

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

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

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

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

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

1 1 MLSAA) at § 1.01).

2 B. The Protocol

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

8 The steps of the Protocol were as follows:

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

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

22 Step 2: Review of claim files by the Plan
23 Administrator. The Plan Administrator reviewed the claim
24 files and determined whether the Trustees proved a material
25 breach. If it determined that a material breach was proven,

1 the Plan Administrator approved the file and then either
2 approved or recalculated the purchase price. If the file
3 was not approved, the Plan Administrator prepared a
4 statement explaining the basis for rejection of the claim.

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

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

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

23 C. The Trustees' Protocol Process

24 The Trustees' loan review process under the
25 Protocol was led by Mr. James Aronoff and Mr. Edmond Esses

1 of Duff & Phelps ("D&P"); it was comprised of five stages:
 2 the Completeness Review; the Initial Loan Review; the Second
 3 Level Review; and two quality control reviews, referred to
 4 by D&P as QC1 and QC2. The first three stages of the review
 5 process were conducted by one of five forensic review firms
 6 hired by D&P (the "Loan Review Firms"), while QC1 and QC2
 7 were conducted by D&P. The Loan Review Firms were
 8 DigitalRisk, The Oakleaf Group, CrossCheck Compliance,
 9 EdgeMac, and Opus Business Services Group.

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

21 Next, in the "Initial Loan Review" of a loan file,
 22 a loan reviewer from one of the Loan Review Firms conducted
 23 what the Trustees characterize as a complete "re-
 24 underwriting" of each loan. In the "Second Level Review," a
 25 second loan reviewer purportedly conducted an independent

1 re-underwriting of any loans with material breaches
2 identified in the Initial Loan Review; loans that were not
3 found to have a breach in the Initial Loan Review were not
4 reviewed in the Second Level Review. In addition to
5 utilizing documents typically found in the loan files, such
6 as tax returns, Form W-2s, bankruptcy filings, credit
7 reports, and hardship letters, the Loan Review Firms often
8 utilized data and reports produced by third-party sources
9 such as credit bureaus (that is, Equifax, Experian, and
10 TransUnion); the Bureau of Labor Statistics ("BLS Data");
11 the Mortgage Electronic Registration System ("MERS");
12 DataVerify; LexisNexis; Accurint; and Salary.com. In
13 addition, the Loan Review Firms sometimes conducted a
14 verification of employment ("VOE"), generally done via a
15 telephone call, email, or fax, to a borrower's former
16 employer to inquire about the borrower's salary or
17 employment as of the date of origination of the loan. The
18 third-party data and VOEs were often obtained by the Loan
19 Review Firms during their Protocol loan review process.

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

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

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

17 At the QC2 level, Mr. Aronoff's team at D&P
18 repeated the review conducted in QC1; in addition, the QC2
19 reviewer was tasked with (i) confirming that the breach
20 finding was connected to one or more representations and
21 warranties in the applicable MLSAA, (ii) addressing any
22 questions raised during QC1, and (iii) analyzing the breach
23 claim for AMA and making a final determination on the claims
24 for submission to the Plan Administrator. Mr. Aronoff's QC2
25 team concluded that a defect had a material and adverse

1 effect on the value of a loan if it met one of the following
 2 four criteria: (1) the defect increases the likelihood of
 3 default with respect to the loan, thereby increasing the
 4 credit risk associated with such loan; a breach causing an
 5 increase in credit risk is material and adverse to the value
 6 of the loan; (2) the defect increases the potential loss
 7 severity with respect to the loan, thereby increasing the
 8 credit risk associated with such loan; a breach causing an
 9 increase in credit risk is material and adverse to the value
 10 of the loan; (3) the defect increases the potential loss
 11 severity and the likelihood of default with respect to the
 12 loan, thereby increasing the credit risk associated with
 13 such loan; a breach causing an increase in credit risk is
 14 material and adverse to the value of the loan; and (4)
 15 pursuant to the related governing documents, the defect is
 16 material and adverse to the value of the loan (i.e., a
 17 "Deemed AMA"). See TRDX-173.

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

1 calculate the purchase price for each loan.

2 D. The Plan Administrator's Protocol Process

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

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

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

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

1 the Protocol.

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

7 E. The "On-Hold" Loans

8 During Step 2 of the Protocol, the Plan
9 Administrator placed over 30,000 loan files "on hold"
10 following its determination that each such loan file was
11 missing one or more of the following documents deemed to be
12 "critical" to the Plan Administrator's review (collectively,
13 the "PA Critical Documents"): (i) servicing notes, which are
14 routinely compiled by the loan servicer and contain
15 communications between the servicer and the borrower,
16 including potential reasons for a borrower's default; (ii)
17 payment history, which provides information on loan payments
18 made by borrowers and how such payments are allocated to
19 outstanding principal and interest; (iii) loss
20 certifications, which provide a detailed calculation of the
21 unpaid losses on a loan; and (iv) corporate expense logs,
22 which record costs associated with servicing the loan and
23 costs incident to the foreclosure process, including the
24 dates such costs were incurred. The Plan Administrator
25 asserts that, when PA Critical Documents were missing from a

1 file, it made numerous requests for such information from
 2 the Trustees. In most cases, the Trustees did not obtain
 3 the requested documents and, as a result, the Plan
 4 Administrator never received them. During the Protocol, by
 5 an agreement among all parties, the Plan Administrator put
 6 aside all loan files missing one or more of the PA Critical
 7 Documents (Dkt. No. 53161; TRX-854, pp. 5-6) and it never
 8 reviewed such loan files unless it received the missing
 9 documents. The Plan Administrator argues that breach claims
 10 asserted on the "on hold" loans should be valued at zero.
 11 The Trustees disagree, and assert that such claims should be
 12 allowed in the full amount asserted. At trial, the number
 13 of "on-hold" loans was reduced to approximately 24,000 loan
 14 files as a result of collapsed trusts or withdrawn claims.

F. The Withdrawn Claims

15 F. The Withdrawn Claims
 16 During the Protocol, the Trustees asserted that a
 17 total of approximately 94,000 loan files contained material
 18 breaches. Subsequent to the termination of the Protocol and
 19 in connection with the Estimation Proceeding, the number of
 20 at-issue loan files was reduced to approximately 91,000 as a
 21 result of loans that had been paid in full, trusts that had
 22 terminated, and the parties' reconsideration of certain
 23 claims submitted during the Protocol. However, on June 1,
 24 2017, the Trustees submitted the Expert Report of James
 25 Aronoff, which offered opinions on approximately 76,044

1 loans files. Throughout June and July of 2017, the Plan
2 Administrator repeatedly requested that the Trustees provide
3 information on the basis for their withdrawal from the
4 Estimation Proceeding of approximately 72,088 breach claims
5 (the "Withdrawn Claims"), which included the withdrawal of
6 15,107 disputed mortgage loan files in their entirety. The
7 Trustees refused to provide any such information, asserting
8 that the rationale surrounding their decision to withdraw
9 certain loans from the Estimation Proceeding is protected by
10 attorney-client privilege and as attorney work product. The
11 Trustees have steadfastly maintained this position
12 notwithstanding the Plan Administrator's assertion that the
13 withdrawal of some 40% of the Trustees' breach claims
14 profoundly undermines the integrity and validity of the
15 Trustees' loan review process.

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

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

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

9 II. SUMMARY OF THE PARTIES' POSITIONS

10 A. The Plan Administrator

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

23 Specifically, the Plan Administrator asserts,
24 metaphorically, that "every loan is a snowflake" - that is,
25 that every loan and every loan file is unique. Thus, in

1 order to prove breaches of representations and warranties
2 under the Governing Agreements, the Trustees have the burden
3 to show, on a loan-by-loan basis, a Threshold Fact that
4 constitutes a breach of a representation and warranty in the
5 applicable MLSAA. Instead of making reliable and accurate
6 determinations of Threshold Facts, the Loan Review Firms,
7 argues the Plan Administrator, (i) relied on evidence
8 insufficient in quality and/or quantity, (ii) ignored
9 contradictory evidence, (iii) drew unsupported and
10 conclusory inferences, and/or (iv) failed to weigh all of
11 the relevant evidence when making their breach
12 determinations. The Trustees' claims were often based on
13 inconclusive evidence that was given more weight than the
14 borrower's statements in the loan application itself. In
15 contrast, the Plan Administrator contends that its own
16 review process was reliable and that its responses to the
17 Trustees' asserted breach claims were reasonable.

18 The Plan Administrator criticizes the Trustees'
19 determination of AMA by breach type and further asserts that
20 the Trustees did not prove AMA for each material breach
21 asserted as they conflated the question of whether a
22 misrepresentation was "material" with the separate
23 determination of whether the breach, if proven, adversely
24 and materially affects the value of the loan. By failing to
25 analyze AMA with respect to each specific loan and instead

1 matching a breach type to one of four types of AMA recitals,
2 the Trustees effectively write the AMA requirement out of
3 the Governing Agreements and render meaningless the
4 requirement that AMA be assessed at the time of notice of
5 the breach. Further, the Plan Administrator disagrees with
6 the Trustees' "risk of loss" analysis of AMA, asserting
7 instead that, in order to demonstrate AMA, the Trustees must
8 show actual loss in value on the loan at issue rather than a
9 material increase in the risk of loss that has yet to
10 actualize. Even assuming the Trustees' standard is the
11 correct one, the Plan Administrator points out that the
12 Trustees made no effort to quantify a baseline risk of loss
13 on any loan to determine whether the alleged breach had
14 significantly increased it.

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

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

11 B. The Trustees

12 The Trustees characterize their claims as
13 "straightforward breaches of contract" for which they seek
14 damages of approximately \$11.4 billion. They argue that
15 Lehman made sweepingly broad representations and warranties
16 in the Governing Agreements which were both standard in the
17 RMBS market and critical to investors. Specifically, Lehman
18 represented and warranted, as to each mortgage loan it
19 securitized, that (i) the documents submitted for loan
20 underwriting "contain no untrue statement of material fact
21 or omit to state a material fact;" (ii) the borrower did not
22 give "materially false, misleading or inaccurate statements
23 to Lender" or "fail[] to provide Lender with material
24 information;" (iii) there was no default under the mortgage;
25 and (iv) the borrower's ratio of debt to income ("DTI") did

1 not exceed a critical threshold. The Trustees submit that
 2 they have proven widespread breaches of these reps and
 3 warranties by providing Lehman evidence of breaches that
 4 they assert went largely un rebutted during the Protocol.

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

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

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

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

14 The Trustees' position is that a breach materially
15 and adversely affects the value of a loan if it increase the
16 risk of loss on that loan or decreases the price that a
17 purchaser would be willing to pay for it. Moreover, the
18 Trustees assert that because each of the breaches identified
19 by the Trustees during the Protocol increased the risk of
20 loss on the subject loan, every such breach materially and
21 adversely affected the value of the subject loan, thus
22 satisfying the AMA requirement. The Trustees assert that
23 (i) the term "materially affects" in the Governing
24 Agreements means that the breach at issue would have altered
25 the price that a willing purchaser would pay for the loan or

1 otherwise changed the risk of loss on a loan; and (ii) the
 2 term "adversely affects" means that the impact would be
 3 detrimental to the financial interests of the
 4 certificateholders by either lowering the price or
 5 increasing the risk of the security. The Trustees submit
 6 that they need not show the claimed breach caused an actual
 7 loss on a loan because the Governing Agreements do not
 8 require that loss causation be demonstrated to assert a
 9 repurchase claim based on a breach of reps and warranties.
 10 In other words, in sum and substance, and according to their
 11 expert, Mr. Aronoff, the Trustees' interpretation of the
 12 Governing Agreements and applicable law is that every
 13 material breach has an adverse material effect on the value
 14 of the subject loan.

15 Notwithstanding the loan-by-loan review conducted
 16 during the Protocol and acknowledging that, at trial, they
 17 were not relieved of their loan-level burden of proof, the
 18 Trustees maintained that it would be impossible to
 19 demonstrate breaches on a loan-by-loan basis during the
 20 Estimation Proceeding. Instead, the Trustee sought to build
 21 up to their aggregate claim by bucketing allegedly breaching
 22 loans based on "breach type" and presenting exemplar loans
 23 for each of the most significant breach categories. The
 24 vast majority of the Trustees' claims fell into one of four
 25 buckets that they deemed the "Big Four" - borrower breaches

1 of income, debt, occupancy, and DTI. Some 54,792 of the
2 Covered Loans and approximately \$9.1 billion of the
3 Trustees' claims can be attributed to one of the Big Four
4 breaches. The Trustees' intention was to provide the Court
5 with the ability to extrapolate from the exemplar loans to
6 the breach categories and then to the greater pool of
7 Covered Loans based upon what the Trustees assert was a
8 rigorous, multi-stage Protocol process. Significantly, the
9 Trustees did not rely on any statistical sampling
10 methodology to establish the amount of their claim.

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

25 III. APPLICABLE LAW

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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 Adelpia 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

1 presented at trial.

2 B. Burden of Proof

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

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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

1 no means exhaustive summary of some of those decisions.

2 1. Timing of the AMA Determination

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

13 The documents governing the MARM Trusts contained
14 repurchase provisions which are substantially similar to the
15 repurchase provisions contained in the Governing Agreements
16 in this case. The repurchase provisions stated that UBS was
17 obligated to repurchase a loan only upon showing the
18 existence of a material breach that "materially and
19 adversely affects" the interest of the MARM Trust
20 certificateholders. MARM III, 205 F. Supp. 3d. at 464.
21 Interpreting the unambiguous present-tense use of the word
22 "affects" and construing such language in the context of the
23 contract as a whole, the court held that AMA is measured as
24 of the date the repurchase demand is made, not the date that
25 the representations and warranties were made, which was

1 generally the "closing date" of the transaction. As Judge
2 Castel explained,

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

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

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

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

4 Id. at 466-67.

5 Providing further guidance, Judge Castel clarified
6 that the materiality requirement contained in individual
7 representations and warranties should be analyzed separately
8 from AMA. If a warranty was breached - for example, if a
9 borrower provided materially untrue information -then in
10 order for a repurchase obligation to apply, the trustees
11 must also prove that such breach "materially and adversely
12 affects" the interests of the certificateholders. Id. at
13 467.

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

22 2. Loss Causation and Proof of an Adverse
23 Material Effect

24
25 Under New York law, a plaintiff can only recover

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

7 Notwithstanding this fundamental principal of
8 contract law, several RMBS decisions involving monoline
9 insurance companies have held that, in order to mandate loan
10 repurchase pursuant to applicable contracts, plaintiffs need
11 not show that the alleged breaches caused the loans to
12 default, but only that the breaches materially increased the
13 plaintiffs' risk of loss. In Assured Guar. Mun. Corp. v.
14 Flagstar Bank, FSB, Judge Rakoff observed that "causation is
15 ordinarily an essential element of damages in a breach of
16 contract action" but that "'causation' is far from a self-
17 defining term, and raises all sorts of questions, such as
18 whether the causation must be direct or indirect,
19 transactional, proximate, risk-related, or whatever." 892
20 F. Supp. 2d 596, 601 (S.D.N.Y. 2012) ("Flagstar"). In
21 Flagstar, Assured Guaranty Municipal Corporation
22 ("Assured"), a financial guarantee insurer, brought an
23 action against Flagstar Bank, FSB, an issuer of securities
24 backed by home equity loans, alleging that the underlying
25 loans were either materially fraudulent or the product of

1 material underwriting defects. Because the Flagstar
2 governing documents did not mention "cause," "loss," or
3 "default" with respect to the defendants' repurchase
4 obligations, and the court observed that sophisticated
5 parties such as Flagstar and Assured would have expressed
6 their intent in the written contracts, the court
7 "conclude[d] that the contracts did not require the
8 plaintiffs to show that the breaches caused the loans to
9 default, but only that the breaches 'materially increased'
10 the plaintiff insurer's risk of loss." Id. (citations
11 omitted).

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

1 The courts in both Flagstar and Syncora relied on
2 the protections afforded to New York insurers under New York
3 insurance law, which defines warranty as "any provision of
4 an insurance contract which has the effect of requiring . .
5 . the existence of a fact which tends to diminish, or the
6 non-existence of a fact which tends to increase, the risk of
7 the occurrence of any loss, damage, or injury within the
8 coverage of the contract." Flagstar, 892 F. Supp. 2d at 602
9 (citing N.Y. Ins. L. § 3106(a)); see also Syncora, 874 F.
10 Supp. 2d at 339 (citing MBIA Ins. Corp. v. Countrywide Home
11 Loans, Inc., 936 N.Y.S.2d 513, 521-22 (Sup. Ct. N.Y. Cnty
12 2012)).

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

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

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

23 accepts Holt's conclusion that proven borrower
24 deceit materially and adversely affects the interests of the
25 Certificateholders. But in other instances, the Court has

1 examined the nature of the breach in the context of the
 2 total mix of information to determine whether Holt's opinion
 3 that the breach materially and adversely affected the
 4 interests of the Certificateholders should be accepted.

5 Id. at 475. The MARM III court conducted its own
 6 analysis by examining each alleged breach to determine
 7 whether it was in fact a breach and, if so, whether it
 8 materially and adversely affected the interests of the
 9 certificateholders. Notably, after examining 20 of the over
 10 9,000 loan files at issue and providing a detailed analysis
 11 as to those 20, Judge Castel stated that he would be turning
 12 the remaining files over to a Lead Master for the timely
 13 entry of findings of fact and conclusions of law relating to
 14 all loans not covered by his decision. MARM III did not
 15 address or award damages.

16 As in MARM III, other non-monoline cases in this
 17 District have held that demonstrating increased risk of loss
 18 is sufficient to trigger AMA repurchase conditions and that
 19 a showing of actual financial loss is not required. See,
 20 e.g., Wells Fargo Bank, N.A. v. JP Morgan Chase Bank, N.A.,
 21 2014 WL 1259630 at *4 (S.D.N.Y. Mar. 27, 2014) (concluding
 22 that "nothing in the contract's language suggests that an
 23 actual financial loss must precede a repurchase demand. A
 24 growing consensus among New York courts holds that [AMA]
 25 repurchase conditions are triggered when the plaintiff's

1 risk of loss increases and not just when that risk
 2 actualizes."); Homeward Residential, Inc. v. Sand Canyon
 3 Corp., 298 F.R.D. 116, 131 (S.D.N.Y. 2014) (finding that the
 4 plaintiff did not have to prove that a particular loan
 5 defaulted in order to prove that a breach "materially and
 6 adversely affects the value" of the mortgage loans at
 7 issue); Wells Fargo Bank, N.A. v. Bank of Am., N.A., No. 10
 8 Civ. 9584, 2013 U.S. Dist. LEXIS 44955, 2013 WL 1285289, at
 9 *10 (S.D.N.Y. Mar. 28, 2013) ("In keeping with other courts'
 10 approaches, the [c]ourt declines to equate ['material
 11 adverse effect'] with causing the loan to default.").

3. Sampling

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

19 Recently, in Deutsche Bank Nat'l Tr. Co. v. Morgan
 20 Stanley Mortg. Capital Holdings LLC, Judge Forrest engaged
 21 in a thorough analysis of statistical sampling and the
 22 propriety of its use in RMBS litigation. 2018 WL 583116,
 23 2018 U.S. Dist. LEXIS 12591 (S.D.N.Y. Jan. 25, 2018)
 24 ("Deutsche Bank"). As the court stated:

25 Sampling is a statistical means of "estimat[ing],

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

16 Id. at *8. Citing to Flagstar and Syncora among
17 other RMBS cases, the court stated that "[c]ourts applying
18 New York law have repeatedly approved the use of statistical
19 sampling [as] a means of proving liability and damages in
20 RMBS cases" (Id. (collecting cases)) and reasoned that
21 "proper statistical sampling is not a shot in the dark—it is
22 a well-established and scientifically sound method of
23 inferring (to varying degrees of certainty) how many
24 individual loans in the pool contain material breaches."
25 Id. at *15. While concluding that statistical sampling was

1 appropriate in the Deutsche Bank case, the court noted that
2 other courts in the Southern District of New York have
3 disagreed with its use, reasoning that statistical sampling
4 does not supply adequate or relevant proof regarding non-
5 sample loans. Id. at *9 (citing Mastr Adjustable Rate
6 Mortgages Tr. 2006-OA2 v. UBS Real Estate Sec. Inc., 2015
7 U.S. Dist. LEXIS 24988, 2015 WL 764665, at *10-11 (S.D.N.Y.
8 2015) ("MARM II"); Homeward Residential, Inc. v. Sand Canyon
9 Corp., 2017 U.S. Dist. LEXIS 187265, 2017 WL 5256760, at *7
10 (S.D.N.Y. 2017) ("Homeward")). See also Royal Park
11 Investments SA/NV v. HSBC Bank USA, Nat. Ass'n, (Case 1:15-
12 cv-02144-LGS-SN) [Dkt. No. 314] (February 23, 2018).

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

23 In MARM II, Judge Castel rejected the MARM Trusts'
24 use of statistical sampling to prove the trusts' theory of
25 "pervasive breach" - that UBS, as the sponsor, had effective

1 notice of widespread breaches throughout the loan pools even
 2 though, as of the conclusion of the statute of limitations
 3 period, UBS had only been provided loan-by-loan notice that
 4 21% of the mortgage loans were allegedly in breach. Judge
 5 Castel reasoned that statistical sampling did not supply
 6 adequate or relevant proof regarding non-sample loans where
 7 (i) due to the requirement in the governing agreements that
 8 AMA must be demonstrated, not all breaches would have
 9 triggered a cure or repurchase obligation and (ii) the
 10 defined terms utilized in the repurchase remedies set forth
 11 in the governing agreements were loan-specific. Id. at *11.

12 In the most recent RMBS decision issued by the
 13 District Court for the Southern District of New York, Royal
 14 Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n, the
 15 plaintiff certificateholders requested permission to re-
 16 underwrite a sample of loans to (i) prove that the
 17 defendant, HSBC, as trustee of the trusts that issued the
 18 RMBS certificates, had constructive notice of pervasive
 19 breaches in the loan portfolios and (ii) measure damages.
 20 (Case 1:15-cv-02144-LGS-SN) [Dkt. No. 314] (February 23,
 21 2018).) The defendant trustee opposed the plaintiffs'
 22 request to use sampling. Finding that the plaintiffs must
 23 prove that HSBC breached its contractual obligations on a
 24 loan-by-loan basis, Judge Schofield rejected the use of
 25 sampling, observing that "unavoidable fact that a sampling

1 is just that, and by definition cannot provide loan specific
2 information as to any loan outside the sample." Id. at 9.

3 She continued:

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

16 Id.

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

25 D. The MLSAAs are Rejected Executory Contracts

1 and Thus the Trustees' Claims are Prepetition Breach Claims

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

25 The lens through which the Plan Administrator

1 views the Trustees' claims is contract rejection, i.e., the
2 Trustees have a contract rejection claim arising from
3 Lehman's rejection of certain of the Governing Agreements as
4 executory contracts under section 365 of the Code. The
5 Court does not disagree. "If the contract is executory and
6 the debtor rejects it, the non-debtor party is left with a
7 pre-petition unsecured claim for breach of contract." In re
8 Hawker Beechcraft, Inc., 486 B.R. 264, 277 (Bankr. S.D.N.Y.
9 2013). As counsel for the Plan Administrator conceded, the
10 notional amount of damages incident to MLSAAs rejected in
11 bankruptcy should not differ from the amount of damages
12 which would be awarded pursuant to the MLSAAs outside of
13 bankruptcy. The sole distinction is that the damage amount
14 here will constitute the allowed amount of the Trustees'
15 claims, and the Trustees, on behalf of their
16 certificateholders, will receive from Lehman the
17 distribution to which such allowed unsecured claims are
18 entitled under the confirmed plan. The happenstance that
19 these are bankruptcy claims does not provide a basis for
20 applying concepts of loss causation that would not be
21 applicable were these claims adjudicated in a non-bankruptcy
22 forum, nor, on the other hand, does it provide a basis for
23 allowing the claims in a larger amount to compensate for the
24 fact that the claims will be paid in discounted bankruptcy
25 dollars.

1 IV. THE TRIAL

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

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

22 In the Plan Administrator's rebuttal case, the
23 Court heard the testimony of Dr. Bradford Cornell, an expert
24 witness who testified regarding damages and valuation. The
25 Court also (i) viewed designated video deposition testimony

1 and reviewed designations from the expert reports of Mr.
2 Daniel I. Castro, Jr., an expert witness who was tendered as
3 the Plan Administrator's AMA expert on the valuation of
4 mortgage loans and the impact of certain breaches on the
5 value of a loan; (ii) reviewed deposition designations from
6 the deposition of Mr. Fiachra O'Driscoll, who was designated
7 but not tendered by the Trustees as an expert witness
8 regarding the materiality of the Trustees' breach claims and
9 the meaning of applicable contract provisions within the
10 securitization industry; and (iii) reviewed deposition
11 designations from the deposition of Mr. John Burnett, who
12 was designated but not tendered by the Trustees as an expert
13 witness regarding servicing industry custom and practices.

14 The Court heard live testimony from the following
15 witnesses in the Trustees' case in chief: (a) Mr. Edmond
16 Esses, the Head of Investigations at Duff & Phelps who
17 served as the Trustees' Project Manager under the Protocol
18 and testified regarding the Trustees' loan review process;
19 (b) Mr. James H. Aronoff, a principal at Baker Tilly who
20 testified as both a fact witness regarding the Trustees'
21 loan review process and as an expert witness regarding (i)
22 the validity and materiality of the breach claims submitted
23 by the Trustees and (ii) the validity and integrity of the
24 Trustees' loan review process; (c) Mr. J.F. Morrow, an
25 expert who testified regarding the validity and materiality

1 of the breach claims submitted by the Trustees based on his
2 review of a sample of such claims; in lieu of live cross-
3 examination and re-direct examination of Mr. Morrow, the
4 parties submitted deposition designations and designations
5 of Mr. Morrow's rebuttal expert report; (d) Dr. G. William
6 Schwert, an expert witness who testified regarding the
7 methodology he used to select the loans reviewed by Mr.
8 Morrow; (e) Dr. Karl N. Snow, an expert witness who
9 testified regarding the net purchase price associated with
10 the Trustees' breach claims; (f) Dr. Richard W. Ellson, an
11 expert witness who testified regarding the value of non-
12 liquidated loans subject to the Trustees' breach claims and
13 whose valuation was utilized by Dr. Snow; (g) Hon. Robert S.
14 Smith (Ret.), an expert witness who testified in rebuttal to
15 Professor Fischel's opinions regarding comparable RMBS
16 settlements and the Institutional Investors Settlement; and
17 (h) Mr. James K. Finkel, an expert witness who also
18 testified in rebuttal to Professor Fischel's opinions.

19 In addition, pursuant to Exhibit G to the RMBS
20 Settlement Agreement, millions of pages of documentary
21 evidence, including the parties' Claims Tracking
22 Spreadsheets, as well as the voluminous loan files and other
23 documents exchanged by the parties during the Protocol, were
24 admitted into the trial record. The parties also utilized
25 dozens of demonstrative exhibits in support of witness

1 testimony, filed pre-trial and post-trial memoranda of law,
2 and presented three days of opening and closing arguments.

3 Summaries of the testimony of the witnesses
4 follow.

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

7 1. Mr. Zachary Trumpp

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

21 Mr. Trumpp's testimony over the course of three
22 days included a discussion of the evidentiary standards the
23 Plan Administrator applied to its review of the Trustees'
24 claims during Step 2 of the Protocol. Mr. Trumpp testified
25 at length to the Plan Administrator's documentary

1 requirements when carrying out its review of the Trustees'
 2 submissions. Specifically, he described the four PA
 3 Critical Documents and the reasons the Plan Administrator
 4 required the presence of such documents in the loan file
 5 before it could conduct its review; without the PA Critical
 6 Documents, such loans were placed "on hold" by the Plan
 7 Administrator and not reviewed until the documents were
 8 provided to the Plan Administrator.

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

17 In describing the Plan Administrator's approach,
 18 Mr. Trumpp emphasized that Lehman did not assert all
 19 possible defenses to the Trustees' claims during the Plan
 20 Administrator's Step 2 review; rather, his goal was to make
 21 "fair assessments." Mr. Trumpp testified that Lehman
 22 examined the Trustees' Claim Package as well as the evidence
 23 in the loan file (beyond what the Trustees themselves
 24 referenced) to determine whether there was evidence
 25 sufficient to demonstrate a Threshold Fact or whether the

1 evidence supplied was inconclusive. Mr. Trumpp emphasized
2 that the Plan Administrator eschewed any "bright-line
3 rule[s]" when conducting this holistic evaluation of each of
4 the Trustees' claims. Mr. Trumpp testified that when
5 determining whether the AMA standard had been met, the Plan
6 Administrator considered a variety of "compensating factors"
7 such as macroeconomic conditions at the time of alleged
8 breach; the state of the job market; life events affecting
9 the borrower's ability to pay; and the performance history
10 of the loan. He expressed his view that not all losses and
11 not all defaults arose out of breaches of representations
12 and warranties, and that he believes the Trustees ignored
13 this inquiry in making their claims submissions.

14 In discussing the Trustees' claims, Mr. Trumpp
15 criticized, among other things, (i) the Trustees' use of
16 "boilerplate" AMA assertions for the "materiality basis" of
17 alleged breach claims, (ii) the Trustees' citation to
18 incorrect guidelines in their breach claims, (iii) the
19 Trustees' assertion of claims of misrepresentation of debt
20 where the debt in question was incurred post-origination of
21 the subject loan, and (iv) the Trustees' assertion of claims
22 that overlooked contradictory evidence that the Plan
23 Administrator found in the loan file. He was also surprised
24 by certain types of claims the Trustees asserted, such as
25 breach claims (a) based on missing documentation, (b)

1 related to regulatory requirements, and (c) on active loans
2 that were still performing over a decade post-securitization
3 - all claims that would, in his view, typically not be
4 pursued in RMBS put-back litigation.

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

15 On redirect examination, Mr. Trumpp explained
16 that, in the cases emphasized by the Trustees, such demand
17 letters and the piece of evidence attached thereto merely
18 served the purpose of "opening a dialogue" on a subject
19 loan. He testified that when repurchase claims were
20 actually litigated, the evidence on which Lehman relied was
21 more considerable, often including multiple types of
22 evidence obtained through extensive discovery, which may
23 have included deposition testimony obtained pursuant to
24 Federal Rule of Civil Procedure 30(b)(6). In Mr. Trumpp's
25 view, the Trustees did not support their claims nearly as

1 thoroughly in the Estimation Proceeding. He testified that,
2 of the approximately 70,000 claims of breach asserted in the
3 Trustees' major breach categories, approximately 48,000 of
4 such breach claims were supported by only one type of
5 evidence. Finally, Mr. Trumpp distinguished prior cases
6 highlighted by the Trustees during cross-examination on the
7 grounds that (i) they involved the repurchase of whole
8 loans, not securitized loans and (ii) the applicable
9 agreements contained repurchase provisions different from
10 those in the MLSAAs here.

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

15 2. Professor Daniel R. Fischel

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

1 Professor Fischel analyzed the reasonableness of
2 the Plan Administrator's proposed allowed claim amount of
3 \$2.38 billion and the Trustees' proposed allowed claim
4 amount of approximately \$11.6 billion. In his analysis,
5 Professor Fischel compared the parties' proposed allowed
6 claim amounts to (a) the amount of the Institutional
7 Investors Settlement and (b) the recovery ratios for five
8 comparable large global RMBS settlements referred to as the
9 "Comparable Settlements." From such comparisons, Professor
10 Fischel drew two primary conclusions: (i) the Institutional
11 Investors Settlement supports estimating the Covered Loan
12 Claims at \$2.38 billion and (ii) a \$2.38 billion allowed
13 claim reflects a recovery ratio that falls at the higher end
14 of the range of Comparable Settlements, while the \$11.4
15 billion claim now asserted by the Trustees is far above that
16 range.

17 Professor Fischel testified that, in his
18 experience analyzing large RMBS settlements, it is routine
19 to compare a proposed settlement to settlements in
20 comparable cases to assess reasonableness. Here, Professor
21 Fischel chose cases with characteristics similar to this
22 proceeding: RMBS cases involving put-back claims for alleged
23 breaches of representations and warranties in connection
24 with loans originated in the years leading up to the housing
25 crisis, and which involved a large number of trusts. He

1 recognized that an exact comparison of the settlements would
2 be difficult but opined that he could reach certain
3 conclusions based on the Recovery Ratios.

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

22 Professor Fischel examined illustrative factors
23 relating to the size of settlement payments and found that
24 certain factors tend to increase the size of a settlement
25 (such as the availability of prejudgment interest), while

1 other factors tend to reduce it (such as a legal or
2 practical impediment to the plaintiff's claim). He
3 evaluated nine principal factors: (i) the nature of the
4 claims being released; (ii) non-cash considerations; (iii)
5 practical impediments to the plaintiff's pursuit of claims
6 such as the monetary cost of litigation or delayed recovery
7 caused by litigation; (iv) legal impediments to the
8 plaintiffs' pursuit of claims, such as a statute of
9 limitations; (v) the ability of the potential defendant to
10 pay a cash judgment; (vi) the differences in governing legal
11 issues and standards; (vii) the differences in the
12 underlying loans; (viii) the time period of the settlement;
13 and (ix) incentives of the defendant to settle that go
14 beyond avoiding costs of litigation, such as reputation.
15 With the exception of the seventh factor, the difference in
16 the underlying loans, the results of which were deemed
17 inconclusive, all of the evaluation factors used by
18 Professor Fischel were qualitative and not quantitative.
19 Professor Fischel testified that many of the factors that
20 tend to increase the size of a settlement payment are not
21 present in this case.

22 On cross-examination, the Trustees successfully
23 demonstrated that a number of the aforementioned factors
24 that Professor Fischel believed would decrease settlement
25 amounts were applicable to the Comparable Settlements but

1 not applicable to this case. For instance, Professor
2 Fischel admitted that a number of the Comparable Settlements
3 related to claims that were subject to the assertion of
4 statute of limitation defenses, another factor which also
5 tends to lower settlement amounts. Professor Fischel
6 acknowledged that many of the Comparable Settlements
7 occurred pre-litigation and the Trustees elicited evidence
8 suggesting that settlement amounts are more likely to
9 increase as litigation advances. In the comparable case of
10 Citigroup, Professor Fischel was shown evidence that certain
11 trusts elected to opt-out of the Citigroup global settlement
12 and to pursue litigation; after the lawsuit of the opt-out
13 trusts progressed through the discovery stage, those opt-out
14 trusts received a substantially higher settlement amount
15 than the trusts that accepted Citigroup's global settlement
16 offer. Professor Fischel admitted that pre-litigation
17 settlements could result in lower settlement amounts because
18 the parties desire to avoid litigation costs.

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

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

23 Other than eliciting Professor Fischel's general
24 acknowledgment that the Comparable Settlements were achieved
25 prior to full litigation of the claims in those cases and

1 that, in certain cases, there may have been statute of
2 limitation defenses asserted, the Trustees failed to
3 meaningfully challenge the comparability of the Comparable
4 Settlements to the RMBS Settlement.

5 3. Mr. Charles Grice

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

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

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

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

13 The essence of Mr. Grice's opinion is that every
14 loan file and every borrower is unique, and that in order to
15 conduct a loan review properly, one must consider everything
16 about the borrower. Mr. Grice identified numerous
17 challenges presented by the loan files in this proceeding.
18 First, he believes that a loan file is generally an
19 incomplete depiction of the borrower. He also noted the
20 inherent difficulty in completing the standard loan
21 application form inasmuch as interpretations of its terms
22 may differ from borrower to borrower. The standard
23 application contains no definitions or instructions on how
24 to complete it. Moreover, Mr. Grice pointed out, credibly,
25 that loan files degrade over time and that this presents a

1 particular challenge in reviewing loans that were originated
2 as long ago as the subject loans, most of which were
3 originated between 2002 and 2008 and are "older than
4 average." In his words, "there is a challenge created by
5 the passage of time" and "stuff goes missing in files. The
6 more auditors, the more examiners, the more loans are
7 subjected to inspection, investigation, photocopying,
8 shipping, things come out of files." (Dec. 5, 2017 Hr'g Tr.
9 at 1394:12-24). He testified that this is particularly true
10 for liquidated loans, loans that have been paid off through
11 foreclosure or otherwise. Mr. Grice vehemently disagrees
12 with the assertion of Mr. Morrow, one of the Trustees'
13 experts, that if it is not in the loan file, it did not
14 happen or exist at origination.

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

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

24 During his testimony, Mr. Grice reviewed various
25 loan files and gave compelling examples of ways in which,

1 despite what a particular piece of data appeared to suggest
 2 regarding an income or debt breach, other evidence in the
 3 file contradicted or called into question reliance on that
 4 one piece of data to support a claim of breach, particularly
 5 if that piece of data itself was unreliable. For example,
 6 for the loan ending in 8407, the Trustees asserted a
 7 misrepresentation of income claim based on BLS Data which
 8 ostensibly indicated the borrower's income was much lower
 9 than the income stated on his loan application. Mr. Grice
 10 demonstrated that, while the BLS Data used by the Trustees
 11 was for a "sales representative in a construction trade,"
 12 the evidence in the loan file indicated that the borrower
 13 was in fact the president of a construction firm. Mr. Grice
 14 also used this example to point out that using BLS Data as
 15 an income verification tool (i.e., not its intended use) can
 16 lead to extremely misleading results. He concluded that
 17 reliance on such data by the Trustees, particularly as the
 18 sole source of evidence of a breach claim, reflects flaws in
 19 the architecture of the Trustees' claims review process.

20 Mr. Grice also testified regarding what he termed
 21 "fundamental and significant deficiencies in the Trustees'
 22 breach analysis." Those included, in his opinion, the
 23 Trustees' (i) failure to give appropriate weight to
 24 information reflected in the loan application, including
 25 crediting what he viewed as less reliable information over

1 information in the application itself; (ii) failure to
 2 include inconsistent or contradictory evidence from the loan
 3 file in the Claim Package submitted to the Plan
 4 Administrator in support of the breach claim; (iii) failure
 5 to consider the materiality of the breach in the context of
 6 the origination credit decision; and (iv) failure to submit
 7 reliable evidence in support of breach claims, as previously
 8 discussed.

9 Finally, Mr. Grice's direct testimony thoroughly,
 10 and quite credibly, criticized the Trustees' claims of
 11 breach based on missing documents. Mr. Grice noted that, in
 12 his experience, it was atypical to see such a large number
 13 of asserted breaches based on missing documents. Here, he
 14 understood that, in reviewing the missing document claims
 15 asserted by the Trustees, the Plan Administrator frequently
 16 found that the allegedly missing document was, in fact, (i)
 17 actually in the file, (ii) missing but had what he referred
 18 to as a "footprint" in the file, (iii) located in part, or
 19 (iv) not a document that was required to be in the loan file
 20 in the first place. With respect to the fourth category,
 21 Mr. Grice opined that many of the Trustees' claims of breach
 22 based on the failure to provide a final TIL form or based on
 23 a missing HUD-1 form were without merit because (a) the
 24 requirement to maintain such forms for a certain period of
 25 time (if such a requirement had even existed for that

1 particular loan) had since elapsed or (b) contrary to the
2 Trustees' assertions, such forms were not required to be
3 signed or stamped. Additionally, Mr. Grice noted that, not
4 only were many of the Withdrawn Claims based on missing
5 documents, but there appeared to be no principled
6 distinction between the missing document claims that were
7 withdrawn and those that were not. Simply put, Mr. Grice
8 was not able to arrive at any understanding of the basis for
9 the Trustees' withdrawal of approximately forty percent of
10 their breach claims prior to the Estimation Proceeding.

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

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

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

3 4. Dr. Bradford Cornell

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

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

1 mathematical calculations.

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

14 Dr. Cornell constructed four illustrative
15 scenarios: (a) all Disputed Claims; (b) the Disputed Claims
16 excluding the non-liquidated loans; (c) the Disputed Claims
17 excluding the On-Hold Loans; and (d) the Disputed Claims
18 excluding both the non-liquidated loans and the On-Hold
19 Loans. For each of these four scenarios, Dr. Cornell then
20 calculated the amount of the Disputed Claims assuming
21 certain success rates (the "Presumed Success Rates")
22 provided by the Plan Administrator to Dr. Cornell. The
23 Presumed Success Rates included success rates for each of
24 Mr. Aronoff's 12 breach claim categories, and were further
25 bifurcated based upon the likelihood that the Trustees could

1 prove (a) the existence of a material breach and (b) that
2 such breach has an adverse material effect on the loan. The
3 Presumed Success Rates ranged from 1% to 20%. Dr. Cornell
4 did not provide any opinion on the accuracy or likelihood of
5 the Presumed Success Rates; there was no testimony on how
6 the Presumed Success Rates were selected. In his
7 calculations, Dr. Cornell also assumed that there was no
8 correlation between the success rates of multiple breach
9 claims on the same loan and, therefore, he treated each
10 breach claim as a "fresh bite at the apple." He explained
11 that such an assumption was favorable to the Trustees
12 because it statistically increased the Trustees' likelihood
13 of success on a loan with multiple breach claims.

14 In each of the four illustrative scenarios, Dr.
15 Cornell calculated the Trustees' aggregate claim amount for
16 the Compensable Claims and the Disputed Claims assuming that
17 the Trustees succeed in proving the Disputed Claims at rates
18 of (a) 100%; (b) the Presumed Success Rates; and (c) 0%. A
19 matrix presenting all of Dr. Cornell's calculations was
20 provided to the Court in PA Exhibit 987. By way of example,
21 for all Compensable Claims and all Disputed Claims excluding
22 the non-liquidated loans, Dr. Cornell calculated the
23 aggregate claim value to be (i) \$8,875,425,539, assuming a
24 100% success rate on the Disputed Claims; (ii)
25 \$1,836,173,758, assuming the Presumed Success Rates on the

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

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

11 5. Mr. Daniel I. Castro

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

25 Mr. Castro reviewed a sample of 380 alleged

1 breaches and agreed with the Plan Administrator that the
 2 Trustees had failed to meet their burden to establish AMA on
 3 378 of them. In large measure, because he agreed almost
 4 entirely with the Plan Administrator's breach
 5 determinations, Mr. Castro concluded that the Plan
 6 Administrator's AMA review process was reliable and was more
 7 likely than the Trustees' process to lead to an assessment
 8 of AMA that was consistent with industry standards. On the
 9 other hand, Mr. Castro stated that (i) the Trustees'
 10 position that the mere presence of a material breach
 11 standing alone proves AMA is contrary to industry custom and
 12 practice and (ii) the Trustees had conflated the question of
 13 whether there was a material breach with the question of
 14 whether such breach resulted in AMA.

15 Mr. Castro also opined that the Trustees' position
 16 with respect to the non-liquidated loans contradicts
 17 industry custom and practice. In his experience, repurchase
 18 claims (and, therefore, AMA determinations) are not
 19 typically made on performing loans because investors value a
 20 mortgage loan's ability to produce cash flows either through
 21 periodic mortgage and interest payments or through
 22 prepayment or liquidation. Instead, Mr. Castro stated that
 23 an investor would determine the existence of AMA based on
 24 whether a breach either (i) led to an actual default,
 25 delinquency, or other significant loss on a particular

1 mortgage loan; or (ii) impeded the servicer's ability to
 2 enforce the terms of the mortgage loan in default. A breach
 3 that did not lead to an actual loss or affect foreclosure
 4 rights in the event of a default was not typically
 5 considered to be "material and adverse" and did not result
 6 in repurchase.

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

24 Lastly, Mr. Castro disagreed with the Trustees'
 25 assertion that a breach has an adverse material effect on a

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

15 6. Mr. Fiachra T. O'Driscoll

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

1 designations.

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

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

24 7. Mr. John Burnett

25 Mr. Burnett was the Trustees' expert witness

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

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

23 B. The Trustees' Case in Chief

24 1. Mr. Edmond Esses

25 Mr. Esses is the Head of Investigations at D&P and

1 served as the Trustees' Project Manager for the Protocol.
 2 Mr. Esses was responsible for developing and overseeing the
 3 systems, processes, and personnel necessary to implement the
 4 Protocol for the Trustees. He worked under the supervision
 5 of Mr. James Aronoff until Mr. Aronoff left D&P in December
 6 2015.

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

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

1 5% of stated income should be reported). Mr. Esses also
 2 testified that D&P held weekly telephone calls with the Loan
 3 Review Firms to provide "real-time feedback." At the same
 4 time, Mr. Esses testified that he did not provide any
 5 instructions to the Loan Review Firms on the mechanics of
 6 how to conduct a forensic loan review. Instead, the Loan
 7 Review Firms were permitted to use their discretion and
 8 experience to review each loan file. In Mr. Esses' opinion,
 9 the Loan Review Firms were all well qualified and understood
 10 accepted industry practices, so D&P did not need to give
 11 them specific instructions. Mr. Esses' testimony on this
 12 subject was not particularly concrete. Notably, the
 13 Trustees did not present any testimony by any personnel
 14 employed by the Loan Review Firms who had reviewed the loan
 15 files at issue in this proceeding.

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

1 Trustees' status updates at court conferences. (Dec. 12,
2 2017 Hr'g Tr. 2061-2064).

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

17 Moreover, during his testimony, Mr. Esses
18 confirmed his understanding that (i) before placing loans
19 "on hold," the Trustees were warned by Lehman that if the PA
20 Critical Documents were not obtained for each loan at issue,
21 Lehman did not intend to review such loan files until the
22 documents were received and (ii) as a result of Lehman's
23 position, the Trustees agreed to place all loans missing PA
24 Critical Documents "on hold" until the Trustees obtained the
25 missing documents and that claims related to such loans

1 would not be expunged but would be resolved "at a later
2 time."

3 On cross-examination, Mr. Esses' testimony
4 revealed myriad flaws in the Trustees' Protocol process,
5 including the following: (i) Mr. Esses, as Project Manager,
6 never personally reviewed a loan file except to understand
7 the process; (ii) while the Loan Review Firms conducted two
8 independent reviews of each loan file, D&P itself never
9 reviewed the loan file during QC1 or QC2; (iii) in QC1, D&P
10 only checked the accuracy of the breach narrative against
11 the evidence in the Claim Package and did not look at the
12 loan file itself for evidence that might contradict the Loan
13 Review Firms' findings; (iv) when the Trustees asserted
14 missing document claims, they did not check the loan files
15 or any other source for the missing documents - in fact,
16 missing document claims were not reviewed at all in QC1 or
17 QC2; (v) the Trustees took no depositions, obtained no
18 public records, got no records custodian affidavits, issued
19 no records subpoenas, conducted no field reviews, and
20 conducted no interviews of anyone involved in loan
21 originations as support for their breach claims; and (vi)
22 the Trustees generally did not consult the underlying
23 underwriting guidelines or the product profiles to determine
24 whether a breach met the AMA standard for a claim (and when
25 they did, they apparently sometimes looked at the wrong

1 guidelines). Mr. Esses also admitted that, with respect to
2 the loan files themselves, he did not know what the
3 originators' practices were in handling hard copy loan
4 files, when or by whom the files were scanned, or whether
5 any documents went missing from the files between the time
6 of the closing of the loan and the review by the Loan Review
7 Firms. He testified that it was not part of the Trustees'
8 process to make sure that the contents of the loan file
9 being reviewed were the same as the contents in the file
10 that was on the closing table; the Trustees assumed for
11 purposes of their review that the loan file under review was
12 identical to the loan file at closing.

13 To arrive at a purchase price for each allegedly
14 breaching loan, Mr. Esses testified that the Trustees simply
15 transcribed the "realized loss" amounts directly from the
16 master servicer data tapes onto the Claims Tracking
17 Spreadsheet; the Trustees did not independently audit the
18 components (such as fees and accrued interest) used by the
19 master servicer to calculate the realized loss. Because the
20 numbers were provided by the master servicer, who in many
21 instances was Aurora, and because the same numbers were
22 reported to investors in the servicers' remittance reports,
23 Mr. Esses asserted his belief that such numbers were
24 reliable. However, Mr. Esses admitted that the Trustees did
25 not attempt to disaggregate which portions of the losses

1 were attributable to Lehman and which were not, although he
2 conceded that it was possible that losses to the Trusts
3 could be caused by things completely unrelated to any
4 conduct of Lehman. During his cross-examination, Mr. Esses
5 also confirmed that the Trustees did not utilize a model to
6 measure the risk of loss in connection with any loan, e.g.,
7 by setting a baseline and then quantifying an increase in
8 the risk of loss.

9 2. Mr. James H. Aronoff

10 Mr. Aronoff, currently a Principal at Baker Tilly,
11 has more than thirty years of experience in the structured
12 finance industry, focusing on RMBS in particular. He was a
13 managing director at Duff & Phelps at the time of
14 implementation of the Protocol, left the firm in December
15 2015 during the Protocol, and was re-hired by the Trustees
16 in May 2016 to continue to work on the Protocol, which had
17 continued in his absence. Mr. Aronoff was tendered by the
18 Trustees as an expert in loan origination, underwriting, and
19 securitization; factors affecting the value of mortgage
20 loans; the industry understanding of reps and warranties and
21 AMA language; and methods and evidence customarily used in
22 repurchase reviews.

23 Over the course of five days of the trial, Mr.
24 Aronoff gave extensive testimony in support of the Trustees'
25 case. He testified in two different capacities. As the

1 principal architect and "boss" of the Trustees' loan review
 2 process during the Protocol, Mr. Aronoff described in detail
 3 (i) the Trustees' loan review process, (ii) the Trustees'
 4 Protocol review of approximately 171,000 loan files for
 5 breach and their assertion of breach claims on 94,566 loan
 6 files, (iii) the types of evidence relied upon by the
 7 Trustees to assert their breach claims, and (iv) the major
 8 categories of breach claims asserted by the Trustees. In
 9 addition to this fact testimony, Mr. Aronoff offered his
 10 expert opinion that the process he had designed,
 11 implemented, and overseen as its "boss" was thorough and
 12 rigorous. His overall opinion is that, because the
 13 Trustees' loan-level review was conducted by experienced
 14 professionals in a manner consistent with the way in which
 15 such loan reviews are conducted in the industry and in
 16 reliance on types of evidence customarily used in put-back
 17 cases, the Trustees' breach findings presented in his report
 18 are (i) valid, (ii) material, and (iii) material and adverse
 19 to the interests of certificateholders.

Mr. Aronoff's Fact Testimony

20
 21 In describing the Protocol process, although he
 22 first attempted to suggest otherwise, Mr. Aronoff eventually
 23 conceded that his team provided no written guidance to the
 24 Loan Review Firms for their loan-by-loan review; rather, he
 25 stated, rather cavalierly, that because each of the firms

1 that was retained was engaged in loan review as their
2 primary business, there was not "much discussion or concern"
3 about telling them how to conduct the review. (Dec. 13,
4 2017 Hr'g Tr. at 2341:20-2342:4). Mr. Aronoff and his team
5 gave the firms guidance by telephone during the review
6 process as questions arose. Regarding the types of evidence
7 used by the loan review firms to support breach claims, a
8 subject about which he gave detailed testimony, Mr. Aronoff
9 opined that many of the types of evidence were "customary
10 sources" widely used in the industry and deemed to be
11 reliable.

12 While Mr. Aronoff designed and oversaw the
13 Trustees' loan review process, he testified that (i) he did
14 not know how the loans that were sent to each of the Loan
15 Review Firms were selected; (ii) he had no role in deciding
16 what documents would be requested from the servicers and did
17 not know whether origination or servicing files were
18 requested from any source other than the servicers; (iii) he
19 did not believe there is a requirement that an additional
20 layer of independent quality control is required to vet the
21 results of a forensic loan review; (iv) he did not know how
22 many claims were filtered out at each step of the Trustees'
23 loan review or at what level of review a breach finding may
24 have been rejected; (v) his QC team did not assess whether
25 the loan file contained any information inconsistent with

1 the breach claim because the QC reviewers did not look at
2 the loan file itself; (vi) his QC team could not verify
3 whether a missing document was actually in the loan file
4 because missing document claims were not reviewed by the QC
5 teams; and (vii) he himself did not review any loan file in
6 its entirety. Not a single one.

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

18 Mr. Aronoff testified that his interpretation and
19 understanding of the word "material" (as such term was used
20 in the context of identifying breaches) was based on what
21 was material to the credit risk of the loan in the
22 origination process vis-à-vis the investor; his statements
23 regarding materiality focused solely on credit risk rather
24 than on the potential effect a breach may have on the value
25 of the loan. When questioned on this issue, Mr. Aronoff

1 testified that, in his view, materiality, as such term is
2 used both with respect to the materiality of breaches and in
3 the AMA requirement, relates to credit risk (which he also
4 described as "risk of loss") on a loan. If the defect that
5 is the basis for the breach finding increases the risk of
6 loss to the investor, the breach is material, and every
7 material breach materially and adversely affects the value
8 of the underlying loan by increasing the credit risk vis-a-
9 vis the investor. Thus, he believes that the AMA
10 requirement is satisfied for each and every of the 72,500
11 loans for which the Trustees asserted a material breach.

12 Mr. Aronoff testified that the Trustees made their
13 breach determinations on a loan-by-loan basis but described
14 how, in his expert report, he grouped similar types of
15 breaches into categories (based on similar evidentiary bases
16 and on similar reps across loan pools). He opined that this
17 grouping, by breach type enabled him to illustrate that,
18 because a certain breach type "will always have the same
19 effect with respect to an investor" it will therefore
20 "always, absent specific circumstances, have the same [AMA]
21 with respect to that type of breach finding." (Dec. 13, 2017
22 Hr'g Tr. at 2313:18-2314:7). He testified that the reason
23 that a loan defaults is irrelevant to his loan analysis.
24 Accordingly, in submitting breach claims to the Plan
25 Administrator, Mr. Aronoff and his team tied the alleged

1 breach type to one of four "boilerplate" explanations of how
 2 the alleged breach may affect loan performance or loss
 3 severity. When asked at trial, Mr. Aronoff did not provide
 4 a single example of a loan as to which the Trustees asserted
 5 a material breach which he found did not have an adverse
 6 material effect on the value of the loan to investors;
 7 instead, his testimony demonstrated that, once a material
 8 breach was discovered, the Trustees concluded that the AMA
 9 requirement was met without any additional analysis being
 10 conducted. In other words, every material breach was
 11 effectively "deemed" to satisfy the AMA requirement.

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

22 Mr. Aronoff's Expert Testimony

23 Mr. Aronoff disagreed with any suggestion that, by
 24 virtue of his role in designing and implementing the
 25 Trustees' loan review process, he was not in a position to

1 give credible testimony about, in sum and substance, what a
2 superlative job he had done. His views on that topic were
3 crystal clear. With the exception of his acknowledgement of
4 a few of the "errors" that were pointed out to him during
5 cross-examination, Mr. Aronoff steadfastly held to his
6 opinion that every single one of the breach claims submitted
7 by the Trustees was valid. Since the Trustees elected not
8 to question Mr. Aronoff about the Withdrawn Claims, which
9 reduced the loan pool at issue in the Estimation Proceeding
10 from over 91,000 to approximately 72,500 loans, there was no
11 opportunity for the Plan Administrator to question Mr.
12 Aronoff about why such "valid" claims were not presented at
13 trial.

14 During his direct testimony, Mr. Aronoff was shown
15 a handful of exemplar loans that Mr. Grice had reviewed.
16 While Mr. Grice had concluded that, for each of the loans,
17 the Trustees had failed to put forth evidence sufficient to
18 support a claim of breach, Mr. Aronoff disagreed with all of
19 Mr. Grice's conclusions. When shown exemplar loans as to
20 which the Trustees had asserted claims for misrepresentation
21 of income, Mr. Aronoff emphasized several times that his
22 objective in reviewing loans and asserting income breach
23 claims was not to determine a borrower's actual income but
24 rather to determine whether it was more likely than not that
25 the income stated by the borrower on his or her loan

1 application had been misrepresented. Mr. Aronoff's
2 testimony regarding several different exemplar loans
3 revealed that, at times, certain assumptions had been made
4 by the Loan Review Firms when concluding that a material
5 breach had occurred. Moreover, a material breach finding
6 was often predicated on one single type or piece of evidence
7 with no secondary confirmatory source. On cross-
8 examination, Mr. Aronoff was shown a number of exemplar loan
9 files which revealed the subjective nature of the Trustees'
10 loan review and, at times, the reviewers' disregard of
11 contradictory evidence.

12 Mr. Aronoff's Expert Report

13 On cross-examination, Mr. Aronoff was shown
14 Exhibits 4-13 to his expert report, which exhibits purported
15 (i) to summarize the claims asserted by the Trustees in each
16 of their twelve major breach categories and (ii) to
17 demonstrate, through such summaries, the validity of each
18 breach type and Mr. Aronoff's conclusion that each breach
19 type met the Trustees' "materiality standard." When
20 confronted with such exhibits, which Mr. Aronoff conceded he
21 did not prepare, Mr. Aronoff was unable to explain the
22 source of the data included. He subsequently admitted that
23 the information came from a database (later identified as
24 "TeamConnect") that had not been provided to the Plan
25 Administrator; notwithstanding, he testified (but could not

1 confirm) that the data he used in his report should match
2 loan data from the Claims Tracking Spreadsheet used by the
3 parties. However, during his examination, Mr. Aronoff was
4 presented with myriad examples of data included in the
5 exhibits that was inconsistent with data in the Claims
6 Tracking Spreadsheet. He had no explanation for these
7 errors, instead simply stating that, even if the "values
8 were wrong, the conclusion doesn't change." (Dec. 18, 2017
9 Hr'g Tr. 2700:23-24).

10 Mr. Aronoff's testimony also revealed that the
11 exhibits to his report may not be reliable because certain
12 data reflected in the exhibits was not accurately presented.
13 For example, Exhibit 4 to Mr. Aronoff's report, entitled
14 "Misrepresentation of Income Breach Findings," purported to
15 depict an enormous "Monthly Percentage Difference" between
16 (i) a borrower's monthly income as represented on the loan
17 application and (ii) the borrower's "actual" monthly income
18 by listing these figures for each loan as to which the
19 Trustees asserted a misrepresentation of income breach
20 claim. As such, two columns on Exhibit 4 were entitled
21 "Represented Monthly Income" and "Actual Monthly Income."
22 When questioned on the meaning of such terms at trial, Mr.
23 Aronoff testified that "Represented Monthly Income" may mean
24 different things depending on the loan, such as (i) income
25 from one job alone or (ii) income from multiple sources. He

1 also conceded that the information contained in the "Actual
 2 Monthly Income" column was at times subjectively selected by
 3 the Trustees' loan reviewers from information in the loan
 4 file, with no consistent methodology employed. Admitting
 5 that perhaps the Trustees should not have used the term
 6 "Actual Income," Mr. Aronoff testified that the Trustees'
 7 objective was not to establish what a borrower's actual
 8 origination income was but instead to establish that, more
 9 likely than not, the income listed on the loan application
 10 had been misstated. He explained that, oftentimes, the
 11 number used as "actual income" was simply a number the
 12 Trustees felt comfortable using to recalculate DTI and to
 13 assert a breach of "Excessive DTI."

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

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

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

19 3. Dr. G. William Schwert

20 Dr. Schwert is a professor of finance, economics,
21 and statistics at the University of Rochester; he was
22 tendered as the Trustees' expert in statistics. Dr.
23 Schwert's assignment in this case was (i) to draw a
24 statistically significant random sample of loans from the
25 76,044 mortgage loans reviewed by Mr. Aronoff (the "Aronoff

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

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

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

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

13 Dr. Schwert's work provides scant support for the
14 Trustees' claims. Most notably, Dr. Schwert was not asked
15 to draw a representative sample of the entire pool of 94,566
16 allegedly breaching loans submitted by the Trustees through
17 the Protocol prior to the reduction of the loan pool by the
18 Withdrawn Claims. Dr. Schwert testified that he had no
19 information about the Trustees' claim submission process nor
20 did he design a sample specifically to test the reliability
21 of the Trustees' process for submitting claims through the
22 Protocol. Further, Dr. Schwert tested the
23 representativeness of the 600 Sample Loans against Mr.
24 Aronoff's breach categories but did nothing to determine
25 whether Mr. Aronoff had properly sorted the loans into the

1 correct breach categories. He did not sample the loans by
 2 the type of evidence used to support an alleged breach and
 3 he did not know whether the evidence types were
 4 proportionately represented in the 600 Sample Loans.

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

12 Dr. Schwert testified that the subsets of mortgage
 13 loans used by Mr. Grice and Mr. Castro to criticize Mr.
 14 Aronoff were not representative samples of Mr. Aronoff's top
 15 12 Breach Finding categories; he therefore concluded that it
 16 was impossible to extrapolate from their subsets to the
 17 larger Aronoff Loan Population. On cross-examination, Dr.
 18 Schwert conceded that the subset of loans reviewed by Mr.
 19 Grice and Mr. Castro included more loans from the Trustees'
 20 "big four" breach categories than he would have expected if
 21 they had reviewed a representative sample of the Aronoff
 22 Loan Population. Dr. Schwert also admitted that he did not
 23 examine whether the samples used by Mr. Grice and Mr. Castro
 24 were representative of the larger population of loans that
 25 the Trustees initially submitted to the Protocol, nor did he

1 consider the purposes for which Mr. Grice and Mr. Castro
2 chose their samples.

3 4. Mr. J. F. Morrow

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

15 Mr. Morrow was asked to conduct an independent
16 review of the 600 Sample Loans identified by Dr. Schwert to
17 assess the reliability of Mr. Aronoff's breach findings.
18 Mr. Morrow assembled a support team from Investors
19 Consulting Group ("ICG") to assist him with his review. He
20 did not give ICG formal instructions, relying instead on
21 ICG's experience and knowledge of market standards for re-
22 underwriting loans. Mr. Morrow and his ICG team completed
23 what he characterized as a re-underwriting of each of the
24 600 Sample Loans to determine whether a breach existed and,
25 if it did, to determine whether such breach met the AMA

1 standard. To ensure consistency between his loan
 2 determinations and those of ICG personnel, Mr. Morrow chose
 3 15 of the 600 Sample Loans to "calibrate" the review
 4 process. Mr. Morrow did not elaborate on how the 15 sample
 5 loans were chosen or whether the sample was statistically
 6 significant; he testified that he and ICG arrived at
 7 conclusions on the 15 sample loans that were consistent with
 8 one another.

9 Mr. Morrow agreed with Mr. Aronoff on 831 of 897
 10 of Mr. Aronoff's breach findings, yielding an Agree Rate of
 11 92.6%. He also agreed that 556 of the 600 Sample loans
 12 contained one or more breach findings, yielding an Agree
 13 Rate of 92.7%. Mr. Morrow stated that he disagreed with Mr.
 14 Aronoff on 14 loan files only because he located a document
 15 that Mr. Aronoff had claimed was missing from the file.

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

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

6 Although Mr. Morrow and Mr. Aronoff agreed on
 7 nearly 93% of the 600 Sample Loans, the significance of this
 8 result is undermined by the fact that Mr. Morrow's review
 9 was not conducted on a blind basis. First, Mr. Morrow and
 10 his team were aware that all 600 Sample Loans were loans
 11 that the Trustees assert have breaches. Further, Mr. Morrow
 12 relied on the Claim Package compiled by the Loan Review
 13 Firms; Mr. Morrow and his team did not review the entire
 14 loan file unless they disagreed with the asserted
 15 conclusions. In fact, Mr. Morrow testified that his team
 16 would cease their review of a sample loan once they found
 17 one piece of evidence corroborating a breach and that they
 18 did not look for contradictory evidence in the loan file or
 19 otherwise. And even though Mr. Morrow and ICG regularly
 20 used third-party data to support a breach finding, they
 21 merely relied on evidence already in the Claim File and did
 22 not independently gather or verify such third-party data.
 23 Mr. Morrow's review of the 600 Sample Loans would have been
 24 more persuasive had he worked on a pool of sample loans
 25 containing both allegedly breaching and non-breaching loans,

1 without knowing the "right" answer in advance.

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

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

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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

1 in order to confirm or deny the existence of certain
 2 breaches, such as a misrepresentation of income or debt. If
 3 there was inconsistent information in the loan file, Mr.
 4 Morrow believed, incorrectly, that it was Mr. Grice's burden
 5 to address it. Further, even though he acknowledged that
 6 underwriting guidelines may determine whether or not a loan
 7 had been breached - for instance, underwriting guidelines
 8 may dictate whether photographs are required to be included
 9 in the appraisal of a subject property - Mr. Morrow admitted
 10 that he did not consult the underlying underwriting
 11 guidelines unless the MLSAAs contained a representation and
 12 warranty related to such guidelines.

13 5. Dr. Karl N. Snow

14 Dr. Snow was tendered as the Trustees' expert on
 15 the calculation of damages. Dr. Snow has over 25 years of
 16 experience working in the areas of finance, economics, and
 17 statistical analysis in academia and the private sector. He
 18 has served as a damages expert in several other RMBS
 19 litigations including MARM III, In re Residential Capital
 20 LLC, and Syncora. Dr. Snow was retained to calculate the
 21 "Purchase Price" for each Covered Loan and to disaggregate
 22 the accrued interest component of the Purchase Price for
 23 such loans. Dr. Snow did not review any of the loan files
 24 and offered no opinion as to whether the loans provided to
 25 him by the Trustees contained valid breach claims. Dr. Snow

1 made it clear that he was not offering an opinion on damages
2 generally; rather, his opinion was limited to how damages
3 should be calculated under the Governing Agreements.

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

1 subject to a high level of scrutiny inasmuch as it is
2 available to investors and relied upon to determine the
3 amount of distributions they receive.

4 For liquidated loans, Dr. Snow did not calculate
5 the Purchase Price based on the aforementioned formula.
6 Instead, he adopted the realized loss value as reported by
7 the servicer as a surrogate for the Purchase Price; he
8 testified that such methodology was not inconsistent with
9 the Governing Agreements. Dr. Snow calculated an aggregate
10 Purchase Price of \$9,282,204,782 for all liquidated Covered
11 Loans. For non-liquidated Covered Loans, Dr. Snow
12 calculated the Purchase Price using numbers from the
13 Performance Data, and then subtracted the estimated current
14 value of such loans (as calculated by Dr. Ellson) from the
15 Purchase Price to calculate the "Net Purchase Price." Dr.
16 Snow calculated an aggregate Net Purchase Price of
17 \$5,382,554,290 for all non-liquidated loans as of April
18 2017. Lehman did not dispute the mathematical accuracy of
19 the calculations he performed based on the instructions he
20 was given by the Trustees.

21 The Trustees also asked Dr. Snow to offer an
22 opinion with respect to Dr. Cornell's views that (i) a
23 reliable Purchase Price on a liquidated loan cannot be
24 calculated without a loss certificate and corporate expense
25 log and (ii) the Purchase Price for non-liquidated loans

1 should automatically be zero based on Lehman's position that
2 these loans will suffer no losses. With respect to Dr.
3 Cornell's first contention, Dr. Snow testified that, in his
4 years of experience, he has never reviewed a loss
5 certificate because it has never been necessary to do so.
6 Additionally, Dr. Snow reviewed loss certificates and
7 corporate expense logs for 154 loans at issue here and
8 compared them to the Performance Data on which he relied.
9 He found that the loss certificates and corporate expense
10 logs provided greater detail about the fees and expenses
11 related to a loan but otherwise found no significant
12 difference between these two data sets. Dr. Snow opined
13 that Performance Data is more accurate than corporate
14 expense logs and loss certificates because the latter two
15 only provide a "snapshot in time." In his opinion, loss
16 certificates and corporate expense logs, in contrast to
17 Performance Data, do not reflect recoveries received or
18 expenses incurred subsequent to liquidation. Dr. Snow did
19 not review, nor did he give any opinion about, the need for
20 loan payment history or servicer reports, which documents
21 Lehman has also claimed are necessary to calculate the
22 Purchase Price on a breaching loan.

23 With respect to Dr. Cornell's second opinion that
24 the Purchase Price for non-liquidated loans should be zero,
25 Dr. Snow testified that, in instances in which there have

1 been loan modifications or if there is unpaid accrued
2 interest, a performing loan could yield a net purchase price
3 even if the market price of such loan was par, and
4 therefore, Dr. Cornell is incorrect. Dr. Snow clarified
5 that the Purchase Price under the Governing Documents, which
6 measures the historical losses of a loan, is not identical
7 to the market price of a loan, which measures future
8 performance. He also effectively rebutted the Plan
9 Administrator's argument that the Trustees' calculation of
10 Purchase Price ignores interest payments that
11 certificateholders have received on non-liquidated loans
12 since the unpaid accrued interest for such loans, which is a
13 component of the Purchase Price calculation, would be zero.

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

24 6. Dr. Richard Ellson

25 Dr. Ellson was tendered by the Trustees as an

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

24 Dr. Ellson testified extensively about the
 25 components, architecture, and reliability of LoanKinetics,

1 and it was evident from his testimony that he had been
 2 heavily involved in its sale and marketing. Dr. Ellson
 3 demonstrated that he was familiar with how LoanKinetics
 4 worked and that he had worked closely with ADCo's modeling
 5 and financial engineering group, which developed the
 6 underlying models prior to his employment at ADCo. However,
 7 on cross-examination, he admitted that he was less familiar
 8 with, and was not involved with, the testing or validation
 9 of the underlying models that LoanKinetics utilizes. Dr.
 10 Ellson confirmed that he relied on ADCo to validate the
 11 underlying models; and the Trustees did not present any
 12 other testimony regarding the reliability or accuracy of
 13 LoanKinetics.

14 In response to the opinion of Mr. Castro that
 15 performing non-liquidated loans were inappropriately
 16 included in the Trustees' claim, Dr. Ellson stated that most
 17 of the non-liquidated loans are "re-performing." By "re-
 18 performing," he means that such loans were not performing
 19 under their original terms but rather performing pursuant to
 20 modified terms that resulted in, for example, a reduction in
 21 principal balance or applicable interest rate. Dr. Ellson
 22 argued that the credit risk associated with re-performing
 23 loans is substantially greater than the risk associated with
 24 loans that have never been modified. To highlight this
 25 risk, Dr. Ellson testified that, as of the time of his reply

1 report, 11.13% of the non-liquidated loans at issue here
 2 were delinquent; 31.62% of the non-liquidated loans had been
 3 delinquent in the last year; 10.51% of the non-liquidated
 4 loans were in default; nearly 50% of the non-liquidated
 5 loans were sub-prime; and almost 40% of the non-liquidated
 6 loans were Alt-A. Dr. Ellson conceded, however, that he did
 7 not know why or under what terms any of the non-liquidated
 8 loans had been modified.

9 On cross-examination, the Plan Administrator
 10 attempted to establish that LoanKinetics was unreliable, as
 11 evidenced by data relating to the 804 non-liquidated loans
 12 that liquidated after Dr. Ellson issued his report. The
 13 realized losses on such loans were approximately \$94
 14 million, whereas Dr. Snow had calculated the Net Purchase
 15 Price for such loans to be \$144 million, a \$50 million
 16 difference. In response to this point, Dr. Ellson
 17 testified, unconvincingly, that the 804 non-liquidated loans
 18 had been terminated "ad-hoc" and that therefore those loans
 19 did not constitute a statistically significant sample that
 20 could support the conclusion that LoanKinetics was not
 21 reliable or accurate. He also stated that Lehman was not
 22 making an "apples to apples" comparison and that Lehman
 23 should have compared estimated losses as predicted by
 24 LoanKinetics (rather than the Net Purchase Price of the non-
 25 liquidated loans) to actual realized losses. Dr. Ellson

1 explained how Lehman should have used the LoanKinetics data
 2 to calculate expected losses on liquidated loans, and then
 3 compared those values to the actual losses. Upon making
 4 such a comparison, Dr. Ellson found that LoanKinetics
 5 actually predicted smaller losses in the event of
 6 liquidation than the actual loans suffered on the 804 non-
 7 liquidated loans and that the estimated loss predicted by
 8 LoanKinetics was 92% accurate. Dr. Ellson offered no
 9 opinion, however, as to why the Net Purchase Price on non-
 10 liquidated loans is not equal to the amount of estimated
 11 losses for such loans.

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

13 Over the objection of the Plan Administrator, the
 14 Trustees tendered the Honorable Robert S. Smith as an expert
 15 on the negotiation and evaluation of litigation settlements.
 16 Judge Smith testified that he has negotiated and overseen
 17 hundreds of settlements in his long career as a judge on the
 18 New York Court of Appeals, as an attorney in private
 19 practice, and as a mediator. Judge Smith was asked to opine
 20 solely on Professor Fischel's opinions that (i) the
 21 Institutional Investors Settlement supports estimating the
 22 Trustees' claims at \$2.38 billion and (ii) an allowed claim
 23 of \$2.38 billion reflects a recovery ratio that falls well
 24 within the range of recovery ratios in the Comparable
 25 Settlements. Based on his experience with settlement

1 negotiations, Judge Smith was of the view that Professor
 2 Fischel had no basis for rendering the opinions set forth in
 3 his expert report because (a) Professor Fischel overlooked a
 4 number of key factors with respect to the Institutional
 5 Investors Settlement and (b) Professor Fischel did not
 6 perform a quantitative analysis of the facts underlying the
 7 Covered Loan Claims to determine whether the Covered Loan
 8 Claims have a lower or higher probability of success than
 9 the claims settled in the Comparable Settlements.

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

1 Settlement.

2 Judge Smith opined that the Institutional

3 Investors were uninformed when they entered into the

4 Institutional Investors Settlement because they had not

5 performed a loan-by-loan analysis of their claims as the

6 Trustees have here in connection with the Protocol and the

7 Estimation Proceeding. He did acknowledge, however, that

8 the Institutional Investors are all large, sophisticated

9 financial institutions that are fully capable of making

10 informed settlement decisions. In Judge Smith's opinion,

11 the amount a litigant, particularly an uninformed litigant,

12 is willing to accept in a settlement is not predictive of

13 the outcome of a case. He believes that Professor Fischel

14 improperly likened the amounts of the Comparable Settlements

15 to a determination by this Court of the amount of the

16 Covered Loan Claims after a full trial. In his experience,

17 he has seen litigants in "good cases" settle for less than

18 50% of the amounts they sought; however, none of the

19 specific examples Judge Smith provided was from an RMBS case

20 nor did Judge Smith disclose sufficient substantive details

21 about those cases to draw thorough comparisons. Judge Smith

22 testified that he did not deem it relevant that the

23 Institutional Investors were some of the same parties that

24 negotiated the Comparable Settlements or that the parties

25 negotiating the settlement amounts in the Comparable

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

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

20 8. Mr. James K. Finkel

21 Mr. Finkel is a Managing Director and National
22 Practice Leader for Financial Crisis Disputes at D&P. He
23 has worked at a number of large financial institutions at
24 which he gained experience valuing fixed income and complex
25 securitized products. The Trustees tendered Mr. Finkel as

1 an expert in financial models; specifically, Mr. Finkel was
 2 asked to critique Professor Fischel's calculation of the
 3 projected lifetime losses on non-liquidated loans using the
 4 same ADCo LoanDynamics Model that Professor Fischel had
 5 used. Although Mr. Finkel had not previously used
 6 LoanDynamics prior to his work in this case, he was able to
 7 reverse-engineer Professor Fischel's approach with only a
 8 0.036% difference. After correcting what he considered to
 9 be certain errors committed by Professor Fischel, Mr. Finkel
 10 independently derived projected losses on the non-liquidated
 11 loans and calculated total lifetime losses (including
 12 historical and projected losses) of \$21.115 billion, which
 13 is \$49.86 million lower than the amount of losses calculated
 14 by Professor Fischel. Mr. Finkel stated that the effect of
 15 overstating lifetime losses would result in understated
 16 Recovery Ratios; he did not, however, calculate a different
 17 Recovery Ratio or state whether such difference was
 18 significant.

19 Mr. Finkel was also asked by the Trustees to
 20 compare the Recovery Ratio of the Lehman Proposed Claim
 21 Amount to the Recovery Ratios in six other RBMS put-back
 22 litigation settlements that were concluded between October
 23 2015 and September 2016 (the "Finkel Comparable
 24 Settlements"). To draw such comparison, Mr. Finkel used the
 25 ADCo LDM toolkit with the modifications previously described

1 and the reported realized losses for the trusts related to
 2 the Finkel Comparable Settlements to calculate the Recovery
 3 Ratios for those six settlements. Such Recovery Ratios
 4 ranged from 23% to 23.75%, higher than the 11.24% Recovery
 5 Ratio of the Lehman Proposed Claim Amount. Using the
 6 Recovery Ratios for the Finkel Comparable Settlements, Mr.
 7 Finkel derived benchmark settlement amounts for the Covered
 8 Loans that ranged from \$2.477 billion to \$2.668 billion
 9 higher than the Lehman Proposed Claim Amount of \$2.38
 10 billion.

11 Although Mr. Finkel's calculations were
 12 unchallenged, and, indeed, were unremarkable, his
 13 conclusions were of limited value. Mr. Finkel performed no
 14 analysis of and presented no rebuttal testimony on the
 15 Comparable Settlements and the Recovery Ratios for those
 16 settlements. Mr. Finkel did no qualitative analysis on the
 17 Finkel Comparable Settlements. He offered no opinion on how
 18 the Finkel Comparable Settlements did or did not compare to
 19 the Comparable Settlements. On cross-examination, Mr.
 20 Finkel admitted that he did not evaluate the similarities
 21 between the RMBS Settlement at issue here and the Finkel
 22 Comparable Settlements, which were settlements relating to
 23 individual RMBS trusts. In fact, he did very little
 24 analysis, if any, of the Finkel Comparable Settlements; he
 25 conceded that he did not analyze the default rates, the

1 types of collateral, the vintage of the loans, who
 2 originated the loans, what portion of the settlement amount
 3 was allocated to attorneys' fees, or what motivated the
 4 settlement in each matter. Further, Mr. Finkel did not
 5 engage in any attempt to review any other comparable
 6 settlements and/or compare them to the RMBS Settlement; he
 7 only looked at the settlements that were provided to him by
 8 counsel to the Trustees. As was revealed on cross-
 9 examination, counsel for the Trustees had carefully curated
 10 the Finkel Comparable Settlements. The Trustees' counsel
 11 represented the plaintiffs in each such settlement;
 12 significantly, only settlements with higher Recovery Ratios
 13 were presented to Mr. Finkel and not, for instance, a
 14 settlement in which Trustees' counsel had represented HSBC
 15 and which had a Recovery Ratio of 12.7%. While Mr. Finkel
 16 testified truthfully and accurately performed the tasks that
 17 he was assigned, his opinions are of little value to the
 18 Court.

V. DISCUSSION

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

23 Having reviewed at some length the voluminous
 24 evidence presented by the parties, the Court must now
 25 confront the question it has been asked by the parties to

1 this Estimation Proceeding. Have the Trustees demonstrated,
2 by a preponderance of the evidence, that they are entitled
3 to an allowed claim against Lehman in some amount greater
4 than \$2.38 billion? They have not, for a host of reasons.
5 Indeed, any of the shortcomings in the Trustees' proof that
6 the Court is about to identify would in and of itself
7 constitute a sufficient basis for denying the relief
8 requested by the Trustees. That there are, in the Court's
9 view of the record, multiple flaws, fallacies, and
10 deficiencies in the proof bolsters the ultimate conclusion
11 reached by the Court.

12 Before turning to a detailed discussion of the
13 proof at trial, it is instructive to revisit what the
14 parties set out to demonstrate. In their pretrial
15 memorandum, the Trustees stated that their "proof, which is
16 un rebutted for all but a tiny fraction of the loans at
17 issue, will demonstrate by a preponderance of the evidence
18 that Lehman breached the representations and warranties and
19 that it did so repeatedly for tens of thousands of loans."
20 (Trustees' Pretrial Brief at 5.) Even though at trial the
21 Trustees did not present their proof pursuant to any
22 sampling methodology, what the Trustees did present was, in
23 essence, "sampling lite" - the use of so-called exemplar
24 loans (and the so-called un rebutted "proof" in the Claims
25 Tracking Spreadsheet) from which they would ask the Court to

1 extrapolate to an aggregate claim amount. The Trustees
 2 urged that the Court could do so on a breach category by
 3 breach category basis because the Court would find that the
 4 Trustees' process was extremely reliable. The Trustees
 5 promised a roadmap that the Court could follow to arrive at
 6 an allowed claim amount. As it turned out, the roadmap
 7 presented required the Court to take too many shortcuts and
 8 to substitute conjecture for proof.

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

11 The Trustees' loan review process suffered from
 12 numerous flaws and shortcomings. Notably, not one single
 13 loan reviewer from the five Loan Review Firms employed by
 14 the Trustees appeared as a witness at trial to testify
 15 regarding the review process; such testimony would have
 16 enabled the Court to evaluate and/or compare the processes
 17 undertaken by the firms. Rather, the Court was asked to
 18 rely on the general descriptions offered by Mr. Esses and
 19 Mr. Aronoff, neither of whom reviewed a single loan file in
 20 its entirety, in order to understand the review process
 21 undertaken by the Loan Review Firms. No uniform set of
 22 instructions given to the firms, in writing or otherwise,
 23 was introduced into evidence. No rosters of personnel
 24 listing qualifications and experience were offered into
 25 evidence. The totality of the proof on this point - the

1 most fundamental level of proof on which the Trustees built
 2 their entire case - was Mr. Esses and Mr. Aronoff assuring
 3 the Court that the Loan Review Firms "knew what they were
 4 doing" and that what they were doing complied with "industry
 5 standards."

6 In MARM III, there was a similar absence of
 7 firsthand proof as to the underlying loan review process.
 8 Judge Castel noted that the backgrounds and professional
 9 experience of the MARM Trusts' individual loan reviewers -
 10 several hundred individuals employed by three different
 11 companies - were only "vaguely described." In addition, he
 12 observed that "[n]either party endeavored to show the extent
 13 to which the hundreds of individuals who worked on the loan
 14 review process were the same individuals employed in the
 15 process of underwriting subprime loans for other originators
 16 or institutions in the years leading up to the collapse of
 17 the financial markets in 2008." While Judge Castel stated
 18 that he would place "no weight on this undeveloped issue,"
 19 205 F.Supp. 3d at 403-04, this Court is troubled by the lack
 20 of foundational evidence on this critical issue.

21 Additionally, in MARM III, as here, testimony was
 22 elicited regarding the parties' failure to provide
 23 guidelines or parameters to the loan review firms. Judge
 24 Castel noted that UBS's expert testified that, for at least
 25 some portion of the loan reviewers, she provided no type of

1 written or oral instruction, instead directing them to "use
 2 common sense;" inasmuch as "[t]hese were all experienced
 3 either underwriters or reunderwriters[,] I didn't feel that
 4 I needed to explain to them how to calculate a DTI or, you
 5 know, some of the basic tenets of reunderwriting. They all
 6 had that experience." Id. Judge Castel held that, "[t]he
 7 Court's findings are informed by the work of [the experts]
 8 and their vendors, but that does not mean that the opinions
 9 of either are accepted or rejected wholesale." Id. at 405.
 10 So too here. The Court will give appropriate weight to the
 11 evidence in the record regarding the Trustees' process,
 12 including the work of the Loan Review Firms.

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

1 that the loan reviews were geared towards the discovery of
2 just enough evidence to support the assertion of a breach.

3 Another notable shortcoming of the Trustees'
4 process was a critical disconnect between the work performed
5 by the Loan Review Firms and the so-called "quality control"
6 review performed by D&P, a "QC" process which did little to
7 correct any errors that may have been made by the Loan
8 Review Firms while conducting their review of loan files in
9 search of potential breaches. Once a Loan Review Firm
10 finished its review of a loan file, it created a "Claim
11 Package" of original and third-party source documents -
12 sometimes only a single document - that it believed
13 supported any breach it had identified. The entire loan
14 file was never reviewed again for mistakes or inadvertent
15 errors once the Claim Package left the Loan Review Firm and
16 made its way to D&P for two rounds of quality control. In
17 fact, the quality control process did not include any review
18 by anyone at D&P of the entire loan file. Thus, if a loan
19 reviewer mistakenly missed a critical document in the loan
20 file, there was nothing in the QC1 or QC2 process conducted
21 by D&P that would have caught the mistake. In fact, Mr.
22 Esses, the Project Manager for the Trustees' loan review
23 process, admitted at trial that when the Trustees asserted
24 missing document claims, they did not even check their own
25 mortgage files (or any other source) for the missing

1 document before submitting the claim. Second, because the
 2 D&P QC team only reviewed the Claim Package, if contrary
 3 evidence existed in the loan file that was missed by the
 4 loan reviewer, the D&P QC team would not have found it. As
 5 Mr. Aronoff himself stated, D&P did not go "poking around in
 6 the loan files." (P.A. Ex 804, October 6, 2017 Aronoff
 7 Depo. Tr. at 262:21-22; Dec. 14, 2017 Hr'g Tr. at 20617:24-
 8 2618:2).

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

19 The significance of this flaw in the D&P QC
 20 process is further amplified by the Trustees' apparent
 21 application of the assumption that "if it is not in the loan
 22 file now it never was," the stated opinion of the Trustees'
 23 expert, Mr. Morrow. As Lehman's expert Mr. Grice testified,
 24 the loan files at issue here were generally old and their
 25 quality was poor, creating challenges surrounding the

1 integrity of the contents of the loan file due to the
2 passage of time. Even though the loans were originated at
3 least 11 years ago and in some instances more than 15 years
4 ago, the Trustees applied a presumption that a document that
5 is missing now - in 2017 or 2018 - had not been in the loan
6 file at origination. Further, no proof was presented as to
7 originator or servicer document retention policies,
8 digitization procedures employed by servicers, or any
9 evidence relating to the chain of custody of the loan files.
10 Mr. Esses admitted at trial that he did not know what the
11 originators' practices were in handling hard copy loan
12 files, when or by whom the files were scanned, or whether
13 any documents went missing. Mr. Esses further testified
14 that it was not part of the Trustees' process to make sure
15 the loan file being looked at by the Loan Review Firms was
16 the same as the loan file that left the closing table;
17 instead, the Trustees assumed for purposes of their review
18 that the file was identical. Indeed, the Trustees went so
19 far as to ignore the fact that a closing checklist may have
20 reflected the existence of a document at closing; even such
21 evidence seemed to be insufficient to rebut the presumption
22 that a missing document simply never existed. The apparent
23 failure to "evaluate the total mix of information" in the
24 loan file reflects poorly on the Trustees' loan review
25 process. See MARM III, 205 F. Supp. 3d at 446 (declining to

1 credit expert opinion that gave controlling or near-
 2 controlling weight to one document in the loan file and
 3 failed to evaluate the "total mix of information" in the
 4 file).

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

24 At trial, the Plan Administrator's expert, Mr.
 25 Grice, described in detail the limitations surrounding the

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

21 For example, BLS Data, if used correctly, may be
22 reliable as a highly generalized benchmark of the earnings
23 of someone employed in a particular job category in a
24 particular geographic area. But the evidence revealed that
25 the Loan Review Firms did not always correctly match the

1 actual job of a borrower with the correct BLS category. The
 2 Plan Administrator presented numerous examples during the
 3 trial of the foibles of BLS Data generally and as applied by
 4 the Trustees during the loan review process. The Plan
 5 Administrator presented evidence with respect to the
 6 limitations of BLS Data in that (i) it does not measure
 7 certain categories of compensation such as overtime,
 8 bonuses, or benefits and (ii) it is only conducted as a
 9 survey every three years. Notwithstanding, for many loans,
 10 the Trustees relied on BLS Data as the sole source of
 11 evidence of an alleged breach.

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

24 Another category of evidence relied upon by the
 25 Trustees which courts have concluded "must be treated with

1 caution and cannot be accepted at face value" is bankruptcy
 2 filings. See MARM III, 205 F. Supp. 3d at 476. In MARM
 3 III, the MARM Trusts' expert testified that he assumed the
 4 truth of a borrower's statements in a bankruptcy filing,
 5 even when they were contradicted by other sources that he
 6 considered reliable, and he concluded that a bankruptcy
 7 filing was a more reliable source of a borrower's income
 8 than the stated income on the loan application itself.
 9 Noting that a borrower may have an incentive to overstate
 10 income on a loan application but also an incentive to
 11 understate income in a bankruptcy petition, Judge Castel
 12 rejected the notion advanced by the MARM Trusts' expert that
 13 a statement in a bankruptcy proceeding "trumps all other
 14 available data and per se proves a misstatement" and
 15 declined to credit the expert's opinions as to DTI ratio
 16 breaches based solely on a borrower's statement in
 17 bankruptcy documents. See id. at 446.

18 Here, the parties disagree on the weight to be
 19 given to statements in a borrower's loan application versus
 20 statements made by the borrower in bankruptcy filings and in
 21 other documents deemed reliable in certain circumstances.
 22 The Court declines to establish a per se rule that a
 23 particular data source is unreliable but instead observes
 24 that, particularly when relying on a sole source of
 25 evidence, the Trustees failed to exercise a certain degree

1 of caution with respect to its use. As Judge Castel
2 observed, when statements in bankruptcy documents were
3 consistent with other information in the loan file, in those
4 instances, such statements "are properly considered as part
5 of the total mix of information that goes toward a
6 borrower's income." Id. Instead of taking into account the
7 "total mix of information in the loan file," including
8 either corroborative or contrary evidence, however, the
9 Trustees oftentimes relied on a sole type of evidence
10 "accepted in the industry" as dispositive and sufficient
11 proof of breach.

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

14 a. Discussion of Several Exemplar Loans

15 At trial, each side offered approximately a dozen
16 "exemplar loans" into evidence in connection with the direct
17 testimony of its expert or the cross-examination of the
18 other side's expert, presumably selecting the strongest
19 exemplar loans they could find from the universe of 72,500
20 disputed loans. As counsel for the Plan Administrator
21 pointed out in closing argument, the breach claims in the
22 exemplar loans presented by the Trustees at trial by all
23 accounts should have been "slam-dunk winners." This was not
24 the case. Rather, as counsel observed, some of them "were
25 at best jump balls." The Plan Administrator successfully

1 challenged the Trustees' breach claims on many of their
 2 exemplar loans, raising serious doubts about the extent to
 3 which the Trustees' loan review process could generally be
 4 trusted. The exemplar loans presented by the Plan
 5 Administrator during Mr. Aronoff's cross-examination
 6 revealed (i) the subjective nature of the Trustees' loan
 7 review and the assumptions made by the Loan Review Firms
 8 during their review, (ii) the Trustees' frequent reliance on
 9 one, often insufficient, piece of data as support for their
 10 claims, and (iii) at times, the loan reviewers' disregard of
 11 contradictory evidence or evidence that raised questions
 12 regarding the Trustees' breach claims. Here are some
 13 specific examples of exemplar loans that did not withstand
 14 close scrutiny.

Loan Number 2979

15
 16 The Trustees asserted a misrepresentation of
 17 income breach claim for Loan Number 2979, which loan was
 18 presented as an exemplar loan during Mr. Aronoff's direct
 19 examination. The borrower's 2006 loan application stated
 20 income of almost \$8,000 per month, or approximately \$96,000
 21 per year, earned as a self-employed HVAC contractor. The
 22 Trustees used the borrower's tax returns from 2006, 2007,
 23 and 2008 to assert that the borrower allegedly earned
 24 between \$2,166 and \$4,000 per month for those years, less
 25 than half the amount stated in his loan application. Mr.

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

14 In addition, the loan file for Loan Number 2979
 15 also contains a 2008 hardship letter from the borrower
 16 stating that business was excellent until late 2007 but, due
 17 to (i) a difficult customer who monopolized his time and
 18 (ii) emergency surgery, the borrower had fallen behind in
 19 his payments after that. The Trustees do not appear to have
 20 considered this letter. Given that the Trustees elected to
 21 use this loan as one of their exemplar loans at trial, one
 22 would have expected the breach claims asserted to be
 23 virtually flawless and backed by solid, uncontroverted
 24 evidence. Not so here. The fact that the Trustees elected
 25 to present this particular exemplar loan causes the Court

1 concern, highlighting as it does the subjective and
2 conclusory manner in which the Trustees' loan review process
3 appears to have proceeded with respect to this loan.

4 Loan Number 1955

5 The Trustees asserted a misrepresentation of
6 income breach claim for Loan Number 1955, another exemplar
7 loan presented during Mr. Aronoff's direct examination at
8 trial. For this loan, the borrower listed income of \$10,750
9 per month on his loan application in July 2006. The
10 Trustees based their breach claim on (i) the borrower's 2006
11 tax return, which listed monthly income of \$4050 per month
12 and (ii) the borrower's 2006 W-2 form, which corroborated
13 such amount. The borrower's tax returns, W-2s, and paystubs
14 from 2007-2010 showed similar income of between \$4055 and
15 \$4682 per month. The Plan Administrator disagreed with the
16 Trustees' claim of breach. After re-reviewing this evidence
17 from the loan file at trial, Mr. Aronoff testified that he
18 was certain that it was more likely than not, given the
19 evidence in the file, that monthly income of \$10,750 was a
20 misrepresentation.

21 The evidence presented on this exemplar loan
22 included the clear and striking admission by Mr. Aronoff
23 that the Trustees made no attempt to determine a borrower's
24 actual income; rather, it was enough to find evidence that
25 made it more likely than not that the borrower's represented

1 income was inaccurate. Notwithstanding, as previously
 2 discussed, the Trustees presented as exhibits to Mr.
 3 Aronoff's expert report summary charts of (i) the magnitudes
 4 of income breaches by borrowers and (ii) recalculations of
 5 DTI as compared with origination DTI in order to show
 6 seemingly staggering magnitudes of breach. All of the
 7 calculations reflected in these magnitude of breach
 8 summaries are based on what the Trustees referred to as
 9 "actual" borrower income, a term that Mr. Aronoff declined
 10 to adopt when examined at trial.

11 Loan Number 1643

12 For Loan Number 1643, the borrower, a registered
 13 nurse, stated monthly income of \$13,783 on her loan
 14 application in July 2006, which translates to annual income
 15 of \$165,400. The Trustees claimed that the borrower
 16 misrepresented her income on her loan application, citing as
 17 the sole support for their claim BLS Data that indicated
 18 that registered nurses at the 90th percentile of income in
 19 the same geographic area at the same time earned annual
 20 income of \$95,300. No other evidence was presented by the
 21 Trustees in support of their breach claim on this loan.
 22 During his direct examination, Mr. Aronoff testified to the
 23 existence of several "red flags" in the loan file that he
 24 stated would indicate that it is "more likely than not" that
 25 the borrower misstated her income. The red flags he

1 identified were (i) that the borrower had \$41,000 of credit
 2 card debt, which Mr. Aronoff opined should be unlikely if
 3 the borrower had over \$11,000 of free cash every month that
 4 she could have used to pay off the debt, and (ii) that the
 5 borrower's bank account held \$25,000, which was only
 6 approximately two months of free cash (based on her stated
 7 income).

8 When questioned about this loan file, Mr. Aronoff
 9 defended the Trustees' use of "red flags" to support BLS
 10 Data (as was done here), stating that their presence would
 11 indicate to the loan reviewer that the borrower's stated
 12 income "doesn't make sense for other reasons" and such red
 13 flags would be used "in reference to the totality of the
 14 file to support, based on a BLS income number, that it's
 15 more likely than not that income is misstated." (Dec. 14,
 16 2017 Hr'g Tr. at 2478:7-20). But there was no testimony
 17 whatsoever indicating that the loan reviewer had actually
 18 identified these red flags, on this file or any others. In
 19 response to questioning during cross-examination, Mr.
 20 Aronoff conceded that such "red flags" would be based on the
 21 loan reviewer's subjective interpretation. He also
 22 acknowledged that BLS Data does not take into account
 23 overtime, bonuses, or other sources of income that may add
 24 to a borrower's total earnings. Indeed, on this particular
 25 loan, Mr. Aronoff was also shown a hardship letter from the

1 borrower which the Trustees had not included in the Claim
 2 Package which revealed that the borrower had been supporting
 3 family members, her brother had been paying half the
 4 mortgage, and because he was moving out she was no longer
 5 able to pay the monthly payment in full. Based on the
 6 entirety of the evidence presented on this loan, it seems
 7 clear that the Trustees failed to prove that it is more
 8 likely than not that the borrower misrepresented her income
 9 in her loan application.

10 Loan Number 9621

11 The Trustees alleged a misrepresentation of income
 12 breach for Loan Number 9621. On the borrower's 2004 loan
 13 application, he listed income of \$12,000 per month (or
 14 \$144,000 per year) from his occupation as a self-employed
 15 realtor. The loan was issued in December 2004. As support
 16 for their claim of breach based on the borrower's alleged
 17 misrepresentation of income on his 2004 loan application,
 18 the Trustees relied on the borrower's 2005 tax return, which
 19 indicated income of \$1923 per month for 2005. The Trustees
 20 did not include in the Claim Package any evidence of the
 21 borrower's income in 2004, and Mr. Aronoff testified at
 22 trial that he did not know how much the borrower earned in
 23 any month in 2004. Because there was no evidence in the
 24 file of the borrower's 2004 income, Mr. Aronoff stated that
 25 the Trustees elected to assert their breach claim based on

1 information from the subsequent year. Relying on the
 2 borrower's subsequent year tax returns and on BLS Data
 3 indicating that the 90th percentile of realtors in his
 4 geographic area earn \$93,000 per year, Mr. Aronoff testified
 5 that the Trustees concluded that it was more likely than not
 6 that the borrower had misrepresented his income on his loan
 7 application. When questioned at trial, Mr. Aronoff
 8 acknowledged, however, that ten percent of realtors in the
 9 area covered by BLS Data would in fact earn more than
 10 \$93,000, and he also conceded that he did not know why the
 11 borrower had a decrease in income in 2005. The Trustees'
 12 conclusion as to misrepresentation of income for this loan
 13 is far too speculative to be sustained. It is not based on
 14 any evidence of the borrower's 2004 income, and it fails to
 15 acknowledge the variable nature of the income earned by the
 16 self-employed, particularly a self-employed realtor like the
 17 borrower on Loan Number 9621.

18 Loan Number 2963

19 The Trustees asserted a misrepresentation of
 20 employment breach claim for Loan Number 2963. They cited as
 21 the support for their claim (i) a VOE conducted at the time
 22 of origination of the loan and (ii) BLS Data. On the loan
 23 application, the borrower had listed his job title as
 24 "Senior Project Manager / Litigation." The VOE form, based
 25 on a phone call made at the time of origination, states that

1 the borrower's position was "EDD Manager." At trial, the
 2 VOE form was introduced during Mr. Aronoff's cross-
 3 examination; it included what Mr. Aronoff conceded appeared
 4 to be a typed notation by the loan reviewer that the
 5 borrower's position was "Employment Development Dept (Human
 6 Resources/Recruiter)." No evidence was introduced as to why
 7 the loan reviewer appears to have concluded that the
 8 borrower worked in a human resources position other than
 9 speculation that "EDD" is an acronym for, among other
 10 things, a state agency in California, the Employment
 11 Development Department. Nevertheless, the Trustees, in
 12 support of their breach claim, cited BLS Data for a human
 13 resources position indicating that the 90th percentile of
 14 earners in the borrower's geographic area earned \$89,400.

15 During his cross-examination, Mr. Aronoff
 16 reluctantly conceded that the Loan Review Firm had made a
 17 mistake on this loan with respect to its breach finding of
 18 misrepresentation of employment, the only claimed breach
 19 finding for this loan. This error was not caught during QC1
 20 or QC2. When presented with evidence indicating that it was
 21 more likely than not that the borrower did not work in human
 22 resources, Mr. Aronoff testified that he had not been aware
 23 of such information. Among other things, however, the loan
 24 file contained a financial statement listing the borrower's
 25 occupation as "Director Data Services." A simple "Google"

1 search for the name of the borrower's employer (which was
2 listed in the loan file) revealed that the firm was a
3 litigation consulting firm, and the term "EDD" likely meant
4 "Electronic Data Discovery." In addition, the loan file
5 contained a letter from the borrower's employer stating
6 that, before raises, the borrower earned \$120,000 per year.
7 Notwithstanding all of this information, the Loan Review
8 Firm selected an incorrect category of BLS Data for the
9 borrower (human resources) and, based on the \$89,400 number
10 generated for a human resources position, asserted a claim
11 of breach, ignoring the letter from the borrower's employer.
12 At trial, Mr. Aronoff acknowledged that this loan was
13 included on at least one of the exhibits to his expert
14 report which purported to summarize categories of breach
15 findings. The subjective and variable nature of the breach
16 conclusions reached by the Loan Review Firms is highlighted
17 by this exemplar loan and reveals that the Trustees' process
18 was, at times, a daisy chain of unfounded inferences and
19 faulty assumptions.

20 Although there were additional exemplar loan
21 presented at trial that survived scrutiny by the Plan
22 Administrator, the conclusion is inescapable that the
23 exemplar loans were not, on the whole, exemplary. Moreover,
24 as articulated in MARM III, while an exemplar loan "may have
25 been selected to illustrate a single, isolated point," there

1 is "no basis to conclude that the exemplar loans . . . are
2 representative of the universe of loans" at issue. 205 F.
3 Supp. 3d at 477.

4 b. The Withdrawn Claims

5 The Withdrawn Claims were the subject of countless
6 disputes and discussions in the months leading up to the
7 Estimation Proceeding and continuing into the Estimation
8 Proceeding. Why, asks the Plan Administrator, were some
9 72,000 breach claims withdrawn from those presented for
10 consideration to the Court? What is the difference between
11 those claims that were withdrawn and those claims that were
12 presented at trial? The Trustees have declined to provide
13 direct answers to these questions, instead selectively
14 revealing information to the Court regarding the withdrawal
15 of certain claims. For example, the Trustees presented
16 information to the Court which indicated that a majority of
17 the breach claims that were withdrawn were "missing
18 document" claims; however, there was no explanation of (i)
19 why all missing document claims were not withdrawn and (ii)
20 what distinguished those claims that were withdrawn from
21 those that were not. These unanswered questions cast
22 further doubt on the nature of the Trustees' loan review
23 process and leave the Court with difficulty in understanding
24 how the withdrawal of certain claims from the Estimation
25 Proceeding fits into the larger picture.

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

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

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

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

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

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

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

1 regarding the Trustees' alleged claims.

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

12 Loan Number 7599

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

20 At trial, Mr. Grice reluctantly conceded that,
21 while it may be possible that a borrower employed in
22 Washington, D.C. continued to tele-work for his Washington,
23 D.C.-based employer from his new residence in Arizona, the
24 evidence of (i) a 2012 letter in the loan file stating that
25 the borrower used the Arizona property as a rental property

1 and (ii) the Washington, D.C. address on his 2010 W-2
 2 suggests that it is more likely than not that the borrower
 3 did not use the Arizona property as his primary residence
 4 between the time of origination in 2005 and 2012, as he had
 5 represented at origination. Notwithstanding this evidence
 6 in the Claim Package, however, Mr. Grice continued to raise
 7 hypotheses and possibilities that he had raised during his
 8 original review of the file, including (a) that the
 9 borrower's Washington D.C. employer could have had an
 10 Arizona office (a fact he admitted he had not investigated)
 11 and (b) the observation that there was no solid evidence put
 12 forth by the Trustees regarding 2005, the year of the
 13 borrower's alleged misrepresentation. On redirect
 14 examination, Mr. Grice was shown a letter from the
 15 borrower's Washington D.C. employer indicating that the
 16 borrower would be retaining his position upon his move to
 17 Arizona. Thus, as Mr. Grice observed, no one piece of
 18 evidence is necessarily dispositive. Nonetheless, Mr.
 19 Grice's analysis of this particular misrepresentation of
 20 occupancy claim seems overly aggressive.

21 Loan Number 3301

22 In another example shown to Mr. Grice on cross-
 23 examination, Loan Number 3301, the Trustees had asserted a
 24 misrepresentation of income claim. On his 2005 loan
 25 application, the borrower, a respiratory therapist, had

1 stated income of \$8900 per month (approximately \$106,000 per
2 year). In 2015, during the Protocol, a loan reviewer had
3 conducted a telephonic VOE, and had written on the VOE form
4 that the borrower's income "in 2005?" was \$50,318. The
5 borrower's tax returns for 2008 and 2009 indicated annual
6 income of \$70,000 and \$78,000, respectively, and a paystub
7 from 2010 indicated annual income of \$80,000. The 2015
8 VOE, the 2008 and 2009 tax returns, and the 2010 pay stub
9 were introduced as evidence supporting the Trustees'
10 assertion that it was more likely than not that the borrower
11 had misrepresented his income in his 2005 loan application.
12 The Plan Administrator had rejected the Trustees' income
13 breach claim, and, during his review, Mr. Grice stated in
14 his written narrative that "there is nothing in the file
15 that points to a misrepresentation of income."

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

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

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

24 Overall, the Court concludes that the Plan
 25 Administrator's breach review process was rigorous to a

1 fault. It seems clear that far more than 1263 loans should
 2 have been "passed" by the Plan Administrator's team and that
 3 the \$300 million claim amount touted by the Plan
 4 Administrator in its pre-trial brief is considerably off the
 5 mark.

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

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

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

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

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

18 205 F. Supp.3d at 466.

19 In addition, in MARM III, Judge Castel clarified
 20 that the materiality requirement contained in individual
 21 representations and warranties should be analyzed separately
 22 from AMA. While it is undisputed that the Governing
 23 Documents require that AMA be demonstrated for each and
 24 every material breach asserted, the Trustees in the instant
 25 case presented no proof whatsoever on this point. As

1 previously discussed, Mr. Aronoff testified that every
 2 breach had an adverse material effect on the value of the
 3 subject loan. Therefore, once a material breach was
 4 discovered, the Trustees concluded that the AMA requirement
 5 was met without any additional analysis being conducted.

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

23 As previously discussed, the Trustees grouped
 24 similar types of breaches into categories and asserted AMA
 25 based on breach type. In Mr. Aronoff's view, because a

1 certain breach type "will always have the same effect with
 2 respect to an investor," it will therefore "always, absent
 3 specific circumstances, have the same [AMA] with respect to
 4 that type of breach finding." (Dec. 13, 2017 Hr'g Tr. at
 5 2313:18-2314:7.) Mr. Aronoff testified that, because the
 6 overarching premise of securitization is homogeneity -
 7 enabling investors to assess risk by looking at a pool of
 8 loans - representations and warranties serve as the primary
 9 source of promises providing homogeneity and one can thus
 10 reach breach and AMA conclusions across groups of loans.
 11 The Court observes that Mr. Aronoff's views in this regard
 12 highlight the conflict between the premise of securitization
 13 and the need for loan-by-loan determinations to support
 14 putback claims.

15 Despite continuing to acknowledge that they were
 16 not relieved of their burden of proof on a loan-by-loan
 17 basis, the Trustees based their AMA proof on Mr. Aronoff's
 18 views and attempted to present exemplar loans for their
 19 largest "breach type" categories in order to provide the
 20 Court with the ability to extrapolate from the exemplar
 21 loans to the breach categories and then to the greater pool
 22 of Covered Loan Claims. Approximately \$9.1 billion of the
 23 \$11.4 billion claimed by the Trustees has been attributed to
 24 one of what the Trustees refer to as the "Big Four" breaches
 25 - borrower breaches of income, debt, occupancy, and DTI.

1 Exhibits annexed to Mr. Aronoff's expert report purported to
 2 demonstrate, in summary form, that the borrowers on the
 3 72,500 loans at issue here made considerable
 4 misrepresentations regarding their income, debt,
 5 and/occupancy on their loan applications and that the
 6 magnitude of these massive misrepresentations could be
 7 quantified utilizing percentage amounts.

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

20 In MARM III, Judge Castel held that proof of a
 21 borrower's intentional misstatement of information, i.e.,
 22 proven borrower deceit, suffices to prove AMA. 205 F. Supp.
 23 3d at 470. The Trustees attempt to apply this holding to
 24 the instant case, arguing that

25 The facts here support the inference that the vast

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

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

20 Intentional misstatements or deceit by particular
 21 borrowers, however, cannot be proven either by providing
 22 statistics as to the magnitude of breaches or by pointing to
 23 macroeconomic conditions and general behavior at the time of
 24 issuance of the subject loans. It is more complicated than
 25 that. First, the Court observes that, at the time of

1 origination of the loans at issue here, the standard loan
 2 application contained no definitions or directions for the
 3 applicant. The ambiguities inherent in the loan application
 4 could easily contribute to a blurring of the line between
 5 intentional and unintentional misstatements by a borrower.
 6 It is also possible to conceive of situations in which a
 7 borrower had no intent to make a misrepresentation at the
 8 time of origination but, due to changed circumstances, the
 9 information stated in his or her loan application proves to
 10 be "untrue." In yet other instances, intent to deceive
 11 indeed may be inferred, but even in those cases, the
 12 criteria for evaluating intent is imprecise.

13 Notwithstanding the court's holding in MARM III with respect
 14 to intent and AMA, proof of a borrower's intentional
 15 misstatement of information may not, in this Court's view,
 16 suffice to prove AMA in all circumstances. Most
 17 importantly, even if borrower intent to deceive can be
 18 proven, it would have to be demonstrated on a loan-by-loan
 19 basis and not on a category basis for a broad group of
 20 loans, as the Trustees attempt to do.

21 In addition, even assuming borrower intent could
 22 be inferred by examining magnitudes of alleged
 23 misrepresentation by borrowers - which the Court finds it
 24 cannot - the Trustees' proof in this regard suffered from
 25 significant shortcomings which preclude the Court from being

1 able to determine the accurate percentage of income, debt,
 2 occupancy, and DTI breaches that would fall into this
 3 category. Simply put, the Trustees' "liar loan" theory of
 4 satisfying the AMA requirement must be rejected.

5 As the Court has discussed previously in
 6 connection with its observations regarding the testimony of
 7 Mr. Aronoff and the "breach type" summary exhibits to his
 8 expert report, the summary figures calculated by the
 9 Trustees and listed on such exhibits were computed based in
 10 part on flawed methodologies utilizing incomplete,
 11 incorrect, or subjective data. These exhibits purported to
 12 (i) summarize the claims asserted by the Trustees in each of
 13 their twelve major breach categories and (ii) demonstrate,
 14 through such summaries, the validity and materiality of each
 15 breach type, with particular emphasis in certain exhibits on
 16 the magnitudes of the alleged breaches. During his
 17 examination, Mr. Aronoff (a) conceded he did not prepare
 18 such exhibits, (b) was unable to explain the source of the
 19 data included, (c) admitted that the information came from a
 20 database (later identified as "TeamConnect") that had not
 21 been provided to the Plan Administrator, and (d) was
 22 presented with myriad examples of data included in the
 23 exhibits that were inconsistent with data in the Claims
 24 Tracking Spreadsheet. Additionally, the testimony raised
 25 serious questions regarding the reliability of the Trustees'

1 breach category exhibits because certain data reflected in
2 the exhibits was not accurately presented or was used in a
3 misleading or incorrect manner. For example, Mr. Aronoff
4 admitted that the "Actual Monthly Income" of a borrower
5 listed was not actual income at all and that "Represented
6 Monthly Income" may mean different things depending on the
7 loan, such as (i) income from one job alone or (ii) income
8 from multiple sources. The Trustees failed to lay a
9 foundation through any witness that such exhibits were
10 reliable. The Trustees attempted to utilize the exhibits to
11 demonstrate the excessive nature of certain of the alleged
12 breaches but, as a result of the exhibits' confirmed
13 weaknesses, this "magnitude of breach" data cannot support
14 the "liar loan" inference on which the Trustees rely to
15 satisfy the AMA requirement for the vast majority of alleged
16 breaches.

17 D. The Trustees' Calculator

18 Perhaps in an attempt to bridge some of the gaps
19 in their proof, the Trustees presented at closing (over the
20 objection of the Plan Administrator) a series of summaries
21 pursuant to Federal Rule of Evidence 1006 which they urge
22 the Court to utilize to "calculate" a damage amount based on
23 whatever conclusions the Court reaches as to dozens of types
24 and categories of proof. As described by the Trustees, "the
25 calculator tool applies a series of filters on the Excel

1 versions of the Aronoff exhibits submitted during the
2 hearing." (Trustees' Post-Hearing Brief at 44.)

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

16 There are a variety of reasons that the so-called
17 "calculator" cannot be used to sustain the Trustees' burden
18 to prove breaches on a loan-by-loan basis. First and
19 foremost, summaries of the sort contemplated by Rule 1006
20 are typically limited to a universe of objective data.
21 Here, the Trustees' use of a "summary" to present the
22 millions of pieces of data contained in some 72,500 loan
23 files is not an appropriate use of Rule 1006. Next, as
24 previously discussed, the summaries were prepared using the
25 exhibits to Mr. Aronoff's expert report and the data

1 therein; such summaries have been afforded little weight by
2 the Court due to their reliance on incomplete, incorrect, or
3 subjective data. In sum and substance, the Trustees have
4 asked to Court to make significant leaps of faith to arrive
5 a conclusion that the Trustees' loan process is entitled to
6 an extraordinary degree of deference and that therefore, in
7 essence, the Trustees can be relieved of the burden to prove
8 their claim on a loan by loan basis. Neither the record nor
9 applicable law supports such an approach. The Court
10 declines the Trustees' invitation to use the calculator to
11 guess at an allowed claim amount.

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

19 E. Estimating and Allowing the RMBS Claims at
20 \$2.38 Billion is Fair and Reasonable

21 While the stated purpose of the Estimation
22 Proceeding was for the Court to estimate the allowed claim
23 amount of the Trustees' RMBS Claims as if the parties had
24 completed the Protocol, the Court was not presented with any
25 methodology during the Estimation Proceeding which would

1 enable it to estimate such amount on a loan-by-loan basis.
 2 As a result, the Court has determined that it must look to
 3 (i) the Institutional Investors Settlement and (ii) the
 4 Comparable Settlements in order to inform its determination
 5 of the allowed amount of the Trustees' RMBS Claims.

6 1. The Institutional Investors Settlement

7 The Institutional Investors Settlement in October
 8 2015 encompassed a settlement of both the Covered Loan
 9 Claims and the Transferor Loan Claims (which, at the time,
 10 comprised a portion of the RMBS Claims) for \$2.44 billion.
 11 Here, only the Covered Loan Claims are at issue, which
 12 results in a downward adjustment of the amount to \$2.38
 13 billion. There is no serious dispute that the Institutional
 14 Investors are all sophisticated economic actors. As such,
 15 with enormous amounts of their own capital and that of
 16 others at stake, they have strong incentives to maximize
 17 their returns and, conversely, minimize their losses. The
 18 Institutional Investors' willingness to settle their RMBS
 19 Claims against Lehman for \$2.44 billion in 2015 is entitled
 20 to substantial weight in this proceeding.

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

1 Institutional Investors collectively hold approximately
2 \$10.9 billion, or 24 percent, of the outstanding unpaid
3 principal balance of all the Covered Loans. Although the
4 Trustees attempted to suggest that the Institutional
5 Investors' interests are not aligned with those of other
6 certificateholders here because of the waterfall payment
7 provisions, there was no evidence introduced that
8 distinguishes the interests of the Institutional Investors
9 from the interests of the other certificateholders. As the
10 group holding the largest collective interests in this
11 proceeding, the Institutional Investors unquestionably have
12 an enormous incentive to seek the best possible economic
13 outcome for themselves and their stakeholders. As the
14 Trustees' expert Judge Smith conceded, the Institutional
15 Investors are highly sophisticated financial institutions
16 that collectively own or manage nearly \$11 trillion in
17 assets.

18 Moreover, as Judge Smith also acknowledged, the
19 interests of the Trustees and the interests of the
20 Institutional Investors are not aligned in certain respects.
21 While it is true that the Trustees are indeed charged with
22 protecting the economic interests of the certificateholders,
23 they also act in their own economic interests, which
24 interests may include concerns about exposure to liability.
25 In contrast, the sole focus of the Institutional Investors

1 is maximizing the return to their investors, and in so
 2 doing, preserving the value of the capital they have at risk
 3 and safeguarding their reputations as careful stewards of
 4 trillions of dollars of portfolios. The Court views their
 5 conduct as the single best barometer of the reasonableness
 6 of the Proposed Lehman Claim Amount here.

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

13 Accordingly, the Court concludes that the
 14 Trustees' RMBS Claims should be allowed in the amount of
 15 \$2.38 billion, the adjusted amount of the Institutional
 16 Investors Settlement for the Covered Loans at issue in the
 17 Estimation Proceeding.

18 2. The Comparable Settlements

19 The Plan Administrator, through the testimony of
 20 Professor Fischel, demonstrated that the Lehman Proposed
 21 Claim Amount of \$2.38 billion is well within the range of
 22 comparable settlements of RMBS put-back litigation. As
 23 previously discussed, Professor Fischel calculated the
 24 Recovery Ratios for five Comparable Settlements that
 25 involved sizeable put-back claims arising from similar legal

1 and macroeconomic circumstances. The Recovery Ratios
 2 represent the ratio of the settlement consideration to the
 3 expected lifetime losses on the loans in the trusts that
 4 were releasing claims. The Recovery Ratios for the
 5 Comparable Settlements ranged from 6.9% to 17.1%, as
 6 follows: 7.1% for the JPMorgan settlement; 8.3% for the
 7 Citigroup settlement; 6.9% for the ResCap settlement; 13.2%
 8 for the Washington Mutual settlement; and a range of 7.9% to
 9 17.1% for the Countrywide settlement. The 11.2% Recovery
 10 Ratio for the Lehman Proposed Claim Amount of \$2.38 billion
 11 falls within the high end of the range of the Comparable
 12 Settlements. By contrast, the 55% Recovery Ratio for the
 13 Trustees' Proposed Claim Amount of \$11.4 billion is more
 14 than three times greater than the highest Recovery Ratio of
 15 the Comparable Settlements. The Court is persuaded that the
 16 Comparable Settlements confirm the reasonableness of the
 17 Lehman Proposed Claim Amount of \$2.38 billion.

18 To refute Professor Fischel's opinions, the
 19 Trustees attempted to (i) distinguish the Comparable
 20 Settlements from this case and (ii) establish that the
 21 Comparable Settlements do not accurately reflect RMBS put-
 22 back recovery rates. Although Professor Fischel conceded
 23 that the Comparable Settlements were achieved prior to full
 24 litigation of the claims in those cases and, in certain
 25 cases, there were statute of limitation defenses asserted,

1 the Trustees did not meaningfully challenge the
2 comparability of the Comparable Settlements to the RMBS
3 Settlement. The Trustees argue that the Comparable
4 Settlements are not comparable because they were entered
5 into early in litigation and/or prior to a full loan review
6 process, and the Trustees posit that, had the settlements
7 occurred later in those cases, the settlement amounts would
8 have been much larger. This argument must be rejected as a
9 matter of common sense. To accept the Trustees' proposition
10 would be tantamount to concluding that the trustees involved
11 in the Comparable Settlements, many of whom are serving as
12 Trustees herein, made decisions in those cases to abandon
13 litigation claims that would have been worth three times
14 more had they proceeded, at a minimum, through discovery, or
15 to judgment. The Court finds this proposition wholly
16 incredible. And while Judge Smith characterized the
17 trustees in the Comparable Settlements as being
18 "uninformed," this too flies in the face of common sense.
19 Whatever else one might say about Goldman Sachs or
20 BlackRock, "uninformed" is not a word that comes to mind.

21 Through the testimony of Judge Smith and Mr.
22 Finkel, the Trustees also attempted to establish that the
23 Comparable Settlements do not accurately reflect RMBS put-
24 back recovery rates. Judge Smith criticized Professor
25 Fischel's report because, in his opinion, it "contains

1 virtually no analysis of the facts underlying, or the law
 2 applicable, to the Covered Loan Claims.” (Smith Expert
 3 Report, ¶ 10.) With all due respect to Judge Smith, aspects
 4 of his report suffered from the same deficiencies - he
 5 provided no specific factual or legal bases on which to
 6 differentiate this case from the Comparable Settlements, nor
 7 did he provide any meaningful specific details about the
 8 cases he cited that purportedly demonstrate that settlement
 9 amounts are not predictive of case outcomes.

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

1 had represented HSBC.

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

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

24 Simply put, the Trustees have not only failed to
25 demonstrate any basis on which the Court can conclude that

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

14 VI. CONCLUSION

15 For all of the foregoing reasons, the Court
16 concludes that the Trustees' RMBS Claims at issue in the
17 Estimation Proceeding shall be allowed in the amount of
18 \$2.38 billion. The parties are directed to submit an order
19 consistent with the foregoing.

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