

**In The Matter Of:**

*MBIA v.  
Countrywide*

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*December 12, 2012*

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*New York Supreme Court - Civil  
60 Centre Street  
New York, New York 10007*

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**Min-U-Script® with Word Index**

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK : PART 3

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3 MBIA INSURANCE CORPORATION,

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Plaintiff,

4

-against-

Index No.  
602825-08

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6 COUNTRYWIDE HOME LOANS, INC.,  
7 COUNTRYWIDE SECURITIES CORP.,  
8 COUNTRYWIDE FINANCIAL CORP.,  
9 COUNTRYWIDE HOME LOANS SERVICING., L.P.,  
and BANK OF AMERICA CORP.,

MOTION FOR  
SUMMARY  
JUDGEMENT

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Defendants.

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December 12, 2012  
60 Centre Street  
New York, New York

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BEFORE: HON. EILEEN BRANSTEN  
Supreme Court Justice

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APPEARANCES:

16

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BY: DAVID J. APFEL, ESQ.  
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Proceedings

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Senior Court Reporters

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2 THE COURT: If new people come in and  
3 they are attorneys, then they could come and stand  
4 over here. They don't have to stand back there.  
5 They could stand in front. Otherwise, do we have  
6 anymore chairs? What happened to the chairs over  
7 there?

8 COURT OFFICER: They are all around.

9 THE COURT: Let me tell you how we're  
10 going to handle today. We have scheduled two days  
11 of arguments, so hopefully we have plenty of time  
12 to get every issue thoroughly vetted before time  
13 runs out. When it runs out, it will run out. We  
14 are going to work from now to 11 o'clock, at which  
15 point we'll take a break.

16 So we are going to have daily copy. That's  
17 good. At 11 o'clock we'll take a ten minute break  
18 and then we'll work until approximately 12:45.  
19 However, 12:40 if we change, we're going into a  
20 new subject. We'll stop at 12:40 if we're not  
21 going to go into a new subject and, guess what,  
22 break in five minutes. But we must be out of the  
23 courtroom fully. Everybody has to be out by 12:45  
24 because there is no overtime in this courthouse.  
25 I can't give anybody overtime and my personnel has  
26 to be able to lock the door at 12:45. In the

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2 afternoon we'll start at 2:15. We'll take a break  
3 at 3:15 and then go to quarter to four -- sorry.

4 Yes. Again we have to close the door at 4:45.

5 All right. With that who is on first?

6 Mr. Selendy, are you going -- let me introduce

7 Who is in the well. We have Philippe

8 Selendy, Manisha Sheth as you well know. We have

9 Jonathan Harris, and of course we have the great

10 Peter Calamari. We have all of you. Then on the

11 other side we have David Apfel, Paul Ware

12 Jr. and of course our famous Mark Holland.

13 In the back representing people who will

14 be speaking next time around we have from Bank of

15 America, we have Jonathan Rosenberg and Daniel

16 Cantor. And we also have from Goodwin Procter we

17 have Abby Hemani and Derek Adams. Okay. And

18 in the back over here we have not going to be

19 speaking we have Renee Beltranena Bea, how are you

20 and Blyth McLeod. We also have Joy Lurinsky.

21 What happened to her. Okay. You're in charge of

22 the boxes. Okay. Good. We also have Alicia

23 Cobb. Now we're ready to start Mr. Selendy.

24 MR. SELENDY: Thank you, your Honor.

25 I'll take the podium. And we will during the

26 course of today, we will have slides that will

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2 show on the screen. But I'd like to start with a  
3 few words before I introduce the slides.

4 Today, as your Honor knows, MBIA seeks to  
5 hold Countrywide to the terms of its own bargains  
6 and moves for summary judgment on the contract  
7 claims of the case. So today we move on the  
8 contract claims. We'll address fraud tomorrow and  
9 as your Honor knows the 15 RMB transactions at  
10 issue are really at the intersection of the  
11 security and insurance markets where Countrywide  
12 had heightened duties of disclosure both as the  
13 underwriter of the of the RMBS and as the  
14 insurance applicant. And what's important to keep  
15 in mind is that Countrywide elected to make  
16 extraordinarily detailed representations as to  
17 every single one of the 389,000 loans, borrowers,  
18 and properties in these transactions. Countrywide  
19 had to make those disclosures because it was  
20 uniquely advantaged as to the facts. It directly  
21 originated the vast majority of the loans. It was  
22 the seller of all of the loans to the RMBS Trust,  
23 as the sponsoring underwriter that securitized and  
24 marketed the deals, Countrywide had due diligence  
25 obligations under federal law and today  
26 Countrywide was the applicant for financial

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2 guarantee insurance. MBIA, for its part demanded  
3 even more than representations as to the loans and  
4 as to Countrywide operated and originated those  
5 loans. The facts were so material to the basic  
6 question of what risks would be insured that MBIA  
7 required Countrywide to warranty the truth of its  
8 representations and MBIA made those warranties  
9 conditions precedent to the insurance. Those  
10 conditions had to be materially satisfied before  
11 the insurance issue. And that's a day one test  
12 based on the transfer of risks which applies to  
13 the insurance agreement as a whole. If that test  
14 isn't satisfied, then Countrywide bares the  
15 consequences here damages equivalent to rescission  
16 or rescissory damages. There is a similar test,  
17 your Honor, that applies to each loan individually  
18 and that's the repurchase provision based on  
19 material and adverse affects on MBIA's interest.  
20 And as an insurer, MBIA's interests are all about  
21 the risks. If Countrywide breaches create a  
22 material increase in risks as of day one, then  
23 there is a material and adverse affect as to the  
24 meaning of the contract and the loan should be  
25 repurchased. So MBIA today is seeking summary  
26 judgment on just Countrywide's breaches of

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2 warranties and conditions precedent that are  
3 incontestable. As I'll show we're moving slowly  
4 on the black and white issues as to which there is  
5 no real dispute of facts. Either Countrywide has  
6 wholly failed to rebut MBIA, or it feigns a  
7 dispute built essentially on speculation and  
8 error. Fundamentally, your Honor, if our markets  
9 are to function with integrity and transparency,  
10 then banks and loan originators as Countrywide  
11 have to live by the rules and respect their  
12 contracts and that's exactly what is not happening  
13 here. If I could ask the first slide to be put  
14 up. This shows you the difference between  
15 applying a test based on the material and adverse  
16 effects in the contract. This is slide two in the  
17 deck, versus the standard that Countrywide  
18 applied. If we used the contract test as MBIA's  
19 expert showed we see breaches that are material  
20 and pervasive extending across nearly 97 percent  
21 of all of the loans in the securitizations.  
22 Clearly 56 percent of those in our view are  
23 incontestable and the subject of the motion here.  
24 We believe there is no real dispute of fact as to  
25 56 percent of the material breaches that are in  
26 all of the securitizations. If we contrast that

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2 with what Countrywide actually did they have  
3 repurchased to date as of 2012 in December, zero  
4 point 2 percent of the loans in all of the  
5 securitizations. And what they did was apply  
6 multiple standards that appear nowhere in the  
7 contracts. For example, they apply a standard  
8 that the loan would have to be so egregious and  
9 embarrassing that they would have to be red faced  
10 not to repurchase it. They apply a standard that  
11 the loan had to have already defaulted and that  
12 the breach caused the default. And they also  
13 introduced as I'll discuss later, multiple  
14 procedural hurdles specifically from underlined  
15 insurers like MBIA, consequence that is we see  
16 this grotesque disparity between actual breaches  
17 and what Countrywide did to repurchase it. And  
18 this, we submit your Honor, came from a direction  
19 at the top, Countrywide former CEO Angelo Mozilo  
20 was preoccupied with dominating the mortgage  
21 sector rather than prudent lender as he said in  
22 his own words. I'd like play that video clip,  
23 your Honor.

24 (Whereupon, the video is being played in  
25 open court with all parties present)

26 MR. SELENDY: Domination was Mr.

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2 Mozilo's goal and as a consequence of that  
3 production rode rough shod over their own rules as  
4 they sought to expand in the mortgage sector and  
5 be the nation's largest lender. They did not  
6 respect their own guidelines and again Mr. Mozilo  
7 gave this evidence himself in his deposition.

8 (Whereupon, the video tape is being  
9 played in open court with all parties present)

10 MR. SELENDY: They should have been the  
11 ten commandments for Countrywide because otherwise  
12 we have exactly the situation that we have today.  
13 And, your Honor, I'm going to walk through first  
14 of all the materiality standard for assessing  
15 breach or inducement of the insurance contract  
16 specifically the focus on day one risks.

17 Secondly, the indisputable breaches of  
18 the representations and warranties and I'm going  
19 to show you specific examples of loans and explain  
20 why those breaches are indisputable. It may be a  
21 little bit dry, but it's key to the motion so I'll  
22 take you through that. And then I'll discuss the  
23 extrapolation of those breaches from the random  
24 samples that the court approved to the population  
25 as a whole which gets us to that 56 percent figure  
26 and shows which recissory relief is warranted.

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2 And finally, I'll talk about how Countrywide  
3 fundamentally prorated its repurchase obligations  
4 under the contract giving this court a second  
5 independent basis to provide rescissory relief.

6 Turning to the materiality standard, this is  
7 slide 6 because the insurer is assuming risks as  
8 of the closing date. It is the day one risk that  
9 must be tested. If we look to the contract  
10 standard, this is true for all of the HELOC and  
11 closed end second deals at issue. The test is  
12 whether the substance of any representation and  
13 warranty inaccurately and the inaccuracy  
14 materially and adversely affects the interest of  
15 MBIA in that loan. That's a test materially upon  
16 the closing of the deal. Does it affect the  
17 interest of the insurer because of heightened  
18 risk? And this is echoed in the second  
19 requirement again for all of the insurance  
20 agreements that MBIA agrees to issue the policy on  
21 the closing date subject to the satisfaction of  
22 conditions precedent specifically including that  
23 Countrywide representations and warranties shall  
24 be true and correct as of the date of issuance.  
25 That's day one. The date the deal closes they  
26 have to be true and correct. That's when the test

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2 is made and that is similar, your Honor, to the  
3 broad standard under the insurance law. If we  
4 look to 3106(b) the question is whether there is a  
5 material increase in the risk of loss in which a  
6 breach of warranty allows for the avoidance of  
7 insurance contract or for rescissory relief.  
8 Specifically, warranty deals with the question of  
9 whether there is a fact which tends to increase  
10 the risk of occurrence of loss as reflected in the  
11 slide.

12 Now, we have moved on the basis on one  
13 contract previously in front of this court in our  
14 motion for partial summary judgment, at which time  
15 your Honor recognized the strength of the argument  
16 as to what material and adverse affect meant.  
17 This is slide 7, but you noted we had based our  
18 argument on a single securitization. We're now  
19 moving across all 15 deals with new evidence of  
20 admissions that come from Countrywide witnesses  
21 themselves. So turning to the plain language of  
22 the documents on page 8, it's clear that the  
23 repurchase remedy --

24 THE COURT: What happened to the slides?

25 MR. SELENDY: Let's play slide 8. I was  
26 going to focus on the graphics.

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2 THE COURT: I'm happy. I have my slide.

3 MR. SELENDY: As you could see, the  
4 plain language of the transaction documents makes  
5 clear that the repurchase remedy is not limited to  
6 defaulted loans. The whole test is whether there  
7 is a material and adverse affect on the interest  
8 of MBIA. There is no statement anywhere in the  
9 contracts that the loan must have defaulted, or  
10 that the breach caused the default, or that the  
11 loan be seriously delinquent. These are all adhoc  
12 standards that Countrywide in fact sought to  
13 introduce after the deals closed once they  
14 realized they were seeing problems in the level of  
15 the purchases. And this is corroborated by  
16 certain other language in 11 out of the 15 deals.  
17 There is the specific provision dealing with  
18 additional disclosures with respect to repurchases  
19 of mortgage loans that are not in default or as to  
20 which default is not imminent. Those deals are  
21 cited at the second part of our slide. There is  
22 no ambiguity in the documents, your Honor. It's  
23 very clear what the standard is and we submit  
24 that's why Countrywide's own witnesses on  
25 examination and depositions have turned out to  
26 support MBIA's position.

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2 And if we turn to the next slide, slide 9 I'm  
3 starting with Michael Schloessmann who is  
4 currently the president of Countrywide Home Loans  
5 and the head of the Rep and Warranty Group, he  
6 testified repeatedly that performing loans were  
7 subject to repurchase. And let's play the first  
8 clip please.

9 (Whereupon, a video clip is being played  
10 in open court with all parties present)

11 MR. SELENDY: In other words, your  
12 Honor, if they were going to repurchase currently  
13 performing loan they needed seasoned and senior  
14 people to approve it according to their internal  
15 structure. It wasn't a question of whether the  
16 contracts barred it. It's simply they set up a  
17 higher standard internally for repurchases of  
18 performing loans and that's confirmed in the  
19 second clip where I asked Mr. Schloessmann to  
20 describe his repurchase approval framework and he  
21 made plain that that framework was designed to  
22 deal with repurchases of loans that had not yet  
23 defaulted. Exactly MBIA's position. It's on the  
24 text. I'll read it for you. He said specifically  
25 "our repurchase approval framework and levels  
26 required to approve a particular transaction was

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2 influenced in part or dictated in part by the  
3 magnitude of exposure." And he went on to say  
4 "that would also apply to loans that had not yet  
5 defaulted." And further in his deposition he made  
6 plain that even if a loan was still performing,  
7 then there would be a risk rating assigned to it  
8 and the repurchase process would go forward. And  
9 this testimony was echoed by others responsible  
10 within Countrywide for repurchases.

11 If we turn to the testimony of Karen Jewett,  
12 this is slide 10. She's a senior loan refi  
13 manager. She testified very simply a loan does  
14 not have to be in default and does not have to be  
15 delinquent. That's because it's a day one test.  
16 Let's play that clip.

17 (Whereupon, the video is being played in  
18 open court with all parties present)

19 MR. SELENDY: Unequivalent, your Honor.  
20 Doesn't have to be in default. Doesn't have to be  
21 delinquent. It's exactly what MBIA has been  
22 saying in this case. In slide 10 I asked John  
23 McMurray, the former chief risk officer in  
24 Countrywide about this and he made plain that the  
25 risk department wanted but did not get a  
26 repurchase standard in these contracts that would

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2     require default.   Thus, he testified look we tried  
3     to develop this standard, but it was aspirational.  
4     It wasn't in place and he said specifically that  
5     Countrywide would accept put-back demands even if  
6     the loans hadn't defaulted, both before and after  
7     his efforts in 2005 trying to adopt a new  
8     standard.   The standard wasn't adopted.   It's not  
9     in our contracts.   It doesn't apply.   Other courts  
10    that have looked at this issue subsequent to our  
11    last issue before you have agreed default is not a  
12    prerequisite to repurchase.

13             If we turn to slide 11, we have in the case  
14    of Syncora versus EMC, Judge Crotty was emphatic,  
15    the material adverse language does not require in  
16    that case Syncora to prove that the alleged  
17    warranty breaches caused HELOC loans to default.  
18    And the proposed construction that the repurchase  
19    provision required default has no support in the  
20    parties' agreement.   It's exactly the same  
21    position that Countrywide is advancing here and  
22    equally there is zero support for that in the  
23    parties' agreement.

24             Similarly, Judge Rakoff in the case of  
25    Assured Guarantee v Flagster, another stated  
26    unequivocally the repurchase provision does not

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2 require the plaintiff to show that the breaches  
3 caused the loans to default. And he went on to  
4 say the defendants offer no good reason for such a  
5 substantial departure from the order meaning of  
6 adverse. They tried to argue as Countrywide did  
7 here that adverse means the loan to be in default.  
8 They offered no good reason for that. The court  
9 knows of none and therefore it's rejected. So  
10 under the contracts there is no question it's the  
11 day one test. If you ignore whether the loan  
12 performed or why it defaults, you simply focus on  
13 what did Countrywide do when they put those loans  
14 in there. What was the risk characteristics? Did  
15 they materially increase the risk of loans to the  
16 insurer? In case there is any doubt of the  
17 significance of these other two cases, the  
18 repurchase provision is virtually the same. In  
19 Syncora it states materially and adversely affects  
20 the value of the interests of the notes of the  
21 insurer. In the Assured case similarly materially  
22 adverse affects the interest of the note of the  
23 insurance and here in our case in all 15 of the  
24 deals the repurchase obligations triggered in the  
25 breach of the representation of the warranty  
26 materially and adversely affects the interests of

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2 the insurer. Exactly the same language. And if  
3 you turn to slide 13, I've said a couple of times  
4 that the test is whether it's a material increase  
5 in the risk of loss. Judge Crotty agreed to that  
6 as well. The question is whether you show a  
7 material breach by proving that those breaches  
8 increase the risk of loss on the policy.

9 Similarly in the Assured case the question is  
10 whether there is a breach of contract that  
11 materially increases the risk of loss and that's  
12 the causation that must be shown. As your Honor  
13 previously ruled, the causation is whether those  
14 alleged breaches caused plaintiff to suffer an  
15 increased risk of loss on day one. You don't need  
16 to then show that the breach led to a default or  
17 was the cause of a specific default of a loan.  
18 For this reason slide 14 please as Judge Rakoff  
19 observed during the trial of the Assured v  
20 Flagstar the test is a risk at the time the loan  
21 was approved not whether in hindsight the borrower  
22 was able to pay off the loan. The fact that later  
23 on the loan turned out to be fully payable is  
24 completely irrelevant. This is very important,  
25 your Honor, because much of what Countrywide says  
26 is oh look many of these loans happened to perform

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2 therefore you're not entitled to the repurchase,  
3 you're not entitled to rescission. It doesn't  
4 matter that we jammed these deals full of  
5 ineligible loans with material defects because we  
6 were lucky most of those borrowers paid off. But  
7 that's irrelevant, completely irrelevant under the  
8 law and so their ex-post analysis should not be  
9 considered either as to the question of whether  
10 the breach materially and adversely affected MBIA  
11 or to the question of what breaches are material.  
12 And this is the same standard under the insurance  
13 law I set forth on slide 15 just a compendium of  
14 authorities. The basic point is that it's  
15 immaterial that the breach of the loan was in no  
16 manner whatsoever connected with the loss, the  
17 warranty is a condition on which the validity of  
18 the contract rests. That's the citation of  
19 Calcium Insurance. The cases are on all fours  
20 with this, your Honor. The key point is to focus  
21 on day one rather than subsequent performance. If  
22 you look to the second to last bullet on the page,  
23 if the rule were otherwise the insured could  
24 freely misrepresent information specifically  
25 requested and still recover on the policy if the  
26 causal connection could not be traced. So there

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2 is a significant public policy reason for this.

3 You don't want applicants to commit fraud and  
4 obtain insurance they were never entitled to and  
5 then be able to recover just so long as the reason  
6 for the loss isn't directly connected to the  
7 reason for the misrepresentation. The whole point  
8 is that that risk should never have been passed to  
9 the insurer in the first place. That's why

10 rescissory relief is appropriate for these  
11 breaches. Or for inducement of the insurance  
12 agreement for material representation. So I'd  
13 like to take you to the indisputable breaches.

14 Let's put up slide 17. The category of breaches  
15 identified by MBIA's expert goes farther beyond  
16 the ones that is the subject of the motion today.

17 These broadly speaking are the various types of  
18 problems. Loans where Countrywide failed to  
19 underwrite the loan in accordance with prudent and  
20 customary standards. Loans where the stated  
21 income loans showed a patently unreasonable  
22 incomes stated by the borrower. Loans where there  
23 are guideline breaches, for example, of the  
24 debt to income or combined loan to value ratio.  
25 Loans that don't satisfy the conditions of the  
26 approval of Countrywide's own automated system.

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2 They called it CLUES, Countrywide loan  
3 underwriting expert system. That system would say  
4 here are certain preconditions mandated for  
5 approval. If Countrywide didn't satisfy those  
6 conditions, that itself is clearly non conformity  
7 with their own guidelines and requirements. One  
8 example of that is if the CLUE system says you  
9 have to have a manual underwriting to address all  
10 the complex risk factors that we've seen and in  
11 issues of refer recommendation, if Countrywide  
12 simply approves the loan without that manual  
13 underwriting, that's a breach and it's a material  
14 one. Similarly loans where Countrywide's  
15 underwriting failed to follow up on credit  
16 inquiries, but where the value is unsupported.  
17 Now, as I've said we've narrowed these down to  
18 just the ones where we think are not the  
19 reasonable subject of dispute. It really isn't a  
20 battle of the experts for the breaches that we're  
21 moving on. We approved these breaches as material  
22 based on Countrywide's own internal documentation.

23 Let's move to the next slide. And these are  
24 the categories that we're moving on. Loans that  
25 Countrywide actually admitted should be  
26 repurchased and has repurchased or additional

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2 loans as to which their loan review expert Ms.  
3 Godfrey had not factual basis at all to disagree  
4 with MBIA's expert Mr. Butler. The only basis was  
5 look the loan performed for a couple of years so  
6 I'm not going to agree it's in breach even though  
7 she can't rebut it on the facts. We submit those  
8 are simply concessions and that constitutes simply  
9 11 percent of the entire population. They have no  
10 answer on those breaches.

11 Secondly, loans where the mortgage loans  
12 schedule contains material false information  
13 violation of the specific warranty, the MLS  
14 representation, that schedule is essentially the  
15 final version of the loan tapes. It's a spread  
16 sheet that's reflected in pro sups of each of the  
17 15 deals and it lists all of the information as to  
18 individual loans in every single transaction.  
19 Here as I'll talk about we submitted a showing of  
20 a loan by loan basis of where there was falsity  
21 and Countrywide's expert at first put in a  
22 response, but then when we asked for the back up  
23 and we said where is your data, where is your  
24 support, they actually withdrew that report and  
25 they never came back with a correction or a  
26 supplementation. So they have no rebuttal on

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2 those mortgage loan schedules.

3 THE COURT: We're having daily copy.

4 You have a chair. When you want to change, put up

5 your hand and I'll make sure the change happens.

6 You have to stop when they change.

7 MR. SELENDY: Absolutely, your Honor.

8 In the third category these are loans that

9 Countrywide's own quality control department rated

10 severely unsatisfactory. They call them SUS

11 loans. It's their own ranking not ours and we're

12 moving on those loans. Similarly, loans with

13 combined loan to loan ratio greater than a hundred

14 percent, those are loans where the value of the

15 property is actually less, loans where the value

16 of the property is less than the total amount of

17 the loans and as I'll discuss loans that contain

18 representations by borrowers in violation of the

19 loan default rule under the mortgage note. That's

20 different than no default under the loan itself.

21 There is a special definition for no default under

22 the note which says the borrower can't make

23 representations that are false.

24 (Continued on the next page)

25

26

1 Motions - Mr. Selendy

2 MR. SELENDY: The last, again, is violations of the  
3 approval. Sorry, the appraisal representation and  
4 violations of the mortgage file representation. I'd like to  
5 just give you a sense of the magnitude of these.

6 Put up the next slide, please. And we also have --  
7 Your Honor, as the board may be difficult to see that, but  
8 we'll put this up as a marker. As we go through each  
9 category, I can refer back to the board, but I'll focus  
10 mainly on the screen.

11 This gives you some sense of the magnitude of  
12 breaches overall. The indisputable breaches add up to at  
13 least \$12.7 billion, that's 56 percent of the total amount  
14 of the loans based on the original principal balance of the  
15 loans across all of the deals. So when we look to day one,  
16 the loans that are materially defective, are at least \$12.7  
17 billion of the total loans, and it's a minority of loans  
18 that actually are not material and indisputable under this.

19 These are the different categories. I won't go  
20 through all the numbers, except to highlight that the first  
21 two categories taken together are approximately \$9 billion.  
22 It's a huge sum. If we look at the materially false and  
23 incorrect statements as to which they have no rebuttal,  
24 that's approximately \$2.6 billion across the  
25 securitizations, and then the materially false, incorrect  
26 information, the mortgage loan schedules, as to which their

## 1 Motions - Mr. Selendy

2 expert withdrew her report. And again, they have no  
3 rebuttal. That's another \$6.2 billion more for the deals.  
4 Enormous sums.

5 One point just to make plain in the calculation  
6 where we have information that is actual across all of the  
7 grids as opposed to extrapolated, we have not included those  
8 figures in the total. So, for example, on the severely  
9 unsatisfactory loans, that's a calculation that's based on  
10 Countrywide's provision of information, and discovery  
11 applies to all the loans. It's not an extrapolation, so we  
12 have not included that in the totals. The totals are,  
13 therefore, conservative.

14 Let's turn to the process by which we determine  
15 whether there were material and indisputable breaches. I'd  
16 like you to see a little bit about our expert, Steven  
17 Butler; he's one of the foremost experts in this case, and  
18 he's had extensive firsthand experience in the mortgage  
19 industry. He is here today, Your Honor, if you wish to ask  
20 any questions of him, but I want to emphasize --

21 THE COURT: Where is Mr. Butler? Okay.

22 MR. SELENDY: I want to emphasize that he was a  
23 senior executive officer for three banks with responsibility  
24 for establishing and overseeing the mortgage loan department  
25 and origination underwriting and closing of residential  
26 mortgage loans, as well as other loans. He's had very broad

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2 consulting experience. He's been retained by the Federal  
3 Trade Commission itself to investigate mortgage lenders to  
4 assess the company's real residential mortgage origination,  
5 underwriting and servicing practices, and he's been retained  
6 broadly by banks, savings and loan institutions, and  
7 insurance companies. He's worked on every side of the  
8 industry and has a very, very deep background in evaluating  
9 whether or not loans comply with guidelines. And the  
10 process that he used for this case, he made use of a further  
11 very large team of underwriters, EdgeMAC.

12 The next slide, please. He specifically selected,  
13 trained and supervised those underwriters, and he developed  
14 the methodology and standards by which facts that he  
15 developed in order to test compliance with guidelines.  
16 Specifically, he built the methodology, worked with EdgeMAC  
17 for it, and reviewed all of their findings. EdgeMAC did the  
18 compilation of loan level data points and factual findings,  
19 and what Mr. Butler did was review every finding and reach  
20 his own conclusions. He was supported in this as well by a  
21 team of corporate staff attorneys, who did a quality control  
22 review of the factual findings. A very robust, very lengthy  
23 process involving literally multiple years of hours of labor  
24 across all the members of the team.

25 Slide 22 illustrates the steps in the process,  
26 specifically determining the applicable guidelines,

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2 assessing whether the loans were underwritten manually or  
3 through an automated system, such as CLUES, assessing  
4 whether the required legal documents were in the file,  
5 determining whether critical documents were missing, and  
6 then performing multiple reviews; a credit review,  
7 compliance review, an appraisal review, a catalog of  
8 findings and assessing whether as a whole for any given loan  
9 those findings showed a meaningful and substantial increase  
10 in the credit risk for the loan, which was his standard of  
11 whether the loan was significant.

12 And importantly, Mr. Butler used the day one  
13 standard that is consistent with the contracts and the  
14 insurance law. He examined, one, what are the risks in that  
15 loan origination. Countrywide's counsel cross examined him  
16 on this in the deposition in the context of a loan that Mr.  
17 Butler had identified as materially defective and involved a  
18 statement by Countrywide that a chef was making \$600,000 a  
19 year. And this is the examination which, in fact, the  
20 counsel for Countrywide asked Mr. Butler to address Your  
21 Honor in the deposition, which is what he did, so we'll play  
22 that.

23 (Whereupon, a videotape deposition was played in  
24 open court.)

25 MR. SELENDY: So that's the standard he assessed  
26 the risks as of origination. He did not look at whether, in

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2 fact, loans may have been paid off or not for reasons that  
3 may or may not have been anything to do with the  
4 misrepresentations, because that's not relevant as a matter  
5 of law; and he was instructed to focus on what was relevant,  
6 what was in that file at the time these deals were included  
7 in the contract.

8 Now I'd like to contrast the robust process that  
9 Mr. Butler used with a team that he specifically supervised  
10 and trained and the standards that key directly off of a  
11 review of Countrywide's own contacts and representations of  
12 warranties. I'd like to contrast that with what  
13 Countrywide's loan review expert did, that's Ms. Godfrey,  
14 who admitted, first of all, that she's never been retained  
15 as a loan review expert, except by Countrywide. She did not  
16 even review the representations and warranties in the  
17 transaction documents for these securitizations. She  
18 admitted that she -- admitted she has no experience in re  
19 underwriting loans. And, in fact, Your Honor, she actually  
20 admitted she didn't even do a thorough enough review to  
21 determine whether a loan was significantly defective.

22 And I'd like to play the clip so you can see that  
23 in her own words.

24 (Whereupon, a videotape deposition was played in  
25 open court.)

26 MR. SELENDY: She didn't do the work to reach the

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2 answer. And that's the basis of their attempt to rebut Mr.  
3 Butler. And she further admitted she didn't employ any  
4 standard.

5 Let's play the next clip.

6 (Whereupon, a videotape deposition was played in  
7 open court.)

8 MR. SELENDY: What she admitted further was that  
9 her mandate was always to disagree with Mr. Butler, and for  
10 that reason she could not agree with a single one of the  
11 49,000 separate findings that he made after his diligent and  
12 exhaustive review of the loan files.

13 I'd like you to see that clip as well.

14 (Whereupon, a videotape deposition was played in  
15 open court.)

16 MR. SELENDY: Not once, not a single time, was she  
17 prepared to agree. That's not an independent expert.  
18 That's not an expert using standards. And interestingly,  
19 Your Honor, after we submitted our motion for summary  
20 judgment, Ms. Godfrey tried to change her testimony, but we  
21 have it on tape, as I've just played for you. And she  
22 further admitted she didn't review the loan findings or  
23 responses associated with every loan. She didn't even know  
24 how many she had reviewed.

25 It's the same kind of problem when we look at  
26 Countrywide's compliance expert, Lisa Murphy -- we can put

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2 up slide 24 -- who admitted that she too had no experience  
3 in this case reviewing loan files for compliance to reps and  
4 warranties; and she admitted that she did not generally  
5 consider or review Countrywide's own underwriting  
6 guidelines; and in formulating her opinions and drafting a  
7 report, she didn't even review the transaction documents,  
8 just like Ms. Godfrey, except as for excerpts out of two out  
9 of 15 deals, and then only as to three reps that  
10 Countrywide's counsel gave her.

11 Then if we look at Countrywide's appraisal expert,  
12 slide 25, he admitted he's not an underwriter, he has no  
13 experience underwriting, he didn't review the appraisals  
14 from an underwriting perspective, and he doesn't even know  
15 what credit risk is. So there's a sharp difference in the  
16 standards of experts that both sides presented, and we  
17 submit there's a reason for that when the loans are as  
18 materially defective as they are. The only experts  
19 Countrywide could find were ones that would do this kind of  
20 limited and cursory review of ignoring the guidelines and  
21 the representations of the warranties that govern this whole  
22 case.

23 So let's turn to category one. This is on the  
24 board here. I'll just keep this up here, but this is the  
25 first category as to which there is no dispute by their  
26 expert. She's agreed there's no factual basis for

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2 disagreement. And if we look at that, there's 670 loans out  
3 of the 6,000 loan samples, roughly 11 percent of the  
4 samples. As to these, Ms. Godfrey, their expert, did admit  
5 that 88 of those loans should be repurchased; and she  
6 concluded that because she had no factual rebuttal and the  
7 loans became more than 60 days delinquent within the first  
8 two years after the securitization closed, so she said,  
9 right, I'll admit it as to those 88 loans.

10 There are an additional 582 loans where Ms. Godfrey  
11 concedes, "I have no factual basis to rebut it, but the  
12 loans performed, as we've said, that ex-post evidence is  
13 irrelevant." And I'll note, Your Honor, even as to Ms.  
14 Godfrey's findings in this respect, her lack of standard  
15 meant that she applied her own analysis inconsistently.

16 Let's put up the next slide. So for the particular  
17 loan here, she indicated that the loan file was missing the  
18 manual approval that was required by the internal  
19 Countrywide system saying there were too many areas of  
20 layered risk for the automated system to evaluate if there  
21 needed to be a manual review. She said, "There was no such  
22 manual review; therefore, Mr. Butler's right, this loan  
23 should be repurchased, it's materially outside of  
24 guidelines."

25 Now, having said that, you would think that she  
26 would agree for at least that category of similar loans

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2 within the sample, but as reflected on the slide 28, she did  
3 not. And we've illustrated two different loans where it's  
4 the same finding by Mr. Butler that the loan was a CLUES  
5 refer due to the compilation of layered risk factors, and  
6 there's no evidence in the file of an exception approval or  
7 manual underwrite.

8 For the first loan Ms. Godfrey says, yes, you  
9 should repurchase it. She does speculate maybe there was  
10 some documentation in the file originally that isn't there  
11 today, but she admits it's not in the file; therefore, the  
12 loan has to be repurchased. For the second loan, it's  
13 exactly the same analysis by both experts; and she says, no,  
14 I'm not going to agree to repurchase it. It's a lack on  
15 Countrywide's part of the mortgage loan schedule  
16 representation. These are the final set of actual data as  
17 to all the loans. It's basically what was in the loan  
18 tapes, it's finally confirmed by Countrywide in the filing  
19 before the SEC as part of the process, and it illustrates  
20 all of the specific representation as every single one of  
21 389,000 loans.

22 The warranties on this are essentially the same for  
23 HELOC and CES; and in both instances the information has to  
24 be true and correct in all material respects, because this  
25 schedule is listing data as to individual loans. That means  
26 that the loan data has to be correct at an individual loan

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2 level. Thus, in the HELOC deals it makes plain, if you  
3 create a substitute loan, that individual loan also has to  
4 conform in all material respects to the representation for  
5 the CES deal. Similarly, it states the information set  
6 forth on the mortgage loan schedule with respect to each  
7 initial mortgage loan is true and correct in all respects.  
8 It's an individual loan level test and there are multiple  
9 errors that Mr. Butler identified here. They fall in  
10 multiple categories.

11 Let's put up this slide. It's documentation  
12 program, loan purpose, piggyback status, FICO score,  
13 occupancy status, lien position and CLTV ratio. I'm going  
14 to explain what each of these is as we go through them.  
15 Again, for the convenience of the Court, we do have a board  
16 just to indicate the separate categories. We'll put that up  
17 while we go through this category of the MLS Rep.

18 As I mention, looking at just the unique loans,  
19 there can be more than one breach for each loan, so taking  
20 the number of total unique loans, one or more material  
21 defects, we have \$6.259 billion of material defects in this  
22 category alone.

23 Now, documentation type --

24 THE COURT: Where do you see the 6.25 -- oh, I see.

25 MR. SELENDY: Bottom right. It's taking the  
26 extrapolated number then eliminating duplicate loans so you

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2 get a unique number of loans. Documentation type, we'll  
3 start with that first category. This is the basic question,  
4 do you have a full-documentation loan where it's everything  
5 that you ordinarily expect to see from the borrower; an  
6 executed verification of employment over a two-year period,  
7 current pay stubs, two years of W-2's and tax returns and  
8 the like. That's the full documentation measure. And then  
9 there are multiple other categories.

10 I'm going to contrast the super-streamlined version  
11 that Countrywide adopted. If you have a super-streamline  
12 loan, instead of all the verifications that you would have  
13 in the full documentation loan, there is no debt ratio, no  
14 income documentation or asset verification required. It's  
15 essentially the borrower's statement with a telephone call.  
16 And here's an example of a misrepresentation on the MLS  
17 schedule.

18 For this loan, what Countrywide affirmatively  
19 represented and guaranteed was that this loan was a  
20 full-documentation loan. In fact, when we went to the loan  
21 file and looked at Countrywide's own report generated from  
22 the CLUES System, as you can see in the highlighted area,  
23 this was a super-streamlined loan. They said it was a  
24 full-documentation loan and, in fact, it was a  
25 super-streamlined loan. This is evident simply by reviewing  
26 the loan itself. It's a black-and-white breach; and this

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2       particular case it's an instance where the borrower said,  
3       look, I'm making \$9,100 a month as a food service manager,  
4       you know, at some little restaurant, \$9,100 a month, and  
5       Countrywide didn't verify that. They told us, yeah, it's a  
6       full-documentation loan. So we have the W-2's but, in fact,  
7       it was a super-streamlined loan. So that verification was  
8       never made and, of course, it turns out to be a materially  
9       defective loan.

10                If we turn to page 33, the materiality of  
11       documentation type is established by evidence from  
12       Countrywide's own files. This is an admission on their  
13       part. And specifically I'll direct you to the fourth bullet  
14       on that page, there's a statement that the internal rate  
15       sheets and pricing schedules provided for higher interest  
16       rates for loans approved under the reduced documentation  
17       programs. In other words, if you have a full-documentation  
18       loan, there's a certain interest rate. If it's super  
19       streamlined, you have to pay more. The reason you have to  
20       pay a higher interest rate, of course, is that there's a  
21       higher credit risk, you haven't given all the data.

22                That's material as a matter of law. If Countrywide  
23       itself is attaching different pricing for the loan, then  
24       that's material and they can't argue against it. Thus, as  
25       their experts stated, documentation program is a key factor  
26       in predicting loan performance; and their expert Robert

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2 Hubbard said, yes, academic research shows that loans with  
3 less than full documentation are more likely to default; we  
4 don't want those loans if we can help it. Their fact  
5 witness similarly agreed, limited documentation programs  
6 have historically higher incidents of default. That's the  
7 testimony of Rob Williams under the first bullet. Higher  
8 interest rates are therefore charged, and they used the  
9 document type in their own internal models to predict an  
10 estimate of the likelihood of defaults.

11 Let's go to the next category. This is loan  
12 purpose, another field on the mortgage loan schedule, and  
13 here the key difference between a purchase, which is  
14 original purchase; in other words, a representation that  
15 this a new home that I want to go live in, it's a purchase,  
16 and all the funds from the mortgage are going in to the  
17 purchase versus a cash out refinance where the borrower's  
18 taking money out of the property for any reason. It could  
19 be to buy a new Camaro, it could be to go to Vegas for the  
20 weekend, nobody knows. The cash is taken out of the  
21 property, it's no longer available, so it becomes a more  
22 leveraged and risky loan.

23 Once again, here Countrywide warranted that the  
24 purpose of this loan was purchase. In fact, going to their  
25 internal loan file, the Form 1008 said specifically that the  
26 loan purchase type was cash out refinance. Again, this is

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2 material based on Countrywide's own internal documentation.  
3 Slide 35 they confirm -- and this is their second bullet --  
4 that the loan purpose does affect credit risk, cash out  
5 refinances are more likely to default. Thus, there's the  
6 testimony of Josh Adler in his deposition that a cash out  
7 refinance transaction has a higher propensity to default  
8 than a purchase transaction.

9 Their experts similarly agree that refinances and  
10 cash outs have a higher probability of going delinquent.  
11 That's from their expert Hausman. It's at the bottom of the  
12 page. So once again, they admit the materiality of it as a  
13 matter of law and the breach is incontestable. And that  
14 loan purchase consists of \$2.6 billion, if you're looking at  
15 the original transactions. That misrepresentation affects  
16 \$2.6 billion of the whole population on the securitizations.  
17 It's a very high incident problem.

18 Next category is piggyback status, piggyback loans.  
19 This is essentially the situation where the borrower takes  
20 out first and second lien loans at the same time. It's  
21 basically a way to buy a property with minimal or no down  
22 payment and, of course, it's riskier. A piggyback loan is  
23 riskier than if you have a borrower that's taking a second  
24 lien loan after an already established first lien loan is in  
25 place. The example that we have here on the slide shows  
26 that the mortgage loan schedule, which Countrywide prepared

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2 and warranted the truth of, said "piggyback flag, no,"  
3 meaning it's not a piggyback. In fact, the CLUES report  
4 shows that Countrywide originated the first lien and the  
5 second lien loan at the same time. Indeed, their first lien  
6 loan was a so-called fast and easy first lien and on the  
7 same day their second lien loan was a super-streamlined  
8 second lien loan basically combining the worst of both  
9 worlds in a piggyback loan, which they told us was not.

10 Once again, their own pricing sheets show that if  
11 it's a piggyback loan, you adjust the price upward, it's  
12 riskier. Pricing differences are material as a matter of  
13 law and, as they had testified, if there's a piggyback  
14 structure, typically it will demonstrate higher risk. When  
15 you take out the equity, typically it will show up in  
16 performance.

17 Let's go to the next category. These are the MLS  
18 FICO scores. And this is, Your Honor, this is the basic  
19 category, the borrower's credit score, FICO score. The  
20 higher the credit score, the more creditworthy you are.  
21 It's one of the most important determinants of the ability  
22 to repay. In this one they represented that the mortgage  
23 loan schedule shows a FICO score of 722, but when we looked  
24 at the actual Land Safe Credit Report in the loan file, it  
25 shows that the borrower's credit score was 682, and they  
26 actually have a procedure for identifying what the credit

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2 score is. They get credit scores from three different  
3 agencies, you're supposed to take the middle score. Here  
4 the scores actually on the loan file were 678, 682 and 722.  
5 So under their rules, you take 682. But what they did was  
6 just invent a new number, 722, which shows up no where in  
7 the loan file; it's patently false and, again, it's  
8 material.

9 On slide 39 we give the consensus of the evidence  
10 of materiality. FICO is a basic driver of delinquency and  
11 default as reflected in the first bullet. That's the  
12 testimony of the chief risk officer. Their experts agree,  
13 as Ms. Godfrey admitted, it's pretty much the industry  
14 standard for most lenders as part of their total assessment.  
15 And as their expert Mr. Hubbard stated, all else equal, a  
16 borrower with a higher FICO score is more creditworthy and  
17 therefore less likely to default or become delinquent.  
18 Similarly, their expert Jerry Hausman admitted there's a  
19 general consensus FICO score is going to matter.

20 So not surprising, we see, if we look to their own  
21 internal rate sheets, pricing schedules, they adjust  
22 interest rates depending upon the creditworthiness of the  
23 borrower. Again, that's material as a matter of law. Once  
24 the pricing is affected, it's a material change in credit  
25 risk. And they can't dispute --

26 THE COURT: This question, how much would FICO

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2 deviation have been in order for it to be material to  
3 MBIA --

4 MR. SELENDY: That's a very good question, Your  
5 Honor. What we've done is move solely on those breaches as  
6 to FICO scores where the difference is incontestably  
7 material, because Countrywide's own guidelines showed  
8 differences in pricing. And if you look at their  
9 guidelines, they basically break borrowers into three big  
10 buckets; the gold borrowers, the preferred borrowers, and  
11 the flex borrowers. Flex have the lowest credit score.

12 We've only asserted breaches for those instances  
13 where the variants were so great that the borrower actually  
14 should have been in a different category by Countrywide's  
15 own standards, which means different pricing, different  
16 requirements as to documentation, different verification of  
17 data. So although our expert, broadly speaking, has  
18 identified FICO variances that go beyond the scope of this  
19 motion, we've limited this motion and these numbers to just  
20 those instances where Countrywide's own data showed the  
21 borrower should not have been given that loan, they were  
22 misclassified in the wrong bucket. And there are only three  
23 buckets that they use, very broad buckets. If it's big  
24 enough to shift from one to another, it's material and  
25 there's different pricing, and that's what we're moving on.

26 Let's move to the fourth category. This is

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2 occupancy status, and this is basically a question of is  
3 this property your home or is it one that's a speculative  
4 investment. And we all know which one the borrower is more  
5 likely to repay if the home value drops below the amount of  
6 the loan. If it's your home, you're going to do your best  
7 to repay it. If it's an investment property, you won't.  
8 Again, black-and-white breach. They warranted that this is  
9 an owner-occupied property with respect to this particular  
10 loan. In fact, their own report shows the property use was  
11 investment. There's no dispute about it, it's simply a  
12 false representation.

13 And turning to the next page, once again, their own  
14 pricing schedule showed a difference. If it's an investment  
15 property, you have to pay a higher interest rate, exactly as  
16 you would expect. If it's an owner-occupied property, you  
17 get the better rates, that's because the credit risk is  
18 higher for a secondary or investment property.

19 And again, going to the testimony of their own  
20 witnesses, Rob Williams admitted non-owner occupied homes  
21 have historically higher incidents of default. And if we  
22 look at their experts, Jerry Hausman admitted in his  
23 deposition that it's generally thought that people walk away  
24 from underwater loans much more than for a primary -- much  
25 more for a non-prime residence, in other words, an  
26 investment property, than one that you occupy as your home.

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1  
2 Pricing is different, it's material, and that affects the  
3 category here, the fifth category on the chart.

4 Next category is the materiality of lien position.  
5 This is the first lien, second lien, or in some instances  
6 we've identified a third lien. I'm not going to spend a lot  
7 of time on that, because it doesn't affect much loans, but  
8 there's no question the farther you are now, if you have the  
9 more subordinate lien, the riskier you are, because the  
10 first thing gets paid off first in the event of foreclosure.  
11 If you have a third lien, you're very encumbered.

12 Let's go to the next category, CLTV ratio. This  
13 is, as I mentioned, it's the combined loan-to-value ratio;  
14 and on the example that we've given you here the mortgage  
15 loan schedule represents that the ratio is 89.58 percent.  
16 In fact, when we go to the loan file and recalculate it with  
17 the correct numbers, it's one hundred percent. In other  
18 words, the amount of the loan equals the value of the  
19 property at origination.

20 It's the very type of risky loan that should be  
21 flagged for review. And Countrywide's witnesses admit that  
22 the CLTV ratio, again, is one of the most important drivers  
23 of delinquency and default. We're basically looking at the  
24 key characteristics that Countrywide uses to assess credit  
25 risk. CLTV ratio, loan purpose, FICO score is how they  
26 determine are these creditworthy borrowers or not. They're

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2 the key parameters of risk in each of these areas. When we  
3 go through the mortgage loan schedule, we're finding flat  
4 misrepresentation as to what those attributes are.

5 So slide 45 we show that --

6 THE COURT: In terms of CLTV, how large would the  
7 difference have to be in order for that to be material?

8 MR. SELENDY: For CLTV, Mr. Butler used a -- there  
9 are two different tests. One is if there is a ratio above  
10 one hundred percent on the schedule that is contrary to a  
11 special representation that you can't have any loan that  
12 exceeded one hundred percent. There's a separate  
13 representation that the reported value on the mortgage loan,  
14 the MLS, the mortgage loan schedule, is itself accurate.

15 For that Mr. Butler used a one percent figure, one  
16 percent, and the reason for that is that every point  
17 difference means that much less value available in the  
18 property. So if you go through a period of market stress,  
19 then every point that you're closer to one hundred percent  
20 is a point where the borrower -- point closer to the point  
21 where the borrower has to just walk away from the property  
22 altogether.

23 THE COURT: The MBIA, was the information on that  
24 an MLS?

25 MR. SELENDY: Yes.

26 THE COURT: If so, was MBIA noticed that the

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2 purchase of CLTV was exceeding one hundred percent breach?

3 MR. SELENDY: Okay. So the mortgage loan schedule  
4 was part of -- and this is important -- this is part of the  
5 basic data that was represented and warranted by Countrywide  
6 and it was used by Countrywide to obtain the ratings on the  
7 transactions, specifically confirmation from the rating  
8 agencies that the overall pool of collateral was investment  
9 grade. That was a further condition that MBIA required in  
10 order to do the deal.

11 The schedule itself, as I mentioned, is every  
12 single loan in dispute across 50 to 60 attributes for every  
13 single loan, but the mortgage loan schedule was not made  
14 available to MBIA pre-closing, because it's only published  
15 once the transaction guidelines issue. The pre-closing loan  
16 dates themselves were used as confirmation of the data that  
17 was provided broadly by Countrywide; but what MBIA did not  
18 do was go back and re-underwrite loans, and we'll talk about  
19 this more tomorrow.

20 In terms of the allocation of risk, the whole  
21 purpose of the deal was for Countrywide to stand behind its  
22 representations as to the characteristics of every single  
23 one of these loans resulting in aggregate values for the  
24 pools. And what MBIA required, the condition precedent, was  
25 that those representations be true. For purposes of the  
26 claim today, as a warranty claim it's a guarantee by

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2   Countrywide regardless of knowledge that the loan has the  
3   characteristics that they say. If they don't, they have to  
4   repurchase it, and that's why we're moving on. So  
5   reasonable reliance isn't a factor that plays into the  
6   contract claims, although we'll discuss that further  
7   tomorrow on the fraud claims.

8                   Just to complete this statement on materiality, I  
9   wanted to highlight that not only did Countrywide's own rate  
10  sheets show that we needed higher interest rates for loans  
11  with higher CLTV ratios, but as their witnesses confirm, an  
12  understated CLTV would, Your Honor, understate the risk.  
13  Again, it's one of the basic parameters of risk.

14                  Now, I want to pause here. After this is  
15  categories one and two. I'll take this down so you can see.  
16  These are the first two of the seven categories on which  
17  removing the loans they recommend for repurchase, which are  
18  un-rebutted, and the loans where there's materially false  
19  and incorrect MLS information. And what's critical here is,  
20  as I stated before, they don't have any factual rebuttal to  
21  Mr. Butler's findings of the MLS breaches. Specifically,  
22  they withdrew their own expert's report that tried to rebut  
23  that, and they never put it back. They've argued that,  
24  look, the MLS is only relevant to pool-wide attributes, but  
25  that's contradicted by plain meaning of the MLS  
26  representation itself.

1 Motions - Mr. Selendy

2 This isn't a statement of aggregate attributes  
3 across all of the loans. Instead what we have are  
4 individual loans which have detailed representations as to  
5 every single one. And what their obligation is on summary  
6 judgment is to come forward with evidence of genuine triable  
7 issues of fact. There aren't any such issues here as to  
8 these two categories, the first two categories.

9 And on slide 47 we've included -- I won't spend  
10 much time -- but this is the chronology of the report. Mr.  
11 Butler served his underwriting report February 27th. Some  
12 months later, July 3rd, Ms. Godfrey's rebuttal report was  
13 served, and we asked throughout the month of the July for  
14 the backup for the loan level responses from Ms. Godfrey.  
15 They never gave it to us, and the date before the deposition  
16 they withdrew that report.

17 So if we put up the significance of this -- this is  
18 slide 48 -- on just these two categories it shows that the  
19 category of indisputable breach and as to the total unique  
20 loans added together is \$8.09 billion. That's roughly 32  
21 percent of the entire random sample, Your Honor, almost  
22 one-third of the whole sample, as to which they have no  
23 rebuttal; and I haven't even gone through the later five  
24 categories. Just these first two categories they have no  
25 rebuttal. By any standard, that level of pervasive breach  
26 is material.

1 Motions - Mr. Selendy

2 And as I mentioned at the beginning, MBIA required  
3 not only that the loan satisfy the reps and warranties, but  
4 that that was a condition precedent to the insurance. So  
5 for these deals, to give you a little bit of context, MBIA  
6 went into each deal requiring a structure that would allow  
7 over the life of the deal somewhere between four and seven  
8 percent losses on loans, and yet that would not trigger an  
9 obligation under the insurance.

10 In other words, you could see some level of  
11 defaults and it wouldn't affect MBIA. They call that their  
12 no loss underwriting policy. It was an attempt to estimate  
13 under situations of market stress what level of loss they  
14 could withstand and still be good, because the premiums on  
15 this can be very small. The idea was that the cash flows  
16 would be more than sufficient to pay off the obligations on  
17 the RMBS certificates.

18 That built-in protection against loss presumed that  
19 all the loans were proper and eligible and conformed to the  
20 representations and warranties that were conditions  
21 precedent. Problem is, when loans are defective, as we've  
22 shown here, when they're defective, the risks are not as  
23 disclosed, and there's uncertainty that can't be assessed by  
24 the insurance. Almost like there's a black box. There's a  
25 black box around, in this case, 32 percent of the loans.  
26 That uncertainty cuts against MBIA and those numbers far

## Motions - Mr. Selendy

1  
2 outstrip the protection that was built in of four to seven  
3 percent.

4           And Your Honor doesn't even have to say, well, at  
5 what point by these level of pervasive breaches so material  
6 you don't need to decide if it's 15 percent or 18 percent or  
7 20 percent, we're so far beyond it on just those two  
8 categories. It's multiples of the risk that, as a matter of  
9 law, we've shown just on this alone that there are  
10 materially defective breaches each of which, Judge, the loan  
11 is material, would result in the increase of price for the  
12 life of the loan, and taken together means that MBIA was  
13 presented with material defects that undo the purpose of the  
14 insurance agreement.

15                   (Continued on next page.)  
16  
17  
18  
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26

1 Proceedings

2 MR. SELENDY: That materially increase  
3 the risk of loss to MBIA as a whole from each  
4 transaction and that warrants rescissory relief.  
5 And I want to emphasize that you could reach that  
6 decision without even considering any disputes  
7 that may come up on the next five categories of  
8 loans. We've already supported it. This isn't 56  
9 percent, as it turns out 32 percent, but it almost  
10 gets MBIA home these policies should never have  
11 been precured by Countrywide and rescissory  
12 damages should be granted. And I'll take you  
13 through the next categories because they  
14 corroborate the level of defect.

15 THE COURT: You want to start now or do  
16 you want to take the break at this moment before  
17 you start the new.

18 MR. SELENDY: It's up to you, your  
19 Honor. I'm happy to keep going.

20 THE COURT: Reporters. 10 minutes now.  
21 Please come back exactly the same seats. Do not  
22 think because you're staying behind you're going  
23 to get a seat. The seats now occupied are the  
24 seats that are going to be occupied when you get  
25 back.

26 MR. SELENDY: Thank you.

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2 (Whereupon, a brief recess is taken)

3 THE COURT: Okay. Do we have everybody  
4 here. Because whoever is missing can't be here to  
5 tell me.

6 MR. SELENDY: I think we're good to go.

7 THE COURT: Before we do go, I do have a  
8 question that came up in my mind. I tried to ask  
9 it before. Maybe I didn't ask it as articulately  
10 as I need to know. In terms of the CLTV loans  
11 that section, we know that there was a tape  
12 produced at least at the time or really  
13 concurrently with when you were putting forth the  
14 insurance. And the question is on that tape did  
15 you have opportunity to notice the over 100  
16 percent.

17 MR. SELENDY: It's a very good question,  
18 your Honor, and I should have been clearer. The  
19 instances where CLTV were over 100 hundred percent  
20 were not on those loan tapes. They showed up only  
21 until the MLS so they were not available to MBIA  
22 to read off the loan tapes before closing.

23 THE COURT: Because that's an issue  
24 obviously with the insurance law, if you were on  
25 notice even though you may not find it material,  
26 if you were on notice that's an element of the

## 1 Proceedings

2 insurance law.

3 MR. SELENDY: Right. I think the  
4 standard is not so much on notice as whether the  
5 seller has disclosed the falsity and candidly  
6 agreed and you still go forward knowing that the  
7 warranty is false. That is not this type of  
8 situation, your Honor. There was no such candid  
9 acknowledgement and disclosure by Countrywide in  
10 the information that was provided to MBIA prior to  
11 closing. And I appreciate the question.

12 Now, let's put the slide back up. Slide 49.  
13 "Severely unsatisfactory" loans. As I stated  
14 these are loans that Countrywide itself determined  
15 violated underwriting guidelines and in their own  
16 words post a "severe underwriting risk with  
17 limited or no compensating factors." It was part  
18 of their internal quality control process and  
19 we've only picked out those loans that they  
20 identified as SUS as an additional category. In  
21 fact, if we could put up slide 50 there is a  
22 document this is drawn from Countrywide itself.  
23 It's the Wholesale Loan Division Credit Risk and  
24 Quality Assurance description of audit procedures.  
25 As you could see in the right hand column under  
26 severely unsatisfactory these are the types of

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2 things that they identify. Loans that have severe  
3 underwriting risk with limited or no compensating  
4 factors. Also, loans with fraud which will result  
5 in repurchase if and when investor becomes aware  
6 of the issue.

7 Your Honor, we've now become aware of the  
8 issues as you know. We are demanding repurchase.  
9 Countrywide itself was betting on these saying,  
10 look if the investor figures out they are going to  
11 come back to us in this case, it is the insurer  
12 and we are seeking the repurchase.

13 THE COURT: Did you ever seek repurchase  
14 prior to this moment?

15 MR. SELENDY: Yes, your Honor. There  
16 were multiple instances in which MBIA demanded  
17 repurchase. Going back to before the filing of  
18 the complaint in 2008, and as I'll discuss with  
19 you in fact given the level of breaches that MBIA  
20 observed and alleged in its complaint back in  
21 2008, Countrywide has been on notice of pervasive  
22 and systematic material defects for years, for  
23 years. And keep in mind since they were  
24 originator of virtually all of these loans, the  
25 test is when did they become aware of the problem.  
26 The duty to repurchase is not triggered just by

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2 MBIA giving a specific notice. It's when did they  
3 become aware of it. Since they originated the  
4 loans, they knew of the problem from inception and  
5 they can't invoke some kind of loan by loan  
6 specific notice requirement to get out of their  
7 repurchase obligation. The loans never should  
8 have been in there and under the terms of the  
9 contracts because they were aware of the problems  
10 they should have repurchased them as soon as they  
11 were improperly put in there. And that's years  
12 ago. I'll walk through that later today just to  
13 indicate how severe that problem is because there  
14 are other problems related to that and how  
15 Countrywide processed those requests. Staying  
16 with SUS as you'll see in the third box down to  
17 the right they admit look if these problem loans  
18 are reviewed. There is an unacceptable high  
19 probability of fallout, indemnification or  
20 repurchase. And finally the credit risk issue  
21 against the probability of default is unacceptably  
22 high. And I'd like to give you an example of one  
23 of these loans slide 51. Under the rule for their  
24 guidelines, CLTV has to be based on the lessor of  
25 either the purchase price or the current appraised  
26 value. Looking at the loan that's here and going

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2 to the original purchase price, the CLTV is  
3 actually at 120 percent. That's the level that  
4 was actually flagged by Countrywide itself. It's  
5 SUS report of the quality control group shows the  
6 problem Mr. Butler identified the same defect and  
7 said there was no basis for any exception noted in  
8 the files. Therefore, the loan should never have  
9 been included. All Ms. Godfrey had to say for  
10 Countrywide is well the current file may not  
11 reflect documentation available at origination.  
12 That's a non sequitur. Has nothing to do with the  
13 problem. The original purchase price is what  
14 should have been used should the CLTV at 120  
15 percent. It doesn't matter what other  
16 documentation might have existed and that type of  
17 speculation can't create a factual dispute. She  
18 has to have actual facts to rebut Mr. Butler and  
19 she doesn't. That's the SUS loan.

20 Next category as you asked me about loans  
21 that breach the 100 percent CLTV rep, I won't  
22 spend a lot of time on this. Obviously if the  
23 loan is greater than the entire value of the  
24 property, it's an extraordinary risk. It should  
25 never have been included in the deal and  
26 Countrywide's own expert admits that's a problem

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2 on slide 53. We gave an example of this slide 54.

3 It turns out when we look at the mortgage loan

4 schedule that and determine the correct CLTV rate

5 we see a CLTV of 130 percent and they simply

6 agreed to that problem. There is no dispute on

7 that. If we look at slide 55 take another example

8 here the CLTV is 101 percent as Mr. Butler found.

9 Ms. Godfrey says well perhaps the senior loan

10 balance could have been lower at origination and

11 that could have reduced the principle balance to

12 below a hundred percent. Well, there is no

13 evidence of that. In fact, the file shows just

14 the opposite on the file the CLTV ratio included

15 that hundred percent. And you can't rebut us by

16 saying could have, might have been different.

17 That's not a fact. Let's turn to category five.

18 These are loans that breached the no default rep.

19 They only apply to the HELOC securitization not to

20 all of them. What's critical here is there are

21 two separate tests. There is the statement "no

22 default exists under any Mortgage Note or Mortgage

23 Loan." Default under the mortgage loan is, of

24 course, a default. The borrower doesn't pay and

25 that's a separate category then what we're dealing

26 with right now. We're dealing with the default

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2 under the note which is defined if you look at the  
3 mortgage note itself, it explains that the lender  
4 may take certain actions in response to the  
5 borrower being in default of any material  
6 obligation. Those obligations include that the  
7 borrower has not made and will not make any  
8 misrepresentation. So a misrepresentation by the  
9 borrower under the mortgage note extends to  
10 include misrepresentations as well as failures to  
11 pay. And critically here Countrywide tries to say  
12 hey that's the borrower making a  
13 misrepresentation. It's not us. We didn't make  
14 the misrepresentation. If you go back to the  
15 transaction documents, and this is true actually  
16 for all of the deals HELOC again closed in  
17 seconds. Countrywide's knowledge is irrelevant  
18 when they stand up for their warranties it says  
19 specifically that notwithstanding that the sponsor  
20 did not know that the substance of the  
21 representation and warranty was inaccurate at the  
22 time the representation or warranty was made the  
23 inaccuracy shall be a breach of the applicable  
24 representation or warranty. For these warranties  
25 Countrywide's knowledge is irrelevant. It's  
26 guaranteeing the truth and that's a burden that it

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2 took on as part of the effort to sell the deals  
3 and to procure insurance. It's part of the  
4 fundamental allocation of risks. Countrywide took  
5 that burden regardless of its knowledge, but has  
6 to back it up. To give you some examples of this,  
7 slide 57 shows you just how important this loan  
8 default rep is. Here the borrower claimed to be  
9 earning \$7,000 a month as head of security at a  
10 funeral home. Well, we went and subpoenaed the  
11 records as to the borrower's 1099 and payroll.  
12 And it turns out that the monthly income was \$417  
13 a month. A stark difference, an obvious violation  
14 of the no-default rep and again keep in mind it's  
15 the income which is one of the fundamental  
16 determinants of the borrower's ability to repay.  
17 It's material as a matter of law.

18 Take another example slide 58. Here the  
19 borrower claimed to be employed as a manager of a  
20 grocery store and claimed to be earning \$6,800 a  
21 month as a manager. When we subpoenaed the form  
22 1040's for the actual income it turns out the  
23 borrower was earning an average of \$1,235 a month.  
24 In fact, the borrower was self employed as a  
25 limousine driver not as the manager of the store.  
26 Totally different income material as a matter of

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2 law and clear breach.

3 THE COURT: You're sure that correlates  
4 between loan number. The last four numbers 4370  
5 is for this person that says --

6 MR. SELENDY: I know your Honor. It is  
7 extraordinary and yes we are. It was a subpoena  
8 that went directly to the borrower. Directly to  
9 the borrower and the borrower disclosed the  
10 information and said here is my tax returns here.  
11 This is what I made, here is where I worked, and  
12 it's completely different than the basis on which  
13 the loan was granted.

14 THE COURT: Did that loan default? It  
15 doesn't matter. I would understand, but the  
16 interest.

17 MR. SELENDY: This is Countrywide's  
18 argument saying luckily for us the loan continued  
19 to perform. That's irrelevant under the  
20 contracts, irrelevant under the insurance law. As  
21 of day one there is no way that loan satisfied the  
22 eligibility criteria and no way MBIA would have  
23 taken on such a loan given its insurance premiums.  
24 The next loan I'll just talk about generally. In  
25 fact we'll skip the next loan because it's under  
26 seal so we won't put 59 and 60 up. Let's go to

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2 61. As we've indicated before Countrywide's fact  
3 witnesses concede that misrepresentations of  
4 income impact credit risks at the time of  
5 origination. That's when you're most concerned  
6 about the misrepresentation because you can't know  
7 whether things might work out years from now and  
8 then go back and fix the problem. It has to be  
9 right as of day one. This is testimony from Mr.  
10 Abdou on examination by Ms. Sheth.

11 (Whereupon, the video is played in open  
12 court with all parties present)

13 MR. SELENDY: It's a straight admission.  
14 Yes, it increases the credit risk. As for  
15 materiality, your Honor may ask us how did we  
16 decide how big a misrepresentation is sufficient  
17 to include. And as you may expect, we did not  
18 include all breaches. We just included on this  
19 motion the breaches where the variance was so  
20 great, so great that the difference in income  
21 would have required under Countrywide's own  
22 guidelines that you resubmitted for approval. So  
23 you run it again through the CLUES system, for  
24 example, or you re-underwrite the loan. And  
25 that's identified by Countrywide's own technical  
26 manual which states that, if during the process

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2 the borrower's income decreases by more than 5  
3 percent, you have to underwrite the risks all over  
4 again. In other words, it's a different credit  
5 risk that affects how the loans are going to be  
6 repaired and you need to reevaluate the deal. So  
7 we've appropriately limited our motion to just  
8 those categories, one Countrywide's own documents  
9 confirm materiality.

10 Slide 63 it's probably important to note that  
11 Countrywide's internal documents further makes  
12 claim that misrepresentation of income was one of  
13 the top five reasons for repurchases from  
14 monolines where they categorized what are our  
15 biggest problems as to which we've agreed to  
16 repurchase loans and this falls in that category  
17 of the top five. Stated income unreasonable or  
18 misrepresentation as to income. Those are their  
19 top two categories.

20 Let's move to the next group. These are  
21 loans that breach the appraisal representation.  
22 And here, your Honor, there is a specific  
23 representation that the appraisal was obtained  
24 from a qualified appraiser who had no interest  
25 direct or indirect in the mortgaged property. In  
26 other words, it's a warranty that you have the

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2 true kind of appraisal, not an automated  
3 appraisal, not a property update, not a short form  
4 but an appraiser who looks at comparables, checks  
5 out the property, examines the neighborhood and so  
6 forth. Go to the next slide. There are four  
7 basic types. The appraisal by the qualified  
8 appraiser stated value, valuation, automated  
9 valuation, or property valuation. Significantly  
10 the stated value is simply the borrower providing  
11 his or her own estimate with little or no version  
12 by the underwriter. The AVM is a statistical  
13 model that again rates an automated valuation.  
14 There is no on site inspection or evaluation of  
15 the property. And the property evaluation itself  
16 is used to update a value when you have an old  
17 appraisal. It's a much shorter form. When you go  
18 to the next slide you could see essentially the  
19 left reflects the full appraisal by a qualified  
20 appraiser. Comprehensive just like a full  
21 documentation loan. The others are various short  
22 form appraisals. And it's undisputed by  
23 Countrywide's internal data --

24 THE COURT: Just to go back because you  
25 didn't mention this. What is the property  
26 valuation this is.

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2 MR. SELENDY: It can be used to update a  
3 value of the property where you have an appraisal  
4 that's more than 120 days old. It's not a full  
5 blown appraisal by a qualified appraiser, but it's  
6 saying let's adjust the numbers. We'll take a  
7 quick look so it's another short form appraisal  
8 test.

9 Going back to slide 67 Countrywide's  
10 secondary marketing executive Josh Adler had said  
11 to the Chief Risk Officer McMurray, "we have a  
12 significant issue with the quality of stated value  
13 appraisals." We have problems with that program  
14 and as you expect the next slide and further the  
15 senior executive Darren Bigby said, "if we are  
16 going to continue to include these loans in HELOC  
17 securities, we need to revise our disclosure and  
18 our reps and warranties." Because they were  
19 warranting that they used qualified appraisers  
20 that they weren't doing. Let's go to the last  
21 category. Category 7, these are loans that  
22 breached the mortgage file representation. And  
23 this is important. This is basically the core  
24 documentation about the mortgage and the note and  
25 the transfer. So when you heard the issues about  
26 robo cop problems and inability to foreclose and

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2 the like, it's because the core documentation as  
3 to the actual mortgage was not validly or properly  
4 transferred to the trust or their key documents  
5 that are missing. In the definition of mortgage  
6 file it includes the original loan, the assignment  
7 of mortgage, the recorded mortgage, each  
8 intervening assignment, and the title policy. And  
9 these things fundamentally matter to ensure that  
10 if you have the property in trust and there is a  
11 foreclosure, you could do something with it. It  
12 confirms yes this is the owner, this borrower that  
13 we've identified. Yes, the terms of the mortgage  
14 are set forth in the file. If we look at slide 70  
15 this shows you the number of loans in the random  
16 sample where there were breaches in the mortgage  
17 file representation. A total of 521 breaches of  
18 the categories of either they are missing the  
19 complete mortgage note or the final title policy  
20 or the complete recorded mortgage of the grantee.  
21 Some of them missed more than one document, so the  
22 total number of unique loans with those breaches  
23 is 460, again out of a population of six thousand,  
24 so a significant percentage have these issues.  
25 These tend to be again very clear black and white  
26 breaches once you go to the file. So if we take

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2 71, Mr. Butler determines look it's missing the  
3 recorded mortgage. That's a precondition to the  
4 loan being included in the trust. It's not there.  
5 Countrywide's expert agrees, look the file didn't  
6 document evidence that the mortgage was filed.  
7 And so they have nothing to say. Go to the next  
8 slide. Here this loan is missing a title  
9 insurance policy. There is a preliminary title  
10 report, but no title policy and Countrywide's  
11 expert Ms. Murphy says well no title insurance is  
12 documented and HUD one did not document that its  
13 purchased again. It's essentially an admission  
14 that's not there, but they would have repurchased  
15 the loan. Let's go to the next one. They try to  
16 argue well you don't need a title policy for loans  
17 that are under a hundred thousand dollars. And if  
18 we go back for a second to slide 69 the title  
19 policy is required for each mortgage loan with a  
20 credit limit in excess of a hundred thousand  
21 dollars. So Ms. Murphy's argument would appear to  
22 be consistent but, your Honor, we only moved on  
23 those loans which were greater than a hundred  
24 thousand dollars for which a final title policy is  
25 plainly required under the documents. So to say  
26 you don't need it for a loan under a hundred

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2 thousand dollars misses the point. All of these  
3 loans that we move on are above a hundred thousand  
4 dollars. It's all 17 and there is no valid  
5 response of any kind coming from Countrywide.

6 Let's go to slide 74. This is an example of  
7 a loan that's missing a mortgage note and that  
8 note is the evidence of the terms of the actual  
9 indebtedness. You need to have the mortgage note  
10 to be able to enforce your claim against the  
11 borrower. Countrywide's two experts responded  
12 saying well, the fact that the loan file doesn't  
13 have it doesn't mean that it wasn't there  
14 originally. That's not an okay answer. You need  
15 to have the documentation in the file. It's  
16 required and it's necessary to be able to enforce  
17 the mortgage against the borrower. Ms. Murphy  
18 says reference to the note is found in the closing  
19 instructions, but she's unable to identify it.  
20 There is no real dispute of fact.

21 THE COURT: I see. Just one little  
22 problem. The bottom Ms. Murphy there is an  
23 incorrect loan number; am I correct?

24 MR. SELENDY: Yes, thank you. Yes.  
25 That doesn't correspond to the loan number. It's  
26 a base number.

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2 THE COURT: It's a base number. All  
3 right.

4 MR. SELENDY: As I understand. It's not  
5 a publicly disclosed number.

6 THE COURT: That's not a problem. Thank  
7 you.

8 MR. SELENDY: An example of how they try  
9 to dispute this is made plain on slide 75. Mr.  
10 Butler says there is no copy of the note in the  
11 file. The response that comes back from  
12 Countrywide's expert that says when the senior  
13 lien note is in the file, the senior lien note is  
14 the first lien note. That's not the loan we care  
15 about. We care about the second note. It doesn't  
16 do any good if the senior lien note is in the  
17 file. The type of attempt to dispute a fact that  
18 does not exist, you need to have the second lien  
19 note in the file. Let's go to the next example.  
20 These are the grant deeds. On this loan Mr.  
21 Butler says it's missing the required grant deed  
22 prudent and reasonable lending practices require  
23 the document to be provided. It's missing. Only  
24 response from Countrywide is this document isn't a  
25 required document. We set forth on slide 77 what  
26 the grant deed is and why it's necessary. The

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2 grant deed is the document that transfer title to  
3 real property from one party to another. It's as  
4 the second bullet reflects it's what warrants that  
5 the grantor actually owned the title to transfer  
6 and it's part and parcel of the original recorded  
7 mortgage. So for these issues there is no dispute  
8 as to fact they argue that it's not necessary.

9 I'll note that this affects only 36 of the unique  
10 loans in the total. Fundamentally, your Honor,  
11 it's undisputed that missing mortgage file  
12 documents increase the credit risk because a  
13 lender can't foreclose on the mortgage loan  
14 without those required documents on slide 78. And  
15 we note that Cynthia Simantel, the vice president  
16 of investor audit stated that loans with missing  
17 legal documents were rated as "severely  
18 unsatisfactory" because the loan wouldn't really  
19 be valid. Wouldn't be a valid loan. In which  
20 case it should never have been in these deals.

21 And as we show on slide 79, this issue was  
22 examined by the Congressional oversight panel in  
23 its November oversight report examining the  
24 consequences of mortgage irregularities for  
25 financial stability and foreclosure mitigation.  
26 And as the panel stated "the primary concern

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2 arising out of documented irregularities is the  
3 potential failure to convey clear title to the  
4 property and ownership of the mortgage and the  
5 note. If during the securitization process,  
6 required documentation was incomplete or improper,  
7 as it was in all of these instances that MBIA has  
8 identified, then ownership of the mortgage may not  
9 have been conveyed to the trust. The trust may be  
10 unable to enforce the lien through foreclosure."  
11 And this led, as your Honor may be aware, to many  
12 banks throughout the country having to slow up or  
13 stop foreclosures for months at a time to try to  
14 get the correct documentation. Well, Countrywide  
15 spent years trying to get the correct  
16 documentation in response to MBIA's demand. In  
17 fact, as your Honor may recall you had to give  
18 multiple opportunities for Jackson affidavits the  
19 original production was supplemented on multiple  
20 occasions. We even accepted productions that were  
21 not presented as part of the second lien file  
22 where they gave us first lien documents and we  
23 added those in to try to find out were those  
24 missing documents anywhere present and they were  
25 not. So that gives us, your Honor, the 56  
26 percent. If you look at all of these categories

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2 together, as I've just described the subset of  
3 breach is identified by Mr. Butler's letter that  
4 we submit are incontestable as to which the only  
5 disputes are feigned or they're unsound under the  
6 contract because there are ultimate requirements  
7 that are not there, then you have 56 percent of  
8 the overly all population more than half with  
9 material defects. Again under any standard that  
10 would warrant rescissory damages.

11 And I'd like to say just a couple of things  
12 about the method for extrapolation. If you turn  
13 to slide 81. As you may recall Doctor Cowan a  
14 couple of years ago stood here in this courtroom  
15 and testified for an entire day about his sampling  
16 method. Originally Countrywide had two experts  
17 that were going to contest what Doctor Cowan said.  
18 But when Doctor Cowan was done, their experts left  
19 and didn't come back. There was no testimony  
20 about an alternative sample. And this court  
21 concluded yes the process that Doctor Cowan has  
22 advanced meets the Frye standard. It's  
23 scientifically reliable and because Countrywide  
24 elected not to submit any opposition sample or to  
25 put forward any sampling expert, it's unrebutted  
26 both as to the method as to which the sample was

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2 taken and as to the extrapolation methodology.  
3 The extrapolation method is relatively clear for  
4 each securitization. You could either take the  
5 fraction of breached loans of the sample, compared  
6 to the total population, and then apply that  
7 fraction to the securitization. 30 percent in the  
8 sample means 30 percent in the deal. Or you could  
9 take the breach loans and figure out what's the  
10 dollar amount. If it's 32 percent of the dollar  
11 value of the sample, then it's 32 percent of the  
12 deal. Very straightforward. The extrapolation  
13 method similarly is uncontested by Countrywide.  
14 They didn't forward any expert to rebut Doctor  
15 Cowan. And on slide 82 the third bullet point  
16 their own expert Doctor Hausman conceded that the  
17 method of extrapolation is correct. So we don't  
18 have a dispute as to the use of the random sample  
19 or the method of the extrapolation. There is no  
20 reason for this court not to conclude if you agree  
21 that a certain percentage of breaches are  
22 indisputable that identify to the overall  
23 populations in this case. And on slide 83 we  
24 again create what this means if you extrapolate  
25 the indisputable breaches to look at what those  
26 breaches are in the securitizations. You'll find

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2 that looking at the original principle balance,  
3 which is the day one balance, well over half at  
4 least 12.7 billion dollars of loans have the  
5 material defects that are indisputable. The  
6 number is much higher if we do go to trial as  
7 we'll show the number is much higher taking into  
8 account all of the breaches that were identified.  
9 Just the categories here give us the 12.7 billion  
10 dollars. And on slide 84 these warranties as I've  
11 said are all conditions precedent to the issuance  
12 of the insurance policies. We looked at New  
13 York's common law and the standard under 3106(b)  
14 the question is whether there was a breach of  
15 warranty that was a condition present in the deal  
16 such as there was a material increase in risk to  
17 the insurer. That's exactly what we've shown here  
18 breaches of condition precedent that create that  
19 risk and therefore rescissory relief is  
20 appropriate. I won't spend a lot of time talking  
21 about the basis for rescissory damages. This  
22 court already knows that rescissory damages are  
23 appropriate based on cases from New York and  
24 elsewhere. I do want to put on the slide 85.

25 (Continued on the next page)

26

1 Motions - Mr. Selendy

2 MR. SELENDY: I do want to point out slide 85 that  
3 Judge Crotty, just as Judge Crotty and Rakoff agreed with  
4 your initial reading on material and adverse effect. They  
5 said this Court has the power in equity to award relief  
6 equivalent to rescission, namely claim payments less  
7 premiums.

8 Judge Rakoff gave a different ruling, because in  
9 the contract in his case the insurer rights and remedies  
10 were made expressly subject to remedies applicable to the  
11 investor and the insurer cannot have the ability to revoke  
12 multiple clauses in the insurance agreement, which were  
13 independent, as we do here.

14 So rescissory damages is available. And as Judge  
15 Crotty held under similar facts in a similar forum, the  
16 indemnity agreement is a primary agreement between the  
17 insurer and the plain language of the agreement reflects the  
18 parties' clear intent to provide expansive and inclusive  
19 remedies in case of breach clearly reserving Syncora's  
20 rights to pursue any available remedy under the common law  
21 and equity, and he specifically distinguished the ability to  
22 go after rescissory damages from the contract repurchase  
23 protocol.

24 As Judge Crotty said, the repurchase protocol is a  
25 low-powered sanction for bad mortgages that slip through the  
26 cracks. It is a narrow remedy, one breach and two breaches,

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2 that is appropriate for individualized breaches and designed  
3 to facilitate an ongoing information exchange among the  
4 parties. That is not what is alleged here. We're not  
5 talking about a two percent or five percent or seven percent  
6 re-trade, Your Honor, we're talking about 56 percent or  
7 higher, and for that we need to look at the broad remedies  
8 reserved under the contracts for MBIA.

9 Slide 87. The Court's prior ruling on rescissory  
10 damages is law of the case. Countrywide has tried to stand  
11 up and say, no, look, there's this argument we didn't make  
12 before as to sole remedy, that means rescissory damages  
13 aren't available. Well, that issue was necessarily  
14 determined already when this Court examined the contracts on  
15 submissions by both parties and said rescissory damages are  
16 available. If Countrywide had any belief in their sole  
17 remedy argument, they should have raised it last October,  
18 certainly before this Court's determination in January that  
19 rescissory damages are appropriate.

20 There's law of the case specifically designed to  
21 prevent the re-litigation of issues of law that have already  
22 been determined at an earlier stage in the proceedings. And  
23 while I won't spend much time on it, I want to point out  
24 that even if their new argument as the sole remedy were not  
25 barred by law of the case, they're wrong on the merits.  
26 There are multiple provisions that give MBIA the ability to

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2 come after Countrywide and seek relief for the breaches of  
3 conditions precedent, the agreement.

4 There is a limitation in one of those provisions,  
5 Section 2.01(1), that only applies to breaches of this  
6 paragraph that states, "The remedy for any breach of this  
7 paragraph with respect to representations and warranties  
8 relating to a mortgage loan shall be limited to the remedies  
9 specified in the related transaction document." But MBIA is  
10 relying upon other paragraphs in Section 2.01(1),  
11 specifically Section 2.01(j) in which the insurer obtains a  
12 special warranty from Countrywide that the transaction  
13 documents and other material information do not contain any  
14 statement of material fact which was untrue or misleading in  
15 any material adverse respect when made.

16 MBIA is also relying upon sections outside of 2.01  
17 altogether. For example, in Section 5.01(a) -- this is at  
18 the bottom of the slide -- in event default occurs, if any  
19 representation or warranty made by the master servicer, the  
20 indenture trustee, the issuer, the sponsor -- which is  
21 Countrywide -- or the depositor -- which is also  
22 Countrywide -- shall prove to be untrue or incomplete in any  
23 material respect. An event of default entitles MBIA to very  
24 broad remedies, as specified in Section 5.02(a), MBIA can  
25 exercise any rights and remedies under the documents or take  
26 whatever action at law or in equity as may appear necessary

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2 or desirable in its judgement to enforce performance of the  
3 obligations.

4 And I'll reserve slide 89, which distinguishes  
5 other cases for a reply to Countrywide, as they intended to  
6 pursue the sole remedy and argument, which we submit was  
7 waived and is clearly inadequate under the documents. I  
8 will show, however, in slide 90 that our showing of material  
9 breach means that any limitation under the insurance  
10 agreement which is different than the insurance policy is  
11 also void as an issue. If we're entitled to rescissory  
12 relief, those remedies can't stop us, those limitations  
13 can't stop us from pursuing a remedy.

14 Countrywide, in its papers, confuses the insurance  
15 policy with the agreement. Clearly, the policy will  
16 continue to run. It's an absolute and irrevocable policy.  
17 MBIA has today, by it's commitment to the note holders, has  
18 paid out about \$300 billion, as of today, and continues to  
19 pay out under that policy while Countrywide is not  
20 purchasing loans. MBIA will continue to. That's an  
21 absolute policy. But the agreement between MBIA and  
22 Countrywide, the insurance agreement is not irrevocable,  
23 there's nothing that prevents that court from voiding any  
24 limits under that policy upon our showing either of material  
25 breach of conditions precedent, which means that the  
26 agreement never had effect, the conditions precedent had not

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2 been satisfied or our showing, as we intend to discuss  
3 tomorrow, of material inducement of the policy through  
4 misrepresentations, which also means that the agreement  
5 never took effect. So Countrywide cannot stop us from  
6 seeking relief under sole remedy provision.

7 Now, I've spent a lot of time discussing the  
8 indisputable breaches here. I'd like to talk about what  
9 Countrywide actually did on the repurchases, and  
10 specifically its frustration of that repurchase remedy,  
11 which is one of the basic obligations in the contract.

12 If you put up slide 92, this shows you on a  
13 securitization-by-securitization basis just what Countrywide  
14 has done and the percentage range -- percentage of  
15 repurchases ranges from 0.01 percent up through a high of  
16 one percent and then down to .23 percent. This is every  
17 single deal. That's all they've repurchased. And that's,  
18 you can clearly see it, that's the little bit of red at the  
19 very bottom of each securitization, a miniscule amount of  
20 repurchases.

21 The blue corresponds to the categories of  
22 incontestable defect that we have discussed today; and the  
23 green area is the additional set of defects, which we will  
24 discuss if this case goes to trial. Those confirm extremely  
25 high and pervasive defects as Mr. Mozilo should have  
26 expected when he made his theme domination rather than

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2 prudent underwriting. They're very high levels and they  
3 weren't repurchased.

4 Slide 93, please. As I indicated earlier, the  
5 obligation to repurchase arises within 90 days of  
6 Countrywide's discovery or awareness of the defect, whether  
7 or not MBIA is the entity that provides notice, and that's a  
8 similar provision for the HELOC deals closed and second  
9 deals.

10 The first sub bullet refers to the sale and  
11 servicing agreement which makes plain that the sponsor,  
12 which is Countrywide, should use all reasonable efforts to  
13 procure in all material respects any breach of the forgoing  
14 representations of warranties within 90 days of becoming  
15 aware of it. And similarly, the PSA, Pooling and Servicing  
16 Agreement, associated with the close end second  
17 securitizations provides that master servicer and the  
18 sellers, meaning Countrywide, hereby covenants that within  
19 90 days of the earlier -- of the discovery or receipt of  
20 written notice, that it shall cure such breach of all  
21 material respects or remove such mortgage loan.

22 As I indicated, Countrywide's 90 days opportunity  
23 to cure has long since expired with respect to all defective  
24 loans contained in the securitization. That's partly  
25 because the notice provided by MBIA was provided using its  
26 complaint and using its sampling where it gave notice of

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1  
2 rampant and systematic defects. It's partly because  
3 Countrywide originated, underwrote and serviced the vast  
4 majority of the loans and had knowledge of the defects  
5 since, in fact, before the securitizations even closed, and  
6 certainly as of the time of closing, they further had  
7 knowledge from databases within Countrywide that tracks  
8 defects, such as a loan auto cure database, which was part  
9 of their quality control group or their FACTS database which  
10 tracked instances of suspected or confirmed fraud. MBIA  
11 gave specific demands for repurchase totaling over 13,000  
12 loans in 2008 and again in 2010. And if we look at the  
13 complaint and amended complaint, that's 2008, 2009, each of  
14 those defect rates was alleged in excess of 90 percent.

15 Further, MBIA provided the Butler expert report as  
16 of February 27th of this year giving specific notice that  
17 96.8 percent of mortgage loans in the random sample were  
18 materially defective and further notice was given in the  
19 rebuttal report. I want to point out again the insured  
20 Flagstar Vision where in that case where Judge Rakoff  
21 allowed use of sampling following Your Honor's decision to  
22 prove the extrapolation of defects.

23 He made plain that you cannot construe the notice  
24 requirement as requiring a literal identification of every  
25 single individual loan that's inconsistent with the  
26 insurer's rights and remedies, and if you provide notice

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2 through a sampling or, as we did, in both the complaint and  
3 the sampling, then you've given the notice that triggers the  
4 duty to cure.

5 I want to point out for all of these notices given  
6 by MBIA, not once, not once, did Countrywide repurchase  
7 loans within 90 days. Let's put up the timeframe. This is  
8 the first specific -- I'm going to show you, these are where  
9 we actually gave here all the loan numbers. Countrywide, in  
10 addition to our statements of pervasive and systematic  
11 defect, here are the particular loan numbers. Well, on this  
12 demand 1,378 loans were identified. They took Countrywide  
13 140 days after that demand to repurchase just 36 of the  
14 loans, and indeed they continued in dribs and drabs 250 days  
15 later, 326 days later, 418, one thousand --

16 THE COURT: Excuse me. That's for the same 1,378  
17 loans?

18 MR. SELENDY: Yes, it is. Yes, it is, Your Honor.  
19 So 1,514 days later, they repurchased a total, across all of  
20 these, a total of 151 loans. Let's look at the second band  
21 here. 914 different loans were identified. It took  
22 Countrywide 236 days to repurchase 18 of those loans. And  
23 if we stretch it out and look, 1,424 days later they still  
24 had only repurchased 106 loans out of that grant.

25 Let's go to the next one. December 2008, MBIA gave  
26 a further demand for 2,397 loans. Again, 104 days later

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2 Countrywide first repurchased. MBIA made this demand even  
3 though by now it was apparent that Countrywide was not  
4 honoring the repurchase remedy, had totally frustrated the  
5 purpose of it, and therefore was futile to do. MBIA  
6 nonetheless formulated additional specific demands at high  
7 cost to itself and presented it to Countrywide to see can we  
8 negotiate a resolution, will you repurchase the loans and,  
9 in substance, Countrywide did not.

10 The fourth demand, June 23, 2010, and an additional  
11 8,781 loans were demanded. Again, it took Countrywide 201  
12 days to make the first repurchase, which was a small  
13 fraction of that total. And during this entire period while  
14 Countrywide is dishonoring the repurchase obligation, taking  
15 well over 90 days and typically refusing to repurchase at  
16 all, MBIA continues to pay claims under the insurance  
17 policies. So the money which should have come in and helped  
18 fund an insurance obligation, even if all the loans had been  
19 eligible and properly included, the money which should have  
20 come in, in the event of any errors by Countrywide, to deal  
21 with insurance payments, was not coming in and has not come  
22 in today. One reason for this is that Countrywide, as I  
23 stated earlier, did not apply the standards under the  
24 contract.

25 If we can turn to the next slide, please. This is  
26 slide 100, please. What Countrywide did was literally

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2 employ what they described as a red-faced standard to the  
3 repurchase review of monoline demands. This was a process  
4 established in November 2008. The document we cite from is  
5 production update monoline cite, and in that process they  
6 added multiple levels, three levels, before any repurchase  
7 could be done from monoline loan; and they further put the  
8 substantive limit we'll only repurchase the most egregious  
9 loans, the ones that can be poster children in litigation,  
10 the red-faced loan. And they testified in deposition what  
11 they meant. They, as they stated, Countrywide would  
12 re-limit purchases to those loans that had blatant issues  
13 with them. That's obviously not a standard under the  
14 contract.

15 I would like to play you the clip of one of their  
16 own witnesses trying to explain what is this red-faced  
17 standard.

18 (Whereupon, a videotape was played in open court.)

19 MR. SELENDY: So, Your Honor, whether the  
20 standard -- the so called red-faced standard is the very  
21 egregious loan standard or the highly incredible loan  
22 standard, it's not a contract standard. That should never  
23 have been applied to the repurchase demands from MBIA. And  
24 it wasn't just new substantive limits that Countrywide  
25 imposed. They also created new process hurdles for monoline  
26 repurchase. I asked Michael Schloessmann, the head of the

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2 rep and warranty group about this, didn't you create new  
3 process burdens for monoline demands, and finally he  
4 admitted, after he first denied it, that Countrywide had, in  
5 fact, created additional hurdles for approving repurchase  
6 requests submitted by monolines.

7 Let's have a clip.

8 (Whereupon, a videotape was played in open court.)

9 MR. SELENDY: Special process, a new step to the  
10 front end, a new step at the back end, multiple layers of  
11 approval required. Mr. Schloessmann first said it was  
12 absolutely untrue. It's reflected in the slide, that's on  
13 your deck, and then he finally says, yes, yes, that's true.  
14 And there's further testimony from -- let's go to the next  
15 slide from Countrywide and BAC witnesses that made clear  
16 while at any level any employee, except for trainees, was in  
17 the power to deny the request in saying no, if you wanted an  
18 approval you needed to have two levels of loan level review  
19 by the underwriter and manager, in addition to approval by  
20 the pending management review or PMR monoline committee,  
21 three different levels of approval, and ultimately both  
22 Countrywide and the Bank of America sign off.

23 And something that's important to say here, Your  
24 Honor, Bank of America took over this repurchase process.  
25 We've been talking about Countrywide, but you should keep in  
26 mind that Bank of America has continued to adopt and

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1  
2 implement the process of Countrywide in these loans. It's  
3 Bank of America operation. And that's reflected in their  
4 levels of required reviews. Any Countrywide or BAC  
5 repurchase employee could refuse to repurchase it. If you  
6 look at the text on the bottom of the page, both sides would  
7 have to agree for an approval, meaning both Countrywide and  
8 Bank of America would have to agree to approval, approve a  
9 loan from a monoline.

10           So I'd like to put up on the page just a contract  
11 standard. Let's start with that, Andy. Going back to the  
12 contract standard, it's the blue boxes at the top. What's  
13 necessary for repurchase, you need to show did the loan  
14 breach the representation and warranty and did that breach  
15 materially and adversely affect the interest of MBIA in the  
16 loan. The answer to both those questions is yes, then  
17 contract standard is satisfied and the repurchase should be  
18 made.

19           But for Countrywide this was just the starting  
20 point, if it even applied these factors at all, because what  
21 Countrywide said was we'll hang on, let's see was that  
22 breach so egregious that Countrywide would be red faced not  
23 to repurchase the loan. If the answer is no, there's no  
24 repurchase even if the contract standard is satisfied. If  
25 it's yes, there's another question did the loan default. If  
26 you make it through that hurdle, there's another question,

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2 did the breach cause the default. So it's red-faced, was  
3 their default, did the breach cause a default standard that  
4 are no where in the documents.

5 And then in terms of process, was the loan  
6 recommended for repurchase by investor review as one of the  
7 groups looking at the monoline demands. If the answer is  
8 yes, there's another process burden, was the loan  
9 recommended for repurchase by both Tier One and Tier Two  
10 underwriters in the investor audit group. If the answer is  
11 yes, you need yet another level, was the loan recommended  
12 for repurchase by both BAC and Countrywide, members of the  
13 workout strategies group, and if you make it through these  
14 six additional hurdles process and substantive hurdles only  
15 then do you satisfy the Countrywide standard, which starts  
16 to explain how it could possibly be that where we receive a  
17 breach rate of 96.8 percent Countrywide is repurchasing 0.2  
18 percent.

19 This explains why. They didn't use the contract  
20 standard. They created new processes, specifically targeted  
21 to monolines, and if you had the temerity to actually sue  
22 Countrywide to enforce your contracts there was a special  
23 additional burden, they would stop processing loans through  
24 their litigation.

25 So, Your Honor, we submit that rescissory relief is  
26 warranted not just for the pervasive and systematic breach

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2 at the beginning of the contract by including all of those  
3 materially defective loans and transferring risks to the  
4 insurer that should never have been transferred, but also  
5 because the repudiated deal, and this a remedy under general  
6 common law, as we've pointed out in the first bullet, this  
7 is the Court of Appeals case. Rescission is permitted for  
8 repudiation of contract or an essential part thereof. And  
9 in the case of repudiation, unless the damages can be  
10 ascertained with reasonable certainty, rescission is a  
11 matter of right. And this is echoed by other cases from the  
12 Fourth Department, Second Department that were cited here.

13 So because Countrywide has utterly failed to  
14 perform in accordance with the repurchase obligations under  
15 the contract, they've repudiated the contract and for this  
16 independent reason rescissory damages is appropriate. They  
17 canceled or delayed delivery of loan files to MBIA. They  
18 created their new extra contractual standards requiring the  
19 loan to default, default caused by the breach that you need  
20 this red-faced test, they created process hurdles and they  
21 refused repurchasing.

22 So to sum up, Your Honor, on this day of argument  
23 on the contract side of summary judgment, this Court should  
24 grant MBIA summary judgment on seven key issues. First,  
25 going back to the core standard, material and adverse  
26 effects are assessed as of the closing date of the

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2 securitizations. Securitizations alone need not be in  
3 default, need not be delinquent. The test is a day one test  
4 that's true both under the contract terms and under the  
5 insurance law.

6 Secondly, Countrywide materially breached its  
7 representations and warranties for each of the identified  
8 categories of defect on which we're moving to the  
9 incontestable breaches as to which, at best, Countrywide  
10 only feigns a dispute, and as to the first two categories as  
11 to which they have no factual disputes at all.

12 Third, MBIA sampling and the related extrapolation  
13 is un-rebutted scientifically, reliable on the basis of  
14 an -- on award of rescissory damages. As I've stated,  
15 Countrywide does not present any rebuttal on the sampling,  
16 they have no sampling expert, they don't contest the  
17 extrapolation. Fourth, that the sole remedy argument they  
18 invoke to try and change this Court's prior ruling on  
19 rescissory damages is barred by law of the case. It's also  
20 wrong on the merits.

21 Fifth, in consequence, Countrywide is liable for  
22 rescissory damages as to each securitization, because it not  
23 only breached warranties, but it breached warranties that  
24 were conditions precedent to the insurance and that  
25 materially increased MBIA's loss.

26 Six, that Countrywide is independently liable for

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2 rescissory damage as to each securitization, because it  
3 fundamentally frustrated and repudiated contracts by denying  
4 its obligations and dishonoring the repurchase obligation.

5 Finally, Your Honor, I would note at minimum that  
6 these pervasive breaches of representations of warranties  
7 warrant an award at the least of repurchase damages as to  
8 each category of defect. If for whatever reason Your Honor  
9 were not inclined to rule on the rescissory damage as to  
10 each transaction, and we believe that you should given that  
11 we've so far exceeded any test of materiality for MBIA, at  
12 the least MBIA's entitled to an award of repurchase damages  
13 for the categories we've shown according to the numbers  
14 reflected on the extrapolation.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Selendy. All right, we  
17 are now at 12:03. Certainly we can begin rebut opposition  
18 at this point, though, right? Does everybody want to  
19 take -- why don't we do this, why don't we all stand up and  
20 take a calisthenic break. Why don't you take five minutes  
21 and do that.

22 (Whereupon, a brief recess was taken.)

23 (Continued on next page.)  
24  
25  
26

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2 MR. APFEL: Good afternoon at this point  
3 your Honor.

4 THE COURT: Yes, good afternoon.

5 MR. APFEL: Let me tell you up front  
6 that we're going to be splitting the argument, Mr.  
7 Ware and myself. And the division is going to be  
8 I'm going to cover the disputes as to the various  
9 allegations concerning the 56 percent of the loans  
10 that Mr. Selendy says are incontestable and  
11 showing why there are contests at every point.  
12 And then Mr. Ware is going to be covering the  
13 issues from extrapolation on down talking about  
14 the various forms of relief that MBIA is seeking  
15 based on the purported incontestable indisputable  
16 breaches which we will show are very much in  
17 dispute. Before getting -- and your Honor one  
18 other warning ahead of time. Our deck I hope to  
19 cover all of it although we're going to be taking  
20 things a little bit out of sequence so we will be  
21 skipping around a bit, but I will alert the court  
22 exactly on what slide we are on.

23 THE COURT: Your slides are numbered  
24 too.

25 MR. APFEL: Before getting into the  
26 details of our argument, your Honor, I want to

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2 step back for a moment and discuss with your Honor  
3 the extraordinary nature of the relief that MBIA  
4 is seeking. Without a trial, without your Honor  
5 as fact finder having the opportunity to hear a  
6 single witness other than a few snippets from  
7 multiple day depositions that Mr. Selendy played  
8 for you this morning, the plaintiff is asking you  
9 in this case to first award well over three  
10 billion dollars in damages. Or in the alternative  
11 repurchase of over 56 percent of all loans in  
12 securitizations a total of over two hundred and  
13 eighteen thousand loans. Repurchase -- order the  
14 repurchase of paid in full loans and performing  
15 loans, even though paid in full loans cannot be  
16 repurchased. And repurchase of performing loans  
17 would actually hurt innocent investors and trusts.  
18 And they are basing all of this not exclusively  
19 but primarily in connection with their summary  
20 judgment motion. 99 percent of the motion rests  
21 on the judgment and opinions of a single purported  
22 expert witness Steven Butler whom you've seen in  
23 the back of the courtroom and you've heard maybe  
24 10 seconds of his testimony that went on over the  
25 course of two days. This is a man who found 97  
26 percent of the loans he reviewed significantly

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2 defective, even though nearly 80 percent of those  
3 loans are actually paid in full or performing. He  
4 never reviewed 98 -- over 98 percent of the loans  
5 as to which MBIA seeks repurchase and or damages  
6 on this motion for summary judgment. And his  
7 testimony and his opinions are disputed by six  
8 different independent experts. Karen Godfrey who  
9 is our underwriting expert, Frank Lucco who is an  
10 appraisal expert, Lisa Murphy who is a compliance  
11 expert who worked for years and years in the  
12 office of thrift supervision as regulator.  
13 Charles Grice, who is also compliance and banking  
14 expert and Jerry Hausman and Glen Hubbard both of  
15 whom are economists in econometrics.

16 Now, the request by plaintiff here, your  
17 Honor, to award billions of dollars in damages  
18 what amounts really to the word of one man sight  
19 unseen other than in the courtroom today whose  
20 testimony is flatly disputed by at least six  
21 Countrywide experts is remarkable and  
22 extraordinary and I suggest to your Honor it is  
23 unprecedented. More importantly the motion is not  
24 supported by the facts let alone as Mr. Selendy  
25 says incontestable and indisputable facts. And  
26 it's not supported by the law including the law of

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2 the case as decided by, your Honor. For these  
3 reasons, and we'll get into more reasons in a few  
4 moments, the motion must be denied. MBIA you  
5 should understand, your Honor has not simply  
6 initiated litigation against Countrywide. It has  
7 commenced litigation against virtually every  
8 single lender in the industry whose residential  
9 mortgage backed securities it insured during the  
10 relevant period to our case which is 2004, to  
11 2007. In every case not just against Countrywide  
12 it has made the exact same allegations of fraud  
13 and breach of contract and in every case it  
14 alleges that nearly every loan underlying the  
15 securitization anywhere from 85 percent to 99  
16 percent of the loans were defective and made in  
17 breach of representations and warranties. Here  
18 are some examples of cases brought by MBIA and the  
19 breach rates that it has alleged with respect to  
20 representations and warranties. The breach rates  
21 with regard to the loans at issue. 97 percent, 97  
22 percent, you could see 95 to 99 percent, the low  
23 being 85 percent. According to MBIA it would  
24 appear as if most of the mortgage lending industry  
25 not simply Countrywide was engaged in some sort of  
26 conspiracy to systematically make bad loans. In

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2 Countrywide's case I would suggest, your Honor,  
3 MBIA's allegation that 97 percent of the loans in  
4 the securitizations were significantly defective  
5 meaning that they brought with them in the words  
6 of Mr. Butler a meaningful and substantial  
7 increase in the credit risk associated with those  
8 loans. It's a particularly remarkable allegation  
9 because as the record here shows Countrywide loans  
10 have out performed others and indeed performed  
11 extraordinarily well given the economic times that  
12 we faced since 2007. In fact, nearly 80 percent  
13 as I noted of the loans had been either paid in  
14 full or had performed and continue to perform  
15 notwithstanding the worse recession that the  
16 United States has had since the great depression  
17 of the 1930's. MBIA has not suffered any harm as  
18 a result of these loans yet it seeks to have  
19 Countrywide repurchase most of them. Mr.  
20 Selendy's figures this morning was the incontestable  
21 repurchase should be in the nature of over 12  
22 billion dollars even though at this point MBIA has  
23 paid out claims of approximately three billion  
24 dollars.

25 THE COURT: How much do you say that  
26 MBIA has paid out in terms of claims?

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2 MR. APFEL: I believe they paid out a  
3 bit over three billion dollars.

4 THE COURT: Three billion. Are they  
5 asking for three billion dollars at this point?

6 MR. APFEL: At this moment. But what's  
7 confusing is that they also seem to have in the  
8 alternative a repurchase claim where they are  
9 seeking the repurchase of loans including loans  
10 that can't be repurchased because they no longer  
11 exist since they've been paid in full. And the  
12 addition as to all of those loans as to by they  
13 are seeking repurchase some of which are  
14 indisputable. There is no question are compliant  
15 and good loans that add up to over 12 billion  
16 dollars, which is the number being shown to your  
17 Honor.

18 THE COURT: The main point Mr. Selendy  
19 made and I think has to be talked about and that  
20 is the main point is that you have to take  
21 everything at the origination not at whether or  
22 not they performed or didn't perform or whether or  
23 not they were good loans or bad loans or whatever.  
24 You have to take it as of the origination. Do you  
25 agree with that?

26 MR. APFEL: We don't agree, but for

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2 purposes of today's discussions we will agree. We  
3 know your Honor has ruled on this issue. We've  
4 been before your Honor previously on the issue.  
5 We believe that materiality and adversity requires  
6 something more, something more than nearly a  
7 material increase of the credit risk at the point  
8 of origination. 99 percent of the argument I'll  
9 advance to your Honor today will assume that  
10 that's the standard and that that day one the  
11 point of origination is the only time that matters  
12 for our purposes. There are, I would suggest your  
13 Honor, five principal reasons why the motion  
14 should be denied. The first is genuine disputes  
15 of material fact.

16 Now, Mr. Selendy said over and over again  
17 that they've been modest in their demands for  
18 summary judgment. That they have focused only on  
19 that subset of loans what he describes as the 56  
20 percent across the securitizations that are  
21 incontestable indisputable in material breach of  
22 guidelines. All of them. There can't be any  
23 dispute about. I will demonstrate, I hope, over  
24 the course of the day that there are disputes  
25 across the board with respect to virtually, if not  
26 all of the loans that have been put in issue by

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2 MBIA on summary judgment. Let me just take a  
3 moment to show your Honor two or three examples.  
4 One of which will be an example that is not in the  
5 deck, but that is in MBIA's power point deck which  
6 Mr. Selendy skipped over. I think it's in page  
7 sixty of his deck. And as you could see he left  
8 out some crucial information, but I will get to  
9 that in a moment.

10 THE COURT: Is this the one by the way  
11 that is sealed?

12 MR. APFEL: I'm not aware that the  
13 entirety of the loan is sealed, your Honor.

14 THE COURT: Who asked for the sealing?  
15 Does anybody know who requested that this document  
16 be sealed beyond my usual statements of law which  
17 is take out the first numbers and just have the  
18 back numbers? As far as I remember no loan was  
19 sealed in its entirety.

20 MR. APFEL: I thought there were just  
21 redactions made.

22 THE COURT: I thought there were only  
23 redactions.

24 MR. SELENDY: We have no objection  
25 regardless, your Honor.

26 THE COURT: Okay. So wait a second. We

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2 agreed that what I stated -- by the way Bank of  
3 America please listen. Do you agree what I stated  
4 is that bank numbers should be truncated the way  
5 we agreed to do it.

6 MR. APFEL: That's what we've done, your  
7 Honor.

8 THE COURT: And we've also we don't --  
9 we take out names of people, originations,  
10 anything that makes that loan particularly  
11 something that we could then trace back to an  
12 individual. And then beyond that if there is  
13 something that has to be redacted, it's the sum  
14 itself, it's not the sum on the back of the  
15 statement. That's what I thought what we did.

16 MR. SELENDY: I understand from my team  
17 it's Countrywide's motion. They did not file that  
18 loan publicly yet. That's the only reason why I  
19 did not talk about it. If they correct that, I  
20 would be happy to talk about it.

21 THE COURT: With that in mind, go to  
22 page sixty with those redactions in mind.

23 MR. APFEL: What we'll show we have the  
24 exact same loan set up. It's not in the deck. We  
25 didn't intend to speak about it but since it is in  
26 Mr. Selendy's power point deck, I thought we would

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2 provide an opportunity to talk about this loan.

3 Now, this is the loan that ends with and  
4 we'll refer to it ends with 3901. And this is a  
5 loan that just to situate, your Honor, MBIA  
6 maintains is in breach in material breach of the  
7 no default representation. And the basis for  
8 their argument is that the borrower committed  
9 fraud. And therefore, since the borrower  
10 committed fraud that in and of itself is a  
11 violation of the no default representation. We'll  
12 spend sometime later on talking about how the no  
13 default representation doesn't cover fraud at all,  
14 is not a no fraud representation. And therefore,  
15 it doesn't apply to any of the instances where  
16 borrowers committed fraud, but for these purposes.  
17 For these purposes let's assume MBIA is right in  
18 its interpretation of the so-called no default  
19 representation, and that it really is in their  
20 terms a no fraud representation. They claim that  
21 this is an incontestable. It's incontestable that  
22 this one is in material breach.

23 Now, Mr. Butler's documentation they received  
24 is from a subpoena to an employer. Santa fe  
25 station Casino, and it reflects the documentation  
26 that they received reflects is that the borrower

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2 made \$2,500 some odd dollars a month instead of  
3 \$4,000 a month as stated in the original  
4 application. Countrywide disputes the finding  
5 because the borrower listed the second job,  
6 exposition transportation on her application  
7 stating a total of \$4,167.00 for her two jobs.  
8 But Mr. Butler did not subpoena job number two.  
9 MBIA argues that Countrywide here -- this is an  
10 example and this is why it's in their deck in  
11 number 60 attempts to manufacture an issue of  
12 fact. This is an example of how we're supposed to  
13 be feigning issues of fact, because job number two  
14 ended 14 days prior to the completion of the loan  
15 application. But the file itself proves that MBIA  
16 is wrong. Now, if you look at the application the  
17 borrower made the initial call to Countrywide on  
18 February 12th of 2004. With respect to the job  
19 two application it says on the job two application  
20 that there is a line filled out that indicates  
21 that the borrower from March 1 of '94 to March 3  
22 of 2004, and then MBIA says the completed loan  
23 application is 14 days later and that's what's  
24 featured in their materials. 14 days later and so  
25 the borrower is no longer employed at number two.  
26 The borrower committed fraud. The only salary

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2 that should count, the only income that should  
3 count for purposes of this loan at day one is the  
4 Santa Fe Casino income and not this other income.  
5 But let's look at the form in the file that they  
6 don't show you, your Honor. And that is this form  
7 that is dated 3-22 of 2004, where also in the file  
8 five days after the completion of the loan  
9 application where there is as your Honor can note  
10 there is reverification. There is a reverified  
11 email that indicates that the borrower is still  
12 employed at the place. And if you look at this  
13 you'll note that the initial interview occurs on  
14 3-3 of '04 and that's why the line is filled out  
15 3, '94 for employment to present which was the  
16 date that that form or that telephone contact  
17 certification 3-3-04. It was not meant or did not  
18 suggest that the borrower stopped working as of  
19 that day two weeks before the borrower took out  
20 the loan. And then just to make sure that they  
21 were doing it right and making sure the borrower  
22 was still employed, five days after the -- five  
23 days after the loan was completed the borrower's  
24 employment was reverified and that's noted in the  
25 file. And yet this is pointed to by MBIA as one  
26 of its examples of an incontestable example of how

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2 a borrower has committed fraud. I would suggest,  
3 your Honor, if anything the proof here is the  
4 opposite. The proof of the actual documents is  
5 not that Countrywide feigned any dispute, but that  
6 if there is no dispute it's in Countrywide's  
7 direction and that this borrower did not commit a  
8 fraud. That's one example.

9 Let me show you another example, your Honor.  
10 MBIA seeks summary judgment on loan number 7047  
11 and it claims a material breach of what it refers  
12 to and Mr. Selendy discussed earlier today as the  
13 qualified appraiser representation. Now, the  
14 basis of its finding with respect to loan 7047 and  
15 let's go to slide five --

16 THE COURT: Is it in the book two. Can  
17 I see the book.

18 MR. APFEL: It's in our book which is  
19 book number two, your Honor.

20 THE COURT: Okay.

21 MR. APFEL: Now, the basis of their  
22 finding with respect to this loan and why its in  
23 breach of the qualified appraiser representation  
24 is that the appraisal is missing from the file.  
25 And Mr. Butler on the basis of that says that the  
26 representation was breached because the appraisal

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2 is missing. We can't tell whether there was ever  
3 an appraisal let alone one that was done by a  
4 qualified appraiser. That seems logical except  
5 when you look in the file and when Countrywide's  
6 expert looked in the file they found the appraisal  
7 in plain view notwithstanding the fact that Mr.  
8 Butler's team had worked for months on this and  
9 now Mr. Selendy stands up in court and says there  
10 are no disputes. This is one of the loans that  
11 they seek summary judgment on and yet right in the  
12 file here is an example is the actual appraisal.  
13 Uniform residential appraisal report. Appraisal  
14 of the property. Signature of the appraiser. And  
15 the state certification number of the particular  
16 appraiser. A clear dispute.

17 Then, with respect to the mortgage loan file.  
18 Let's take one third, a third example just to show  
19 you from the beginning. I want to talk about loan  
20 number 3195. It is not in the book so if you're  
21 going to look in the book you're not going to find  
22 it, but we'll hold something else up that will  
23 show what we're talking about. MBIA claims this  
24 is one of the categories where Mr. Selendy says no  
25 rebuttal whatsoever. He says two categories Ms.  
26 Godfrey's so-called admissions and then all the

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2 MLS, all of their MLS breaches unrebutted, end of  
3 story. We could leave court now. We don't have  
4 to discuss anything else. MLS the mortgage loan  
5 schedule representation is implicated by this  
6 loan. This is loan number 3915 and MBIA's claim  
7 is that it is, your Honor, undisputed and  
8 indisputable that there is a material breach of  
9 the mortgage loan schedule representation  
10 because -- which requires information that the  
11 information on the schedule be correct in all  
12 material respect.

13 Now, the claim here for this loan is that on  
14 the mortgage loan schedule there is a material  
15 discrepancy between the FICO score which we  
16 acknowledge is an important loan characteristic,  
17 important borrower characteristic. There is a  
18 material discrepancy between the FICO score of the  
19 borrower as stated in the loan application and the  
20 FICO score that's on the mortgage loan schedule  
21 and the mortgage loan schedule overstates the  
22 FICO. Therefore, leading MBIA to believe that  
23 this is a safer, more credit worthy borrower than  
24 it really is. Now, the MLS which Mr. Selendy  
25 spent a lot of time talking about the mortgage  
26 loan schedule. Your Honor should understand what

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2 the MLS is. I mean, it's a follow up to  
3 preclosing the loan tapes. It's a huge spread  
4 sheet, gigantic spread sheet. For every one of  
5 the deals it has a row for each one of the loans  
6 and it has columns anywhere from 40 to 70 columns  
7 for the different loan attributes whether it be  
8 purpose of the loan, FICO, CLTV, if it's a cash  
9 out refi or rate term refi. Multiple multiple  
10 columns describing in detail the loan, it's a  
11 spread sheet that people look at on the screen.  
12 If you print one out, my colleague Mr. Adams is  
13 holding one up, that's the amount of paper  
14 involved. As your Honor knows these  
15 securitizations involve anywhere from a loan of --

16 THE COURT: Just for the record, would  
17 you say that -- would you say that's two feet?  
18 How big is it?

19 MR. APFEL: I would say it's about 18  
20 inches my set.

21 THE COURT: 18 inches --

22 MR. APFEL: Mr. Selendy, would you  
23 stipulate.

24 THE COURT: Whatever we decide put it on  
25 the record.

26 MR. APFEL: It's large.

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2 THE COURT: It is large.

3 MR. APFEL: And I want to give your  
4 Honor a sense of how many columns are indicated  
5 and what MBIA is focused on when it talks about  
6 material breaches with respect to the MLS. So  
7 here is an example what we have here is one, two,  
8 three, four, five, five loans from a particular  
9 securitization that are listed. And what you  
10 could see, your Honor, stretched across the page  
11 are all of the various attributes that are written  
12 in on the mortgage loan schedule for these  
13 particular five loans. And what we have in yellow  
14 in each case is the one. And the only one of the  
15 attributes that MBIA claims with respect to each  
16 one of these loans is in material breach of the  
17 mortgage loan schedule --

18 THE COURT: My question to you has to be  
19 I could think of many different things. Let's  
20 take an ordinary folk okay. I have a bank  
21 statement and I look at what supposedly is my  
22 income and then all the deductions from it and  
23 that comes with a balance, right? If what was  
24 said on that bank statement in terms of my income  
25 was materially wrong, everything else would fall  
26 apart?

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2 MR. APFEL: I agree.

3 THE COURT: So the question is I see two  
4 yellows in the same place, I have no idea what  
5 they are because I can't see that far. I can't  
6 see --

7 MR. APFEL: I can't see it even from  
8 here, your Honor.

9 THE COURT: And what it is on top of it,  
10 but if that is something of crucial nature versus  
11 the first column being a number, the second one  
12 being the date, and the third one being that it's  
13 a residential property. The forth one is that  
14 it's an estate thing, that type of thing which I  
15 have no idea what it says might be not material.

16 MR. APFEL: I agree and it's a great  
17 question and that's why I'm focused on 3195 which  
18 is the middle loan, the middle loan represented on  
19 these five lines. That's one where MBIA said that  
20 there is a material discrepancy in the FICO score  
21 that made a difference.

22 First of all, your Honor, there is a dispute  
23 whether or not there is even a discrepancy. Mr.  
24 Butler says there is a discrepancy between the  
25 FICO score on the MLS and the FICO score that was  
26 in the file. Ms. Godfrey's findings say

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2 otherwise. No rebuttal because Ms. Godfrey  
3 withdrew her report as to the MLS. Well, she did  
4 withdraw her report because as it turned out while  
5 we were preparing for a deposition, it became  
6 clear that the loan tapes that she had reviewed to  
7 make her analysis were not the same loan tapes as  
8 the loan tapes that Mr. Butler reviewed and  
9 therefore what she was comparing apples to  
10 oranges. But she still made findings with respect  
11 to each one of the loans and it doesn't take an  
12 expert. It takes, I would suggest, maybe a sixth  
13 grader to compare values that are in a file with  
14 values on the loan tape and say whether they  
15 match. And so we went and looked at Ms. Godfrey's  
16 findings to see what she says about FICO versus  
17 what Mr. Butler says about FICO and in this  
18 particular case Ms. Godfrey says there is no  
19 discrepancy. But again let's give MBIA the  
20 benefit of the doubt and lets say there is a  
21 discrepancy with respect to loan 3195. Mr.  
22 Selendy said all the discrepancies that we worked  
23 with we just want to make sure there would be no  
24 debate as to whether or not they are material. So  
25 I think his words were we selected ones that were  
26 so great quote, so great that there could be no

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2 debate with regard to CLV and with regard to FICO.

3 THE COURT: Let's see what this one is.  
4 We'll see after lunch.

5 MR. APFEL: This will take two seconds.

6 THE COURT: Two seconds.

7 MR. APFEL: The FICO here which is the  
8 only alleged discrepancy they are saying is  
9 material, in the file on the loan tape on the  
10 mortgage loan schedule, it says 701. What does  
11 Mr. Butler find and what does Mr. Selendy and MBIA  
12 say is a material discrepancy, a FICO of 698. So  
13 a difference of three points. Just three points  
14 on a FICO score which is the only discrepancy out  
15 of 65 possible discrepancies on this one loan. I  
16 would suggest to, your Honor, that even if there  
17 is a breach here, this is not material.

18 THE COURT: All right. Very good. All  
19 right. Everybody we're going to start at 2:15.  
20 We'll open up the doors at 2:10 so everybody could  
21 take their seats and be ready to go at 2:15.  
22 Please be on time if you want to be here.

23 (Continued on the next page)

24

25

26

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2 THE COURT: Okay, ready for the next one. Is  
3 everyone in their own seats? I see some empty spots.  
4 Whoever wants to sit down, there's spots.

5 All right, go ahead.

6 MR. APFEL: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MR. APFEL: I'll pick up where I stopped, where we  
9 stopped, when we discussed the differential between the 701  
10 and the 698 FICO score that was just the last three  
11 illustrative examples I wanted to give Your Honor.

12 THE COURT: Yeah, but the issue that I have there  
13 is whether or not these three points put it into a different  
14 category then as a result of being from 702 to 697, whatever  
15 the numbers are, right, that that changed the amount that  
16 was required, that it should have been a more amount of  
17 money required in order to put it into the securitization.

18 MR. APFEL: The short answer is no.

19 THE COURT: Okay.

20 MR. APFEL: And the, you know, the somewhat longer  
21 answer is that to the extent that there's any categorization  
22 that's being done by MBIA or by Countrywide, for that  
23 matter, that's being done at the pool level with respect to  
24 all of the loans in securitization, not any single loan.  
25 But that difference that you're focusing on doesn't make any  
26 difference in this case. So those suggest examples of the

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2 pervasive disputes of fact that are all over the record that  
3 we'll come back to when we talk about the specific  
4 representations and warranties that were allegedly breached.  
5 But let me go through the other principal reasons why we  
6 think the motion should be denied.

7 The second reason is improper attempts by MBIA to  
8 rewrite the parties' contracts in its effort, I would  
9 suggest, to avoid a trial, MBIA does twists and turns with  
10 the applicable transaction documents or contracts at issue  
11 here, among other things, all of which are discussed in our  
12 briefs and that we'll discuss somewhat later today.

13 It reads the so-called sole remedy provision out of  
14 the contracts, that's we'll talk about later, we'll also  
15 talk about it tomorrow, at the same time it attempts to read  
16 a no fraud representation and warranty into the contracts  
17 where one doesn't exist and endeavors to have the Court read  
18 other provisions, like the qualifying appraiser  
19 representation, completely out of context. And we'll talk  
20 about those when we talk about the particular  
21 representations.

22 At this stage, I would suggest to Your Honor when  
23 the contracts are read in their entirety, as they must be,  
24 and ambiguities are resolved, as they must be at this stage  
25 in favor of non-moving party, namely Countrywide, I would  
26 suggest that the alterations that MBIA is making in the

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2 parties' contracts in and of themselves defeat the lion's  
3 share of MBIA's motion for summary judgment, and I'll show  
4 that, I'll demonstrate that, when we talk about the specific  
5 representations and warranties.

6 Third reason, weaknesses in question of Steven  
7 Butler's, MBIA's reported expert, Mr. Selendy trumpeted Mr.  
8 Butler, as I think his words were, one of the foremost  
9 experts in the country in this area. We disagree. We had  
10 moved to disqualify Mr. Butler --

11 THE COURT: I know.

12 MR. APFEL: -- as an underwriting expert and for  
13 good reason. I mean, our motion is based on his lack of  
14 qualifications, including that he has never previously been  
15 qualified as an expert in residential mortgage underwriting,  
16 that he has never been a mortgage loan underwriter himself,  
17 that has not personally underwritten a loan in over 25  
18 years, that he played no role in the mortgage industry  
19 during the years at issue in this case, and that he spent no  
20 more than a scant few seconds in making his materiality  
21 judgments on a purported non-compliant loan in this case.

22 Now, I'm not going to argue the disqualification  
23 motion now. If we get to it later today, my colleague Mr.  
24 Ware may argue it; but in any event, for the point in  
25 current purposes in connection with the summary judgment  
26 motion is that even if we lose, even if we lose on the

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2 disqualification motions, as Your Honor finds, as you may  
3 well, we recognize that all of the issues we have raised  
4 with respect to Mr. Butler go more to the weight of his  
5 testimony than to the admissibility of his testimony.  
6 That's all the more reason to deny MBIA's motion for summary  
7 judgment and have a trial, because if those issues go to the  
8 weight, you really need to see Mr. Butler in the flesh, not  
9 just, you know, sitting in the back of the courtroom but on  
10 a witness stand subjected to cross examination and to see  
11 whether or not what we're saying about his qualifications  
12 holds true once he's cross examined. And since so much, by  
13 their own acknowledgment, so much of their motion depends  
14 upon -- depends upon the credibility of Mr. Butler and  
15 whether or not he can be trusted, whether or not his  
16 opinions really hold water, all the more reason that we  
17 really need to see him in the flesh and hear his testimony.

18 Fourth reason, what I would describe as classic  
19 disputes between experts. Even if we concede or even if we  
20 disagree, and we made that clear in his disqualification  
21 motion, we don't see Mr. Butler as an expert. But even  
22 assuming he is, there are disputes all over the place  
23 between Mr. Butler on the one hand and numerous of the  
24 different Countrywide experts, all of whom we would suggest  
25 are fully qualified, that need to be resolved at trial.

26 But right now, Your Honor, I want to give you one

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2 example of a dispute between our experts on one hand and Mr.  
3 Butler on the other hand, which is a dispute that we believe  
4 in and of itself should lead to the denial of MBIA's motion  
5 in its entirety. The two experts whose work I want you to  
6 consider now are two -- we mentioned them, their names  
7 earlier today, they are two of the worlds leading economists  
8 or econometricians.

9 Professor Jerry Hausman, who holds an endowed chair  
10 at MIT who among various and other awards he has received in  
11 the course of his career is the Bates Clark Medal, which is  
12 given annually to the best economists in the United States  
13 under the age of forty. He received that some time ago.  
14 He's no longer under the age of forty. I believe the  
15 statistics are something like 95 percent of the Clark Medal  
16 winners go on to win the Nobel Prize. I mean, that's the  
17 stature of the man that we're talking about. And the other  
18 expert that we're talking about is Professor Glen Hubbard,  
19 who's the dean of Columbia Business School and who you know  
20 who has an extensive and very impressive resume himself,  
21 including being the chief economic advisor to presidents in  
22 the past.

23 The analyses of process for Professor Hubbard and  
24 Professor Hausman, all of which are part of the summary  
25 judgment record, call into question, in other words, they  
26 dispute all of Mr. Butler's judgments with regard to

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2 materiality. Let me explain what I mean by that. For each  
3 of the -- the numbers appear different in different charts,  
4 but I believe the numbers 3246, some places just say 3247,  
5 for each of the 3,246 loans from the sample that Mr. Butler  
6 purportedly finds in breach of a representation in warranty,  
7 he also finds that they are, you know, material breaches.  
8 That is that he finds or reportedly finds that they, in his  
9 words, meaningfully breaches, meaningfully and substantially  
10 increase the credit risk associated with the particular  
11 loans.

12 These 3,246 from the sample, you know, the loans  
13 from the sample that his team reviewed, in their review of  
14 the entire sampling, and I'll call it a 6,000 loan sample,  
15 although there may be question about ten or 12 loans, that  
16 didn't have complete files but for purposes of the hearing  
17 the parties are referring to the 6,000 loan sampling. In  
18 his review of the sampling, Mr. Butler found that about  
19 5,800 of the 6,000 loans had breaches that, again,  
20 meaningfully and substantially increased the credit risk  
21 associated with the loan.

22 In the other two hundred or so loans, with only two  
23 exceptions, Mr. Butler found that there were breaches of  
24 representations and warranties but that they were not  
25 material. He found at least one more defect, in other  
26 words, or breaches in all but two of the loans that his team

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2 reviewed. Mr. Butler was asked, Your Honor, how he was able  
3 to determine which breaches were material and which breaches  
4 were not. He had really no answer to the question other  
5 than to say, "trust me; based on my experience, I  
6 subjectively know when the set of breaches in a loan  
7 materially increase the risk and when it does not; I know it  
8 when I see it." But this subjective "trust me" approach  
9 raises questions, and here's an illustration.

10 Let's turn to slide nine. So here are two loans,  
11 Your Honor. Up top is a candid concession on the part of  
12 Mr. Butler at deposition when Mr. Wells was examining him.  
13 Mr. Wells asked, "Determining that a loan is significantly  
14 defective would be your, frankly, subjective decision?"

15 "ANSWER: Based on my experience, yes."

16 So he acknowledges that his decisions about  
17 materiality are subjective. Now, here or two loans  
18 side-by-side that Mr. Butler reviews and he finds on 8743  
19 four defects; one, two, three, four. On 6535 he finds the  
20 exact same defects. They match up exactly. In one case he  
21 concludes, he steps back and he says, this loan is  
22 significantly defective.

23 In another case he says, hum, based on the exact  
24 same information this loan is not significantly defective.  
25 So we ask, well, how does -- how do you make that judgment.  
26 So we look at other loan attributes that he doesn't comment

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2 on, and what we find is that, peculiarly, that in the loan  
3 that he finds to be significantly defective the borrower has  
4 a higher FICO score than the other borrower. The borrower  
5 has a lower CLTV than the other borrower. The borrower has  
6 a lower DTI or debt to income ratio than the other borrower.

7 In other words, in all three of, frankly, the most  
8 important categories with respect to a borrower's ability to  
9 repay a loan, the borrower, who Mr. Butler regards as  
10 significantly defective, whose loan he regards as  
11 significantly defective, is a more creditworthy loan, a less  
12 risky borrower than the borrower he says is not  
13 significantly defective. So that's a puzzlement. Mr.  
14 Butler has no explanation for the disparate results beyond  
15 trust me, I'm experienced, you know, I know it when I see  
16 it. But of course, Your Honor, trusting Mr. Butler's  
17 subjective judgments, sight unseen, unheard from a witness  
18 stand is at a minimum not the stuff for summary judgment.

19 But independent of whether or not Mr. Butler should  
20 be trusted, Professors Hausman and Hubbard independently  
21 dispute his materiality findings. Here's what they do.  
22 They look at Mr. Butler's conclusions regarding all the  
23 loans in the sample, and they say if Mr. Butler is right in  
24 his determinations which breaches really result in material  
25 increase credit risk, then that increased credit risk should  
26 manifest itself in some way. Specifically, if he's right,

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2 all else being equal, those loans that he finds have a  
3 materially increased credit risk, the significantly  
4 defective loans should default more often than those where  
5 Mr. Butler himself finds no material increase in credit  
6 risk. There's an increase in the credit risk, it should  
7 manifest itself some way.

8 According to Professors Hausman and Hubbard,  
9 Professors Hausman and Hubbard has hypothesized that can be  
10 tested, just as the hypothesis that cigarette smoking causes  
11 lung cancer can be tested by determining with appropriate  
12 controls whether cigarette smokers get cancer more often  
13 than non-smokers. Mr. Butler's hypothesis that the breaches  
14 in certain loans materially increase credit risk or  
15 significantly defective while the breach in others do not  
16 can be tested, again, with appropriate controls. And that's  
17 exactly what Processor Hausman and Professor Hubbard did  
18 independently of one another.

19 In setting up their tests, they noted that if Mr.  
20 Butler were right then they would expect that the loans with  
21 the alleged material increase in credit risk would default  
22 meaningfully and substantially more often than the loans Mr.  
23 Butler found were not significantly defective. In fact,  
24 they found just the opposite to be the case. So the  
25 expectation, based on Mr. Butler's findings, Mr. Butler  
26 finds 97 percent of the loan to be materially breached of

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2 guidelines. He finds only about three percent to be  
3 non-material in breach. So based on expectations, if he's  
4 right, you would think that in the real world those loans  
5 with meaningful and substantial increase in the credit risk  
6 would default meaningfully and substantially more often.  
7 But, in fact, these are Professor Hubbard's results, but  
8 Professor Hausman's are basically the same, they find just  
9 the opposite to be the case. Remarkably, what Mr. Butler  
10 concluded to be the nonsignificantly defective loans default  
11 more often than the ones he says have an increased credit  
12 risk.

13 I would suggest to Your Honor that this is  
14 empirical scientific evidence that Mr. Butler's materiality  
15 assessments are wrong, they're wrong as of day one. MBIA  
16 has no substantive answer to this. All it says is that  
17 there are inconsistencies between Professor Hausman's and  
18 Hubbard's approach, that Professors Hausman and Hubbard are  
19 impermissibly looking at performance information when Your  
20 Honor has already determined that performance does not  
21 matter to the day-one determination of whether a loan at the  
22 time of origination had materially increased credit risk.

23 But Professors Hausman and Hubbard are only using  
24 performance here to test whether Mr. Butler is right or  
25 wrong in his judgment that the loans prior to origination  
26 had materially increased credit risk. Their analyses prove

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2 that Mr. Butler's wrong and that his "trust me" answers just  
3 should not be trusted.

4 For current purposes, Your Honor, you don't have to  
5 accept what Professors Hausman and Hubbard are saying. You  
6 don't have to accept that they're right. We think that  
7 they're right, and we think Mr. Butler is wrong, but the  
8 point here is that, at a minimum, a live dispute exists  
9 between our experts and Mr. Butler and Your Honor has stated  
10 in many opinions where there's a dispute between experts  
11 summary judgment is just not available.

12 You put it in Rosen v. Moss in the case you decided  
13 back in April of 2005, the issue of which expert is correct  
14 is for the jury to decide after a trial. The particular  
15 dispute I've highlighted here between Professors Hausman and  
16 Hubbard on the one hand and Mr. Butler on the other hand  
17 goes to the heart of Mr. Butler's determination and  
18 materiality and therefore means there's a genuine dispute  
19 regarding the factual underpinning of MBIA's entire summary  
20 judgment motion. On this basis alone, Your Honor, without  
21 anything more, Plaintiff's motion should be denied.

22 Let me go back to slide four. That's just one  
23 example, but I think an important example of a dispute  
24 between our experts on the other hand and Mr. Butler. Our  
25 experts on one hand, Mr. Butler on the other. Then the last  
26 and final principal reason that we have why Your Honor

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2 should deny MBIA's motion for summary judgment is MBIA's  
3 disregard of the Court's prior rulings.

4 Mr. Selendy spent some time this morning indicating  
5 various ways in which Countrywide supposedly is disregarding  
6 Your Honor's orders. Let me point out a few ways in which I  
7 think MBIA is, and in a way that would deprive Countrywide  
8 of its ability to defend itself at trial, as is its right.

9 There are three ways in which we think that MBIA has  
10 disregarded the prior warnings. First, in your December 22,  
11 2010 opinion on sampling, you authorized MBIA to use  
12 sampling in an effort to prove it's case. Now, as evidenced  
13 by what Mr. Selendy was saying this morning, MBIA is taking  
14 that decision and saying that based on the sample results  
15 the Court may ensure to extrapolate and find that over two  
16 hundred thousand loans and securitizations are immaterial  
17 breaches of one or more representations and warranties.

18 In addition, MBIA argues that the Court should not  
19 allow Countrywide to contest MBIA's proof at trial. In  
20 making this argument, MBIA disregards other important  
21 components of Your Honor's opinion. Let's take a look.

22 Slide 11. You say, among other things, that Mr.  
23 Selendy did not focus on this morning in your sampling  
24 opinion "Defendants' assertions are not without merit and  
25 Defendant-cited issues would be decided by the trier of fact  
26 as pertaining to weight rather than acceptability of the

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2 evidence. That decision will be made at trial. Defendants  
3 will have the ability to contest Plaintiff's proofs and the  
4 trier of fact will decide the issues."

5 Among the decisions, Your Honor, that, you know, as  
6 Your Honor I think aptly put it were to be made at trial by  
7 the trier of fact or decisions regarding whether any  
8 extrapolation is permissible, whereas here both sides'  
9 underwriting experts, including Mr. Butler, emphasize the  
10 uniqueness of each and every loan. Whether the sole remedy  
11 and notice of cure provisions in the parties' contracts,  
12 both of which are important components of Countrywide's  
13 affirmative motion for summary judgment, preclude  
14 extrapolation and ultimately the rescissory relief demanded  
15 by MBIA, which Your Honor said they're permitted to seek,  
16 but only permitted to seek, you haven't granted that,  
17 whether a sample that was chosen using certain parameters in  
18 this case, a sample using FICO, CLTV and doc type,  
19 documentation type, as parameters by which the selected  
20 sample may be used to draw conclusions regarding wholly  
21 different issues, such as borrower fraud, appraisal issues,  
22 mortgage loan scheduling issues and whether extrapolation  
23 can be used in any way shape or form to proof damages.

24 Here on summary judgment MBIA, I think, remarkably  
25 asked the Court to decide all of these issues without  
26 hearing from any of the pertinent witnesses. This would be

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2 unjust, unfair and, as Your Honor's already noted, just  
3 plain wrong. Second way in which MBIA disregards Your  
4 Honor's prior opinions, MBIA's summary judgment, that's with  
5 respect to the January 3, 2012 order you issued on MBIA's  
6 first motion for summary judgment, there Your Honor, I'm  
7 sure you recall, you found that the meaning of the  
8 materially and adversely effects the interests language in  
9 the parties' contracts was ambiguous.

10 You specifically wrote, "If the contract is  
11 reasonably susceptible to more than one interpretation,  
12 summary judgment is inappropriate. This court finds that  
13 the applicable provisions of the SSA and PSA are subject to  
14 various interpretations regarding interest and affect on  
15 interest."

16 Now, MBIA sees seeks to have Your Honor revisit  
17 this ruling at the same time that it is also appealing the  
18 ruling to the First Department. If Your Honor does not  
19 depart from your earlier determination that materially and  
20 adversely effects provision is reasonably susceptible to  
21 more than one determination, then at least for summary  
22 judgment purposes you must resolve the contractual ambiguity  
23 against MBIA, the moving party. Here that resolution would  
24 all but eviscerate MBIA's motion for summary judgment,  
25 because 2,604 of the 3,246 loans that are supposedly  
26 undisputed and indisputable, 80 percent of those loans --

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2 about 80 percent of those loans have not materially and  
3 adversely affected the interests of MBIA, because they are  
4 either paid in full or performing. And here MBIA puts, Your  
5 Honor, 3,246 loans -- and this is on slide 13 -- they say  
6 it's undisputed 812 of those are still performing, 1,792 of  
7 those loans are paid in full.

8 So to the extent that the provision that triggers  
9 the repurchase allocation is ambiguous and we are entitled  
10 to explore the meaning that we think it has, in our view  
11 adversity requires default. Default, as you know, on all  
12 but the 642 loans would be off the table for purposes of  
13 summary judgment. This would change the entire dynamic of  
14 MBIA's motion, for instance, with a starting point and  
15 ceiling on summary judgment of about 10 percent, 642 of the  
16 6,000, a little over ten percent as opposed to 56 percent.  
17 MBIA's claims for rescissory relief repudiation would  
18 necessarily fail. Regardless of whether our position is  
19 ultimately vindicated at trial for summary judgment  
20 purposes, our position must prevail, I would suggest, given  
21 Your Honor's decision regarding the ambiguity of the  
22 language.

23 Finally, Your Honor made a prior ruling on  
24 causation and, among other things, in your January 3, 2012  
25 ruling with respect to causation you wrote, "MBIA must prove  
26 its breach of warranty claim that Countrywide's alleged

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2 misrepresentations materially increase MBIA's current risk  
3 of loss. MBIA must then prove that it was damaged as a  
4 direct result of the material misrepresentations's. As has  
5 been aptly pointed out by Countrywide, this will not be an  
6 easy task. Upon reaching its burden of proof, MBIA must  
7 prove the amount of its damages. It is without basis. And  
8 case law requires MBIA to prove a causal link between the  
9 alleged misrepresentations made pursuant to the policies;  
10 however, the Court does not find that this disposes of  
11 Countrywide's 14 and 15 affirmative defenses. The burden of  
12 proof remains upon MBIA to prove all elements of its causes  
13 of action. Defendants' 14 and 15 affirmative defenses are  
14 not dismissed.

15 Now, without saying so, MBIA tries to do an end run  
16 around this part of your order and eliminate Countrywide's  
17 14 and 15 affirmative defenses, notwithstanding the fact  
18 that Your Honor expressly denied Plaintiff's prior motion to  
19 do just that. The lack of transparency of what MBIA is  
20 trying to do is a little troubling and surprising, but it's  
21 not surprise that MBIA wants to avoid altogether the  
22 difficult task of proving that Countrywide accorded  
23 inadequate underwriting, caused MBIA's losses. There's no  
24 surprise here, because the record evidence overwhelmingly  
25 demonstrates that MBIA's losses were caused by  
26 macro-economic events, specifically that the losses were

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2 caused by worldwide depreciation in housing prices that was  
3 well beyond the control of the Countrywide.

4 Consistent with Your Honor's denial of MBIA's  
5 motion to strike Countrywide's 14 and 15 affirmative  
6 defenses, we should be allowed to present that evidence and  
7 there the 14th and 15th affirmative defenses, which are on  
8 slide 15, which deal precisely with the issue of causation.  
9 Let me next turn Your Honor specifically to the so called  
10 incontestable, indisputable breaches of representations and  
11 warranties and we'll try to go through those as quickly as  
12 we can.

13 First of all, let me remind Your Honor that MBIA  
14 needs to prove in each and every case both a breach and the  
15 materiality of the breach. Their materiality cannot be  
16 deemed in this case. There are representations and  
17 warranties in the transaction documents between these  
18 parties that allow for certain representations and  
19 warranties to be deemed material to be considered and  
20 accepted as material, but the five representations of  
21 warranties that MBIA has put at issue in the summary  
22 judgment are not among them.

23 Lets turn to slide 19. Slide 19, this an example  
24 of a provision, and a provision like this appears in the  
25 transaction documents for each of the 15 securitizations. A  
26 breach of any of the representations in this case, sections

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2 3.02 858 to 64 will be considered to materially and  
3 adversely affect the interests of note holders and the  
4 credit enhancer. So there are certain representations that  
5 in and of themselves will be considered, will be deemed to  
6 materially and adversely affect the interests of the credit  
7 enhancer here, MBIA. But the five representations and  
8 warranties that are at issue here, which are listed right  
9 down below, are not among that group in this particular  
10 transaction. The 2005 E transactions group where a  
11 representation would be deemed material is 58 to 64, but as  
12 you can see listed below the five representations and  
13 warranties at issue here are four, 13, 19, 36 and 32,  
14 they're not among that group. So each case MBIA must put on  
15 proof positive of materiality.

16 Let's discuss first -- I'm going it take the  
17 representations, Your Honor, in the order in which they  
18 appear in MBIA's moving papers. First, the qualified  
19 appraiser representation, just to situate the Court, the  
20 qualified appraiser representation reads, "before the  
21 approval of the mortgage loan application, an appraisal of  
22 the related mortgage property was obtained from a qualified  
23 appraiser." Now, there are two reasons why, in our view,  
24 MBIA's motion for summary judgment as to 1,423 loans in  
25 this -- with regard to this particular category should be  
26 denied. One is that MBIA read the representation

1                                   Motions - Mr. Apfel

2 selectively, and we would suggest that properly read in the  
3 context of the parties' contracts there is no breach of the  
4 representation.

5                   And second has to do with materiality issues. Let  
6 me take them one at a time. With respect to reading the  
7 representation out of context, the representation in and of  
8 itself, if one puts one's blinders on and only reads the one  
9 provision, it says, "appraisal is a representation that the  
10 appraisal has to come from a qualified appraiser." It seems  
11 to be pretty straightforward.

12                                   (Continued on next page.)

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2 (Continuing) MR. APFEL: It seems to be  
3 pretty straight forward. But if you look at other  
4 provisions in the contract, and here I'm just  
5 taking some provisions. You could see that there  
6 are other representations, other representations  
7 that indicate and contemplate the use of  
8 appraisals other than those done strictly by a  
9 qualified appraiser, namely appraisals that are  
10 done electronically so called AVM's that stand for  
11 automated valuations models. So here in just this  
12 one contract as of the closing date no more than  
13 the percentage specified in the Adoption Annex of  
14 the mortgage loans by aggregate principal balance  
15 were appraised electronically. So there is a  
16 representation having to do with AVM's which are  
17 electronic appraisals suggesting that in this  
18 contract, notwithstanding, the qualified appraisal  
19 representation there is an understanding that at  
20 least some of the loans will be appraised  
21 electronically. As of the closing date no more  
22 than 32.65 percent and 12.24 percent of the  
23 mortgage loans in loan group one and loan group  
24 two respectfully by adding principal balance were  
25 appraised electronically. Again these are  
26 representations elsewhere in the contract. If you

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2 read these provisions together with the provision  
3 that MBIA narrowly focuses on, there is at least  
4 an understanding and a contemplation that other  
5 forms of appraisals are going to be used and MBIA  
6 knew it. It knew it, your Honor, because as we  
7 could see on slide 24, with regard to the  
8 preclosing tapes, the mortgage loan schedule those  
9 schedules that we talked about this morning.

10 There was one of those many many columns that we  
11 saw on the scroll that we put out this morning  
12 that neither one of us could read, but one of  
13 those columns was for appraisal type description.

14 And here we've just taken some examples in the  
15 appraisal type description. I believe there is as  
16 many as 18 different types of appraisals or  
17 valuations that are referenced. MBIA never said  
18 word one never said boo about any of them because  
19 they recognize all of them are acceptable ways of  
20 doing the credit. Here we see 1004U. That's the  
21 uniform standard appraisal form for a standard  
22 appraisal. There is some instances where that was  
23 used for these particular loans. Then we see  
24 2055E which is a form for an exterior appraisal  
25 only. That's what the E is. CAPES was  
26 Countrywide's proprietary AVM so those instances

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2 where an automated evaluation model or an  
3 electronic appraisal was done. And stated value  
4 those are instances where the loans were made  
5 where the valuation was stated pursuant to a  
6 program that the borrower took the loan out, and  
7 that MBIA knew about it, and MBIA saw these  
8 different appraiser type descriptions over and  
9 over and over again with respect to every one of  
10 the securitizations. So again, properly read in  
11 context, the way MBIA read it in the real world as  
12 opposed to the way they are now reading it in  
13 court is that everyone understood that the  
14 contracts permitted alternative forms of  
15 appraisal. The second reason that we have for  
16 denying their motion for summary judgment on the  
17 loans in this category has to do with materiality.  
18 Materiality even if they're right and the only  
19 appraisals that are permitted are full loan  
20 appraisals by qualified appraisers, they still  
21 have to demonstrate that the valuation in the file  
22 is off, is off in a material way. They have to  
23 not only find a breach of the representation, but  
24 again they have to find that it's material. But  
25 here Mr. Butler when he first did his analysis as  
26 to the 1,423 loans, they now put at issue he found

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2 only 200 or 150 or so to be in violation even of a  
3 representation warranty because he was reading the  
4 representation warranty properly in context the  
5 way MBIA and Countrywide read it at the time.

6 Now, in connection with summary judgment he  
7 has submitted an affidavit in which he says these  
8 1,423 loans are in breach of representation, but  
9 what he doesn't do and what he can't do is opine  
10 that these breaches are material. Because he  
11 himself has found with respect to many of these  
12 loans that the breaches are not material. Here is  
13 an example. Remember we talked earlier about how  
14 Mr. Butler went through and his team went through  
15 these six thousand loans. And they found one or  
16 more defects in all but two of the loans. One of  
17 the two, one of the two in which they found no  
18 breach of representation warranty, no defect  
19 whatsoever was loan number 2246. And that loan  
20 had an AVM in the file. It didn't have an  
21 appraisal. It didn't have a full blown appraisal.  
22 It had an AVM in the file. So Mr. Butler found no  
23 breach, no material breach, no nothing with  
24 respect to this one. Obviously he was very  
25 motivated to find defects because he found them in  
26 almost every one. Here are one of two pristine

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2 loans in the entire universe and it has an AVM.  
3 Now he says that's a breach of the representation  
4 and warranty having to do with qualified  
5 appraisers. But he doesn't say and he can't say  
6 because he didn't say at the time that this breach  
7 if it's a breach at all, gives rise to a  
8 meaningful and substantial increase in the credit  
9 risk. In other words, that it's material. He  
10 makes no finding on materiality and there is no  
11 evidence of materiality. He himself Mr. Butler  
12 himself based on his own findings rebuts the  
13 materiality of the purported breaches in over  
14 twelve hundred of the 1,423 cases in this  
15 category. And Ms. Godfrey and Mr. Lucco dispute  
16 the lion's share if not all of the remainder.  
17 There are disputes between the experts on this  
18 issue and there is a dispute Mr. Butler even with  
19 himself. There is no evidence other than MBIA's  
20 say so and Mr. Selendy's say so which is argument  
21 not evidence that there is materiality to this.

22 Let's move to the no default representation.  
23 This is the second category where MBIA finds that  
24 there was 626 loans from the sample, a little over  
25 10 percent of the sample whereas they claim  
26 indisputable material and adverse breaches of this

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2 representation and warranty as of the closing  
3 date. No default exists under any applicable  
4 mortgage note or applicable mortgage loan.

5 Now, again, we have two arguments here as to  
6 why the entire motion for summary judgment as to  
7 this package of loans should be denied. One has  
8 to do with meaning of the contract and the second  
9 has to do with just plain old disputes of fact.

10 Let me take them one at a time. With respect to  
11 the meaning of the contract. MBIA reads the  
12 contract. They take -- read the contract no  
13 default. They read the representation where it  
14 says no default exists and they will read it as a  
15 representation meaning no fraud. But it's not.  
16 No default means no default. It doesn't mean no  
17 fraud. Dictionary defines default clearly, your  
18 Honor, here on slide 30. Default means failure to  
19 make payments. It doesn't mean fraud. You could  
20 look up the definition to your hearts content in  
21 the any dictionary, you're always going to find  
22 the same definition, failure pay financial debts.  
23 And at the time of closing there is no evidence,  
24 nor could there be any evidence, that any of the  
25 loans at issue in any of the securitization were  
26 in default meaning that the borrower had failed to

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2 make a payment as of the time of closing.  
3 Countrywide knew how to write a no fraud  
4 representation when it wanted to. Take a look at  
5 slide number 31, your Honor. On the left hand  
6 side we see the no default representation that  
7 MBIA is making out to be a no fraud  
8 representation. On the other hand, there were no  
9 fraud representations that Countrywide did give to  
10 Fannie Mae and Freddie Mac, and they are very  
11 clear. Quote no fraud or material representation  
12 has been committed in connection with the  
13 origination of the mortgage and servicing prior to  
14 the sale. Close quote. There is no such  
15 representation in any of the securitizations and  
16 again MBIA knew it at the time. Because MBIA  
17 asked Countrywide at the time in real life outside  
18 of the courtroom whether or not it could have a no  
19 fraud representation and the answer was  
20 unequivocal no. The evidence in the record, your  
21 Honor, is that the term early payment default or  
22 EPD is used interchangeably with fraud. Because  
23 typically in the industry when the fraud exists  
24 the borrower there is an early payment default.  
25 The default occurs early on in the life of the  
26 loan. And there was an exchange between Melissa

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2 Brice of MBIA and Garrett Galati of Countrywide  
3 dealing with early payment defaults which is  
4 equivalent of fraud. Ms. Brice asked point blank  
5 in an email exchange, "does Countrywide buy out  
6 all the early payment defaults for these pools?"  
7 And Mr. Galati's answer was unequivocally "CHL  
8 (Countrywide Home Loans), has never repurchased  
9 EPD's from a second lien security nor is there any  
10 intention to do so." Now, here in court MBIA says  
11 oh no default means no fraud. But that's a  
12 torturing of the English language and I would  
13 suggest a torturous reading of the parties'  
14 various and sundry agreements. But, second reason  
15 why we've claimed the motion for summary judgment  
16 on all loans in that category must be denied, even  
17 if it is a no fraud representation, there are  
18 disputes. There are disputes across the board  
19 with respect to whether or not the purported fraud  
20 even occurred. The basis for their claims here  
21 that there are breaches of this so called no fraud  
22 representation in their view is the information  
23 they received from subpoenas, from subpoenas to  
24 borrowers, from subpoenas to employers typically  
25 to employers. Subpoenaed -- and from that  
26 subpoenaed information is itself often unreliable

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2 and I would suggest in this case MBIA often  
3 misreads the subpoenaed information that they  
4 received. Let's take an example.

5 THE COURT: Why is the subpoenaed  
6 documents unreliable?

7 MR. APFEL: Why are they reliable?

8 THE COURT: Unreliable.

9 MR. APFEL: Let me show you an example.  
10 They are not necessarily unreliable in and of  
11 themselves, although sometimes they are especially  
12 when the wrong employer is subpoenaed. But what's  
13 unreliable about them is the particular reading of  
14 the documents by MBIA. So we could turn to slide  
15 6. So here is one of the loans that Mr. Selendy  
16 terms as incontestable, indisputable, immaterial  
17 breach of the nonexistent no fraud representation  
18 based on subpoenaed information. Here is the  
19 subpoenaed information that they have. And Mr.  
20 Butler in MBIA claims subpoena information quote  
21 reveals that at the time the loan closed the  
22 borrower was never employed at the particular  
23 employer Marie Calendars as a waitress. But here  
24 is the information, your Honor. Here is the  
25 information that actually came in from the  
26 subpoena. Perkins and Marie Calendars LLC, which

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2 is the entity that was subpoenaed, does not show  
3 borrower as ever being an employee of any of our  
4 corporate locations. Apparently Mr. Butler and  
5 MBIA stopped reading because the subpoenaed  
6 information goes on to say please note that said  
7 person may be employed by a franchisee in which  
8 case this company would have no record of her  
9 employment. So this is what they are taking as  
10 affirmative proof, uncontested proof that this  
11 borrower committed fraud and therefore on a non  
12 existent representation and warranty involving no  
13 fraud they should get summary judgment on this  
14 loan. I would suggest that the subpoenaed  
15 information itself disputes their claim.

16 Let's look at one other example. Slide 33  
17 please. This is another example that falls into  
18 this category of subpoenaed information, and this  
19 is what I'm talking about the unreliability, your  
20 Honor. It's the unreliability of the reading of  
21 the information. In its reply brief MBIA asserts  
22 subpoenaed information proves that there is no  
23 genuine dispute of fact that the borrower 0157 was  
24 not an employee of Bristol-Myers Squibb, but the  
25 subpoenaed information offers no such proof. In  
26 the borrower's loan application if you look at it

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2 it's dated March 26th, 2003. The subpoenaed  
3 information is dated eight and a half years later.  
4 November 29th, 2011 and what the subpoenaed  
5 information says is no documents available.  
6 Company policy provides that when an employee has  
7 been separated from the company for more than  
8 seven years, all records of that employee are  
9 destroyed. So this is proof that this borrower  
10 was lying in March of 2003 about being employed by  
11 Bristol-Myers Squibb. Maybe he was, maybe he  
12 wasn't employed by Bristol-Myers Squibb, but  
13 that's eight and a half years earlier. If he left  
14 the company six months after March of 2003, or a  
15 year after 2003, or a year and a half after 2003,  
16 then the subpoena would have picked up nothing  
17 based on Bristol-Myer Squibb's own internal  
18 document control policy. And yet this is another  
19 example of what MBIA is pointing to as affirmative  
20 proof no need for trial, no dispute whatsoever  
21 that this borrower committed fraud. I would  
22 suggest this is not evidence of fraud.

23 Finally, your Honor, there are disputes on  
24 the issue not just whether or not the fraud  
25 occurred, but whether or not it's material. And  
26 even Mr. Butler acknowledges that when a borrower

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2 commits fraud, it's not always material, doesn't  
3 always necessarily result in a material  
4 significantly and meaningfully increase the credit  
5 which is associated with the loan. Here is an  
6 example. Slide 37 this is loan number 7225. And  
7 this is one where based on subpoenaed  
8 documentation Mr. Butler claims that the  
9 borrower's income was much lower than was stated  
10 in the file. And he then recalculates the debt to  
11 income ratio based on the reduced income. And  
12 finds that it goes to 42.22 percent.

13 Notwithstanding this fraud, and six other defect  
14 findings, Mr. Butler concludes that this loan is  
15 not significantly defective. In other words, that  
16 there was no meaningful or substantial increase in  
17 credit risk associated with the loan. So here is  
18 an example even Mr. Butler acknowledging that not  
19 in all instances even where there is fraud, and  
20 even if it were a breach of an actual  
21 representation, that it would be material. The  
22 combination of their misreading the contract and  
23 the disputes, both on whether the fraud occurred  
24 and materiality, defeats summary judgment on this  
25 package.

26 Next the mortgage loan schedule. We've

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2 already spent some time talking about the mortgage  
3 loan schedule and I'll try to keep this relatively  
4 brief. The mortgage loan schedule representation  
5 is somewhat different for different groups of the  
6 securitizations. The language is somewhat  
7 different in all three cases. For one group of  
8 the HELOC another group of the HELOC and closed  
9 end seconds. I don't think that makes a material  
10 difference to this proceeding, your Honor. Let's  
11 focus on the language of the first. AS of the  
12 closing date, the information in the mortgage loan  
13 schedule for the mortgage loans is correct in all  
14 material respects. In our view there are three  
15 reasons why all the loans that MBIA views as in  
16 breach of this particular representation warranty  
17 are not deserving of summary judgment.

18 First has to do with materiality. Second has  
19 to do with disputes of fact. Third has to do with  
20 the actual language of the contract. The language  
21 of the representation itself incorporates a  
22 materiality requirement. If you look at the  
23 contract language in all the common denominator in  
24 all three of the variations of the  
25 misrepresentation is that as of the closing date  
26 the information on mortgage loan schedule for

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2 mortgage loans is correct in all material  
3 respects. We find that in all material respects  
4 in all cases. So to the extent there is an issue  
5 with materiality there is also no breach of the  
6 representation and warranty to the extent that the  
7 representation and warranty itself incorporates  
8 the materiality requirement. Incorporates the  
9 materiality requirement. So let's talk first  
10 about the materiality requirement. The  
11 discrepancies identified by MBIA to the extent  
12 they even exist we believe are immaterial. They  
13 did not affect and could not have affected, could  
14 not have materially and adversely affected MBIA's  
15 interests. They were immaterial and I would  
16 suggest in four different ways. First, they were  
17 in many instances trivial in and of themselves.  
18 Immaterial in and of themselves. And we've  
19 already shown you an example of that, the  
20 difference between the 701 and 698 FICO score.  
21 Secondly, they were immaterial at the loan level.  
22 As Mr. Butler acknowledges a loan always has to be  
23 reviewed in its entirety so if there is one single  
24 discrepancy, one single discrepancy on a MLS that  
25 in and of itself may be a discrepancy between the  
26 value on the mortgage loan schedule and what's in

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2 the file, but it doesn't establish, doesn't  
3 establish that the loan as a whole has a  
4 materially increased credit risk. For that, one  
5 needs to look at the loan as a whole. So here is  
6 an example and Mr. Butler acknowledges each loan  
7 is underwritten individually with a separate  
8 aggregate of factors to consider. So here is one  
9 case in which Mr. Butler finds that something  
10 called a refi cash out flag in the -- on the  
11 mortgage loan schedule. It said no, suggesting  
12 that it was a rate-term refinancing versus a cash  
13 out--

14 THE COURT: What does refi cash out flag  
15 mean?

16 MR. APFEL: What's that, your Honor.

17 THE COURT: What does refi cash out flag  
18 mean?

19 MR. APFEL: It means it -- the answer  
20 can be yes or no to this for the flag. And it  
21 means is this loan a cash out refinancing, or is  
22 it another form of refinancing? Is it a  
23 refinancing of the loan where the borrower is  
24 going to take cash out by --

25 THE COURT: It's the second loan.

26 MR. APFEL: It's the nature of the type

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2 of refinance. And Mr. Butler's assumption which  
3 is disputed by Professor Hausman which we'll talk  
4 about in a moment, in all instances a rate-term  
5 refinancing is safer, is less risky than a cash  
6 out refinancing. Professor Hausman does a test  
7 that shows otherwise and there is a dispute on  
8 that basis. But here even assuming Mr. Butler is  
9 right, he's saying this was this particular  
10 discrepancy between on the tape it's saying that  
11 it was a not a cash out and in the file saying it  
12 was a cash out was a material breach of the MLS  
13 representation. But again you can't look at that  
14 in and of itself. You have to look at -- in order  
15 to determine whether there is a material increase  
16 in the credit risk associated with the loan, you  
17 have to look at all of the columns. All of the  
18 attributes of the loan including FICO, including  
19 CLTV, and in this case just looking at those two  
20 other attributes this is a borrower with a very  
21 high FICO score. A very low especially given the  
22 loans in these pools CLTV, and these I would  
23 suggest are attributes of this loan that in and of  
24 themselves compensate for this one discrepancy  
25 that Mr. Butler has found on making it clear that  
26 it couldn't be material. It couldn't in and of

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2 itself increase the credit risk associated with  
3 the loan. And as Mr. Butler said each loan is  
4 underwritten individually with a separate  
5 aggregate of factors to consider.

6 Next, the way in which MBIA used the closing  
7 loan schedules or the preclosing loan tapes is  
8 suggestive of what was material to MBIA at the  
9 time. Now, Mr. Selendy is right that the MLS the  
10 actual mortgage loan schedule they don't receive  
11 until the actual closing of the transaction. But  
12 they receive similar tapes the preclosing, similar  
13 tapes that have all the same information with some  
14 variations prior to them. And the way in which  
15 they use that is suggestive as to what counted for  
16 them and what didn't count for them. So and they  
17 always they never looked at individual loans.  
18 They always looked at the pools. They were  
19 looking at averages. So let's take this just one  
20 example. Mr. Butler acknowledges he doesn't do  
21 any pool level analysis even though that was the  
22 only form of analysis that really mattered to MBIA  
23 in real life. So in this case for summary  
24 judgment purposes with respect to this one  
25 securitization we've taken some examples where Mr.  
26 Butler finds that one two three four five

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2 instances the FICO score on the MLS was higher  
3 than the FICO score in the file, and therefore  
4 there was and these are included as part of the  
5 1,416 loans in this group that he says are a  
6 material breach of the representation. So he says  
7 these are all higher and therefore the  
8 misrepresentation that was adverse was that there  
9 was a suggestion here that these loans were better  
10 credit risks than they really were. But what he  
11 doesn't point out, and what Mr. Selendy doesn't  
12 tell you about this morning is that he finds  
13 discrepancies with regard to FICO for other loans  
14 in the same pool as part of the same pool. And  
15 here are five loans where the FICO score just goes  
16 in the opposite direction. And it's lower  
17 indicating that in all of these cases because of  
18 the discrepancy, but that the FICO score is  
19 represented on the tape suggests that the borrower  
20 is riskier. For summary judgment purposes they  
21 don't include them. This is part of the 1,416.  
22 But, the way in which these are used in the real  
23 world is that you average all of the higher FICO  
24 scores with all of the lower FICO scores and you  
25 see what the average comes out to be. If Mr.  
26 Butler is right in his assessment with regard to

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2 these ten loans, the average is 697.5. Lo and  
3 behold when you actually take into account the  
4 five loans that MBIA does not tell you about as  
5 part of summary judgment, the average is 697.5.  
6 Exactly the same. So that these discrepancies  
7 when evaluated properly at the pool level which is  
8 the way in which MBIA evaluate them there ends up  
9 presenting no increased material risk with respect  
10 to this package of loans which is really what they  
11 care about and what they review. And MBIA knew  
12 this, your Honor. They knew that these levels of  
13 defects because they cut both ways were gonna be  
14 immaterial. Because in real life they received,  
15 and I'll direct your attention to slide 43 at the  
16 time. Countrywide outside auditor at the time  
17 KPMG with respect to every one of the  
18 securitizations at issue, did a matching exercise  
19 as between the mortgage loan schedule and the loan  
20 files, exactly the same thing that Mr. Butler's  
21 team did. And they did it with samples of a  
22 hundred loans for each one of the securitizations  
23 and the results in each and every case were given  
24 to MBIA and as you could see from the slide they  
25 found for instance in the first one of this group  
26 40 percent of the loans had one more discrepancy.

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2 So 40 out of a hundred. Second one 27, as high as  
3 67 percent. As high as 67 had one or more  
4 discrepancies. On average 27 percent of the  
5 loans. 27 percent of the loans that they reviewed  
6 across all 15 securitizations had one or more MLS  
7 discrepancy. All this information was given to  
8 MBIA at the time. Now, the current level of  
9 discrepancy that they claim to be material is 24  
10 percent of the sample which is comparable to lower  
11 than the average number of discrepancies that they  
12 were alerted to at the time. It was immaterial to  
13 them then. They can't turn around in court and  
14 all of a sudden say that it's material. The  
15 reason that it was immaterial to them then is  
16 because again they are not reviewing isolated  
17 attributes. They are not reviewing single loans.  
18 They are reviewing the pools as a whole. Then  
19 even if independent of materiality which we think  
20 really disposes of all of this, there are disputes  
21 regarding whether or not there are even  
22 discrepancies and if there are discrepancies  
23 whether they are material. For instance, Mr.  
24 Butler disputes himself in seven cases these are  
25 seven of the loans that are the incontestable,  
26 indisputably, in breach of the MLS. When you

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2 actually go and compare what Mr. Butler's findings  
3 are to the MLS, he matches up in these seven  
4 cases. In hundreds of cases out of this group Ms.  
5 Godfrey's result, this is one on slide 45 and here  
6 are hundreds of others that are listed on slides  
7 46 --

8 MR. SELENDY: Your Honor, I don't mean  
9 to interrupt. It's my understanding that these  
10 are not in the record and therefore they are  
11 outside the scope of the motion.

12 MR. APFEL: Your Honor, these are  
13 charts. The information that's here is from the  
14 reports of Ms. Godfrey and from the MLS which are  
15 part of the record. And the information from Ms.  
16 Godfrey is from the exhibit to her report which I  
17 think some of the exhibits are in the record and  
18 to the extent that they are not in the record they  
19 are incorporated by reference into her report  
20 which is part of the record. And this is simply a  
21 matching exercise taking what's in here, what's in  
22 her findings and comparing them to what's on the  
23 MLS and then comparing those results to --

24 MR. SELENDY: The loan level findings  
25 which were reproduced here are not in summary  
26 judgment records. The narration the report is in

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2 this data is not.

3 THE COURT: Let's skip it, okay.  
4 Because if it's not in -- it's not in, it  
5 shouldn't be part of it.

6 MR. APFEL: This is part of it, your  
7 Honor. And this is a dispute, not this particular  
8 entity empty circle which I'll try to fill in.

9 THE COURT: I see there is more color to  
10 it.

11 MR. APFEL: But there are independent of  
12 disputes between Ms. Godfrey and Mr. Butler as to  
13 whether or not the discrepancies even exist.  
14 Professor Hausman rebuts Mr. Butler's findings of  
15 materiality with respect to the piggy back issue,  
16 the issue of cash out versus rate-term refinancing  
17 document type and document type.

18 (Continued on the next page)

19  
20  
21  
22  
23  
24  
25  
26

## 1 Motions - Mr. Apfel

2 MR. APFEL: And those disputes in and of themselves  
3 account for 74 percent of Mr. Butler's findings.

4 THE COURT: You know, I don't want to stop you in  
5 your presentation, however, we have to look at the time,  
6 3:22. All right. Mr. Ware hasn't started. We have to  
7 leave at 4:30, quarter to 5:00.

8 MR. APFEL: I will be finished.

9 THE COURT: Tomorrow we're doing a whole other  
10 subject, and I don't have anymore time than these two days.  
11 I mean, it's extraordinary I'm giving two days,  
12 extraordinary. But that's it. Two days is two days. The  
13 problem is that really your point is that I think that you  
14 are presenting to the Court mature issues that make it a  
15 question whether or not there can be granting of summary  
16 judgment.

17 MR. APFEL: That's exactly right.

18 THE COURT: And you've done it now very thoroughly.  
19 The question is do I need to hear anymore? So the question  
20 is how much more detail do we need to go, because I know you  
21 presented it in all your papers and, you know, I just wonder  
22 if we need to go much further?

23 MR. APFEL: I'm just trying to touch on all the  
24 categories that are presented by MBIA. I will finish all of  
25 the categories by no later than quarter of 4:00, and I  
26 believe Mr. Ware's portion of the presentation is no more

## 1 Motions - Mr. Apfel

2 than a half an hour, which would leave Mr. Selendy an half  
3 an hour for rebuttal, which would make it even Steven in  
4 terms of time.

5 THE COURT: I want you to do that timely, please,  
6 okay.

7 MR. APFEL: Okay. So in any event, we're finished  
8 with the mortgage loan schedule. These disputes between  
9 Professor Hausman and Mr. Butler are, you know, cover 74  
10 percent of the loans or disputes, with Ms. Godfrey cover  
11 others. And in any event, the key issue here is the issue  
12 of materiality, which defeats this portion of their motion  
13 for summary judgment.

14 THE COURT: We're losing our court officers. So  
15 all of those who want to attack me at 4:30, there's a time  
16 that you can do it. Then that's it, I'm without defenses.  
17 Go ahead.

18 MR. APFEL: Okay. The last -- the next  
19 representation and warranty that is breach is the mortgage  
20 file documents representation. As of the closing day, the  
21 mortgage file for each mortgage lien contains each of the  
22 documents specified to be included. And Mr. Selendy  
23 mentioned this morning that one of the documents that is  
24 indisputably a mortgage file document was the grant deed.  
25 Your Honor, here is the language from the contracts, the  
26 parties' contracts, that define the mortgage file documents.

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1  
2 We have expert testimony from Lisa Murphy, our compliance  
3 expert with background as a regulator with the Office of  
4 Thrift Supervision who says that the grant deed is not one  
5 of the mortgage file documents and the definition of  
6 mortgage file documents also supports our view that it's not  
7 one of the mortgage file documents. You can look through  
8 those definitions until your heart's content, you'll never  
9 find grant deed there.

10 But independent of that and more fundamentally,  
11 there are two reasons to deny the entirety of MBIA's motion  
12 with respect to this package of loans that supposedly  
13 materially breached the mortgage file representation.  
14 First, there is no evidence that as of the closing date any  
15 of the mortgage file documents were actually missing, and  
16 the representation only applies as of the closing date.  
17 Now, the representation was given by Countrywide as of the  
18 closing date Countrywide only possesses these documents and  
19 is only charged with possessing the originals of these  
20 documents, the Countrywide Defendants in this case, as of  
21 the closing date. As of the closing date, it transfers the  
22 mortgage file documents to the trustee who in turn transfers  
23 them to the custodian of the documents, which is not any of  
24 the Countrywide Defendants in this case.

25 The evidence that Countrywide maintains files but  
26 the fact that in its files one or more of the documents may

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1  
2 be missing is not evidence in and of itself that as of  
3 closing date, which is all that counts for purposes of the  
4 representations, the documents were missing. Ms. Murphy and  
5 others, the record is replete with testimony about the  
6 various and sundry ways in which documents can and do go  
7 missing when the files are accessed by regulators or others  
8 over the course of years, and years, and years. But  
9 independent of whether or not, you know, there's any  
10 requirement, any breach by Countrywide of this  
11 representation, the breaches are not material and really  
12 can't be material to the extent that the missing documents  
13 can be cured.

14 Mr. Butler himself acknowledges that a missing  
15 mortgage file document is not material in and of itself. He  
16 testifies with respect to loan number 1751, he finds that  
17 loan file is missing the original recorded mortgage with  
18 evidence of recording on it. He finds five other defects  
19 with the loan, but he concludes as to this loan that it's  
20 not significantly defective. In other words, no material  
21 increase in the credit risk associated with the loan. So  
22 even though he finds that the document is missing, there is  
23 a breach of representation, even he finds in this case that  
24 it's not material.

25 Ms. Murphy notes that these breaches can almost  
26 never be material, because they are readily fixable and if

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2 they're readily fixable in a matter of literally seconds,  
3 then where is the materiality with respect to the breach?  
4 Here's an example. Loan number 740074, Mr. Butler finds a  
5 breach because the loan file is missing the original  
6 recorded mortgage with evidence of recording on it, which is  
7 one of the mortgage file required documents. Ms. Murphy  
8 searches publicly available records online at the pertinent  
9 Registry of Deeds and finds the original reported mortgage  
10 with evidence of recording on it. She fixes the problem.

11 In another instance here, Mr. Butler finds loan  
12 1934 to be in material breach because of missing mortgage  
13 file document. In 30 seconds we're able to find the  
14 document, no trouble, whatsoever, just by accessing the  
15 borrower's name and mortgage and getting it from the  
16 relevant registry. So again, no materiality.

17 MR. SELENDY: This document is not in the record,  
18 Your Honor.

19 THE COURT: That document is not?

20 MR. APFEL: Your Honor this is --

21 MR. SELENDY: As well as the prior slide.

22 MR. APFEL: This is part of -- this is part of Ms.  
23 Murphy's report. And this, Your Honor, is something that  
24 Your Honor could access, publicly available information with  
25 respect to any of these borrowers. What MBIA is suggesting  
26 in its motion on material breaches, the ability to fix these

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2 problems readily is evidence that they are not material.

3 THE COURT: Well, that's your position. I got it.

4 MR. APFEL: The next and last category of  
5 representations of warranties that are purportedly breached  
6 in a material way by Countrywide is the no CLTV in excess of  
7 one hundred percent. Now, we won't linger on this, we'll  
8 take only a few seconds, because there are only ten loans  
9 that fall into this category. The representation of the  
10 prime loan to value ratio for each mortgage loan is not in  
11 excess of one hundred percent.

12 Now, with regard to seven of the ten that are at  
13 issue here, there is a clear dispute. In fact, the two  
14 reasons we have the clear disputes as to seven and as to all  
15 of them, there's an issue of materiality. With respect to  
16 the disputes, Mr. Butler himself acknowledges that there's a  
17 dispute as to five of them. In his report, in his  
18 affidavit, he says there are ten loans where I recalculate  
19 CLTV ratio to be greater than one hundred percent; and  
20 Countrywide's purported expert Karen Godfrey recalculated  
21 the CLTV percent to be one hundred percent or higher. You  
22 look at his schedule of loan and you find that in five cases  
23 she actually recalculated it to be one hundred percent. And  
24 the representation is that it's only breached if a CLTV in  
25 excess of one hundred percent.

26 There are two other loans from this group of ten

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1  
2 that Ms. Godfrey finds -- where Ms. Godfrey finds the CLTV  
3 to be below one hundred percent, so there's a clear dispute  
4 of fact on seven of the ten. With respect to all of the  
5 loans, there's an issue of whether or not the purported  
6 breaches are material.

7 Mr. Butler acknowledges that once CLTV reaches one  
8 hundred percent, any marginal excess does not increase the  
9 probability of default because the borrower already has no  
10 skin in the game, no equity, and therefore no incentive to  
11 repay the loan. Ms. Godfrey agrees, as does Mr. Aronoff  
12 (phonetic), one of MBIA's other witnesses, they all  
13 acknowledge that this issue of the difference -- negligible  
14 differences between one hundred percent and a little over  
15 one hundred percent.

16 THE COURT: Do not put up the slide for the next  
17 one. Do not put up 67, all right; is that clear?

18 MR. APFEL: Okay.

19 THE COURT: You know why. Take a look.

20 MR. APFEL: I'm not sure I do, but I definitely  
21 won't, Your Honor.

22 THE COURT: Well, there's a lot of loan numbers  
23 there that haven't been redacted. Okay, no 67.

24 MR. APFEL: Okay. All right. The point of 67 is  
25 to simply to illustrate that MBIA was aware at the time that  
26 there were CLTV's in the years as expressed on the mortgage

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2 loan schedule that were in excess of one hundred percent  
3 they regarded as immaterial -- at this time experts didn't  
4 regard them as material. There's a dispute on the issue of  
5 materiality.

6 Now let me finally, Your Honor, in the time  
7 remaining, there are three additional categories of loans  
8 that MBIA points to all outside -- well, two of the sets  
9 outside of the sample, one Ms. Godfrey's findings that it  
10 focuses on in its summary judgment motion, and let me just  
11 say a word about all three of those sets of loans.

12 First, there is the recommendation by Ms. Godfrey  
13 that 88 loans be repurchased. Now, you'll recall, Your  
14 Honor, MBIA focuses on these 88 loans as an example in terms  
15 of Countrywide's repudiation of its repurchase obligation  
16 because Ms. Godfrey had recommended that the loans be  
17 repurchased and, according to MBIA, they were not. So in  
18 its initial brief on summary judgment on September 19th,  
19 MBIA wrote, "although Countrywide's own loan review expert  
20 Ms. Karen Godfrey recommended that 88 loans be repurchased,  
21 Countrywide failed to repurchase all but one of those loans.  
22 There could be no question that CHL's conduct clearly  
23 demonstrates it's attempt to repudiate its repurchase  
24 obligations.

25 Countrywide responded by pointing out through a  
26 sworn affidavit from the appropriate person that repurchase

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1  
2 proceeds for these 87 loans, the one -- the 87 that  
3 purportedly had not been repurchased were remitted to trust  
4 for securitizations on or about August 15th. Promptly after  
5 Ms. Godfrey made the recommendation, the funds were recorded  
6 in the trustees August 2012 reports which reflect activity  
7 in July 2012 report. MBIA's reply, there's silence on this.  
8 They don't acknowledge that they made a mistake or anything  
9 like that. It's a clear example not of repudiation, but of  
10 an example of Countrywide following the recommendation of  
11 its retained expert, even though the expert said that these  
12 loans were not necessarily significantly defective when she  
13 was erring on the side of caution. They also argue that  
14 there should be extrapolation from these loans. Mr. Butler  
15 talks about extrapolation, but for this purpose, just for  
16 these 88, Ms. Godfrey and Mr. Butler both made clear that  
17 every loan is unique and that what conclusions you draw from  
18 one loan can't simply be transferred or extrapolated to  
19 other loans.

20 Next category of loans I'd like to talk briefly  
21 about is so called significantly unsatisfactory loans. The  
22 SUS loans. First of all, Your Honor, we're talking about  
23 very few loans here, all told. These are not part of the  
24 sample. These are loans that Countrywide's quality control  
25 group find to be severely unsatisfactory, SUS. And there  
26 are a total of 1,099 loans. We're talking about one quarter

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1  
2 of one percent of the loans in the securitizations. MBIA's  
3 position is that all of these loans, all of these severely  
4 unsatisfactory loans found by Countrywide to be severely  
5 unsatisfactory necessarily should have been repurchased by  
6 Countrywide and Countrywide's failure to do so is a  
7 repudiation of its obligation. They're categorical in their  
8 assessment that any finding of severely unsatisfactory  
9 constitutes a material breach of one or more representations  
10 and warranties. But, you know, even Mr. Butler says that's  
11 not true, which I'll point out in a moment. And  
12 Countrywide's witnesses made clear that severely  
13 unsatisfactory loans are not necessarily breached loans.  
14 Loans received SUS ratings for procedural reasons unrelated  
15 to credit quality and that is the testimony, Your Honor, on  
16 slide 75 of Cindy Simantel, who is the head of Quality  
17 Control at Countrywide. This is to provide feedback to the  
18 branches. It doesn't have anything to do with quality,  
19 absolutely nothing. It's just helping them monitor  
20 processes. We may rate a loan SUS because a branch didn't  
21 cross a T properly. With respect to the specific 1,099 SUS  
22 loans here, Ms. Simantel testified, "There's a lot of  
23 procedural audits in here. Targeted audits. Those audits  
24 have nothing to do with loan quality. They have to do with  
25 process audits that we were doing. That doesn't have  
26 anything to do with the loan. There's a lot of audits here

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1 but have absolutely nothing to do with the loans. I mean,  
2 hundreds and hundreds of them." Mr. Butler agrees that SUS  
3 loans are not necessarily in material breach of anything.  
4 Through sheer serendipity, one of these 1,099, in fact a  
5 group of about 20 or so of the 1,099 were part of the sample  
6 of 6,000. Mr. Butler found one of them, one of the few  
7 loans that he found to be not significantly defective was  
8 one of the SUS loans, and that appears on slide 76. It's  
9 loan number 9744. Quality control had previously found it  
10 to be severely unsatisfactory for some procedural reason  
11 unrelated to credit, and as we can see from Mr. Butler's own  
12 finding, he agrees. Ms. Godfrey rebuts Mr. Butler's  
13 findings with respect to almost all of the remaining.  
14

15 So, in other words, Your Honor, with respect to  
16 these SUS loans, these severely unsatisfactory loans, those  
17 are not loans that MBIA has met its burden of showing need  
18 to be repurchased at all.

19 Finally, last category that MBIA points to for  
20 summary judgment purposes is so called fraud confirmed  
21 loans, and these are loans that they say that Countrywide's  
22 fraud risk management group or its fraud investigators  
23 confirmed for fraud after doing investigations. Again,  
24 we're talking about a tiny number of loans in the overall  
25 population. Talking about 97 loans that they put at issue  
26 in their motion for summary judgment, which is about

## Motions - Mr. Apfel

1  
2 one-fiftieth of one percent of the loans in the  
3 securitization, and their claim is that as to these loans  
4 they were all confirmed for fraud. Well, in some instances  
5 there simply wasn't the confirmation. The confirmation  
6 they're talking about is the checking of the box on  
7 something called the FACTS or FITS database. FACTS is Fraud  
8 Activity Case Tracking System, and there's a box there that  
9 says fraud confirmed, but in not all instances where that  
10 box is checked is the fraud actually confirmed.

11 Let's go to slide seven for an example. The better  
12 place to look is often in the investigative file or in the  
13 comments, the comments section within the FACTS database.  
14 And for one loan that, again, MBIA claims is indisputable in  
15 terms of breach, loan 2268 MBIA asserts that FRN, Fraud Risk  
16 Management, within Countrywide confirmed fraud because the  
17 borrower's loans were secured by vacant lots. In its reply,  
18 MBIA asserts that Countrywide feigns dispute regarding fraud  
19 risk management's findings, but the final conclusion of  
20 Fraud Risk Management on the FACTS database in the comments  
21 field supports Countrywide because it finds that, as you can  
22 see, the fraud allegation was inaccurate, notwithstanding  
23 the fact that a box was checked off inaccurate. The fraud  
24 at issue that is confirmed does not always bear on credit  
25 issues.

26 Let's take a look at slide number 81. And

## 1 Motions - Mr. Apfel

2 therefore can't be material and adverse to MBIA's interest.  
3 Here's an example, loan number 8703, this is an  
4 investigation of broker fraud that has nothing to do with  
5 credit issues. Fraud Risk Management investigated and  
6 confirms third-party broker fraud. Fraud Risk Management  
7 finds the broker -- finds that the broker charged the  
8 borrower approximately \$240 in excessive closing fees,  
9 Countrywide reimbursed the borrower, terminated the broker,  
10 the borrower who presented no credit issues elected to keep  
11 his loan. This confirmation of fraud, albeit a  
12 confirmation, is a fraud that doesn't bear in any way, shape  
13 or form on MBIA's interests and is not in any way material  
14 or adverse to MBIA, yet it is among the loans that MBIA is  
15 saying should have been repurchased.

16 Finally, their motion with respect to this package  
17 of loans fails in its entirety for the reason we gave before  
18 with respect to because the only time in which Countrywide  
19 would ever have the obligation to repurchase any of these  
20 fraud confirmed loans is if Countrywide had taken on the  
21 risk of borrower fraud, if they had given a no fraud  
22 representation. And as we've discussed in detail earlier,  
23 there was no fraud representation and therefore no  
24 obligation on the part of Countrywide to repurchase these  
25 loans even if the borrower fraud was confirmed.

26 THE COURT: I'm going to have to end it there,

## 1 Motions - Mr. Apfel

2 because the time has come.

3 MR. APFEL: And I am done.

4 THE COURT: That's it. All right. Let's take a  
5 standing break while we get the --

6 MR. SELENDY: Your Honor, can I request, as each  
7 side has taken equal time, that after the break whatever  
8 time Your Honor concludes to be available to us be split  
9 equally between the parties. That's the agreement that both  
10 sides entered into. I think we've each taken a little over  
11 two hours at this point.

12 THE COURT: So Mr. Ware hasn't started his. He  
13 says it's a half hour. So how much time do you have?

14 MR. SELENDY: Well, actually, there's so much to  
15 say, I'll occupy the time that you allow me, Your Honor.

16 THE COURT: Well, I don't know what you're going to  
17 have. I mean, we have to close, the door locked at a  
18 quarter to 5:00, all right. At 4:30 or quarter to 5:00?

19 THE COURT OFFICER: 4:30.

20 THE COURT: 4:30 shutdown.

21 MR. SELENDY: I'll submit after the break --

22 THE COURT: We're not taking a break. We're just  
23 standing. We're not taking any break. So you have how  
24 long?

25 MR. SELENDY: I have about half an hour myself,  
26 Your Honor, but I'll compress it to whatever needs to be

## Motions - Mr. Apfel

1  
2 done.

3 THE COURT: Well, as I suggested. How long do you  
4 have.

5 MR. WARE: Your Honor, I will cut it shorter than  
6 it would otherwise would have been. Whatever the Court's  
7 desire is. I mean --

8 THE COURT: All right. So why don't we do this.  
9 Why don't you give you 15 minutes, all right, and then that  
10 will -- will that equalize it?

11 MR. SELENDY: Your Honor, alternatively, we could  
12 take half an hour in the morning tomorrow.

13 THE COURT: You know, tomorrow --

14 MR. WARE: I think that's fatal. We should finish  
15 it today.

16 THE COURT: I really do think that, because we do  
17 have a lot to do tomorrow and, you know, I think if we put  
18 it over to the next day it's going to be that much less  
19 tomorrow.

20 MR. SELENDY: Of course. Understood.

21 THE COURT: All right. So, all right, so take 15  
22 minutes on the clock. So you'll go to 4:03, okay?

23 MR. WARE: Yes, Your Honor, it's okay.

24 THE COURT: It is tight. Tomorrow we're going to  
25 really keep the timing, okay. Let's give a heads up on  
26 that.

## 1 Motions - Mr. Ware

2 MR. WARE: Your Honor, briefly let me address the  
3 extrapolation issue which MBIA, of course, here asserted  
4 today that summary judgment's appropriate and that it's time  
5 for the Court to permit extrapolation to take place as a  
6 matter of law. And I just want to go back in that regard to  
7 what Mr. Apfel has said, I think as the Court remarked, if  
8 we've seen anything this afternoon it is that there are  
9 endless disputes of fact and just written reviews of experts  
10 which after all should be ultimately thrashed out in a  
11 courtroom. This is a trial court. Among this Court's many  
12 talents is as a trial judge and the Court's orders both with  
13 respect to sampling and related orders in this case have in  
14 each case emphasized that while the Court is making  
15 findings, for example, as to sampling, that it is a vehicle  
16 for offering proof. The weight of that evidence is to be  
17 determined by the trier of fact.

18 And in that regard we could look at 82, the  
19 December 22, 2010 order. The Court, again, to my inference  
20 said you've had the opportunity. In fact, I was here and  
21 cross examined MBIA's expert with respect to sampling. The  
22 Court made the decision that sampling was an appropriate  
23 vehicle, that it should be available, and that from an  
24 evidentiary standpoint properly done sampling might be  
25 admissible. The Court did not go beyond that. In fact, the  
26 Court gave the assurance that the weight of that evidence

## Motions - Mr. Ware

1 following cross examination by Countrywide would be  
2 determined by you at trial or by the trier of fact. And  
3 that's exactly what the Court's order has said will be  
4 decided by the trier of fact. That decision will be made at  
5 trial and the Court gave increasing emphasis to the fact  
6 that you would be weighing the evidence at the time of  
7 trial. Inherent in that, obviously, is that these issues  
8 will, in fact, be tried. And you went on to say, slide 83,  
9 that the issues as to which you made any decision as regard  
10 sampling did not obviate the requirement that the Plaintiff  
11 prove its case and prove every element of its case.  
12

13 No need to guild the lilly here, I'm simply  
14 pointing out that the Court's instinct this afternoon is the  
15 same that there ought to be a trial with respect to disputed  
16 issues and at the end of the day that's really all that  
17 Countrywide is asking for here. This should not be a case  
18 in which \$3 billion or any billion dollars or anything is  
19 awarded without the opportunity to try the case and cross  
20 examine the evidence and to give the Court an informed  
21 decision with respect to the credibility of both the  
22 evidence and those witnesses.

23 In listening to this today, because I have not been  
24 at every hearing, I'm struck by the fact that this summary  
25 judgment motion is somewhat different than the typical  
26 motion. Often we come in to court with a summary judgment

## Motions - Mr. Ware

1 motion to clear away some of the underbrush and to get rid  
2 of issues as to which there is no material factual issue.  
3 Here it's quite the reverse. MBIA is going for the home run  
4 and essentially arguing that at the end of the day we don't  
5 need a trial, that the Court can already impose, for  
6 example, rescissory damages or can already, as a matter of  
7 law, order that the same extrapolation be imposed on the  
8 samples as identified by Plaintiff. That essentially  
9 undercuts the purpose of summary judgment. And as I think  
10 we've seen here today, there are plenty of issues to be  
11 tried in this case.

12  
13 Let me turn to rescissory damages, if I may, in  
14 some of the time I have remaining. This is an issue that's  
15 on appeal, and I am not going to reargue what was argued  
16 previously with respect to whether rescissory damages are  
17 available in this case. You made your ruling. That matter  
18 is before the appellate court and will be perfected, as I  
19 understand it, for the January term. So I'm not here to  
20 reargue that. But I am here to point out similarly that in  
21 your order you were again quite clear not that rescissory  
22 damages were a matter of entitlement, but rather that under  
23 New York law rescissory damages can be available and that  
24 the Court will consider that availability at the appropriate  
25 time. It was not a statement by the Court as a matter of  
26 law that MBIA is entitled to rescissory damages, but rather

## Motions - Mr. Ware

there was an explanation of the Court's view that under the law one can get rescissory damages under appropriate circumstances.

If we could have 85, please.

(Continued on next page.)

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2 (Continuing) MR. WARE: You say quite  
3 clearly that rescission may be warranted and if  
4 found warranted and in your order you say MBIA may  
5 seek rescissory damages upon proving all elements  
6 of its claim. Maybe I'm wrong, but I certainly  
7 understood that order to say rescissory damages is  
8 a potential kind of relief, but you MBIA are not  
9 relieved from proving all of the prerequisites  
10 that might entitle you to rescissory relief.  
11 Those include the fact that rescission is by  
12 definition an equitable remedy and yet the court  
13 is being asked without a trial to determine that  
14 rescissory damages are available now. That is  
15 inappropriate, your Honor, and I believe not your  
16 intention. Because it's an equitable remedy, the  
17 court is in the position of needing to assess the  
18 evidence to determine whether any equitable remedy  
19 indeed would be appropriate here.

20 Counsel, my colleague Mr. Selendy brought to  
21 your attention the Syncora case this morning and  
22 Judge Crotty's decision in which he likewise  
23 indicates that for certain purposes rescissory  
24 damages may be available. But importantly if I  
25 could have 86 please, he also comes to the same  
26 conclusion that this court has under other

## 1 Proceedings

2 circumstances. Namely in the top bullet "without  
3 a complete factual record, it would be premature  
4 to consider what equitable relief, if any, is  
5 appropriate." And I think that's the point here  
6 because it's equitable relief the court needs the  
7 benefit of all four sides of the evaluation here,  
8 needs to evaluate whether or not any equitable  
9 remedy is appropriate and if so whether that  
10 should be rescission or whether it should be  
11 rescissory damages or indeed some other equitable  
12 remedy. I don't believe the court intended and I  
13 certainly don't read the court's order as saying  
14 you get rescissory damages in this case. There  
15 are other independent reasons why equitable relief  
16 should not be granted in this case. Among them  
17 some things that have been mentioned earlier. And  
18 that is that MBIA has adequate remedies of law  
19 here. For example, if we could look at 87, MBIA's  
20 own expert testified that among the ways in which  
21 damages could be calculated would be a benefit of  
22 the bargain analysis. In other words, in a  
23 benefit of the bargain bullet three that's up  
24 there your Honor, analysis presumably the parties  
25 would value what MBIA would have charged had it  
26 known the facts it says it does not know. And so

## 1 Proceedings

2 here we have Doctor Mason having testified in this  
3 case that among the possibilities of damages is a  
4 legal remedy, mainly benefit of the bargain  
5 damages. I don't want to over emphasize that. He  
6 doesn't say that that is a slam dunk, or could be  
7 easily done. He has reasons why maybe that's  
8 inappropriate. But the point is it's still on the  
9 table and should be on the table for the court.

10 In addition, your Honor, as what we discussed  
11 tomorrow there is the repurchase provision and  
12 that too if you think about it is a legal remedy  
13 to the extent that Countrywide is successful in  
14 showing the court demonstrating to the court that  
15 the remedy which should obtain here is the  
16 repurchase remedy, and I'll talk about the  
17 repudiation issue in a minute. That too is a  
18 legal remedy which would obviate not only the need  
19 for, but the right to any kind of equitable remedy  
20 such as rescissory damages.

21 In addition, Judge Kornreich as the court I  
22 think is aware in Assured versus TLJ as opined  
23 with respect to whether or not rescissory damages  
24 may be obtained at all under circumstances in  
25 which a party like MBIA has continued to pursue  
26 its contractual rights, that is has continued to

## Proceedings

1  
2 live under the contract by accepting millions of  
3 dollars in premium payments. And certainly there  
4 is an open issue as a matter of law whether or not  
5 having elected to do that and accepted premiums  
6 for 3 or 4 years following the point of which they  
7 understood they had an issue whether that somehow  
8 precludes them from equitable relief in this case.  
9 Let me turn in a few minutes I have to the  
10 repudiation issue. MBIA has argued this morning  
11 that in effect it should be relieved of its  
12 contractual obligations to repurchase these loans.  
13 First of all I think it's appropriate to  
14 understand this is a contractual remedy. These  
15 parties were sophisticated an insurer on the one  
16 hand and counter-parties on the other hand and  
17 they bargained for a particular type of relief for  
18 breaches of representations of warranties as to  
19 individual loans. And they bargained for specific  
20 kind of relief and that was effectuation of  
21 repurchase. And the obligation under the contract  
22 is to follow a prescribed methodology to do that.  
23 And in fact, that protocol was followed initially  
24 by MBIA when it first became aware that it had  
25 potential claims it submitted a schedule of  
26 proposed loans for repurchase. And it did that by

## 1 Proceedings

2 carrying out the obligations of the contract,  
3 which is to say it identified the loan  
4 specifically, and since there is a cure provision,  
5 in other words Countrywide gets the opportunity to  
6 learn from MBIA what the problem is with the loan  
7 and to cure it as opposed to repurchasing that  
8 loan. MBIA will identify what the individual  
9 weaknesses in each loan it believed existed. They  
10 identified the defects that its now talking about.  
11 And Countrywide now began to address those loans.  
12 That protocol fell by the wayside because about 90  
13 days after the first request for repurchase, MBIA  
14 sued and that put Countrywide in the position of  
15 having to defend a litigation position while  
16 trying to concurrently carry out its obligations  
17 to repurchase under the contract. And the  
18 unequivocal testimony from Countrywide's  
19 individuals who are involved in the repurchase  
20 process, was that they did that. They did it with  
21 integrity. They did it as best they could. But  
22 what followed was MBIA shoveling in thousands of  
23 loan requests. After they sued, they began  
24 sending requests for repurchase by the thousands.  
25 Simply could not be administered as quickly as had  
26 been hoped. That does not mean that Countrywide

## Proceedings

1  
2 was acting in bad faith or that it was in any way  
3 repudiating the repurchase device or contractual  
4 remedy. And the law in New York under Noracom  
5 Power, which I don't think either party disputes,  
6 is that repudiation has to be unequivocal. Which  
7 is to say it really has to be without doubt that  
8 the party with the burden to act has repudiated  
9 and that is simply not the case. There is no  
10 evidence of that in this case, your Honor. MBIA  
11 has pointed to allegations that Countrywide  
12 repurchased some loans which performed and that  
13 accordingly it must have the obligation to  
14 repurchase all performing loans or at least every  
15 performing loan that MBIA suggests. But what was  
16 unsaid, your Honor, is that none of those loans  
17 had the same language as in this case. They did  
18 not have a requirement of a material or adverse  
19 affect. These were government sponsored entity  
20 Fannie Mae, Freddie Mac. Their contractual remedy  
21 was quite different so the repurchase obligation  
22 on Countrywide was in fact absolute and was not  
23 subject to a determination whether or not the  
24 credit enhancer in this case the insurance company  
25 MBIA was materially and adversely affected by the  
26 defect in the loan. So those loans are

## 1 Proceedings

2 substantively different and do not give any  
3 counsel to MBIA with respect to this argument.  
4 And I should add that Countrywide has repurchased  
5 about seventy million dollars in loans, around  
6 eight hundred loans. That is not repudiation,  
7 your Honor. That's an effort in good faith to  
8 carry out the obligation as best can be done in  
9 the face of massive litigation. Under  
10 circumstances in which the economic climate in  
11 which all of this occurred is unprecedented.  
12 Thank you, your Honor.

13 THE COURT: Thank you, very much.

14 MR. SELENDY: Your Honor, I appreciate  
15 your patience.

16 THE COURT: You did it exactly in the  
17 time. Thank you.

18 MR. SELENDY: I was going to say I  
19 appreciate your patience, your Honor, and I will  
20 try to do this more rapidly as well.

21 THE COURT: Rapid is good.

22 MR. SELENDY: First of all.

23 THE COURT: But don't speak fast. It  
24 doesn't mean rapid that way.

25 MR. SELENDY: Mr. Butler used a specific  
26 standard unlike Countrywide's expert of

## 1 Proceedings

2 significantly defective loans. He was testing  
3 whether there was a material increase in credit  
4 risk. But for this motion we moved only on  
5 objective standards of materiality as defined in  
6 Countrywide's own guidelines, pricing matrixes and  
7 witness testimony. The motion is not based on any  
8 subjective determination or expert opinion as to  
9 materiality by MBIA's expert. It's based on  
10 Countrywide's admissions as to what was material,  
11 what changed the pricing under their own protocols  
12 and so for example you've heard reference to this  
13 loan FICO was 698 instead of 701. There is a line  
14 that has to be drawn for characteristics of the  
15 borrower and it's Countrywide itself that draws  
16 that line. If you're above 700, you're a gold  
17 borrower. If you're below that, you're a  
18 preferred borrower and the preferred borrower pays  
19 higher interest because they are in a different  
20 bucket and Countrywide itself concluded that those  
21 are riskier loans. We are not making reference to  
22 the deemed material section of the contract that's  
23 a red herring by Countrywide. The risks are  
24 material under Countrywide's own unequivocal  
25 documents. And I'd like to say with respect to  
26 the testimony that was advanced as to the experts

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2 Hausman and Hubbard, we have not yet moved to  
3 exclude that evidence. We will do so for trial,  
4 but we didn't regard it as appropriate for summary  
5 judgment, but that's basically a back door way to  
6 use ex-post events after your Honor said it's not  
7 relevant to causation, they are trying to use it  
8 for materiality. Not surprisingly those experts  
9 do not go back and say well as to Countrywide's  
10 contemporaneous documents evidencing materiality  
11 those were wrong. And that's what we rely upon  
12 Countrywide's own internal documents saying what's  
13 material. Arguments based on ex-post statistical  
14 regrettings by their experts today can't undo them  
15 especially when we're trying to test the day one  
16 risks.

17 Now, with respect to your opinion on  
18 sampling. Mr. Ware suggested that we were  
19 overreaching on that. As you may recall, you  
20 specifically invited Countrywide to come back with  
21 your own sample. You're trying to put in your own  
22 expert testimony to challenge the sample that's  
23 used by MBIA. They didn't do it. They made use  
24 of our sample. That's what Ms. Godfrey reviewed.  
25 They never came forward with any criticism by any  
26 expert of sampling after that hearing.

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2 THE COURT: That's not the issue in  
3 terms of sampling. Sampling is not the issue.  
4 It's how you go back proving your case. The issue  
5 is I permitted this as a mechanism of proof.

6 MR. SELENDY: Correct.

7 THE COURT: It certainly did not say,  
8 and that is clear, I wanted to make it clearer  
9 maybe that this was a mechanism of substituting  
10 proof. This is a way of going about making the  
11 proof.

12 MR. SELENDY: And that's exactly what  
13 we're doing, your Honor. We're using the sample  
14 itself as the basis for the set of findings by the  
15 re-underwriting expert. Neither you nor I suspect  
16 anyone in this courtroom would want us to go  
17 through 389 thousand separate loans. Instead  
18 we're using a scientifically reliable method to  
19 draw the random sample which is used by the  
20 re-underwriting expert. Those conclusions are  
21 then extrapolated to the populations. There is  
22 nothing no expert rebuttal of any kind from  
23 Countrywide as to either how that sampling was  
24 done and executed or how the extrapolation was  
25 made. We are proving every single element of our  
26 claims using as a method of proof the sampling

## 1 Proceedings

2 itself and as I say it's unrebutted. There is no  
3 factual or expert testimony that could counter our  
4 use of that --

5 THE COURT: Mr. Ware makes a very good  
6 point. I think there is a difference between  
7 being in the summary judgment mode and being  
8 before trial. If you're asking a jury to accept  
9 your sampling, if you're asking a jury to accept  
10 what you are proposing are the facts based on the  
11 sale, the jury can reject that saying well I don't  
12 think the sampling is enough. Say because there  
13 will be cross examination also. After all the  
14 facts are before the jury. But the jury would be  
15 in a position of saying that indeed the mechanism  
16 of the sample not the fact that anybody has come  
17 out with a better sampling method, just the  
18 mechanism that you chose to use is not sufficient  
19 for me to accept that as the proof in this matter,  
20 me the jury. And what's different is when you  
21 come to the judge, the judge is really a tryer  
22 more of law and you're asking me to make a  
23 judgment call saying yes you're a hundred percent  
24 right, the sampling is perfect and let's go  
25 forward and give you summary judgment. But that's  
26 the job of the jury, not this jury but another

## 1 Proceedings

2 jury.

3 MR. SELENDY: Your Honor, with respect  
4 they would need to present a genuine dispute of  
5 facts such as a reasonable jury could find  
6 otherwise. There is no contest. There is no  
7 contest. Expert discovery has closed. There will  
8 only be our expert as to sampling and  
9 extrapolation and with respect to their experts,  
10 they agreed and we cited this in our papers that  
11 the extrapolation method from Doctor Cowan was  
12 correct. So the testimony is undisputed as to the  
13 validity of that sample and extrapolation and  
14 there is a reason why they haven't come forward  
15 with another expert. That's because sampling  
16 loans is no different than sampling any other  
17 population. It doesn't matter whether it's loans  
18 or voters or otherwise. You could take a sample  
19 and you could extrapolate. If they had a valid  
20 basis to contest it, they would have done so and  
21 they haven't, your Honor. That period is now  
22 closed and they can't come back with a new expert  
23 and say look this sample is unreliable. They just  
24 conceded that issue on the papers. It's not that  
25 your Honor previously ruled we can go forward for  
26 all purposes. You gave them the opportunity to

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2 oppose us and they did not. That's an affirmative  
3 election. That means right now there is no basis  
4 for any reasonable jury to find otherwise than  
5 that our sample are properly --

6 THE COURT: That doesn't go to the next  
7 step. Yes, you could say you're a hundred percent  
8 right. The sampling method is perfect, it's  
9 wonderful and hasn't been contested. But does it  
10 prove -- does your sample prove the elements of  
11 your causes of action?

12 MR. SELENDY: That's a separate issue,  
13 your Honor.

14 THE COURT: Yes, and a very important  
15 one.

16 MR. SELENDY: And that issue doesn't  
17 turn on the staple sample or the extrapolation.  
18 It turns on what have we shown as to  
19 misrepresentation, what have we shown as to  
20 materiality, what have we shown as to the  
21 causation of an increased level of risk from  
22 misrepresentation, and what have we shown as to  
23 MBIA's harm. Those are the elements and we do  
24 show those.

25 Specifically, your Honor, coming back to the  
26 question of what do we have to show here. As to

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2 the element of causation I referred you to Judge  
3 Rakoff's holding in which he was citing to you  
4 approvingly that the question is whether the  
5 misrepresentations of the sponsor caused a  
6 material increase in risk to the insurer. That's  
7 exactly what we've gone through today both the  
8 facts of the misrepresentations and as to the  
9 materiality in terms of risk of loss. That's the  
10 finding. Those are the elements of our cause of  
11 action which were proven and were unrebutted.  
12 I'd like to say a little bit more with respect to  
13 the material and adverse affect ruling that your  
14 Honor previously entered. That ruling was subject  
15 to our ability to come forward with evidence. The  
16 evidence we submitted was from Countrywide's own  
17 witnesses and depositions taken after that motion  
18 was submitted to this court. It's subsequent new  
19 evidence. There are unequivocal admissions. They  
20 confirm that the tests of materiality is day one  
21 and we have shown through the documentation  
22 through Countrywide's own files that the types of  
23 breaches in the record are material by their own  
24 admissions. That's as a matter of law. There is  
25 no reasonable dispute as to those issues.

26 With respect to the challenge on the no

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2 default, the mortgage note, we're not arguing that  
3 a no default rep is the same as a no fraud rep.  
4 Those are two entirely different things. A no  
5 fraud rep is no fraud by anyone, including  
6 appraisers, brokers, borrowers and others. The no  
7 default rep here is defined in the plain meaning  
8 of the mortgage note itself and is specifically  
9 defined to include any misrepresentation by the  
10 borrower, any misrepresentation by the borrower.  
11 That's what it means, plain meaning analysis.

12 Now, Countrywide has challenged the fact that  
13 Mr. Butler did a loan by loan assessment as  
14 opposed to looking at the whole pool of loans and  
15 saying what's the aggregate fact. But that is  
16 because Mr. Butler was following unlike  
17 Countrywide's expert the actual representations  
18 and warranties which are loan by loan. Each one  
19 of those is warranting attributes of each  
20 particular loan. That's why the Purchase remedy  
21 is also loan by loan. So this standard is  
22 tracking exactly the contractual structure that  
23 Countrywide created to market and sell this deal.

24 With respect to the argument that some of the  
25 loans might have been a little bit better than the  
26 worst possible scenario and so you should compare

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2 the two of them and aggregate them and maybe the  
3 overall pool works better. That's not how it  
4 works. There are eligibility criteria that  
5 specify ranges which you could have acceptable  
6 loans and boundary over which you cannot. You're  
7 not permitted to put in a whole bunch of terrible  
8 loans and then put in some slightly better loans  
9 and say it all washes out. That's not how the  
10 warranties are structured. And the arguments that  
11 they made as to what Countrywide's counsel  
12 referred to as real life are unsound and  
13 unsupported by the records.

14 With respect to the argument on missing  
15 mortgage documents, I'd just like to remind the  
16 court MBIA accepted every attempt by Countrywide  
17 to try and cure that over a period of years.  
18 Whether it was the original set that they said was  
19 complete, or then the second set they said this is  
20 now complete, or even the third set which was  
21 first made loans. We took all of that into  
22 account. If they were able to cure a missing  
23 document, we accepted it and said right that  
24 document is in the file and we didn't move on  
25 that. I'd like to point out when they made  
26 reference to the 88 loans that were repurchased,

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2 they didn't give us notice when they did make that  
3 for repurchase. It was after our expert  
4 identified the defect, their expert then admitted  
5 it. Once we found out about it, we acknowledged  
6 it on page 22 of our reply. And what we argued  
7 that repurchase was an admission that they were  
8 contractual obligated to repurchase the loans and  
9 indeed since this was 88 out of a sample of six  
10 thousand, it tells you a great deal about the  
11 overall units. Moreover, there were 582 more  
12 which had the same problems, but they didn't  
13 repurchase them only because the loans had  
14 continued to perform for the first two years they  
15 fall into the same camp. They have to be  
16 extrapolated out.

17 As to the SUS, the findings of SUS loans, you  
18 saw a chart that Mr. Apfel put up I believe it was  
19 slide 74 saying look it's just point 2.8 percent  
20 of the securitizations. That's a highly  
21 misleading chart because they only looked at eight  
22 or nine thousand loans. In other words, their  
23 findings were only 10 percent of their own sample.  
24 Higher than 10 percent of their sample yet they  
25 are telling you it's zero point 28 percent. They  
26 took a sample of eight thousand loans and found a

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2 thousand problems. That means in the overall  
3 population of 389 thousand loans we ought to see  
4 somewhere north of 10 percent, not zero point 28  
5 percent. We're not sure why Countrywide put that  
6 up as they did. Fundamentally in this case if you  
7 look at the various area of breaches on the  
8 mortgage loan schedule in their opposition papers,  
9 there are only two instances, two out of 1,416  
10 where they offer any type of factual dispute. The  
11 expert report on that area was withdrawn. No  
12 questions were therefore asked at the expert  
13 deposition about expert findings relating to the  
14 mortgage loan schedule because their expert  
15 withdrew it. They said so in a letter, they said  
16 look we reserve our right to supplement. But they  
17 never came back and supplemented the file. They  
18 therefore waived the ability to contest it. As I  
19 stated previously between just the mortgage loan  
20 schedule reps and the loans as to which Ms.  
21 Godfrey admitted either the loan should be  
22 repurchased or she has no factual basis to  
23 disagree with Mr. Butler except for the loans  
24 performed for a little while. Take just those two  
25 categories alone, leave aside all the issues that  
26 Mr. Apfel tried to raise today with particular

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2 loans. Even all of those together numbering only  
3 in the dozens, but leave them all aside for all  
4 those categories, no default rep qualified  
5 appraiser, each of the other categories we  
6 reviewed from lines 3 through 7 and focus on the  
7 first two, there is no dispute in the record that  
8 those are material defects and that is 32 percent  
9 of the entire population reviewed by either  
10 expert. Under any reasonable extrapolation you're  
11 going to get to a percentage of the overall  
12 populations that is so high that it is a material  
13 risk of loss to MBIA under any standard, as a  
14 matter of law no reasonable jury could disagree  
15 with that because it outstrips by multiples any  
16 tests used to assess materiality by MBIA. And  
17 that means that this court is able on summary  
18 judgment to enter that award of rescissory relief.  
19 I'd like to point out, ever since this case was  
20 filed in 2008, two things is true. Countrywide  
21 have sought delay and MBIA has sought an  
22 adjudication on the merits. We want that  
23 adjudication because justice should not be delayed  
24 here and we submit it's time for a ruling on  
25 summary judgment.

26 And a final point, you didn't hear either of

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2 Countrywide's able counsel discuss my point that  
3 these warranties are conditions precedent to the  
4 issuance of the insurance. That means if you  
5 breach those warranties which are conditions  
6 precedent, the insurance itself is invalid, the  
7 insurance agreement is invalid where the insurance  
8 policy can't be revoked because they're innocent  
9 certificate holders and trusts that are being  
10 paid, that means rescissory damages are warranted  
11 and that's exactly what the insurance law is  
12 designed to do here is to protect and ensure that  
13 takes on such an obligation. They didn't discuss  
14 the fact that these are conditions precedent  
15 because there is no way around that. That's  
16 unequivocal and the documents Countrywide didn't  
17 satisfy the conditions and therefore a ruling  
18 should be entered on behalf of MBIA. I can also  
19 your Honor, if I have two seconds I will be quick  
20 on the appraisal issues. You heard some  
21 discussion of dispute. Just to take the numbers  
22 here. There 1,423 instances where we show that  
23 there was no qualified appraisal by a qualified  
24 appraisal. There are seven instances where  
25 Countrywide came back and said look we found an  
26 appraisal in the file, just seven. They put one

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2 of those on the screen. If you go through those,  
3 three of the seven, the basis for Mr. Butler's  
4 finding was not a missing appraisal, but that the  
5 appraisal was not performed by a licensed  
6 appraiser. For one of those loans the appraisal  
7 was in the first lien file, not in the second lien  
8 file. For two of those loans, the appraisal was  
9 in the second set of second lien files that they  
10 gave us, and for the last one the appraisal was in  
11 the second lien file but over 6 months old and  
12 therefore invalid. So you take the only seven  
13 instances on the appraisal rep where they came  
14 back with an actual dispute and of those three of  
15 them are on the wrong basis, and one of them is an  
16 invalid appraisal. One of them is in the first  
17 lien file and the other two are explained by the  
18 fact it was a supplemental production. We'll give  
19 them maybe it's two, maybe it's five, maybe it's  
20 seven. The bottom line is the overwhelming  
21 numbers here all point in the same direction.  
22 While they can quibble at the edges and produce  
23 instances in the ones and fives and sixes of  
24 disagreement with us as to each category, we have  
25 demonstrations as to the thousands and we  
26 submitted that in the Butler report. They could

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2 have come back if they had a real dispute and said  
3 here are the thousands of disagreements that we  
4 had with you. Having failed to do it on summary  
5 judgment, they failed to raise a genuine disputed  
6 fact and we will submit that judgment should be  
7 entered. Thank you, your Honor.

8 THE COURT: Thank you Mr. Selendy.

9 Well, thank you both very much. It was an  
10 excellent day today, very interesting and very  
11 well argued. We will continue the argument  
12 tomorrow starting -- are we supposed to start at  
13 9:30?

14 MR. APFEL: 9:30.

15 MR. SELENDY: 9:30.

16 THE COURT: I'll get up especially  
17 early. And so we will continue this entire event  
18 tomorrow morning at 9:30. Meantime leave your  
19 equipment, if you want to leave documents, I have  
20 no problem but just neaten it up a bit. Everybody  
21 in the back can leave. Everybody else need to  
22 straighten up. Get it done as quickly as  
23 possible.

24 (Whereupon, the case was adjourned to  
25 December 13, 2013, at 9:30 a.m.)  
26

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