

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS INC.,

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9 Debtor.

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11

12 United States Bankruptcy Court

13 One Bowling Green

14 New York, NY 10004

15

16 April 19, 2018

17 10:06 AM

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21 B E F O R E :

22 HON SHELLEY C. CHAPMAN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: F. FERGUSON

1 **HEARING re Doc #57838 Motion for Temporary Restraining Order**
2 **and Order to Show Cause filed by Chester B. Salomon on**
3 **behalf of Institutional Investors.**

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25 **Transcribed by: Sonya Ledanski Hyde**

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P R O C E E D I N G S

MR. OSTROW: Alec Ostrow, from Becker, Glynn, Muffly, Chassin & Hosinski, co-counsel to the institutional investors.

MR. SHEEREN: Good morning, Your Honor. David Sheeren, with the Gibbs & Bruns firm in Texas, for the institutional investors.

MR. SIEGEL: Good morning, Your Honor. It's Glenn Siegel, from Morgan Lewis, on behalf of U.S. Bank. And I expect I'll be taking the lead for the Trust administrators.

THE COURT: Okay, thank you. I apologize for the telephonic format this morning. As some of you know, I rather messed up my knee and I'm just having a very hard time getting around, and therefore, I am not there today. So, I did want to proceed since I understand that this is a matter of some urgency.

Could someone give me an update as to the current state of things in the State Court?

MR. SHEEREN: Yes, Your Honor. This is David Sheeren for the institutional investors. The hearing before Justice Friedman went forward last week. She didn't enter any of the proposed orders. Instead, she's asked the parties to call her, I believe on April 23rd following this hearing to update her on what happened in the Bankruptcy Court.

1 She also asked the parties to address a couple of,
2 I'll call them form issues, and maybe even a substantive
3 issue she had with the order to show cause that had been
4 submitted. And I believe a new order to show cause
5 reflecting some edits has been submitted in the State Court.

6 But in effect, Your Honor, that case is not
7 proceeding at this moment, and the Judge has asked us to
8 call her and update her on the outcome of this bankruptcy
9 hearing next week.

10 MR. NEWMAN: Judge, Good morning. It's Zach
11 Newman, from Hahn & Hessen, representing Wells Fargo. Just
12 to give the Trustee administrator and the Trustee's side of
13 things with respect to the State Court, the proposed order
14 to show cause was the effort of all of the interested
15 parties that have filed notices of appearance, including the
16 institutional investors. And an agreed-upon order to show
17 cause was filed yesterday following a conference call with
18 the Judge's law secretary.

19 The Judge's law secretary indicated that absent a
20 ruling today from the Bankruptcy Court that it is proceeding
21 to exercise jurisdiction over the matter, it intends to have
22 that order to show cause signed and docketed, which includes
23 various notice provisions, likely tomorrow, or the end of
24 today, perhaps. It is Thursday, I believe -- or tomorrow.

25 So, as far as the State Court proceeding, Judge

1 Friedman is certainly aware of these proceedings and is
2 aware of the schedule here, but that proceeding is moving
3 forward presently. Thank you.

4 THE COURT: Okay. Okay. All right, so who do I
5 hear from first, Mr. Ostrow?

6 MR. OSTROW: Thank you, Your Honor. As we put in
7 the penultimate part of our supplemental memorandum, we'd
8 like very much to divide the responsibility for the
9 discussions today.

10 As I said last week, I'm not all that familiar
11 with the RMBS settlement agreement and the particulars of
12 how the distributions are supposed to work. Mr. Sheeran,
13 from Gibbs & Bruns, has lived with this for some time, and
14 with your permission I'd like to have him address that. I
15 can address the bankruptcy issues of jurisdiction and the
16 issue that was raised in the papers -- in our position about
17 the applicability of the Anti-Injunction Act. And we'd be
18 happy to take those in any order Your Honor would like to
19 hear them.

20 THE COURT: Okay. I appreciate that. Thank you,
21 Mr. Ostrow. I think that with respect to the jurisdictional
22 issues and the like, I don't know that I need to hear much
23 more other than what is in the papers. Where the action is,
24 so to speak, is what we talked about the first go-round, and
25 very simply, whether I'm asked to interpret the settlement

1 agreement, or whether the resolution of this matter is going
2 to involve more than that and interpretation of the
3 governing agreement, that's the whole ball of wax as far as
4 I'm concerned. And everyone dove into those issues very
5 thoroughly. So, that's really the only thing that I'm
6 interested in hearing about today.

7 So, Mr. Sheeren, if you want to speak more to
8 that, that would be great.

9 MR. SHEEREN: Absolutely. Thank you, Your Honor.
10 Your Honor, the question you pose is does this require the
11 interpretation of the indenturers or the settlement
12 agreement. As we laid out in our papers, we believe this
13 only requires the Court to interpret the settlement
14 agreement.

15 You asked the parties to lay out a roadmap of the
16 provisions that issue. Your Honor, we've done that under
17 the settlement agreement. Fundamentally, there are three
18 provisions that control the outcome here: 3.01, that's the
19 provision --

20 THE COURT: I --

21 MR. SHEEREN: Sorry, Your Honor?

22 THE COURT: Yeah, no, I'm just following along
23 with you and agree, it's -- yes, 3.01.

24 MR. SHEEREN: Yes, that's the provision under
25 which the settlement agreement the Trustees could come into

1 court potentially and seek further judicial instruction.
2 But importantly, it also requires Trustees to use their
3 reasonable best efforts to distribute the plan payments
4 promptly. So, that's the first provision.

5 THE COURT: The second provision is Section 3.06.
6 That's the provision of the settlement agreement that
7 dictates how the Trustees were to distribute the plan
8 payments. And the structure of Section 3.06, we think, is
9 pretty simple. We think that it's quite clear that in
10 3.06(a), there is an instruction to the Trustees to
11 distribute the plan payments to investors as though they
12 were subsequent recoveries under the governing agreements.

13 The second step is 3.06(b). And 3.06(b) provides
14 for a write up of the certificate balances in connection
15 with the distribution of the subsequent recoveries.
16 Importantly, Your Honor, the Trustees have alleged that the
17 central issue in this case is, do they distribute the plan
18 payments to investors first and then write up the
19 certificate balances, or to the first write up a certificate
20 balances and then distribute the plan payments to investors?

21 We think that question, which they have described
22 as the central issue here -- and that is at Paragraph 3 of
23 their brief -- we think that question is resolved by the
24 last sentence of section 3.06(b) of the settlement agreement
25 itself. And what does that sentence say? It says, "For the

1 avoidance of doubt, this Subsection 3.06(b) is intended only
2 to increase the balances of the related classes of
3 securities as provided for herein and shall not affect the
4 distribution of plan payments on the net allowed claim
5 provided for in Subsection 3.06(a)."

6 We think that sentence speaks directly to the
7 order of operations, and we think it resolves it. But we're
8 not here to fundamentally resolve the question of the
9 interpretation of the settlement agreement. The question
10 is, what document is this Court going to have to interpret
11 to resolve the "central issue" of the order of operations.

12 Your Honor, it is telling indeed that in the
13 Trustees' brief, which they submitted yesterday, they have
14 not cited a single provision of the indenturers which they
15 will be asking Your Honor to interpret as to the order of
16 operations issue.

17 We have laid out that we think the issue is a
18 settlement agreement issue; it's a 3.06 issue. And we're
19 somewhat baffled that they still have not identified these
20 alleged interpretation questions under the indentures. They
21 haven't cited any provision of the indenturers in their
22 brief. They talk about the settlement agreement.

23 All right, so that's the first point, Your Honor.
24 We think that the central issue --

25 THE COURT: Well let me ask a question and maybe

1 we will --

2 MR. SHEEREN: Yes.

3 THE COURT: -- do this by way of a little back-
4 and-forth with the Trustee. Because I guess I'm looking
5 exactly at the language that you are focusing on, which
6 seems to reflect that this is not a finding so much as an
7 observation, which seems to reflect that people thought
8 about this and put in the line settlement agreement language
9 to specifically address it.

10 MR. SHEEREN: Correct.

11 THE COURT: But --

12 MR. SHEEREN: We think the --

13 THE COURT: So, to take you up --

14 MR. SHEEREN: -- settlement agreement is clear.

15 THE COURT: Right. So, to take you up on your
16 challenge, if you will, if I were to say I am enforcing the
17 settlement agreement as written and direct the Trustees to
18 make distributions in accordance with that language in
19 3.06(a) and 3.06(b), are the Trustees telling me that they
20 wouldn't know what to do?

21 MR. SHEEREN: I cannot imagine that they wouldn't
22 know what to do for this reason. That is a clear
23 instruction. Pay first, write up second. And then when you
24 look to Section 6.04 of the settlement agreement, Your
25 Honor, what it says is this settlement agreement is not

1 intended to amend the governing agreements, but it says
2 something more. It says if the Trustees distribute the plan
3 payments in conformance with the settlement agreement, they
4 will be deemed to have complied with the terms of the
5 governing agreements.

6 Your Honor, they bargained for that provision
7 because they wanted judicial cover that their distribution
8 of the plan payments in accordance with the settlement
9 agreement, including 3.06(a) and 3.06(b), would be subject
10 to judicial confirmation, and that if someone came in and
11 tried to sue them for distributing the plan payments in that
12 way, they could go carry around that 9019 order that Your
13 Honor signed, which barred holders -- and there's a bar
14 order, Paragraph -- there's a bar order in that 9019,
15 Paragraph 19. It says certificate holders are barred from
16 suing the Trustees so long as they implement the settlement
17 agreement in accordance with its terms. And so, we think
18 this is clearly a settlement issue.

19 The Trustees have -- they appear to concede that
20 the governing agreements are silent as to the order of
21 operations issue. They certainly haven't cited a provision
22 of the governing agreements that goes to the order of
23 operations issue. So, we don't understand what terms of the
24 indenturers they would be asking the Court to interpret as
25 to this central question. And I can --

1 THE COURT: Okay.

2 MR. SHEEREN: -- move on with the argument, unless
3 --

4 THE COURT: Yeah, I --

5 MR. SHEEREN: -- unless Your Honor has further
6 questions about that point.

7 THE COURT: No. So, that was very helpful. And
8 again, this isn't an evidentiary hearing, but we've all been
9 at this for a very long time. And what you appear to be
10 telling me is that people thought about this and the
11 settlement agreement was drafted to take care of this, as
12 opposed to the alternative narrative, which is, oh gee, you
13 know, so focused on settlement in terms of arriving at a
14 vehicle for liquidating the claims, we didn't really focus
15 on the distribution issue, and imagine our surprise to find
16 there is an ambiguity. Alternatively, and I guess worse --
17 and I'm asking you for your reaction to this -- the Trustees
18 just elected to lay in the weeds.

19 The thing that troubles me the most is this has
20 been around for years, and years, and years. It's not the
21 Trustees' first rodeo. We knew we were -- we knew what we
22 were doing for months, and months, and months. And yet,
23 here we are in April and we're starting -- the Trustees want
24 to go down another path.

25 So, I just am asking for your observations or

1 arguments, because it's not evident, about whether issue was
2 joined on this point back at the time of the settlement
3 agreement or not. You seem to be telling me that the
4 settlement itself reflects a thoughtful resolution of how to
5 distribute these payments, yes?

6 MR. SHEEREN: Yes, Your Honor. That is our
7 position. Our position is the settlement agreement was
8 drafted by sophisticated parties, and it's clear and speaks
9 for itself. And the argument that I've made on 3.06(b) on
10 the settlement agreement, that we think that dictates the
11 order of operations, that's absolutely consistent with what
12 we've said in a couple of the prior State Court proceedings.
13 This isn't a new argument. But I want to talk about that
14 delay point, Your Honor, because I think it is very
15 important, and it's one of our client's key concerns.

16 The question is why did the Trustees wait until
17 the evening before receiving approximately \$800 million in
18 plan payments to raise this issue? We think they have
19 utterly failed to offer any explanation for that. We think
20 that if they felt this was a real ambiguity or dispute, they
21 were obligated under the settlement agreement, section 3.01
22 -- that's their duty to reasonably -- to use reasonable best
23 effort to promptly distribute the settlement payments, and
24 3.01 says they also have to form a good faith belief that
25 there is a real ambiguity or dispute -- we think they had an

1 obligation to raise this back in July of 2017.

2 As Your Honor noted, if they felt it was an
3 ambiguity, they must have known back then because, Your
4 Honor, the Countrywide case where this first came up, the
5 Trustees' petition was filed in February of 2016. A similar
6 issue was raised in the bankruptcy case of the ResCap
7 matters in July of 2015.

8 So, this was on their radar and it is absolutely
9 wrong to suggest, as the Trustees do, that the institutional
10 investors somehow knew that the Trustees were going to do
11 this, that we somehow agreed to kick the can. That's not
12 only wrong, it's baffling, Your Honor, because when you look
13 at how the prior cases had been filed and when they were
14 resolved, there was nothing that would've prevented the
15 Trustees from coming to Your Honor and asking for
16 clarification on the order of operation.

17 THE COURT: Well, here's my observation on that.
18 And Mr. Siegel, you can address this when it's your turn.
19 The entire structure of this very unusual and heavily
20 negotiated settlement revolved around the Trustees'
21 findings. There is absolutely no reason if the Trustees
22 needed an order, the protection of an order, which it seems
23 like they do, there is absolutely no reason that in the
24 Trustees' findings this issue couldn't have been raised.

25 This is just -- it is -- you know, shocking is too

1 strong a word in the world that we live in, but it's
2 troubling that we have to have this discussion now, when
3 sure as shooting, at least from my perspective, we were
4 done. We were done. And I said this at the preliminary go-
5 round on this when Mr. Ostrow was holding down the fort,
6 there's just no way that this couldn't have been raised at
7 an earlier point.

8 And Mr. Siegel, you weren't at the first hearing,
9 and there was some argument that was made that, oh, we
10 couldn't have gone and started an Article 77 proceeding then
11 because we didn't know what trusts were going to be
12 involved. And that's just flat out wrong. The only thing,
13 the only high-class problem that, frankly, the -- that folks
14 were going to have -- not from Lehman's perspective -- was
15 that the number -- the claim was going to be greater. And
16 then the waterfall might have extended farther down. But
17 there was absolutely no reason why this couldn't have been
18 raised at many, many stages before today.

19 MR. SHEEREN: And --

20 THE COURT: And I feel -- obviously, I feel pretty
21 strongly about that.

22 MR. SHEEREN: Your Honor, David Sheeren. Just to
23 finish up quickly, they have asked the State Court to weigh
24 in on trusts that account for -- I think the number is
25 around \$800 million out of the \$940 million that I believe

1 has been distributed to the Trustees. So, the suggestion
2 that they were somehow judicious in selecting the trusts
3 where they're seeking instructions is just wrong. It
4 appears to us that they have not even analyzed to a large
5 degree whether any of these issues, these alleged issues,
6 make any difference in investors recoveries.

7 Your Honor, we've been in these cases pursuing
8 RMBS claims for six years. This Court has a unique
9 perspective on the history of these disputes. The 9019
10 process, which the Trustees bargained for and got a very
11 protective order -- and that's what they needed, and they
12 got it, and it prevents certificate holders from suing the
13 Trustees, so long as they implement the settlement
14 agreement. And we think the settlement agreement here is
15 very clear.

16 And in any event, if there's a fight about what it
17 means or what it requires, we think this Court is the Court
18 that should exercise that jurisdiction. And with that, Your
19 Honor, unless you have further questions, I'll cede the
20 floor.

21 THE COURT: All right. Thank you. Mr. Siegel?

22 MR. SIEGEL: Your Honor, there are so many things
23 I need to respond to, I'm having a little difficulty
24 figuring out in what order I should respond to them. So,
25 forgive me if I don't respond to them in the order you would

1 prefer, although I'm sure you'll tell me if there's
2 something you want to hear about earlier than other things.

3 THE COURT: Well, Mr. Siegel, I'm going to tell
4 you right at the top, okay? This is not what proceeding in
5 good faith looks like. This is not what it looks like to
6 involve the Lehman estate, the Court, the institutional
7 investors, and everyone else in a transparent, good faith
8 process. That's not what it looks like. This is what --

9 MR. SIEGEL: Your Honor --

10 THE COURT: -- (indiscernible) -- no, Mr. Siegel,
11 you're not going to interrupt me just because I'm not in the
12 courtroom. This is not what it looks like. There were
13 many, many, many points during this incredibly lengthy
14 process in which the Trustees, who have never been shy about
15 saying what they don't know and what they can't identify,
16 the Trustees could have been, just to be clear, Your Honor,
17 after this is all over, we are going to commence and Article
18 77 proceeding.

19 If nothing else is clear, nobody said that.
20 Nobody told me that. At the -- in the middle of February,
21 you knew that I was ruling on March 8th, because everybody
22 knew that we were driving towards the distribution date.
23 Did you start the Article 77 proceeding in February? No.
24 You started it in April. Was it raised at the time of the
25 9019 settlement where there could've been findings that

1 would protect the Trustees? No.

2 Did anybody speak up and tell me, oh, by the way,
3 Judge, that order that you're entering that looks like on
4 its face it's directing payments, it's ripe with ambiguity;
5 we're going to have to go do a whole State Court Article 77
6 proceeding?

7 There were countless chamber conferences leading
8 to the settlement, when everybody was torturing themselves
9 over how to get this done, that the concept of an Article 77
10 proceeding, to protect the Trustees came up. And lo and
11 behold, when the 9019 structure was arrived at, it was
12 hailed as a protective and effective procedure to avoid that
13 whole thing.

14 And now, five -- just kidding, the certificate
15 holders may have to wait another couple of years to get
16 their money. It's not a good look. It's not a good look.
17 And the last thing I want to do is take on more work; trust
18 me. This is just wrong.

19 MR. SIEGEL: Your Honor, I very much understand
20 your frustration with the process. And obviously, as a late
21 --

22 THE COURT: No, no, no. No, no, no, no, no. It's
23 not my frustration with the process. It is my frustration
24 and profound disappointment with the Trustees.

25 MR. SIEGEL: Understood. I am only going to do

1 the best I can to explain to you where we are, give you the
2 perspective of the Trustees, and indicate to you what I
3 believe you would have to undertake if in fact you determine
4 that this last issue was an issue that needed to be
5 resolved.

6 I understand Your Honor's feelings about this.
7 I'm certain that the Trustees did not intend to give you
8 this impression. And I think probably it is most
9 constructive to move forward and talk about where we are now
10 and how we need to get across the finish line. Is that
11 appropriate, Your Honor?

12 THE COURT: Truthfully, I find your remarks very
13 patronizing, and you can continue to say whatever you want
14 to say. Nothing that you said has addressed on the merits
15 any of my points about what has led us to today. So,
16 instead, what you're going to do now is attempt to, in
17 essence, frighten me by pointing at all the provisions of
18 the governing agreement that I'm going to have to resolve.

19 So, why don't we -- we're going to have to agree
20 to disagree, and Mr. Siegel, why don't I just let you make
21 your points.

22 MR. SIEGEL: Well, Your Honor, having heard what
23 you've said, then I'm going to take a little bit of a step
24 back and at least give you some of the perspective we have,
25 not to change your mind, because I was not here, I did not

1 participate in this proceeding. So, I understand that you
2 have -- that you have your views on this, and I'm not going
3 to go there.

4 But what I do want to talk about is at least my
5 reading of these documents and my perception, having worked
6 previously with the institutional investors as well, and the
7 one thing I will certainly say is they are well represented,
8 they have been involved in these proceedings for many, many
9 years, and they are familiar with all of these issues. I --
10 just as this is not the first visit of the Trustees to this
11 rodeo, this is certainly not the first visit of the
12 institutional investors to this rodeo.

13 The issue that we are talking about, which is the
14 order of operations, is an issue that has been raised
15 numerous times in numerous courts and been resolved in a
16 variety of different ways. When it has economic
17 significance, parties who have points of view as to how to
18 read these documents, I've had an opportunity to be heard,
19 and then the arbiter makes a decision about how the
20 documents are to be read. When there is not an economic
21 consequence to this, the parties move on and they don't
22 worry about the issue.

23 The reason we are talking about this, among other
24 things, is that the order of operations has economic
25 consequences to a variety of the certificate holders. I

1 mean, it depends on what you get.

2 THE COURT: Mr. Siegel, at what point in time did
3 the Trustees know that this issue was live in this case?
4 Are you telling me, as a matter of the math, that you did
5 not know that this issue would be in play until I entered my
6 decision?

7 MR. SIEGEL: What I --

8 THE COURT: I don't -- I do not under -- as a
9 matter of the math, I do not understand that, because the
10 settle -- the amount of the claim is, frankly, the lowest
11 possible amount that was likely to happen. Your argument
12 has some sway if you're saying, oh, well look, it's an \$11
13 million claim and we didn't realize we were going to be
14 distributing down that far, and therefore, we never raised
15 it.

16 But what you told me three minutes ago was it has
17 been -- it's come up before and it's been raised in numerous
18 courts, and there have been instructions numerous times,
19 putting to one side how I don't really understand how the
20 same provision in indentures gets different readings.

21 I mean, I just don't understand at what point the
22 Trustees just perform under the indentures. If the point is
23 that every single time they're going to need instruction
24 from a court, and given the low level of the settlement
25 here, you're admitting to me that you knew this was coming

1 down the pike.

2 MR. SIEGEL: The --

3 THE COURT: And if that's the case, then it seems
4 to me that someone should have told me that, just so you
5 know, Your Honor, after you're all done, we're going to be
6 going -- we're going to be having an Article 77 proceeding.

7 MR. SIEGEL: Clearly --

8 THE COURT: So, my narrow question is at what
9 point -- isn't it the case that you knew long before April
10 of 2018 that this order of operations issue was going to be
11 in play?

12 MR. SIEGEL: Your Honor, first of all, let me just
13 say it is very clear that this is something that it would
14 have been preferable earlier on to flag to this Court. I
15 can't say otherwise. We could have avoided a lot of
16 unhappiness if we had simply identified this issue more
17 clearly. I certainly don't want to give you a different
18 impression.

19 What I do want to indicate to you is the ripeness
20 of this did depend, at least in part, on the scope and
21 extent of the settlement proceeds. For example, if the
22 number had been higher, the economics that drove the order
23 of operation would have been different, and it might very
24 well have been that some trusts would have been indifferent
25 to the outcome. You know, money sometimes just solves

1 problems.

2 This is about -- ultimately, the order of
3 operations is about whether you write things up because
4 money has come in that formally was thought not to be coming
5 in, and people were taken out of the money and out of the
6 distribution scheme. When enough money comes in, that can
7 work itself out.

8 The Trustees had a concern -- and again, perhaps
9 that should have been expressed earlier on to this Court as
10 part of the overall process -- but had a concern that had
11 they gone to the Article 77 court, or had they raise the
12 issue here -- and I will come back to that for a moment --
13 and forgive me, I was not involved in the earlier part of
14 the process, so if I -- if my understanding of what I have
15 is different than yours, it's certainly not intended to be
16 anything other than my honest view of what's going on here.

17 The first thing is, the thought was that if the
18 number was higher or if the number was lower, it was going
19 to impact a different pool of investors. And one of the
20 things the Trustees wanted to make sure of is that the
21 various certificate holders knew what was at stake for them
22 prior to the commencement of the proceeding, so that they
23 could make a determination whether this was worth fighting
24 for them.

25 I would also make the observation that, at least

1 from my point of view in reading the documents, and indeed,
2 looking at the last sentence of 3.06(b), that the priority
3 here -- particularly from the standpoint of this Court and
4 the administration of the Lehman estate -- was to make sure
5 that there was a settlement of the claim amount between the
6 Lehman estate and the various trusts so that the Lehman
7 estate could go forward and make the distribution it could
8 make to the maximum amount possible to its own creditors.

9 I think that -- first of all, again, I think this
10 is an issue the institutional investors have known about and
11 have been familiar about. Perhaps it should've been
12 resolved in this Court, but I would suggest to you if that
13 had happened, we would have all still preferred to have done
14 this part of the settlement first, because if we had held
15 up-- if we had held up the settlement -- I'm sorry, the
16 settlement of the gross claim from Lehman to the trusts --
17 if we had held that in order to resolve the order of
18 operation issue, that would have resulted -- delay
19 distribution to Lehman creditors of the amounts that were
20 now freed up.

21 THE COURT: Mr. Siegel, with all due respect,
22 that's what you call a strawman argument. It's not about,
23 oh, we didn't deal with this issue because from the Lehman
24 estate's perspective, this needed to be done. This took
25 long enough, every step of the way, every painful step of

1 the way.

2 If your argument -- the terms of the settlement
3 agreement cut against your argument. If it were only Lehman
4 on the one hand and distributes, I'll call it, on the other
5 hand, then there would have -- the settlement agreement
6 would have been entirely silent, entirely silent, on this
7 issue.

8 But there's language in the settlement agreement.
9 There's language in the settlement agreement. The
10 settlement agreement could have said, this settlement
11 agreement shall have no effect whatsoever on how the
12 distributions of the plan payments would be made, and the
13 parties and the Trustees shall commence an Article 77
14 proceeding within 10 days of the entry of this Court's order
15 approving the settlement. You're all a bunch of really
16 smart lawyers. It didn't say that.

17 MR. SIEGEL: But, Your --

18 THE COURT: What the institutional investors are
19 telling me -- and I don't hear you to have contradicted
20 them, because I know you to be very forthright and honest --
21 is that this was discussed, that there was any crisp sense
22 that notwithstanding the fact that lawyers spent time
23 drafting this language in the settlement agreement, it
24 doesn't really matter because we're just going to go get an
25 Article 77 order. And it could've been in the Trustees'

1 findings because, as the Trustees have pointed out, it talks
2 about to the extent that there's any open questions, go to a
3 court of competent jurisdiction.

4 I simply do not understand. If I enter an order,
5 which I think I will, that says that the settlement proceeds
6 shall be distributed in accordance with the settlement
7 agreement, the Trustees better, with specificity, identify
8 why they can't. Not just a vague, general, dear Justice
9 Friedman, please tell us how to do our job --

10 MR. SIEGEL: Understood, Your Honor.

11 THE COURT: -- other than --

12 MR. SIEGEL: (indiscernible)

13 MR. SIEGEL: -- other than telling me that this is
14 inevitably going to lead me into interpreting the governing
15 agreement, which I have no intention of doing, you have not
16 specifically identified the specific questions under the
17 governing agreement which I would be being asked to decide.

18 MR. SIEGEL: Your Honor, I understand that we did
19 not provide you with the specific agreements -- I'm sorry --
20 the specific provisions of the governing agreements in
21 response to these pleadings. What I can -- I can say two
22 things, though.

23 If you look at Section 3.06 generally, you can see
24 that all of the provisions that are made reference to by the
25 institutional investors are qualified by the terms pursuant

1 to the terms of the governing agreements. There are
2 repeated references to the governing agreements.

3 I accept the fact that we haven't given you any of
4 the provisions of the governing agreements, but we have
5 those provisions of the governing agreements. If Your Honor
6 thinks it would be useful, we would provide that to you.

7 What the Trustees do not feel comfortable doing is
8 making the determination on their own in the face of the
9 language of those agreements that the agreements are silent
10 on the point. That's the term that the institutional
11 investors used. The term we use in the petition is that
12 they are -- let's see, we say that they do not clearly
13 specify. But there are provisions that talk about the
14 treatment of subsequent payments.

15 If it would be useful to Your Honor, we can show
16 you what those provisions are. We do think that the
17 document, as written, makes it clear that 3.06 is only
18 applicable if it does not contradict with the terms of the
19 governing agreements.

20 I appreciate the fact that the institutional
21 investors are unhappy that they found so many of the
22 agreements to have these provisions in them, but we are
23 happy to provide those provisions.

24 I think it Your Honor enters an order that says
25 that we should enforce the agreement and act pursuant to

1 3.06, that doesn't solve the problem completely because
2 unless Your Honor also finds that the terms of the governing
3 agreements do not require a different outcome, I don't know
4 that we will be able to do so, because all 3.06 --

5 THE COURT: Okay, so Mr. Siegel -- so Mr. Siegel,
6 I'll make that finding.

7 MR. HOUPT: Christopher Houpt, of Mayer Brown, for
8 Citibank, and I'd like to respond -- and actually, I think
9 this falls on what we were just talking about -- but respond
10 to, as Your Honor, I think, correctly characterized the
11 investors' argument about the last sentence of 3.06(b). And
12 I will make this point, although as I think you know, my
13 client, Citibank, is not a Trustee, and we were not involved
14 in negotiating the settlement agreement, and we became
15 involved only as we got closer to the payment, because we're
16 the paying agent.

17 But Mr. Sheeren read that last sentence to you and
18 he pointed out that at the time this agreement was being
19 negotiated, the parties, or at least the institutional
20 investors, were aware that the order of operations issue was
21 being litigated under the Countrywide settlement.

22 What he forgot to mention is that the Countrywide
23 settlement had exactly the same language in it. It was not
24 verbatim, but I can read it to you. It's pretty close. And
25 in fact, the Countrywide settlement's language is even more

1 detailed and more robust than what is in the Lehman
2 settlement.

3 And so, as I, someone who was involved in the
4 Countrywide case and did not become involved in the Lehman
5 matter until recently, looked at that language in 3.06(b), I
6 found it hard to believe that that was intended to resolve
7 the ambiguity with respect to the distribution of the
8 Countrywide settlement, because they simply adopted the same
9 language that had been used in the Countrywide settlement.

10 MR. SHEEREN: if I may respond to that, Your
11 Honor, David Sheeren, with the institutional investors.

12 THE COURT: I don't know... Again, this is
13 getting to be a little surreal, because I'm hearing --
14 everyone I'm hearing from on the Trustees' side wasn't here
15 before. And no one is engaging with me on my fundamental
16 question about why we're here now when, according to the
17 Trustees, you know, boy, we really need this instruction,
18 and oh, we've done this countless times. But nobody
19 bothered. Nobody bothered making that clear at any earlier
20 point. And you know what? It might have made a difference
21 in the institutional investors' willingness to sign on to
22 the settlement.

23 MR. KRAUT: Your Honor, Michael Kraut, for U.S.
24 Bank.

25 THE COURT: Well, I find it particularly unhelpful

1 to keep hearing from people who weren't here during those
2 years that we spent before today.

3 MR. KRAUT: Your Honor, Michael Kraut, from Morgan
4 Lewis, for U.S. Bank. I was here. Mr. Sheeren was not, but
5 I was, and I can walk you through -- I can answer your
6 questions, Your Honor. I'm prepared to answer. I jotted
7 down five quick points I would like to make to address what
8 you've been asking. I can't be confident that you will be
9 satisfied, but you're entitled to an answer to your
10 question. So, let me try.

11 THE COURT: Okay.

12 MR. KRAUT: First of all, Your Honor asked whether
13 this issue or the possibility of this issue was known a year
14 ago. It was. It was known to all parties because of the
15 parallel proceedings, as in the other actions.

16 As Mr. Siegel mentioned before, to have a proper
17 Article 77 or Trust instructional proceeding of any kind, it
18 requires meaningful notice to the affected holders, and that
19 couldn't be done until a month ago. And we can explain why,
20 if that would be helpful, Your Honor. We've tried, but we
21 can try a little better. But that could not have been done
22 until then.

23 THE COURT: So, just to be very -- just to be
24 nitpicky about it, why wasn't your action commenced on March
25 9th?

1 MR. KRAUT: Once we found out the amount that was
2 available, the Trustees -- we -- I can only speak for U.S.
3 Bank -- we worked with our investor reporting folks who do
4 calculations. We talked to the Securities administrators,
5 some of whom are in this court now, but weren't part of that
6 proceeding before. And we had to try to see which trust
7 would be affected once we knew the amount that was there.
8 That takes a little bit of time to go through hundreds of
9 trusts in a month. You may disagree, Your Honor, but to me,
10 that was actually very quick. And for us to be able to do
11 that, we were able to exclude a number of trusts that are
12 not part of this proceeding now because we determined that
13 it would not have a material effect -- issues would not have
14 a material effect on the payment, the intra-trust payments.
15 And therefore, that's what we used that time to do, and to
16 prepare the pleadings to be ready to go on that. So, that's
17 my first point, Your Honor.

18 The second is -- and I'll apologize on behalf of
19 the Trustees -- we thought we did address this. We thought
20 by having that provision in the agreement that said, to the
21 extent that the Securities administrators, some of whom are
22 not parties to this proceeding, have questions about this,
23 or as we were watching the way this was playing out and
24 being hard fought in another court, we recognized that there
25 was a possibility that there would not be clarity coming out

1 of that proceeding that would solve this issue for all
2 trusts. There are hundreds of trusts here with different
3 language. And so, we thought we did raise that by including
4 that provision.

5 Number three, the reason we didn't speak about it
6 with Your Honor is because it never occurred to us that this
7 was an issue for this Court. In our view, once the money
8 was paid and was in the Trustees' -- had been received by
9 the Trustees, the Trustees what do what they always do,
10 which is to go to a New York court or a trust instructional
11 proceeding court to address these issues.

12 So, if that was oversight on our part, and it
13 sounds like it was, then I apologize for that. But I hope -
14 - the way I view it is that it reflects our good faith
15 belief that this was never going to be an issue for this
16 Court. But we should not have assumed that, and we could've
17 raised it.

18 THE COURT: But hold on. The institutional
19 investors are telling me that they've been completely
20 blindsided.

21 MR. KRAUT: Your Honor, that was going to be my
22 fifth point, but I'll make it my fourth point.

23 THE COURT: Okay.

24 MR. KRAUT: That's --

25 THE COURT: Okay, thanks.

1 MR. KRAUT: That's completely disingenuous, Your
2 Honor. I sat in rooms with the institutional investors'
3 counsel and with counsel for the plan administrator, and at
4 the time these discussions were ongoing, we included this
5 provision to address this issue because the plan
6 administrator wanted this proceeding to go forward, to get
7 this resolved. The institutional investors were pushing to
8 get this resolved. We, of course, wanted it resolved too,
9 Your Honor. But the decisions were made among the three
10 parties there, and if Mr. Sheeren wasn't involved in those
11 discussions and doesn't know that, then that's fine. I hope
12 that's all this is. Because the pressure on the Trustees to
13 not raise issues like that that could bog us down so that we
14 could get this proceeding back on track and forward after
15 all these years was exactly what we were hearing from the
16 plan administrator and from the institutional investors.

17 When we raised issues that seemed like they were
18 things that needed to be dealt with at the time, that could
19 create delay, we were told that we were causing this process
20 to slow down. And the way-- the three parties, not the
21 Trustees, Your Honor -- the three sets of parties agreed to
22 work through this issue -- was to deal with the issues that
23 would get the money out of the estate, and then at that
24 point the plan administrator wasn't concerned anymore, the
25 institutional investors knew they had their deal, and this

1 could go forward.

2 So, for people to come into Your Honor's court and
3 say that this is all on the Trustees and they're surprised?
4 I know you said earlier that we shouldn't use the word
5 shocked these days, but I'm shocked.

6 And then the last point, Your Honor, is I know you
7 mentioned earlier today, and you said it last time, that the
8 \$2.4 billion was the lowest that the Trustees could get.
9 And I think there are two points that I want to respond to
10 on that, Your Honor.

11 The first one is that even if the -- as Mr. Siegel
12 said before, if the number was lower or the number was
13 higher, that could have affected which trusts were part of
14 this proceeding. So, it wasn't just knowing that there was
15 a minimum. More trusts or less trusts -- more money or less
16 money could have impacted this.

17 But I will tell you, Your Honor, the way we
18 negotiated this agreement and the discussions that we had,
19 and the way we still read that agreement, there was no
20 certainty to us that \$2.4 billion was the low number. The
21 low -- below \$2 billion, we had a right of appeal, and we
22 bargained for that right because we believed that while we
23 thought the claims were worth more, we recognized there was
24 a possibility that the amount could be less. And so, it was
25 not our understanding then. It was not our read of the

1 agreement then. And we don't think the agreement provides
2 that. So, the notion that before March we knew that we were
3 going to get at least \$2.4 billion, that's not what the
4 Trustees understood.

5 And those are the points --

6 THE COURT: Yeah, I --

7 MR. KRAUT: -- I wanted to raise and I'm happy to
8 listen.

9 THE COURT: I agree. I thoroughly agree with your
10 last point and I appreciate your perspective on what the
11 institutional investors may or may have not known.

12 MR. SHEEREN: Your Honor, may I respond to that?
13 David Sheeren, for the institutional investors.

14 THE COURT: Yes.

15 MR. SHEEREN: Thank you.

16 THE COURT: Of course.

17 MR. SHEEREN: Your Honor, I have not had the honor
18 or pleasure of appearing before you. This is the first
19 time. As counsel here knows, I'm a senior associate at
20 Gibbs & Bruns. I have been involved in RMBS matters for six
21 years. I know all of these lawyers very well. Again, I was
22 involved in every draft settlement agreement. The
23 suggestion that I'm a new person here, that I'm a stranger,
24 that I don't know what was going on, Your Honor, is wrong.
25 It's just wrong.

1 Let me say this. 3.01 speaks for itself. It says
2 the Trustees have a duty to use their reasonable best
3 efforts to promptly distribute the settlement payments, and
4 that if they have a good faith belief that there is a real
5 dispute or ambiguity, they can seek judicial relief.

6 Your Honor, that's what the settlement agreement
7 sets. There was no reason that the Trustees could not have
8 filed this case in July 2017. The notice issue is a
9 complete red herring. They could have come to Your Honor
10 and said, look, we think there is a potential ambiguity on
11 the order of operations; let's solve that problem so we
12 don't have a situation where at the end of the estimation
13 proceeding we have an allowed claim, but the true economic
14 creditors, the investors, don't receive their money for two
15 years. They should have done that. I think they've
16 admitted that this could have been brought earlier.

17 Another point on the timing, Your Honor. The
18 suggestion that the Trustees may find more disputes or
19 ambiguities if they received it less money is bizarre. Your
20 Honor, under these waterfalls, the more money to sort of
21 flow through them, the more likely you are to find problems.
22 And in any event, that is a new explanation for the delay
23 that we didn't see in the papers, that they haven't
24 substantiated in any way, and which I frankly find baffling.

25 I do not understand how the Trustees would have

1 been unable to seek an earlier declaration from this Court
2 that the order of operations is pay first or write up first.

3 There's been some discussion, Your Honor about
4 what the state of the world was back in March and April and
5 May and June of 2017. I was there. Here's the state of the
6 world at that time.

7 The Countrywide case had been filed in February of
8 2016. BNY Mellon said do you pay first or do your write up
9 first? Three months later, there was unanimous investors'
10 support that the order of operation should be pay first for
11 512 of the 530 trusts. So, within three months, investors
12 agreed, hey, there is no issue here under the settlement
13 agreement. That settlement agreement said pay first, write
14 up second, and lo and behold, investors could read that
15 provision and the Court entered an order releasing over \$8
16 billion to investors in May 2016 on a pay first basis.

17 But that didn't end the Countrywide case. There
18 were still a handful of trusts, about a dozen trusts, where
19 there was disputes around another provision in the
20 indentures that had nothing to do with pay first or write up
21 second. It had to do with a defined term. I litigated
22 this. Some counsel in this room litigated this as well. It
23 had to do with a defined term called the principal
24 distribution amounts, and the parties had different views of
25 what that defined term is and what it required by way of the

1 distributions.

2 We briefed up that question and had an order from
3 Justice Scarpulla in Supreme Court on that second question
4 of what does the principal distribution amount mean in April
5 of 2017? That's Docket 193 from the Countrywide matter.
6 "Parties do not dispute that the distribution provisions in
7 the settlement agreements" -- this is a reference to the
8 Countrywide settlement agreement -- "direct the Trustee to
9 pay out the allocable share first and then to write up the
10 certificates."

11 So, Your Honor, that decision was issued in April
12 of 2017, and back in May of 2016 there had been a unanimous
13 consensual distribution on pay first, using, as counsel, Mr.
14 Houpt, pointed out, a settlement agreement that had this
15 same provision at the end of the (indiscernible) write up
16 provision.

17 So, the notion that, you know, because of some
18 complications in our Countrywide Article 77, we somehow
19 agreed to kick the can is just flatly disproven by the
20 timing of the Countrywide case, and the fact that we had the
21 resolution of the pay first issue before the Trustees even
22 accepted the lien settlement agreement, Your Honor.

23 But whether or not the settlement agreement at
24 Section 3.06 is dispositive is something Your Honor should
25 determine, because it's wrapped up in the seemingly endless

1 need for judicial cover that these Trustees have displayed
2 throughout these cases.

3 Section 3.01 says there's a threshold before even
4 going and seeking judicial instructions. That's part of
5 this Court's jurisdiction. We think the Court should
6 exercise its jurisdiction. The Trustees have sought to
7 exercise a right to seek judicial relief. But with that,
8 Your Honor, comes obligations to show that they're
9 exercising that right in an appropriate way, that they've
10 not been hiding the ball for 10 months.

11 And with that, I've responded to the points that I
12 just couldn't leave unopened, Your Honor.

13 MR. HOUPT: Your Honor, if I may respond to that
14 as briefly as I can? This is Chris Houpt again for
15 Citibank.

16 THE COURT: Yes.

17 MR. HOUPT: There were some general points there
18 and some specific points. With respect to the supposed
19 endless need for judicial instruction, I think counsel --
20 I'm sure he doesn't mean to misstate this, but obviously,
21 both the Countrywide case and the J.P. Morgan distribution
22 case, they did not involve unanimous investor consent. They
23 were heavily litigated. In some trusts, only one investor
24 appeared, and those were resolved quickly because that
25 investor just said, here's what I want to do, and the court

1 did it.

2 But on many other trusts, there were numerous
3 investors arguing and filing very long, detailed briefs
4 about why -- you know, why each side was right. What the
5 institutional investors argued in that case -- I was looking
6 at their brief again this morning -- they did not cite at
7 all in the Countrywide case the language that they say is
8 dispositive here at the end of 3.06(b). Instead, they
9 argued that the Court needs to interpret the PSAs in light
10 of the prospective supplements. They argued about the
11 purpose of securitization and the purpose of subordination,
12 and that the Court should enter an order that is consistent
13 with the idea that senior investors get paid first,
14 regardless of what the details in the contract say.

15 They argued about the purpose, not the text, of
16 the settlement agreement. They quoted trial testimony from
17 my partner, who was involved in drafting that, about what he
18 thought the settlement agreement was intended to do, rather
19 than what it said. And then they concluded by arguing that
20 the court should interpret the PSAs to give effect to the
21 reasonable commercial expectations of the investor
22 community, as reflected in the Intex model, which is a
23 computer software that investors use for analyzing RMBS cash
24 flows.

25 Now, those arguments were ultimately unsuccessful.

1 No one said that they were made in bad faith and no one ever
2 suggested that the Court should simply order us to follow
3 the contracts for all of us to follow the settlement
4 agreement. No one thought that it was that simple.

5 Now, with respect to the idea that the order of
6 operations issue was resolved promptly in the Countrywide
7 case, that, I believe, was because the Countrywide
8 settlement said explicitly that after the distribution of
9 the allocable share to investors pursuant to a particular
10 paragraph, the Trustee will allocate the amount of the
11 allocable share for that trust in the reverse order, et
12 cetera.

13 That settlement agreement at least had some fairly
14 explicit language about the order. One thing happens after
15 the other. That particular language -- sorry for this
16 feedback -- that language is not present in this agreement.
17 Instead, the investors are telling you that this agreement
18 is clear and explicit, and the parties resolved that issue
19 by taking language that was already in the Countrywide
20 settlement agreement, and that the Court in the Countrywide
21 settlement case didn't find relevant to the resolution of
22 the issue under the PSAs.

23 So, I think at a minimum -- and I understand the
24 Court is frustrated with the timing -- but the idea that
25 there is not a good faith need for resolution, and the idea

1 that because we're here today in a proceeding that only the
2 institutional investors have been able to initiate and have
3 been able to appear in, that you're only getting one side of
4 the story, I think it is -- there is no reason at all to
5 think that if we have notice that investors are going to
6 unanimously stand up and condemn the Trustees and say, just
7 order the Trustees to do what the contracts say. It's
8 absolutely not that simple, and the history confirms that.

9 MR. SHEEREN: Your Honor, David Sheeren for the
10 institutional investors. Counsel just read from a brief
11 that we submitted on the dozen or so trusts that I had just
12 described did not involve the pay first issue. We were
13 debating --

14 THE COURT: Mm hmm.

15 MR. SHEEREN: -- the meaning of the principal
16 distribution amount. The pay first issue --

17 THE COURT: Yep.

18 MR. SHEEREN: -- was resolved in May 2016. In the
19 order that I just read from the Countrywide court that
20 resolved the principal distribution amount dispute, that was
21 issued in --

22 THE COURT: Yep.

23 MR. SHEEREN: -- April 2017. Okay, so that's the
24 context of the timing here.

25 THE COURT: Okay. Let me -- I'm just trying to...

1 Very narrow question on pay first.

2 MR. SHEEREN: Yes.

3 THE COURT: The institutional investors believe
4 that pay first is conclusively resolved by section 3.06 of
5 the settlement agreement, correct?

6 MR. SHEEREN: Correct, Your Honor.

7 THE COURT: Okay. And on what basis, or what is
8 exactly the Trustees' argument to the contrary? Section
9 3.06 clearly -- makes it very clear that certificate write
10 up cannot occur before payment. It's just entirely clear.

11 MR. SHEEREN: We agree, Your Honor, and at Section
12 3.06(c) it says if the party distributing the payments
13 determines -- and I'm summarizing it -- determines that
14 doing what 3.06(a) and 3.06(b) say to do, they say if that
15 conflicts with the governing agreements, then follow the
16 governing agreements. But 3.06(a) and (b) provide that
17 clear instruction. And the Trustees have not cited a single
18 provision of the indenturers that they argue conflicts with
19 that construction, that clear order of operations.

20 THE COURT: So --

21 MR. SHEEREN: And that's the nature of our --

22 THE COURT: So --

23 MR. SHEEREN: -- complaint.

24 THE COURT: So, Mr. Siegel, I'll go back to you.

25 I clearly can order and direct that the settlement

1 agreement's terms be enforced, including without limitation
2 that payments shall be made in accordance with Section
3 3.06(a) (b) and (c), which in sum and substance say pay
4 first, write up second? So, you --

5 MR. SIEGEL: You --

6 THE COURT: You can go -- right? I mean, I can
7 say that. That's obvious.

8 MR. SIEGEL: Your Honor, you can certainly say
9 that we are required to comply with Section 3.06, because we
10 agreed that we -- not only -- it doesn't matter if we
11 agreed, but we also agree with you that you could do that.
12 Our difficulty is not that point. Our difficulty is that
13 strewn throughout 3.06 is language that says that this is
14 the case, provided that the governing agreements do not
15 conflict. So, what we think is --

16 THE COURT: But it's -- but, sir, you're ignoring
17 the language about that it cannot affect the distribution of
18 plan payments. And if you did write up first, that would
19 affect the distribution of the plan payments.

20 MR. SIEGEL: But the distribution of the plan
21 payments --

22 THE COURT: So, what you're going to tell me --
23 yeah. It's a circularity, you're going to tell me --

24 MR. SIEGEL: I mean -- there is --

25 THE COURT: You have to go into --

1 MR. SIEGEL: Yeah, I mean, there is a problem with
2 that. Whatever this means, it can't mean that we have to
3 make a distribution that doesn't comply with the governing
4 agreements. So, what -- look, what we think at the end of
5 the day is that so long as --

6 THE COURT: Hold on. Hold on. Hold on. If I
7 were to say -- if I were to make a finding that... I mean,
8 there's just a level of absurdity to this, frankly, that if
9 I were to say the settlement agreement has to be enforced as
10 written, and the settlement agreement requires pay first,
11 period, you're telling me that that's not good enough?

12 MR. SIEGEL: Your Honor, what I'm... If you were
13 to read Section 3.06 to determine that the language that
14 says pursuant to the terms of the governing agreements does
15 not affect the remainder of the provisions, I suppose we
16 would be required to comply with that

17 But Your Honor, if you were to consider doing so,
18 we would feel very strongly that to do so, you would need to
19 give other certificate holders the opportunity to present
20 their own points of view on this. That is what we are
21 concerned about. This is ultimately a due process issue for
22 them.

23 MR. SHEEREN: As to notice, Your Honor, that will
24 be a question you can determine whether that is necessary.
25 This is -- sorry -- David Sheeren for the institutional

1 investors. Our view would be that the settlement agreement
2 provides clear notice as to the order of operations and that
3 none would be required.

4 However, the issue here is, is this going to be a
5 case that you decide or a case that Justice Friedman in the
6 State Court decides. And at this moment, Your Honor, we
7 just haven't heard any argument why this Court shouldn't
8 exercise its jurisdiction over issues like whether there
9 should be notice.

10 MR. ITKIN: Your Honor, this is Uri Itkin, from
11 Kasowitz. We're here on behalf of the noteholder group, and
12 we were observing in the background. But I would like just
13 a minute to speak. While we agree with the --

14 THE COURT: Wait. Hold on. Hold on, I don't know
15 who -- what do you mean, noteholder group? Who are you?

16 MR. ITKIN: We have appeared in the context of the
17 RMBS estimation proceeding. We had objected to the 9019
18 motion.

19 THE COURT: Okay. Same group.

20 MR. ITKIN: Yeah, we represent a number of other
21 investors. And while we agree with the institutional
22 investors that this should be decided expeditiously, and
23 investors certainly want to get paid as soon as possible,
24 our understanding was that this hearing and this proceeding
25 is really about the forum, and not to decide the meaning of

1 the document. And so, we just want to caution the Court
2 about, you know, resolving and interpreting the documents --

3 THE COURT: Okay. Hold on. Hold on. Hold on.
4 You don't need to caution me about anything.

5 MR. ITKIN: I apologize, Your Honor. I --

6 THE COURT: I understand how to do my job. The
7 fact that I am not in the room doesn't mean that any of you
8 get to be patronizing and condescending.

9 MR. ITKIN: Your Honor, that was not at all my
10 content.

11 THE COURT: Don't caution me. I'm sure it wasn't
12 your intent. But people need to be thoughtful about the
13 words that come out of their mouths. So, start now. You
14 don't need to caution me. We are talking about whether or
15 not I'm going to decide these issues, or whether Justice
16 Friedman is. I'm fully aware of that.

17 MR. ITKIN: And --

18 THE COURT: Do you have anything else to say?

19 MR. ITKIN: No, that was my only intent, Your
20 Honor. And to the extent that you're going to interpret the
21 settlement agreement here, we just would like an opportunity
22 and maybe some notice -- and it does not have to be long --
23 to weigh in on those issues as well.

24 THE COURT: Thank you.

25 MR. ITKIN: Thank you, Your Honor.

1 THE COURT: Anyone else?

2 MR. HOUPT: Well, Your Honor, just very briefly.

3 This is Chris Houpt again. I think it was pointed out to
4 you, but I just want to make sure that it was pointed out in
5 a clear way, that 3.06(b) says what it says. And then
6 3.06(c) says that if the distributions required by the
7 settlement agreement deviate from the terms of the governing
8 agreements, then we don't follow the settlement agreement,
9 we followed the governing agreements.

10 And so, I think that's exactly the problem with
11 just ordering us to follow the settlement, even assuming
12 that everyone agreed that the settlement was unambiguous on
13 this point, that the settlement expressly defers to the
14 governing agreements. And it does that because the Trustees
15 and the investors certainly were not permitted, under the
16 terms of those agreements, to amend those agreements.

17 THE COURT: All right. All right.

18 MR. SIEGEL: Your Honor, only one additional
19 point. The entirety of the Article 77 proceeding actually
20 deals with a number of other issues in addition to this
21 issue.

22 THE COURT: Yes.

23 MR. SIEGEL: It deals with zero -- what is it,
24 zero --

25 MAN 1: Balance.

1 MR. SIEGEL: -- zero balance. And there was one
2 other issue -- what?

3 MAN 1: Over-collateralization --

4 THE COURT: Yes.

5 MR. SIEGEL: Over-collateralization issues.

6 THE COURT: You're right. Yep.

7 MR. SIEGEL: We -- whether Your Honor decides to
8 hear this or not, we will have to decide what to do with
9 those issues as well.

10 THE COURT: Yeah, I appreciate that. You're
11 right. We were focusing on the one provision, and it's more
12 complicated than that. Well, obviously I've thought about
13 this, and as you can probably tell, I'm quite unhappy that
14 we have to deal with this issue.

15 This is not an evidentiary record. I'm not making
16 evidentiary findings, but I find the fact that we're here
17 extremely troubling. I think that it was having -- I think
18 the due process point is a serious point. Due process is a
19 nonnegotiable right and it is of concern to me that
20 appropriate notice be given.

21 That being said, this has been going on for a
22 very, very long time, and I do think as a practical matter,
23 that folks with the most skin in the game have certainly
24 kept apprised of what's going on.

25 I find it troubling that this was not brought to

1 my attention and that there was not a crystal-clear
2 understanding that, you know, as they say in the securities
3 trading business, done is done. Done was not done here. We
4 had a 9019 process, we had a very long trial, a decision,
5 and I frankly find not satisfying the explanation that it
6 was only upon the rendering of decisions that the Trustees,
7 who have been the Trustees under these indentures for years
8 and years and years, only then began to determine whether
9 and to what extent there would be these issues.

10 I take the point about the possibility that the
11 claim amount could have been lower and there would've been
12 appeal rights, and that's certainly correct. I have no
13 intention of interpreting the government agreement. As to
14 that, I am going to abstain. That's not what I do. It's
15 not what I have expertise in. It would not be appropriate
16 for me to do that.

17 What I'm going to direct you to do, it's not
18 entirely clean, if you will, but I will enter an order
19 abstaining, provided however -- not provided however, but
20 also directing that the settlement agreement be enforced
21 strictly in accordance with its terms. And that I would
22 suggest greatest respect to Justice Friedman for taking on
23 these Herculean tasks. That when you embark on whatever it
24 is you're going to embark before her, that the questions
25 presented to her be examined through the lens of the

1 language of the settlement agreement.

2 And to the extent that there is any question in
3 her mind as to what the settlement agreement means, I would
4 respectfully request that that question be sent back to me.

5 But to the extent that what happens when you go into the
6 settlement agreement and link it up to the governing
7 agreement is that you're driving a road and you're
8 completely clear how to get to the destination.

9 And then at the very end, if there's a slight
10 ambiguity that requires a detour into the governing
11 agreement, certainly on those questions, I'm not going to
12 offer an opinion. I do not feel that that would be an
13 appropriate exercise of my jurisdiction.

14 That being said, as I think I've made it pretty
15 clear, and I'm usually -- I hope you all would agree, I'm
16 usually in a better humor most of the time -- the reason for
17 that is I feel that there was a lack of candor here. I'm
18 hesitating to not use the words bad faith, but I think there
19 was a lack of candor here. And I think that it's a shock to
20 lots of folks that we were done, and then we were not done.

21 And to the extent that the institutional investors
22 believe they have rights that they can assert in this Court
23 in that regard, I'll hear them. I think that, you know, the
24 notion that there are going to be further proceedings and
25 that these certificate holders, who have waiting years and

1 years and years, frankly, while the Trustees drafted one
2 solution versus another solution to get the comforts that in
3 the exercise of their responsibilities they need, that
4 shouldn't be a cost borne by the certificate holders. And
5 that's what I feel is happening now.

6 But I am very careful about not getting out ahead
7 of where I believe I should exercise my jurisdiction. And
8 accordingly, I'm going to direct that you work on an order
9 that reflects the ruling that I've just made, including
10 language that says that this is without prejudice to the
11 rights of the institutional investors to seek whatever
12 relief or assert whatever claims they believe they had with
13 respect to what I'll call, you know, the process points
14 leading up to this, and what I'm concerned about in terms of
15 the candor of the Trustees in making clear that this was
16 going to be the path. In other words, that done was not
17 done.

18 That's all I have. I appreciate you coming down
19 and putting up with this slightly unusual format, in light
20 of the fact that I'm having a hard time walking. And I wish
21 you all a good day.

22 MR. OSTROW: If you don't mind, we have some
23 questions about what exactly Your Honor has reserved
24 jurisdiction over.

25 THE COURT: I am -- I don't know that -- it's a

1 reservation of jurisdiction only to the extent that Justice
2 Friedman identified questions that she believes require
3 interpretation of the settlement agreement. As to purely
4 issues of interpretation of the governing agreement that are
5 not otherwise resolved by the settlement agreement, as to
6 that latter category, I am abstaining.

7 MR. OSTROW: Your Honor, does that mean that we
8 can only come back to you if Justice Friedman says we can,
9 or is there something that come back to you for, such as to
10 enforce the pay first, to enforce the provision that they'll
11 use reasonable best efforts to distribute the amounts as
12 promptly as possible?

13 THE COURT: That's just getting to the substantive
14 results that you're seeking. And what I'm saying is that
15 I'm not going to do that. You can urge to Justice Friedman
16 that the settlement agreement says what you would have it
17 say, and my request and expectation is that the settlement
18 agreement will be enforced in accordance with its terms. To
19 the extent that Justice Friedman determines that there's a
20 question in that regard, she can determine to send it back
21 to me. Otherwise, we're just chasing our tails.

22 MR. OSTROW: Okay. Thank you, Your Honor.

23 THE COURT: I know it's not -- it may not be the
24 most crystal-clear proposition. It's the best I can do.

25 MR. OSTROW: Thank you.

1 THE COURT: You can work on in order and I have a
2 high degree of confidence you won't agree.

3 MR. OSTROW: Okay.

4 THE COURT: But at least try to work on an order
5 on a consensual basis.

6 ALL: Thank you, Your Honor.

7 THE COURT: All right. Thank you, folks.

8 (Whereupon these proceedings were concluded at 11:25 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: April 23, 2018

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