UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL HOUSING FINANCE AGENCY, Plaintiff, v. UBS AMERICAS INC., et al., Defendants, and other FHFA cases.	11 Civ. 5201 (DLC) 11 Civ. 6188 (DLC) 11 Civ. 6189 (DLC) 11 Civ. 6190 (DLC) 11 Civ. 6192 (DLC) 11 Civ. 6193 (DLC) 11 Civ. 6195 (DLC) 11 Civ. 6196 (DLC) 11 Civ. 6198 (DLC) 11 Civ. 6200 (DLC) 11 Civ. 6201 (DLC) 11 Civ. 6202 (DLC) 11 Civ. 6203 (DLC) 11 Civ. 6739 (DLC) 11 Civ. 7010 (DLC) 11 Civ. 7048 (DLC)

New York, N.Y.
July 31, 2012
3:00 p.m.

Before:

HON. DENISE COTE

District Judge

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(Case called)

THE COURT: Thank you, everyone. Appreciate your appearance here today. We have a number of matters to address. So let me list the issues that I am aware of. We're going to talk about a schedule for expert discovery, what I'll refer to at this stage for expert discovery. We're going to talk about discovery of the plaintiff and its constituent entities beyond the PLS divisions or branches within those agencies.

I am going to ask Ms. Shane for a status report on how we're doing with predictive codeine. I am hoping that a meet and confer process has resolved any disputes concerning discovery related to ResCap, but we'll see.

I know I have been given two documents. I haven't had a chance to look at them. I want to say my two page letter limit had a good impact on attorney's time but has failed adequately to address the paralegal time issues but I made a good stab at getting through materials. I am not sure I've' focused on precisely the passages you wanted me to but I've looked at a lot of material you've submitted. And counsel, of course, may have other issues they want to address today as well.

I have good news and bad news for everybody. So depending on the issue, you will be happy or disappointed. So maybe I'll just start with some preliminary rulings on an issue and then give a chance to the disappointed parties to be heard

and, if necessary, we'll have a more extensive discussion.

Why don't I start by disappointing FHFA and I'll move on to the defendants.

So let's talk about the staging of expert discovery. At our June 13 conference at page 14 I briefly outlined how I thought disclosures might proceed. Based on the materials that had been presented to me in advance of that conference which I noted at the time were very helpful to me, I came to the conclusions that the defendants would not agree to restricting discovery in this case to a sample of loan files. And that, indeed, the plaintiff wanted to reserve its rights as well potentially as affirmative defenses were played out to look beyond any initially designated sample of loan files.

So as much as I was disappointed by that conclusion I shared that with you all on June 13th and outlined how I thought we might proceed with respect to expert discovery. And I know that the plaintiff is already on its way to making disclosures of samples and individual cases and it began that in the UBS case because that's our first tranche trial.

And I think the defendants are right that the next thing that has to happen is for the plaintiff to make a disclosure of how it feels the misrepresentations and one, two or all three categories are playing out when you look at that sample.

And then the next stage would be for the defendants to

respond and it's possible that defendants will respond with a disagreement about the content of the plaintiff's sample and it's analysis of the extent to which misrepresentations appear in that sample or they may do their own sample of a larger or I suppose potentially smaller or just an intersecting group, different sample all together or they might not do any sample and that may change from case to case.

It may change from misrepresentation to misrepresentation. And I don't think that's something I could control or would seek to control even if I could. And I feel as if the plaintiff wants to use this request to require the defendants to disclose a sample before they know what the plaintiff's position is with respect to the misrepresentations and the extent to which misrepresentations appear in the plaintiff sample.

It's sort of way of managing discovery and of managing the litigation and that had been my hope but as I explained on June 13th I don't think that is going to fly for all the reasons I described then. So I think what we're left with is setting out a schedule, hopefully, one that we could agree to in the UBS case and that could be used as a model for the other tranches. So I am not saying that -- it would just be a model. The parties would have an opportunity to agree or disagree in a particular case that the model worked. But so I think what should happen is what has already begun in the UBS case and

that is the plaintiff has identified -- I think was last Friday the 27th of July -- the sample it's going to use in the UBS case. It's made a commitment to identify the extent and nature of the breaches within that sample to UBS within 45 days of getting custody, complete custody of the loan files as I understand it. Counsel will be able to correct me to the extent I've misunderstood anything. And then there's a period of time after that and I know the defendants asked for 90 days but I think we're going to have to talk about that for a bit, for the defendants to respond with their own expert analysis which could take any number of forms. If the defendants are going to use their own different sample I think their response would have to identify that along with their analysis of what that sample showed or didn't show.

If the defendants were going to instead just attack the plaintiff's sample and its conclusions in that analysis, then that's what it would have to do and then the plaintiff would have a chance to reply. It could change its sample, broaden it, respond in any number of ways that seemed appropriate and that's when the issues would be joined.

The plaintiff suggests that it might be useful to have Daubert motion practice at this stage. If we did do that all we'd have is a Daubert motion addressed to the methodology the plaintiff used to create its sample. I don't know if the plaintiff wants that, given what I am outlining. Because it

had envisioned Daubert practice addressed to sampling protocols.

I, personally, think it might be useful for everyone to have a statement of how I would read a Daubert challenge to the plaintiff's sampling protocol in the UBS case and I think it would be useful for all of us to have that statement of the law and analysis as we move forward. But, and folks may prove me wrong here, I sort of think it unlikely that any methodology is ultimately going to be rejected by a Daubert analysis. I think what will probably happen is that the lines of attack will be more clearly fleshed out through such motion practice. And it may inform the development of different sampling protocols by both the plaintiff and the defendants as we move forward. Even though I am not sure the motion could be granted, I am happy to receive such a motion if the parties think it would be useful.

I am interested in learning what the state of play is with respect to production of the loan files. I had assumed that they would have been produced by now or largely produced by now. I thought we were engaged in an effort to get the ResCap files which had its own separate issues.

So, I don't know, Mr. Selendy, I know you have been anxious to speak. I don't know if you want to speak or you want Ms. Chung to address this issue.

MR. SELENDY: I would be glad to address this issue,

your Honor. And let me begin by saying we are committed to having a disciplined, efficient and rigorous process to deal with sample and re-underwriting. But there is a fundamental problem that we have with the schedule that you've proposed and I think it goes in part to your belief that FHFA had accepted what was, in fact, a UBS proposal that we think is impossible to meet. And if I could step back a little bit --

THE COURT: I don't think you accepted any UBS proposal.

MR. SELENDY: Just to be clear about it, when we talk about the sampling, that is something that can be set forth on a basis regardless of any results, obviously, of the re-underwriting exercise. That's a statistical matter. It can be done on a clear methodology with well-settled guidelines and we, therefore, propose in a movement that, actually, went significantly toward the defendants. We proposed a broader set of samples which would allow extrapolation on a deal by deal basis at a 95 percent confidence interval with a margin of error of plus or minus ten percent.

In order to come up with a sample we did require the loan tapes. And just to refresh your Honor's recollection, the loan tapes are the disclosed characteristics of loans and borrowers that are essentially equivalent to the mortgage loan schedule as part of the prospectus supplement. It is the basis on which the underwriters and sponsors are making

representations and warranties about the loans in each portfolio.

The loan tapes are very different than the loan files. The files contain the application, plus the work product of the loan underwriters as they attempt to assess whether the loan is consistent or not with the underwriting guidelines and then state the various attributes of loan borrower which, ultimately, end up in the loan tapes.

The process of choosing a sample is relatively efficient as we've previously informed your Honor. That can be done in a matter of weeks. Once we have the loan tapes and, indeed, we've provided, as you mentioned, a sample for the UBS case which is completely random. It's a random sample across the securitizations in that case that stratifies according to FICO scores. So the purpose of stratification is to increase the precision of the estimate and reduce the margin of error. It's still a 95 percent confidence interval but it's better than a pure random sample.

The truly laborious part of this work, however, is not in the sampling but in the re-underwriting exercise that is, essentially, taking each one of the loan filings which defendant previously represented to be, approximately, 300 pages per file and going through that. And it's not just to test whether the data in the loan file is correctly described in the loan tape but it's also to test whether the

representations in the application are truthful, whether the appraised value is as represented, if the appraised value is false, the loan devalue ratio will be false, whether, in fact, it's a primary residence or not. If it's not a primary residence the owner occupancy ratios may be false. Whether the loan and borrower characteristics comply not only with the stated fines but also with federal law and regulation, there are compliance requirements and other requirements. Indeed, there is a check list of probably more than 50 attributes for every single loan that needs to be tested and that is the truly burdensome part of the exercise.

As you may recall, the proposed sample initially put forward by defendant UBS would have involved re-underwriting, approximately, 50 or 55 percent of the entire population. A totally unworkable proposal.

We have proposed various ways of designing a sample that would still give the Court confidence in the results and in any extrapolation but would significantly reduce the numbers. Our current proposal for UBS if applied across all securitizations would be, approximately, $44,900. The maximum capacity that we have currently would be to review, approximately, four to five thousand loans per month but that's just the review. We also need in order to develop a particularized assessment of breach on a loan by loan basis we need the guidelines. We need to map the guidelines and the

reps and warranties in every single securitization so that when the loans are re-underwritten we can test for each loan in the sample whether or not the loan is eligible, whether or not the representations and warranties have been truthfully made or if instead they are materially in error.

And then we need to aggregate the results of that assessment, have our testifying expert review them across the entire population and combine them into a report. So the proposal to come forward with a -- the results on a particularized basis loan by loan is nothing less than a proposal to present our final expert report on re-underwriting. And we have already been working with the Court's very accelerated service discovery schedule for document discovery. If we were to produce that now it's, essentially, saying that rather than the June 2013 date for expert disclosures on re-underwriting we would need to produce that within 45 days and that's simply not possible, your Honor.

THE COURT: Let me ask you about two numbers. I just want to make sure I've captured them correctly.

MR. SELENDY: Yes.

THE COURT: For the UBS sample, are you saying that your sample resulted in a selection of 44,000, roughly, loans?

MR. SELENDY: No. That's across all of the securitizations in all of the cases. We have, approximately, a million loan files across all of the cases before your Honor.

And if we use our sampling method we can bring that sample down to 44,900. In the UBS case that would be, approximately, 2200 loans. And our belief is that once we actually get production of loan files -- and I'll note that FHFA has produced more of the UBS loan files to UBS than we've received from UBS to date. Once we actually get the loan files and the guidelines, we then need to do the mapping exercise, build the protocol for the re-underwriting and assuming the sample is acceptable we can re-underwrite those 2200 loans for the UBS case.

My best estimate right now is that we could complete that in, approximately, four months. We're working to shorten the time for re-underwriting but the reason that we sought to stage this so we had either an agreement with defendants as is common in many cases --

THE COURT: You won't get one here.

MR. SELENDY: I understand that. Or whatever challenges. We don't know, frankly, the basis of defendant's objections, whether they're opposed to idea of sampling, if they have particular problems or not, we don't know what those issues are. We had thought if there were legitimate issues they should be framed up on an early basis for the Court to consider and for us to address it so that before the tremendous expense of re-underwriting is undertaken we can at least have the mathematical issues of the sample resolved.

THE COURT: So you want the Daubert motion.

MR. SELENDY: Frankly, your Honor, we that I think that the proposal that we suggest for sampling is incontestable. But if there are objections we think they should be framed early before the re-underwriting exercise is undertaken so that no one wastes time and money re-underwriting loan files that either may be outside the samples or if the sample size is not big enough, let's resolve that first and then we can put the huge teams to work in actually going through the loan files. The sampling exercise, in other words, is a much simpler mathematical exercise. The re-underwriting exercise is very complicated and, indeed, involves going through all those loans.

I have to say, your Honor, there is more than a little irony here in defendant's trying to force us to a 45 day period to re-underwrite 2200 loans because the entire reason we're here, we submit, the entire reason is that we had this reckless dramatic origination of loans and systematic disregard of guidelines at an incredible pace, rather than the proper re-underwriting according to guidelines. And we do not propose to do as defendants did when they first originated the loans. We want to re-underwrite these responsibly and present them in the context of an expert report, as we do in other cases.

THE COURT: I had thought when I had those submissions before the June conference that your expert wanted to at least consider a different sampling methodology for different cases

depending on the characteristics of the securitizations.

MR. SELENDY: Yes. Your Honor, the issue there is that for certain of the cases, specificly the Tranche Two cases, JP Morgan and Merrill, the volume is very high. In terms of the number of securitizations and our expert wanted to be able to frame up a further efficiency measure whether it's clustering or some other form of aggregating deals with the same underwriter, the same originator and the same vintage so that you could develop results for a cluster of deals within the sample. That issue only arises in these cases where we have such a huge volume. For most of the cases they will be like UBS. And we're prepared do the re-underwriting on a securitization by a securitization basis at a 95 percent confidence interval, plus or minus ten percent in the margin of error.

And that would be, I believe, a similar process. It still has to be confirmed once we see the loan tapes. And I don't want to speak ahead of our expert but once we go through the loan tapes for all the securitizations it's my belief that we will be able to do a simple stratified random sample as we're proposing for UBS for virtually all the other cases.

And, indeed, we may be able to do that for JP Morgan and Merrill Lynch depending upon the timing of the re-underwriting it's the expense associated with the volume there that's driving us to see if we can find a further

efficiency measure.

THE COURT: So you proposal is to produce an expert report by August 9th on your sampling protocol for the UBS case?

MR. SELENDY: That's correct. We had proposed -- and the reason we had proposed a simultaneous exchange is that if defendants don't want to work with us from the same sample but instead are generating their own sample, we'll have the same difficulty in understanding re-underwriting what they put in their sample.

And, indeed, if they don't want to use the settled protocol that we're advancing, we would like an opportunity to review that and respond to it. So if they have a different sample for their affirmative defenses, we don't see why it's necessary but if they do, we would like to have a simultaneous exchange on that date.

THE COURT: Okay. I am not going to order a simultaneous exchange but I understand you want to produce your expert report with respect to your sampling protocol on August 9.

MR. SELENDY: That's correct.

MR. KASOWITZ: And you propose August 31s for any motion, a Daubert motion challenging that protocol and then you'd respond on September 13.

MR. SELENDY: That's correct.

THE COURT: Okay. Any objection to that schedule, Mr. Kasner?

MR. KASOWITZ: Your Honor, I am going to defer to Mr. Fumerton who is going to object, not only to the schedule but to much of what my colleague in a very measured tone has explained to the Court because we have a very different view of what's going on here. But if it would please the Court, Mr. Fumerton will present that position.

THE COURT: Well, I'll turn to you, Mr. Fumerton, in a second. I thought I was asking an easy question.

MR. KASNER: We do not consent, your Honor, to that schedule because we object to what is being advanced now. And what I had understood at least your Honor preliminary seemed disinclined to allow.

THE COURT: Okay. Mr. Selendy, I want to let you finish your presentation.

MR. SELENDY: The only further point is that we had proposed consistent with the Court's prior schedule that we produce our expert report reflecting the re-underwriting analysis March 15, 2013. The results of that analysis will take into account information learned from discovery as well as information from the course of third-party subpoenas and the like. That can't be done until fact discovery is complete. That's part of what goes into the re-underwriting assessment and it's part of why we can't present a loan by loan

particularized assessment as my colleague, Mr. Kasner, has asked in our view a, frankly, completely untenable request. We can't to that, nor should we. This is not even a standard and fraud case. It's a loan by loan early expert report at the conclusion of document discovery.

This re-underwriting exercise in other cases and, logically, should follow from the collection of all the relevant evidence, the application of that to the loans in the sample and the generation of the expert report which would contain the loan by loan breakdown together with the mapping -- and warranties for every single securitization in dispute and together with the expert's justification.

THE COURT: So if you are suggesting March 15th for expert report with respect to the misrepresentation notice UBS case, what are the dates for the reports in the other cases?

MR. SELENDY: We had proposed, your Honor, that for each of the other tranches we serve expert reports on August 15th and that would allow us to have rebuttal reports from the other defendants November 7th and in time for the completion of expert discovery according to your Honor's schedule by December 6th of 2013.

THE COURT: So, that would --

MR. SELENDY: If I may, your Honor?

THE COURT: Okay. I had thought I understood that you might, depending on what the defendant's response was in a

particular case, to revise your sampling protocol.

MR. SELENDY: Well, ideally, your Honor, any revision of sampling protocol would come long before that date. That's why we had proposed the exchange in August of this year on the sampling protocol, so that if there are any modifications based on Daubert or other challenges those can be resolved promptly this fall before the re-underwriting exercise is undertaken. And we would expect that any challenges that any of the defendants may have could be presented at the same time as the UBS challenge. We doubt there will be issues that vary that much in other cases.

And the last point I wanted to mention, your Honor, is that the schedule that we've proposed, the sampling first followed by the re-underwriting exercise is consistent, for example, with the MBIA versus Countrywide case. In that matter there was a general review by the court, a sampling and the re-underwriting exercise just as we proposed here was submitted in the ordinary course, together with other expert reports. Thank you, your Honor.

THE COURT: And, Mr. Selendy, what's the status of the production of the loan files?

MR. SELENDY: Okay. With respect to the loan files we understand that JP Morgan has produced most, if not all, of the loan files. UBS, as I mentioned, has produced according to our count 2200 of the loan files, a very small subset of the loan

files in that case. We have actually produced to UBS 2700 loan files relating to UBS securitizations. Those consist of files that we had obtained and, of course, leading up to the filing of complaint and therefore.

As far as I know we have little or no files produced yet by any other defendant. I may be surprised but based on our own analysis I don't believe we have any significant production of loan files from other defendants

THE COURT: Let me hear from Mr. Fumerton.

MR. SELENDY: Thank you.

THE COURT: Mr. Fumerton, do you have any objection to the schedule for a Daubert motion addressed to the sampling protocol and the UBS case.

MR. FUMERTON: We do, your Honor. Robert Fumerton, on behalf of UBS.

We can't be in a position to evaluate plaintiff's proposed sample in the abstract. We need the benefit of factual discovery, of deposition discovery, of full factual record before we can determine even whether their sampling methodology is adequate.

If I could give your Honor an example, Mr. Selendy claims that the 2200 loans that he's provided UBS would have a margin of error of ten percent. Now, defendants, certainly, disagree with that and we've set forth in detailed position back in June. But how can defendants be in a position to take

a position on whether ten percent margin of error is sufficiently precise when we have no idea of what the defect rate they're claiming in these cases. Obviously, if the defect rate that they identified came in under ten percent, defendants couldn't be in a position sign-off or make a determination on a Daubert motion before we have that information. What we need is fundamental factual basis for plaintiff's claims.

Defendants are not seeking early expert discovery. All we're asking and we appreciate that Mr. Selendy provided us with the sample upon which he intends to reply, provides us those 2200 loans by loan ID. But what we need now is which loans are defective and why? What is the basis for those claims? And if we get that information that will help narrowly tailor the rest of discovery. For example, if they're claiming that a specific loan has an inflated appraisal defendants may want to take a third party deposition of that appraiser to determine whether, in fact, the value was inflated.

Mr. Selendy's proposal is, essentially, give us until March 15th after deposition discovery, three months before the close of all fact and expert discovery, give us till March 15th before we have to identify a single defective loan or the manner in which that loan was defective would completely deprive defendants of their due process rights to develop their defenses to take discovery and third party discovery to respond to the basis of plaintiff's claims.

THE COURT: Good. Why has the UBS production of loan files not been completed?

MR. FUMERTON: Your Honor, UBS does not maintain loan files in the ordinary course. UBS has produced every single loan file in its possession, custody or control, approximately, 2400. We have been asking since May 22nd for all of the UBS loan files in plaintiff's possession, custody or control. Plaintiff has had a huge start here. Plaintiff alleged in the UBS complaint that it conducted a forensic review of, approximately, 1300 loans. They alleged that in the complaint to survive the motion to dismiss.

What we've learned since Friday now that we the 2200 loans in the sample, is that there is actually considerable overlap between the loans they've reviewed for the forensic review and loans the in the sample. In fact, approximately, 20 percent of the loans for three originators that they allege in the complaint are the exact same loans in the sample. This is work they've already done.

And I'd like to return to this issue of materials related to the forensic review after we've finished this. But UBS has produced all of the loan files it has in its possession, custody or control. Plaintiff has not done the same. We've asked plaintiff since May 22nd to produce everything you have. It's in a discrete place. They haven't produced it.

What UBS has done, your Honor, is gone out and subpoenaed, issued third party subpoenas to servicers, to originators, to trustees, to get all of the loan files in our case and we're working to get those loan files as quickly as possible and that's why we've set a deadline for plaintiff's identification that teed up off of the date the plaintiff has all these loan files. We don't know what loan files they have. Assuming Mr. Selendy's representation that they don't have all of these 2200, we're working with them to get those loan files.

THE COURT: Okay. So on what date did you produce the loan files in UBS's custody or control?

MR. FUMERTON: We've produced them last week, your Honor.

THE COURT: And when did you serve the subpoenas on the third parties to get the remainder of the loan files?

MR. FUMERTON: We served the third party subpoenas. I don't have the exact date but it was shortly after the commencement of fact discovery, so back in June, I believe.

THE COURT: And so those files then should have been produced in July.

MR. FUMERTON: We are actively working to try to, with the third parties, with the servicers, with the originators, with the trustees to try to get all of these loan files. One of the things we asked plaintiff for was to identify the sample of 2200 loans. Now, back in June plaintiff identified a sample

of a thousand loans, 1060 to be precise, that it claimed would be the UBS proposal. They have now doubled that, which is fine. We told Mr. Selendy and his colleagues, if you give us the sample by loan ID then we can go out and prioritize the production of those loan files from third party so we can go to third party servicers and say, hey, you have these specific loan numbers that are part of the 2200 that plaintiff wants to rely on for their sample.

THE COURT: Excuse me just one second.

(Pause)

MR. FUMERTON: Your Honor, if I could add one --

THE COURT: So do you think it might be helpful if we chose an afternoon the last week in August for anyone, any third party who hasn't completed production of their loan files to show up in court here and explain why the production has not yet been completed? Do you think that might assist you, Mr. Fumerton?

MR. FUMERTON: Yeah, we think that would be a productive idea, your Honor. If I could just add one point that I neglected to make earlier. When we served our request, document requests for all the loan files in plaintiff's possession, we served that on May 22nd. Over the next two months we repeatedly asked plaintiff, what's taking so as long? Why can't we get these loan files? And what we learned from plaintiff is that there were all sorts of third party

consent -- and maybe Mr. Selendy can address this in more detail -- but plaintiff needed to obtain consent from third partys to produce the loan files. But what we also learned from plaintiff is that they didn't even notify those third parties for months after our document requests.

So, again, what I think would also accelerate this process is if plaintiff is ordered once and for all to produce all of the UBS loan files it has in its custody, possession or control. So at least we know what we have to get from third partys

THE COURT: Well, you have to get them from third partys -- I am sorry -- if FHFA produces them or not. I assume that's how it normally works. One file may be more or less complete than another. I don't know.

Mr. Selendy.

MR. SELENDY: We also agree. It would be a very good idea, I think, to bring in the third parties that have not produced files at the end of August. I think that would be highly effective.

Just one point with respect to the notion of burden for the defendants and re-underwriting using our sample. On the schedule that we propose they would have, approximately, eight months to do the re-underwriting exercise with the sample that we provided to them last week, that's far beyond the 45 days that they thought was sufficient for FHFA.

THE COURT: So, Mr. Selendy, you identified the sample to UBS last Friday?

MR. SELENDY: Yes.

THE COURT: And you're planning to use the same protocol across the board and the 16 lawsuits with, perhaps, two exceptions.

MR. SELENDY: Yes. And subject to our expert's review of the loan tapes for each deal, there is effort to ensure depending upon variability and securitizations that the proposal would work. But we have some high degree of confidence that a simple random stratification as we've done here according to FICO scores may well work for virtually all of the deals.

In any way case the proposed confidence interval 95 percent with a margin of error plus or minus ten percent is the target that we're shooting for for virtually all the cases.

THE COURT: And what is your proposal then with respect to the disclosure in the other actions of the precise loans that would constitute the samples in those cases?

MR. SELENDY: Right. We are proposing -- and this is reflected in Exhibit A to my letter to the Court -- we are proposing that for the other cases we would provide for Tranche Two the sampling protocol on August 23rd of this year and then for Tranche 3, September 13, and Tranche 4, September 30. So, again, all of those would be done very quickly over the next

few months.

THE COURT: Thank you very much. And do you want to address the status of the disclosure of the loan files in FHFA's possession?

MR. SELENDY: Right. My colleague, Mr. Schirtzer, I think will address that together with other production issues. It is my upstanding we're working to make all of that available.

THE COURT: Mr. Schirtzer? Ms. Chung.

MS. CHUNG: I think it was two weeks ago that we produced most of the loan files that we this in our possession relating to UBS securitization. The ones that we have compared to the universe of loans is a small number. It would never get us the entire sample. It would never get us to the 44,000 loans that are issued in the UBS case. But there is a remainder left and we could produce those this week. That's not a problem.

As your Honor pointed out, the real issue though is that would never get us to even the sample loans and so we will have to turn to the third party. UBS in a case for which third parties hold the lion's share of the loans. In many of the other cases that's not the case. So the fact that we only have -- JP Morgan, UBS and I think yesterday we got loan file productions from First Horizon. That means that we're still well behind the ball in terms of getting the loan file that

will allow us to do the underwriting.

THE COURT: So, Ms. Chung, how did FHFA get the loan files that it has?

MS. CHUNG: Yes, your Honor. Thank you.

We got -- some of the loan files were subpoenaed from servicers or trustees. So FHFA had gotten these loan files under their own civil investigative powers for purposes including, but not limited to this litigation in the lead-up to litigation. And as Mr. Fumerton mentioned, in some of those cases we have confidentiality agreements for notification duties to the third parties from whom we obtained the files. So there was a process of notifying those entities that we were about to produce the files in this case. Now that process is complete or nearly complete. But we have turned back to the defendant's. Some of loan files that we have and we have every intention to turn back the remainder of those loan files very promptly.

There is a misimpression though that somehow we have all the loan files that relate to those securitizations. The loan files that we have were not gathered just for this litigation and they're only a fraction of what are at issue in the 15 actions that we have here.

THE COURT: So consents on loan files, it may be moot now but I would have been happy to issue an order requiring any objection to be made in writing to me within two weeks with the

understanding that the files would be produced, you know, two weeks and one day hence. So if there is any similar problem with production think of me as a resource.

MS. CHUNG: Thank you, your Honor. We appreciate that.

THE COURT: Okay. So in all actions before me I will expect the loan files to be produced in their entirety by August 29th. To the extent they are not, I'd like a report on August 29th. And I'd like, I will hold a conference on August 30th. I'll issue an order to show cause for any entity that has failed to produce all of the loan files in its possession by August 29th to appear on August 30th at three o'clock and explain why it has not completed production.

So I would like every party before me, plaintiff and defendants, to provide me with a list by tomorrow of all the parties who have possession of loan files and who need to be subject to my order.

Do I have jurisdiction to order production out of state? How many of the loan file -- I might have to ask for some help from some colleagues in other districts here.

Ms. Shane.

MS. SHANE: Yes, your Honor. Thank you for the afternoon to be heard.

JP Morgan, as your Honor may recall, is both a defendant in an action in which it is physically producing loan

files for purposes of the use in that action. It also has possession of loan files that may be relevant to other actions including, for example, in the UBS action. So JP Morgan is in a particular position of producing madly loan files for all different purposes in its different capacities in that regard.

As we discussed last week, J.P. Morgan has already produced 66 million pages of loan files and is continuing to produce as fast as it possibly can. J.P. Morgan understood that the document production deadline in this case was September 30th. It is a date that we discussed every hour of everyday with respect to many pads of document production and will continue to proceed as quickly as we can in order to meet.

This order that your Honor is entering moves that up by a whole month where it was already going to be extremely tight, as I understand it. Or if it does not and gives us an opportunity to be heard as to our particular circumstance and why it is that this would be enormously difficult, if not actually impossible for an entity it in this situation to meet despite its best efforts, we would appreciate that opportunity to be heard. We don't want to wait until August 29 to bring that to your Honor's attention.

We are aware from the issuance of nonparty subpoenas, not only for ourselves but to a host of other entities, most of which are not here and are not here in any capacity, not represented, not parties, not anything that they are in many

jurisdictions. And that the process of working with those entities to bring about their compliance with those subpoenas is one that has been proceeding with a good deal of attention and intensity on behalf of all defendants and the plaintiff may be making efforts of their own.

It is not as easy as it sounds, your Honor. Loan files in cases of that age are, themselves, quite old. There are multiple versions, as your Honor alluded to, in different depositories, in different forms, with different levels of completeness. Many are not electronically maintained. And even the identification of which loan file one is talking about requires a fair amount of matching exercises that can consume some time on the part of people who are most familiar with those files and the ways in which they retract from institution to institution but for purpose one versus purpose two.

So I don't in any way mean to suggest that it won't happen, that all these things will be collected but August 30th would be very, very difficult at least for those entities like JPM that are in possession of the large quantities of them and are trying to prioritize.

THE COURT: Thank you, Ms. Shane.

Am I right that these loan files were gathered together in one location for a particular securitization or not?

MS. SHANE: Not necessarily, your Honor. It would

depend on the securitization. Some of these securitizations were backed by loans that were almost entirely or in some instances entirely originated by an institution. There were processes that had to be undertaken, including due diligence, for example, that would have required some entity or number of entities to review the loan files in some form in connection with a securitizations. And at the close of that process, once the securitization happened, loan files could be and were, as I understand it, sent to any number of different additional places. Servicers, who would have the responsibilities to maintain the loans over time, could end up having most of them. Servicers changed over time and what would be relayed from one to the next for the next purpose, again, could be some or all of the file. And they would not necessarily all travel together because different supporting loan groups and different tranches could have different groups of loans that require different forms of attention.

Some loans would get paid and paid early. Some would get defaulted on. And those would all go in different directions depending on what path the actual underlying financial transaction was taking. So assembling them back together again is a challenge. It will happen and people are working very hard on having it happen. Sometimes it's an easy repository which is why we have been able to get to 66 million in the very short period of time so far since your Honor had

ordered that it happen, but the next couple hundred million or more will be more challenging.

THE COURT: Well, those are talking about pages, the 66 million. How many loan files does that represent?

MS. SHANE: The number is in the tens of thousands and we have tens of thousands to go, at least.

THE COURT: So, one, I don't have authority over who's not here or at least in New York State present to command their appearance. I don't have a sense of how many, at least, I don't think I do. I don't have a sense of where the problems in production lie.

Ms. Chung.

MS. CHUNG: Your Honor, as to your original suggestions to have the parties -- both sides have issued subpoenas to entities that have possession of loan files and we're promptly doing it. The requests are all out there. If it will be helpful to the Court to have the list of those entities, where they are and which districts they're in, we could, certainly, do that. That would be a starting point.

THE COURT: The September date, September 30th, I think, whatever date it was in the order is for substantial completion of document production. It's not, and nobody's treated it as such, as the date on which production is to be made. Parties are making it on a rolling basis and there's no way it could be substantially complete on September 30th unless

people were making an ongoing effort.

So, Ms. Chung, give me a sense -- and you know what, we may take a break here so that the parties have a chance to talk -- what would and could be accomplished by a late August conference? I don't want to have one -- there are too many people in this courtroom now -- unless it's going to be, serve a useful purpose. So we'll address that again after we take a break.

(Continued on next page)

Returning to our schedule, Mr. Fumerton argued, as I understood it, that it is premature to have a Daubert motion addressed to the sampling protocol that the plaintiff intends to use until one knows the defect rate. I'm not sure I find that persuasive. Indeed, a motion with margin of error plus or minus 10 percent, someone could say that that is insufficient in and of itself. Indeed, I think the expert for the defendants took that position in the June submissions.

A lot of work is going to be invested by the parties, not just the FHFA but each of the defendants, in addressing the loans selected through the plaintiff's sampling protocol. It seems to me that it would behoove everyone to know whether or not it is going to be the basis of the receipt of admissible evidence at trial.

I think the briefing should proceed on roughly the schedule suggested by the plaintiff. I know we are in August and therefore it may affect -- I don't know who is going to be the principal brief writer -- vacation schedules, so I'm not wedded to specific dates. But I think a fully submitted motion sometime in September, mid September, would be great.

I think it should run across all the actions before me. I think UBS can write the principal brief, but everyone should have an opportunity to make any additional arguments. If UBS wants to cede the principal brief writing responsibilities to the defendants in another case, that's

fine, as long as everyone understands they have an opportunity to be heard.

I'll expect the plaintiffs to present their expert report on August 9th. I'm adopting their date. I'm going to ask you, Mr. Kasner, to coordinate a briefing schedule that accommodates everyone's scheduling needs in consultation with Mr. Selendy and advise me later this week what the proposed schedule is so that I have something fully submitted in roughly mid September.

MR. KASNER: We will do that, your Honor. With the utmost respect, your Honor, I just would state that for UBS we vigorously object to being required to address Daubert expert issues in the absence of a complete factual record prior to the time that basically any document discovery has been provided, prior to the time that any deposition discovery has been taken. I note that, your Honor. Obviously, we will do what your Honor orders, but do I place our vigorous, vigorous objection to this procedure on the record.

THE COURT: Thank you, Mr. Kasner.

Ms. Shane.

MS. SHANE: Yes, your Honor, I'm sorry if I'm confused, but it seems as though the schedule for the plaintiff to announce what its planned sampling protocol would be in the other cases extends so far into September that those in the other cases, especially tranche 4, which wouldn't receive word

of what is being proposed until September 30th, would be in no position whatsoever to meaningfully participate in the motion practice.

The proposed date that I understand Mr. Selendy to be advancing for tranche 2, which is what JPM and Merrill Lynch are in, is August 23rd, which is certainly better than September 30th. But if we are expected to participate meaningfully in a motion directed to the sufficiency of a sample that, by Mr. Selendy's account, differs markedly from what has been proposed with respect to UBS, we may very well need more time to assess whatever it is we learn at that time.

We would echo Mr. Kasner's concern about the process here but would suggest, your Honor, that it could usefully be customized so that what we are addressing is the sampling proposal in its abstract form, and only the sampling proposal in its abstract form, so that all other potential objections, that is, with respect to its application or with respect to what in the reasonable exercise of professional judgment a statistician would learn as he went and would expect to do as he went, those kinds of objections and Daubert challenges we would expect to be able to make to your Honor at such time as they became ripe, which they couldn't possibly have done by mid September.

With that, we would also think it could begin to solve some of the problems your Honor is wrestling with regarding

loan file production. To the extent that, having preserved all of defendants' rights regarding that sample, the plaintiff at least has a basis on which to focus its efforts to get particular loan files, then perhaps we are not talking about the need to have those loan files come in by September. They have to come in eventually, because none of us are giving up the right to go beyond the samples, but they don't have to come in as fast. We can concentrate on the ones that are in the samples.

THE COURT: Thank you, Ms. Shane. Very helpful. Obviously, as to any further objections that defendants might have to the admissibility of the plaintiff's expert testimony that couldn't fairly be made with respect to the August 9th report, your rights are preserved. You can only meet the objections that would be appropriate with respect to the August 9th report and not anything more.

Mr. Selendy, I think Ms. Shane has a very good point. Are you committing yourself now to using the same sampling protocol for all of the cases before me?

MR. SELENDY: I, as I say, don't wish to get ahead of our expert on this. The objective is to be as similar as possible to the protocol we have advanced for UBS. What I would suggest is a way that is analogous to what your Honor did on the motion to dismiss briefing.

To the extent any defendant has objections to the

proposal that is set forth in UBS, those can be done on a coordinated basis. To the extent there are any differences introduced in the tranche 2 matters in particular or potentially in other cases, as your Honor suggested, objections can be reserved and advanced as soon as we roll those out.

Our strong effort is to provide a unified and common approach across all these cases. We just need to confirm the feasibility of that with our expert as we continue to process loan tapes in the later tranches.

THE COURT: Will you know by August 9th whether you're using the same protocol with respect to all the cases or not?

MR. SELENDY: We will try, your Honor. I think it may take us another week or possibly two weeks after that. We will do our level best to see if we can get that done. I think there is a fair amount of processing. My understanding is that the schedule we have provided to your Honor is as fast as we can do it to issue the actual samples, but it may be that we can run various tests on the data that's in the loan tapes to confirm similarity.

THE COURT: I don't think it is efficient to have this briefing before each of the defendants knows what protocol they are facing in their case. No defendant has standing to object to the protocol you're using in the UBS case except the UBS defendants. Only if there was one protocol that was going to be applied across the board and that was known on August 9th

does it make sense for all the defendants in the 16 cases to be heard.

Mr. Selendy, I'm going to ask you to work with Mr. Kasner, who will coordinate for the defendants -- I won't necessarily expect a motion on August 9th -- when you have your expert report on the sampling protocol with potential variations across the 16 cases. I think it might be informative to the defendants to see the variations. They may say that that is an additional argument for the insufficiency in the UBS case, that there is a dramatically different protocol used in the Merrill Lynch case.

MR. SELENDY: Just so I understand, your Honor, are you proposing that what we do is a single report that will address all of the cases and will note variability where it exists?

THE COURT: Yes.

MR. SELENDY: Then I will work with Mr. Kasner and our expert to determine the earliest date on which we could do that. Thank you.

THE COURT: Good. Ms. Shane?

MS. SHANE: Your Honor, may I ask that the level of specificity in that report, whenever it may come, be as detailed as it was for UBS in the sense that we start to have identification of the actual loans that will be at issue? That would permit us to start going out after loan files in a much

more targeted way.

THE COURT: I think the identification of the individual loan files is a separate issue, an important issue but a separate issue from the methodology. I'm not going to urge the identification to be done on a faster schedule than Mr. Selendy has now outlined.

MR. KASNER: Your Honor?

THE COURT: Mr. Kasner.

MR. KASNER: If it please the Court, I had two questions for the Court, one of which I believe my colleague Mr. Fumerton will raise, with respect to the forensic review, which I understood ordered on the telephonic conference that I was not able to make that day, be deferred in relation potentially to expert discovery which we seem to be transitioning into. I will leave that to Mr. Fumerton, who was on that call, if it would please the Court.

I would however inquire of the Court the following. As Mr. Fumerton explained, the nature of a potential Daubert challenge in theory to plaintiff's expert's methodology will vary depending upon the nature of the breach, the severity of the breach, precisely what it is they are claiming is breached. A margin of error of 10 percent either way, as my friend from Fumerton explained to the Court, will impact review potentially under Daubert.

I understood from Mr. Selendy to the Court earlier

that it will take him until March of 2013 to reunderwrite the loans notwithstanding that there is at least a 20 percent overlap between the loans that were in the forensic review and the loans that are in the sample. Presumably at least that is the 20 percent of the loans. They have a sense of what the breach is that they are contending exists here.

I would encourage the Court to please rethink whether it is appropriate for us to respond in a Daubert context without at least knowing what are the breaches that the plaintiff is contending, as opposed to addressing hypothetical methodologies under Daubert that in a particular factual context may or may not be appropriate in terms of your Honor's gatekeeping function.

THE COURT: Thank you, Mr. Kasner. I'm going to just assume everyone thinks the objections made by Mr. Fumerton and Mr. Kasner are precisely what they would like to say.

MR. BENNETT: I have a question actually as well, your Honor. Ed Bennett from Williams & Connolly for Bank of America and Merrill Lynch. Is the intention here, your Honor, to issue an advisory opinion so they can adjust fire going forward and change their expert opinions or expert methodologies after the Court rules, or, if the Court rules upon these motions that they don't pass the muster of Daubert, are they done?

THE COURT: No, they are not done.

MR. BENNETT: We would object to that as well, your

Honor, under the federal rules and the constitutional issues we briefed earlier in December.

THE COURT: Good. No, I don't issue advisory opinions.

MR. CLARY: May I ask a question, your Honor?

THE COURT: Yes.

MR. CLARY: Richard Clary from Cravath for Credit Suisse. As I understood what your Honor said most recently --

THE COURT: As opposed to?

MR. CLARY: Earlier in this hearing.

THE COURT: Yes, or in June.

MR. CLARY: At the very end of your discussion with Ms. Shane, if I understood correctly, your Honor, those of us, for instance, in Credit Suisse we may or may not have the actual identification of the loans in the sample at the time we are supposed to be raising a Daubert challenge. We have the methodology in the abstract of how we would pick them. I'm assuming that would mean we would know how many loans would be picked but we wouldn't know which loans.

Does that mean, your Honor, that subsequently we will have follow-on Daubert motions if we conclude that the loans identified by the plaintiff don't actually meet the criteria that they say they are going to meet if they haven't already picked them? Do you understand my question? Perhaps I was not clear.

THE COURT: Will there be follow-on Daubert motion practice? No doubt there will. There are motions in limine scheduled for each tranche, if I remember correctly. Thank you.

MR. FUMERTON: Your Honor, may I be heard?

THE COURT: Mr. Fumerton.

MR. FUMERTON: On behalf of UBS, we are still operating in the dark here. It's been three months. Plaintiff hasn't identified a single loan. What we would ask is that with respect to --

THE COURT: Wait one minute. They last Friday identified something like 2200 loans, I think.

MR. FUMERTON: That's correct, loans that will constitute the sample. But they still haven't identified a single loan they claim is defective or the manner in which it is defective.

Now we know there is an overlap. This is an overlap. They have alleged the forensic review in the complaint of over a thousand loans. We know there is an overlap with respect to three securitizations of approximately 20 percent. They have that information. Mr. Selendy says they need to go reunder-write a loan. They already reunderwrote that loan. They have alleged it in the complaint.

We think the plaintiff should, at a minimum, be ordered with respect to those overlapping loans to disclose the

loans they claim are defective and the manner in which they are defective separate and apart from the overlap. We still think we are entitled to the results of the forensic review alleged in the complaint. We think we are entitled to discover the methodologies that plaintiff used in that forensic review to survive a threshold motion practice.

Now that we know that there is an overlap, that information is even more relevant. Imagine if in one of the overlapping loans plaintiff flip-flopped, so for purposes of forensic review in the amended complaint they allege it was defective, now they allege it's not, or vice versa. This is all fertile information for cross-examination. They have either waived the privilege or not. We think it is clear under applicable case law that by putting it at issue in the complaint, they have waived it. We are aware of no authority which would enable them to sit on that information which plainly discoverable in this case.

THE COURT: Thank you, Mr. Fumerton.

MR. FUMERTON: Thank you.

THE COURT: Let's talk a little bit about the schedule here. Mr. Selendy, I understood you to be saying that when you had the underwriting guidelines which I'm going to assume are being gathered now and certainly would be produced by September 30th, and the loan files, that you could begin your reunder-writing process, that you could do that, in terms of staffing,

roughly at a rate of 4 to 5,000 loans per month, and that there are 2,200 loans in the UBS case that your sampling protocol has identified. Do I understand that correctly?

MR. SELENDY: That's correct, your Honor. As I mentioned, because of the project of mapping guidelines against the loans, I can't take the 4 to 5,000 rate and say it would only be two weeks for UBS. What I understand from talking with our experts is that it will take approximately three to four months, once we have an agreed-upon sample and the guidelines and the loan files to build the process, to reunderwrite all the loans, to write up the results, have them validated by our testifying expert, and have them available in a report. In other words, if we have an agreed-upon sample that has survived whatever challenges defendants may raise and we have the applicable guidelines and loan files, from that point forward we would estimate somewhere between three and four months.

We had suggested March 15th because that was consistent with the Court's prior schedule for expert reports in the UBS action.

THE COURT: I would like you to talk to Mr. Fumerton or Mr. Kasner, whoever is the lead attorney on this, about a schedule for that portion of the process and the exchange of expert reports. What I'm thinking about is a Daubert decision. Hopefully, I'm going to have briefing complete sometime in September. It might not happen, I understand that.

I'm thinking about after I rule on the Daubert motion -- again, counsel should talk about this with each other -- something like two months for the UBS expert report and something like six weeks for their responsive report. I want you to have a discussion with each other because you understand this in a way that I don't, obviously.

MR. KASNER: Thank you, your Honor. We will talk to Mr. Selendy, of course.

By way of example and with respect to illustrating the difficulties we believe in what your Honor is proposing -- I know I have beaten a dead horse about the early Daubert motion. Now I'm going to shift gears a little bit to the difficulty of not having complete fact discovery to provide an expert report to address what they put in.

If your Honor contemplates a Daubert decision, quote-unquote, hypothetically in October, just hypothetically -- and I wouldn't presume to suggest what the Court intends by way of the schedule -- November, December, we get an expert report in December, the FHFA identifies the bases I guess finally in December, the bases on which they are contending this loan was breached for that reason, and this breaches that representation, we then need to sit down and have Mr. Fumerton explain to the Court and decide what are the nature of the breaches and what discovery do we need to take.

If they don't give that to us until December and then

your Honor contemplates six weeks, we have to determine if there is additional document discovery that we need, we have to depose people that may be relevant for the expert to evaluate it. We are entitled under the rules for our expert to have an opportunity to consider the discovery record that we are making. It really is putting UBS in an impossible, impossible position in a way that it cannot adequately defend itself.

I would urge the Court to consider a schedule where the FHFA puts their expert report in whenever they say they are ready to do it, with reasonable time for us to take fact discovery. Then, as in every other case, once fact discovery is concluded, we have an opportunity to do expert discovery and expert reports in the orderly course.

Your Honor, that is the nature of scheduling that the Court is familiar with in garden variety breach of contract cases which barely make the threshold for diversity in this court. We are facing a multibillion dollar exposure in this case.

Your Honor heard, and your Honor will hear a lot over the course of the next months, I promise you, there is an effort on the part of the Fannie and Freddie to run the clock on the discovery schedule. By that I mean everything gets backloaded, nothing happens quickly, in the hopes that by the end of the year we're done. So, on the issue of the notice, your Honor --

THE COURT: Mr. Kasner, if I was going to point fingers in that direction, I wouldn't be pointing my fingers at the first table.

MR. KASNER: Your Honor, with respect, we are moving heaven and earth. If your Honor wishes to come to 4 Times Square, I assure you day and night we are working round the clock to produce whatever we have. I advised the Court at the beginning of this case, when your Honor selected the UBS case --

THE COURT: Mr. Kasner, we have so much to do.

MR. KASNER: I know. But we weren't the loan originator, your Honor. We have given over everything we have. The government -- Fannie, Freddie -- GSE, excuse me, waited months knowing that they needed consents on loan files to send out those consents. It was only after we had to pressure them to do it.

I apologize, your Honor. But really, with all due respect, we are entitled to be able to defend the expert report on a fully developed factual record. Six weeks simply isn't enough.

THE COURT: Actually, I'm not quite sure that that's what is at stake here. To the extent that you're attacking the findings on the application of the sampling protocol concerning the misrepresentations, I'm not sure you need fact discovery for that. No doubt you're going to have expert reports on many

different topics, some of which are more responsive to the fact record as it gets developed in January and February.

In any event, I know you're going to talk with Mr. Selendy about the schedule and make a proposal.

MR. KASNER: Thank you, your Honor.

MR. SELENDY: May I, your Honor, very briefly? I don't want to presume to tell Mr. Kasner how to defend his case, but in other cases, once the sample is identified, it would be incredible to me if defendants were not working to examine those loans and do any reunderwriting they wished to do before our expert puts in his report on that. Mr. Kasner will have eight months to do that.

MR. KASNER: Your Honor, for the record, we don't have the loan files. We can't do a reunderwriting. We don't have all the loan files, your Honor.

THE COURT: Thank you.

Since I have clearly not achieved my goal of giving happy news to the defendants on the first topic, let's turn to another one and see how we do. I have submissions about whether or not the defendants should be able to get discovery from the plaintiff and its constituent parts of document custodians in the single- and multifamily business portion of their enterprises.

Right now I understand that consultation among the parties has resulted in an agreement that FHFA will produce

documents from 81 document custodians, and the issue is whether or not they produce documents from an additional 164 custodians. The plaintiff represents that it will be producing, quote, upwards of 1.7 million, closed quote, documents.

The parties presented me with a lot of attachments to their letters, and these included policy statements from Fannie Mae or Freddie Mac, internal investigation report, documents more in the nature of an annual report, documents from this litigation and that litigation, emails, lots of different kinds of documents. The defendant had highlighted certain pages and portions of these materials.

Preliminarily, before I give defense counsel an opportunity to be heard, I am not going to require that the plaintiff produce electronic discovery from the additional custodians, 164, in these other lines of business. I have many reasons for that decision. I don't know if, Mr. Kasner, you wanted to be heard on this or someone else from your team.

MR. KASNER: If it please the Court, my partner Joe Sacca would present arguments as to why we disagree with the Court's tentative conclusion.

MR. SACCA: Your Honor, Joseph Sacca from Skadden Arps for UBS.

First of all, let me say that I think perhaps there is a misunderstanding about the number of custodians that has been

bandied about and whether they are tied directly to the issue of discovery into areas outside of the particular securitizations at issue in this case.

Across the 17 cases, your Honor, defendants have proposed a number of additional custodians to the FHFA. Many of those are people that we know were directly involved in the securitizations at issue on our case. For example, for UBS, we asked the FHFA to add a number of custodians who dealt with UBS on these particular securitizations. They have declined in many instances. They have given us, quite frankly, no reasoned explanation for why we can't have the files of people that dealt with us on this particular securitization search.

Your Honor, the question is not if we are allowed to inquire outside the particular people who dealt with these securitizations, will that require 164 additional custodians. That is not the case, your Honor.

Let me be absolutely clear here. We are interested in the quality of the discovery we get, not the quantity of the discovery we get. We are not interested in increasing the number of custodians. We are interested in making sure we are looking in the files of the appropriate people, people who will have information that will allow us to defend ourselves in this case.

We are not interested in the strict number of documents the FHFA produces. If they produce 1.7 million

documents to us, your Honor, or 17 million documents to us, if those documents don't contain the facts that we need to defend ourselves, they are useless to us.

What we did here, your Honor, as the parties had agreed back at the time we put in our rule 26 report, we served a 30(b)(6) notice on the FHFA. What we wanted to do was take discovery of them to find out how their different groups worked together, how they were integrated, what information was shared with whom. We were met with objections.

I will note, your Honor, for the record that late last week the FHFA served UBS with a 30(b)(6) notice seeking the same type of information that they are now saying we are not entitled to from them. If I might, your Honor, this is just an example.

Topic 17 of the 30(b)(6) notice they served on us asked for the sources of your, and "your" is each UBS defendant, sources of your knowledge prior to each securitization concerning the underwriting practices, policies, and procedures of the originators of the mortgage loans to be included in that securitization, including but not limited to prior business relationships or deals with the originator and the identity of your employees who communicated with the originators.

Your Honor, they are asking us for information about what UBS knew about the originators who originated loans in our

securitizations but not the particular loans in our securitizations. That is much of what we want from them, your Honor. In the mortgage industry, aside from the originators themselves, Fannie and Freddie knew more and were more deeply involved with loan originators than anybody.

Mr. Selendy mentioned earlier today, and it's all over their complaint, this contention they have that loan originators systemically abandoned their origination guidelines not with respect to the particular loans in our case, but in general systemically abandoned their guidelines.

We know Fannie and Freddie, your Honor, conducted operational reviews of loan originators. We know Fannie and Freddie created documents called originator scorecards, where they graded, as we understand it, how originators were doing complying with their guidelines.

Under the FHFA's position here, if they conducted an operational review of an originator who had loans in one of the UBS securitizations, if they took the results of that operational review, and let's say it concluded that this particular originator had abandoned its origination guidelines, we know that Fannie and Freddie each had high-level committees that were designated, designed to be bridges between the PLS business and the single-family business to facilitate the flow of information back and forth, including information, for example, about originators.

Hypothetically, if Fannie conducted an operational review of an originator and that originator had loans in the UBS securitizations, Fannie concluded that that originator had systemically abandoned its origination guidelines, that report gets communicated to the Fannie private label advisory team which had on it a representative of the single-family business. We will never seen that unless that report happened to get passed on and ends up in the email of the trader who bought the particular UBS Securities.

We think that is far, far, far too narrow a construct of discovery and will prevent us from raising important issues in this case, such as what knowledge triggered the running of the statute of limitations.

There are fraud defendants who I know would like to speak with your Honor and block out some particular documents who have reasonable reliance issues that they need to explore. There is the issue of the knowledge defense under section 11 and the plaintiff's affirmative need to prove an absence of knowledge under their section 12. There are issues of what was material to the FHFA, your Honor, that all relate to issues like what did they know about loan originations. We are going to be, under their objection, deprived of all of that information.

Your Honor, I'd like to take a step back to what brought us here today, which is our 30(b)(6) notice. What we

wanted to do and accomplish through our 30(b)(6) deposition was to build a factual record that would demonstrate how information flowed, where it went, what the nature of the information was. The FHFA refused to give us that.

We served our 30(b)(6) notice on June 28th seeking a deposition on July 12th. We received objections. Then, about a month after we had served our 30(b)(6) notice, we got a written response to our 30(b)(6) notice. We got a narrative response, which is something that FHFA decided unilaterally they were going to provide. They didn't want a witness. They said, we are going to give you a writing and in that writing we are going to explain to you how we were structured and how information flowed.

Your Honor, quite frankly, that writing raises more questions than it answers. The effort that went into educating the lawyers to create this narrative could easily have gone into educating a witness to sit for a deposition. That would have allowed us to build the kind of factual record we think we need to put before your Honor before you can properly rule on the scope of permissible discovery in this case, which is something we are very much anxious to do.

Your Honor, I'd like to highlight a couple of things from this written response and the information that we have been able to develop outside of the formal discovery process which we think at minimum warrants our ability to take a

30(b)(6) deposition to further inquire into some of these very, very, very important issues to us.

Your Honor, I alluded to it before. Both Fannie and Freddie had senior-level committees that were designed to bridge their single-family and PLS businesses. We submitted a small packet of demonstratives to you. I think we also shared it with FHFA's counsel earlier.

I'd like to draw your attention, your Honor, to the third one, which is a little chart here, which illustrates graphically the input that the Fannie Mae single-family business had on the private label advisory team, which then in turn both received from and provided information to the capital markets group, which is the group that was responsible for making these investments.

What we do know, your Honor, from what the FHFA has told us is that information flowed from single-family to capital markets. What they haven't disclosed yet and what we very much need to see is what the nature of that information was. They have said that they had some policies in place that prevented information flow, but they were not absolute. We know that.

The policies appeared to us to be quite limited to loan-level information and pool-level information primarily that couldn't be shared between single-family and the PLS business. But that does not mean, for example, that

information gathered during an operational review of an originator couldn't be shared. We think that in fact could be shared.

Your Honor, on the Freddie side, page 9 of the handout that you have --

THE COURT: Excuse me. With respect to page 3, I'm trying to understand from the source, is this demonstrative something that you prepared from narrative information?

MR. SACCA: Yes, your Honor. I'm sorry. I should have called your attention to that before. There is a note on the bottom right corner of the page that tells you what the source of this is. It's information that they gave us in the narrative response to the 30(b)(6) and one document, private label security's risk policy, which is in the binder of information that we submitted to your Honor.

THE COURT: You created the diagram based on that description?

MR. SACCA: Yes.

THE COURT: Thank you.

MR. SACCA: I'm sorry, your Honor. The quotes are Fannie's language.

THE COURT: Yes.

MR. SACCA: But the diagram was created by the defense side. Your Honor, page 9 are some selected quotes of Freddie Mac's special litigation committee in a derivative litigation

against the company that talks about the company's enterprise risk management committee, which is apparently an analog to the private label advisory team on the Fannie Mae side. This, in terms of Freddie's business, you will see from the quote, was created for the purpose of the different business areas meeting to share information with each other. Your Honor, what we need to know, of course, is the precise nature of that.

But we do know that the highest levels of the company were sharing information across the private label securities business and the single-family business, and this information was obviously making its way somehow into the decisions of what securities to purchase.

I'd like to call your attention to two brief issues, and this is just by way of example of things that are in the FHFA's narrative that certainly warrant further inquiry, seem inaccurate to us, your Honor, and we certainly need the opportunity to look into further.

Page 14 of the FHFA's second amended objections and responses to our Rule 30(b)(6) notice, which I hope your Honor will be able to find in the packet of documents we gave you, behind tab number 2 under the larger tab 30(b)(6).

THE COURT: I'm not sure I'm in the right binder. I have a Freddie Mac portion and a Fannie Mae.

MR. SACCA: Before the Freddie Mac portion, your Honor, I think is a smaller 30(b)(6) portion.

MR. KASNER: If it please the Court, I can provide one to your Honor.

THE COURT: No, I have this. Thank you, Mr. Kasner. Which tab?

MR. SACCA: Tab 2 behind the 30(b)(6) tab.

THE COURT: Yes.

MR. SACCA: Is plaintiff's second amended objection and responses to our 30(b)(6) notice. On page 14 of that, your Honor, the first full paragraph speaks about the single-family counterparty risk management department within Fannie Mae. That was the department that was represented, that single-family representative on the advisory team.

There is a sentence here, the third sentence of the paragraph, which says, "Pursuant to the PLS risk policy, the vice president of single-family counterparty risk management also was responsible for ensuring that the whole-loan purchase counterparty reviews are performed independently from PLS counterparty reviews to avoid information sharing risk."

As best we understand it, your Honor, what they are describing there are these operational reviews of loan originators. What they have told us here is that the single-family's operational reviews were somehow maintained separate and distinct from the private label securities operational reviews. But, your Honor, we have strong reason to believe that that is not true, at least in all cases.

If you look behind the Freddie Mac tab, your Honor, at tab 6, there is a declaration of Cynthia Simantel.

THE COURT: S-I-M-A-N-T-E-L.

MR. SACCA: Yes. Ms. Simantel was a Countrywide executive, a loan originating executive. In here, and I'm particularly looking at paragraph 4, your Honor.

MR. SCHIRTZER: Your Honor, if I may interrupt, when we received the documents last night, we did not get the Simantel declaration. Is there a copy perhaps?

THE COURT: I think the same declaration is in the Fannie Mae section, too.

MR. SCHIRTZER: I don't think we got it there either, your Honor.

MR. SACCA: Your Honor, paragraph 4 of that declaration talks about these annual audits conducted by the GSEs and at least one instance where Fannie Mae was trying to simultaneously and in close proximity schedule an audit by their single-family side and an audit by their private label side, and at Countrywide's request combined them.

If you look at Exhibit A to Ms. Simantel's declaration, there is an email from Patricia Wolf at Fannie Mae to Ms. Simantel and others at Countrywide where she says, "Cindy, these reviews are related and should be tied together. Thanks." So we know, your Honor, that at least on this one occasion, I wouldn't be surprised if there were more, but at

least on this one occasion the PLS and single-family originator reviews were said by Fannie Mae to be related to each other and tied together.

Looking back now, your Honor, at the responses to the 30(b)(6) deposition, on page 25, and this is addressing the Freddie Mac side now, your Honor, there is a description of a Freddie Mac information request. What it says here is that individuals responsible for making purchasing or sales decisions regarding private label securities were restricted from receiving certain information regarding single-family loan originators pursuant to Freddie Mac's information wall policy. There is a citation to policy 7-115.

That document, your Honor, was submitted by the FHFA. It is at tab 11 of their submission. That submission, your Honor, at least reading it on its face, appears applicable only to Freddie Mac employees trading in Freddie Mac's own securities, not to traders in private label securities. So, this does not appear to support what we were told in the narrative response to our 30(b)(6) deposition that this information policy prevented Freddie Mac from --

THE COURT: I have Exhibit 11 before me. If you could repeat the statement you just made.

MR. SACCA: Certainly, your Honor. It is titled "Information Wall Policy." You can look in a couple of places, but at the tail end of the first paragraph, it says, "This

policy prohibits using or the possibility that others may perceive that we are using material nonpublic information regarding Freddie Mac's mortgage and the purchase and sale of those securities and secondary market transactions."

On the second page, under Roman numeral II, "Who are restricted persons and how can I be sure I know the current list? A restricted person is defined as someone whose job responsibilities include purchasing and selling Freddie Mac's mortgage securities in the secondary market." So this policy does not appear, at least on its face, applicable to private label securities transactions.

All to the point, your Honor, that we have reason to believe, based on the information we put before you -- I know others want to address this, and I don't want to take that opportunity from them -- that there was substantial information shared within both Fannie and Freddie of information between the single-family side of the business that bought loans from loan originators and therefore dealt with loan originators literally many times a day, and the private label securities side of the business that was buying securities backed by loans issued by many of those same originators.

We have strong reason to believe that the information that was exchanged included information about those originators, how they were doing with regard to their origination practices, and that information we think

necessarily would have had to factor into the decisions to invest in private label securities.

That is why we wanted to take the 30(b)(6) deposition, your Honor, so that we could develop that record for you more fully, to come before you at the appropriate time to argue about what the proper scope of discovery is in this case. We believe that it is manifestly proper to take discovery beyond that of the particular people involved in these particular securitizations because we think they were getting information, at least their superiors were getting very relevant information, from outside the PLS business, from the single-family business. But we need to develop that better for you.

We have done, I think, the best we can with the limited public record available to us. The best source of this information would be from the FHFA itself. I think they have already sort of conceded that by giving us this narrative. The problem is that the narrative is not subject to cross-examination, it is as yet unsworn, and it really answers questions that they chose to pose.

We chose not to, your Honor, serve a deposition on written questions or interrogatories. We chose to serve a 30(b)(6) deposition because we think from prior conferences your Honor is in agreement with us that that is the most efficient way to get at information like this.

THE COURT: I have an application on July 30th from

the plaintiff that the defendants not be able to redepose, as I understood it, a 30(b)(6) deponent on topics 1, 2, 10, and 11. That's it.

MR. SCHIRTZER: That is a different issue, your Honor.

THE COURT: OK.

MR. SACCA: Your Honor, topics 1, 2, 10, and 11 dealt with document preservation or destruction policies and document maintenance, not this issue.

THE COURT: With respect to this issue, I understood it was not a 30(b)(6) issue, it was an identification of the document custodians and whether or not the defendants would be able to obtain electronic discovery from document custodians in the single- and multifamily business portion of the GSEs.

MR. SCHIRTZER: Your Honor, it is all three issues. It is in part an issue of whether we have designated the proper custodians, it is in part an issue of the scope of documents to be produced and specifically whether documents that were purely or solely on single-family and multifamily side need to be produced. Then there is the issue of the defendants' request for 30(b)(6) witnesses to go into custodial issues. So is all three issues, your Honor.

THE COURT: This is Mr. Schirtzer speaking.

MR. SCHIRTZER: Yes, your Honor.

THE COURT: Before I hear from the plaintiff, is there any other defense witness who has some additional point to make

on these topics, or defense attorney?

MS. SHANE: Thank you, your Honor, very much. I'll be brief.

I think Mr. Sacca rightly expressed the actual procedural posture we are in. There has been an exchange of requests both ways for additional custodians for various reasons. The defense has added as many custodians or more than the plaintiff has. We have much bigger numbers of custodians than they have. That is what we were trying to get at with the 30(b)(6) and with other modest discovery devices, among other things.

But it is correct that the 30(b)(6) is what we most feel we need in order to properly streamline discovery, your Honor, not to expand it, but to direct it at the places where we most likely will find a very critical crossover kind of information.

The comments that we have put in front of you, the ones we have been able to amass, and some of the helpful answers that have been given in response to the 30(b)(6), albeit in written form, have pointed us to some very low-hanging fruit. There were these committees. They had minutes. They received reports. They met monthly. From what we are able to tell so far, all of that would be extremely easy material to produce.

What scares us, your Honor, and the reason we feel we

need to further develop this, is because what the plaintiff keeps articulating as the standard by which it will judge not just the naming of custodians but the production of information and documents, the provision of names of people at the agencies or entities that dealt with the originators, it's all according to this filter that if it didn't make it to the person who decided to invest in the particular securitizations at issue, persons we haven't yet had identified to us, but that small subset, or the subset of people who happened to report to those people, not to whom those people reported, then we will never see that information.

The relevance standard both for purposes of identifying these people and for answering interrogatories and for producing documents someday is one in which only the very lowest level of information appears to be coming our way.

They have now named as custodians some of these cross-over people at higher levels, not nearly as many as we would expect to see. There are people who have responsibility for both divisions who still aren't on their list and who were in this critical risk management function who still aren't on their list.

We understand that even if they get named as custodians, we have this relevance fight that has to do with whether it made it to the decision-maker or someone who reported to that decision-maker. That is what causes us to

continue to feel that it is very, very important that we all understand what the information is, how it flowed, and therefore what would be reasonable ways to cut off the discovery.

I will add that in addition to low-hanging fruit, there are pieces of paper that we have found that suggest that there were lower-level communications that we might well need to try to find a way to efficiently explore, your Honor, in the packet of demonstratives that your Honor has. They are in addition to the joint reviews. We also have some email that may be a little bit hard to decipher. This is number 6 in your packet.

(Continued on next page)

MS. SHANE: But it reads -- I am sorry. It's from a Tony Holmes at Fannie Mae who we believe to be on the Single Family side to a Chase representative who was dealing in whole loans at the time. But what Fannie's person said was:

As I mentioned earlier, we have an axe for this product as either whole loans or securities. Our whole loan bid reflects our intercoupon spread multiples, depending on your internal excess servicing multiples you may find an MBS execution superior. If so, we're interested in bidding on your pools once more. Please keep us in mind if you choose to securitize this product.

So the same loan pools could have been taken by Fannie and Fannie was interested in taking them either as whole loan purchases on the Single Family side or in a PLS product that ultimately becomes at issue in this litigation. And so we would hope to be able to develop again by way of 30(B)(6) in the first instance a way to get at those people who were on the Single Family side who did, in fact, look at products or whole loan opportunities for purposes of both whole loan and PLS and may therefore have gotten even down to the whole level reviews, your Honor, that could be sufficient to put the GSEs on notice with respect to the particular defects.

There are documents in your packet, your Honor, that reflect that they were doing loan level reviews of those portfolios so that it would not necessarily only lead to the

idea that they had a cleared idea that certain originators might not have been performing under to their own standards and have made them frivolous. But even the particular loans in the pools did not need one verification or other and they were getting to that level.

Thank you, your Honor.

MR. BENNETT: Ted Bennett, from Williams & Connolly, for Bank of America and Merrill Lynch.

Hopefully, not to repeat anything that was covered by the able presentation by counsel for UBS and for J.P. Morgan, but I think it's important to emphasize that it's clearly premature for the Court to rule at this point that we should be foreclosed from taking this discovery for a couple of reasons.

First of all, although FIFA has provided us with certain organizational charts for Fannie and Freddie, there are a couple of drawbacks to those charts. First of all, they don't cover the entire relevant period. But more particularly, they don't cover all of the relevant areas. We've asked several times for new charts. They have not been forthcoming.

And secondly, your Honor, although FIFA has provided certain policies relating to the sharing of information across functions, what they call a cross functional sharing or cross functional processes, those too are mostly dated 2006/2007, the latter half of relevant period. We simply don't have the policies that were in effect at the beginning and prior to the

relevant period.

But more to the point, your Honor, it's important to understand that the intimate relationship that Fannie and Freddie had with the originators, the very originators who are at issue in this case and who plaintiffs claim had utterly abandoned their underwriting guidelines.

Taking just one originator who is at issues in several of the cases, Countrywide, Countrywide sold Fannie and Freddie during the relevant period 11.1 trillion dollars -- trillion with a "T" -- worth of mortgages. In fact, during that period Fannie originated more than five thousand of its own securities that were 100 percent made up of Countrywide originated loans. Fannie and Freddie had people who were on campus at Countrywide daily.

I commend your Honor to the declaration of Ms. Simentel who was referenced earlier. She's a long time Countrywide employee. She goes into some detail in her declaration about these meetings, annual reviews, where they came in for to and a half days and GSEs and looked at loan levels, looked at performance, looked at procedure, looked not just at policies that were in place but, actually, looked to see how Countrywide was doing. And we know they did it not just to Countrywide because if your Honor looks into the e-mail that was referenced earlier attached to Ms. Simentel's declaration, you'll see that just on that single trip they were

also visiting other originators on the West coast who are at issue in this case and some originators on the East coast who are also at issue in the case. We know further from the documents that have been introduced in the last few weeks, last few days, rather, by FIFA, that Fannie and Freddie were required by policy to do reviews of originators to whom the GSE has had certain levels of exposure. So we know they were doing these review. We know further from Ms. Simentel's recounting of it how closely involved these reviews were with the very practices that FIFA now complains about.

For example, your Honor, she mentions in her declaration that they would look at loans that had been purchased by Fannie or Freddie either as whole loans or as part of securitizations. And at times they discovered that the occupant didn't actually occupy the property and that led to a discussion with Fannie and Freddie's representatives about whether the loan had, nonetheless, been prudently underwritten because at the time the originators and Fannie and Freddie had an understanding that if the originator had done a pretty good job of following the practice in the industry at the time that the loan was prudently underwritten and it didn't need to repurchase the loan from Fannie and Freddie even if it was an occupancy misrep.

Also mentioned in Ms. Simentel's declaration are issues relating to LTD and issues relating to how the

underwriting guidelines were being practiced. So it's not hypothetical exercise of maybe Fannie and Freddie knew those things. We know they knew these things. And we know they knew them not just on whole loan side but on the private label side. And we know that they shared information across either through the PLAT at Fannie or through Freddie's Enterprise Risk Management Committee.

We know all those things. And we know that they spotted issues with some of the originators. But we don't know because FIFA refuses to give us the discovery is what is in the files of people who did those reviews. Now FIFA argues --

THE COURT: What do you mean? Which people who did what reviews?

MR. BENNETT: The people at Fannie who did the reviews of the originator.

THE COURT: On the Single Family side?

MR. BENNETT: Yes, your Honor. I'm not sure we have it from the people who did it on the PLS side as well. Certainly, the people who are mentioned in Ms. Simentel's declaration mentioned in the e-mail, a couple of those are custodians. The vast majority are not. We simply don't know whether we'll ever see those people's documents.

But, your Honor, imagine a document in the files of a whole loan person at Fannie that says Option One is a den of thieves. Nobody should ever buy a mortgage from Option One.

According to the way FIFA sees it we should never get that document. Even if it flowed to the PLS but didn't somehow end up -- PLAT, even if it flowed to the PLAT but didn't somehow end up in the files of one of the few custodians they've named at Fannie. So we know that if it ended up in the files of someone at Freddie that there's a very good chance that it was destroyed because they have a random document destruction issue at Freddie. So what we need to do is cast a wider net to go look at the files of people on the Whole Loan side and see what documents are there because we simply can't trust the production on just the PLS side to pick all of those documents out, even the ones that were communicated.

Now, your Honor I have been framing this all on terms on the way FIFA argues the law --

THE COURT: You don't need to address that.

MR. BENNETT: You'd like me not to address the law, your Honor?

THE COURT: Mr. Williams, thank you. I said you didn't need to address that.

MR. BENNETT: Case. Would you like me to address other causes we've cited, your Honor? We've cited the Norbank case and also the Davison Pike case which are also extremely informative on the issue of justifiable reliance which of course is the burden of the plaintiffs to prove. And these documents even if they weren't in the hands of people who made

the decisions on the loans are critical to the issues of justifiable reliance which is the plaintiff's to prove. I'd be happy to address that, your Honor, if your Honor would like.

THE COURT: I don't think I need that right this month. Thank you so much, Mr. Williams, for that offer.

MR. BENNETT: The last thing I would venture, your Honor, there's been a number of years that have passed, more than eight years have passed since these loans are originated. We heard today about how the loan files have gone many different places. Well, there's been tremendous turnover within the GSEs as well. There's been turnover. There's been document destruction for a number of years. We would urge the Court in light of those facts to cast as broad a net for discovery as possible, at least to allow us the 30(B)(6) we need to identify the custodians and beyond that to allow us to explore these documents that are relevant for not just the knowledge defendants under Section 11 and plaintiff's burden of proving knowledge, no knowledge under Section 12 or also justifiable reliance under the D.C. Blue Sky law and the plaintiff's broad claims to bring against a number of the defendant's here, your Honor. Thank you.

THE COURT: Is it, Mr. Sacca?

MR. SACCA: Yes, your Honor.

THE COURT: Mr. Sacca, I just am still trying to figure out the precise issues that you need a decision on

today. And I had spent some time with the parties' submissions which through my fault entirely were limited in number of pages. You want a 30(B)(6) deposition?

MR. SACCA: I think, your Honor, the crucial issue that we would like resolved today is whether we are entitled to a 30(B)(6) to inquire further into these issues of what information -- your Honor, just begging your indulgence, page 10 in the slides I think will give your Honor maybe a better sense than I did initially of exactly how all of this works. This is a blow-up, your Honor, of a Freddie Mac organization chart that is in whole in the binder. But what we're trying to intend to show you by this part that we've pulled out and highlighted the reporting lines on, your Honor, is that both of these businesses, Single Family and PLS, are in the same reporting -- to an executive one below Freddie Mac's chairman and CEO.

Your Honor, these businesses both reported to the same -- executive. It was executives at the highest levels of these companies that were both making the decisions to invest in private label securities and that were responsible for the Single Family side of the business. Information we know from both of those businesses went to those people who are sharing. What we need to look into and what we want the 30(B)(6) for is to figure out exactly what that information was so that we could come to your Honor on a more fully developed record to

talk about the appropriate scope of which custodians we should search and for what.

I'm sorry, your Honor. I know that was a very long answer to you are question.

THE COURT: And with respect to the 30(B)(6) request, which once of the 30(B)(6) were you denied -- I know there have been 30(B)(6) depositions.

MR. SACCA: Yes.

THE COURT: So which specific items that are subject to your 30(B)(6) demand do you want to take a deposition for?

MR. SACCA: Items three -- three is probably the principle one, your Honor. That's the one that we have the narrative and response to. I think -- right -- all of the topics I guess, your Honor, the easiest way to say it is I guess all of the topics except one, two, ten and 11 which they've already provided testimony. And they all relate, your Honor, in one way or the other to this issue of flow of information and the information coming in to Fannie and Freddie.

THE COURT: So with respect to FHFA's July 30th letter in which they ask that there be no redeposition of a 30(B)(6) witness on topics one, two, ten and 11, you're consenting to that?

MR. SACCA: No, your Honor, we're not. But that's no this issue, I guess is the way I would answer that. And

Mr. Woll I think is prepared to address that separate and distinct issue, okay.

THE COURT: OK. Then I'll just put that aside. Your principally interested in Item Three.

MR. SACCA: Three I think is maybe the most significant of the topics.

THE COURT: Let me read that. It's on page 6 at Exhibit 2?

(Pause)

MR. SACCA: You are reading -- I am sorry, your Honor. It's Exhibit One to our submission is the 30(B)(6) notice itself.

THE COURT: I am reading the plaintiff's objections and responses to Defendant's Notice of Rule 30(B)(6) deposition. Let me see if I can get a date for you. Dated July 10th.

MR. SACCA: That would, I think, restate the topic, your Honor.

THE COURT: Okay. Thank you very much. That's helpful.

Mr. Schirtzer.

MR. SCHIRTZER: Your Honor, because the nature of defense presentation a lot of different points of information were thrown out, I am going to rather than try to respond point by point, try to put some structure on my response. And I am

glad we finally, actually, got to a specific discovery request because the reason that we have objected is because of the nature of the specific discovery request that have been thrown at us which I'm going to address in a moment.

But just as a place holder, a very substantial amount of what you heard from defense is simply based on the belief that we have not adequately done the job that we are required to do as counsel and that our client is required to do under the rules to identify proper custodians and that is manifestly false as I hope to demonstrate, your Honor.

So let's talk about the discovery requests themselves and there's a short little history here. This all started with the interrogatories that defendant served before they served any 30(B)(6) notice. And what they wanted in Interrogatory No. 3 was the identity of all persons employed by you or acting on your behalf who participated in, were involved in, approved or were responsible in any way for the GSE's relationships including his purchaser of loans with any mortgage are originator disclosed in the prospectus supplement for the securitizations. Please, specify which person had responsibility for which originators.

As I am sure your Honor understands, the fact that the originators were part of the securitization was not a limit on what they were asking for on Interrogatory No. 3. So, for example, if Countrywide was an originator on one of the

securitizations or Option was an originator one of the securitizations, then they literally wanted every person who ever interacted with Countrywide or with Option One including what responsibility they had with respect to Countrywide or Option One.

We said to them in enumerable meet and confers, this is way too broad. This is essentially our entire organization, however many thousands of people work at Freddie Mac and Fannie Mae other than the back office people and even some of them all have some kind of dealing with originators, the business we are in. So we asked them to narrow that interrogatory. And we told them that if they narrow that interrogatory we would be happy to answer. They refused to narrow the interrogatory. Instead, what they did was serve the 30(B)(6) notice. The 30(B)(6) notice was not much of an improvement on the interrogatory. Your Honor has already looked at Topic Three of the 30(B)(6) notice which has multiple subparts and, essentially, asks for much of the same information in Interrogatory No. 3.

Let's look at, if we may, Topic Four and Five of the 30(B)(6) notice which, if your Honor is still looking at the objections and responses, Topic Four is on page 25, the composition of each group.

THE COURT: Well, I have page 7 so.

MR. SCHIRTZER: I believe you are now looking at the

30(B)(6) notice themselves. So if you have Topic Four that's fine. The deposition of each group responsible for any aspect of your purchase or mortgage loans including your due diligence --

THE COURT: Slow down.

MR. SCHIRTZER: Your communications with mortgage loan originators, your pricing decisions, your monitoring of the performance of mortgage loans and your communications with any third parties including but not limited to operational reviews of third party in connection with a mortgage loans or your purchase of them from the time period January 2004 to September 2007.

And I won't read the entirety of Topic Five but it is similarly broad and similarly infirmed. And so we said to them again in innumerable meet and confer sessions that in essence what you are asking for is an identification of almost everybody who has any operational responsibilities at Freddie Mac or Fannie. And we have and we will identify the custodians who in any way touched on the what we call the private label securities business. And if they happen to be Single Family people who touched on the private label securities business, we will identify them as well and indeed we have.

Now we come to the misunderstanding part of defendant's presentation. I heard repeated references to the fact that there is a PLAT at Fannie Mae, a high level committee

and there is a corollary committee at Freddie Mac. Your Honor, we have designated as custodians 11 members of the PLAT and members of enterprise risk management at Freddie Mac. We have also identified -- and this is the handout that I've provided to the Court at the beginning of the day. We've given the identity, the title, the business unit and the responsibilities as they relate to PLS of the 82 custodians we have named. These custodians, your Honor -- and I assure you because I was very much involved in the process of identifying them -- these custodians cover the field of business responsibilities. They cover the field of the documents that the plaintiffs claim they ought to be getting, and indeed, many of which they will be getting, although, they don't seem to believe that.

Let me add two features that are particularly germane to why no more custodian -- let me take a step back.

So the reason we provided a written response to the 30(B)(6) notice as opposed to producing a witness was because it was a monumental effort on our part to try to gather all of the information just to respond to Topic No. 3 and to make sure it was accurate. It involved the efforts of many people of Quinn Emmanuel and many people the client end, phone calls, checks of computer records. It was a very substantial undertaking. And as I said to defendants again in meet and confers before we provided a written response, the written response, frankly, contained far more information than any

witness I could have put in a chair would have been able to offer on the subject of custodians. But at the end of the day the important thing to understand is that the 30(B)(6) topics on which they now seek to compel a witness are solely to identify additional custodians. That is why they want to take these 30(B)(6) depos because they believe the 81 custodians we have named to date are not enough and they want more of their list of 164 custodians to be added to the list.

And, your Honor, we submitted as part of our submission the various letters that we got from defendants as to the reasons why these additional 164 custodians were supposedly proper.

Let's talk about UBS since their counsel stood up. In many instances what UBS told us with respect to their proposed additional custodians was, essentially, that they had looked at our organizational chart and that these custodians corresponded to a functional bucket that they believed would have relevant information.

Notwithstanding, the paucity of that justification for additional custodians, we took each and every name and fully vetted them with the client, with in-house counsel, with the people working in the business units to identify whether these people were or were not proper custodians. And as a result we have added an additional 17 custodians and we are still considering adding more custodians because some of these

letters came in quite recently. But the bottom line, your Honor, is that as I hope the handout I've provided demonstrates, the custodians we have named do cover every essential function, including the functions that defendants were talking about just moments ago. The PLAT is covered. Enterprise Risk Management is covered. The operational -- sorry -- the reviews of seller services. The people who sat above that task are covered.

Indeed, your Honor, there's another fact which defendants don't seem to have taken from our written response which is critically important and it has to do with the way documents are maintained at Freddie and Fannie Mae. At Freddie Mac people have access to directories. And depending upon what business unit you're in, you have access to directories in that unit. But the higher up the chain you go, the more directories you have access to.

So when we designate for them Don Bisenius who is a very senior executive.

THE COURT: Can you spell that?

MR. SCHIRTZER: B-I-S-E-N-I-U-S. He was the Senior Vice President of Credit Policy and Portfolio Management.

He had as a result of his position, access to everything in Single Family control and Single Family credit and the entire counter-party credit risk directory. We name Patty Cook, also a very senior executive. She had access to an

extraordinary amount of information. So when I say that these custodians covered the field, they will, in fact, capture all of the types of documents that defendants say they know are out there and demand to see.

And just as an example, I asked the clients to provide me with a list of the sorts of documents that are already being captured. I am sorry. Let me go back. Fannie Mae has a different system. Fannie Mae has a system of shared drives that people different people have access to. And the client has identified for me something like 25 different shared drives which we are in the process of reviewing for documentation. And the kinds of documents we're going to see in those share drives are PLS counter-party annual reports, PLS credit trend reports, risk analysis reports, credit risk committee minutes, credit risk committee presentations, PLAT meeting minutes, the very thing the defendants were talking about, PLAT risk policies and there's about 20 other things on this list and, similarly, at Freddie Mac the kinds of documents that are our existing custodians are going to capture our report on site visits and originating evaluations, counter-party credit risk reports, letters, proof seller lists, the kinds of things that they claim they need.

Let me correct another misunderstanding on the part of defendants. They seem to think that the only documents they're going to get are the documents that were given to the traders

or the people who work for Lota. That is a misimpression on the part of defendants. What we said in our submission and I thought it was clear but let me make it clear is that defendants are going to get the documents that were considered in connection with the PLS purchases, the purchases at issue in this litigation. Those will be the documents in the possession of the traders but it will also be the documents that people who were required to give those traders information had in their possession. And so if a supervisor of the traders had in his possession a document which showed hypothetically that Option One was not an approved originator, that document will also be produced.

So between the combination of the very elaborate and fulsome custodians that we have identified and the documents that those custodians have access to, defendants are going to get everything about originators that made it over to the PLS side and was considered in connection with the decisions to purchase or not purchase these particular securitizations.

Now, I don't want to suggest that there isn't any fundamental issue between us because there is at the end of the day a fundamental issue. What they're not going to get is the documents that were considered only on the Single Family side and related only for the Single Family business. And we are not giving them custodians who were cabined on the Single Family side. And the reason we're not doing that is, actually,

stems from your Honor's earlier order in connection with the statute of limitations.

As your Honor rightly pointed out there, this is not a case about whether the originators had dubious underwriting practices generally. This is a case about whether the defendants failed to act diligently to ensure consistent with the representations in the offering materials that the originators' questionable practices did not lead to the inclusion of nonconforming loans in the particular securitizations sold to GSEs. So if documents pertain solely to Single Family originations and, for example, that could include every repurchased demand ever issued by Freddie Mac or Fannie Mae on any loan every sold to them by any originators who happens to be an originator on securitization, at that level of granularity, no, they're not going to get those documents. They are not entitled to those documents. Those documents are not relevant to what is in dispute here.

But if Option One is disapproved as a seller servicer, that list goes to the PLS people. Counter-party risk reports on Option One at Countrywide go to PLS and get considered in connection with the purchasers. And they're going to get all of that.

So now let's first circle back to the need for a 30(B)(6) deposition on this.

If the defendants would, actually, look at the list of

custodians that we have already designated, as I say we are still considering more and understand their functions as we had explained it to them in the written response, and now with the additional understanding of the scope of documents that these custodians had, they will understand that, in fact, adding additional custodians in the same departments will not garner them any additional documents, that adding custodians who worked solely on the Single Family side had nothing to do with the PLS side will not produce relevant -- and consequently if what they want the 30(B)(6) deposition for is to confirm the effort that we undertook to put this document together, all I can say, your Honor, is that no witness that I could prepare will have more information than we were able to garner and put into the written response. What I expect is the case is that they really want the 30(B)(6) deposition to try to get information that always remained on the Single Family side and was germane to the Single Family side, well, then that' information that they're simply not entitled to, your Honor, and this a fundamental dispute that's going to run across interrogatories, 30(B)(6) depositions and document requests.

THE COURT: Thank you for your presentation.

Let me ask you about this phrase, a document considered in connection with PLS purchases. If the document came before the risk committee at one of the two GSEs how do you know it was considered in connection with PLS purchases?

MR. SCHIRTZER: Well, because there are a number of PLS people on that risk committee. So if a document, for example, in one of these PLS site audits at Countrywide, those documents would have made their way up to one of the risk committees. They would have necessarily been considered in connection with the PLS purchases and we're going to produce them.

THE COURT: Okay. So if the document itself doesn't have to indicate that it's prepared for the purpose of being considered on the PLS side if it came before the Risk Committee which had shared membership and discussed the performance of originator, it will be turned over.

MR. SCHIRTZER: There is one exception, your Honor, and that is the -- there was a reference before to site visits and I think this is at Fannie May. And they did -- it is true that they did them in close proximity so there would be a Single Family audit, then a PLS audit. But, in fact, in one of policies that were submitted to your Honor to explain the information laws, in fact, the information regarding the Single Family site visit was not shared with the PLS. In fact, it was not shared pursuant to policy.

THE COURT: So it didn't make it to the risk committee?

MR. SCHIRTZER: Doesn't make it to the PLS side.

THE COURT: So it's at the Risk Committee but it's not

shared with the PLS members of the Risk Committee?

MR. SCHIRTZER: Your Honor, I understand the question and I don't know the answer, so I don't want to misrepresent.

THE COURT: So good. Why don't we flag that as an issue.

MR. SCHIRTZER: Now, your Honor --

THE COURT: When are you making your document production?

MR. SCHIRTZER: That's a question I need to ask Ms. Chung.

MS. CHUNG: Well, your Honor, the review is all underway and we are on target as I think everyone in this room is to produce by the end of September. Certainly, we anticipate making productions up to that date.

THE COURT: When do you think you will make a substantial production with respect to these custodians that we're talking about today?

MS. CHUNG: Well, your Honor, there we started with a quarter list and in response to considering the defendant's proposals we've expanded that list considerably. So some of those custodians are being loaded into new process as we seek. So I can't say it's going to be that they get all of these cuss custodians at the front end of the role in process. I think it will be some custodians come out and then others come out and we're on track to get it all done by the end of September.

THE COURT: So we're about to move into August. Will the defendants get some of this production in August?

MS. CHUNG: I think so, your Honor. I don't want to represent that it's going to be a significant amount but I think that everyone is finding it a challenge. So most of it will be through September. But there is material now in the pipeline being used and being sent out so, yes, we will make some production. I don't want to overstate the situation because I think that there is -- we have a considerable number of documents to review. We are undertaking to do it the old fashioned way on our side and so we need to get through those and produce them and I do think very much of it will be in September, not in August.

THE COURT: I have one more question for you, Mr. --oh, I'm sorry.

MR. SCHIRTZER: Your Honor, I was just standing to address the question.

THE COURT: No. It was for Mr. Sacca.

MR. SCHIRTZER: Did I do it again?

THE COURT: Yes. I wanted to know if the defendants or at least UBS has decided at this point that it would like to brief the substantive law with respect to knowledge with respect to Section 11. And I ask that question because of Footnote Two on the defendants' submission for the July 31st hearing and an undated letter that I think I got on the 30th.

And this was a topic that we talked about at the May 14th conference and at pages 25 to 26 in which I offered to have early motion practice on the standard for knowledge for Section 11 claim. And at that time the thinking, as I understood it, on the defense side was, no, it'd be too fact intensive a question and would not be meaningful, helpful in the way that I'd anticipated to have that legal discussion now.

Have the defendants changed their mind?

MR. SACCA: Your Honor, we have not. I think we still would welcome the opportunity to brief that after we have had the chance to develop a more full record for your Honor, part of which would be the 30(B)(6) deposition, part of which would probably be documents we get in production after that.

Your Honor, to respond very briefly to what Mr. Schirtzer said, we saw the 30(B)(6) depositions. The partys are agreed on that. We did for a reason, your Honor. A narrative is all well and good for whatever limited purposes but I can't cross-examine a narrative. I can't ask the follow-up questions of a narrative and I can't ask clarifying questions of a narrative. And we've seen plenty today to tell us that we shouldn't take everything that's in this narrative at face value. Mr. Schirtzer just said that where there were counter-party reviews done by Single Family and done by PLS they made an effort to strip out information. We've seen an e-mail though that said that they did this review together at

Freddie's choice to put the Single Family and the PLS review of Countrywide together where, obviously, both sides were going to hear whatever Countrywide had to say.

Now, your Honor, I also will note that many of the Fannie people on that very e-mail about the Countrywide operational review are not on the custodian. Also missing from the custodian's list, your Honor, Freddie's CEO, Mr. Syron. Freddie Exhibit 4 in the binder in front of you which I made reference to before the Special Litigation Committee's report says on pages 16 to 17, although Freddie Mac had been involved in the subprime market prior to Mr. Syron's joining the company and even prior to 2000, the senior management under Mr. Syron increased the company's involvement in that market. The person responsible for Freddie's decision to take on more subprime securities largely through PLS isn't on the custodian list.

So, your Honor, again, we're not after more, per se. We're after the right ones. And we have been deprived up till now of the opportunity to ask questions that we think are necessary to decide who the right ones are. Your Honor has raised some very good questions that we would like answers to about if certain information reached the Private Label advisory team. Do they consider to have been passed on or not? We think this they have the amputation standard on its head. We think under the third restatement of agency information is imputed unless there's a duty to share it.

But, your Honor --

THE COURT: Let me ask you, on this ten page list of the document custodians, are there people who you think should not be on that list?

MR. SACCA: We don't know yet entirely, your Honor. I am not -- it is possible that there are people that we after we learn a little more would think are not necessary. Like I said, judge, I can't stress this enough, we're not out simply to increase the number of custodians. We want to make sure we have the right ones.

THE COURT: Okay. Thanks.

MR. SCHIRTZER: Actually, your Honor, the example that was just offered is almost too telling. They want Dick Syron, the former CEO and chairman of Freddie Mac. And their basis for wanting him is a couple of SEC complaints that claim that he essentially led Freddie Mac into an overconcentration of subprime and didn't disclose it was the gist of the SEC complaint.

What they don't say is that Don Bisenius and Patty Cook, the operational executive vice presidents or whatever titles were immediately below him, were also defendants in that same case and they're both custodians on our list which proves the point I am trying to make, that we have gone to the top levels of the company, the people who had access to directories that will encompass all sorts of information. And we've put

those people on custodian lists. To say that we need a 30(B)(6) deposition to identify an apexed opponent that's -- it is what it is, your Honor.

THE COURT: Okay. Thank you. We're going to take a brief recess. I want counsel to talk about the late August date and whether an order in connection with that would be helpful and whether or not reports, status reports on document production late August before such a conference would be helpful. I need the parties' guidance and if you could discuss that together. We'll take a ten minute recess.

(Recess)

(Continued on next page)

THE COURT: Mr. Bennett, I understand I kept calling you Mr. Williams.

MR. BENNETT: Yes, your Honor.

THE COURT: I apologize.

MR. BENNETT: That's quite all right, your Honor. The "Edward Bennett" gets people confused all the time.

THE COURT: Someone earlier today mentioned that I was going backwards. I'm going to do that again. I'm going to revisit our first topic.

I think we should keep it simple. We should have the Daubert motion addressed just to the protocol in the UBS case, briefed by FHFA and UBS on roughly the schedule that the plaintiffs proposed -- august 9th, August 31st, September 13th -- understanding that counsel will discuss the appropriate schedule with each other that accommodates vacations and other personal needs and get me a letter describing what schedule they would like me to endorse. Then, any other defendant who wishes to bring a similar Daubert motion based upon the plaintiff's sampling protocol in their case may during the fall talk with Mr. Selendy about a schedule. Write me and let me know what your desires are.

Again UBS gets the great honor and privilege of being the stalking-horse on the issue for everyone.

MR. KASNER: I would say thank you, your Honor, but given my vehemence in reaction, I will sit mute.

THE COURT: I appreciate Mr. Sacca helping me focus on precisely what relief is being sought with respect to the most recent issue we have been discussing. To the extent the request is for a 30(b)(6) deposition on item 3, that request is denied.

I think that I can make a couple of observations here beyond simply saying that request is denied that may have broader implications and, hopefully, helpful guidance for the parties. I think that specific request was just one of a constellation of issues about the adequacy of FHFA's document production and the number of custodians and the identity of the custodians.

Let's step back and ask what this discovery of the plaintiff is all about. To some extent I'm going to share these thoughts because if you think I see things incorrectly, I think it is important that you hear the way I'm thinking so you can correct my thinking. Mr. Bennett, that even means pointing out some law to me on occasion.

I don't think a defendant can proceed to trial here unless a defendant believes they can successfully defend the section 11 claim. I know there are these other issues in the case, other claims of federal securities law violations and fraud claims, but I think it is hard for a defendant to proceed to trial unless they think they have a good defense on the section 11 case.

The role of knowledge in a section 11 claim is a limited one. Over and over again the arguments by defense counsel to me this afternoon have talked about how information from the single-family side of the enterprise was necessarily shared with the PLS side and therefore necessarily appropriate for discovery in this case.

The theme of the defense arguments has not been that information held solely within the single-family side of the business should be discoverable. The fear is that the document production that is being undertaken by the plaintiffs will be inadequate to capture information principally about originators that was shared with the PLS side. I don't find any basis to believe that that is a realistic fear.

First of all, the FHFA is making a massive production here. As its description of the roles of the various custodians that it has already agreed to make shows, they represent many different functions within the GSEs, including on the risk committees that were so much the focus of discussion with me today.

If there was, as the defendants argue, a tying together of the single-family and PLS function within these organizations and substantial information sharing between the two sides of the businesses within these organizations, and I think I'm capturing the precise terms used this afternoon, those documents are going to be captured in this document

production. If they aren't, come on back to me.

There is no basis to argue now or to fear now that they won't be produced. And that is before I even get to the level of analysis that rule 1 would require me to undertake and a proportionality analysis, weighing the role that a knowledge defense is going to have in this case with the kind of intensive undertaking that FHFA is making and that the defendants are each going to be burden by.

I think Mr. Sacca had a good point. He said it's not the number, it's the quality. And that's true. Everybody has to spend money looking at whatever is produced.

I find that FHFA's production of a written response was to be commended. It was a much more reliable presentation of extremely complex matters, more reliable and more detailed than could have been received in any 30(b)(6) deposition under any time frame that could have been considered reasonable.

I don't have a request from the defendants that is pinpointed. There has been only one name mentioned here of a custodian that should have been included and wasn't. I take that as a tribute to both sides here and the meet and confer process, and also in recognition that FHFA is taking its responsibilities seriously, that when it needs to reconsider a particular custodian, it's thinking about that and keeps adding when it finds it's appropriate to do so.

These are layers of reasons which support each other

for my ruling.

MR. BENNETT: Your Honor?

THE COURT: Yes?

MR. BENNETT: I wasn't clear. We certainly are arguing that documents that never went, if there are any, never went from the home loan side to the PLS side are relevant, for a number of reasons.

THE COURT: We have finished argument on that issue. It's late. Thank you so much, but those documents I will not order produced for all the reasons I have just described. Thank you.

MR. BENNETT: Thank you, your Honor.

THE COURT: Counsel, the two exhibits that you gave to me today, I want to make sure that all the materials that we have considered this afternoon in addition to these two handouts -- one, the custodian list, and the other the collection of documents that begins with an excerpt from a Form 10-K -- if you could give me another set so I can make sure that everything is appropriately filed.

MR. KASNER: Your Honor?

THE COURT: Yes, Mr. Kasner?

MR. KASNER: I'm not here to reargue, I assure the Court. I just wish to place on the record so your Honor knows that the issues as to which discovery was being sought that we discussed today do not relate solely to the issues of actual

knowledge.

I understand why your Honor focused on the section 11 claim, which perhaps may impact the component of knowledge a bit differently than the affirmative element in a section 12 claim, for example. However, there are other aspects of the defendants' defenses I wish to advise the Court to which this discovery relates. I assure the Court I'm not here to reargue your Honor's ruling.

Issues of materiality are impacted by what is in the files that we were seeking, in the 30(b)(6) information that we were seeking, information with respect to reliance for those fraud defendants -- I am not one.

THE COURT: Yes.

MR. KASNER: -- and issues related to inquiry notice with respect to the statute of limitations we believe will all be impacted by those issues, your Honor, not simply actual knowledge.

THE COURT: Yes, I understand that. I hope you weren't misled by my frank sharing of an analysis which was just one and not a necessary component to my ruling.

MR. KASNER: I understood, your Honor.

THE COURT: I would have ruled the same way without any reference to the knowledge component of the section 11 claim.

MR. KASNER: I understood that, your Honor. Your

Honor had indicated that that was your Honor's belief about the centrality of that component to our defenses. I just thought it was important to make plain on the record it's not just that issue. I understand what the Court is saying.

THE COURT: The third paragraph in your submission of I believe July 30th lists a number of those other elements or the way knowledge relates to elements of a variety of claims and defenses. I did read that with care and I am well aware of it.

MR. KASNER: Thank you, your Honor.

THE COURT: I have what I thought was the 30(b)(6) issue in a set of letters raised in the first instance I think by FHFA with respect to four separate questions and a request that the 30(b)(6) witness not be redeposed. I believe someone wished to address that for the defendants.

MR. WOLL: Yes, thank you, your Honor. David Woll for the defendants. As you noted, the plaintiff raised with the Court issues we had with the adequacy of two witnesses that were produced to testify with respect to, generally speaking, document retention issues. We submitted something this morning in response to that.

We do have issues with respect to the adequacy of the 30(b)(6) testimony on the document retention issues, but the fundamental issue I want to focus on is the Freddie Mac document destruction issue because I think it impacts really

everything we have been talking about today in terms of custodians and scheduling.

To briefly summarize, and I know it's late, the plaintiffs originally brought to our attention that Freddie Mac employed an automatic deletion protocol originally described to us as having been in place at least from January 2004 to September 2008. They told us during the week of June 29th, when we were talking about document custodians, that as a result of that protocol, basically any email that wasn't affirmatively saved for an employee prior to September 2008 didn't exist anymore and any emails to an employee who left prior to 2008, those emails also wouldn't exist anymore, even if they had been affirmatively saved, because they would have been affirmatively discarded at the time of departure.

Obviously, it is pretty fruitless to talk about document custodians if they don't have any documents. We thought it important to bring this to the Court's attention right away, which we did in a letter from Mr. Kasner on July 2nd. Counsel for the plaintiff responded, noted that they had brought this to our attention because it was relevant to document custodians and discovery, and said in that letter, quote, "FHFA will continue to work in good faith to resolve any outstanding issues regarding e-discovery and to exchange information with defendants that bears on that effort." That sounded pretty good.

We wrote a letter to the plaintiff on July 5th. I wrote that letter. Other letters followed on July 12th. Suffice it to say there were numerous requests to plaintiff to try and get to the bottom of this issue, which fundamentally is to what extent are there large gaps in the emails available for relevant custodians for the relevant period. We didn't get any answers, unfortunately, to those letters.

We did make it part of our 30(b)(6) notice, which is why it comes up in this context now. One of the topics in our 30(b)(6) notice, topic 1, was about the systematic deletion of potentially relevant documents pursuant to this protocol. The plaintiffs did produce a witness, on July 20th I believe, to testify with respect to topics 1, 2, 10 and 11 in the notice, all of which are document retention topics. His name was Rick Keogh. Mr. Keogh was not able to tell us anything about what custodians proposed either by the plaintiff or by the defendants had electronic documents remaining.

We showed him the list of custodians that were proposed by the plaintiff at that point. We showed him some lists. We asked him, do you know what's available from any of the plaintiffs? He said no. The plaintiffs have taken the position that that is beyond the scope of the notice.

It is certainly not beyond the scope of the notice as it was originally framed by us. We also don't think it is beyond the scope of the notice as they agreed to produce the

witness Mr. Keogh to testify about document retention policies and practices, quote, as they applied to the groups and individuals responsible for the securitizations.

It certainly wasn't a surprise to the plaintiff that we were keenly interested in this, because we had written to them, we had written to the Court, and they said they were going to provide this information. But Mr. Keogh couldn't provide that.

The other thing that troubled us, and still troubles us, and why I think we need to get to the bottom of this, is the description of this automatic deletion protocol has changed over time. The plaintiff, through counsel originally, represented what I just described, referring to January 4th of 2008. Mr. Keogh submitted a declaration, which I cited in one of my letters, which was referenced in the letter to the Court, in another federal action where he said that documents prior to October 2007 had been automatically deleted, but then in October 2007 they ceased the recycling of backup tapes.

Then, at his deposition Mr. Keogh said and plaintiff produced some information saying, hold on a second, we have lots of backup tapes for emails prior to October 2007, which was directly contrary to what it said in Mr. Keogh's declaration in this other federal action. We followed up with some more correspondence. We asked some more questions.

In their letter to the Court yesterday, the plaintiff

told you that, quote, "FHFA has advised defendants that each agreed Freddie Mac custodian has significant amounts of electronic information, including email, for the relevant period." They advised us at the same time they sent the letter to your Honor. We got a separate letter that included the same statement.

Respectfully, I don't think that that statement, given what we know or have heard about the Freddie Mac auto deletion policy, really answers the question of whether there are large gaps in the emails that were apparently subject to some type of auto deletion policy.

We don't know what are on the backup tapes that Mr. Keogh identified for the first time at his deposition. If there are substantial emails from custodians, I don't know exactly what that means. For instance, if somebody worked on deals in 2005 and I have emails for 2007, that's not going to help us very much.

They have only identified that there are substantial emails for the initial custodians they agreed to. They had initially agreed to, I think, 38 Freddie Mac custodians. They say they are going to add more. I think it will bring them up to like 51. They say that should ameliorate our concerns. But we don't know if any of those extra custodians have any emails, so it doesn't really ameliorate the concerns.

I don't think we can wait until the end of the

discovery period to find out, oh, these custodians had large gaps in their emails. That's why we have been asking and why we have asked the Court to instruct plaintiff to give us more specific information about which custodians have emails for which relevant periods and to identify whether there are significant gaps. If the plaintiffs need more time to do that, that's one thing, but not responding to the letters and narrowly construing the deposition notices is not the way to go.

THE COURT: With respect to your request, these are topics 2 and 3, am I right?

MR. WOLL: It's actually 1 and 2 primarily, your Honor.

THE COURT: I'm sorry. 1 and 2 primarily?

MR. WOLL: Yes.

THE COURT: Yes. 3 we just dealt with.

MR. WOLL: Right.

THE COURT: If I remember correctly, the plaintiff principally responded that topics 1 and 2 didn't require the employee-by-employee description that you are suggesting that you would like now.

MR. WOLL: That is the position they took, your Honor, yes.

THE COURT: Reading topics 1 and 2, I must agree. So, I don't find that the 30(b)(6) witness who was prepared to

answer topics 1 and 2 would have been inadequately prepared because they were not able to answer information about a specific individual.

I would like Mr. Woll to handle this issue this way, which is you will get your document production for the custodians. The plaintiff has represented and I have received today a letter to you of July 30th that they are searching backup tapes, that substantial amounts of email covering relevant dates are being produced, etc. I don't know if the production is going to satisfy you or not, but you will get a production. If it doesn't satisfy you, please meet and confer with plaintiff's counsel and, if necessary, come back to me.

MR. WOLL: Very good, your Honor. Given the timing of things, I thought it was important to raise this issue, since by the time we get the documents and identify the gaps, it might be September 30th. I appreciate your Honor's consideration.

THE COURT: Thank you, Mr. Woll.

Ms. Shane, a quick report. How is predictive coding going?

MS. SHANE: Your Honor, we are working very hard at predictive coding, as your Honor directed. We meet every day with the plaintiff to have a status report, get input, and do the best we can to integrate that input. It isn't always easy, not just to carry out those functions but to work with the

plaintiff. The suggestions we have had so far have been unworkable and by and large would have swamped the project from the outset and each day that a new suggestion gets made. But we do our best to explain that and keep moving forward.

We very much appreciate that your Honor has offered to make herself available, and we would not be surprised if we need to come to you with a dispute that hasn't been resolved by moving forward or that seems sufficiently serious to put the project at risk. But that has not happened yet and we hope it will not.

THE COURT: Are you still on schedule?

MS. SHANE: We are basically on schedule, yes.

THE COURT: Thank you very much, Ms. Shane.

MS. CHUNG: Your Honor, may we address predictive coding for just a second? We agree that the parties have been working together very diligently. There have been a series of meet-and-confers. One issue in terms of the benchmarks that your Honor knows, we did resolve a major issue, which was the layering of the predictive coding on top of search terms. There was agreement over the weekend that the predictive coding would be applied to the entire universe of documents. That is very helpful and very useful to us. As you know, that was one of our major objections.

We do feel that we are working toward the deadline that your Honor has set to report to the Court. We agree that

there are issues that may require your Honor's attention. One that has come up, and if another time is better, we can raise it separately. It has to do with the training of the coding. There is the seed set that your Honor referred to in conference. That is the set of documents against which we try to run the coding.

There is something called the enrichment set, which is a set of documents that you put in to help train, to help do the training. Typically, in the enrichment set you would include documents that you know are relevant.

One issue that we have discussed with defendants is there have been requests from our side, document requests, for deposition testimony and written statements that have been given in other RMBS cases and also to governmental agencies or inquiries or to Senate subcommittees where there have been prior investigations of the defendants' RMBS origination practices or their checking that loans were being originated in accordance with underwriting guidelines. This required culling of the complaints, your Honor.

You know that there are references to complaints in other litigations and also to the FCIC inquiries. It is the type of issues that are plainly relevant, such as whether the defendants were waiving into loan pools loans they had been put on notice were not in compliance with the underwriting guidelines. One of the things that we requested to be included

in this enrichment set are such documents.

THE COURT: What do you mean? The depositions?

MS. CHUNG: It wouldn't be everything, your Honor, but yes, documents that are depositions or written statements. These are within the scope of documents requests that we made that are from these other investigations or suits. They haven't been produced to us, so we don't know what they are.

THE COURT: Why would a document custodian and a bank have a copy of a deposition?

MS. CHUNG: Your Honor, these are, for example, in the case of the FCIC, some of the defendants here have turned over information to the financial commission, including giving witness statements, on topics that are about practices that are at issue in these cases.

THE COURT: You have some affidavits from potential document custodians or declarations?

MS. CHUNG: We would expect there to be deposition testimony. There were interviews done by some of these committees. In the case of the FCIC, they did take I think it was testimony. I think it was sworn testimony.

Now what we have been informed by the defense is they consider these documents just not relevant. It is not even really an issue about predictive coding. We would agree with them that if the documents aren't relevant, there is no point in using the documents in the enrichment set. But we have a

dispute about what is relevant in terms of the scope of documents that are relevant to the case.

I can stop there, your Honor, and we can raise it separately. But you can see why, in terms of all the justifications that Ms. Shane gave on the conference call we had with your Honor last Tuesday, if we are going to train the system up right, we need to have the right things in the seed set and in the enrichment set. So there may be these kinds of issues that arise.

THE COURT: Good. We will put those over for another day. I'm learning about predictive coding as we go. But a layperson's expectation, which may be very wrong, would be that you should train your algorithm from the kinds of relevant documents that you might actually uncover in a search. Maybe that's wrong and you will all educate me at some other time.

I expect, Ms. Shane, if a deposition was just shot out of this e-discovery search, you would produce it. Am I right?

MS. SHANE: Absolutely, your Honor. But your instinct that what they are trying to train the system with are the kinds of documents that would be found within the custodian files as opposed to a batch of alien documents that will only confuse the computer is exactly right.

THE COURT: Good.

MS. SHANE: You will get confirmation but not any further education on that score.

THE COURT: Here I'm hoping for a great report from Ally.

MR. GOEKE: Reginald Goeke from Mayer Brown. From our perspective, I think things are on track. As we indicated, we gave our responses and objections to the 30(b)(6) notice to the FHFA on Monday. We had a meet-and-confer with them. We believe that we are currently going down the process. We are going to provide them with a witness on the 9th to answer most of the questions that they have identified in their 30(b)(6) notice.

I don't know whether there are any other issues from the defense side.

MS. LEUNG: Thank you. For the record, Kanchan Leung. There is one issue that we would like to move on today. It became apparent from our meet-and-confer session yesterday that the overarching dispute between the parties right now is whether Ally has produced a witness that will be knowledgeable, will have information that is reasonably available to it from the debtors. We think that they should be preparing their witness and should put up a witness knowledgeable about the documents in the possession of the debtors.

We are concerned that we are going to go down this road, get a deposition, and at the end of the day still not know whether documents are in the possession of the debtors. This is putting aside the issue of control. Ally seems to be

taking the position that they don't need to educate their witness outside the four corners of Ally. We don't think that that is defensible.

The rule contemplates for 30(b)(6) that the witness be educated not just from within the company but possibly from documents, from former employees, and we think from the subsidiaries. They have a corporate relationship, their ResCap is a domestic subsidiary; they have a contractual relationship. I won't belabor the shared services agreement. And Ally continues to provide great financial support for the debtors in bankruptcy.

We think as a practical matter that information is available from the debtors and that they should be informing the witness with that information. It is our concern that at the end of the day we are going to go through the deposition process, it's not going to really advance this case any further.

THE COURT: When you say reasonably available from the debtors, you mean in preparation for this deposition you would like the 30(b)(6) witness to speak with representatives of the debtor to inform themselves about the debtor's knowledge on these issues?

MS. LEUNG: Correct.

THE COURT: Do you oppose that?

MR. GOEKE: Yes, your Honor.

THE COURT: Your application is granted. In the best of all possible worlds, that would happen, but these companies are now in bankruptcy. While the bankruptcy court may certainly order their participation in discovery even though there is a stay of litigation, I don't want in the first instance to require that. I think any application should go before the bankruptcy court. But I don't think it is necessary for this 30(b)(6) witness, and I think the deposition should go forward. Thank you.

Is there anything else that we need to put on today's agenda?

MR. BENNETT: Your Honor, going back on one point very briefly, I appreciate your Honor's comments about the seminality of section 11 to the plaintiffs going forward. There are six sections under which punitive damages have been claimed.

THE COURT: I looked at that.

MR. BENNETT: We ask permission for your Honor to brief the justifiable reliance issue we put briefly in our letter. We think if the fraud claims go forward, we need to be able to address documents supporting or attacking justifiable reliance. Otherwise, the claims will be vastly overvalued by the plaintiffs.

THE COURT: I absolutely agree that the punitive damage claim is very important for my consideration and for

everyone's consideration when they are facing that claim. I'm going to ask for your indulgence and trust me that I have looked at that issue and noted in how many of the cases it occurs. I'm aware of the justifiable reliance element of certain claims and the way all of the defenses in paragraph 3 of Mr. Kasner's letter -- I guess it's a joint letter from many folks.

MR. KASNER: Correct, your Honor.

THE COURT: Yes. I thought about all of those. My ruling with respect to the scope of discovery, e-discovery from FHFA, would not change in any way given the fact that a particular defendant is facing a fraud claim.

MR. BENNETT: Thank you, your Honor. Should the parties anticipate a written ruling capturing today's order?

THE COURT: We have a court reporter.

MR. BENNETT: Thank you, your Honor.

THE COURT: That is the great of great benefit to me and to all of us. Ms. Chung?

MS. CHUNG: Your Honor, we were supposed to get back to you about the idea of a late August conference. I wanted to address that. This is about loan files that are in the hands of third parties. We would support your Honor's original idea to have such a conference. I do think it would serve a purpose.

There is no doubt that there are jurisdictional

issues, but I think if we were to put together a list of where these entities are and what jurisdictions they are subject to, I think we could potentially work through the jurisdictional issues. It may require starting miscellaneous actions in other jurisdictions, but we could do that. This has been done in other RMBS cases. Sometimes you have to go to the other jurisdictions to get either the files or the information that gets worked into the reunderwriting. The parties could draft many of these documents for your Honor if that was helpful.

You can see from the discussion today, and your Honor has also pointed it out, we are in a situation where, as you put it, both sides are reserving their rights to go back to the loan files, all of them. Certainly nothing we have heard from the defendants today is any concession of any agreement to do anything less than that.

This is not where the plaintiff wanted to start, but this is where we are today. Given that that is the case and that the loan files threaten to become a real bottleneck for the reunderwriting on both sides, we think we should at least explore what the possibilities are for having this conference.

I also think we shouldn't assume that the parties won't participate in the conference, especially if it was by telephone, even if they could make jurisdictional objections. I think just knowing that the Court is putting the focus on these requests could be very useful in getting people to

prioritize turning to the production of these loan files.

I agree with Ms. Shane, when you ask for these loan files, it runs the gamut. Sometimes you have entities who are nonparties who have already produced these loan files for resecuritizations in some other litigation, so it's just a matter of pressing a button. For others it is a matter of going and finding the bits and pieces and putting them together. But certainly it couldn't hurt for them to know that the Court is focused on this issue and we have our own schedule that we appear.

THE COURT: Would you be suggesting, Ms. Chung, starting with a status report per case before me with a list of the entities and jurisdictions with loan files for that case?

MS. CHUNG: I think so, your Honor. As your Honor proposed, we could get the list together very quickly. But yes, we could go on a case-by-case basis and have a status report.

THE COURT: How long do you think you would need to do that?

MS. CHUNG: Here I need to say I think I misremembered. I misremembered what we had issued and what the defendants have been issuing. I may inadvertently have taken too much credit for us. I think the defendants have issued the subpoenas that have gone to people who may have the loan files. We may have some. Our third-party subpoenas were directed at

due diligence firms and ratings agencies. So much of the information is actually in their hands. I see Ms. Shane standing, so maybe she could address this.

THE COURT: Ms. Shane.

MS. SHANE: Your Honor, we would welcome a status conference in part to address the issue of where we stand with respect to some very important third-party discovery initiative which, Ms. Chung is correct, has mostly been undertaken by defendants. We think that could be productive. I would suggest a couple of interim steps to make it more productive, including that the parties change information about what loan files they have and therefore what loan files they need.

We would most welcome the conference to make sure we are all on the same page on that and are being productive about it, as well as party production issues. As several of your Honor's rulings today have turned on the idea that we will be seeing fruits of production undertakings and representations that have been made by the plaintiff, custodian searches, and production of material from people whose emails have been destroyed, a number of different issues where we need to see the results, we would very much welcome the opportunity to have your Honor help us to make sure that we are seeing production.

We have so far only seen 1,000 pages produced by the plaintiff. We have produced well over 800,000, excluding loan files on the defense side. We are worried we are going to get

whatever we get in September, when it is too late. If we could broaden the agenda, take a couple of steps with the parties exchanging information about nonparty subpoena status and requests for loans and waivers and the like, so that we lead up to a conference and can very productively give your Honor status reports and get your Honor's assistance in moving forward, that would be very much welcome.

THE COURT: Ms. Shane, do you think it's realistic for me to get proposed orders for my signature and status reports, let's say, a week from today, or is that too fast?

MS. SHANE: I think it would probably make more sense to have it be ten days from today so that we might have an opportunity to see some of the production that has been promised, or its absence, so that we can talk to plaintiff as well about when they think we will see some documents. You have vacation, I believe, your Honor. If it's more convenient for the Court to have it in a week than in ten days, certainly we can do it in a week.

THE COURT: I'm talking about orders with respect to production of the loan files, just that portion of the topic or topics. Can you and the plaintiff and the defendants and the plaintiff do what they need to do in order to understand where the outstanding production issues lie within a week, or not?

MS. SHANE: I think that is too fast, your Honor, given the enormity of the undertaking and the differences in

the situations people have.

THE COURT: This is what I would very much appreciate. I think August 9th is a Thursday. I would like by August 9th a proposed order or two and status letter so that I can review them and give my input and, if necessary or appropriate, sign them by August 10th and get a system set up for my absence for a period of time the following week where more proposed orders of a similar nature and status reports might come in. Is that doable, Ms. Shane?

MS. SHANE: Yes, your Honor.

THE COURT: Then we already have the date government late August conference. I'll get out a scheduling order. My chambers will be in touch with counsel. If we don't have unmarked courtesy copies of each of the submissions, we may need another set so we can get that docketed. We'll be in touch with you on that.

Ms. Shane?

MS. SHANE: Your Honor, it would be very helpful if in advance of the 9th the plaintiff could provide us a list of the loan files that they have and where they got them from so that we can together work on crossing those off the list of those we still have to go after.

MS. CHUNG: Your Honor, we can to that. To get all the loan files in one place, it's not just us, it's the defendants. For some of them we have the information on

whether they have loan files or whether the loan files that are at issue in their cases are coming from third parties. I think everyone needs to contribute to understand where all the loan files are going to be coming from, what the entities are, where they sit. I agree with that.

THE COURT: It sounds like everyone is in agreement. Good.

MS. SHANE: Right.

THE COURT: Anything else we need to address? Thanks so much, counsel.

(Adjourned)