In The Matter Of:

MBIA v.

Countrywide

December 12, 2012

New York Supreme Court - Civil

60 Centre Street

New York, New York 10007

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

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MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.
602825-08

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

MOTION FOR SUMMARY JUDGEMENT

Defendants.

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

BEFORE: HON. EILEEN BRANSTEN
Supreme Court Justice

APPEARANCES:

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Senior Court Reporters

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

COURT OFFICER: They are all around.

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

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

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afternoon we'll start at 2:15. We'll take a break at 3:15 and then go to quarter to four -- sorry. Yes. Again we have to close the door at 4:45.

All right. With that who is on first? Mr. Selendy, are you going -- let me introduce Who is in the well. We have Philippe Selendy, Manisha Sheth as you well know. We have Jonathan Harris, and of course we have the great Peter Calamari. We have all of you. Then on the other side we have David Apfel, Paul Ware Jr. and of course our famous Mark Holland.

In the back representing people who will be speaking next time around we have from Bank of America, we have Jonathan Rosenberg and Daniel Cantor. And we also have from Goodwin Procter we have Abby Hemani and Derek Adams. Okay. And in the back over here we have not going to be speaking we have Renee Beltranena Bea, how are you and Blyth McLeod. We also have Joy Lurinsky. What happened to her. Okay. You're in charge of the boxes. Okay. Good. We also have Alicia Cobb. Now we're ready to start Mr. Selendy.

MR. SELENDY: Thank you, your Honor. I'll take the podium. And we will during the course of today, we will have slides that will

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

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

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

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

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

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

MR. SELENDY: Domination was Mr.

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

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

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

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

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

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

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

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

THE COURT: What happened to the slides?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the insurer. Exactly the same language. And if you turn to slide 13, I've said a couple of times that the test is whether it's a material increase in the risk of loss. Judge Crotty agreed to that as well. The question is whether you show a material breach by proving that those breaches increase the risk of loss on the policy. Similarly in the Assured case the question is whether there is a breach of contract that materially increases the risk of loss and that's the causation that must be shown. As your Honor previously ruled, the causation is whether those alleged breaches caused plaintiff to suffer an increased risk of loss on day one. You don't need to then show that the breach led to a default or was the cause of a specific default of a loan. For this reason slide 14 please as Judge Rakoff observed during the trial of the Assured v Flagstar the test is a risk at the time the loan was approved not whether in hindsight the borrower was able to pay off the loan. The fact that later on the loan turned out to be fully payable is completely irrelevant. This is very important, your Honor, because much of what Countrywide says is oh look many of these loans happened to perform

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

is a significant public policy reason for this. You don't want applicants to commit fraud and obtain insurance they were never entitled to and then be able to recover just so long as the reason for the loss isn't directly connected to the reason for the misrepresentation. The whole point is that that risk should never have been passed to the insurer in the first place. That's why rescissory relief is appropriate for these breaches. Or for inducement of the insurance agreement for material representation. So I'd like to take you to the indisputable breaches. Let's put up slide 17. The category of breaches identified by MBIA's expert goes farther beyond the ones that is the subject of the motion today. These broadly speaking are the various types of problems. Loans where Countrywide failed to underwrite the loan in accordance with prudent and customary standards. Loans where the stated income loans showed a patently unreasonable incomes stated by the borrower. Loans where there are guideline breaches, for example, of the debt to income or combined loan to value ratio. Loans that don't satisfy the conditions of the approval of Countrywide's own automated system.

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

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

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

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

those mortgage loan schedules.

THE COURT: We're having daily copy. You have a chair. When you want to change, put up your hand and I'll make sure the change happens. You have to stop when they change.

MR. SELENDY: Absolutely, your Honor. In the third category these are loans that Countrywide's own quality control department rated severely unsatisfactory. They call them SUS loans. It's their own ranking not ours and we're moving on those loans. Similarly, loans with combined loan to loan ratio greater than a hundred percent, those are loans where the value of the property is actually less, loans where the value of the property is less than the total amount of the loans and as I'll discuss loans that contain representations by borrowers in violation of the loan default rule under the mortgage note. That's different than no default under the loan itself. There is a special definition for no default under the note which says the borrower can't make representations that are false.

(Continued on the next page)

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

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

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

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

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

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

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

THE COURT: Where is Mr. Butler? Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Let's play the next clip.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, documentation type --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: This question, how much would FICO

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

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

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

Let's move to the fourth category. This is

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

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

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

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

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

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

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

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

So slide 45 we show that --

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

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

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

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

MR. SELENDY: Yes.

THE COURT: If so, was MBIA noticed that the

purchase of CLTV was exceeding one hundred percent breach?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on next page.)

Proceedings

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

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

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

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

MR. SELENDY: Thank you.

Proceedings

(Whereupon, a brief recess is taken)

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

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

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

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

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

insurance law.

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

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

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

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

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

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

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

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

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

on slide 53. We gave an example of this slide 54. It turns out when we look at the mortgage loan schedule that and determine the correct CLTV rate we see a CLTV of 130 percent and they simply agreed to that problem. There is no dispute on that. If we look at slide 55 take another example here the CLTV is 101 percent as Mr. Butler found. Ms. Godfrey says well perhaps the senior loan balance could have been lower at origination and that could have reduced the principle balance to below a hundred percent. Well, there is no evidence of that. In fact, the file shows just the opposite on the file the CLTV ratio included that hundred percent. And you can't rebut us by saying could have, might have been different. That's not a fact. Let's turn to category five. These are loans that breached the no default rep. They only apply to the HELOC securitization not to all of them. What's critical here is there are two separate tests. There is the statement "no default exists under any Mortgage Note or Mortgage Loan." Default under the mortgage loan is, of course, a default. The borrower doesn't pay and that's a separate category then what we're dealing with right now. We're dealing with the default

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

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

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

law and clear breach.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

grant deed is the document that transfer title to real property from one party to another. It's as the second bullet reflects it's what warrants that the grantor actually owned the title to transfer and it's part and parcel of the original recorded mortgage. So for these issues there is no dispute as to fact they argue that it's not necessary. I'll note that this affects only 36 of the unique loans in the total. Fundamentally, your Honor, it's undisputed that missing mortgage file documents increase the credit risk because a lender can't foreclose on the mortgage loan without those required documents on slide 78. And we note that Cynthia Simantel, the vice president of investor audit stated that loans with missing legal documents were rated as "severely unsatisfactory" because the loan wouldn't really be valid. Wouldn't be a valid loan. In which case it should never have been in these deals. And as we show on slide 79, this issue was examined by the Congressional oversight panel in its November oversight report examining the consequences of mortgage irregularities for financial stability and foreclosure mitigation. And as the panel stated "the primary concern

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

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

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

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

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

(Continued on the next page)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Let's have a clip.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Six, that Countrywide is independently liable for

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

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

Thank you, Your Honor.

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

(Whereupon, a brief recess was taken.)

(Continued on next page.)

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

THE COURT: Yes, good afternoon.

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

THE COURT: Your slides are numbered too.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I thought there were only redactions.

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

THE COURT: Okay. So wait a second. We

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

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

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

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

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

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

provide an opportunity to talk about this loan.

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

THE COURT: 18 inches --

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

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

MR. APFEL: It's large.

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THE COURT: It is large.

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

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

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MR. APFEL: I agree.

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

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

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

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

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

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

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debate with regard to CLV and with regard to FICO.

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

MR. APFEL: This will take two seconds.

THE COURT: Two seconds.

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

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

(Continued on the next page)

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

All right, go ahead.

MR. APFEL: Good afternoon, Your Honor.

THE COURT: Good afternoon.

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

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

MR. APFEL: The short answer is no.

THE COURT: Okay.

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

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

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

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

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

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

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

THE COURT: I know.

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

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

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

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

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

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

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

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

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

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

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

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

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

"ANSWER: Based on my experience, yes."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Selendy spent some time this morning indicating various ways in which Countrywide supposedly is disregarding Your Honor's orders. Let me point out a few ways in which I think MBIA is, and in a way that would deprive Countrywide of its ability to defend itself at trial, as is its right. There are three ways in which we think that MBIA has disregarded the prior warnings. First, in your December 22, 2010 opinion on sampling, you authorized MBIA to use sampling in an effort to prove it's case. Now, as evidenced by what Mr. Selendy was saying this morning, MBIA is taking that decision and saying that based on the sample results the Court may ensure to extrapolate and find that over two hundred thousand loans and securitizations are immaterial breaches of one or more representations and warranties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Continued on next page.)

Proceedings

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

read these provisions together with the provision that MBIA narrowly focuses on, there is at least an understanding and a contemplation that other forms of appraisals are going to be used and MBIA knew it. It knew it, your Honor, because as we could see on slide 24, with regard to the preclosing tapes, the mortgage loan schedule those schedules that we talked about this morning. There was one of those many many columns that we saw on the scroll that we put out this morning that neither one of us could read, but one of those columns was for appraisal type description. And here we've just taken some examples in the appraisal type description. I believe there is as many as 18 different types of appraisals or valuations that are referenced. MBIA never said word one never said boo about any of them because they recognize all of them are acceptable ways of doing the credit. Here we see 1004U. That's the uniform standard appraisal form for a standard appraisal. There is some instances where that was used for these particular loans. Then we see 2055E which is a form for an exterior appraisal only. That's what the E is. CAPES was Countrywide's proprietary AVM so those instances

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

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

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

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

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

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

Now, again, we have two arguments here as to why the entire motion for summary judgment as to this package of loans should be denied. One has to do with meaning of the contract and the second has to do with just plain old disputes of fact. Let me take them one at a time. With respect to the meaning of the contract. MBIA reads the contract. They take -- read the contract no default. They read the representation where it says no default exists and they will read it as a representation meaning no fraud. But it's not. No default means no default. It doesn't mean no fraud. Dictionary defines default clearly, your Honor, here on slide 30. Default means failure to make payments. It doesn't mean fraud. You could look up the definition to your hearts content in the any dictionary, you're always going to find the same definition, failure pay financial debts. And at the time of closing there is no evidence, nor could there be any evidence, that any of the loans at issue in any of the securitization were in default meaning that the borrower had failed to

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

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

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

THE COURT: Why is the subpoenaed documents unreliable?

MR. APFEL: Why are they reliable?

THE COURT: Unreliable.

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

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

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

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

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

commits fraud, it's not always material, doesn't always necessarily result in a material significantly and meaningfully increase the credit which is associated with the loan. Here is an example. Slide 37 this is loan number 7225. And this is one where based on subpoenaed documentation Mr. Butler claims that the borrower's income was much lower than was stated in the file. And he then recalculates the debt to income ratio based on the reduced income. And finds that it goes to 42.22 percent. Notwithstanding this fraud, and six other defect findings, Mr. Butler concludes that this loan is not significantly defective. In other words, that there was no meaningful or substantial increase in credit risk associated with the loan. So here is an example even Mr. Butler acknowledging that not in all instances even where there is fraud, and even if it were a breach of an actual representation, that it would be material. The combination of their misreading the contract and the disputes, both on whether the fraud occurred and materiality, defeats summary judgment on this package.

Next the mortgage loan schedule. We've

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

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

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

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

THE COURT: What does refi cash out flag mean?

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

THE COURT: What does refi cash out flag mean?

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

THE COURT: It's the second loan.

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

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

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

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

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

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

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

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

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

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

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

this data is not.

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

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

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

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

(Continued on the next page)

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

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

MR. APFEL: I will be finished.

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

MR. APFEL: That's exactly right.

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

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

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

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

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

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

Go ahead.

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

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

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

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

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

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

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

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

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

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

THE COURT: That document is not?

MR. APFEL: Your Honor this is --

MR. SELENDY: As well as the prior slide.

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

problems readily is evidence that they are not material.

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

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

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

There are two other loans from this group of ten

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

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

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

MR. APFEL: Okay.

THE COURT: You know why. Take a look.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

because the time has come.

MR. APFEL: And I am done.

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

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

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

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

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

THE COURT OFFICER: 4:30.

THE COURT: 4:30 shutdown.

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

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

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

done.

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

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

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

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

THE COURT: You know, tomorrow --

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

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

MR. SELENDY: Of course. Understood.

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

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

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

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

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

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

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

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

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

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

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

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

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

here we have Doctor Mason having testified in this case that among the possibilities of damages is a legal remedy, mainly benefit of the bargain damages. I don't want to over emphasize that. He doesn't say that that is a slam dunk, or could be easily done. He has reasons why maybe that's inappropriate. But the point is it's still on the table and should be on the table for the court. In addition, your Honor, as what we discussed tomorrow there is the repurchase provision and that too if you think about it is a legal remedy to the extent that Countrywide is successful in showing the court demonstrating to the court that the remedy which should obtain here is the repurchase remedy, and I'll talk about the repudiation issue in a minute. That too is a legal remedy which would obviate not only the need for, but the right to any kind of equitable remedy such as rescissory damages.

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

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

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

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

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

THE COURT: Thank you, very much.

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

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

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

THE COURT: Rapid is good.

MR. SELENDY: First of all.

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

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

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

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

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

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

MR. SELENDY: Correct.

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

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

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

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

jury.

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

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

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

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

THE COURT: Yes, and a very important one.

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

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

the element of causation I referred you to Judge Rakoff's holding in which he was citing to you approvingly that the question is whether the misrepresentations of the sponsor caused a material increase in risk to the insurer. That's exactly what we've gone through today both the facts of the misrepresentations and as to the materiality in terms of risk of loss. That's the finding. Those are the elements of our cause of action which were proven and were unrebutted.

I'd like to say a little bit more with respect to the material and adverse affect ruling that your Honor previously entered. That ruling was subject to our ability to come forward with evidence. The evidence we submitted was from Countrywide's own witnesses and depositions taken after that motion was submitted to this court. It's subsequent new evidence. There are unequivocal admissions. They confirm that the tests of materiality is day one and we have shown through the documentation through Countrywide's own files that the types of breaches in the record are material by their own admissions. That's as a matter of law. There is no reasonable dispute as to those issues.

With respect to the challenge on the no

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. APFEL: 9:30.

MR. SELENDY: 9:30.

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

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

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