Docket #0065 Date Filed: 7/9/2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: RESIDENTIAL CAPITAL, LLC, *et al.*, Debtors.	Case No. 12-12020 (MG) Chapter 11 Jointly Administered
RESIDENTIAL CAPITAL, LLC, *et al.*, Plaintiffs, v. ALLSTATE INS. CO. *et al*., Defendants.	Adv. Pro. No. 12-01671 (MG)

THE WESTERN & SOUTHERN DEFENDANTS'[1] EXHIBIT LIST FOR HEARING REGARDING DEBTORS' MOTION TO EXTEND THE AUTOMATIC STAY OR ENJOIN PROSECUTION OF CERTAIN LITIGATION

Exhibit No.	Description
W&S—A	Excerpted transcript of proceedings held in *The Western and Southern Life Insurance Company et al. v. Residential Funding Company, LLC et al.*, No. A1105042, (Hamilton Cnty. C.P.) on February 3, 2012, attached as Exhibit 1 to the Declaration of Steven S. Fitzgerald dated June 28, 2012 [DKT # 49].
W&S—B	Memorandum and order dated June 6, 2012 in *The Western and Southern Life Insurance Company et al. v. Residential Funding Company, LLC et al.*, No. A1105042, (Hamilton Cnty. C.P.), attached as Exhibit 2 to the Declaration of Steven S. Fitzgerald dated June 28, 2012 [DKT # 49].
W&S—C	Scheduling order in *The Western and Southern Life Insurance Company et al. v. Residential Funding Company, LLC et al.*, No. A1105042, (Hamilton Cnty. C.P.) dated December 22, 2011, attached as Exhibit 3 to the Declaration of Steven S. Fitzgerald dated June 28, 2012 [DKT # 49]

[1] References to "Western & Southern" or "W&S" are to The Western and Southern Life Insurance Company, Western-Southern Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, National Integrity Life Insurance Company, and Fort Washington Investment Advisors, Inc.

Dated: July 6, 2012
New York, New York

Respectfully submitted,

/s/ Steven S. Fitzgerald

Paul R. DeFilippo
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COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

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THE WESTERN AND SOUTHERN, INSURANCE COMPANY, et al. Plaintiffs,
vs.
RESIDENTIAL FUNDING COMPANY, LLC, et al., Defendants.

CASE NO. A1105042

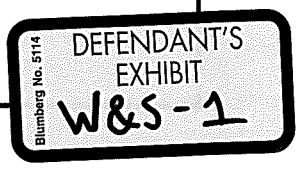
TRANSCRIPT OF PROCEEDINGS

EDITED FOR EXPEDITED PURPOSES

APPEARANCES:
ON BEHALF OF PLAINTIFFS:
Glenn Whitaker, Esq.
Erik Bond, Esq.
On behalf of Western and Southern.

ON BEHALF OF DEFENDANTS:
Jeffrey Lipps, Esq.
Michael Beekhuizen, Esq.
On behalf of RFC, Morgan, Deutsche Bank.
Laura Hinegardner, Esq.
Alan Turner, Esq.
On behalf of UBS/RBS.
Christine M. Haaker, Esq.
Caitlin Grusauskas, Esq.
On behalf of Citigroup.

BE IT REMEMBERED that upon the Motion hearing of this cause, on February 3, 2012, before the Honorable Beth A. Myers, a said judge of the said court, the following proceedings were had.



MR. LIPPS: So we'll work on that.

THE COURT: All right.

MR. LIPPS: I don't think any of us -- at the time I remember you said set two hours, and we had a pretty good idea what we were going to do with the motion.

THE COURT: Let me ask you a couple more questions before I turn to Mr. Whitaker.

If I would grant the request, either in whole or in part, would you be in a position, your clients be in a position to begin producing, in a very meaningful way, the documents within 30 days of any written opinion, and have it completed within 60 to 90 days?

Because the reason I ask that is, when the argument is it's so burdensome then I'm afraid what's going to happen, if I grant the request, is the defendants come back and say this is so burdensome we need seven months to produce it, and you will have lost -- plaintiffs will have lost another three, four or five months.

So I'd like at least a professional estimate of when you could begin producing documents and when it could be completed.

MR. LIPPS: Well, the completion side of it is a little more difficult, and the beginning production is a little easier to answer. Obviously we would want to be in a position where we are within 30 days we could respond to the written discovery and begin producing.

There are clearly -- in these cases, if you keep some of the case alive, there are clearly portions of documents that will not be contested on relevancy grounds or whether it's outside of discovery.

So there will be the ability to begin production in a meaningful way, whether it's 30 days or 45 days. I can't say for sure, but there will certainly be groups of documents out there. We would anticipate that within that 30 days, whatever is remaining of the case, probably having conversations with

respect to search terms and document custodians, in terms of who would likely be the person who would have relevant conversations, and then you've got to restore those tapes, run searches against them and produce them.

In the other cases I've been involved in, the thing that takes some time are the loan files.

THE COURT: I would think. So you're going to review them, maybe redact the personal information.

MR. LIPPS: But I'll be honest with you, I think that, at least in the investor cases I've been involved in, there's not been an appetite for the entirety when you get right down to the production of the costs associated with it, an appetite on the part of the investors to get all of the loan files, so there tends to be something less than that.

There may be some electronic data information that may tail on. I'm not going to be able to tell you when the

I'm going to -- well, let me start with some of the comments that I made earlier. It does appear that under the current scheduling order, assuming that nothing changes, the motion will be heard, the motions to dismiss will be heard in mid-April. If I'm able to give you a decision within 30 to 60 days of that, which is certainly my intention, that means you would have a decision in mid-May or mid-June at the latest, depending on the complexity of the motions.

And so, in reality, that's really a three, four, four-and-a-half month stay of the discovery, not an extended period of time if I grant the request.

I do find that the motion is well-taken with respect particularly to the loan files and the other documents. I do find that it would be burdensome and that the defendants may prevail on a motion to dismiss. They certainly might not prevail on a motion to dismiss, but I don't find that there will be any harm by

staying it briefly.

However, Mr. Lipps did represent, on the record, that it would not delay document production after a ruling on the motion to dismiss if claims remain. And, also, I am going to require that the counsel meet after this and determine whether there are some documents that would be meaningful to the plaintiff, that it would not be burdensome to produce, and that those begin -- that production begin immediately.

And if there's any problem about that, either party can request further hearing and guidance from the Court, even in an informal conference call. But I do think that there are some groups of documents that could be provided now that will enable the case to proceed, if it does proceed without burdening the defendants.

And if there is any discovery that needs to be accomplished, for purposes of the motion, that this order doesn't deal with that.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

COURT OF COMMON PLEAS
ENTER
HON. BETH A. MYERS
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, et al.	:	Case No. A1105042
Plaintiffs	:	Judge Myers
vs.	:	
RESIDENTIAL FUNDING COMPANY, LLC (F/K/A RESIDENTIAL FUNDING CORPORATION, et al.	:	***DECISION***
Defendants	:	

This case is before the Court following oral argument on several motions to dismiss Plaintiffs' Amended Complaint. These include: 1) Motion of Defendants Deutsche Bank Securities and J.P. Morgan Securities to Dismiss Plaintiffs' Amended Complaint; 2) Motion of the RFC Defendants to Dismiss Plaintiffs' Amended Complaint (filed on behalf of Residential Funding Company, GMAC Mortgage, Residential Accredit Loans, Residential Asset Mortgage Products, Residential Funding Mortgage Securities I and Residential Funding Securities, LLC)[1]; 3) Motion of the BNP Defendants (BNP Paribas Mortgage Corp. and BNP Paribas Mortgage Securities) to Dismiss Plaintiffs' Amended Complaint; 4) Defendant Citi Group Global Market's Motion to Dismiss the Amended Complaint; 5) Defendants UBS Securities and RBS Securities Motion to Dismiss Plaintiffs' Amended Complaint; and 6) Motion of the RFC Office Defendants to Dismiss Plaintiffs' Amended Complaint. For the reasons discussed below, the motions are granted in part and denied in part.

[1] Of these RFC Defendants, all but Residential Funding Securities, LLC have filed bankruptcy. Therefore, the action is stayed as to those Defendants, and the Court will address only issues as to Residential Funding Securities.

DEFENDANT'S EXHIBIT W&S-2
Blumberg No. 5114

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STANDARD

In order to dismiss a complaint pursuant to Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. When ruling on a motion to dismiss, the Court must accept all allegations of the Complaint as true and make all reasonable inferences in favor of the non-moving party. *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182, 184 (1995) (citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753, 756) (1988).

A motion to dismiss pursuant to Civ. R. 12(B)(6) must be granted when a complaint on its face indicates that a claim is barred by the applicable statute of limitations. *Mills v. Whitehouse Trucking Co.*, 40 Ohio St.2d 55 (1974); *Kotyk v. Rebovich*, 87 Ohio App.3d 116, 119 (1993). Likewise, a motion to dismiss based on the statute of limitations is erroneously granted when the complaint does not conclusively show on its face that the action is barred. *Velotta v. Leo Petronzio Lanscaping*, 69 Ohio St. 2d 376 (1982).

When a defendant asserts lack of personal jurisdiction, plaintiff has the burden to establish jurisdiction. *Jentzen v. K.M.T. Miniature Golf, Inc.*, 1994 WL 243955 (1st Dist. 1994). If no evidentiary hearing is held, Plaintiff's burden is met by a prima facie showing of jurisdiction. *Id.* The allegations in the pleadings and the evidence must be viewed in the light most favorable to plaintiff.

BACKGROUND/FACTS

This case arises out of the purchase and sale of over $200 million of mortgage backed securities ("MBS"). Plaintiffs Western & Southern Life Insurance Company, Western & Southern

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Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, National Integrity Life Insurance Company, and Fort Washington Investment Advisors (collectively "Western & Southern" or "W&S") allege that Defendants defrauded it in numerous ways including misrepresentations about owner occupancy rates, loan origination guidelines, appraisals and loan to value ratios, underwriting guidelines, borrowers' ability to pay, and transfer of title issues. The Amended Complaint sets forth in great detail W&S's claims.

Defendants participated in the securitization and sale of MBS. In general, each MBS transaction is initiated by a sponsor that acquires pools of residential mortgage loans from mortgage originators and transfers them to a Depositor. Securities (certificates) are sold to investors; the securities constitute the interest in the cash flow of the mortgages. When payments are made by the underlying borrower, these mortgage payments are passed through to the investor (here W&S).

As stated in the Amended Complaint, each securitization involves several entities that perform distinct tasks. The first step in creating a residential mortgage-backed security, such as the Certificates, is the acquisition by the Depositor of an inventory of mortgage loans from a Sponsor or Seller, which either originates the loans or acquires the loans from other mortgage originators. To create securities backed by the mortgage loans, the Depositor then forms one or more mortgage pools with the inventory of loans and creates tranches of interest in the mortgage pools with various levels of seniority. Interests in these tranches are then issued by the Depositor (who serves as the Issuer) through a trust in the form of bonds or certificates. Each tranche has a different level of purported risk and reward, and, often, a different credit rating. The most senior tranches often receive the highest investment grade rating (triple-A). Junior tranches, which usually have lower ratings, are more exposed to risk but offer higher potential returns. The most

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senior tranches of securities will be entitled to payment in full before the junior tranches. Conversely, losses on the underlying loans in the asset pool – whether due to default, delinquency, or otherwise – are allocated first to the most subordinate or junior tranche of securities, then to the tranche above that. This hierarchy in the division of cash flows is referred to as the "flow of funds" or "waterfall." The Depositor works with one or more of the nationally recognized credit-rating agencies to ensure that each tranche of the mortgage-backed securities receives the rating desired by the Depositor (and Underwriter). Once the asset pool is securitized, the certificates are issued to one or more Underwriters (typically Wall Street banks), who resell them to investors such as Western & Southern.

In this case, Residential Funding was the Sponsor for five of the ten securitizations involved in this case. GMAC was the Sponsor for two others and Residential Accredit Loans for the other three. Residential Funding Mortgage Securities I was the Depositor for two of the ten securitizations. As mentioned earlier, all four have filed for bankruptcy. Residential Funding Securities (which is not in bankruptcy) was the Underwriter for one of the securitizations.

The Underwriters were UBS Securities (2), RBS Securities (3), J.P. Morgan Securities (1), Deutsche Bank (3) and Citigroup Global Markets (2).

BNP Paribas Mortgage was the Seller for the TBW offering and BNP Paribas Mortgage Securities was the Depositor. There were 10 issuing trusts which issued the Certificates for each securitization. Some were Residential Funding Trusts and some were TBW Trusts. TBW is also now in bankruptcy.

W&S details in its 150 page complaint the factual basis for its claims. In general, Plaintiff claims that Defendants violated Ohio Securities Law and common law in its offering materials for the sale of the Certificates. In particular, W&S claims that: Defendants abandoned their disclosed

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underwriting standards to facilitate the sale of low quality loans to investors; Defendants made misrepresentations concerning transfer of titles to issuing trusts; Defendants manipulated the ratings process; Defendants improperly manipulated the appraisal process and misrepresented loans to value (LTV) ratios; and Defendants misrepresented owner occupancy information.

DISCUSSION

A. Statute of Limitations

As an initial matter, all Defendants argue that Plaintiffs' claims are barred by the statute of limitations. They ask the Court to take judicial notice of several things outside of the Amended Complaint.

1. Applicable Law

The claims in this case are governed by R.C. 1707.43(B) which provides:

> (B) No action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for sale made in violation of Chapter 1707, of the Revised Code, shall be brought more than two years after the plaintiff knew, or had reasons to know, of the facts by reason of which the actions of the person or director were unlawful, or more than five years from the date of such sale or contract for sale, whichever is the shorter period.

A similar statute of limitations exists for actions against corporate directors. O.R.C. § 1707.41(D). This statute applies not only to Plaintiffs' securities laws claims, but also to their common law claims as they arise in connection with the sale of securities. *Goldberg v. Cohen*, 2002 Ohio 3012 (7th Dist. 2002); *Wyser-Pratte Management Co. v. Telxon Corp.* 413 F.3d 553 (6th Cir. 2005).

To determine whether Plaintiff has constructive notice under § 1707.43(B) the *Wyser-Pratte* Court first determined that Ohio courts would apply the "inquiry notice" standard

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applicable under federal securities law. The Court went on to examine this "inquiry notice" and stated:

> After the district court's decision in this case, we clarified the standard for "inquiry notice" in *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495 (6th Cir. 2003), cert. denied, 540 U.S. 1183, 158 L. Ed. 2d 87 (2004) . Joining at least seven other circuits, this court held that "inquiry notice" is sufficient to trigger the limitations period for securities fraud claims brought under § 10(b). The court also rejected the view that the limitations period should begin to run when a plaintiff learns facts that would cause a reasonable investor to investigate the "possibility of fraud." Instead, adopting the majority view, the court held that "knowledge of suspicious facts- -'storm warnings,' they are frequently called- -merely triggers a duty to investigate, and that the limitation period begins to run only when a reasonably diligent investigation would have discovered the fraud." 336 F.3d at 501. In other words, the limitations period "begins to run when a plaintiff should have discovered, by exercising reasonable diligence, the facts underlying the alleged fraud." *Id.* This, the court found, reflected an "appropriate balance" between the competing interests in requiring plaintiffs to bring suit promptly while "not driving plaintiffs to bring suit . . .before they are able, in the exercise of reasonable diligence, to discover the facts necessary to support their claims."' *Id.* (citation omitted).

See also, Loyd v. Huntington National Bank, 2009 U.S. Dist. LEXIS 51858 (N.D. Ohio 2009).

Ohio courts have since adopted the standard set forth in *Wyser-Pratte. Cain v. Mid-Ohio Securities*, 2007 Ohio 3711 (9th Dist. 2007).

The Supreme Court of the United States recently examined inquiry notice in *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010) and held:

> In determining the time at which "discovery" occurs, terms such as "inquiry notice" and "storm warnings" may be useful insofar as they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating. But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation," including scienter- -irrespective of whether the actual plaintiff undertook a reasonably diligent investigation.

2. <u>Judicial Notice</u>

Defendants have asked this Court to take judicial notice of several things in determining whether the statute of limitations bars Plaintiffs' claims. For example, Defendants cite W&S

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Congressional testimony, news reports and lawsuits, all of which they claim support their argument that Plaintiffs had constructive notice of the facts giving rise to their claims.

The Court in *Goldberg, supra*, recognized that generally, "[a]ffirmative defenses such as statute of limitations are generally not properly raised in a Civ. R. 12(B)(6) motion because they usually require reference to material outside the complaint." *See also, Cramer v. Archdiocese of Cincinnati*, 158 Ohio App. 3d 110 (1st Dist. 2004) (because statute of limitations issues generally involve mixed questions of law and fact, Rule 12 (B)(6) usually not appropriate vehicle to challenge).

Rule 201 of the Ohio Rules of Evidence provides the type of facts a Court can take judicial notice of:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Ohio courts have taken notice of such things as a trial court's docket. *Jagow v. Weinstein*, 2011 Ohio 2683 (2nd Dist. 2011). The Supreme Court of Ohio refused to take judicial notice of facts because they were subject to dispute. *Squire v. Greer*, 117 Ohio St. 3d 506 (2008). The Court has found no Ohio case taking judicial notice of the numerous materials requested here.

Federal courts in addressing this issue have reached differing conclusions about what matters outside the Complaint a Court may consider. For example, the Court in *Loyd, supra*, stated:

> On a motion brought under *Fed. R. Civ. P. 12(B)(6)*, this Court's inquiry is limited to the content of the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint may also be taken into account.

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A New York District Court apparently went further:

> It is proper to dismiss a complaint on the basis of inquiry notice when the complaint and other "uncontroverted evidence clearly" support such a findings. *Id.* In this analysis courts may take judicial notice of financial data, news coverage, and prior lawsuits without converting a motion to dismiss into a motion for summary judgment. Courts may note the existence of the information without analyzing whether the information is true. *Id.* Even a single news article may give rise to inquiry notice.

In Re Morgan Stanley Mortgage Pass-Through Certificates Litigation, 2010 U.S. Dist. LEXIS 84146 (S.D. N.Y. 2010).

The Court in *Hayes v. Mid-Ohio Securities Corp.*, 2006 U.S. Dist. LEXIS 53706 (N.D. Ohio 2006) permitted consideration of public records or other materials appropriate for the taking of judicial notice, so long as the Court took judicial notice only of facts not subject to reasonable dispute.

In this case, the Court will not take judicial notice of the majority of extraneous information relied upon by Defendants. Instead, the Court will examine the statute of limitations based upon the Complaint and properly identified public records.

While the Court does not decide the issue, it notes that the Court in *In Re Wells Fargo Mortgage Backed Certificates Litigation*, 712 F.Supp.2d 958 (N.D. Cal. 2010) took judicial notice of newspaper articles and public statements for the purpose of determining inquiry notice, finding they indicated what was in the public realm at the time, but not considering them for their truth. Even so, the Court concluded that the question of whether the press coverage was sufficient to put a reasonable investor on notice was a factual question not appropriate for resolution on a motion to dismiss. *See also, Public Employees' Retirement System of Mississippi v. Goldman Sachs Group*, 2011 U.S. Dist. LEXIS 3267 (S.D.N.Y. 2011).

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3. Application of § 1707.43

Plaintiffs filed their Complaint on June 29, 2011. Therefore, their claims are timely unless they should have known of their claims before June 29, 2009. As for Citigroup only, it was not added until the Amended Complaint. Therefore, the date as to it is September 9, 2009. As stated earlier, much of what Defendants rely upon is outside the Amended Complaint, such as W&S Congressional testimony on March 25, 2009, a press release from March of 2008, news reports and other lawsuits (the Court agrees that at least some of these may be considered by judicial notice). The Court will not consider most of the extrinsic information. These issues can be re-raised on motion for summary judgment or at trial.

Defendants also argue that looking no further than Plaintiffs' Complaint, the claims are time barred. For example, Defendants cite the Amended Complaint to show Plaintiffs now have knowledge of rising delinquency rates on the loans backing the certificates, credit agency downgrades of the Certificates, and tax and property records showing the loan statistics in the offerings were misleading. Defendants claim all of this was publicly available to W&S more than two years before it filed suit, and that W&S therefore had construction notice of the problems and of its claims that the underwriters abandoned their underwriting standards.

The Court recognizes that Courts in other jurisdictions have found similar claims time barred. For example, a Court in California recently held that "a reasonable purchaser of Countrywide RMBS, exercising reasonable diligence, should have discovered facts sufficient to state every element of its claim at least prior to February 14, 2009." *Allstate Insurance Co. v. Countrywide Financial Corp.* 2011 WL5067128 (C.D. Cal. 2011).

Similarly, while the Court in *Western and Southern Life Ins. Co. v. Countrywide Financial Corp.*, Case No. 2:11-CV-07166MRP (C.D. Cal. March 9, 2012) denied Defendant's

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motion to dismiss regarding claims based on title transfer allegations, it granted the motion as to other claims stating:

> Every previous Countrywide RMBS complaint that the Court has considered alleged a scheme to underwrite and securitize as many loans as possible and to sell those loans into the RMBS market by misrepresenting the associated risks. In such a scheme, the plaintiff is harmed by the purchase of riskier-than-anticipated RMBS. The Court has held that a reasonable plaintiff exercising reasonable diligence should have been aware of every element of a Section 10(b) claim based on such a scheme, including damages and scienter, by December 27, 2008. Western and Southern alleges such a scheme, and the Court dismisses the allegations as time-barred for the same reasons set out in *Stichting* and *Allstater*.

On the other hand, the Court in *Massachusetts Mutual Life Ins. Co. v. Residential Funding Co.*, 2012 U.S. Dist. LEXIS 17864 (D. Mass. 2012) stated a few months ago:

> In support of this argument, Defendants point to newspaper articles, industry publications, and government reports that were publicly available before early 2007. Defendants claim these documents put Plaintiff on notice of the mortgage loan origination problems alleged in the complaints, including the failure or originators to verify borrower information, inflated appraisals and understated LTV ratios, and occupancy fraud.
>
> This information, however, was insufficient to establish inquiry notice because it did not directly relate to the misrepresentations and omissions alleged in the complaints. The articles and other publications provided only generalized reports on the industry, did not discuss Defendants' practices specifically, and did not alert Plaintiff to potential fraud in any specific securitization it had purchased.

The Court finds that the facts as alleged in the Amended Complaint do not establish that Plaintiffs had constructive or actual knowledge prior to June 29, 2009. The Court cannot say as a matter of law that there were "storm warnings" sufficient to put Plaintiffs on notice or that an inquiry would have led a diligent investor to discovery. The Court therefore denies Defendants' motions to dismiss on the basis of statute of limitations.

4. Statute of Repose

Having determined that the motions to dismiss should be denied as to the two year statute of limitations, that leaves the five year statute of repose under § 1707.43. Some of the sales

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occurred more than 5 years before this case was brought. As to those, Defendants claim they are barred by the 5 year statute of repose.

A statute of repose differs from a statute of limitations; a statute of repose operates as an absolute bar to claims outside of a certain period.

The Supreme Court of Ohio has made clear that not all statutes of repose are unconstitutional. *Groch v. General Motors Corp.*, 117 Ohio St. 3d 192 (2008). Courts have applied the five year statute in § 1707.43. *See, e.g., In Re National City Financial Enterprises*, 541 F. Supp. 2d 986 (S.D. Ohio 2007).

The United States Court of Appeals for the Sixth Circuit very recently held § 1707.43 to be constitutional. *Fencorp v. Ohio Kentucky Oil Corporation*, 2012 U.S. App. LEXIS 6693 (6th Cir. 2012). The Court analyzed Ohio case law extensively:

> Fencorps' second contention on cross-appeal is that the district court erred in applying the Ohio securities statue of repose because that statute is contrary to the Ohio state constitution's right to remedy provision.
>
> Article 1, section 16 of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done to him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const. art. I, § 16. Fencorp asserts that this "right to remedy" provision has been used to strike down various statutes of repose that take away the remedy the law would have otherwise permitted. Ohio courts, for example, struck down the medical malpractice statute of repose. *Hardy v. VerMeulen*, 512 N.E. 2d 626, 629 (Ohio 1987). *But see Groch v. Gen. Motros Corp.*, 883 N.E. 2d 377, 398 (Ohio 2008) (upholding the products liability statute of repose). Fencorp now asks us to employ the right to remedy provision and hold that the Ohio securities statue of repose is contrary to the Ohio constitution.
>
> We begin our analysis by noting that Ohio law requires a high degree of certainty before a law is declared to be contrary to the state constitution. "All [Ohio] statutes have a strong presumption of constitutionality." *Arbino v. Johnson & Johnson*, 88 N.E. 2d 420, 429 (Ohio 2007); *see also Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1366 (6th Cir. 1984) ("[A]cts of the General Assembly are presumed valid under Ohio law, and in cases of doubt should be held constitutional). For an Ohio court to declare the

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> legislature's action unconstitutional, "it must appear beyond a reasonable doubt that the legislative and constitutional provisions are clearly incompatible." *Id.* (quoting *State ex rel. Dickman v. Defenbacher*, 128 N.E. 2d 59, 60 (Ohio 1955)). Furthermore, "the constitutionality of any statute of repose should turn on the particular features of the statute at issue, and. . . such a statute should be evaluated narrowly within its specific context." *Groch*, 883 N.E. 2d at 401. A party bringing a facial challenge "must demonstrate that there is no set of circumstances in which the statute would be valid." *Id.*
>
> Recently, the Ohio Supreme Court in *Groch* considered *Brennaman v. R.M.I. Co.*, 639 N.E. 2d 425 (Ohio 1994), a case Fencorp cites and upon which other cases Fencorp cites rely. The Ohio Supreme Court criticized the logic of *Brennaman* decision and stated: "To the extent that *Brennaman* stands for the proposition that all statutes of repose are repugnant to Section 16, Article 1 [of the Ohio Constitution], we expressly reject that conclusion." *Groch*, 883 N.E. 2d at 403. The Court "confine[d] *Brennaman* to its particular holding" regarding that statute of repose for improvements to real property. *Id.* Instead the court quoted with approval language from an earlier Ohio Supreme Court case: "the right to remedy provision...applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available." *Id.* (quoting *Sedar v. Knowlton Const. Co.*, 551 N.E. 2d 938, 947 (Ohio 1990)).
>
> Reviewing the statute "narrowly within its specific context", we emphasize that the securities claims were created by statute and gave plaintiff substantial protections and privileges not available under common law. Where the legislature creates a new, statutory right, it is reasonable that the legislature also has the ability to shape the contours and limits of that right. To hold otherwise would mean that any statutorily created right in Ohio, once created, could not be limited by a statute of repose. This policy concern cautions us from declaring the statute unconstitutional.

The Court noted that no Ohio court had found the statute unconstitutional and it upheld the five year statute of repose. Thus, the Court finds that all claims not brought within the 5 year statute must be dismissed. These are the 13 transactions with purchase dates of December 14, 2005 and March 30, 2006.

B. <u>Failure to State a Claim – Ohio Securities Law</u>

Defendants argue that Plaintiffs have failed to state a claim for which relief can be granted. Under Ohio Securities law ("OSA") O.R.C. § 1707.41 and § 1707.44 provide

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prohibitions for anyone engaging in the sale of securities in Ohio. Specifically, § 1707.41 provides:

> (A) In addition to the other liabilities imposed by law, any person that, by a written or printed circular, prospectus, or advertisement, offers any security for sale, or receives the profits accruing from such sale, is liable, to any person that purchased the security relying on the circular, prospectus, or advertisement, for the loss or damage sustained by the relying person by reason of the falsity of any material statement contained therein or for the omission of material facts, unless the offeror or person that receives the profits establishes that the offeror or person had no knowledge of the publication prior to the transaction complained of, or had just and reasonable grounds to believe the statement to be true or the omitted facts to be not material.
>
> (B)(1) Whenever a corporation is liable as described in division (A) of this section, each director of the corporation is likewise liable unless the director shows that the director had no knowledge of the publication complained of, or had just and reasonable grounds to believe the statement therein to be true or the omission of facts to be not material.

Plaintiffs have also brought claims under R.C. § 1707.44 which provides in relevant part:

> (B) No person shall knowingly make or cause to be made any false representations concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for any of the following purposes:
>
> * * * *
>
> (4) Selling any securities in this state;
>
> * * * *
>
> (G) No person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited.
>
> * * * *
>
> (J) No person, with purpose to deceive, shall make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts affecting the value of securities, or as to the

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financial condition of any issuer of securities, when the person knows that the statement or advertisement is false in any material respect.

Plaintiffs' claims fall into several categories: 1) misrepresentations concerning underwriting guidelines; 2) misrepresentations concerning transfers of title; 3) misrepresentations concerning the appraisal process, LTV and CLTV; 4) misrepresentations concerning ratings; and 5) misrepresentations concerning owner occupancy.

1. Underwriting guidelines

Plaintiffs allege in ¶s 69-113 that Defendants abandoned their underwriting standards to facilitate the sale of low quality loans to investors. Plaintiffs set forth specific facts in support.

Defendants argue that there is no actionable misrepresentation because the offering materials directly contradict Plaintiffs allegations and expressly disclose that not all underwriting standards may be followed and that loans may be considered to comply even if all criteria is not met. Defendants point out that similar allegations were dismissed for failure to state a claim. *Footbridge Limited Trust v. Countrywide Homes*, 2010 U.S. Dist. LEXIS 102134 (S.D.N.Y. 2010). Plaintiffs respond by saying that virtually every Court that has examined similar allegations (15 or more) has concluded that similar allegations are sufficient to state a claim. See cases cited by Plaintiffs on p. 11 of their brief. They point out that even *Footbridge* is in the minority in its own district.

Taking the allegations of the Amended Complaint as true, and considering the disclosures made, the Court cannot say Plaintiffs can prove no facts entitling them to relief. *See Plumber's Union Local No. 12 v. Nomura Asset Acceptance Corp.*, 632 F. 3d 762 (1st Cir. 2011) (allegation of wholesale abandonment of underwriting guidelines is sufficient to overcome motion to dismiss). The disclosures do not as a matter of law determine that Defendants are not liable.

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Plaintiffs allege that even though some disclosure may have been made, Defendants failed to disclose the extent to which guidelines would be abandoned.

2. Transfers of Title

Plaintiffs allege that the offering materials led investors to believe that the Certificates were "backed" by mortgage loans that could be foreclosed upon in the event of borrower default. In ¶s 126-144 of the Amended Complaint they detail how the statements were false and misleading. They claim Defendants failed to properly execute or deliver paperwork in order to foreclose on the loans. They claim a cover-up by "robo-signers." In short, they allege the mortgages cannot be foreclosed upon as a result of Defendants failures and misrepresentations.

Defendants argue that the alleged misrepresentations are not actionable because they are forward looking. The Court disagrees. The Certificates were marketed as mortgage backed and the representations referred to present circumstances. When construed in favor of Plaintiffs, the allegations support an inference that the statements were false when made. Plaintiffs have stated a claim based on transfer of title issues.

The Court finds Defendants' arguments regarding MERS equally unavailing at the motion to dismiss stage.

3. Appraisals, LTV and CLTV

Defendants argue that Plaintiffs state only conclusory allegations and not specific facts. Defendants also argue that LTV ratios and appraisals are non-actionable statements of opinions. *See, e.g., Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs.* 2001 U.S. Dist. LEXIS 109912 (S.D. Ohio 2011) (statements of opinion actionable only if speaker does not believe the opinion when made).

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In this case, taking the allegations of the Amended Complaint as true, the Court cannot say that Plaintiffs can establish no facts entitling them to relief. Plaintiffs allege fraud in the appraisal process and that Defendants falsely represented that LTV and CLTV ratios were based on industry standard appraisals when they were not. *In Re Wells Fargo Mortgage Backed Certificate Litigation*, 712 F.Supp. 958 (N.D. Cal. 2010) (allegations regarding appraisal practices state a claim). *Compare, Plumber's Union, supra.* The Court finds the allegations are not merely "bald conclusions" as claimed by Defendants and that they are sufficient to state a claim. Moreover, the Court cannot say at this stage that they are non-actionable opinions.

4. Ratings

Defendants allege the credit ratings are non-actionable opinions. *See, e.g. Ohio Police and Fire Pension Fund v. Standard & Poor's Financial Services*, 813 F.Supp.2d 871 (S.D. Ohio 2011) (credit ratings of mortgage backed securities were predictive opinions). Plaintiffs allege that Defendants knowingly provided false information to the credit rating agencies. Thus, they argue, Defendants essentially pre-determined the ratings and therefore this is actionable. Taking the allegations of the Complaint as true, Plaintiffs may be able to establish a claim. *See In Re Wells Fargo Mortgage Back Certificate Litigation, supra.*

5. Owner Occupancy

Defendants argue that the offering materials clearly disclosed that owner-occupancy data was based on the representations of borrowers or originators, and therefore contained no misrepresentations. Plaintiffs argue that the disclosures were false and that Defendants had an obligation to perform due diligence. Plaintiffs point out that a similar disclaimer defense was recently rejected in *Allstate v. GMAC*, Case No. 27-CV-11-3480 (D. Minn. 2011). The Court finds Plaintiffs have stated a claim as to owner-occupancy.

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C. Materiality

Defendants argue that Plaintiffs have failed to plead that the misrepresented or omitted matters were material. The Court disagrees and finds that Plaintiffs have sufficiently plead this element.

D. Reliance

Defendants also argue that Plaintiffs have failed to properly plead their reliance on any misrepresentations or omissions. Again, the Court disagrees and finds that Plaintiffs have properly pled this element.

E. Failure to State Fraud With Particularity

Defendants also argue that the Amended Complaint fails to state the fraud and misrepresentation claims with particularity. The Court disagrees. A review of the Amended Complaint establishes that Plaintiffs have met the requirement of Rule 9(B).

F. Civil Conspiracy

Civil conspiracy is "a malicious combination of two or more persons to injure another person or property, in a way not competent for one alone, resulting in actual damages." *Avery v. Rossford, Ohio Transportation Improvement District* (2001 6th Dist.), 145 Ohio App.3d 155. A predicate unlawful act is required. *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464.

The Court finds that Plaintiffs have properly plead an unlawful predicate act as well as the other elements of a civil conspiracy claim.

G. Negligent Misrepresentation

Under Ohio law, to be liable for a claim of negligent misrepresentation, the defendant must (1) supply false information; (2) for the guidance of other in their business transactions; (3) causing pecuniary loss to the plaintiff; (4) while the plaintiff justifiably relied upon the

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information; (5) and while the defendant failed to exercise reasonable care or competence in obtaining or communicating the information. *Delman v. Cleveland Heights*, 41 Ohio St. 3d 1 (1989). As to the second element, Plaintiff must be part of a limited class whose reliance can be specifically forseen. *Haddon View Investment Co. v. Coopers & Lybrand*, 70 Ohio St. 2d 154 (1982). "Liability may be imposed for negligent misrepresentation only if the disseminator of the information intends to supply it to a specific person or to a limited group of people." *Amann v. Clear Channel Communications*, 165 Ohio App. 3d 291 (1st Dist. 2006).

Whether Plaintiffs can ultimately establish this element is not the question. The Court finds that Plaintiffs have adequately plead a claim for negligent misrepresentation, including their relationship to Defendants.

H. National Integrity Claims

Some Defendants argue that Plaintiff National Integrity's claims must be dismissed because its purchases occurred in New York, and since the Amended Complaint alleges it is a New York insurer with its principal place of business in New York. Plaintiffs claim the purchases occurred in Ohio, relying on the Affidavit of a Western & Southern employee. The Court will consider the affidavit as it relates to jurisdiction. The Court finds that National Integrity may maintain this action.

I. Personal Jurisdiction Over RFC Officer and Director Defendants

Plaintiffs allege that the RFC Officers are liable to Plaintiffs because they signed the Registration Statements. Defendants argue that simply signing these Registration Statements is not sufficient to grant this Court personal jurisdiction over these Defendants.

To determine whether personal jurisdiction exists, the Court must first determine whether jurisdiction is proper under Ohio's long arm statute, R.C. 2307.382 and the related Civil Rule,

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Civ. R. 4.3. If so, the Court must determine whether granting jurisdiction comports with the Due Process Clause of the U.S. Constitution. *Greene v. Whiteside*, 181 Ohio App.3d 253 (1st Dist. 2009).

1. Long Arm Statute

R.C. 2307.382 and Civ. R. 4.3 confer personal jurisdiction over a defendant when the cause of action arises out of:

> (1) Transacting any business in this state;
>
> * * * *
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state.
>
> * * * *

a. Transacting Business

Ohio courts construe "transacting business" broadly. *Greene, supra.* "Transact" is broader than "contract" and includes "to carry on business" and "to have dealings" *Id.*

In this case the Officer Defendants signed the registration statements. The Amended Complaint alleges that the Officers therefore qualify as "sellers" under the Ohio Securities Law and are therefore liable for any misstatements therein. There is no separate allegation that they independently acted outside their signing of the registration statements nor is there any allegation that they controlled the companies.

Moreover, these are not statements that were filed with the State of Ohio. Rather, they were statements that were filed with the SEC. Thus, the filings and sales were not specifically directed to Ohio residents, but rather to all potential investors nationwide.

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Plaintiffs rely on *Goldstein v. Christiansen*, 70 Ohio St. 3d 232 (1994). In that case, the court found that a Florida accounting firm "transacted business" in Ohio when it provided services to Ohio limited partnerships, contracted with limited partners where many of the general partners lived in Ohio, and provided financial information to Ohio investors. Such is not the case here.

The First District Court of Appeals in *Interior Services v. Iverson*, 2003-Ohio-1187 (1st Dist. 2003) stressed that a Court must look to the actions taken by an individual Defendant only as an individual, not corporate actions. The Court found the contacts insufficient to be "transacting business".

The Court finds that the Officer Defendants did not "transact business" in Ohio by signing the registration statements which allegedly contained false information.

b. Tortious Conduct

The Court finds, however, that jurisdiction may be proper under 2307.382 (A)(6). *Schneider v. Hardesty*, 669 F. 3d 693 (6th Cir, 2012) (fraudulent communications or misrepresentations directed at Ohio residents satisfy § 2307.382 (A)(6)). That, however, does not end the inquiry.

2. Due Process

The next question is whether exercise of jurisdiction would violate due process. As stated by the Court in *Greene, supra*:

> The Due Process Clause protects an individual's liberty interest in not being subject to binding judgment of a forum with which that individual has no meaningful contacts, ties, or relations. A state may constitutionally assert personal jurisdiction over a nonresident defendant only if the defendant has minimum contact with the state so that maintaining the suit does not offend "traditional notions of fair play and substantial justice."

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> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. The defendant must purposely avail itself of the privilege of acting in the forum state, thus invoking the benefits and protections of its laws. The defendant's actions in the forum state must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable. (*footnotes and citations omitted*).
>
> The First District Court of Appeals in *Jentzen,* 1994 WL 243955 (1st Dist. 1994) stated:
>
> Where, as here, personal jurisdiction over a nonresident defendant is based on a single act or transaction, the court must use a three-part analysis to determine whether it may constitutionally exercise such jurisdiction. *Cincinnati Art Galleries, supra* at 696, 591 N.E.2d at 1338; *Reliance Electric Co., supra*, at 920. As a first step, the court must determine whether the nonresident defendant purposefully availed itself of the privilege of acting the forum state or causing a consequence there. Next, the court must determine whether the claim arises from the defendant's activities in the forum state. Third, the trial court must determine whether the acts of the nonresident defendant or the consequences caused have a substantial connection with the forum state such that the exercise of jurisdiction over it is reasonable. *Id.* 'Where the first two prongs of the test are met an inference arises that the third element, fairness, is also present.' *Reliance Electric Co., supra*, at 920.

Id. at *3.

In this case, the Court finds the Officer Defendants did not purposely avail themselves of the privilege of conducting activities in Ohio. As recently stated in *Western & Southern Life v. Countrywide Financial Corp., supra:*

> Western and Southern alleges that Adler, Kripalani, Sandefur, Sieracki, and Spector are liable because they either signed the Registration Statements or were control persons. Nothing in the Western and Southern Amended Complaint indicates that any of these defendants directed their own actions towards Ohio or expressly aimed Countrywide's actions towards Ohio. . . The Certificates at issue in this case were registered with the SEC and disseminated nationally (and internationally). Nothing in the Western and Southern Amended Complaint indicates that the certificates were particularly aimed at Ohio or that any of these defendants helped expressly aim the Certificates at Ohio. . .
>
> Western and Southern cite several cases for the proposition that signing a registration statement constitutes purposeful direction. *In re LDK Solar Secs. Litig.*, 2008 WL 4369987 at *6 (N.D. Cal. Sept. 24, 2008); *In re Alstom SE Sec. Litig.*, 406 F. Supp. 2d 346, 398 (S.D.N.Y. 2005). These cases are fundamentally inapposite; they considered only whether a foreign defendant had purposely

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> directed its actions to the United States as a whole for the purposed of *federal* securities claims. . . The question in this case is not whether the defendants directed their activities towards the United States security markets, but rather Ohio specifically.

The Court dismissed without prejudice W&S' claims against the individuals.

Moreover, unlike the claims in *Massachusetts Mutual Life Insurance, supra*, there is no allegation that the individual Defendants were control persons who directed the sale of securities in Ohio.

This case is also distinguishable from *In Re Blue Flame Energy Corp.*, 171 Ohio App. 3d 514 (10th Dist. 2006). In that case, the individual signed a Form D and filed it in Ohio. The Court found that this gave the Division jurisdiction over him as he did purposely avail himself of Ohio.

The Court finds jurisdiction over the individual Defendants would not meet the requirements of due process.

B. BNP Defendants' Arguments Under New York Law

BNP Defendants argue that claims against them should be dismissed because the Certificates involved are governed by New York law, which precludes claims under Ohio's Securities laws. Plaintiffs seem to agree that if New York law applies, the claims must be dismissed.

The Court finds that Ohio law applies. Plaintiffs bring their claims under Ohio Securities laws. These laws apply to any purchase or sale of securities in Ohio. Plaintiffs have alleged the Defendants sold them securities in Ohio.

The Certificates provide for application of New York law. They state: "This Certificate shall be governed by and construed in accordance with the laws of the State of New York." Plaintiffs, however, are not claiming Defendants breached the Certificates. Nor are they

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alleging a dispute about their terms. Rather, they are claiming Defendants sold securities in violation of Ohio's statutes.

CONCLUSION

The Court denies the motions to dismiss except as follows: 1) the motions to dismiss the claims based on the five year statute of repose are granted (transaction dates of December 14, 2005 and March 30, 3006); and 2) the motion to dismiss of the RFC Officers for lack of personal jurisdiction is granted (without prejudice).

Judge Beth A. Myers

ENTER

JUN 06 2012

BETH A. MYERS, JUDGE

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, et al.,	:	Case No. A1105042
Plaintiffs,	:	Judge Myers
v.	:	
RESIDENTIAL FUNDING COMPANY LLC, et al.,	:	
Defendants.	:	

ENTERED
DEC 22 2011

AGREED ORDER REGARDING CASE MANAGEMENT SCHEDULE

By agreement of the undersigned parties, and the Court being duly advised, the case management schedule is hereby set as follows:

1. TRIAL:	January 6, 2014
2. PRETRIAL CONFERENCE:	December 2, 2013
Pretrial statements:	November 18, 2013
Jury instructions:	November 18, 2013
3. ALTERNATIVE DISPUTE RESOLUTION:	None at this point
4. DISCOVERY:	
All discovery to be completed by	April 4, 2013
5. EXPERTS:	
a. Plaintiffs' reports:	January 24, 2013
b. Defendants' reports:	March 7, 2013
6. DISPOSITIVE MOTIONS:	
c. Motions due:	April 25, 2013
d. Oppositions due:	June 6, 2013
e. Replies due:	June 27, 2013

IT IS SO ORDERED

Date ENTER
DEC 22 2011
BETH A. MYERS, JUDGE

Judge Myers

DEFENDANT'S EXHIBIT W&S-3
Blumberg No. 5114

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