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UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16349

In the Matter of	ADMINISTRATIVE PROCEEDING File No. 3-16349
BARBARA DUKA	**RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Respondent.	

Respondent Barbara Duka ("Duka"), by and through her counsel, Petrillo Klein & Boxer LLP, and in accordance with the Court's Order dated January 9, 2017, following the evidentiary hearing held before Hon. James E. Grimes, hereby submits the below Proposed Findings of Fact and Conclusions of Law.[1]

I. PROPOSED FINDINGS OF FACT

Definitions

1. AEGON USA Investment Management, LLC will be referred to as "AEGON."
2. Commercial mortgage-backed securities will be referred to as "CMBS."
3. Conduit/fusion will be referred to as "CF."
4. Credit enhancement may be referred to as "CE."

[1] Citations to the Transcript of Proceedings are indicated with the abbreviation "Tr." Citations to a Respondents Exhibit are indicated with the abbreviation "RX" followed by the exhibit number. Citations to a Joint Exhibit are indicated with the abbreviation "JX" followed by the exhibit number. Citations to a Division Exhibit are indicated with the abbreviation "DX" followed by the exhibit number. The Expert Report of John J. Richard will be referred to as "Richard Rept." The Expert Report of Peter Rubinstein will be referred to as "Rubinstein Rept." The Division of Enforcement's Motion for Partial Summary Disposition will be referred to as "DSD." The Division of Enforcement's Opposition to Respondent Barbara Duka's Memorandum of Law in Support of her Motion *in Limine* to Strike Substantial Portions of the Expert Report of Peter D. Rubinstein, Ph.d will be referred to as "Div. Rubinstein Br." The Division of Enforcement's Prehearing Brief will be referred to as "DPB."
The Prehearing Brief of Respondent Barbara Duka will be referred to as "RPB." Respondent Barbara Duka's Motion for Summary Disposition will be referred to as "RSD."

5. Debt Service Coverage Ratio will be referred to as "DSC" or "DSCR;" the denominator of the DSC will be referred to as "debt service" or "DS."

6. DSCs computed using the actual constant of a loan or loans will be referred to as "Actual DSCs."

7. DSCs computed using the Blended Constant of a loan or loans will be referred to as "Blended DSCs."

8. DSCs computed using the Table 1 Constant of a loan or loans will be referred to as "Table 1 DSCs."

9. FREMF 2011-K11 Mortgage Trust will be referred to as "FREMF 2011-K11."

10. FREMF 2011-K13 Mortgage Trust will be referred to as "FREMF 2011-K13."

11. FREMF 2011-K14 Mortgage Trust will be referred to as "FREMF 2011-K14."

12. FREMF 2011-K701 Mortgage Trust will be referred to as "FREMF 2011-K701."

13. GS Mortgage Securities Trust 2011-GC4 will be referred to as "GSMS 2011-GC4."

14. J.P. Morgan Chase Commercial Mortgage Securities Trust 2010-C1 will be referred to as "JPMCC 2010-C1."

15. J.P. Morgan Chase Commercial Mortgage Securities Trust 2010-C2 will be referred to as "JPMCC 2010-C2."

16. J.P. Morgan Chase Commercial Mortgage Securities Trust 2011-C3 will be referred to as "JPMCC 2011-C3."

17. JX 1, which is an S&P publication entitled "Request for Comment . . . U.S. CMBS Rating Methodology And Assumptions For Conduit/Fusion Pools" and dated May 26, 2009, will be referred to as the "RFC."

18. JX 2, which is an S&P publication entitled "Criteria . . . U.S. CMBS Rating Methodology And Assumptions For Conduit/Fusion Pools" and dated June 26, 2009, will be referred to as the "2009 Criteria."

19. JX 5, which is an S&P publication entitled "Criteria . . . U.S. CMBS Rating Methodology And Assumptions For Conduit/Fusion Pools" and dated November 3, 2010, will be referred to as the "November 2010 Criteria."

20. Morgan Stanley Capital I Trust 2011-C1 will be referred to as "MSC 2011-C1."

21. MSC 2011-C1, FREMF 2011-K701, JPMCC 2011-C3, FREMF 2011-K11, FREMF 2011-K13, FREMF 2011-K14, JPMCC 2011-C4, and GSMS 2011-GC4 will be referred to as the "2011 CF Transactions."

22. Nationally Recognized Statistical Ratings Organizations will be referred to as "NRSROs" or rating agencies.

23. Net Cash Flow will be referred to as "NCF."

24. Principal Financial Group will be referred to as "PFG."

25. PPM America, Inc. will be referred to as "PPM."

26. The CMBS New Issuance Group at S&P will be referred to as "New Issuance" or "NI."

27. Proposed Conclusions of Law below will be referred to as "COL."

28. Proposed Findings of Facts below will be referred to as "FOF."

29. The Relevant Period is defined as May 2009 through September 2011.

30. The CMBS Surveillance Group at S&P will be referred to as "Surveillance."

31. Rating Analysis and Methodology Profiles will be referred to as "RAMPs."

32. Section 15E(c)(3)(A) of the Exchange Act, 15 U.S.C. § 78o-7(c)(3)(A), will be referred to as the "IC Statute."

33. Securities issued in connection with MSC 2011-C1, FREMF 2011-K701, JPMCC 2011-C3, FREMF 2011-K11, FREMF 2011-K13, FREMF 2011-K14, JPMCC 2011-C4, and GSMS 2011-GC4 will be referred to as the "2011 CF Securities."

34. S&P Presale reports for MSC 2011-C1, FREMF 2011-K701, JPMCC 2011-C3, FREMF 2011-K11, FREMF 2011-K13, FREMF 2011-K14, JPMCC 2011-C4, and GSMS 2011-GC4 will be referred to as the "2011 Presales."

35. S&P's RAMPs for MSC 2011-C1, FREMF 2011-K701, JPMCC 2011-C3, FREMF 2011-K11, FREMF 2011-K13, FREMF 2011-K14, JPMCC 2011-C4, and GSMS 2011-GC4 will be referred to as the "2011 RAMPs."

36. Standard & Poor's Rating Services will be referred to as "S&P."

Relevant Parties

37. During the Relevant Period, S&P was an NRSRO "that issued publicly available credit ratings" regarding CMBS. JX 85 at ¶ I.A.

38. "During the Relevant Period, Barbara Duka was a Managing Director and Analytical Manager at S&P, and was primarily responsible for overseeing CMBS New Issuance." JX 85 at ¶ I.B.

CMBS Background

39. "CMBS are structured finance investments collateralized by pools of commercial real estate mortgages . . . CMBS pools comprise mortgages to borrowers who own income-generating properties such as retail shopping centers, office buildings, multifamily housing developments, and other property types. These properties are situated in either urban or suburban areas and can be located in either major or tertiary markets throughout the various regions of the country." Richard Rept. ¶¶ 21-22; *see also* Rubinstein Rept. ¶ 1 n.1 ("CMBS, are certificates of beneficial ownership in a trust containing one or more mortgage loans of commercial properties such as retail centers, office buildings, hotels, industrial buildings, warehouses, and multifamily properties."); Thompson Tr. 40:5-11 ("[I]t's a security that is entitled to payments from underlying loans that are held in a trust, and the securities that are issued by the trust, they generally vary in credit quality from the highest, which would be AAA, all the way down through very speculative grade which could be B or not even rated."); RX 801 at 4 (defining CMBS as "security backed by commercial mortgage loans."); RX 773 at DUKA-PETERSON-0000018 ("CMBS are fixed rate bonds that represent an investment in a portfolio of first mortgages on a diverse range of commercial properties . . . A first mortgage is the primary lien against a property and takes precedence over all other mortgages. That means that if the property is sold or if the borrower defaults, the first mortgage is paid before any other mortgage lien on the property.").

40. There are different types of CMBS transactions, including but not limited to CF transactions and large loan/single borrower transactions. *See* Jacob Tr. 580:16-20 ("Single borrower is typically -- well, it means only one borrower. And conduit/fusion could be where we -- many, many loans. And sometimes being a fusion would be a combination of some big loans and small loans.").

41. Offering Memoranda for CF transactions included a spreadsheet called "Annex A," which contained loan-level data – annual debt service, underwritten DSCR, underwritten LTV, etc. – for each loan backing CF pool. JX 26 (Annex A for MSC 2011-C1), JX 34 (Annex A for FREMF 2011-K701), JX 41 (Annex A for JPM 2011-C3), JX 50 (Annex A for FREMF 2011-K11), JX 57 (Annex A for FREMF 2011-K13), JX 64 (Annex A for JPM 2011-C4), JX 73 (Annex A for GSMS 2011-GC4), JX 83 (Annex A for FREMF 2011-K14).

42. S&P defined CF transactions as "deals that include a pool of at least 40 loans that is diversified by both property type and geography, which may or may not contain several relatively larger-sized loans." JX 2 at SEC-STRS-E-0000003.

43. CF pools contained loans that were governed by fixed, not floating, interest rates. Rubinstein Rept. ¶ 25 ("At one time, the conduit market offered both fixed rate bonds backed by fixed rate loans, and floating rate bonds backed by floating rate loans, but the modern market is now exclusively a fixed rate market. In fixed rate conduit deals, all the loans and usually all the bonds carry fixed rates, and both the bonds and loans pay on a monthly schedule."); *see also* Thompson Tr. 114:5-9 (Q And in a typical 30-year fixed amortizing loan to be extant for ten years before refinance would the annual debt service typically be a constant number? A Yes.); RX 773 at DUKA-PETERSON-0000018 ("A 'typical' CMBS mortgage has a 10-year loan term,

a fixed interest rate, a substantial balloon payment due at loan maturity, and investor-friendly prepayment provisions.").

44. "A loan constant is a number which, when multiplied by the original face amount of a loan, produces the periodic fixed payment required on the loan." Rubinstein Rept. ¶ 2 n.5; *see also* Duka Tr. 1260:3-5 ("The loan constant is the relationship between debt service and loan amount expressed as a loan -- as the loan's original loan balance typically."); Digney Tr. 462:9-13 (a "loan constant" is "a function of the interest rate on the loan, the amortization, but it is essentially, you know, on any given year, how much interest plus principal is being paid on the loan as a percentage of the loan balance."); Henschke Tr. 1686:16-18 ("The constant would be -- it's just like a calculation of just, you know, debt service divided by loan amount."); Penner Tr. 701:17-20 ("loan constant" is "the constant payment that one makes -- a borrower makes on a loan, and it has to do with the -- a combination of the interest and the principal.").

45. There is a proportional relationship between a loan constant and the loan's interest rate; as interest rates decrease, loan constants decrease, and as interest rates increase, loan constants increase. Digney Tr. 462:14-21 ("[T]here is a proportional relationship between loan constants and interest rates, right? A Right. Q And if interest rates go up, actual loan constants go up, right? A Right."); Duka Tr. 1260:18-21 ("Q Can one impute the actual interest rate if given the actual constant and the amortization schedule? A Yes."); Henschke Tr. 1686:19-21 ("Q And is there a relationship between loan constants and interest rates? A Yes.").

46. RX 695A is a spreadsheet that demonstrates the relationship between loan constants and interest rates. For a loan constant shown in Cell B9, the interest rate associated with that loan constant will be calculated in Cell B10. For an interest rate shown in Cell B13, the loan constant associated with that interest rate will be calculated in Cell B14. RX 695A; Duka Tr. 1261:7-18 ("Q And what is the document showing? A It's assuming you're on a 30-year amortization schedule. And then the first two numbers, the constant and the imputed interest rate, the constant is a number you can plug in, and it derives the interest rate. Q Okay. And if we show the formula bar for the imputed interest rate, and that's at the top above the lettered columns, is that the formula that applies to calculate the imputed interest rate from the actual constant? A Yes."); Duka Tr. 1262:2-6 ("So what -- the two numbers at the bottom do the opposite. Here you plug in your hard code, the 7 percent, which is the actual interest rate, and then it computes your constant. So it does the reverse of that.").

47. A DSCR or DSC is a term that is commonly understood to refer to a ratio where the actual debt service is the denominator. Digney Tr. 461:25-462:4 ("[I]n the CMBS world, if people refer to the term DSC, are they referring to a ratio where the actual debt serves as the denominator? A Yeah."); Peterson Tr. 1075:10-12 ("Q And is [the term DSC] generally used to refer to a ratio where the actual debt service is the denominator? A Yes."); Parisi Tr. 1497:8-13 ("Q What is a debt service coverage ratio? A It's the ratio of a commercial property's incoming cash flow to its debt service. Q And debt service is the amount that is -- needs to be paid to service a loan on a property? A Yes."); Duka Tr. 1259:19-24 (DSC "measures -- the ratio is net cash flow divided by debt service. It's the loans -- it's the loan's actual debt service typically. And it measures the cushion or the lack of cushion to measure debt service over the term of the loan."); RX 801 at 5 (DSCR is "a measure of a property's ability to support payments on debt that it secures; with respect to a commercial mortgage loan, the ratio of monthly revenue on the

mortgaged property to the scheduled monthly payment on the loan. A debt service coverage ratio near or below 1:1 indicates that a loan may be in distress."); Penner Tr. 701:21-702:7 ("Q How do[] CMBS investors use loan constants, if at all? A I think they use it as a measurement of the borrower's ability to make the payment and comparing it to the income of the property. Q And now you're referring to something called a debt service coverage ratio? A Yes. Q And if you multiply a loan constant by the principal balance of the loan, you arrive at the annual debt service; is that right? A Yes.").

48. Commercial Mortgage Alert was "a resource used extensively in the CMBS market." Division's Rubinstein Br. at 11; *see also* Penner Tr. 699:2-10 ("[I]s Commercial Mortgage Alert an industry publication that you're familiar with? A Yes. Q And is this something that CMBS bond buyers would look at in the course of their job? A Yes. It's -- it's probably the most commonly -- had been the most commonly read publication for this industry for some time.") Digney Tr. 781:2-6 ("Are you familiar with a publication Commercial Mortgage Alert? A Yes. Q Is it your practice to review that publication? A Yes.").

49. Trepp is a "modeling software" used by CMBS investors that contained the loan-level data from the issuer and allowed investors to run customized stress scenarios. Weih Tr. 1013:4-17 ("Trepp is a software solutions provider focusing mainly, certainly at that point in time, on commercial mortgage-backed securities. It's a modeling software. So the issuing bank, it is my understanding, would give the cash flows of the loans to Trepp, and Trepp would model it. So versus having us try to model it or someone -- it's a modeling service that assisted in creating your own scenarios. So you had the cash -- the loans that are loaded in the -- a Trepp software, and you could provide your own scenarios, you know, assuming loan XYZ defaults in year 4 at a 30 percent -- so it was a customizable..."); Reidy Tr. 1968:16-1969:1 ("Trepp is a -- it's essentially a cash flow engine for CMBS properties. It has all of the property detail for an entire deal. And, again, it allows us to go in and adjust the net operating income. It allows us to put in conditions on whether or not a property will default at a certain set service coverage ratio. It allows us to put in either a straight cap rate or a spread of treasuries. And then we'll apply those assumptions to every property throughout the deal.").

S&P's Credit Ratings

50. Credit ratings are "forward-looking opinions about the creditworthiness of issuers and obligations," with the "likelihood of default [serving as] the single most important dimension of creditworthiness." RX 91 at SP-CMBS 01192917; *see also* Adelson Tr. 268:9-11 ("Credit ratings are -- they are forward-looking opinions about the creditworthiness of an issuer or a bond...").

51. "Ratings do not constitute investment, financial or other advice. Ratings are not recommendations to purchase, hold or sell a particular security or to make any other investment decision. Ratings and other opinions do not comment on the suitability of an investment for a particular investor and should not be relied on when making any investment decision." DX 269 at 3-4.

52. S&P expressed its opinions about creditworthiness using rating categories –AAA, AA, A, BBB, etc. – which were intended to denote different levels of risk. Thompson Tr. 41:7-

17 ("Q Could you explain for the Court what the significance of the different ratings assigned to a CMBS is? A Well, if you are high investment-grade credit quality such as AAA, somebody purchasing those would expect to have minimal risk of credit loss and minimal rating volatility, in other words, minimal risk of a rating downgrade. As you go into the more speculative grade ratings, the risk of loss or downgrade increase proportionally.); Adelson Tr. 268:20-269:3 ("So bonds and issuers that receive high ratings are supposed to be ones where the lender or investor doesn't have much to worry about and ought to have confidence that, you know, except for the next Great Depression, he is going to get his money. And ones with low ratings, well, those are chancy, but ones that have AAA ratings should be able to withstand horrible economic conditions and still repay the investors.").

53. On June 3, 2009, S&P published "Understanding Standard & Poor's Rating Definitions" ("Ratings Definition Article"), an article that was "designed to help market participants better understand the nature of Standard & Poor's credit ratings." RX 91 at SP-CMBS 01192916. The Rating Definitions Article provided a qualitative definition and a corresponding "stress scenario" for each rating category. RX 91 at SP-CMBS 01192925-28. The Rating Definitions Article stated that AAA meant that "[t]he obligor's capacity to meet its financial commitment on the obligation is extremely strong" and thus "should be able to withstand an extreme level of stress[, akin to the Great Depression] and still meet its financial obligations." RX 91 at SP-CMBS 01192924, SP-CMBS 01192928; *see also* Adelson Tr. 269:13-19 (In the Ratings Definition Article, "we announced that we were going to use historically based economic stress scenarios as the touchstone, the benchmarks for calibrating criteria, so that criteria for assigning a AAA rating should contemplate that the bonds would still pay even if you had conditions comparable to the Great Depression."). The Rating Definitions Article stated that BBB means the obligor "exhibits adequate protection parameters," and "should be able to withstand a moderate level of stress and still meet its financial obligations." RX 91 at SP-CMBS 01192926.

54. S&P used the term "Credit Watch" to indicate when there was a high potential for a rating change; Credit Watch Positive denoted when a rating had a high potential to be upgraded and Credit Watch Negative denoted when a rating had a high potential to be downgraded. Thompson Tr. 67:17-21 ("[W]hen the criteria piece uses the phrase 'CreditWatch negative,' what does that mean? A That means that the ratings have high potential to be downgraded"); Thompson Tr. 134:23-135:4 ("And what does it mean to place a security on watch? A It effectively means that you may take rating action and the direction, whether it was negative or positive, would be whether it was a negative or positive direction you thought the rating might move.").

55. Credit enhancement or credit support refers to "the bonds that are subordinate to that bond that essentially ensures against or insulates that bond from losses. By absorbing losses to the full extent of it -- of all -- you know, of all the other subordinate [classes]." Penner Tr. 695:8-13; Richard Rept. ¶¶ 31-33; RX 801 at 5 (Credit enhancement is a "technique[] used to improve the credit quality of a bond so that it can obtain a high rating . . . Common examples of credit enhancement include . . . subordination - the credit quality of a deal's senior class of bonds is improved by subordinating the junior classes.")

Ratings at S&P Were Issued in Accordance With Criteria

56. "Ratings criteria are **published** principles, methodologies, and assumptions that our analysts use to assign ratings; they provide the framework by which our analysts assess creditworthiness." JX 85 at ¶ I.C.(a) n.2 (emphasis added); *see also* JX 10 at SP-CMBS 00793853 (Criteria "encompasses all **published** guidance that governs the analytic basis for determining ratings," and "include all fundamental quantitative and qualitative elements, analytical principles, methodologies and assumptions that we use in the ratings process to produce our opinions.") (emphasis added).

57. "S&P's CMBS rating analysts were obligated to rate all conduit CMBS transactions using the methods and assumption disclosed in the approved, **published** Criteria." Rubinstein Rept. Appendix 1 at 1 (emphasis added); *see also* DX 269 at 4 ("Analysts involved in the preparation or review of any Rating Action shall use criteria and methodologies established by Ratings Services. Analysts shall consistently apply the then-existing rating criteria and methodologies in the analytical process for any Rating Action, in each case, as determined by Ratings Services.").

S&P Divided Commercial and Analytical Functions

58. S&P separated employees between analytical and commercial functions. RX 245 at SP-CMBS 01906710 ("Standard & Poor's maintains a separation of commercial and analytical activities. Please note that our analysts are not permitted to engage in discussions about commercial matters. Any questions about commercial matters should be directed to your Client Business Manager.").

59. "The analytical positions were focused on [doing] the actual analytical work, voting and participating in committees, and working or participating in any criteria processes. The business roles, while they might be knowledgeable about the product type, were effectively barred from doing that, and they could have more knowledge of individual billings for deals, interactions with the sales personnel in that regard." Thompson Tr. 47:2-10; *see also* DX 269 at 7-8 ("Ratings Services shall not forbear or refrain from taking a Rating Action, if appropriate, based on the potential effect (economic, political, or otherwise) of the Rating Action on Ratings Services, an issuer, an investor, or other market participant. Ratings Services and its Analysts shall use care and analytic judgment to maintain both the substance and appearance of independence and objectivity. The determination of a rating by a rating committee shall be based only on factors known to the rating committee that are believed by it to be relevant to the credit analysis. Ratings assigned by Ratings Services to an issuer or issue shall not be affected by the existence of, or potential for, a business relationship between Ratings Services (or any Non-Ratings Business) and the issuer (or its affiliates) or any other party, or the non-existence of such a relationship . . . Reporting lines for Analysts and their compensation arrangements shall be structured to eliminate or effectively manage actual and potential conflicts of interest. Ratings Services shall not have Analysts who are directly involved in the rating process initiate, or participate in, discussions regarding fees or payments with any entity they rate.").

S&P's CMBS Group

60. S&P's CMBS Group was divided into two groups, NI and Surveillance. JX 85 at ¶ I.B; *see also* Thompson Tr. 37:23-38:1 ("The Surveillance Group would monitor the ratings of outstanding securities that Standard & Poor's assigned in the ongoing course of its business."); Digney Tr. 419:6-11 ("So on the New Issuance side, you are essentially tasked with assigning ratings to a new transaction as it comes to issuance, and then it is the monitoring of the ratings on an ongoing basis is handed over to the Surveillance Group for the remaining life of the transaction.").

61. "The CMBS Group fell within S&P's Structured Finance division, which was led by David Jacob during the Relevant Period." JX 85 at ¶ I.B. The Structured Finance division included CMBS, residential mortgage-backed securities ("RMBS"), asset-backed securities ("ABS"), and collateralized-loan obligations ("CLO"). Jacob Tr. 515:19-516:1 ("Were you also overseeing the commercial mortgage-backed security? A Yes. All structured finance, which meant commercial mortgage-backed securities, residential mortgage-backed securities, asset-backed securities and CLOs. These were the three main -- four main asset classes.").

62. Eric Thompson was Duka's counterpart that led Surveillance during the Relevant Period until he left S&P in early 2011. Thompson Tr. 38:15-19 ("I want to fast-forward to 2008. At that time you became the co-head of the CMBS Group with Ms. Duka focused on surveillance; is that correct? A Yes."); Thompson Tr. 39:7-10 ("Do you recall the date that you left Standard & Poor's? A It was the first week of January, shortly after New Year's.").

63. From the time of Thompson's departure from S&P in early January until March 2011, there was "no one" assigned to oversee the Surveillance Group. Duka Tr. 1112:13-18 ("Q Mr. Thompson left in January of 2011; is that right? A That's my recollection. Q Who oversaw surveillance after he left, before March or April? A To my recollection, no one did.").

64. In March 2011, Duka was assigned to oversee the Surveillance Group. Duka Tr. 1112:7-12 ("And then you took over surveillance – the surveillance side of rating commercial mortgage-backed securities from Eric Thompson; is that right? A Correct. Q And that was in early 2011? A Yes. Roughly March or April 2011."); RX 436 at SP-CMBS 00318235 (March 4, 2011 email from Jacob to "Standard & Poor's Structured Finance Ratings Staff" stating, "I am pleased to announce a new organizational structure for US CMBS Mortgages and the appointment of Barbara Duka to head the combined group of CMBS new issuance and surveillance teams").

65. "For part of 2009, Duka and the CMBS Group were supervised by Kim Diamond, and after Diamond's departure in August 2010 the supervisor was Grace Osborne. Both Diamond and Osborne reported to David Jacob during the Relevant Period." JX 85 at ¶ I.B.

66. For most of the Relevant Period, Duka, had two senior subordinates in NI. From May 2009 through January 2011, the two senior subordinates were Kurt Pollem and David Henschke. *See* Henschke Tr. 1715:25-1716:3 ("I kind of viewed myself and Kurt Pollem as kind of the lieutenants underneath Barbara, you know, kind of shepherding the process of rating new

deals."); Snow Tr. 1740:20-1740:24 ("Who were you reporting to sort of at the end of 2010 and early 2011? A I believe the reporting lines at that time put me under Kurt Pollem, which would have -- you know, Kurt would have reported to Barbara Duka.").

67. After Henschke left S&P in January 2011, Pollem was Duka's only senior subordinate until James Digney joined NI in March 2011. Digney Tr. 432:5-17 ("Were there other individuals within the group who were at the same level as you who were also supervised by Ms. Duka? A Yeah, Kurt Pollem on the new issue side, and then I guess it would be like Gary Carrington, Barbara Hoeltz, Deegant Pandya, maybe, I think, kind of same level. Q And were they on the surveillance side at that time? A Yes. Q So on the new issuance side, it was you and Mr. Pollem? A Right."); RX 436 at SP-CMBS 00318235 (March 4, 2011 email from Jacob to "Standard & Poor's Structured Finance Ratings Staff" stating, "Supporting Barbara will be four analytical managers: James Digney and Kurt Pollem for New Issuance and Gary Carrington and Barbara Hoeltz for Surveillance.").

The CMBS Group Used a Model to Determine CF Ratings

68. The CMBS Group determined CF ratings using a model, which was "an Excel spreadsheet" that contained formulas. Thompson Tr. 57:15-23 ("A Model in the case of the way I'm referring to it is simply an Excel spreadsheet that has formulas, it is effectively a tool that deploys the assumptions that are present in the criteria. It is effectively a calculator. Q And who uses the model? A The analysts who are either assigning new issue or conducting surveillance would use it in their work.").

69. The model produced credit enhancement levels based on the CMBS Group's loan-by-loan analysis. Digney Tr. 431:9-17 ("I mentioned the analysis that we're doing at the loan level, and the result of that is property level, I guess you could say value and cash flow, which gives us . . . loan to value ratios and debt service coverage ratios, but those are outputs of the loan-level analysis, but you need something to take those and create, or, you know, produce recommended credit enhancement levels. So the model is what does that.").

70. Investors were not provided access to S&P's model. Digney Tr. 800:11-19 ("Do you provide the model or the formatted data sheet itself to investors as part -- A No. Q -- of your transaction? A No. Q That's purely an internal tool that's used in deriving the ratings? A That's right.").

S&P's CMBS Ratings Were Determined by Rating Committees

71. S&P's ratings were "determined by a vote of a rating committee comprised of ratings analysts and not by any individual analyst." JX 17 at SP-CMBS 01693785. "Each rating committee must have, and document, a designated chairperson," whose responsibility included "monitoring that the rating committee . . . [a]ppropriately applies Ratings Services' criteria." *Id.*; DX 269 at 4 ("Credit ratings shall be assigned by a vote of a rating committee comprised of Analysts and not by any individual Analyst. Ratings shall reflect all information known, and believed to be relevant, to the rating committee, consistent with Ratings Services established criteria and methodologies. Ratings Services shall use Analysts who individually or collectively

have the appropriate knowledge and experience in developing a rating opinion for the type of credit being applied.").

72. Rating Committees decided both preliminary and final ratings, Digney Tr. 430:8-10 ("Can ratings be assigned on a preliminary or final basis without committee vote? A No."), as well as whether any rating changes were warranted by the analysis conducted by Surveillance. Thompson Tr. 43:14-44:1 ("Q Could you describe the role of a committee in the rating process. A Typically you would have one or two, potentially more, analysts assigned to conducting the majority of the work that was -- analytical work that was required for the review. They would present their findings to a committee, and the committee would effectively review and discuss the results and determine if the underlying assumptions and information and the results warranted a rating change or an affirmation and they would document their -- they would document their findings both internally and then externally.").

RAMPs

73. The determination of a Rating Committee was documented in a RAMP. Thompson Tr. 44:3-6 ("Q Where would the committee findings be documented at S&P? A At S&P there was a committee memo that was put forth. They called it a RAMP.").

74. According to S&P's RAMP Guidelines, a RAMP was an S&P "template that analysts use to present financial, structural, and other information to a rating committee [that] ... outlines the analyst's rating recommendation." JX 16 at SP-CMBS 00293775.

75. The objective of the RAMP was "to explain the rating recommendation to voting committee members through the application of criteria," capturing "the key drivers of the issue being rated, the relevant facets of the analysis, the pertinent information considered, and the underlying criteria and applicable assumptions, as well as the committee's final decision and the rationale for the rating." JX 16 at SP-CMBS 00293775; *see also* Digney Tr. 431:1-3 (a RAMP is "essentially it is a summary of all of the analysis that went into the transaction to come up with the recommended ratings."); Digney Tr. 770:6-19 ("Does the RAMP represent S&P's effort to document the steps taken in developing or rating to permit an after-the-fact reviewer to understand how the rating was arrived at? A Yeah. It's -- well, both, I guess. It's the primary document that the committee members are reviewing prior to the committee and during the committee. But then the idea being that it's a comprehensive record of what was done to rate it so someone could look at it later. Q And understand how the rating was arrived at? A Right."); Duka Tr. 1207:15-1208:8 ("[W]hat is the purpose of the RAMP? A To document internally rating committee discussions. Q Does it highlight certain facts that are used to rate a transaction? A It should highlight the facts that were considered in the rating committee, yes. ... Is it a guide or a reference for surveillance as to the rationale used at issuance? A I think it would be one of several documents that surveillance would use when looking at a transaction. Q And should the RAMP reflect the relevant factors that were considered in the analysis that led to the credit rating? A I think that's what the RAMP guidelines require. So I would say yeah.").

76. Duka, as the Analytical Manager assigned to oversee NI, was not responsible for preparing the RAMPs or reviewing the RAMPs to ensure that they were completed properly. Instead "[t]he RAMP Guidelines directed that the primary analyst of a transaction complete the

RAMP and that the chairperson of the Rating Committee review and approve the RAMP upon its completion." JX 85 at ¶ II.B.; Duka Tr. 1400:1-3 ("It's really the rating committee chair's responsibility to make sure that that RAMP reflects the discussions in the committee."); Duka Tr. 1401:7-10 ("[W]ho does the documentation for the RAMP? A It's the analysts that are working on the transaction."); Duka Tr. 1399:22-25 ("But the RAMP is technically completed by the analyst or one of the two analysts and reviewed by the other. And then it -- it's supposed to be reviewed by the chair of the rating committee."); Duka Tr. 1468:7-16 ("JUDGE GRIMES: And did you say that the RAMP is completed by the analyst -- one of the analysts and then reviewed by the other analyst? A. I don't know which one of them does it. I don't care. All I care about is the more senior of those analysts is responsible for making sure it's done. I don't care how they distribute the work between the pre-sale or the RAMP. But they're responsible for reviewing it."); Duka Tr. 1469:16-20 ("The preliminary RAMP is what is presented by the analyst. It may or may not be correct. So it is the chair's responsibility to make sure that that is corrected and reflects what is discussed in the committee."); Snow Tr. 1746:15-19 ("And what is the role of the primary analyst in completing the documentation known as the RAMP? A I mean, the primary analyst would prepare the RAMP."); Digney Tr. 772:3-9 ("[I]s it fair to say that the primary analyst is responsible for completing the RAMP, and basically signs affirming that they've reviewed it and it's completed properly? A Yeah. I guess, you would say that. These are specific attestations about model use and -- but, yeah, I think that's a fair statement.").

Process of Rating CF Transactions

77. New Issuance would begin the rating process after an engagement letter was executed between the issuer and S&P. Digney Tr. 422:6-8 ("So before we would start work on a transaction, there has to be a formal engagement in place between S&P and the issuer."); *see, e.g.*, JX 21 (engagement letter for MSC 2011-C1).

78. During "[P]hase 1" of the rating process, the issuer would present a preliminary collateral pool to S&P, along with other NRSROs. Digney Tr. 423:11-14 ("[R]ating a new transaction, there is a couple of steps to the process, the first being I guess what I would call phase 1 where they've presented a preliminary collateral pool to all of the rating agencies . . . .").

79. Over the course of approximately two weeks, analysts in New Issuance would sample and analyze the loans in the preliminary collateral pool, with a focus on the top ten largest loans, and run the pool through the "rating model." Digney Tr. 423:17-23 ("[There is a primary analyst that takes charge of the transaction. They may recruit the help of a few additional analysts doing a sampling of the loans in the pool, some analysis. A lot of the focus is on the top-ten largest loans. The pool is then run through the rating model.").

80. S&P would then provide the issuer with "preliminary feedback," which consisted of the anticipated credit enhancement levels for each tranche based on S&P's initial review. Digney Tr. 423:25-424:3 ("[T]he two weeks really culminates with S&P as well as the other agencies sending the issuer essentially their CE levels based on that preliminary review of the pool."); Digney Tr. 424:15-18 ("Q What is preliminary feedback? A So that would be what we are sending after that preliminary review of a transaction, so the two-week review that I was mentioning.").

81. Issuers would collect preliminary feedback from multiple ratings agencies and then decide which ratings agencies would proceed to "[P]hase 2" – actually rating the transaction. Digney Tr. 424:24-425:4 ("So the issuer then collects that feedback from the multiple agencies and then makes a decision about which agencies they are moving forward with to move to what I call phase 2, and that's to actually assign -- ultimately assign ratings to the transaction."); Thompson Tr. 69:10-21 ("Generally speaking, when an agency is approached to rate a transaction, it is to provide preliminary ratings or an indication of where there credit enhancement would be given rating levels, and they will post all the information in a [17g-5] site, at which time the analysts that are assigned to the deal will determine what those answers are. There will be a Credit Committee. They will provide them back to the issuer, and then generally the issuers will look at the feedback provided by the agencies and select the agencies that they want to rate the transaction.").

82. During "[p]hase 2," S&P would expand the review done during Phase 1 by, *inter alia*, analyzing additional loans, conducting on-site visits of certain properties, and reviewing the "structural and legal documents that form the transaction." During this phase, which lasted four to five weeks, loans would be continuously added and dropped from the pool. Digney Tr. 425:24-426:12 ("[I]n phase 2 they are continuing to -- there is always changes happening to the collateral pool, so loans are being added and dropped, but from S&P's perspective, what we are trying to do is expand that desktop review that we had done for the prelim, analyze additional loans, we are going out to see a certain number of the assets as part of, you know, an analytical process. We are also then digging into the structural and legal documents that form the transaction. We are doing, you know, all types of analysis, not just on the collateral, but also on, you know, the SPE structure, all sorts of other criteria pieces that we sort of have to factor in."); Digney Tr. 427:18-22 ("Phase 2, about how long does it take, in general? And, again, focusing back in the 2011 time period. A I would say four to five weeks, somewhere in there.").

83. Following Phase 2, S&P would provide the issuer with final feedback, which included the final credit enhancement levels. Digney Tr. 427:23-428:4 ("Q What happens at the end of phase 2 in terms of reporting back to the issuer? A So that culminates with our final CE levels. So we've completed our analysis, and based on the final collateral pool, these are the CE levels that we think are now appropriate for the transaction."); Digney Tr. 428:8-10 ("Q And what is final feedback? I think what you were just describing? A Yes, final feedback, exactly.").

84. After the issuer received final feedback, it would provide S&P with the "actual capital structure of the deal." Digney Tr. 428:21-22. S&P would convene a rating committee to vote on a preliminary rating, which S&P would then include in a published presale report that it issued. Digney Tr. 428:18-24 ("The preliminary ratings are issued after a committee at S&P, but the timing is right after we have given them the final feedback, they have come back to us with the actual capital structure of the deal that they are going to be issuing. We have a committee. We issue prelim ratings along with our pre-sales report.); Digney Tr. 429:2-6 ("Q The credit enhancement levels included in the final feedback then drive the preliminary rating that is assigned as a result of a committee vote, and that's incorporated into the pre-sale document? A That's right.").

85. During the final phase, the issuer would market and price the CF securities. S&P would analyze whether the transaction changed during the final phase and, after voting in

committee, convert the preliminary rating to a final rating. Digney Tr. 429:10-21 ("[S]o the third and I guess final phase, that can take I would say probably two to three weeks, and that's when, you know, the issuer is marketing the securities, you know, the deal has priced, and then they are ultimately closing the transaction and settling. And then from our perspective, what we need to provide at the end of that is the final ratings. So we are essentially seeing if anything has changed in the transaction over that course of time. There is another committee, and then we convert our prelim rates to final rates.").

Factors Issuers Consider in Retaining NRSROs to Rate CF Transactions

86. There are different factors that issuers consider in deciding which NRSROs to retain to rate a CF transaction, one of which is the proposed CE levels. Issuers prefer to retain NRSROs that propose lower CE levels because that increases "the economics" of the transaction for the issuer. Thompson Tr. 70:25-71:6 ("Q What is your understanding? A It comes down to the absolute credit enhancement levels that are assigned. The higher the credit enhancement levels, typically it means that there is less economics in the transaction. So issuers tend to look at agencies that might have lower enhancement levels.").

87. Other factors that issuers weigh in deciding which NRSROs to retain include "maintaining good relations with rating agencies," Jacob Tr. 647:3-7 ("Is one of the considerations, based on your experience in the CMBS industry, for a rating agency being selected by an issuer maintaining good relations with rating agencies? A Yes."), "investor guidelines," Thompson Tr. 71:8-9 (issuers "also consider if an agency has certain investment charters and things of that nature."), Thompson Tr. 72:1-6 ("Different organizations have different investor guidelines. Certain agencies such as S&P and Moody's and Fitch are written into guidelines whereby investment buyers can only purchase securities if they are rated by one of those three agencies."), a desire to retain more than one rating agency to rate a CF transaction, Jacob Tr. 647:22 ("mostly you need a second rating"), and a desire to rotate the use of rating agencies. Jacob Tr. 648:2-9 ("Is it also the case that issuers, based on your experience in CMBS 2010-2011, sought to rotate the use of rating agencies amongst their deals as an objective in selecting rating agencies from time to time? A Less than it was in the heyday of the market, because there are so few deals going on here. But that is a factor.").

88. When multiple rating agencies are retained to rate a CF transaction, for each tranche, the credit enhancement levels assigned to that tranche in the offering documents will be the highest of those proposed by the retained rating agencies. Digney Tr. 77:19-78:2 ("Are you familiar with the term constraining rating agency? A Yes. Q And what is that term? A So it would be the -- when multiple rating agencies send their credit enhancement levels for each rating category, it would be the rating agency who is -- at a particular rating whose credit enhancement level was higher.").

Criteria Group

89. "The Criteria Group was structured to be independent from the groups within S&P that issued rating opinions, including the CMBS Group." JX 85 at ¶ I.C.(a).

90. The CMBS Criteria Officer was "[t]he person assigned to determine and interpret CMBS sector-specific ratings definitions and in-depth articles that explain how Standard & Poor's determines its ratings." DX 72 at SP-CMBS 00480756 (document entitled "North America CMBS New issue Rating Procedures"); *see also* Duka Tr. 1256:8-14 ("My understanding is [the criteria officer] would, essentially, have jurisdiction over criteria and how it was published. They were the resource to vet criteria interpretations or criteria changes. They were involved in . . . criteria committees. They could be involved in model development."); Thompson Tr. 50:10-15 ("Criteria officer was responsible for ensuring that the criterias and methodologies being worked on were advancing and they would hold criteria committees in a process that would ultimately determine what assumptions might be used in methodologies and how it would work."); Parisi Tr. 1492:8-19 ("The practice criteria officers, as they were called, were responsible for working with the analytical managers and the analysts within their practice and any criteria development efforts. They also served as a first line of – you know, if someone had a question or needed some clarification or bounce an idea off of, you know, the -- the criteria officer would often participate in that way as well. And then each practice criteria officer was also responsible for chairing his or her criteria committee for that -- for that group.").

91. The CMBS Criteria Officer's duties, as described in a job posting drafted by Parisi, included:

> Manage and oversee the criteria process for CMBS.
>
> Assure that analytic methodologies remain sound, evidence thought leadership, are adapted on a timely basis in response to market developments and industry changes, and are reasonably consistent globally within CMBS. Also, serve as a voting member of the Structured Finance Criteria Committee.
>
> Attend CMBS rating committees concerning high profile credits or controversial issues. At committees, serve as an authoritative reservoir of knowledge with respect to applicable rating criteria and promote the application of sound analytic judgment.
>
> Make final interpretations of criteria for his/her coverage area (subject to escalation process in the case of a disagreement).

RX 238 at SP-CMBS 01400672 (October 1, 2010 email from Parisi to Amy, Tricia with the subject "Job Description – Sr. Dir-Criteria Officer" with the job description attached); RX 239 at SP-CMBS 00423304 (October 4, 2010 email from Thompson to Duka with the subject "Criteria Spot Was Posted" with the job description) ; Parisi Tr. 1544:11-13 ("[D]id you write that while you were at S&P? A Yes, I did."), Parisi Tr. 1545:5-8 ("Q And did you author the description? A I created the memo. I most likely borrowed from other criteria officer job descriptions, but, yes.").

92. The Criteria Officer was responsible for documenting the minutes of practice criteria committee meetings, such as CMBS Criteria Committee meetings. Thompson Tr. 120:21-23 ("Q Was it generally the practice that the criteria officer would document criteria minutes? A It was.").

93. The Criteria Officer was responsible for documenting criteria interpretations and discussions relating thereto. Thompson Tr. 187:13-18 ("Q Did you have an understanding at the time that the criteria officer was tasked to keep notes regarding criteria interpretations? A That was my understanding. Q That was your understanding? A Yes."); Duka Tr. 1139:6-16 ("[D]id you create any internal documentation that explained the change to blended constants or to make that change official? A What would you mean by internal documentation"? Q Documents internal to Standard & Poor's opinion. A I did not document the conversation with Frank, if I'm understanding your question correctly. But, also, I understood that to be something that the criteria officer documents.").

94. "The Criteria Group was led by a Chief Credit Officer. From May 2008 to December 2011, Mark Adelson served as the Chief Credit Officer. Reporting to the Chief Credit Officer was a Chief Criteria Officer ('CCO') for Global Structured Finance who in turn supervised Criteria Officers ('CO's') for particular ratings practices." JX 85 at ¶ I.C.(a); *see also* Parisi Tr. 1486:23-1487:14 ("Now, could you briefly describe your responsibilities in October 2009 as chief credit officer for structured finance? A I was responsible for overseeing the criteria development for all of structured finance globally. And that included four key divisions, which was RMBS, or residential mortgages; the CMBS; asset-backed securities; and the collateralized debt or the CDO sector. In that position, I oversaw -- there were four -- or five criteria officers . . . I chaired the structured finance criteria committee. And my role was really to manage the overall criteria development process for structured finance."); RX 646 (organization chart for the Criteria Group).

95. "Thomas Gillis was the CCO for Global Structured Finance, which included CMBS, from the beginning of the Relevant Period until October 2009. From October 2009 to March 2012, Frank Parisi served as the CCO for Global Structured Finance, which included CMBS. From January 2009 through the fall of 2009, James Palmisano was the CMBS CO, until he was replaced by James Manzi. Parisi himself filled in as the Acting CMBS CO after Manzi's departure, from summer of 2010 through mid-December 2010, and was then replaced by Majid Geramian." JX 85 at ¶ I.C.(a); *see also* RX 233 at SP-CMBS 00426517 (email dated September 23, 2010 from Parisi to others stating, "Manzi recently joined our Global SF Research team led by Howard Esaki. I'm in the process of looking for a replacement, and until such time, I'm the acting CMBS CO.").

Criteria Process Guidelines

96. The Criteria Process Guidelines ("CPG") provided "guidance for the entire criteria development and review process, including the conceptualization, research, approval, dissemination of criteria, and the on-going reviews of their continued applicability and robustness." JX 10 at SP-CMBS 00793851.

97. Introductory Section 2.1 provided that the CPG "do not apply to interpretations of the application of our criteria to a particular circumstance which are expected to occur as a natural by-product of our analysis and committee process." JX 10 at SP-CMBS 00793851; *see also* Adelson Tr. 373:25-374:3 ("Well, the criteria process . . . doesn't apply to interpretations.").

98. Questions regarding whether an application of methodology was a change of criteria or an interpretation of criteria were to be directed to the Criteria Officer. JX 10 at SP-CMBS 00793851 ("Analysts [were] encouraged to consult with analytical managers, criteria committee members, and criteria officers with application and interpretation questions."); Thompson Tr. 185:25-186:6 ("Q If you had a question about whether an idea was an interpretation of criteria versus a difference from criteria, would you have considered it during your tenure as the analytical manager for Surveillance, that that was an appropriate question to raise with your criteria officer? A Yes."); Parisi Tr. 1549:5-12 ("Q If I'm in the analytical group and I want to know whether an issue I have is a matter for interpretation or a matter that requires a criteria amendment with the five steps that you referred to earlier, under 2.3, would it be appropriate for me to bring that question to my practice criteria officer in 2010? A Yes."); RX 528 at SP-CMBS 01373802 (June 13, 2011 email from Parisi to others, copying Bukspan and Barnes, stating, "The interpretation of criteria resides with criteria - application resides with the ratings practice.") Parisi Tr. 1546:8-16 ("At the bottom of the email, which you have written there, you write that 'The interpretation of criteria resides with criteria. Application resides with the ratings practice.' Was that your understanding in June of 2011? A Yes. And would that be the same understanding that you had in December of 2010? A Yes.").

99. "Where a proposed methodology constituted not an interpretation but a change in criteria, the CPG set forth a five-step process of Initiation, Research, Approval, Dissemination, and Periodic Review to implement a proposed criteria change." JX 85 at ¶ II.A.

100. The Initiation phase included, *inter alia*, "identifying the criteria issue," appointing "a member of the practice criteria committee to serve as a Criteria Champion for the issue" and allocating resources for criteria projects. JX 10 at SP-CMBS 00793856-858; *see also* Parisi Tr. 1500:7-16 ("[I]nitiation would -- or refers to the introduction or the idea to -- or the need to revise or create sub-criteria. So it could come out of analysts seeing different types of structure, you know, maybe analysts identifying an area of improvement or an area of the criteria that could be improved. So it's just -- sort of starting the process, raising the question to look at the criteria again.").

101. The Research phase included, *inter alia*, "researching the issue," "formulating recommendations," "writing documentation for internal vetting and approval," with the "research sub-process end[ing] with bringing documentation to the relevant practice criteria committee for approval." JX 10 at SP-CMBS 00793856; *see also* Parisi Tr. 1500:20-24 ("Well, the analyst working on the criteria -- or the primary person working on the criteria had a responsibility to put together -- conduct research and put together whatever information they could to support whatever proposed change they were making.").

102. The Approval phase described how proposed criteria were to be formally approved, with "[p]ractice criteria committees serving as the primary criteria decision makers," unless the proposed criteria change required escalation. JX 10 at SP-CMBS 00793860; Parisi 1501:7-23 ("[B]efore any criteria can be applied, it would need to be approved; again, whether it was a criteria change or introduction of new criteria. And the approval process included – or consists of us going through various committees; the practice level criteria committee and the structured finance criteria committee, in the case of structured criteria. And then depending on the potential impact of the criteria or whether the criteria crossed multiple sectors, it may

sometimes need to go to the analytics policy board. Q And would the level at which approval needed to be obtained be set forth in the escalation provisions of the criteria process guidelines? A Generally, yes.").

103. Within the Approval phase, Section 3.13 was entitled "Escalation," and provided as follows:

> An analytic issue and its related criteria should be escalated in accordance with Section 3.26 if one or more of the following conditions apply:
>
> 1. they may affect multiple practices or regions;
>
> 2. they are inconsistent with those of another practice;
>
> 3. they represent a loosening of criteria assumptions or removal of a specific area of analytical review;
>
> 4. they involve the application of highly specialized expertise, beyond what is typically encountered in the practice;
>
> 5. they involve a meaningful methodological change or the development of new tools or models;
>
> 6. they present substantial resource allocation considerations;
>
> 7. they may impact existing ratings by more than three notches;
>
> 8. they may affect a large number of ratings (including outlook changes, CreditWatch placements, or rating withdrawals);
>
> 9. they are considered in response to a criteria change by a competitor; or
>
> 10. they are otherwise identified as an explicit matter for escalation by the APB or a criteria committee.
>
> An analytic issue and its related criteria should be escalated to the Chief Credit Officer or the APB in accordance with Section 3.26 if one or more of the following conditions apply:
>
> 1. they depart from existing analytical principles as expressed in the articles described in Section 2.8(i);
>
> 2. they are related to a type of issuance that is rapidly growing;
>
> 3. they carry meaningful franchise or reputational risk;
>
> 4. they are related to a topic that is receiving vast media attention;

> 5. they are considered in response to a lack of market acceptance of our current criteria (i.e., an assertion that the criteria lack credibility); or
>
> 6. they are expected to lead to a situation where the marketplace strongly disagrees with the position we are taking.
>
> Criteria officers are responsible for escalating issues when any of the foregoing conditions apply.
>
> JX 10 at SP-CMBS 00793862-3.

104. Section 3.13 only applied to the implementation of criteria changes that went through the Initiation and Research phases, and portions of the Approval phase. Adelson Tr. 407:4-23 ("[B]efore you even get to Section 3.13, the escalation procedure, what has to happen prior to that if you are talking about implementing your criteria change? A Well, a criteria project has to get started. You have to create a criteria project. So you have the initiation, the research, presenting it to committee, all of those things . . . Q I guess in that five-step process, my question is, at what stage do you go to the escalation point? A Escalation occurs after -- it occurs after each committee has voted, but before anything is published.").

105. The term "practice" in Section 3.13 refers to "asset type." Duka Tr. 1375:2-7 ("What did practice refer to, as you understood it, in this numeral? A I guess product, asset type. Q So give us an example of a different practice of CMBS as you understood this section. A RMBS.").

106. Section 3.26, referenced in Section 3.13, was entitled "Criteria Appeals and Escalation," and provided as follows:

> Rating analysts and managers can appeal existing or new criteria for any analytic reason. The hierarchy for escalation and for criteria appeals is as follows:
>
> (i) The first level of appeal/escalation is to a Practice Criteria Officer, who should convene a practice criteria committee to address the matter. The practice criteria committee should resolve the appeal in a manner consistent with its best collective, analytic judgment. Analytic staff and managers can appeal the decision of the practice criteria committee to the next level.
>
> (ii) The second level of appeal/escalation is to a DRSCO, who may convene a departmental or regional criteria committee to address the matter. The committee or the DRSCO acting individually should resolve the matter in a manner consistent with its or his/her best analytic judgment. Analytic staff and managers can appeal/escalate the decision of the committee or of the DRSCO to the next level.
>
> (iii) In the special case of issues involving the global consistency of criteria, an appeal from the decision of a regional criteria committee or from the decision of a regional DRSCO acting individually may be directed to the appropriate departmental DRSCO (i.e., for either Structured Finance or Corporate & Government), who may convene a departmental criteria committee to address the matter. The departmental criteria

committee or the departmental DRSCO acting individually should resolve the matter in a manner consistent with its or his/her best analytic judgment. Analytic staff and managers can appeal the decision of the departmental criteria committee or of the departmental DRSCO to the next level.

(iv) The final level of appeal/escalation (other than escalation pursuant to Section 3.15) is to the Chief Credit Officer, who may convene the APB to address the matter. (See footnote 1.) The Chief Credit Officer acting individually, or in consultation with the APB, should resolve the matter in a manner consistent with its or his/her best analytic judgment.

JX 10 at SP-CMBS 00793867.

107. The first level of appeal under Section 3.26 was to a practice criteria officer, such as the CMBS Criteria Officer. Parisi Tr. 1550:17-20 ("So the first level of appeal or escalation would be to the practice criteria officer under 3.26, right? A Yes.").

108. The term "departmental criteria committee" referred to the Structured Finance Criteria Committee ("SFCC"), which was composed of the Criteria Officers for the different asset classes within the Structured Finance Division. *See* FOF¶ 676.

109. APB refers to the Analytic Policy Board, which was senior to the SFCC. Thompson Tr. 123:24-124:1 ("Analytical Policy Board which was -- effectively that was senior members of the organization that were in the Criteria Group.").

110. The Dissemination phase included, *inter alia*, "publication of approved criteria internally and externally," with external publications to appear on sandp.com and RatingsDirect. JX 10 at SP-CMBS 00793857; *see also* Parisi Tr. 1501:25-1502:5 ("Once a criteria change or a new criteria were developed, it would -- the intent of dissemination was to publish a criteria article to say, you know -- whatever it is, to say this is how S&P now rates or -- you know, this type of security or something like that. So publish the criteria.").

111. For an application of methodology to be considered "Criteria," it was required to be published by S&P. Thompson Tr. 141:12-20 ("Was it your understanding as the analytical manager of surveillance during the period that you held that role that S&P criteria, to be criteria, required publication? A At this time, yes. JUDGE GRIMES: I'm sorry, can I just interrupt, this being right now today or this being back then? A. This being back then."); Adelson Tr. 334:6-15 ("Q And do you see where it says 'criteria must be disseminated externally through published documentation'? A Yes. Q And is it the case that Criteria, capital C, can only be criteria if it is published? A When you say Criteria, capital C, what do you mean? Q S&P criteria that is official criteria. A Yes.").

112. When S&P changed its criteria, Surveillance was required to review outstanding ratings to determine whether ratings changes were warranted in light of the new criteria. Thompson Tr. 67:6-12 ("Whenever we would launch new criteria, you would have to determine the impact of the criteria on your outstanding ratings. In effect, you would have to test all of the transactions that you currently had rated. The test, or the testing that we conducted, resulted in what you see in the first line.").

113. The CPG were publicized within S&P. Adelson Tr. 279:11-22 ("Q Were these criteria process guidelines publicized within Standard & Poor's? A Yes, these were a policy that had to get voted and approved at the Policy Governance Group and at the Analytic Policy Board, and then disseminated.").

114. S&P employees were required to comply with the CPG. JX 10 at SP-CMBS 00793851("Rating services employees are required to comply with these guidelines. Failure to comply may result in disciplinary action up to and including termination of employment."); *see also* Digney Tr. 733:2-5 ("And did you understand that the CMBS group needed to comply with the criteria process guideline? A Yeah.").

Quality Group

115. "S&P's Quality Group . . . was responsible for ensuring compliance by S&P's analysts with criteria and internal ratings processes." JX 85 at ¶ I.C.(c).

116. "Quality's job was to see that the analysts were following and applying correctly the criteria," Jacob Tr. 540:3-4, which included monitoring compliance with the CPG. Adelson Tr. 275:22-276:4 ("Q What was the purpose of the criteria process guidelines? A The criteria process guidelines define the system, the process, for developing and approving criteria. What they also do is they create a set of rules that the Criteria Group and anyone involved with criteria development has to follow that the Quality Group can then police."); *see also* Duka Tr. 1256:18-23 ("I understood the job of the quality officer to essentially periodically review internal documents. In some cases, it might just be the committee documents, but in some cases it might be a broader range with the purpose of seeing if the analytical team was following the criteria."); Parisi Tr. 1548:15-18 ("Was it also part of the responsibility of the quality group to ensure that the criteria were applied correctly through their reviews? A Yes.").

117. "Susan Barnes was the Quality Officer for Structured Finance throughout the Relevant Period, and was also the Quality Officer for CMBS." JX 85 at ¶ I.C.(c). Barnes reported to Neri Bukspan, the Chief Quality Officer. Milano Tr. 215:4-5 ("Q And who is Neri Bukspan? A Neri was the chief quality officer.").

MQR Group

118. S&P's Model Quality Review Group ("MQR") "independently assess[ed] and validate[d] the quality of models used in Standard & Poor's Ratings Services analytical processes in order to determine whether a model is suitable for its intended use." JX 13 at SP-CMBS 01694210. "MQR was tasked with performing periodic reviews of models, including CMBS models." JX 85 at ¶ I.C.(b); Thompson Tr. 179:25-180:4 ("Folks from [the MQR] group I believe would vet the models and provide reports on what their findings were and how the report complied to the criteria being used or if there was errors in it."); Digney Tr. 479:18-22 ("[D]oes MQR approve models, is that their function? A Yeah, I believe so. It is just the model review processes changed a lot from over the years, but yeah, I think that was the primary function.").

119. The MQR Reviews, per the Model Quality Review Policy, "consider[ed] relevant aspects of a model, including a review of Criteria application . . ." JX 12 at SP-CMBS 01694209;

Duka Tr. 1194:10-13 ("[M]y understanding [was] that [MQR] would compare the criteria to the model that was submitted and determine whether the model was following the criteria.").

120. The Model Quality Review Guidelines, effective September 7, 2010, provided that MQR, *inter alia*, "examines whether a model is suitable for the relevant criteria." JX 13 at SP-CMBS 01694212. The Model Quality Review Guidelines, effective June 1, 2011, provided that "[t]he MQR process examines whether a model correctly embodies the elements of Criteria that it is designed to embody and whether it is suitable for its intended analytic use." JX 14 at SP-CMBS 00649709.

121. The MQR Group fulfilled its function of reviewing models through, among other things, engaging in dialogue with the rating practices, *i.e.*, CMBS. Digney Tr. 479:23-480:3 ("Was there dialogue with what I will call the rating practice prior to -- in connection with the MQR's review of the model? A Yeah, I think it was -- yeah, it was them, if they had questions about certain formulas or how things were being done in the model.").

122. "During the Relevant Period, MQR was led by Martin Goldberg and was part of the Criteria Group." JX 85 at ¶ I.C.(b). Haixin Hu was a subordinate of Goldberg who reviewed the CMBS ratings model in late 2010 and early 2011. *See* Exhibit B to DPB.

Efforts at S&P in 2009 to Formulate New Criteria for Rating CF Transactions After the Financial Crisis

123. The process of drafting the RFC involved: (1) members of the CMBS Group, including but not limited to Thompson, Duka, Pollem, and Harris Trifon, *see, e.g.*, RX 123, (2) the Criteria Group, including but not limited to Adelson, Gillis, and Palmisano, *see, e.g.*, RX 129, and (3) Manzi, a member of the Research Group at the time. *See, e.g.*, RX 134.

124. An initial draft of the RFC was circulated on May 7, 2009 to members of the CMBS Group and Criteria Group for discussion at a CMBS Criteria Committee scheduled to take place on May 8, 2009. RX 123 (May 7, 2009 email from Palmisano to Duka, Thompson, Manzi, Pollem, Gillis and others with the subject "Criteria committee"). The draft contained in RX 123 defined a "loan constant" as follows:

> "A rate that reflects the relationship between amortizing debt service and the principal amount of a mortgage loan. As an example, the loan constant for a 7% loan with 30-year amortization is 7.98%."
>
> RX 123 at SP-CMBS 01693008.

125. The proposed methodology contained in RX 123 included a term default test and a maturity default test. RX 123 at SP-CMBS 01693011-13; *see also* FOF¶ 209 (explaining the difference between a term default and maturity default).

126. The term default test in RX 123 provided that S&P would determine that a loan defaulted during its term when:

"1) The debt service coverage (DSC), based on Standard & Poor's 'AAA' NCF, is below 1.0 and the loan to value (LTV), based on the Standard & Poor's 'AAA' Value, is greater than 100%; this is represented by the upper left quadrant of the char [sic] below. 2) A more nuanced methodology will be used if the property can not [sic] cover its debt service (i.e. DSC< 1.0x) but the borrower still retains some equity (i.e. LTV< 100%)."

RX 123 at SP-CMBS 01693012.

127. This term default test contemplated using actual constants to compute debt service. Duka Tr. 1265:2-6 ("No. 2 on this page where the text reads, 'A more nuanced methodology would be used if the property cannot cover its debt service.' What did 'its debt service' refer to? A Its contractual debt service."); Thompson Tr. 126:5-8 ("I see no reference in paragraph 1 on page 8 to the use of constants contained in any separate table contained in this document; is that right? A Yes.").

128. The maturity default test in RX 123 employed "Refinance Loan Constant[s]," including 10% for Lodging, 8.75% for Industrial, 8.75% for Multifamily, 9% for Office, and 9% for Retail. RX 123 at SP-CMBS 01693013; Duka Tr. 1265:11-13 (the maturity default test was "looking at a refi test based on a constant and a -- a refi constant. And minimum debt service coverage ratios.").

129. In discussing the draft RFC contained in RX 123, the CMBS Criteria Committee made three decisions that were reflected in the CMBS Criteria Committee minutes. RX 108 (May 8, 2009 CMBS Criteria Committee minutes).

130. First, the minutes reflect that "[t]here was unanimous agreement that the term default test should be LTV > 100% AND DSC < 1.0x." RX 108 at SP-CMBS 01693694.

131. Second, the maturity default test was changed from using "predetermined loan constants" to being based on a loan's ending LTV. RX 108 at SP-CMBS 01693694-5 ("There was some discussion on the maturity test. Possibilities suggested for determining a maturity default included: 1) use predetermined loan constants and minimum DSCs to test whether the ending loan amount can be refinanced; 2) ending LTV > 100%, determined by capitalizing NCF; and 3) ending LTV> 100%, determined by capitalizing NOI. The committee preferred using ending LTV> 100%, determined by capitalizing NOI as the maturity default test since lenders typically look to NOI when making lending decisions rather than NCF."); Duka Tr. 1267:14-1268:1 ("I read this to mean that we discussed essentially three tests: One which was -- as I described before, that was driven by debt service coverage ratios and minimum -- minimum debt service coverage ratios and refinance constants. And, two, that just involved LTV; one that's driven by net cash flow, and one that is driven by net operating income. And we decided that we would use the LTV test that's driven by NOI. Q For the maturity default test? A The maturity default test.").

132. Third, the minutes reflect the addition of a "Prototypical Pool," the characteristics of which were included in a table in the CMBS Criteria Committee minutes. RX 108 at SP-CMBS 01693693. The Prototypical Pool, as reflected in the minutes, did not contain loan constants. *Id.*; Thompson Tr. 128:14-20 ("Would you please take a look at the attachment, the

table included under the section on page 1 called Prototypical Pool. Would you confirm for the record that there are no constants listed in that table? . . . I don't see any constants in the table, no.").

133. The May 8, 2009 CMBS Criteria Committee meeting was attended by Duka, Thompson, Harris Trifon, Pollem, Craig Brundage, who were listed as members, Adelson, Gillis, Manzi, Calvin Wong, Cristina Polizu, Joe McQuown, who were listed as "Other Attendees," and Palmisano, who was listed as Chairperson. RX 108 at SP-CMBS 01693693.

134. Following the May 8, 2009 CMBS Criteria Meeting, Palmisano, the then-CMBS Criteria Officer, circulated a draft RFC to the CMBS Criteria Committee, and Gillis, which reflected the decisions indicated in RX 108. RX 124.

135. The term default test in RX 124 provided that S&P would determine that a loan defaulted during its term when:

> 1)The debt service coverage (DSC), based on Standard & Poor's 'AAA' NCF, is below 1.0 and the loan to value (LTV), based on the Standard & Poor's 'AAA' Value, is greater than 100%; this is represented by the upper left quadrant of the char below. 2) A more nuanced methodology will be used if the property can not cover its debt service (i.e. DSC< 1.0x) but the borrower still retains some equity (i.e. LTV< 100%).

RX 124 at SP-CMBS 01759763.

136. The maturity default test in RX 124 was revised from RX 123 to provide:

> Properties which do not default during their terms will be tested for a balloon, or maturity, default. Rather than capatilizing [sic] the S&P AAA NCF to derive value to test balloon defaults, we capitalize the S&P NOI. If the LTV derived in this method is greater than 100%, we deemed the loan to have defaulted at its maturity date.

RX 124 at SP-CMBS 01759763-64.

137. RX 124 contained a description of the Prototypical Pool, RX 124 at SP-CMBS 01759764, which did not include loan constants. Duka Tr. 1268:21-25 ("Q "[D]o you see here that with reference to the constants, that you -- that have been described, there are no particular constants identified here; is that right? A That's correct.").

138. On May 17, 2009, the CMBS Criteria Committee minutes included a "revised" table showing the features of the prototypical pool, which included "[c]onstants" of "8% for all prop types except 10% for hotels." RX 109 at SP-CMBS 01693689. As with the other metrics listed in RX 109, the loan constants were listed as a feature of the "benchmark pool." Duka Tr. 1269:14-22 ("Q So as best you understand it, what was the purpose of having constants listed in a prototypical pool as reflected in later criteria committee meeting minutes? A It's just -- it creates some definition around that -- I'm going to call it a benchmark pool just because it's easier to say, and that's what it is. But the -- it creates definition around it.").

139. The May 17, 2009 CMBS Criteria Committee meeting was attended by Duka by telephone, Thompson, Harris Trifon, Pollem, Craig Brundage, who were listed as members, Adelson by telephone, Gillis, Manzi by telephone, Cristina Polizu, Joe McQuown, who were listed as "Other Attendees," and Palmisano, who was listed as Chairperson. RX 109 at SP-CMBS 01693689.

140. On May 20, 2009, Adelson sent his comments to a draft of the RFC to Manzi, Gillis, and Palmisano. RX 134. Table 1 of the Prototypical Pool included "Loan Constants: 8% for Apt, Ret, Off, Ind; 10% for Hotel." RX 134 at SP-CMBS 01794332. On Page 30 of 49, Adelson added "If the pools backing actual transaction eventually differ so markedly from the prototype pool that its use as a benchmark becomes significantly diminished, we may update the prototype pool – and its associated credit enhancement benchmarks – to preserve the functional utility of the prototype." Table 5 of the draft RFC contained a "Suburban Office Building Analysis" that included a BBB Actual DSC and a AAA Actual DSC. RX 134 at Page 35 of 49; *see infra* at FOF¶¶ 147-148. Adelson did not make any edits to the table. RX 134 at Page 35 of 49.

RFC Publication

141. The RFC introduced the concept of a "Prototypical Pool" that was intended to serve as a "benchmark" against which CF pools would be measured. JX 1 at SP-CMBS 01754122.

142. Table 1 of the 2009 RFC listed the features of the Prototypical Pool, including an S&P LTV of 90%, an S&P DSC of 1.2X, property mix concentration, loan concentration by size, geographic distribution, and loan constants for Retail (8.25%), Office (8.25%), Multifamily (7.75%), Lodging (10%), and Industrial (8.5%) property types. JX 1 at SP-CMBS 01754121.

143. The purpose of Table 1 in the RFC was to demonstrate the characteristics of the "benchmark pool." Duka Tr. 1270:18-1271:2 ("Q As a generic matter, what was the purpose of Table 1? A It's just to let the reader know that if a pool such as this came in, we would expect it to have subordination levels of whatever we said here; 19 percent, I think, or something like that. So if it -- it demonstrates the credit quality of a benchmark pool and how that pool is expected to -- what sort of losses that pool is expected to have based on those characteristics.").

144. The constants listed in Table 1 of the RFC were actual constants, not stressed constants, based on CMBS market activity at the time. Born Tr. 2004:14-22 ("Q Could these loan constants that are listed be considered stressed loan constants in May 2009? A Not in my opinion, no. Given where treasury yields were and where -- the types of spreads we were quoting on commercial mortgages and -- well, there wasn't really a CMBS market at that point in time. But based on where the spreads at which institutional lenders were quoting, those to me would have been -- would have been actual constants.").

145. The RFC then described the methodology by which S&P would apply assumptions to the issuer's NCF figure to calculate BBB and AAA credit enhancement levels.

146. This methodology encompassed the following general steps:

Applying stresses to the issuer's NCF to arrive at S&P NCF for the BBB stress ("S&P NCF");

Capitalizing S&P NCF to determine a value for each property based on a BBB stress ("S&P Value");

Determining BBB credit enhancement levels;

Applying rental declines to S&P NCF to arrive at AAA NCF;

Capitalizing AAA NCF to determine a value for each property based on a AAA stress; and

Calculating AAA Alternate NCF for Office, Retail, and Industrial Properties.

JX 1 at SP-CMBS 01754124-26.

147. The description of how S&P would calculate these metrics culminated with Table 5, which illustrated how S&P would calculate these metrics in connection with a hypothetical $600,000 loan on a suburban office building with a 7% fixed rate and 30-year amortization schedule:

Table 5

Suburban Office Building Analysis
($600,000 balance, 7% rate, with 30-year amortization)

	S&P NCF for DSC and value ('BBB')	'AAA' NCF	'AAA' Alternate NCF
Effective gross income ($)	100,000	71,000	82,600
Fixed expenses ($)	31,000	31,000	31,000
Variable expenses	11,500	8,200	9,500
NCF ($)	57,500	31,800	42,100
Value ($)	621,622	343,784	Not applicable
LTV (%)	97	175	Not applicable
DSC (x)	1.20	Not applicable	0.88

NCF--Net cash flow. LTV--Loan-to-value. DSC--Debt service coverage.

To further explain the adjustments in table 5, the S&P NCF derived in the second column represents our basic analytic approach to commercial real estate. NCF is determined by subtracting fixed and variable expenses from effective gross income (EGI). The S&P Value is derived by dividing S&P NCF by a cap rate (9.25% in the example). The LTV is determined by dividing the loan balance by the S&P Value. The DSC is determined by dividing the NCF by the annual debt service ($47,902 in the example).

JX 1 at SP-CMBS 01754126.

148. The DSCs of 1.20 and .88 were Actual DSCs, computed using an actual constant of 7.98%, which is associated with a loan with a 7% interest rate and a 30 year amortization schedule. Duka Tr. 1271:6-10 ("And what constant does the example employ to determine the listed debt service coverage on the last line of the table? A 7.98 is what it employs, which is the loan's actual constant."); *see also* RX 695D (the formulas for Cells B12 and D12 show that

7.98% was used to arrive at the DSCs); Duka Tr. 1272:3-6 (RX 695D "shows that this loan with a 7 percent interest rate and a 30-year amortization had a 7.98 percent constant, which is lower than the Table 1 constant[] for office building[,]" which is 8.25%); Thompson Tr. 132:5-8 ("Is the Table 5 in the RFC based on the discussion we had earlier today calculated using an actual constant? A Yes.").

149. The $47,902 was calculated by multiplying the loan balance, $600,000, by 7.98%.

150. Regarding the fourth column, with the heading, AAA Alternate NCF, the RFC stated that "[t]he fourth column in table 5 represents the calculation of the 'AAA' Alternate NCF **used to determine the 'AAA' DSC.**" JX 1 at SP-CMBS 01754126 (bold added).

151. After AAA NCF, AAA Alternate NCF, and AAA Value were calculated, the RFC provided that S&P would conduct two "default tests," a term default test and a maturity default test. JX 1 at SP-CMBS 01754127.

152. The term default test assessed the ability of the borrower to meet its debt service obligation during the term of the loan using S&P's metrics; and the maturity default or balloon default test assessed whether the loan would default at maturity. Thompson Tr. 200:22-25 ("[T]he term default test was trying to determine the ability of the loan to cover its debt service coverage and the loan maturity test is if you can refinance or not.").

153. The RFC provided that a loan would default during its term if it satisfied either of the following two conditions:

1. If LTV > 100% and DSC < 1.0; or
2. If 90% ≤ LTV ≤ 100% and DSC ≤ LTV.

JX 1 at SP-CMBS 01754128.

154. If a loan passed the term default test, the loan would be tested for default at maturity. JX 1 at SP-CMBS 01754128 ("We will test loans that do not default during their terms for balloon, or maturity, defaults.").

155. "If a loan's 'AAA' LTV at maturity, based on the amortized loan balance, is greater than 100%, the loan will default at its maturity date." JX 1 at SP-CMBS 01754128.

156. The 2009 RFC then provided formulas for calculating term and maturity losses:

A. 'AAA' term loss
The 'AAA' term loss = 'AAA' Value – (outstanding principal balance + two years of lost interest + foreclosure expenses)

Foreclosure expenses are typically 5% of the value of the property; and the two years of lost interest represent an average time between default and ultimate resolution of a distressed property. The outstanding loan amount will be determined after subtracting scheduled amortization (if any) from the current loan balance.

B. 'AAA' balloon (maturity) loss
The 'AAA' balloon loss = 'AAA' Value – (outstanding principal balance + two years of lost interest + foreclosure expenses)

JX 1 at SP-CMBS 01754128.

157. Once these calculations were performed, the RFC provided that S&P would compute so-called "raw" AAA credit enhancement levels by adding the term and balloon losses and dividing that number by the pool balance. JX 1 at SP-CMBS 01754128 ("We define 'AAA' credit support as the sum of the 'AAA' term and balloon losses divided by the total loan balances.").

158. The raw AAA credit enhancement levels that resulted from the calculation described in FOF¶ 157 would be used to interpolate raw credit enhancement levels for the AA, A, BB, and B rating categories. JX 1 at SP-CMBS 01754128.

159. The final step of the analysis was application of a "concentration adjustment" to the raw credit enhancement levels for each rating category – an adjustment intended to account for geographic concentration and loan concentration by size that generally had the effect of increasing credit enhancement levels. JX 1 at SP-CMBS 01754129.

CMBS Market Reaction to the RFC

160. The reaction to the RFC from investors and issuers was "overwhelmingly negative." Thompson Tr. 132:19-21 ("Would you characterize those comments as overwhelmingly negative? A That's fair."); Thompson Tr. 201:9-15 ("I think you testified that S&P received a lot of negative feedback? A. Yes. JUDGE GRIMES: From whom? A. From market constituents, investors, issuers. That's it."); Duka Tr. 1273:3-12 (And do you recall what the reaction was to this document once published in the marketplace? A It was negative. Q What do you recall, generally, about the nature of the comments? A There was confusion about the criteria in general. There were comments about all constituents, issuers and investors feeling that the criteria was conservative, maybe arbitrary.").

161. On May 29, 2009, the lead article of Commercial Mortgage Alert was entitled "S&P Rating Plan Sparks Industry Firestorm." RX 140 at SP-CMBS 01756108. The article stated: "The initial reaction came fast and furious, with near-universal condemnation from bondholders, lenders and traders alike." *Id.* The article noted that "[o]ne frequent refrain among market players was the notion that the rating agencies have collectively lost the market's trust as the financial collapse has played out." RX 140 at SP-CMBS 01756116.

162. On May 28, 2009, Darrell Wheeler from Citigroup's Research Group published CMBS Weekly, which included Citigroup's comments on the RFC. RX 141. Wheeler "was one of the top researchers in the CMBS industry." Duka Tr. 1275:22-23.

163. Wheeler criticized the term default test as being too onerous in assuming that a loan will automatically default if the DSCR falls below 1.0X and the LTV is above 100%. RX 141 at SP-CMBS 01793026-7 ("S&P compounds the impact of this decision by assuming various loan default tests. The most flawed assumes a significant chance of default when DSCR has dropped below 1.0 times and the property still has value . . . This is a large contrast with our research that has shown that many times commercial borrowers with low-cost mortgages find a way to support their loans in these conditions."). Wheeler also stated that his team tried to duplicate the methodology described in the RFC for the prototypical pool, and was not able to formulate credit enhancement levels. RX 141 at SP-CMBS 01793028 ("We did try to duplicate the S&P analysis using the prototypical CMBS pool provided as an example in their report, assuming a 23% rent decline as well as some of the various factors they mention. We ended, however, quickly crushing the pool's value. After that effort we concluded that the report did not provide enough information to accurately duplicate their approach and estimate formal new levels.").

164. On June 1, 2009, Kent Born, the CMBS Portfolio Manager of PPM, sent his comments on the RFC to S&P. RX 142. Born noted that, at the time, he was "responsible for an approximate $6.8 billion CMBS portfolio," and was a CMBS market participant for 16 years at that point, as a ratings analyst at Fitch, and as a CMBS investor. RX 142 at SP-CMBS 01693178.

165. Born noted as follows with reference to the term default test in the RFC:

> Aside from this lack of what I will call a cause and effect relationship between why you believe current super senior AAA credit enhancement levels to be inadequate, the one part of your suggested model that I find most troubling is what I understand to be the very rigid approach to default/no default at the loan level. Anyone who has worked in commercial real estate for any amount of time knows that there are reasons why presumably strong loans go into default, as well as reasons why borrowers will continue to carry loans that are seemingly underwater. That being the case, to assume that every loan will default if the LTV exceeds 100% and the DSC falls below 1.0x strikes me as an overly severe assumption.

RX 142 at SP-CMBS 01693178-9; *see also* Born Tr. 2002:9-2003:3 ("[A]s I understood it at the time, S&P was proposing a new methodology whereby any loans below a certain debt service coverage ratio or above a certain loan to value would automatically default. And the point that I was trying to make was that there are a lot -- there are a lot of other considerations that go into that decision when you're a borrower, and I felt that that was too rigid of an approach to take. ... Q Can you explain more what you mean by when you say it was too rigid? A That -- well, to assume that any loan above 100 percent loan to value would go into default didn't make sense. Q Okay. A Because there could be -- there could be reasons why a borrower would opt to carry a loan that was seemingly under water.").

166. On June 2, 2009, S&P convened a meeting with CMBS investors to discuss the RFC. RX 150 at SP-CMBS 01693155 (June 10, 2009 email from Warner, Ernestine with the subject "CMBS Investor Meeting – RMBS RFC" with attachments stating, "Brian Furlong of New York Life contacted senior business leaders at S&P, on behalf of the CMSA industry group, to request a meeting with S&P to discuss concerns about our recent CMBS Request for Comment (RFC)."). In addition to thirteen investors, Adelson, Manzi, Palmisano, Duka, Thompson, and others attended on behalf of S&P. RX 150 at SP-CMBS 01693155.

167. Perry Goshen of Loan Core Capital asked "so will credit support for 'AAA' be 50%." Adelson "used the conduit fusion deals as an example. The existing criteria are used to review the loans S&P Value and S&P NCF and to apply further stresses described in the RFC. Depending on the pool, you may be above or below 20%." RX 150 at SP-CMBS 01693158.

168. The "Call Report" reflected discussions of stresses that the CMBS Group would apply to CF pools, *see, e.g.*, RX 150 at SP-CMBS 01693158 ("Mark referenced the additional stresses that need to be applied to the rental cash flow to produce 'AAA' NCF from S&P NCF"), but did not include any discussions of stressing debt service or using Table 1 Constants to do so. Duka Tr. 1277:13-16 ("Do you recall anyone in this meeting discussing a stressed loan constant [at the meeting referenced in RX 150]? A I don't recall ever hearing about a stressed loan constant until July of 2009.").

169. On June 8, 2009, Mark Peterson from PFG sent S&P comments to the RFC. DX 343. Peterson viewed the methodology in the RFC as representing a material change in S&P's rating methodology, which Peterson expected to lead to downgrades in PFG's portfolio. Peterson Tr. 1041:20-1042:4 ("[W]hat was your concern about the proposed methodology? A It was a material change in the -- in how they approached rating CMBS. So we looked at -- to address that here on the assumptions -- if I recall, we felt the assumptions became much more conservative. And we're -- again, we're expected to lead to material downgrades in our portfolio, and so we looked to address that in our comments.").

170. Peterson criticized the use of a 20% AAA credit enhancement for the Prototypical Pool:

> The approach that S&P is proposing for AAA credit support does not appear to be based on any actual or historical data, which seems unreasonable considering the dramatic impact that these changes will have on the CMBS market. By anchoring their entire methodology to one number without providing any good rationale behind why 20% is the right number is concerning.
>
> DX 343 at SP-CMBS 01792895; Peterson Tr. 1066:13-21 ("Q Okay. So if you go to page 5, on the first bullet on the top of Joint Exhibit 1, it says, 'Our prototypical pool which is defined below is being anchored to a credit enhancement level of 20 percent.' Does that refresh your recollection that the 20 percent that's written in Respondent's Exhibit 147 is the 20 percent AAA credit enhancement level for the prototypical pool? A Yeah. It refers to that.").

171. Peterson criticized the term default test as being "arbitrary," stating as follows:

Default Test Assumptions - It is arbitrary to assume that 100% of loans will default no matter what the stress given the non-homogeneity of commercial real estate. Every borrower has different motivations driving default decisions so to assume that every borrower will act the same in a stressed situation seems awfully arbitrary. Is there historical performance to support the assumption that in times of stress these tests are valid? Borrowers will also behave differently if there is the potential for an economic recovery, which S&P does not allow in this analysis.

DX 343 at SP-CMBS 01792896; *see also* Peterson Tr. 1068:13-24 ("There are loans that have a less than 1 debt service coverage -- or greater than 100 percent loan-to-value that don't default. Q Right. Because the borrower can come out of pocket for whatever -- a variety of reasons to cover the debt service even when the property's under water? A Correct. Q So is it fair to say that assuming that if the LTV is above 100 and the DSC is below 1, in your view, it's a severe assumption to assume that the loan will default during the term? A That 100 percent probability, yes.").

172. In his comment to the RFC, in a section entitled "Stress on Stress," Peterson endeavored to list all of the stresses he could discern in the RFC; he did not list a stress to debt service. DX 343 at SP-CMBS 01792896-7; Peterson Tr. 1069:20-24 ("[I]s it fair to say that to make the point that the -- that the proposed criteria were excessively onerous, you would want to list as many stresses as you could discern from this document? A That would be my point.").

173. In the concluding portion of his comment, Peterson wrote that "[i]f S&P decides to anchor this methodology to a seemingly arbitrary number without providing the market with data to help support that number, then credibility, reasonableness and relevance will all come into question." DX 343 at SP-CMBS 01792898. With this comment, Peterson was trying to communicate that "if the methodology was left unchanged, in [his] view, S&P would not be credible, would not be viewed as reasonable and would not be viewed as relevant." Peterson Tr. 1070:14-18.

174. On June 9, 2009, Douglas Weih from AEGON sent comments to the RFC. RX 154. Weih felt that the RFC was much too conservative, Weih Tr. 895:24-896:2 ("[W]ith this, it felt like the pendulum swung too far on the conservative side at a time when the market was trying to find its footing."); Weih Tr. 896:7-9 ("To us, it appeared like, you know, candidly it wasn't what the market needed at the time. It was too -- it was much too conservative."), and was not transparent. Weih Tr. 926:13-15 ("I can tell you as a team that we had probably more questions than answers in looking at the document.").

175. Weih wrote as follows regarding the Prototypical Pool:

I'd like a lot more information on your "prototypical pool" and justification on why 20% credit enhancement is the right level of credit enhancement for a AAA rating. In my opinion, it is very easy to come up with two pools that match your "prototypical pool" but have much different probability of default outcomes based on property level detail. Commercial real estate has always been a property-specific analysis and there are numerous examples of good properties performing well in bad markets and stressful economic times and vice versa. This does not seem to be incorporated into your analysis.

Also, if the makeup of your "prototypical pool" changes over time and you update your "prototypical pool" (something you mention), what happens to those CMBS securities benchmarked and rated against the prior "prototypical pool"? Is there a risk of ratings volatility based solely on benchmark changes to the prototypical pool? At a minimum, I'd like more justification on why 20% is the "right" level of AAA credit enhancement for a deal that matches the "prototypical pool" characteristics.

RX 154 at SP-CMBS 01792658; *see also* Weih Tr. 916:23-917:1 ("If things change, how -- if you're changing the benchmark or changing the rules mid-game, that doesn't give us a lot of confidence. I think that's where I was probably heading with that.").

176. Weih felt that the cash flow stresses were too "onerous":

The AAA cash flow stress that you are incorporating seems to be excessively onerous as you are a severely haircutting a S&P stabilized NCF which embeds some level of stress as your stabilized NCF is usually lower than in-place NCF. It appears that massive tenant defaults would be needed to generate the severe AAA NCF stress that you are incorporating and, as such, does that mean that we'll see severe downgrades in the corporate credit space? If so, on a relative basis, has anything really been achieved?

RX 154 at SP-CMBS 01792658; *see also* Weih Tr. 917:22-918:1 ("So it's taking -- there were things that were already stressed, and you're going to stress it even more. I think it really spoke to our lack of confidence that they were approaching it maybe the right way.").

Drafting and Approvals of the 2009 Criteria

177. On June 16, 2009, Manzi emailed a draft of the 2009 Criteria to Adelson, Gillis, Palmisano, Thompson, Trifon, Duka, Pollem, Brundage, Polizu, and McQuown. RX 158. In the cover email, Manzi wrote: "Jim P. - please check my math on the suburban office example table, I did it with a calculator late Sunday night." RX 158 at SP-CMBS 01791581. The draft of the 2009 Criteria at SP-CMBS 01791593 contained the suburban office example in Table 7 that lists a BBB Actual DSC and a AAA Actual DSC. *See* RX 695E. None of the recipients to this draft objected to the manner in which the figures in the table were calculated. Duka Tr. 1278:23-1279:1 ("Q Do you remember any of the recipients of this email commenting on the suburban office example table that was included in the attachment? A I don't.").

178. The CMBS Criteria Committee unanimously approved the 2009 Criteria on June 17, 2009. RX 113 at SP-CMBS 01693696 ("The CMBS criteria committee approved the criteria. The vote was unanimous."); DX 289 at SP-CMBS 01705236.

179. The members of the CMBS Criteria Committee at the time were Duka, Thompson, Pollem, Craig Brundage, Gillis, and Palmisano. Duka Tr. 1283:5-10 ("[W]ho were the members of the criteria committee at the time of that unanimous vote? And that would be -- that's Respondent's Exhibit 113 at tab 6. A I believe, to the best of my recollection, it was me, Eric, Kurt, Craig [Brundage], Tom Gillis, because any criteria officer can participate, and Jim Palmisano.").

180. Duka voted to approve the 2009 Criteria with the understanding that the actual constant would be used to compute debt service in the term default test. Duka Tr. 1430:3-7 ("[W]hen did you decide that the 2009 criteria required the use of the actual loan constant? A I don't know that I decided. That's always what I thought it was. That's what I voted for."). Duka Tr. 1281:25-1282:8 ("And at the time that you voted with the other members on the criteria . . . what was your understanding about what constant would be used in the debt service calculation for purposes of the term default test? A I understood the thinking to be that we would use a loan's actual debt service – reported debt service to calculate the debt service coverage ratios.").

181. The CMBS Criteria Committee Minutes from May, June, and July of 2009 do not reflect any agreement, discussion, or even a suggestion that the Table 1 Constants were intended to be used by the CMBS Group to compute debt service or that the debt service would be stressed in any fashion. *See generally* RX 108-119; *see also* Duka Tr. 1281:10-14 ("Do any of these documents refer to using the Table 1 constants to compute debt service or to using constants from the prototypical pool or Table 1 in the actual published criteria to compute debt service? A No."); Thompson Tr. 119:10-16 ("Is it the case that the Criteria Committee minutes that I presented to you as Exhibits 109 through 119 do not reflect a vote by the Criteria Committee to the effect that Table 1 constants would be used in the DSC test for term default purposes? A I don't see that voted in the minutes that you put before me.").

182. The Structured Finance Criteria Committee approved the 2009 Criteria on June 17, 2009. DX 289 at SP-CMBS 01705236.

183. The Analytic Policy Board approved the 2009 Criteria on June 18, 2009. DX 289 at SP-CMBS 01705236.

2009 Criteria

184. The 2009 Criteria stated that they "will be effective immediately upon the publication of this article," and would be applied "to both new and outstanding ratings." JX 2 at SEC-STRS-E-0000003.

185. Under the heading "Rating Implications," the 2009 Criteria stated:

> The release of these criteria affects the ratings on 3,563 tranches from 217 transactions. Of these tranches, our ratings on 1,979 are currently on CreditWatch negative. We are placing the remaining ratings on CreditWatch negative immediately. We intend to resolve a substantial portion of the CreditWatch placements over the next three to six months.

JX 2 at SEC-STRS-E-0000003.

186. The 2009 Criteria introduced the concept of an "Archetypical Pool," which replaced the Prototypical Pool. JX 2 at SEC-STRS-E-0000004 ("[t]his article defines the 'archetypical' pool (referred to as the 'prototype pool' in the RFC)"); Thompson Tr. 117:23-118:6 ("Q Yes, I will ask about 115 in a minute. But from 108 to 114 the minutes at this point in the game are referring to a prototypical pool; is that correct? A Yes, in 108. Q And is that concept a concept that changed over time to be described as the archetypical pool that we discussed earlier today? A Yes.").

187. The concept of an Archetypical Pool did not exist prior to the issuance of the 2009 Criteria. Adelson Tr. 357:22-358:3 ("JUDGE GRIMES: I think the question was, isn't it the case that the criteria had not previously used the notion of an archetypical pool? A. Yes. JUDGE GRIMES: What's the answer to that question? A. Yes.").

188. The Archetypical Pool was to be "used as a general benchmark against which other conduit/fusion deal pools can be compared." JX 2 at SEC-STRS-E-0000005; Peterson Tr. 1073:1-6 ("Q And as a CMBS investor, would you understand that the archetypical pool as described in this document was just intended to be just kind of -- would serve as a benchmark against which other pools would be compared? A Based on how it's described, yes."); Parisi Tr. 1559:9-12 ("Did you understand that the archetypical pool was a benchmark pool against which future actual transactions would be compared? [A] Yes.").

189. The Archetypical Pool had a AAA credit enhancement level of 19%. JX 2 at SEC-STRS-E-0000005.

190. Table 1 of the 2009 Criteria listed the features of the Archetypical Pool, including an S&P LTV of 90%, an S&P DSC of 1.2X, property mix concentration, loan concentration by size, geographic distribution, and loan constants for Retail (8.25%), Office (8.25%), Multifamily (7.75%), Lodging (10%), and Industrial (8.5%) property types. JX 2 at SEC-STRS-E-0000005-6.

191. The loan constants in Table 1 were included as one of the features of the Archetypical Pool. Duka Tr. 1116:18-1117:3 ("And those loan constants published for the archetypical pool, those were stress loan constants, right? A That's not how I viewed them. Q How did you view them? A I viewed them like I viewed every other characteristic of the archetypical pool. It's a description of that pool. Q So you did not view those as stress loan constants? A No.").

192. To function as a "benchmark," the CMBS Group was supposed to adjust the credit enhancement levels of the CF pool it was rating by, among other things, comparing the features of the CF pool it was rating to the Archetypical Pool. Thompson Tr. 99:18-100:10 ("If the property mix of what I'm calling the real-life pool or the actual pool were different from the property mix that's shown in the table, would adjustments be made to the credit enhancements of the real-life pools to reflect the differences in the property mix? A Yes, that's fair. Q Likewise, if the concentration of the real-life pool were different than the benchmark, would there be adjustments made in the credit enhancements to the real-life pool? A Yes. Q And if you look at the geographic mix, the same question, if the real-life pool had a geographic mix that was different from the benchmark pool, would there be the potential for credit enhancement adjustments? A Yes."); Adelson Tr. 347:1-15 ("Q So I take it, then, that if an actual pool had a weighted average DSC that was higher than 1.2, that even if the resulting credit enhancements were not 19 percent of the AAA level, it might be the case, pursuant to that paragraph, that the actual pool would achieve credit enhancements at or higher than 19 percent, correct? A I think you said it backwards. You are positing that the debt service coverage ratio was higher. Q Correct. A So the loans are stronger. Q Correct. A So all other things being equal, it would come in with lower credit enhancement, not higher.").

193. Because the Archetypical Pool functioned as a benchmark, the features listed in Table 1 were not intended to be substituted for features of actual CF pools that the CMBS Group would review following the publication of the 2009 Criteria. Duka Tr. 1288:10-16 ("Did you have an understanding in the analysis of actual pools, conduit/fusion pools following the publication of Joint Exhibit 2, that any of the metrics in Table 1 would be used as substitutes for the metrics that were associated with the actual pools, in fact? A No."); Adelson Tr. 345:7-16 ("Q So take a look at Table 1 For example, when an actual pool was to be assessed, would the S&P LTV be used in assessing that pool notwithstanding its own weighted average LTV? A No, the idea is that if the loans have higher LTVs, in other words, less collateral coverage, they are riskier than the archetypical pool, and if that was the only difference, then you could expect to come out with needing more credit enhancement to compensate for the greater risk.").

194. The 2009 Criteria then described the methodology by which S&P would apply stress assumptions to the issuer's NCF to calculate BBB and AAA credit enhancement levels. JX 2 at SEC-STRS-E-0000010-16.

195. The first step was to apply stresses to the issuer's NCF to arrive at the S&P NCF. JX 2 at SEC-STRS-E-0000011.

196. The S&P NCF was tied to the BBB stress, S&P's measure of a "moderate stress." Digney Tr. 465:14-22 ("Q Is the cash flow that -- going back to the criteria now -- is the Standard & Poor's cash flow that's described on page 11 of the criteria, is that the BBB cash flow? A Yes. Q And so is that the cash flow that the property will generate under a moderate level of stress? A Yes.").

197. The next step was to capitalize S&P NCF to determine a value for each property based on a BBB stress ("S&P Value"). JX 2 at SEC-STRS-E-0000011-13; Digney Tr. 468:8-11 ("[D]irect capitalization is a valuation technique in commercial real estate where you are taking the cash flow, dividing it by the cap rate to get to the value.").

198. Using the S&P NCF and the S&P Value, the CMBS Group would then determine BBB credit enhancement levels. JX 2 at SEC-STRS-E-0000013-14; Digney Tr. 468:17-20 ("Q And on page 13, do the criteria set forth a method to determine the BBB credit enhancement levels? A Yes.").

199. The CMBS Group would then determine AAA credit enhancement levels. JX 2 at SEC-STRS-E-0000014-16.

200. To do so, the CMBS Group would apply rental declines to S&P NCF to arrive at AAA NCF, which was the cash flow the property was expected to generate at a "AAA stress level." Digney Tr. 469:18-470:9 ("[T]hen you are moving to the AAA credit enhancement, and the way that we are getting there would be to take those BBB cash flows, and, you know, run them through some stresses or some declines to get to what we would call a AAA net cash flow, and then you're essentially using a cap rate again to get to a AAA value. So it is a lower value in a more stressed scenario. Q And are the cash flow -- or I should say the rental cash flow declines set forth in Table 5 on page 14? A Yes. Q And when you arrive at a AAA cash flow, net cash

flow, what is that intended to convey? A The AAA cash flow is meant to be like a theoretical cash flow that the property would throw off in a AAA stress level.").

201. The 2009 Criteria only specified rental declines for five properties types: Office, Retail, Industrial, Multifamily, and Lodging. JX 2 at SEC-STRS-E-0000014; Digney Tr. 768:20-23 ("The criteria don't even provide how S&P was going to calculate AAA cash flows for those – for property types other than office retail, industrial -- A Right.").

202. After calculating the AAA NCF, the CMBS Group would capitalize AAA NCF to determine a value for each property based on a AAA stress level, which was referred to as the AAA Value. JX 2 at SEC-STRS-E-0000015.

203. For Office, Retail, and Industrial properties, the CMBS Group would calculate a AAA Alternate NCF to account for the longer-term leases of tenants of those property types. JX 2 at SEC-STRS-E-0000016; Digney Tr. 470:11-23 ("And then are you familiar with the term AAA alternate net cash flow? A. Yes. Q Can you explain what that is? A So I think, it's been a while, you know, since we've used this, but that was to recognize that a cash flow can't -- you know, in a commercial real estate property where you have long-term leases in place, the cash flow can't drop overnight, it would happen over time. So it was to recognize that the cash flow decline would be less severe for some property types with leases in place.").

204. The description of how S&P would calculate these metrics culminated with Table 6, which illustrated how S&P would calculate these metrics in connection with a hypothetical $600,000 loan on a suburban office building with a 7% fixed rate and 30-year amortization schedule:

Table 6

Suburban Office Building Analysis

($600,000 balance, 7% rate, with 30-year amortization)

	S&P NCF for DSC and Value ('BBB')	'AAA' NCF	'AAA' Alternate NCF
Effective gross income ($)	100,000	80,000	88,000
Fixed expenses ($)	31,000	31,000	31,000
Variable expenses ($)	11,500	9,200	10,120
NCF ($)	57,500	39,800	46,880
Value ($)	621,622	430,270	not applicable
LTV (%)	97	139	not applicable
DSC (x)	1.20	not applicable	0.98

NCF--Net cash flow. LTV--Loan-to-value.

To further explain the adjustments in table 6, the S&P NCF derived in the second column represents our basic analytic approach to commercial real estate. NCF is determined by subtracting fixed and variable expenses from effective gross income (EGI). The S&P Value is derived by dividing S&P NCF by a cap rate (9.25% in the example). The LTV is determined by dividing the loan balance by the S&P Value. The DSC is determined by dividing the NCF by the annual debt service ($47,902 in the example).

JX 2 at SEC-STRS-E-0000016.

205. The DSCs of 1.20 and .98 in Table 6 were Actual DSCs, computed using an actual constant of 7.98%, which is associated with a loan with a 7% interest rate and a 30 year amortization schedule. RX 695E; Duka Tr. 1286:13-1287:1 ("[B]y reviewing Table 6, did you determine what constant was used in the calculation depicted in that table? A Yes. Q And what constant was used? A 7.98, or the loan's actual constant. Q And prior to coming to court, did you prepare Respondent's Exhibit 695-E for identification, 695-E as in Edward? A Yes. Q What does this document represent? A It's basically calculating the 7.9 percent loan constant based on 7 percent interest rate and a 30-year amortization."); Duka Tr. 1287:12-15 ("Okay. We can toggle back to that. A I think I have it here. Yeah, it's basically reproducing this table but showing what the constant being used is."); Duka Tr. 1287:23-1288:4 ("Q Now, going back to Table 6 -- going back to Table 6 in Joint Exhibit 2. Is there any reference in Table 6 to Table 1 constants? A No. Q Is there any reference to stressed constants? A No.").

206. The $47,902 was calculated by multiplying the loan balance, $600,000, by 7.98%.

207. Regarding the fourth column, with the heading, AAA Alternate NCF, the 2009 Criteria stated that "[t]he fourth column in table 6 represents the calculation of the 'AAA' Alternate NCF **used to determine the 'AAA' DSC.**" JX 2 at SEC-STRS-E-0000016 (emphasis added).

208. After AAA NCF, AAA Alternate NCF, and AAA Value were calculated, the 2009 Criteria provided that S&P would conduct two "default tests," a term default test and a maturity default test.

209. The term default test assessed the ability of the borrower to meet its debt service obligation during the term of the loan using S&P's metrics; and the maturity default or balloon default test assessed whether the loan would default at maturity using S&P's metrics. Digney Tr. 471:17-22 ("[M]ost of these are ten-year loans, and then there is a balloon balance at maturity, but term default would be if the borrower misses a loan payment sometime during the loan term, maturity default being that they can't repay the balloon balance at maturity.").

210. The 2009 Criteria provided that a loan would default during its term if it satisfied either of the following two conditions:

1. If LTV > 100% and DSC < 1.0, or

2. If 90% ≤ LTV ≤ 100% and DSC ≤ LTV

JX 2 at SEC-STRS-E-0000017.

211. The first condition, described as "the simplest default condition," was "when the DSC, based on 'AAA' Alternate NCF, is below 1.0x and the LTV, based on the 'AAA' Value, is greater than 100%." JX 2 at SEC-STRS-E-0000016.

212. Both the DSC and LTV were necessary metrics to assess term default risk because even if the borrower could no longer afford to service the debt, *i.e.*, the DSC is below

1.0X, the CMBS security holder would only suffer a loss if the property is underwater. Digney Tr. 472:6-14 ("[W]hy is an LTV above 100 also necessary to assess whether or not a loan would term default? A Because if you think about if they default on a loan based on insufficient cash flow, you want to figure out if there would be a potential loss on the property, if the lender or the trust had to foreclose on the asset and liquidate it, is it at least worth what the loan amount is or is it worth something less.").

213. Investors believed that S&P was going to use the actual constant to compute debt service in the term default test. *See* Born Tr. 2003:4-7 ("And based on your review of the term default test in Joint Exhibit 1, how did you think S&P was going to compute the denominator of the DSC in the term default test?"); Born Tr. 2003:22-2004:4 ("A. That was my understanding at the time, which is why I sent the email at the time. All right. It would have been my assumption that they would have used an actual -- an actual loan constant. The loan's actual constant to determine whether or not the debt service coverage ratio was above 1 or below 1.0.").

214. If a loan passed the term default test, it would be tested for default at maturity. Digney Tr. 473:12-14 ("Q So what loans were tested at maturity? A The ones that didn't fail the term default test.").

215. "If a loan's 'AAA' LTV at maturity, based on the amortized loan balance, is greater than 100%," S&P assumed it would "default at its maturity date." JX 2 at SEC-STRS-E-0000018; Digney Tr. 472:17-19 ("[C]an you explain the balloon default test? A Sure. I think that was simpler, it was just based on the balloon LTV, if that was above 100.")

216. The 2009 Criteria then provided formulas for calculating term and maturity losses:

> **1. *'AAA' term loss***
> The 'AAA' term loss = 'AAA' Value – (outstanding principal balance + two years of lost interest + foreclosure expenses)
>
> Foreclosure expenses are estimated to equal 5% of the value of the property. The two years of lost interest represent an average time between default and ultimate resolution of a distressed property, and are calculated net of rents collected. When we used state-level figures for both foreclosure expenses and the average time between default and resolution, we found doing so to be an unnecessary complication that yielded very little added value. The outstanding loan amount will be determined after subtracting scheduled amortization (if any) from the current loan balance.
>
> **2. *'AAA' balloon (maturity) loss***
> The 'AAA' balloon loss = 'AAA' Value – (outstanding principal balance + two years of lost interest + foreclosure expenses)

JX 2 at SEC-STRS-E-0000018; *see also* Digney Tr. 473:1-7 ("So the biggest piece of the loss is really the principal loss, so if the LTV is above 100, you are calculating that gap between the implied value of the property and that loan balance, but then there was some additional, you know, things added on to that, so two years of lost interest and foreclosure-related expenses.").

217. Once these calculations were performed, the 2009 criteria provided that S&P would compute so-called "raw" AAA credit enhancement levels by adding the term and balloon losses and dividing that number by the pool balance. JX 2 at SEC-STRS-E-0000018 ("We define the raw figure for 'AAA' credit support (before any pool-level adjustments, if necessary) as the sum of the 'AAA' term and balloon losses divided by the total loan balances."); Digney Tr. 473:23-474:6 ("Q How does one calculate the unrounded credit enhancement levels? A So it is essentially, you know, adding up all of the -- all of the maturity and term default losses at each rating category, or at AAA and then at BBB. Q And do you divide that number by the total pool balance? A Yes.").

218. The raw AAA credit enhancement levels that resulted from the calculation described in FOF¶ 217 would be used to interpolate raw credit enhancement levels for the AA, A, BB, and B rating categories. JX 2 at SEC-STRS-E-0000018; Digney Tr. 474:7-12 ("Q And then just explain very briefly how you arrive at the AA, A, BB, B, C levels. A Yeah, so those are -- it is interpolated between the anchor points of AAA and BBB, and I believe the B was this formula down at the bottom here.").

219. The final step of the analysis was application of a "concentration adjustment" to the raw credit enhancement levels for each rating category – an adjustment intended to account for geographic concentration and loan concentration by size that generally had the effect of increasing credit enhancement levels. JX 2 at SEC-STRS-E-0000018; Digney Tr. 474:13-23 ("Q And then did the CMBS Group apply a concentration adjustment after calculating the raw credit enhancement levels? A Yes. Q And could you just explain generically what that is? A So it is -- or it was, you know, something -- it was a measure to kind of compare the diversity of different pools based on loan count and geographic diversity, and then there could be an additional adjustment to the levels.").

220. Consistent with the Archetypical Pool's use as a benchmark, the 2009 Criteria stated as follows regarding the application of the concentration adjustment:

> Standard & Poor's will measure the relative loan and geographic concentration of the CMBS pools it rates to the archetypical pool and make adjustments in credit support, either up or down, for pools that differ from the archetypical pool. Note that the archetypical pool is already well diversified by loan balance, and there will be little extra benefit for further diversification. However, a lack of diversification may result in significantly higher pool-level credit enhancement figures.
>
> JX 2 at SEC-STRS-E-0000019.

221. The 2009 Criteria contained a "Glossary," which defined "Debt service coverage" as "[t]he ratio of a real property's NCF to the scheduled debt service expressed as a multiple (e.g. 1.2x)." JX 2 at SEC-STRS-E-0000030. The term "scheduled debt service" refers to the actual debt service of the loan. Thompson Tr. 109:22-24 ("when somebody says scheduled debt service, typically they mean the debt service pursuant to the loan, the actual terms of the loan"); Adelson Tr. 360:21-25("[I]s the scheduled debt service the debt service scheduled under the contract governing the loan? A The debt service, the contractual debt service, right.").

222. The methodology set forth in the 2009 Criteria represented a major shift in S&P's ratings methodology. JX 2 at SEC-STRS-E-0000004 (describing the 2009 Criteria as a "significant update to its methodologies and assumptions for determining credit enhancement levels and ratings for CMBS conduit/fusion pools."); Thompson 57:7-12 ("Q Did the 2009 criteria for conduit/fusion pools reflected in Joint Exhibit 2 represent a shift in ratings methodology for S&P? A I would say yes, it did. It was effectively a new methodology which was using a new model which hadn't been used prior to that date.").

223. Prior to the issuance of the 2009 Criteria, the CMBS Group calculated DSCs using the actual constant. Digney Tr. 461:13-20 ("Did the New Issuance Group calculate the debt service coverage ratios before the 2009 criteria were published? A Yeah. Q How did the New Issuance Group calculate the denominator of the debt service coverage ratio before the 2009 criteria were published? A Just using the in-place actual constant."); Duka Tr. 1262:24-1263:10 ("Q Prior to the 2009 criteria, which is Joint Exhibit 2, did the CMBS group calculate DSCRs? A Yes. Q And what was used for the denominator in the ordinary course in those calculations? A In conduit/fusion deals? Q I'm sorry. Thank you. Conduit/fusion deals. A A loan's actual debt service. Q And from the loan's actual debt service could one derive an actual loan constant? A Yes.").

224. The 2009 Criteria neither state nor suggest that the Table 1 Constants were going to be used to compute debt service as part of the term default test. Adelson Tr. 364:24-365:6 ("Q I don't see anywhere in the criteria article in June of 2009 any statement that suggests -- that states, much less suggests, that the Table 1 constants are to be used in evaluating future pools. You have looked at the criteria. You helped draft them. Am I incorrect? A I have to agree with you that the article itself leaves something to be desired on that score.")

Investor Reaction to the 2009 Criteria

225. Manthe, a member of AEGON's CMBS team, noted that there were no major changes between the RFC, which Weih criticized, *see* FOF¶ 174, and the 2009 Criteria. RX 705 at S&PRatings.AUIM002017 (June 26, 2009 email from Manthe to Weih stating "[o]n the surface it does not look like they have made any major changes to their view from the initial announcement of the ratings chance.").

226. Peterson explained that the methodology described in 2009 Criteria was not materially different from that described in the RFC. Peterson Tr. 1044:19-22 ("Q Do you recall Standard & Poor's making any substantial changes to their criteria as a result of feedback from investors like you? A I don't recall any material changes."); Peterson Tr. 1071:19-21 ("To my memory, I don't recall a material change from the proposed and what was put in place.").

227. Investors expected that S&P would apply the 2009 Criteria (including the manner in which DSCs were calculated in Table 6) consistently following its issuance. Peterson Tr. 1076:10-1078:5 ("You testified during your direct examination that consistency as an investor was important to you? A Correct. Q And you wanted a rating agency to consistently apply its methodology? A Yes. Q And by its methodology, you referred to the methodology that's set forth in this document? A Yeah. Yes, yes. Q Okay. And so what I'm asking is: Would you expect that the way that DSC is calculated in this table, Joint Exhibit 2, is the way that S&P

would apply its methodology going forward? A Yeah. As far as understanding the debt service coverage is income over debt service, yes.").

Frequently Asked Questions and Answers Regarding the 2009 Criteria

228. After the 2009 Criteria were published, senior members of the CMBS Group and the Criteria Group, including Thompson, Duka, Gillis, and Palmisano, developed a list of questions and answers for how members of the CMBS Group should respond to internal and external inquiries regarding the 2009 Criteria. RX 165; Thompson Tr. 139:10-15 (RX 165 "was put forth because there was a lot of, to the point made before, there was a lot of negative feedback on the request for proposal put forth, and if there was questions we wanted to make sure that everyone in the group was on the same page in responding to them.").

229. The list of Frequently Asked Questions and proposed answers included the following:

> Q: Why did you expand the pool of loans to 40 from 20? The archetypical pool represents the type of pool that we expect to see when CMBS issuance resumes. As our thinking evolved during RFC comment period, we concluded that 40 loans is more representative than 20.
>
> . . .
>
> Q. How was the archetypical pool derived? A. The archetypical pool is reflective of the type of pool we expect to see when CMBS conduit/fusion issuance resumes. The 90% S&P LTV, 1.2x S&P DSC and 10/30 amortization reflect that fact that we expect to see more conservatively underwritten loans in future conduit/fusion pools. The geographic distribution and property mix are consistent with the population of loans contained in deals rated by S&P.
>
> . . .
>
> Q. The term default test assumes that a loan default when the LTV is over 100% and the DSC is less than 1.0x. Doesn't this ignore a borrower's interest to stay with a property during a down cycle in the hope of a market recovery? A We recognize the fact that a borrower may choose to come out of pocket to fund debt service if he believes that there is some equity remaining in the property, and our term default test doesn't default loans with small debt service shortfalls where the borrower has some equity remaining. This corresponds to the lower left quadrant of Chart 4 in the criteria.
>
> RX 165 at SP-CMBS 01787304, SP-CMBS 01787308, SP-CMBS 01787309, SP-CMBS 01787311.

230. RX 165 discussed a number of stresses, *see, e.g.*, SP-CMBS 01787310 ("We used historic rent changes reported by Torto Wheaton to set our 'AAA' rent stress for office properties"), but did not discuss stressing debt service or using the Table 1 Constants to do so. Thompson Tr. 145:12-17 ("I don't see any reference [in RX 165] to use of the Table 1 constants in the calculation of the DSCR. If you would flip through it and let me know if I'm wrong,

please do. A I don't see it here, no."); Duka Tr. 1284:15-20 ("And in the questions and answers that are included in the FAQ document as attached, can you confirm that there is no reference whatsoever to the use of Table 1 constants in the calculation of debt service for purposes of the DSCR test? A Yes.").

Thompson Used the Table 1 Constants to Compute Debt Service In Connection With Rating Actions Taken Following the 2009 Criteria

231. Surveillance, led by Thompson, used the Table 1 Constants to compute debt service in connection with the rating actions taken following the publication of the 2009 Criteria. Thompson Tr. 136:13-21 ("Q Fair enough, for 94 and 95, the two CreditWatch documents. A To the best of my recollection, the CreditWatch placements were done using the constants. Q Which constants, I'm sorry? A The constants that were put forth in the criteria. Q At Table 1? A Yes."); *see also* Thompson Tr. 68:21-69:1 ("In arriving at the numbers reflected in Section IV [of JX 2], Rating Implications, did the analysts use the criteria constants that we were looking at in Table 1 in performing their analysis? A Yes, they were coded into the model that was used to arrive at the watch placements.").

232. Thompson used the Table 1 Constant to apply surveillance ratings to nine different vintages of securities, 2000-2008. RX 93 at SP-CMBS 01787465 (noting potential downgrades for vintages from 2000 to 2008).

233. Interest rates fluctuated during this nine-year period, which meant that the amount of stress imposed by using the Table 1 Constant differed between vintages. Thompson Tr. 137:8-25 ("Q So am I correct in saying that for vintages 2000 through 2008 the analysis performed by the Surveillance Group used the Table 1 constant, among many other things? A To the best of my recollection, it did, yes. Q And would it be your recollection that between 2000 and 2008 interest rates varied, or coupon rates varied? A Yes. Q So is it correct that by virtue of using the Table 1 constants, the stress applied by vintage depended on the coupon rate that was relevant to the vintage, correct, the size of the stress? A The application of the constant would result in different stresses depending upon what the actual coupon would be, depending upon what the variability may have been.").

Surveillance Failed to Disclose That the Table 1 Constants Were Used to Take Rating Actions Following the 2009 Criteria

234. On July 14, 2009, Surveillance, led by Thompson, issued press releases announcing ratings changes to fourteen different CMBS CF transactions. RX 7-20.

235. Each of those press releases provided that "[t]he downgrades follow our analysis of the transaction using our recently released U.S. conduit and fusion CMBS criteria, which was the primary driver of the rating actions." RX 7 at SP-CMBS 01781667, RX 8 at SP-CMBS 01781677, RX 9 at SP-CMBS 01781682-3, RX 10 at SP-CMBS 01781687, RX 11 at SP-CMBS 01781692, RX 12 at SP-CMBS 01781697, RX 13 at SP-CMBS 01781702, RX 14 at SP-CMBS 01782505, RX 15 at SP-CMBS 01782515, RX 16 at SP-CMBS 01782520-1, RX 17 at SP-CMBS 01782525, RX 18 at SP-CMBS 01782530, RX 19 at SP-CMBS 01782535, RX 20 at SP-CMBS 01782540.

236. None of these press releases, which outlined S&P's rationale for changing the ratings, explained or even intimated that the Table 1 Constants were used to compute debt service in analyzing the particular CF transaction. Thompson Tr. 146:5-147:11 (RX 7-10 "are the actual -- the actual documents or press releases where the watch placements were resolved and the actual ratings were adjusted or affirmed . . . I would like just as an example to point you to 8 for identification at page 2, the bottom of 1 rolling over to the top of 2. A Okay. Q Do you see that? That paragraph talks about calculating an adjusted debt service coverage of 0.83x and along with a loan to value ratio of 161percent. It goes on to say 'We further stressed the loans' cash flows.' Again, no reference to any stressed constant or Table 1 constant, correct? A I don't see it there. Q I did not see any reference to a stressed constant or a Table 1 constant in 7, 8, 9 or 10. Was my reading correct? A I didn't see it in 7. Q Take your time. A I don't see it there, no. Q Not in 7, 8, 9 or 10, right? A I don't see it, no.").

237. In fact, each of the press releases suggests that the only stress S&P applied to the DSC was to the numerator, and not the denominator. *See, e.g.*, RX 7 at SP-CMBS 01781667-8 ("We further stressed the loans' cash flows under our 'AAA' scenario to yield a weighted average DSC of 0.92x and an LTV of 147%."); RX 8 at SP-CMBS 01781678 ("We further stressed the loans' cash flows under our 'AAA' scenario to yield a weighted average DSC of 0.66x and an LTV of 222%."); RX 9 at SP-CMBS 01781683 ("We further stressed loan cash flows under our 'AAA' scenario to yield a weighted average DSC of 1.52x and an LTV of 106%."); RX 10 at SP-CMBS 01781687-8 ("We further stressed the loans' cash flows under our 'AAA' scenario to yield a weighted average DSC of 1.55x and an LTV of 125%.").

July 31, 2009 Meeting

238. Approximately three weeks after the 2009 Criteria were published, Gillis told Thompson to cease taking rating actions until there was "further dialogue" about using Table 1 Constants to compute debt service. Thompson Tr. 150:1-3 ("I do recall Tom telling me to stop effectuating committees at one point until there was further dialogue about the matter."); RX 171 at SP-CMBS 01693277 (July 30, 2009 email from Thompson to Gillis stating, "I subsequently told them to stop the process after our discussion late yesterday evening. During that discussion, you indicated that you wanted to extend the appeal while you looked into the issue of whether we are using constants appropriately in our rating processes.").

239. Manzi, who "participate[d] quite a bit in the criteria development process as well as with the drafting of the document," Thompson Tr. 55:21-23, thought that the actual constant should be used to compute debt service. Thompson Tr. 149:18-23 ("[D]id Mr. Manzi express the view that the criteria required the application of actual constants to the DSCR test? A To the best I can recall, Manzi thought that the actual should be used. That was his opinion."); *see also* OIP ¶ 19 ("others argued that S&P should use 'actual constants' derived from the terms of the loans").

240. There was a meeting invite sent on July 30, 2009 scheduling a meeting for July 31, 2009 to discuss the use of Table 1 Constants. DX 45 (July 30, 2009 email from Milano to Jacob, Adelson, Gillis, Thompson, Manzi, Palmisano, Sharma, and Diamond cc'ing Santiago, Erica; Calvoni, Laura; and Schuman, Adam with the subject "RE: CMBS – IMPORTANT MEETING 9:45 FRIDAY MORNING.").

241. Duka was not invited to the July 31, 2009 meeting, *see* DX 45, nor were her views solicited regarding whether to use Table 1 Constants to compute debt service prior to the meeting. Duka Tr. 1432:10-14 ("I wasn't -- I don't recollect being invited to the 47th-floor meeting. I don't recall being asked how I voted. I don't recall anybody asking me how I viewed the whole situation. I don't even recall knowing about it until a decision was made.").

242. Going into the meeting, Thompson was concerned that, if the decision was made to use actual constants to compute debt service, Surveillance would be forced to re-evaluate the rating actions and announcements that S&P issued. Thompson Tr. 152:17-153:1 ("Going into the meeting, did you have concerns that to the extent you were instructed to use something other than the Table 1 constant in the DSCR, that surveillance would have to look backward at the actions it had taken to that point? A If I recall, yes, I had those concerns. I had broader concerns that everyone be in consensus with what the path was forward one way or the other because given the magnitude of the adjustments being made, everyone needed to be on the same page.").

243. At the meeting, it was decided that the Table 1 Constants would be used to compute debt service ("July 2009 Decision"). OIP ¶ 19; Exhibit A to DPB ("July 31, 2009: Decision to use criteria constants to calculate DSCRs for ratings").

244. There is no evidence in the record of any analysis presented at the July 31, 2009 meeting. Thompson Tr. 156:8-11 ("And do you recall what was presented at the meeting, if anything? A I don't recall anything necessarily being presented.").

245. Duka learned about the July 31 meeting after it occurred from Thompson and Palmisano. Duka Tr. 1289:10-20 ("And from whom did you learn about the meeting that you're referring to? A Eric and Jim Palmisano who attended the first meeting had scheduled a follow-up meeting with members of the CMBS group sometime thereafter. I'm not really sure what the timing between the two meetings were. Q And the meeting that you're referring to as a follow-up meeting was a meeting that occurred at the request of Thompson and Palmisano; is that right? A Correct.").

246. Thompson explained that Surveillance had used the Table 1 Constant to take rating actions in connection with the implementation of the 2009 Criteria. Duka Tr. 1290:8-10 ("What I understood from that meeting was that Eric had used the Table 1 constants and the rating of transactions since the criteria was published.").

247. Surveillance used the Table 1 Constant as an interpretation of the 2009 Criteria. Duka Tr. 1124:23-1125:4 ("I was aware that surveillance had used the Table 1 constants [be]for[e] that meeting, and that a decision was made that they could continue to use the Table 1 constants after that meeting. My understanding of that is it was an interpretation; not a criteria. It wasn't required by criteria, nor was it a change to criteria.); Duka Tr. 1290:17-22 ("And I understood from what Eric and, I guess, Jim by -- I guess not directly, but he -- essentially, the decision was made, and the decision was explained as an interpretation. My understanding was that it was used to address interest-only loans."); Duka Tr. 1294:24-1295:6 ("Q What did you understand as to his use of Table 1 constants and surveillance going forward after that meeting, after the meeting with the senior executives? A That he would just continue rating transactions under an interpretation. Q Interpretation of what? A Of criteria."); Duka Tr. 1430:15-24 ("[T]he

July 2009 decision essentially boiled down to an interpretation of something that was not otherwise covered by criteria. So it's not suggesting that the Table 1 constant should have been necessarily – was contemplated. It's saying that something was not contemplated. And as a result of an issue not being contemplated, the methodology to adjust for that risk was to use the Table 1 constant."); Duka Tr. 1431:23-1432:19 ("Well, the criteria constants or the Table 1 constants are published as a benchmark. Criteria doesn't call for the use of those benchmarks. Eric unilaterally decided to adjust for an issue that he saw. He later went and had somebody interpret it. They agreed with his interpretation. He came back, and he told the CMBS group essentially what [the] decision was. And the decision was that he can continue interpreting as he had done at the time. . . . So I think what's different about July 2009 is the CMBS group learned about the problem and the solution after the meeting happened, and it was a decision. It was a decision to do it, and it was a decision that was a criteria interpretation."); Thompson Tr. 157:1-2 ("The dialogue [at the July 31, 2009 meeting] was more about the **interpretation**, what to apply.") (emphasis added).

248. The 2009 Criteria did not address what, if any, additional stresses were to be imposed on interest-only loans, which formed a large portion of the 2005 to 2009 vintages that Surveillance was reviewing. Duka Tr. 1291:16-1292:6 ("My understanding was that he had identified interest-only loans as a risk. It's a type of loan that wasn't addressed in the criteria. The vintages that Eric is looking at that make up the bulk of the surveillance portfolio, or a large part of it, are 2005 to 2009 vintages. Those vintages have a large degree of interest-only loans in them. So it was understandable that he was testing these deals. He was looking at them, and he identified something, and he addressed it. And the way he addressed it was by using the Table 1 constants, theoretically, to penalize for the credit risk of those loans. Q The credit risk of the interest-only loans? A Yes."); Duka Tr. 1294:9-16 ("That the criteria didn't address how interest-only loans would be treated. He believed that they should be treated differently. That's why he implemented this methodology to use the Table 1 constants. And he believed that it appropriately -- what's the word? [--] adjusted credit enhancement levels to account for that level of risk.").

249. Thompson did not present Duka with any research during the meeting referenced in FOF¶ 245 . Duka Tr. 1294:17-19 ("Did he show you any research related to that in the meeting that you're describing? A I don't recall seeing any.").

250. Duka deferred to Thompson because he was a peer, and because Surveillance, as opposed to NI, was actually using the 2009 Criteria to evaluate CF transactions. Duka Tr. 1292:19-1293:5 ("I wasn't looking at any transactions . . . So I had no feel for how that methodology would, in fact, be applied and how it would impact the loans. But Eric was testing it. He had been testing it for X months. And I just relied on his expertise and -- you know, I -- I basically deferred to him. Q Was he a peer of yours at that time or a subordinate? A He was a peer."); Duka Tr. 1293:15-22 ("Q Okay. But in the case of surveillance, I take it your testimony is surveillance was actually rating transactions that consisted of collateral originated in earlier years; is that right? A Yes. Surveillance had a portfolio of over, I think, 300 deals that they were looking at. So they had really the only live transactions to look at during that period of time.").

251. The July 2009 Decision was neither made nor ratified made by the CMBS Criteria Committee, Duka Tr. 1295:9-15 ("Was the decision that Mr. Thompson was explaining to you in the meeting that you've just described to use the Table 1 constants and the surveillance of pools,

including interest-only loans, was that a decision made by the CMBS criteria committee? A No."); Duka Tr. 1295:21-25 ("Was the CMBS criteria committee in or around July of '09, ask[e]d] to reconvene to take up the question of the use of Table 1 constants in the surveillance analysis? A Not to my recollection."), the Structured Finance Criteria Committee, nor the APB. Thompson Tr. 154:19-21 ("And do the recipients encompass all of the Criteria Committee for CMBS? A They don't."); Thompson Tr. 155:3-9 ("And I take it that this group also does not include the APB? A No. Q In total? A No. Q Or Structured Finance Committee in total? A No.").

Surveillance Failed to Disclose to CMBS Market Participants That the Table 1 Constants Were Used to Take Rating Actions Following the July 2009 Decision

252. The July 2009 Decision was not published. Thompson Tr. 157:20-22 ("And was there any external publication of the decision made at the July 31st meeting? A No, there wasn't."); Duka Tr. 1295:16-18 ("Q To your understanding, was [the July 31 Decision] a published decision at any point in time? A No.").

253. After the July 2009 Decision was made, Surveillance, led by Thompson, continued to publish press releases announcing ratings actions for CF transactions that failed to disclose that Table 1 Constants were being used to compute debt service. RX 21-36, 38-40, 45, 49-50; Thompson Tr. 158:2-9 ("And after the meeting, did Surveillance clarify publicly in its publications that going forward it would use the Table 1 constants? As best you can recall, sitting here today. A As best as I can recall, there wasn't any specificity with regard to the constants that were being used at the time and we didn't come out with something following that time."); Thompson Tr. 159:24-160:2 ("Does Respondent's Exhibit 21 for identification contain any mention of the [Table 1 Constants]? A No.").

254. In fact, like the press releases issued before the July 2009 Decision, *see* FOF¶ 237, the Surveillance press releases only mentioned stressing the numerator of the DSC. *See, e.g.*, RX 27 at SP-CMBS 01008915 ("We further stressed the loans' cash flows under our 'AAA' scenario to yield a weighted average DSC of 0.83x and an LTV of 147.7%.").

255. On August 17, 2010, S&P published a document entitled CMBS Framework Model that was authored by Thompson. DX 180. The purpose of DX 180 was to describe "how the [CMBS] model worked." Thompson Tr. 86:4-10 ("Q What is it? A There were many processes and procedures at S&P, one of which was that the models that were used in our process, they had to be uploaded to a model repository, and there was also a descriptive document that had to be put forth in how the model worked, and that's what this document was.").

256. Thompson's description of the CMBS Framework Model made no mention of stressing debt service nor provided any indication that Table 1 Constants would be used to do so. Thompson Tr. 170:11-22 ("Q There is no mention of a stress constant, correct? A That's correct. Q And who is the author of this document? A I am. Q And was your purpose in writing this document to explain to the public how the CMBS framework model works, the purpose of writing the document? A The purpose of writing the document was we were all directed to perform these write-ups, to explain all the models, yes.").

The Surveillance Group Failed to Disclose Internally That the Table 1 Constants Were Being Used to Compute Debt Service

257. There was no internal memorandum distributed to members of the CMBS Group informing them of the July 2009 Decision to use Table 1 Constants to compute debt service. Digney Tr. 476:2-15 ("Did you receive some form of internal memoranda regarding using Table 1 constants to calculate debt service? ... A. Not that I can recall."); Henschke Tr. 1688:22-1689:1 ("Q Do you recall whether or not there were any internal memorandum that were disseminated to the CMBS group that described the Table 1 constants were going to be used to compute debt service? A I don't recall.").

258. Members of the CMBS Group only learned about the use of Table 1 Constants upon reviewing the model. Digney Tr. 475:17-476:1 ("And how did you come to learn that that was going to be -- that the Table 1 constants were going to be used to calculate debt s[ervice]? . . . [W]hen I first started attending Surveillance Committees and just seeing the model results, I think that's when I noticed."); Henschke Tr. 1688:16-21 ("And how did you come to learn that the Table 1 constants were going to be used to compute debt service? A It was probably just by seeing it in the model. I don't think there were discussions that I was party to.").

259. Members of the CMBS Group did not know where the Table 1 Constants originated. Digney Tr. 478:8-10 ("Q Do you know where the Table 1 constants came from? A No."); Henschke Tr. 1689:10-13 ("Q Do you have any understanding of where those particular loan constants came from, Table 1 constants? A No.").

260. Members of the CMBS Group did not know why the Table 1 Constants were being used to compute debt service, Digney Tr. 478:11-15 ("Q Do you know why they were being used for computing debt service in the term default test? A In Surveillance or just -- Q Generally. A No, I'm not sure."); Henschke Tr. 1689:6-9 ("Q Do you have any understanding of why the Table 1 constants were going to be used to compute debt service? A No."), and did not know how that decision was made. Henschke Tr. 1689:2-5 ("Q Were you ever informed of how the decision was made to use the Table 1 constants to compute debt service? A No.").

Ratings on CF Transactions Were Issued Using the CMBS Framework Model

261. The CMBS Group issued ratings following the 2009 Criteria using a model that was referred to as the CMBS Framework Model. Thompson Tr. 87:25-88:2 ("Q What is the CMBS framework model? A That was the name that we gave to the model that was used to deploy the criteria.").

262. On November 2, 2009, Thompson emailed "*ModelRepositorySupport," copying Pandya, Deegant; Diamond, Kim; Mahoney, Patrick; Morokoff, William; and Duka, Barbara, a spreadsheet entitled "AAA Framework Model Template.xls." Thompson described the model as follows:

> The 'AAA' framework template is a deterministic model that calculates term and maturity losses for CMBS using the methodology outlined in our June 26, 2009 "U.S. CMBS Rating Methodology And Assumptions for Conduit/fusion Pools". This model is for use by the CMBS practice for new issuance and surveillance.

RX 178 at SP-CMBS 00465844.

263. The model attached to RX 178 reflected the LTV-based test for maturity default. Duka Tr. 1298:7-1299:12 ("This model, which is attached to this email in native form under AG, is referring to a maturity loss or mat loss under AG; is that right? A Maturity loss. Q Is that associated with the maturity default test? A It's the loss that's calculated. Q Okay. And is -- can you tell by looking at the formatted data sheet how the -- how the maturity default test is determined? A It's saying if a loan doesn't -- if a loan has no loss during the term, then take the balloon balance and divide it by the value. And if that number is greater than 100 percent, the loan defaults. And if the loan defaults, take that value, subtract -- it doesn't say subtract, but essentially it backs into the subtraction. Multiply that number by 95 percent to account for the 5 percent liquidation costs. And then subtract the balloon balance of the loan to calculate the loss. Q And the reason I brought this up is just to ask you whether this model attached to the email that is Exhibit 178 is consistent with the description of the LTV-based maturity test that's in the criteria? A It's consistent with the default test . . . But does it reflect that the balloon test or maturity default test is determined by reference to an LTV and nothing else? A Yes."); Digney Tr. 472:20-22 ("Q Were the constants listed in Table 1 ever, to your knowledge, used for the balloon test? A No."); Digney Tr. 796:9-21 ("[T]his memo reflects that you and the other members of the CMBS group wanted to look at whether or not to use the Table 1 constants at the maturity default test? A Right. Q I mean, is it fair to say that you were not using those constants for the maturity default test prior to this email? A That's correct. Q And what about after this email? Did you ever use the Table 1 constants to calculate maturity default testing after May of 2011? A No.").

The Application of Methodology was Different Between NI and Surveillance

264. Because actual performance data was available when Surveillance reviewed CF transactions, the approach that Surveillance took was different from the NI approach. Thompson Tr. 42:4-15 ("The difference is more that at the new issuance part of the process the securities are being formulated and you are assigning initial ratings to the transaction where it didn't have any in the past. Once the ratings are assigned, from that point on, then that would be considered more of the surveillance or the monitoring function whereby you would be looking at ongoing performance data to ensure that the assumptions that were used in formulating the initial ratings still held and that the ratings were still appropriate."); Henschke Tr. 1690:15-1691:17 ("Q And why were there -- why were there differences between the -- between the two groups, as you refer to it? A I think it's just a different process. So when we're rating a new issue transaction, you have a large number of analysts looking at a large number of loans in that new issue deal. You've got a lot of information that's -- you have a high degree of certainty is accurate. It's coming from the loan sellers, the underwriters who have, you know, data. It's all certified from the borrowers. There's a lot of information. In the surveillance process, you generally just have one or two surveillance analysts who are covering a deal with information that's coming from deal servicers, which isn't necessarily as accurate or as complete. And so they wouldn't evaluate -- or they wouldn't re-underwrite as many loans as we did. For example, I think they did more of a sampling approach looking at just the larger loans. Q Due to the availability of actual performance data, were the differences between new issuance -- were there differences inherent to the approaches that new issuance took and surveillance took? A I think so."); Jacob Tr. 556:12-557:4 ("Did you have an expectation while you were the head of structured finance at

S&P, that under the criteria, the new issuance group and the surveillance group would apply the methodology set forth in the criteria somewhat differently? A I think by definition they have to be somewhat different. Because when you have -- in a surveillance, even if you already have the loans with existing performance, you have actual cash flows and a history of cash flows. And so it's different from when you're doing a new issue where the loans are newly originated, and you don't have a history of the revenues produced by the businesses in which these loans are financing. So by definition, despite the -- what you have in front of you, it's -- it could be different, but the idea is that they should be consistent -- after the ratings that come out should be consistent."); Jacob Tr. 564:9-13 (adopting his prior testimony, in which he stated "Remember, the goal was not to have methodology the same. It wouldn't have the same information. The transactions could be different. The goal was to have methodology that produced consistent results.").

265. NI stressed the numerator of the DSC ratio more than Surveillance. Henschke Tr. 1704:10-1705:3 ("Was there a difference between new issuance and surveillance in how both groups stressed the numerator of the DSC ratio? A Yes. New issue team, we underwrote a large percentage -- or re-underwrote a large percentage of the loans, you know, taking those cash flows given to us from the bankers generally being given historical cash flows, being given an appraiser's cash flow and re-underwriting those cash flows to S&P's criteria for how we looked at properties. In the surveillance group, we did it, but not to the same degree, not to the same number of properties. And also just the quality of information that they had in the surveillance process was often much lower than what we had at new issue. And I believe that they would oftentimes defer, at least in the early years, to the new issue information just given that lower quality.").

266. In 2011, Surveillance used the Table 1 Constant. Duka Tr. 1426:12-15 ("Do you know whether the surveillance model used in this analysis incorporated a blended as opposed to a criteria constant? A It used the Table 1 constant.").

267. Surveillance did not consider subordinated debt, Duka Tr. 1427:6 ("surveillance would not include sub-debt"), which NI considered. FOF¶ 463.

March 2010 Memorandum

268. On or around March 10, 2010, members of the CMBS Group made certain "enhancements" to the CMBS model. DX 48 ("March Memorandum").

269. Specifically, the March Memorandum contained four "enhancements" to the model:

> 1. The original version of the model did not capture S&P NCF in excess of interest payments, if available, and use it to offset losses for loans which defaulted under the term and maturity default tests enumerated in the criteria. An enhancement was made to the model to capture excess S&P NCF, if any, and use it to offset loss. Criteria committee decided to calculate the excess S&P NCF, if any, using fully declined S&P 'AAA' NCF outlined in the Conduit/Fusion criteria (see letter "b" on page 15 of the criteria regarding how S&P 'AAA' NCF is calculated).

2. The original version of the model used the constants outlined in the criteria publication to calculate debt service payments. Some new issuance requests had been received, however, where the actual debt service was higher than that calculated with the criteria constants. It was decided that, going forward, the model would calculate the higher of the debt service derived by the constants outlined in the criteria or actual debt service.

3. The original version of the model calculated lost interest on defaulted loans using the constants, versus the interest rate derived from the constants. It was decided that it was more appropriate to calculate lost interest using the interest rate derived from the constant, or, if higher, the actual loan interest rate.

4. The original version of the model did not provide for the calculation of lost interest resulting from maturity defaults. An enhancement was made to provide for this.

DX 48 at SP-CMBS 01692973.

270. The memorandum was sent to Manzi, the then-CMBS Criteria Officer, for his approval. DX 48 at SP-CMBS 01692972; Duka Tr. 1302:11-1303:7 ("At that point in time, March 10, 2010, what was Jim Manzi's role at S&P? A My recollection is he was the CMBS criteria officer. Q And if you go to the first page of the document in the email, you see that the document is -- an email is being sent by a Deegant Pandya to Mr. Manzi? A That is correct. Q . . . [Y]ou see that sign-off is being requested in the second line? A Yes. Q And whose sign-off is being requested? A The criteria officer's. Q Is that Mr. Manzi? A Yes.").

271. Manzi approved the enhancements in the March 2010 Memorandum on March 16, 2010. DX 49 at SP-CMBS 01692970 (March 16, 2010 email from Manzi to Pandya, copying Thompson, stating "This is fine.").

272. The second enumerated "enhancement," the "Higher of Approach," was an interpretation of criteria. Duka Tr. 1434:11-18 ("All we're doing in March 2010 is saying if -- I don't know what you guys meant, but if you meant to use a stressed constant, it's not stressed if the actual is higher. So, you know -- so we're just amending a decision that was made in 2009 that we viewed as a criteria interpretation. So July 2009 criteria interpretation, March 2010 criteria interpretation.").

273. The "enhancements" to the CMBS model were not the subject of publication by S&P. Duka Tr. 1464:1-4 ("Q Did the matters that are covered in this memorandum that Mr. Manzi said were fine ever become the subject of a publication by S&P? A Not to my knowledge, no."); Thompson Tr. 161:7-9 ("And were those decisions published in an S&P document, to your best recollection? A To the best of my recollection, no.").

274. Surveillance did not review all outstanding CF transactions following the March Memorandum to determine if rating changes were warranted in light of the model adjustments set forth in DX 48. Thompson Tr. 161:10-19 ("After these decisions were made, those reflected in this document, did Surveillance return to reexamine ratings actions it had taken prior to March 10th, 2010 to determine whether use of a constant equal to the actual or the Table 1, whichever

was higher, would have resulted in different outcomes? A I don't recall going back to do systemic testing of the entire portfolio relating to these items, specifically number 2.").

June 2010 Criteria Article

275. On June 14, 2010, S&P published a Criteria article entitled "Methodology and Assumptions for Analyzing the Major Property Types in U.S. CMBS Transactions." RX 4 ("June 2010 Criteria Article"). Manzi, Snow, Duka, and Thompson were identified on the first page of the June 2010 Criteria Article. RX 4 at SP-CMBS 00430964.

276. The introduction to the June 2010 Criteria Article stated as follows:

> Standard & Poor's Ratings Services is updating and refining the methodology it uses to evaluate commercial real estate mortgage collateral that is typically included in U.S. commercial mortgage-backed securities (CMBS) transactions that we rate. This methodology is fundamental to determining the "S&P NCF" and "S&P Value" in a 'BBB' stress scenario, as referred to in our criteria for rating U.S. conduit/fusion CMBS transactions (see "U.S. CMBS Rating Methodology And Assumptions For Conduit/Fusion Pools," published June 26, 2009). We believe that the examination of the underlying properties in any transaction represents the foundation of our analysis and the key component of our CMBS rating process.

RX 4 at SP-CMBS 00430966.

277. The June 2010 Criteria Article included guidelines for assessing Retail properties, *id.* at SP-CMBS 00430967-73, Office properties, *id.* at CMBS 00430973-77, Industrial properties, SP-CMBS 00430977-80, Hotel properties, SP-CMBS 00430981-86, Manufactured Housing properties, SP-CMBS 00430986-88, Health Care properties, SP-CMBS 00430988-89, Independent Living, SP-CMBS 00430989-91, and Self-Storage properties, SP-CMBS 00430991-93.

278. The Appendix of the June 2010 Criteria contained two examples of how loans would be evaluated under the methodology set forth therein. Appendix A was an example of an Anchored Retail Property, SP-CMBS 00430994, and Appendix B was an example of a Hotel Property, RX 4 at SP-CMBS 00430997.

279. Appendix A contained as an example a $15,500,000 retail loan, with an "[a]ctual interest rate" of 7%, a term of 10 years, and an amortization schedule of 30 years. RX 4 at SP-CMBS 00430994. The loan constant associated with a loan with an interest rate of 7%, and an amortization schedule of 30 years is 7.98%. FOF¶ 124. The DSC of 1.24 was calculated by dividing the S&P NCF, $1,534,491, by the loan amount $15,500,000 multiplied by 7.98%.

280. Appendix B calculated a DSC of 2.12X using an actual constant and not the 10% Table 1 Constant for Lodging. RX 4 at SP-CMBS 00431000. Thompson Tr. 168:8-169:1 ("A And your question is about the hotel loan specifically? Q Yes. A Yeah, I come up with the same number you cited, 8.6. Q I couldn't hear you, I'm sorry. A I come up with the same number you cited of 8.6 on the constant. Q 8.6 is a constant that is not listed in Table 1, correct, of the criteria? A Not for lodging. I would have to go back and look. Q The constant listed for

lodging in Table 1 is 10 percent, correct? A Yes. Q 8.6 is the actual constant, correct? A Yes Q For a 7.75 percent interest loan? A Yes."); RX 695F; Duka Tr. 1305:5-14 ("The DSC, debt service calculation, is basically the S&P [net cash flow] divided by the debt service coverage using the actual constant. So that's 2.12. That's the debt service coverage ratio using the actual. And the example below calculates the debt service coverage based on the Table 1 constant, and that's a lower debt service coverage number at 1.82. Q And so which constant was used in the example, based on your analysis? A The actual.").

JPMCC 2010-C1 Commentary ("Commentary")

281. On June 22, 2010, S&P published a "Commentary" entitled "S&P Comments On J.P. Morgan Chase Commercial Mortgage Securities Trust 2010-C1's Potential Credit Strengths And Risk Considerations." DX 230.

282. S&P published the Commentary because JPMCC 2010-C1 was the first CF transaction after the financial crisis. DX 230 at SP-CMBS 00829863 ("We chose to comment on this transaction-which appears to be the first conduit/fusion U.S. CMBS transaction" since the 2009 Criteria were published); DX 51 at SP-CMBS 01089026 ("We are in the process of publishing a commentary on the JP Morgan transaction - the first conduit transaction issued in more than 2 years.").

283. The Commentary provided that one of the strengths of JPMCC 2010-C1 was that "[t]he transaction has weighted average debt service coverage (DSC) of 1.64x, based on the issuer's net cash flow (NCF) and actual constants for each loan." DX 230 at SP-CMBS 00829863; Duka Tr. 1309:20-23 ("Can you explain why that was a strength? A The actual debt service coverage ratio is high, based on the loan's contractual debt service or the weighted average of the loans that is covered.").

284. The Commentary further provided as follows:

> Standard & Poor's typically evaluates a transaction's loan default probability using a stressed DSC based on 'BBB' and 'AAA' cash flow scenarios and a stressed loan constant. For JPMCC 2010-C1, The pool's weighted average stressed debt constant would equal approximately 8.33%, based primarily on the retail and office exposure, for which our constant is 8.25%.
>
> DX 230 at SP-CMBS 008298661; Duka Tr. 1216:18-20 ("And that stressed loan constant is a Table 1 constant, correct? A That's correct.").

285. On July 7, 2010, Duka sent a document entitled "Executive Summary and Feedback on Commentary for JPMCC2010-C1.doc" to members of the CMBS Group, which contained feedback from investors regarding S&P's publication of a commentary on JPMCC 2010-C1. RX 190 at SP-CMBS 00325756-59.

286. None of the investor comments related to the portion cited in FOF¶ 284. Duka Tr. 1311:19-1312:4 ("Looking through the document, do you see any summaries of questions or comments from investors relating to the DSC that was discussed in the commentary for the JPM

C1 deal? A. I don't see any reference to the Table 1 loan constants. Q And how about to DSCRs based on Table 1 constants? A I don't see that here either.").

287. On July 12, 2010, Thompson sent an article from Real Estate Finance and Investment regarding the Commentary to Jacob, Duka, Snow, Manzi, and David Wargin, which quoted Duka as saying that "[t]he new criteria are more conservative with the AAA categories." RX 192 at SP-CMBS 00643958.

November 2010 Criteria

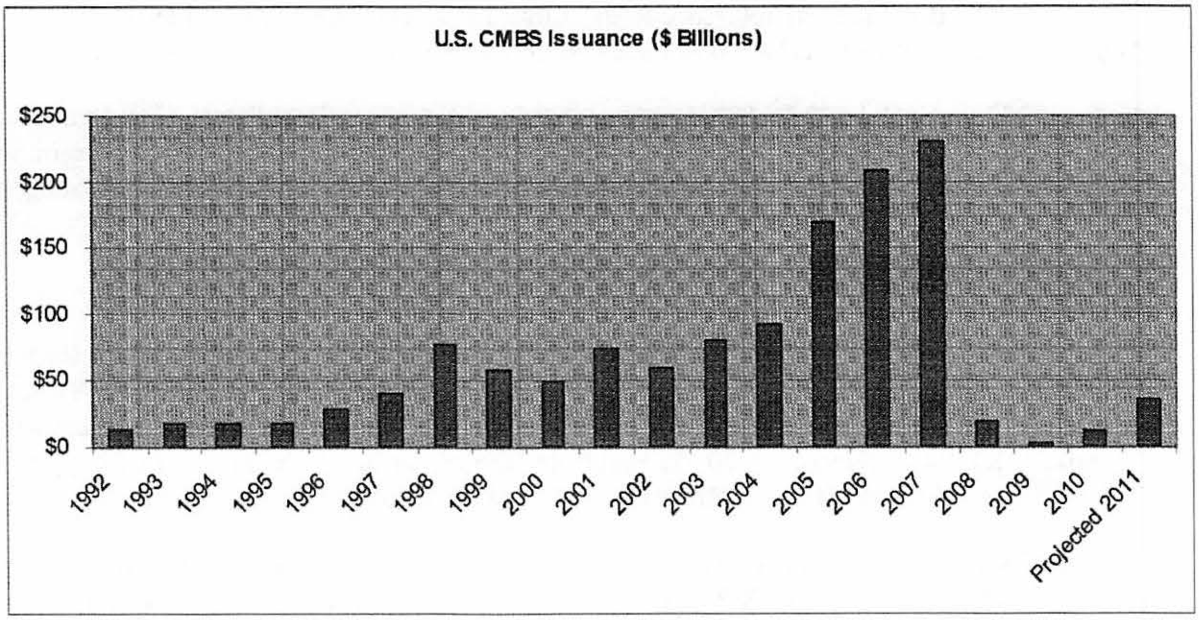
288. The November 2010 Criteria, JX 5, were reviewed by, among others, Barnes and Parisi before being published. RX 246 (October 12, 2010 email from Thompson to Barnes copying Duka, Parisi, and Digney stating, "We've gone through the attached document with Frank."); RX 247 (October 13, 2010 email from Barnes, Susan to Thompson, Eric copying Duka Barbara; Parisi, Frank; Digney, James stating "Looks fine to me.").

289. The November 2010 Criteria did not make any changes to the term default test, *compare* JX 5 at 16-17 *with* JX 2 at SEC-STRS-E-0000016-17, and did not make any changes to Table 6. *Compare* JX 5 at 16 *with* JX 2 at SEC-STRS-E-0000016; *see also* Thompson Tr. 172:13-15 ("And the actual constant was used in that analysis as we previously discussed; is that right? A Yes."); Duka Tr. 1309:8-13 ("And I take it that no one on [RX 247], to your recollection, made any efforts prior to the publication of the November 2010 criteria to change Table 6; is that right? A Yeah. My recollection is that nobody made any comment to change.").

290. The Glossary defined "[d]ebt service coverage" as "[t]he ratio of a real property's NCF to the scheduled debt service expressed as a multiple (e.g. 1.2x)." JX 5 at SP-CMBS 00320224. "[S]cheduled debt service" means "contractual debt service." Thompson Tr. 172:16-24 ("Q And the glossary, again, refers to debt service coverage on page 30 as a ratio of the real property's NCF to the debt service expressed as a multiple, correct? A Yes. Q Scheduled debt service in the industry means the contractual debt service, I think you said; is that right? A That's the way I would think of it, yes."); Duka Tr. 1264:2-3 ("Q What is scheduled debt service? A It's the loan's contractual debt service.").

2009-2010 CMBS Market Activity

291. As shown in the following chart of U.S. CMBS Issuance that was part of a presentation given by Duka and Osborne in January 2011, U.S. CMBS issuance declined substantially in the wake of the financial crisis.



RX 361 at SP-CMBS 00630539; *see also* Rubinstein Tr. 1631:24-25 ("I understand that in 2009, issuance came to a virtual halt.").

292. Throughout 2010, Duka and others noted that U.S. CMBS issuance activity was increasing. RX 211 at SP-CMBS 00642950 (activity report attached to an email dated August 17, 2010, which stated "Activity continues to increase and we continue to field inquiries and meet with issuers about traditional and nontraditional property types, general criteria and deals."); RX 234 at SP-CMBS 00426536 (activity report attached to an email dated September 23, 2010, stating, "Activity continues to increase and we continue to field inquiries and meet with issuers about traditional and nontraditional property types, general criteria and deals. We met or spoke with 6-7 issuers in August / September who are beginning to originate loans for securitization."); RX 255 at SP-CMBS 00484215 (October 20, 2010 email from Duka to Osborne, copying Thompson and Jacob, stating "We are going to be looking at another deal [FREMF 2011-K10] that I did not anticipate"); RX 259 at SP-CMBS 00481719 (November 1, 2010 email from Duka to Jacob, Osborne, and Thompson, stating "we've seen the tremendous increase in shops and investors talking about new issuance so none of this comes out of left field," referring to an estimate of $100 billion in new issuance in 2013); RX 325 at SP-CMBS 00521832 (activity report attached to an email dated December 13, 2010, stating, "Activity continues to increase and we continue to field inquiries and meet with issuers about traditional and nontraditional property types, general criteria and deals. This month we met or spoke to Societe Generale, H2, Grain Communications, CREFC committees, RBS Greenwich, Assured Guaranty and DR Residential (a Canadian prospect). We also met or spoke with multiple Issuers who are either beginning to originate loans for securitization or have been actively originating loans. The analytical team has been actively fielding these numerous calls relating to process, procedures and general property evaluation or legal criteria from issuers."); Jacob Tr. 599:25-600:4 ("Q Is it fair to say that as 2010 preceded, the CMBS conduit/fusion market went from being almost completely inactive to seeing more deals? A I don't have the history in front of me, but that's my recollection.").

293. In 2010, S&P was retained to rate a substantial number of large loan/single borrower transactions and reremic transactions. Duka Tr. 1465:5-9 ("How many single borrower loans -- transactions was conduit -- I'm sorry -- was your group reviewing in 2010? A That's where the bulk of our activity was."); Duka Tr. 1465:17-18 ("I recall rating a large share of single borrower deals."); RX 198 at SP-CMBS 00405607 (activity report attached to an email dated July 20, 2010, stating, "We released ratings on two separate CMBS trusts in July secured by the BofA headquarters building in NY. We are currently rating two single borrower transactions: both are secured by a diverse portfolio of retail properties."); RX 211 at SP-CMBS 00642950 ("ActivityAugustV3.doc" attached stating, "We released ratings on two separate CMBS trusts in July secured by the BofA headquarters building in NY (closed in July) and one in August (Vornado retail transaction). The Vornado transaction will close 8/18. Additionally, we are currently rating one single borrower transaction (Centro) . . . and one re-remic (Citi)."); RX 226 at SP-CMBS 00430704 (email dated September 13, 2010 from Duka to Thompson, stating, "Since the last update, pre-sales were posted for two transactions: Citigroup 2010-RR3, a Super Senior Re-Remic, and JPM 2010-CNTR, a single borrower transaction."); RX 237 at SP-CMBS 00381468 (October 1, 2010 email from Burbage with the subject "September US Structured Finance Talking points" with attachments stating, "So far this year, we have rated 4 of the 7 deals completed"); RX 252 at SP-CMBS 00451400 (activity report attached to an October 18, 2010 email, stating "We are currently in the process of rating two transactions: a conduit transaction (for JP Morgan) and a single borrower hotel transaction (ESH) . . . We have also been engaged to rate or upsize an existing Morgan Stanley reremic."); RX 274 at SP-CMBS 00477996 (activity report attached to an email dated November 15, 2010, stating, "We are currently rating four transactions: a single borrower hotel deal (ESH) , a single borrower cold storage transaction (Americold), a CTL transaction (CVS) and a reremic of a 2004 conduit transaction (Morgan Stanley HQ4 - B).").

294. According to a January 21, 2011 article in Commercial Mortgage Alert, S&P rated 98.8% of the U.S. single-borrower transactions issued in 2010. RX 369 at SP-CMBS 00548729, SP-CMBS 00548731 (S&P "rated 98.8% of single-borrower transactions" in 2010).

295. In 2010, S&P had a 57% market share of the U.S. CMBS market, Moody's had a 63% market share, and Fitch had a 55% market share. DX 275 (chart entitled "U.S. CMBS Deals: Big Three Market Penetration" with data from Commercial Mortgage Alert).

296. In 2010, Duka and others expected U.S. CMBS issuance, including CF issuance, to increase substantially in 2011. RX 237 at SP-CMBS 00381467 (October 1, 2010 email from Burbage to Jacob, Duka, Thompson and others, which stated, "S&P's forecast is predicting $6 billion in CMBS issuance for the fourth quarter of 2010 and $35 billion in issuance for 2011"); RX 325 at SP-CMBS 00521830 ("Based on transaction[s] currently in the pipeline, there will be approximately $13 billion of CMBS issued in the 1st quarter[.] For all of 2010, CMBS volume is estimated at $10 billion. We have estimated CMBS issuance of $35 billion in 2011. Other researchers are in the same spot or higher (with some estimates of $50 billion)."); Duka Tr. 1320:2-5 ("In August of 2010, were you expecting activity to increase substantially in the latter half of 2010 and 2011? A Seems to be the case, yes."); Jacob Tr. 611:5-11 ("[I]s [this] consistent with your recollection that by December 2010, S&P CMBS was anticipating as of -- that activity in the new year would be substantially above in volume activity in 2010 in the area of conduit/fusion new issuance transactions? A Yes.").

297. On December 27, 2010, Real Estate Finance & Investment reported that "Freddie Mac plans to double its multifamily commercial mortgage-backed securities issuance to more $10 billion in the coming year," and use more than one rating agency to rate Freddie deals. RX 343 at SP-CMBS 00517654.

298. As early as July 2010, Duka reported that the increase in CMBS issuance would result in S&P rating more deals in 2011, including more CF deals. In July 2010, Duka reported to Besenoff, the manager of the S&P's editorial group, that she expected to rate more CMBS transactions in 2011. RX 204 at SP-CMBS 00403535 (July 28, 2010 email from Duka to Besenoff, in which Duka responded to Besenoff's question of "How will 2011 issuance compare to 2010 issuance in your area?" by stating, "I expect issuance next year to increase and the # of deals we rate to increase. This year, I expect maybe 10-15 deals to get done and I expect to 1/2 of them. Next year, I expect that will double."); Duka Tr. 1315:22-1316:13 ("Q And what is your response in No. 1 of your email to Arlene Bessenoff? A That I expect issuance to grow. I expect the number of deals that we were rating to increase. I define sort of the numbers that I expect to see, number of deals, percentage rated. And then I say what I think is happening the next year. Q So are you saying in 2011, in this sentence, that you expect the numbers that you described in the earlier part of the numerical one answer will double? Is that what you are saying? 2011 will double versus 2010? A I think that is what I am saying. Q And are you referring to conduit/fusion deals or conduit/fusion deals and others? A Both; conduit/fusion deals and others.").

299. On December 7, 2010, Shirley Lai asked Duka, "[W]hat explanation should I put down for why US CMBS NI utilization dips in Q4 2010 and then spikes in Q1 2011?" RX 305 at SP-CMBS 00523398. Duka responded later in the evening, copying Jacob and Osborne, stating:

> 1. I believe my actual hours for 4th quarter 2010 will be higher than what I estimated, largely due to an increase in deal volume over what I anticipated.
>
> 2. We have projected a shift in deal types from single borrower to pooled deals, going forward. **We expect to see more pooled transactions issued this year and also project rating more pooled transactions**. We slightly decreased our projections for volume in the single borrower deal sector. We project an increase from rating "O" pooled transactions in the 4th quarter 2010 to rating 3-4 transactions in the 1st quarter 2011. Pooled transactions have more effort hours and manpower associated with them. We are projecting this given what we know about the trend in the market. We expect deals to be larger, more lenders originating loans & contributing to pools and that most issuers will now sign our revised T&C's. In the 4th quarter, we actually rated 1 pooled transaction (while we forecast none). Also, in the 2nd half of the year, most issuers were not willing to sign our engagement letters. My understanding is that Goldman is now the only issuer who will not sign our engagement letter. I am projecting having looked at 4 pooled deals in the 4th quarter and 4-5 in the 1st quarter (8.5 =total) and rating 1/3rd of that. I'm already looking at 3 new deals and anticipate looking at another 3 before the end of the year.

RX 305 at SP-CMBS 00523398 (emphasis added); *see also* Duka Tr. 1337:7-1338:3 ("There must be a noticeable difference in utilization at the end of the year and at the beginning of 2011 [as reflected in] . . . my projections for this workforce planning model . . . I'm describing that I expect to see a shift in deal types from single-borrower transactions to multi-borrower transactions; that that shift will create staffing needs . . . I think I also explain the business terms changing and some other things that happened during this period of time that will also impact volume [in terms of] an increase in volume.").

300. "[P]ool[ed]" in RX 305 transactions meant CF transactions. Jacob Tr. 609:2-8 ("Q And the second sentence [in RX 305] -- the real second sentence, it reads, 'We expect to see more pool transactions this year and also project rating more pool transactions.' Again, do you understand that to be conduit/fusion transactions? A Yes.").

301. As deal volume increased toward the end of 2010, and because it was expected to increase in 2011, Duka reported to her superiors that NI was busy and would require additional staffing. RX 273 at SP-CMBS 00478293 (November 14, 2010 email from Duka to Jacob, responding to "How r things," stating "Busy .... expect to be busy between now and year end ..... looking at a few deals and expect more ..... also rating the self storage deal whcih needs to close by year end"); RX 272 at SP-CMBS 00478412 (November 12, 2010 email from Duka to Jacob, Osborne, and Thompson, stating "Today there was another article about Moodys staffing. They added 7 analysts for a total of 42 analysts; equally distributed between NI and Surviellience. I have 12 including me and my CRISIL resource."); Duka Tr. 1333:5-14 ("Q Why did you write this email? A It was another opportunity to distribute information, which was suggesting that other rating agencies were also expecting growth in the CMBS product, and they were staffing for it well ahead of time, and we weren't. Q And what was your hope on November 12, 2010, in writing this email? A That we would change course and hire more people."); RX 282 at SP-CMBS 00526499 (November 17, 2010 email from Duka to Osborne, copying Thompson, which list deals S&P was asked to rate or provide feedback on, and stating, "Grace, Just wanted to update you (and Eric) an update on the tidal wave that I expect to see come in either next week or the week after)."); Duka Tr. 1335:19-23 ("What are you referring to when you use the term 'tidal wave'? A A large increase in volume. Q Of what? A The CMBS transactions."); RX 316 at SP-CMBS 00630799 (December 10, 2010 email from Duka to Osborne and Thompson, stating, "I have 2 deals in-house now that I can manage (DBUBS and WFRBS). I just got 3 deals today (Freddie K701, JPM 2011 - C3 and the Golden State portfolio) and will get another one on Monday (MS I BofA conduit). I'm going to think about how to staff these this weekend. I'll discuss with my team early next week, when we go through the tapes. I'm going to need help NOW ....."); Duka Tr. 1338:21-22 ("Were you intending to convey urgency? A Yes."); Duka Tr. 1339:12-18 (Concerning "NOW," "[w]ere you intending to convey urgency? A Yes.").

302. On December 13, 2010, Duka reported as follows in an activity report to Osborne:

> Issuance volume in CMBS will increase exponentially in the 1st quarter. It is likely that total issuance in the 1st quarter alone, will exceed total 2010 issuance by 30% or more. Most of this growth will be in conduit / pooled transactions, where our criteria has historically been somewhat more conservative than the other agencies. It is likely we will require **more resources** in the upcoming year to keep up with the rating activities

and those activities needed to support the rating process (criteria development, commentaries, outreach, policies and procedures). Other rating agencies and issuers have been increasing their New Issuance staffs significantly this past year to prepare for the increased volume.

RX 325 at SP-CMBS 00521834 (emphasis added).

303. Duka wrote that "more resources" would be required because of, among other things, the shift from single-borrower to multi-borrower deals. Duka Tr. 1181:8-19 ("Q Why were you telling Ms. Osborne and Mr. Jacob that it was likely that you would require more resources in the upcoming year? A My recollection, just looking at some documents, is the market is moving from single borrower to multi-borrower deals. Multi-borrower deals are more complex. They take more resources. They take more time. They're much more difficult to coordinate. And so I'm letting them know that the market's shifting. That shift is going to impact us. And I need bodies not only to rate deals, but to keep up with all changes in regulations, all the criteria demands and all these other activities. That's what I think I'm saying here.").

304. Duka was not concerned that S&P was not rating enough CF transactions in 2010. Duka Tr. 1339:12-18 ("Q Any concern on December 10, 2010, that you have a lack of work going forward into 2011? A I don't think that's my concern. Q What is your concern? A That I'm concerned that I don't have adequate staffing to complete the work in a -- in the manner that I would like."); Duka Tr. 1180:3-6 ("Q With the market coming back, were you worried that you wouldn't get a fair share of the ratings due to S&P's more conservative criteria? A I don't recall thinking about that."); Henschke Tr. 1706:25-1707:6 ("Did Barbara Duka ever communicate to you that she was very concerned that S&P was not rating enough conduit/fusion transactions? A No. Q Did she ever tell you that she was afraid of losing her job? No."); Henschke Tr. 1707:7-10 ("Q Did she ever tell you that she was worried that the CMBS group would need to be downsized? A No. I mean, at that point, we had already been downsized pretty significantly.").

305. Duka received complaints from her subordinates in 2010 regarding how busy NI was during the second half of 2010. RX 210 at SP-CMBS 00440654 (August 17, 2010 email exchange between Pollem and Duka, in which Pollem stated "I thought Garruto wasn't supposed to be doing surveillance work now that we're so busy. He's not."); Duka Tr. 1319:7-12 ("Q Did you agree with him on August 17, 2010, that new issuance was quite busy? A I think I did, based on my response. Q What is your response? A He shouldn't be working on surveillance anymore."); Duka Tr. 1456:22-35 ("Q And you weren't actually busy rating deals at this time, were you? A We were. They just weren't conduit/fusion deals."); RX 322 at SP-CMBS 00399613 (Pollem emailing Duka on December 13, 2010 that DeFalco should not be permitted to take a vacation day because "Adria will probably be assigned at least five loans to look at this week, if not more."); Duka Tr. 1340:16-23 ("What are you referring to there? A To see if Adria will agree to delay her vacation. Q Why? A Because we need her. Q To do what? A Look at this avalanche of deals that we're seeing.").

306. NI was not adequately staffed at the end of 2010, as CMBS issuance volume was increasing. Duka Tr. 1340:24-1341:2 ("Q Was your new issuance group within CMBS adequately staffed at the end of 2010, meaning the fourth quarter? A No."); RX 211 at SP-CMBS

00642951 (August 17, 2010 email from Thompson to Cheung, Martina; Osborne and Jacob, copying Duka, with "ActivityAugustV3.doc" attached, stating, "The most recent staffing model results both continue to show resource utilization in excess of 100%. As a result, we are evaluating current market conditions on the primary and secondary front, and exploring the need to continue to add additional resources once we fill our open requisitions."); Duka Tr. 1321:8-1322:1 ("At the time of this document, was new issuance looking to hire more analysts? A I read it to mean, yes, new issuance and surveillance were looking to hire more analysts. Q And what is resource -- what is the recent staffing model? What does that refer to? A It's a -- it's a projection of various activities that the group engages in. Essentially, it's estimating man hours associated with certain activities and then associating the number of those activities that would get done on a quarterly and annual basis. And then inputting the staff into that model. And essentially it matches the amount of hours needed to complete the work to the amount of resources that are in the group. By saying that it's in excess of 100 percent, it's saying that I can't complete all the activities I think I am going to be seeing."); RX 234 at SP-CMBS 00426537 (September 23, 2010 email from Thompson to Osborne, copying Duka, with "ActivitySeptember2010v4.doc" attached, stating, "We are continuing to run over capacity on the new issuance and surveillance fronts."); Duka Tr. 1322:6-11 ("Under 'Resource management,' can you explain the first comment in bullet -- in the first bullet? A The 'we are continuing'? Q Yeah. A Just that we think we're understaffed in both new issuance and surveillance.").

307. S&P was not retained to rate certain CMBS CF transactions in 2010 because of S&P's position on Rule 17g-5, RX 198 at SP-CMBS 00405606 (July 20, 2010 email from Thompson to Cheung, copying Jacob and Duka, with "July_2010V2.doc" attached, stating, "We may also have lost one to two transactions due to our position on 17g-5"), which was unrelated to the 2009 Criteria. Jacob Tr. 581:7-17 ("Do you have a recollection of what the 17G issue was? A I really don't. I remember I was going through -- there were so many things like this. But I really don't remember what 17g5 was about. If you want to refresh my recollection, I'm more than happy to. But I certainly remember the term 17g5, because it came up a lot. Q Do you recall, at a minimum, that the 17g5 issue had nothing to do with criteria? A Sounds right.").

308. S&P was not retained to rate certain CMBS transactions in 2010, some of which were CF transactions, because issuers were not willing to sign S&P's terms and conditions. RX 194 at SP-CMBS 00595317 (July 13, 2010 email from Jones to Duka, Mason, Weiss, and Jacob stating, "Goldman told us earlier in the week that they will not sign based on current terms and conditions. Freddie does not intend to sign themselves."); RX 211 at SP-CMBS 00642949 (August 17, 2010 email from Thompson to Cheung, Osborne, and Jacob, copying Duka, with "ActivityAugustV3.doc" attached, stating, "Virtually every issuer has expressed concerns with our terms and conditions. To date, the following issuers will not sign the terms and conditions and will not even show us transactions: Barclay's, Goldman, Freddie, Wells. Even issuers that are signing the current terms and conditions have expressed hesitation in doing so going forward. That includes: JP Morgan, BofA, Deutsche Bank and Morgan Stanley."); RX 226 at SP-CMBS 00430704 (September 13, 2010 email from Thompson to Duka, copying Osborne, with subject "September 2010 SF BU Review_v1.ppt," stating, "To date this year, we lost at least five transactions due to the terms of the new (revised) engagement letter (Goldman Sachs large loan transaction, Freddie Mac K-8 transaction, MS Re-Remic, Barclay's Re-Remic, and Wells BofA conduit transaction)."); RX 234 at SP-CMBS 00426535 (September 23, 2010 email from

Thompson to Osborne, copying Duk,a with "ActivitySeptember2010v4.doc" attached, stating, "Virtually every issuer has expressed concerns with our terms and conditions. To date, the following issuers will not sign the terms and conditions and will not even show us transactions: Barclay's, Goldman, Freddie, Wells. Even issuers that are signing the current terms and conditions have expressed hesitation in doing so going forward. That includes: JP Morgan, BofA, Deutsche Bank and Morgan Stanley . . . Currently, there are several deals posted on the 17G website that we were not shown due to T&C's: Freddie Mac pool (est. $1 billion), Wells pool (est. $1 billion), LEAFS reremic (est. $1 billion, Morgan Stanley reremic (est. $250million) We lost at least seven transactions (since May) due to the terms of the new (revised) engagement letter (Goldman Sachs large loan transaction, Freddie Mac K-8 transaction, a large Barclay's credit assessment, a Morgan Stanley Reremic, LEAFS, Freddie K-9 and Wells pooled transaction. Most of these transactions would be about $1 billion in size."); RX 245 at SP-CMBS 01906710 (October 11, 2010 email from Duka to Osborne and Mason stating, "2. Wells / Wachovia would not sign our engagement letter because of T&C's . . . There was another Freddie deal that recently came out, as well. They would not sign our engagement letter because of T&C's."); RX 252 at SP-CMBS 00451401 (October 18, 2010 email from Thompson to Osborne copying Duka and Sarajian with attachment "October_Activity1018V3.doc," stating, "We lost a Wells Fargo transaction due to T&C's."); RX 274 at SP-CMBS 00477995 (November 15, 2010 email from Duka to Osborne, copying Thompson, with "NovemberActivity_V2.doc" attached, stating, "We lost another Goldman transaction in October due to T&C's.").

309. The terms and conditions issue related to indemnification, RX 237 at SP-CMBS 00381460 (October 1, 2010 email from Burbage to Jacob, Duka, and others with subject "September US Structured Finance Talking Points," stating, "S&P Terms & Conditions: Indemnifications clauses in engagement and rating letters as well as requests that certain terms and conditions be included in deal closing documents by the rating agencies is being met with strong resistance by some issuers. Essentially, S&P is looking for issuers to take responsibility for the quality and accuracy of information about the deals and the underlying assets."), and did not relate to the 2009 Criteria. Jacob Tr. 586:14-17 ("Q Do you understand all of that paragraph to be concerned with issues for losing transactions other than criteria reasons? A Yes.").

310. The terms and conditions were revised in or around December 2010, which resulted in a "significant increase in rating activity." RX 325 at SP-CMBS 00521830 (December 13, 2010 email from Duka to Osborne, copying Thompson, with "December2010Activityfinal.doc" attached, stating, "We have experienced a significant increase in rating activity, since the revised terms & conditions have been distributed. This is from a combination of more overall activity in the sector as well as the willingness of all issuers (except Goldman), to sign the revised T&C's. We have 6 deals currently in-house and expect a 7th in shortly. These deals have a combined issuance amount of $11 billion which will be issued in the 1st quarter of 2011. Much of the activity is now skewed toward larger, multiborrower pools. The trend is that transaction sizes are larger, ranging from $1.5 billion to $2.8 billion. In 2010, transaction sizes were typically less than $1 billion."); RX 344 at SP-CMBS 00517714 (January 3, 2011 email from Duka to Osborne, Jacob, and others, with the subject line "Goldman Sachs is now signing our engagement letters"); RX 362 at SP-CMBS 00630554 (January 14, 2011 email from Duka to Osborne, copying Thompson, with "January2011Activity.doc" attached, stating, "We have experienced a significant increase in rating activity, since the revised terms &

conditions have been distributed. This is from a combination of more overall activity in the sector as well as the willingness of all issuers (even Goldman), to sign the revised T&C's.").

311. Although Commercial Mortgage Alert, in an article titled "S&P Getting Squeezed in New-Issue Market," attributed S&P being "left off the bulk of" CF transactions in 2010 to "conservative criteria," Duka attributed it to issuers being unwilling to agree to the terms and conditions of S&P's engagement letter. RX 400 at SP-CMBS 00503375 (February 7, 2011 email from Duka to Osborne stating, Commercial Mortgage Alert "highlighted that S&P was left off the bulk of conduit / fusion transactions in 2010 as a result of our more conservative criteria. In fact, for a majority of those deals, we were not even asked to look at the deals because the issuers would not sign our T&C's."); Duka Tr. 1362:2-8 ("I'm saying that Commercial Mortgage Alert highlighted that S&P was left off the conduit/fusion transactions in 2010 as a result of more conservative criteria. And I'm saying, in fact, we didn't even look at most of those deals because issuers would not agree to sign our terms and conditions."); RX 370 at SP-CMBS 00548741, RX 369 (January 21, 2011 Commercial Mortgage Alert article).

312. On October 11, 2010, in an email to Grace Osborne and Scott Mason, Duka reported that S&P was not retained to rate a Deutsche Bank deal, explaining that the "deal had a lot of storied assets in the Top 10," "including a ground lease on a retail center under construction, a Secaucus office building with tenant concentration that was very vacant, etc." RX 245 at SP-CMBS 01906710. The term "storied" meant "that there were a lot of large assets in the transaction that were extremely complicated. And by "extremely complicated," meaning that, "different people could look at them different ways and have more variability around the opinions they reach." Duka Tr. 1323:8-13.

313. On November 11, 2010, Duka wrote under the heading "Key Challenges"

> More conservative criteria, particularly on conduit / fusion transactions and probably counterparty criteria (depending on where bank ratings migrate to). Could impact the business. May depend on investors and volume i.e. the more volume, the more of an investor base that will be needed to buy .... giving potentially more balance of power to investors than what exists today).

314. Duka explained that investors have leverage to pressure issuers to retain certain rating agencies notwithstanding the issuer's consideration of credit enhancement levels in selecting rating agencies. Duka Tr. 1174:13-25 ("Q Ms. Duka, in November of 2010, did you write to Ms. Osborne and others that one of the key challenges that your group was facing was, under No. 4, More conservative criteria particularly on conduit/fusion transactions and probably counterparty criteria depending on whether the banks' ratings mitigate to -- and that it could impact the business? A That seems to be what I'm saying. But I'm also saying that it ultimately depends on investors. Investors can choose if they want more conservative ratings. And as the market grows and the investor base grows, it's really up to them."); Duka Tr. 1176:15-25 ("Q Okay. And you would agree that it makes sense that more conservative criteria may make it harder to get retained to rate deals? A I think it may make it harder. It depends on the investors. The investors have the leverage to push, so -- Q Did you say the investors have the leverage to push? A I think the investors may have the leverage to push. If they want to see a rating agency on the deal, they can see a rating agency on the deal.").

315. Duka's comment regarding the "Key Challenges" related to both the 2009 Criteria and the counterparty criteria. Duka Tr. 1332:2-12 ("And what's counterparty criteria? A It -- I can't explain to you exactly what it is, but here is what it does: It's criteria that applies across the board to all rating groups, not to just CMBS. So, for instance, if -- if I'm reading a transaction that relies on a guarantee, and that guarantor gets downgraded, I have to look to the guarantee of that downgraded entity as a counterparty, and that overrides any rating that I have, essentially. Q And it's both the conduit/fusion transaction criteria and counterparty criteria that are the introduction to your following notes; is that correct? A Correct.").

316. Jacob explained that "there's lots of part of the criteria," with credit enhancement levels only being one part. Jacob Tr. 530:11-531:4 ("What is your understanding of the sentence 'We lost the $1.2 billion deal because of criteria'? A The issuers were not happy with our criteria. I should point out in all fairness, that there's lots of parts of the criteria. One is credit enhancement levels. It could be other things in a -- other parts of criteria. Remember, we're not talking about fees. Strictly on criteria. There are other criteria besides credit enhancement that are part of a transaction. Q Sure. A I don't recall any of these transactions in particular. It's a long time ago. There were things like counterparty risk and all sorts of things that were part of a transaction. What was clear in this is they didn't like our criteria, so they went elsewhere.").

317. Commercial Mortgage Alert ("CMA") identified seven CF transactions that were issued in 2010. RX 369 at SP-CMBS 00548729. RBS 2010-MB1 was included among the seven CF transactions, but should have been classified as "a large-loan deal instead." RX 804 at 1. The other 6 CF transactions were JPMCC 2010-C1, GSMS 2010-C1, JPMCC 2010-C2, COMM 2010-C1, WFCM 2010-C1, and GSMS 2010-C2. RX 804.

318. S&P rated JPMCC 2010-C2, and did not consider it a CF transaction. JX 18; *see also* FOF¶ 440.

319. S&P was not retained to rate the two Goldman Sachs transactions listed in RX 804, GSMS 2010-C1 and GSMS 2010-C2, due to Goldman Sachs unwillingness to sign S&P's terms and conditions; Goldman Sachs only agreed to sign S&P's engagement letter as of January 2011. RX 344 at SP-CMBS 00517714 (January 3, 2011 email from Duka to Osborne, Jacob, and others, with the subject line "Goldman Sachs is now signing our engagement letters"); *see also* RX 274 at SP-CMBS 00477995 (November 15, 2010 email from Duka to Osborne, copying Thompson, with "NovemberActivity_V2.doc" attached, stating, "We lost another Goldman transaction in October due to T&C's.").

320. The Wells Fargo transaction referenced in RX 252 at SP-CMBS 00451401 (October 18, 2010 email from Thompson to Osborne, copying Duka and Sarajian, with "OctoberActivity_1018V3.doc" attached, stating, "We lost a Wells / Fargo transaction due to T&C's.") was WFCM 2010-C1. Duka Tr. 1329:21-1330:4 ("Q Okay. And the Wells Fargo transaction, similarly, is that -- have you reached any conclusion by looking at the email and the attachment as to the relationship between the Wells Fargo transaction and -- the Wells Fargo transaction on the spreadsheet and the Wells Fargo transaction that you've testified about in the last 20 minutes or half an hour? A Yeah. It could only be this deal. It's the only Wells Fargo deal.").

321. S&P was not retained to rate JPMCC 2010-C1, which was the subject of the Commentary, "partly for criteria reasons." DX 54 at SP-CMBS 00440832 (August 17, 2010 Memorandum from Duka and Thompson to Jacob and Osborne with the subject "August 2010 Activity Report U.S. CMBS," stating, "The conduit transaction is notable as we were not asked to rate their first transaction, partly for criteria reasons. We published a commentary on that transaction in June.").

322. The Deutsche Bank deal referenced in RX 245 was COMM 2010-C1. Duka Tr. 1329:4-20 ("Q Okay. Having looked at this email and attachment and compared it to the commentary documents, have you reached any conclusion as to what transaction is being referred to in the spreadsheet when it refers to the Deutsche Bank transaction? A It's -- the Deutsche Bank shelf is referred to as comm. So it's the comm 2010-C1 deal. It's the third transaction up from the bottom. Q Okay. And according to the spreadsheet, S&P is not a rating agency assigned to that one; is that right? A That is correct. Q And on the -- is that the same Deutsche Bank transaction that you testified about in the last 20 minutes? A Yes."); *see* FOF¶ 312.

323. Duka continued to note, even in 2011, when transactions were lost due to criteria. RX 400 at SP-CMBS 00503375 (February 7, 2011 email from Duka to Osborne, stating, "We lost 2 conduit fusion transactions that will come to market and close in February (DBUBS 2011-LC1 and WF-RBS Commercial Mortgage Trust 2011-C2). We lost these deals, in part, due to criteria."); RX 533 at SP-CMBS 01588870 (June 16, 2011 email from Duka to Osborne, stating, "[w]e lost the WFRBS 2011-C4 (conduit), GSMS 2011-GC3 (conduit), LStar 2011-1 (conduit), BALL FASHN 2011-and Trust 2011-THCNL transactions largely due to criteria"). When that happened, Duka emphasized that it was important to publish commentaries to "incent[]" issuers "to make good loans rather than a lot of pretty bad loans." RX 362 at SP-CMBS 00630555 ("It is important for the CMBS group to devote resources to develop procedures to and publish opinions on transactions we were not retained to rate. In CMBS, those transactions are typically issued under Rule 144A, which has made it difficult for us to obtain information that Legal considers public. As transactions get more leveraged, but larger, other rating models reward diversity over good credit. Still others are incredibly inconsistent. It is important for us to point this out now so that investors understand that there are differences among agencies and those issuers are incented to make good loans rather than a lot of pretty bad loans.").

324. Duka did not think of the 2009 Criteria as being conservative or not conservative; she simply viewed it from the perspective of whether or not the application of the methodology in the 2009 Criteria was analytically sound. Duka Tr. 1164:14-19 ("Q Did you have a perception in 2010, that the criteria S&P published in 2009 were too conservative? A I don't think I thought in terms of too conservative or not conservative. I thought in terms of: Does it make sense or does it not make sense?").

Duka Took Steps to Ensure Issuers Could not Circumvent 2009 Criteria by Securitizing Commercial Mortgages in CDOs Under the CDO Criteria

325. On or around November 2, 2010, Duka raised with Parisi the concern that issuers could package commercial mortgages into CDOs as opposed to CF transactions for the purpose of circumventing the stresses imposed by the 2009 Criteria. RX 260 at SP-CMBS 00539247

(November 2, 2010 calendar invitation from Duka to Parisi: "Fundamentally, my biggest problem is that at the individual property sectors we recalibrated our criteria in the US in the last 12-24 months and are continuing that globally. There was significant push back to what we did (I know there was for CMBS). If the CDO criteria is more liberal than what we are doing at the property sector (which I believe it is), that creates problems on multiple fronts. That is what I want to talk about."); Duka Tr. 1326:20-1327:2 ("[S]omehow [I] came to understand the CDO criteria or read the CDO criteria, the RFC, and I'm concerned that the criteria in that RFC is more liberal than the CMBS criteria, which we had worked so hard to explain. All I'm saying is that if -- if -- this was so important for us to do in CMBS, then it doesn't make sense to allow a backdoor way to liberalize it through the CDO criteria.").

326. Duka noted that Issuers would circumvent the stresses imposed by the 2009 Criteria for the purpose of receiving lower credit enhancement levels under the CDO criteria. Duka Tr. 1327:6-1328:7 ("If the CDO criteria was -- did not -- did not consistently apply the same stresses at different rating categories resulting in the same transaction being inserted into a CDO deal, having lower credit enhancement levels than the CMBS transaction. Q So a CMBS deal can be inserted into a CDO deal? Is that what you're saying? A I think two things can happen. You can either have mixed CDOs where there are multiple asset classes, or you can have commercial real estate CDOs, which are a hundred percent commercial real estate, which would be rated in CMBS under the CDO criteria. Q And the concern that you had was what? That the CDO criteria that had been rating that commercial real estate would generate results as compared to the CMBS criteria that were higher? lower? the same? What's the concern? A Inconsistent and lower. Q So which of the criteria that you were looking at then, the CMBS criteria, the CDO criteria, were -- to use my phrase, and if it is wrong, correct me -- more stringent? A The CMBS criteria. Q And the concern was that if the CDO criteria were used as a backdoor in the rating of CMBS, that the CMBS criteria would be undermined; is that right? A That's correct.").

GSMS 2011-KYO

327. Duka "passed on even looking at" GSMS 2011-KYO because of concerns she had with the quality of the collateral in the deal. RX 415 at SP-CMBS 00626391 (February 14, 2011 email from Duka to Mason and Moses, copying Osborne and Jacob, stating, "I am going to have Aparicia cancel the deal in CORE. I did not and will not complete Phase I of the analysis. An analyst looked at the deal structure after preliminary conversations with Goldman. In the end, we did not put numbers to the deal, because we could not get comfortable with the following: it is a standalone deal secured by hotels concentrated in Hawaii (largely Honolulu); there was a lot of debt on the properties; the 2010 and estimated 2011 net cash flow could not cover the actual loan constant (on the 1st and mezzanine) -- never mind a refinance constant. It was the last point that I really could not get comfortable with. It felt like a 2005 loan that should have been restructured but was not. So, we passed on even looking at the deal."); Jacob Tr. 618:2-7 ("Q What was your understanding of the bottom email [in RX 415]? A It looked like Barbara was uncomfortable with the loans in the deal, and so she declined to rate it. And she asked the analyst to cancel it in CORE. CORE is the system that records incoming deals.").

MQR's Review of the CMBS Models in 2010

328. Beginning in or around September 2010, MQR began reviewing certain of the CMBS models, including the CMBS Surveillance Review Template. RX 229 (September 15, 2010 email exchange between Hu, Thompson, and MQR with the subject "MQR Request for Information – CMBS Surveillance Review Template").

329. On September 15, 2010, Hu asked Thompson for "a few typical sample deals that run through the [CMBS Surveillance Review] Template," which was a model used by Surveillance. Thompson asked Digney to assist "with this effort." RX 229 at SP-CMBS 00731644; Digney Tr. 480:14-25 ("Do you have an understanding of the template that Dr. Hu is referring to in this e-mail? A I think she was just referring to the model. Q And the model, is that the model described in the subject line of the e-mail? A Yes. Q What was the CMBS surveillance review template? A So that was a template where they would load all their transactions in with like the latest performance data, loan-level.").

330. The CMBS Surveillance Review Template was a different model from the CMBS Framework Model. Digney Tr. 481:1-5 ("Q Is that a different model than the ones that we looked at earlier when Mr. Day was asking you questions? A Yeah, it was -- it is a little bit different.").

Discussion Among Members of the CMBS Group Regarding the Table 1 Constants Leading to the December 14, 2010 Meeting With Parisi

331. Towards the end of 2010, as NI was evaluating more CF transactions, members of the CMBS Group began discussing the analytical soundness of using the Table 1 Constants to compute debt service. Henschke Tr. 1691:20-1692:10 ("Do you recall whether there were discussions among members of a CMBS group as to whether the CMBS group should continue to use the Table 1 constants to compute debt service? A Yes. Again, keeping in mind that originally there were no new issue deals, you know, in the beginning there weren't that many conversations about what to -- how to look at new deals. As more new deals started to come to us to evaluate, we started to obviously take a close -- a very close look at how they were being modeled. So I would probably say towards the end of 2010 is when we were taking a very close look at everything.").

332. Discussions regarding whether it was analytically appropriate to continue using the Table 1 Constants occurred among Henschke, Duka, and Pollem in NI, and Thompson, Digney, Carrington, and Hoeltz in Surveillance. Thompson Tr. 177:25-178:20 ("Q Do you recall that in the fall of 2010 analysts in the CMBS Group engaged in discussions in which you participated about whether it was analytically appropriate to use the Table 1 constant in the DSCR calculation for purposes of the term default test? A Yes. Q And do you remember the names of the folks that you were discussing that with? A I think that it was the senior folks from New Issue that reported to Barbara, David Henschke, Kurt Pollem. Q What, in substance, were Mr. Henschke and Mr. Pollem conveying to you in those discussions? A Well, I don't remember what was being conveyed like to me directly, but in terms of the dialogue, it was about the appropriateness of the continued use of the constant in the criteria and in credit modeling."); Digney Tr. 730:16-731:4 ("[D]o you remember discussions . . . in the second half of 2010

among other members of the CMBS group regarding whether or not it was appropriate to use the Table 1 constants to calculate debt service? A Yeah. I mean, I remember it coming up here and there. People were sort of questioning -- questioning it, if it was appropriate. Q And who are the people that you were referring to? A So I was in -- on the surveillance side during that period of time; you know, Barbara Hoeltz, Gary Carrington, just people involved with the surveillance side primarily."); *see also* Duka Tr. 1197:16-20 ("[B]efore we went to talk to Frank, there were conversations that we had in the CMBS group that included new issuance and surveillance. I'm not saying that surveillance adapted it, but they were part of the dialogue.").

333. The discussions resulted from the fact that, *inter alia*, the model was producing credit enhancement levels for CF transactions that were "very high," as "almost all of the loans were defaulting during the term versus maturity." Henschke Tr. 1692:12-1693:7 ("[W]hat were the nature of the discussions among members of the CMBS group about the use of Table 1 constants to calculate debt service in the second half of 2010? A I think it started with, we were looking at the model results that we were seeing on the preliminary deals that we were looking at, at the second half of 2010. And the subordination levels that the model was shooting out were very high. And then trying to understand what was driving those model losses, we looked at it closely. And basically almost all of the loans were defaulting during the term versus at maturity. So effectively what that meant was none of the loans were getting credit for the amortization that they were actually going to have over the course of the loan. I think that's really what then drove us to look at it, given that they were [all defaulting] not because of actual interest rates or because of the extra stress implied from the loan constants.").

334. For example, in December 2010, the CMBS Group was asked to provide feedback concerning DBUBS 2011-LC1. RX 302 (email from Pollem to members of the CMBS Group, including Duka and Henschke, assigning loans in DBUBS 2011-LC1 for review). The model for the DBUBS 2011-LC1 showed a AAA credit enhancement level of 29.46%, which was "too high," and resulted from a substantial number of the loans defaulting during the term. Henschke Tr. 1696:11-1697:10 ("Q Do you see in cell C 30 at the AAA credit enhancement, 29.4604 percent? A Yes, I do . . . Q Now, you testified earlier that at the time in the second half of 2010 you were seeing model results that were producing -- where a lot of the loans were defaulting during the term. Do you remember that testimony? A Yes. Q And I'm just going to scroll through Column AG, and if you can just pay attention. Are these the type of results that you were referring to earlier? A Yes."); Henschke Tr. 1714:4-10 ("I would also say that it was our belief that the credit enhancement levels that the model was putting out were too high, which you could -- again, if you just compare it to the archetypical pool, which put out credit enhancement AAA of about 20 percent versus that deal that we looked at earlier, AAA I believe was about 29 percent.").

335. The low interest environment that existed at the end of 2010 brought the issue of the Table 1 Constants into focus. Henschke Tr. 1693:16-1694:1 ("Q In the course of the discussions that you were having among members of the CMBS group in the second half of 2010, did you discuss the interest rate environment? A Yes. Q And what was the nature of those discussions? A At that point in time, and still continuing today, it's been a very low interest rate environment, significantly lower than what the constants would imply."); Duka Tr. 1165:21-1166:10 ("I think as a result of the market conditions, we realized that the application of the Table 1 constants caused us to be estimating losses in the model and estimating the behavior of

how those loans would perform in a way that was not consistent with how they would actually perform. Q Other than new issuance deals coming back on line in the latter half of 2010, what specifically changed in market conditions between March and December that made you rethink the loan constant? A Interest rates. Interest rates moved. And so there was a bigger disparity between what a loan's actual credit risk was and that which was implied when one used a Table 1 constant.").

336. The model results being reviewed, *see* FOF¶¶ 333-334, ran counter to the expectation that in a low interest rate environment, the risk of term default is less than the risk of maturity default. Henschke Tr. 1697:11-21 ("Q Do you agree that in a low interest rate environment, the risk of a term default is less than the risk of a maturity default? A Yes. Q And why is that? A Because given the lower interest rates, generally debt service coverage ratios were higher, so the real tests for these loans are really at maturity. If they mature into a higher interest rate environment, would they be able to refinance out at those higher interest rates?").

337. The "high" credit enhancement levels in the model, *see* FOF¶ 333, were inconsistent with the fact that the loans were underwritten conservatively. Henschke Tr. 1694:2-15 ("Q And in the course of the discussions that we've been talking about among members of the CMBS group about the use of the Table 1 constants, were there discussions about the underwriting of the particular loans that were contained in the pools at the end of 2010? A. So in 2010, you had kind of the restart of CMBS post-financial crisis. So I think, at that time, you know, everybody had the expectation -- and I think it's mostly, is what we've seen, is that underwriting standards were much more conservative at that time.").

338. Digney believed that the actual constant should have been used to assess term default risk. Digney Tr. 478:25-479:9 ("Q At any time between 2009 and 2011, did you think that actual constants should be used to calculate debt service in the term default test? A I think it -- I think it crossed my mind at one point or another. Q And when was the first time it crossed your mind? A It was, I don't know exactly, but sometime when I was in Surveillance and just seeing, you know, some of the model results."); Digney Tr. 731:5-11 ("Q Okay. And did you have a view at the time? A I don't know about at that particular moment. But, you know, I think over time I began to think about it and wonder if it -- if it made sense. Q And what conclusion, if any, did you reach? A My view was that it was more appropriate to use the actual constants.").

339. Henschke believed that it did not "make sense for a term test to be based off of a stressed constant necessarily given that real life default probabilities would be based on the actual debt service." Henschke Tr. 1698:20-1699:2 ("[M]y view is that it doesn't make sense for a term test to be based off of a stressed constant necessarily given that real life default probabilities would be based on the actual debt service that they're paying. And I think that deal kind of proves it out with just current performance of that deal being very strong.").

340. On December 12, 2010, in connection with the MQR Review, Duka commented on a Draft MQR Report of the CMBS Framework Model, and inserted the sentence: "Henschke's starting to convince me that we should rethink this, as it do[es] not have the intended result," after: "In the second sentence, the loan constants were not derived based on the archetypical pool, they were vetted in a criteria committee. Further, we use the higher of the actual debt constant or the S&P debt constant." RX 318 at SP-CMBS 00399623. In reference to

this comment, Duka explained that Henschke was "starting to convince" her that the use of the Table 1 Constant to compute debt service "didn't make sense." Duka Tr. 1443:18-22 ("What was it that Mr. Henschke was starting to convince you of? A That the -- that application of the Table 1 constants in the analysis essentially didn't make sense."). Duka became convinced that the use of the Table 1 Constant resulted in the application of inconsistent stresses that depended on the actual interest rates of the loan, and didn't "accurately reflect the credit risk" of how the loans would perform in an economically stressed environment. Duka Tr. 1443:22-1444:2 ("It inconsistently applied a methodology. It did not reflect the actual credit risk in the underlying loans. It certainly didn't tailor the hit, as I would call it, or the adjustment to the types of loans it was trying to adjust."); Duka Tr. 1375:24-1376:18 ("That the Table 1 constant, first of all, is inconsistent. And that the use of the Table 1 constant doesn't accurately reflect the credit risk of the underlying loans. And it certainly has no correlation between the adjustment of credit enhancement levels for the risk that it was supposed to consider, which was interest-only loans. Q Why is that? A Because the adjustment, first of all, hits all loans. It's not just directed at interest-only loans. And second of all, in certain instances, when the Table 1 constant is similar to the actual constant, there is no penalty. In instances where the Table 1 constant deviates from the actual constant, there is a penalty. But the penalty is associated with the difference between the actual interest rate environment that loan has been originated in and the Table 1 constant.").

December 14, 2010 Meeting With Parisi

341. There was a meeting among Duka, Henschke, Thompson, and Parisi on December 14, 2010. Duka Tr. 1478:14-20 ("The meeting you had with Dr. Parisi was attended by you and Mr. Thompson; is that right? A Me, Mr. Thompson, Dave Henschke, and I believe Majid was present. JUDGE GRIMES: I'm talking about the December 2010 meeting. A. Yes, yes."); Duka Tr. 1378:24-1379:5 ("Q Yesterday there was testimony about the December 13, 2011, -- 2010 meeting with Dr. Parisi. Do you recall that generally? A The December 13? I thought it was the 14th, right? Q Did I say 13th? I meant 14th. A Yeah.").

342. The meeting took place in Parisi's office. Parisi Tr. 1511:7-9 ("Where did the conversation take place? A It was in my office."); Thompson Tr. 90:15-18 ("Q Was the meeting with Dr. Parisi set up in advance? A Yes. Q Where did it take place? A In his office.").

343. The purpose of the meeting was to discuss CMBS' possible use of a constant lower than the Table 1 Constant to compute debt service. Thompson Tr. 90:10-14 ("There was dialogue about the application of the criteria and the constants whereby Barbara wanted to have dialogue with Frank in terms of, you know, under what circumstances could we potentially use alternative methods or assumptions."); Thompson Tr. 91:1-6 ("The substance was, again, about the applicability of the constants and under what circumstances they may or may not be appropriate from an analytical perspective, and under what circumstances could we potentially use different constants in the analysis.").

344. A spreadsheet was presented to Parisi that showed the credit enhancement levels using the actual constant, the Blended Constant, and the Table 1 Constant. Duka Tr. 1379:9-20 ("Do you recall that there was anything presented to the participants in the meeting at that time? A I generally recall some sort of a spreadsheet, which had several scenarios. It had at least three scenarios. The use of an actual, the use of the Table 1, and then a 50/50 blend. My recollection

is it had it for multiple deals, I just don't know how many. Q And in your investigative testimony in this case, did you mention a document of that kind? A I think I generally described it, yes."); Henschke Tr. 1701:15-19 ("Q Did the CMBS group review what the impact would be on the credit enhancement levels if the group was going to move away from using the Table 1 constants to calculate debt service? A Yes."). RX 670C is a spreadsheet that was created on December 13, 2010 that shows, for a single transaction, the credit enhancement levels using "Actual Constant," "Stressed Constants," and "50/50 blend." RX 670C at Sheet 2; Duka Tr. 1444:9-10 ("I recall that we presented three options and somehow we got to the blend."). This was the form of spreadsheet presented at the December 14, 2010 meeting with Parisi, a day after it was created. Duka Tr. 1380:4-9 ("Does this appear to be the form of spreadsheet that you recollect being presented at the meeting on December 14? A Yes. I would have -- I would have expected this type of information. I'm not sure all the rating categories. And there may be some subset of deals."). Duka recalled that Henschke created this spreadsheet. Duka Tr. 1441:23-1442:1 ("Q Do you know which analyst produced it? A I mean, there may have been multiple analysts working on it, but I believe it was David Henschke."); Henschke Tr. 1702:1-7 ("Do you recognize this spreadsheet? A It looks familiar. Q Is this something that you could have -- is this something that you put together? A It would either be that I put it together, or I had somebody put it together, one of the modelers in the group. I can't recall which.").

345. Thompson and Parisi agreed that continued use of the Table 1 Constant "didn't make sense." Duka Tr. 1140:6-10 ("My recollection of the meeting with Dr. Parisi is that we -- we discussed the methodology that we had been using up to that point. We described why we thought that methodology didn't make sense. Frank agreed with us."); Duka Tr. 1381:24-1382:6 ("[D]id Mr. Thompson express a view regarding conceptual presentation? A My recollection is that he agreed with the analytics. Q And what was Dr. Parisi's view, as you recall it, in the December 14 meeting with respect to the analytics? A The same."); Thompson Tr. 93:13-18 ("The outcome, as I can recall it, is that Frank was open to using different constants provided that they were documented and you put them forth. He indicated that there was room for analysts' judgment in regard to the work or the assumptions as the analysis was being conducted.").

346. Parisi approved of the use of the "50/50 blend." Duka Tr. 1145:16-17 ("I don't recall what the discussion was, but I do recall that we arrived at the 50/50 blend.").

347. Duka was "comfortable" with this decision. Although she thought the actual constant should be used to assess term default risk, the use of a Blended Constant was "closer" to "a number that" made "sense," and she expected that the CF criteria were going to be enhanced. Duka Tr. 1382:14-1383:7 ("[G]iven that your understanding in 2009, at the time the criteria were adopted, was that actual constants were called for, how you could be comfortable with the outcome of the meeting which permitted, as you testified, the use of blended constants. Do you recall that? A I do. Q Okay. And were you comfortable at the end of the meeting? A I think so, yes. Q Okay. And can you explain on what basis you were comfortable? A Because at least the change starts to move you closer to a number that makes sense. And then I think that we knew that we were identifying criteria projects. And this was going to be at the top of the list of a conduit/fusion criteria project."); Digney Tr. 813:18-23 ("[D]id you believe at that time that the use of the 50/50 blend was an analytically sound procedure? A I thought that -- at that time, I

think my view was that anything closer to the actual constant was better than moving in the other direction.").

348. Use of the Blended Constant was more analytically appropriate than use of the Table 1 Constant because it served to harmonize the results between NI and Surveillance. Digney Tr. 734:6-21 ("What was your understanding of the analytical reason for using a constant lower than Table 1 constant to calculate debt service? A Just that, you know, that they're fixed rate loans with contractual interest rates and constants. So, you know, to do a term default test on something other than that might not make sense. And then the comparison between -- you know, there was a comparison making sure that there was comparability between new issuance and surveillance. So on the new issue side, there's additional cash flow stresses that are happening. So, I guess, sort of collaborate – not collaborate, but make it more comparable, it might make sense to use a little less debt stress on the new issue side."); Digney Tr. 813:24-814:5 ("I liked the idea that it brought better comparability between new issuance and surveillance, because a new issuance, there's cash flow stresses occurring. Surveillance is just taking recorded cash flows from servicers. So you're sort of, in a way, evening out the stress between the two."); *see also* FOF ¶¶ 685-694.

349. Parisi counseled Duka to document the use of a Blended Constant in a presale and a RAMP. Duka Tr. 1140:12-15 ("And he counseled us to document it internally and externally with a pre-sale and a RAMP to describe essentially the change in the interpretation."); Duka Tr. 1142:22-24 ("[Y]ou do admit that you did agree to disclose any change in the application, both the pre-sale and the RAMP? A That's correct."); Thompson Tr. 93:19-23 ("Q And when you say 'provided that they were documented,' what do you mean by that? A Whether it be the committee memo or the publications that you put forth for the ratings action or assignment.").

350. Parisi did not communicate to Duka any expectations as to how the Blended Constant would be documented. Parisi Tr. 1589:8-24 ("With regard to the meeting with Ms. Duka, you said you had certain expectations regarding how the change or amendment or interpretation, however we describe that, would be documented . . . Did you communicate those expectations to anyone at the meeting? Or were those just expectations that you held? A Those were expectations that I held. I mean, Ms. Duka is an experienced -- she was an experienced credit analyst, senior person of the company. I didn't think it was necessary -- or possibly could have been insulting had I said, 'Oh, by the way, don't forget to write it here or there.' So those were just where I would have expected it, but I did not communicate it.").

351. In agreeing to document the use of Blended Constants in the RAMPs, Duka was not imposing an additional obligation on her subordinates, FOF¶ 76, to the already imposed obligations imposed by the RAMP Guidelines. Duka Tr. 1473:4-1474:7 ("By agreeing with Dr. Parisi that you would disclose any change in the use of loan constants in the RAMP, in your opinion, did you assume any responsibility for ensuring that the RAMP in fact made that disclosure? A When I was -- when I was talking to Frank -- the RAMP actually requires the type of disclosure that Frank was asking for. So I wasn't promising him anything that I didn't expect to be done as a normal process. The RAMP guidelines require the analyst to publish any methodology changes and the factors that impact the rating. And they require the chair to essentially make sure that that RAMP is completed in a way that accurately reflects what the

committee talked about. So I don't -- I was only promising Frank something that I already knew would happen as a normal course. . . I know that the guidelines require analysts to fill out the RAMP in a manner that would have fulfilled Frank's request.").

352. As a result of Parisi's approval, NI began, with certain exceptions, to use a 50/50 blend of the actual constant and the Table 1 Constant. Duka Tr. 1133:14-18 ("Q Now, in mid-December of [2010], is it true that CMBS new issuance switched to using the higher of the actual constant or a 50/50 blend of the actual and the criteria constant? A With some exceptions, yes."); Duka Tr. 1136:7-12 ("Is it correct that the change to the higher of the actual or blend took place shortly before or shortly after the meeting you and Mr. Thompson had with Dr. Parisi in mid-December 2010? A After. After the meeting with Frank Parisi.").

353. The exceptions included partial interest only loans, where NI used the constant that applied during the amortizing portion of the term. Duka Tr. 1133:20-25 ("For instance, partial interest-only loans were calculated differently. We were using not the in-place constant on day one, but the higher constant during the term of the loan as the actual."); Duka Tr. 1134:25-1135:8 ("A partial interest-only loan pays interest for some period of time, based on whatever the contractual loan terms are, and then it converts to paying amortization during the remaining term of the loan. So when we were looking at partial interest-only loans, we were not using the constant on day one; we were using the higher -- the higher of the two constants during the term of the loan.").

354. Thompson, to Duka's recollection, did not mention to Duka following the meeting with Parisi that the use of the Blended Constant should be elevated to Adelson or the Quality Group. Duka Tr. 8-14 ("Q Now, Mr. Thompson also testified that after the meeting he mentioned to you that the issue should be elevated to either Mark Adelson or the quality group. Do you recall Mr. Thompson mentioning that to you after the meeting with Dr. Parisi? A I don't.").

355. Thompson or Parisi were free to raise the Blended Constant with Adelson or the Quality Group. Duka Tr. 1478:21-1479:3 ("Are you aware of whether after the meeting Mr. Thompson elevated any concerns he may or may not have had above Dr. Parisi's level? A I'm not aware of that. JUDGE GRIMES: Would he have needed your permission to do so? A No."); Duka Tr. 1384:12-21 ("Q And what was your point of view on the topic of raising -- independent of Mr. Thompson's testified-to comments that you've testified that you don't recall, independent of that, what was your understanding of, you know, whether the issue would be raised, and if so, by whom -- raised higher in the chain? A It would be raised by Frank if he thought it needed to be raised higher. And I don't think he needed my approval to do it.").

356. Parisi recalled that he approved the use of a Blended Constant for a single Freddie Mac transaction. Parisi Tr. 1513:18-1514:19 ("As I recall, the discussion was around using the loan constants for a particular issuance . . . And the reason for -- or the rationale behind that was, as I recall it, was a Freddie Mac transaction. And given Freddie Mac's underwriting standards, loan quality standards, sole servicer guidelines and so on, to me, you know, that seemed like a mitigating factor, you know, because the loans were typically better quality than the average type of loan you would see."). Parisi acknowledged, however, that his recollection was inconsistent with other documents shown to him, *see, e.g.*, RX 356, and testified that he "can't refute" the

evidence that is inconsistent with his recollection. Parisi Tr. 1587:7-1588:1 ("Reflecting on the notes you were shown today, Dr. Parisi, and the other documents that you were shown, what is your view today as to whether your recollection of the events is a reliable one pertaining to the December meeting? A Well, I recall what I recall. But having seen some of the other evidence, and I've seen some of this evidence before, I can't say, you know, another meeting did not occur. I can't say I did not say this. I mean, but what I recall was the one meeting with Ms. Duka, the other -- I don't recall what I said to Susan Barnes. But I have no reason to believe that, you know, these things didn't happen. Because there's other evidence that says that there was another meeting or that I may have said this or that. So, you know, it's -- I know what I recall. But I can't refute some other things that may suggest differently.").

357. The analytical reasons for using a Blended Constant versus a Table Constant applied generally and not solely to a single transaction. Henschke Tr. 1703:23-1704:1 ("Q Did the analytical reason for using the constant lower than the Table 1 constant apply to a single transaction? A No."); Digney Tr. 734:23-735:2 ("[A]re the reasons for using a constant lower than the Table 1 constant to calculate debt service? Did any of those reasons make sense to only do it for one transaction? A I don't think so."); Duka Tr. 1140:23-1141:4 ("[M]y understanding is that it applied to all transactions, not -- it doesn't make sense to apply to specific loans or one transaction. That just does not make any sense -- Q Okay. A -- from a comparability and consistency standpoint.").

358. Duka also met with Parisi in November or December 2010 regarding whether NI could take into account the historically strong performance of GSE collateral in determining CE levels for Freddie Mac transactions. Duka Tr. 1385:9-14 ("In the period -- I think we -- well, in the period November and December, plus or minus a month, do you recall any other specific meetings with Dr. Parisi regarding interpretation of criteria? A I mean, I had a meeting with Frank also about Freddie Mac transactions."); Duka Tr. 1386:7-19 ("Freddie Mac had essentially showed performance history where the performance of the multifamily transactions that Freddie had originated was better than the performance of the multifamily product that was being originated in the typical conduit/fusion transactions. And we -- we raised the issue -- we don't generally consider performance history, but this is different. There's a long -- long performance track record. And they do perform better, and it doesn't seem to be picked up in our criteria. So is there something that we can do?"). Parisi agreed that, as a criteria interpretation, Freddie Mac's performance history could be considered in formulating credit enhancement levels. Duka Tr. 1386:20-1387:2 ("Q And did Dr. Parisi express any input with regard to the issue raised? A I mean, I don't exactly recall the conversation. But the bottom line was that, yes, you can consider the performance history. There was another instance where we treated it like the -- the it -- the conversation as a criteria interpretation."). Parisi did not impose a limitation on the number of Freddie Mac transactions this could be applied to as an interpretation. Duka Tr. 1391:8-11 ("Did Dr. Parisi impose any limitation on the number of deals in which that interpretation could be applied in Freddie Mac transactions? A Not that I recall.").

359. Duka subsequently approved the following disclosure, which appeared in each of the "Methodology" section of the presales for FREMF 2011-K701, FREMF 2011-K11, FREMF 2011-K13, and FREMF 2011-K14:

> In very rare cases, we consider the quality of the collateral in particular pools versus the general quality of the collateral assumed in our CMBS conduit/fusion criteria. Standard & Poor's considered the aforementioned positive credit features of Freddie Mac loans. Because GSE collateral has consistently performed better than the typical CMBS multifamily loans, we adjusted our default and loss assumptions to reflect this.
>
> JX 30 at SP-CMBS 00285282; JX 46 at SP-CMBS 00285078; JX 53 at SP-CMBS 00285144; JX 77 at SP-CMBS 00285211; Duka Tr. 1387:3-5 ("I recall that also being another instance where I was advised to disclose the methodology in the pre-sale and around there."); Duka Tr. 1387:20-1388:1 ("Q Okay. Do you see the paragraph that begins 'in very rare cases' in this section of the pre-sale? A I do. Q And what relationship does this disclosure have to the meeting that you have described? A It's the way I viewed explaining the change in methodology that Frank was looking to disclose.").

Post-December 14, 2010 CMBS Group Discussions Regarding the Blended Constant

360. After the December 14, 2010 meeting with Parisi, it became "universally known" among members of the CMBS Group that NI was going to use a Blended Constant. Digney Tr. 437:24-438:5 ("Q How did you become aware if the New Issuance Group was using a blended constant as part of the analysis? A I don't know -- I don't remember specifically when or how I heard, but it was something that was just sort of I guess universally known."); Digney Tr. 803:12-13 ("I knew we were using the blend, everyone else knew."); Digney Tr. 773:1-4 ("Q Right. But I think you also testified everyone in the room knew that you guys were using blended constants to compute debt service, right? A Right."); Henschke Tr. 1723:5-14 ("Q Who else in the group knew about it? A I mean, it's hard for me to say with certainty, but I believe almost everyone senior would have known. Q And I believe your testimony earlier was that you and Mr. Pollem were Ms. Duka's lieutenants; were you referring to those three individuals -- A And I'm also including senior people from surveillance. Those were all the people who were involved in kind of those discussions.").

361. On December 17, 2010, Thompson, on behalf of the CMBS Group, emailed Hu, copying Digney, Ramkhelawan, Duka, Pollem, Henschke, and the MQR Group, with comments from the CMBS Group on the draft MQR Report. RX 334 at SP-CMBS 00399521 ("The CMBS team has carefully reviewed it. This e-mail outlines comments and thoughts for your consideration. The review was a collaborative effort between various members of the team that focus on new issuance (David Henschke and Kurt Pollem), as well as members of the team that focus on surveillance (James Digney and Gregory Ramkhelawan).").

362. Concerning the use of constants, Thompson's email stated:

> In the second sentence, the loan constants were not derived based on the archetypical pool, they were determined after deliberation in a criteria committee. Further, we may use an alternate debt constant in certain circumstances since the criteria doesn't stipulate that we have to use loan constants listed. If we do, we would document it in the RAMP.
>
> RX 334 at SP-CMBS 00399522.

363. Thompson agreed with his comment in RX 334, Thompson Tr. 190:16-21 ("Q So two days after the meeting with Parisi, this comment was added, sent to Dr. Haixin Hu. I take it that you were not in disagreement with that comment, correct? A I guess I was not, because I reviewed the document."), as did Digney, Digney Tr. 733:10-21 ("Q Did you agree with the comments that's listed on this page under assumption 2? A Did I agree with this bullet? Q Yes. A Yeah."), and as did Henschke. Henschke Tr. 1705:8-14 ("Q Did you view use of the blended constant as a change to criteria? A No. Q Why not? A Because we viewed it as the constant to be used to not necessarily be -- have been addressed in the criteria.").

364. None of the recipients of RX 334 expressed any objection to the statement that the use of "an alternate debt constant" was permissible under the 2009 Criteria. Digney Tr. 734:2-5 ("Do you recall if any of the recipients of the email expressed any objection to what's listed -- what was listed in the assumption 2? A Not that I recall.").

365. The term "alternate debt constant" was used, as opposed to a 50/50 blend, because a broader description allowed for some flexibility in the event that future circumstances warranted use of some other constant. Henschke Tr. 1706:16-24 ("Would there be any reason not to tell the MQR group that you were using the higher of the actual or the 50/50 blend as, you know -- A Are you asking me why I didn't say that versus the -- Q Alternate debt constant, yes. A I think it was just being -- it was being vague here, just in case we wanted to change it in the future as circumstances needed.").

The Reasons NI Used the Blended Constant

366. Both Henschke and Digney, senior members of the CMBS Group, denied participating in a scheme to rapidly and materially decrease credit enhancement levels for the purpose of getting rating engagements, and denied knowledge of such a scheme. Henschke Tr. 1707:12-1708:3 ("Did you participate in devising a scheme to rapidly and materially decrease credit enhancement levels for the purpose of getting rating engagements? A No. Q And were you aware of the existence of such a scheme at S&P between 2009 and 2010? A No."); Digney Tr. 763:14-764:10 ("When you were at S&P, did you participate in devising a scheme to rapidly and materially decrease credit enhancement levels for the purpose of getting conduit/fusion rating engagements? A No. While you were at S&P, did you participate in devising a scheme to rapidly and materially decrease credit enhancement levels for the purpose of getting conduit/fusion rating engagements? A No. Q Were you aware of the existence of such a scheme at S&P between 2009 and 2011? A No.").

367. Use of the Blended Constant would not automatically lead to a decrease in CE levels. Instead, such decrease would result only if a loan that would term default using the Table 1 Constant would not term default using the Blended Constant. Henschke Tr. 1729:21-1730:16 ("As I understand the model -- you correct me if I'm wrong -- the constant is one of the formulas that ultimately -- the constant is one -- is included in one of the formulas for the term of the default test, right? A Yes. Q And if I lower the constant, let's call it from Table 1 to blended, it could be the case that both loans fail the term default test, right? A Yes. Q And it could be the case that both loans pass the term default test, right? A Yes. Q In either of those two circumstances, the credit enhancement levels would not change, right? A That's correct. Q And so the only circumstance where the credit enhancement levels would change is where I term

defaulted using the Table 1 constant and did not term default using the blended constant; is that right? A That's correct."); Digney Tr. 830:2-830:16 ("As I see it, there are three possibilities. You could both -- both using -- using the Table 1 constant and using a blended constant, both loans could fail the term default test, right? A Yeah. Q And, conversely, both loans could pass the term default test, right? A Right. And so the only time a difference -- there would be a difference in credit enhancement levels that would occur arriving from using those two applications of methodologies is if using the Table 1 constant the loan did term default and using a blended constant the loan did not term default, right? A Right.").

January 2011 Inquiry by Quality Group

368. In January 2011, Barnes was asked to investigate an anonymous complaint that suggested that the use of the Blended Constant was pursued for business, not analytical reasons. DX 157.

369. On January 7, 2011, Barnes reported as follows based on her discussions with Geramian and Parisi:

> 3) Potential misapplication of criteria: The author of the email states "she (Barbara) is using an average of the in-place interest rate and the criteria constants, ones she voted for, in the c/f model, to get the levels down. I wonder what Quality would say about that. She said today that she's looking to add 6 new issuance analysts because she's so busy.'"
>
> a. The first sentence may infer that the criteria are not being appropriately applied. I asked Frank if he recalled discussing the use of in-place interest rate versus the criteria constants. Frank stated that he had a couple of conversations with Barbara and Eric Thompson on the use of the criteria constants versus the in-place interest rates. Frank recalled first discussing with them the need to document and substantiate any request for criteria exceptions. Upon further review Barbara presented and discussed with Frank the analytic results of the analysis when applying both methods. In addition, they discussed the differences of the market and property characteristics to those of the archetypical loan. Frank decided that since the characteristics differed from the archetypical pool, the criteria assumptions used could be tailored to the property characteristics and no criteria needed to be modified or created. In essence this is a question of criteria application not a criteria change. In that same meeting they decided it was appropriate to use the average of the in-place interest rate and the criteria constant where the property characteristics differed from the archetypical pool as those discussed in that meeting. This is the practice referenced by the author of the email.
>
> b. The author states the criteria application of assumptions being applied were derived to 'get the levels down'. Based on my conversation with Frank, I do not believe commercial aspects influenced the decision to tailor the application of the criteria assumptions for the property characteristics. Based on the above I do not see the need to look further into this.

Please let me know if you disagree. I do think the CMBS AMs should explicitly communicate the application of the criteria assumptions referenced in 3a above to the analytic staff. I will follow up with Barbara Duka on this point.

RX 356 at S&P-SEC 2012 0357308.

370. Parisi recalled discussions with Barnes regarding the "issue of constants" in January 2011. Parisi Tr. 1560:15-18 ("Do you recall having discussions with Susan Barnes in January of 2011 about the issue of constants? A Yes."); RX 357 at SP-CMBS 01425781 (calendar invitation from Barnes to Parisi for a meeting on January 10, 2011 to "[f]ollow up on" "[u]se of archetypical loan criteria constant and MA court ruling."); Parisi Tr. 1561:1-4 ("Do you have any reason to think that the discussions schedule[d] as shown in Respondent's Exhibit 357 did not take place? A No, I have no reason to believe that.").

371. On January 18, 2011, Duka met with Barnes. RX 363-364 (calendar invitations between Barnes and Duka scheduling a meeting for January 18m 2011 at 3:30 PM in "Barbara's office").

372. Barnes did not ask Duka for a model that included the formula for the Blended Constant, and Duka responded to all of Barnes' requests. Duka Tr. 1370:22-25 ("Q do you have any recollection of Ms. Barnes asking you for a new issuance model at the time? A I don't."); Duka Tr. 1371:16-23 ("Q The question is: Did you respond to Ms. Barnes' requests for information, to the best of your ability, in January of 2011, notwithstanding that you don't recall the specific discussions? A I think I always try to respond to the best of my ability, so yes.").

373. On January 23, 2011, Duka wrote to Barnes:

Susan

As a followup to our conversation, for the following deals we provided feedback which incorporated looking at both the actual constant and S&P constants. Of these deals, we were asked to rate FREMF K701, JPM 2011-C3 and MSC 2011-C1. For most of the others, we lost the transactions due to criteria. For FREMF K11, we are still waiting to hear whether we will be asked to rate the transaction.

DBUBS 2001-C2
FREMF K701
JPM 2011-C3
FREMF K11
WF-RBS Commercial Mortgage Trust 2011-C2
COMM 2011-C2
MSC 2011-C1

If you would like, I can forward you the presales when we have conducted our rating process and published our rationale (which my analysts typically do anyway).

DX 73 at SP-CMBS 00379948.

374. Barnes responded:

> Thanks, I'll look for the analysis in RDR for the application of the criteria and may need to follow up with the analysts if Oi [sic] have questions. Thanks, Susan

DX 73 at SP-CMBS 00379948.

375. RDR is a repository, and Barnes was communicating to Duka that she would get the presales herself. Duka Tr. 1248:23-1249:5 ("[W]hat did you understand Ms. Barnes to be indicating? A That she didn't need me to forward it; she would find it herself. Q In the so-called RDR? A That's correct. Q That's some sort of repository? A That's my recollection, yes.").

376. At this point in time, the presales for MSC 2011-C1 and FREMF 2011-K701 were not in final form, Duka Tr. 1248:14-17 ("At this point in time, were any of the pre-sales ultimately published in 2011 in existence as final documents? A No."), and there is no evidence that the presales for MSC 2011-C1 and FREMF 2011-K701 were even in draft form.

NI's Use of a Blended Constant to Compute Debt Service was not Contrary to the 2009 Criteria

377. Parisi approved NI's use of a Blended Constant as an interpretation of the 2009 Criteria. Duka Tr. 1140:11-12 ("[Parisi] agreed that we could -- we could amend the previous interpretations."); Duka Tr. 1155:13-17 ("Now, at the time of your meeting with Dr. Parisi, did you understand whether switching to blended constants would be a change as opposed to an interpretation? A I understood it to be an interpretation."); Thompson Tr. 183:6-8 ("Q And is it true that you considered that meeting to be an **interpretive** type of discussion? A Yes.") (bold added).

378. If the 2009 Criteria required using the Table 1 Constants to compute debt service, then the five-step process under the CPG would have been required before use of a different constant. Duka Tr. 1125:12-20 ("Q And that would include -- jumping through those organizational hoops would include talking to criteria about what the change in constant meant; is that right? A It would include running through the five-step criteria process. Q Okay. And that would apply to new issuance constants as well as surveillance constants, right? A **If they were criteria, correct.**") (bold added); Duka Tr. 1246:6-1247:1 ("Under what circumstances were you explaining that you would need to go through hoops in connection with modifying the constant used in the new issuance model? A Well, in any instance where a change was being contemplated, it would begin with the criteria officer. And the criteria officer would determine whether or not it was a change that was criteria or whether or not it was an interpretation. And depending on that decision, it would have a different process. Q Okay. And in the case of interpretation, is the five-step process that we've heard about in this trial applicable under the criteria process guidelines? A No. Q Okay. And the criteria officer in the circumstance that you just described counseled that the suggested revision would require criteria amendment, what happens in that circumstance? A Then the five-step process would apply.").

379. Parisi did not impose any limits on the number of loans and/or transactions to which the Blended Constant could be applied. Thompson Tr. 183:23-184:2 ("Q Did Frank Parisi indicate to you that analysts' discretion could **always** be had to potentially average constants? A

My recollection was he said that analysts could apply their judgment, **so yes**.") (emphasis added).

380. Parisi, as the CMBS Criteria Officer and Chief Criteria Officer for Global Structured Finance, had the authority to approve the use of the Blended Constant. Duka Tr. 1138:1-11 ("I went to Dr. Parisi, because it's the criteria officer's responsibility or it's the criteria officer's duty to counsel the ratings analyst on interpretation of criteria. I talked to Frank about the criteria interpretation. Frank made it. He made a decision. He didn't think it needed to be escalated any higher. That's his call. Based on a -- based on the guidance I got from him, I didn't feel there was a need to go any further."); Duka Tr. 1147:20-24 ("Q And you can implement that solution across the board, all loans going forward, as a policy of the new issuance group? A I think that's up to the criteria officer to determine."); Duka Tr. 1149:8-14 ("It is an analyst's obligation when they identify a risk that is not in criteria, to identify it, to raise -- to raise the risk, to define a solution. And it's up to the criteria officer to decide how that is implemented and what the proper documentation of that is."); Duka Tr. 1150:3-8 ("But as long as you talk to the criteria officer, you can use actual criteria or anything in between? A I think that's up to criteria to decide. That's function -- that's a duty of the criteria officer to decide."); Jacob Tr. 651:12-652:8 ("Q… '[S]o, again, let's assume that in this meeting between Frank and Barbara Frank says, This is okay. You can use whatever constant you want going forward. End of discussion. I don't write anything down. I don't do anything else. I just give Barbara Duka that opinion and life goes on. Is that okay for a criteria officer to do that? A He has the right to interpret criteria.' A Okay. Q Do you agree with that prior testimony today? A I guess so, yeah. Q And you continue to hold that view, right? A Well, I don't know what their rules and regulations are right now for criteria officers. Q But you have no reason to -- I'm referring to his right at the time. A Oh, I believe they had -- criteria officers had leeway to interpretation, yes."); *see* FOF ¶¶ 90-91, 98.

381. In Duka's view, the July 2009 Decision and the March 2010 Memorandum were interpretations of the 2009 Criteria, and precedent for Parisi's approval of the use of the Blended Constant as a Criteria interpretation of the 2009 Criteria. Duka Tr. 1383:8-1384:1 ("Q And did you give any consideration to steps that had been taken previously with regard to constants as compared to the meeting that you had with Dr. Parisi on the 14th? A I think I looked at them as a precedent given the decisions that were made in December of 2010, yes. Q Okay. So what precedent are you referring to? A The July 2009 meeting and the March 2010 meeting were all treated as interpretations. Q And those meetings, as you're referring to them, are the July 2009 meeting relating to constants? A Correct. Q And the March 2010 meeting related to constants as associated with Division Exhibit 48? You can take a look at that if you want. A Yeah. Yes."); Duka Tr. 1138:11-13 ("Also, the change in March of 2010 and the change in 2009 was handled exactly the same way."); Duka Tr. 1142:2-3 ("I viewed it as an interpretation for the reasons that Eric gave in July of 2009.").

The Distinction Between a Criteria Change and a Criteria Interpretation was not Well-Defined at S&P

382. The distinction between a methodological approach that was considered criteria (which required the five-step process in the CPG) and an interpretation of criteria was not well defined at S&P. On September 13, 2012, the SEC wrote a letter to Douglas L. Peterson, the

President of S&P, regarding "2012 Examination of Standard & Poor's Ratings Services - Staff Findings and Recommendations. The letter stated, in part, regarding the CMBS Group's use of a Blended Constant:

> It appears that S&P has not established written policies and procedures applicable to criteria interpretations. The lack of such policies and procedures may have contributed to the uncertainty within S&P with respect to the appropriate characterization of the change in the loan constants used to rate new CMBS transactions. Thus, there appears to be an internal disagreement among S&P analysts, Quality, and Criteria as to whether the change in January 2011 from using the Stressed Loan Constant to the Blended Loan Constant in rating new CMBS transactions was an approved criteria interpretation or an unapproved criteria change.
>
> RX 643 at SEC-DUKA-0358311.

383. Notwithstanding the requirement that criteria be published, FOF¶¶ 56-57, 110-111, Parisi explained that the use of loan constants for property types other than those listed in Table 1 of the 2009 Criteria could be considered an application (not an interpretation) of the 2009 Criteria. FOF¶ 454. Parisi also said that use of loan constants for property types other than those listed in Table 1 of the 2009 Criteria could be considered an interpretation of the 2009 Criteria, and could be applied on an unlimited basis to transactions and/or loans. Parisi Tr. 1553:5-1554:19 ("That second sentence, would you agree that for the ratings team to use specific pairings would need to do so by interpretation of the criteria; insofar as the criteria did not contain the published -- any constants for the property types at issue? A It may also be an application of the criteria, because the team published -- or S&P published the constants for five types. And then as an analytical team, they determined that, for example here, multifamily -- or manufactured housing is close to multifamily. Or if that's -- yeah. I think, yeah. So you can substitute one for the other. So I don't know if it's so much an interpretation as an application. Q Could it be -- could it be considered either? A I think it could, yeah. Q Okay. So to the extent that it's considered either, and it's not critical as to which one -- A Right. Q -- would there be any limitation on the number of times that that interpretation could be applied or that application of criteria by analytic judgement could be applied in transactions? A Well, in this case, no. Because there was an established sort of lookup table to simplify it. But the team had established that for this type of -- for this property type, we'll use that constant and so on. So it could be used repeatedly, because it was an established mapping, if you will -- Q Right. A -- of one to the other. Q Thank you. But that established mapping is not in the criteria, correct? A It's not in the published criteria.").

384. Although Adelson explained that an interpretation of criteria was a "one-off situation," he provided no clear guidance as to how many times an application of methodology could be employed before it was necessary to codify that application into criteria. Adelson Tr. 402:12-21 ("[T]he idea of interpretation, is that it is a kind of one-off situation, so if you are going to go rate -- if you are looking at your first Libyan bank and you have to adjust and adopt for how you use their financial statements, well, if you are going to rate, your 2nd, 3rd, 4th, 5th, 10th, 12th, 20th, **at some point** you have to codify that and embody it in a separate article that says these are the adjustments for rating banks under Libyan accounting practices.") (emphasis added).

385. Similarly, Parisi explained that his approval of use of the Blended Constant in December 2010 would have allowed NI to use the Blended Constant in rating FREMF 2011-K701, FREMF 2011-K11, FREMF 2011-K13, and FREMF 2011-K14. Parisi Tr. 1575:25-1576:7 ("Q And I take it, in fact, Freddie institution issued securities multiple times, conduit/fusion securities, that provided the same collateral quality issue was present, you would have a similar view. And that provided the interest rate environment were about the same or substantially the same? . . . A Yes. Logically it would make sense to do that.").

Enhancement of CF Criteria

386. As early as January 2011, Duka recognized that the CF criteria needed to be enhanced. RX 361 (presentation sent by Duka to Roni Goldstein, David Klein, and Osborne, in which she wrote: "Enhancements to the conduit/fusion criteria.).

387. Discussions regarding enhancing the 2009 Criteria among the members of the CMBS Group, the Criteria Group, and the Research Group began around April 2011. RX 469 at SP-CMBS 00624659 (April 11, 2011 calendar invitation reflecting a meeting among Digney, Duka, and Esaki, which was forwarded to Geramian, concerning "Conduit/Fusion Criteria Enhancements," and stating, "Barbara and I would like to run a couple ideas by you regarding possible enhancements to our conduit/fusion criteria. Specifically, we're looking at the default tests and also the revenue decline assumptions, but we can fill you in more on Monday."); Duka Tr. 1366:16-18 ("Who is Howard Esaki? A At the time, he was the head of the research, structured finance research at S&P.").

388. On April 20, 2011, Digney wrote an email to Duka, Pollem, and others, copying Geramian, with the subject line "Conduit/Fusion Criteria Enhancements." RX 473. Included among the proposed "[e]nhancements" was the following paragraph related to "Loan Constants:"

> Issue: We are currently using a 50/50 blend of actual loan constants and the stressed loan constants set forth in the criteria, which may be overstating term defaults.
>
> Proposal: We think it makes more sense to use the actual loan constants for our term default tests. In conjunction with this change, however, we'd like to look at incorporating our stressed loan constants with our maturity default test. The current maturity test is simply LTV> 100% using our AAA Value and balloon balance. We'd like to consider a slightly tougher test, for example LTV> ~75% and DSC < ~1.20x (using stressed loan constant). Loans that default under this test would be subject to a minimum 1 % loss to account for special servicing fees, etc. The next step is to discuss and test possible maturity default tests.
>
> RX 473 at SP-CMBS 00572872.

389. Use of the Blended Constant to assess term defaults "may be overstating term defaults" "[b]ecause . . . anything higher than the actual loan constant would be resulting in, you know, more term defaults than in theory would happen." Digney Tr. 787:12-15.

390. Digney proposed using the Table 1 Constants for the maturity default test because the debt service can change at maturity, and the Table 1 Constants can be used to determine if

the loan will be able to sustain a hypothetically higher debt service if interest rates increased between the time of origination and maturity. Digney Tr. 787:22-788:7 ("Why did it make sense to use the Table 1 constants in the maturity default test? A As opposed to the term? Q Correct. A Because when the loan matures, you're not sure what kind of interest rate environment you'll be in. During the term, that rate is locked in as a fixed rate loan. So this would be a way to -- a way to basically stress the interest rate environment that you're in when you're trying to refi a loan."); Digney Tr. 789:1-10 ("So if I understood what you're saying correctly, it makes sense to stress debt service when the debt service can change, right? A Right. Q And if it -- if the debt service can't change, then it doesn't make sense to stress it? Is that -- A Yeah. Q -- a fair summary of your testimony? A That's what I was trying to get at, yeah."); Henschke Tr. 1730:21-1731:6 ("Q Is one of the ways rating agencies use stressed loan constants is to test the maturity default? A That's correct. Q And why do they do that, if you know? A Because, again, the question is, Will a loan be able to refinance if the interest rate environment at maturity is significantly higher? So some of the other rating agencies use basically a stress constant test at maturity. I can think of two that use that methodology.").

391. Geramian, the CMBS Criteria Officer at the time of this email and memo described in FOF¶ 392, made no comments or objection to NI's "current[] us[e]" of "a 50/50 blend of actual loan constants and the stressed loan constants." Digney Tr. 789:11-14 ("Do you recall if Mr. Geramian raised questions about the portion of your email where you say we're currently using a 50/50 blend? A Not that I recall."); Digney Tr. 793:2-14 ("Q Now, I don't read Mr. Geramian's email to communicate any objection to the description in the memo that the CMBS group is using a 50/50 blend; is that right? A Yeah. I didn't see anything in there about it. Q Do you recall him saying something along -- stating that in sum or substance outside the context of this email; meaning, did Mr. Geramian ever say to you or anyone else, to your knowledge, you can't use a 50/50 blend because it's inconsistent with the criteria? A I never heard that.").

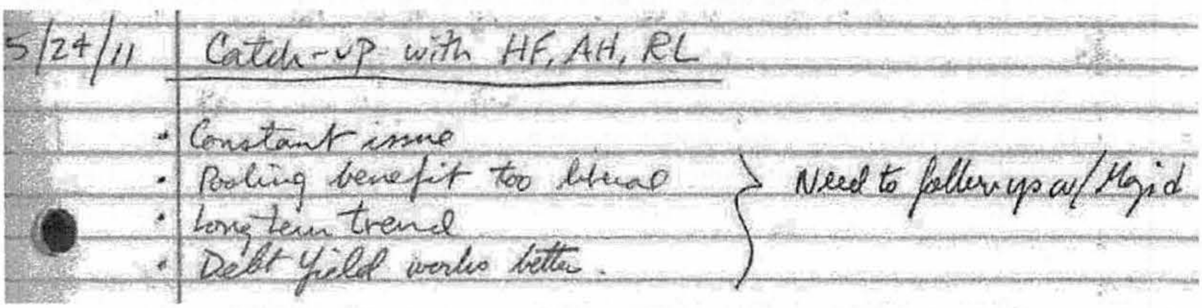
392. On May 20, 2011, Digney sent Geramian a memorandum, copying Duka, Pollem, Hoeltz, Carrington, and Pandya, that concerned "[p]roposed enhancements to CMBS conduit/fusion criteria." RX 514. The memorandum included the following section:

> Issue: We are currently using a 50/50 blend of actual loan constants and the stressed loan constants set forth in Table 1 of the criteria (unless the actual loan constant is higher), which may be overstating term defaults.
>
> Proposal: We think it makes more sense to use the actual loan constants for our term default tests, since those are in fact the loan constants in place during the loan term. In conjunction with this change, however, we'd like to look at incorporating our stressed loan constants with our maturity default test. The current maturity test is simply LTV> 100% using our AAA Value and balloon balance. We'd like to consider a slightly tougher test, for example LTV> 75% OR DSC < 1.20x (using stressed loan constant). Losses would still be calculated as they are now, but loans that default under this test would be subject to a minimum 1 % loss to account for special servicing fees, etc.
>
> RX 514 at SP-CMBS 00565694.

393. Geramian responded to the memorandum contained in RX 514 the next day, May 21, 2011. RX 517 at SP-CMBS 00565254. Geramian sent his response to Digney and Duka, copying Parisi, and attached a copy of the memorandum that was contained in RX 514.

394. Parisi reviewed the memorandum, RX 518 at SP-CMBS 00623998 ("The other proposed changes in the memo also lack sufficient research and evidence to support the change."); Digney Tr. 829:5-8 ("[D]oes this refresh your recollection that Dr. Parisi read the memo? A Yeah, he must have read the memo."), and "never said anything to [Digney] about the 50/50 not being okay." Digney Tr. 793:23-794:11 ("And you recall whether or not Dr. Parisi ever expressed any objection to the statement in the memo that we're currently going to be using 50/50 blend of the actual Table 1 constant? A No. . . . Q With respect to Dr. Parisi, I just want to clarify your answer. Are you saying no, you don't recall Dr. Parisi saying that; or you don't recall -- or Dr. Parisi never said that? A He never said anything to me about the 50/50 not being okay."); Parisi Tr. 1525:15-17 ("I don't recall if I read the full memo or any of it, but I must have looked at it for me to respond.").

395. Parisi's handwritten notes, dated May 24, 2011, reflected the items contained in the memorandum attached to RX 517, and the need for a further discussion among Parisi and Geramian.


5/24/11 Catch-up with HF, AH, RL
- Constant issue
- Pooling benefit too liberal
- Long-term trend
- Debt yield works better.

Need to follow up w/ Majid

RX 657 at SP-CMBS 01704087; *see also* Parisi Tr. 1575:11-16 ("Do you think these notes related to that memo? A I don't know. They may. Q Do they appear to? A Yes. The topics do appear to be consistent, yes."). Parisi "[p]robably did" "follow up" with Geramian about the "constant issue." Parisi Tr. 1574:1-7 ("It says, 'Need to follow up with Majid.' Q Okay. Do you recall following up with Majid on the items that you listed? A I don't recall, but I probably did. Okay. Did you follow up on the constants issue, in all likelihood? A Probably did, yes.").

396. S&P published revised CF criteria in September 2012, which were preceded by discussions among the CMBS Group, the Criteria Group, and the Research Group. Digney Tr. 795:3-795:19 ("Q Okay. And I assume there were a lot of discussions among members of the CMBS group about what those final -- those revised criteria would look like? A And you're referring to the one that was ultimately published in September 2012? Q That's correct? A Yeah. Q So there were discussions among members of the CMBS group about what those criteria would look like? A There were, yeah. Q Okay. And did those discussions include members of the criteria group? A Yes. Q And did those discussions include the research group at S&P? A Yes.").

397. The 2012 CF Criteria required using actual constants to compute debt service. Digney Tr. 795:20-24 ("Q Okay. And those criteria, the ones that you refer to that were published in September of 2012, those criteria called for using the actual constant to calculate debt service, right? A That's right.").

398. In the course of those discussions, no one suggested that S&P should continue to use the Table 1 Constants to compute debt service for the term default test. Digney Tr. 795:25-796:5 ("Q And do you recall anyone in the course of the discussions from the research group or the criteria group or members of the CMBS group ever saying we should still use the Table 1 constants for debt service? A I don't think so.").

MQR Dialogue in 2011

399. On Sunday March 20, 2011, Duka wrote to Hu, copying Digney, Ramkhelawan, Pollem, Hansen, and the MQR Group:

> Loan constants: In New Issue, given our larger sample set and the analysis (which considers building in forecasts at the property level and extrapolating against the remainder of the pool) -- we consider both the constants in Table 6 and the actual constants (adjusted for interest only loans to reflect the amortizing constant). For Surviellience, given the smaller performing loan sample size and the analysis (which does not incorporate forecasts on the loans not evaluated - typically outside the Top 10 loans), we feel that using the higher Table 6 constants is appropriate (as it includes an additional level of cash flow stress).
>
> RX 480 at SP-CMBS 00572056.

400. The next day, March 21, 2011, Ramkhelawan wrote to Hu and Duka, copying Digney, Pollem, Hansen, and the MQR Group, stating "CMBS Surveillance generally employs the higher of the pre-defined stress constants, and the actual in-place constants." RX 480 at SP-CMBS 00572056.

401. Duka responded to Ramkhelawan's email, and wrote as follows to Hu, copying Digney, Pollem, Hansen, and MQR:

> New Issuance would use the actual (if higher) but look at both if the actual constant is lower than the Table 6.
>
> RX 480 at SP-CMBS 00572055.

402. Hu responded, in part, as follows:

> On Page 9, I added highlighted paragraph: The "loan constants" used in the Model is the higher of the actual loan constants and those depicted in Table 6: Loan.Constant i = max (Loan.Constant actuali , Loan.Constant prescribed i)."
>
> RX 480 at SP-CMBS 00572055.

403. Duka then sent an email to Digney and Ramkhelawan, which contained a proposed email to Hu and Hansen. RX 480 at SP-CMBS 00572054 ("Gregory and Jim I just want to make sure I am explaining this right. Could you look at my responses and could we meet for 1/2 hour and get this off my desk?"). In Duka's proposed email, under "point #3," Duka wrote: "The loan constants section I referenced in my last email in point #3, was not incorporated in this amendment. We consider both the actual and the stressed constants in our evaluation and may not necessarily default to the lower of the 2 in all situations. My prior email explains what we do and why." RX 480 at SP-CMBS 00572054.

404. Digney responded as follows:

> Points 2 and 3 look right. The only change I see is with point 1 - in surveillance for the top 10 loans the analysts are also calculating the AAA and alternate AAA cash flows outside the framework model, as we do in new issuance.

RX 480 at SP-CMBS 00572054.

405. Digney explained that, in writing this response to Duka, he was communicating that he "thought that Ms. Duka's explanation in the emails to Dr. Hu sufficiently described how [NI] would calculate debt service." Digney Tr. 739:4-9 ("Is it fair to say that at the time you wrote this email, that you thought that Ms. Duka's explanation in the emails to Dr. Hu sufficiently described how new issuance would calculate debt service? A Yes.").

406. Ramkhelawan responded the next day, April 27, 2011, stating, "Sorry for the delay - same comment as Jim - all else looks good." RX 480 at SP-CMBS 00572054.

407. Shortly after receiving Ramkhelawan's response in FOF¶ 406, Duka sent the email to Hu. RX 479 at SP-CMBS 00572020 ("The loan constants section I referenced in my last email in point #3, was not incorporated in this amendment. We consider both the actual and the stressed constants in our evaluation and may not necessarily default to the lower of the 2 in all situations. My prior email explains what we do and why.").

408. Following the email correspondence in RX 479 and RX 480, there was an in-person discussion among Hu, Duka, and possibly others on May 2, 2011. RX 499 at SP-CMBS 00568367 ("Please see attached the revised report based on our discussion this afternoon.").

409. During this in-person discussion, Hu was informed that "new issuance sometimes uses the average of the actual loan constant and those depicted in Table 6 and suggested that the loan constant assumption should really be a 'combination' of the two." DX 300 at SP-CMBS TEMP039.

410. After the in-person discussion, Hu sent a revised MQR Report to Duka and others, which contained the following description:

> The Model also assumes that the debt service is a constant fraction of the current loan balance, depending on the property type. The loan constants are described in Table 1 'Archetypical CMBS Conduit/Fusion Pool' of the Criteria [1]. The "loan constants" used in the Model is a combination of the actual loan constants and those depicted in Table 6.

> We notice that the Model makes additional assumptions for property types not specified in the Criteria [l].
>
> RX 499 at SP-CMBS 00568395.

411. Duka forwarded the revised report to Digney and Ramkhelawan and asked them to review it before she sent her approval to Hu. RX 499 at SP-CMBS 00568366 ("This looks ok to me. Let me know if you have issues. Otherwise, I will give ok to proceed.").

412. On May 10, 2011, Digney wrote to Duka and Ramkhelawan, stating, "Looks good to me too." RX 498 at SP-CMBS 00568346. Digney explained that he "reviewed" the MQR Report, and thought that the sentence regarding the constants—"The 'loan constants' used in the Model is a combination of the actual loan constants and those depicted in Table 6"—"sufficiently described how new issuance was going to calculate debt service[] [in the] model." Digney Tr. 744:1-9 ("Q Do you recall reviewing the MQR -- the draft MQR report that was sent to you on or around May 10 of 2011? A Yeah. I reviewed it. Q Okay. So is it fair to say that at the time you wrote this email, that you thought that the MQR groups report sufficiently described how new issuance was going to calculate debt services model? A Yes.").

413. On May 10, 2011, after receiving the email from Digney, Duka wrote as follows to Hu, "Thank you for your review. The report depicts an accurate reflection of both the model and our processes around deriving the model inputs. Please proceed to the next step." RX 497 at SP-CMBS 00464832.

414. The draft report attached to RX 497 contained the following description:

> The loan constants are described in Table 1 'Archetypical CMBS Conduit/Fusion Pool' of the Criteria [l]. The "loan constants" used in the Model is a combination of the actual loan constants and those depicted in Table 6. We notice that the Model makes additional assumptions for property types not specified in the Criteria [l].
>
> RX 497 at SP-CMBS 00466061.

415. Hu did not request from the CMBS Group an NI model that used the Blended Constant in 2011, Duka Tr. 1372:3-6 ("Do you recall in 2011 at a time when you were interacting with Ms. Hu -- Dr. Hu, rather, that she asked at any point for the new issuance model? A I don't recall her asking for a model."); Digney Tr. 832:23-833:4 ("Q Okay. My last question is: Do you recall if Dr. Hu ever asked you or anyone else in the CMBS group, to your knowledge, for a copy of a model that used the blended constant? A I'll not -- I don't know if I remember. Q Okay. A Not that I recall, no."), and would have been provided one had she made such a request. Digney Tr. 481:17-25 ("Q And did you feel that Dr. Hu was capable of asking for information from the CMBS Group that she needed to perform her duties in the MQR Group? A That she was capable? Q Yes. A Yeah. Q And did you provide such information when she requested it? A Yeah."); Digney Tr. 833:5-7 ("Q Okay. And I take it if she asked for one, you would have provided it to her? A Yeah.").

416. On June 21, 2011, Goldberg sent the final MQR Report regarding the "CMBS Framework Model" to Duka, Osborne, Jacob, Geramian, Digney, and Ramkhelawan, copying Rosaleen Manzi, Vignola, Adelson, Griep, Milano, and Bukspan, stating:

I approve the addition of the aforementioned model to Ratings Services Approved Model Library, consistent of the requirements, as applicable, of the Model Use Policy and the Model Quality Review Policy and related Guidelines and the Model Development and Criteria Process Guidelines . . . This model has now been approved by MQR and Alternative Procedures are no longer required."

RX 535 at SP-CMBS 00599863.

417. The final MQR report stated as follows:

"MQR concludes that subject to the minor qualifications and limitations outlined in this report, the model is an appropriate computer implementation of the S&P Criteria [l], and is suitable for its intended analytical use . . . Based on information MQR has received, MQR did not find any factual discrepancies between applicable criteria and the model."

. . .

The model also assumes that the debt service is a constant fraction of the current loan balance, depending on the property type. The loan constants are described in Table 1 'Archetypical CMBS Conduit/Fusion Pool' of the Criteria [l]. The "loan constants" used in the model is a combination of the actual loan constants and those depicted in Table 6. We notice that the model makes additional assumptions for property types not specified in the Criteria [l]."

RX 535 at SP-CMBS 00599869, SP-CMBS 00599871, & SP-CMBS 00599880.

418. The final report contained Duka's approval and Geramian's approval as CMBS Criteria Officer. RX 535 at SP-CMBS 00599874 ("Criteria Officer's approval of the model . . . Dear Haixin, I am approving the CMBS Framework Model also known as MQR # 253 ("Model") in accordance with your email to Frank Parisi dated May 10, 2011." Digney Tr. 746:15-20 ("Directing your attention to page S&P CMBS 00599874. Who is Majid Geramian at the time? A He was the CMBS criteria officer. Q Does the page that we're looking at reflect Mr. Geramian's approval of the MQR report? A Yes. That's looks like it.").

419. None of the recipients of the MQR Report, which included Adelson and Milano, raised questions regarding the language describing the loan constant used in the model as a "combination" of the actual constant and the Table 1 Constant. Digney Tr. 747:25-748:3 ("Do you recall if any of the recipients of this report raised questions regarding the language that we saw about the loan constants? A Not that I recall").

420. The SEC alleged in the settled OIP with S&P:

S&P's Model Quality Review Group ("MQR"), which was supposed to determine whether numerical models used by rating practice groups appropriately implemented

S&P's criteria, conducted a review of the CMBS model during the time that the CMBS Group was using blended constants to calculate DSCRs. MQR began its review with a model that used the higher of the actual loan constants or Table 1 loan constants. The CMBS Group modified the model to use blended constants while the review was ongoing, but failed to provide the modified model to MQR. Nevertheless, the CMBS Group provided information to MQR which, although vague, was a red flag that the CMBS Group was no longer applying the "higher of" methodology. MQR failed to respond to this red flag and never requested the modified model.

RX 782 at ¶ 33(a).

Staffing in Early 2011

421. In January 2011, Thompson and Henschke resigned, which placed strain on the resources of the CMBS Group and increased Duka's "workload." RX 400 at SP-CMBS 00503375 ("We are resource constrained on the Surviellience and New Issuance fronts. We are meeting minimum New Issuance needs by utilizing some Surv[eillance] resources, at times. However, we cannot continue at this pace without impacting productivity on the Surviellience front. We will have trouble meeting criteria needs, model development, supporting the Research Group (Recovery Analytic), customer service (investor and issuer outreach) and the publishing front (in a timely manner). If this continues, we will likely need to begin turning new transactions away. This will further negatively impact both current market perception and issuer's confidence in our ability to be reliable. There is also a concern that this is negatively impacting morale in the group, particularly in light of 2 key departures: Eric Thompson and David Henschke. Both Eric and David resigned January 4. Also, Ed Barrett (a senior analyst) resigned in December. In March, we will have an analyst on leave."); Duka Tr. 1360:6-23 ("At this time in new issuance, would you describe the workload that was in place with respect to the new issuance members that had not resigned? A It would add to their workload, particularly the more senior members. Q Who was the more senior member of the new issuance group that you refer to here as resigning? A Well, David Henschke, as it relates to new issuance. Q Was he one of your principal deputies at the time? A He was. Q Who was the other? A Kurt Pollem. Q Okay. And by virtue of Eric Thompson resigning, what did that do to your workload? A It increased my workload and forced me to restructure over time my day-to-day duties."); RX 362 at SP-CMBS 00630555 ("Eric Thompson and David Henschke resigned in January . . . Both will be heavy losses for the CMBS team.").

Presale Drafting in 2009 and Before

422. On March 19, 2008, S&P published a presale report for Credit Suisse Commercial Mortgage Trust Series 2008-C1. Donna Trisarnsri was identified as the Primary Credit Analyst, and Duka was identified as the Secondary Credit Analyst. RX 6 at SP-CMBS 00466622.

423. The presale for CSCM 2008-C1 contained a Rationale section, which stated in part, "Standard & Poor's Ratings Services' analysis determined that, on a weighted average basis, the collateral pool has a debt service coverage (DSC) of 1.24x, a beginning loan-to-value (LTV) ratio of 102.4%, and an ending LTV of 96.9%." RX 6 at SP-CMBS 00466624.

424. The rationale section was included in the presale for as long as Duka could recall. Duka Tr. 1252:11-14 ("Q Do you recall going to the rationale section -- how early in your career the rationale section was included in the pre-sales? A As far back as I can remember.").

425. The CSCM 2008-C1 presale also included the following generic disclosures:

Standard & Poor's took the IO structure into account when determining credit support levels for this transaction;

Standard & Poor's took the loan structure and all additional debt into consideration when sizing the loan's capital structure and the deal's subordination levels.

RX 6 at SP-CMBS 00466625 and SP-CMBS 00466632.

Presale Drafting Process in 2011

426. In 2011, the "primary analyst" was primarily responsible for drafting NI's presale reports. Digney Tr. 764:17-19 ("The primary analyst is more or less doing the organization of the document and a lot of the, I guess, heavy lifting and writing."); Snow Tr. 1741:24-1742:2 ("Q Before I go further, what is a primary credit analyst? A It means that that person takes ownership of the quality of the pre-sale report.").

427. The primary analyst, as a matter of practice, used the prior presale as a template. Digney Tr. 765:10-12 ("Q And does the primary analyst use the prior pre-sale as a template? A Generally, yes."); RX 202 at SP-CMBS 00403854 ("Yes ...... so the analyst who writes the next one will start with JP as a basis and change, as appropriate (much harder for me to have templates, because my asset class is not granular) so certain things are always important to talk about but some things change deal to deal."); Duka Tr. 1357:23-1358:5 ("Can you explain what the quoted word 'template' means? A A format that's used to prepare a future transaction. Q Okay. And at this time, in July of 2010, the transaction that new issuance has prepared since the conduit/fusion criteria were published in '09 is the single commentary, if I'm correct, June of 2010; is that right? A I believe so, yes."); Snow Tr. 1749:9-15 ("In preparing a pre-sale -- and on this one you're the primary credit analyst. How do you go about in terms of assembling a document in the first instance? A You would typically start with a template. And that template would be the most recent transaction that you've rated that is similar.").

428. A secondary analyst oversaw the drafting process and reviewed the presale before it was published. Digney Tr. 765:13-23 ("Q And what about the secondary contact or secondary analyst? What does that person do? A So that was typically myself or Kurt, I believe, . . . kind of overseeing the process and reviewing the pre-sale."); Snow Tr. 1742:24-1743:2 ("[T]he secondary is expected to have read the pre-sale report and be knowledgeable. And, you know, typically they would provide some kind of oversight in terms of quality.").

429. The individual top ten loan "write-ups" were assigned to different analysts in the CMBS Group, and it was the primary analyst's responsibility to "pull it together into a cohesive draft." Digney Tr. 765:20-765:2 ("They do farm out some of the individual loan write-ups to various analysts within the group that had done the -- the underwriting and analysis of those loans. So it's, you know, a lot of people involved at the end of the day, though, it's the primary

analyst's responsibility to pull it together into a cohesive draft."); Snow Tr. 1743:3-7 ("And as a primary credit analyst, we've heard some evidence on this already, but I take it that you're not the only new issuance staff person working on the pre-sale, correct? A No."); Snow Tr. 1752:5-8 ("Q Okay. And as a primary credit analyst, are you orchestrating and attempting to bring that all together in a final report? A Yes.").

430. Analysts that were referred to as the "modelers" would "produce statistics using both the issuers' data tape as well as [S&P's] analysis." Snow Tr. 1750:13-17 ("Modelers are analysts. They review the data tape, and they get the data tape into the subordination model. And they produce statistics using both the issuers' data tape as well as our internal analysis.").

431. Specifically, the "modelers" produced the pool-level metrics in the Rationale section and the data contained in the tables in the presales. Snow Tr. 1749:16-1750:10 ("Q And then if you go to this section that is near the top of the document that is called Rationale, how would you complete the rationale section as the primary credit analyst? A Initially, in a template, you would want to know what was original material and what you're going to change. So what you might do is highlight things like the 1.2 DSC and the transaction name and the dollar amounts, and the other -- the other statistics, you'd probably highlight those. And then once you prepared the pre-sale, you would most likely change those numbers to match what's in your transaction. And when you say what's in your transaction, where do you find those numbers? A In different tables. Q And who handles the tables that generate the numbers in the ordinary course at that time? A There are modelers."); Snow Tr. 1751:21-1752:4 ("So loans get assigned to individual analysts, and they write up -- they write up, you know, the top 7 or top 10 And then those get integrated into the pre-sale report, where the deal lead would typically integrate that into the report. But at the same time, you would have a modeler working on other sections of the report to put together data tables that are more at the pool level.").

Duka's Practice of Reviewing Presales

432. Duka reviewed the presales "from a big picture standpoint." Duka Tr. 1204:4-8.

433. Duka reviewed the presale in sections and did not review the presales cover to cover. Duka Tr. 1395:1-2 ("[I] would generally review the pre-sale in sections as the pre-sale was completed by the analyst."); Duka Tr. 1464:10-15 ("A I reviewed them piecemeal as analysts completed certain sections. Q So did you ever sit down and read any of the pre-sales cover-to-cover prior to publication, to your recollection? A No.").

434. Duka focused on making sure that the presale was internally consistent because different analysts drafted different portions. Duka Tr. 1395:10-17 ("[W]hat I was trying to do is make sure that it looked like the pre-sale was written by one person rather than the five or six who were actually writing the pre-sale. I almost used it as a training tool essentially because my comments would go back to the senior analysts so that they knew what they should be looking for in the future."); Duka Tr. 1470:13-1471:21 ("I'm just looking at it to make sure that it reads consistently, the presentation is consistent; that I'm telling the analysts to make sure, you know, things are consistent, that the presentation's consistent, that the same bullets for every property type is the same . . . JUDGE GRIMES: So do you mean that if you want it to be internally consistent and then consistent with other pre-sales so they look similar in appearance? A I want

it to be consistent within the pre-sales. Because the top 10 loans are not written by just those two analysts. They can be written by 10 different analysts. So I want to make sure that they are all presenting the information the same way. And just to -- the pre-sales are 65 pages long. They're not short. And I would say 2/3 of that is a top 10 analysis. So I'm just looking to make sure that every office property kind of has the same format, presents information the same way, describes the underwriting in the same way, both in the way it's described and -- that they line up. Because they could be using different formats. So I'm just making sure that it's all consistent, consistent within the pre-sale. And I might look outside the pre-sale, if there's an odd property type that I'm just not used to seeing, to make sure that we're picking up all of the things that would be important to somebody."); Duka Tr. 1396:20-24 ("I do add value in making sure that we're producing the same type of information for every office property that the -- that the -- the format of it reads the same way from loan to loan; that it looks like it's written by one person and not six people.").

435. Duka did not recall reviewing the Rationale section of the presales. Duka Tr. 1451:17-24 ("Is one of the things that you would look at in the pre-sale the rationale section? A I don't recall if I looked at the rationale or not. Q It's the very first section in the pre-sale as far as the text. But you wouldn't necessarily look at that? A No.").

436. In reviewing the presales, Duka would not focus on the calculation of S&P metrics, Duka Tr. 1395:3-5 ("I wouldn't focus on the numbers, largely because I'm not reconciling the numbers. I provide no value there."), because ensuring that the S&P metrics were calculated properly was the responsibility of the analysts working on the transaction. Duka Tr. 1470:8-12 ("I'm not sitting there ticking and tying the numbers. That responsibility is with the backup analyst or the more senior of those two analysts on the transaction."); Duka Tr. 1475:21-22 ("I didn't focus on the numbers. I don't remember focusing on the numbers.").

437. Duka did not know if she was required to review the presales at all before they were published. Duka Tr. 1469:25-1470:6 ("What's the exact nature of your responsibility with respect to the pre-sales -- or was in the 2010-2011 time frame? A I'm not sure that I'm required to look at the pre-sales. I'm also not sure that any other person in my position at S&P would do that. But I did.").

JPMCC 2010-C2 Presale

438. On September 24, 2010, S&P published a presale for JPMCC 2010-C2. JX 18.

439. Lucienne Fisher was the primary credit analyst and Kurt Pollem was the secondary contact. JX 18 at SP-CMBS 00285473.

440. S&P explained that it did not consider JPMCC 2010-C2 to be a CF transaction:

> In our opinion, the JPMCC 2010-C2 transaction does not have the diversification of a typical conduit/fusion transaction, given the number of loans (30), the loan concentration (the top 10 loans represent 74.5% of the pool balance), and the property type concentration (67% in retail). Furthermore, the transaction has 47 individual properties (28 of which are retail properties), as compared with, for example, J.P. Morgan Commercial Mortgage Securities Trust 2010-CNTR, a single-borrower transaction with

> one loan that is backed by 72 retail properties (for more information, see "Presale: J.P. Morgan Chase Commercial Mortgage Securities Trust 2010-CNTR," published Aug. 20, 2010). Our conduit/fusion criteria is generally meant to be applied to diversified multiborrower pools of 40 or more loans. This transaction falls somewhere between a conduit transaction and a large loan transaction based on its overall diversity. As such, in evaluating this transaction, we also considered our large loan/single-borrower rating methodology to derive appropriate credit enhancement for the pool.
>
> . . .
>
> In addressing the pool's concentration levels and determining credit enhancement levels, we considered both our large loan/single-borrower rating methodology and our conduit/fusion rating methodology to derive the pool's credit enhancement levels.

JX 18 at SP-CMBS 00285490-92; RX 226 at SP-CMBS 00430704 ("Eric, call C2 a pooled transaction ... there were so many drops I'm having trouble calling it a conduit / fusion transaction now.").

441. The JPMCC 2010-C2 Presale contained sections describing the "Conduit/Fusion Methodology" and the "Large Loan/Single-Borrower Rating Methodology."

442. In the Conduit/Fusion Methodology section, the JPMCC 2010-C2 Presale provided as follows:

> Once the 'AAA' rental declines are applied and the resulting stressed value declines are determined, we use a relatively straightforward set of default tests to determine losses and credit enhancement levels. The tests for term default are: if the loan's LTV ratio is greater than 100% and its DSC is less than 1.00x; or if the loan's LTV ratio is greater than or equal to 90% but less than or equal to 100%, and its DSC is less than or equal to the LTV ratio. The loans that pass the term default test are tested again at maturity, and the loans will default if the loans' LTV ratio under the 'AAA' stress is greater than 100% based on the amortized loan balance. These same default tests are applied to the in-place Standard & Poor's NCF and value conclusion in order to derive the 'BBB' credit enhancement levels and may be subject to other tests, including a floor test based on the tests' relative difference when compared with the 'AAA' credit enhancement levels.

JX 18 at SP-CMBS 00285490.

443. Opting to use both the 2009 Criteria and the criteria for large loan/single borrower transactions had the effect of increasing credit enhancement levels relative to the credit enhancements that would have resulted had the transaction been evaluated using the 2009 Criteria exclusively. Duka Tr. 1249:11-1250:8 ("And you testified this morning that in analyzing the rating -- rating for the transaction, that S&P used a hybrid approach; is that right? A That's correct. Q And so the methodology section contains a description of two different forms of criteria; is that right? A That's correct. Okay. My question is: Had new issuance used solely the conduit/fusion methodology rather than considered and applied two methodologies, conduit/fusion and large loan, what outcome would you have expected in terms of the credit enhancements or -- withdrawn -- outcome would you have expected in terms of the ultimate

credit rating? And if that refers to credit enhancements, that's fine. A They would have been lower, particularly at the AAA and the higher category. Q And why is that, in general? A Because, in general, the single borrower large loan criteria is more conservative. It makes the assumption that loans default 100 percent of the time. And it's, essentially, a liquidation analysis.").

Models for the 2011 CF Transactions

444. The modelers or the modeling team actually populated the fields of the model. Digney Tr. 833:20-834:12 ("Who actually creates this document? . . . So we have -- they're team members, but they are part of the -- we call them the modelers, the modeling team. But it's a subset of the CMBS group. So the framework model is -- it's all set up in terms of the formulas. It's just blank in terms of the actual loans. JUDGE GRIMES: But somebody has to put the inputs in. A Yeah, to populate. JUDGE GRIMES: Yes, populate the fields. THE WITNESS: Populate this with the data tape, which is essentially a list of all the loans and all their, you know, characteristics."). Typically, one member of the modeling team populated the model from the "data tape" and another member verified that it was populated correctly. Digney Tr. 834:13-20 ("JUDGE GRIMES: So it's more than one person that is putting that together? A It is typically one, but we -- you know, we have one modeler that does it, and then another one will kind of review it. JUDGE GRIMES: To verify it's being done correctly? A. Yeah.").

445. The "Output" tab contained "the results from the calculations that are in the other tabs of the model." Digney, Tr. 748:18-19 ("What is the -- the output tab is – does that contain kind of the results from the calculations that are in the other tabs of the model? A Yes.").

446. The "Results" tab contained interim calculations that are then used to derive the final numbers contained in the "Output" tab. Digney Tr. 749:8-16 ("Q And what's the purpose of the results tab? A So this is -- you can think of it as coming before the final output tab. This is where there is -- because there's a number of ways to derive some of the anchor point CEs, AAA, BBB, B, right here. You know, there's floors and things in there. So that's where this is -- is accounting for all of those different ways. And then also doing interpolation between rating categories.").

447. Column D of the "Results" tab, entitled "Term Loss," contained the sum of term losses for the loans in the pool. Digney Tr. 749:20-22 ("Q Is that the sum of the term losses for the loans in the pool? A Yes.").

448. Column F, entitled "Maturity Loss," contained the sum of the losses of the loans that default in the maturity tests. Digney Tr. 749:23-750:1 ("And what is Column F? A Similar to the term loss. It's . . . the sum of the losses of the loans that experience maturity loss and defaults and losses.").

449. The AAA raw credit enhancement level was calculated by adding the term loss and the maturity loss, Column D to Column F. Digney Tr. at 750:5-8 ("[T]he raw credit enhancement level is calculated by adding the term losses and the maturity losses, right? A Right.").

450. The "Formatted Data Sheet" tab listed, *inter alia*, the loan balances, cash flows, constants, capitalization rates, values, and results of the term and maturity default tests for each of the loans in the pool. Digney Tr. at 750:9-15 ("Q And what about the formatted data sheet? What is the purpose of that? A So this is one of the main sheets in the model where you are essentially doing the term and maturity default tests as, you know, the -- for each loan they're listed, you know, the loan balances, the cash flows, constants, cap rates, values.").

451. Columns E, F, and G contained, respectively, the principal balance, balloon balance, and loan constant for each loan in the pool. Digney Tr. 750:22-751:3 ("Q And Column E is the principal balance of the loan? A Yes. Q Column F is the balloon balance of the loan? A Yeah. Q Column G is the loan constant? A Right.").

452. The formula that appeared when a cell in Column G was selected showed how the Blended Constant was calculated. Digney Tr. 751:4-9 ("Q And does the formula that is displayed -- what is the formula that is displayed on the screen in the formula bar? A . . . [I]t's factoring in the -- that -- the adjustment factor to weight -- the Table 1 constant and the actual constant."); Digney Tr. 830:17-24 ("Q Okay. Do you recall whether or not the formula in the loan constant column was a 50/50 blend in all circumstances? A I think it was. Q Was it -- I mean, we can pull it up, but was it the higher of the actual or the 50/50 blend? A Oh, yeah, I mean, if the actual was higher than that blend, then it was the actual.").

453. The Table 1 Constants, which were included in the weighting in the formula for Column G, were located in Column D of the Assumptions tab. *See, e.g.*, DX 362.

454. In addition to the five property types listed in Table 1, the Assumptions tab also included loan constants that were not bolded for Healthcare ("HC"), Manufactured Housing ("MH"), Mixed Use ("MU"), and Self-Storage ("SS") (collectively, "Non-Criteria Property Types"). DX 362. S&P did not publish loan constants for the Non-Criteria Property Types in the 2009 Criteria. Digney Tr. 742:19-743:11 ("Okay. And are the non-bolded property types -- I just handed you Joint Exhibit 2 -- are the non-bolded property types listed in Table 1 of the criteria? A I think it was just the -- yeah, just the five major ones were in the criteria. Q Do you know how the CMBS group came to have constants or property types that are not listed in the criteria? A I don't remember the specific – specifics around it. But my sense was it was just, you know, the property type that it was most similar to. They would line up the constants to match. Q All right. Do you recall a publication by S&P to that effect? A No, I don't think so. Q Okay. A No.").

455. For certain of the 2011 CF Transactions, Cell D15 on the Assumptions tab contained a formula that dictated the weighting of the Table 1 Constant and the actual constant, and was set to 50%. Digney Tr. 758:1-6 ("[W]hen this cell in the assumptions tab, which is cell D 15 is set to 50, is it your understanding that the model is calculating debt service based on, quote/unquote, the blended constant? A Yeah."). If Cell D15 was set to 100%, that would cause the model to calculated credit enhancement levels using the Table 1 Constant. Digney Tr. 441:22-25 ("Q Now, if you set it to 100 percent, what would the result be? A That would be using the full constant in the criteria.").

456. Column H displayed the interest rate implied by the loan constant, which was higher than the loan's actual interest rate unless the actual constant was higher than the Table 1 Constant. Digney Tr. 751:10-18 ("And what about Column H? A That's the sort of backing into the corresponding interest rate that that loan constant implies. Q And . . . is the interest rate that's listed in Column H different from the actual interest rate governing the loan? A It would be if you're using anything other than the actual loan constant.").

457. Using an interest rate higher than the loan's actual interest rate to calculate losses was not required by the 2009 Criteria; the 2009 Criteria contemplated using the actual interest rates. Using an interest rate that was higher than the actual interest had the effect of increasing CE levels. Digney Tr. 752:12-753:9 ("Column H is not the interest rate of the loan, right? A Oh, right. Q Right? It's an implied interest rate after selecting the loan constant, right? A Yeah. Q And that's different from the loan's actual interest rate, right? A Right. Q So the question is whether or not the portion of the criteria you're reading now required you to use anything other than the loan's interest rate? A Oh, no. Q Okay. And what affect does it have to use an interest rate that's higher than the interest rate that's implied by the loan's actual constant? A Well, you would be calculating a larger amount of loss and lost interest. Q And when you calculate a larger amount of loss, that leads to an increase in credit enhancement levels, right? A Right.")

458. Column I showed the property type of the loan. Digney Tr. 753:10-12 ("Moving to Column I is property type, right? A Yes.").

459. Column J, entitled "S&P NCF" contained the net cash flow at the BBB level. Digney Tr. 753:13-15 ("Q And Column J is entitled 'S&P NCF.' Is that the BBB net cash flow number? A Yeah, I believe so.").

460. Column K, entitled "S&P CAP," contained the "capitalization rate . . . applicable to the particular property," and Column L, entitled "Loan Maturity," contained the date that each loan matures. Digney Tr. 753:16-22 ("Q And Column K is the cap -- is the capitalization rate that's applicable to the particular property? A Yes. Q Known maturity is the date that the loan matures, right? A Right.").

461. Applying the capitalization rate from Column K to the BBB cash flow in column J resulted in the value at the BBB level, which was displayed in Column M. Digney Tr. 753:23-754:4 ("BBB value is the value at the BBB level, right? A Right. Q And that is calculated by applying a capitalization rate to the BBB cash flow that's in Column J? A Right.").

462. "BBB LTV," Column N, resulted from dividing the principal balance from Column E by the BBB value from Column M. Digney Tr. 754:5-7 ("Q BBB LTV is the principal balance divided by the BBB value, right? A Right.").

463. Column T, entitled "All-in DS," and Column U, entitled "Trust DS," contained the same values unless there was subordinated or secondary debt, defined as "additional debt on the property that's held outside of the trust." Digney Tr. 754:11-20 ("Column T is entitled, 'All-in debt service.' And Column U is entitled 'Trust debt service.' What's the difference between those two columns? A So they'll mostly be the same unless there's additional debt on the

property that's held outside of the trust."); Digney Tr. 755:15-22 ("Q And when I use the term 'subordinated debt,' is that synonymous with additional debt outside the trust? A Yeah. Q Okay. Is it sometimes referred to as secondary debt? A Yeah."). The 2009 Criteria did not address how, if at all, the CMBS Group should account for subordinated debt. Digney Tr. 755:12-16 ("Do you remember whether or not the criteria required you to take into account subordinated debt? A I don't think the criteria mentioned anything about that."); Duka Tr. 1417:22-23 ("Criteria was silent on the treatment of subordinate debt."). The incorporation of additional debt to the debt service calculation had the effect of decreasing debt service coverage. Digney Tr. 755:9-11 ("Q What effect does adding additional debt into the debt service calculation have in the model? A Well, it lowers the debt service coverage."); Duka Tr. 1417:24-1418:20 ("[S]ubordinate debt takes two forms; that which is in place at the time and that which can be incurred at a future date usually subject to certain terms and conditions. And what that does -- how we factor it into place is we would -- if it was in place, we would use the actual terms of the subordinate debt, if we knew what they were, to factor into the default tests. And what that does is it increases the debt service for the whole loan, even that portion that is outside the trust. And it puts more pressure on the loan; makes it more likely that that loan will default usually during the term of the loan. Q And for -- A For those that were not in place but that the borrower could at some future date put in place subordinate debt, we would make certain assumptions as to what the terms of that debt would be based on where we saw similar loans at the time. And that would have the same impact. It would increase debt service that we factored into the debt service coverage calculation.").

464. Column V, entitled "Trust Interest," contained "the interest component of the debt service due on the trust balance," which was used to calculate losses. Digney Tr. 755:24-756:4 ("And what's Column V? A It's the interest component of the debt service due on the trust balance. Q Is Column V ultimately used to calculate losses? A Yes.").

465. Column W, entitled "BBB DSC," calculated the debt service coverage using the BBB cash flow and trust debt service. Digney Tr. 756:5-7 ("Q What about Column W? A So that's using the BBB cash flow and the trust debt service to get debt service coverage.").

466. Column X, entitled "Partial AAA Term NCF," contained the "alternate AAA NCF" figure, *see* FOF¶ 203. Digney Tr. 756:9-12 ("Column X, partial and AAA term NCF, is that what's referred to in the criteria as alternate AAA NCF? A Yeah."). Column Y, entitled "Full AAA Term NCF," contained the "AAA NCF" figure, FOF¶ 201. Digney Tr. 756:13-15 ("Q And full AAA term NCF is referred to in the criteria as AAA NCF? A Right."). Partial AAA Term NCF or Full AAA Term NCF consisted of "S&P's assessment under the criteria of what cash flow the property will generate in a highly stressed economic environment." Digney Tr. 756:17-20.

467. Column Z, entitled "AAA NCF All-in DSC," contained the debt service coverage while taking into account additional debt. Digney Tr. 756:21-23 ("Q Column Z, is that the debt service coverage taking into account additional debt? A Yeah. For all in, right, that's right.").

468. Column AC, entitled "AAA Value," was arrived at by dividing the AAA NCF from Column Y by the capitalization rate from Column K. Digney Tr. 756:24-757:1

("Q Column AC is the -- how is Column AC arrived at? A That's the AAA NCF divided by the cap rate.").

469. Column AG, entitled "Term Loss," contained the losses estimated by the model in the event that a loan was deemed to term default. Digney Tr. 757:13-17 ("Q And then after the - - after the conditions for the term default test are satisfied, then the model calculates losses, right? A Yeah."). If the column is blank, then according to the model, the "loan [did] not default during the term." Digney Tr. 757:6-8 ("[W]here Column AG is blank, does that mean that the loan does not default during the term? A Yeah.").

470. Column AW calculated whether or not the loan defaulted at maturity, and if it did default, what losses result from such default. Digney Tr. 757:19-24 ("Column AW, the column that calculates whether or not a loan defaults at maturity? A Yes. Q And if the loan does default at maturity, then the model calculates losses? A Yes.").

Output of the Models for the 2011 CF Transactions if Table 1 Constants Were Used To Compute Debt Service

471. If the Table 1 Constants were used to compute debt service for the term default test, the CMBS Group would have imposed a substantially higher debt service on a loan where the actual debt service would not change during the term regardless of the economic circumstances. Digney Tr. 476:16-477:10 ("Q [W]hen you stressed the numerator of the debt service coverage ratio, you are doing that because you assume in a period of economic stress the property is going to generate less cash; is that correct? A Yes. Q And in a period of economic stress, does the annual debt service of the loan change during the term? A Not for a fixed rate loan. Q And were the loans in conduit/fusion pools fixed rate loans? A Yes. Q Did the criteria call for stressing the numerator of the LTV ratio? A No. Q Is that because the loan amount was fixed, it can't change? A Yeah.").

472. The use of a Table 1 Constant was only "stressed" if the actual constant was lower than the Table 1 Constant. If the actual constant was higher than the Table 1 Constant, and the Table 1 Constant was used to compute debt service, then there would be an understatement of debt service. Put differently, the amount of stress imposed by the Table 1 Constants increased as interest rates decreased. Digney Tr. 477:25-478:7 ("If the actual constant of a loan is higher than a Table 1 constant, if you use the Table 1 constant to calculate debt service, would that be stressed? A No. Q What would happen if I did that? A What would be -- it would be understating the debt service or -- yeah, yeah, the debt service.").

473. The use of Table 1 Constants introduced a randomness to credit enhancement levels because loan's subject to different interest rates were penalized differently. Duka Tr. 1376:19-1377:12 ("Q And -- A So I -- Q Then you explained yesterday that that introduced a randomness to the analysis. Do you recall that testimony? A Yes. Q So how -- what do you mean? A Well, you could have three deals originated during different years with the same level of interest-only loans, but they're originated in different interest rate environments. So the ones that are originated in environments where the Table 1 constant is more similar to the actual constant, there would be no penalty. The ones that are originated in environments where there is

a difference, the penalty would differ based on how different the loan's actual constant is from the Table 1 constant.").

474. The additional credit enhancement that would have resulted using the Table 1 Constants would have imposed higher prices on investors, Weih Tr. 979:8-20 ("Q I'm asking if the pricing of the AAA would be different if AAA credit enhancement level were higher? A It's certainly possible if not probable. Q Isn't it most likely? A Yes. The only thing is if it's overenhanced -- I mean, I can't say that with a broad statement. But, yes, more than likely the price -- the spread would be lower, price would be higher. Q Because generally you pay more for more enhancement, right, at the AAA level? A Usually that's -- that's usually correct."), for addressing a risk that was non-existent. Duka Tr. 1175:7-1176:4 ("Q But doesn't more -- more credit enhancement protects investors; you'll agree with that, right? A Not necessarily. If it's addressing a risk that's not there, then the credit enhancement is unnecessary. Q But aren't you better off as an investor with more credit enhancement as opposed to less, as a general matter? A I don't know that you are. I think you are -- you're better off as an investor if the credit enhancement levels appropriately address the risk of the deal. If they don't address the risk of the deal, I'm not sure you're better off. Then they're random. Q I'm sorry. I missed that last -- A Credit enhancement levels are random, potentially. Q Nobody wants that -- right? -- random credit enhancement levels? A No. Q Okay. A Which is why I changed the Table 1 constants. They're random. You say they're conservative; I say they're random.").

475. In June 2011, Adelson wrote as follows:

> Ratings Mustn't Be Meaningless: Never define rating symbols or create criteria so that ratings become meaningless. A rating must communicate a useful message about the creditworthiness of the subject credit. It's not OK to carve out all the credit risk from a rating. In other words, a rating only makes sense if there is a way for the security default (within our conception of default). A regular rating addresses both interest and principal and can't ignore either.

RX 526 at SP-CMBS 00533686.

476. In connection with Adelson's guidance, Duka explained as follows:

> [B]y using the Table 1 constant, the Table 1 constant ignores the actual credit risk that is -- what's the word? reflected in a -- interest rates reflect the loan's credit risk. And so by ignoring the actual constant, you're overriding what an issuer or the marketplace thinks the actual credit risk of that loan is. And you're overriding it with an arbitrary assumption. Q And is -- generically, is that concept covered in Appendix A, subsection A; generically on a broader level? A Yes. Because the use of the Table 1 constant has no correlation. And it's being -- although the same -- the same assumption is being applied to every deal, that assumption is not having the same results in every deal.

Duka Tr. 1377:25-1378:15.

477. No analytical justification existed for requiring the additional credit enhancement that would have resulted had NI used the Table 1 Constant instead of the Blended Constant. Digney Tr. 761:25-762:7 ("Q So that's about an additional $17 million that are now being

calculated as losses in the model [from using the Table 1 Constant versus the Blended Constant], right? A Yeah. Q Okay. Can you think of any analytical reason why that $17 million should be included in the credit enhancement levels? A Not really."); Digney Tr. 763:3-7 ("Okay. And you think of -- if somebody asked you why is that stressing the model, what would you tell them? A Yeah. I mean, I can't think of a good -- a good explanation.").

MSC 2011-C1 Presale

478. On February 2, 2011, Pollem emailed Duka and Purij a draft of the methodology section for the MSC 2011-C1 Presale. The cover email states "New language begins at underlined section." In the attachment, the following sentence was underlined:

> In determining a loan's DSC, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based upon property type as further detailed in our conduit/fusion criteria.
>
> RX 387 at SP-CMBS 00626715.

479. Aside from this sentence, the draft methodology section was otherwise the same as the CF methodology description included in the JPMCC 2010-C2 Presale. *Compare* RX 387 at SP-CMBS 00626715-6 *with* JX 18 at SP-CMBS 00285490-1.

480. Duka explained that she approved this disclosure, which was added to all of the 2011 Presales, because she wanted to alert the reader that debt service would be not be calculated solely using Table 1 Constants. Duka Tr. 1393:12-22 ("[W]ere you comfortable with the draft that Mr. Pollem sent along? A Yes. Q And why is that? What was your intention in approving - - I take it you approved this disclosure, correct? A I did. Q What was your intention in approving it? A To alert the reader of the manner in which we calculated debt service coverage had changed and was no longer solely focused on Table 1 constants."); Duka Tr. 1475:11-20 ("I understood Frank to tell me that he thought we needed to disclose the methodology so that the reader understood that we were using a different constant than we might have been before these transactions that were rated in 2011. I focused on making that disclosure in a section I did, because I know that section didn't include any sort of disclosure. That's how I thought about it.").

481. Duka opted for a broad enough disclosure to encompass all transactions, and one that would not need to be changed from presale to presale. Duka Tr. 1394:5-17 ("I think I thought about this disclosure the way I consider all disclosure, which is to generally describe what factors we're considering and to generally alert the reader about the general methodology. And the purpose of using a general methodology is, I don't want the section changing from transaction to transaction. I want it to accurately reflect every loan in the deal and every -- and the transactions I'm looking at, but also transactions that are going forward where I can't possibly contemplate what exceptions they're going to be to the language.").

482. The reference to "as further detailed in our conduit/fusion criteria" is a reference to the Table 1 Constants. Duka Tr. 1429:25-1430:2 ("Q So in the pre-sale you're pointing the reader to the stressed constant in Table 1? A That's correct.").

483. The MSC 2011-C1 Presale was published on February 4, 2011. JX 22 at SP-CMBS 00285558.

484. Brian Snow was the primary credit analyst and Kurt Pollem was the secondary contact. JX 22 at SP-CMBS 00285558.

485. The Division alleges that the credit enhancements listed on SP-CMBS 00285561 of JX 22 were arrived at using a Blended Constant. OIP ¶¶ 32-33.

486. The Rationale section provided as follows, in part:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage (DSC) of 1.20x based on a weighted average Standard & Poor's Ratings Services loan constant of 8.46%, a beginning loan-to-value (LTV) ratio of 88.9%, and an ending LTV ratio of 78.5%.

JX 22 at SP-CMBS 00285562.

487. The pool-level weighted average DSC was not a metric that was used to arrive at the disclosed credit enhancement levels. Digney Tr. 829:17-20 ("And is a weighted -- is a pool - - is a pool-level weighted DSC something that is actually used to arrive at the credit enhancement levels? A No. It's just like a summary statistic.").

488. The DSCs listed in the Rationale section and throughout the presale were BBB DSCs. Digney Tr. 767:12-15 ("Now, the DSC that's listed in the rationale section, that's the DSC for -- at the BBB rating category, right? A Right."); Digney Tr. 767:25-768:3 ("Q And is that -- throughout the pre-sale, are the cash flow numbers and the DSCs reported with respect to the BBB-rated category? A Right. That's right.").

489. The MSC 2011-C1 transaction's pool balance consisted of 5.9% Self-Storage properties and 4.9% Mixed Use properties. JX 22 at SP-CMBS 00285564.

490. The MSC 2011-C1 transaction contained 0% Interest Only Loans and 30.5% Partial-Interest Only Loans. JX 22 at SP-CMBS 00285571.

491. In the section titled "Conduit/fusion methodology," the presale stated:

> Once the 'AAA' rental declines are applied and the resulting stressed value declines are determined, we use a relatively straightforward set of default tests to determine losses and credit enhancement levels. The tests for term default are: if the loan's LTV ratio is greater than 100% and its DSC is less than 1.00x; or if the loan's LTV ratio is greater than or equal to 90% but less than or equal to 100%, and its DSC is less than or equal to the LTV ratio. The loans that pass the term default test are tested again at maturity, and the loans will default if the loans' LTV ratio under the 'AAA' stress is greater than 100% based on the amortized loan balance. These same default tests are applied to the in-place Standard & Poor's NCF and value conclusion in order to derive the 'BBB' credit enhancement levels and may be subject to other tests, including a floor test based on the tests' relative difference when compared with the 'AAA' credit enhancement levels. In

determining a loan's DSC, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

JX 22 at SP-CMBS 00285575.

492. The MSC 2011-C1 Presale contained the similarly worded disclosures. *See, e.g.*, JX 22 at SP-CMBS 00285563 ("We also considered all existing and potential secondary debt in the subordination levels."); JX 22 at SP-CMBS 00285563 ("[W]hen evaluating loans with operating expenses that are expected to increase based on contractual terms, we will consider what the actual credit risk profile of those loans is and may adjust our default and loss assumptions to more accurately reflect this.").

493. Table 15, entitled Stressed Scenario Analysis for MSC 2011-C1, included DSCs calculated using "the pool's actual debt service." JX 22 at SP-CMBS 00285578.

494. The MSC 2011-C1 was distributed to a wide group within S&P. RX 405 (Feb. 10, 2011 email from Purij distributing the MSC 2011-C1 Presale to a wide group, which included Jacob, Manzi, Esaki, and Palmisano).

MSC 2011-C1 RAMP

495. On February 28, 2011, Brian Snow signed the MSC 2011-C1 RAMP as the analyst and Kurt Pollem signed as chair. JX 23 at SP-CMBS 0032671-72.

496. Snow and Pollem affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 23 at SP-CMBS 00132671.

497. Snow and Pollem affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model Use Policy and analytical criteria." JX 23 at SP-CMBS 00132671.

498. The Rating Rationale, JX 23 at SP-CMBS 00132673, was copied and pasted from the presale by Snow. Snow Tr. 1753:25-1754:13 ("Q See this section on the Bates stamp number 242784 called Rating rationale, do you see that? A Yes. Q Where does that come from? Or how is that prepared? A It would have been copy-pasted from the pre-sale. Q Okay. And as the primary credit analyst on this deal, are you the person who just physically did the assembly of the document and the cutting and pasting in the ordinary course? A For the RAMP? Q Yeah. A Most likely I put the RAMP together.").

MSC 2011-C1 Feedback

499. On January 31, 2011, Pollem sent an email with the subject "RE: MSC 2011-C1 Feedback" with an attachment to employees of Morgan Stanley, copying Duka and Purij. JX 24. Among other metrics, the feedback included an "S&P Trust DSC" of 1.33. JX 24 at SP-CMBS 00626731.

MSC 2011-C1 Revised Presale

500. On September 2, 2011, S&P published a revised presale for MSC 2011-C1. JX 28.

501. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 28 at SP-CMBS 01698056.

502. The Rationale Section included an additional sentence, stating, "[i]n our analysis, we utilized a blended loan constant of 7.61% and derived a Standard & Poor's deal level debt service coverage of 1.34x." JX 28 at SP-CMBS 01698057.

503. Table 93, titled Deal-Level and Top 10 Loan Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and top ten loans. JX 28 at SP-CMBS 01698121.

FREMF 2011-K701 Presale

504. On February 15, 2011, S&P published a presale for FREMF 2011-K701. JX 30.

505. Brian Snow was the primary credit analyst and Kurt Pollem was the secondary contact. JX 30 at SP-CMBS 00285263.

506. The Division alleges that the credit enhancements listed on SP-CMBS 00285266 of JX 30 were arrived at using a Blended Constant. OIP ¶¶ 32-33.

507. The AAA ratings were issued on the closing date and withdrawn the following day; the AAA ratings were not subject to surveillance by S&P. JX 30 at SP-CMBS 00285266 ("The rating on each class of securities is preliminary and subject to change at any time. The preliminary ratings on the class A-1, A-2, and X1, certificates are point-in-time ratings determined as of the issuance date. The preliminary ratings on the class A-1, A-2, and X1 certificates will not be subject to ongoing monitoring, upgrades, withdrawals, surveillance, or any further assessment after the issuance date. As such, the preliminary ratings on the class A-1, A-2, and Xl certificates will be issued on the closing date and withdrawn the following day. The preliminary rating on the class B certificates is a long-term public rating, which will be subject to ongoing monitoring, upgrades, withdrawals, surveillance, and/or any further assessment after the issuance date."); RX 676; Duka Tr. 1389:12-22 ("What is a P-I-T rating? A Point in time. Q What is point in time? A It essentially is telling the market what your view of the credit is as of that day. But the rating is later withdrawn, and there is no ongoing surveillance or opinions produced after that date. Q And who makes the determination at a ratings point in time? A Well, it would have been the issuer, so Freddie would have asked for it.").

508. The Rationale section provided as follows, in part:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage ratio (DSCR) of 1.09x based on a weighted average Standard & Poor's loan constant of 7.75%, a beginning loan-to-value (LTV) ratio of 99.5%, and an ending LTV ratio of 90.8%.

JX 30 at SP-CMBS 00285266.

509. The DSCs listed in the Rationale section and throughout the presale were BBB DSCs. Digney Tr. 767:12-15 ("Now, the DSC that's listed in the rationale section, that's the DSC for -- at the BBB rating category, right? A Right."); Digney Tr. 767:25-768:3 ("Q And is that -- throughout the pre-sale, are the cash flow numbers and the DSCs reported with respect to the BBB-rated category? A Right. That's right.").

510. The FREMF 2011-K701 deal contained 10% Interest Only Loans and 53.9% Partial-Interest Only Loans. JX 30 at SP-CMBS 00285275.

511. In the section titled "Conduit/fusion methodology," the presale stated:

> In determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

JX 30 at SP-CMBS 00285282.

512. The FREMF 2011-K701 Presale contained the similarly worded disclosures. *See, e.g.*, JX 30 at SP-CMBS 00285268 ("The transaction is comprised of only 44 loans, which is a relatively small pool for a conduit transaction. We considered this factor in our evaluation of the pool."); JX 30 at SP-CMBS 00285268 ("We considered [subordinate debt] in our evaluation.").

513. Table 16, entitled Stressed Scenario Analysis for FREMF 2011-K701, included DSCs calculated using "the pool's actual debt service." JX 30 at SP-CMBS 00285285.

514. The FREMF 2011-K701 was distributed to a wide group within S&P. RX 417 (Feb. 15, 2011 email from Defalco distributing the FREMF 2011-K701 Presale to a wide group, which included Geramian).

FREMF 2011-K701 RAMP

515. On March 7, 2011, Snow signed the FREMF 2011-K701 RAMP as the analyst and Pollem signed as chair. JX 31 at SP-CMBS 00242783.

516. Snow and Pollem affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 31 at SP-CMBS 00242783.

517. Snow and Pollem affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model Use Policy and analytical criteria." JX 31 at SP-CMBS 00242783.

FREMF 2011-K701 Feedback

518. On February 8, 2011, Adria Defalco sent an email with the subject "FREMF 2011-K701 Feedback" with attachment to employees of Morgan Stanley, copying Reilly,

Pollem, Snow, and Duka. Among other metrics, the attachment included an "S&P BBB Trust DSC" of 1.23. JX 32 at SP-CMBS 00503076.

FREMF 2011-K701 Revised Presale

519. On September 2, 2011, S&P published a revised presale for FREMF 2011-K701. JX 35.

520. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 35 at SP-CMBS 01705671.

521. The Rationale Section included an additional sentence stating, "[i]n our analysis, we utilized a blended loan constant of 6.88% and derived a Standard & Poor's deal-level DSC of 1.24x." JX 35 at SP-CMBS 01705672.

522. Table 90, titled Deal-Level and Top 10 Loans Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and the top ten loans. JX 35 at SP-CMBS 01705727.

JPMCC 2011-C3 Presale

523. The JPM 2011-C3 Presale was published on February 18, 2011. JX 37.

524. Michael Nelson was the primary credit analyst and Pollem was the secondary contact. JX 37 at SP-CMBS 00285325.

525. The Division alleges that the credit enhancements listed on SP-CMBS 00285328 of JX 37 were arrived at using a Blended Constant. OIP ¶¶ 32-33.

526. The Rationale section provided as follows, in part:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage (DSC) of 1.31x based on a weighted average Standard & Poor's Ratings Services loan constant of 8.34%, a beginning loan-to-value (LTV) ratio of 82.6%, and an ending LTV ratio of 72.3%.

JX 37 at SP-CMBS 00285329.

527. The DSCs listed in the Rationale section and throughout the presale were BBB DSCs. Digney Tr. 767:12-15 ("Now, the DSC that's listed in the rationale section, that's the DSC for -- at the BBB rating category, right? A Right."); Digney Tr. 767:25-768:3 ("Q And is that -- throughout the pre-sale, are the cash flow numbers and the DSCs reported with respect to the BBB-rated category? A Right. That's right.").

528. The JPMCC 2011-C3 transaction's pool balance consisted of 3.3% Manufactured Housing properties and 2.0% Self-storage properties. JX 37 at SP-CMBS 00285331.

529. The JPMCC 2011-C3 transaction contained 1.7% Interest Only Loans and 39.3% Partial-Interest Only Loans. JX 37 at SP-CMBS 00285338.

530. In the section titled "Conduit/fusion methodology," the presale stated:

> In determining a loan's DSC, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

JX 37 at SP-CMBS 00285342.

531. The JPMCC 2011-C3 Presale contained the similarly worded disclosures. *See, e.g.*, JX 37 at SP-CMBS 00285339 ("[W]e considered existing debt when evaluating the loans and the transaction."); JX 37 at SP-CMBS 00285331 (With respect to loans containing one or more single-tenant properties, S&P "considered the market, tenant rating, lease term, loan structure, and the dark value when evaluating each loan.").

532. Table 16, entitled Stressed Scenario Analysis for JPMCC 2011-C3, included DSCs calculated using "the pool's actual debt service." JX 37 at SP-CMBS 00285345.

533. The JPMCC 2011-C3 was distributed to a wide group within S&P. RX 429 (Feb. 18, 2011 email from Nelson distributing the JPMCC 2011-C3 Presale to a wide group, which included Palmisano, Esaki, Manzi, Osborne, and Jacob).

JPMCC 2011-C3 RAMP

534. On March 16, 2011, Michael Nelson signed the JPMCC 2011-C3 RAMP as the analyst and Snow signed as chair. JX 38 at SP-CMBS 00003028.

535. Nelson and Snow affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 38 at SP-CMBS 00003028.

536. Nelson and Snow affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model Use Policy and analytical criteria." JX 38 at SP-CMBS 00003028.

JPMCC 2011-C3 Feedback

537. On February 10, 2011, Pollem sent an email with the subject "RE: JPMCC 2011-C3 S&P Feedback" with an attachment to employees of JP Morgan, cc'ing Nelson and Duka. Among other metrics, the attachment included an "S&P BBB Trust DSC" of 1.31, the same as published in the Rationale Section of the Presale. JX 39 at SP-CMBS 00626510.

JPMCC 2011-C3 Revised Presale

538. On September 2, 2011, S&P published a revised presale for JPMCC 2011-C3. JX 44.

539. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 44 at SP-CMBS 01697902.

540. The Rationale Section included an additional sentence, stating that "[i]n our analysis, we utilized a blended loan constant of 7.68% and derived a Standard & Poor's deal level debt service coverage of 1.42x." JX 44 at SP-CMBS 01697903.

541. Table 97, titled Deal-Level and Top 10 Loan Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and the top ten loans. JX 44 at SP-CMBS 01697970.

Brian Snow Email

542. On February 15, 2011, Snow emailed Duka and Pollem with the following suggestion:

> Just a thought... after seeing Freddie and JPM presales; we might want to reconsider how we present data tables on DSC< 1.00 and LTV> 100
>
> Would it be helpful if we showed 2 DSC tables: 1 with actual constants; and 1 with S&P constants?
>
> RX 419 at SP-CMBS 00501216.

543. The presales published subsequent to Snow's email incorporated his suggestion. Duka Tr. 1402:24-1403:1 ("What was done subsequent to this email to modify the disclosure in the pre-sales that followed? A We took Brian Snow's recommendation and changed the section with the tables in it to reflect both an actual constant and a Table 1 constant.").

FREMF 2011-K11 Presale

544. The FREMF 2011-K11 Presale was published on March 15, 2011. JX 46.

545. Lucienne Fisher was the primary credit analyst and Pollem was the secondary contact. JX 46 at SP-CMBS 00285058.

546. The Division alleges that the credit enhancements listed on SP-CMBS 00285061 of JX 46 were arrived at using a Blended Constant. OIP ¶¶ 32-33.

547. The AAA ratings were issued on the closing date and withdrawn the following day; the AAA ratings were not subject to surveillance by S&P. JX 46 at SP-CMBS 00285061.

548. The Rationale section provided as follows, in part:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage ratio (DSCR) of 1.08x based on a weighted average Standard & Poor's

loan constant of 7.75%, a beginning loan-to-value (LTV) ratio of 101.1%, and an ending LTV ratio of 84.3%.

JX 46 at SP-CMBS 00285061.

549. The DSCs listed in the Rationale section and throughout the presale were BBB DSCs. Digney Tr. 767:12-15 ("Now, the DSC that's listed in the rationale section, that's the DSC for -- at the BBB rating category, right? A Right."); Digney Tr. 767:25-768:3 ("Q And is that -- throughout the pre-sale, are the cash flow numbers and the DSCs reported with respect to the BBB-rated category? A Right. That's right.").

550. The FREMF 2011-K11 transaction contained 0% Interest Only Loans and 45% Partial-Interest Only Loans. JX 46 at SP-CMBS 00285070.

551. In the section titled "Conduit/fusion methodology," the presale stated:

> In determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

JX 46 at SP-CMBS 00285078.

552. The FREMF 2011-K11 Presale contained the similarly worded disclosures. *See, e.g.,* JX 46 at SP-CMBS 00285069 ("We considered permitted additional debt and insurance criteria deviations in evaluating the transaction."); JX 46 at SP-CMBS 00285062 ("Standard & Poor's considered historical operating performance, appraisals, and comparable properties in its analysis.").

553. Table 16, entitled Stressed Scenario Analysis for FREMF 2011-K11, included DSCs calculated using "the pool's actual debt service." JX 46 at SP-CMBS 00285081.

554. Table 20 on page 26, entitled "Standard & Poor's DSCR Range Based on An Actual Debt Constant, included DSC ranges "based on the actual constant and Standard & Poor's NCF." JX 46 at SP-CMBS 00285083.

555. The FREMF 2011-K11 was distributed to a wide group within S&P. RX 453 (email from Reilly distributing the FREMF 2011-K11 Presale to a wide group, which included Geramian and Osborne).

FREMF 2011-K11 RAMP

556. On March 29, 2011, Fisher signed the FREMF 2011-K11 RAMP as the analyst and Pollem signed as chair. JX 47 at SP-CMBS 00342933.

557. Fisher and Pollem affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 47 at SP-CMBS 00342933.

558. Fisher and Pollem affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model use Policy and analytical criteria." JX 47 at SP-CMBS 00342933.

FREMF 2011-K11 Feedback

559. On March 9, 2011, Reilly sent an email with the subject "FREMF 2011-K11" with attachment to Grainger of Deutsche Bank, copying Pollem and Fisher. The attachment does not include an S&P BBB Trust DSC. JX 48 at SP-CMBS 00365932.

FREMF 2011-K11 Revised Presale

560. On September 2, 2011, S&P published a revised presale for FREMF 2011-K11. JX 51.

561. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 51 at SP-CMBS 01705463.

562. The Rationale Section included an additional sentence stating, "In our analysis, we utilized a blended loan constant of 6.95% and derived a Standard & Poor's deal level debt service coverage of 1.20x." JX 51 at SP-CMBS 01705464.

563. Table 93, titled Deal-Level and Top 10 Loan Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and the top ten loans. JX 51 at SP-CMBS 01705525.

FREMF 2011-K13 Presale

564. The FREMF 2011-K13 Presale was published on May 9, 2011. JX 53.

565. Adria DeFalco was the primary credit analyst and Purij was the secondary contact. JX 53 at SP-CMBS 00285125.

566. The Division alleges that the credit enhancements listed on SP-CMBS 00285128 of JX 53 were arrived at using a Blended Constant. OIP ¶¶ 32-33.

567. The AAA ratings were issued on the closing date and withdrawn the following day; the AAA ratings were not subject to surveillance by S&P. JX 53 at SP-CMBS 00285128.

568. The Rationale section provided as follows, in part:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage ratio (DSCR) of 1.09x based on a weighted average Standard & Poor's loan constant of 7.75%, a beginning loan-to-value (LTV) ratio of 96.4%, and an ending LTV ratio of 83.2%.

JX 53 at SP-CMBS 00285128-9.

569. The DSCs listed in the Rationale section and throughout the presale were BBB DSCs. Digney Tr. 767:12-15 ("Now, the DSC that's listed in the rationale section, that's the DSC for -- at the BBB rating category, right? A Right."); Digney Tr. 767:25-768:3 ("Q And is that -- throughout the pre-sale, are the cash flow numbers and the DSCs reported with respect to the BBB-rated category? A Right. That's right.").

570. The FREMF 2011-K13 transaction contained 8.9% Interest Only Loans and 40.5% Partial-Interest Only Loans. JX 53 at SP-CMBS 00285137.

571. In the section entitled "Conduit/fusion methodology," the presale stated:

> In determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

JX 53 at SP-CMBS 00285144.

572. The FREMF 2011-K13 Presale contained the similarly worded disclosures. *See, e.g.,* JX 53 at SP-CMBS 00285129 ("Standard & Poor's considered historical operating performance, appraisals, and comparable properties in its analysis."); JX 53 at SP-CMBS 00285130 ("We considered this additional [subordinate] debt in our evaluation."); JX 53 at SP-CMBS 00285131 ("We considered [the concentration of student housing] in our evaluation of this transaction.").

573. Table 15, entitled Stressed Scenario Analysis for FREMF 2011-K13, included DSCs calculated using "the pool's actual debt service." JX 53 at SP-CMBS 00285147.

574. Table 20 on page 25, entitled "Standard & Poor's DSCR Range Based on An Actual Debt Constant, included DSC ranges "based on the actual constant and Standard & Poor's NCF." JX 53 at SP-CMBS 00285149.

FREMF 2011-K13 RAMP

575. On May 24, 2011, DeFalco signed the FREMF 2011-K13 RAMP as the analyst and Pollem signed as chair. JX 54 at SP-CMBS 00167183.

576. DeFalco and Pollem affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 54 at SP-CMBS 00167182.

577. DeFalco and Pollem affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model use Policy and analytical criteria." JX 54 at SP-CMBS 00167182.

FREMF 2011-K13 Feedback

578. On May 3, 2011, Defalco sent an email with the subject "RE: Freddie 2011-K13 Feedback" with attachment to an employee of Bank of America/Merrill Lynch, copying Purij

and Pollem. The attachment does not include an S&P BBB Trust DSC. JX 55 at SP-CMBS 00882479.

FREMF 2011-K13 Revised Presale

579. On September 2, 2011, S&P published a revised presale for FREMF 2011-K13. JX 58.

580. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 58 at SP-CMBS 01705531.

581. The Rationale Section include an additional sentence stating, "In our analysis, we utilized a blended loan constant of 7.05% and derived a Standard & Poor's deal level debt service coverage of 1.20x." JX 58 at SP-CMBS 01705532.

582. Table 91, entitled Deal-Level and Top 10 Loan Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and top ten loans. JX 58 at SP-CMBS 01705593.

JPMCC 2011-C4 Presale

583. On May 17, 2011, Standard & Poor's published a presale for JPMCC 2011-C4. JX 60.

584. Fisher was the primary credit analyst and Digney was the secondary contact. JX 60 at SP-CMBS 00285398. Digney Tr. 445:19-22 ("What was your role in preparing this document? A So not primary author, but sort of supervisory reviewing various drafts of the pre-sale.").

585. Digney reviewed the JPMCC 2011-C4 Presale before it was published. Digney Tr. 766:9-11 ("And you reviewed this pre-sale before it was published, right? A Yes.").

586. The Division alleges that the credit enhancements listed on SP-CMBS 00285401 of JX 60 were arrived at using a Blended Constant. OIP ¶¶ 32-33.

587. The Rationale section provided as follows:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage (DSC) of 1.26x based on a weighted average Standard & Poor's Ratings Services loan constant of 8.22%, a beginning loan-to-value (LTV) ratio of 86.6%, and an ending LTV ratio of 77.6%.
>
> JX 60 at SP-CMBS 00285401-02.

588. The DSCs listed in the Rationale section and throughout the presale were BBB DSCs. Digney Tr. 767:12-15 ("Now, the DSC that's listed in the rationale section, that's the DSC for -- at the BBB rating category, right? A Right."); Digney Tr. 767:25-768:3 ("Q And is

that -- throughout the pre-sale, are the cash flow numbers and the DSCs reported with respect to the BBB-rated category? A Right. That's right.").

589. The JPMCC 2011-C4 deal's pool balance consisted of 8.1% Manufactured Housing properties and 0.3% Self-storage properties. JX 60 at SP-CMBS 00285405.

590. The JPMCC 2011-C4 deal contained 13.8% Interest Only Loans and 0% Partial-Interest Only Loans. JX 60 at SP-CMBS 00285411.

591. In the section titled "Conduit/fusion methodology," the presale stated:

> In determining a loan's DSC, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

JX 60 at SP-CMBS 00285416.

592. The JPMCC 2011-C4 Presale contained the similarly worded disclosures. *See, e.g.*, JX 60 at SP-CMBS 00285403 ("We also considered all existing secondary debt when evaluating the transaction."); JX 60 at SP-CMBS 00285415 ("Standard & Poor's considered the insurance deviations by making downward adjustments in our value conclusions and/or more conservative default assumptions, which translate into higher credit enhancement levels for the transaction.").

593. Table 15, entitled Stressed Scenario Analysis for JPMCC 2011-C4, included DSCs calculated using "the pool's actual debt service." JX 60 at SP-CMBS 00285419.

594. Table 18 on page 23, entitled "Standard & Poor's DSCR Range Based on An Actual Debt Constant, included DSC ranges "based on the actual constant and Standard & Poor's NCF." JX 60 at SP-CMBS 00285420.

JPMCC 2011-C4 RAMP

595. On June 21, 2011, Fisher signed the JPMCC 2011-C4 RAMP as the analyst and Digney signed as chair. JX 61 at SP-CMBS 00083017.

596. Fisher and Digney affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 61 at SP-CMBS 00083016.

597. Fisher and Digney affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model use Policy and analytical criteria." JX 61 at SP-CMBS 00083016.

JPMCC 2011-C4 Feedback

598. On May 10, 2011, Fisher sent an email with the subject "Prelim Feedback – JPMCC 2011-C4" with attachment to Sheikh, copying Digney and Reilly. Among other metrics, the attachment includes an "S&P BBB Trust DSC" of 1.39. JX 62 at SP-CMBS 00341908.

JPMCC 2011-C4 Revised Presale

599. On September 2, 2011, S&P published a revised presale for JPMCC 2011-C4. JX 66.

600. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 66 at SP-CMBS 01697602.

601. The Rationale Section included an additional sentence, stating that "[i]n our analysis, we utilized a blended loan constant of 7.47% and derived a Standard & Poor's deal level debt service coverage of 1.39x." JX 66 at SP-CMBS 01697603.

602. Table 97, entitled Deal-Level and Top 10 Loan Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and the top ten loans. JX 66 at SP-CMBS 01697672.

GSMS 2011-GC4 Presale

603. Between 8:00PM and 9:00PM on the night before the GSMS 2011-GC4 Presale was published, Fisher and Digney communicated by email. DX 103. Fisher asked "Did you ever find out if BD wants us to report the DSC based on the blend as well as the stressed constant?" Digney replied at 8:58PM stating, "I spoke with her and she wants to show both the dsc using stressed constant and the dsc using actual constant." DX 103 at SP-CMBS 00333158.

604. Digney did not recall speaking with Duka about the DSC in the GSMS 2011-GC4 presale, and Duka did not recall any conversations on the topic. Digney Tr. 459:17-19 ("Q Do you have a recollection of speaking with Ms. Duka about this issue? A Not really."); Duka Tr. 1237:5-7 ("Q Do you recall that conversation with Mr. Digney about disclosing blended constants? A I don't recall it . . .).

605. In July 2011, Duka's workload was "probably the heaviest" in her career at S&P. Duka Tr. 1403:21-24 ("Q And what was your work activity load like in July 2011? A It was probably the heaviest of my career at S&P.").

606. The GSMS 2011-GC4 Presale was published on July 12, 2011. JX 68.

607. Louis Cicerchia was the primary credit analyst and Digney was the secondary contact. JX 68 at SP-CMBS 00314422.

608. Digney reviewed the GSMS 2011-GC4 Presale before it was published. Digney Tr. 775:1-3 ("Q You reviewed this pre-sale before it was published? A Right.").

609. The Division alleges that the credit enhancements listed on SP-CMBS 00314425 of JX 68 were arrived at using a Blended Constant. OIP ¶ 43.

610. On July 13, 2011, Cicerchia emailed Fisher, Pollem, Digney, copying Duka, with a copy of Morningstar's presale for GSMS 2011-GC4. RX 554. Morningstar's presale

contained the same credit enhancements as the GSMS 2011-GC4 Presale. *Compare* RX 554 at SP-CMBS 00314302 *with* JX 68 at SP-CMBS 00314425.

611. The Rationale section of the S&P Presale provided as follows, in part:

> In our analysis, we determined that, on a weighted average basis, the pool has a debt service coverage ratio (DSCR) of 1.25x based on a weighted average Standard & Poor's Ratings Services loan constant of 8.31%, a DSCR of 1.54x based on the weighted average in-place loan constant of 6.75%, a beginning loan-to-value (LTV) ratio of 86.8%, and an ending LTV ratio of 75.6%.
>
> JX 68 at SP-CMBS 00314425-6.

612. The DSCs in the GSMS 2011-GC4 Presale were BBB DSCs. Digney Tr. 775:4-9 ("Q And this pre-sale also reports DSCs that are tied to the BBB rating category? A That's right. Q And the cash flow numbers in the pre-sale from the BBB cash flow numbers? A Yes.").

613. The numerator of the DSC, not the denominator, bore a relationship with the denominator of the LTV ratio. Digney Tr. 776:5-21 ("And so starting with the LTV of 86.8 percent, the numerator of the LTV ratio is the loan amount, right? And I guess this is the total -- this is the weighted average of all of the loans in the pool, right? A Yeah. Q And the value is the BBB value, right? A Yeah. Q And that BBB value is calculated by taking the BBB cash flows and applying the capitalization rates that are in the criteria, right? A Yes. Q Okay. And so -- okay, that's enough. And then on the DSC, which is on -- of 1.25, the numerator of that ratio is the BBB cash flow, right? A That's right.").

614. The GSMS 2011-GC4 transaction's pool balance consisted of 1.4% Self-storage properties, 1.7% Mixed Use properties, 8.9% Student Housing properties, and 1.9% Manufactured Housing properties. JX 68 at SP-CMBS 00314429.

615. The GSMS 2011-GC4 pool contained 13.1% Interest Only Loans and 8.8% Partial-Interest Only Loans. JX 68 at SP-CMBS 00314435.

616. In the section titled "Conduit/fusion methodology," the presale stated:

> In determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.
>
> JX 68 at SP-CMBS 0031444.

617. The GSMS 2011-GC4 Presale contained the similarly worded disclosures. *See, e.g.*, JX 68 at SP-CMBS 00314427 ("We considered all existing secondary debt when evaluating the transaction."); JX 68 at SP-CMBS 00314428 ("With respect to loans containing one or more single-tenant properties, S&P "considered the market, tenant rating, lease term, and loan structure when evaluating the loan.").

618. Table 16, entitled Stressed Scenario Analysis for GSMS 2011-GC4, included DSCs calculated using "the pool's actual debt service." JX 68 at SP-CMBS 00314442.

619. Table 18 on pages 22 and 23, entitled "Standard & Poor's DSCR Range Based On An Actual Debt Constant Of 6.75%," included DSC ranges "based on the actual constant and Standard & Poor's NCF." JX 68 at SP-CMBS 00314443-44.

620. The GSMS 2011-GC4 Presale was distributed to a wide group within S&P. RX 549 (July 12, 2011 email from Cicerchia distributing the GSMS 2011-GC4 Presale to a wide group, which included Geramian, and Manzi.)

GSMS 2011-GC4 RAMP

621. On July 11, 2011, Cicerchia signed the GSMS 2011-GC4 RAMP as the analyst and Digney signed as chair. JX 69 at S&P-SEC 2012 0013652.

622. Cicerchia and Digney affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 69 at SP-CMBS 01477448.

623. Cicerchia and Digney affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model use Policy and analytical criteria." JX 69 at SP-CMBS 01477448.

GSMS 2011-GC4 Feedback

624. On July 6, 2011, Cicerchia sent an email with the subject "S&P Feedback" to an employee of Goldman Sachs, copying Fisher, Digney, Duka, and Pollem. Among other metrics, the attachment includes an "S&P BBB Trust DSC" of 1.38. JX 70 at SP-CMBS 00314661.

GSMS 2011-GC4 Revised Presale

625. On September 2, 2011, S&P published a revised presale for GSMS 2011-GC4. JX 75.

626. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 75 at SP-CMBS 01477773.

627. The Rationale Section included an additional sentence stating, "In our analysis, we utilized a blended loan constant of 7.53% and derived a Standard & Poor's deal level debt service coverage of 1.39x." JX 75 at SP-CMBS 01477774.

628. Table 103, titled Deal-Level and Top 10 Loan Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and top ten loans. JX 75 at SP-CMBS 01477849-50.

FREMF 2011-K14 Presale

629. The FREMF 2011-K14 Presale was published on July 18, 2011. JX 77.

630. A.K. Prabhakar was the primary credit analyst and Defalco and Pollem were the secondary contacts. JX 77 at SP-CMBS 00285191.

631. The Division alleges that the credit enhancements listed on SP-CMBS 00285194 of JX 77 were arrived at using a Blended Constant. OIP ¶ 43.

632. The AAA ratings were issued on the closing date and withdrawn the following day; the AAA ratings were not subject to surveillance by S&P. JX 77 at SP-CMBS 00285194.

633. The Rationale section provided as follows, in part:

> In our analysis, we determined that the pool has a debt service coverage ratio (DSCR) of 1.25x based on a weighted average Standard & Poor's Ratings Services loan constant of 7.92%, a DSCR of 1.55x based on the weighted average in-place loan constant of 6.50%, a beginning loan-to-value (LTV) ratio of 89.9%, and an ending LTV ratio of 77.6%.

JX 77 at SP-CMBS 00285194.

634. The FREMF 2011-K14 deal's pool balance consisted of 6.4% Assisted Living properties. JX 77 at SP-CMBS 00285198.

635. The FREMF 2011-K14 deal contained 17.3% Interest Only Loans and 21.7% Partial-Interest Only Loans. JX 77 at SP-CMBS 00285204.

636. In the section titled "Conduit/fusion methodology," the presale stated:

> In determining a loan's DSCR, Standard & Poor's will consider both the loan's actual debt constant and a stressed constant based on property type as further detailed in our conduit/fusion criteria.

JX 77 at SP-CMBS 00285211.

637. The FREMF 2011-K14 Presale contained the similarly worded disclosures. *See, e.g.*, JX 77 at SP-CMBS 00285196 ("We considered this additional debt in our evaluation."); JX 77 at SP-CMBS 00285197 ("We considered [the concentration of student housing] in our evaluation of this transaction.").

638. Table 16, entitled Stressed Scenario Analysis for FREMF 2011-K14, included DSCs calculated using "the pool's actual debt service." JX 77 at SP-CMBS 00285214.

639. Table 20 on pages 26 and 27, entitled "Standard & Poor's DSCR Range Based on An Actual Debt Constant, included DSC ranges "based on the actual constant and Standard & Poor's NCF." JX 77 at SP-CMBS 00285216-17.

640. The FREMF 2011-K14 was distributed to a wide group within S&P. RX 557 (July 18, 2011 email from Prabhakar distributing the FREMF 2011-K14 Presale to a wide group, which included Geramian, Manzi, and Osborne).

FREMF 2011-K14 RAMP

641. On July 14, 2011, Prabhakar signed the FREMF 2011-K14 RAMP as the analyst and Pollem signed as chair. JX 78 at SP-CMBS 00164192.

642. Prabhakar and Pollem affirmed that "[t]he ratings assigned reflected application of criteria pertinent to this type of issuer/transaction." JX 78 at SP-CMBS 00164191.

643. Prabhakar and Pollem affirmed that "[t]he model(s) application appropriately represent(s) the transaction structure or the attributes evaluated, consistent with Ratings Services Model use Policy and analytical criteria." JX 78 at SP-CMBS 00164191.

FREMF 2011-K14 Feedback

644. On July 12, 2011, Prabhakar sent an email with the subject "FREMF 2011-K14 Feedback" with attachment to employees of JP Morgan, copying Defalco and Pollem. The attachment does not include an S&P BBB Trust DSC. JX 79 at SP-CMBS 00836680.

FREMF 2011-K14 Revised Presale

645. On September 2, 2011, S&P published a revised presale for FREMF 2011-K14. JX 84.

646. The revised presale stated in the "Editor's Note," in part, that S&P "updated this presale report on Sept. 2, 2011, to include supplemental debt service coverage and blended loan constant information." JX 84 at SP-CMBS 01705599.

647. The Rationale Section included an additional sentence stating, "In our analysis, we utilized a blended loan constant of 7.21% and derived a Standard & Poor's deal level debt service coverage of 1.38x." JX 84 at SP-CMBS 01705600.

648. Table 90, entitled Deal-Level and Top 10 Loan Constants and DSCRs, included Blended Constants and Blended DSCs for the pool and top ten loans. JX 84 at SP-CMBS 01705665.

Evidence Regarding the Presentation of Table 1 DSCs in the 2011 Presales

649. The 2011 Presales included Table 1 DSCs due to "sloppiness" and likely resulted from analysts' over-reliance on using the prior presale as a template for drafting presales. Digney Tr. 818:3-8 ("Q And I think you said earlier something to the effect of sloppiness was to blame for those being put in the reports; is that correct? A Yeah. I mean, it's the -- the format tends to use the template from the previous transactions, so, yeah."); Digney Tr. 820:1-8 ("So your explanation for eight pre-sales with literally hundreds of references to DSCs and loan constants calculated using criteria constants is sloppiness? A Well, I don't -- I think the question

was with regard to one specific place and the rationale. But I think more or less it was following the same format as the preceding transaction.").

650. Digney did not know who actually changed the value of the cell in the assumptions tab in the course of preparing the 2011 Presales. Digney Tr. 832:12-22 ("Q Okay. And do you know who actually went into the model to make the change between 50 and a hundred that we saw earlier? A In the process of doing the pre-sale? Q Yes. A I'm not entirely sure, but either the primary analyst or the modeler or maybe¶ the two of them together. Q Did you ever go in and make the change in that cell in the assumptions tab? A No.").

651. Consistent with her practice of reviewing presales, FOF¶¶ 435-437, Duka did not notice that the DSCs were computed using the Table 1 Constants and that the Standard & Poor's Rating Services loan constant was based on the Table 1 Constant. Duka Tr. 1450:23-1451:5 ("Do you recall noticing that the pre-sales included criteria constants and debt service coverage ratios that were based upon those criteria constants? A I don't. Q Okay. Is it that you may have noticed, and you just don't recall? A I don't think so, but I don't remember noticing . . ."); Duka Tr. 1397:10-15 ("[D]o you have any explanation for why you didn't catch the references in the pre-sales to S&P loan constants or stressed constants as related to the DSCs? A I don't -- I don't think I was looking at it. I don't even think I was looking at the number"); Duka Tr. 1425:13-17 ("Q So my question to you is: If you're so busy, do you have an explanation as to why they're creating three models instead of just using one? A I don't. But all I can say is I didn't realize they were doing it at the time."); Duka Tr. 1250:20-1251:8 ("What is your best recollection as to the inclusion of DSCRs in the 2011 pre-sales that referenced Table 1 constants? A I don't have a recollection of how those -- how that disclosure was made. I just don't know. I honestly know that the analysts put the information in there. Not sure why. It continued to have the disclosure related to Table 1. Q And prior to the discussions that ensued after the pulling of the Goldman Sachs rating in late July, do you remember noticing that the pre-sales published to that point made reference to DSCRs based on Table 1 constants? A I don't recall."); Duka Tr. 1250:23-1251:2 ("Q What is your best recollection as to the conclusion of DSCRs in the 2011 pre-sales that referenced Table 1 constants? A I don't have a recollection of how those -- how that disclosure was made. I just don't know. I honestly know that the analysts put the information in there. Not sure why. It continued to have the disclosure related to Table 1."). Duka explained that the presale should have used DSCs using the Blended Constants. Duka Tr. 1222:12-15 ("Q Okay. And I believe you said that the pre-sale should reflect the numbers that were actually used, right? A That's correct.").

652. Duka focused on the disclosure in the Methodology section, which she acknowledged "could have been better." Duka Tr. 1230:10-15 ("And would it be fair to say that, sitting here today, you believe you could have said something clearer about actually using a 50/50 blend in the pre-sale? A I think the totality of the disclosure could have been better, yes."); Duka Tr. 1475:23 ("And that disclosure could have been better.").

653. Like Digney, Duka did not know that the modelers needed to create different versions of the model to produce the 2011 Presale Reports. Duka Tr. 1398:2-17 ("Q Did you know in the period, January 2011 and going forward, at any time through July of 2011, that the modelers were doing that? A I think Jim actually correctly pointed out that there would be three versions. There is an actual, a Table 1, and then a blend. Now that you say it, it makes sense.

Because how else could they have populated it? But I don't recall knowing it at the time. JUDGE GRIMES: Can I interrupt just for one second? I just want to know what the it is in that sentence. You said, I don't recall knowing it at the time. What is the it? A That they were using three separate models to populate the pre-sale.").

654. Until the S&P internal review in connection with the GSMS 2011-GC4 rating, Duka did not receive comments from anyone internal or external to S&P that the disclosure in the 2011 Presales was inadequate, incomplete, or in need of revision. Duka Tr. 1403:13-20 ("Q Other than Mr. Snow's email that you are aware of now, do you recall prior to July 11, 2011, at 8:58 p.m., receiving any comments from anyone about the disclosure regarding the DSC in the previous six pre-sales that had come before this date? A Excluding Brian Snow? Q Yeah. A No.").

655. The presentation of Table 1 DSCs in the 2011 Presales did not result from an intention of Duka's to mislead anyone. Digney Tr. 766:24-767:11 ("[Y]ou didn't intend to mislead readers in the pre-sale by including DSCs that were calculated using Table 1 constants, right? A Right. Q And you didn't intend to misread – mislead readers of this pre-sale by including DSCs calculated using the Table 1 constants anywhere else in this report, right? A Yes. Q Okay. Were you aware in 2011 of any attempt to mislead readers of pre-sale reports by anyone at S&P? A No."); Digney Tr. 775:10-14 ("You didn't intend to mislead readers of this pre-sale by including DSCs that were calculated using the Table 1 constants, did you? A No."); Duka Tr. 1250:9-11 ("[D]id you intend to mislead anyone by including in the pre-sales in 2011 DSCRs making reference to Table 1 constants? A No."); Duka Tr. 1250:9-11 ("[D]id you intend to mislead anyone by including in the pre-sales in 2011 DSCRs making reference to Table 1 constants? A No.").

656. Considering that use of the Blended Constant was more analytically justifiable than use of the Table 1 Constant, there was no specific reason not to disclose NI's use of a Blended Constant in the 2011 Presales. Henschke Tr. 1724:16-19 ("Q Would there be any reason not to disclose a change in methodology that you viewed as analytically justified to investors? A No."); Digney Tr. 816:3-8 ("Now, if hypothetically you believed in 2011 that the use of blended constant was analytically sound, then I gather there would have been no reason to disclose that practice to the investing public; is that correct? A Yeah, that's correct.").

657. Although Duka expected that the DSCs would match between the presale and the feedback email, Duke Tr. 1222 2-8 ("Q You would have expected them to be -- the numbers to be the same in the pre-sale as in the preliminary feedback memo? A I would have expected that if these were the numbers we were providing to issuers, and that was helpful, then we should be providing the same numbers to the investors. That's what I would have expected."), Duka did not realize that, for certain of the 2011 CF Transactions, there was a discrepancy between the BBB DSC metric in the presale and the BBB DSC metric that was in the feedback email to the issuer until the investigation of this matter. Duka Tr. 1221:10-1222:1("[S]hould the numbers for the weighted average debt constant and the trust debt service coverage and the preliminary feedback email be the same as the numbers in the pre-sale? A I think the numbers in the pre-sale should reflect what was used to derive -- what numbers were used to derive the credit enhancement levels. So I don't -- I don't recall noticing this at the time. I did notice this, obviously, that we had provided Morgan Stanley with the weighted average debt constants and the debt service

coverage versus what we were providing in the published report. I didn't realize it at this point in time. But the first time I think I would realize it is during my previous testimony. But had I realized it at that time, yes, I think that's what I would have expected.").

658. For certain of the 2011 CF Transactions, issuers were provided with Blended DSCs at the feedback stage and Blended DSCs were not disclosed in the presales due to "sloppiness." Digney Tr. 774:4-18 ("And was it just sloppiness as far as -- you know, was sloppiness the reason that the DSC using the blended constant is not in the RAMP? A So the fact that it's not in the RAMP but it's in the feedback? Q Yes. A Yeah. I -- that's what I think. I mean, it's -- Q You're the only one testifying today. A So, yeah, I mean, the feedback sheet is coming from the modeler. I just think it is a little bit of a sloppiness. Everything -- when the pre-sale is getting done, it's, you know, always stressful and very rushed. It's a very long document to pull together, so, yeah, I guess."); Digney Tr. 777 7-15 ("[I]s it fair to say that it was just -- sloppiness is why the DSC that's reported here is the DSC using the -- calculated using the Table 1 constant? A The fact that it doesn't match up with the pre-sale? Q The fact -- the fact that it's -- doesn't match up with the feedback. A Yeah. I would say so.").

659. Duka did not instruct members of the CMBS Group to report BBB Blended DSCs to the issuers and BBB Table 1 DSCs in the 2011 Presales. Digney Tr. 769:20-24 ("Q And as far as you know, did Barbara Duka instruct members of the CMBS group to report BBB DSCs using blended constants to issuers and not to put them in the pre-sales? A Not as far as I know.").

Evidence Regarding the Presentation of Table 1 DSCs in the 2011 RAMPs

660. As set forth above, Digney attributed the presentation of DSCs computed using Table 1 Constants in the RAMPs to "sloppiness." FOF¶ 658.

661. Duka did not instruct members of the CMBS Group to report BBB DSCs using the Table 1 Constants in the 2011 RAMPs. Digney Tr. 773:24-774:3 ("Barbara Duka didn't direct you to put -- direct you or anyone else, to your knowledge, to put DSCs that were computed using Table 1 constants in the RAMPs? A Not that I recall.").

662. Duka did not recall reviewing any of the RAMPs for the 2011 CF Transactions. Duka Tr. 1477:14-18 ("And sitting here today, do you recall reviewing any of the RAMPs, that is, the written document called the RAMP, during the -- during or in connection with the RAMP meetings? A I don't."); Duka Tr. 1399:20-21 ("I don't recall reviewing the RAMP necessarily."), and simply thought that her analysts would document NI's use of a Blended Constant in the 2011 RAMPs. Duka Tr. 1474:13-24 ("Q And your promise to Dr. Parisi didn't impart any additional responsibility on you to make sure that what was supposed to happen did, in fact, happen? . . . . A. I don't know that I thought about it. I thought it would be done. It was part of the process. I may have talked about it specifically outside of what the RAMP guidelines require. I just don't remember.").

663. The presentation of DSCs computed using Table 1 Constants in the 2011 RAMPs was not a result of any intention to mislead on Duka's part. Duka Tr. 1250:14-17 ("Did you intend to mislead the reader of the RAMP with respect to which constants were used in the calculation of the DSCRs? A No.").

664. Given that use of the Blended Constant made more sense analytically than use of the Table 1 Constant, no specific reason existed to decline to disclose the use of a Blended Constant in the 2011 RAMPs. Henschke Tr. 1724:11-24 ("Q Would there be any reason not to disclose a change in methodology that you viewed as analytically justified to others within the S&P organization, for example, through the RAMP? A No.").

Market Attention to GSMS 2011-GC4

665. After the GSMS 2011-GC4 Presale was published, CMBS investors expressed the view that the 14.5% AAA credit enhancement level was too low, *see* DX 105 at SP-CMBS 00561895, at least when compared to a Wells Fargo transaction that was issued around the same time. Digney Tr. 780:11-15 ("And is it your recollection that investors were comparing the credit enhancement levels for that transaction to the Wells Fargo transaction that was issued in or around the same time? A Yeah, I recall that.").

666. When Duka analyzed the initial reaction of some investors, Duka did not draw a connection between use of the Blended Constant and the market focus on the credit enhancement levels of GSMS 2011-GC4. RX 555 at SP-CMBS 00561877 ("This deal is going to be controvercial because people are not looking at big picture .... I'd like the opportunity to address that... .. deal has largest multi concentration, lowest leverage we've seen in 2.0, a top 10 loan which was ridiculously low leveraged and a mall in the retail concentration that was very high quality without lender stretching on value .... that covers 25 percent+ of the pool --- not a small amount AND the appraisals in this pool were not proforma ..... this pool is different, very different")

667. On or about July 22, 2011, Goldman Sachs and Citigroup, in response to comments from CMBS investors, increased the credit enhancement levels of the four original AAA classes to 20%, and created a "new junior" AAA class with credit enhancement levels of 14.5%. DX 146 at SP-CMBS 00807948 ("The subordination levels of the four original triple-A classes were increased to 20%. And $81.2 million of the benchmark class was carved out into a new junior triple-A tranche with a 14.5% level."); Parisi Tr. 1583:25-1584:7 ("Did there come a time that the transaction analyzed in the pre-sale, known as the Goldman Sachs pre-sale, was modified by Goldman Sachs and Citi to change the structure of the deal? A Yes, I was aware of that. Q Did that happen prior to the withdrawal of the rating by Goldman Sachs? A As I recall it, yes."); Digney Tr. 780:16-20 ("Do you recall that Goldman Sachs and Citigroup took it upon themselves to raise the credit enhancement levels from 14.5 to 20? A Yes. I forgot what the exact timing of that was, but I do remember that.").

668. On July 27, 2011, S&P published an Advanced Notice Of Proposed Criteria Change ("ANPCC") authored by Adelson that stated as follows:

> [S&P] is reviewing the application of our conduit/fusion CMBS criteria in relation to the calculation of debt service coverage ratios (DSCRs). The review was prompted by the discovery of potentially conflicting methods of calculation in use. We intend the review to harmonize the potentially conflicting methods without changing the overall calibration of the conduit/fusion CMBS criteria. More specifically, [S&P] started using two methods to calculate DSCRs in early 2011. Before that time, DSCRs used in the criteria were

> based on the worse of (i) actual debt service amounts and (ii) loan constants specified in the criteria article. Starting around January 2011, [S&P] started using a simple average of the two methods in the analysis of new deals. Surveillance continued to use the earlier approach. The review may result in multiple technical changes to the conduit/fusion CMBS criteria. Because of the early stage of the review, the potential impact on outstanding ratings is uncertain. Until the review is completed, [S&P] will not assign new ratings to transactions that are based on the conduit/fusion criteria.

JX 6 at SP-CMBS 01701221; Adelson Tr. 311:6-7 ("Who drafted the ANPCCs? A I drafted them.").

669. On July 27, 2011, Digney, Duka, David Mollin, Pollem, and Snow signed a meeting log related to GSMS 2011-GC4, entitled PROPOSED WITHDRAWAL OF RATINGS, that provided as follows:

> The members of this committee strongly believe that the preliminary ratings, as originally assigned, were done so correctly, and in full compliance with S&P's then current criteria. However, in light of the Advanced Notice of Proposed Criteria Change and the uncertainty created thereby, we were left with no option but to withdraw the ratings. This in no way changes our opinion regarding this pool. This is the unanimous view of this committee.

JX 71 at SP-CMBS 00463207.

670. On July 28, 2011, DeFalco, Digney, Duka, Pollem, and A.K. Prabhakar signed a meeting log related to FREMF 2011-K14, entitled Proposed Withdrawal of Ratings, that provided as follows:

> The members of this committee strongly believe that the preliminary ratings, as originally assigned, were done so correctly, and in full compliance with S&P's then current criteria. However, in light of the Advanced Notice of Proposed Criteria Change and the uncertainty created thereby, we were left with no option but to withdraw the ratings. This in no way changes our opinion regarding this pool. This is the unanimous view of this committee.

JX 80 at SP-CMBS 00164185.

671. Digney explained that he signed on to these meeting logs because he, among others, felt that GSMS 2011-GC4 and FREMF 2011-14 were "rated appropriately." Digney Tr. 782 22-24 ("Does this paragraph accurately represent your view at the time? A Yeah . . ."); Digney Tr. 783:17-25 ("Q And does the paragraph at the bottom of Joint Exhibit 80 accurately represent your view at the time? A Yeah. Q So how did it come to be that these paragraphs were added to the RAMPs for that Goldman Sachs deal and the Freddie deal? A Because we felt that the deals were rated appropriately."). Digney was willing to put his "neck out there" because he felt "it was the right thing to do." Digney Tr. 784:16-785:3 ("The chief credit officers published this advanced notice of proposed criteria change. And after that -- after the chief credit officer did that, you're putting your name on a document that says that you -- basically you disagreed

with the decision, right? A Right. Q In a way, you were putting your neck out there, right? A Yeah. Q Okay. And why did you do that? A Because I felt like it was the right thing to do.").

672. On July 28, 2011, after the publication of JX 6, Adelson received the following email from a CMBS investor named Duane Hewlett:

> Mark
>
> I'm sure you're inundated with questions regarding S&P press re lease y'day regarding S&P's review of conduit/fusion CMBS criteria.
>
> I'm trying to find the S&P article regarding loan constants that is referenced in item (ii) in the press release. I'd like to learn how S&P derives its loan constant rates and how they compare to actual debt service amounts. The most recent article I found on S&P's website is dated November 3, 2010 but I don't see any description of loan constants that S&P applies.
>
> Can you direct me to the operative article?
>
> RX 580 at SP-CMBS 01298981.

673. On July 28, 2011, S&P withdrew its preliminary ratings on GSMS 2011-GC4. RX 105 at SP-CMBS 00297064.

674. There was no consensus among senior S&P management that the GSMS 2011-GC4 rating should be withdrawn. Parisi Tr. 1585:17-23 ("Did you believe by July 26 that Goldman Sachs had restructured the security and were now putting up 20 percent credit enhancement; and, accordingly, that it seemed reasonable to go ahead and rate the transaction with the 20 percent credit enhancement A Yes. In my opinion, yes."); Adelson Tr. 309:22-310:1 ("Q What was your input? A My input was that we should pull it. Q And, again, why was that? A Because we had prepared those preliminary ratings without following the criteria in force.").

675. Jacob and Osborne called Goldman Sachs to inform them that S&P could not move forward with rating GSMS 2011-GC4. Goldman Sachs was astonished at the news. Jacob Tr. 547:2-7 ("And the reaction was astonishment? Why? For how long? Okay. You have a problem. Like, okay, we'll have this figured out like in 12 hours, 24 hours? Like, okay, we can understand you have a problem. Let's go figure it out and get the rating back on track."). Jacob did not tell Goldman Sachs that the representation it included in the Offering Memorandum, *see* FOF¶ 701, was not true. Jacob Tr. 635:23-636:7 ("Q Did you tell Goldman Sachs that their representation in this offering circular to the effect that the amount, type and nature of credit support, if any, provided with respect to the offered certificates was determined on the basis of criteria established by each rating agency? Did you say that was not true? A Did I say that was not true? Q Yeah. A No, I did not say that is not true.").

676. Adelson asked Parisi and the other criteria officers in Structured Finance to review four of the 2011 CF Transactions – MSC 2011-C1, JPMCC 2011-C3, JPMCC 2011-C4, and GSMS 2011-GC4 – to determine whether the ratings for those transactions, which used the Blended Constant to compute debt service, were consistent with S&P's rating definitions. Parisi

Tr. 1528:1-10 ("On August 3, Mark Adelson contacted me and asked me to get the other criteria officers together. And we reviewed the summary statistics, like the pool characteristics, credit enhancement levels and so on. Might have been a half a dozen or so conduit/fusion transactions. And the purpose of the review was to determine if the credit enhancement levels were generally consistent with, as it says here, rating definitions."); Adelson Tr. 315:13-21 ("[W]hat I determined to do was to ask the criteria officers, the structured finance criteria officers to look at these bonds without regard to the criteria but, rather, by reference to the definitions of S&P's ratings, which we had put a piece out on June 3rd about understanding the rating definitions, tying it back to what I mentioned before, the historical -- historically based stress scenarios."); Adelson Tr. 316:3-19 ("I instructed the Structured Finance chief credit officer under me, Frank Parisi, to go make this happen, to round up his troops, the front-line criteria officers . . . And the idea of getting them together is that they were a group that had, in contrast to regular S&P analysts, a lot more exposure across different sectors, because collectively they formed the Structured Finance Criteria Committee which received escalations and appeals from the product-level criteria committees. So each of them would, over the course of his years in that role, get exposure to ratings and criteria on asset classes other than his own specialty.").

677. Adelson, who spearheaded this exercise, Adelson Tr. 320:23-321:1 ("Q Do you know whose idea it was to make the question whether the ratings were consistent with ratings definitions? A That had to be me"), explained that even though, in his view, the ratings were arrived at "incorrectly," they may still correctly indicate S&P's opinions regarding the creditworthiness of the 2011 CF Securities. Adelson Tr. 321:5-9 ("[A]t the end of the day, the ratings are supposed to be an indicator of creditworthiness, and what I was trying to figure out is they might be correct indicators even if they had been arrived at incorrectly.").

678. The SFCC concluded that the ratings for the four transactions were consistent with S&P's rating definitions. Parisi Tr. 1536:16-18 ("[W]e got comfortable that the ratings on those securities were generally consistent with the criteria in the ratings definitions."). Parisi testified that he was comfortable with this conclusion, Parisi Tr. 1582:17-20 ("Q Were you comfortable with that conclusion at the time that you delivered it to Mr. Adelson and others? A Yes, I was."), and acknowledged that his analysis played a role in the conclusion expressed in JX 7. Parisi Tr. 1583:5-9 ("The analysis that you and your team provided, at least part of the basis, if not the basis for this document statement, as far as you understood it? A Yes."); Jacob Tr. 675:17-23 ("Q So you were asked 'Basically then the two approaches result in ratings that are not materially different; is that fair to say? A In these -- in these six or so transactions.' A That's fair to say that's what the conclusion was by the analysts who made it, yes."); RX 613 at SP-CMBS 01178385 ("The SF criteria team reviewed this and concluded that the results from the analysis of the four CMBS are consistent with our ratings definitions and criteria calibration.").

679. On August 5, 2011, S&P published an Advanced Notice Of Proposed Criteria Change authored by Adelson that stated as follows:

> In connection with the review of the application of its conduit/fusion CMBS criteria in relation to the calculation of debt-service-coverage ratios (DSCRs), [S&P] has determined that the approach used for DSCRs on new transactions rated since early 2011 has produced results that are consistent with Standard & Poor's rating definitions . . . The averaging approach was applied consistently to new CMBS conduit/fusion deals

> rated since early 2011. [S&P] uses a different approach for surveillance. For surveillance on outstanding CMBS conduit/fusion deals, a loan's DSCR for purposes of applying the tests in the criteria is the worse (lower) of (i) the ratio determined using the actual debt service amount as the denominator and (ii) the ratio determined using a hypothetical debt service amount, based on the loan constants specified in the criteria, as the denominator. . . . Effective immediately, Standard & Poor's will resume assigning ratings to new conduit/fusion transactions by applying the averaging approach described above. Standard & Poor's is currently reviewing its CMBS conduit/fusion criteria for potential updates, including the harmonization of the two approaches to calculating DSCRs described above.
>
> JX 7 at SP-CMBS 01701226; Adelson Tr. 311:6-7 ("Who drafted the ANPCCs? A I drafted them.").

680. The inclusion of the statement that "[e]ffective immediately, Standard & Poor's will resume assigning ratings to new conduit/fusion transactions by applying the averaging approach described above," communicated to the market that the ratings for the 2011 CF Transactions were "consistent with criteria." Digney Tr. 785:25-786:4 ("Did the inclusion of this sentence in the document published by the chief credit officer reinforce . . . that use of the blended constants was consistent with criteria? A Yeah."); Jacob Tr. 646:6-15 ("A As I said, what this says to me and is correct is that now S&P is telling the world that they're going to resume assuming ratings based on the approach ascribed above. Q Right. And what is -- is it true that S&P can only resume an approach that fits the requirements of criteria? A It would have to - - new ratings would have to follow criteria.").

Post-Goldman Criteria Enhancements

681. After the GSMS 2011-GC4 rating was withdrawn, S&P undertook an effort to issue revised CF Criteria.

682. On July 31, 2011, Jacob updated Sharma on the efforts to issue enhanced CF criteria, writing as follows:

> Many, many people working all weekend. Making progress. I want extensive testing, so still planning for completion towards end of the week. This an incredibly complex effort. See below for some of the technical updates. It is important to recognize and note that these changes are not a correction of what was done. **It appears that what was done before was a quite reasonable interpretation of the application of criteria.** And the results we are showing so far, re-inforce this. To re-iterate what I have said before, the new deal market was consistently rated based on the 50-50 blend of the stressed constant and actual debt service, as opposed the surveillance approach which used 100 percent the stressed constant. The analytic reason is simply that in new issue the numerator to dscr (DSCR=NCF/ debt service), is the stressed Net cash flow (NCF). Whereas in surveillance since we do not re-underwrite the loans, the NCF is actual. Therefore, using the stressed constant for debt service, and under-written cash flows for NCF, for new deals would have been double counting. The new approach is a more unifying approach. In addition, we took the opportunity to incorporate a number of enhancements. Together, these

changes might result in some changes to required credit enhancement and some rating changes. We have a team update call at 10am. Later today I will draft some bullet points that I would like to use for a tele-conference tomorrow to let the market know where we are.

RX 589 at SP-CMBS 01613875 (bold added).

683. On July 28, 2011, Parisi sent Adelson "DRAFT CMBS Conduit Fusion Criteria," and Adelson provided comments on July 30, 2011. RX 585.

684. On July 31, 2011, Parisi forwarded Adelson's comments to the "DRAFT CMBS Conduit Fusion Criteria" to, among others, Digney, Duka, Manzi, and Pollem. RX 586. The draft specified that the Table 1 Constants would be used to test maturity defaults, and the term default test would be based on an actual constant. RX 586 at SP-CMBS 00395748 ("Used for calculating DSC for maturity test (see ¶ 47)"); Duka Tr. 1369:12-1370:6 ("Q Looking through paragraphs 43 through the end of this section, can you describe in what way this document was contemplating using stressed constants? A It was contemplating introducing a debt service coverage test at maturity, converting the term test to use of the actual constant, and including a refinance test that considered debt service coverage on maturity. Q And with regard to the particular contemplated maturity test, is there a reference to Table 1 there in paragraph 47? A Yes. Q Okay. What's your understanding of that Table 1 constant to be used -- what's your understanding of how Table 1 constants would be used in this proposed enhancement criteria? A To forecast refinance constants on maturity, and to see if that loan would default based on whether or not it not only failed an LTV test but also failed a debt service coverage test."). The draft also contained Table 6 from the 2009 Criteria. RX 586 at SP-CMBS 00395757.

Surveillance Review of 2011 CF Transactions

685. A meeting was scheduled for August 1, 2011 among Digney, Duka, Hoeltz, Pollem, DeFalco, Fisher, Hoffman, and Ramkhelawan regarding "Surveillance Testing of 2010 & 2011 Transactions," during which the following was to be discussed:

> After meeting with David [Jacob], this has become priority #1 on our to do list. We want to review all 2010 & 2011 S&P rated transactions from a surveillance perspective, basically using our current criteria and process. The deals are listed below. We'll discuss strategy.
>
> GSMS 2011-GC4 (completed)
> JPMCC 2011-C3
> JPMCC 2011-C4
> MSC 2011-C1
> FREMF 2011-K11
> FREMF 2011-K13
> FREMF 2011-K14
> FREMF 2011-K701
> FREMF 2011-K703

RX 590 at SP-CMBS 00328761; Duka Tr. 1461:24-1462:1 ("Was the analysis from [RX] 611 created for David Jacob? 1462 A Yes.").

686. In early August 2011, members of Surveillance analyzed the 2011 CF Transactions using the Surveillance model, which incorporated the Table 1 Constant. Duka Tr. 1407:3-5 ("A Essentially what surveillance did is they surveilled the deal on the same day that it was issued using surveillance methodology."). The purpose of the analysis was to "essentially see if there is a difference in the credit enhancement levels" between NI and Surveillance. Duka Tr. 1427:22-23.

687. The results of this analysis were provided to Duka. Duka Tr. 1406:22-25 ("Q Do you recognize the attachment there as something you received in or around the date of this email? A Yes.").

688. The results demonstrated that the credit enhancement levels determined by NI, which used the Blended Constant, and Surveillance, which used the Table 1 Constant, were consistent for these transactions. RX 605 at SP-CMBS 01573068 ("In general, the surveillance review levels were lower than those of the new issuance levels. This is primarily due to new issuance having lower aggregate net cash flow numbers under both the 'AAA' and 'BBB' scenarios."); Duka Tr. 1407:5-9 ("[E]ssentially what this is showing is that there isn't a significant difference between the credit enhancement levels that were produced utilizing a surveillance methodology and model and those that were produced in new issuance.").

689. For example, the following table reflects the results of the analysis described in FOF¶ 686 for JPMCC 2011-C3:

Summary of Threshold Levels			
Rating Level	**Iss.**	**Surv.**	**Variance**
AAA	16.00%	15.16%	0.84%
AA+	14.50%	13.71%	0.79%
AA	13.00%	12.26%	0.74%
AA-	11.50%	10.81%	0.69%
A+	10.00%	9.37%	0.63%
A	8.50%	7.92%	0.58%
A-	7.00%	6.47%	0.53%
BBB+	5.50%	5.03%	0.47%
BBB	4.00%	3.58%	0.42%
BBB-	3.50%	3.15%	0.35%
BB+	3.00%	2.72%	0.28%
BB	2.50%	2.29%	0.21%
BB-	2.00%	1.86%	0.14%
B+	1.50%	1.43%	0.07%
B	1.00%	1.00%	0.00%
B-	0.88%	0.88%	0.00%

RX 599 at SP-CMBS 01122940.

690. The Surveillance Meeting Log for JPMCC 2011-C4 that contains the results of the analysis described in FOF¶ 686 is located at RX 610 at SP-CMBS 01122823.

691. The Surveillance Meeting Log for GSMS 2011-GC4 that contains the results of the analysis described in FOF¶ 686 is located at RX 648 at SP-CMBS 01573067.

692. The Surveillance Meeting Log for FREMF 2011-K11 that contains the results of the analysis described in FOF¶ 686 is located at RX 649 at SP-CMBS 01573087.

693. The Surveillance Meeting Log for FREMF 2011-K13 that contains the results of the analysis described in FOF¶ 686 is located at RX 650 at SP-CMBS 01573528.

694. A compilation of the results of the analysis described in FOF¶ 686 for all of the 2011 CF Transactions is located at RX 609 at SP-CMBS 01122820.

Post-Event Statement

695. Duka recalled that there were discussions regarding the differences between NI and Surveillance in the aftermath of the GSMS 2011-GC4 rating withdrawal, but did not recall those discussions relating to disclosure in the 2011 Presales. FOF¶ 696.

696. Duka did not state, in sum or substance, that she did not want to disclose NI's use of a Blended Constant in the 2011 Presales because she did not want to have to explain the difference in methodological approach between NI and Surveillance. Duka Tr. 1241:9-1242:7 ("Do you recall ever saying that you didn't want to have to explain why new issuance and surveillance were doing something different through -- A I don't actually recall that comment – or that comment in a meeting. I'm just recalling, you know, the meetings that we might have had about conversations with documentation and differences between new issuance and surveillance. And those never happened before the Goldman transaction, but there were a lot of those after the Goldman transaction. So that's the context and the backdrop of where I think I might have had a conversation like that. But it didn't reference the pre-sales. Q Did you actually recall a specific conversation where you – A No. Q -- said you didn't have to explain the difference between -- A No. Q -- what new issuance was doing and surveillance? A No.").

697. A presale was not the appropriate document to disclose differences between NI and Surveillance. Duka Tr. 1239:22-1241:6 ("Ms. Duka, did you ever say in a meeting in July of 2011, or at any time, that you did not want to disclose the use of blended constants, because you didn't want to have to explain why new issuance was doing something different than surveillance? A In relation to a pre-sale? Q In relation to anything. A I do recall having conversations as part of the post-Goldman event, many conversations, many meetings. And there were meetings around documentation of this interpretation. What I recall about those meetings is that -- I believe it was Mark Adelson was very focused on the differences between new issuance and surveillance, and his thought that we should be disclosing in a document the different – the difference between new issuance and surveillance with respect to this methodology; not in a pre-sale necessarily. But just as a -- just as a disclosure. That didn't come up in the conversations about pre-sales. That type of disclosure wouldn't ordinarily be made in a pre-sale. That's a type of disclosure that would be made in, say, a criteria document. So to the extent that I can conceptualize having a conversation at all, that's the backdrop of how I think that conversation would have went. And it's not that I didn't want to disclose it. It's just it doesn't belong in a pre-sale. That's not the place for it.").

Disclosures in the Offering Memoranda of the 2011 CF Transactions

698. With the exception of FREMF 2011-K701, each of the 2011 CF Transactions was rated by one or more NRSROs in addition to S&P.

- JX 25 at SP-CMBS 01579447 (MSC 2011-C1 was rated by S&P and Fitch);
- JX 33 at SP-CMBS 00242532 (FREMF 2011-K701 was rated by S&P);
- JX 40 at SP-CMBS 00001388 (JPMCC 2011-C3 was rated by S&P, Realpoint, and Fitch);
- JX 49 at SP-CMBS 00205608 (FREMF 2011-K11 was rated by S&P and DBRS);
- JX 56 at SP-CMBS 00167283 (FREMF 2011-K13 was rated by S&P and Realpoint);
- JX 63 at SEC-STRS-E-0051960 (JPMCC 2011-C4 was rated by S&P, Realpoint, and Fitch);
- JX 72 at SP-CMBS 00356379 (GSMS 2011-GC4 was rated by Morningstar and S&P); and
- JX 81 (FREMF 2011-K14 was rated by S&P and Fitch).

699. Each of the offering memoranda for MSC 2011-C1, JPMCC 2011-C3, JPMCC 2011-C4, and GSMS 2011-GC4 contained the following disclosure, which provided that investors could ask questions and obtain information regarding the loans in the transaction.

> Each offeree of the certificates and its representatives are invited to direct questions to the initial purchasers concerning the terms, conditions and other aspects of this offering circular and to obtain any additional information with respect to the certificates, the mortgage loans, the borrowers, the mortgaged properties, the issuing entity, the depositor, the sponsors, the master servicer, the special servicer, the trustee, the certificate administrator and the trust advisor necessary to verify the accuracy of the information contained in this offering circular to the extent such information is within the possession of the initial purchasers or obtainable by them without unreasonable expense.
>
> JX 25 at SP-CMBS 01579452; JX 40 at SP-CMBS 00001395-6; JX 63 at SEC-STRS-E-0051967-8; JX 72 at SP-CMBS 00356385.

700. Each of the offering memoranda for MSC 2011-C1, JPMCC 2011-C3, JPMCC 2011-C4, and GSMS 2011-GC4 contained the following disclosure:

> As part of the process of obtaining ratings for the certificates, the depositor had initial discussions with and submitted certain materials to Fitch, Inc., Moody's Investors Service, Inc., DBRS, Inc. and Standard & Poor's Ratings Services. Based on preliminary feedback from those ratings agencies at that time, the depositor selected Fitch, Inc., and

Standard & Poor's Ratings Services to rate the certificates and not the other rating agencies due, in part, to those agencies' initial subordination levels for the various classes of certificates. Had the depositor selected such other rating agencies to rate the certificates, we cannot assure you as to the ratings that such other rating agencies would have ultimately assigned to the certificates. Although unsolicited ratings may be issued by any rating agency, a rating agency might be more likely to issue an unsolicited rating if it was not selected after having provided preliminary feedback to the depositor.

JX 25 at SP-CMBS 01579479-80; JX 40 at SP-CMBS 00001441; JX 63 at SEC-STRS-E-0052010-SEC-STRS-E-0052011; JX 72 at SP-CMBS 00356422; *see also* Peterson Tr. 1079:14-25 ("Q So is this paragraph -- does this paragraph contain in the offering circular for the JPMorgan 2011-C4 transaction informing investors that at least in part, the -- the issuer selected the rating agencies based on the preliminary feedback? A It does say that. Q Okay. And it also warns investors that they can't get -- that the issuer can't guarantee that if, what I'll call the unselected rating agencies had rated the deal, that they would have come out with the same credit enhancement levels? A Correct.").

701. Each of the offering memoranda for MSC 2011-C1, JPMCC 2011-C3, JPMCC 2011-C4, and GSMS 2011-GC4 contained the following disclosure:

Furthermore, the amount, type and nature of credit support, if any, provided with respect to the Offered Certificates was determined on the basis of criteria established by each rating agency. These criteria are sometimes based upon analysis of the behavior of mortgage loans in a larger group. However, we cannot assure you that the historical data supporting that analysis will accurately reflect future experience, or that the data derived from a large pool of mortgage loans will accurately predict the delinquency, foreclosure or loss experience of the mortgage loans in the issuing entity. As evidenced by the significant amount of downgrades, qualifications and withdrawals of ratings assigned to previously issued CMBS during the recent credit crisis, the rating agencies' assumptions regarding the performance of the mortgage loans related to such CMBS were not, in all cases, correct.

JX 25 at SP-CMBS 01579538; JX 40 at SP-CMBS 00001507; JX 63 at SEC-STRS-E-0052074; JX 72 at SP-CMBS 00356498.

702. Each of the offering memoranda for FREMF 2011-K701, FREMF 2011-K11, FREMF 2011-K13, and FREMF 2011-K14 contained the following disclosure, which provided that investors could ask questions and obtain information regarding the loans in the transaction:

Each offeree of the Offered Non-Guaranteed Certificates and its representatives and beneficial owners, if any, are invited to- • ask questions concerning the terms, conditions and other aspects of the offering contemplated by this confidential offering memorandum, • obtain any additional information with respect to the Offered Non-Guaranteed Certificates, the Mortgage Loans, the borrowers under the Mortgage Loans (the "Borrowers"), the Mortgaged Properties, us and the other parties to the transactions discussed in this confidential offering memorandum, and • request that any documents referred to in this confidential offering memorandum or the accompanying information circular, be made available.

JX 33 at SP-CMBS 00242442; JX 33 at SP-CMBS 00242442 JX 49 at SP-CMBS 00205592; JX 56 at SP-CMBS 00167267; JX 81 at JPMS SP 0001192.

703. Each of the offering memoranda for FREMF 2011-K701, FREMF 2011-K11, and FREMF 2011-K13 contained the following disclosure:

> As part of the process of obtaining ratings for the series 2011-K701 certificates, the depositor had initial discussions with and submitted certain materials to DBRS, Inc., Fitch, Inc., Moody's Investors Service, Inc., Realpoint LLC and S&P. Based on preliminary feedback from those five (5) rating agencies at that time, the depositor and Freddie Mac selected S&P to rate the series 2011-K701 certificates (other than the class D, X3 and X4 certificates, which will not be rated) and not DBRS, Inc., Fitch, Inc., Moody's Investors Service, Inc and/or Realpoint LLC due in part to those rating agencies' initial subordination levels for the certain classes of the series 2011-K701 certificates and Freddie Mac's desire to have diversity among the rating agencies rating its multifamily securitization transactions. Had the depositor and Freddie Mac selected DBRS, Inc., Fitch, Inc., Moody's Investors Service, Inc and/or Realpoint LLC to rate the series 2011-K701 certificates, we cannot assure you as to the ratings that DBRS, Inc., Fitch, Inc., Moody's Investors Service, Inc and/or Realpoint LLC would ultimately assign to the series 2011-K701 certificates. Although unsolicited ratings may be issued by any rating agency, and rating agencies have the ability to access information required to make a ratings determination, a rating agency might be more likely to issue an unsolicited rating if it was not selected after having provided preliminary feedback to the depositor.

JX 33 at SP-CMBS 00242582; JX 49 at SP-CMBS 00205735; JX 56 at SP-CMBS 00167416-7.

704. The disclosure in the FREMF 2011-K14 offering memorandum was slightly different because it was published following S&P's withdrawal of the preliminary ratings in late July 2011. JX 81 at JPMS SP 0001342-43.

CMBS Investors' Due Diligence Process Generally

705. CMBS investors are sophisticated. Reidy Tr. 1984:23-25 ("Q Fair to say as a general rule, CMBS investors are a pretty sophisticated group? A I would say I believe that to be true."); Richard Rept. ¶ 63 (investors in the 2011 CF Transactions "include many large, sophisticated institutional investors").

706. Before investing in a CF transaction, CMBS investors made a determination that the credit enhancement was sufficient in light of the price, yield, and risk posed by the collateral. Richard Rept. ¶ 41 ("The final cumulative loss expectation is evaluated relative to the level of credit enhancement being provided for the security, and the decision to invest is made if the level of this risk is commensurate with the return (i.e., price) being offered for the security."); Rubinstein Tr. 1909:2-9 ("Before the investor purchased any of the securities in the

conduit/fusion deals that are the subject of this proceeding, they would have to make a determination whether or not the credit enhancement levels disclosed in the offering documents were sufficient in light of the price, yield and other factors, right? A I believe most investors did that, yes."); Born Tr. 2012:23-2013:1 ("Q To your recollection, is that feedback on the GSMS 2011-GC4 deal that your team provided to Goldman Sachs? A It would have been, yes."); Born Tr. 2014:2-15 ("Q Mr. Born, how did PPM arrive at the conclusion that -- of what's purported in this cell that 14.5 credit enhancement level was not sufficient? A Well, it would have been driven by our discussion of the 10 largest loans in the deal. And I don't recall what they were. But when we go through them, if we see more risk than we would like and expect that some of those larger loans could go into default, we would pass on the transaction. Q And when you refer to our discussion, are you referring to an internal discussion at PPM? A Yes. The internal discussion between me and the two other analysts.").

Credibility of NRSROs After the Financial Crisis

707. The credibility of rating agencies following the financial crisis was severely damaged. Peterson Tr. 1056:2-9 ("And my question is: How did the financial crisis affect the credit enhancement rating agencies in your view -- and their reputation? A In my view, the credibility of ratings were, I guess, under question given the, you know, performance of the securities that they would have rated pre-crisis to the actual performance and ratings post the crisis, post the financial crisis."); Peterson Tr. 1056:15-20 ("Q But is it fair to say that in your view, post-crisis, the credibility of the rating agencies was -- there was more to question about the credibility of the rating agencies? A I think, in general, I can say probably in the market, yes."); Born Tr. 1999:18-20 ("Q Did the financial crisis impact the credibility of rating agencies, in your view? A Yes."); Wood Tr. 2117:20-24 ("Q But based on your direct testimony, it's fair to say that you -- after the financial crisis, you maybe had a more jaundiced view -- A Correct. Q -- of the rating agencies?").

CMBS Investors' Understanding of S&P's Opinions Expressed in the 2011 Presales

708. To the extent investors reviewed the 2011 Presales, investors believed that Actual DSCs were used, in some fashion, to arrive at the disclosed CE levels. Weih Tr. 973:19-23 ("Would your team have made the assumption that the disclosure of this table reflected that the credit enhancements in some fashion took into account the DSCR based on an actual debt constant? A Yes."); Penner Tr. 722:18-723:8 ("So rating agencies like Standard & Poor's, they publish their pre-sales to provide an explanation as to how they arrived at a particular rating, right? A Yes. Q And the culmination of that document is the presentation of credit enhancement levels and ratings, right? A Right. Q And that's -- that's how they express their opinion about the credit enhancement risk associated with each tranche, right? A I believe that's right. Q Okay. And would you assume that metrics reported in the pre-sale were used in arriving at those -- at the disclosed credit enhancement levels? A I think so."); Penner Tr. 723:13-724:1 ("'We determined that on a weighted average basis, the pool has' -- and then it says 'a DSCR of 1.54X based on the weighted average in-place loan constant of 6.75 percent.' See that? A Yes. Q Is it fair to say that that DSCR and that loan constant would also have been used to arrive at the disclosed credit enhancement levels? A Yeah, look, I think that -- Q I just want to make sure. I didn't hear your answer. A The answer is: These are factors that I'm sure played a part in the overall analysis."); Richard Rept. ¶¶ 79-87.

709. Investors did not know the analytic reason for S&P's use of a constant higher than the actual constant for a term default test. Weih Tr. 992:25-3 ("Are you aware of S&P's analytical reason for using a constant in the term default test above an actual constant? A No. I -- no."); Peterson Tr. 1085:4-8 ("Are you aware of what analytical reason S&P may have had to use constants listed in Table 1 to evaluate debt service? A I'm not aware.").

710. Investors did not have an understanding on reading the 2009 Criteria as to how S&P evaluated interest-only or partial interest-only loans. Weih Tr. 986:3-14 ("Did your team have an idea, by reading the criteria, of how interest-only loans in a pool -- in a conduit/fusion pool were assessed for purposes of credit enhancements? A I -- I can't say that they for sure did. I can't say that for sure. I know that it was -- interest-only loans was a metric that we looked at, a variable that we looked at when assessing. But I think your question is: Did the team have an understanding with how S&P accounted for interest-only loans? I can't say for sure that they had an awareness of that."); Weih Tr. 987:9-13 ("Did you have an understanding that there was no detail provided in the criteria as to the treatment of partial interest only or interest-only loans in a conduit/fusion pool? A I can't -- yeah, I don't remember.").

711. Investors were unable to determine what, if any, impact there would be to CE levels had S&P disclosed different metrics in the 2011 Presales. Richard Tr. 2024:25-2025:12 ("And speaking more broadly, for any metric that's listed in the pre-sale, could an investor determine what, if any, effect on credit enhancement would result if that metric were lower or higher? A Are you referring to poolwide members or loans -- well, the answer for either, whether it's a poolwide number or a metric associated with a particular loan, which were -- which they've published also throughout various sections of the pre-sale report. If those numbers were different, I don't know how an investor would be able to quantify the effect on credit enhancement levels.").

712. Investors did not have an understanding on reading the 2009 Criteria as to how S&P calculated the numerator or the denominator of the DSCs for property types other than Office, Retail, Industrial, Lodging, and Multifamily. Weih Tr. 988:15-20 ("Q And did your team have any sense of how S&P accounted for property types not listed in the criteria in the credit enhancement analysis when it came to the incremental stress to be the rental cash flows to those particular property types? A I can't say if we did or didn't at the time."); Peterson Tr. 1077:15-1078:5 ("Q Okay. And so if you look at Table 5, are you aware of whether or not in 2011, there were property types other than the five that are listed in Table 5? A I don't know if I'm fully aware. There are other property types that are included in CMBS pools. Q Okay. Is one of them self-storage? A Yes. Q Okay. So given that self-storage is not in this table, did you have any understanding as to how S&P was calculating AAA rent declines with respect to self-storage properties? A No. Q And I assume the same goes for any property type that is not listed in Table 5? A Correct."); Peterson Tr. 1084:24-1085:3 ("Do you recall whether or not anyone on your team or yourself called Standard & Poor's to find out what AAA rent decline they were using for property types that were not listed in Table 5? A I do not recall.").

AEGON

713. AEGON was an asset management group that managed funds on behalf of AEGON, an insurance company. Weih Tr. 852:2-10 ("Q What is Aegon? What kind of company

is it? A It's a large financial services organization. It's Dutch-based within the U.S. It sells its products mainly -- particularly from the retail perspective through Transamerica -- is our insurance company. They sell annuities, life insurance, 401(k) products. We are the asset management group that manages that money.").

714. From 2009 through 2011, Weih was the head of AEGON USA's CMBS Group. Weih Tr. 853:12-854:6 ("Can you just describe what positions you have held at Aegon since 2003? A Sure. In 2005 -- in 2004 I kind of did trading analyst. We were kind of a self-contained group at that point in time. In 2005, I headed up the group. It was a group of three of us. So I headed up our CMBS group. We had about $6 million in assets. I think before that time, I technically co-headed it. But an individual left, I became the head of that group in 2005. In two-thousand -- and I helped that role until 2009, at which point during the crisis in March of 2009, I gained responsibility for our residential mortgage-backed securities portfolio, agency and non-agency, which was approximately $6 billion. So that team -- I had responsibility for that team. I held that role until approximately 2012 . . .").

715. In addition to purchasing CMBS, AEGON originated commercial real estate loans. Weih Tr. 856:14-23 ("But your question on the commercial real estate group, we have approximately $18 billion commercial real estate portfolio, and that group goes out and makes first mortgage loans on office retail, multifamily, all across the country. In fact, they're at times competing with conduit lenders in making loans and other insurance companies. Those loans are for the benefit of our insurance company client -- or were at the time.").

716. AEGON leveraged the expertise of the Real Estate Group in making decisions to purchase CMBS. Weih Tr. 856:23-857:16 ("And we, at that time, I think, paid for one full-time equivalent. Within that group, we called it the evaluation team. There were four or five MAIs. It's a designation. I'm not exactly sure what it stands for, but it's essentially a professional designation where their expertise is valuing commercial real estate. And their role was to do appraisal reviews on every mortgage loan that got made for Aegon. So Aegon would go out and make a commercial mortgage loan; and an external appraisal would be ordered. And the valuation team would do an appraisal review saying we agree with this valuation or we disagree. Like I said, there were four or five in the group at that time. And we paid for one full-time equivalent. And they were part of our process in assessing CMBS deals.").

AEGON's Purchases

717. AEGON purchased $10,000,000 of the A4 tranche of MSC 2011-C1, JX 27, $11,300,000 of the A4 tranche of JPMCC 2011-C4, JX 43, and committed to purchase $10,000,000 of the A4 tranche of GSMS 2011-GC4, JX 74.

AEGON's Due Diligence Process

718. AEGON sent the term sheet and any presale reports to the "real estate group" to conduct a "deeper dive" into top 10 loans in the transaction. Weih Tr. 863:23-864:18 ("So when a new issue deal came, we sent the term sheet down to our valuation group, in this case Greg Camburn . . . . And he would also at some point in the process get the pre-sale report when that

was -- when that was given to us by the rating agencies. When that was available, we would also shoot that down to the valuation group as well.").

719. The "real estate group" or "valuation team" prepared a CMBS Consultation Report, DX 354, RX 700, RX 702, RX 704, which consisted of "valuation work" on the top 10 loans and an "opinion of value and stress[ed] value." Weih Tr. 863:17-864:13 ("Q Can you tell us, what is this document that's entitled CMBS consultation? A Yes. So Greg Camburn was one of the individuals that was in our valuation group at that time . . . He would have looked at the term sheet, done the analysis. I think that on the top 10 loans. At one point in time, we did the top-ten plus two random loans in the deal. But he would do valuation work on the top 10 loans and provide his -- his opinion of value and stress value and just, again, write a consultation back to us."). The CMBS Consultation Reports were used by AEGON's CMBS Group to decide whether or not to invest in a particular CF securities. Weih Tr. 864:19-865:19 ("[W]e would take that information [from the valuation group], and that would help us in our decision-making on a particular deal . . . I take it from your perspective your folks are able to do a deeper dive on some of these loans, and that's helpful for you as an investor to make a decision? A That's right. We certainly -- our team has commercial real estate expertise. We always viewed that team as having very deep, you know, commercial real estate expertise. In fact, they had the designations. So they spent most of their professional careers doing this. So we viewed them as the primary real estate experts. And we were more the modeling structure, pricing, where things should price, assessing the risk.").

720. For example, the CMBS team sought from the valuation team "a worst case of value that they would place" on the properties they evaluated, which was used in the CMBS team's modeling the transaction. Weih Tr. 1008:18-1009:1 ("Again, the timing -- I'm getting off a little bit in my head. But some point in time we were asking for an RTC, a Resolution Trust Corporation. That was a severe time in the commercial real estate markets. We were asking them for a -- essentially a worst case of value that they would place on the property. And we would use that analysis in our modeling of the transaction.").

721. The CMBS Consultation Reports do not reflect consideration of S&P's BBB Table 1 DSCs from the 2011 Presales. RX 700, RX 702, RX 704.

722. AEGON uploaded the loan-level information that was provided in the term sheet into Trepp. Weih Tr. 867:8-10 ("[W]e would take . . . information [from the term sheet and pre-prospectus], and it would be normally loaded into Trepp, which is a modeling software that we used."); Weih Tr. 868:15-21 ("We would run kind of a base-case scenario, you know, as-is values, what we thought, you know, the properties, from work with our valuation group, were worth. Certainly we do specific analysis on the top 10, whatever our real estate group provided, as-is values. We would load that into Trepp.").

723. AEGON used customized stress scenarios in Trepp to evaluate the probability of the securities experiencing losses and/or downgrades. Weih Tr. 868:22-869:23 ("We would also do some modeling that we did, kind of scenario stress runs that we had set up that we tried to best replicate the rating agency's approach. And just thoughts that we had on stress in the commercial real estate markets, how bad it might be. We ran those scenarios. And then ultimately our decision was predicated upon, you know, what those cash flows looked like. So

how far losses might eat up into the transaction. If, for example -- and this is why we were mostly purchasing AAAs -- the losses under stress scenarios would look like they could have a high probability of downgrades, potentially in some of the CMBS bonds, and/or the bonds could take a loss, a principal loss. We would try to stay away from those transactions. So we were mostly focused on AAA where we felt that the risk of loss was very low and the risk of downgrades was very low as well. So we run the stress analysis. We'd look at the output of that and decide -- you know, ultimately came down to the decision: Are we getting paid appropriately for the risk that we're taking? And part of that would be, you know, risk of principal loss and risk of downgrade.").

724. RX 741 lists AEGON's "Severe Stress Assumptions," which included, *e.g.*, a 25% Decline in Net Operating Income and a 9.75% Cap Rate for Office Properties. RX 741 at S&PRatings.AUIM001321. Weih Tr. 945:16-19 ("What is this document? A This would have been, I think, and not looking at -- our stress assumptions that we were running internally, pretty much at the bottom there.").

725. Weih testified that he looked at the presale reports "to see if" AEGON was "missing something or if they have a different view than us, and if so, why," and to see "what the rating agency liked about the transaction, what they didn't." Weih Tr. 884:3-14 ("We rely in part on the pre-sale report on highlighting anything that we may not have highlighted. We don't rely solely on it, but we're looking at the pre-sale report to see if they're -- you know, again, there's a higher probability that they've seen the property, met with management. So they're going to have information that we're not going to see in a week looking at a transaction. So the first part I would say is we're looking to see if they're highlighting anything that we didn't catch or didn't see.").

726. Weih explained that AEGON would look at its "analysis relative to how the rating agencies rated it, and do we agree or disagree," and would do so at the "rating level." Weih Tr. 977:19-978:7 ("Q At what level of detail? A Basically at the rating level, but a lot went into that, right? I mean, there's a lot of variables that go into that. But it ultimately would come down to, you know, do we think -- do we agree or disagree with the risk of loss and/or the risk of downgrade? And that's ultimately -- comes through the rating by the rating agencies, and then we will do our own analysis to come up with our view of those risks. And then will your institution make a decision whether the price at which the risk would work that you have analyzed internally is a price that makes sense? A Yes."); Weih Tr. 883:20-885:8 ("Q So how does the rating agency's assessment of the CMBS offering impact your investment decision? A It -- we look at the ratings -- but the ratings matter. Obviously it drives price in the market. So we're looking at the rating of the – that the rating agencies provide relative to our internal view on value. So I guess a little -- two things:. Second then, when we're getting down to a decision on what to purchase, we're looking at our assessment of value in running our models versus what our rating agencies are rating it. And if we think that there's a high probability that the ratings will remain stable -- if we think that the ratings will remain stable and/or we think that there's a probability of an upgrade, you know, if we're buying below AAA, that's something -- and we like the underlying real estate, that's something that we would likely purchase. If we think that there's a high probability that this bond may be downgraded, that's something that we're probably going to, you know, stay away from. So we're looking at our assessment of value

versus what the rating agencies are looking at it; and we're trying to, you know -- trying to make a relative value decision.").

727. AEGON considered the 22.875% AAA credit enhancement of the MSC 2011-C1 an "attractive aspect of the deal." Weih Tr. 982:13-24 ("And do you see that underneath -- the second sentence, it says, '22.875 percent credit to the AAA class which is higher than we have seen with recent new issue deals.' Do you see that? A Yes. Q So considering whether to invest in AAA tranche in this particular transaction, the team assessed that the credit enhancements were an attractive aspect of the deal, correct? A Yes. Made a note that they were higher than the other deals that they've seen.").

728. The BBB DSC that was published in the MSC 2011-C1 Presales was not used in AEGON's model. Weih Tr. 936:2-8 ("And in terms of your internal analysis, though, am I correct to say that, based on your knowledge, the BBB level DSC number that is published in the pre-sale by S&P is not getting entered into whatever analysis your team is doing? A It doesn't -- to my recollection at the time, it doesn't get put into our modeling.").

729. Weih was not aware that the pool-level metrics (DSC and LTV) in the Rationale section pertained to the BBB stress. Weih Tr. 932:22-933:1 ("Q So you didn't have the understanding, I take it, that that pertained to the BBB security, correct? A I don't remember in detail like that. The team certainly may have. I can't remember if I would have known that at the time or not.").

730. AEGON did not use the pool-level BBB weighted average DSC to analyze whether to purchase the AAA tranche. Instead, AEGON used its own stresses, and compared the results of its own analysis to the credit enhancement to see if AEGON agreed. Weih Tr. 933:2-24 ("Q Do you know how the team would have used the pool weighted average basis, debt service coverage and the BBB level to do an analysis of the AAA tranche that your firm was considering purchasing at this particular deal? A Our -- well, our normal process was -- as a team, was to provide our own stress. I think I went through with our process, utilizing the real estate group, and provide our stress analysis, and then comparing that to the credit enhancement.").

731. If the pool-level BBB DSC in the Rationale section were higher, Weih explained as follows:

> Q Hypothetically, that number is 1.4 or some higher number. I want to know specifically on how that change would be the -- the higher number would be incorporated into the specific analysis that Aegon's team is doing as you described on direct. A Yeah. I guess I would say hypothetically if it -- we're looking at debt coverage -- we're looking at pool metrics, right? So if it was 1.4, and other deals that were brought were 1.2, we might look at that deal **more favorably** for all else equal. Or conversely, if it was significantly below kind of what we would have assumed to be in the range of reasonable, that would have raised a red flag for us saying we maybe wouldn't look at purchasing this deal, all else equal.
>
> Weih Tr. 935:9-25 (bold added).

732. RX 741 at S&PRatings.AUIM001322 contained "all the deal[s] that were originated and . . . the metrics that we are highlighting at a deal level," Weih Tr. 945:20-22, and was prepared by the CMBS team at AEGON to "keep internally for reference." Weih Tr. 948:17-18. The information was updated as of June 2011. RX 741 at S&PRatings.AUIM001322. The Table contained Moody's Stressed DSCR, Moody's Stressed LTV, % Stressed Moody's LTV greater than 90%, Moody's Cash Flow Haircut, and Moody Property Quality Score. Weih Tr. 951:1-10 ("I'm seeing Moody's stressed DSCR. I'm seeing Moody's illegible LTV. And then I'm seeing three additional statements. Can you read those statements? A I think it's Moody's stressed debt service coverage ratio; Moody's stressed LTV; percentage of stressed Moody's LTV greater than 90 percent; Moody's cash flow haircut -- maybe? I don't know that one. Moody's property quality score."). For CF transactions rated by S&P, and not Moody's, which were MSC 2011-C1, JPMCC 2011-C3, and JPMCC 2011-C4, the Table was blank, *i.e.*, the S&P Stressed DSCR was not listed. Weih Tr. 951:11-952:5 ("Q Okay. Now take your time and scroll across the document. And you'll see that under certain deals, there's no information in the box that is to the right -- in the box that corresponds to the box that you just described? A That's correct. That meant that Moody's was not on that deal. Q Can you look up at the top and see if you can read the name of the deals that Moody's is not on in 2011? A Yeah. The first one looks like it's MSC 2011-C1. Q Right. A The other looks JPMorgan CC11-C3. The next one is JPMorgan 11-C4, I believe. And that appears to be the three that they're not on. Q Okay. And do you recognize those transactions or any of them as transactions that S&P rated? A Yes. I believe they rated all of them."); Weih Tr. 953:2-3 ("But you're right, we don't -- if Moody's is not on a deal, we're not including it in here.").

733. Weih explained that AEGON "had the most clarity on Moody's," and that "Moody's was the rating agency that we probably aligned with most on their approach." Weih Tr. 952:8-15 ("Q And is it fair to say that at the time that this table was updated in June of 2011, the information that is in the pre-sales regarding DSCs and other -- and LTVs were available? A Yes. We -- versus putting all the rating agencies, we felt like we had the most clarity on Moody's. And, candidly, Moody's was the rating agency that we probably aligned with most on their approach."); Weih Tr. 954:9-10 ("[W]e felt that Moody's was the rating agency that we had the most clarity and maybe confidence in.").

734. AEGON did not create a similar document that would have compared the rating agency metrics for all 2011 CF transactions, which would have included S&P's metrics. Weih Tr. 954:11-21 ("Q Okay. And is there another document that would have a comparison of all deals in 2011 conduit/fusion rated by all rating agencies, including S&P? Because I didn't see it in the production -- A I don't think so. Again, this is more appropriate, I think, at an annual level, in which case we would have had enough data points from Moody's being rated that we could see kind of how they were looking at things. But, no, we probably don't have that for -- I don't know. I don't believe we do.").

735. S&P did not provide the requisite level of clarity in Weih's view. Weih Tr. 944:9-13 ("So it was, again -- it went to the broader perception of lack of -- confidence may be a strong word -- lack of certainty on exactly what they were coming up with their ratings.").

736. Weih testified that he would not have read the Methodology section of the presale report, Weih Tr. 891:15-20 ("Q Now, is this a section that you would have necessarily read as

part of your review in connection with making an investment decision? A Likely -- I, again, don't remember specifically for me. I would say it's highly unlikely that I would have read this section."), and therefore would have been unaware if the methodology section included a comprehensive description of the Blended Constant. Weih Tr. 992:7-22 ("So if a methodology section had said in performing the credit enhancement analysis, new issuance uses for a constant a blend of the Table 1 constant in the criteria and the actual constant on a 50/50 basis, with the exception that if the actual is higher, we use the actual, and subject to certain exceptions, you wouldn't have seen it, correct? Because you didn't read the methodology section? A You're saying the methodology section in the pre-sale? Q Yeah. A I can say that's probably -- that -- certainly, I can only speak for myself. That's likely that I did not see that. Q Uh-huh. A That's correct.").

737. Weih probably did not read the "Credit Evaluation" section of the presale. Weih Tr. 973:19-25 ("Would your team have made the assumption that the disclosure of this table reflected that the credit enhancements in some fashion took into account the DSCR based on an actual debt constant? A Yes. I don't know, again, if we -- I don't know. I can tell you that I probably wouldn't have gotten back to that page to pick up on that.").

738. Weih did not call S&P after the ANPCCs were published to find out what the CEs would have been if the Table 1 Constants were used. Weih Tr. 1003:8-19 ("Q If you look at 735, do you see at the bottom of the third paragraph, the last sentence, 'After reviewing the affected deals, Standard & Poor's has determined that no [rating] changes are appropriate.' Do you see that? A Yes. Q Okay. At that point in time, did you or anyone on your team call and ask S&P: As to the conduit/fusion deals we purchased in 2011, are the credit enhancements different? A No. We would not have called S&P at that time."). Weih Tr. 1004:10-13 ("Q I'm asking credit enhancements. A Yeah. We would not have called. I'm quite certain we would [not] have called to ask that specific question.").

739. Weih did not review the revised presales that contained the Blended DSCs. Weih Tr. 1005:19-1006:12 ("Q Right. And you came to understand eventually that the AAA securities that you purchased in 2011, which were rated by S&P, remained AAA? A That's correct. Q Okay. And did you review the amended pre-sale documents? A Did I? Probably not. Certainly in great detail. Did the team? I can't say specifically at that point. What deal -- you're asking about the deals that -- not the Goldman deal that was pulled, correct? Q Correct. A Yeah. I doubt that we would have gone back. Q This isn't going back. Perhaps my question is unclear. There was subsequently a publication of amended pre-sales. I'm just asking if you read them. A Did I? Likely not in great detail."); Weih Tr. 1011:24-1012:5 ("Q Without speculating, do you have any recollection -- do you have any recollection today of reviewing the amended pre-sales? Just to make it quicker on the probability or likeliness, I just want to know your recollection. A Personally I do not. I don't have a recollection of that.").

PFG

740. PFG is the real estate arm of Principal Global Investors, a life insurance company. Peterson Tr. 1015:15-21 ("A I work for Principal Financial Group -- actually Principal Real Estate Investors, which is a real estate investment arm for Principal Global Investors. Q Is Principal primarily a life insurance company? A Yes.").

741. Peterson was a Managing Director at PFG. Peterson Tr. 1015:24-25 ("Q So what is your current title? A Managing [director]."); Peterson Tr. 1017:11-24 ("Q And when you first moved to the CMBS investment group, what was your title? A At that point, I would have been an analyst. Q Okay. So if you could just walk us through the positions that you've held since that time, since being an analyst and all the way up to being managing director. A So I started as an analyst, and then a portfolio manager in 1998 And then I don't know exactly the year I became a managing director. That would have been sometime in the early 2000s. Q And I'm sorry, in 2000? A In the early 2000s. Q Early 2000s, okay.").

742. PFG has a "commercial lending practice" with "roughly 50 underwriters" and a portfolio value of about $20 billion. Peterson Tr. 1020:24-1021:11 ("Do you have a commercial lending practice there? A Yes. Q And can you tell us a little bit about the size of that group? A Yeah. We have roughly 50 underwriters who are originating loans in the larger markets in the U.S. Q Okay. And about how many -- I don't know what the precise term of art is, but what is the total amount of loans that Principal has? A Off the top of my head, roughly about 20 billion.").

743. PFG leveraged the real estate experience of the underwriters in connection with purchasing CMBS CF securities. Peterson Tr. 1021:12-17 ("Q So -- and does that real estate group internally play any role with regard to the CMBS group's analysis of investment opportunities? A Yes. We use their experience in different markets to help us with []our due diligence in re-underwriting loans.").

744. PFG underwrote every fixed rate CF deal that was issued. Peterson Tr. 1022:17-1023:1 ("Q Fair to say that, you know, Principal looks at -- I imagine a fair number of CMBS investment opportunities but not all of them? A Well, we re-underwrite every fixed rate conduit deal that [comes] to market. Q Every fixed rate conduit deal? A Yes. Q So when you say that S&P is seeing deals or the rating agencies are seeing deals -- A They're seeing the same deals.").

PFG Purchases

745. PFG purchased $214,818,153 of the XA tranche of MSC 2011-C1, JX 27, $15,000,000 of the A2 tranche of FREMF 2011-K701, JX 27, $25,000,000 of the A4 tranche of JPMCC 2011-C3, JX 43, $176,000,000 of the XA tranche of JPMCC 2011-C4, JX 43 and committed to purchase $30,000,000 of the AS tranche of GSMS 2011-GC4, JX 74.

PFG's Due Diligence Process

746. PFG sampled loans, usually the top 15 or 20 loans in a transaction, and assigned them to underwriters for review. The underwriters provided feedback about what risks they perceived with the loan, their view of the underwriting, and any experience they have in the market, with the borrower, or with the tenants. This information would inform PFG's perspective on the "risk profile" of each loan. Peterson Tr. 1026:5-1027:5 ("So thinking about a new issuance of CMBS, I want to ask you to just sort of walk us through, you know, when you find out from the issuer that there is going to be this -- you know, a new offering in the marketplace, what does your team do in order to diligence that investment opportunity and make a decision as to whether Principal is going to buy into it? A So the first step, you know, we'll get

a data tape in from the issuer that contains all the information on the loans. Then our group will pull a sample of loans, typically the larger loans, the top 15 or 20, and assign those to specific underwriters within Principal Real Estate Investors based on market. All the publicly available information is sent to those underwriters to help them to provide -- we're only asking them to provide feedback on the -- on what they think about the risks in the -- you know, in the property and the market, how the loan was underwritten, if we know -- experience with the borrower, any tenant -- any concern with tenants. All of that information is used to help provide us with their feedback on ultimately what the risk profile of each -- of any given loan would be from Principal's perspective as an originator.").

747. PFG utilized a proprietary model, Peterson Tr. 1019:16-18 ("Q So this was essentially a model for Principal to be able to analyze CMBS -- A Correct.") which was more sophisticated than Trepp. Peterson Tr. 1020:13-20 ("Q So for sort of a layman explanation, is it, in your view, a somewhat more sophisticated way of approaching modeling versus Trepp, which is more sort of readily available and prepackaged? A Yeah. From a better -- it provides a distribution of outcomes. I guess I would consider that to be more -- you know, a step above Trepp, a higher level.").

748. PFG's model ran a Monte Carlo simulation, which means that it ran through 2,000 different "economic paths and then projects the performance of the loans through those various paths." Peterson Tr. 1020:7-12 ("A It's a simulation that runs a variety of different scenarios. So the model runs through 2,000 different economic -- it basically runs through 2,000 different economic paths and then projects the performance of the loans through those various paths. So we have 2,000 scenarios that we run.").

749. PFG's model did not use a loan constant. Peterson Tr. 1058:9-16 ("Q Okay. Have you heard of the term 'loan constant'? A Yes. Q And what's your understanding of the term? A I don't -- I'm -- it's not a -- it's not a -- I guess a term that we use -- it's not a number -- a variable that we use in our model, so I -- I cannot define exactly what a loan constant is.")

750. PFG's model provided an internal rating on each tranche, Peterson Tr. 1030:18-24 ("When the document says 'Internal rating' there, is there -- is this internal rating assigned automatically? Or does this reflect all of the work that your team's done to come up with an internal rating? A The internal rating would be provided from our model."), which differed at times from the rating assigned by the NRSROs. Peterson Tr. 1031:19-1032:1 ("Q Again, you see this time this is one that is rated by Moody's and S&P. And you also see your internal rating there; is that right? So fair to say there were times where, you know, you're on the same page as S&P and Moody's about what the appropriate rating is, and sometimes you come out in a different place? A Yeah. Correct.").

751. PFG's CMBS team would review the presale reports. Peterson Tr. 1028:4-5 ("My analysts would be more focused on the term sheet and the pre-sales.").

752. PFG produced "investment committee packets" in response to a subpoena from the SEC. RX 760 at Page 15 of 17. PFG's investment committee packets do not contain S&P's BBB DSCs from the 2011 Presales, *see* RX 744, 745, 747, 748, 749, 750, 751, 752 and certain of them reflect that PFG's decision to invest was based on the results from PFG's model. *See* RX

744 at CMBS 000320 ("Credit approval down through Class B and the X-A based on model projections and underwriter review of the underlying loans"); RX 747 at CMBS 000345 ("Potential investments –Class XA for the General Account -Recommending credit approval down to Class B based off model runs").

753. Peterson explained that if a different BBB pool-level DSC was used in S&P's analysis than the one disclosed in the presale, it would "matter" to him only "if a different set of assumptions were going to be used in surveillance." Peterson Tr. 1048:13-19 ("Q Okay. But fair to say that if the DSCR number or the loan constant number listed in this pre-sale were not, in fact, the numbers that were used to drive credit enhancement, would that matter to you? A It would if -- if a different set of assumptions were going to be used in surveillance, that would concern us.").

754. Peterson explained that PFG would not have wanted to purchase CF securities that would be subject to a downgrade solely because the methodological approach was different between NI and Surveillance. Peterson Tr. 1080:23-1082:10 ("Is the -- is your concern that if you purchase a deal at new issuance, you don't want to be downgraded at surveillance solely because of a methodological approach that's different in surveillance? A That's correct. If the new issuance approach was applied, and you automatically got upgraded as a result of a change in methodology, I assume that is inconsistent with your view of -- that ratings should be stable? A Well, we would be concerned either way, you know, why an upgrade happened for no reason compared to us. Q Right, Right. I guess, put it a different way, if you get downgraded as a result of methodology or if you get upgraded as a result of methodology, either of those contribute to rating instability? A Correct. Q And ultimately what you're concerned about is that the results are consistent? A I'm concerned about the methodology being consistent. We know why -- you know -- we understand that a bond can be upgraded or downgraded because of the loans and how they perform, and that's -- that's -- we're analyzing that risk. Is this change in methodology that is applied -- our concern is that that could lead to a change in rating. That would be a concern. We would want to understand what that change is. And that would be a concern for us. Q Right. Right. But ultimately you're concerned about whether or not the change in the approach results in the change in rating? A Correct.").

Fort Washington

755. Reidy was the senior portfolio manager for CMBS at Fort Washington, a subsidiary of Western & Southern Financial Group. Reidy Tr. 1963:4-9 ("I am the senior portfolio manager for CMBS at Fort Washington Investment Advisors. Q And what is Fort Washington Investment Advisors? A It's a subsidiary of Western & Southern Financial Group.").

756. Reidy made the decision to purchase CF securities for Fort Washington. Reidy Tr. 1965:22-1966:5 ("Q Okay. And in 2011, assuming you had authority from that person to consider CMBS conduit/fusion investments, did you do that on your own, or did you do that with a team? A Once I was told that we had money to invest in CMBS, I handled it from there. Q Okay. And then in terms of the actual decision to purchase, who made that decision? A That was my decision as well.").

757. Reidy conducted the analysis in connection with Fort Washington's purchase of CF securities. Reidy Tr. 1965:4-21 ("I conducted all of the research on all of the investments and made the decision on whether or not to purchase and in conjunction with our asset liability management person who helped determine the size of the investment. Q Okay. So you identified an asset liability person. Can you just describe what that means? A Sure. For insurance business, we take in insurance premiums or annuity premiums, which are the liabilities. And there's a -- you know, typically a lifespan or expected lifespan of that liability. And so then we acquire assets that match up with that liability. So basically that person's role is they hold the purse strings. So they basically let us know what -- what money is available to invest for the insurance company.").

Fort Washington's Purchases

758. Fort Washington purchased $25,000,000 of the A2 tranche of MSC 2011-C1, $15,000,000 of the A4 tranche of MSC 2011-C1, JX 27, $50,000,000 of the A2 tranche of FREMF 2011-K701, JX 27, $20,000,000 of the A2 tranche of JPMCC 2011-C4, JX 43, and $23,000,000 of the ASB tranche of JPMCC 2011-C4, JX 43. RX 881; Reidy Tr. 1966:14-1967:7 ("Q And are you able to confirm that the table that is 881 accurately sets forth the purchases that Fort Washington made in the MSC 2011-C1 transaction and the JPMCC 2011-C4 transaction? A To the best of my recollection, I would say that's likely accurate. Q Do you recall which tranches -- or tranches of these particular transactions Fort Washington acquired? A As it says here, on the MSC 2011-C1-A2, we were invested in the A2 and A4 tranche, which was the -- I believe the original 5-year and 10-year Page 1967 average life tranches. In the JPMCC 2011-C4, it looks like the 5-year tranche and the ASB tranche, which is more of a protected amortization class bond. Q Are all these series -- are all those tranches AAA? A Yes.").

759. Fort Washington "probably" purchased more than half of the CF transactions in 2011. Reidy Tr. 1976:24-1977:4 ("Do you have a general recollection in 2011 as to how many of the conduit/fusion CMBS new issuance transactions your firm took positions in across the board? A I don't recall that exactly, but I would say it was probably more than half.").

760. Reidy viewed the collateral backing the 2011 CF transactions favorably, with "reasonable" DSCs and "pretty low" LTVs. Reidy Tr. 1977:5-1978:1 ("Q And did you have a view generally on the collateral backing of those 2011 conduit/fusion CMBS transactions, again, generally? A Yeah, we were pretty favorable on the underwriting on most of the deals. We like the collateral quality. If there was a negative in that time frame, it was likely a retail concentration in most deals was relatively high. Q So you liked the collateral quality. Can you just be a little bit more specific what that means? A We felt that the amount of debt on each property was favorable for lending. So the LTVs, you know, were pretty low. And the debt service coverage ratio in many cases seemed reasonable. In most cases, the lease terms for tenants were pretty good. You know, a lot of stuff that was underwritten that -- like lows for rents, which meant that there was a potential for growth and operating income in rents. So, you know, on -- that's kind of what I mean by favorable quality.").

Fort Washington's Due Diligence Process

761. Reidy reviewed the term sheet, along with the loan-level metrics provided therein, would "dig into the top 15 properties in the deal" to form his "own opinion" on the "property overall." Reidy Tr. 1967:12-1968:4 ("We would take a look at the term sheet that was issued by the originator, which would have high-level detail on the transaction as a whole, summary detail, an average LTV, average debt service coverage ratio, average debt yield, percentage breakdowns of property types and geographies. And then we would dig into the individual properties which were also presented in the -- at term sheet, which was typically the top 15 properties in the deal with much more detail available on the top 10 We would dig through those properties looking through the rent roll, the operating income, the market comparables for rents. And would kind of form our own opinion on what we believed to be -- the operating income to be, the property value to be, and, you know, what we thought of the property overall."). This process was called desktop underwriting. Reidy Tr. 1971:3-5 ("Q So all the work that you just described, is that sometimes called desktop underwriting? A Yes.").

762. Through desktop underwriting, Reidy arrived at a projection of loss, using stress assumptions that Reidy created. Reidy Tr. 1971:6-19 ("Q And when you do your desktop underwriting, do you arrive at a projection of loss, or loss scenarios? A Yes, we do. That's -- basically that comes out in the -- in the cash flow modeling within Trepp. So we'll input our assumptions on this top 10 to 15 loans, you know, specifically, and then the rest of the deal would be applied just through kind of the NOI haircut scenario I described. And then it would generate a loss total overall. Q And the specific haircut that you referred to is one that you choose? A Yes. It's a strategy. We look at it as a stress scenario, so...").

763. Once this process was completed, Reidy used Trepp to apply "haircut[s]" to the "net operating income" and used cap rate to determine "whether or not we thought a property was going to default, and if so, at what value we would expect recovery." Reidy Tr. 1968:5-12 ("And once we completed that review of those top 10 to 15 loans, we would use that view and Trepp, an analytical system for CMBS, that would allow us to basically apply a haircut to net operating income and apply different cap rates, et cetera, to determine whether or not we thought a property was going to default, and if so, at what value we would expect recovery.").

764. If Reidy ran through the above-described process, and there was no "loss at the AAA level," Fort Washington would invest if there was capital available. Reidy Tr. 1971:20-1972:2 ("Q Okay. Let me ask you, after you had that information, how do you make a determination whether to actually invest in the proposed transaction? A Typically, if we run through that scenario and there's no loss at the AAA level, which there rarely is, we would go ahead -- if we have the need from the asset liability matching side, then we would go ahead and make the investment.").

765. Reidy did not review rating agency presales in 2011 "as a matter of course," and guessed that he reviewed 25% of the presales in his investment process in 2011. Reidy Tr. 1973:16-23 ("Q Was it your job in 2011 to review rating agent pre-sales? A Not as a matter of course, no. Q How often would you estimate that you looked at rating agency pre-sales in your investment process in 2011 for these kinds of deals? A I don't recall. If I had to venture a guess, maybe one in four.").

766. Reidy described two situations when he would review a presale. First, Reidy would review the presale as a "double-check," such as where Reidy formed a different opinion on a particular loan from the issuer. For example, Reidy explained that the issuer may cherry-pick comparable properties for a particular loan, and Reidy would review the presale to see if the rating agency provided more objective comparable properties. Reidy Tr. 1973:24-1974:5 ("Q And when you did review pre-sales, as you've just described, what was your purpose in doing so? A Typically, it would be as kind of -- I would say two situations. One would be as kind of a -- maybe a double-check on something, you know, where we maybe had a different view on the loan than what the issuer may have had."); Reidy Tr. 1975:1-11 ("Q Can you give a specific example of that? A Yeah. I mean, we may -- we may think that the rents are overstated in the term sheet or that they're well above market. But maybe the comparables that the issuer provides are cherry-picked, so to speak. So we might look to see if the rating agency is using the same comparables or if they provide a little bit different opinion than what the issuer is presenting that maybe fits more what we believe to be the case.").

767. Second, Reidy would review the presale to see if information that was not generally provided in a term sheet was provided in a presale. Reidy Tr. 1973:24-1974:21 ("Q And when you did review pre-sales, as you've just described, what was your purpose in doing so? A Typically, it would be as kind of -- I would say two situations. One would be as kind of a -- maybe a double-check on something, you know, where we maybe had a different view on the loan than what the issuer may have had. Or the other situation would be if there was information that maybe wasn't presented in the term sheet that we thought perhaps would be in the pre-sale report. An example of that would be, like, sometimes on a regional shopping mall, the issuer may not provide sales per square foot. And so we might look at the pre-sale report to see if it were in there. Q And when you say -- that's an example of information that's not in the prospectus or in the Schedule A or Annex A? A Sometimes. It's typically not -- that information is not going to be in the prospectus or Annex A in most cases. But typically it's in the terms sheet that's provided.").

768. Reidy stated that the DSC metrics in rating agency presales are not relevant to Fort Washington's investment decision-making process. Reidy Tr. 1975:16-20 ("Q To what extent generally are the specific metrics in rating agency pre-sales applicable to your analysis, metrics or, for example, LTV or DSC? A In the typical decision-making process, they're not relevant to us."); Reidy Tr. 1991:23-1992:4 ("With respect to any conduit/fusion transaction in 2011, was a metric published in a pre-sale applicable in any way to your independent analysis where the metric concerned DSC? A It would not have made a difference in our decision to invest, because we would have calculated those numbers independently.").

769. Reidy had no recollection of reviewing the presales for MSC 2011-C1 or JPMCC 2011-C4. Reidy Tr. 1975:12-15 ("Q Do you have any recollection of reviewing the S&P pre-sales for the MSC 2011-C1 and JPMCC 2011-C4 transactions? A I don't recall if I did or not.").

PPM

770. PPM America is a money management firm with approximate $110 billion in assets under management. Born Tr. 1996:8-11 ("A PPM America is a subsidiary of Prudential,

PLC in the UK. We are a money management firm with about 110 billion in assets under management.").

771. Born was the CMBS portfolio manager between 2009 and 2011. Born Tr. 1998:7-9 ("Q And between 2009 and 2011, what was -- what were your job responsibilities at PPM? A I was the CMBS portfolio manager.").

772. Between 2009 through 2011, PPM had a CMBS portfolio of approximately $4 billion. Born Tr. 1998:10-14 ("Q Okay. And what was the CMBS -- the size of PPM CMBS portfolio in that time period, 2009 through 2011? A As best as I can recall, it would have been around $4 billion.").

773. Born was the "final decision-maker" in making recommendations to PPM's portfolio managers to purchase CMBS CF securities. Born Tr. 2005:3-13 ("And what role did you play in that process? A I was the final decision-maker -- well, from a credit perspective, I made recommendations as to the bonds that I thought we should buy. Q And to whom did you make those recommendations? A To our various portfolio managers. And they would either take them, if they had appetite for CMBS. Or there were instances where I would recommend deals, and they wouldn't buy them simply because they were looking at other asset classes at the time.").

PPM Purchases

774. PPM America purchased $25,000,000 of the A4 tranche of MSC 2011-C1. RX 881; Born Tr. 2005:14-18 ("Q Do you have any recollection of making a recommendation that PPM purchased the A4 tranche of MSC 2011-C1? A Yes, yes. We own that in our portfolio, I believe.").

PPM's Due Diligence Process

775. The CMBS team at PPM reviewed the term sheet, reviewed the presale reports, and ran the pool through PPM's model that applied stresses to the loans in different ways. Born Tr. 2006:1-2006:11 ("So there were three members of the team, a couple of folks junior to me. They would go through -- read through the term sheet. They would listen to the call, the call by the issuer on the deal. They would read through the rating agency pre-sale reports. And then we would also take the pool and run it through our own model to -- that stressed certain loans in different ways, to come up with what we thought was a reasonable loss expectation.").

776. Once this process was completed by the junior analyst, Born and his team would meet to discuss the deal, with particular focus on the top 10 loans in the deal. Born Tr. 2006:18-23 ("After the junior analyst finished that up, the three of us would convene, sit down and talk about the deal and focus most of our attention on the 10 largest loans in the deal. At which point we would be good either on the credit of the transaction or not.").

777. If Born came away from that discussion with a favorable view of the transaction, PPM would review "price guidance" and see whether "the return made sense given the nature of the underlying collateral." Born Tr. 2006:25-2007:2.

778. Born explained that PPM's review of presale reports would involve "primarily" the description of the top ten loans in the CF deal. Born Tr. 2007:23-2008:19 ("Q In 2011, was the rating agency pre-sale report applicable to the decision made by PPM to invest in a particular transaction? A. Yeah. We certainly took the pre-sale reports into account when we were making our credit decision, yes. Q Which portions of the pre-sales did people at PPM look at? A Mostly -- hold on. Let me just grab one to refresh my memory. But primarily it would be the disclosure on the largest loans in the deal. At that point in time, we were buying almost exclusively AAA rated securities. And in my estimation, the only way you could really get hurt on those types of bonds would be if one of the 10 or 15 largest loans had issues. So we were most interested what the rating agencies had to say about those assets."). As an example, Born explained that presale reports included discussions of the condition and location of certain of the larger loans, which PPM found helpful. Born Tr. 2008:20-2009:4 ("Q Can you provide the Court an example of something that would appear in a description of the top 10 loans that PPM would, you know, take into account? A First of all, property quality. You know, they grade -- they grade the assets on condition, functionality, location, that sort of thing. Since we're -- we don't really have the time to go inspect the properties ourselves. That's an enormous help to us.").

779. Born explained that the manner in which S&P arrived at credit enhancement levels "[c]andidly . . . not a big consideration" in PPM's decision to invest because PPM's analysis of the top 10 loans was the "driving" force of the investment decision. Born Tr. 2015:1-13 ("To what extent in 2011 were you concerned about how a rating agency calculated credit enhancement levels as reflected in a pre-sale? A. Candidly, it was not a big consideration when we were looking at transactions. JUDGE GRIMES: All right. Thank you. A. We were buying -- JUDGE GRIMES: Go ahead. I cut you off. A. No, no. It was just we were buying for the most part highly-enhanced AAA rated securities. And if we were comfortable with the top 10 loans, that was what was really driving the decision.").

Hartford

780. Antony Wood was running the CMBS Group in 2011 at The Hartford, an insurance company. Wood Tr. 2093:3-6 ("I'm employed at The Hartford as a portfolio manager. Q What is The Hartford? A An insurance company."); Wood Tr. 2094:15-18 ("Then I moved to The Hartford in 2009 to take over the CMBS group. And just recently I took over the -- CMBS in '09, then just recently I took over the structured products group."); Wood Tr. 2095:11-12 ("Q And your role in 2011, just to refresh? A So I was running the CMBS group in 2011.").

Hartford's Purchases

781. Hartford purchased $2,725,000 of the A2 tranche, $10,000,000 of the C tranche, and $214,818,156 of the XA tranche of MSC 2011-C1. JX 27.

782. Hartford Investment Management purchased $6,000,000 of the A2 tranche of FREMF 2011-K701. JX 27.

783. The Hartford Insurance Group purchased $1,820,000 of the A2 tranche and $103,000,000 of the XA tranche of JPMCC 2011-C3. JX 43.

784. Hartford purchased $15,000,000 of the A3FL tranche and $106,500,000 of the XA tranche of JPMCC 2011-C4. JX 43; Wood Tr. 2095:21-2096:3 ("Q I'm going to show you what's been admitted as a demonstrative exhibit under the heading Respondent's Exhibit 881, and ask you whether the purchases of conduit/fusion CMBS that are reflected on that schedule comport with your general recollection as to the purchases made by your company in that 2011 period of CMBS conduit/fusion new issuances? A Actually, not all of them."); Wood Tr. 2096:18-19 ("A I don't believe you have every one that I own on those deals."); Wood Tr. 2097:4-13 ("Q I can represent that we took this information from documents that are in the record in this case. A Yeah. But they're not necessarily always accurate. Q Okay. Understood. A Because, remember, I ran general account and third-party fund money, so I could have invested in other bonds that you wouldn't have necessarily seen as The Hartford or managed by me.").

Hartford's Due Diligence Process

785. The CMBS team at The Hartford underwrote every loan in a CF transaction; they "[l]ook who the borrower is," they project "cash flows," determine whether the loan will default at the term or at balloon, arrive at a "loss expectation for every loan," and from that estimate a "cumulative loss" to come up with an "internal rating." Wood Tr. 2098:11-2099:20 ("[W]e underwrite every loan . . . So we look at every loan. We make a determination. We project our cash flows. Look at tenants. Look who the borrower is. My guys have loaned all over the country. So they know who the bad borrowers are, they know which are the bad locations. And we come to a determination on each loan where they think we can take a loss, either during the term -- there may be some event that we think is going to create a term default or a balloon default. So that will give us a loss expectation for every loan. From that, we have a cumulative loss. And we use that cumulative loss to come up with our own internal rating.").

786. The internal rating is assigned to each tranche. Wood Tr. 2012:8-17 ("So we'll take that cumulative loss -- so that's a base-case loss. We'll also create a stress-case loss in case -- let's say we're wrong, and it's actually a higher loss. And then we'll use, similar to the rating agencies, of a lost coverage multiple to come up with an internal rating for each tranche. Q Okay. And is an internal rating expressed as a number -- A Similar to the ratings, AAA, AA, plus/minus.").

787. The CMBS team built an "internal modeling tool" called Pharos to project cash flows and make default determinations. Wood Tr. 2099:25-2100:23 ("In performing some of the work that you just described, is there any analytical tool that is used in the ordinary course of 2011? A So we spent a couple of years building out an underwriting tool called Pharos, P-H-A-R-O-S. That's our internal modeling tool. We basically are projecting out cash flows monthly for 10 to 15 years. We use PPR Campus for their basically zip code, projections of rents, vacancy. And then we're overlaying what we expect for that property. And then we have decision rules based on, you know, triggers whether we think it's going to default or extend. That we'll say is the mechanical model. Then we're overlaying the analyst's view of that particular property, that particular market, that submarket, those tenants. Then we do a primary research. Oftentimes we'll call up and ask: 'Is Tractor Supply still open?' 'No. It closed last month.' 'Thank you very much.' That's clearly a credit event.").

788. PPR Campus is a third-party service provider that gives "macro forecasts for rents and vacancies by submarket and property type." Wood Tr. 2100:24-2102:4 ("When you refer to PPR Campus, is that the third-party service provider? A Yeah. So we're using a third-party service provider just to give us basically macro forecasts for rents and vacancies by submarket and property type.").

789. Typically, the CMBS team at Hartford did not review S&P presales. Wood Tr. 2103:25-2104:1 ("Typically, we do not look at the S&P pre-sale.").

790. Concerning the S&P presales for MSC 2011-C1, JPMorgan 2011-C3, Freddie K701, Freddie K13, Hartford's files did not contain the S&P presales for two of the transactions it purchased. For the two presale reports that were in Hartford's files, Wood did not think they were reviewed. Wood Tr. 2104:2-2105:2 ("Q Okay. Do -- okay. Do you have any recollection of doing so with respect to those four securities? A So I know for certain two of the deals we don't even have the pre-sale from S&P. Q Okay. Let me ask you: Do you maintain for particular -- for deal by deal third-party documents in a transaction file? A Correct. Q Okay. Did you review that -- the transaction file before coming to Court? A Correct. Q Okay. And I think you already testified to this. Just to be clear: What did you find? A So I think at least -- of the three conduit deals, at least two of those deals we didn't even pull the S&P pre-sales. We don't have it, so we clearly couldn't have read it. And one we pulled, I don't believe we actually even read it. Q And what's your basis for saying that you didn't actually read it, or you don't believe you fully read it? A We -- having lost so much money in CMBS through the crisis, we clearly had to develop our own independent internal ratings and view of credit. We can't rely on credit rating agencies.").

John Richard

791. Richard, a CMBS investor with over 20 years of as an investment management professional, Richard Rept. ¶ 7, concluded as follows regarding the 2011 Presales:

> Concerning the Transactions-at-Issue and related 2011 Presale Reports, whether S&P used the Table 1 Constant or a weighted average of the Table 1 Constant and the actual loan constant (the "Blended Constant") in its analysis would not have been analytically significant to reasonable investors. Reasonable investors did their own due diligence to analyze the creditworthiness of the transaction (especially given the lack of transparency in S&P's methodology), and knowledge of which loan constant S&P used in its model—the Table 1 Constant or the Blended Constant—would not have been analytically significant to reasonable investors and would not have significantly altered the relevant information considered in their investment decision-making process. In addition, both loan constants would have been viewed by reasonable investors as stressed loan constants, and the use of either loan constant would result in lower DSCRs (unless the actual loan constant was equal to or greater than the Table 1 Constant, in which case S&P used the actual loan constant) and generally higher credit enhancement levels than those calculated using the actual loan constant. As a result, which of these two stressed constants was used in the S&P analysis would not have been important to the investment decision of the reasonable investor.

Richard Rept. ¶ 17(c).

792. Although his fund did not purchase CF securities in 2011, Richard Tr. 2039:21-2040:1 ("Q Okay. So, Mr. Richard, you were not yourself a new issuance CMBS investor for conduit/fusion in 2010 and 2011, were you? A Like I said, the fund that I was involved in, the Taurus Horizon Fund, did not invest in new issuance."), Richard evaluated whether to purchase NI CF transactions in 2011. Richard Tr. 2074:16-2075:15 ("Q In 2011, period, did you evaluate whether to purchase CMBS conduit/fusion securities that were new issuance securities? A Yes. With Taurus, it was a consideration that we were evaluating 2011 issuance with Taurus."); Richard Tr. 2040:11-20 ("Q Right. As an astute investor, though, you were looking at this to get a sense of where the market was, but you weren't buying any of it, right? A If the yields -- our evaluation during the time period was if the yields presented themselves in a fashion that was comparable from a risk-adjusted standpoint to prior vintage CMBS, then we had the capability to do that. As a matter of fact, we did not invest in new issuance, though.").

793. Richard could not conceive of how a CMBS could make use of S&P's weighted average BBB pool-level DSC in making an investment decision. Richard Tr. 2021:22-2022:9 ("Q With respect to the weighted average pool level DSC, what applicability, if any, does that pool level metric have to investors analysis, in your view? A That particular metric specifically -- Q Yes. A -- are you referring to? Q Yes. A I can't think of really any applicability it has in an investor's decision. Investors were more focused on loan-level due diligence as opposed to pool-level characteristics, poolwide-level characteristics.").

II. PROPOSED CONCLUSIONS OF LAW

794. On January 21, 2015, the SEC issued the OIP, alleging that Duka violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted and caused violations by S&P of the IC Statute, Exchange Act Rule 17g-2(a)(6), and Exchange Act Rule 17g-6(a)(2).[2] The alleged violations presented in the OIP allege categories of allegations as follows:

> Concerning the alleged violation of Rule 17g-6(a)(2), that Duka supported the use of a "Blended Constant," and sought approval to use the same from Parisi, because she was allegedly motivated to assist S&P in increasing the number of CF rating engagements (collectively, the "Commercial Motive Allegations").[3]
>
> Concerning the disclosures in the 2011 Presale Reports, that Duka "made false and misleading statements to investors concerning the DSCRs used and the amount of stress S&P applied in ratings or preliminary ratings," in the presales for the 2011 CF Transactions by failing to disclose that the recommended credit enhancements were

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[2] The OIP also alleged that Duka aided, abetted, and caused S&P's violation of Rule 17g-2(a)(2)(iii). This claim, however, was dismissed on July 2, 2015 by Administrative Law Judge Cameron Elliot, then presiding over this proceeding. *See* Order on Respondent's Motion for Summary Disposition, Barbara Duka, Release No. 2893 (July 2, 2015), *available at* https://www.sec.gov/alj/aljorders/2015/ap-2893.pdf.

[3] OIP at ¶¶ 5, 24-29.

"based on Blended Constants," thus misleading readers "into believing that the ratings at issue were more conservative than they actually were" (collectively, the "Presale Allegations").[4]

Concerning the CP Guidelines, that Duka (1) "unilaterally concluded that she obtained" Parisi's approval "for use of the Blended Constants," (2) failed to document Parisi's approval, and (3) concluded unreasonably that Parisi was authorized to interpret the criteria to allow for the use of "Blended Constants" (collectively, the "Criteria Process Allegations").[5]

Concerning the RAMPs, that the these documents (1) did not disclose DSCRs calculated using the "Blended Constants," (2) "did not describe the use of Blended Constants," and (3) did not describe "the fact that the models were modified to apply Blended Constants" (collectively, the "RAMP Allegations").[6]

Concerning the MQR process, namely, that Duka "used vague language" in discussions with MQR and failed to provide MQR with a model that incorporated a "Blended Constant" (the "MQR Allegations").[7]

Division's Burden

795. "The Division has the burden of showing that the allegations in the OIP are true by a preponderance of the evidence." *Miguel A. Ferrer*, Admin. Proc. Rulings Release No. 730, 2012 WL 8751437, at *4 (ALJ Nov. 2, 2012) (citing *Steadman v. SEC*, 450 U.S. 91, 101-02 (1981)). The Division must establish "each of the elements" of an allegation in order to prove it true. *SEC v. Lowry*, 396 F. Supp. 2d 225, 240 (E.D.N.Y. 2003).

Applicable Law Regarding Aiding, Abetting, and Causing Liability

796. Under the statutes authorizing the SEC to bring an action against "any person that knowingly provides substantial assistance" to a primary violator of the securities laws, 15 U.S.C. § 78t(e); 15 U.S.C. § 77o(b), the SEC must prove the following to establish an aiding and abetting violation: "(1) the existence of a securities law violation by the primary (as opposed to the aiding and abetting) party; (2) 'knowledge' of this violation on the part of the aider and abettor; and (3) 'substantial assistance' by the aider and abettor in the achievement of the primary violation." *SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009) (quoting *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985)).

797. Concerning the "substantial assistance" element of aiding and abetting liability, "[i]naction on the part of an aider and abettor is not sufficient to satisfy the substantial assistance prong of the standard unless it was designed intentionally to aid the primary fraud or it was in

4 *See* OIP at ¶¶ 4, 33, 48.

5 *See* OIP ¶ 27, 30.

6 *See* OIP ¶ 41-43.

7 See OIP ¶ 38-39.

conscious or reckless violation of a duty to act." S.E.C. v. Treadway, 430 F. Supp. 2d 293, 339 (S.D.N.Y. 2006) (internal quotation marks omitted)).

798. To establish "causing" liability under 15 U.S.C. § 77h-1 and 15 U.S.C. § 78u-3, the SEC must prove that "due to an act or omission the person knew or should have known would contribute to such violation." "For a causing violation, three similar elements [to aiding and abetting] are required: (i) a primary violation occurred; (ii) an act or omission of the respondent contributed to the violation; and (iii) respondent knew, or should have known, his conduct would contribute to the violation." *Douglas W. Powell, Charles D. Elliott, III, & Russell S. Tarbett*, Release No. 255, 2004 WL 1845545, at *18 (Aug. 17, 2004). Negligence is sufficient to establish causing liability where the primary violation is non-scienter based. *In re KPMG Peat Marwick* LLP, Exchange Act, Release No. 43862, 2001 WL 47245, at *19 (Jan. 19, 2001).

799. "[S]cienter is required to establish secondary liability for causing a primary violation that requires scienter." *See In the Matter of Brandt, Kelly & Simmons, LLC, & Kenneth G. Brandt*, Release No. 289, 2005 WL 1584978, at *7 (June 30, 2005).

Liability Under § 10(b) of the Exchange Act, Rule 10b-5, and § 17(a)

800. "To prevail on each of its claims under § 10(b) of the Exchange Act and . . . Rule 10b-5, the SEC must establish that, in connection with the purchase or sale of securities in a domestic transaction, the defendants acted with scienter, and by means of instrumentalities of interstate commerce, in employing a fraudulent device or in making a material misrepresentation or a material omission as to which they had a duty to speak." *SEC v. Constantin*, 939 F. Supp. 2d 288, 303 (S.D.N.Y. 2013).

801. "Section 17(a) of the Securities Act, requires substantially similar proof, and to show a violation of section 17(a)(1), the SEC must prove (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with scienter." *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) (citing *Aaron v. SEC*, 446 U.S. 680, 697 (1980)) (internal quotation marks omitted).

802. To prevail on a Section 17(a)(2) claim, the Division must establish: (1) "the offer or sale of securities," (2) "the existence of a material misrepresentation or omission," and (3) the "obtain[ing] [of] money or property by means of" the alleged misrepresentations or omissions. *U.S. S.E.C. v. Syron*, 934 F. Supp. 2d 609, 637 (S.D.N.Y. 2013).

803. Duka cannot be held liable as a primary violator of § 10(b) of the Exchange Act or § 17 of the Securities Act.

804. Neither Duka nor S&P "obtain[ed] money or property by means of" the statements in the 2011 Presales. 15 U.S.C. § 77q(a)(2); *see also Syron*, 934 F. Supp at 637.

805. The Division failed to prove that the 2011 Presales were misleading.

806. The Division was required but failed to prove that the failure to disclose S&P's use of a Blended Constant was material.

807. The Division was required but failed to prove that Duka acted with scienter.

Liability Under Rule 17g-6(a)(2)

808. Rule 17g-6(a)(2) under the Exchange Act prohibits "[i]ssuing, or offering or threatening to issue, a credit rating that is not determined in accordance with the [NRSRO's] established procedures and methodologies for determining credit ratings, based on whether the rated person, or an affiliate of the rated person, purchases or will purchase the credit rating or any other service or product of the nationally recognized statistical rating organization or any person associated with the nationally recognized statistical rating organization."

809. Rule 17g-6(a)(2) incorporates a scienter element because it concerns actions for a particular purpose. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 502 (1982); *In the Matter of Brandt, Kelly & Simmons, LLC, & Kenneth G. Brandt*, Release No. 289, 2005 WL 1584978, at *7 (June 30, 2005).

810. The Division failed to prove that the ratings for the 2011 CF Transactions were "not determined in accordance with" S&P's "established procedures and methodologies for determining credit ratings."

811. The Division also failed to prove that Duka used a constant lower than the Table 1 Constant to compute debt service due to an aim on her part to achieve more CF transaction ratings assignments for S&P.

Liability Under the IC Statute

812. The IC Statute provides that "[e]ach nationally recognized statistical rating organization shall establish, maintain, enforce, and document an effective internal control structure governing the implementation of and adherence to policies, procedures, and methodologies for determining credit ratings, taking into consideration such factors as the Commission may prescribe, by rule."

813. The IC Statute, as applied to Duka, is unconstitutionally vague.

814. The IC Statute, as a matter of law, can only apply to an NRSRO or arguably individuals who work in a control function.

815. In connection with the Criteria Process Allegations, the RAMP Allegations, and the MQR Allegations, the Division failed to prove that Duka violated or caused and aided and abetted S&P's alleged violations of the IC Statute.

Liability Under the Rule 17g-2(a)(6)

816. Rule 17g-2(a)(6) provides that NRSROs are required to "make and retain" "[a] record documenting the established procedures and methodologies used by the nationally recognized statistical rating organization to determine credit ratings."

817. The Division failed to prove that Duka caused and aided and abetted S&P's alleged violation of Rule 17g-2(a)(6).

This Proceeding violated Article II of the Constitution

818. Under the Appointments Clause of Article II of the U.S. Constitution, inferior officers of the United States must be appointed by a limited set of Executive Branch officials, which set includes the Commission. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010).

819. SEC ALJs are inferior officers for purposes of the Appointments Clause, yet they are not appointed by the Commission. *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1179 (10th Cir. 2016)

820. This forum is therefore unconstitutional under the Appointments Clause of Article II of the U.S. Constitution. *See Freytag v. Comm'r*, 501 U.S. 868, 878-90 (1991) (where judge serves in violation of the Appointments Clause, the error is "structural," with resulting constitutional harm regardless of how the proceeding is otherwise conducted).

821. There are no grounds under the facts of this case for issuance of a cease and desist order.

822. There are no grounds under the facts of this case for an award of sanctions.

823. There are no grounds under the facts of this case for an award of disgorgement.

824. There are no grounds under the facts of this case for an award of civil penalties.

825. The Division has failed to carry its burden of proof in this case.

Dated: February 17, 2017
New York, New York

Respectfully submitted,

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