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Hearing Date and Time: June 12, 2013 at 10:00 a.m.
Objection Deadline: May 6, 2013 at 4:00 p.m.

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN RESIDENTIAL EQUITIES, LLC, in its own individual capacity and in Its capacity as Trustee under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005,	:	Adv. Proc. 12-01934 (MG)
Plaintiff,	:	
v.	:	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, And BALBOA INSURANCE COMPANY	:	
Defendants.	:	
In re	:	
RESIDENTIAL CAPITAL, LLC, *et al.*,	:	Case No. 12-12020 (MG)
	:	Chapter 11
Debtors.	:	Jointly Administered

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NOTICE OF DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING

PLEASE TAKE NOTICE that on April 26, 2013, Defendant GMAC Mortgage, LLC ("GMACM"), a debtor and debtor in possession in the above-captioned chapter 11 cases, filed the *Debtor's Motion for Dismissal of Adversary Proceeding* (the "**Motion**") with the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"). A hearing to consider the Motion is scheduled for **June 12, 2013 at 10:00 a.m. (prevailing Eastern Time)** before the Honorable Martin Glenn, United States Bankruptcy Judge, in Courtroom 501 at the Bankruptcy Court, One Bowling Green, New York, New York 10004.

PLEASE TAKE FURTHER NOTICE that any objection to the Motion must be in writing, conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York, and the Notice, Case Management, and Administrative Procedures approved by the Bankruptcy Court [Docket No. 141], be filed electronically by registered users of the Bankruptcy Court's electronic case filing system, and be served, so as to be received no later than **May 6, 2013 at 4:00 p.m. (prevailing Eastern Time)**, upon (a) counsel for the Debtors, Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, NY 10104 (Attn: Norman S. Rosenbaum, Stefan W. Engelhardt and Paul Galante) and Bradley Arant Boult Cummings, LLP. 1819 5th Avenue North, Birmingham, Alabama 35209 (Attn: Hope T. Cannon); (b) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, NY 10004 (Attn: Tracy Hope Davis, Linda A. Riffkin, and Brian S. Masumoto); (c) the Office of the United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001 (Attn: US Attorney General, Eric H. Holder, Jr.); (d) Office of the New York State Attorney General, The Capitol, Albany, NY 12224-0341 (Attn: Nancy Lord, Esq. and Enid N. Stuart, Esq.); (e) Office

of the U.S. Attorney for the Southern District of New York, One St. Andrews Plaza, New York, NY 10007 (Attn: Joseph N. Cordaro, Esq.); (f) counsel for Ally Financial Inc., Kirkland & Ellis LLP, 153 East 53rd Street, New York, NY 10022 (Attn: Richard M. Cieri); (g) counsel to Barclays Bank PLC, as administrative agent for the DIP lenders, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY 10036 (Attn: Ken Ziman & Jonathan H. Hofer); (h) counsel for the committee of unsecured creditors, Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, NY 10036 (Attn: Kenneth Eckstein & Greg Horowitz); (i) counsel for Ocwen Loan Servicing, LLC, Clifford Chance US LLP, 31 West 52nd Street, New York, NY 10019 (Attn: Jennifer C. DeMarco and Adam Lesman); (j) counsel for Berkshire Hathaway Inc., Munger, Tolles & Olson LLP, 355 South Grand Avenue, Los Angeles, CA 90071 (Attention: Thomas Walper and Seth Goldman); (k) Internal Revenue Service, P.O. Box 7346, Philadelphia, PA 19101-7346 (if by overnight mail, to 2970 Market Street, Mail Stop 5-Q30.133, Philadelphia, PA 19104-5016); and (l) Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, Suite 400, New York, NY 10281-1022 (Attn: George S. Canellos, Regional Director).

PLEASE TAKE FURTHER NOTICE that if an objection to the Motion is not timely filed and served, the Bankruptcy Court may enter an order granting the relief requested in the Motion without further notice or opportunity to be heard afforded to any party.

Dated: April 26, 2013
New York, New York

/s/ Norman S. Rosenbaum

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UNITED STATES BANKRUPTCY COURT
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Plaintiff,	:	
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GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, And BALBOA INSURANCE COMPANY	:	
Defendants.	:	
In re	:	
RESIDENTIAL CAPITAL, LLC, *et al.*,	:	Case No. 12-12020 (MG)
	:	Chapter 11
Debtors.	:	Jointly Administered

DEBTOR'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING

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Defendant GMAC Mortgage, LLC ("GMACM") submits this Motion to Dismiss all claims filed against it by Plaintiffs American Residential Equities, LLC, individually, ("ARE") and in its capacity as Trustee ("ARE, as Trustee")[1] (collectively, "Plaintiffs") in Plaintiffs' Amended Complaint (Doc. 26). The Court should dismiss the Adversary Proceeding as contravening the automatic stay and claims process. Alternatively, if the Court retains jurisdiction, it should dismiss Plaintiffs' claims against GMACM for failure to state causes of action for which relief can be granted.[2]

I. FACTS AND PROCEDURAL HISTORY BACKGROUND

A. Events Giving Rise to the Adversary Proceeding

(i) American Residential Equities, LLC, in its Individual Capacity

1. ARE is a sophisticated company, which was formed in Delaware in 2003, and until January 2011, managed portfolios of non-performing mortgage loans for various foreign investors.[3] See Kirsch Dep., Redwood Recovery Servs., LLC v. Kirsch, et al., Case No. 08-65603-CA-40, Circuit Court of 11th Judicial Circuit In and For Miami-Dade Florida, Exhibit A, p. 28.[4] ARE managed these mortgages through numerous individual limited liability

[1] ARE, as Trustee, lacks standing to assert any claims against GMACM. It was not a party to the Servicing Agreement. It did not have any relationship with GMACM. ARE represented that it, individually, was the owner of the mortgage loans serviced by GMACM. See Servicing Agreement ¶ 9.06 (ARE "is the owner of all right, title and interest in and to the Mortgage Loan (and the servicing rights appurtenant thereto"). ARE was prohibited from assigning the mortgage loans unless it did so in writing and such writing was provided to GMACM. See Servicing Agreement ¶ 8.05.

[2] The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 (a) and 1334(b). Venue is proper under 28 U.S.C. § 1409. This involves a non-core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2), either in whole or part. Nonetheless, pursuant to Local Bankruptcy Rule 7012-1, GMACM consents to entry of a final order or judgment by this Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution.

[3] In 2008, ARE stopped acquiring undervalued first mortgage loans and engaged solely in servicing and liquidating said mortgages. See Kirsch Dep., Exhibit A, pp. 20-21. In 2010, its authority to do business in Florida was revoked. See Secretary of State printout regarding ARE, Exhibit B.

[4] The last annual report ARE filed with the Florida Secretary of State, in 2009, indicated that Kirsch was the managing member of ARE through a company called Meadow Mint, LLC. See Annual Report, attached as Exhibit C. When Kirsch, a former attorney, was deposed in the Redwood case, he stated that he did not know what

companies, each set up by ARE to represent an individual investor or a group of investors. See Kirsch Dep., Exhibit A, pp. 15-17, 28, 30, 39; Hirschkowitz Dep. 1, Exhibit D, pp. 14-15.[5]

2. The investors solicited by ARE were generally "non-resident alien investors . . . who [had] an interest in investing in nonperforming residential mortgages." See Kirsch Dep., Exhibit A, p. 32. The investors provided funds to ARE in exchange for a promissory note or an equity interest in the individual LLCs. See Kirsch Dep., Exhibit A, pp. 33-35; see also Findings of Fact, Final Judgment, Redwood Recovery Servs., LLC v. Kirsch, et al., Case No. 08-65603-CA-40, Exhibit E (explaining how ARE's investments were structured). ARE was responsible for selecting and purchasing the mortgage loans for the investors, servicing the loan or selecting a servicer, interacting with the servicer, and making decisions regarding the liquidation of loan. See Kirsch Dep., Exhibit A, pp. 28, 30, 71.

3. As of January 2011, ARE transferred all of its employees, operations and assets to a company called Addle Hill, also operated by Kirsch. See Hirschkowitz Dep. 1, Exhibit D, pp. 35-39. The ARE bank account in which remittances from servicers, such as GMACM, were wired was closed in 2011 because ARE "moved operations" to Addle Hill. See Hirschkowitz Dep. 1, Exhibit D, p. 31-32. Addle Hill also took over the management of the loans that were serviced by GMACM. See Hirschkowitz Dep. 1, Exhibit D, pp. 33-35. Thus, ARE is no longer engaged in any operations. See Hirschkowitz Dep. 1, Exhibit D, p. 39.

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position he holds for ARE. See Kirsch Dep., Exhibit A, pp. 22-23. This Deposition was produced by ARE in the Pending Florida Action. Kirsch admitted, however, that he is the only person who has authority to sign checks for ARE; that he reports to no one at ARE and that "ultimately" all employees at ARE reported to him. See Kirsch Dep., Exhibit A, p. 24. (Deposition testimony of a party in other proceedings is admissible under Federal Rule of Civil Procedure 32(a)(3)).

[5] William Hirschkowitz was the CFO of ARE and is now the CFO of Addle Hill, a company formed by Kirsch to take over the operations and assets of ARE. See Hirschkowitz Dep. 1, Exhibit D, pp. 5, 11, and 44. This Deposition was produced by ARE in the Pending Florida Action.

(ii) GMACM's Servicing Agreement with ARE

4. On July 29, 2004, ARE (solely in its individual capacity) and GMACM entered into a Servicing Agreement, pursuant to which GMACM agreed to subservice over 2,600 mortgage loans (the "ARE Loans") on behalf of ARE, defined as the "Owner". See Servicing Agreement (with amendments) (attached to the Amended Complaint as Exhibit B). The Servicing Agreement specifically identified GMACM as an "independent contractor and not as an agent" of ARE. See Servicing Agreement ¶ 13.08 ("The Servicer shall have full control of all its acts, doings, proceedings, relating to or requisite in connection with the discharge of its duties and responsibilities under this Agreement").

5. ARE represented in the Servicing Agreement that it "is the owner of all right, title and interest in and to the Mortgage Loan (and the servicing rights appurtenant thereto)." See Servicing Agreement ¶ 9.06. The Servicing Agreement prohibited ARE from assigning its interest in the mortgage loans unless certain circumstances were met, including executing a mutually agreeable Assignment and Assumption Agreement and delivering said agreement to GMACM. See Servicing Agreement ¶ 8.05.

6. Under the terms of the Servicing Agreement, typical of many servicing agreements in the industry, GMACM, as the subservicer, among other things, collected mortgage payments and liquidated mortgaged property in the event of default. See Servicing Agreement ¶¶ 2.02, 2.03. The payments and proceeds collected by GMACM were to be deposited by GMACM into a "Custodial Account." See Servicing Agreement ¶ 2.04.

7. The Servicing Agreement specified how the funds in the Custodial Account would be disbursed by GMACM and, as between ARE and GMACM, who was entitled to what portion of the funds. For example, GMACM was entitled to "first priority

reimbursement" for unreimbursed Servicing Advances[6]. See Servicing Agreement ¶ 3.02. GMACM was also entitled to a Servicing Fee, to interest earned on the funds, to withdraw funds for investments and to "clear and terminate the Custodial Account upon the termination of the Agreement." See Servicing Agreement ¶ 2.05.

8. The net of the funds deposited into the Custodial Account (after the withdrawals under ¶ 2.05) were remitted to ARE via wire transfer on each Remittance Date (defined as the 18th day following the last business day of the prior month). See Servicing Agreement ¶ 3.01. A Remittance Advice, with a trial balance, was provided by GMACM on each Remittance Date. See Servicing Agreement ¶ 3.02; Hirschkowitz Dep. 2, Exhibit F, pp. 92-93.

9. Pursuant to the terms of the Servicing Agreement, an uncured failure by GMACM to make remittances to ARE as set forth in the Servicing Agreement was a default event, which could have provided a basis for termination by ARE. See Servicing Agreement ¶ 11.01(a).

10. On April 1, 2010, GMACM ceased servicing the ARE Loans under the Servicing Agreement and, pursuant to the terms of the Servicing Agreement, transferred the servicing of the ARE Loans to Acqura Loan Services[7] (the "Transfer Date"). See ARE v. GMACM, LLC, 10-CV-21943, Order on Motion for Judgment on the Pleadings, Exhibit G, pp. 4, 8.

11. Under the terms of the Servicing Agreement, on "the Transfer Date for each related Mortgage Loan, [the] Agreement . . . shall terminate with respect to each Mortgage

[6] "Servicing Advances" were defined in the Servicing Agreement to include, essentially, all out of pocket expenses expended by GMACM in servicing the ARE loans. See Servicing Agreement at p. 10.

[7] Acqura Loan Services was subsequently purchased by Vantiuum.

Loan." See Servicing Agreement ¶ 6.02. Thus, the parties' obligations under the Servicing Agreement, including any obligations they had with regard to the Custodial Account were terminated, at the very latest, on April 1, 2010.[8]

(iii) The Florida Federal Court Litigation

12. On June 11, 2010, ARE in its individual capacity, and not as a purported "trustee," filed a complaint (the "Florida Complaint") in the United States District Court for the Southern District of Florida (the "Florida Federal Court"), Case No. 1:10-cv-21943-ASG, (the "Pending Florida Action"), against GMACM.[9] The Florida Complaint contained allegations of breach of contract and specific performance, including a request for an accounting. See Florida Complaint, Exhibit H.

13. In the Pending Florida Action (as ARE does here), ARE alleged that GMACM breached the Servicing Agreement by engaging in the following conduct, including: overinsuring or underinsuring properties; failing to maintain properties; failing to secure properties; failing to file insurance claims timely and failing to follow an approval matrix contained in the Servicing Agreement. See Florida Complaint, Exhibit H, ¶¶ 25-28.

14. On October 15, 2010, ARE filed a Motion for Judgment on the Pleadings as to its specific performance claim for an accounting. On March 8, 2011, the Florida Federal Court entered an order denying Plaintiff's motion. See Order on Motion for Judgment on the Pleadings, Exhibit G, pp. 7, 11-12. The court denied the motion because the court found that

[8] It is GMACM's position that GMACM actually terminated the Agreement on April 20, 2009, effective November 30, 2009, but continued to service the loans because ARE could not find a new servicer. See Order Denying Plaintiff's Motion for Judgment on the Pleadings, Exhibit G.

[9] GMACM also asserted Counterclaims in the Pending Florida Action, including claims for breach of contract based on ARE's failure to reimburse GMACM for its Servicing Advances as required under ¶ 6.02(b) of the Servicing Agreement. See Answer and Counterclaims, Exhibit I. Although GMACM had a first priority interest in the funds deposited into the Custodial Account, there were insufficient funds in the Custodial Account on the Transfer Date to compensate GMACM for its unreimbursed Servicing Advances. See Answer and Counterclaims, Exhibit I.

ARE failed to present evidence that it requested an accounting prior to the Agreement being terminated. See ARE v. GMACM, LLC, 10-CV-21943, Order on Motion Judgment on the Pleadings, Exhibit G, p. 8. In denying the motion, the Florida Federal Court found that any obligation for an accounting terminated upon termination of the Servicing Agreement. See id.

15. Prior to the filing of the Chapter 11 cases by GMAC and its debtor affiliates on May 14, 2012 (the "petition date") and the imposition of the automatic stay under Section 362(a) of Title 11 of the United States Code ("the "Bankruptcy Code"), the parties in the Pending Florida Action engaged in extensive discovery (which included the taking of depositions and the production of over 550,000 pages of documents by GMACM), exchanged expert reports, and also engaged in considerable motion practice, including the filing of discovery motions, Daubert motions and a motion for partial summary judgment by GMACM. See Florida Federal Court Docket, Exhibit J; Daubert Motion, Exhibit K; Order Granting Sanctions, Exhibit L. One of the discovery motions addressed by the Florida Federal Court was ARE's Motion to Compel discovery against GMACM. The Magistrate Court entered a Report and Recommendation awarding fees and costs to GMACM in connection with that motion. See Order Granting Sanctions, Exhibit L, p. 13. Just prior to the Petition Date, ARE filed an appeal of that Report and Recommendation to the District Judge, which appeal was pending at the time of the Petition Date. The amount of fees and costs sought by GMACM was over $20,000.00.

16. Also, as of the Petition Date, GMACM's Motion for Partial Summary Judgment, was also pending before the Florida Federal Court. See GMACM's Motion for Summary Judgment, Exhibit M. The Summary Judgment Motion was based primarily on the deficiencies in the expert report of ARE's proffered expert, Lawrence Morriss ("Morriss"), as well as, Morriss' failure to qualify as an expert.

17. Although ARE opposed GMACM's Motion to Exclude Morriss, as well as, GMACM's Motion for Partial Summary Judgment, after the Pending Florida Action was stayed, ARE filed suit against Morriss and his company CBIZ MHM, LLC, in which ARE acknowledged the overwhelming deficiencies in Morriss' report and qualifications. See Complaint in American Residential Equities, LLC v. CBIZ MHM, LLC, et al., Case No. 1:12-cv-23764-PAS (Southern District Florida), Exhibit N. In that action, ARE made the following statements about Morriss and his report:

- ARE was "shocked at the disturbingly poor quality of work product";
- "Morriss again failed to provide any competent analysis or opinion";
- Morriss "failed to set forth specific actions or inactions by GMACM that occurred; what constituted violations of the loan servicing contract or loan servicing industry standards; or a correlation between GMACM's action/inaction and ARE's damages";
- "the Report provided no conclusion as to damage attributable to GMAC";
- that Morriss "failed to provide any analysis and/or expert opinion detailing which part of the loss was GMAC's fault"; that "Morriss was simply unwilling or incapable of performing the duties as an expert";
- "the Report was so deficient" that it was used as a basis for the motion to exclude and summary judgment motion;
- "ARE concluded that Morriss simply lacked the ability to conduct the analysis of damages"
- "Even worse, as a result of Defendants' failures, ARE found itself in a weakened position in its case, possibly irreparably harmed by Defendants incompetence and delays."

See American Residential Equities, LLC v. CBIZ MHM, LLC, et al., Complaint, Exhibit N.

18. ARE, recognizing it had a losing battle with Morriss as its sole expert in the Pending Florida Action, filed this Adversary Proceeding as an attempt to get a "do over." The First Amended Complaint contains the same allegations against GMACM as those in the Pending Florida Action, and advances essentially identical requests for relief.[10] In fact,

[10] On March 22, 2013, ARE filed its First Amended Complaint (Doc. 26) to add additional allegations and claims against GMACM and Balboa, as well as, to add Ally as a defendant.[10] ARE's First Amended Complaint also added "ARE, as Trustee" as a plaintiff. ARE's First Amended Complaint omitted ARE's claim for unjust enrichment against GMACM, presumably recognizing after GMACM filed its Motion to Dismiss the Adversary Complaint

Plaintiffs' breach of contract claim in the Adversary Proceeding is virtually verbatim to the breach of contract claim alleged in the Pending Florida Action. See Florida Complaint, Exhibit I, ¶¶ 3-4; 6-7. Further, Plaintiffs' conversion, fraud and breach of fiduciary duty claims in the Adversary Proceeding are intertwined with their breach of contract claim and are nothing more than impermissible tort versions of their breach of contract claim in the Florida Federal Court.

II. ARGUMENT

A. Plaintiffs Are Attempting to Circumvent the Bankruptcy Claims Process With This Adversary Proceeding.

19. Disputes in bankruptcy cases are divided into two categories, adversary proceedings and contested matters. Rule 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") specifically differentiates those litigated matters that are adversary proceedings from those disputes which are characterized as contested matters under Bankruptcy Rule 9014. Healey/Mellon-Stuart Co. v. Coastal Grp., Inc. (In re Coastal Grp., Inc.), 100 B.R. 177, 178 (Bankr. D. Del. 1989); see also Sears Roebuck & Co. v. Penney (In re Penney), 76 B.R. 160, 161-62 (Bankr. N.D. Cal. 1987).[11]

20. A creditor asserting a pre-petition claim for money damages that is barred by the automatic stay is not entitled to file an adversary proceeding under Bankruptcy Rule 7001 to recover on such claim. See In re Ephedra Prods. Liability Litig., 329 B.R. 1 (S.D.N.Y. 2005)

(Doc. 25), that ARE cannot state a cause of action for unjust enrichment because ARE's and GMACM's obligations and duties are set forth in an express contract i.e., the Servicing Agreement. See Umbelina v. Adams, 34 A.3d 151 (Pa. Super. Ct. 2011); Braun v. Wal-Mart Stores, Inc., 24 A.3d 875 (Pa. Super. Ct. 2011); Wilson Area Sch. Dist. v. Skepton, 895 A.2d 1250 (Pa. 2006); Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa. Super. Ct. 1999).

[11] As the court in *Penney* explained: [Bankruptcy] Rule 7001 is not . . . an open invitation to commence any sort of adversary proceeding against the debtor. Rather, it merely specifies what sort of relief properly sought under the Bankruptcy Code must be obtained by formal adversary proceeding as opposed to less formal motion or contested matter pursuant to [Bankruptcy] Rule 9014. [Bankruptcy] Rule 7001 is not an invitation to sue the debtor on a cause of action which, if brought in state court, would be a blatant violation of the automatic stay. To say that if money or property is sought it must be by adversary proceeding is not the same as granting leave to seek money or property for any reason . . . . In re Penney, 76 B.R. at 161.

("In bankruptcy, 'the only appropriate way to assert a claim against a debtor's estate is through the timely filing of a properly executed proof of claim' and not through an adversary proceeding." (citing In re Johns-Manville Corp., 53 B.R. 346, 354 (Bankr. S.D.N.Y. 1985)); see also In re Coastal Grp., Inc., 100 B.R. at 178-79; see also Galitz v. Edghill (In re Edghill), 113 B.R. 783, 783-84 (Bankr. S.D. Fla. 1990) (holding that Rule 7001 did not give creditor the right to sue on pre-petition, state-law claim in the bankruptcy forum); In re Penney, 76 B.R. at 161-62; Sears, Roebuck, & Co. v. Willhite (In re Willhite), No. 87-00959, 1988 WL 1058216, at *1-2 (Bankr. N.D. Cal. June 28, 1988) (same). This is particularly true where the adjudication through an adversary proceeding would be "a waste of judicial resources . . . when the claims process is moving the same issues down a parallel track." Mondragon v. Circuit City Stores, Inc. (In re Circuit City Stores Inc.), Adv. No. 09-03073, 2010 WL 120014, at *5 (Bankr. E.D. Va. Jan. 11, 2010) (citing Binford v. First Magnus Fin. Corp. (In re First Magnus Fin. Corp.), Adv. No. 07-00060, 2008 WL 348805 (Bankr. D. Ariz. Feb. 6, 2008), aff'd 403 B.R. 659 (D. Ariz. 2009)).

21. Moreover, although courts in this Circuit have held that the commencement of an adversary proceeding does not, by definition, violate the stay, an adversary proceeding "may be dismissed if it is procedurally improper or if there is no substantive basis for asserting the cause of action at issue in bankruptcy." Prewitt v. N. Coast Vill., Ltd. (In re N. Coast Vill., Ltd.), 135 B.R. 641, 644 (B.A.P. 9th Cir. 1992). A pre-petition, state law claim for money damages is properly asserted through the bankruptcy claims process, not through an adversary proceeding, and the bankruptcy court may dismiss an adversary proceeding brought to recover on such a claim from the debtor or the debtor's property. Id. at 644 (citing In re Penney, 76 B.R. at 160); see also Robert Christopher Assocs. V. Franklin Realty Grp., Inc. (In re FRG, Inc.), 121 B.R. 710, 714-15 (Bankr. E.D. Pa. 1990) (holding that although the plaintiffs did not

violate the stay by filing an adversary proceeding, the adversary proceeding was due to be dismissed in favor of plaintiffs proceeding through the bankruptcy claims process).

22. Plaintiffs' First Amended Complaint as to GMACM is clearly an attempt by the Plaintiffs to circumvent both the bankruptcy claims process and to violate the automatic stay and should be dismissed. The allegations in the First Amended Complaint as to GMACM all relate to pre-petition conduct, advancing allegations concerning the respective rights of ARE and GMACM under a Servicing Agreement that was entered into on or about July 29, 2004 and was terminated in 2009 (and, at least, by 2010), more than two years before the Debtors' bankruptcy. Plaintiffs cannot simply circumvent the stay or avoid the claims process by recasting their claims as an adversary proceeding. In re First Magnus Fin. Corp., 2008 WL 348805, at *2; see also In re Ray, 46 B.R. 424, 426 (S.D. Ga. 1984) (holding that the bankruptcy court can dismiss a case "where to do so perpetuates the proper use of the bankruptcy mechanism"). If Plaintiffs wanted to pursue their claims in litigation, then they should have filed a motion for relief from stay with this Court. They did not. Pursuant to this Court's inherent powers under 11 U.S.C. § 105, this Court should dismiss Plaintiffs' claims against GMACM in this Adversary Proceeding, which is duplicative of the normal bankruptcy claims procedure.

23. This Court addressed similar issues in, Evergreen Solar, Inc. v. Barclays PLC (In re Lehman Bros. Holdings, Inc.), No. 08-13555, 2011 WL 722582, at *7-8 (Bankr. S.D. N.Y. Feb. 22, 2011), where it held that a claim for damages resulting from an alleged breach of contract was not properly brought in an adversary proceeding and could properly be brought only through the proof of claim process. See also DBL Liquidating Trust v. Majutama (The Drexel Burnham Lambert Grp., Inc.), 148 B.R. 993, 998-99 (Bankr. S.D.N.Y. 1992) (holding that Bankruptcy Rule 7001 precluded a claim for damages resulting from the breach of a letter

agreement brought in an adversary proceeding because such a claim could only properly be brought through the proof of claim process). This Court reached that decision on the basis that Bankruptcy Rule 7001 enumerates nine categories of controversies that may be brought as adversary proceedings, and that a claim for damages for a breach of contract was not included among those categories. Id.

24. Here, not only are Plaintiffs attempting to avoid the bankruptcy claims process and the automatic stay by filing this Adversary Proceeding, but Plaintiffs are also engaging in impermissible forum shopping. Plaintiffs are attempting to wipe from the record, the unfavorable results ARE received in the Pending Florida Action. ARE should not be allowed to evade the adverse rulings in the Pending Florida Action by now bringing claims against GMACM in this Adversary Proceeding cut out of the same cloth.

25. The only claims against GMACM in the Adversary Proceeding that Plaintiffs could possibly argue are not contained in the Pending Florida Action are Plaintiffs' claims for a declaratory judgment and for a purported "turnover." Like Plaintiffs' alleged tort claims, however, Plaintiffs' declaratory judgment and turnover claim are nothing more than a re-casting of their breach of contract claim.[12] Moreover, although Bankruptcy Rule 7001(7) provides that adversary proceedings may include requests for injunctive or equitable relief, where, as here, that claim reduces to a money judgment, equitable relief must be denied. In re Johns-Manville Corp., 53 B.R. at 354-55 (holding that because a mandatory injunction requiring the debtor to remove asbestos would force expenditure of substantial assets, it reduced to a money judgment making adversary proceedings an inappropriate vehicle for adjudicating the

[12] If this Court denies GMACM's Motion to Dismiss on grounds that this Adversary Proceeding is an improper attempt to circumvent the automatic stay, this Court should grant GMACM's motion as a matter of law on Plaintiffs' breach of contract claim, to the extent that said claim is premised on any conduct that took place more than 4 years prior to November 9, 2012, as being barred by the statute of limitations. 42 PA. CONS. STAT. ANN. § 5525.

claim) (citing Ohio v. Kovacs, 469 U.S. 274 (1985); United States v. Robinson (In re Robinson), 46 B.R. 136 (Bankr. M.D. Fla. 1985) (reversed on other grounds)).

26. In this case, Plaintiffs' declaratory judgment claim essentially seeks a money judgment, specifically, entitlement to monies ARE claims should have been or are being held in a "Custodial Account" that was terminated by contract, at least by 2010. That is exactly what ARE sought in the Pending Florida Action when it sought payments of the remittances it alleged was due to it for the month of April 2010.[13] Accordingly, Plaintiffs' declaratory judgment claim should be dismissed.

27. The declaratory judgment claim should further be dismissed because Plaintiffs have failed to identify any assets held in GMACM's Custodial Account on its behalf. It has not done so, because there are no assets being held by GMACM in any existing Custodial Account. Per the Servicing Agreement, the Custodial Account was terminated at the termination of the Servicing Agreement, at least two (2) years prior to the Petition Date. The Servicing Agreement makes clear that GMACM may withdraw funds from the Custodial Accounts "to clear and terminate the Custodial Account upon the termination of this Agreement." See Servicing Agreement ¶ 2.05(x). Additionally, GMACM's and ARE's rights and obligations as to the Custodial Account terminated at the termination of the Servicing Agreement. See Servicing Agreement ¶ 6.02. Clearly, the inclusion of a declaratory judgment count in the Adversary Proceeding is just a veiled attempt by Plaintiffs to switch forums.

[13] Similarly, in 2006 ARE (not ARE, as Trustee) brought a breach of contract claim against the servicer it used prior to GMACM, Select Portfolio Servicing, Inc., alleging that Select had breached the servicing agreement by failing to remit funds due to ARE. See Complaint in American Residential Equities, LLC v. Select Portfolio Serv'g., Inc., Case No. 1:06-cv-20007-AJ (Southern District of Florida), Doc. 2, Exhibit Q.

28. Similarly, Plaintiffs' turnover claim should be dismissed.[14] This claim appears to be based on Plaintiffs' allegation that GMACM is holding or converted assets, which were to be held in trust by GMACM for ARE, such that those assets are not assets of the estate. GMACM, however, was not a trustee for ARE and no express trust was ever created. To the contrary, the Servicing Agreement clearly identifies GMACM's relationship to ARE as an "independent contractor." See Servicing Agreement ¶ 13.08. As discussed herein, no fiduciary or confidential relationship existed between GMACM and ARE, and the lack of such a relationship is fatal to Plaintiffs' argument that an express trust had been created as to the funds deposited into the Custodial Account. See In re Kulzer Roofing, Inc., 139 B.R. 132, 140 (Bankr. E.D. Pa. 1992), aff'd sub nom., McMillen v. Jarmul (In re Jarmul), 150 B.R. 134 (E.D. Pa. 1993) ("[I]nherent in the definition of an express trust is the presence of a fiduciary [relationship] between the trustee and the beneficiary of the trust").

29. Moreover, an express trust was never created because GMACM was not holding funds solely for ARE's benefit; rather, the funds deposited into the Custodial Account belonged to GMACM and ARE. GMACM had first priority to the funds to satisfy its unreimbursed Servicing Advances. See Servicing Agreement ¶ 3.02. In fact, from the funds deposited into the Custodial Account, GMACM had the authority to make the specific withdrawals as specified in ¶ 2.05 of the Servicing Agreement. GMACM had the authority to make these withdrawals prior to any amounts being due to ARE. See Servicing Agreement ¶ 3.01. The fact that the funds in the Custodial Account belonged to both GMACM and ARE is

[14] GMACM notes that an action for turnover actually belongs to a bankruptcy trustee as provided by 11 U.S.C. § 542 and involves delivery of property to the bankruptcy estate. Here, Plaintiffs' "turnover" allegations ask that property be excluded from the bankruptcy estate on the basis that it is held in trust by GMACM for Plaintiffs' benefit. (Adversary Complaint ¶¶ 45-48.) GMACM construes this as a claim under 11 U.S.C. § 541(d), which involves property to which the debtor holds only legal title and not an equitable interest. See 11 U.S.C. § 541(d) (2012).

fatal to any argument by ARE that an express trust was created. See In re Kulzer Roofing, Inc., 139 B.R. at 140 ("The incompatibility of commingling of funds and a trust [relationship] flows from the general precept that a trustee, though its legal owner, administers the trusts' *res* according to the terms of the trust for the benefit of another and, hence, does not use the *res* for the trustee's own purpose.")

30. Any alleged failure by GMACM's to provide remittances to ARE can only be actionable as a breach of the Servicing Agreement. See Servicing Agreement ¶ 11.01; Skilled Nursing Prof'l Servcs. V. Sacred Heart Hosp. of Norristown (In re Sacred Heart Hosp. of Norristown), 175 B.R. 543, 556 (Bankr. E.D. Pa. 1994) (citing Fox v. Shervin (In re Shervin), 112 B.R. 724, 734 (Bankr. E.D. Pa. 1990) ("[a] trust must be distinguished from a debt, which arises when one incurs merely an obligation to pay a certain sum")).

31. Moreover, a court ordered "turnover" of property, allegedly held in trust (which in this case does not even currently exist), essentially seeks the imposition of a constructive trust on existing assets of the Estate. This would, in effect, provide preferential treatment to the detriment of all other creditors of the estate who are awaiting their own recovery in the context of the larger claims process, and amount to a claim for damages for a breach of contract as discussed in the cases cited herein. See In re Kulzer Roofing, Inc., 139 B.R. at 138 ("[W]e are not inclined to allow creditors to utilize a trust theory as a means of obtaining preferential treatment in a bankruptcy.") (citation omitted).

32. Thus, the imposition of a constructive trust is contrary to the Bankruptcy Code's purpose to distribute funds equally among the debtor's creditors because, in essence, it allows one alleged creditor to receive more than its share at the expense of other creditors. See Superintendent of Ins. For N.Y. v. Ochs (In re First Cent. Fin. Corp.), 377 F.3d 209, 217 (2d Cir.

2004) ("[t]he constructive trust doctrine can wreak . . . havoc with the priority system ordained by the Bankruptcy Code.") (citing In re Haber Oil Grp., 12F. 3d 426, 436 (5th Cir 1994); Cadle Co. v. Mangan (In re Flanagan), 503 F.3d 171, 180 (2d Cir. 2007) ([R]ejecting the imposition of a constructive trust and stating "the effect of a constructive trust in bankruptcy is to take the property out of the debtor's estate and to place the constructive trust claimant ahead of other creditors with respect to the trust *res* . . . . It is therefore not the debtor who generally bears the burden of a constructive trust in bankruptcy, but the debtor's general creditors. This type of privileging of one unsecured claim over another clearly thwarts the principle of ratable distribution underlying the Bankruptcy Code. As a consequence bankruptcy courts have been reluctant, absent a compelling reason, to impose a constructive trust on the property estate.") (internal citations omitted); Brown v. Capital Title Agency (In re Pauley & McDonald, Inc.), 215 B.R. 37 (Bankr. D. Ariz. 1996) (holding that real estate agents could not establish express, resulting, or constructive trust for purposes of removing earned sales commissions from debtor's real estate broker's estate; therefore, sales commissions would remain property of the estate under §541).

33. Additionally, a constructive trust is not permissible here under Pennsylvania law.[15] Under Pennsylvania law, constructive trust is not a cause of action, but an equitable form of relief for a successful claim of unjust enrichment, that is, a cause of action precluded by the existence of an express contract between the parties. See Kamand Constr., Inc. v. Prop. Mgmt., Inc. (In re Kamand Constr., Inc.), 298 B.R. 251, 255 (Bankr. M.D. Pa. 2003) ("[u]nder Pennsylvania law, a constructive trust is a fictional trust, an equitable remedy to avoid

[15] Whether a trust interest exists is a matter of state law. See e.g., Butner v. United States, 440 U.S. 48, 54 (1979).

unjust enrichment"); Lerario v. Provident Life & Accident Ins. Co., No. Civ. A. 96-2100, 1996 WL 532491, at *4 (E.D. Pa. Sept. 20, 1996).

34. To impose a constructive trust, ARE must demonstrate that GMACM: (1) holds an identifiable *res* and (2) is subject to an equitable duty to convey or return the such *res* to ARE. See Yohe v. Yohe, 353 A.2d 417, 420 (Pa. 1976). Pennsylvania courts have imposed a constructive trust only if a party acquired the property "as result of fraud, duress, undue influence, mistake, abuse of a conditional relationship, or other such circumstances suggesting unjust enrichment." See In re Kamand Constr., Inc., 298 B.R. at 255 (citation omitted).

35. ARE, however, has not (and cannot) alleged that GMACM is holding a specific *res* because the Custodial Account has not existed since at least 2010 and GMACM has no equitable duty to ARE. GMACM's and ARE's rights and entitlement to funds in the Custodial Account were governed by contract. Thus, no fiduciary relationship exists between ARE and GMACM and GMACM did not obtain the funds by "fraud, duress, undue influence, mistake, or abuse of a confidential relationship." The absence of a fiduciary relationship makes the imposition of constructive trust improper under Pennsylvania law. See In re Estate of Fritts, 906 A.2d 601, 608-09 (Pa. Super. Ct. 2006) (a fiduciary relationship "is marked by such a disparity in position that the inferior party places complete trust in the superior party's advice and seeks no other counsel, so as to give rise to a potential abuse of power;" it exists "only where there's overmastering influence on the part of the proponents.") (citations omitted). As stated herein, ARE was a sophisticated entity, operated by an attorney, with its own in-house counsel. There was no disparity of bargaining power between ARE and GMACM.

B. Plaintiffs' Claims Should be Dismissed for Failure to State a Claim Upon Which Relief Can be Granted.

36. Bankruptcy Rule 7012 incorporates by reference Rule 12(b)-12(i) of the Federal Rules of Civil Procedure ("FRCP"). FRCP 12(b) provides that a party may assert specified defenses by motion, including failure to state a claim upon which relief can be granted under FRCP 12(b)(6), and that a motion asserting any of these defenses may be made before pleading. ARE's claims against GMACM in the Adversary Proceeding should be dismissed pursuant to Bankruptcy Rule 7012(b)(6) because Plaintiffs have failed to state a claim upon which relief can be granted.[16]

37. Under choice of law principles, Pennsylvania state law applies to Plaintiffs' contractual and alleged tort claims. In deciding what state's law applies to a dispute, federal courts will apply the choice of law rules of the forum state. See Klaxon Co. v. Stentor Elec. Mfg. Co. Inc., 313 U.S. 487 (1941). As to Plaintiffs' breach of contract claim, Pennsylvania law applies because the parties contractually agreed to be bound by Pennsylvania law.[17] Such choice of law provisions are uniformly upheld under New York law. See Chiste v. Hotels.Com, LP, 756 F. Supp. 2d 382, 408 (S.D.N.Y. 2010). Thus any contractual dispute is governed by the laws of Pennsylvania.

[16] For FRCP 12(b)(6) purposes, a court must accept a plaintiff's factual allegations as true, drawing all reasonable inferences in the plaintiff's favor. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996). The regular standard for determination of a motion to dismiss under FRCP 12(b)(6) is made applicable to bankruptcy adversary proceedings by Bankruptcy Rule 7012(b). Dismissal is warranted when the plaintiff's allegations, taken as true, along with any inferences that flow from them, are insufficient as a matter of law. Dibbern v. Adelphia Commc'ns Corp. (In re Adelphia Commc'n. Corp.), 325 B.R. 89, 98 (Bankr. S.D.N.Y. 2005) (citing Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993). On a motion to dismiss, courts may consider certain documents in addition to the complaint, including the contents of any documents attached to the complaint or incorporated by reference, or matters as to which it can take judicial notice, such as public records. See e.g., ABF Capital Mgmt. v. Kidder Peabody & Co. (In re Granite Partners L.P.), 210 B.R. 508, 514 (Bankr. S.D.N.Y. 1997); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995); Toussie v. Town Bd. of E. Hampton, 874 F. Supp. 2d 135, 142 (E.D.N.Y. 2012).

[17] The Servicing Agreement provides, in pertinent part, "This agreement shall be construed in accordance with the Laws of the Commonwealth of Pennsylvania and the obligations, rights and remedies hereunder shall be determined in accordance with the substantive laws of the Commonwealth of Pennsylvania (without regard to conflicts of laws principles), except to the extent preempted by Federal law." See Servicing Agreement ¶ 13.07.

38. The choice of law provision in the Servicing Agreement also includes Plaintiffs' tort claims. See e.g., Chiste, 756 F. Supp. 2d at 409 (holding that choice of law clause in user agreements included tort claims of conversion and breach of contract). The choice of law provision states that all of the parties' "obligations, rights and remedies" under the Agreement will be governed by the substantive law of the state of Pennsylvania. That provision is broad enough to include Plaintiffs' tort law claims in this case. See Turtur v. Rothschild Registry Int'l., 26 F.3d 304, 310 (2d Cir. 1994) ("as [the plaintiff's] fraud claim clearly 'arises out of' or 'relates to' their investment in ANA 367, we will apply New York law as provided in the subscription note").

39. Even if the choice of law provision in the Servicing Agreement did not include Plaintiffs' tort law claims, Pennsylvania substantive law would nonetheless apply to those claims. Under New York's choice of law rules, this Court should apply the "interest analysis" to determine which state's substantive's law applies. See e.g., Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 399 (S.D.N.Y. 2010). Under the "interest analysis" "the law of the jurisdiction with the most significant interest in, or relationship to, the dispute" is the law that applies. See id. In this case the only connection to Florida is the fact that ARE was authorized to do business there and had its office there when the parties entered into the Servicing Agreement.[18] Pennsylvania, however, is where GMACM is headquartered. It is the jurisdiction the parties agreed to be bound by. Furthermore, based on the allegations in Plaintiffs' Amended Complaint, it is where the alleged wrongdoing (the purchase of insurance, the wiring of funds, the servicing of the loans) occurred. See Prime Mover Capital Partners, LP

[18] However, at the time of the filing of this action (and, since 2010) ARE was no longer authorized to do business in Florida. See Secretary of State Printout Regarding ARE, Exhibit B. Moreover, as of January 2011, it had transferred its assets and its operations to a company called Addle Hill, which is located in California. Additionally, the ARE loans were secured by properties that were located across the country.

v. Elixir Gaming Tech., No. 10-cv-2737, 2012 WL4714799, at *13 (Sept. 27, 2012) ("the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction had the greatest interest in regulating the tortuous conduct at issue").

(i) Plaintiffs' Accounting Claim Should Be Dismissed Because There Is An Adequate Remedy At Law And Is Moot Given The Pending Florida Action.

40. Under Pennsylvania Law, an accounting is available only when there is no adequate legal relief or when the legal relief will cause loss, inconvenience, or embarrassment to one of the parties. See e.g. Pa. Ship Supply, Inc. v. Fleming Int'l, Ltd., 113 F. Supp. 2d 760, 764 (E.D. Pa. 2000) (dismissing the plaintiff's accounting claim because documents were readily attainable through the discovery process). Here, ARE has an adequate legal relief in the form of damages and ARE has already received the documents necessary to do an accounting through discovery in the Pending Florida Action. Thus, the accounting claim should be dismissed.[19]

(ii) Plaintiffs' Conversion Claim Is Barred By The Gist-Of-The-Action Doctrine And The Statute Of Limitations.

41. "[T]he 'gist-of-the-action' doctrine . . . operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims." Vives v. Rodriguez, 849 F. Supp. 2d 507, 516 (E.D. Pa. 2012) (citing Hart v. Arnold, 884 A.2d 316, 339 (Pa. Super. Ct. 2005)). In this case, the gist of the action doctrine bars Plaintiffs' conversion and fraud claims. Both claims arise out of Plaintiffs' allegations regarding GMACM's conduct under the Servicing Agreement. Thus, where a tortious claim for conversion is based solely on the failure to perform under a contract, it is barred by the gist of the action doctrine. Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 584 (Pa. Super. Ct. 2003) (observing that "the basis of the duty allegedly breached by [defendants], their duty to pay [plaintiff] according to the draw schedule, was created by and

[19] Moreover, in the Pending Florida Action, the court found that ARE did not have a right to an accounting after the termination of the Agreement. See Order on Motion for Judgment on the Pleadings, Exhibit G.

defined by the contract itself . . . . [W]e will not permit [plaintiff] to interject a claim for tortious conversion into an action that is decidedly contractual.") (internal citation omitted); see also Brown & Brown, Inc. v. Cola, 745 F. Supp. 2d 588, 623-24 (E.D. Pa. 2010) (applying the gist-of-the-action doctrine to bar a conversion claim).

42. Here, Plaintiffs' conversion claim is premised entirely on GMACM's alleged failure to remit funds allegedly due "per its contractual obligations." (First Amended Complaint ¶ 90). Allegations related to contractually provided payments are categorically contractual in nature and should be addressed in a breach-of-contract action, not an action sounding in tort. As such, the gist-of-the-action doctrine bars this Court from entertaining Plaintiffs' conversion claim.

43. Plaintiffs' conversion claim is also time-barred. Under Pennsylvania law, conversion claims are subject to a two (2) year statute of limitations.[20] Here, Plaintiffs filed the Adversary Proceeding on November 9, 2012, more than two years after the date that servicing was transferred from GMACM to ARE's subsequent servicer on April 1, 2010. See 42 PA. CONS. STAT. ANN. §5524(3). Yet, the transfer date, at the very latest, was the last day that any alleged conversion could have taken place since the Custodial Account terminates at the termination of the Servicing Agreement. Thus, Plaintiffs' Conversion claim is time-barred.

(iii) Plaintiffs' Fraud Claim Is Insufficiently Pled, Barred By The Statute Of Limitations, Barred By The Gist-Of-The-Action Doctrine And Barred By The Flat Rate Doctrine.

44. Under FED. R. CIV. P 9(b), which is applicable to these proceedings pursuant to Bankruptcy Rule 7009, Plaintiffs must "state with particularity the circumstances

[20] Under New York choice of law rules, New York will apply the shorter of the statute of limitations in New York or in Pennsylvania. In this case, that statute of limitations is Pennsylvania because it is two years versus New York's statute of limitations for conversion claims of three years. See Chiste v. Hotels.com, LP, 756 F. Supp. 2d 382, 410 (S.D.N.Y. 2010); N.Y.C.P.L.R. § 214(3).

constituting fraud or mistake in the fraud pleadings." FED. R. CIV. P. 9(b). Each fraud claim must be pled with particularity as to each defendant. Shane v. Marceca (In re Marceca), 127 B.R. 328, 332 (Bankr. S.D.N.Y. 1991) (citations omitted). Plaintiffs' fraud claim, however, is premised entirely on conclusory allegations relating to an alleged "kick-back scheme" between Balboa and GMACM. Plaintiffs do not allege any other facts about the fraud, such as the what, who, when, where or how that is required by FRCP 9(b). Plaintiffs have not pled their claims for fraud with the requisite specificity and, accordingly, its fraud claims should be dismissed.[21]

45. Plaintiffs' fraud claim is also barred by Pennsylvania's two-year statute of limitations. See 42 PA. CONS. STAT. ANN. § 5524(7). Although the discovery rule tolls the time for bringing a fraud action, the plaintiff must exercise due diligence to learn the existence of a claim. See JNA-1 Corp. v. Uni-Marts, LLC (In re Uni-Marts, LLC), 404 B.R. 767, 779 (Bankr. D. Del. 2009). Plaintiffs have not alleged any facts that would support a tolling argument, nor could they. Plaintiffs' bald allegation that they could not have discovered the alleged fraud simply because lawsuits alleging kickbacks were not filed until 2012, is not sufficient to warrant a tolling. Similarly, Plaintiffs' unsupported statement that it simply could not discover the fraud is insufficient.

46. The gist-of the-action doctrine also bars recovery on a fraud claim flowing from strictly from a contractual relationship. Vives v. Rodriguez, 849 F. Supp. 2d at 520. The Court must determine whether the "the fraud concerned the performance of contractual duties,

[21] Also, Plaintiffs' fraud claim, which is premised on the allegation that GMACM and Balboa inflated insurance premiums, may be barred by the filed rate doctrine. See Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994) ("[s]imply stated, the doctrine holds that any 'filed rate' – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings brought by ratepayers"). Plaintiffs cannot circumvent this bar by casting it claim as a fraud or fraudulent inducement claim. See Wegoland, 27 F.3d at 21 (holding that claims for fraud were precluded by the filed rate doctrine); Woodhams v. Allstate Fire & Cas. Co., 749 F. Supp. 2d 211, 220 (S.D.N.Y. 2010) ("there is no exception to the field rate doctrine based on alleged fraud on the rate maker").

[and] [if] so, then the alleged fraud is generally held to be merely collateral to a contract claim for breach of those duties. " Id. at 520-21; (citing eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 19-20 (Pa. Super. Ct. 2002)).[22] Here, Plaintiffs' fraud claim relates exclusively to duties imposed under the Servicing Agreement. In fact, the fraud claim (which is based on Plaintiffs' allegation that GMACM unnecessarily insured property because it got a kickback from Balbo) is nothing more than a re-casting of Plaintiffs' breach of contract claim, which includes allegations that GMACM "overinsured" the properties in the ARE Portfolio. See Complaint in Pending Florida Action, Exhibit I, ¶ 28(f). Clearly, the Plaintiffs' fraud claim is contractual in nature, and, thus, is barred as a matter of law.

(iv) Plaintiffs' Breach Of Fiduciary Duty Claim Fails Because GMAC Was Not A Fiduciary And Any Such Claim Is Barred By the 2-Year Statute Of Limitations

47. Plaintiffs cannot state a cause of action against GMACM for breach of fiduciary duty because, as stated above, GMACM and ARE were not in a fiduciary or confidential relationship. Under Pennsylvania law, ARE must establish that: 1) a fiduciary or confidential relationship existed; 2) GMACM acted in bad faith; and 3) GMACM's failure to act solely for ARE's benefit was the real factor of ARE's injuries. See Nordetek Envt'l, Inc. v. RDP Techs., Inc., 862 F. Supp. 2d 406, 423-24 (E.D. Pa. 2012). ARE cannot, as a matter of law, establish those elements.

48. GMACM and ARE were each sophisticated companies involved in a contractual relationship not a fiduciary or confidential relationship. While a confidential relationship may "exist … wherever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an

[22] The economic loss doctrine also bars fraud claims based on contract. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995); Brunson Commc'ns, Inc. v. Arbitron Inc., 239 F. Supp. 2d 550, 579 (E.D. Pa. 2002); Harris v. O'Connor Truck Sales, Inc., 153 F. Supp. 2d 584 1589 (E.D. Pa. 2001).

overmastering dominance on the one side, or weakness, dependence, or justifiable trust, on the other," ARE simply cannot allege such circumstances. See DePaul v. DePaul, 429 A.2d 1192, 1194 (Pa. Super. Ct. 1981). There is no evidence or allegations of such "overmastering" dominance by GMACM.

49. Similar to Plaintiffs' fraud claim, Plaintiffs' breach of fiduciary duty claim is also barred by the 2-year statute of limitations.[23] See 42 PA. CONS. STAT. ANN. § 5524(7).

III. CONCLUSION

Accordingly, for the reasons set forth herein the GMACM respectfully requests that the Court dismiss the Adversary Proceeding with prejudice and grant such other and further relief as it deems just and proper.

Dated: April 26, 2013
New York, New York

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Counsel for GMACM in the Adversary Proceeding

[23] Under New York law, a claim for breach of fiduciary duty for which a plaintiff seeks monetary damages is governed by a 3-year statute of limitations. See N.Y.C.P.L.R. § 214(4). Thus, Pennsylvania's shorter 2-year statute applies.

EXHIBIT A

IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
COMPLEX BUSINESS LITIGATION
CASE NO. 08-65603 CA 40

REDWOOD RECOVERY SERVICES, LLC, and ELEVEN HOMES LIMITED,

Plaintiffs,

vs.

JEFFREY L. KIRSCH, MEADOW MINT, LLC, KEY BISCAYNE FAMILY TRUST, AMERICAN RESIDENTIAL EQUITIES, LLC, AMERICAN RESIDENTIAL EQUITIES, INC., ARE ASSET MANAGEMENT, LLC, SEABREEZE FINANCIAL, LLC and AMERICAN RESIDENTIAL EQUITIES LIII, LLC,

Defendants.

DEPOSITION OF
JEFFREY L. KIRSCH
Taken on Behalf of the Plaintiffs
DATE TAKEN: August 18, 2009
TIME: 9:44 a.m. - 11:47 a.m.
PLACE: 1111 Brickell Avenue
Miami, Florida 33131

Examination of the witness taken before:
Lance W. Steinbeisser, RPR-CSR-FPR
Certified Court Reporter
Steinotype, Inc.
1140 NE 86 Street
Miami, Florida 33138-3434

APPEARANCES:
ON BEHALF OF THE PLAINTIFFS:
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Also present: Paul DeStefanis

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(Exhibits were retained by counsel.)

Thereupon--
JEFFREY LAWRENCE KIRSCH
was duly administered the oath: Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

MR. ROSENTHAL: I have a brief statement to indicate defendants' objection to the fact that we received the documents responsive to defendants' request to produce after 5:00 o'clock last night, more than 1500 pages, which were not identified as to which request they were responsive, and as a result of that, it causes prejudice to the defendants.

DIRECT EXAMINATION

BY MR. FERRER:

Q. Mr. Kirsch, please state your full name for the record.

A. Jeffrey L. Kirsch.

Q. What does the "L" stand for?

A. Lawrence.

Q. What is your date of birth?

A. [redacted]

Q. What is your home address?

A. [redacted]

Q. How long have you been living at that address?

A. Three days.

Q. I'm sorry, three days you said?

A. Yes.

Q. Where were you living before?

A. [redacted]

Q. How long were you living at that address?

A. Probably six years.

Q. What is your business address?

A. 848 Brickell Avenue, Penthouse, Miami, Florida.

Q. 33131?

A. Correct.

Q. What is your highest level of education?

A. I graduated from law school.

Q. Where did you go to law school?

A. Brooklyn Law School.

Q. When did you graduate from law school?

A. January '74.

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Q. Where did you obtain your undergraduate degree?
A. University of Miami.
Q. In what year did you obtain that degree?
A. I believe January of '70.
Q. I'm sorry?
A. I believe January of 1970.
Q. What was your major at the University of Miami?
A. InterAmerican studies.
Q. Any other majors?
A. I only received a B.A. I believe that was my only area of study.
Q. Are you admitted to the Florida Bar?
A. I am.
Q. When did you become admitted to the Florida Bar?
A. I don't remember.
Q. Do you remember how long ago, more or less, in terms of years?
A. I would think, just a guess --
MR. ROSENTHAL: Don't guess.
A. Approximately 1975.
BY MR. FERRER:
Q. Are you admitted to any federal courts?

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A. I don't know.
Q. You don't know whether you're admitted to any federal courts?
A. I don't know.
Q. Do you remember applying to any federal courts?
A. I do.
Q. What federal courts did you apply to?
A. The Southern District.
Q. Were you ever admitted to the Southern District?
A. I don't remember.
Q. When did you apply to the Southern District?
A. I don't remember.
Q. Have you applied to any other federal courts?
A. I do not believe I did.
Q. Have you been admitted to the bars of any other state?
A. I was a member of the bar association of the state of New Jersey.
Q. In order to become a member of the New Jersey Bar Association, did you have to sit for a bar exam?

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A. I did.
Q. When did you sit for that exam?
A. I don't remember the exact date.
Q. Are you still a member of the New Jersey Bar Association?
A. No.
Q. When did you stop being a member of the New Jersey Bar Association?
A. I'm not sure that I was ever really a member of the New Jersey Bar Association.
Q. I'm sorry. I thought that a moment that ago --
A. I joined --
MR. ROSENTHAL: Don't -- let him finish the question.
BY MR. FERRER:
Q. I thought a moment ago you said that you were a member of the New Jersey Bar Association.
A. I belong to an organization known as the New Jersey Bar Association.
Q. Were you ever admitted to practice law in New Jersey?
A. I don't know.
Q. Are you currently a member in good standing with the Florida Bar?

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A. Yes.
Q. Have you ever been suspended from the Florida Bar?
A. No.
Q. Have you ever had any disciplinary proceedings brought against you before the Florida Bar?
A. Yes.
Q. When was that?
A. I don't remember.
Q. Do you remember approximately how many years ago that happened?
A. Yes.
Q. Could you tell me?
A. Approximately 30 -- more than 30 years ago.
Q. Can you tell me what the nature of those proceedings were?
A. I really don't remember.
Q. Do you remember what the outcome of those proceedings were?
A. Yes. The case was dismissed.
Q. Do you remember who it was that brought that case against you?
A. His last name was Smith. I don't

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remember his first name.
Q. Was he a client of yours?
A. Yes.
Q. In what capacity did you represent Mr. Smith?
A. I represented his corporation, as I remember it.
Q. Do you remember the nature of his complaint?
A. Not really.
Q. Do you remember anything about that complaint?
A. No.
Q. Are you still engaged in the practice of law?
A. No.
Q. When did you stop practicing law?
A. 1981.
(Conference room phone rings.)
MR. FERRER: Let me just make sure -- I'm sorry. Let's go off the record.
(Discussion off the record)
(Mr. Carmona entered the conference room.)
MR. ROSENTHAL: Back on the record.

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We're going to recess the deposition to seek a protective order from Judge Freeman regarding the attendance of Mr. Carmona at the deposition.
MR. FERRER: You're going to recess the deposition now?
MR. ROSENTHAL: Yes. We're going to seek a protective order regarding Mr. Carmona's attendance at the deposition.
MR. FERRER: All right, I'll ask Mr. Carmona to leave. That's fine.
MR. ROSENTHAL: That's fine.
MR. FERRER: Miguel, if you don't mind.
MR. CARMONA: I understand.
(Mr. Carmona exited the conference room.)
BY MR. FERRER:
Q. Mr. Kirsch, we were discussing the practice of law. For how long did you practice law?
MR. ROSENTHAL: I'm sorry. Could you read the question back, please.
(The last question was read back by the court reporter.)
A. Approximately seven years.

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BY MR. FERRER:
Q. In what areas of law did you practice?
A. Real estate, trusts and wills.
Q. Any other areas?
A. I did not specialize in anything, so it would have pretty much been a general practice.
Q. Did you do any litigation?
A. No.
Q. In your capacity as a real estate, trusts and wills attorney, did you have occasion to draft promissory notes?
MR. ROSENTHAL: Object as to form. You can answer.
A. I don't remember what took place 30 years ago.
BY MR. FERRER:
Q. Have you ever drafted promissory notes?
A. I don't remember drafting a promissory note.
Q. Did you have occasion to ever sue to enforce a promissory note?
MR. ROSENTHAL: Object as to form.
A. I may have.
BY MR. FERRER:
Q. Do you remember how many times you may

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have had occasion?
A. No.
Q. Under Florida law, sir, as you know, a promissory note, is it required to be signed by the holder in order to be enforceable?
MR. ROSENTHAL: Object as to form. You may answer.
A. Could you repeat the question for me?
BY MR. FERRER:
Q. Sure.
Under Florida law, is a promissory note required to be signed by the holder in order to be enforceable?
MR. ROSENTHAL: Object as to form.
A. I don't believe I should comment on Florida law. I haven't practiced law in 20-some-odd years, so I'm not sure what Florida law is on the subject.
Q. You don't have an opinion one way or the other?
MR. ROSENTHAL: Object as to form.
A. The obligor of a promissory note would have to execute a note in order for it to be enforceable. Is that the question you're asking me?

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Q. I'm asking you whether the holder -- do you know the difference between the holder --
A. No, maybe --
MR. ROSENTHAL: Wait. Let him ask the question, please -- finish the question before you answer.
BY MR. FERRER:
Q. Do you know the difference between a holder and an obligor?
A. No.
Q. The person that gives a promissory note to somebody --
MR. ROSENTHAL: Hold on just one second. Is that phone on?
MR. DESTEFANIS: No.
MR. ROSENTHAL: Mr. DeStefanis was pushing buttons on the speakerphone in the room.
MS. FERRER: You probably have to move your Blackberry because sometimes it makes it --
MR. ROSENTHAL: Thank you.
MR. FERRER: Are you going to keep on interrupting, Alan? Are you?
MR. ROSENTHAL: Let's proceed with your

questioning.
BY MR. FERRER:
Q. Sir, do you deal with promissory notes on a daily basis?
MR. ROSENTHAL: Object as to form.
A. I do not deal with promissory notes on a daily basis. I have lawyers that do that.
BY MR. FERRER:
Q. Do you know what a promissory note is?
A. Of course.
Q. Are you aware whether a promissory note needs to be signed by the holder of the note in order to be enforceable?
MR. ROSENTHAL: Object as to form.
A. You were going to tell me about the holder. I think we were distracted.
BY MR. FERRER:
Q. Okay. The person that you give the note to is the holder. Does the note need to be signed by the holder in order to be enforceable?
MR. ROSENTHAL: Object as to form.
A. I do not know.
Q. Do you know whether a note needs to be notarized in order to be enforceable?
MR. ROSENTHAL: Object as to form.

A. I do not know.
BY MR. FERRER:
Q. What is your current employment, sir?
A. I am employed at American Residential Equities.
Q. When you talk about American Residential Equities, is that American Residential Equities, LLC or American Residential Equities, Inc.?
A. LLC.
Q. Is there a difference between American Residential Equities, LLC and American Residential Equities, Inc.?
A. One is a corporation and one is a limited liability company.
Q. Do you currently do any work for American Residential Equities, Inc.?
A. Yes.
Q. What do you do for American Residential Equities, Inc.?
A. I'm an officer.
Q. What is the business of American Residential Equities, Inc.?
A. It serves as the manager of one or more operating LLCs.
Q. These operating LLCs that you're

referring to, sir, what are their names?
A. I don't know.
Q. How many companies does American Residential Equities, Inc. serve as a manager for?
A. I don't know.
Q. Does American Residential Equities, Inc. do anything else?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. Can you tell me what that is?
A. It is an obligor on a lease, and I don't know what else it does.
Q. Its main function is to act as a manager or a managing company for these other limited liability companies that you spoke about?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. What types of companies are those that American Residential Equities, Inc. manages?
A. They are limited liability companies.
Q. Are these limited liability companies in which you have an interest?
MR. ROSENTHAL: Object as to form.

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A. An ownership interest.
BY MR. FERRER:
Q. Fair enough.
Are these limited liability companies that American Residential Equities, Inc. manages, do you have an ownership interest in any of these entities?
MR. ROSENTHAL: Object as to form.
A. I don't know.
BY MR. FERRER:
Q. Could you tell me what the business of American Residential Equities, LLC is?
A. It serves as the manager of a number of LLCs.
Q. How is the business of American Residential Equities, LLC different than the business of American Residential Equities, Inc.?
A. They are not different.
Q. Are they operated as one in the same?
A. No.
Q. So when do you use American Residential Equities, LLC, and when do you use American Residential Equities, Inc.?
MR. ROSENTHAL: Object as to form.
A. I don't believe that we have used

American Residential Equities, Inc. for a new LLC for quite some time.
Q. When is the last time that --
A. I don't know.
Q. Well, let me ask the question.
When is the last time that you believe American Residential Equities, Inc. was used as a managing company?
A. I don't want to venture a guess. I don't know.
Q. Do you remember if it was before 2006?
A. I don't know.
Q. Why did you stop using American Residential Equities, Inc. as a management company for --
A. There were tax reasons.
MR. ROSENTHAL: Let him finish the question, please.
BY MR. FERRER:
Q. Let me just ask it really quick. And I appreciate it that you're trying to give me the answer. I just want to make sure the court reporter gets it down.
What was the reason why American Residential Equities, Inc. stopped acting as a

manager for these LLCs that you've described?
A. There were tax issues.
Q. Could you explain to me what those tax issues were?
A. It is my understanding that American Residential Equities, Inc. was a regular C-corporation, and we were unable to pass through the losses, and we were at one point in time having some difficulty with accumulated income, is my recollection.
Q. Do you recall when those issues arose?
A. No.
Q. What caused you to transition from the practice of law to the business of managing limited liability companies?
MR. ROSENTHAL: Object as to form.
A. I did not enjoy the practice of law and was looking for something else to do.
Q. And when did that happen?
A. 1981.
Q. Was American Residential Equities, LLC formed in 1981?
A. No.
Q. When you transitioned from the practice of law, what was the name of the company that you

began working for?
A. I don't remember.
Q. Does American Residential Equities, LLC specialize in acquiring, servicing and liquating undervalued first mortgage loans?
A. Today?
Q. Did American Residential Equities, LLC ever specialize in acquiring, servicing and liquidating undervalued first mortgage loans?
A. Yes.
Q. When was it involved in that type of business?
A. From the inception -- and I'm not sure when that was -- to date.
Q. To date you said?
A. To date.
Q. So American Residential Equities, LLC is today still specializing in acquiring, servicing and liquidating undervalued first mortgage loans?
A. Parts of that statement are true. It is servicing and liquidating.
Q. So American Residential Equities, LLC is no longer acquiring undervalued first mortgage loans; is that correct?
A. That's correct.

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Q. Why did American Residential Equities, LLC stop acquiring undervalued first mortgage loans?
A. Timing.
Q. What do you mean by timing?
A. It just was not the correct time to acquire loans.
Q. When did the timing change; in other words, when did American Residential Equities, LLC stop acquiring undervalued first mortgage loans?
A. Sometime in the first quarter of '08.
Q. Could you tell me why it was that American Residential Equities, LLC stopped acquiring undervalued first mortgage loans in the first quarter of '08?
MR. ROSENTHAL: Let me first object generally that Mr. Kirsch is not here as a corporate representative for any American Residential Equities entity or any other corporate entity. He's only here in his individual capacity.
BY MR. FERRER:
Q. Okay. You can answer the question, sir.
A. Could you repeat it?
MR. FERRER: Sure. Lance, would you

mind reading it back.
THE REPORTER: Sure.
(The above-requested portion was read back by the Court Reporter.)
A. We did not feel the time was right.
BY MR. FERRER:
Q. What about the time wasn't right?
A. We were experiencing an economic collapse in the real estate market.
Q. What positions or titles do you hold with American Residential Equities, LLC?
A. I'm not sure.
Q. Do you hold any positions or titles with American Residential Equities, LLC?
A. I probably do, but I don't know what they are.
Q. Who better than you know what your titles with American Residential Equities, LLC are?
A. Probably Lisette de Padua.
Q. Who is Lisette de Padua?
A. She's a lawyer within American Residential Equities.
Q. Do you remember ever holding any titles with American Residential Equities, LLC?
A. Yes.

Q. What titles do you remember holding?
A. I don't remember.
Q. You don't remember holding any titles with American Residential --
A. That's not what I answered. My answer was I do remember that I held titles, but I don't remember what they are.
Q. When was the last time that you remember holding a title with American Residential Equities, LLC?
A. The last time I saw something filed with the State.
Q. What do you mean when you say the last time you saw something filed with the State?
A. Each year we file a report.
Q. What type of report does American Residential Equities, LLC file every year?
A. An annual report.
Q. And what about the filing of the annual report reminded you that you had a title with American Residential Equities, LLC?
A. I remember seeing my name on a report.
Q. Do you remember what year that was?
A. No.
Q. Who determines what titles you're going

to hold with American Residential Equities, LLC?
A. The report has been consistent. I just don't remember what that report says.
Q. But you don't remember the date that you last saw that report?
A. No.
Q. Do you sign those reports?
A. I may or may not.
Q. Are those reports submitted to you before they're filed with the Department of Corporations?
A. Sometimes.
Q. This last time that you saw the report, where did you see it?
A. Probably on my desk with a request for a check.
Q. Who other than you has authority to sign checks for American Residential Equities, LLC?
A. Nobody.
Q. Do you report to anyone at American Residential Equities, LLC?
A. No.
Q. Who reports directly to you at American Residential Equities, LLC?
A. Ultimately anyone who works there.

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Q. Were you involved in the formation of American Residential Equities, LLC?
A. Yes.
Q. How were you involved?
A. I don't understand what you mean by how was I involved.
Q. Did you form American Residential Equities, LLC?
MR. ROSENTHAL: Object as to form.
A. I executed whatever documents needed to be executed in order to form it.
BY MR. FERRER:
Q. Do you remember when you did that?
A. No.
Q. Could you give me an explanation of how it is that American Residential Equities, LLC operates?
MR. ROSENTHAL: Object as to form.
A. I don't understand the question, I'm sorry.
Q. Sure. Does American Residential Equities, LLC solicit investors?
A. No.
Q. What are these limited liability companies that American Residential Equities, LLC

manages?
MR. ROSENTHAL: Object as to form.
A. What do you mean?
BY MR. FERRER:
Q. Sure. I want to try to get an idea of what it is that American Residential Equities does in a little bit more description than just it manages limited liability companies.
MR. ROSENTHAL: There's no question pending.
Q. So would you mind doing that for me, give me an explanation of what it is that it does?
MR. ROSENTHAL: Object as to form.
A. Well, I think you --
MR. ROSENTHAL: Wait, wait, wait. Read the question back, please. Not the speech, the question. Listen to the question. If you understand it, answer it.
(The last question was read back by the court reporter.)
A. I believe you read to me before a sentence that describes what it does.
BY MR. FERRER:
Q. Okay. So you agree with me then that American Residential Equities, LLC --

MR. ROSENTHAL: Let him --
A. I answered that question when I said to you what it does.
Q. Okay, and what are these companies that American Residential Equities, LLC manages?
MR. ROSENTHAL: Object as to form.
Q. What types of companies are they?
MR. ROSENTHAL: Wait, wait, wait. Which question do you want answered, counsel?
BY MR. FERRER:
Q. What types of companies are these limited liability companies that American Residential Equities, LLC manages?
A. You just answered it. They are limited liability companies.
Q. What do they do? What are you managing?
MR. ROSENTHAL: Objection. Which question?
BY MR. FERRER:
Q. What do those companies do?
A. You answered the question before.
Q. Sir...
A. You said -- you asked me what American Residential Equities, LLC does, and you read me a statement and you asked me if that was true and

correct, and I answered that. It does that on behalf of limited liability companies.
Q. I'm sorry. Give me an example of how it is that American Residential Equities, LLC operates.
A. It acquires, services and disposes of assets on behalf of limited liability companies. It is a manager of limited liability companies.
Q. The limited liability companies that American Residential Equities, LLC manages, are those companies that you formed?
MR. ROSENTHAL Object as to form.
A. What distinguishes -- I'm unclear when you say to me that I formed -- I'm not sure what that actually means. Did I file something with the State; is that the question?
BY MR. FERRER:
Q. Well, let me ask you this question. It's a lot easier.
A. Okay.
Q. What is it that American Residential Equities does? Is it an investor group? Does it solicit investors? Does it just manage assets?
A. It manages assets on behalf of limited liability companies.

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Q. Okay, and do these limited liability companies that American Residential Equities, LLC manages, are those companies that you've formed by either filing with the government entity in whatever state it might be formed in the correct documents?

MR. ROSENTHAL: Object as to form.

A. I don't know if I filed them. They're filed by someone within our organization or lawyers on behalf of those limited liability companies.

Q. Okay --

MR. ROSENTHAL: Could I before you -- could I get some water?

MR. FERRER: Of course, right behind you there's a cooler, and there's water and soda, if you like.

THE WITNESS: No, thanks.

BY MR. FERRER:

Q. Mr. Kirsch, the limited liability companies that American Residential Equities manages, what do they do?

A. They acquire assets.

Q. How do they go about acquiring assets?

MR. ROSENTHAL: Object as to form.

A. Today?

BY MR. FERRER:

Q. Let's start with today, yes.

A. Not acquiring many assets today, but they do it through their manager, which would be American Residential Equities, LLC.

Q. How do those LLCs go about acquiring assets through American Residential Equities, LLC? Can you tell me specifically what that means?

A. American Residential Equities, LLC would look for assets on behalf of the LLC.

Q. And when you talk about looking for assets, what does that mean?

A. It would look for nonperforming loans, foreclosed real estate, through brokers, directly, any number of places.

Q. The limited liability companies that American Residential Equities, LLC manages, are those composed of groups of investors?

A. Sometimes.

Q. When they're not composed of groups of investors, what are they composed of?

A. Individual investors.

Q. So these limited liability companies that American Residential Equities, LLC manages, those are all companies that are meant or intended

for investment purposes?

A. They are not exclusively meant for investment purposes, but that's what they're utilized for.

Q. Does American Residential Equities, LLC solicit any investors for the limited liability companies that it manages?

A. Does the company or -- whom are you referring to there?

Q. Let me ask it again.

Does American Residential Equities, LLC solicit investors for the limited liability companies that it manages?

A. It has independent representatives that do that, third parties typically.

Q. Could you tell me who third parties are?

MR. ROSENTHAL: Object as to form.

A. We have -- you're asking me who the names of these people are over the years. I can't remember them all.

BY MR. FERRER:

Q. Well, let me ask it this way. How is it that those third parties go about soliciting investors for the LLCs, for the limited liability companies that American Residential Equities, LLC

manages?

A. They approach non-resident alien investors typically who have an interest in investing in nonperforming residential mortgages.

Q. What representations do these third parties make to these non-resident alien investors with regard to their investment in these limited liability companies that American Residential Equities, LLC manages?

MR. ROSENTHAL: Object as to form.

A. I don't know.

BY MR. FERRER:

Q. Do you give these third parties any guidance as to what representations they should be making about investments by nonresident aliens?

MR. ROSENTHAL: Object as to form.

A. They have received some training.

BY MR. FERRER:

Q. Who gives these third parties that training?

A. Over the years it's been many people.

Q. Is it employees of American Residential Equities, LLC that trains these third parties?

A. Sometimes.

Q. When it's not the employees of American

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Residential Equities, LLC that trains these third parties, who does?

A. Independent reps.

Q. Could you tell me what you mean when you say independent reps?

A. Third parties, independent contractors.

Q. What do these independent reps do for American Residential Equities, LLC, if anything?

A. The only thing they would do is raise capital.

Q. And when you talk about raising capital, what do you mean?

A. Raising money.

Q. And when you talk about raising money, do you mean money from these investors to be invested in these assets, real estate assets?

MR. ROSENTHAL: Object as to form.

A. It's usually raising debt to lend to an entity.

BY MR. FERRER:

Q. Could you tell me what that means?

A. They raise debt for the LLCs that you're describing.

Q. In other words, these LLCs give promissory notes to these non-resident aliens --

A. Yes, sir.

Q. -- in exchange for their investment of capital?

A. In exchange for their loan.

Q. Okay. Just so that I understand, these limited liability companies that American Residential Equities, LLC manages, they give promissory notes to foreign investors in exchange for their loans?

MR. ROSENTHAL: Excuse me. Could you read back the question, please.

(The last question was read back by the court reporter.)

MR. ROSENTHAL: Thank you.

A. I need to clarify an answer. Sometimes it's equity and sometimes it's debt.

BY MR. FERRER:

Q. Could you give me an example of a situation where it's equity?

A. There are times that non-resident alien investors will also file a U.S. Tax Return, and they choose to invest in the form of equity.

Q. And when you talk about equity, what do you mean? How do they invest in the form of equity?

A. Ownership, membership units.

Q. In other words, for their investment, they get a membership interest in the limited liability companies that American Residential Equities, LLC manages?

A. Correct.

Q. Could you give me an example of how it is that it is debt, how some of these investors invest by way of debt?

A. They prefer to receive portfolio interest income.

Q. What does that mean?

A. That is a form of income that has no withholding attached to it.

Q. Could you give an example of how that's done?

MR. ROSENTHAL: Object as to form.

A. I cannot, but it is a function of the business that we're in.

Q. Okay. When these non-resident investors invest by way of debt, do they receive a promissory note from the limited liability company in exchange for their investment?

A. Yes.

Q. In terms of the third parties that

American Residential Equities, LLC uses to raise capital, what materials do those third parties use?

A. Powerpoint presentations -- I haven't seen them in years. I don't know everything, but I do know a Powerpoint presentation.

Q. Are you aware of what representations these third parties make to non-resident investors in order to raise capital?

A. No.

Q. Do you provide these third party representatives with any information pertaining to their efforts to raise capital for American Residential Equities, LLC?

A. I'm sorry. Could you ask that question again, please?

MR. FERRER: Lance, would you mind reading that back.

(The last question was read back by the court reporter.)

A. We provide them with information.

BY MR. FERRER:

Q. You provide them with all of the information that they need in order to engage in soliciting these non-resident investors?

MR. ROSENTHAL: Object as to form.

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A. I'm not there. I don't know what they say, and I don't know what they're showing to investors at times.

Q. Do you provide any parameters or any guidance to those third party investors as to what they can and they cannot represent to non-resident investors?

A. Yes.

MR. ROSENTHAL: Object as to form.

BY MR. FERRER:

Q. What are those parameters?

A. I don't know them all at this time. We haven't raised capital in awhile, so I can't remember them all, but one thing is we make no guarantees.

Q. Are those parameters written down anywhere?

A. I don't know.

Q. You described two situations pursuant to which non-residents invest in the limited liability companies that American Residential Equities, LLC manages. I want to focus for a moment on those situations where they're getting debt back, okay, where you describe them getting a promissory note in exchange for a loan that they make; yes?

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A. Correct.

Q. In those situations, who are the members of the limited liability companies that American Residential Equities, LLC manages?

A. Who are the members... I believe there are different members, but American Residential Equities, LLC is certainly one in certain instances. American Residential Equities, Inc. is certainly one in some instances. I don't know what other entities there are that hold interest in those.

Q. When do you decide to use American Residential Equities, LLC as opposed to American Residential Equities, Inc. as the member of those LLCs?

MR. ROSENTHAL: Object as to form.

A. When or why did you say?

BY MR. FERRER:

Q. Well, tell me why.

A. As I said to you before, I believe we've stopped using Inc. and started using LLC.

Q. And you don't have any recollection when it is that you stopped using Inc.?

A. No.

Q. Was it before 2006?

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A. I don't know.

Q. Does American Residential Equities, LLC create a separate limited liability company for each individual investor?

A. No.

Q. How does American Residential Equities, LLC go about creating the limited liability companies --

MR. ROSENTHAL: Object as to form.

Q. -- that it manages?

MR. ROSENTHAL: Object as to form.

A. Sometimes one investor wants to be by himself and he has a specific amount of money that he wants to invest, and sometimes an investor wants to be a part of a greater pool, or sometimes we have a pool and we need to raise a specific amount of money. It's not very scientific.

BY MR. FERRER:

Q. Are these limited liability companies that American Residential Equities, LLC manages given names?

A. They're numeric.

Q. Could you tell me what that means?

A. American Residential Equities XXV, LLC, XXVI, XXVII, so on and so forth.

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Q. And how is the numeral associated with any particular limited liability company? How do you come up with that?

A. We just -- they went in sequence for awhile and then we jumped.

Q. When did you begin jumping?

A. I believe when I met Mr. Magno.

Q. And what was it about Mr. Magno that caused you to jump in terms of how you were naming the LLCs that American Residential Equities, LLC manages?

A. We just selected a hundred --

Q. What about that number --

A. -- which was "C."

Q. I see. So you selected a number which was C, C being the Roman numeral for a hundred?

A. Correct.

Q. What about Mr. Magno or his company made you select the number 100?

A. I don't think he made me do anything. I think it was becoming very confusing for us. We were becoming at times confused by the Roman numerals themselves.

For instance, some people for ARE XL would put down four X's, and unintentionally

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numbers were being juxtaposed, and it just became very difficult.

Q. By the time that you met Mr. Magno, was American Residential Equities, LLC managing at least a hundred limited liability companies?

A. No.

Q. At that time, how many limited liability companies was American Residential Equities, LLC managing?

A. I don't know.

Q. More than 50?

A. I don't know.

Q. When an investor chooses to invest with American Residential Equities, LLC and chooses to do it in the form of debt, aside from the promissory note is there any other document that is signed by the limited liability company that American Residential Equities, LLC manages and the investor?

MR. ROSENTHAL: Object as to form.

A. Signed ... sometimes.

Q. Are you familiar with the concept of a pledge agreement?

A. Yes.

Q. Could you explain to me how it is that

you're familiar with that?

A. It's a document that we've used.

Q. And when is it that you use that document?

A. When I'm requested.

Q. I'm sorry?

A. When someone requests it.

Q. What is a pledge agreement?

A. It's pledging the LLC units to the borrowers.

Q. And is that a document that is always signed and executed when an investor chooses to invest by way of debt as opposed to equity?

A. If it's required, if someone requests it of us, we do sign a pledge.

Q. Otherwise, if the investor doesn't request it, you don't do it?

A. Sometimes we do and sometimes we don't. I can't give you an answer that takes into consideration all investors. I can't say that every single investor has or hasn't received a pledge agreement.

Q. Can you tell me those situations where you wouldn't use a pledge agreement and the investor was investing through debt?

A. Again, if someone doesn't request it, we probably don't do it.

Q. Are all of the limited liability companies that American Residential Equities, LLC manages Delaware companies?

A. I don't know.

Q. Who is it that actually forms the limited liability companies that American Residential Equities, LLC manages?

MR. ROSENTHAL: Object to the form.

A. One of the lawyers who works in-house.

BY MR. FERRER:

Q. What is the name of that lawyer?

A. Could have been David Merrill, could have been Lisette de Padua. I might have done it once.

Q. Are there any other employees of American Residential Equities, LLC that might have formed these limited liability companies that American Residential Equities, LLC manages?

A. Since it's not very difficult, one of our accountants like Bill Hirschkowitz could have done it. One of our outside accountants could have done it. I -- it's simple enough to do online today. I don't know whether anyone else might have

done it over the years.

Q. You are aware that a significant number of the limited liability companies that American Residential Equities, LLC manages are Delaware companies?

MR. ROSENTHAL: Object. He just asked and answered that question.

THE WITNESS: Excuse me?

MR. ROSENTHAL: No, he's just asking the same question over and over again. I would ask you to please stop.

BY MR. FERRER:

Q. It's not, but go ahead and answer it, please.

A. Yes.

Q. Why is that?

A. I don't know.

Q. Who determines what state the limited liability companies that American Residential Equities, LLC --

A. I think Baker & McKenzie did originally.

Q. Okay. Let me ask that question again. I know you're trying to get your answer out as quickly as possible, but for the record, I would appreciate you waiting until I finish; okay?

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Who is it that determines where and what state the limited liability companies that American Residential Equities, LLC manages are going to be formed?

A. Originally it is my recollection that Baker & McKenzie did, and then we just kept following suit.

Q. Have any of the limited liability companies that American Residential Equities, LLC manages been formed anywhere other than Delaware?

A. Yes, but I don't know where.

Q. Are these limited liability companies, would it be fair to call them basically holding companies for pools of assets?

MR. ROSENTHAL: Object as to form.

A. I'm not exactly sure what your definition of holding company is. It sounds reasonable.

Q. Does American Residential Equities, LLC have a management agreement with each of the limited liability companies that it manages?

A. I don't know.

Q. Who better than you at American Residential Equities, LLC would have knowledge regarding whether American Residential Equities,

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LLC signs or enters into a management agreement with these limited liability companies that it's managing?

A. One of the in-house lawyers probably.

Q. Who are the in-house attorneys today?

A. Today it's only Lisette de Padua, but we haven't done any new LLCs for the past year and a half, so...

David Merrill was there at the time in that capacity. Plus, we had outside lawyers doing some of them.

Q. What is the purpose of holding assets through the limited liability company as opposed to having the investors own them directly?

A. A lot of times investors don't want to have their own names, they want to be insulated from litigation, and I'm sure there's some tax reasons.

Q. You stated earlier that the members of these limited liability companies that American Residential Equities, LLC manages is usually either American Residential Equities, LLC or American Residential Equities, Inc. Do you remember that testimony?

MR. ROSENTHAL: Objection as to form.

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A. You'd have to read back the answer. I may have said that there was -- there may be another entity involved, but generally that sounds right.

BY MR. FERRER:

Q. Is there ever more than one member with respect to any of the limited liability companies that American Residential Equities, LLC manages?

A. Might be.

Q. How is it determined who the members of the limited liability company that American Residential Equities, LLC manages are going to be?

A. Many times, the investors.

Q. Does each limited liability company that American Residential Equities, LLC manages have a separate bank account?

A. They did.

Q. When did they stop having their separate bank accounts?

A. When we went to the trustees.

Q. What do you mean by that?

A. Sometimes multiple pools would buy an asset and we formed a trust agreement.

Q. So in certain instances, different limited liability companies enter into a trust

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agreement to buy a single asset, correct?

A. Or assets.

Q. Other than in those circumstances, does each of the limited liability companies that American Residential Equities, LLC manage have their own independent bank account?

MR. ROSENTHAL: Object as to form.

A. I believe that recently we've tried to close down as many as possible, because so many have become inactive. So what you would see today possibly is an LLC that would be reflected on the Delaware Secretary of State records or possibly Florida where we filed to do business in many instances, but we shut down the bank account because there was de minimis.

Q. In terms of when the limited liability companies that American Residential Equities, LLC manages, when those companies are formed, was it the case that an independent bank account was formed for each of those limited liability companies?

MR. ROSENTHAL: Object as to form. Go ahead.

A. That is correct.

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BY MR. FERRER:
Q. How does American Residential Equities, LLC go about acquiring assets to market to foreign investors?
MR. ROSENTHAL: Object as to form.
A. People might contact us, we might contact people, and there's numerous ways.
Q. What type of due diligence does American Residential Equities, LLC do with respect to the assets that it purchases?
MR. ROSENTHAL: Object as to form.
A. It would do -- I don't know that it was always consistent, but collateral file review, servicing notes, BPO. It would also depend upon the type of asset that it was.
BY MR. FERRER:
Q. When you talk about collateral file review, what does that mean?
A. Collateral, notes, mortgages, make sure all the documentation is there, title policies.
Q. Okay. So when you talk about collateral file review, what you're talking about is reviewing the actual documents associated with that asset, correct?
A. Correct.

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Q. When you talk about servicing notes, what is it that you mean?
A. Notes that the servicer would make about an asset.
Q. Would that also be part of the collateral file?
A. No. This is not my area. This is asset management, third party. I just want to interject that.
MR. ROSENTHAL: When you get to a convenient area for a break, I would appreciate it.
MR. FERRER: Yes.
BY MR. FERRER:
Q. When you talk about asset management and it not being your area, what do you mean?
A. We have people to do that.
Q. People in house at American residential --
A. In house and out of house.
Q. Who are the people in house at American Residential Equities, LLC that do asset management?
A. Pam Perrot, Derrell Riley. There's been 20 people over the past few years -- maybe I'm exaggerating. Maybe 15.

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Q. Who are the in-house people at American Residential Equities, LLC that did asset management in June of 2006?
A. Denise Shea was there. Other than Denise, I can't be specific.
MR. FERRER: All right. Do you want to take a break?
MR. ROSENTHAL: Sure.
(A break was taken.)
BY MR. FERRER:
Q. Back on the record.
Mr. Kirsch, we were talking before the break about the activities of American Residential Equities, LLC in soliciting foreign investors, and you stated that there were third parties that took care of those activities for American Residential Equities, LLC; is that correct?
A. I guess it's your definition of solicitation.
Q. Well, I don't mean anything pejorative by it. American Residential Equities, LLC has third parties that go out and seek out investments by foreign investors, correct?
A. That's predominantly the case. There are exceptions.

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Q. And in those exceptions, have you participated in any solicitation or seeking out of investments by foreign investors?
A. That's why I asked you about your definition of solicitation. Have I spoken with investors? Absolutely.
Q. Have you made representations to investors regarding what rates of return they can expect to receive?
A. We do.
Q. Usually what is it that you tell the investor that they can expect to receive in terms of a rate of return on their investment?
MR. ROSENTHAL: Object as to form.
A. Well, if there's a promissory note, the promissory note speaks for itself.
BY MR. FERRER:
Q. And if there isn't a promissory note?
A. That would take care of all the instances of debt.
Q. In other words, the promissory note would take care of all instances of debt, correct?
MR. ROSENTHAL: Object as to form.
A. It's an obligation to repay a specific sum.

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Q. Okay. So the rate of return --
MR. ROSENTHAL: His answer wasn't finished.
BY MR. FERRER:
Q. I'm sorry. Please.
A. It's an obligation to pay a specific sum at a specific rate.
Q. Now you stated also that investors didn't just invest in terms of debt but also in terms of equity, correct?
A. Sometimes.
Q. And in those times when they invest by way of equity, what representations have you made, if any, regarding the rates of returns that they can expect on their investments?
A. There may have been a private placement offering that spoke for itself.
Q. In terms of those investors that invest by way of equity and not by way of debt, is there always a private placement offering?
MR. ROSENTHAL: Object as to form.
A. I am not 100 percent positive.
BY MR. FERRER:
Q. Have you made any representations regarding the loan-to-value ratio that you could

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purchase properties for?
A. Yes.
Q. What representations, if any, do you make to investors regarding the loan to value at which you or American Residential Equities, LLC purchases properties for investment?
MR. ROSENTHAL: Object as to form.
A. It's an impossible question to answer. First off, I would have to know the date, I would have to know the asset class, I would have to know the state. It's not that simple.
Q. In terms of investments by Petra Opportunity Fund, were there any representations made by you regarding the loan-to-value ratio at which American Residential Equities, LLC was going to acquire real property?
MR. ROSENTHAL: Object as to form.
A. I don't remember the specifics. They bought several different asset classes.
BY MR. FERRER:
Q. Do you remember making any representations to the representatives of Petra Opportunity Fund in terms of the loan-to-value ratio in which American Residential Equities was going to obtain assets?

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A. I'm sure I did both in writing and orally.
Q. Do you remember whether in writing or orally you made any representations that the loan-to-value ratio at which American Residential Equities, LLC was going to acquire residential properties was 60 percent?
MR. ROSENTHAL: Object as to form.
A. It could be.
MR. ROSENTHAL: Listen to the question, to the whole question.
THE WITNESS: I'll do that now.
MR. FERRER: I'll go ahead and give you the original. That's just for your attorney to review.
(Plaintiffs' Exhibit 1 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm handing you what's been marked as Plaintiffs' No. 1 for identification purposes. I'll ask you to review it --
MR. ROSENTHAL: Do you have the original?
MR. FERRER: That is the original.
MR. ROSENTHAL: Thank you.

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BY MR. FERRER:
Q. Once your attorney is done reviewing it, I'll ask you to take a look at it, review it, please familiarize yourself with it, because I'm going to ask you some questions.
A. Okay.
Q. Do you recognize the document, sir?
A. Yes.
Q. Can you identify it for the record?
A. It is a registered note for $10,492,242.66 dated April 28, 2006.
Q. Okay. Are you familiar with the circumstances pursuant to which this registered note was signed?
A. Generally speaking.
Q. I'll ask you to turn to the last page on that exhibit. Can you tell me whether that is your signature on the upper part of the last page under the American Residential Equities LIII, LLC signature block?
A. It looks like my signature.
Q. Okay. Do you remember signing this document?
A. No.
Q. Do you remember signing any documents

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with Petra Opportunity Fund?
MR. ROSENTHAL: Wait a minute.
MR. FERRER: It's okay.
MR. ROSENTHAL: This is not a Petra Opportunity Fund document.
BY MR. FERRER:
Q. That's fair.
You can answer the question.
A. What's the question?
Q. Do you remember signing any documents with Petra Opportunity Fund?
MR. ROSENTHAL: Object as to form.
A. I signed many documents.
Q. You have no reason to believe that that is not your signature on the last page of this note?
MR. ROSENTHAL: Object as to form.
A. It looks like my signature.
BY MR. FERRER:
Q. Do you remember whether at the time you signed it -- well, let me backtrack.
Do you recognize Mr. Erick Magno's signature on the bottom of that last page of that note?
A. No.

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Q. Do you remember whether when you signed this note Erick Magno had signed it?
MR. ROSENTHAL: Object as to form.
A. Mr. Magno would never see me sign anything.
BY MR. FERRER:
Q. What does that mean?
A. He was never in my presence when I signed anything.
Q. Does that in your mind mean that there was some sort of fraud associated with this note --
A. I didn't say that.
MR. ROSENTHAL: Let him finish the question, please.
BY MR. FERRER:
Q. Does that mean that in your mind that there's some sort of fraud associated with this particular promissory note that I'm showing you?
MR. ROSENTHAL: Object as to form.
A. I only said that Mr. Magno did not see me sign this.
Q. And my question was when you signed it --
A. If I signed it.
Q. Okay. Well, let me go back to that. Do

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you doubt that you signed this note?
MR. ROSENTHAL: Object as to form.
A. I said it looks like my signature, but I can't recollect specifically signing this note.
BY MR. FERRER:
Q. Okay. You don't recollect signing a note for $10,492,242.66?
A. I recollect signing a note, two notes --
Q. Okay.
A. -- one for 10 million 492, the other one -- the ARE LIII for 3 million some-odd dollars. I don't remember the exact amount. Whether they were signed at the same time or different times, I can't tell you.
Q. Okay. Was this --
A. But I do remember signing a note.
Q. At the time that this note that we're looking at was signed, do you remember whether it had Mr. Magno's signature at the bottom of that note as reflected in the last page on Page 5?
A. I do not remember.
Q. Okay. You stated a moment ago that there were two notes signed, one for 10.4 and another one for approximately 3.5 million; is that correct?

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A. I think the total sum, if I remember correctly, was $14 million.
Q. Okay. So this was one of two notes totaling $14 million, to your recollection?
A. Yes.
MR. ROSENTHAL: Are you done with this exhibit?
MR. FERRER: I'm going to be referring to it interchangeably.
(Plaintiffs' Exhibit 2 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, let me show you what's been marked as Plaintiffs' Exhibit No. 2. Your attorney is reviewing a copy. I'll ask you to review the copy that I put in front of you, familiarize yourself with it, and let me know when you're done, please.
MR. ROSENTHAL: Do you have the original?
MR. FERRER: I don't.
A. Yes, sir.
BY MR. FERRER:
Q. Do you remember -- well, let me backtrack. Is this the second note that you were

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referring to just a moment ago as part of a $14 million transaction?
A. I believe so.
Q. And I'll ask you to turn to the last page of that $3.5 million note, sir, and tell me whether you recognize your signature on the top portion of that note.
A. It could be, even though it looks different than the signature on the 10 million four.
Q. Do you have any reason to believe that you did not sign the note that we're looking at now for --
A. I don't remember.
Q. -- 3,507,754.34?
A. I have no reason to believe that we did not sign notes totaling $14 million.
Q. Okay, and you have no reason to believe that the note that is shown to you as Plaintiffs' Exhibit No. 1 and the copy of the note that I've shown you as Plaintiffs' Exhibit No. 2 are the two notes that comprise that $14 million transaction, correct?
A. I don't know, because if you look at the note for 10,492,000, I happen to see that Mr. Magno

crossed out the name of -- it looks like Marissa Normania, who was one of our employees, and wrote in his own. So I'm not sure what that's all about.
Q. Okay, but you have to reason to doubt that you signed that note?
MR. ROSENTHAL: Object as to form.
A. Again, I'll state, for the record, that I signed two notes totaling $14 million.
BY MR. FERRER:
Q. Okay, and my question is very simple, and I don't mean to go around with you, but is the note that's marked as Plaintiffs' No. 1 one of the notes that you signed that totaled $14 million?
A. It looks like my signature.
Q. Okay. I'm in terms of the note that's been marked as Plaintiffs' No. 2, is that the note that you signed as part of the $14 million transaction?
A. It could very well be my signature.
Q. Okay.
A. I'm not doubting it.
Q. Why was the $14 million deal -- well, let me backtrack. Are you aware of a company by the name of Eleven Homes Limited?
A. I don't know if it's Elevenhome or

Eleven Homes that I'm familiar with.
Q. At the time that you entered into -- well, tell me what this transaction entailed, this $14 million transaction.
A. It dealt with the borrowing of $14 million for the acquisition of the product.
Q. Okay. In other words, Eleven Homes was one of the foreign investors that you were describing awhile ago that invested $14 million with American Residential Equities, LLC?
MR. ROSENTHAL: Object as to form.
A. I never met Eleven Homes.
BY MR. FERRER:
Q. Okay. Go ahead.
A. I met what was purportedly a representative of Elevenhome Limited.
Q. And who was that?
A. Gerry Couch and Erick Magno.
Q. When did you meet Gerry Couch and Erick Magno the first time in connection with the two notes totaling $14 million?
A. I don't remember.
Q. Do you remember the year?
A. No.
Q. You'd agree with me, though, that it was

before April 28, 2006; is that correct?
A. I may have met Mr. Couch after that. I certainly met Mr. Magno before that.
Q. And when you met Mr. Magno, what did he represent himself to be in terms of Eleven Homes Limited?
MR. ROSENTHAL Object as to form.
A. A person who spoke on behalf of Eleven Homes Limited.
BY MR. FERRER:
Q. To your understanding --
MR. ROSENTHAL Just for the court reporter, to be very careful, because there's an "S" and sometimes there isn't. So please just be very careful in terms of taking down the testimony.
You should be very careful of making sure you're clear for the court reporter.
BY MR. FERRER:
Q. When you met with Mr. Magno for the first time and he told you that he was the person who spoke for these individuals, did he tell you whether the company's name was Eleven Homes Limited with an "S" or Elevenhome Limited without an "S"?
MR. ROSENTHAL Object as to form.

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A. I was not paying attention.
BY MR. FERRER:
Q. Did a company by the name of Eleven Homes Limited invest $14 million with American Residential Equities, LLC?
A. I don't know that there is a company Eleven Homes. I was told that there was a company called Elevenhome -- I could be wrong -- but an entity by the name of Eleven Homes Limited has been issued a promissory note totaling -- two notes totaling $14 million.
Q. Did Eleven Homes actually pay American Residential Equities, LLC $14 million?
A. I don't know where the money came from.
Q. Did American Residential Equities, LLC receive $14 million in connection with these two notes that we've been looking at, Plaintiffs' No. 1 and Plaintiffs' No. 2?
A. I doubt that.
Q. You doubt that American Residential Equities, LLC received $14 million?
A. I doubt that.
Q. Why do you doubt that?
A. Because I doubt that American Residential Equities, LLC would have received

$14 million.
Q. What was the point of these promissory notes?
A. The money never came to American Residential Equities, LLC is what I'm trying to say you.
Q. Okay. Tell me where the money went.
A. I don't know, but I doubt that it went to American Residential Equities, LLC. It would have either gone to a -- it would have probably gone to -- again, probably gone to a separate dedicated account.
MR. ROSENTHAL: Just please don't testify as to guessing, speculation, abilities, please.
BY MR. FERRER:
Q. What was the purpose of the $14 million loan?
A. To acquire nonperforming residential mortgages.
Q. Was American Residential Equities LIII, LLC a limited liability company that American Residential Equities, LLC formed specifically with respect to this $14 million transaction?
MR. ROSENTHAL: Object as to form.

A. I don't know that American Residential Equities, LLC formed it. An individual on behalf would have. I don't know who that was. And I'm not even sure that American Residential Equities, LLC -- I take that back. American Residential Equities, LLC appears to be the manager of American Residential Equities LIII.
BY MR. FERRER:
Q. And where do you find the information --
A. On the signature page.
Q. What involvement, if any, did you have with respect to this $14 million transaction?
A. Please be clearer, more specific.
Q. What did you do? I mean did you meet with Erick Magno? Did you meet with Gerry Couch? Did you tell them where to wire the money?
MR. ROSENTHAL: Which question would you like, counselor?
BY MR. FERRER:
Q. What was your involvement?
A. With Erick Magno?
Q. With respect to the $14 million transaction.
A. This $14 million transaction, I believe, came about after several other transactions.

Q. What was your involvement with respect to this $14 million transaction?
A. I don't remember what my involvement was. It was probably no different than it was in the other transactions.
Q. Okay. Tell me what your involvement was with respect to those other transactions.
A. I met with Erick Magno, and he said that he had additional moneys to invest on behalf of Elevenhome or Eleven Homes Limited, and to go out and start looking for nonperforming loans.
Q. And did you do that?
A. I suspect that I or someone else in the company started to look for nonperforming loans to acquire.
Q. And when you refer to the company, what you're referring to is American Residential Equities, LLC, correct?
A. Correct.
Q. Why did you sign the note for $10,492,242.66?
A. I signed it because if the money was given to us, then we were obligated to repay it if I signed the promissory note.
Q. Then why were you obligated to repay the

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$14 million? I'm trying to understand what this deal was.

MR. ROSENTHAL: Again, you're confusing the witness.

MR. FERRER: Okay.

MR. ROSENTHAL: He wasn't obligated under the documents you have in front of him to pay anybody anything. He is an individual here, Jeffrey Kirsch. Jeffrey Kirsch is not obligated in that instrument.

MR. FERRER: All right. Let me know when you're done.

MR. ROSENTHAL: I'm done now.

MR. FERRER: I guess --

MR. ROSENTHAL: So again, if you want to rephrase that question, then I won't instruct him not to answer. I'm really trying to avoid it. So I would ask you to rephrase the question.

BY MR. FERRER:

Q. I'm trying to find out, Mr. Kirsch, what your involvement was with respect to this $14 million transaction consisting of two promissory notes that we've now marked as Plaintiffs' No. 1 and No. 2.

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MR. ROSENTHAL: There's no question pending.

Q. Can you tell me what that --

A. I'm sorry?

Q. -- was?

MR. ROSENTHAL: It wasn't a question. It was a declarative statement. Now there's a question. Do you understand the question? If so, answer it.

BY MR. FERRER:

Q. Let me go ahead and ask you again, because the record needs to read clearly.

What was your involvement, sir, with respect to this transaction for $14 million that comprises the two promissory notes that we've now marked as Plaintiffs' No. 1 and Plaintiffs' No. 2?

A. I would have met with Erick Magno, as I did in other transactions, on behalf of American Residential Equities, LLC to discuss the investment of $14 million.

Q. Did American Residential Equities, LLC manage the $14 million that Eleven Homes Limited paid?

MR. ROSENTHAL: Object as to form.

A. Yes, it says that we are the manager.

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BY MR. FERRER:

Q. And in what sense did American Residential Equities, LLC manage those investments of $14 million?

A. We would acquire them. We would interreact -- we would select a servicer. We would interreact with the servicer. We would make decisions regarding the liquidation of assets, the reacquisition of assets. We would have conversations with the investor's agent about what was going on, show him what he wanted to see.

Q. When you stated a moment ago that you would acquire them, what you're referring to is a pool of assets; is that correct?

A. Yes.

Q. So American Residential Equities, LLC purchased a pool of assets with the $14 million evidenced by these two notes, correct?

A. I can't say that it was a single pool. I don't know whether it was multiple pools, single pool, but it would have comprised short of initial expenses and the like $14 million, reserves, payments of third parties, whatever.

Q. Okay, but I just want to make sure that the record reads clearly. American Residential

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Equities, LLC purchased properties --

A. Didn't purchase them. Purchased them on behalf of ARE LIII.

Q. Very well. American Residential Equities, LLC purchased on behalf of American Residential Equities LIII, LLC various properties, whether they be one pool or different pools of assets with the $14 million --

MR. ROSENTHAL: Object --

A. Not real property. Mortgages. Intangible.

BY MR. FERRER:

Q. What was the purpose of American Residential Equities, LLC purchasing those intangibles on behalf of American Residential Equities LIII, LLC?

A. It's their primary business.

Just for the record, I'm having an allergic reaction to some medicine I'm taking. I'm going to push through this as best I can, but I just want to go on the record as saying my head is breaking out.

Q. What is the medicine that you're taking?

A. I'm taking four different medicines.

Q. Okay. So that the record is clear in

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case that you end this deposition, what medicines are those?

A. Lorik, cultrazine, Efudex, the usual lipitors, some holistic medicine, which is Hydracal, but I feel well enough to go on.

Q. Okay. Thank you.

At any point you don't, please let me know.

A. I will.

So I don't mean to be abrupt, but I seem to be hot.

MR. ROSENTHAL: Do you want to take a break?

A. No, I would rather keep going. It's just that we're at that point. Let's just keep going.

BY MR. FERRER:

Q. Are you aware, sir, why this $14 million transaction involving American Residential Equities LIII, LLC was structured with two separate notes as opposed to just one for $14 million?

A. My recollection is that one was a 30-day note, and I think Mr. Magno just chose to do it that way.

Q. Which of Plaintiffs' Exhibits --

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A. The one in my right hand entitled 3,507,757.34.

Q. The $3 million note, that was the one that was 30 days?

A. Yes, sir.

Q. And that was at the request of Mr. Magno you said?

A. I believe he requested that we do two separate notes. We would not have objected to it.

Q. Now, sir, you've had copies of both of those notes in your possession, correct?

A. You mean now or before?

Q. Before today's deposition and after the signing of those two notes, has American Residential Equities, LLC had copies of those two notes in its possession?

MR. ROSENTHAL: Objection. He is not here as a corporate rep for any entity, any LLC whatsoever. If you're asking him whether he has personally possessed any document, you're certainly free to do so.

BY MR. FERRER:

Q. I'm going to go ahead and ask you again, Mr. Kirsch.

From the time that these notes were

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executed to today's deposition, do you know whether American Residential Equities, LLC has had copies of those two notes in its possession?

A. I don't.

Q. Who better than you at American Residential Equities, LLC would have knowledge in that regard?

A. Bill Hirschkowitz might. We would have turned them over if it was request to produce.

Q. Okay. To the extent that -- well, let me show you the next exhibit.

(Plaintiffs' Exhibit 3 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm now showing you --

MR. ROSENTHAL: Excuse me just one second. Are you feeling okay?

THE WITNESS: Yeah.

MR. ROSENTHAL: I want you to listen to the question carefully, and I don't want you guessing, all right? You seem to be affected by the medication, and I just want you to be very careful.

THE WITNESS: Okay.

MR. ROSENTHAL: Which is the exhibit

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that you just handed him?

MR. FERRER: No. 3.

A. Okay. I'm presently looking at --

MR. ROSENTHAL: Wait, wait. Let's get the right one in front of you. Look at the exhibit stamp, because that's the best way to identify them.

A. Okay, I have them in front of me.

BY MR. FERRER:

Q. Okay. Mr. Kirsch, I've shown you what's been marked as Plaintiffs' Exhibit No. 3. I'll represent to you that it is a copy that we received from you in response to my client's request for production of documents --

MR. ROSENTHAL: Objection. You did not receive anything from him.

MR. FERRER: Actually I did. The request was to him and it was responded by him.

MR. ROSENTHAL: You received it from counsel.

MR. FERRER: Okay.

BY MR. FERRER:

Q. Mr. Kirsch, I'll represent to you that this is one of the documents that I received from

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counsel to my client's request for production of documents to you. You'll note that it has a number at the very bottom on the right-hand lower portion --

A. Right.

Q. -- KIR 01438. That's a Bates number that was provided to us.

A. Okay.

Q. My question is would you agree with me, sir, that American Residential Equities, LLC had a copy of this note in its possession after it was signed?

MR. ROSENTHAL: Object as to form.

A. Yes.

BY MR. FERRER:

Q. And I'll ask you to turn to the last page, sir.

A. Yes.

Q. You'll agree with me that the copy of the $10,492,242.66 note that we've been looking at contained your signature and Mr. Magno's signature at the bottom, correct?

A. I do.

Would you like this back?

Q. Let's go ahead and keep them together,

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if you don't mind.

Now, are you aware of who it was that drafted the two notes that we've been discussing, the $10.4 million note and the $3 million note?

MR. ROSENTHAL: You've identified three notes, counselor. If you could identify them specifically about which ones you're asking him.

BY MR. FERRER:

Q. Sure.

Are you aware of who it is that drafted Plaintiffs' 1 and Plaintiffs' 2?

A. I think -- I don't know.

Q. In terms of going out and seeking investments by foreign investors, does American Residential Equities, LLC usually draft the documents necessary for those investments?

MR. ROSENTHAL: Object as to form.

A. Sometimes.

BY MR. FERRER:

Q. Does American Residential Equities, LLC sometimes draft promissory notes?

A. Yes.

Q. Does Lisette de Padua have any occasion to draft promissory notes on behalf of American

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Residential Equities, LLC?

A. Yes.

Q. Do you know if Lisette de Padua drafted the notes that we've been discussing as Plaintiffs' Exhibit No. 1 and Plaintiffs' Exhibit No. 2?

A. No.

Q. You don't know?

A. I don't know if she had a hand in it or if Mr. Magno did, or both. I didn't.

(Plaintiffs' Exhibit 4 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm showing you what's been marked as Plaintiffs' Exhibit No. 4 for identification purposes. I'll ask you to review it briefly, and let me know when you're done.

MR. ROSENTHAL: We object to the use of any e-mails that were printed out by you, Mr. Ferrer, on August 17, 2009 --

MR. FERRER: Okay.

MR. ROSENTHAL: -- and particularly since I believe this document was produced late last night.

MR. FERRER: Okay.

MR. ROSENTHAL: And so we're not going

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to answer any questions with regard to documents that you produced last night.

MR. FERRER: Okay. You're instructing your client not to answer? What's the nature of the privilege, just so that the record is clear.

MR. ROSENTHAL: No, no, no. As I indicated to you yesterday when you declined to produce the documents in a timely basis, we're not going to have testimony today about documents that you produced last night without making them responsive to particular requests.

MR. FERRER: And is that based on a particular order or a privilege?

MR. ROSENTHAL: It's based upon the fact that you declined to produce these documents on a timely basis. And these are documents that have your name on them and are dated August 17, 2009. And we haven't had an opportunity because of the lateness of your delivery to review all of these documents. And it would be prejudicial to our client to have him testify about documents that you provided insufficient time for us to review.

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MR. FERRER: Okay.
MR. ROSENTHAL: Once we have sufficient time to review them, assuming that you haven't exceeded the time limitations of the rules, Mr. Kirsch will reappear to testify about that.
MR. FERRER: Okay. I tell you what I'm going to do. I'm going to try to get -- because I have a significant number of e-mails that were produced yesterday, and I have questions about them. I'm going to try to get Judge Freeman on the phone to get a ruling on your objection and your instruction not to answer; okay?
MR. ROSENTHAL: That's fine.
MR. FERRER: Let's take a break.
(A break was taken.)
MR. ROSENTHAL: I need to make a statement for the record.
We received the documents at 6:00 p.m. last night.
BY MR. FERRER:
Q. Well, I can't get the judge on the line. I'm going to go ahead, Mr. Kirsch, and ask you a question about the document that's in front of you.

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Mr. Rosenthal can choose to instruct you not to answer. And if he does that, then you may have to come back; okay?
MR. ROSENTHAL: Your threat about him coming back after I offered to bring him back is just more intimidation that didn't --
MR. FERRER: I tell you what. What's not going to work is you continuing to talk, and I'm tired of you interrupting. You instruct him not to answer if you don't want him to, and that's fine. There are no threats.
MR. ROSENTHAL: I already instructed him not to answer with respect to any documents that were produced last night at 6:00 o'clock that were printed out from your computer yesterday.
MR. FERRER: Okay.
MR. ROSENTHAL: And that includes the Exhibit 4 that you just handed to him.
BY MR. FERRER:
Q. Mr. Kirsch, I've handed you Plaintiffs' Exhibit No. 4. Do you recognize that as an e-mail that you received on or about May 8, 2006?
A. I don't --

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MR. ROSENTHAL: Objection. Instruct him not to answer.
Q. Okay.
MR. ROSENTHAL: I would request, counsel, that you move on to other areas that do not involve those documents.
I would also point out, for the record, that Exhibit 4 that you handed to the witness does not include the Bates numbers that were on the documents that you produced yesterday --
MR. FERRER: Okay, great.
MR. ROSENTHAL: -- more alteration of documents.
MR. FERRER: More ridiculous accusations, Alan.
MR. ROSENTHAL: If you get personal with me, then we're going to terminate the deposition now.
MR. FERRER: Feel free to do so.
MR. ROSENTHAL: Okay, stop it.
MR. FERRER: Are you ready to go on, or are you going to terminate it?
MR. ROSENTHAL: It's not my deposition being taken here today. If you have a

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question, I suggest you ask it.
MR. FERRER: Okay. I just want to make sure that I got it right. You threatened to terminate, and I wanted to make sure whether we were going to continue.
MR. ROSENTHAL: I didn't make any threat. If you continue with personal comments, derogatory comments to me, then we will stop the deposition.
MR. FERRER: There haven't been any --
MR. ROSENTHAL: When you call me ridiculous, that's the kind of personal comment I'm talking about. So I ask you, please, sir, to stop it.
MR. FERRER: Okay. I'll ask you, please, to stop making allegations that I'm somehow manipulating documents; okay?
BY MR. FERRER:
Q. Mr. Kirsch, I want to go back to something that you said with respect to the $14 million transaction that we were discussing a few moments ago.
You stated that American Residential Equities, LLC had not received the $14 million or that it likely went to a different account?

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A. Right.
Q. What account would that have been?
A. ARE LIII.
Q. The $14 million should have gone to a bank account set up for American Residential Equities LIII, LLC, correct?
A. Correct.
Q. Do you know whether that was done?
A. No.
Q. Who better than you at American Residential Equities, LLC would have knowledge regarding whether the $14 million was actually deposited into the account of American Residential Equities LIII, LLC?
A. It would have been done by a wire, and --
MR. ROSENTHAL: He asked you who at American Residential Equities, LLC. Please answer the question.
A. Bill Hirschkowitz.
BY MR. FERRER:
Q. I want to direct your attention again to Plaintiffs' No. 1, which is the original note, directing your attention specifically to Paragraph 4, the very last sentence. I'm going to

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read it beginning with the words "Cash outflows means all cash outflows." Do you see that?
A. Yes.
Q. I'm going to read that into the record. I'll ask you to follow along silently with me to make sure I read it correctly --
MR. ROSENTHAL: Let's just correct the record. That is not the last sentence of Paragraph 4. The last sentence of Paragraph 4 begins "The additional interest is an amount equal to 45 percent."
BY MR. FERRER:
Q. Okay. The last sentence of the first paragraph of Paragraph 4, "Cash outflows means all cash outflows incurred by borrower in realizing the value of the collateral as reflected in the model entitled ARE LIII Portfolio Acquisition and Liquidation 18-month Time Period Cash Flow attached hereto, as such model may be adjusted by borrower to reflect actual results, provided that all adjustments to such cash outflows represent reasonable payments to third parties or are otherwise at arm's length."
Did I read that correctly?
A. You did.

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Q. Do you know what the term ARE LIII Portfolio Acquisition and Liquidation 18-month Time Period Cash Flow as contained in that sentence that I read refers to?
MR. ROSENTHAL: Object as to form.
A. No.
BY MR. FERRER:
Q. Did American Residential Equities LIII, LLC ever have a portfolio acquisition and liquidation 18-month time period cash flow?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. What is that? What is that document?
MR. ROSENTHAL: Object as to form.
A. It is a projection of cash flow showing various expenditures and income.
Q. Okay. Let me ask the question again then. When this registered note refers in the last sentence on the first paragraph of Paragraph 4, ARE LIII Portfolio Acquisition and Liquidation 18-month Time Period Cash Flow, do you know what that refers to?
A. I know what an 18-month time period cash flow looks like. I don't know this one.

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(Plaintiffs' Exhibit 5 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm handing you Plaintiffs' Exhibit No. 5 for identification purposes. Please review it and let me know when you're done.
MR. ROSENTHAL: The same objection as to the previous objection regarding documents produced at 6:00 p.m. last night. He's not going to answer any questions about it at this time until counsel have had an opportunity to review it.
MR. FERRER: Okay. So there's no privilege or there's no order specifying that, correct?
MR. ROSENTHAL: Mr. -- can I please have this? Mr. Ferrer, my deposition is not being taken today. My objection has been clearly stated on the record.
MR. FERRER: Okay. With respect to this exhibit, what is the nature of your objection?
MR. ROSENTHAL: My instruction and objection was just stated clearly -- and perhaps the court reporter could read it back

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for you. I would prefer to rely on the statement that I made.
MR. FERRER: Okay, and you're instructing your witness not to answer any questions with respect to --
MR. ROSENTHAL: Again, again, if you need the court reporter to read it back, I suggest you ask him to read it back. My deposition is not being taken here today.
BY MR. FERRER:
Q. Mr. Kirsch, in looking at Plaintiffs' Exhibit No. 5, do you recognize that as an e-mail exchange between you --
MR. ROSENTHAL: Again, Mr. --
MR. FERRER: Excuse me, I'm not finished.
MR. ROSENTHAL: If you raise your voice again --
BY MR. FERRER:
Q. -- between you and Erick Magno on April --
MR. ROSENTHAL: We're going to recess the deposition right now.
MR. FERRER: Okay.
MR. ROSENTHAL: Come on. When you

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decide you want to lower your voice --
MR. FERRER: I'm not raising my voice. You keep on interrupting me.
MR. ROSENTHAL: It certainly sounds like it to me.
MR. FERRER: Okay. Of course it does.
MR. ROSENTHAL: So we'll take a break for five minutes, and maybe you can calm yourself down.
MR. FERRER: No, no, no. You either --
MR. ROSENTHAL: We're taking a break for five minutes.
MR. FERRER: I'm not doing that. I'm going to continue asking questions. I can either terminate the deposition now and go on --
MR. ROSENTHAL: Oh, no, no. I need to take a break for five minutes.
MR. FERRER: Okay. After you took one just five minutes ago?
MR. ROSENTHAL: Yeah, yeah.
MR. FERRER: Okay.
MR. ROSENTHAL: Maybe it's only three minutes this time.
Mr. Kirsch...

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(Mr. Rosenthal and the witness exited the conference room.)
(A break was taken.)
MR. FERRER: Mr. Kirsch, based on your counsel's objections, I'm going to terminate the deposition. We'll go before the Court, and depending on what she says, we might have to bring you back; okay?
MR. ROSENTHAL: I would urge you, counsel -- we have dedicated the time, we've been to hearings to continue with this deposition, and we're here, ready to continue the deposition. It is not unreasonable for me to suggest to you that you behave appropriately and that you not raise your voice.
Mr. Kirsch is here, ready to proceed, and we want to go forward with the deposition, not on the documents that you produced last night. We'd be happy to come back for those.
MR. FERRER: Okay. Now that you've made your record, let me make mine. I haven't raised my voice to you. You're speaking above me.

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On top of that, there is absolutely no basis for your objections and your instructions not to answer.
Secondly, I am not going to take this deposition and have you object and see all of my exhibits before I have a chance to ask unobstructedly Mr. Kirsch for responses to my questions. So we're going to terminate the question --
MR. ROSENTHAL: Why don't you just ask about questions other than the documents you produced last night --
MR. FERRER: No.
MR. ROSENTHAL: -- that now you're producing to the witness that were Bates stamped when you produced them but they're not Bates stamped today.
MR. FERRER: We're not going to do that. I'm going to go ahead and terminate. Thank you, Mr. Kirsch.
MR. ROSENTHAL: We object to the termination of the deposition.
MR. FERRER: Of course you do.
THE WITNESS: I'm going to leave this for you.

Electronically signed by Lance Steinbeisser (201-323-334-0895)
Electronically signed by Lance Steinbeisser (201-323-334-0895)
f792f6f0-6d80-4867-8d1c-c893626e9adc

MR. FERRER: Yes, please.

(The reading and signing of this deposition was not waived.)

(This deposition was adjourned at 11:47 a.m. sine die.)

CERTIFICATE OF OATH

STATE OF FLORIDA :

:SS.

COUNTY OF MIAMI-DADE :

I, Lance W. Steinbeisser, Notary Public, State of Florida, certify that JEFFREY LAWRENCE KIRSCH personally appeared before me on the 18th of August, 2009.

Signed this 18th day of August, 2009.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Notary Public, State of Florida at Large
My Commission Number: DD409358
Expires: May 4, 2009

REPORTER'S DEPOSITION CERTIFICATE

I, Lance W. Steinbeisser, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the deposition of JEFFREY LAWRENCE KIRSCH; that a review of the transcript was requested; and that the transcript, pages 1 through 93, is a true record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 18th day of August, 2009 at Miami, Miami-Dade County, Florida.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Certified Court Reporter

ERRATA SHEET
DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES
RE : REDWOOD RECOVERY VS. KIRSCH
CASE NO. : 08-65603 CA 40
DEPO OF : JEFFREY L. KIRSCH
TAKEN : AUGUST 18, 2009

Page #	Line #	Change	Reason

Under penalties of perjury, I declare that I have read the foregoing document, and that the facts stated in it are true.

Date Signature

Electronically signed by Lance Steinbeisser (201-323-334-0895)
Electronically signed by Lance Steinbeisser (201-323-334-0895)
f792f6f0-6d80-4867-8d1c-c893626e9adc

STEINOTYPE, INC.
1140 NE 86th Street
Miami, Florida 33138-3434
(305)632-4464

August 18, 2009
Alan Rosenthal, Esquire
CARLTON FIELDS, P.A.
100 Southeast Second Street
Suite 4000
Miami, Florida 33131
RE : REDWOOD RECOVERY VS. KIRSCH
DEPO OF : JEFFREY L. KIRSCH
TAKEN : August 18, 2009
Dear Mr. Rosenthal:
With reference to the deposition of JEFFREY L. KIRSCH taken on August 18, 2009, in connection with the above-captioned case, please find enclosed the transcript of said deposition.

Please arrange to have the witness read your copy of the transcript, denoting any corrections by page and line number on the enclosed errata sheet. This errata sheet must be signed by the witness, notarized and returned to Jose M. Ferrer, attorney for the Plaintiffs, for filing with the original transcript, which has been sent to counsel.

If this has not been taken care of within the next thirty days or by the time of trial, whichever comes first, it will then be concluded that the reading, subscribing and notice of filing have been waived.

Sincerely,

STEINOTYPE, INC.

cc: Original transcript
J. Ferrer, Esq.

Electronically signed by Lance Steinbeisser (201-323-334-0895)
Electronically signed by Lance Steinbeisser (201-323-334-0895)
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IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
COMPLEX BUSINESS LITIGATION
CASE NO. 08-65603 CA 40

PETRA OPPORTUNITY FUND, REDWOOD RECOVERY SERVICES, LLC, and ELEVEN HOMES LIMITED,

Plaintiffs,

vs.

JEFFREY L. KIRSCH, MEADOW MINT, LLC, KEY BISCAYNE FAMILY TRUST, AMERICAN RESIDENTIAL EQUITIES, LLC, AMERICAN RESIDENTIAL EQUITIES, INC., ARE ASSET MANAGEMENT, LLC, SEABREEZE FINANCIAL, LLC and AMERICAN RESIDENTIAL EQUITIES LIII, LLC,

Defendants.

CONTINUED DEPOSITION OF
JEFFREY L. KIRSCH
Taken on Behalf of the Plaintiffs
DATE TAKEN: October 27, 2009
TIME: 8:20 a.m. - 4:01 p.m.
PLACE: 73 West Flagler Street
Miami, Florida 33131

Examination of the witness taken before:
Lance W. Steinbeisser, RPR-CSR-FPR
Certified Court Reporter
Steinotype, Inc.
1140 NE 86 Street
Miami, Florida 33138-3434

APPEARANCES:
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Also present: Paul DeStefanis
Lisette de Padua

- - - - - - -

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JEFFREY L. KIRSCH	
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(Exhibits attached hereto.)

MR. ROSENTHAL: We object to the presence of Erick Magno at this deposition and will not proceed until Mr. Magno exits, pursuant to Judge Thomas' ruling and the applicable rules of procedure.

MR. FERRER: There is absolutely no ruling by Judge Thomas with respect to Erick Magno. Erick Magno is still a representative of Elevenhome. His deposition was taken yesterday, so there is no basis for invoking the rule. I'll note that Lisette de Padua Smith is also walking in. So we're going to ask him to stay. If you insist in not going forward with Erick Magno here, then I guess we'll take it up in a half an hour with Judge Freeman.

Erick, do me a favor and step out, and we'll take care of it in a half an hour.

(Mr. Magno exited the conference room.)

Thereupon--

JEFFREY L. KIRSCH

was duly administered the oath: Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth?

Electronically signed by Lance Steinbeisser (201-323-334-0895)
Electronically signed by Lance Steinbeisser (201-323-334-0895)
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THE WITNESS: I do.
DIRECT EXAMINATION
BY MR. FERRER:
Q. Mr. Kirsch, welcome back.
A. Thank you.
Q. Sir, I'm handing you what was marked at your last deposition as Plaintiffs' Exhibit No. 1. I'll ask you to review it so that I may ask you some questions.
A. I would like to clarify two points, if I could, for the record.
I reviewed my deposition from the last time we met, and I wanted to make two corrections to it.
The first is on Page 36 through 37. I don't know if I was clear, but I want to be clear that our sales reps did have prospectuses. And the other clarification that I wanted to make was you had asked me a question in regard to whether I had ever prepared any promissory notes. The answer to that question for some reason was "no" in the transcript. It should have been "yes."
Q. Thank you very much for your clarification.
Directing your attention to Plaintiffs'

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Exhibit No. 1. Please familiarize yourself with it so that I may ask you some questions.
A. Okay.
Q. Do you recognize the document as the note that you signed on behalf of American Residential Equities LIII, LLC on April 28, 2006 for $10,492,242.66?
A. No.
Q. Tell me what's wrong about that statement.
A. The note that I signed did not have a crossed-out notary. The note that I had seemed to not contain Mr. Magno's notary.
Q. Anything else?
A. I don't remember seeing Mr. Magno's lender's acknowledgment signature.
Q. Sir, is it your testimony --
MR. ROSENTHAL: He wasn't finished.
BY MR. FERRER:
Q. Okay. Go ahead.
A. This note refers to attachments. There are no attachments to it. So I don't remember in that regard. Other than that, I have no other comment.
Q. Is it your testimony that you didn't

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sign that document that's been marked as Plaintiffs' Exhibit No. 1?
A. It appears to be my signature. It looks very similar to my signature, but I just testified that the one that I signed didn't contain the items that I specified.
Q. So you signed a note similar to the one that you're looking at, except for those items that you've identified; is that correct?
MR. ROSENTHAL: Object as to form.
A. I did.
BY MR. FERRER:
Q. Other than the signature by Erick Magno, the notary stamp by Erick Magno on the last page, you recognize Plaintiffs' Exhibit 1 as the Eleven Homes note that you signed?
MR. ROSENTHAL: Object as to form.
A. I also mentioned the lender's acknowledgment and no exhibits.
BY MR. FERRER:
Q. Do you have any reason to believe that that's not your signature on Plaintiffs' Exhibit No. 1?
A. No.
Q. So that is your signature, correct?

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A. It looks like my signature.
Q. I'm not asking you whether it looks like it. Is it your signature on that note?
A. I don't know. The note that I signed doesn't -- did not contain Mr. Magno's notary.
Q. Well, let me show you what has been marked as Plaintiffs' Exhibit No. 3 at your last deposition. I'll ask you to review that, please.
MR. ROSENTHAL: Excuse me. Let me...
A. I've reviewed it.
BY MR. FERRER:
Q. Do you recognize Plaintiffs' Exhibit No. 3 as a document that your attorneys produced on your behalf in response to the request for production of documents that we served on you, correct?
A. Correct.
Q. This is a document that you had in your possession, correct?
MR. ROSENTHAL: Object as to form.
BY MR. FERRER:
Q. Sir, is Plaintiffs' Exhibit No. 3 a fair and accurate copy of the note that you signed for $10,492,242.66 on April 28th, 2006?
MR. ROSENTHAL: Object as to form.

Electronically signed by Lance Steinbeisser (201-323-334-0895)
Electronically signed by Lance Steinbeisser (201-323-334-0895)
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A. This note does not contain the exhibits.
BY MR. FERRER:
Q. That's not what I asked.
A. What did you ask?
Q. I'm asking you whether Plaintiffs' Exhibit No. 3 is a fair and accurate copy of the note that you signed on April 28, 2006 for $10,492,242.66?
A. I don't --
MR. ROSENTHAL: Let me object as to form. Go ahead.
A. I can only be certain if you were to show me the exhibits that are supposed to be attached to this note.
BY MR. FERRER:
Q. Tell me where this note references an exhibit.
A. Paragraph 4.
Q. What about Paragraph 4 references an exhibit?
A. "Borrower cash outflows (defined below)."
Q. I'm sorry. Where are you reading from, sir?
A. "Attached hereto." I am three lines off

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the bottom of the first paragraph. There's something to be attached to this note.
Q. Okay, well, let's discuss that. Just so that the record is clear, let me read that entire sentence into the record.
"Cash outflows means all cash outflows incurred by borrower in realizing the value of the collateral as reflected in the model entitled ARE LIII Portfolio Acquisition and Liquidation 18-month Time Period Cash Flow, attached hereto, as such model may be adjusted by borrower to reflect actual results, provided that all adjustments to such cash outflows represent reasonable payments to third parties or otherwise at arm's length."
Did I read that correctly?
A. Yes.
Q. And is that the attachment that you were referring to earlier?
A. I am referring to an 18-month cash outflow, correct.
Q. Let's take a look at what's been marked as Plaintiffs' Exhibit No. 5.
MR. ROSENTHAL: That doesn't appear to be the 5 that we have.
MR. FERRER: It was marked. I can give

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you another copy.
MR. ROSENTHAL: Excuse me one second.
MR. FERRER: Sure.
A. Okay.
BY MR. FERRER:
Q. Sir, do you recognize Plaintiffs' Exhibit No. 5 as an e-mail you sent to Erick Magno on April 27, 2006?
A. Yes.
Q. And that's an e-mail with which you attached a copy of a schedule, correct?
A. A schedule, correct.
Q. Could you tell me what that schedule is?
A. The schedule that I've been presented with is entitled ARE LIII 102 Loan Acquisition and Liquidation 18-month Time Period Cash Flow.
Q. And could you tell me what that is? Other than the title, what is it? Do you recognize the document?
A. It is a projected cash flow.
Q. And is that the projected cash flow that's referred to in registered note Paragraph 4 when it says ARE LIII Portfolio Acquisition and Liquidation 18-month Time Period Cash Flow?
A. I don't believe so.

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Q. Why not?
A. There are others.
Q. How many others?
A. At least two.
Q. Have you provided them to me through discovery?
A. I don't know. We just found them recent.
Q. When did you find them?
A. I think in the past couple of weeks we found other cash flows.
Q. After your deposition?
A. I don't remember, but I've seen two other cash flows.
Q. Okay. What are the names on those cash flows?
A. The same.
Q. Okay. So you don't know whether -- and what's different about -- let me backtrack.
What's different about the cash flows that you found in this one that I've shown you today?
A. There are minor differences in the expenses -- the inflows and outflows.
Q. Show me where --

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A. I don't have them in front of me.
Q. Show me what column you're referring to --
A. Total inflows.
Q. -- would be different.
MR. ROSENTHAL: Excuse me just one second.
MR. FERRER: Sure.
MR. ROSENTHAL: Let him finish and he'll let you finish, okay?
THE WITNESS: Sure.
BY MR. FERRER:
Q. So the row that reads total inflows toward the top portion of the page, that's different than the one that I've provided you with?
A. My recollection is that it's total inflows, net cash end of month changes, private placement offering, investor payment analysis changes.
Q. Okay. Sir, can you explain to me why it is that on April 27th, the day before the date of the note that we've been discussing, that you were sending Erick Magno an ARE LIII cash flow revision?
MR. ROSENTHAL: Object as to form.
A. It's a projection, and we continued to

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refine the projections.
BY MR. FERRER:
Q. Did you refine the projection that you sent to Erick Magno on April 27th -- between April 27th and April 28th when the registered note for $10,492,242.66 were signed?
MR. ROSENTHAL: Object as to form.
A. I don't know the exact date.
BY MR. FERRER:
Q. Well, can you tell me whether you remember whether there were any changes to the cash flow that you provided to Erick Magno the day before the note was signed?
A. The day before?
MR. ROSENTHAL: Wait, wait. Object as to form.
A. I don't know.
BY MR. FERRER:
Q. Do you have any reason to believe that there were any changes to the cash outflow that you provided to Erick Magno the day before the note was signed between the date that you provided it to him and the date that the note was signed?
MR. ROSENTHAL: Object as to form.
A. I don't know.

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BY MR. FERRER:
Q. Do you have any reason to believe that?
A. Yes.
Q. Why?
A. Because I found two others.
Q. Okay, but were those two other cash flows attached to any particular e-mails?
A. I don't know.
Q. When did you find it?
A. Within the past couple of weeks.
Q. Where did you find them?
A. On our server.
Q. Are they saved as an electronic file?
A. I don't know.
Q. Is it an Excel file?
A. It would be the same file as this.
Q. What kind of file is that?
A. XLS.
Q. So it's an Excel file, correct?
A. Correct.
Q. And those are on your system, you said?
A. Yes.
Q. Are those files, those cash flows that you're referring to, are those kept locally on your computer or are those on a server of American

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Residential Equities, LLC?
A. There are on a server, not at American Residential Equities.
Q. Where would I find those files if I had to look for them?
A. In California -- oh, it's Texas, actually.
Q. And what about the files in Texas, why is it that those files are in Texas?
A. No, on the server, which is maintained in Texas.
Q. But you have access to it from South Florida, correct?
A. Yes.
MR. ROSENTHAL: Please let him finish and he'll let you finish.
BY MR. FERRER:
Q. And what is it that caused you to look for those additional cash outflows?
A. Well, we were looking for other e-mails and came across those.
Q. And you came across those in looking for other e-mails?
A. Correct.
Q. So going back to my question earlier, do

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you remember whether those other two cash flows are attached to any e-mails?
A. I do not remember.
Q. But it would be reasonable to assume that if you were looking for e-mails and you came across those two cash outflows, you found them attached to an e-mail, correct?
MR. ROSENTHAL: Object as to form.
A. I don't remember. My recollection is I found on an e-mail from one of the ladies who worked for us who did these types of cash flows.
BY MR. FERRER:
Q. What's her name?
A. Her name is Veronica Brizuela.
Q. And what was the context of the e-mail by Veronica Brizuela attaching these files?
A. ARE LIII cash flow, the same as this.
Q. And were those e-mails by Veronica sent to anyone in particular?
A. To me, I believe.
Q. And do you remember the date of those e-mails?
A. I do not.
Q. Do you remember why Veronica would be sending you those cash outflows?

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MR. ROSENTHAL: Object as to form.
A. We ordinarily prepared a cash flow projection prior to closing and then we continued to update those through closing. So whether it was another one prepared the day of closing or the day after, I'm not certain.
BY MR. FERRER:
Q. Would you typically attach copies of the cash flows to the registered notes that you were closing?
MR. ROSENTHAL: Object as to form.
A. Many times, yes.
BY MR. FERRER:
Q. And many times no?
A. Sometimes no.
Q. When was it that those cash flows were not attached to the notes?
A. When someone didn't ask us for them, we probably didn't attach them.
Q. Those cash flows were not necessarily a part of the note?
A. They were a part of the note, but there were times when they weren't attached.
MR. ROSENTHAL: Hold on. Note an objection as to form to the last question,

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please.
BY MR. FERRER:
Q. Well, I'm trying to understand when they were attached and when they weren't attached. Referring to those situations that you testified earlier about where they weren't attached to the notes, could you tell me why it wasn't in those circumstances that they were not attached to the note?
MR. ROSENTHAL: Object as to form.
A. There were scores of notes. I can't be sure of each and every time a note was produced that an 18-month cash flow projection was attached. Not every note required an 18-month cash flow projection.
This note was different than many of the other notes that we used and required it. So and -- 90 percent of the cases that we were required to prepare notes for investors, there was no cash flow needed.
BY MR. FERRER:
Q. With respect to this note that we're looking at, you don't recall, sir, whether the cash flow we looked at as Exhibit No. 5 were any of those other cash flows that you referred to earlier

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were attached to this note, correct?
MR. ROSENTHAL: Object as to form.
A. Correct.
BY MR. FERRER:
Q. You don't remember whether when you signed the note those cash flows were attached, correct?
MR. ROSENTHAL: Object as to form.
A. I don't remember if there was or wasn't a cash flow attached.
BY MR. FERRER:
Q. What was significant about an 18-month cash flow? What does an 18-month cash flow show?
MR. ROSENTHAL: Object as to form.
A. It shows a projection.
BY MR. FERRER:
Q. A projection of what?
A. How a pool might liquidate over an 18-month time period.
Q. And with respect to this registered note that we've been discussing, there was a projection that the pool would be liquidated within 18 months, correct?
MR. ROSENTHAL: Object as to form.
A. Correct.

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BY MR. FERRER:
Q. Other than the 18-month cash flow not being attached to the note -- what you stated earlier -- you can't remember whether that was or wasn't done at the time that you signed the note, and Mr. Magno's signature on the notary block of the last page, is it fair to say that you signed the note we've been discussing as Exhibit No. 1?
MR. ROSENTHAL: Object as to form.
BY MR. FERRER:
Q. Exhibit No. 1.
MR. ROSENTHAL: Can you do me a favor, Lance, and read back the question, please. It was a long one.
(The above-requested portion was read back by the Court Reporter.)
A. This note references a security agreement as well. I don't see a security agreement attached. I don't know whether or not it references the attachment of the security agreement.
BY MR. FERRER:
Q. That wasn't the question. And let me be more specific, because maybe I may not have been clear.

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Did you sign the note that's been marked as Plaintiffs' Exhibit No. 1?
MR. ROSENTHAL: Object as to the form.
A. Except for all those things you've mentioned, yes.
BY MR. FERRER:
Q. It doesn't make any sense. You signed it, and you've explained certain things that may not have been on the note when you signed it --
A. Right.
Q. -- and we can talk about those. My question is whether you signed the note, and then we can jump to the next stage where we talk about what wasn't included.
MR. ROSENTHAL: Let me object and ask counsel to please refrain from insulting the witness by telling him his answer doesn't make sense. It's inappropriate. Please stop it. Thank you.
You can answer the question.
A. Can you read back the question for me, please?
BY MR. FERRER:
Q. I'll go ahead and restate it.
A. Okay.

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Q. Did you sign the document that's been marked as Plaintiffs' Exhibit No. 1. Specifically turning to the last page of that document, I'll ask you to tell me whether that's your signature on that last page.
MR. ROSENTHAL: Object as to the form.
A. I believe we just spent the last ten minutes talking about my signature on a note similar to this one, but it did not contain things that we've now enumerated.
BY MR. FERRER:
Q. Do you believe that that's not the note that you signed, Plaintiffs' Exhibit No. 1, the actual document?
MR. ROSENTHAL: Object as to form.
A. I believe that I testified that I didn't sign a note containing these things.
BY MR. FERRER:
Q. That's not my question. Did you sign the last page of the document that's been shown to you as Plaintiffs' Exhibit No. 1?
MR. ROSENTHAL: Objection to the form.
A. It appears to be my signature.
BY MR. FERRER:
Q. Sir, directing your attention to

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Paragraph 10.1 of the note on Page 3, please.
MR. ROSENTHAL: Which exhibit are we talking about?
BY MR. FERRER:
Q. Plaintiffs' No. 1. I'm going to read that section into the record. I'll ask you to follow along silently with me to make sure that I read it correctly; okay?
"10.1, Registration: A register for this note shall be kept by the borrower. The name and address of the registered holder of this note shall be set forth on the register, both with respect to the payment of principal and interest on the note. The lender agrees to provide any information requested by the borrower necessary for the borrower to maintain its records and the register."
Did I read that correctly?
A. You did.
Q. Sir, did American Residential Equities LIII, LLC ever make any requests to Erick Magno to provide them with a copy of the corporate book for Elevenhome?
A. For Elevenhome?
MR. ROSENTHAL: Read back, because I

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didn't -- read back the last name.
(The above-requested portion was read back by the court reporter.)
MR. ROSENTHAL: Object as to form.
A. For Elevenhome? No.
BY MR. FERRER:
Q. Did you ask Mr. Magno to provide you with copies of the corporate book for any entity in connection with this note?
A. No.
Q. Why not?
A. I don't know.
Q. Now I just want to be certain --
MR. ROSENTHAL: Let me just -- the question about the corporate book for any entity, object as to form, please.
BY MR. FERRER:
Q. Did you ask Mr. Magno at any point to provide you with any information to confirm what the name of the lender would be in connection with this note?
MR. ROSENTHAL: Object as to form.
A. No.
BY MR. FERRER:
Q. Why not?

A. I would just assume that it was Eleven Homes as is specified here.
Q. Why would you make that assumption?
A. Because Mr. Magno was the attorney for the entity. I would assume he would know the name.
Q. And as far as you're concerned, you didn't care whether it was Eleven Homes Limited or Elevenhome Limited; correct?
MR. ROSENTHAL: Object as to form.
A. I don't know what I assumed at the time. I assume that it was Eleven Homes. That's what's on there.
BY MR. FERRER:
Q. And now you've learned that it's not Eleven Homes, correct?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. It's Elevenhome Limited; correct, one word without the "S"?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. You didn't know that the actual name of the company wasn't Eleven Homes Limited, but

instead was Elevenhome Limited at the time that the note was signed, correct?
MR. ROSENTHAL: Object as to form.
A. I didn't know there was an Elevenhome.
BY MR. FERRER:
Q. American Residential Equities LIII, LLC, that was an entity that was specified formed for purposes of this $14 million loan, correct?
A. That is correct.
Q. On April 28, 2006, who were the members of American Residential Equities LIII, LLC?
A. American Residential Equities, LLC.
Q. Who was the manager on April 28th, 2006 of American Residential Equities LIII, LLC?
A. American Residential Equities, LLC.
Q. Who are the members of American Residential Equities LIII, LLC today?
A. I don't remember. I don't know.
Q. Do you have any reason to believe that the membership structure of American Residential Equities, LIII would have changed from April 28, 2006 to the present day?
MR. ROSENTHAL: Object as to form.
A. I want to make a correction. The manager American Residential Equities, LLC -- I'm

sorry, the manager of American Residential Equities, LL -- American Residential Equities LIII is and was American Residential Equities, LLC.
Mr. Ferrer asked me about -- I believe he asked me about members' units. I am not sure whether American Residential Equities, LLC had any units in American Residential Equities LIII. There were other investors.
BY MR. FERRER:
Q. Sir, do you understand what a member of a limited liability company is?
A. Yes.
Q. I'm going to ask you again. On April 28, 2006, who were the members of American Residential Equities LIII, LLC?
A. I believe American Residential Equities, LLC and others, but I'm not sure.
Q. Who are the members of American Residential Equities LIII, LLC today?
A. I'm not sure.
Q. Do you have any reason to believe that since April 28, 2006 the members of American Residential Equities LIII, LLC have changed?
A. The manager remains the same, but I don't -- I'm not sure about the member.

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Q. Today the manager of American Residential Equities LIII, LLC is still American Residential Equities, LLC?
A. Right.
Q. Going back to a couple of questions ago. At the time that you signed Exhibit No. 1, were you aware of any other companies by the name Elevenhome Limited?
MR. ROSENTHAL: Object as to the form.
A. No.
(Plaintiffs' Exhibit 6 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm handing you what's been marked as Plaintiffs' Exhibit No. 6. I'll ask you to familiarize yourself with it and let me know when you're done, please.
Have you had an opportunity to review the exhibit, sir?
A. I'm not done.
Q. Okay, take your time.
A. Okay.
Q. Do you recognize the document?
A. I do.
Q. Would you identify it for the record,

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please.
A. It's a pledge agreement.
Q. It's a pledge agreement between Eleven Homes Limited and American Residential Equities, LLC, correct?
A. That is correct.
Q. Please turn to the last page of that exhibit. Do you recognize your signature under the heading American Residential Equities, LLC?
A. I do.
Q. Is this a document that you signed?
A. I did.
Q. Is this a document that you signed on or about April 28th, 2006?
A. Yes.
Q. Could you tell me in your own words what the purpose of this document is?
MR. ROSENTHAL: Let me just object to the last question, please. Object as to form.
BY MR. FERRER:
Q. Could you tell me in your own words, sir, what the purpose of this document was.
A. To provide collateral for the $14 million loan.

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Q. And the collateral that American Residential Equities, LLC was providing to Eleven Homes Limited was the membership interest in American Residential Equities LIII, LLC, correct?
A. Correct.
Q. Sir, did you ever refer to pledge agreements as security agreements?
A. I believe they're two distinct things.
Q. Tell me what you understand the difference to be.
A. A security agreement in my --
MR. ROSENTHAL: Object as to form.
A. -- in my mind, a security agreement is a security interest, as we use the term in mortgages -- in mortgages. A pledge agreement is a pledge of membership units in an LLC.
BY MR. FERRER:
Q. Other than the fact that a security agreement, based on your definition, is a security interest in mortgages, would you agree with me that they're both the same type of document?
MR. ROSENTHAL: Object as to form.
A. I'm not sure I understand what you mean by the same type of document.
BY MR. FERRER:

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Q. A security agreement is intended to give collateral, correct?
MR. ROSENTHAL: Object as to form.
A. A security agreement is intended to give -- a security agreement is not an assignment, which a pledge agreement I believe is. In a pledge agreement you're assigning your membership units as collateral. A security agreement you're giving a security interest, but I don't believe you're pledging anything.
BY MR. FERRER:
Q. It's your testimony that this pledge agreement that we've been discussing today marked as Plaintiffs' No. 6 gave Eleven Homes present interest in the membership units of American Residential Equities LIII, LLC?
A. No, it gave it contingent interest.
Q. What was it contingent on?
A. Default.
Q. So how is that different than a security agreement, that would only give a contingent interest upon default?
A. They both are triggered upon a default.
Q. Is that the only difference between the two documents, to your knowledge?

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MR. ROSENTHAL: Object as to form.
A. I don't know.
BY MR. FERRER:
Q. Going back to Plaintiffs' No. 1 for just a moment, please. That's the document that's to your right.
You referred earlier to the fact that the registered note marked as Plaintiffs' No. 1 refers to a security agreement; do you remember that testimony?
A. I do.
Q. And specifically you were speaking about, referring to the language in the first paragraph of Paragraph 4, correct?
A. Yes.
Q. Specifically the sentence that reads as follows -- I'm going to read it into the record. I'll ask you to read along silently with me.
"The liquidation date is the date on which" --
A. Excuse me.
Q. Sure.
A. I don't mean to interrupt, but could you help me out here where you're reading from.
Q. Absolutely. It's a long paragraph. So

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Paragraph 1, right --
A. Paragraph 1 or 4?
Q. I'm sorry, Paragraph 4.
A. Right.
Q. The first paragraph in Paragraph 4.
A. Okay.
Q. Right toward the middle, beginning with "the liquidation date"...
A. Okay, I have it.
Q. Have it?
A. Yeah.
Q. "The liquidation date is the date on which borrower has disposed of all or substantially all of the assets acquired pursuant to the purchase agreement, as defined in the security agreement dated the date hereof between borrower and lender."
Did I read that correctly?
A. You did, sir.
Q. Sir, could you tell me what that security agreement reference refers to?
MR. ROSENTHAL: Object as to form.
A. A security agreement would refer to a security agreement.
BY MR. FERRER:
Q. We're talking about the reference to

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security agreement in this note, the sentence we just read; what does that refer to?
MR. ROSENTHAL: Object as to form.
A. I'm confused by your question. I think I've testified to what a security agreement is. I haven't seen a security agreement. If this note refers to a security agreement, I assume there is a security agreement. You showed me a pledge and asked me about that pledge.
BY MR. FERRER:
Q. Did you ever see a security agreement in connection with the note that we've been discussing?
A. I may have.
Q. Do you --
A. It would not be untypical for us to prepare a security agreement.
Q. American Residential Equities, LLC provides security agreements in connection with investments?
MR. ROSENTHAL: Objection to the form.
A. It's my recollection, yes, this refers to one.
BY MR. FERRER:
Q. When would American Residential

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Equities, LLC provide a security agreement versus a pledge agreement?
A. When the document --
MR. ROSENTHAL: Object -- object as to form.
A. When the document says "pledge agreement," it's a pledge agreement; when the document says "security," it's security.
BY MR. FERRER:
Q. But you don't remember any specific security agreement with respect to this note, correct?
A. I do not remember any specific security agreement, correct.
Q. And you didn't produce any security agreement in connection with this note as part of your production, did you?
MR. ROSENTHAL: Object as to form.
A. I don't know if we did or we didn't.
BY MR. FERRER:
Q. Take my representation that you didn't produce one; would you disagree with that?
MR. ROSENTHAL: Object as to form.
A. I'll take your representation.
BY MR. FERRER:

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Q. Where would you look to find a security agreement to the extent there was one prepared in connection with the note we've been discussing?
A. Now that I've been presented with the dilemma, I'd have to look harder -- closed out files, it's possible that it was misfiled. I don't know.
Q. I just want to make sure that I understand. When you went through and answered the request for production of documents as served on you several months ago, you didn't look through closed files?
A. Closed mislabeled files, no.
Q. And are those files something that you can locate today?
A. No.
Q. Where would you --
A. They're in storage in California.
Q. Why are they in storage in California?
A. Because we have --
MR. ROSENTHAL: Object as form.
A. Because we have an office in California.
BY MR. FERRER:
Q. Who manages the office in California where those files would be located?

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A. Miss De Padua.
Q. Do you believe that in those files you might find a security agreement referred to in this registered note?
MR. ROSENTHAL: Object as to form.
A. I don't know what I'll find.
BY MR. FERRER:
Q. But you haven't looked, correct?
A. I have not looked.
Q. Now you testified earlier that American Residential Equities, LLC was the manager and has been the manager of American Residential Equities LIII, LLC since April 28, 2006, correct?
A. I did.
Q. Has American Residential Equities, LLC received any payments in connection with its management of American Residential Equities LIII, LLC?
A. We did. We no longer do.
Q. How much did American Residential Equities, LLC receive for its management of American Residential Equities LIII, LLC?
A. I don't know.
Q. Do you remember if it was more than $500,000?

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A. I don't believe so.
Q. Was there a particular agreement between American Residential Equities LIII, LLC and American Residential Equities, LLC that sets forth the management?
MR. ROSENTHAL: Object as to form.
A. Normally our cash flow projections set forth our fees. We show them to our investors, and we try to be all inclusive.
BY MR. FERRER:
Q. Would you please turn back to Plaintiffs' Exhibit No. 5, please.
A. Sure.
Q. Could you tell me what fees you were projecting with respect to this $14 million loan on April 27, 2006?
A. Sure --
MR. ROSENTHAL: Wait. Read the question back, please.
(The last question was read back by the court reporter.)
MR. ROSENTHAL: Object as to the form.
A. It's under the heading Administration.
BY MR. FERRER:
Q. Okay, and where would I find that?

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There are several pages here.
A. On the first page. If you look under Cash OutFlows, Administration.
Q. So it sets forth an administration cost associated with this $14 million loan for Months 1 through Month 13, correct?
A. That is correct, sir.
Q. And those are --
A. Maybe --
Q. I'm sorry, go ahead.
A. Let me correct that. I believe it does it for Months 1 through 18 on the second page, sir.
Q. And the total amount of administration or management fees projected with respect to this $14 million investment to American Residential Equities, LLC was $322,026.37, according to this cash flow?
MR. ROSENTHAL: Object as to form.
A. Yes, sir.
MR. FERRER: We have a hearing at 9:00 o'clock, Mr. Kirsch, so we're going to take a brief recess, go down and talk to the judge, and we'll be back as soon as we possibly can.
(A recess was taken.)

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BY MR. FERRER:
Q. Back on the record.
Mr. Kirsch, directing your attention again to Plaintiffs' Exhibit No. 5, which we were discussing before we had to --
A. I'm going to try, if you don't mind, to move a little bit closer. I have this post in the middle of my legs here.
Q. I don't mind at all, sir.
A. Yes, sir.
Q. Plaintiffs' Exhibit No. 5, you stated before the break that under the heading Cash Out Flows in the spreadsheet that's attached to the e-mail, your e-mail of April 27, 2006, specifically under the caption administration, that row contains projected management fees that American Residential Equities, LLC would be entitled to in connection with its management of American Residential Equities LIII, LLC, correct?
A. That is correct, sir.
Q. Do you have any reason to believe that the amounts set forth in this cash outflow in terms of the administration fees of American Residential Equities, LLC was projected to get are different than what it actually got?

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A. It's possible.
Q. What reason do you have to believe that the amounts set forth in this outflow are different than the amounts that American Residential Equities, LLC actually got for its management services?
A. Well, a part -- there was another portion -- you had shown me a cash flow for $10 million. What I'm not sure about is whether this administration fee also encompassed the demand note of three and a half or three-point some odd million dollars. I'm not sure of that.
Q. When you say that I have shown you a cash outflow for $10 million, could you point me, sir, to which specific portion of that exhibit references the $10 million?
A. There's nothing in that cash flow that references the $14 million. I just don't know if we -- based the administration fee off of 14 million or off of 10 million --
Q. To the --
A. -- and then when the demand note was paid off whether we reduced this administration fee.
Q. When you talk about the demand note,

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you're referring to the $3.5 million --
A. That's correct.
Q. -- note, correct?
A. Correct.
Q. Do you know if the management fees that American Residential Equities, LLC received in connection with its management of American Residential Equities LIII, LLC were higher or greater than the amounts reflected on this cash outflow that we've been discussing?
MR. ROSENTHAL: Object as to form.
A. I do not know.
BY MR. FERRER:
Q. Do you recall what the actual amount of management fees was that American Residential Equities, LLC received in connection with its management of American Residential Equities LIII, LLC?
MR. ROSENTHAL: Object as to form.
A. I do not know.
BY MR. FERRER:
Q. Other than the management fees labeled "Administration" in the cash outflow, were there additional fees that American Residential Equities, LLC collected in connection with its management of

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American Residential Equities LIII, LLC?
MR. ROSENTHAL: Object as to form.
A. We would have received a portion of what is termed origination and initial setup fee including due diligence.
BY MR. FERRER:
Q. And how much is that?
A. I couldn't tell you.
Q. Is that figure set as a percentage of the total investment?
A. Usually.
Q. And usually what percentage is it of the total investment?
A. I don't know.
Q. American --
A. It varied.
Q. It varies within any range?
A. Within a range, but I'm not sure what the range is, sitting here today.
Q. What is the range to the extent that American Residential Equities, LLC has any other such investments today?
MR. ROSENTHAL: Object as to form.
A. Well, this investment took place sometime in 2006. I don't remember what we were

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charging.
BY MR. FERRER:
Q. Is it higher than 5 percent?
MR. ROSENTHAL: Object as to form.
A. No.
BY MR. FERRER:
Q. It would be less than 5 percent of the total investment?
A. Yes, sir.
Q. And that would be a one-time fee?
A. Yes, sir.
Q. How much less than 5 percent, to your recollection?
A. I don't want to venture a guess. I don't know.
Q. Usually what is the percentage that American Residential Equities, LLC charges for that type of service?
MR. ROSENTHAL: Object as to form.
A. This took place three years ago. I don't remember.
BY MR. FERRER:
Q. Do you know what American Residential Equities, LLC charges today for that type of service?

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MR. ROSENTHAL: Object to form.
A. We don't.
BY MR. FERRER:
Q. And you don't why?
A. Because we're not offering any investments at this time.
Q. So just to be clear, in addition to monthly management fees, American Residential Equities, LLC would have received an additional up-front fee in connection with this $14 million investment, correct?
MR. ROSENTHAL: Object as to form.
A. It's correct to the extent that it received it, but I believe you're suggesting that we retained it ourselves as a fee when in fact a large percentage of this went paid out to third parties.
BY MR. FERRER:
Q. Who are the third parties to which a large percentage of that initial fee was paid out to?
A. It would have been outside due diligence companies.
Q. Could you give me examples of who those outside due diligence companies are?

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A. Names?
Q. Yes.
A. We used so many over the years. I can give you an example of one.
Q. Yes, please.
A. It would have been Boston Portfolio Advisers.
Q. And what does Boston Portfolio Advisers do in connection with investments of this nature?
A. They would do everything from obtain BPOs for us from third parties, they would review those BPOs, they would do collateral file review, they would do real estate tax searches, they would review servicing notes, they would review the loans in the context of state violations, they would make sure the chain of title was correct.
Q. Why is it important for American Residential Equities, LLC to retain a company like Boston Portfolio Advisers to undertake all of those activities that you've just described?
A. We didn't always, but I believe that in a pool this large, we didn't want to burden our own staff internally with that.
Q. Is it your testimony that this investment of $14 million was one of the largest

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that American Residential Equities, LLC was handling at the time of April 28, 2006?
A. I don't know that to be the case.
Q. So when you said that a pool this large, what did you mean?
A. Well, when we talk in terms of 102 loans, it probably started out much larger and was pared down to 102 loans. So depending upon how busy we were in the office, it might make sense for us to outsource it.
Q. What percentage of that initial up-front fee that American Residential Equities, LLC charged Eleven Homes Limited did Boston Portfolio Advisers take?
MR. ROSENTHAL: Object as to form.
A. First off, I didn't testify that it was Boston Portfolio Advisers that did the due diligence on this. I'm testifying I don't know who did the due diligence on this. So let's be clear about that.
The second part is, sitting here today, I have no idea whether we outsourced it, whether we didn't outsource it. I don't know how much we retained if we did outsource it.
BY MR. FERRER:

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Q. To the extent that American Residential Equities, LLC retained those services that you described earlier, would it have had any reason to pay out any portion of that initial fee that you testified about earlier to anyone?
MR. ROSENTHAL: Object as to form.
A. I'm sorry. Can you read that question back to me?
(The last question was read back by the court reporter.)
A. I think the question answers itself. If we retain someone, we paid them, unless I'm -- I'm probably misunderstanding that question then.
BY MR. FERRER:
Q. That's fair. Let me go ahead and state it again.
You described two circumstances. You said that sometimes American Residential Equities, LLC would do all of these activities, these due diligence activities that you described earlier, correct? It would do it in-house?
A. We would do some in-house, but we always had to use the services of third parties. So for instance, we did not do BPOs in-house. We would have ordered BPOs from third parties. We would not

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do tax searches in-house. We would order those from third parties. On occasion we would do collateral file review. We might do collateral file review as a standalone, we might do collateral file review in conjunction with third parties to expedite the process.
So -- I'm sorry, I drifted off. Can you read the question to me again.
(The last question was read back by the court reporter.)
BY MR. FERRER:
Q. I'll go ahead and ask it a different way.
A. Okay.
Q. You don't know with respect to this $14 million investment how much of an up-front fee American Residential Equities, LLC charged, correct?
MR. ROSENTHAL: Object as to form.
A. This figure of 203,000 may have changed with the other cash flow that we discussed earlier in my deposition.
BY MR. FERRER:
Q. Which figure of $203,000 are you referring to, sir?

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A. Origination and initial set-up fee including due diligence.
Q. I see. So looking back at Plaintiffs' No. 5, at the cash outflow in the row that reads origination and initial set-up fee including due diligence, that would represent the projected up-front fee that American Residential Equities, LLC would have charged in connection with this investment, correct?
A. That's correct.
Q. Again, that's different than the administration fee that American Residential Equities, LLC charged American Residential Equities LIII, LLC every month for its management activities, correct?
A. Correct.
Q. Now did American Residential Equities LIII, LLC ever have any employees?
MR. ROSENTHAL: Object as to form.
A. No.
BY MR. FERRER:
Q. Did American Residential Equities LIII, LLC have any active business other than holding these assets you've been describing?
MR. ROSENTHAL: Object as to form.

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A. It did more than hold. It took title, it sold. It may have hypothecated, I don't know. It may have rented, it may have assigned, it may have done all things related to real estate transactions.
BY MR. FERRER:
Q. You would agree with me that it would have undertaken all of those activities in connection with the pool of assets that it originally purchased, correct?
A. Yes.
Q. And it did that through its management company American Residential Equities, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. Its manager.
BY MR. FERRER:
Q. Let me restate it. American Residential Equities LIII, LLC did all of those activities you described a moment ago through its manager American Residential Equities, LLC; is that correct?
A. That is correct.
Q. I believe I may have asked you this earlier, but I can't remember the answer, sir. If you'll indulge me. Was there an agreement between

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American Residential Equities LIII, LLC and American Residential Equities, LLC that would set forth the terms of American Residential Equities, LLC's management?

A. I believe there is an operating agreement and a prospectus. The operating agreement would set forth the expenses.

Q. Would it set forth any of the management activities in American Residential Equities, LLC undertook on behalf of American Residential Equities LIII, LLC?

A. I can't be sure.

Q. Do you have copies of those documents in your possession?

A. No.

Q. Where would copies of those documents be?

A. I don't know as we sit here today.

Q. Do you know if those copies of those documents are in Miss De Padua's possession in California?

A. I don't know.

Q. What documents in connection with this Eleven Homes note are in the possession of counsel in California?

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A. I don't know.

Q. Do you keep duplicates of everything that counsel has in California in your offices on Brickell?

A. No, sir.

Q. How do you determine what documents are sent over to counsel and what documents do you keep in Brickell?

A. We keep documents in Brickell, in several storage faults as closed-out files. We keep documents in California based on Miss De Padua's needs and my need when I'm out there. Those are typically documents that we work with every day, active portfolios that need our attention, and then we have documents that are in closed-out files. So they're somewhat scattered.

Q. With respect to documents pertaining to this investment of $14 million that we've been discussing, are all of those documents in the possession of Miss De Padua in California?

MR. ROSENTHAL: Object as to form.

A. I don't believe so.

BY MR. FERRER:

Q. Have you reviewed all of the files in connection with this investment of $14 million that

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we've been discussing today in compiling your responses to the request for production of documents that were served on you earlier this year?

MR. ROSENTHAL: Wait. Read it back, please.

(The last question was read back by the court reporter.)

MR. ROSENTHAL: Object as to form.

A. I reviewed what I could find.

BY MR. FERRER:

Q. Where you could find where, sir?

A. By looking in storage, by looking in California and by looking on Brickell.

Q. In terms of compiling documents that your counsel produced on your behalf earlier this year, you physically went to California and conducted an inspection of the documents in Miss De Padua's possession?

A. I'm not sure that the California office was open at that time.

Q. When did the California office open?

A. Probably about five months ago.

Q. Five months ago being in May of this year, May of 2009?

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A. I could be wrong about that, but I believe about in May.

Q. Prior to May of 2009, were all of the documents that are now in the California office stored in the Brickell office?

A. No, some documents were stored in Miss De Padua's garage while we were awaiting for the build-out to be completed.

Q. Miss De Padua's garage in California?

A. Yes, sir.

Q. And in compiling answers to the request for production of documents that were served on you earlier this year, did you inspect the documents stored in Miss De Padua's garage?

A. No, I asked Miss De Padua to inspect those.

Q. And do you know if Miss De Padua did that?

A. I believe she did.

Q. Are there any files that you have not looked into with respect to this $14 million investment in compiling your answers and your responses to the request for production of documents that were served upon you earlier this year?

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MR. ROSENTHAL: Object as to form.
A. I did not go through every file that we have in storage. I went through those that were labeled ARE LIII.
BY MR. FERRER:
Q. And in those files that were labeled ARE LIII, you did not find a security agreement, did you?
A. I did not.
Q. Now did American Residential Equities LIII have its own bank accounts?
A. It did, sir.
Q. What is the status of those banks accounts today?
MR. ROSENTHAL: Object as to form.
A. Open through this month.
BY MR. FERRER:
Q. Are the accounts going to be closed after this month?
A. We were changing accounting systems and moving away from separate bank accounts where we were legally able to do so.
Q. So what does that mean?
A. We wanted to try and go to a single pay system.

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Q. Does that mean that you're going to take all of the accounts for each of the investors of the companies that American Residential Equities, LLC manages and put them into one?
A. Where we're permitted to consolidate, we're going to consolidate.
Q. When was the bank account for American Residential Equities LIII, LLC opened?
A. I don't have the exact month.
Q. Would it be correct to state that it was opened on or about April 28, 2006, the date of the notes that we were discussing earlier?
MR. ROSENTHAL: Object as to form.
A. I don't know if it was that date or the date that the final note was signed, which I thought was -- I thought this note had gone through some amendments and was really signed in May. If that were the case, maybe it was May, but somewhere between April and May.
BY MR. FERRER:
Q. You have no reason to believe as you sit here today that this note that we've shown you as Plaintiffs' Exhibit 1 is not a final note other than those exceptions that you testified about earlier, correct?

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MR. ROSENTHAL: Object as to form.
A. Somehow I thought that -- my recollection is I signed this note -- even though it's dated April, that I signed it in May and there had been some -- the note date remained the same, but there were modifications continually going on to that note between Mr. Magno and Miss De Padua, and that ultimately I signed this note after the date on the note.
BY MR. FERRER:
Q. In your search of all of the files labeled ARE LIII, did you find any other versions of the note we've been discussing today with a later date?
A. I don't remember -- I don't remember if I did.
Q. How many accounts did American Residential Equities LIII, LLC have?
A. One.
Q. Has American Residential Equities LIII, LLC ever had more than just one account?
A. I am unsure if it changed banks. There may have been a time when we transitioned from one bank to another -- there might have been two ARE LIIIs open for a very short period of time. I'm

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not sure about that.
Q. Other than that overlap between changes of banks, did American Residential Equities LIII, LLC have more than one account at any given time?
A. My recollection is no.
Q. Who are the authorized signers on the bank account for American Residential Equities LIII, LLC?
A. I know I would have been.
Q. Anyone other than you?
A. I don't know.
Q. Do you have any reason to believe that anyone other than you would have been an authorized signer on the bank account that was opened for American Residential Equities LIII, LLC?
A. The only reason I have to believe that is that at times Miss De Padua was put on accounts in the event that I was out of town, couldn't sign checks that needed to be signed. But I'm not sure that she was on this account.
Q. You don't know one way or the other whether Miss De Padua --
A. I do not know.
Q. I'm going to ask you -- and I appreciate your answer. I just want to make sure that the

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record reads correctly. You don't know one way or the other whether Miss De Padua was ever an authorized signer on American Residential Equities LIII, LLC's bank account, correct?

A. I'm not sure that she was or wasn't.

Q. And even if Miss De Padua had been an authorized signer on that account, you certainly have always been an authorized signer on that account, correct?

A. That is correct.

Q. Sir, is there a balance remaining on the bank account of American Residential Equities LIII, LLC today?

A. I believe so. It's an active -- it was an active account, the last I looked.

Q. When was the last time you looked at that account?

A. A few weeks ago.

Q. What was the purpose of you looking at that account?

A. I was just online, having to pay bills.

Q. Were you paying bills for American Residential Equities LIII, LLC?

A. Yes, sir.

Q. What kind of bills does American

Residential Equities LIII, LLC have to pay?

A. Well, it has many assets. We pay management companies on rentals. We have repair bills. We have electricity bills. We have water bills. We have lots of bills.

Q. Does American Residential Equities LIII, LLC still pay management fees to American Residential Equities, LLC today?

A. No, sir.

Q. When did that stop?

A. Many months ago.

Q. Do you remember when?

A. My recollection is probably a year or more ago.

Q. And why did that stop?

A. We felt it was important to pay the bills before we paid ourselves.

Q. Was it enough money to pay bills and pay American Residential Equities, LLC its management fees?

A. We felt we needed to retain as much money as possible to improve real estate and rent it out, rather than take it and put it in our own pockets.

Q. When you say "we," who are you referring

to?

A. Asset management. The people in asset management took a look at the pool and needed help, and we decided that it would be best for the pool if we did repairs, paid our real estate taxes and made those things a priority.

Q. When you talk about people in asset management, can you tell me specifically who those people are?

A. Denise Shea, at the time she was there, I believe, and...

Q. Denise Shea was an employee of American Residential Equities, LLC?

A. Yes, sir.

Q. When did you have those conversations with Denise Shea --

A. Oh, I don't remember exactly. It had to be more than a year or more ago.

Q. From April 28, 2006 through the present day, do you know how much American Residential Equities, LLC has been paid in management fees?

A. Sir, I testified I do not know.

(Plaintiffs' Exhibit 7 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm showing you what's been marked as Plaintiffs' No. 7. I'll ask you to review the exhibit, familiarize yourself with it so that I may ask you some questions about it.

A. Do we need this any longer?

Q. We might.

A. Okay.

Q. Do you recognize the document as your answers to Interrogatories No. 4 and 5 of plaintiffs' first set of interrogatories?

A. Yes.

Q. Turn to the last page, please.

A. Sure.

Q. Do you recognize your signature on that last page of that exhibit?

A. I do.

Q. Sir, directing your attention to the second page, the portion where it says Interrogatory No. 5.

A. Yes, sir.

Q. Do you recognize all of the payments set forth in the lower half of that second page as payments made by American Residential Equities LIII, LLC to Eleven Homes Limited pursuant to the registered note marked as Plaintiffs'

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Exhibit No. 1?
MR. ROSENTHAL: Object as to form.
A. At the time this was prepared, I would have reviewed the payments that came out of the checkbook. Without the checkbook, without Bill Hirschkowitz's records, I don't know, but I assume that these lists are the ones that I copied from the checkbook.
BY MR. FERRER:
Q. You have no reason to believe that the amounts set forth on the bottom half of the second page of Plaintiffs' Exhibit No. 7 accurately represent payments made by American Residential Equities LIII, LLC to Eleven Homes Limited, correct?
MR. ROSENTHAL: Object to the form.
A. Could you read that to me again, please.
(The last question was read back by the court reporter.)
MR. ROSENTHAL: Object as to form.
A. I believe the payments are correct.
BY MR. FERRER:
Q. All of these payments reflected on the lower half of the second page of Plaintiffs' 7 going into the third page, do they represent

strictly principal payments toward the balance of the $14 million loan, or do they also comprise interest?
MR. ROSENTHAL: Object as to form.
A. I suspect some represent current interest, some represent principal, but I'm not sure by looking at this -- once I look at the August 23, 2006 payment for three and a half million dollars, I'm not sure that that relates to the $10 million note or the $14 million note.
BY MR. FERRER:
Q. Okay, the question is a little bit different --
A. Okay.
Q. -- and I just want to make sure that I understand that the payments reflected here, some of them are principal, some of them are interest, and some of them reflect both principal and interest; correct?
MR. ROSENTHAL: Object as to form.
A. Some reflect current interest. Based upon the size of these, I can only assume that some represent principal.
BY MR. FERRER:
Q. Okay, but you don't know from looking at

this exhibit --
A. No --
Q. -- one way or another, correct?
A. -- I do not.
Q. With respect to payments made with reference to this $14 million loan that we've been discussing today, were those payments made by American Residential Equities LIII, LLC or by American Residential Equities, LLC?
MR. ROSENTHAL: Object as to form.
A. They may have been made by American Residential Equities LIII, and some may have come out of another account.
BY MR. FERRER:
Q. What other account would those payments have come out of?
A. We had another account that was used for third party moneys, another American Residential Equities account, which was used by our servicers to wire money to us on a monthly basis, and there may have been times where we quickly just turned around from that account and sent money to the lender.
Q. How was it determined, sir, when payments were made on the $14 million loan

reflected in the two notes we were discussing today, Plaintiffs' 1 and Plaintiffs' 2?
MR. ROSENTHAL: I'm sorry. If you're referring to an exhibit, can he look at it, please?
MR. FERRER: Sure.
MR. ROSENTHAL: Thank you.
BY MR. FERRER:
Q. Showing you Plaintiffs' 1 and Plaintiffs' 2 --
MR. ROSENTHAL: Could you read the question back, sir.
(The last question was read back by the court reporter.)
A. Looking at the payment schedule, it appears that we consciously made an effort to make payments on the 1st or 31st and the 15th. And as we discussed before, this three and a half million dollar note -- demand note -- paid in full 8/23/06 corresponds with this unusual payment of August 23rd.
So not knowing for sure, I can only assume that something occurred on or about August 23rd that produced three and a half million dollars in revenue; took that money and paid off

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this note.
BY MR. FERRER:
Q. How are the amounts that were paid bimonthly by American Residential Equities LIII, LLC to Elevenhome calculated?
MR. ROSENTHAL: Object as to form. Can you read it back, please.
(The last question was read back by the court reporter.)
MR. ROSENTHAL: Elevenhome you said?
(The last question was read back by the Court Reporter.)
MR. ROSENTHAL: I object as to form.
A. The money was paid to someone other than Elevenhome. The money was paid to a number of different parties.
BY MR. FERRER:
Q. I'm going to get into the name of those parties in just a moment, but could you tell me how those amounts that were paid to those third parties was calculated on a bimonthly basis?
MR. ROSENTHAL: Object as to form.
A. We would have anticipated our cash needs for the next 30 days and unscientifically paid out the remainder to the lender's assignee.

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BY MR. FERRER:
Q. When you say "we," who do you refer to?
A. I would start with Hirschkowitz, I would start with asset management and try to get a handle on what our cash flow needs would be over that next 30-day period of time.
Q. In other words, members of American Residential Equities, LLC, including you, would have conferred and determined what those payments should be to Eleven Homes' designee, correct?
A. What they could be.
Q. And based on that conversation, that unscientific method, as you described it, payments were made on a bimonthly basis; is that correct?
A. As you can see on the last page, there were a number of payments made on the last day of the month in '07. So we paid bimonthly when we could pay bimonthly.
Q. Whenever you made a payment, it's pursuant to conversations that you had with members of American Residential Equities, LLC made a determination using that unscientific method you spoke about just a few moments ago, right?
MR. ROSENTHAL: Object as to form.
A. I'm sure that I also wanted to know

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where we stood. So for instance, this note was due; how are we going to have the money to pay that note? Where are we going to get the money to pay this note when it comes due?
On the $10 million note, I would be concerned about current interest, how much current interest did we owe. So it wasn't just a matter of anticipated expenses, but it was anticipated expenses taking into consideration as well current interest expenses pursuant to the note.
BY MR. FERRER:
Q. How did you determine current interest expenses pursuant to the note? How did you determine that amount on a monthly basis?
MR. ROSENTHAL: Object as to form.
A. I would ask Mr. Hirschkowitz, who would have done some calculations on interest.
BY MR. FERRER:
Q. Do you know how it was that Mr. Hirschkowitz went about doing those calculations on interest?
A. No.
Q. Do you know whether he based it on the note itself, the calculations based on interest?
MR. ROSENTHAL: Object as to form.

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A. I don't know whether Mr. Hirschkowitz saw the note, retained the note or whether it came about from conversations with me.
BY MR. FERRER:
Q. I'm just trying to figure out how it was that American Residential Equities, LLC determined interest with respect to the $10.4 million note we were discussing earlier today.
MR. ROSENTHAL: Object as to form.
A. I would have read the note and told Mr. Hirschkowitz this is what the note says, and he would have put it down on a spreadsheet, calculated interest, and told me what it was.
BY MR. FERRER:
Q. Is there anything about the note that is difficult or vague in terms of what the interest that is called for under that note is?
MR. ROSENTHAL: Object as to form.
A. The note does not appear to be ambiguous as to the interest.
BY MR. FERRER:
Q. Very well. Let's talk about these third parties to which you stated earlier the payments by American Residential Equities or payments pursuant to the two notes we've discussing were actually

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made. Can you tell me what entities or third parties those are?
A. I'm going to mispronounce the name. Ambigil -- Ambigil Limited. There was another one I believe to Overseas -- Emerald Oversees possibly was the name.
Q. Any other companies?
A. I believe we paid to Erick Magno's trust account some money. We wired money to Safira. I don't -- there were other wires -- and so I may not be taking into account all the different company names.
Q. Starting with the last person that you mentioned first, payment to Safira. Can you tell me how many payments American Residential Equities LIII, LLC made to Sephira?
A. I can't tell you how many.
Q. Do you know ballpark?
MR. ROSENTHAL: Object as to form.
A. One or two.
BY MR. FERRER:
Q. Do you remember the amounts of the payments made to Sephira?
A. I believe one was $200,000.
Q. And that payment of $200,000 was for

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what?
A. It was a payment made to Mr. Magno pursuant to his request.
Q. His request for what, a commission?
A. It could have been due diligence fees. Not sure how to classify them.
Q. How did you classify it in American Residential Equities LIII, LLC's books?
A. I don't know what Mr. Hirschkowitz did.
MR. ROSENTHAL: Object as to form to the last question, please.
BY MR. FERRER:
Q. Do you understand that the $200,000 payment was a payment toward principal and interest on the $14 million loan?
MR. ROSENTHAL: Object as to form.
A. If Mr. Magno paid that money to Mr. Couch and Mr. Hansen, then it can be construed in any number of ways. I have no idea.
BY MR. FERRER:
Q. Who came up with the figure of $200,000?
A. Mr. Magno.
Q. He said to you "I want $200,000"?
A. That is my recollection.
Q. Can you tell me --

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A. It was based upon a percentage of the money. That's my recollection. I can't tell you sitting here today what that percentage was.
Q. So $200,000 represented a percentage of the $14 million loan?
A. It may have been something other than a straight percentage, because there was a 30-day provision, and he came up with a number of $200,000.
Q. To the extent that Mr. Hirschkowitz classified that $200,000 payment in his records as a commission, would you agree with me that that amount would not constitute a payment toward principal and interest?
MR. ROSENTHAL: Object as to form.
A. I don't think Mr. Hirschkowitz was the best person to classify it in any way, shape, form or other. He wasn't a part of those conversations.
BY MR. FERRER:
Q. How did you classify that $200,000 payment?
A. I didn't classify it. Mr. Magno said he wanted $200,000, he was emphatic about it, and we paid it. To me it was the cost of doing business with him. I had paid him on every prior deal.

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This deal was no different.
Q. When you had paid him as to each prior deal, those payments constituted a commission or something other than a commission?
A. Due diligence. He had come to me with Mr. Cunha and Mr. Carmona in previous deals -- do you need me to spell those names? I see Mr. Ferrer is looking at you.
Q. I've got it.
A. He had brought Mr. Carmona and Mr. Cunha into the office to do similar type transactions. He wanted money for those deals; we paid him. Was he paid as a lawyer doing legal work? I believe part of it, yes.
Q. The sole point that I want to touch with you is whether or not those $200,000 were characterized as a principal or interest payment toward the $14 million, represented by the two notes we were looking at earlier today, Plaintiffs' 1 and Plaintiffs' 2?
MR. ROSENTHAL: Object as to form.
A. I'm going to think about the question for a second, if you don't mind.
BY MR. FERRER:
Q. While you're doing that --

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A. Yes, sir.
Q. -- let me direct your attention to Plaintiffs' No. 7, which is right in front of you, I'll ask you to turn to Page No. 2. We've established that the bottom portion -- beginning on the bottom portion of Page No. 2, that represents payments made by American Residential Equities LIII, LLC to Eleven Homes pursuant to the $14 million investment we were discussing; is that correct?
A. That's correct, sir.
MR. ROSENTHAL: Wait, wait. Object as to form.
BY MR. FERRER:
Q. And looking back at those amounts, sir, those $200,000 that you're talking about that were paid to Mr. Magno, those are not represented in the amounts set forth on Page 2 going onto Page 3, correct?
A. Sitting here today, I don't know if ARE LIII paid to Mr. Magno the $200,000. I don't know where the $200,000 came from as I'm sitting here today.
This is list of payments made by American Residential Equities LIII to Eleven Homes.

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I'm not sure where the $200,000 came from, which account. It may have come from American Residential Equities, LLC. I'm not sure.
Q. Are there other payments that you contend are not reflected in Plaintiffs' No. 7 that should be credited toward the $14 million loan represented by Plaintiffs' No. 1 and Plaintiffs' No. 2?
MR. ROSENTHAL: Object as to form.
A. I don't believe so.
BY MR. FERRER:
Q. Who did you understand Ambigil Holdings to be in relation to Eleven Homes Limited?
MR. ROSENTHAL: Wait. Hold on a second. Read it back, please.
(The last question was read back by the court reporter.)
MR. ROSENTHAL: Object as to form.
A. I have no understanding.
BY MR. FERRER:
Q. Did you inquire why payments were being made by American Residential Equities LIII, LLC to Ambigil?
A. I did.
Q. And what were you told?

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A. Mr. Magno was having a difficult time opening an account. He was asked to leave Lloyds Bank because of KYC issues, and therefore the money was to be paid to Ambigil.
Q. Mr. Magno was having a difficult time opening an account for Eleven Homes Limited?
A. Eleven Homes Limited, that's my recollection.
Q. When did you have those conversations with Mr. Magno whereby he conveyed to you the difficulty he was having with Lloyds Bank in opening an account for Eleven Homes?
A. I believe an account was opened and then closed. At the same time, he called me and asked me if I could help him open an account at Wachovia. I called Wachovia on his behalf. They were not keen about any offshore entity accounts at the time. And then in further conversations with him, he had the cooperation of Mr. Cunha and Mr. Carmona in opening accounts either at Citi or JPMorgan Chase; I can't be certain about that.
Q. And those accounts that you believe are open at Citi or at JPMorgan Chase, were they open in the name of Eleven Homes?
A. I have no idea.

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Q. Did you have any reservations about making payments that under Plaintiffs' No. 1 and Plaintiffs' No. 2 should have gone to Eleven Homes Limited to Ambigil Holdings?
MR. ROSENTHAL: Object as to form.
A. No.
BY MR. FERRER:
Q. Why not?
A. Because I relied upon and trusted Mr. Magno.
Q. To be sure, the payments made by American Residential Equities LIII, LLC to Ambigil Holdings Limited were payments toward the $14 million loan reflected in Plaintiffs' No. 1 and No. 2, correct?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. How many payments were made by American Residential Equities LIII, LLC to Emerald Overseas?
A. I have no idea.
Q. Do you recall whether any payments were made by American Residential Equities LIII, LLC to Emerald Overseas?
A. There were payments made to a number of

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entities, and sitting here today, I don't remember their names.
Q. The payments that you're describing that were made to other entities, those were payments toward the $14 million loan reflected in Plaintiffs' No. 1 and Plaintiffs' No. 2, correct?
MR. ROSENTHAL: Object as to form.
A. Correct.
BY MR. FERRER:
Q. I want to understand what it is that American Residential Equities LIII, LLC did with the $14 million that it borrowed. Is it correct, sir, that American Residential Equities LIII, LLC purchased real estate assets with that money?
MR. ROSENTHAL: Object as to form.
A. No.
BY MR. FERRER:
Q. Could you tell me what's wrong with that statement?
A. It didn't purchase real estate assets.
Q. What did it purchase?
A. Mortgages.
Q. The $14 million loan to American Residential Equities LIII, LLC were used to purchase mortgage loans?

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A. Yes.
Q. Have all the mortgage loans -- let me backtrack. Was the purpose of acquiring those mortgage loans by American Residential Equities LIII, LLC to eventually liquidate them?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. Have all the assets purchased by American Residential Equities LIII, LLC with the $14 million loan been liquidated as of today?
A. No, sir.
Q. How many of the assets purchased by American Residential Equities LIII, LLC with the $14 million have been liquidated?
MR. ROSENTHAL: Object as to form.
A. Have been liquidated?
BY MR. FERRER:
Q. Yes. How many of the assets purchased by American Residential Equities, LLC with the $14 million have been liquidated to date?
A. I don't know.
Q. Originally there were 102, correct?
A. Originally there were 102, correct.
Q. And as of today's date, you don't know

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how many assets have been liquidated from those 102?
MR. ROSENTHAL: Object as to form.
A. There were 102, according to this 18-month cash flow.
BY MR. FERRER:
Q. Do you have any reason to believe --
A. Did I -- let me just answer. I was going to help you, I think, as well as myself. There were 102. But if we liquidated assets along the way and decided that there was a good deal out there and bought some asset, it would have gone from 102 to some other number. Sitting here today -- so it might have gone from 102 to 142; I don't know. Sitting here today, I don't know how many we liquidated. I looked at the number of assets remaining as of a particular date. That date wasn't today.
Q. When was that date?
A. My recollection is April -- the third week of April of 2008.
Q. Since the third week of April 2008, have you checked again to see how many of the assets are remaining in American Residential Equities LIII, LLC?

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A. Periodically.
Q. When was the last time you looked?
A. Within the last three months.
Q. Within the last three months, how many assets remained in American Residential Equities LIII, LLC?
A. I looked at it in terms of the percentage. My recollection is about 15 percent --
Q. 15 percent --
A. -- could be 16 percent.
Q. 15 or 16 percent of what?
A. The original number of assets.
Q. 15 or 16 percent of the original 102 assets?
A. I'm not sure whether it was the original 102 or it was the high point, but... I believe it was 16 percent the original.
Q. Of the original 102, correct?
A. I'm not sure about that. It might have been -- it might have been the larger number, but I'm not clear.
Q. When you talk about looking to see how many assets are remaining, what is it that you're actually looking at?
A. The database.

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Q. What database?
A. I maintain a database.
Q. Is that database maintained digitally?
A. I look at a spreadsheet.
Q. Are those spreadsheets derived from some sort of electronic file?
A. Asset management prepares them for me.
Q. Asset management being a department of American Residential Equities, LLC, correct?
A. Yes.
Q. And do you know where asset management derives that information?
A. Well, it's a running tally, and they look at the servicers. We have something in-house.
Q. And if I wanted to look today to see how many assets remained within American Residential Equities LIII, LLC, is that something that could easily be done by asset management at American Residential Equities, LLC?
A. Yes.
Q. How often does asset management prepare spreadsheets for you to review pertaining to the assets remaining in American Residential Equities LIII, LLC?
A. They don't prepare them for me

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necessarily. They prepare them for themselves so they know how to attribute money that comes in.
Q. Often does asset management for American Residential Equities, LLC prepare spreadsheets pertaining to the assets remaining in American Residential Equities LIII, LLC?
A. It's updated monthly.
Q. And how often do you review those spreadsheets?
A. There's no set time.
Q. Just whenever you feel like it?
A. There's always something that triggers it.
Q. What was it that triggered your review of those spreadsheets the last time you reviewed them?
A. I was being asked a question about an asset in ARE LIII, and asset management was asking my opinion on what we should do about it, so I looked at the history of the asset.
Q. Who was raising questions about that particular asset?
A. Sasha Daberdine I think is her last name. I'm not sure.
Q. Who is she?

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A. She works at ARE in asset management.
Q. And what particular concern did she have with respect to that one asset?
A. The question was did I want to repair the asset and rent it, or did I want to spend the money to fix it up and lease it out.
Q. In this case with respect to that particular asset, are you referring to a mortgage loan or are you referring to actual property?
A. To an REO at that point.
Q. REO meaning "real estate owned"?
A. Yes.
Q. Can you tell me what it is that that term means?
A. Foreclosed real estate. Banks typically use it to describe their own REO.
Can I take a break?
MR. ROSENTHAL: Sure.
MR. FERRER: Sure.
(A break was taken.)
BY MR. FERRER:
Q. Pertaining to the remaining assets in American Residential Equities LIII, LLC, are they all today REOs?
A. No.

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Q. How many of the assets remaining in American Residential Equities LIII, LLC are other than REOs?
A. I don't know.
Q. Who is servicing the remaining assets today?
A. Some are at SRG. The name has changed. It's now Acqura, A-C-Q-U-R-A. Some are at GMAC, I believe, and some we service in-house.
Q. How many assets remaining in American Residential Equities LIII, LLC does American Residential Equities, LLC service in-house?
A. I don't know.
Q. Do GMAC and Acqura provide monthly reports of the assets that they're managing?
A. Yes, sir.
Q. Do you have copies of all of those reports?
A. Do I? No.
Q. Does anyone at American Residential Equities, LLC have copies of those reports pertaining to the assets remaining in American Residential Equities LIII, LLC?
A. Yes.
Q. Who would that person be?

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A. Andrea Lutchman.
Q. Is Andrea in Miami?
A. No.
Q. Where is Andrea?
A. California.
Q. Do you have Andrea Lutchman's address?
A. No.
Q. Is Andrea Lutchman still an employee of American Residential Equities, LLC?
A. I believe so.
Q. Does she have any positions or titles?
A. Investor relations.
Q. What is the value of the assets remaining in American Residential Equities LIII, LLC today?
A. I don't know.
Q. Is there any report prepared by American Residential Equities, LLC that would show what the value of the assets remaining in American Residential Equities LIII, LLC is today?
A. No.
Q. Do GMAC or Acqura provide American Residential Equities, LLC with any reports pertaining to the value of those assets?
A. Certainly not as to the mortgages. As

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to the REO, only if we ask them.
Q. Has American Residential Equities, LLC asked GMAC or Acqura within the last three months to provide it with value of REOs that it is managing for American Residential Equities LIII, LLC?
A. It might be a specific asset, but not all of them.
(Plaintiffs' Exhibit 8 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm showing you what has been marked as Plaintiffs' Exhibit No. 8. I'll ask you to review it, familiarize yourself with it so that I may ask you some questions about it, please.
A. Okay.
Q. Sir, do you recognize the document?
A. Yes.
Q. What is it?
A. It's an application by a foreign limited liability company for withdrawal of authority to transact business in Florida.
Q. Specifically it's an application filed by you on behalf of American Residential Equities LIII, LLC to withdraw its authority to transact

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business in Florida, correct?
A. That is correct.
Q. And that was filed on April 9th, 2009, correct?
A. That's correct.
Q. And on the last page of that exhibit, that's your signature, correct?
A. It is, sir.
Q. Can you tell me why it is that you filed this application by a foreign limited liability company for withdrawal of authority to transact business in Florida on behalf of American Residential Equities LIII, LLC?
A. We felt it was a waste of money to pay the State of Florida their fee, their annual fee.
Q. What was different about April of this year that caused you to come to that realization?
A. We didn't foresee ourselves having any REO in the state of Florida.
Q. Does American Residential Equities LIII, LLC have any REO in Florida today?
A. I assume not. That's why we would have done this.
Q. Is the only reason why a certificate of authority to transact business on behalf of

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American Residential Equities LIII, LLC was filed in Florida is to account for any REOs held in Florida?
A. Could you repeat that question?
Q. Let me go ahead and ask it in a different way. What was the point of filing a certificate of authority to do business in Florida on behalf of American Residential Equities LIII, LLC to begin with?
MR. ROSENTHAL: Object as to form.
A. I don't think we specified American Residential Equities LIII -- can I let them finish and then I'll finish?
MR. ROSENTHAL: No.
BY MR. FERRER:
Q. Go ahead.
A. As a matter of course and practice and procedure, we did it for all of our LLCs. We always filed an application to do business in the State of Florida. In 2008 and 2009, we started to look at it and it was our opinion that it would be unnecessary if our pools didn't have Florida assets in them. We have a limited number of Florida assets, and therefore it wouldn't be necessary to file good standing certificates with title agents,

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lawyers, et cetera, if -- in Florida if we didn't have Florida assets.

Q. When you talk about as a matter of course we did it for all of our LLCs, what you mean is that American Residential Equities, LLC filed a certificate of authority to transact business in Florida with respect to all of the limited liability companies it manages, correct?

MR. ROSENTHAL: Object as to form.

A. Substantially all.

BY MR. FERRER:

Q. Were there any for which --

A. 99 percent.

Q. What was that 1 percent for, which it wasn't --

A. I don't know. I'm leaving -- I'm leaving wiggle room because I'm not sure. There may have been one.

(Plaintiffs' Exhibit 9 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm handing you what's been marked as Plaintiffs' Exhibit No. 9 for identification purposes. Please review it so that I may ask you some questions about it.

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A. Okay.

Q. Do you recognize the document?

A. I do.

Q. Can you identify it for the record, please.

A. It is an application for American Residential Equities C to transact business in the state of Florida, and it is also a designation of registered agent registered office, and attached thereto as well is a certificate of good standing it looks like for American Residential Equities C from the State of Delaware.

Q. I'll ask you to turn to Page 3 of that exhibit, specifically the document titled application by foreign limited liability company for authorization to transact business in Florida; do you see that?

A. Yes, sir.

Q. That was signed by you, correct?

A. Yes, sir.

Q. That was filed by you on or about July 20, 2006, correct?

MR. ROSENTHAL: Object as to form. Also, object. He's not here as a corporate representative. AREC is not a party to this lawsuit.

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BY MR. FERRER:

Q. You filed this document on or about July 20, 2006, correct?

A. It was filed on my behalf as signatory. I didn't file it.

Q. Okay, but you signed the document, correct?

A. I did.

Q. Could you tell me what American Residential Equities C, LLC is?

A. I believe I testified to this in my last session; that American Residential Equities C was an LLC formed in the state of Delaware.

Q. Specifically, American Residential Equities C, LLC was an entity created for purposes of investments by Petra Opportunity Fund, correct?

MR. ROSENTHAL: Object as to form.

A. American Residential -- American Residential Equities C was formed for the purpose of acquiring mortgages.

BY MR. FERRER:

Q. Who was the investor with respect to the mortgages to be acquired by American Residential Equities C, LLC?

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MR. ROSENTHAL: Object as to form.

A. Debt or equity?

BY MR. FERRER:

Q. What does that mean?

A. Debt or equity.

Q. I don't know what that means. Can you explain that to me?

A. You asked me who the investor was, and I asked you on the debt side or the equity side.

Q. I see, debt or equity. Who were the investors on the debt side?

A. Petra.

Q. When you talk about Petra, you're talking about Petra Opportunity Fund, right?

A. Right.

Q. Who were the investors on the equity side?

A. American Residential Equities.

Q. American Residential Equities, LLC?

A. My recollection is yes.

Q. Can you tell me how it was that American Residential Equities, LLC was an equity member of American Residential Equities C, LLC?

MR. ROSENTHAL: Object as to form.

A. They agreed to invest equity.

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BY MR. FERRER:
Q. How much did American Residential Equities agree to invest in American Residential Equities C, LLC?
A. I don't know how much it agreed to invest. I don't remember that. I believe we invested about a million dollars.
Q. American Residential Equities, LLC invested about a million dollars worth of American Residential Equities C, LLC, correct?
A. I believe that was the case.
Q. Could you explain to me how it was that Petra Opportunity Fund invested by way of debt in American Residential Equities C, LLC?
A. What do you mean by your question?
Q. Well, when I asked you originally whether American Residential Equities C, LLC was an entity created for investment by Petra Opportunity Fund, you said debt or equity.
A. Correct.
Q. And I followed up and I said let's start with debt --
A. Right.
Q. -- and you said Petra Opportunity Fund --

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A. Correct.
Q. -- and I just want to know what that relationship was or entailed.
MR. ROSENTHAL: Object as to form.
A. They were a debt investor.
BY MR. FERRER:
Q. Can you explain to me how it is that that worked?
A. They loaned -- initially they loaned money to ARE -- American Residential Equities C. So for the purposes, I'll refer to it as ARE from now on -- AREC. At some point in time that debt was converted to purchase agreements.
Q. How much was it that Petra Opportunity Fund invested by way of debt in AREC?
A. At its high point, it was probably somewhere between 52 and $54 million.
Q. Could you explain to me what it is when you state "but at some point that debt was converted to a purchase agreement"?
A. Initially we started out -- this is my recollection -- as straight debt and then Mr. Magno and -- in conjunction with Miss De Padua began to draw up purchase and sale agreements for the assets.

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Q. Am I correct in understanding your testimony that when those purchase and sale agreements with respect to the asset AREC began to be drawn up, the purpose was to transfer title of those assets directly to Petra Opportunity Fund?
A. I don't think so. I think it had more to do with a taxation issue, but I'm not clear right now.
Q. Okay. Tell me what it is that you meant when you said they started drafting up purchase and sale agreements.
A. They drafted up purchase and sale agreements. I don't have any in front of me, but I remember purchase and sale agreements.
Q. What was the effect of those purchase and sale agreements on Petra Opportunity Fund's debt investment in AREC, if any?
MR. ROSENTHAL: Object as to form.
A. I'm not sure what the impact was. I do know that the number that I quoted before, between 52 and 54 million, would have been both debt, purchase and sale agreements, however you want to construe it.
BY MR. FERRER:
Q. In total at its high point, Petra

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Opportunity Fund loaned AREC 52 to $54 million, correct?
MR. ROSENTHAL: Object as to form.
A. That is correct.
BY MR. FERRER:
Q. Petra invested in residential pools of assets, correct?
A. Petra didn't invest in anything. Petra loaned money.
Q. Fair enough. Petra loaned money so that AREC could invest in residential pools of assets, correct?
MR. ROSENTHAL: Object as to form.
A. It wasn't residential.
BY MR. FERRER:
Q. Could you tell what other assets it was that money invested by Petra was used by AREC to purchase?
A. There may have been commercial assets as well.
Q. When you talk about commercial assets, could you explain for the record what that means?
A. It would be something other than a single family-owned, one to four units, something other than an MFR, manufactured -- something other

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than a dwelling --
Q. In terms of -- sorry.
A. -- or for some reason it was a dwelling. But because of a local code, state interpretation, it wasn't classified as residential. So, for instance, a large tract of land with one home on it might have been construed as a commercial asset.
Q. In terms of those commercial loans, in what capacity, if any, was a company by the name of Seabreeze Financial, LLC involved?
A. It would have been the -- it would have sourced the loans.
Q. What do you mean by sourced the loans?
A. It would have gone out and looked for commercial loans by advertising, phone calls.
Q. Commercial loans were made by Seabreeze Financial, LLC, correct?
A. At times and at times not.
Q. And those times that it made loans, Seabreeze would take back a promissory note from the borrower, correct?
A. Here it was in direct privity with the borrower.
Q. In those cases where it was in direct privity with the borrower, American Residential

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Equities, LLC would then give a note back to Petra, correct, for the amount of the Seabreeze note with the borrower?
MR. ROSENTHAL: Object as to form.
A. I don't know if that was always the case.
BY MR. FERRER:
Q. That was the case with respect to at least some of the investments --
A. Yes, it was.
Q. -- made by Petra, correct?
A. Yes, it was.
Q. Now Seabreeze Financial, who was the principal broker of Seabreeze Financial, LLC?
A. I believe it was my son Steven Kirsch who was -- who had the mortgage broker's license up until -- he left in July of 2007, and then we had a number of other people come through there with mortgage broker licenses.
Q. Has Steven Kirsch been the manager of Seabreeze Financial, LLC from inception through the present date?
A. Well, he resigned in July of 2007, so I don't -- and to today I believe it's been dissolved.

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Q. When do you believe that company was dissolved?
A. It should have been dissolved -- we waited for a renewal date to do it. I believe the renewal date was in 2008, probably June, July, August, something like that.
Q. To your recollection, sir, Petra invested in five or six commercial loans involving Seabreeze Financial, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. I don't know. There were -- there were far more loans than that. I don't know whether Seabreeze -- whether Petra -- and it wouldn't have been Petra. It would have been Seabreeze -- probably originated more than...
(Plaintiffs' Exhibit 10 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, let me go ahead and hand you what has been marked as Plaintiffs' Exhibit 10. I'll ask you to review it so that I may ask you some questions about it.
(Plaintiffs' Exhibit 11 was marked for identification.)
BY MR. FERRER:

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Q. Mr. Kirsch, I'm also handing you what's been marked Plaintiffs' Exhibit 11. I'll ask you to review that document, familiarize yourself with it so that I may ask you some questions about both 10 and 11, please.
A. Okay.
Q. Mr. Kirsch, beginning with Plaintiffs' No. 10, do you recognize the document?
A. No.
Q. Could you turn to the last page of that document, please.
A. Okay.
Q. Does that appear to be your signature on that document?
A. Yes.
Q. Do you have any reason to believe that you didn't sign this document?
A. No.
Q. Sir, would you agree with me that it purports to be a registered note in the amount of $1,072,200?
A. Yes.
Q. And it's a note by American Residential Equities C, LLC to Petra Opportunity Fund for that amount?

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A. Yes.
Q. And that's dated November 30, 2007?
A. Yes.
Q. Could you tell me what that particular document pertains to?
MR. ROSENTHAL: Object as to form.
A. As a standalone document, I don't -- I'm trying to find something within this note that would jog my memory as to why we would have given them a note for a million seventy-two thousand.
BY MR. FERRER:
Q. Are you familiar with the term Town Square Garden?
A. Oh, yes.
Q. Can you tell me how you're familiar with that?
A. It was a commercial loan.
Q. Could you explain to me how it was that Petra Opportunity Fund was involved with respect to the Town Square Garden loan?
A. My recollection is they -- if this loan is in Minneapolis, Minnesota, I remember this well. It was a loan that they made me buy back.
Q. When did Petra Opportunity Fund make you buy this loan back?

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A. On or about February 2008 -- if this is Minneapolis, Minnesota.
Q. Let's take it --
MR. ROSENTHAL: He wasn't -- are you finished with your answer?
A. And it would be helpful to know if this was Minneapolis, Minnesota, because otherwise we're not talking about the same loans.
BY MR. FERRER:
Q. I'll represent to you, sir, that these are the documents involved with the loan known as Town Square Garden; does that help you in any way, shape or form?
A. Only the location.
Q. When I mentioned earlier Town Square Garden loan, you said that that jogged your memory with respect to these notes --
A. It does. I just want to verify that it is Minneapolis, Minnesota or somewhere in Minnesota.
Q. Okay.
A. I suspect there's a mortgage somewhere in your documents.
Q. I don't believe through the documents that we have we can verify that it's Minnesota, but

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I'll ask you -- and to the best your recollection you can testify. If you don't remember, you don't remember --
A. This is my recollection this is Minneapolis, Minnesota.
Q. And to be sure, let's take it step by step. With respect to this loan, Seabreeze Financial loaned $1,072,200 to Town Square Garden, LLC, correct?
A. That's a difficult question to answer for me. My recollection is that it never left the escrow agent's hands.
Q. Okay. Let me direct your attention to Plaintiffs' No. 11, specifically Paragraph B. Would you mind reading that to yourself, seeing if it refreshes your recollection as to whether or not Seabreeze Financial loaned $1,072,200 to Town Square Garden, LLC.
A. Okay.
Q. Does looking at that particular paragraph refresh your recollection as to whether or not Seabreeze Financial, LLC loaned $1,072,200 to Town Square Garden, LLC?
A. My recollection of this particular loan is that the money never changed hands, so I can't

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be for sure whether or not it actually is construed as a loan.
The money remained with the title company in Minneapolis and it never funded. So I don't know how you construe that, as funded loan, as a contingent loan, as an unfunded loan, what it is.
Q. Okay. Let's take a look at Plaintiffs' No. 11, which is titled the Pledge Agreement.
A. Yes.
Q. Do you recognize the document?
A. Only as a pledge agreement.
Q. And do you recognize the document as a pledge agreement entered into on November 30, 2007 by and between Petra Opportunity Fund, American Residential Equities C, LLC and Seabreeze Financial, LLC?
A. That's what it says, yes.
Q. And you don't have any reason to doubt that what it says is actually what it is?
MR. ROSENTHAL: Object as to form.
A. No.
BY MR. FERRER:
Q. I'll ask you to turn to the last page of this document. Is that your signature, sir, on

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behalf of American Residential Equities C, LLC?
A. I have no reason to believe that it's not.
Q. And is that also your signature on behalf of Seabreeze Financial, LLC?
A. Yes.
Q. Directing your attention to the very opening paragraph, it defines Petra Opportunity Fund as the pledgee, correct?
A. Yes.
Q. And it defines American Residential Equities C, LLC and Seabreeze Financial, LLC as the pledgor, correct?
A. Correct.
Q. And now I'm going to read Paragraph B into the record, because I'm going to ask you some questions about it, and I'll ask you to read along silently with me to make sure I read it correctly.
"Pledgee made the loan to pledgors upon the condition precedent that pledgors execute and deliver this pledge agreement, pledging to pledgee as security for repayment of the loan in accordance with the note, that certain promissory note and/or mortgage loan receivable owned by pledgors or assigned to any of his affiliates as the case may

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be including but not limited to Seabreeze Financial, LLC issued by Town Square Garden, LLC in favor of Seabreeze Financial, LLC in the amount of $1,072,200 bearing interest at the rate of 14-percent and maturing on November 30, 2010. The collateral, the note and the obligations of the pledgors under this agreement shall be referred to herein as the obligations."
That's quite a mouthful. Did I read that correctly?
A. You did, sir.
Q. Does that paragraph state that the deal never funded?
A. That deal -- that paragraph does not say that.
Q. Just so that I understand it, the way that the deal was supposed to have happened is that Seabreeze was supposed to have loaned to Town Square Garden, LLC $1,072,200, correct?
MR. ROSENTHAL: Object as to form.
A. Yes.
BY MR. FERRER:
Q. And American Residential Equities, LLC turned around and gave Petra Opportunity Fund a note, which is what we're looking at in Plaintiffs'

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No. 10 for the same amount of $1,072,200, correct?
MR. ROSENTHAL: Object as to form.
A. No, I think there would be something missing here.
Q. Well, is it correct that American Residential Equities C, LLC gave Petra Opportunity Fund a note for $1,072,200.
MR. ROSENTHAL: Object as to form.
A. Which it received from Seabreeze Financial, LLC.
BY MR. FERRER:
Q. So Seabreeze Financial, LLC gave American Residential Equities C, LLC a note; is that your testimony?
MR. ROSENTHAL: Object as to form.
A. If Seabreeze was the originator, then these documents that you've shown me as standalone documents don't make sense to me.
BY MR. FERRER:
Q. Why wouldn't they make sense to you?
A. That I would be looking for another document which would put Seabreeze in the chain which it would then be able to assign to AREC.
Q. Wouldn't the pledge agreement marked as Plaintiffs' Exhibit No. 11 put Seabreeze Financial,

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LLC in the chain --
A. No.
Q. -- to use your term?
A. No, no, I would be looking -- my experience in commercial loans -- and I could be wrong -- I am looking for another document --
Q. Okay.
A. -- which document would be a note from Town Square Gardens, LLC to Seabreeze Financial, LLC --
Q. Okay --
A. -- if it was the originator.
Q. Looking at these documents here, particularly Plaintiffs' 11, Paragraph B, does that give you any idea who it was that was the originator with respect to the Town Square Garden loan?
MR. ROSENTHAL: Object as to form.
A. I would think it is Seabreeze.
BY MR. FERRER:
Q. In other words, Seabreeze Financial, LLC loaned $1,072,200 to Town Square Garden, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. That's my recollection.

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BY MR. FERRER:
Q. And you would agree with me that Plaintiffs' Exhibit No. 10 which is the note for $1,072,200 and the pledge agreement marked as Plaintiffs' No. 11 correspond to the same transaction?
MR. ROSENTHAL: Object as to form.
A. They seem to correspond to the same transaction; but if I'm right, there's documents missing.
BY MR. FERRER:
Q. And those documents would be in the possession of Seabreeze Financial, LLC, correct?
A. I doubt it. I believe they would be in your possession.
Q. Why would documents pertaining to the funding by Seabreeze Financial, LLC to Town Square Garden, LLC be in my possession?
A. Your client's possession.
Q. Why would documents pertaining to a loan funded by Seabreeze Financial, LLC to Town Square Garden, LLC be in my client's possession?
A. For several reasons. The first reason, we were very diligent in giving you complete -- giving your client -- excuse me -- complete copies

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servicing collateral of every commercial loan.
Secondly, this particular loan became an issue for me as well as your client's as well as Mr. Merrill.
Q. Okay, and we'll get into that in just a moment. You would agree with me, though, that these two documents that we've now marked as Plaintiffs' No. 10 and Plaintiffs' No. 11 pertain to a commercial loan made by Petra Opportunity Fund in the amount of $1,072,200?
MR. ROSENTHAL: Object as to form.
A. Petra Opportunity Fund's involvement is a loan to someone other than Town Square Gardens, LLC.
BY MR. FERRER:
Q. Petra Opportunity Fund loaned money to American Residential Equities C, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. That's what it says, correct.
BY MR. FERRER:
Q. And American Residential Equities C, LLC loaned that money to Seabreeze financial, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. That is my guess; but as I said to you

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before, there seems to be an intervening document missing here.
BY MR. FERRER:
Q. Fair enough. And Seabreeze Financial, LLC used the money that it obtained from American Residential Equities C and loaned that money to Town Square Garden, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. And I believe that I answered that before by saying I am unclear as to whether a loan was actually consummated.
BY MR. FERRER:
Q. Let's talk about that. Why is it that you're unclear about that?
A. My recollection is that the moneys remained with a title company subject to certain things happening. I don't have all of the information in regard thereto in front of me.
Q. Can you tell me how it is that the money remained with the title company?
A. Well, there would always be situations -- not always. As you know -- as you well know, there are times in closings when money is held in escrow pending the completion of certain things, and this is one of those cases. I don't

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remember what they were.
Q. Is it your testimony that Town Square Garden, LLC never actually received a loan for a $1,072,200?
MR. ROSENTHAL: Object as to form.
A. My testimony is that I'm unsure whether a loan is actually a loan if someone doesn't receive the money. I don't know.
BY MR. FERRER:
Q. I appreciate that. I just want to know whether Town Square Garden, LLC ever received $1,072,200 from Seabreeze Financial, LLC.
A. I don't believe so.
Q. And in the event that Town Square Garden, LLC never received from Seabreeze Financial, LLC a loan in that amount, would it have been fair for that money to go back to Petra Opportunity Fund?
A. No.
Q. Why not?
A. Because as I just testified, if the money was in escrow and the borrower was able to complete those items that it needed to complete in order to receive the money, then it should be entitled to the money.

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Q. What is your understanding regarding the reasons why the funds remained with the escrow agent with respect to this loan?
A. My recollection is that there were certain items needed to be done -- I don't know what they are before you ask me -- before the money could be disbursed.
Q. Who did these certain items have to be done by?
A. The borrower.
Q. The borrower being Town Square Garden, LLC, correct?
A. Correct.
Q. And to your recollection, did Town Square Garden, LLC ever do those things that were required in order to release the money from escrow?
A. I don't know whether it was given the time.
Q. How much time did Town Square Garden, LLC need to complete those requirements?
A. I would have to have the file in front me to know that.
Q. And the issues that you described earlier about having been made to pay back this loan for $1,072,200 to Petra, does that pertain to

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Petra not giving Town Square Garden, LLC enough time to complete those requirements?
MR. ROSENTHAL: Object as to form.
A. Petra wasn't in a position to do that, only Seabreeze was. It had loaned the money.
BY MR. FERRER:
Q. What right did Petra have to the $1,072,200 that it loaned to American Residential Equities C, LLC with respect to this transaction?
MR. ROSENTHAL: Object as to form.
A. It was the ultimate beneficiary of the loan.
BY MR. FERRER:
Q. To your understanding, does the ultimate beneficiary of the loan have the right to call the loan -- right to call the loan? Does the ultimate beneficiary of the loan have the right to call the loan if in fact the money is sitting in escrow and the borrower hasn't complied with the requirements?
MR. ROSENTHAL: Object as to form.
A. I don't know that.
BY MR. FERRER:
Q. You mentioned that this loan became a problem both for you, for my clients and Mr. Merrill. Could you explain to me what you

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meant?
A. This was a loan that was brought to me by Mr. Merrill. He was very much involved in this, and I gave him free reign to make this loan and close this loan.
When the breakup came between ourselves and Petra, Mr. Magno through Mr. Merrill became insistent that we unwind this loan immediately. He was unhappy with this loan, and apparently we had the rights since the money was sitting in escrow to unwind the loan, and I did.
For me, I had paid a number of people on this loan who had worked for me. I think we were out of pocket about a hundred thousand dollars in legal fees, lots of expenses; and I believe that this loan is the subject of the settlement agreement dated March 17th, '08. And one of my requirements under that was to unwind this loan, I believe, and get them back their money.
Q. And you stated a moment ago that because the amounts were sitting in escrow, Seabreeze Financial, LLC had the right to obtain that money, right?
MR. ROSENTHAL: Object as to form.
A. I believe so.

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BY MR. FERRER:
Q. Let's define who David Merrill is. Can you tell me who it is that David Merrill is?
A. He was an attorney at ARE and Seabreeze.
Q. What legal services was David Merrill providing to American Residential Equities, LLC and to Seabreeze Financials, LLC?
MR. ROSENTHAL: Object as to form.
A. For Seabreeze he was the compliance officer; took care of licensing, made sure we filed what we needed to file. He also handled a limited number of transactions on the origination side, made sure that we were compliant. He also handled the database in many instances. He ran deals by me, and in certain instances he shepherded them through the closing process.
On the ARE side, he was involved in the asset management. He also was responsible for outside counsel. He was responsible for making sure that we always had outside counsel. He chose the outside counsel and interacted with the outside counsel.
On the ARE side, he worked for Denise Shea in asset management, reported to her. Primary responsibility was litigated assets, interacting

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with outside counsel, making sure we had outside counsel in every transaction. He was also responsible for insurance. He handled a number of issues outside the company as they arose. I think that takes care of most of it.

BY MR. FERRER:

Q. With respect to the functions that Mr. Merrill performed for Seabreeze Financial, did he have to be an attorney in order to perform those?

MR. ROSENTHAL: Object as to form.

A. I hired him because he was an attorney, because it was my opinion that in that position you had to have been a litigation attorney at one point in your time -- at one point in your life.

He was involved heavily in creditors' rights -- debtors' and creditors' rights before coming to us. It was important to me to have somebody in that position, considering that we were always dealing in bankruptcy court.

I also felt that it was impossible to understand what was going on at GMAC on the litigated assets unless you were a litigation attorney. That in order to do a good job with nonperforming loans for your clients, you needed

someone who understood when they were being misled by outside counsel. And the only one who could really do that was someone who was a lawyer who understood the litigation process and had been on the other side of the table.

BY MR. FERRER:

Q. I appreciate that you felt comfortable that David Merrill was an attorney in performing those functions. My question was in order to perform the functions that David Merrill was hired to perform, did he need to be an attorney?

MR. ROSENTHAL: Object as to form.

A. Many times he did legal work, and you would have to be a lawyer to do that.

BY MR. FERRER:

Q. When were those times that he did legal work?

A. I'll give you a for instance.

Q. Sure.

A. We had an issue in one of our offices in Tennessee. We needed to shut that office down. We needed contracts drawn. We needed to understand labor law.

There were times when I needed someone to go into other e-mails. For instance, Larry

Lewis was a former CEO. When he left, there was only one or two people in that organization who I could trust to go into those e-mails and read certain things I need read; one is sitting at the end of the table, Lisette de Padua, and the other one was David Merrill.

Q. Mr. Merrill's not licensed to practice in Tennessee, to your knowledge, is he?

A. No, but he was being drafted pursuant to Florida law.

Q. But he wasn't licensed to practice in Tennessee; he's never been, correct?

A. I don't know.

Q. In terms of reviewing e-mails by Larry Lewis, is there anything --

A. I'm only giving you two of probably 50 situations that I felt that someone should be a lawyer or had to be a lawyer, and I wasn't going to get into the unauthorized practice of law.

Q. Okay. We'll get into it --

A. I had responsibility to investors, and I felt that they were best served by a lawyer, and I still feel strongly about that today.

Q. Going back to the Town Square Garden loan, the amounts were in escrow and they were

never funded, correct?

MR. ROSENTHAL: Object as to form.

A. I don't know whether the full 1,072,000 was in escrow or part of it was in escrow. I believe that a part, not all, of the 1,072,000 was in escrow. I could be wrong. We had to make up the difference between 1,072,000 and whatever was returned from the escrow agent.

BY MR. FERRER:

Q. In terms of whatever it was with the escrow agent that was never given to Town Square Garden, LLC; Seabreeze Financial, LLC had a right to reclaim that money, correct, as long as it was sitting in escrow?

MR. ROSENTHAL: Object as to form.

A. I assume so; otherwise, it wouldn't have gotten it back.

BY MR. FERRER:

Q. Fair enough.

MR. ROSENTHAL: Counsel, what are your plans for lunch break?

MR. FERRER: Why don't we go half an hour, just so we can try to wrap up by 4:00 o'clock.

MR. ROSENTHAL: When did you want to

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take the lunch break?
MR. FERRER: Is anybody particularly starving? Can we wait another half hour?
MR. ROSENTHAL: No.
MR. FERRER: No, you're not starving or no, you can't wait --
MR. ROSENTHAL: No, I don't believe we should wait another half hour.
MR. FERRER: Well, let's do it now.
MR. ROSENTHAL: What's your pleasure?
THE WITNESS: No, I'm getting a little worn.
MR. ROSENTHAL: How about now?
MR. FERRER: Let's do it. Be back at 12:30.
(A luncheon recess is taken at 11:45 a.m.)

Afternoon Session
DEPOSITION OF JEFFREY KIRSCH
October 27, 2009
12:38 p.m.
- - - - -
(Ms. De Padua is not present.)
BY MR. FERRER:
Q. Mr. Kirsch, going back to Seabreeze Financial LLC. Who are Seabreeze, LLC's members today?
A. There are none.
Q. Why is that?
A. It's dissolved.
Q. In November of 2007, who were Seabreeze Financial, LLC's members?
A. What is the significance of November 2007?
Q. Going back to the date of the note, the pledge agreement, in November of 2007, who were the members of Seabreeze Financial, LLC?
A. I don't remember.
Q. Who were the members of Seabreeze Financial, LLC at the time that it became dissolved?
A. I don't remember. I don't have the public records in front of me here.

Q. Do you have any recollection at any time of who the members of Seabreeze Financial, LLC were?
A. No.
Q. Was your son Steven Kirsch always the manager of Seabreeze Financial, LLC?
A. Well, it was his mortgage license, so whatever was required under state law, that's what he did.
Q. Did you have a mortgage license?
A. No.
Q. Never had a mortgage license?
A. No, sir.
Q. What were your duties and responsibilities with Seabreeze Financial, LLC in November of 2007?
A. That would depend upon whether or not American residential was a member or a manager, and I don't remember whether they were or they weren't.
Q. Can you explain what you mean by that, please?
A. Well, if American Residential Equities was a manager, then I should have played an active role in that organization.

Q. Regardless of whether or not American Residential Equities, LLC was a manager of Seabreeze Financial, LLC, did you actually play an active role in the management of Seabreeze Financial, LLC?
A. I played an active role in a number of different aspects.
Q. Can you tell me what those aspects were?
A. After my son Steven left, I became more active in educating the people who worked there, because there really wasn't a tremendous amount of experience. They had all come from different organizations, and I was intent on making sure that they had an understanding of commercial real estate, how commercial real estate actually functioned.
I also helped out in sourcing product, and by that I mean finding deals through third parties or directly. I became more involved in the advertising side of things to bring business in the door. That's about what I did.
Q. Would it be fair to state that after your son resigned as manager of Seabreeze Financial, LLC in July of 2007, you became its defacto manager?

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MR. ROSENTHAL: Object to form.
A. Defacto manager?
BY MR. FERRER:
Q. Did you manage Seabreeze Financial after your son resigned in July of 2007?
MR. ROSENTHAL: Object as to form.
A. Not alone, no; there were other people in the departments that were responsible for it. The CEO of ARE, at one point it was Dennis Stemmle. At one point it was Larry Lewis.
I believe it was Stemmle who came into the organization in July of 2007. It was his responsibility to oversee many aspects of Seabreeze. So if the question is was I the lone gun, no.
BY MR. FERRER:
Q. Dennis Stemmle reported to you, correct?
A. Dennis Stemmle ultimately reported to me, but there are also people under Dennis Stemmle who would have reported to him.
Q. Did Mr. Stemmle, to your knowledge, ever hold a mortgage license?
A. I don't know.
Q. Under whose license was Seabreeze Financial, LLC operated after your son resigned in

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July of 2007?
A. I would have to ask the chief compliance officer. That was his job.
Q. Who was the chief compliance officer?
A. David Merrill.
Q. David Merrill was the chief compliance officer of Seabreeze Financial, LLC?
A. That's exactly right.
Q. Did David Merrill hold a mortgage license?
A. I don't know.
(Plaintiffs' Exhibit 12 was marked for identification.)
(Plaintiffs' Exhibit 13 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm handing you what has been marked Plaintiffs' Exhibit 12 and 13. I'll ask you to read both of those documents briefly so that I may ask you some questions about them.
MR. ROSENTHAL: Do you have the originals of 12 and 13?
MR. FERRER: I don't.
(Plaintiffs' Exhibit 14 was marked for identification.)

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BY MR. FERRER:
Q. Mr. Kirsch, I'm also handing you -- in connection with 12 and 13, I'm handing you Plaintiffs' Exhibit 14. I'll ask you to take a look at that one also so that I may ask you some questions about all of them altogether.
MR. ROSENTHAL: Let me just interpose an objection on the record. We had requested all documents in connection with this loan, and we did not receive these documents, other than the promissory note marked as Exhibit 13.
MR. FERRER: Okay. I don't believe a request was made for that, but...
MR. ROSENTHAL: Oh, yes.
MR. FERRER: -- I'll take your word for it.
MR. ROSENTHAL: Oh, yes.
A. Okay.
BY MR. FERRER:
Q. Beginning with what's been marked as Plaintiffs' No. 12, sir, do you recognize that as a registered note in the amount of $10 million between American Residential Equities C, LLC and Petra Opportunity Fund?

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A. Yes.
Q. Dated October 3rd, 2007?
A. Yes.
Q. I'd ask you to flip to the last page of that document, sir. Do you recognize that as your signature on Page 4 of what's been marked as Plaintiffs' No. 12?
A. Yes.
Q. Do you have any reason to believe that you did not sign this document?
A. No.
Q. I'll ask you, sir, to turn to what's been marked as Plaintiffs' 14. Do you recognize that as a pledge agreement by and between Petra Opportunity Fund and American Residential Equities C, LLC?
A. Yes.
Q. I'd ask you to turn to the last page of that document, sir. Do you recognize your signature on the last page of that document as American Residential Equities -- I'm sorry -- do you recognize your signature on the last page of that document on behalf of American Residential Equities C, LLC?
A. I -- I see a signature that looks

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slightly different than the one on the note, but I don't know if it is or it isn't.

Q. Does your signature always look exactly the same?

A. No.

Q. Do you have any reason to believe that the signature on the last page of the pledge agreement marked as Plaintiffs' Exhibit 14 is not your signature?

A. I don't remember this specific pledge agreement, but...

Q. Do you remember the transaction by which Petra Opportunity Fund loaned $10 million to American Residential Equities C, LLC on October 3rd, 2007?

MR. ROSENTHAL: Read back the question for me, please.

(The last question was read back by the court reporter.)

MR. ROSENTHAL: Object as to form.

A. The $10 million note evidences the wire that was sent into AREC, correct.

BY MR. FERRER:

Q. In other words, the $10 million evidenced by the note marked as Plaintiffs' No. 12

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evidences the amount of money that Petra Opportunity Fund loaned to American Residential Equities C, LLC, correct?

MR. ROSENTHAL: Object as to form.

A. There is a note evidencing the debt.

BY MR. FERRER:

Q. Which note is that, sir?

A. Plaintiffs' Exhibit 12 evidences a $10 million loan to AREC, American Residential Equities C, from Petra Opportunity Fund.

Q. Do you have any reason to believe that Petra Opportunity Fund did not actually loan American Residential Equities C, LLC $10 million in connection with what's been marked as Plaintiffs' Exhibit 12?

MR. ROSENTHAL: Object as to form.

A. No.

BY MR. FERRER:

Q. Now directing your attention to what's been marked as Plaintiffs' No. 13, do you recognize that as a promissory note dated October 1st, 2007 between Seabreeze Financial, LLC and, if you can turn to the last page, Cocoa Action Park, LLC?

A. Yes.

Q. Are you familiar with this note?

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A. No.

Q. You've never seen this note?

A. I don't know if I have or I haven't. I'm not familiar with it.

Q. Are you not familiar with the transaction involving the $10 million pertaining to the note that we've marked as Plaintiffs' No. 12?

A. Familiar in what sense?

Q. Have you ever heard of or are you familiar with the loan made by American -- I'm sorry -- are you familiar with the loan made by Petra Opportunity Fund to American Residential Equities C, LLC for $10 million --

MR. ROSENTHAL: Object as to form.

BY MR. FERRER:

Q. -- evidenced by the note that you signed?

A. I signed a note on behalf of AREC to Petra Opportunity Fund for $10 million --

Q. Correct.

A. -- to evidence a wire, I assume, that came into AREC.

Q. What was the purpose of Petra Opportunity Fund loaning American Residential Equities C, LLC $10 million?

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A. In anticipation of a loan closing, I can only assume.

Q. In anticipation of what loan closing?

A. If you're asking me whether this corresponds to -- if Exhibit 12 corresponds to 13, is that the question?

Q. No, I'm asking -- you said that you can only assume that it pertains to a loan that was intended to be closed in the amount of $10 million; is that correct?

A. What I testified to --

MR. ROSENTHAL: Object as to form.

A. What I testified to, I believe, was that Exhibit 12 represents a $10 million loan -- represents -- is an indebtedness for $10 million as a result of $10 million wired into AREC.

It was commonplace that if Petra wired money in that we provide some kind of evidence that it was either for a purchase agreement or an indebtedness.

BY MR. FERRER:

Q. Do you know why it was that Petra Opportunity Fund loaned American Residential Equities C, LLC $10 million as evidenced by this note?

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A. No.
Q. Do you have --
A. I can't tell from this -- from this particular note what the purpose of it was. The document standing by itself is only from what I can see a $10 million note.
Q. Okay.
A. If it refers to something else in it, please point it out to me.
Q. Absolutely. If you could turn to Plaintiffs' 14, please, which is this one. Would you agree with me, sir, that the pledge agreement marked as Plaintiffs' 14 corresponds to the registered note in the amount of $10 million marked as Plaintiffs' No. 12?
A. This refers to a pledge agreement for Cocoa Action Park. I don't know. I assume it's one and the same, but I don't know.
Q. Let's start with the pledge agreement at the very top. The date of the pledge agreement is October 3rd, 2007, correct?
A. Correct.
Q. It's the same day as the $10 million note marked as Plaintiffs' No. 12, correct?
A. Correct.

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Q. And the pledge agreement is between Petra Opportunity Fund and American Residential Equities C, LLC, correct?
A. Correct.
Q. And those are the same parties to the registered note marked as Plaintiffs' No. 12, correct?
A. Right.
Q. Having read that, does that refresh your recollection or give you a better idea as to whether or not the pledge agreement marked as Plaintiffs' No. 14 corresponds to Plaintiffs' No. 12?
A. I would only know -- I assume that if it was the only $10 million on that particular date, then yes.
Q. Do you have any reason to believe that Petra Opportunity Fund loaned American Residential Equities C, LLC another $10 million note -- I'm sorry -- another $10 million on October 3rd, 2007 that is not the one reflected in Plaintiffs' No. 12?
A. I would have no way of knowing. They had clarified that. There was money back and forth all the time, so --

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Q. I'm sorry, go ahead.
A. To the sum of $10 million even I don't know, but certainly $10 million, $15 million, $12 million, different amounts.
Q. Sir, it would be reasonable to assume that because the pledge agreement and the registered note are in the same amount and they were signed on the same date by you, they correspond to the transaction, would it not?
MR. ROSENTHAL: Object as to form.
A. In order for me to be sure, I would have to have our accounting records to see if any of the money came in on or about that same time.
BY MR. FERRER:
Q. Okay, and the pledge agreement that you testified a moment ago that you signed on behalf of American Residential Equities C, LLC, what was that for?
MR. ROSENTHAL: Object as to form.
A. It's pledging a $10 million looks like note at 13 and three quarters percent and a mortgage loan receivable issued by Cocoa Action Park.
BY MR. FERRER:
Q. You're reading from Paragraph B of the

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first page of the pledge agreement, correct?
A. I am.
Q. And specifically it pledges a note issued by Cocoa Action Park, Inc., a Florida corporation, in the amount of $10 million bearing interest at the rate of 14 percent and maturing on September 30, 2008; is that not correct?
MR. ROSENTHAL: If you could please read the whole sentence. You left out some numbers.
BY MR. FERRER:
Q. Paragraph B of the pledge agreement references a note or pledges a note issued by Cocoa Action Park, Inc. a Florida corporation, in the amount of $10 million bearing interest at the rate of 14 percent -- in parenthcticals it says 13.75 percent -- and maturing on September 30, 2008, correct?
A. Correct.
Q. Now directing your attention, sir, to Plaintiffs' No. 13. That document, you've never seen it before?
A. I have seen this, I believe, in discovery.
Q. Prior to seeing it in discovery, you had

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never seen it before?
A. I may have. I don't remember.
Q. The promissory note that we're looking at that's been marked as Plaintiffs' No. 13, that's a promissory note issued by Cocoa Action Park LLC, correct?
MR. ROSENTHAL: Objection as to form.
A. I'm sorry, which exhibit now?
BY MR. FERRER:
Q. Exhibit No. 13, that's a promissory note between whom and whom?
MR. ROSENTHAL: Objection as to form.
A. It says "the undersigned."
BY MR. FERRER:
Q. Okay, and who is the undersigned --
A. Robert Tall and Seabreeze.
Q. On behalf of what entity?
A. Cocoa Action Park, LLC.
Q. What is the date of that note?
A. The 1st day of October 2007.
Q. When does that note mature?
MR. ROSENTHAL: Object as to form.
A. September 30, 2008.
BY MR. FERRER:
Q. So it would appear, sir, that the pledge

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agreement -- the reference in the pledge agreement to the Cocoa Action Park note corresponds to what's been marked as of Plaintiffs' No. 13, would it not?
MR. ROSENTHAL: Object as to form.
A. The Plaintiffs' Exhibit 14 --
MR. ROSENTHAL: Could you read the question back, please.
(The last question was read back by the court reporter.)
A. Yes.
BY MR. FERRER:
Q. Would you agree with me, sir, that all three documents that have been marked as Plaintiffs' No. 12, 13, and 14 correspond to the same transaction?
MR. ROSENTHAL: Object as to form.
A. Well, we discussed Exhibit 12.
BY MR. FERRER:
Q. Well, we discussed Exhibit 12 and you said that that evidenced a loan in the amount of $10 million from Petra Opportunity Fund to American Residential Equities C, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. That's what I said.
BY MR. FERRER:

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Q. And we discussed the fact that the document marked as Plaintiffs' No. 12, that note for $10 million, appears to correspond to the pledge agreement that's been marked as Plaintiffs' Exhibit 14, which you've also testified you've signed, correct?
MR. ROSENTHAL: Object as to form.
A. I don't know that I said that. What I said was that Plaintiffs' Exhibit 12 is a note in the amount of $10 million between AREC and Petra, making no reference to Cocoa Action Park.
And what I said to you was that this looked like my signature -- I have no reason to believe it's not my signature -- that certainly we would have issued notes for money that came into AREC to Petra, and that unless I could look at our cash inflows from Petra on that given day, I wasn't sure that this was the same $10 million note.
BY MR. FERRER:
Q. Petra loaned -- I believe you stated earlier -- American Residential Equities C, LLC between 52 and $54 million in separate transactions, correct?
A. Wrong.
Q. Tell me how that's wrong.

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A. There was a total of about $160 million that came and went, my recollection. At various times that was the inflow and outflow, approximately $160 million.
Q. When you testified earlier that Petra had paid between 52 and $54 million to American Residential Equities C, LLC, what did you mean?
A. What I meant was -- I think we're talking now in different terms than we were speaking before.
The question before was how much money did Petra have at any one given time -- if that wasn't the question, I'll clean it up now -- how much money did Petra have invested through debt in AREC at any time?
My answer to that was -- the high water mark -- was somewhere between 52 and 54 million. Now we're talking about something else, I believe. How much money came and went through AREC? Far more than 52 to $54 million.
Q. Is it your testimony, sir, that you don't remember what this $10 million note that American Residential Equities C, LLC signed on to Petra Opportunity Fund -- what that was intended for?

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MR. ROSENTHAL: Object as to form.
A. My testimony is that if I had our records to review, I could tell you definitively.
BY MR. FERRER:
Q. What records would you need?
A. I would need to see our bank accounts for that given day or for days prior to that.
Q. Bank accounts for American Residential Equities C, LLC?
A. If that's where the money was wired into, yes.
Q. And do you have any reason to believe that Petra Opportunity Fund did not wire into American Residential Equities C, LLC the $10 million reflected in Plaintiffs' No. 12?
A. I don't think that's what I testified to. I think what I testified to is I don't know if that's the only $10 million. That note that you're showing me, I'm not sure that Exhibit 12 is the $10 million that corresponds to 13 and 14.
Q. Okay, but you'll agree with me that the pledge agreement dated the same day as the note, October 3rd, 2007, also corresponds to a $10 million loan, correct?
MR. ROSENTHAL: Object as to form.

A. Yes.
BY MR. FERRER:
Q. So the pledge agreement might correspond either to this note that I've shown you now, Plaintiffs' No. 12, or to another loan by Petra Opportunity Fund to American Residential Equities C, LLC --
A. Not the pledge agreement. The registered note in Exhibit 12 may correspond to Exhibit 14.
Q. The registered note marked as Plaintiffs' No. 12 may correspond to the pledge agreement marked as of Plaintiffs' No. 14?
A. Correct.
Q. And either way, whether it was this particular $10 million note loaned by Petra Opportunity Fund to American Residential Equities C or another loan on the same day, October 3rd, 2007, by Petra Opportunity Fund to American Residential Equities C, you would agree that this pledge agreement marked as Plaintiffs' No. 14 references Paragraph A, a $10 million loan by Petra Opportunity Fund to American Residential Equities C, correct?
A. Very vague -- references a $10 million loan to Petra.

Q. And the only way to find out whether in fact the Plaintiffs' No. 12 corresponds to Plaintiffs' No. 14 is -- you testified earlier -- by looking at the bank account records for American Residential Equities C, LLC?
A. No.
MR. ROSENTHAL: Object as to form.
A. No, I think I could have -- I think there's other ways for me to verify that.
BY MR. FERRER:
Q. But looking at the bank account records for American Residential Equities C, LLC would be one those ways, correct?
MR. ROSENTHAL: Object as to form.
A. For that particular day or for that particular time. Not all the bank records. I would need to see like a two- or three-day period of time.
BY MR. FERRER:
Q. I'm asking you specifically with respect to this loan on October 3rd, 2007, the only way for us to be sure that Petra Opportunity Fund loaned American Residential Equities C, LLC on that date, October 3rd, 2007, 10 million would be to review

the bank account records for American Residential Equities C, LLC, correct?
A. No.
MR. ROSENTHAL: Object as to form.
BY MR. FERRER:
Q. What else could I get?
A. I could look at Bill Hirschkowitz's accounting records to see what came in on a given day, and that's probably what I would do. Because it would be a simpler thing for me to ask him to show me what came in over a specified period of time, since this particular time is no longer available to us online.
Q. You would agree with me that both the registered note marked as Plaintiffs' No. 12 and the pledge agreement marked as Plaintiffs' No. 14 evidence a loan by Petra Opportunity Fund to American Residential Equities C, LLC of $10 million on October 3rd, 2007, correct?
MR. ROSENTHAL: Object as to form.
A. I would agree with you that there's a $10 million loan evidenced by this Plaintiffs' Exhibit 12.
BY MR. FERRER:
Q. What about 14?

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A. **And that's there's a pledge of a $10 million note.**
Q. Could you read Paragraph A into the record of that pledge agreement, please.
A. **"On the 3rd day of October, 2007, pledgee agreed to make a loan (the loan) to pledgor in the amount of $10 million (10 million). To evidence the loan, pledgor executed a promissory note in the amount of $10 million (10 million) in favor of pledgee the note. A copy of the note is attached hereto as Exhibit A and incorporated herein."**
So what is attached hereto and incorporated herein?
Q. Sir, would you agree then that that paragraph that you just read references a loan by Petra Opportunity Fund to American Residential Equities C, LLC for $10 million?
A. **But not attached hereto.**
Q. I'm not asking you that.
Would you agree with me that Paragraph A of the pledge agreement that you just read references a $10 million loan by Petra Opportunity Fund to American Residential Equities C, LLC?
A. **Yes.**

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Q. Now turning back to Plaintiffs' No. 13, it's your testimony that prior to seeing it in discovery, you had never seen this promissory note between Seabreeze Financial, LLC and Cocoa Action Park, LLC in the amount of $10 million?
A. **I don't believe –**
MR. ROSENTHAL: Object as to form.
A. **I don't believe I testified to that.**
BY MR. FERRER:
Q. Prior to seeing it in discovery, had you seen this note before?
A. **I testified to that, I believe. If you would like me to testify again, I believe what I said was that I may have seen this note before.**
Q. Do you remember what this note corresponds to, what transaction?
A. **If I read it on its face, it says a loan from Cocoa Action Park, LLC to Seabreeze Financial, LLC for $10 million.**
Q. Do you have any reason to doubt that Petra Opportunity Fund loaned American Residential Equities C, LLC $10 million so that Seabreeze could fund this loan to Cocoa Action Park, LLC?
MR. ROSENTHAL: Object as to form.
A. **No, I have no doubt of that.**

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BY MR. FERRER:
Q. Do you know who signed this note that's been marked as Plaintiffs' No. 13?
A. **No.**
Q. Have you ever met Robert Tall, the purported person that signed this note?
A. **I know no one by the name of Robert Tall.**
Q. Do you know anyone at Cocoa Action Park, LLC?
A. **No, I've never met anybody at Cocoa Action Park, LLC.**
Q. Does anyone other than you at Sea Breeze Financial, LLC have any knowledge regarding this note that we've marked as Plaintiffs' No. 13?
A. **I have no idea.**
Q. Do you have any knowledge regarding this note marked as Plaintiffs' No. 13?
A. **This --**
MR. ROSENTHAL: Object as to form.
A. **This is a note that's been discussed ad nauseam over the past year and a half.**
BY MR. FERRER:
Q. What discussions have you had regarding this note and with whom?

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A. **My counsel –**
MR. ROSENTHAL: Objection to the extent it calls for attorney-client communications. Instruct him not to answer as to those.
A. **My conversations with Lisette de Padua, I've had many conversations with her about these notes. I've had conversations – extensive conversations with David Merrill about these notes.**
BY MR. FERRER:
Q. Anyone else?
A. **I may have had conversations with Mr. Magno, Cunha, and Couch, Carmona about these notes. I'm sure that over the past 18 months I've had to fend questions from investors and others about this promissory note.**
Q. In terms of the conversations that you had with Mr. Magno, Mr. Cunha, Carmona, and Couch, tell me what it is that you discussed about this note.
A. **That this note -- and I believe another – would be used against me if I didn't pay them $15 million.**
Q. How was it that this note was going to be used against you?
A. **They would turn it over to various**

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authorities.
Q. When did you first have a conversation with Mr. Magno, Cunha, Carmona, and Couch about this note?
A. Well, there were several conversations that took place between February the 13th and March the 13th.
Q. And when you talk about February the 13th and March 13th, you're referring to 2008, correct?
A. Seventeenth -- I'm sorry -- March 17th.
Q. February 13th, 2008 and March 17, 2008?
A. Yes. And there were conversations prior to that in terms of these loans closing. And obviously there would be a need for the notes and assignments and pledge agreements to substantiate this.
Q. Tell me about those conversations regarding this loan closing, as you've just stated.
MR. ROSENTHAL: Other than with counsel, please.
A. This loan was in what we call the pipeline, the pipeline being an anticipated closing. There was an extensive amount of work done on this loan from appraisals and otherwise,

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and we normally brought Petra and its representatives into the discussions on all commercial loans.
So this would have been no different than any other. Typically they would come to our offices, whether it be the three of them or two of them, and they would sit down, and I would bring somebody in to talk about the pipeline, and it would be Mr. Stemmle or someone else that would come in and talk about what's going on in Seabreeze, what loans should they expect to be closing shortly -- Mr. Merrill would be present -- and we would talk about the loans. We would talk about what the collateral was, where the loans were, the guarantors -- that kind of thing.
BY MR. FERRER:
Q. The purpose of those conversations was to get Petra Opportunity Fund to lend money so that you could fund those loans in the pipeline, correct?
A. No, the purpose of those discussions were to keep them informed of what was going on in the event that they didn't like a loan for some reason.
There's plenty of loans that they

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rejected because they didn't like them for one reason or another, and we needed to know about it in advance.
Q. Well, tell me how it was that Petra Opportunity Fund would decide to invest in one of these loans that were in the pipeline.
A. We would have a meeting.
Q. And what was the context of that meeting?
A. I just went through that with you. The context of the meeting was that I would bring people into the office, we would sit in the conference room, we would put the files on the table, and we would say these are the loans that we anticipate closing. Send money in. Do you like it? Do you not like the loan? Bring it in -- wire the money in if you do.
They had free reign of the office. They could go back to Seabreeze, which was on a different part of the floor than I was located, speak to anybody that they wanted to about the loans, and they did, not only on the Petra side, but on the AREC, LLC side.
Q. During those conversations that you had with Mr. Magno, Mr. Carmona, Mr. Cunha, Mr. Couch,

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did you discuss this particular loan?
A. Did I? I don't know that I discussed anything. Normally I bring someone in like Stemmle or Gagliano or 15 other guys that worked there to discuss the loans.
Q. And do you know whether there were any conversations between any of those guys that you typically brought in and Mr. Magno or Mr. Cunha or Mr. Carmona or Mr. Couch with respect to this particular note that I've shown you that's been marked as Plaintiffs' No. 13?
A. Well, it would be custom and practice. I don't remember the exact conversations with this particular loan.
Q. A loan that's in the pipeline, that's not a loan that's yet funded, correct?
MR. ROSENTHAL: Object as to form.
A. Pipeline is what's coming up.
BY MR. FERRER:
Q. In other words, those loans have not yet been funded if they're in a pipeline, correct?
MR. ROSENTHAL: Object as to form.
A. We wouldn't have funded them unless the client was aware of them. So they were in the pipeline.

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Stemmle would send around e-mails as to what was in the pipeline -- internal e-mails -- and we would discuss them at our meetings which took place two or three times a week as to what was coming up.

BY MR. FERRER:

Q. What discussions did you have with Erick Magno, Miguel Carmona, Christian Cunha and Gerry Couch pertaining to this note when the loan was being pitched to them as being in a pipeline?

MR. ROSENTHAL: Object as to form.

A. First off, I had no conversations with Couch about this being in the pipeline. Okay? As far as prior to February 13th when we were talking about this being in the pipeline, I've testified to the fact that it would be common practice for us to bring them into our office and discuss the upcoming loans to get their approval for funding.

BY MR. FERRER:

Q. And is it your understanding that Mr. Magno, Mr. Cunha and Mr. Carmona were brought in to discuss this particular loan when it was in the pipeline?

MR. ROSENTHAL: Object as to form.

A. They would never have been brought in

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just for this loan. They would have been brought in to discuss all -- many things. They lived in our offices, all right. They were there very, very often.

So while they were there, we would discuss pipeline activity in Seabreeze, because Seabreeze was becoming more important in the second half of '07, and they wanted to diversify out of residential into commercial. So it became a topic of the daily conversation. The conversation was what's in the pipeline, we need to get more commercial now.

BY MR. FERRER:

Q. Was this particular loan from Seabreeze Financial, LLC in the amount of $10 million to Cocoa Action Park, LLC discussed with Erick Magno, Christian Cunha, Miguel Carmona when it was in the pipeline?

A. My recollection is yes.

Q. Who was it at Seabreeze Financial, LLC that spoke with Messrs. Magno, Carmona and Cunha pertaining to this loan that was in the pipeline?

A. It could have been any number of people. I don't remember exactly who it was.

Q. Whoever those people might have been,

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they had conversations with Erick Magno, Miguel Carmona, and Christian Cunha?

A. There were always conversations as to loans that were in the pipeline. Who put the presentation on, I'm not sure. It would typically be the person who was working the loan.

Q. Did you ever send Erick Magno a copy of these two loans by e-mail?

MR. ROSENTHAL: Object as to form.

BY MR. FERRER:

Q. I'm sorry, did your send to Erick Magno a copy of this promissory note by e-mail?

A. I don't know. I don't remember.

Q. Would you find it odd that you would be sending a copy of this promissory note to Erick Magno by e-mail?

MR. ROSENTHAL: Object as to form.

A. Would it be odd?

BY MR. FERRER:

Q. Would you find that odd?

A. Why would I find it odd?

Q. Why would you be sending Erick Magno a copy of this promissory note by e-mail?

A. Because he would ask for it.

Q. In what context?

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MR. ROSENTHAL: Object as to form.

A. He would ask me where is the note or where -- he's always missing documentation. There's always a scramble to satisfy Citco, which was their administrator or their accountants.

There's always documents missing. Where's the documents? Help me out. Send me something today. They're looking at the documents. Blah, blah, blah, blah -- sorry about the "blah, blah, blah, blah." But there was always that kind of thing. It was chaotic.

BY MR. FERRER:

Q. In terms of Plaintiffs' No. 14 and No. 12, where did that money go, the $10 million that Petra Opportunity Fund loaned to American Residential Equities C, LLC?

A. AREC.

Q. What happened with that money? It just sat in an account for American Residential Equities C?

A. Yes, sir.

Q. How long?

A. Until the date of repayment.

Q. When was the date of repayment?

A. I don't know.

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Q. Do you know when that loan was repaid?
A. No.
Q. Do you know whether it was in 2008?
A. No, sir.
Q. You have no idea?
A. No, sir, I do have an idea.
Q. Tell me when that idea is or what the idea is.
A. The idea is that it was repaid in 2007.
Q. How was that repaid?
A. Money went into AREC; went back again.
Q. How long was the money sitting in American Residential Equities C, LLC's account?
A. Couple weeks to three weeks.
Q. What was it that caused American Residential Equities C, LLC to return the money to Petra Opportunity Fund?
A. Me.
Q. What about you, what happened?
A. I realized it hadn't funded, and I sent the money back.
Q. You realized what hadn't funded?
A. This particular loan never closed.
Q. Which particular loan?
A. I'm only looking at one, Cocoa Action

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Park.
Q. So going back to my original question that I was asking, Plaintiffs' No. 12 and No. 14 correspond to the Cocoa Action Park loan that we were discussing and evidenced by Plaintiffs' No. 13, correct?
MR. ROSENTHAL: Object as to form. Read the question back, please, in full.
BY MR. FERRER:
Q. Tell you what, I'll spare you --
MR. ROSENTHAL: No --
A. No, no, no, you're referring to exhibits. I just want to make sure I have the right exhibits.
BY MR. FERRER:
Q. I'll go ahead and restate.
A. Okay.
Q. Plaintiffs' No. 12 and 14, what was that particular loan made by Petra Opportunity Fund to American Residential Equities C for?
MR. ROSENTHAL: Object as to form.
A. I'm not sure I understand the question.
BY MR. FERRER:
Q. Okay. When you said that the loan never funded -- you were talking about Exhibits 12 and 14

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a moment ago, and you said the loan never funded; what did you mean?
MR. ROSENTHAL: Object as to form. That's not what he said.
A. What I testified to is the money did not leave AREC's account. It went into AREC's account, stayed in AREC's account. When I realized this loan hadn't funded, I sent the money back; that's what happened.
BY MR. FERRER:
Q. And when you refer to "this loan," what are you referring to?
A. Cocoa Action Park. I'm looking at this – at two things, Exhibit 13, Cocoa Action Park, LLC and Exhibit 14 referencing Cocoa Action Park.
Q. So the reason that American Residential Equities C, LLC returned the money to Petra Opportunity Fund, the $10 million as evidenced by Plaintiffs' No. 12, was because the Cocoa Action Park, LLC loan had never funded?
MR. ROSENTHAL: Object as to form.
A. It didn't return $10 million.
BY MR. FERRER:
Q. How much did American Residential

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Equities C, LLC return?
A. I would have to compute it, but it returned 10 million plus either 13 and three quarters or 14-percent interest.
Q. And the reason that was returned with interest was what?
A. They were entitled to it.
Q. Why?
A. Because we took the money and we owed them at least the note rate.
Q. Okay, and the purpose that when you say "we" American Residential Equities C, LLC took the money was to fund the Cocoa Action Park loan, correct?
MR. ROSENTHAL: Object as to form.
A. We took the money in anticipation of a loan occurring -- funding. With Petra, we always had them wire the money in early. There's always issues with wire transfers and what have you. So we anticipated a closing, had them wire the money in. When I realized that this didn't close, we sent it back to them with interest.
BY MR. FERRER:
Q. When what didn't close? I'm not trying to --

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A. What meaning Cocoa Action Park.
Q. The Cocoa Action Park, LLC loan never closed, correct?
A. No, it never closed.
Q. And again, you don't know who signed Plaintiffs' No. 13?
A. I don't know who signed it.
(Plaintiffs' Exhibit 15 was marked for identification.)
(Plaintiffs' Exhibit 16 was marked for identification.)
(Plaintiffs' Exhibit 17 was marked for identification.)
MR. ROSENTHAL: Can you tell me what you're handing him, please.
MR. FERRER: Yes, it's 15, 16 and 17.
MR. ROSENTHAL: I only have one exhibit. Can you hand it to me, please.
BY MR. FERRER:
Q. Mr. Kirsch, I'm handing you what's been marked as Plaintiffs' 15, 16 and 17. I'll ask you to review those.
A. Excuse me, I have one more comment to make on Plaintiffs' Exhibit 12.
Q. Sure.

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A. If we're going to make the assumption that 12 relates to 13 and 14, that takes us one and the same. Your question to me before was why would I pay them the interest.
Q. That wasn't the question, sir.
A. Why did you return it with interest.
Q. I don't remember that being the question but...
MR. ROSENTHAL: Go ahead, do you want to clarify it?
A. Well, I thought that was the --
BY MR. FERRER:
Q. What do you want to say?
A. -- question. That's what the note calls for.
BY MR. FERRER:
Q. Okay, thanks. Fifteen, 16 and 17 in front of you, please. Let me go back to Plaintiffs' No. 12 for just a moment to wrap up something you just said.
The purpose of this $10 million note by Petra Opportunity Fund to American Residential Equities C, LLC in the amount of $10 million on October 3rd, 2007, that was strictly for purposes of the Cocoa Action Park, LLC loan?

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MR. ROSENTHAL: Object as to form.
A. That's not what I testified to.
BY MR. FERRER:
Q. Tell me how that's wrong.
A. When Petra wired us money -- when anyone wires us money, they are looking for something in return. You just don't get wired $10 million without someone asking you for something. And that's what that something is; it's a promissory note.
Q. Okay, and the money that was being sent to you, the $10 million, that was being sent by Petra Opportunity Fund to American Residential Equities C as evidenced by the promissory note that you've just identified as Plaintiffs' No. 12 that was for purposes of funding the Cocoa Action Park loan?
MR. ROSENTHAL: Object as to form.
A. What I testified to was, we don't know whether 12 relates to 13 and 14. That's what I think I testified to.
BY MR. FERRER:
Q. Okay, and I'm asking you now as you sit here today, do you know why it was that Petra Opportunity Fund was sending American Residential

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Equities C, LLC $10 million on October 3rd, 2007?
MR. ROSENTHAL: Object as to form.
A. First off, I don't even know that they sent us $10 million on October the 3rd. That was your testimony. I don't know that they did. I don't know that October 3rd is the date that they wired the money. All I'm looking at is a note for $10 million from AREC to Petra.
BY MR. FERRER:
Q. Do you have any reason to believe that Petra Opportunity Fund did not loan American Residential Equities C, LLC $10 million on or about October 3rd, 2007?
MR. ROSENTHAL: Object as to form.
A. It's possible that we were cleaning up -- if you have the wire from them, I might be able to back into it.
BY MR. FERRER:
Q. I'm not asking you whether it's possible. I'm asking whether you know.
A. I don't know.
Q. You don't know whether this note evidences an actual loan of $10 million?
MR. ROSENTHAL: Object as to form.
A. That's not what I testified to. You're

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twisting my words. I testified that this $10 million note evidences or this note evidences $10 million that was sent to us from Petra. I also testified that I am not sure whether the $10 million came in on October the 3rd, September 28th or any other day, whether we were cleaning up a wire that had come in.

Many times in good faith, Petra would wire us money in anticipation of a closing, and then I would back into a document like this, because they needed something in their files obviously.

BY MR. FERRER:

Q. What was the $10 million loan in anticipation of?

MR. ROSENTHAL: Object as to form.

A. A closing.

BY MR. FERRER:

Q. On what loan?

A. I don't know whether it's this loan or another loan.

Q. And when you point to this and you say this loan --

A. Cocoa.

Q. Cocoa Action Park, correct?

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A. Right.

Q. Sir, I'm showing you what's been marked as 15, 16, 17. I'll ask you to review those, familiarize yourself with them, so that I may ask you some questions about them.

A. Okay.

Q. Beginning with what's been marked as Plaintiffs' No. 15, do you recognize that as a promissory note from Petra Opportunity Fund to American Residential Equities C, LLC for $7 million on October 3rd, 2007?

MR. ROSENTHAL: Object as to form.

A. I do.

BY MR. FERRER:

Q. Would you flip to the last page of that exhibit, please. Do you recognize your signature on the last page of that document on behalf of American Residential Equities C, LLC?

A. This one's a little -- much different than my signature. I mean I can't -- I don't even recognize that as my signature.

Q. You don't believe you signed that note?

A. I don't recognize that as my signature. You're asking me if I recognize that as my signature. If I could compare it to Exhibit 12 for a second, it would be helpful. It doesn't look like my signature.

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Q. Do you have reason to believe that is not your signature on what's been marked as Plaintiffs' Exhibit 15?

MR. ROSENTHAL: Object to the form.

A. What I'm saying is it appears to be different than my signature.

BY MR. FERRER:

Q. I'm not asking you whether it appears to you to be different or not. I'm asking whether you signed it or not.

A. I don't know.

Q. You don't remember signing a $7 million note on October 3rd, 2007?

A. I do not remember signing anything on October 3rd, 2007.

Q. And to be clear, you have reason to believe that this is not your signature?

MR. ROSENTHAL: Object as to form.

A. I didn't say that. I said I have no recollection of signing a note on October 3rd, 2007, and what I said was this signature looks different than other signatures of mine.

BY MR. FERRER:

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Q. Do you have any reason to believe that the signature on Page 4 of what's been marked as Plaintiffs' 15 is not your signature?

A. I don't know whether it is or it isn't. It's completely different, in my opinion, from other things that you've shown me that I admitted to being my signature.

Q. Do you sign the same all the time, exactly the same?

A. I already testified to that.

Q. And your answer was that you don't, right?

A. Yes, however, if I look at -- regret, some days I don't feel as well as others, some days I sign many things, so my signature is different.

But here's the problem. This purportedly was signed on October 3rd, 2007. Exhibit 17 was purportedly signed the same day. If I look at the signature on 17, I will admit that that is my signature.

Q. Okay.

A. If I look at the signature on 15, it looks different to me.

Q. Okay. Well, let's look at Plaintiffs' No. 17. Do you recognize that as a pledge

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agreement between Petra Opportunity Fund and American Residential Equities C, LLC dated October 3rd, 2007?
A. I do.
Q. And you've identified your signature on the last page of that document, correct?
A. I have, sir.
Q. And this pledge agreement purports to be signed the same day as the note for $7 million that's been marked as Plaintiffs' No. 15, correct?
MR. ROSENTHAL: Object as to form.
A. Correct.
BY MR. FERRER:
Q. And this pledge agreement -- talking about Plaintiffs' No. 17 -- is between Petra Opportunity Fund and American Residential Equities C, LLC, correct?
A. It is.
Q. And the parties to the registered note that's been marked as Plaintiffs' No. 15 are also Petra Opportunity Fund and American Residential Equities C, LLC, correct?
A. Yes, they are.
Q. And now directing your attention to Paragraph A, the pledge agreement marked as

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Plaintiffs' No. 17, specifically references a loan of $7 million on the 3rd day of October of 2007 between Petra Opportunity and American Residential Equities C, LLC, correct?
MR. ROSENTHAL: Object as to form.
THE WITNESS: Could you repeat that, what he just said?
(The last question was read back by the court reporter.)
A. Yes.
BY MR. FERRER:
Q. Sir, comparing those two documents together, do you have any reason to believe that you did not sign the registered note for $7 million that's been marked as Plaintiffs' No. 15?
MR. ROSENTHAL: Object as to form.
A. I would have no reason to believe that I would not sign a note of this nature should $7 million have come into AREC.
BY MR. FERRER:
Q. My question wasn't a note of that nature. My question was with respect to this particular note that's been marked as Plaintiffs' No. 15, having now gone through the pledge agreement as we did, do you have any reason to

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believe that you did not sign this specific note that's marked as Plaintiffs' No. 15?
A. I am unsure that it's my signature.
Q. You would agree with me that the pledge agreement appears to correspond to the registered note that's been marked as Plaintiffs' No. 15?
A. No.
MR. ROSENTHAL: Object as to form.
A. I don't know that it does. Again, my answers would be the same as the last series of questions you asked me on Exhibit 12.
BY MR. FERRER:
Q. And in order to derive a certain answer to whether or not this pledge agreement corresponds to the $7 million note, I'd have to take a look at Mr. Hirschkowitz's accounting records, correct?
MR. ROSENTHAL: Object as to form.
A. You wouldn't have to take a look at Mr. Hirschkowitz's accounting records. You would only have to look and see what came in within a few day time period to see whether there were two or one wire transfers or were there any combination of sum that added up to $7 million.
BY MR. FERRER:
Q. What information in Mr. Hirschkowitz's

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records would reflect that?
MR. ROSENTHAL: Object as to form.
A. I would have to ask him what he has maintained on a daily basis, which I believe he does, to show what money came in on a specific date or a few days before.
BY MR. FERRER:
Q. And when you say money came in, are you talking about money coming into the account of American Residential Equities C, LLC?
A. Only one account, yes, AREC.
Q. American Residential Equities C, LLC only had one account, correct?
A. You might also be able to ask your clients because my recollection is -- my recollection is that they had the ability to view the AREC account at our bank. That's my recollection.
Q. That wasn't my question. My question was --
A. No, I was answering your previous question.
Q. My question was whether or not American Residential Equities C, LLC had more than one account at any given time?

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A. It may have.
Q. Who better than you would know that information?
A. I don't think it's a matter of who better than me. I don't believe anyone better than me. But sitting here today, without the benefit of banking records encompassing a year and a half, I can't be sure nor could anyone else for that matter.
Q. And the banking records you're referring to are the banking records of American Residential Equities C, LLC, correct?
A. Yes, I'm not sure whether there was a money market account, an irregular account, so -- it is my recollection that we had two accounts, but they were probably for the purpose of an interesting bearing checking account.
Q. You were an authorized signer on the account of American Residential Equities C, LLC?
A. Yes, sir.
Q. Anyone other than you?
A. I don't know.
Q. And just to be thorough for purposes of the record, in order to derive you to be able to tell me whether or not the pledge agreement that

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we've marked as Plaintiffs' No. 17 corresponds to what's been marked as Plaintiffs' No. 15, you would have to take a look at the bank account records for American Residential Equities C, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. To be sure that there was only one wire for 7 million or to be certain that we didn't receive a couple of wires adding up to 7 million, I would have to take a look at a specific series -- either a specific day -- in this case October 3rd -- or maybe two or three days there before to see if there was more than 7 million -- one 7 million.
BY MR. FERRER:
Q. Specifically you would have to take a look at the bank account records for American Residential Equities C, LLC, correct?
MR. ROSENTHAL: Object as to form.
A. No, I've testified that that's not the case. I could ask Mr. Hirschkowitz to turn over to me his inflows and outflows for that three-day period of time.
BY MR. FERRER:
Q. Inflows and outflows to what entity?
A. AREC.

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Q. So you would agree with me that the bank account records for AREC would also show inflows and outflows to its account, correct?
A. I believe that that by itself may not, because it may not show where the money came from. We were dealing with lots of other issues when it came to AREC.
Money was wired in from servicers, assets liquidated, loans paid off. I would have to go and find out from Mr. Hirschkowitz about that three-day period of time.
Q. I'm not asking you what may happen or what may be shown --
A. You asked me about the bank records --
Q. Well, let me finish my question. Would you agree with me that looking at the bank account records for American Residential Equities C, LLC two days or three days before October 3rd, 2007 and two days or three days after October 3rd of 2007 would show you the inflows and out flows from that account?
A. It would show me inflows into the account, but it wouldn't necessarily show me where or why it came in --
Q. If there was a loan --

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A. -- from.
Q. If there was a loan for $7 million, a inflow of $7 million --
A. Right.
Q. -- the account would show that, correct?
MR. ROSENTHAL: Object as to form.
A. What the account would show is an inflow of $7 million or a series of wires for $7 million. I'm not sure that the account would show that it was the same $7 million that we're talking about here.
BY MR. FERRER:
Q. What was the purpose of American Residential Equities C, LLC?
A. It was a separate --
MR. ROSENTHAL: Object as to form.
A. It was a separate LLC set up for Petra.
BY MR. FERRER:
Q. In other words, the inflows and cash flows for American Residential Equities C, LLC would only be from Petra Opportunity Fund, correct?
A. The inflows and outflows would only come from Petra did you say?
MR. ROSENTHAL: Object as to form.
BY MR. FERRER:

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Q. Yes.
A. No.
Q. What other inflows and cash flows would go into that account --
A. It's liquidations of assets, there's payments of all kinds that came in and out of there. I mean there's money that was flowing in and out of there all the time.
Q. There wouldn't be any other investors making investments through American Residential Equities C, LLC other than Petra, correct?
A. I testified to that earlier today.
Q. The answer is "no"?
A. The answer was "yes."
Q. There would be other people?
A. I testified to that.
Q. What other people?
A. You asked me about debt and equity, and I explained that to you.
Q. Well, how many other people were investing by way of equity in American Residential Equities C, LLC?
A. We talked about that.
Q. Tell me again.
A. American Residential Equities, LLC

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provided equity; that's what I testified to earlier today.
Q. Looking at the pledge agreement that's been marked as Plaintiffs' No. 17, directing your attention to Paragraph B, you'll agree with me that it references a mortgage loan receivable owned by pledger issued by Lake Helen LP, correct?
A. Correct.
Q. Would you agree with me, sir, that that is a reference to the document that's been marked as Plaintiffs' No. 16?
A. Yes.
Q. Have you ever seen what's been marked as Plaintiffs' No. 16?
A. Yes.
Q. Prior to today, when had you seen the document marked as Plaintiffs' No. 16?
A. Several times. I can't remember each time, but I've seen it several times.
Q. Prior to March 17, 2008, had you seen this document that's now been marked as Plaintiffs' No. 16?
A. When?
Q. March 17th, 2008 -- prior to March 17th --

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A. Had I seen this?
Q. Yes, sir. Let me go ahead and ask it again, so it's clear on the record.
Prior to March 17, 2008 had you ever seen a copy of the document that's been marked as Plaintiffs' No. 16?
A. I believe so.
Q. In what context?
A. In the context -- I saw it several times. I had discussions with David Merrill, who showed this to me, and -- we had conversations about it.
Q. Are you done with your response, sir?
A. No, I'm thinking.
I had conversations with of course Erick Magno, Christian Cunha, Miguel Carmona, Gerry Couch and others, as I discussed and testified to in regard to Cocoa Action Park as well.
Q. Did the loan from Seabreeze Financial, LLC to Lake Helen, LP in the amount of $7 million ever close?
A. No.
Q. Do you know why this document, Plaintiffs' No. 16 is signed?
A. I'm not sure why it's signed.

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Q. Do you know who signed it?
A. Not sure.
Q. Did Petra Opportunity Fund loan American Residential Equities C, LLC $7 million in order to fund this loan?
MR. ROSENTHAL: Object as to form.
A. In anticipation of closing, yes, sir.
BY MR. FERRER:
Q. When was that done?
A. On or about October 3rd.
Q. How do you know that?
A. I'm looking at a note here that purports to be the note that evidences the $7 million.
Q. And that note is Plaintiffs' No. 15, correct?
A. Yeah.
Q. Tell me about the conversations that you had with Erick Magno, Miguel Carmona, Christian Cunha and Gerry Couch pertaining to this particular note that's been marked as Plaintiffs' No. 16.
A. I don't know that we had conversations about this particular note or about this note and Cocoa Action Park together.
Q. Okay. You stated a moment ago that Petra Opportunity Fund loaned money to American

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Residential Equities C, LLC in anticipation of closing this loan for $7 million to Lake Helen, LP, correct?
MR. ROSENTHAL: Hold it. Could you read it back, please.
(The last question was read back by the court reporter.)
MR. ROSENTHAL: Object as to form.
A. **Right.**
BY MR. FERRER:
Q. Yes.
A. **It loaned $7 million in anticipation of the closing, yes.**
Q. And the closing never occurred, right?
A. **That is correct.**
Q. What happened to the $7 million --
A. **It was --**
Q. Wait, wait, let me finish, please.
What happened to the $7 million that Petra Opportunity Fund loaned to American Residential Equities C, LLC in anticipation of this loan that never closed?
A. **It was returned to either Magno or Petra.**
Q. When was that done?

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A. **On or about February 13th.**
Q. Between October 3rd, 2007 and February 13th, 2008, where was the $7 million that Petra Opportunity Fund loaned to AREC, LLC for purposes of this loan kept?
A. **My recollection is AREC.**
Q. It was sitting in an account in AREC's account?
A. **That's my recollection.**
Q. To your recollection, would AREC, LLC's account documents demonstrate that that money was sitting in the account during that period of time?
A. **I believe so.**
Q. And do you have access to those account records?
A. **Yes.**
(Plaintiffs' Exhibit 18 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm handing you what's been marked as Plaintiffs' Exhibit No. 18. I'll ask you to review it so that I can ask you some questions, please.
A. **Okay.**
Q. Sir, I'll represent to you that -- do

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you see how the document has my name on the very top?
A. **I do.**
Q. The reason that that's there is because when I print it out from my printer, the name comes out. Okay? For purposes of my questioning, I'll ask you to disregard my name at the very top. I'll ask you if you recognize this as an e-mail you sent to Erick Magno on December 11th, 2007?
A. **That's correct.**
Q. Attached to the e-mail, sir, are copies of the Lake Helen, LP and Cocoa Action Park notes, correct?
MR. ROSENTHAL: Object as to form.
A. **I'm sorry...**
MR. ROSENTHAL: Read the question back, please.
A. **You said --**
MR. ROSENTHAL: Read the question back.
(The last answer was read back by the court reporter.)
A. **No.**
BY MR. FERRER:
Q. What was the purpose of you sending an e-mail to Erick Magno on December 11th, 2007?

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A. **He had requested it.**
Q. He had requested what?
A. **A copy of the note.**
Q. So your e-mail to Erick Magno December 11th, 2007 included copies of the two notes, correct?
A. **This is one note.**
Q. Mr. Kirsch --
A. **Yes.**
Q. -- directing your attention again to what's now been marked as Plaintiffs' Exhibit 18. On December 11th, 2007 you sent Mr. Magno a copy of the Lake Helen, LP note, correct?
A. **Yes.**
Q. Sir, could you point me in the direction anywhere in your e-mail where you say that this particular loan hadn't funded?
A. **I didn't say anything. I just sent him a copy of this note.**
Q. Why were you sending Mr. Magno a copy of this note on December 11, 2007?
A. **I'm sure that there's another e-mail in which he's requesting it.**
Q. Why would Mr. Magno be requesting a copy of this note?

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A. I don't know.
Q. Do you recall why it was that you were sending it?
A. No.
Q. Do you remember sending the e-mail?
A. No.
Q. You don't remember ever sending Erick Magno a copy of this note by e-mail?
A. No, I don't remember it.
Q. You have no reason to doubt --
(Knock at the door)
MR. ROSENTHAL: Excuse me just one second. Thank you.
BY MR. FERRER:
Q. You have no reason to doubt, sir, that you sent Mr. Magno this e-mail attaching the Lake Helen, LP note on December 11, 2007, correct?
A. Correct.
MR. ROSENTHAL: Just when you get to a convenient break time, please.
MR. FERRER: Let's do it now.
MR. ROSENTHAL: Okay.
(A break was taken.)
MR. ROSENTHAL: Before your next question, please, I just want to ask that you

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give me about 15 minutes before we conclude for some cross-examination.
MR. FERRER: I'm going to try to do that. I can tell you, going through my list of questions, I don't know that I'm going to be done by 4:00 o'clock, so I might go right through 4:00 o'clock.
MR. ROSENTHAL: My request is clear, and it's something to which I'm entitled, and that's the time for the deposition, and I'm entitled to some cross. I'm asking for 15 minutes; that's it.
BY MR. FERRER:
Q. Okay. Mr. Kirsch, going back to the Lake Helen loan that we were talking about just a moment ago in the amount of $7 million, you stated that that loan never funded, correct?
A. That's correct.
Q. You stated that Petra Opportunity Fund loaned American Residential Equities C, LLC $7 million for purposes of that loan on October 3rd, 2007, correct?
MR. ROSENTHAL: Object as to form. That's not what he said.
A. Petra Opportunity Fund wired to ARE

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$7 million, which is evidenced by the promissory note in anticipation of a closing.
BY MR. FERRER:
Q. When did Seabreeze Financial, LLC find out that the Lake Helen loan was not going to close?
MR. ROSENTHAL: Object as to form.
A. My recollection is that I've seen e-mails that indicate well into November and possibly December they were still negotiating to close that loan. So I assume it was sometime in December.
BY MR. FERRER:
Q. When you talk about e-mails that reference the closing of that loan, can you tell me who those e-mails are, between whom and who?
A. I think I've just seen them in discovery -- I've seen thousands of e-mails in discovery.
Q. You don't remember a specific --
A. No.
Q. -- e-mail pertaining to the closing of the Lake Helen loan?
A. No.
Q. Between December when Seabreeze

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Financial, LLC learned that the Lake Helen loan was not going to close and February when you testified the money was returned to Petra Opportunity Fund, where was the money sitting?
A. I believe I testified to that before we took a break.
Q. Tell me again.
A. My recollection is that it was sitting in AREC.
Q. Why wasn't the $7 million returned by American Residential Equities C to Petra Opportunity Fund in December when AREC learned that the Lake Helen loan was not going to close?
A. I'll tell you why. Mr. Magno and company would come to my office every day, hang their heads and virtually cry over the fact that we weren't getting the yields that they needed. In an attempt to help them get a higher rate of return, we kept that money to pay them 14-percent interest; that's why we did it.
Q. When was it that AREC, LLC paid Petra opportunity 14-percent in connection with that $7 million loan?
A. When the breakup occurred on or about February 13th, and they asked for it back -- they

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asked for $7 million back -- we sent it back to them -- and I'm not sure whether we sent the 14 percent or not at this point in time. There was a lot of money flowing back and forth. If they wanted it or asked for it, I don't remember.

Q. I just want to understand why it was that AREC didn't return to Petra Opportunity Fund in December when it learned that the Lake Helen loan wasn't going to fund the $7 million that Petra Opportunity had loaned it.

A. We were trying to -- sorry -- we tried to help the returns.

Q. How would you be helping the returns by keeping their money?

A. By paying interest on the money at a higher rate than they could get at JPMorgan Chase, which was 1 percent or half a percent. As long as we had the money out, we were obligated to pay back 13 and three-quarter percent or 14 percent.

Q. Did AREC, LLC actually pay Petra Opportunity Fund any interest with respect to the $7 million loan?

A. I think I just answered that question. My recollection is I don't remember when the breakup happened what we paid except for the

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principal. I don't know what AREC paid.

Q. You don't know one way or the other whether AREC paid any interest, correct?

A. I don't. I don't.

MR. ROSENTHAL: Let me just ask. Our copy of the exhibit with the cash flows, could you check and see if that's in fact yours or whether you may have inadvertently picked up ours.

MR. FERRER: This one is mine, but you're welcome to have another copy.

(Plaintiffs' Exhibit 19 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm handing you what's been marked as Plaintiffs' Exhibit 19. Please review it and let me know when you're done.

A. Okay.

Q. Sir, do you recognize the document that I've given you as a settlement agreement between you, Petra Opportunity Fund, Gerry Couch, John Hansen, Miguel Carmona, Erick Magno and Christian Cunha?

A. I do.

Q. Would you please turn to Page 7 of the

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document.

MR. ROSENTHAL: Just for the record, the exhibit -- excuse me just one second -- starts on Page 4.

BY MR. FERRER:

Q. Sir, do you recognize your signature?

A. I do.

Q. On the upper half of the page, you signed individually and on behalf of various entities?

A. I do.

Q. You have no reason to believe that these are not your signatures, correct?

A. I thought I remember seeing another document that I signed that contained a notary.

Q. Okay. I'm asking you about this page in particular. You have no reason to doubt that those are your signatures, correct?

MR. ROSENTHAL: Object as to form.

A. No.

BY MR. FERRER:

Q. I'll ask you to flip one more page to where it says Exhibit A at the top. Do you recognize your initials on the upper right-hand of the document entitled Exhibit A?

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A. It could be.

Q. Do you have any reason to doubt that those are your initials as placed on that document by you?

A. Yes.

Q. What reason do you have to doubt that?

A. That when I signed that note, there were no exhibits attached to it. So I don't know whether this is or isn't.

Q. Okay. Did you sign any exhibits at the time that you signed the note?

A. No.

Q. You didn't initial Exhibit A?

A. That's not my recollection. My recollection is that came afterwards. The only thing I signed on that given day was the settlement agreement -- where the signature page is. That's all I signed were signature pages.

Q. You've had an opportunity to review the settlement agreement, did you, before signing it?

A. Yes -- excuse me? Say that again.

Q. You had an opportunity to review the settlement agreement before signing it, correct?

A. I did review it.

Q. I'll ask you to flip to Exhibit B of the

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settlement agreement.
A. Yes.
Q. Do you recognize that as a confidentiality agreement that you entered into with Petra Opportunity Fund and its successors or assigns, Gerry Couch, John Hansen, Miguel Carmona, Erick Magno and Christian Cunha?
A. Again, this --
MR. ROSENTHAL: Let me just again interpose for the record that this document, which purports to be the settlement agreement, there were no exhibits attached to the settlement agreement that was filed with the complaint. This is a different document.
BY MR. FERRER:
Q. Do you recognize, sir, your signature on Page 3 of the confidentiality agreement?
A. It looks like my signature.
Q. You have no reason to believe that that is actually your signature on that confidentiality agreement?
A. Again, this was not -- the only reason I question it is because it's marked Exhibit B, and there was no Exhibit B to the separation agreement.
Q. Aside from the fact that it says

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Exhibit B and you don't remember it being a part of the settlement agreement, do you have any reason to doubt that the signatures on Page 3 of the actual confidentiality agreement are yours?
A. No.
Q. Sir, would you agree with me that this settlement agreement arose out of what you've classified as the breakup of the relationship between American Residential Equities, LLC and Petra Opportunity Fund?
A. This settlement agreement had nothing to do with the breakup.
Q. What did this settlement agreement have to do with?
A. Underhandedness, extortion, trust and belief in a person who was working for my adversary.
Q. When you talk about the trust --
MR. ROSENTHAL: He wasn't -- are you finished?
A. I'm not finished.
MR. ROSENTHAL: Oh, okay. Go ahead.
BY MR. FERRER:
Q. What else?
A. This settlement agreement came about

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through threats, innuendo, having certain personal information that was used against me. The settlement agreement came about as a result of pressure that was put on me in those ways and others, including limited to speaking to present and past employees in an attempt to ruin the company and in an attempt to make sure that it would add other pressures to me to force me into entering into something that was never my intention.
Q. Who do you believe extorted you in connection with this settlement agreement?
A. I believe it was a conspiracy. That conspiracy arose sometime in 2007.
Q. Who were the members of the conspiracy?
MR. ROSENTHAL: Can he please finish his answer?
BY MR. FERRER:
Q. Well, he pauses. I'm not sure whether you're finished or not.
A. I'm sorry. Read me back the question again.
MR. ROSENTHAL: Let him finish the answer to the previous question.
Read back the question and the beginning

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of your answer before you were interrupted. Don't say anything. Let him read it.
(The above-requested portion was read back by the court reporter.)
A. It arose as a confluence of factors. Those factors began sometime in the latter part of the third quarter of 2007 between people known and unknown to me at this time.
BY MR. FERRER:
Q. Who were the members of the conspiracy that extorted you in connection with this settlement agreement?
A. The conspiracy took place between Mr. Magno, Mr. Carmona, Mr. Cunha, Mr. Merrill, possibly Mr. Stemmle -- and I'm not sure who else.
Q. Tell me what it is that Mr. Magno did in furtherance of this conspiracy to extort you.
A. Mr. Magno conspired with the people that I've mentioned to have me execute this settlement agreement. He did it for many reasons, but Mr. Magno was in a very difficult way in the latter part of 2007.
He was losing money for investors by investing money on their behalf into a very difficult environment. He realized that he was

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also losing money to an extent ARE assets continued to decline in value, and he had to do something about that. And he had a perfect co-conspirator, Mr. Merrill.

Q. I believe my question was how did Mr. Magno specifically -- tell me how Mr. Magno conspired to extort you in connection with this settlement agreement.

A. A number of ways.

Q. Tell me.

A. The first way, he was aware of the fact that the OFR was sitting in our office. He would show up on our floor during those examinations. He would threaten that if we didn't come to a settlement that certain things would happen, would occur, including but not limited to the OFR, including but not limited to various other agencies getting involved.

Mr. Magno was also aware of the fact that my wife had been diagnosed with an extremely serious illness. I told him he was well aware of her illness. We discussed it many times. I begged him not to start any problems that would probably kill her. Mr. Magno, along with others, made threats against my son Steven.

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Mr. Magno was also the one who went to employees who worked for me, raised money for me, told them what a bad person I was and that they should stop working for me. And he conspired with a trusted employee of mine to deprive me of adequate counsel, competent counsel, of unbiased counsel to execute this agreement. He came to my home, he threatened me. Mr. Couch threatened me on the phone, Mr. Couch threatened me through e-mails -- it was no suggestion; it was a threat. And it was all very well thought out.

You will see how they conspired to have me transfer all the assets to them from ARE to make sure that we gave them the commercial assets, to make sure that we gave them the residential assets, to make sure that we turned over all cash that we had, and then they came to me and they asked me for $15 million. That's how they did it.

Q. Okay. You said Erick Magno.

A. Yeah.

Q. My question was with respect to Erick Magno. You identified I believe six things that you believe he did that constitute extortion --

A. If you give me awhile longer, I can probably come up with more.

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Q. Go ahead.

A. It depends. We'll have to sit for awhile while I think about it.

Q. Take your time.

A. Mr. Magno would come to our offices during the period -- between the period of February 13th and March the 7th. He would just walk into our offices and in front of other employees begin shouting, begin demanding things. While I was sitting there with investors, he would just blow into our small conference room, what do you mean about this e-mail.

Let's go on. I think I've said enough.

Q. You testified that Mr. Magno was aware that the OFR was sitting in your office. When you talk about the OFR, do you mean the Office of Financial Regulation?

A. Yes.

Q. The State of Florida, correct?

A. Correct.

Q. What was the Office of Financial Regulation doing at American Residential Equities, LLC's offices?

A. They came to -- for a number of reasons. They came for a first -- according to them, they

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came for a routine examination.

Q. What would Mr. Magno do when the OFR was in American Residential Equities, LLC's offices that constitutes extortion?

A. Mr. Magno on February the 13th said to me "I know what you did and I want to be made whole. I want the return of all of our assets and I want to be made whole or there will be repercussions."

He was aware of the fact that the OFR was sitting in our office. He was very much involved. Him showing up on our floor while they were there is enough of a signal to me to understand that I better play ball or else. When you have four members of the OFR sitting there in your conference room and Mr. Magno comes walking off the elevator, looking at them, that's a signal to me.

Q. Did Mr. Magno talk to any of those members of the OFR when he came to your office on February 13th, 2008?

A. He would have no reason to.

Q. Why not?

A. Why would he? So long as I played ball with him, why not? Why would he?

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Q. Play ball about what?
A. Signing -- doing everything that's laid out here.
Q. When Mr. Magno said "I know what you did," what was he referring to, to your understanding?
A. Well, to my understanding, he was referring to one of these loans.
Q. What loans?
A. I think it's the Lake Helen loan.
Q. What about the Lake Helen loan would make you want to play ball with Mr. Magno?
A. Well, I've already testified to the fact that it didn't fund. He was under the impression that it had funded. God knows what else Mr. Merrill told him to plant fear and suspicion in his eyes -- I'm sorry -- fear and suspicion in his mind. We had closed 800 and some odd assets for him. He didn't know whether the 800 and some odd were real, unreal.
Q. Are you finished?
A. Go ahead.
Q. So with respect to that first reason that you mentioned, Mr. Magno was aware that the OFR was sitting in your office, what you were

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alluding to in terms of his extortion was that he showed up on February 13th, 2008 and said "I know what you did" and looked at the four members of the OFR that was sitting in your office, correct?
A. I never testified to that. I was in California on February the 13th.
Q. Okay.
A. Okay. Either I called -- he called me as I was driving to the airport, but I already knew this from conversations that I had with Denise Shea, who called me at 3:00 a.m. and said that David Merrill is running around the office hollering that someone has gone to Mexico with either 7 or $17 million, and everything is a fraud and a sham. So I already knew what was up.
Q. Let me go back to what you stated about the OFR. You said Mr. Magno knew --
A. And prior to that time -- I'm not finished -- and prior to that time I had for days tried to reach out to David Merrill; couldn't find him and couldn't reach him; and finally when I spoke to him --
MR. ROSENTHAL: Careful about...
A. -- on the morning of -- I don't want to get into this. I don't want to violate

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attorney-client. I won't say anything further about that.
BY MR. FERRER:
Q. That conversation you had with Mr. Merrill that you were just about to refer to, does that infer in any sort of way to the extortion that you're alleging in the amended counterclaim?
MR. ROSENTHAL: Object. Attorney-client privilege. Instruct him not to answer.
BY MR. FERRER:
Q. I want to go back to the statement that you made that Mr. Magno was aware that the OFR was sitting in your office. What did he do specifically in that context that you believe constitutes extortion?
A. I've already testified to the fact that when you get off the elevator on our floor and you can stare at the OFR and they can stare back to you; that's an intimating factor to me.
Q. So Mr. Magno, while the OFR was in your office, got off the elevator and looked at the members of the OFR that were meeting with you?
A. On more than one occasion, and wandered through the office.
Q. On how many occasions did he do that?

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A. Several.
Q. How many?
A. I don't know. He was there quite often.
Q. Did he do that more than once?
A. Yes.
Q. Did he do that more than five times?
A. I don't remember.
Q. Did Mr. Magno during any of those visits that you've testified about actually go into conference room and speak to the OFR members?
A. The doors were closed.
Q. Could Mr. Magno see the members of the OFR from where he was?
A. Yes.
Q. How was that, behind a glass wall?
A. Yes. He got off the elevator and looked right at them.
Q. So your answer is that Mr. Magno never spoke to the members of the OFR while they were sitting in your office, correct?
MR. ROSENTHAL: Object as to form.
A. No. That is my answer -- to the best of my knowledge he didn't speak to them -- may have -- not in front of me.
Q. Now you also stated that Mr. Magno would

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threaten that certain things would occur, not the least of which was the OFR and other agencies. Could you tell me what Mr. Magno did in that context that you believe constitutes extortion?

A. Well, Mr. Magno had told me -- which under oath yesterday he testified to the contrary -- that he had a relative that worked either as a prosecutor or a public defender in Dade County and that he would do whatever was necessary to set the record straight.

Q. Did he ever mention the name of this relative that worked as a prosecutor in Dade County?

A. I didn't say a prosecutor. He worked either as a -- I believe it was on his wife's side, either a prosecutor or a public defender or in some form in the Justice Department.

Q. Did he ever give a name --

A. No --

Q. -- of who that person was?

A. -- never asked.

Q. And what he said was that he was going to go to this person that he never identified and set the record straight?

A. No, I think what he said was look, I

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have a relative that works downtown in either the prosecutor's office or -- and I'll do what I have to do in the event that this thing doesn't work out.

Q. And what did you understand that to mean?

A. Again, I better play ball and do what they want or I'm going to have an issue.

Q. An issue with what?

A. With Lake Helen.

Q. Was there an issue to be had with Lake Helen?

A. I've already testified to that. It didn't close, they gave me the money, and I didn't send it back to them until they asked for it.

Q. So why would you care if Erick Magno went to his family member that was either in the prosecutor or public defender's office in Dade County with respect to the Lake Helen loan?

A. I think it would be problematic.

Q. Why?

A. Why? Someone gives you money for a particular reason and it doesn't close and you don't give it back to them until such time as they ask for it, it may be problematic.

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Q. Do you still believe that that's problematic?

A. Maybe.

Q. Is that essentially what Mr. Magno, according to you, was holding over your head to get you to sign the settlement agreement?

A. What Magno was holding over my head was the Lake Helen and Cocoa Expo.

Q. Cocoa Expo you said?

A. Whatever it is, Cocoa Park.

Q. Cocoa Action Park?

A. Yeah, that is correct.

Q. What precisely about Lake Helen and Cocoa Action Park was he holding over your head?

A. We just discussed that.

Q. Tell me.

A. I just told you.

Q. Tell me again.

A. That they didn't close, that they gave me money for that purpose, that they didn't close and that there was deception.

Q. Was there any deception in terms of the Lake Helen and Cocoa Action Park loans?

A. I guess so, if you look at it that way. Of course I wasn't in clear mind and body at that

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time.

Q. You're saying that there was deception in terms of the Lake Helen, LP and Cocoa Action Park loans?

A. I'm saying that you just construed it that way. I'm -- all I said was that if money was sent for a specific purpose and wasn't used for that purpose that there could be a problem.

Q. What kind of problem?

A. You could have a problem with the OFR while they're sitting in your office. You could have a problem with some governmental agency.

Q. At the time that Mr. Magno was doing all of these things between February 13th of 2008 and March 17th of 2008, do you believe that you had done anything wrong with respect to Lake Helen, LP and the Cocoa Action Park loans?

A. I wasn't sure, and I didn't want to find out, and I don't think that I was thinking clearly then.

Q. What was it about that period of time that made you not think clearly?

A. There was a number of things. I had the OFR in my office every day, four people who had obviously been sent in there based on more than

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just a routine examination. Somebody had sent them in there. So there was pressure there. I had pressure in business, period, because it was a very difficult time in the mortgage business.

The values were declining. It was pretty chaotic. It wasn't only Mr. Magno's group that I was concerned about. I was concerned about every investor group, particularly concerned because Mr. Magno had gone to some of our chief fundraisers and told them what an SO -- what a bad person I was and that they should let all their investors know that and that he could help them, he could help them if they would join with him.

Q. Who were these investors that Mr. Magno spoke to?

A. He spoke to Hernan Escobar on more than one occasion. He still tries to reach him.

Q. Who is Mr. Escobar?

A. Mr. Escobar worked for me for several years -- six or seven years.

Q. What was his title with American Residential Equities, LLC?

A. He was a vice-president.

Q. Who else did Mr. Magno approach?

A. Raul Serebrenik.

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Q. Could you spell the last name for me?

A. I really can't.

Q. Could you venture a guess how to spell that, just for purposes of the record?

A. S-E-R-E-B-R-E-N-I-K.

Q. What did Mr. Magno tell Raul Serebrenik?

A. The same thing, what a bad person I was, he was going to sue us, and we had done horrible things to him, you better get your money out of there right away. He also -- we had some space that we rented -- we shared some space at the Espirito Santo Bank building with another group that was heavily invested with us. And Mr. Magno would just show up in that space to start wandering around, looking around, when I wasn't there. He spoke with people with whom I shared space there about us.

Q. What is the name of the group that you shared space with?

A. I'm trying to remember the name. I can't remember. It may come to me.

Q. I want to make sure that I understand you correctly. Were the only things that Mr. Magno was holding over your head between that period of time of February 13th, 2008 and March 17th, 2008

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the issues related to the Lake Helen and the Cocoa Action Park loans?

A. Correct.

MR. ROSENTHAL: Object as to form.

BY MR. FERRER:

Q. Were there any other issues that Mr. Magno was holding over your head at that time?

A. No.

Q. What threats did Mr. Magno make against your son Steven?

A. They came through Merrill.

Q. I see. So Mr. Magno never made any direct threats against your son Steven to you; those threats came through Mr. Merrill?

A. Mr. Couch made them. Mr. Merrill as my liaison reported back to me daily on what was said.

Q. I'm referring to Mr. Magno, sir. What threats did Mr. Magno make against your son Steven?

A. Merrill said he spoke to... and this is what he said.

Q. Merrill said that he spoke to Erick Magno and this is what was said?

A. Yes.

Q. What did Mr. Merrill tell you that Mr. Magno said?

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MR. ROSENTHAL: Instruct you not to answer. Attorney-client privilege.

BY MR. FERRER:

Q. You never had any discussions with Mr. Magno pertaining to any threats against your son Steven, correct?

A. I don't remember exactly.

Q. You don't remember exactly or you -- or you don't remember at all?

A. I don't remember at this time.

Q. As you sit here today, you can't remember a specific threat made directly by Mr. Magno to you pertaining to your son Steven, correct?

A. I think the one that stands out in my mind is Mr. Couch's.

Q. Again, Mr. Magno never made any threats to you directly about your son Steven, correct?

A. That's not what I said. I said I don't recollect at this time what was said.

Q. Do you recollect the nature of the threat that Mr. Magno made to you against --

A. Yes.

Q. -- your son Steven?

A. That Steven was involved somehow in

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Seabreeze and was responsible for whatever flowed from Seabreeze.

Q. And at the time, you thought that the issues pertaining to the Lake Helen and the Cocoa Action Park loans were grave enough to take those threats against Steven seriously, correct?

A. I didn't want my son to be involved in this.

Q. Involved in what?

A. In what we're going through here today.

Q. You testified that Mr. Magno went to -- and let me just go back.

Other than threatening to implicate your son in what we're going through today, did Mr. Magno make any other direct threats to you about your son Steven?

MR. ROSENTHAL: Object as to form.

A. I don't remember at this time.

BY MR. FERRER:

Q. You testified that Mr. Magno went to employees who had raised money for you and told them what a bad person you were, correct? Who were those employees that Mr. Magno went to?

A. He went to -- he testified to that. Escobar.

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Q. That's Hernan Escobar?

A. Yeah. Raul Serebrenik will testify to that. And he had multiple conversations with people in my office. I believe he spoke to Steve Van Horn, Denise Shea. He also, I believe, spoke with AmeriQuest, which is a competitor of ours in Fort Lauderdale; former employees of ours who were aware of the commonality -- who are aware of our investor base to an extent.

Q. Between February 13th, 2008 and March 17, 2008, did you believe there were issues with respect to the Lake Helen and the Cocoa Action Park loans?

MR. ROSENTHAL: Object as to form.

A. I testified to that.

BY MR. FERRER:

Q. And your answer is "yes," correct?

A. I testified to that.

Q. Your answer is "yes," correct?

MR. ROSENTHAL: Object as to form.

A. Yes, I testified to it before.

BY MR. FERRER:

Q. Between February 13, 2008 and March 17, 2008, do you believe that Erick Magno believed you had done something wrong with the Lake Helen and the Cocoa Action Park loans?

MR. ROSENTHAL: Object as to form.

A. Yes.

BY MR. FERRER:

Q. You testified that Mr. Magno conspired with trusted persons to deprive you of counsel. Could you tell me what you mean?

A. David Merrill, in my opinion, was looking for a way to leave ARE, and hated me. He needed an exit strategy; he found one through Lake Helen and Cocoa. And he went to, in my opinion, my belief, Magno while I was out of town and told him about it or led him in that direction.

He was working for Petra in February 2008 while he was supposed to be my legal adviser in the negotiations for a settlement agreement with Petra. He entered into a consulting agreement, which is a sham, with a $50,000 payment, which payment represents nothing more than selling me out.

Q. You don't know that, do you? That's speculation?

A. I think a reasonable person would believe that.

Q. I'm a reasonable person; I don't believe

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that.

A. Alan is too.

Q. The extortion that you believe occurred with respect to the settlement agreement that we were looking at earlier, is it your testimony that that occurred between February 13th, 2008 and March 17th, 2008?

MR. ROSENTHAL: Hold on a second. Could you read it back, please.

(The last answer was read back by the court reporter.)

MR. ROSENTHAL: Thank you. Object as to form.

A. Yes.

BY MR. FERRER:

Q. After March 17th, 2008, was there any other event of extortion upon you by any members of this conspiracy led by Mr. Magno?

A. There was -- there was a continuing implied threat as long as OFR was sitting in my conference room, which took place until September of 2008 -- it was implied, in my opinion. That's what I thought.

Q. How was it implied?

A. It's no different than it was in

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February or March. They're sitting in my conference room. Magno is getting off the elevator, so on and so forth.

Q. That continued through September of 2008?

A. He came into our office -- the receptionist said Erick Magno was just here.

Q. Did you see him in your office after March 17, 2008?

A. I believe he did come over, yes.

Q. Would it be fair to say that the events of extortion leading up to the settlement agreement occurred between February 13th, 2008, as you've testified, and March 17th, 2008?

MR. ROSENTHAL: Object as to form.

A. Mr. Magno had some very unpleasant things to say about Mr. Couch. If I were to take them for face value, which I did, then that would be a continuing threat in my mind.

BY MR. FERRER:

Q. When did Mr. Magno make those comments to you about Mr. Couch?

A. Starting in 2007.

Q. When was the last time that -- and let me ask you this. What comments did Mr. Magno make

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to you about Mr. Couch that you considered a continuing threat?

A. Mr. Magno told me that Mr. Couch was not the type of person to handle things in a business-like and civil fashion; that he would take matters into his own hands. He was a very rough guy, coming out of a very rough background, and would deal with things in a different fashion than Erick Magno might deal with things.

He also told me that Mr. Couch had changed, that he couldn't deal with him any longer, he couldn't deal with him as a result of a number of issues and that he was actually trying to extricate himself from Mr. Couch. He really no longer wanted to operate the family office. He was having a very difficult time dealing with Mr. Couch. I met Mr. Couch. Mr. Magno introduced me to him. He didn't seem to me to be -- to have come from the silk stocking district of New York. I took it for face value.

Q. When did Mr. Magno have this conversation with you?

A. Which part of it?

Q. Any part of the conversation you've just described.

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A. Oh, he had that conversation with me in '07 -- I can't remember the exact time. Maybe the first or second quarter as to Mr. Couch's background. He also had conversations with me in December and January of '07 and '08 as to the difficult nature -- as to how difficult Mr. Couch was becoming to handle.

And then again in March of '08 when they came to my house, to my condo to meet with me, they re-emphasized that they couldn't control him. Not only was it Magno, but it was Carmona and Cunha that told me if we don't get this thing signed right now, we can't control Couch. And you know what that meant to me, Mr. Ferrer? That he was going to hurt me or some member of my family. He had already sent me an e-mail regarding my son Steven. So I did this to protect them, end of story.

Q. Did you call the police?

A. No.

Q. Why not?

A. Why? Why?

Q. Did you call the police?

A. I've already told you I didn't want to involve law enforcement of any type.

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Q. Why not?

A. Because I told you I had the OFR sitting in my office. I also felt that what Magno had told me about his family member was true, and I didn't want to involve anyone. So the best thing for me to do was to appease these people.

Q. You didn't make any report to the police?

A. No.

Q. You didn't report this to any State Attorney?

A. No.

Q. You never reported this to any U.S. Attorney?

A. No.

Q. You did nothing about this?

MR. ROSENTHAL: Object as to form.

A. Yes, I signed the settlement agreement.

BY MR. FERRER:

Q. After the date that you signed the settlement agreement, did you have any other conversations with Mr. Magno pertaining to Mr. Couch?

A. We were not on speaking terms.

Q. After March 17, 2008, the date that you

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signed the settlement agreement, did you have any other conversations with Miguel Carmona pertaining to Mr. Couch?

A. We had no conversation, to the best of my knowledge, about anything after -- I'm not sure that's the case. We didn't speak about Couch.

Q. After March 17, 2008 when you signed this settlement agreement, did you have any conversations with Christian Cunha pertaining to Mr. Couch?

A. I don't recollect.

Q. Now you stated awhile ago that Mr. Magno requested that you pay him $15 million; do you recall that?

MR. ROSENTHAL: Object as to form.

A. It was actually Mr. Carmona that asked for $15 million first.

BY MR. FERRER:

Q. Directing your attention to Paragraph 4 of the settlement agreement that's been marked as of Plaintiffs' No. 19, you'll note that the amount that you agreed to pay Petra Opportunity Fund pursuant to this settlement agreement was $10 million, correct?

A. Correct.

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Q. How did that amount go from $15 million as requested by Mr. Carmona to $10 million?

A. I asked him if he was f-ing crazy.

Q. Is that all you said to get him to lower the amount to $10 million?

A. I asked him if he was crazy, and he said that he wouldn't settle for anything less than $10 million.

Q. Tell me about those conversations pursuant to which Mr. Carmona started by requesting $15 million, you asked him if he was crazy, and then he agreed to $10 million.

A. I'm sure there was more than just one sentence, like, are you crazy. The question that I asked him was where could you possibly come up with this number, and he said more damages. And I asked him if he was crazy. So we have at least $10 million in damages; we won't take anything less.

Q. Is it your testimony that you negotiated with Mr. Carmona from 15 million to $10 million?

MR. ROSENTHAL: Object as to form.

A. I really wouldn't call that negotiating. I didn't negotiate very much of this.

BY MR. FERRER:

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Q. Was there any negotiation in terms of going down from the $15 million they were requesting to the $10 million?

A. The negotiating was on their side, but I was not personally liable for anything at any point in time up until the time I signed this settlement agreement.

Q. I don't understand what that means. Could you be a little bit more specific, please.

A. Back-handed. It's -- it makes no sense that I would personally obligate myself to -- whether it's a 10 or a $15 million liability, none. I was never personally obligated to anything, any amount money.

Why would a person sign a promissory note for $10 million when he was never obligated to pay personally $10 million under any set of circumstances? Even if by the stretch of the imagination I might be, that would have taken years worth of litigation. I gave here what would have taken you or anyone else who represented them years to come up with. Why would I do that? Why would I undertake a $10 million obligation on myself, Mr. Ferrer?

Q. You tell me.

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A. Because I was extorted; that's the answer.

I just have to go to the bathroom.

MR. ROSENTHAL: Take a brief break, please.

(A break was taken.)

BY MR. FERRER:

Q. Mr. Kirsch, I want to direct your attention to Paragraph 1 on the first page of the settlement agreement. It actually has a number four at the very bottom; do you see that?

A. You said there's a four? I'm looking and I don't see a four.

Q. At the very bottom of the page --

A. I'm sorry, Page 4. Okay, I apologize.

Q. Page 4, just for purposes of the record, is the first page of the settlement agreement.

A. Okay.

Q. Directing your attention to Paragraph 1, I'm going to read it into the record. I'll ask you to read it along silently with me to make sure I read it correctly.

"To pay Petra the total sum of $1,072,000 related to that certain transaction known as the Town Square Garden loan in St. Paul,

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Minnesota by April 14th, 2008, Petra acknowledges it has received $916,967.23 of the total funds as of the date of this agreement."

Did I read that correctly?

A. Yes, sir.

Q. This reference to the Town Square Garden loan refers to the Town Square loan that we were talking about earlier, correct?

MR. ROSENTHAL: Objection to the form.

A. That's correct.

BY MR. FERRER:

Q. And as of the date of this agreement, American Residential Equities C had paid back to Petra Opportunity Fund $916,967.29 of that amount, correct?

MR. ROSENTHAL: Object as to form.

A. I'm sorry. Just read back the last part he just said.

(The above-requested portion of the answer was read back by the court reporter.)

A. I believe that 916,000 was wired from an escrow agent in Minneapolis directly to Mr. Magno or Petra, but not to C and then to them.

BY MR. FERRER:

Q. The escrow agent that wired the

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916,967.29 is the escrow agent that you testified earlier was holding the funds for the Town Square Mall pending its closing, correct?

A. That's my recollection.

Q. With a difference between $1,072,000 and $916,967.29, that had not been paid by American Residential Equities C, LLC to Petra Opportunity Fund as of the date of this agreement, correct?

MR. ROSENTHAL: Object as to form.

A. The difference between those two sums was paid back, but I don't remember when. As I testified before, the difference here -- it looks like 90,000 or so was points and fees and expenses. And the purpose of this was to make them totally whole for the 1,072,000, and that was done -- I'm not sure when it was done.

BY MR. FERRER:

Q. Just to give a little bit of context to the agreement, directing your attention to Paragraph 3 below, it says "Kirsch will pay the remaining $100,000 owed to Petra as the result of the Lake Helen asset by 5:00 p.m. on or before April 14th, 2008. Do you understand that that hundred thousand dollars pertains to more or less the difference between the 1,072,000 and the

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$916,967.29?

MR. ROSENTHAL: Object as to form.

A. Yes.

BY MR. FERRER:

Q. Did you or any of your entities associated with you pay those $100,000 by April 14th, 2008 as required under Paragraph 3?

A. I don't know. I believe everything was paid, all money was returned.

Q. I'm going to direct your attention to Paragraph 2 of that first page where it says "Kirsch will turn over any and all funds held or controlled by in escrow, irrespective of the actual escrow agent, that relate to the commercial assets that will serve as transferred to Petra on or about March 5th, 2008. This turnover will occur by 5:00 p.m." -- and then it says -- it's got handwriting that says "by on April 14th." Do you see that?

A. Yes.

Q. Are those your initials next to the handwritten portion on Paragraph 2?

A. It looks that way.

Q. You changed that term, correct?

A. It looks like I did. I don't see anyone

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else's initials on there.

Q. Could you tell me what escrow amounts this particular paragraph pertains to?

A. I believe it refers to escrow moneys that we were holding on behalf of borrowers or others of commercial assets.

(Plaintiffs' Exhibit 20 was marked for identification.)

BY MR. FERRER:

Q. Sir, directing your attention to Plaintiffs' Exhibit No. 20. I'll ask you to review it, let me know when you're done.

A. Okay.

Q. Do you recognize that as an e-mail from David Merrill to Steve Van Horn, Denise Shea, Erick Mango, you, Lisette de Padua and Pamela Perrot on March 4th, 2008?

A. Yes.

Q. Do you remember receiving this e-mail?

A. No.

Q. Do you have any reason to believe that you did not receive this e-mail from David Merrill on March 4th, 2008?

A. No.

Q. Does the escrow amount referred to in

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Mr. Merrill's e-mail of March 4th, 2008 correspond to the escrow amounts discussed in Paragraph 2 of the settlement agreement?

A. I don't know if they're the same number or not. There's no number mentioned here.

Q. Do you have any understanding as to what Mr. Merrill meant when he said that the service transfer date for all commercial except Hamilton is today?

A. I would assume that what Merrill was trying to do there was to get the transfer done on that particular day.

Q. In other words, there were commercial assets -- I'm sorry. There were commercial loans that Petra Opportunity Fund had invested in that were being transferred from American Residential Equities C, LLC to Petra Opportunity Fund on March 4th, 2008, correct?

MR. ROSENTHAL: Object as to form.

A. Yes.

BY MR. FERRER:

Q. Could you tell me whether there were any escrow balances in connection with those commercial loans held by American Residential Equities C, LLC in connection with those commercial loans?

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A. I'm not sure where they were held. There were some, but I don't know if they were Seabreeze, AREC, just two.

Q. Could you tell me what the purpose of escrow balances are in terms of commercial loans?

A. Maybe make the next insurance payment, real estate tax, tax payment, improvements --

MR. ROSENTHAL: Speak up, please.

A. Real estate tax payments, insurance payments, maybe improvements to a particular building.

BY MR. FERRER:

Q. Are you familiar with any law that requires escrow amounts to be transferred simultaneously with the loan to which they correspond if and when they're transferred?

A. No.

MR. ROSENTHAL: Object as to form.

A. Maybe I'm not familiar with it.

BY MR. FERRER:

Q. You don't believe that that's a requirement?

A. I didn't say that. I just said I'm not familiar with it.

Q. Do you believe that that's a

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requirement?

MR. ROSENTHAL: Object as to form.

A. I'm sure that you have to transfer them within some given period of time, yes.

BY MR. FERRER:

Q. Would you agree with me that according to this e-mail that I'm showing you from David Merrill of March 4, 2008, all of the commercial loans were transferred from AREC, LLC to Petra Opportunity Fund on March 4th, 2008?

A. I don't know that they were. I know that we were trying to get the assignments, chain of title correct. I don't know when it happened.

Q. Does looking at either the settlement agreement or the e-mail that I've shown you from Mr. Merrill marked as Plaintiffs' No. 20 give you any idea of when those commercial loans were transferred to Petra Opportunity Fund?

A. Just because Merrill would say it's supposed to be today doesn't mean it was done that day.

Q. The question is whether looking at Plaintiffs' No. 20 or looking at the settlement agreement gives you an idea of when those commercial loans were transferred to Petra

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Opportunity Fund?

A. Sometime in March.

Q. Were the commercial loans transferred from AREC, LLC to Petra Opportunity Fund or from Seabreeze Financial, LLC to Petra Opportunity Fund?

A. My recollection is that we were trying to get the assignments in order from Seabreeze to AREC to Petra. So I think we probably assigned the notes, the mortgages from Seabreeze to C to Petra; that's my recollection.

Q. Do you know what the balance of the escrow amounts pertaining to the commercial loans that are referred to in Mr. Merrill's e-mail of March 4th of 2008 was on March 4th of 2008?

A. No.

(Plaintiffs' Exhibit 21 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm showing you what's been marked as Plaintiffs' 21. I'll ask you to review it and let me know when you're done, please.

A. Okay.

Q. Sir, do you recognize that this top portion as an e-mail string beginning with an e-mail at the upper top portion of Page 1 from

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Steven Van Horn to Erick Magno, you, Lisette De Padua, Andrea Lutchman, Billy Hirschkowitz, David Merrill and Denise Shea?

A. Yes.

Q. And do you remember receiving this e-mail from Mr. Van Horn on March 4, 2008?

A. No.

Q. Do you have any reason to believe that you did not receive this e-mail from Mr. Van Horn on March 4th, 2008?

A. No.

Q. Do you see where it says I can confirm this is correct, $1,095,727.68 in Seabreeze escrow for the six commercial loans?

A. I see that.

Q. Could you tell me what the six commercial loans and Mr. Steven Van Horn's e-mail refers to?

A. I'll turn to the next to last page, which looks to me like that's what you're referring to.

Q. And that refers to six commercial loans that Petra Opportunity Fund had invested in, correct?

A. Yes.

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Q. And it shows a total escrow amount of $1,095,727.68, correct?

A. Yes.

Q. And at the very last column of that page of the exhibit, it refers to total loan amount; do you see that?

A. Yes.

Q. And it shows that Petra Opportunity Fund made six loans, six commercial loans in connection with Seabreeze Financial, LLC ranging from $800,000 all the way up to $2.9 million, correct?

A. I don't know whether those are all the loans or those are the ones that we just had interest reserves or holdbacks on.

Q. The ones that are referred to in this particular exhibit range from $800,000 to $2.9 million, correct?

A. That's correct.

Q. And on March 4th, Seabreeze Financial services was holding escrow amounts in connection with those six commercial loans in the amount of $1,095,727.68, correct?

A. I don't know that that's correct, no.

Q. What gives you pause? What makes you doubt that that amount is correct?

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A. I'm looking at Bluff City, which is 625,000. My recollection is we didn't have that money. My recollection is that $625,000 was being held in escrow in Tennessee. I could be wrong. I don't know that -- we were actually holding either the 625 or the 18,725. They were being held to make certain improvements. I don't -- to be honest with you, I really don't remember.

Q. You don't know one way or the other, correct?

A. That's correct.

Q. Looking back at Page 1 of this exhibit, which is the e-mail from Steven Van Horn, the very top part where he says "The amount to be transferred to Petra as the new servicer is $933,211.01, taking out Hamilton, which is a residential loan, and funds need to be transferred to the new residential servicer."

Could you tell me what that refers to?

A. I think he's talking about us transferring money to the residential servicer on Hamilton, whatever that may be. He's talking about -- he's talking about a Hamilton loan and transferring money to whoever the new residential servicer was.

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Q. Mr. Steven Van Horn was on March 4th, 2008 the associate vice-president of American Residential Equities, Inc. correct?

A. Yes.

Q. Did he also hold the same title on March 4th, 2008 with American Residential Equities, LLC?

A. I don't remember.

Q. Do you have any reason to doubt that the amounts set forth in Mr. Van Horn's e-mail, specifically the $933,211.01 pertaining to escrow amounts that were being held by Seabreeze Financial is incorrect?

A. My recollection was we were holding 452,000, thereabout. I don't remember there being 933 or 1,095,000. Don't remember.

Q. Do you have any reason to doubt that the amounts set forth by Mr. Van Horn in his e-mail, specifically 933,211.01, is incorrect?

MR. ROSENTHAL: Object as to form.

A. My recollection was that it was four hundred and fifty some-odd thousand and not a million, but I could be wrong.

BY MR. FERRER:

Q. Going back to Paragraph 2 of the

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settlement agreement, when it talks there about the turnover to Petra of the commercial assets on or about March 5th, 2008, it specifically talks about the assets referred to in Mr. Van Horn's e-mail, correct?

A. No.

Q. Could you tell me --

A. I don't know. It doesn't reference Mr. Van Horn's e-mail. It talks about commercial assets that were supposed to be service transferred to Petra.

Q. Do you have any reason to believe that the commercial assets that were supposed to be service transferred to Petra on or about March 5th, 2008 as referenced in the settlement agreement are different than the commercial assets to which Mr. Van Horn refers to in his e-mail of March 4th, 2008?

A. No.

Q. Do you know whether the escrow balance of $933,211.01 referred to in Mr. Horn's e-mail marked as Plaintiffs' 21 was transferred to Petra Opportunity Fund on or about March 4th of 2008?

A. I don't think -- I don't know when we transferred it.

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Q. You know that didn't occur on March 4th, 2008, correct?

A. It may have occurred earlier.

Q. What makes you think that it may have occurred earlier?

A. I think we booked it that way.

Q. Would it make any sense if it had occurred earlier for Mr. Horn on March 4, 2008 to be saying that $1,095,727.68 to Seabreeze for the six commercial loans were being held by Seabreeze Financial?

A. He would have no way of knowing what we paid or didn't pay.

Q. I'm not asking you about the amounts that were paid or weren't pay. I'm asking you about the escrow amounts being held by Seabreeze Financial in connection with these six commercial loans on March 4th, 2008.

A. My answer is he didn't know what we transferred prior to this e-mail. All he's saying in this e-mail is this is the amount that's supposed to be transferred. He doesn't know whether it was transferred or it wasn't transferred and when it was transferred if it was transferred.

Q. Direct your attention to the e-mail

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below Mr. Horn's. It's an e-mail from Erick Magno dated March 4th, 2008 to David Merrill, Steven Van Horn, Denise Shea, you, Lisette de Padua and Pam Perrot. I'm going to read it into the record. Please follow along with me to make sure I read it correctly.

"According to ARE/Seabreeze representations, Seabreeze currently has $1,095,727.68 in escrow against Petra's commercial loans, ex-Hamilton. The entire escrow amount must be transferred today as part of the service transfer to Petra Finance, LLC."

Did I read that correctly?

A. You did.

Q. And at the very top, Mr. Van Horn responds to Mr. Magno's e-mail and says "I can confirm this is correct."

Does that refresh your recollection as to whether or not the escrow amounts were transferred from Seabreeze Financial, LLC to Petra Opportunity Fund prior to March 4th of 2008?

A. Well, I believe that Bluff City and possibly Refrigerant were transferred on or about this time. I can't be sure. I don't have my records.

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Q. You don't know one way or the other, correct?

A. No, no, don't say that, don't say that. Let me say it and then you can tell me if I'm wrong.

It is my belief that 600-and-some-odd thousand dollars in Bluff City and Refrigerant Exchange were transferred on or about this time. It is also my recollection that we booked the remaining amount prior to this e-mail when we were wiring money to them. I think there was just a misunderstanding as to what money was being wired to Petra and for what reason.

Q. Is it your testimony that all of the escrow amounts in Seabreeze Financial, LLC's possession in connection with these six commercial loans referred to by Mr. Van Horn in his e-mail of March the 4th, 2008 were transferred to Petra Opportunity Fund on or about March 4th, 2008?

A. No, my testimony is on or about March 4th, it is my recollection that we transferred Bluff City and Refrigerant Exchange. That's my recollection. And that the other moneys, 400-and-some-odd thousand dollars were actually booked by us on our records as being sent before.

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Q. When you talk about booked by us, what does that mean?
A. Moneys that we wired over, how we attributed that money, what it was to be applied to on our books and records.
Q. In terms of booking money over in your accounting records or in American Residential Equities, LLC's accounting records, does that mean that there's an actual transfer of money --
A. Yeah.
Q. -- or just a data entry in your file?
A. A transfer and what it was transferred for.
Q. Directing your attention to Paragraph 4 on the first page of the settlement agreement. I'm going to read it into the record. I'll ask that you read along silently with me to make sure I read it correctly.
"Kirsch, with Jeffrey L. Kirsch as guarantor, will execute a two-year term note in the amount of 10 million U.S. Dollars in favor of Redwood Recovery Services, LLC, secured by an actual transfer of all of Kirsch's right, title and interests in Strategic Recovery Group, LLC, a Delaware limited liability company; which actual

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transfer will be undone only upon the satisfaction of every point contained in this Section A. With the exception described in Paragraph (A)(9) below, this note represents the full agreed to amount of damages incurred by Petra due to Kirsch's negligence or otherwise."
Did I read that correctly?
A. You did.
Q. The $10 million note referenced in paragraph pertains to what we've been calling in this case the Redwood note, correct?
A. Correct.
Q. The portion of the settlement agreement that says "The note represents the full agreed to amount of damages incurred by Petra due to Kirsch's negligence or otherwise."
What do the damages correspond to in your mind?
A. There were no damages as of the date of the settlement agreement, except there's an e-mail from Magno to me dated January 31st in which he's claiming at that point in time that we're only earning 3 to 4 percent annualized because we haven't been able to close the gap on the 25 percent note --

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Q. Go ahead.
A. -- and that he feels that there's $2 million of loss on that not. So... -- up until sometime in early to mid March, that's the only thing I ever heard about losses.
Q. It's your belief that there were no losses because again, the settlement agreement was procured through extortion, correct?
MR. ROSENTHAL: Objection as to form.
A. I don't know what losses they incurred after they separated from ARE. I suspect that they did incur losses once they left us.
BY MR. FERRER:
Q. Had they incurred losses, to your knowledge, before they left ARE?
A. -- Mr. Magno lays it out for you in a January 31st e-mail. PLA something -- you can refer to it. I don't have it here. January 31st, 2008 e-mail he lays it out to me.
Q. The portion of Paragraph 4 that talks about the $10 million secured by actual transfer of Kirsch's right, title and interest in Strategic Recovery Group, LLC, can you tell me what that means or that refers to?
A. It refers to whatever rights I had in

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SRG.
(Plaintiffs' Exhibit 22 was marked for identification.)
(Plaintiffs' Exhibit 23 was marked for identification.)
(Plaintiffs' Exhibit 24 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm showing you what's been marked as 22, 23 and 24. Please review them. They're original documents. I'll ask you to familiarize yourself with them so that I may ask you some questions about them, please.
A. Okay.
Q. Do you recognize the documents, sir?
A. Yes.
Q. Beginning with what's been marked as Plaintiffs' No. 22, could you identify that document for the record?
A. It's entitled Revocable Membership Interest Powers, Assignment Separately from Certificates.
Q. And this document is signed by you, correct?
A. It is.

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Q. By this document, you were assigning American Residential Equities, LLC's right, title and interest to 9,916 Class A preferred interest of Strategic Recovery group, LLC to Redwood Recovery Service, LLC, correct?

MR. ROSENTHAL: Object as to form.

A. Yes.

BY MR. FERRER:

Q. Directing your attention to Plaintiffs' 23, entitled --

A. Excuse me. I want to make a correction.

Q. Yes.

A. I'm assigning ARE's interest and obligation under Paragraph 4 compared to my obligation.

Q. I'm sorry, sir, I missed your answer.

MR. ROSENTHAL: Could you read it back.

A. Paragraph 4 --

MR. ROSENTHAL: That's fine.

(The last answer was read back by the court reporter.)

BY MR. FERRER:

Q. Could you care to tell me what's different about --

A. Well, when I read -- when I read the

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settlement agreement, I am in Paragraph 4 supposed to transfer my right, title and interest to SR&G. It looks to me that what I'm transferring here is ARE's.

Q. I see. So looking back at Paragraph 4, you believe that because it says Kirsch's right, title and interest in Strategic Recovery Group, that paragraph refers to any interest that you might have individually in SRG and not any interest that American Residential Equities, LLC might have?

A. That's my interpretation.

Q. I'll direct your attention, sir, to the very top portion --

A. Thank you.

Q. -- of the settlement agreement, and I'll ask you to tell me what is defined as the term "Kirsch" or parts.

A. Jeffrey L. Kirsch, an individual, together with all entities, which he holds a controlling ownership or beneficial interest, including -- so this is so all encompassing that it takes in entities that I'm not even aware of, nor is Mr. Magno or anyone else who is a party to this. So it takes into consideration more than just these entities. It's so broad that if I have a 1 percent

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interest in General Motors, I assume I did that as well.

Q. General Motors isn't listed in the settlement agreement, is it?

A. I don't even think it's in business anymore, is it?

No, I'm sorry, it says including but not limited to, and it lists these entities. So this agreement, in my opinion, would take into consideration entities not named in here.

Q. You don't have the right to sign for a company like General Motors, correct? You don't have the right to bind --

A. That was an exaggeration, but in case they missed something, in case their record search showed up something else, I'm obligating the something else; right? Isn't that what this says? I think so.

Q. American Residential Equities, LLC was one of the parties defined as Kirsch under the settlement agreement, correct?

MR. ROSENTHAL: Object as to form. Go ahead.

A. It says "Kirsch, an individual, together with." What it should have said was "American

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Residential Equities" if that's who they intended here.

BY MR. FERRER:

Q. Well, I'm not asking you what it should have said. I'm asking you what it says --

A. That's my opinion. It's referring to me. That's my opinion.

Q. American Residential Equities, LLC is one of the entities encompassed within the definition of "Kirsch" within the settlement agreement, correct?

MR. ROSENTHAL: Object as to form.

A. I don't read it the same way you do.

BY MR. FERRER:

Q. Okay. On March 17, 2008, did American Residential Equities, LLC have an interest in Strategic Recovery Group, LLC?

MR. ROSENTHAL: Object as to form.

A. It did.

BY MR. FERRER:

Q. And you, sir, were an authorized officer of American Residential Equities, LLC, correct?

A. Yes.

Q. And you could sign on its behalf?

A. I couldn't obligate it to what I didn't

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own.
Q. You couldn't obligate it to transferring its interests in Strategic Recovery Group, LLC?
A. No.
Q. Why not?
A. I didn't -- I wasn't -- I could only transfer what I owned. That's spelled out in the e-mails to Magno.
Q. Who is the chairman of the board of directors of American Residential Equities, LLC?
A. I don't know if that has a board of directors.
Q. Do you report to anyone at American Residential Equities, LLC?
MR. ROSENTHAL: Object as to form.
A. I would report to the owners.
BY MR. FERRER:
Q. Who are the owners?
A. It's a family limited partnership.
Q. Okay, and what family is the owner of American Residential Equities, LLC?
A. My family.
Q. You're a member of your family of course, right?
A. Yes.

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Q. And you're authorized to sign on behalf of American Residential Equities, LLC by your family, correct?
A. My opinion is that I can't transfer more than I own.
Q. Okay. Whether you did or you didn't, sir, on March 17, 2008 you signed the document marked as Plaintiffs' 22, correct?
A. I signed it with full knowledge -- I signed it, but also before signing it I was told Mr. Carmona, Mr. Magno, Mr. Cunha and everyone else that I was not a beneficial owner of 100 percent of these entities.
Q. Okay.
A. So the only thing that I could really give up is what I owned, in my opinion.
Q. Okay, and on March 17th, 2008 American Residential Equities, LLC owned 9,916 Class A preferred interests of Strategic Recovery Group, LLC, correct?
A. That's what it says.
Q. Directing your attention to Plaintiffs' 23, sir, the document entitled Allonge to Note; do you see that?
A. I do.

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Q. Did you sign that document?
A. I did.
Q. Was this document intended to assign to Redwood Recovery Services, LLC a loan from Strategic Recovery Group, LLC to American Residential Equities, LLC in the amount of $5 million?
A. Right.
Q. Directing your attention, sir, to Plaintiffs' 24, a document entitled Assignment of Security Interests. Do you recognize the document?
A. Magno did not see me sign this.
Q. I'm not asking you whether he saw you sign it --
A. I don't recognize it.
Q. You don't recognize this document at all?
A. No, when I signed it, it did not have Magno's signature.
Q. Okay, but you did sign the document, correct?
A. I signed a document.
Q. You signed a document entitled Assignment of Security Interests?
A. I did, but this has been altered. It

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has Magno's notary on it.
Q. When you signed this document, it didn't include Mr. Magno's signature?
A. No.
Q. Okay. Other than Mr. Magno's signature on the document, did you sign it?
Aside from the fact that it didn't have Mr. Magno's signature --
A. To the best of my recollection, I don't know whose signature this is as a witness -- it's David Merrill. I don't remember having that either.
Q. But you did sign the document, correct?
A. I did sign an assignment of security interest.
Q. In the same form and manner as the one that's been presented to you?
MR. ROSENTHAL: Object to form.
A. I don't know. I signed a security of interest, but it didn't have these signatures on it.
BY MR. FERRER:
Q. Do you have any reason to believe that that is not your signature on Plaintiffs' Exhibit No. 24?

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A. I don't know whether there are alterations to this document or not, because it didn't contain what it now contains when my signing it.

Q. I'm not asking you about alterations. I'm simply asking you to focus on the signature --

A. You're asking me if I signed this document, and I testified that I cannot be sure that I signed this document, because this document is different from when I signed it.

Q. What is different about it?

A. Merrill's signature, this notary... don't know what else, don't remember.

Q. Sir, do you understand Plaintiffs' 22, Plaintiffs' 23 and Plaintiffs' 24 to represent all of the right, title and interests that American Residential Equities, LLC had on March 17th, 2008 in Strategic Recovery Group, LLC?

A. I don't think that's the case.

Q. What other interests do you believe American Residential Equities, LLC had on March 17, 2008 in Strategic Recovery Group, LLC?

A. It had some other membership units that were not transferred to it.

Q. What membership units were those?

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A. Units that were transferred to Stemmle, Dennis Stemmle, or promised to Dennis Stemmle.

Q. Were those units actually transferred to Dennis Stemmle prior to March 17, 2008?

A. It may have been done simultaneously.

Q. Why was Mr. Stemmle being given interests in Strategic Recovery Group, LLC?

A. Good question.

Q. What's the answer?

A. I was foolish.

Q. Why do you say --

A. That's the answer.

Q. Could you give me a more concrete answer than you were foolish?

MR. ROSENTHAL: Objection as to form. Please don't insult him.

MR. FERRER: I'm not trying to insult him. He said he was foolish. I'm trying to understand why it was that Mr. Stemmle was being given interest in Strategic Recovery Group at the same time that this transaction was occurring on March 17, 2008.

MR. ROSENTHAL: The insult is when you indicated that you wanted a concrete answer. He gave you an answer.

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BY MR. FERRER:

Q. Can you elaborate on that, sir, please?

A. Sure. I gave some units to Mr. Stemmle as a bonus for good work that he did and for business that he was supposed to bring to SRG.

Q. And why do you believe that that was foolish?

A. Well, he didn't bring any business, and (B), I didn't realize that he was meeting with Merrill, planning a departure from the company, setting up a business with Merrill on or about -- they had been planning it before the breakup -- on February 13th they had their landing pages ready to go. Didn't realize how much Dennis Stemmle hated Miami and he wanted out of Miami and never intended to stay in Miami, and it was a mistake on my part.

Q. How was it that those units that American Residential Equities, LLC had in Strategic Recovery Group, LLC were transferred to Mr. Stemmle?

A. 9,916 -- I think there were 10,000. I think 84 were assigned to him, I think.

Q. How were they assigned to him? Pursuant to one of these documents, also?

A. I don't remember.

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Q. And you were the person that assigned that assignment?

A. I don't remember.

MR. ROSENTHAL: Mr. Ferrer, I would like to ask you -- it's now 20 minutes to 4:00. I would ask you to finish up so you can give me some opportunity for cross.

MR. FERRER: Mr. Rosenthal, I'm not finished, and I don't think I'm going to be finished today. So we could bring the witness back whenever it's convenient for you and the witness, and you can do your cross-examination then.

MR. ROSENTHAL: You will have had a total of nine hours. Your deposition will be limited to 4:00 o'clock today, as we too were ordered by the Court.

MR. FERRER: There was no agreement in that regard.

MR. ROSENTHAL: That's why we started at 8:15, Mr. Ferrer.

MR. FERRER: So that we could try to accommodate your schedule.

MR. ROSENTHAL: Correct, you will have had nine hours.

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MR. FERRER: No, sir, I haven't. We sat downstairs for an hour and took a lunch break for 45 minutes.
MR. ROSENTHAL: You will of course recall the two hours from the previous session.
MR. FERRER: Yes, I'll recall that prior session where you instructed your witness not to answer and we had to come back.
MR. ROSENTHAL: That was after two hours of deposition time --
MR. FERRER: Okay.
MR. ROSENTHAL: -- and three minutes.
(Plaintiffs' Exhibit 25 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm showing you what's been marked as Plaintiffs' Exhibit 25. I would ask you to look at the document, familiarize yourself with it, let me know when you're done.
A. Okay.
Q. Sir, do you recognize the document?
A. Yes.
Q. Do you recognize the document as the Redwood note that we've been referring to every

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single deposition we've taken in this case so far?
MR. ROSENTHAL: Object as to form.
A. The Redwood note that I signed did not look like this.
BY MR. FERRER:
Q. So is it your testimony that you did not sign this note?
A. I don't know if I did or I didn't.
Q. Okay. You're referring to Page 5, the document which includes a notary signature by Erick Magno, correct?
MR. ROSENTHAL: Object as to form.
A. Well, that's only part of it.
BY MR. FERRER:
Q. Okay. Turn to Page 5, please. Do you recognize your signature on Page 5 of the document?
A. This looks like my signature.
Q. Do you have any reason to believe that that is not your signature as reflected on Page 5 multiple times?
A. Yes.
Q. What is the cause for concern there?
A. The document that I signed didn't contain his notary. It refers to exhibits that aren't attached. So I don't know if it is or it

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isn't.
Q. Okay. Let's discuss the exhibits that aren't attached. You're referring specifically to Paragraph 3, correct, on Page 1?
A. Any exhibit that's supposed to be attached pursuant to Paragraph 3 is not.
Q. Okay. It refers to an Exhibit A, correct?
A. It does.
Q. Do you understand that Exhibit A was the same Exhibit A to the settlement agreement, sir?
MR. ROSENTHAL: Object as to form.
A. I'm just reading it. It says Exhibit A, "Borrower shall have the option to purchase such remaining assets for a sale price equal to the amounts noted in Exhibit A."
I'm looking; there's no Exhibit A.
BY MR. FERRER:
Q. When you signed the document, sir, what did you understand Exhibit A to mean?
MR. ROSENTHAL: Object as to form.
A. When I sign a note for $10 million, I don't think I was of sound mind and body.
BY MR. FERRER:
Q. Okay, but you did sign it, correct?

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MR. ROSENTHAL: Object as to form.
A. I signed a note for $10 million.
BY MR. FERRER:
Q. And the note that is in front of you today, you believe that it's not the one that you signed, because it includes a notary certificate by Erick?
MR. ROSENTHAL: Object as to form.
A. What I said is the note that I signed when I signed it didn't contain Erick Magno's notary signature, this handwritten stuff above his and below my signature, and it should have contained exhibits, and I don't see any.
BY MR. FERRER:
Q. Other than those differences you've just identified, sir, how is the note that's before you today different than the note that you actually signed?
A. As well, this is dated March 17th. That's not my 17. Somebody wrote that in. That's it.
Q. Just so the record is clear, the note that is before you today is different than the note that you actually signed in that it contains handwritten notary block, a signature by Erick

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Magno, the date on the very top that says March 17th, 2008. Is there anything else that's different?

A. When I signed it, it didn't have the letter A. That's not my A's. Somebody wrote that in. So they could have been referring to some other exhibit.

Q. When you signed the note that you actually signed, sir, what did you believe that the Exhibit A referred to?

MR. ROSENTHAL: Object as to form.

A. I signed signature pages; that's all I signed.

BY MR. FERRER:

Q. You never looked at the note itself?

A. Mr. Merrill picked those signature pages up from me and took them to Magno's office.

Q. Did --

A. That's all there was.

Q. Do you regularly sign just signature pages of documents?

A. When I trust the person that I'm giving them to.

Q. And you trusted David Merrill to deliver your signature with respect to this note, correct?

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A. I did.

Q. And on March 17th you had no reason to distrust David Merrill with respect to signatures that you were giving him in connection with this note, correct?

MR. ROSENTHAL: Object as to form.

A. I did not distrust David Merrill on March 17th to the extent that I do now.

BY MR. FERRER:

Q. When you gave David Merrill signatures on a signature page to this note, did you understand that they were going to be used and attached to the registered note that's before you today?

MR. ROSENTHAL: Object as to form.

A. What I expected was that the signature pages -- all the signature pages would be attached to the documents and brought back to me with counter-party signatures such as the settlement agreement. It wasn't done.

BY MR. FERRER:

Q. Was the settlement agreement ever brought back to you --

A. Eventually I got it back from my counsel or somehow.

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Q. When did you get that document for the first time?

A. With signatures? I don't remember. It was well after March 17th.

Q. When did you get the registered note that's before you today back to you with signatures for the first time?

MR. ROSENTHAL: Object as to form.

A. I don't remember.

BY MR. FERRER:

Q. Was it after March 17, 2008?

A. That's my recollection.

Q. How much after March 17, 2008?

A. I don't know.

Q. Who did you understand Redwood Recovery Services, LLC was?

A. I had no idea who they were.

Q. Did it matter to you?

A. When someone has a gun to your head, it doesn't really matter.

Q. The gun to the head being that Erick Magno threatened to go to the authorities with respect --

A. I didn't say Erick Magno alone.

Q. Let me just finish and then you can

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correct me if you feel it's necessary.

The gun to your head that you were referring to is your suspected or your believed wrongdoing with respect to Cocoa Action Park and Lake Helen loans?

MR. ROSENTHAL: Object as to form.

A. What? Read that back to me.

BY MR. FERRER:

Q. What was the gun to your head?

A. The extortion that I've spelled out ad infinitum here.

Q. The extortion by Erick Magno and his co-conspirators?

A. I would have signed any note. I didn't care whether it was payable to Redwood or you. It wouldn't have mattered, quite frankly, who it was made payable to. I was scared. I was scared.

Q. At the time you were concerned --

A. I was scared. I was scared. I was scared for myself, my family, my business. I was scared, threatened.

Q. Threatened, because of the Lake Helen note and the Cocoa Action Park, right --

A. You can keep going on about that. I was scared.

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Q. I'm trying to get it from you. Understanding --
A. No, I've testified to it already. I'm just amplifying now.
Q. Thank you for amplifying. And when you amplify, I'm going to ask a little bit just to make sure that the record is clear. You were scared for your family, correct?
A. For myself, my son, my wife; okay, Mr. Ferrer?
Q. Thank you.
Just to be clear, on March 17, 2008 you didn't care whether it was Redwood Recovery Services or whether it was Petra Opportunity Fund, correct?
A. I couldn't care less.
Q. Now you understood that with respect to this Redwood note for $10 million, you were required to pay $10 million within 24 months from the date of the Redwood note?
MR. ROSENTHAL: Object as to form.
A. I didn't care.
BY MR. FERRER:
Q. Did you review the note in any detail before giving Mr. Merrill the signature pages of

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that note?
A. I think I read it over, yes.
Q. How many times?
A. I don't remember. It was a Friday night. It went on till 11 o'clock at night. They were threatening me, either I sign it that night or else. They can't control their clients anymore.
Q. You didn't report any of this to the police, correct?
A. It's in an e-mail.
Q. Where is it?
A. It's in an e-mail somewhere that I read. Maybe Magno turned it over. He's telling me "It's either tonight or never."
Q. And what about "tonight or never" made you think that something bad was going to happen?
A. I've testified to that.
Q. Directing your attention to Paragraph 4 of the registered note marked as Plaintiffs' 25. Are you there?
A. I'm here.
Q. I'm going to read from the second sentence, Paragraph 4, beginning with the words "not withstanding any assignments." Do you see that?

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A. Yes.
Q. I'm going to read that into the record. Please follow along silently with me.
"Notwithstanding any assignments and/or conveyances of borrowers' interests in SRG to lender, borrower shall continue to be liable for all future funding obligations to SRG with respect to the assigned interests as described in SRG's operating agreement that certain secured term note and security agreement dated June 18th, 2007 between SRG and American Residential Equities, LLC, that certain purchase agreement dated June 18th, 2007 between SRG and American Residential Equities, LLC, and all other related agreements governing the funding obligations to SRG with the respect to the interests assigned to lender."
I want to focus on the part that says "SRG's operating agreement." Do you know what that refers to?
A. An operating agreement. I'm not familiar with it.
(Plaintiffs' Exhibit 26 was marked for identification.)
BY MR. FERRER:
Q. Mr. Kirsch, I'm handing you what's been

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marked as Plaintiffs' Exhibit No. 26. I'll ask you -- it's a voluminous document, so I'll ask you to review it briefly and just familiarize yourself so that I may ask you some questions about it.
A. I don't know if I can familiarize myself with this document in less than -- it would take me hours to read this. It's 50 pages or more.
Q. Do you recognize that as SRG's operating agreement?
A. It he says... it's a limited liability company agreement.
Q. For what company?
A. Strategic Recovery Group.
Q. Do you have any reason to believe that the document I've handed you and that's been marked as Plaintiffs' Exhibit No. 26 is not the operating agreement for Strategic Recovery Group, LLC as referred to in Paragraph 4 of the registered note for $10 million?
A. It contains my signature. It looks like my signature.
Q. So your answer is you have no reason to believe that it's not the operating agreement of Strategic Recovery Group, LLC, correct?
A. I have no way of -- I don't know whether

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it is or it isn't. It contains my signature. It probably is.

(Plaintiffs' Exhibit 27 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm handing you what's been marked as Exhibit No. 27 for identification purposes. I'll ask you to review it briefly and familiarize yourself with it, so that I can ask you a question or two about it.

A. It says a draft agreement. The other one says draft agreement too.

Q. Okay. It says execution draft, correct?

A. Yeah.

Q. Is there a difference as far as you're aware between draft agreement and execution draft?

A. Well, to me if it was the final agreement, it would contain signatures. This one doesn't contain signatures other than mine.

Q. The secure term in the security agreement that I've shown you contains your signature, correct?

A. Without seeing all of the other signatures, I don't know whether this is the final one or not.

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Q. I'm just asking you whether or not it contains your signature.

A. I've testified that the limited liability company agreement does contain my signature, but only my signature. Vida, Wetzold and Vancora are not on there -- yes, they are -- I'm sorry -- on the following pages.

Q. Okay. Directing your attention to Plaintiffs' 27, specifically Page 21.

A. Okay.

Q. The document contains your signature, correct?

A. This document contains my signature.

Q. You understand that this document is what the Redwood note refers to as the secured term note and security agreement dated June 18th, 2007?

MR. ROSENTHAL: Object as to form.

A. I don't know that that's the final copy.

BY MR. FERRER:

Q. Do you have any copies of the final Secured Term Note and Security Agreement in your possession --

MR. ROSENTHAL: Object as to form.

BY MR. FERRER:

Q. -- other than this document?

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A. No.

(Plaintiffs' Exhibit 28 was marked for identification.)

BY MR. FERRER:

Q. Mr. Kirsch, I'm showing you what's been marked as Plaintiffs' No. 28. Please review the document.

A. I did.

Q. Do you recognize this as Strategic Recovery Group, LLC's Class A Preferred Interest Purchase Agreement?

A. That's what it's entitled.

Q. I would ask you to turn to the last page of the agreement.

A. I did.

Q. Does it contain your signature?

A. It contains my signature. But again, it doesn't contain the other existing members or the company, and therefore I don't know that this was the final document.

Q. Do you have any other copies of the Strategic Recovery Group, LLC Class A Preferred Interest Purchase Agreement in your possession that would contain the signature of other individuals?

A. In my possession today, no.

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Q. In your possession anywhere?

A. My counsel may have it. And I would suspect that the law firm that did this for us has it as well.

Q. What was the law firm that did that for you?

A. Something McDermott Wills -- McDermott -- something like that.

Q. McDermott, Will & Emery?

A. Yeah.

Q. McDermott, Will & Emery out of Miami?

A. Yes.

Q. Do you recognize, sir, this document as the purchase agreement dated June 18th, 2007 between SRG and American Residential Equities, LLC referred to in Paragraph 4 of the $10 million registered note marked as Plaintiffs' Exhibit No. 25?

MR. ROSENTHAL: Object as to form.

A. I don't know whether it is or it isn't. Execution draft to me, that doesn't necessarily mean it's the final execution draft. It contains my signature, but I'd feel more comfortable if it contained everyone else's signature as well --

BY MR. FERRER:

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Q. Okay.
A. -- as you've attached in other instances here where you have everyone else's signature.
Q. Do you believe that there's another copy of this Strategic Recovery Group, LLC Class A Preferred Interest Purchase Agreement that contains the signatures of everybody?
A. Yes, I do.
Q. Okay. Where would that be located, sir?
A. I just testified that I believe that the law firm that represented me would have it.
Q. Okay --
MR. ROSENTHAL: Mr. Ferrer --
MR. FERRER: Yes.
MR. ROSENTHAL: -- since we're concluding the deposition now, would you like to receive the documents that you requested pursuant to the notice duces tecum?
MR. FERRER: Yes, please.
MR. ROSENTHAL: Okay. We have for you Bates numbers KIR2399 through KIR2487, which are responsive to the Items 2 and 3 of the duces tecum list.
There are no such documents -- schedules of payments regarding No. 1, which I believe

was the Redwood note.
We are also producing to you KIR2488 and 2489, which are the other cash flow spreadsheets, which Mr. Kirsch testified about previously.
I asked you and you refused to give me 15 minutes for cross-examination after nine hours of depositions after the Court ruled that you improperly terminated the prior deposition as we began today at 8:15 a.m. Even subtracting the lunchtime, it is nine hours of deposition. The fact that you chose to schedule a hearing in the middle of your deposition, sir, candidly and respectfully is your problem. This deposition is concluded.
MR. FERRER: Okay, Mr. Kirsch, for the record, I'm not terminating your deposition. Counsel and I will have to go back to Judge Freeman and decide whether you have to come back.
THE WITNESS: I understand.
MR. FERRER: Okay. Thank you very much.

(The reading and signing of this deposition was not waived.)
(This deposition was adjourned at 4:01 a.m. sine die.)

CERTIFICATE OF OATH

STATE OF FLORIDA :
:SS.
COUNTY OF MIAMI-DADE :

I, Lance W. Steinbeisser, Notary Public, State of Florida, certify that JEFFREY KIRSCH personally appeared before me on the 27th of October, 2009.

Signed this 9th day of November, 2009.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Notary Public, State of Florida at Large
My Commission Number: DD409358
Expires: May 4, 2009

REPORTER'S DEPOSITION CERTIFICATE

I, Lance W. Steinbeisser, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the deposition of JEFFREY KIRSCH; that a review of the transcript was requested; and that the transcript, pages 96 through 374, is a true record of my stenographic notes.
I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED this 9th day of November, 2009 at Miami, Miami-Dade County, Florida.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Certified Court Reporter

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ERRATA SHEET
DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES
RE REDWOOD VS. KIRSCH
CASE NO. 08-65603 CA 40
DEPO OF JEFFREY KIRSCH
TAKEN : OCTOBER 27, 2009

Page #	Line #	Change	Reason

Under penalties of perjury, I declare that I have read the foregoing document, and that the facts stated in it are true.

Date Signature

STEINOTYPE, INC.
1140 NE 86th Street
Miami, Florida 33138-3434
(305)632-4464

November 9, 2009
Alan Rosenthal, Esquire
Carlton Fields, P.A.
100 Southeast Second Street
Suite 4000
Miami, Florida 33131
RE : REDWOOD VS. KIRSCH
DEPO OF : JEFFREY KIRSCH
TAKEN : October 27, 2009

Dear Mr. Rosenthal:

With reference to the deposition of JEFFREY KIRSCH taken on October 27, 2009, in connection with the above-captioned case, please find enclosed the transcript of said deposition.

Please arrange to have the witness read your copy of the transcript, denoting any corrections by page and line number on the enclosed errata sheet. This errata sheet must be signed by the witness, notarized and returned to Jose M. Ferrer, attorney for the Plaintiffs, for filing with the original transcript, which has been sent to counsel.

If this has not been taken care of within the next thirty days or by the time of trial, whichever comes first, it will then be concluded that the reading, subscribing and notice of filing have been waived.

Sincerely,

STEINOTYPE, INC.

cc: Original transcript
J.M. Ferrer, Esq.

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EXHIBIT B

FLORIDA DEPARTMENT OF STATE
DIVISION OF CORPORATIONS

Events **No Name History**

Entity Name Search
Search

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Detail by Entity Name

Foreign Limited Liability Company

AMERICAN RESIDENTIAL EQUITIES, LLC

Filing Information

Document Number	M03000003576
FEI/EIN Number	432032798
Date Filed	10/20/2003
State or Country	DE
Status	INACTIVE
Last Event	REVOKED FOR ANNUAL REPORT
Event Date Filed	09/24/2010
Event Effective Date	NONE

Principal Address

848 BRICKELL AVENUE
PENTHOUSE
MIAMI, FL 33131

Changed: 02/12/2004

Mailing Address

848 BRICKELL AVENUE
PENTHOUSE
MIAMI, FL 33131

Changed: 02/12/2004

Registered Agent Name & Address

HIRSCHKOWITZ, WILLIAM
848 BRICKELL AVENUE
PENTHOUSE
MIAMI, FL 33131

Name Changed: 11/12/2009

Address Changed: 02/12/2004

Manager/Member Detail

Name & Address

Title MGR

MEADOW MINT, LLC
848 BRICKELL AVE. PENTHOUSE
MIAMI, FL 33131

Annual Reports

Report Year	Filed Date
2007	04/30/2007
2008	05/01/2008
2009	04/28/2009

Document Images

11/12/2009 -- Reg. Agent Change	View image in PDF format
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EXHIBIT C

2009 LIMITED LIABILITY COMPANY ANNUAL REPORT

FILED
Apr 28, 2009
Secretary of State

DOCUMENT# M03000003576

Entity Name: AMERICAN RESIDENTIAL EQUITIES, LLC

Current Principal Place of Business:

848 BRICKELL AVENUE
PENTHOUSE
MIAMI, FL 33131

New Principal Place of Business:

Current Mailing Address:

848 BRICKELL AVENUE
PENTHOUSE
MIAMI, FL 33131

New Mailing Address:

FEI Number: 43-2032798 **FEI Number Applied For ( )** **FEI Number Not Applicable ( )** **Certificate of Status Desired ( )**

Name and Address of Current Registered Agent:

DE PADUA, LISETTE
848 BRICKELL AVENUE
PENTHOUSE
MIAMI, FL 33131 US

Name and Address of New Registered Agent:

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE: _____

Electronic Signature of Registered Agent — Date

MANAGING MEMBERS/MANAGERS:

Title: MGR ( ) Delete
Name: MEADOW MINT, LLC
Address: 848 BRICKELL AVE. PENTHOUSE
City-St-Zip: MIAMI, FL 33131

ADDITIONS/CHANGES:

Title: ( ) Change ( ) Addition
Name:
Address:
City-St-Zip:

I hereby certify that the information supplied with this filing does not qualify for the exemption stated in Chapter 119, Florida Statutes. I further certify that the information indicated on this report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am a managing member or manager of the limited liability company or the receiver or trustee empowered to execute this report as required by Chapter 608, Florida Statutes.

SIGNATURE: JEFFREY KIRSCH MGR 04/28/2009

Electronic Signature of Signing Managing Member, Manager, or Authorized Representative / Date

EXHIBIT D

IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
COMPLEX BUSINESS LITIGATION
CASE NO. 08-65603 CA 40

REDWOOD RECOVERY SERVICES, LLC,
and ELEVEN HOMES LIMITED,

Plaintiffs,

vs.

JEFFREY L. KIRSCH, et al.,

Defendants.
_____/

DEPOSITION OF
WILLIAM HIRSCHKOWITZ
Taken on Behalf of the Plaintiffs
DATE TAKEN: August 6, 2011
TIME: 9:35 a.m. - 11:55 a.m.
PLACE: 1450 Brickell Avenue
Miami, Florida

Examination of the witness taken before:
Lance W. Steinbeisser, RPR-CSR-FPR
Certified Court Reporter

APPEARANCES:
ON BEHALF OF THE PLAINTIFFS:
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Thereupon--
WILLIAM HIRSCHKOWITZ
was duly administered the oath: Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth?
THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. FERRER:

Q. Mr. Hirschkowitz, please state your full name for the record.
A. My full name is William Hirschkowitz.
Q. Any middle name?
A. No.
Q. What is your current address?
A. [redacted]
Q. What is the zip code?
A. [redacted]
Q. How long have you lived there?
A. About 11, 12 years.
Q. Are you presently employed?
A. Yes.
Q. Who are you presently employed by?
A. American Residential Equities.

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Q. Which one of the American Residential Equities?
A. LLC.
Q. What is your current position or title with American Residential Equities, LLC?
A. CFO.
MR. OLIN: Bill, wait until he finishes even if you know what his question is going to be. You were jumping in a little early here.
BY MR. FERRER:
Q. Do you presently hold any positions or titles with American Residential Equities, Inc.?
A. No.
Q. When did you last hold a title or position with American Residential Equities, Inc.?
A. I've never had a title with Inc.
Q. Were you ever employed by American Rcsidential Equities, Inc.?
A. No.
Q. Other than your title as Chief Financial Officer of American Residential Equities, LLC, do you hold any other titles with that company?
A. No.
Q. Do you hold any positions or titles with

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ARE Asset Management, LLC?
A. No.
Q. You hold any positions or titles with Seabreeze Financial, LLC?
A. No.
Q. Do you hold any positions or titles with American Residential Equities LIII, LLC?
A. No.
Q. I want to go back to ARE Asset Management, LLC for a moment. It's your testimony that you hold no positions or titles with that company?
A. Correct.
Q. Have you ever held any positions or titles with that company?
A. No.
Q. What is it that that company does?
A. ARE Asset Management manages the assets for an offshore company.
Q. What is the offshore company for which ARE Asset Management, LLC manages assets?
A. I believe it's called ARE Opportunity Fund.
Q. And what type of company is that?
A. It's an offshore investment company.

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Q. And where is it formed or incorporated?
A. I'm not sure.
Q. Have you ever been the chief financial officer of Meadow Mint, LLC?
A. No.
Q. As you sit here today, your testimony is that you are only the chief financial officer of American Residential Equities, LLC?
A. Correct.
(Plaintiffs' Exhibit 1 was marked for identification.)
BY MR. FERRER:
Q. I'm handing you what's been marked Plaintiffs' Exhibit 1. Please familiarize yourself with it so that I may ask you some questions about it.
Have you had an opportunity to review it?
A. Yes.
Q. Do you recognize the document as the "Verified Motion for Stay of Order Denying Emergency Motion to Stay Subpoenas Pending Preparation and Review of Certiorari Petition and to Set Supersedeas Bond and Incorporated Addendum to Motion for Protective order."

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A. I don't know -- can you put that in English?
Q. Sure.
Why don't you flip to the first page of the exhibit, and if you would look at the title of the document right underneath the caption which is the portion with all of the names. Could you read into the record what it says?
A. The underlying portion here?
Q. Yes, sir.
Would you please read into the record the underlying portion.
A. Well, "Verified Motion for Stay of Order Denying Emergency Motion to Stay Subpoenas Pending Preparation and Review of Certiorari Petition -- to Set Supersedeas Bond and Incorporated -- for Protective Order."
Q. Okay, and that's a document that you verified; correct?
A. Yes.
Q. I'll ask you to flip to Page 10 of that document. Are you there?
A. Yeah.
Q. Do you recognize your signature --
A. Yes.

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Q. -- on the upper portion of that page?
A. Yes.
Q. And do you see that you signed, sir, as the Chief Financial Officer of American Residential Equities, LLC, American Residential Equities, Inc., ARE Asset Management, LLC and Meadow Mint, LLC --
A. Yes.
Q. -- and also for American Residential Equities LIII, LLC?
A. Yes.
Q. And what you're telling me is that that designation; in other words, your designation as the chief financial officer of any other company listed on this motion other than American Residential Equities, LLC, that's not correct?
A. What I am is -- I am the CFO for American Residential, LLC.
Now, LLC manages the assets for all these other entities. So I was never told that I was the CFO for these other companies.
Q. Well, you looked at this motion before you signed it; right?
A. Yeah.
Q. And you noticed when you were signing the motion that there was a title ascribed to you

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underneath your name; right?
A. Right.
Q. And it's incorrect that you are the chief financial officer of American Residential Equities, Inc.?
A. Correct.
Q. And it's incorrect that you are the chief financial officer of ARE Asset Management, LLC?
A. As far as I know, I'm -- my title is only American Residential Equities, LLC.
Q. So to the extent that this motion says that you are the chief financial officer --
A. But --
Q. -- of any company other than American Residential Equities, LLC, that would be wrong?
A. Well, we --
Q. Is that -- yes or no, sir.
A. I would say that would be "yes."
Q. Okay. Now --
MR. OLIN: You can explain when you give a yes, if you wish.
MR. FERRER: Well, he can explain when there's a question pending.
MR. OLIN: There is a question pending.

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MR. FERRER: And he answered it.
MR. OLIN: No. You instructed him to give you a particular answer, José. He's allowed to give a full answer to the question.
MR. FERRER: Okay.
BY MR. FERRER:
Q. Sir, do you have anything to add --
MR. OLIN: Excuse me.
Do you have something you want to add to that?
A. Yes.
In our capacity, I've only been employed by ARE, LLC. However, we do manage these other companies, and at that point -- part, that's why they would say that I was the CFO for those companies. I was never employed by them.
BY MR. FERRER:
Q. Okay. Just to be clear, you've never been employed by American Residential Equities, Inc.?
A. No.
Q. You've never been employed by ARE Asset Management, LLC?
A. No.

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Q. You've never been employed by Meadow Mint, LLC?
A. No.
Q. You've never been employed by any of the ARE entities that are listed on Page 5 of this motion; correct?
A. I've never been employed by them.
Q. And you've never held any positions or titles with any other companies listed on Page 5 of this motion; correct?
A. That would be correct because I've only been employed by ARE, LLC.
Q. And you've never held any positions or titles with American Residential Equities, Inc.; correct?
A. Correct.
Q. And you've never held any positions or titles with ARE Asset Management, LLC; correct?
A. Correct.
Q. And you've never held any positions or titles with Meadow Mint, LLC; correct?
A. Correct.
Q. So to the extent that this motion says that you are the chief financial officer of any company other than American Residential Equities,

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LLC, that's wrong; right?
A. That would be correct.
Q. Now, have you ever held any positions or titles with American Residential Equities LIII, LLC?
A. No.
Q. I want to focus on the list of companies that are listed on Page 5 of the motion and on Page 6 of the motion -- and by the way, when you signed this document, you understood that you were swearing under oath that all of the statements made in the motion were true and correct; right?
A. Yes.
Q. Now flipping to Page 6 of the motion. I'm going to read into the record, beginning at the very top portion. I'll ask you to read along silently with me to make sure I read it correctly.
"Examining this fiduciary account will expose sensitive and private information regarding these non-party witnesses and the individual investors who invested money in these non-party entities. Private individuals, actually foreign investors, invested moneys in these non-party entities, and the funds were transferred into this one fiduciary account and then redistributed to the

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entities for the buying of assets for the sake of efficiency and ease in accounting."
Did I read that correctly?
A. Yes.
Q. Could you explain to me in a little bit more detail how it is that an investor goes about investing money in these ARE entities?
A. The way it worked was an investor would wire money into what we called our fiduciary account. From there, we allocated the money into the various different numbered LLCs.
Q. I want to try to get a little bit more clarification. When you talk about investors, you're talking about investors of American Residential Equities, LLC; correct?
(Ms. Bravo entered the conference room.)
A. No, these are -- they would be making an investment into -- to go into a numbered LLC.
Q. Would a numbered LLC be created for each investor or investor group?
A. They would be created for an investor group.
Q. So that each of the entities listed on Page 5 of the motion is an entity created for an investment group?

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A. The numbered LLCs were created for investor groups.
Q. Fair enough.
And my question is whether the numbered LLCs that are listed on Page 5, each represent an investor group for which that company was created?
A. Yes.
Q. Now, at the time that the numbered LLC was created, was an independent bank account opened for that numbered LLC?
A. At the time it was created, yes, we did open up a separate bank account.
Q. So that each of the entities listed on Page 5 of the motion have their independent bank account; correct?
A. They did, yes.
Q. And when an investor wanted to invest in one of these entities, would they wire or would they deposit their money into that individual account that was set up for each of those companies or into a global account for American Residential Equities?
A. They would wire the money into a global -- what we called a global fiduciary account.

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Q. Why was the money wired to the global fiduciary account instead of being wired directly to the account for each of these individual entities?
A. Because, number one, as we were taking money in -- we received the money before we had actually set up these numbered LLCs. And -- and then as soon as we set it up, because we had purchased a pool of the assets for that numbered LLC, that's when we transferred the funds into that bank account.
Q. Was there any other reason why the money would be wired to the global fiduciary account as opposed to being wired to the independent accounts of these entities?
A. It was for the ease of the investors.
Q. Could you tell me how it was easier for the investors --
A. Because we only had --
Q. Let me finish. The court reporter needs to take just one of us down at a time.
Why would it be easier for the investor to wire money into the global fiduciary account versus wiring it directly into the individual accounts for each of these entities?

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A. Because at the time that they would wire the money in to us, that account had not been set up because the numbered LLC had not been set up at that point.

Q. So when you said there were various reasons, it's really one in the same; right?

A. When you say one in the same --

Q. In other words, the reason why the money wasn't wired directly into the individual accounts for these individual entities is because those individual entities weren't created at the time that American Residential Equities received the investment; right?

A. That's correct.

Q. With respect to each of these individual entities listed on Page 5 of the motion, was it the case that those entities weren't created before the investor wired the money?

MR. OLIN: Object to the form.

A. This was usually the case.

BY MR. FERRER:

Q. When you say "usually," what you're trying to say is that it wasn't always the case that when the investors wired the money into the global fiduciary account the independent or

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individual American Residential Equities numbered entity had been created; right?

A. Let me look at -- that would be correct, that -- for the most part. They were all -- that's the way it happened.

Q. But to be sure, you can't tell me by looking at this list whether any of these entities were created before or after the investors funded the investment; right?

A. Looking at this list... I would say out of this list, maybe two or three were the exception. Everyone else, the moneys had come in and then we disbursed it.

Q. And when you talk about the exception, what you mean by that is that the investors sent the money directly to the individual accounts of these single entities and not to the global fiduciary account?

A. No, it was always sent to our fiduciary account.

Q. Could you tell me then what it is that you meant when you talked about the exceptions?

A. When you asked if this -- when the moneys came in before these accounts were set up, that was usually the case. There are maybe two or three that had been set up, and then additional moneys came in after they were set up.

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Q. Could you tell me which of the entities listed on Page 5 of this motion are the exceptions, to use your words?

A. I believe they were ARE XXXII, ARE XLV, and ARE C.

Q. Starting with ARE XXXII, is it your testimony that that company existed when the investors funded their investment?

A. ARE XXXII -- okay. We had had originally received investor money and then set it up. However, later on, additional funds came in and they were allocated to ARE XXXII.

Q. Okay, and when those additional funds came in for ARE XXXII, were those funds deposited into the global fiduciary account or were they deposited directly into the ARE XXXII account --

A. They were deposited into the fiduciary account.

Q. And why at that point, if the company had already been set up and an account had already been opened, would it have been easier for the investors, as you described earlier, to deposit the money into the global fiduciary account instead of

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the ARE XXXII independent account?

A. Because that's where we had the wiring instructions for incoming wires to come into that account.

Q. That's just the way it was done by American Residential Equities; correct?

A. Correct.

Q. Now with respect to American Residential Equities XLV, could you please tell me whether the money that was used to fund the investments in that entity went into the global fiduciary account or into the independent account of American Residential Equities XLV?

A. They went into the fiduciary account.

Q. Were there subsequent investments in American Residential Equities XLV after the initial investment?

A. Yes.

Q. And into which account were those additional investments deposited?

A. The investors invest -- sent their moneys directly into the American Residential fiduciary account. From there, then we sent them to American -- to the account for American Residential Equities XLV.

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Q. And at that point when the additional funds were sent in, again it wasn't for the ease of reference of the investors, but just because that's the way American Residential Equities did things; right?
A. Correct.
Q. Now with respect to American Residential Equities C, could you tell me whether -- and just to be clear, American Residential Equities C is the entity formed for the Petra Opportunity Fund --
A. Correct.
Q. -- group of investors; correct?
A. Yes.
Q. Could you tell me whether there were additional investments made into the American Residential Equities C account by Petra Opportunity Fund after their initial investment?
A. You know, I really don't remember -- can't remember that part.
Q. Well, we talked earlier about exceptions to the rule, that the companies were not formed at the time that the investors sent the money into the global fiduciary account. Do you remember that?
A. Yes.
Q. And you gave me these three companies as

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being the exceptions; correct?
A. Correct.
Q. And could you tell me how it is that American Residential Equities C was an exception?
A. Because what American Residential Equities C did was they kept wiring us funds after the account had been set up, and they wired it into the fiduciary account.
Q. How is it an exception then?
A. Because, as you had said, the money had come in, the account was already set up, and then they kept funding it through the fiduciary account.
Q. When the money came into the account, what information, if any, is contained in the bank records regarding where the money is coming from?
A. It would have a name and an account number.
Q. Was that always the case?
A. When you say "always the case," it's probably not always the case, but I have seen that's where it was a lot of times.
Q. When was the last time that you looked at the bank account statements for the fiduciary account that we've been discussing?
A. I can't remember. It's been awhile.

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Q. How long would you say it's been?
A. I can't remember.
Q. More than six months?
A. Probably.
Q. More than a year?
A. I'm not sure.
Q. So at least no earlier than six months and maybe no longer than a year ago; right?
A. Yeah.
Q. And as you sit here today, could you tell me whether you recall the names of any specific investor listed on any of the bank statements for the global fiduciary account?
MR. OLIN: I would ask you just if you recall the names, not what the names are.
A. I do remember the names.
BY MR. FERRER:
Q. I want to focus it on American Residential Equities C for just a moment.
Could you tell me what name appeared on the bank statements of American Residential Equities' global fiduciary account with respect to deposits that were made to fund American Residential Equities C?
MR. OLIN: Object to the form.

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A. As I recall -- and this is going back from memory because I don't have it -- I believe it said is it was from Petra.
BY MR. FERRER:
Q. Now, were all of the investors in the entities that are listed on Exhibit No. 5 individuals or corporate entities?
A. We would have had some corporate entities.
Q. Could you tell me which of the entities listed on Page No. 5 had investors that were corporate entities as opposed to individuals?
A. They all had individuals -- some had corporate.
Q. I want to focus on any deposits made into the global fiduciary account for purposes of funding one of these entities listed on Exhibit No. 5 where the name on the bank statements wasn't an individual's name but some corporate or other entity's name.
A. You want to know which one of these were specific?
Q. Yes, sir.
A. Well, the first one would be ARE XXVII.
Q. Any others?

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A. I'm trying to remember. I think it was ARE XXXVIII. Might have had some XL -- I'm not sure. ARE XLIV, ARE XLVI, ARE XLIX, ARE LV, ARE LVI, definitely ARE C -- those are the ones that I remember.

Q. So you've listed nine entities from Page No. 5 with respect to which the investors were not individuals but an entity; correct?

A. These were -- they were part of the investments, yes.

Q. Okay, and in those cases where the investments would be made not by individuals but some sort of entity, the bank statements would not show the name of an individual, of course. It would be the name of an entity; correct?

A. As best as I remember, sometimes the owner of that company's name would appear, and we would find out later that it really belonged to a company.

Q. Could you tell me with respect to which of the entities listed on Page 5 the owner's name would appear?

A. I don't remember.

Q. As you sit here today, you can't identify a single one; right?

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A. No, I can't remember.

Q. Now again, the global fiduciary account that we've been discussing is an account that American Residential Equities, LLC had with Wachovia which is now known as Wells Fargo; correct?

A. Correct.

Q. American Residential Equities, LLC and only American Residential Equities, LLC was the holder of that account; correct?

A. No --

MR. OLIN: Object to the form.

A. -- the owner of that account was American Residential Equities, Inc.

BY MR. FERRER:

Q. What is the difference between American Residential Equities, LLC and American Residential Equities, Inc. in terms of the services that they perform for investors?

A. There are none.

Q. American Residential Equities, Inc. and American Residential Equities, LLC do the same thing?

A. Yes.

Q. I'm just trying to figure out when was it that American Residential Equities, Inc. would be used as opposed to American Residential Equities, LLC.

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A. American -- and the history is American Residential Equities, Inc. was set up, and then along about sometime in 2003, we then set up American Residential Equities, LLC. And any entity that was set up after we formed American Residential Equities, LLC would be managed by American Residential Equities, LLC.

Q. Would it be fair to say that after 2003 there were no new entities formed that were being managed by American Residential Equities, Inc.?

A. That would be correct.

Q. So that all of the entities that are described on Page 5, it's your testimony, were formed prior to 2003?

A. No.

Q. What's incorrect about that statement?

A. The only two that were formed prior to the time we converted were American Residential Equities XXVII and XXVIII. The rest were managed by American Residential Equities, LLC.

Q. Let me see if I understand your testimony.

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Of the entities listed on Page 5, only American Residential Equities XXVII and American Residential Equities XXVIII were managed by American Residential Equities, Inc.?

A. Correct.

Q. It's your testimony that the rest of those entities were managed by American Residential Equities, LLC?

A. Correct.

Q. If American Residential Equities, LLC was managing all but American Residential Equities XXVII and American Residential Equities XXVIII, why would American Residential Equities, Inc. be receiving any moneys for the entities listed on Page No. 5?

A. Because we had originally set up the fiduciary account. At the time, we only had American Residential Equities, Inc., and we saw no reason to set up a new account for a fiduciary account at American Residential Equities, LLC.

Q. Did American Residential Equities, LLC or anyone at that company have any signing authority over the fiduciary account that American Residential Equities, Inc. had at Wells Fargo?

A. The only one that had signing authority

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was Jeffrey Kirsch.
Q. When was the fiduciary account with Wells Fargo created or formed?
MR. OLIN: Object to the form.
BY MR. FERRER:
Q. Let me ask it again. That was a terrible question.
When was the fiduciary account that we've been discussing opened?
MR. OLIN: Object to the form. There were two.
BY MR. FERRER:
Q. Okay. Well, we'll discuss that.
There are two American Residential Equities, Inc. fiduciary accounts?
A. No, there's only one American -- there was only one American Residential Equities, Inc. fiduciary account.
Q. Did American Residential Equities, LLC also have a fiduciary account with Wells Fargo?
MR. OLIN: Object to the form.
A. No. As far as I know, no, we did not have a fiduciary account with Wells Fargo.
BY MR. FERRER:
Q. Just a moment ago when Mr. Olin said

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there were two, do you know what he's talking about?
A. We had created another account at a different bank.
MR. OLIN: By the way, I object to the form "if you know what I'm talking about."
MR. FERRER: Fair enough.
MR. OLIN: Because he doesn't even know. I know what I meant, but I'm not sure he knows what I meant.
BY MR. FERRER:
Q. When you say we created an account at a different bank, could you tell me who the "we" is in that sentence?
A. The "we" as I'm referring to it is LLC, and that would have been done by Mr. Kirsch.
Q. Okay, and at which bank was it that American Residential Equities, LLC opened a separate fiduciary account?
A. That would have been at TD Bank.
Q. Was the purpose for that account that American Residential Equities, LLC opened at TD Bank the same purpose we've been discussing thus far this morning?
A. No, it wasn't, as we would say, a

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straight fiduciary account.
Q. How was it not a straight fiduciary account?
A. We set up what we called a one-pay account.
Q. What does that mean?
A. Moneys will come in and would be allocated to the various LLCs, but we would also write our operating expenses from that account.
Q. When was the account at TD Bank opened?
A. That was opened in 2009.
Q. Do you remember the month in 2009 when that was opened?
A. No.
Q. Is that account still open today?
A. No.
Q. When was it closed?
A. It was closed in the beginning of this year.
Q. When you talk about the beginning of this year, could you give me an idea of what month that was?
A. I think it was -- it was probably March or April, not sure.
Q. After the two judgments that were

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rendered in this case?
A. I don't know.
Q. Why was it closed?
A. Because we moved operations.
Q. When you say you moved operations, what are you talking about?
A. We moved operations to another company out of state.
Q. What's the name of the company to which the operations were moved?
A. I think it was called Addle Hill.
Q. Would you spell that for the record.
A. A-D-D-L-E, H-I-L-L.
Q. Is that the full name of the company?
A. Yes.
Q. Addle Hill is what type of entity?
A. It's an S-corporation.
Q. And in what state is Addle Hill incorporated?
A. I'm not sure.
Q. What positions or titles do you hold with Addle Hill?
A. I don't.
Q. What is the principal place of business of Addle Hill?

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A. I believe it's in California.
Q. In what city in California?
A. It's in Santa Monica.
Q. When was Addle Hill incorporated?
A. I don't know.
Q. Would it be fair to say that Addle Hill basically does the same thing that American Residential Equities, LLC used to do?
MR. OLIN: Object to the form.
A. That I'm not sure.
BY MR. FERRER:
Q. What is your understanding regarding the business of Addle Hill?
A. My understanding. My understanding is that they're helping to manage -- well, they're not managing but they're helping to -- helping to manage the assets of the numbered LLCs.
Q. And American Residential Equities, LLC used to manage the assets of the American Residential Equities numbered LLCs; correct?
A. Correct.
Q. So in that instance, Addle Hill does the same thing as American Residential Equities, LLC; correct?
A. Correct.

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Q. What else does Addle Hill, Inc. do?
A. That's all, as far as I know.
Q. And the American Residential Equities numbered LLCs for which Addle Hill is presently managing assets, are those the same American Residential Equities numbered LLCs for which American Residential Equities, LLC was managing assets?
A. Yes.
Q. Is there an agreement between Addle Hill and American Residential Equities, LLC?
A. I don't know.
Q. Is American Residential Equities, LLC still operating today?
A. Yes, it is.
Q. In what capacity is it operating?
A. As far as I know, we're -- we're still -- we're still trying to do -- still trying to keep our head above water, but -- but we're really not -- not doing much.
Q. Well, is American Residential Equities, LLC managing any assets for any entities today?
A. I would say no.
Q. Are all of the entities for which American Residential Equities, LLC used to manage assets now having their assets managed by Addle Hill, Inc.?

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A. That would be correct.
Q. What positions or titles does Mr. Jeffrey Kirsch have with Addle Hill, Inc.?
A. That I don't know.
Q. You understand that he has some position or title; correct?
A. Correct.
Q. You understand that he doesn't report to anyone; right?
A. Right.
Q. You understand that he's the boss; right?
A. That's what -- that's the only thing I understand.
Q. Which employees of American Residential Equities, LLC, if any, are presently employed by Addle Hill?
A. Well, we all are employed by Addle Hill.
Q. When you say you are all employed by Addle Hill, what do you mean?
A. All of the employees that were with American Residential Equities are now employed by Addle Hill.

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Q. Could you tell me the names of all of those employees that were formerly employed by American Residential Equities, LLC that are now employed by Addle Hill?
A. Well, there's myself and there's Jacquelyn Smyth. There's Andrea Luckman. There's Pamela Perrot. There's Derrell Riley.
Q. Anyone else?
A. That's it.
Q. Just to be clear on the record, all of the former employees of American Residential Equities, LLC are now working for Addle Hill; correct?
A. Correct.
Q. When did the transfer happen; in other words, when did all of those employees who you've named just a moment ago stop working for American Residential Equities, LLC and become employed by Addle Hill?
A. That would have been January 1st of this year.
Q. Was there any gap in the employment of any of those persons between their employment at American Residential Equities, LLC and their employment at Addle Hill?

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A. No.
Q. So all of those employees of American Residential Equities, LLC from one day to the next became employed of Addle Hill; correct?
A. Correct.
Q. And that occurred on January 1st of this year?
A. Yes.
Q. How was it that it was communicated to you that you would stop being an employee of American Residential Equities, LLC and become an employee of Addle Hill?
A. We had received a -- an e-mail.
Q. Who was the e-mail from?
A. From Mr. Kirsch.
Q. And that e-mail was directed to all of the employees of American Residential Equities, LLC?
A. Yes.
Q. What was the date of that e-mail?
A. You know, I can't remember.
Q. Do you remember the month when Mr. Kirsch sent that e-mail?
A. Not really.
Q. It had to have been in 2010; correct?

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A. Correct.
Q. How long before January 1st of 2011 would you say Mr. Kirsch sent that e-mail?
A. I can't remember.
Q. Was it a matter of weeks or months?
A. I'm not sure.
Q. What did the e-mail say?
A. That we would be -- we were no longer employed by American Residential Equities, LLC but we are employed by Addle Hill.
Q. Did Mr. Kirsch give any explanation for why it was that you, the employees of American Residential Equities, LLC, would no longer be employed by American Residential Equities, LLC and instead be employed by Addle Hill?
A. No.
Q. Did you have any conversations with Mr. Kirsch in that regard?
A. No.
Q. You didn't once ask Mr. Kirsch, "Hey, what's this all about"?
A. No. He's the boss.
Q. Is Addle Hill using the same contact numbers as American Residential Equities, LLC?
A. When you say contact --

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MR. OLIN: Object to the form.
A. When you say contact numbers...
BY MR. FERRER:
Q. Fair enough.
If I were to call the phone number for American Residential Equities, LLC today, would that number be answered by somebody at Addle Hill?
A. I don't think so.
Q. Does American Residential Equities, LLC presently have any operations whatsoever?
A. No, they don't.
Q. Would it be fair to say that all of the operations of American Residential Equities, LLC have now been transferred over to Addle Hill?
A. Yeah.
Q. Going back to the account that we were discussing this morning that American Residential Equities, Inc. had at Wells Fargo -- okay?
A. You're talking about the fiduciary account?
Q. Yes, sir, what you've called the fiduciary account at Wells Fargo that American Residential Equities, Inc. had. Okay?
The only owner of the account was American Residential Equities, Inc.; correct?

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A. Correct.
Q. American Residential Equities, LLC was not an owner of that account; correct?
A. Correct.
Q. And with the exception of American Residential Equities XXVII and American Residential Equities XXVIII, American Residential Equities, LLC was managing all of the assets for all of the entities listed on Page No. 5; correct?
A. Correct.
Q. And as the owner of the fiduciary account at Wells Fargo, American Residential Equities, Inc. had full power and control over that account; right?
A. When you say full power and control --
Q. Well, American Residential Equities, Inc. could write checks on that account; correct?
A. Yes, but that was who owned it.
Q. And American Residential Equities, Inc. could issue wires from that account; correct?
A. Correct.
Q. And American Residential Equities, Inc. could withdraw money from that account; correct?
A. When you say withdraw, what do you mean by withdraw?

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Q. Could American Residential Equities, Inc. have withdrawn money from that account?
A. For what purpose?
Q. For any purpose.
A. The only time that they would withdraw money from that would be for the numbered LLCs.
Q. Well, I'm not talking about practically why it is or when it is they did it. I'm just talking about generally. There was nothing to preclude American Residential Equities, Inc. from withdrawing any money from that account; correct?
A. Correct.
Q. Do any account documents exist with respect to that account such as signature cards, for instance?
A. I would think there are, but I have never seen them.
Q. What efforts have you made, if any, to gather the signature cards for the fiduciary account that American Residential Equities, Inc. had with Wells Fargo?
A. None.
Q. Why not?
A. No purpose.
Q. What do you mean that there was no

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purpose?
A. Why would I look for the signature cards? For what purpose?
Q. Well, it's your testimony that you haven't looked and you saw no purpose in looking for signature cards; correct?
A. Correct.
Q. To your knowledge, sir, were there any limitations on what American Residential Equities, Inc. was authorized to do with that account?
A. No.
Q. Were any instructions ever given to Wells Fargo regarding the fact that this was a fiduciary account?
A. That I don't know.
Q. Was the account designated as a fiduciary account?
A. It had the word F-I-D in there.
Q. That account has been closed; correct?
A. Yes.
Q. And it was closed in April of this year; correct?
A. No.
Q. When was it closed?
A. That account was closed in 2009.

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Q. In what month in 2009?
A. I think it was September or October. I'm not sure.
Q. Where did the funds that were in that account in September or October of 2009 go?
A. That would have been transferred, if I remember -- you know, I'm trying to remember. I think it went to our one-pay account at TD Bank.
Q. So that the record is clear, when that Wells Fargo account that American Residential Equities, Inc. had was closed in September or October of 2009, the funds were transferred to the TD Bank account that American Residential Equities, LLC opened in 2009; correct?
A. Yes.
MR. FERRER: Can we take five minutes?
MR. OLIN: Sure.
(A break was taken at 10:27 a.m.)
BY MR. FERRER:
Q. Mr. Hirschkowitz, just going back for just a moment. Would it be fair to say that all of the former employees of American Residential Equities, LLC are performing the same functions for Addle Hill that they were previously performing?
A. That would be a fair statement.

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Q. Are you the CFO of Addle Hill?
A. I haven't been told what my title is, if whatever.
Q. But you are performing the same duties for Addle Hill that you were previously performing for American Residential Equities, LLC; correct?
A. Correct.
Q. Does Addle Hill have any operations in Florida?
A. To the best of my knowledge, no.
Q. From where do you perform your functions for Addle Hill?
A. I perform my functions from home.
Q. Does American Residential Equities, LLC still maintain a place of business at 848 Brickell?
A. No.
Q. What, if anything, is located at that address where American Residential Equities, LLC used to operate?
A. Office -- offices. I don't know if there's anybody in there.
Q. When did American Residential Equities, LLC vacate its offices at 848 Brickell?
A. We vacated it in, I think, February of this year.

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Q. I want to focus for a moment on the Vantium account that you speak about in the verified motion; okay?

A. Where is the Vantium thing?

Q. Sure.

I'm going to read starting from Page 7. I'll ask you to read along silently with me to make sure I read it correctly.

The second paragraph, it says "A second opportunity for irreparable injury exists with regard to the subpoena issued to Vantium Capital, Inc. whose servicing agreement with the judgment debtor ARE, LLC was terminated as of April 1st, 2011.

"ARE, LLC, however, did not own any of the loans that were serviced by Vantium Capital, Inc. It was simply the manager of those loans that were owned by the following non-party witnesses."

And it lists the same entities that were listed on Page 5; correct?

A. Correct.

Q. Could you tell me what it is that Vantium Capital, Inc. did for American Residential Equities, LLC?

A. All I know is they -- the only thing I

know is they serviced the -- some of the -- the majority of assets that were owned by the numbered LLCs.

Q. And just so that we're clear on the record as to what we're talking about. When you talk about assets, what you're talking about is loans; right?

A. Mortgages, yes.

Q. And the assets that you spoke about a moment ago Vantium managing were the mortgages that were owned by each of the individual numbered entities listed on Page 5 and 7 of the motion; correct?

A. Correct.

Q. Could you tell me whether there was a segregated account at Vantium with respect to each of the individual entities listed in this motion?

A. I don't know.

Q. You don't have any idea of how it was that Vantium maintained --

A. No.

Q. Well, let me finish asking the question.

A. Okay.

Q. Is it your testimony that you have no idea regarding how it was that Vantium maintained

the assets that it was managing for these individual entities?

A. That's correct; I have no idea.

Q. Did Vantium ever provide account statements of sorts?

A. I'm sure they did.

Q. Did you ever see them?

A. No.

Q. Have you ever seen them?

A. No.

Q. Do you know whether any of the statements provided by Vantium included information pertaining to the individual investors in these American Residential Equities numbered entities?

A. I wouldn't know.

Q. You have no idea in that regard; correct?

A. No.

Q. So to the extent that this motion says that the disclosing of the Vantium information would disclose the names of the individual investors in these American Residential Equities numbered entities, that would be incorrect?

MR. OLIN: Object to the form.

A. As I read this, it doesn't say anything

here about individuals. It says about the loans that were serviced, in this paragraph that you just read.

BY MR. FERRER:

Q. How is anything about the loans that were serviced, how would any of that information reveal the name of the individual investors in the American Residential Equities entities that are listed in the motion?

A. Well, Vantium, there would be no individuals at Vantium because they wouldn't know.

Q. The only thing that Vantium would know is the name of the particular American Residential Equities for which it was managing assets; correct?

A. It would only know the loans they were managing.

Q. Did Vantium manage these loans for each of these individual entities or for American Residential Equities as a whole?

A. For the entities.

Q. Did each of those entities have an independent agreement with Vantium?

A. No.

Q. Who did Vantium have an agreement with, if at all?

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A. That I'm not sure.
Q. Did American Residential Equities, LLC have an agreement with Vantium?
A. That's more -- I'm not sure who they had the agreement with because I've never seen the agreement.
Q. You've never had any relationship with Vantium; correct?
A. Correct.
Q. You don't deal with Vantium; correct?
A. No.
Q. You've never seen any of their account statements; correct?
A. Correct.
Q. You've never seen any contracts with Vantium to the extent any existed; correct?
A. Correct.
Q. So you essentially wouldn't be the person with the most knowledge regarding what, if any, information Vantium has with respect to the individual investors; correct?
A. Correct.
Q. What does a loan servicer do?
A. I believe what they do is they manage the loan, they -- they receive payments and they

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make disbursements for that loan.
Q. And when Vantium receives payments for that loan, into which account does it receive payments?
MR. OLIN: Object to the form.
A. That -- I wouldn't know what Vantium did.
BY MR. FERRER:
Q. Let me see if I can clear it up.
When Vantium receives payments from those loans, those payments are not deposited into the fiduciary account that American Residential Equities, Inc. had with Wells Fargo; correct?
A. Correct.
Q. They would be deposited into some other account that Vantium would have set up; correct?
A. That's correct.
Q. When Vantium makes distributions of payments with respect to those loans, were you referring to distributions through the American Residential Equities numbered entities or to American Residential Equities, Inc.?
A. No. What I would be referring to is they would be making the real estate tax payments, the insurance payments, to make sure that the asset

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was up to-date and everything was clear.
Q. The motion refers to remittances. What do you understand remittances to be?
A. Remittance would be where they would send money to -- to us once a month, which is a summary of all the transactions.
Q. When you talk about "us," who was the "us" that you were referring to in that sentence?
A. That would have gone into our -- if you will, our fiduciary account.
Q. And the fiduciary account that you're referring to is the fiduciary account that American Residential Equities, Inc. had at Wells Fargo; correct?
A. Correct.
Q. And I'm sorry. You said that those remittance payments were made by Vantium into that account on a monthly basis?
A. Once a month.
Q. How was it that Vantium made those deposits into the account?
A. They wired the money in.
Q. Was there anything about the wire from Vantium into the Wells Fargo account that would have identified any of the individual investors in

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any of the American Residential Equities numbered entities that are listed on this motion?
A. In the wire that we received, no.
Q. To your knowledge, is there anything in any of Vantium's records that would reveal the identity of any of the individual investors in any of the American Residential Equities' entities that are listed in this motion?
A. To my knowledge, Vantium would not have any knowledge of any individual investor.
Q. And they wouldn't have any information regarding any individual investor; correct?
A. Correct.
Q. Are you familiar with an entity known as the Key Biscayne Family Limited Partnership?
A. The Key Biscayne -- what was that again?
Q. Sure.
Are you familiar with an entity by the name of Key Biscayne Family Limited Partnership?
A. Yes.
Q. What do you understand that to be?
A. I understand that to be a partnership that -- that owns Meadow Mint.
Q. Who are the partners in Key Biscayne Family Limited Partnership?

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A. Let's see if I can remember. I believe it's Roberta Kirsch, Steven Kirsch, Stacy Kirsch and -- that's all I remember.
Q. Is Mr. Kirsch a partner in Key Biscayne Family Limited Partnership?
A. No.
Q. What role, if any, did you have in setting up The Key Biscayne Family Limited Partnership?
A. None.
Q. How do you derive your knowledge regarding The Key Biscayne Family Limited Partnership?
A. I would be gathering the account information so that we could have tax returns prepared.
Q. What kind of account information did you gather for Key Biscayne Family Limited Partnership?
A. We had a checking account, so I would have the deposits, disbursements.
Q. Anything else?
A. And -- and their K-1 that they would get from Meadow Mint.
Q. Other than gathering account information in order to prepare the taxes for Key Biscayne

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Family Limited Partnership, what involvement did you have for preparing tax returns for Key Biscayne Family Limited Partnership?
A. That would be it.
Q. You're a Certified Public Accountant; correct?
A. Yes, I am.
Q. Have you ever prepared tax returns for Key Biscayne Family Limited Partnership?
A. No.
Q. In which state is Key Biscayne Family Limited Partnership formed?
A. I'm not sure.
Q. Are you aware of a company by the name of Key Biscayne Family Trust?
A. No.
Q. Does that company exist?
A. I don't know.
Q. You've seen the name; correct?
A. Only on your things here where you're saying it.
Q. Do you have any reason to believe that Key Biscayne Family Trust is an actual trust?
A. I have no knowledge of it.
Q. In what year was Key Biscayne Family

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Limited Partnership established or formed?
A. I'm not sure.
Q. Do you know more or less how many years ago Key Biscayne Family Limited Partnership was formed?
A. I would say -- to be a guess, it would probably be eight or nine years ago.
Q. Was Mr. Jeffrey Kirsch ever a partner in Key Biscayne Family Limited Partnership?
A. Yes, at one time he was.
Q. When did Mr. Kirsch stop being a partner in Key Biscayne Family Limited Partnership?
A. In -- he stopped being a partner, I think, December 31, 2009.
Q. Why did Mr. Kirsch stop being a partner in Key Biscayne Family Limited Partnership?
MR. OLIN: Object to the form.
A. I'm not sure the exact reason.
BY MR. FERRER:
Q. Do you have a general understanding of why it was that Mr. Kirsch stopped being a partner in the Key Biscayne Family Limited Partnership?
A. No, I do not know why he stopped.
Q. Now, Key Biscayne Family Limited Partnership -- I'm sorry. I missed the

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relationship that it has with Meadow Mint, LLC. Could you explain that to me one more time?
A. Key Biscayne Family Limited Partnership was an owner of Meadow Mint.
Q. Is Key Biscayne Family Limited Partnership still an owner of Meadow Mint, LLC?
A. I'm not sure.
Q. What causes you to be uncertain as to whether or not Key Biscayne Family Limited Partnership any longer owns Meadow Mint, LLC?
A. Because I haven't seen anything this entire year, so I don't know if they've changed anything at all. I don't know.
Q. The last time that you saw anything regarding Key Biscayne Family Limited Partnership and Meadow Mint, LLC, it was your understanding that Key Biscayne Family Limited Partnership owned Meadow Mint, LLC; correct?
A. The last time I saw it.
Q. When was the last time you saw anything in that regard?
A. At the end of the year.
Q. At the end of last year; correct?
A. Yes.
Q. That's the end of 2010?

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A. Yeah.
Q. As of December of 2010, Key Biscayne Family Limited Partnership owned Meadow Mint, LLC?
A. Correct.
Q. What relationship, if any, is there between Meadow Mint, LLC and American Residential Equities, LLC?
A. Meadow Mint is the owner of American Residential Equities, LLC.
Q. What relationship, if any, is there between Meadow Mint, LLC and American Residential Equities, Inc.?
A. None.
Q. What relationship, if any, is there between Meadow Mint, LLC and ARE Asset Management, LLC?
A. None.
Q. What relationship, if any, is there between Meadow Mint, LLC and Seabreeze Financial, LLC?
A. None.
Q. What relationship, if any, is there between Meadow Mint, LLC and American Residential Equities LIII, LLC?
A. None.

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Q. What relationship, if any, is there between American Residential Equities, LLC and American Residential Equities LIII, LLC?
A. American Residential Equities, LLC manages the assets for American Residential Equities LIII.
Q. Does American Residential Equities, LLC have any ownership interest in American Residential Equities LIII?
A. No.
Q. Is American Residential Equities, LLC a member of American Residential Equities LIII, LLC?
A. No.
Q. To the extent that any tax returns have been filed that state that American Residential Equities, LLC is a member of American Residential Equities LIII, LLC, it's your testimony that that would be incorrect?
A. We would show a K-1 for LLC but only because they would be considered a managing partner with zero equity.
Q. Who are the members of American Residential Equities LIII, LLC?
A. The members?
Q. Yes, sir.

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A. That would be JLK, LLC, and then we would show American Residential Equities, LLC because we filed as a partnership and we need two people or two entities to make it a partnership.
Q. What interest does JLK, LLC have in American Residential Equities LIII, LLC?
A. They would be the 100 percent owner of LIII.
Q. Does "JLK" stand for Jeffrey Lawrence Kirsch?
A. No.
Q. What does "JLK" stand for?
A. I don't know.
Q. What interest, if any, does Mr. Kirsch, Jeffrey Kirsch, have in JLK, LLC?
A. None.
Q. Who do you understand are the members of JLK, LLC?
A. The members of JDLP are --
MR. OLIN: He didn't ask you that. JLK.
A. Well, there is no JLK.
BY MR. FERRER:
Q. Let's go back to that then. A moment ago I asked you who were the members of American Residential Equities LIII, LLC and you told me JLK,

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LLC?
A. No, no. I said JLDP.
Q. I see.
So let's backtrack. The members of American Residential Equities LIII, LLC are JLDP, LLC?
A. Yeah.
Q. Does JLDP stand for Jacquelyn Lisette de Padua?
A. I wasn't there when she formed it.
Q. Do you have any reason to believe that it doesn't stand for Jacquelyn Lisette de Padua --
A. It could be for anything. I have no idea.
Q. What interest does Jacquelyn Lisette de Padua hold in JLDP, LLC?
A. None.
Q. What interest does Jeffrey Kirsch hold in JLDP, LLC?
A. None.
Q. Who are the members of JLDP, LLC?
A. They are American Residential Equities, Inc. and American Residential Equities, LLC.
Q. What percentage membership does American Residential Equities, Inc. have in JLDP, LLC?

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A. I'm not sure.
Q. What percentage interest does American Residential Equities, LLC have in JLDP, LLC?
A. I'm not sure.
Q. When you're referring to JLDP, LLC, the actual name of the company is JLDP26, LLC; correct?
A. Correct.
Q. And that's one of the parties on whose behalf the motion we've been discussing this morning has been filed; correct?
A. Yes, correct.
Q. Just to be clear on the record, the members of JLDP26, LLC are American Residential Equities, Inc. and American Residential Equities, LLC; correct?
A. Correct.
Q. Do you have any reason to believe that those two entities own their membership interest in JLDP26, LLC other than in equal shares?
A. No, I don't think they opened it -- had any equal shares.
Q. Does JLDP26 have any other members?
A. No.
Q. What does JLDP26 do?
A. JLDP26 was a conduit. It was done for

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tax purposes for our foreign investors.
Q. Could you explain to me in a little bit more detail what it is you mean?
A. When a foreign investor would make an investment, we were instructed by an international attorney -- and I don't remember who it was -- that --
MR. OLIN: Don't -- we're not going to disclose attorney-client privileged information, so --
BY MR. FERRER:
Q. I don't want you to tell me about any conversations that you or anyone else at American Residential Equities had with an attorney --
A. This one -- all it was was because -- for tax purposes, it was for the betterment for our investors that we form JLDP who then invested in numbered LLCs.
Q. Would it be fair to say that JLDP26, LLC is a member in all of the American Residential Equities entities listed on Page 5?
MR. OLIN: Object to the form.
A. No.
BY MR. FERRER:
Q. Why not?

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A. Because it's not.
Q. Are there any entities listed on Page 5 of the motion of which JLDP26, LLC is a member?
A. Yes.
Q. Could you tell me which ones?
A. They're members of ARE, LLC XXXII, XXXIII, XXXIV, XXXVI, XXXVII, XL, XLI, XLII, XLIII, XLV, L, LII, LIV, LVII, and LIX.
Q. Okay, and to be clear, you're unaware of any other member of JLDP26, LLC other than American Residential Equities, Inc. and American Residential Equities, LLC; correct?
A. Those are the only two members.
Q. What relationship, if any, is there between JLDP26, LLC and ARE Asset Management, LLC?
A. None.
Q. Does American Residential Equities, Inc. have any membership interests in any of the entities listed on Page 5 of the motion?
A. You said do they have an interest, meaning are they investors?
Q. Okay. Well, let's start with is American Residential Equities, Inc. a member of any of the entities listed on Page 5 of the motion?
A. They're managing -- they're like the

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managing partner with no equity in ARE XXVII and XXVIII.
Q. And when you refer to equity, what is it that you're talking about?
A. They did not disburse any funds or make any investments.
MR. OLIN: I'm sorry. I missed -- which company is this that he's the managing partner of XXVI --
THE WITNESS: Inc. is the managing partner of XXVII and XXVIII.
MR. OLIN: Thank you. I'm sorry. I missed it.
BY MR. FERRER:
Q. Is American Residential Equities, LLC an equity investor in any of the companies listed on Page 5?
A. No.
Q. Is American Residential Equities, LLC a member of any of the entities listed on Page 5?
A. They're a managing entity of these -- of the entities.
Q. Which ones?
A. That would be XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, XXXVII, XXXVIII, XL, XLI, XLII, XLIV,

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XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII.
Q. Slow it down a little. You said L, LI, LII --
A. -- LIV, LV, LVI, LVII and LIX.
Q. Do you see at the very top of Page 5 that there are two, American Residential Equities TN and American Residential Equities OPP. I'm not up to-date on my Roman numerals, but are those also Roman numerals?
A. No.
Q. Who is the manager of American Residential Equities TN?
A. That was -- that was their own company and they would be managed by American Residential Equities, LLC. But TN has been closed; it's no longer in business.
Q. And we'll come to that in just a moment. Who was the manager of American Residential Equities OPP?
A. That also would be American Residential Equities, LLC.
Q. Who were the members of American Residential Equities TN?
A. I don't remember.
Q. Was American Residential Equities, Inc.

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a member in American Residential Equities TN?
A. No.
Q. Was American Residential Equities, LLC a member in American Residential Equities TN?
A. I'm not -- I don't remember -- or unsure.
Q. You're unsure as you sit here today whether American Residential Equities, LLC was or wasn't a member of American Residential Equities TN?
A. Right, I don't remember.
Q. Was JLDP26, LLC a member of American Residential Equities TN?
A. No.
Q. When was American Residential Equities TN closed, to use your words?
A. I -- I think we closed them either in '07 or '08.
Q. Why was it closed?
A. They weren't doing any business.
Q. Was the business of American Residential Equities TN the same as the business of all of the other American Residential Equities --
A. No.
Q. -- Roman numeral entities listed?

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A. No.
Q. How was it different?
A. This was a capital raising entity.
Q. What do you mean by that?
A. They would be going out to secure investments and also look for pools of mortgages to buy. And they just never materialized.
Q. But what relationship, if any, was there ever between American Residential Equities TN and American Residential Equities, LLC?
A. American Residential Equities, LLC would oversee the operations of American Residential Equities TN.
Q. When you say that the business intended purpose of American Residential Equities TN never materialized, what do you mean?
A. They never really brought in any loans and they never brought in any investors.
Q. Did American Residential Equities TN ever send or wire any money into the Wells Fargo account of American Residential Equities, Inc.?
A. I do not believe so.
Q. And American Residential Equities TN did not have individual investors like the other American Residential Equities numbered entities as

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we've been discussing; correct?
A. Correct.
Q. American Residential Equities OPP, could you tell me whether that was also an investment company in the same manner as the American Residential Equities numbered entities we've been discussing this morning?
A. No.
Q. How was it different?
A. They would help oversee the operations of our offshore fund.
Q. When you talk about your offshore fund, you're talking about American Residential Equities Opportunity Fund; correct?
A. Correct.
Q. And is American Residential Equities OPP, LLC still operating today?
A. Yes.
Q. American Residential Equities OPP would not have individual investors in the same way that all of the other American Residential Equities numbered entities that are listed on this page; correct?
A. Correct.
Q. Did American Residential Equities OPP

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ever make any deposits directly into the Wells Fargo account of American Residential Equities, Inc. or the TD Bank account of American Residential Equities, LLC?

A. Yes.

Q. And to your knowledge, those deposits wouldn't identify any particular individual investor because again, American Residential Equities OPP, LLC didn't have any such individual investors; correct?

A. Correct.

Q. What, if any, ownership interest did American Residential Equities, Inc. have in American Residential Equities OPP?

A. American Residential Equities, LLC was -- would be also like a managing partner.

Q. And managing partner aside, what -- you understand that a membership interest in a limited liability company is akin to an ownership interest in a corporation? Do you understand that distinction?

A. So what you just said, LLC did not have an interest, an equity interest in the OPP.

Q. Who were the members of American Residential Equities OPP, LLC?

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A. I can't remember.

Q. Was Mr. Kirsch individually a member of American Residential Equities OPP?

A. No.

Q. Was American Residential Equities, LLC a member of American Residential Equities OPP, LLC?

A. Yes.

Q. What percentage interest did American Residential Equities, LLC have in American Residential Equities OPP?

A. They had zero equity interest.

Q. So a moment ago when I asked you about whether American Residential Equities, LLC had a membership interest in American Residential Equities OPP and you said yes, what were you referring to?

A. That they're the managing partner of the entity. They have no, you know, financial interest in that.

Q. And when you talk about financial interest, you're talking about an equity interest; correct?

A. That's correct.

Q. Do you remember who it was that had the equity interest in American Residential Equities

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OPP, LLC?

A. No.

Q. Is American Residential Equities OPP still operating?

A. Yes.

Q. Where is American Residential Equities OPP based out of?

A. I'm not sure exactly where they're at.

Q. Is American Residential Equities, LLC still the manager of American Residential Equities OPP?

A. I'm not sure but I think so.

Q. Is Addle Hill managing the operations of American Residential Equities OPP today?

A. I'm not sure.

Q. Who would be the right person to ask about American Residential Equities OPP?

A. I would believe that would be Mr. Kirsch.

Q. Now, it's your testimony that American Residential Equities, LLC did not have a membership interest in any of the entities listed on Page 5 of this motion other than in JLDP 26, LLC; correct?

A. Correct.

Q. None whatsoever?

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A. To the best of my knowledge.

Q. Have you reviewed the documents that have been produced to me in connection with this motion?

A. When you say have I reviewed what?

Q. Have you reviewed the operating agreements for each of these entities that were produced to me in this case?

A. No.

Q. So when you say that American Residential Equities, LLC has no membership or equity interest in any of these American Residential Equities numbered entities, what are you basing that testimony on?

A. I'm basing it on my memory of the tax returns that were prepared and the operations therein.

Q. Have you ever reviewed the operating agreements for any of these entities?

A. No.

(Plaintiffs' Exhibit 2 was marked for identification.)

BY MR. FERRER:

Q. Sir, I'm handing you what's been marked as Plaintiffs' No. 2. Please take your time to

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familiarize yourself with it so that I can ask you some questions about it.
A. Where am I looking at?
Q. You're looking at the entire document. I don't expect you to read it, but I want you to familiarize yourself enough so that you can answer some questions about it.
Mr. Hirschkowitz, have you had an opportunity to review the document?
A. I've looked it over.
Q. Do you recognize the operating agreement of American Residential Equities LIX, LLC?
A. Yes.
Q. Have you ever seen this document prior to today?
A. I just saw it just the other day.
Q. When you talk about just the other day, when is it that you're referring to?
A. Talking about, I think, it was on Thursday.
Q. I don't want you to tell me about any conversations that you had with your attorneys -- okay.
By the way, is Mr. Neustein representing you here today?

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A. I'm not sure what -- as far as I know, they all are.
Q. As far as you know, Mr. Neustein and Mr. Olin are representing you?
A. Yes.
Q. Are there any retainer agreements between American Residential Equities, LLC and Mr. Neustein's office?
A. I don't know.
Q. Was Mr. Neustein present at the conversation when you last saw these documents?
A. He was.
Q. And I'm going to ask you a series of questions, and counsel may want to object, but I need to ask them to preserve them for the record. Okay?
What did you talk about with Mr. Neustein when you reviewed these documents last?
MR. OLIN: We'll instruct the witness not to answer.
MR. NEUSTEIN: Objection.
BY MR. FERRER:
Q. And as far as you know, American Residential Equities, LLC doesn't have any retainer agreement with Mr. Neustein's office; correct?
MR. OLIN: He didn't say that. He said he didn't know.
BY MR. FERRER:
Q. As far as you know.
MR. OLIN: Well, you are saying as far as you know he didn't have. He says he didn't know one way or the other.
BY MR. FERRER:
Q. Okay.
MS. BRAVO: Objection to the form. You said American Residential Equities. What corporation --
MR. FERRER: Objection to the form is fine. We don't need to have a speaking objection.
BY MR. FERRER:
Q. Does American Residential Equities, LLC have a retainer agreement with Mr. Neustein's office?
A. I don't know.
Q. Does American Residential Equities, Inc. have a retainer agreement with Mr. Neustein's office?
A. I don't know.

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Q. Does Meadow Mint, LLC have a retainer agreement with Mr. Neustein's office?
A. I don't know.
Q. Does ARE Asset Management, LLC have a retainer agreement with Mr. Neustein's office?
A. I don't know.
Q. Does Seabreeze Financial, LLC have a retainer agreement with Mr. Neustein's office?
A. I don't know.
Q. Does American Residential Equities LIII, LLC have a retainer agreement with Mr. Neustein's office?
A. I don't know.
Q. Do you know if Mr. Neustein's office and Mr. Olin's office have what's called a joint defense agreement?
A. No.
Q. You don't know or --
A. I do not know.
Q. Directing your attention to Page 3 of the Operating Agreement of American Residential Equities LIX, LLC, which has been marked as Plaintiffs' Exhibit No. 2, and specifically to the highlighted portion which is Paragraph 2.14. Do you see that?

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A. Yeah.
Q. I'm going to read it into the record. I'll ask you to read along silently with me to make sure I read it correctly.
"Initial member means the manager and owner of a 5 percent equity interest in the company with a right to share in 5 percent of the profits, except as otherwise provided herein, income and gains arising from company operations during the offering and with a vested remainder interest in the company's equity upon liquidation, termination or dissolution of the company after payment of all debts and expenses of the company and any and all returns due to members other than the initial member."
Did I read that correctly?
A. Yes.
Q. And you understand that the manager of American Residential Equities LIX is American Residential Equities, LLC; correct?
A. Yes, they're the manager.
Q. And you understand from a reading of the paragraph we just read into the record that American Residential Equities, LLC is a 5 percent equity owner of American Residential Equities LIX,

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LLC; correct?
A. That's what it says here.
Q. And you have no reason to doubt that what it says in the operating agreement isn't in fact true?
MR. OLIN: Object to the form.
A. If you take it within this context, that would be the case --
BY MR. FERRER:
Q. Okay.
A. -- however, that's not what happened.
Q. Are there any documents other than this operating agreement that would show that in fact American Residential Equities, LLC is not a 5 percent equity owner of American Residential Equities LIX, LLC?
A. The tax return would show 0 percent capital contributed by American Residential Equities, LLC.
Q. Okay. What you're talking about is the tax return for American Residential Equities LIX, LLC would show that American Residential Equities, LLC is not a 5 percent equity interest in the company?
A. That's correct.

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Q. And you would agree with me that that tax return to the extent it says what you say it says is contrary to what the operating agreement states; right?
A. That would be contrary to the operating agreement.
Q. And the only way for me to find out whether American Residential Equities, LLC was in fact an owner of American Residential Equities LIX, LLC would be to look at the tax returns for American Residential Equities LIX, LLC; correct?
MR. OLIN: Object to the form.
A. That would be the only way because that would show 0 percent of capital contributed by American Residential Equities, LLC.
BY MR. FERRER:
Q. And to the extent that the operating agreements that have been provided to me in connection with all of the other American Residential numbered entities listed on Page 5 of the motion show that American Residential Equities, LLC is an equity owner in each of those companies, you would agree with me that I would also need to look at the tax returns for each of those companies to find out if in fact that was true or not?

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MR. OLIN: Object to the form.
A. Are you saying that in the operating agreement of all the other entities it says ARE, LLC is an equity member?
BY MR. FERRER:
Q. Yes, sir.
A. If you -- the tax returns would all show on the K-1s that ARE, LLC is a 0 percent equity owner on all numbered LLCs.
Q. And without looking at those tax returns from each of these American Residential Equities numbered entities, there would be no way for me to know that American Residential Equities, LLC was not in fact an equity owner of each of those entities as it states in each of their operating agreements; correct?
MR. OLIN: Object to the form.
A. The only way you would know is on the K-1s. Just the K-1s, not the entire tax return.
BY MR. FERRER:
Q. Okay. So just to be clear on the record, the only documents that you know of that contradict the statements made in the operating agreement for each of these American Residential Equities listed on Page 5 of the motion is to look

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at the K-1 report?
A. That would show zero percentage.
Q. And without looking at that document, there would be no other information from which I could gather that American Residential Equities, LLC is not an equity owner in each of the American Residential Equities numbered entities listed on Page 5; correct?
A. Correct.
MR. OLIN: Object to the form.
BY MR. FERRER:
Q. Correct?
A. Yeah.
MR. OLIN: The same.
BY MR. FERRER:
Q. Who prepared the tax returns for each of the American Residential Equities numbered entities listed on Page 5?
MR. OLIN: Object to the form.
A. Well, the tax return for ARE entities TN, there was none because that was closed. American Residential Equities C, there was none because that was closed. ARE --
MR. OLIN: Bill, he just asked you who the accountant would be.

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A. Well, I'm just saying that -- the tax returns for all these entities would have been McNair & Associates.
BY MR. FERRER:
Q. And McNair & Associates are based out of Las Vegas; correct?
A. Correct.
Q. Did McNair & Associates also prepare the tax returns for American Residential Equities OPP?
A. Yes.
Q. Did McNair & Associates also prepare the tax returns for JLDP26, LLC?
A. Yes.
Q. With respect to JLDP26, I just want to clarify something that you said earlier that I may have misunderstood.
Did you say that JLDP26, LLC is a hundred percent member of American Residential Equities LIII, LLC?
A. They're the 100 percent equity owner.
Q. Did you say that the equity owners of JLDP26, LLC are American Residential Equities, Inc. and American Residential Equities, LLC.
A. They're the -- those are two members of JLDP26.

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Q. Now I want to focus on American Residential Equities LIII for just a moment.
That entity, like the other entities we've been discussing earlier today, purchased a pool of mortgages at one point; correct?
A. Correct.
Q. How many of those mortgages remain in the portfolio for American Residential Equities LIII, LLC presently?
A. I don't know.
Q. Do you have an understanding whether any mortgages remain in that portfolio?
A. I don't know. I don't know if there's any mortgages or not.
Q. Is Addle Hill managing American Residential Equities LIII, LLC presently?
A. Yes.
Q. Is Addle Hill receiving a management fee for the services that it provides to American Residential Equities LIII, LLC?
A. No.
Q. Why not?
A. There's -- there's no money to receive any management fees.
Q. Are the management fees realized only

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when the assets owned by each of those entities are liquidated?
A. We haven't -- American Residential Equities, LLC has not taken any management fees since -- for a couple years already.
Q. Has Addle Hill taken any management fees with respect to its management of American Residential Equities LIII, LLC?
A. No.
Q. Do you have any understanding whatsoever regarding what the status of the loan portfolio that American Residential Equities LIII, LLC owns?
A. No.
Q. Sir, you stated earlier that you had an opportunity to review the documents that were produced to me earlier this week at some point this past week; correct?
A. Yeah.
Q. Was it before or after Thursday of this week?
A. It was on Thursday.
Q. Thursday morning or Thursday afternoon?
A. Thursday afternoon.
Q. And Thursday afternoon at what time?
A. Late afternoon.

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Q. When you say late afternoon, would you say it was after 4:00 o'clock?
A. About.
Q. And prior to 4:00 o'clock this past Thursday, you hadn't ever reviewed the documents that were produced to me; correct?
A. I didn't have an opportunity, no.
MR. FERRER: Let's just go off the record for a second.
(Discussion off the record.)
BY MR. FERRER:
Q. Mr. Hirschkowitz, just very quickly, sir.
Does JLDP26, LLC have any operations?
A. No.
Q. It's just a conduit, as you mentioned earlier?
A. Yes.
MR. FERRER: Sir, I have no further questions today. There will be additional documents produced to us, and counsel and I have agreed that you will be called upon to testify again. But for purposes of today, I'm concluding my deposition. Thank you.
MR. NEUSTEIN: I have a couple of

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questions.
CROSS-EXAMINATION
BY MR. NEUSTEIN:
Q. Before we took our break, counsel asked you if you were familiar with the documents that we produced to them, and you said you had never seen them. Do you know what documents we produced to them?
A. The only ones that I'm aware of is this -- is this document there.
Q. You're looking at Exhibit 1?
A. Right.
Q. Are you familiar with the Aqua Loan Services Summary?
A. The summary, yes.
Q. Are you familiar with TD Bank Statements of Account?
A. Yes.
Q. Wachovia Commercial Checking Wholesale?
A. Yeah.
Q. Wachovia Commercial Checking August 1st, '07 through August 31st, '07?
A. Yeah.
Q. Wachovia Commercial Checking Wholesale October 1st, '07 through October 31, '07?

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A. Yes.
Q. Now you testified way back in the beginning that you were employed by ARE, LLC?
A. That's correct.
Q. Okay, and you're the CFO of ARE, LLC?
A. Correct.
Q. As part of your duties and functions as CFO of ARE, LLC, do you also perform as CFO for American Residential Equities, Inc.; Meadow Mint, LLC; ARE Residential Equities LIII, LLC and all of the numbered LLCs?
A. I would perform the same duties, yes.
MR. NEUSTEIN: Okay. I have no further questions at this time.
MR. OLIN: I have a couple. I assume you would just assume I go first?
MR. FERRER: Of course.
CROSS-EXAMINATION
BY MR. OLIN:
Q. Just so we're clear, could you describe for me what Vantium did?
A. What Vantium did, to the best of my knowledge, is they would service mortgages. They would receive payments. They would make disbursements for -- escrow payments for real

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estate taxes, insurance, that kind of thing, to make sure the asset remained viable. And at the end of the month, we would receive a net proceeds from them based on the transactions.
Q. Okay, and those transactions were essentially, perhaps not completely, but the receipt of mortgage payments on various properties --
A. Correct.
Q. -- which they would identify where they received the money from?
MR. FERRER: Object to the form.
A. Yes.
BY MR. OLIN:
Q. Which property, which mortgage, where the money -- there would be an origin of the money provided to you?
A. Yes.
Q. So that you would know how to allocate those receipts --
A. Our -- the person in charge of our database would get that information and know where they would all go.
Q. So because they were managing mortgages that were owned by all of these various entities,

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you would have to know which mortgages were being paid so that you could allocate it --
A. Right.
Q. -- when you received the net deposit?
MR. GUTTMAN: Form.
A. You're talking about the company?
BY MR. OLIN:
Q. Yes.
A. Then that's correct.
Q. I just want to go over this operating agreement issue.
You know who the judgment debtors are?
A. Yes.
Q. Did any of the judgment debtors own any beneficial interest directly or indirectly in the equity of any of the entities listed on Page 5 of Exhibit 1?
MR. GUTTMAN: Object to the form.
A. My answer to that would be "no."
BY MR. OLIN:
Q. And that's regardless of what the operating agreements might say?
A. That is correct.
Q. All right. And the absence of any ownership interest in any of those entities would

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show up on K-1s that were distributed to any judgment debtor that was managing that entity?
MR. FERRER: Object to the form.
A. That's correct.
BY MR. OLIN:
Q. So if ARE, Inc., which I think you said managed XXVII and XXVIII or ARE, LLC, which managed, as I understand it, the rest of the -- or almost all of the rest of them, would get K-1s for the ARE, Inc. and the ARE, LLC return?
A. Correct.
Q. And it would show whether they owned an interest in those various numbered entities that are on Page 5; correct?
A. Correct.
MR. FERRER: Object to the form.
MR. OLIN: That's all I have.
REDIRECT EXAMINATION
BY MR. FERRER:
Q. Very quickly, Mr. Hirschkowitz.
Along those lines, would you mind pulling Plaintiffs' No. 2 out. That's the Operating Agreement for American Residential Equities LIX, LLC.
A. Okay.

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Q. Would you mind, sir, turning to Article 4 with the heading Capital Contributions: Loans to Company.
A. Okay.
Q. Focusing your attention on the highlighted portion, I'm going to read that into the record. I would ask you to read along silently with me, and specifically I'm reading from Paragraph 4.1.
"Capital Contribution by Manager. The manager will contribute $101,000, thus entitling it to 5 percent of all profits, income and gains and have a vested remainder in the company's profits, income and gains, as well as to any assets remaining upon dissolution, termination or liquidation of the company after payment of all debts and expenses of the company."
Did I read that correctly, sir?
A. Yes.
Q. And you understand, again, that the manager to which that particular paragraph refers is American Residential Equities, LLC; correct?
A. Correct.
Q. And you understand that what this paragraph is saying is that American Residential

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Equities, LLC was going to contribute $101,000 for its 5 percent equity interest in American Residential Equities LIX, LLC; correct?
A. That's what it says.
Q. Okay, and what you're telling me is that despite what this document says, that's not in fact true?
A. That is right. We did not -- American Equities, LLC did not contribute any funds to LIX.
Q. And how would I determine whether or not what it says in this document regarding the contribution of $101,000 by American Residential Equities, LLC into American Residential Equities LIX, LLC is true or not?
A. Well, if you look at the K-1, it would show you the capital belonging to ARE, LLC with zero.
Q. When you talk about the K-1, for which year is it that you're referring?
A. Any year.
Q. And this agreement was signed on the 7th day of November 2007; correct?
A. That's the date on here.
Q. And you have no reason to believe that the date on there is not the actual date when the

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document was signed?
A. I have no knowledge of when it was signed.
Q. And in order to find out whether American Residential Equities, LLC contributed the $101,000, I would have to look at the K-1s issued by American Residential Equities LIX, LLC to American Residential Equities, LLC for the tax years 2007, 2008, 2009 and 2010; correct?
A. You can look at any -- any year, 2010, and it would still show you zero.
Q. Well, but just looking at 2010 wouldn't show me if at a certain point American Residential Equities, LLC was an equity member in American Residential Equities LIX, LLC and subsequently didn't own that interest; right?
A. I guess that could be -- I don't know. Probably.
Q. But in order to find out whether American Residential Equities, LLC was ever a member, an equity owner in American Residential Equities LIX, LLC, I would have to look at all of the K-1s issued to American Residential Equities, LLC by American Residential Equities LIX, LLC from 2007 through the present date; correct?

A. That would be correct.
MR. FERRER: Thank you very much, Mr. Hirschkowitz. All done.
MR. OLIN: All done, all right. Good. We'll read.
MR. FERRER: I'll take it, Lance.
MR. OLIN: And we'll take an E-Tran and the exhibits.
(The reading and signing of this deposition was not waived.)
(This deposition was concluded at 11:55 a.m.)

CERTIFICATE OF OATH

STATE OF FLORIDA :
:SS.
COUNTY OF MIAMI-DADE :

I, Lance W. Steinbeisser, Notary Public, State of Florida, certify that WILLIAM HIRSCHKOWITZ personally appeared before me on the 6th of August, 2011.

Signed this 9th day of August, 2011.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Notary Public, State of Florida at Large
My Commission Number: DD 876431
Expires: May 4, 2013

REPORTER'S DEPOSITION CERTIFICATE

I, Lance W. Steinbeisser, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the deposition of WILLIAM HIRSCHKOWITZ; that a review of the transcript was requested; and that the transcript, pages 1 through 94, is a true record of my stenographic notes.
I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 9th day of August, 2011 at Miami, Florida.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Certified Court Reporter

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ERRATA SHEET
DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES
RE : REDWOOD VS. JEFFREY L. KIRSCH
CASE NO. : 08-65603 CA 40
DEPO OF : WILLIAM HIRSCHKOWITZ
TAKEN : AUGUST 6, 2011

Page #	Line #	Change	Reason

Under penalties of perjury, I declare that I have read the foregoing document, and that the facts stated in it are true.

Signature Date

STEINOTYPE, INC.
1140 NE 86th Street
Miami, Florida 33138-3434
(305)632-4464

August 6, 2011
Michael S. Olin, Esquire
LAW OFFICES OF MICHAEL S. OLIN, P.A.
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RE : REDWOOD VS. KIRSCH
DEPO OF : WILLIAM HIRSCHKOWITZ
TAKEN : August 6, 2011

Dear Mr. Olin:

With reference to the deposition of WILLIAM HIRSCHKOWITZ taken on August 6, 2011, in connection with the above-captioned case, please find enclosed the transcript of said deposition.
Please arrange to have the witness read your copy of the transcript, denoting any corrections by page and line number on the enclosed errata sheet. This errata sheet must be signed by the witness, and returned to Jose M. Ferrer, attorney for the Plaintiffs, for filing with the original transcript, which has been sent to counsel.
If this has not been taken care of within the next thirty days or by the time of trial, whichever comes first, it will then be concluded that the reading, subscribing and notice of filing have been waived.

Sincerely,

STEINOTYPE, INC.
cc: Original transcript
J. Ferrer, Esq.

Electronically signed by Lance Steinbeisser (201-323-334-0895)
Electronically signed by Lance Steinbeisser (201-323-334-0895)
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EXHIBIT E

11
ORDR

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

COMPLEX BUSINESS LITIGATION DIVISION

CASE NO.: 08-65603 CA 40

REDWOOD RECOVERY SERVICES, LLC, and ELEVENHOME LIMITED,

Plaintiffs,

vs.

JEFFREY L. KIRSCH, MEADOW MINT, LLC, KEY BISCAYNE FAMILY TRUST, AMERICAN RESIDENTIAL EQUITIES, LLC, AMERICAN RESIDENTIAL EQUITIES, INC., ARE ASSET MANAGEMENT, LLC, SEABREEZE FINANCIAL, LLC, and AMERICAN RESIDENTIAL EQUITIES, LIII, LLC,

Defendants.
_____/

FILED FOR RECORD
2011 MAR -7 PM 2:16
CLERK COUNTY COURTS
CIRCUIT & COUNTY FLA.
MIAMI-DADE COUNTY, FLA.

FINAL JUDGMENT IN FAVOR OF PLAINTIFF ELEVENHOME LIMITED

This action was tried before the Court on January 17, 2011 upon Plaintiff Elevenhome Limited's ("Elevenhome") Second Amended Complaint against American Residential Equities, LIII, LLC ("ARE 53"). On the evidence presented, the Court finds as follows:

FINDINGS OF FACT

I. The Background

1. Jeffrey Kirsch ("Kirsch"), a Florida lawyer, is the principal of American Residential Equities, LLC and American Residential Equities, Inc. (collectively, "ARE"), a Miami-based investment company which, in 2006, was in the business of raising capital from foreign individuals for purposes of investing in pools of residential mortgage loans.

2. ARE represented it would acquire only first mortgage loans in bulk from banks at deeply discounted prices such that the underlying real estate collateral value would be substantially higher than the face value of the investment. Representations to the investors were that even in the event of foreclosure of the mortgage for non-payment and/or a declining real estate market the investor should come out whole since the real estate collateral was supposed to be worth substantially more than the investment amount, and ARE would liquidate the investment portfolios in approximately twelve (12) to eighteen (18) months.

3. The investment involved in this case was structured in the following manner: (1) the individual investor lent money to a limited liability company which ARE formed for the individual investor; (2) the new limited liability company purchased pools of troubled residential loans at a discount using the monies loaned from that investor; (3) the new limited liability company through its Manager, ARE, delivered to the investor a promissory note for the amount of the loan; (4) the new limited liability company, through ARE, delivered to the investor an agreement pledging the membership interest in the new limited liability company as collateral for the debt.

II. The Elevenhome Note

4. On April 28, 2006, Kirsch, as the Manager of ARE 53, signed and delivered to Elevenhome the Elevenhome Note by which ARE 53 "promise[d] to pay to the order of [Elevenhome] Limited . . . the principal sum of TEN MILLION FOUR HUNDRED NINETY-TWO THOUSAND TWO HUNDRED FORTY-TWO DOLLARS and 66/100 (US$10,492,242.66)."

5. The Elevenhome Note was one of two notes comprising a $14 million loan made to ARE 53 by Elevenhome. ARE 53 paid off the other note for $3,507,757.34, on August 23,

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2006. ARE 53 used the entire $14 million loan proceeds to purchase a pool of real estate assets (the "Assets") which it projected to be liquidated over an 18-month period.

6. Elevenhome is a British Virgin Islands company established by Aiden Couch ("Couch"), a foreign national, for the purpose of holding the loans made to ARE. The evidence reflects that, for the lender's convenience, the transfer of the $14 million to ARE 53 was made from the bank account of another Couch holding company, Ambigil Holdings Limited ("Ambigil"), which owned 100% of the member units of Elevenhome.

7. Prior to loaning $14 million to ARE 53, Elevenhome made two smaller loans to ARE entities. These earlier loans were also funded by Ambigil on behalf of Elevenhome and repaid to Ambigil without incident.

8. The unrebutted testimony is that the actual name of the note holder is Elevenhome Limited. The name of the payee on the note is Eleven Homes Limited, but this was shown to be a scrivener's error. There is no entity known as Eleven Homes Limited.

9. The Elevenhome Note was divided into two tranches; half of the principal amount of the Elevenhome Note accrued interest at the rate of eight percent per annum for twenty four months (the "24-Month Tranche"), and the other half accrued interest at the rate of eight and one half percent per annum for a term of eighteen months (the "18-Month Tranche"). The 18-Month Tranche was "fully amortizable", meaning that all interest and principal was due on October 28, 2007, eighteen months from the date of the Elevenhome Note.

10. Additionally, the Elevenhome Note required "[a]ccrued interest [to] be paid monthly on or before the first day of each calendar month after the execution of this Note." ARE 53 was permitted to prepay the principal balance of the Elevenhome Note in whole or in part at any time without penalty, but failure to pay principal or interest when due would

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constitute a default which would entitle Elevenhome to accelerate all sums due under the Elevenhome Note, all of which would then accrue interest at the default rate of eighteen percent.

11. For approximately two years following the execution of the Elevenhome Note ARE 53 made regular payments of principal and interest pursuant to its terms. The evidence showed that the allocation of each payment as to interest and principal and against which of the two tranches the payment would be applied, was entirely determined by ARE 53. Elevenhome never questioned ARE's decisions and, in fact, accepted ARE 53's allocation of payments as reflected in account statements that ARE 53 provided to Elevenhome on a monthly basis. According to the last account statement provided to Elevenhome, ARE 53 allocated the monthly payments it had made to the 24-Month Tranche first, so that by February 15, 2007, ARE 53 had paid off the 24-Month Tranche.

12. After that date, ARE 53 continued making payments toward the 18-Month Tranche until March 31, 2008 when it made an interest payment of $25,048.14. No other payments were made after that date. According to ARE 53's own account statement, the outstanding principal balance on the 18-Month Tranche is $3,456,511.13.

13. ARE 53 presently owes Elevenhome **$6,650,435.13**, consisting of the principal amount reflected in ARE 53's account statement of $3,456,511.13, together with interest through the first day of trial, January 17, 2011.

CONCLUSIONS OF LAW

14. The Elevenhome Note is an enforceable contract supported by adequate consideration.

15. ARE 53's argument that the Elevenhome Note is not supported by adequate consideration because it was Ambigil which actually loaned the $14 million to Elevenhome, fails

because it ignores the fact that ARE 53 got exactly what it bargained for; it received $14 million together with payment of hundreds of thousands of dollars in commissions and fees which Kirsch testified ARE 53 was entitled to in connection with the loan transaction. These facts establish sufficient consideration for the Elevenhome Note. *See* 11 Am. Jur. 2d *Bills and Notes* § 124 (2010) (It is not necessary that consideration flow directly from the payee to the makers of the note in order to bind the makers, so long as they do receive some benefit under the note.

16. ARE 53 breached the Elevenhome Note by failing to make any principal or interest payments after March 31, 2008.

17. As a direct and proximate result of ARE 53's breach of the Elevenhome Note, Elevenhome has suffered damages totaling **$6,650,435.13,** which represents the amount of principal and interest due on the Elevenhome Note as of January 17, 2011.

18. ARE 53's defense that the remaining amounts owed under the Elevenhome Note are not due until it liquidates all of the mortgage inventory assets also fails as a matter of law. Specifically, ARE 53 argues that the meaning of an isolated sentence within the Elevenhome Note required payments to be applied first to the 18-Month Tranche until paid, and then to the 24-Month Tranche. ARE 53 contends that the Court should disregard the fact that ARE 53 itself chose to pay off the 24-Month Tranche first and apply the payments ARE 53 made to the 18-Month Tranche. Instead, ARE 53 argues that the monies paid should have been applied in the reverse order so that ARE 53 would technically not be in default under the Elevenhome Note. This is so, it contends, because, under ARE 53's reading of the Elevenhome Note, payments are not due with respect to the 24-Month Tranche until ARE 53 disposes of "all or substantially all of the assets" it purchased with the $14 million loan (i.e., the "Liquidation Date"), something which has not yet happened. I reject this conclusion for a number of reasons.

19. First, any argument regarding the supposed maturity date of the 24-Month Tranche is academic. ARE 53 chose to pay that tranche first.

20. Second, the maturity date of the 24-Month Tranche was April 28, 2008 and not the date when all of the assets are liquidated as ARE 53 now contends. ARE 53 relies for its argument on the sentence within the "Interest" section of the Elevenhome Note which states that "[p]rior to the Liquidation Date, Borrower will not make any payments other than Current Interest, the 'Preferred Return' (defined below) and 'Cash Outflows' (defined below)." This after-the-fact reading of the Elevenhome Note is inconsistent with the manner in which the parties actually acted on the Elevenhome Note and is belied by the evidence. Under Florida law, the actions of the parties may be considered as a means of determining the interpretation they themselves placed upon the contract. *See Lalow v. Codomo*, 101 So. 2d 390 (Fla. 1958). Here, for two years following the execution of the Elevenhome Note, ARE 53 provided Elevenhome with monthly account statements which clearly stated that the 24-Month Tranche was "Payable" on April 28, 2008. Therefore, the Court rejects ARE 53's contention, made for the first time after the lawsuit was filed, that the maturity date of the 24-Month Tranche was a date other than April 28, 2008.

21. Third, even if it is assumed the terms of the Elevenhome Note would have required the amounts ARE 53 paid to be applied first to the 24-Month Tranche, the parties modified the manner of payment by their subsequent conduct. Under Florida law, the parties' conduct can modify the terms of a contract. *See St. Joe Corp. v. McIver*, 875 So. 2d 375, 382 (Fla. 2004) (*citing In re General Plastics Corp.*, 158 B.R. 258 (Bankr. S.D. Fla. 1993) *and Danforth Orthopedic Brace & Limb, Inc. v. Florida Health Care Plan, Inc.*, 750 So. 2d 774, 776 (Fla. 5th DCA 2000)). The undisputed evidence in this case demonstrates that ARE 53, in its

discretion, chose to apply the payments it made under the Elevenhome Note to the 24-Month Tranche first. Indeed, ARE 53 provided Elevenhome with monthly account statements which showed that the 24-Month Tranche was "Paid in Full [on] 2/15/07[,]" leaving only the 18-Month Tranche to be paid. Elevenhome had a right to and relied on the representation made month after month by ARE 53 that these statements contained accurate and correct information. Having failed to make any of the required monthly interest payments since March 31, 2008 or to otherwise amortize the 18-Month Tranche by October 28, 2007, ARE 53 is in default of the provisions of the Elevenhome Note which require "[a]ccrued interest [to] be paid monthly on or before the first day of each calendar month after the execution of this Note[,]" and the provisions which require the 18-Month Tranche to be "fully amortiz[ed]" within eighteen months.

22. Alternatively, the parties modified the terms of the Elevenhome Note by subsequently agreeing to the First Amendment to Settlement Agreement (the "First Amendment"). Although neither ARE 53 nor Elevenhome were named as parties to the First Amendment, it was signed by Eric Magno, who was Elevenhome's Manager and by Kirsch on behalf of ARE, which was ARE 53's Manager. Their signatures on behalf of the parties to the Note was sufficient to modify the terms of the Elevenhome Note. *See St. Joe Corp.*, 875 So. 2d at 382 ("Under Florida law, the parties' subsequent conduct also can modify the terms in a contract."); *Danforth Orthopedic*, 750 So. 2d at 776 ("[P]arties can modify the terms of their contract by subsequent conduct."). The First Amendment treated the $3,456,511 reflected in ARE 53's monthly account statement as a balance due and owing as of April 28, 2008, and provided for an extension of the maturity date to January 1, 2009 if certain conditions were met. Although the specified conditions were never met and the maturity date reverted back to the modified maturity date of April 28, 2008, nevertheless, the parties agreed to the payments due

under the 18-Month Tranche. Consequently, ARE 53 defaulted under the Elevenhome Note by failing to make any payments of principal or interest since April 28, 2008 when the outstanding balance of the Elevenhome Note matured.

23. Under either of the scenarios discussed above, ARE 53 is also in breach of the default provisions contained in paragraph 6 of the Elevenhome Note, which specifically defines a default to include the failure by ARE 53 to meet its obligation to make required principal or interest payments, and provides that "[i]n the event of default [t]hereunder, the entire amount due [t]hereunder shall be immediately due and payable."

24. Finally, ARE 53's argument that its obligation to pay the outstanding principal and interest owed under the Elevenhome Note will not arise until it has liquidated all of the assets, however long it might be before it actually does so, is equally unavailing. As an initial matter, the term "Liquidation Date" appears in the "Interest" section of the Elevenhome Note and appears only to describe when "Deferred Interest" is due under the Elevenhome Note. Additionally, in order to give the meaning which ARE 53 ascribes to the Note, the Court would have to disregard the words "fully amortizable" used to describe the maturity date of the 18-Month Tranche, which, according to ARE 53's own account statements, is the only tranche that remains to be paid.

25. Moreover, even assuming *arguendo* that the term "Liquidation Date" describes when the remaining principal is due under the Elevenhome Note, ARE 53 nevertheless defaulted on the Elevenhome Note by failing to liquidate the assets within a reasonable time. Although the Elevenhome Note defines the term "Liquidation Date" as "the date on which [ARE 53] has disposed of all or substantially all of the assets," it does not fix a date certain by which this liquidation is supposed to occur. Under Florida law, when no time or an indeterminate or

indefinite time is specified for the performance of an act, the law implies a reasonable time for its performance. *See Hatcher v. Miller*, 427 So. 2d 1039, 1040 (Fla. 1st DCA 1983); *see also Hammond v. DSY Developers, LLC*, 951 So. 2d 985, 988 (Fla. 3d DCA 2007); *De Cespedes v. Bolanos*, 711 So. 2d 216, 218 (Fla. 3d DCA 1998); *Doolittle v. Fruehauf Corp.*, 332 So. 2d 107, 109-10 (Fla. 3d DCA 1976); *and Tyner v. Woodruff*, 206 So. 2d 684, 686 (Fla. 4th DCA 1968). Moreover, evidence may be introduced to aid in ascertaining what was intended as a reasonable time. *See Whiting v. Gray*, 8 So. 726, 727 (Fla. 1891).

26. I find that a reasonable time for liquidating the assets was, at most, eighteen months from the date of the Elevenhome Note. At or about the time ARE 53 delivered the Elevenhome Note, ARE had made numerous representations that the loan would be repaid no later than eighteen months from the date of the loan. On August 27, 2007, the day before Kirsch signed the Elevenhome Note, Kirsch sent an email to Magno attaching a "cash flow" which projected that the assets would be liquidated by no later than eighteen months. Magno testified that Kirsch's representations regarding how long it would take to liquidate the assets were consistent with the manner in which two prior loans Elevenhome had made to ARE were paid back. Both were paid within eighteen months from the date of the respective loans. Thus, even it is assumed that the principal balance owed under the Elevenhome Note was payable only upon the liquidation of all of the assets, ARE 53 has nevertheless defaulted under the Elevenhome Note by failing to liquidate the assets and pay Elevenhome the outstanding principal and interest owed on the Elevenhome Note within eighteen months.

27. With respect to Count III of Plaintiffs' Second Amended Complaint for reformation of the Elevenhome Note, the Court finds in favor of Elevenhome and reforms the Elevenhome Note to reflect that the holder of the Note is "Elevenhome Limited" instead of

"Eleven Homes Limited." Specifically, the Court finds that there was a mutual mistake, as both parties (ARE 53 and Elevenhome) intended to deliver the Elevenhome Note to "Elevenhome Limited," but due to a scrivener's error instead made it payable to "Eleven Homes Limited," a non-existent entity. *See Providence Square Ass'n, Inc. v. Biancardi*, 507 So. 2d 1366, 1372 (Fla. 1987) ("A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument."). It is clear from the evidence that, but for this clerical error, Couch intended Elevenhome to be the entity named as the holder of the Elevenhome Note. ARE 53 did not have a vote in the matter and was essentially indifferent to Couch's decision. 21 *Bevis Constr. Co. v. Grace*, 134 So. 2d 516, 519 (Fla. 1st DCA 1961) ("[E]quity will reform an instrument to prevent manifest injustice and to express the true intent of the parties."); *Providence Square,* 507 So. 2d at 1369 ("A court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument.").

WHEREUPON it is **ORDERED AND ADJUDGED** that:

28. Final Judgment is entered in favor of Elevenhome Limited on Counts I and III of Elevenhome Limited's Second Amended Complaint against Defendant American Residential Equities, LIII, LLC.

29. Elevenhome Limited, whose address is 7330 SW 148th Street, Miami, Florida 33158, shall recover from **American Residential Equities, LIII, LLC**, whose address is 848 Brickell Avenue, Penthouse, Miami, Florida 33131, the sum of **$6,650,435.13 (six million six hundred fifty thousand four hundred thirty five dollars and thirteen cents),** for all of which let execution issue.

30. Pursuant to section 55.03, Fla. Stat. (2011), this judgment shall bear interest at the legal rate of **6% (six percent)** *per annum* from the date of the judgment until paid.

31. Pursuant to the terms of the Elevenhome Note, Elevenhome is entitled to recover its reasonable attorneys' fees and costs from the American Residential Equities, LIII, LLC. The Court reserves jurisdiction to determine the amount of such attorneys' fees and taxable costs.

32. ARE 53 shall complete under oath Florida Rule of Civil Procedure Form 1.977 (Fact Information Sheet), including all required attachments, and serve it on Elevenhome's attorney within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed.

33. Jurisdiction of this case is retained to enter further orders for the award of fees and costs and to compel ARE 53 to complete form 1.977, including all required attachments, and serve it on Elevenhome's attorney.

ORDERED in Chambers at Miami-Dade County, Florida this 7th day of March, 2011.

HERBERT STETTIN
SENIOR CIRCUIT JUDGE

Copies furnished to:

- Jose M. Ferrer, Esq.
- Jorge D. Guttman, Esq.
- Alan Rosenthal, Esq.
- Natalie J. Carlos, Esq.

EXHIBIT F

IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
COMPLEX BUSINESS LITIGATION
CASE NO. 08-65603 CA 40

REDWOOD RECOVERY SERVICES, LLC,
and ELEVEN HOMES LIMITED,

Plaintiffs,

vs.

JEFFREY L. KIRSCH, et al.,

Defendants.
_____/

DEPOSITION OF
WILLIAM HIRSCHKOWITZ
Taken on Behalf of the Plaintiffs
DATE TAKEN: September 26, 2011
TIME: 10:01 a.m. - 12:26 p.m.
PLACE: 1450 Brickell Avenue
Miami, Florida

Examination of the witness taken before:
Lance W. Steinbeisser, RPR-CSR-FPR
Certified Court Reporter

APPEARANCES:
ON BEHALF OF THE PLAINTIFFS:
BY: Jose M. Ferrer, Esquire
Jorge D. Guttman, Esquire
LAW OFFICES OF BILZIN SUMBERG,
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(305)374-7580
jferrer@bilzin.com
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ON BEHALF OF THE DEFENDANTS:
By: Michael S. Olin, Esquire
Alaina Fotiu-Wojtowicz, Esquire
LAW OFFICES OF MICHAEL S. OLIN, P.A.
169 East Flagler Street, Suite 1224
Miami, Florida 33131-1205
(305)677-5088
lgarcia@olinlawfirm.com
Also present: Paul DeStefanis

I-N-D-E-X

WITNESS	PAGE
WILLIAM HIRSCHKOWITZ	
Direct Exam By Mr. Ferrer	3
Cross-Exam By Mr. Olin	97
Redirect Exam By Mr. Ferrer	98

(No exhibits were marked.)

Certificate of Oath .....Page 99
Reporter's Deposition Certificate .....Page 100
Errata Sheet .....Page 101

Thereupon--
WILLIAM HIRSCHKOWITZ
was duly administered the oath: Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

DIRECT EXAMINATION

BY MR. FERRER:

Q. Mr. Hirschkowitz, welcome back, sir.

A. Thank you.

Q. Sir, how were the corporate records of American Residential Equities, LLC historically kept?

A. When you say the records, are you talking -- what are you talking about?

Q. Okay. Well, let's start with the general ledgers. Did American Residential Equities, LLC keep a general ledger?

A. We kept a general ledger, yes.

Q. And when did American Residential Equities, LLC begin to keep that general ledger?

A. We had general ledgers ever since we began.

Q. And when you say ever since we began,

when was it that American Residential Equities, LLC began?

A. I believe that we began in 2003.

Q. And in what form was that general ledger of American Residential Equities, LLC maintained?

A. Well, in 2003 -- it was before I got there and they had an outside accountant -- but when I got there, we had -- and then we set up QuickBooks.

Q. When did you get there, sir?

A. March of 2004.

Q. And would it be fair to say that since March of 2004, American Residential Equities, LLC maintained its general ledger using the QuickBooks software?

A. We've used QuickBooks software since 2004.

Q. Has American Residential Equities, LLC continued using QuickBooks to maintain its general ledger since March of 2004?

A. Yes.

Q. Does American Residential Equities, LLC maintain its general ledger in QuickBooks today?

A. Yes.

Q. When you save entries on QuickBooks, are

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those entries saved locally on your computer or on a server?
MR. OLIN: Object to the form.
BY MR. FERRER:
Q. You can answer.
A. We gave it -- we used to save it on the server but then we changed it to my hard drive.
Q. When you say that you used to save it on the server, when is it that American Residential Equities, LLC began keeping its general ledger in QuickBooks and saving it on its server?
A. We had it on our server through the year 2007.
Q. Through what month in 2007 was the QuickBooks information saved on the server?
A. I don't remember.
Q. And where was that server physically located?
A. I don't remember.
Q. Did you ever see it?
A. No.
Q. How did you know it was kept on the server?
A. Because when I would log in, I would have to go to the server.

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Q. You've never seen any server that American Residential Equities --
A. No.
Q. -- used?
What was it about 2007 that caused American Residential Equities, LLC to start maintaining its general ledger locally on your hard drive as opposed to on the server?
A. Because we had an employee break-in.
Q. Who was the employee that broke in?
A. That I don't remember.
Q. Could you tell me the circumstances pursuant to which that employee broke in and American Residential Equities, LLC started maintaining its general ledger on your hard drive?
A. They wanted to get some financial information.
Q. Could you be a little bit more specific?
A. All I remember is that they wanted to get some financial information concerning the company.
Q. When you say they, are you referring to one individual or various individuals?
A. There was one at that time.
Q. And do you remember that person's name?

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A. No, I don't remember.
Q. And when you say at that time, which time period are you referring to?
A. Sometime in 2007.
Q. Were there subsequently other employees of American Residential Equities, LLC that tried to steal information?
MR. OLIN: Object to the form.
A. There was one prior to that that tried.
BY MR. FERRER:
Q. Okay, and what was the name of that person?
A. That one I don't remember either.
Q. With respect to the first employee of American Residential Equities, LLC that tried to get financial information, whose name you can't remember, was it a man or a woman?
A. I think it was a woman.
Q. And what position or title did that woman hold with American Residential Equities, LLC?
A. I don't remember.
Q. At the time that that woman attempted to get financial information from American Residential Equities, LLC, was she still employed by the company?

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A. Yes.
Q. Is that woman still employed by American Residential Equities, LLC today?
A. No.
Q. What were the circumstances of her leaving American Residential Equities, LLC?
A. I don't really remember.
Q. So that we're clear, the only thing you remember about that was that there was a woman that worked at American Residential Equities, LLC that tried to get financial information; correct?
A. That's correct.
Q. With respect to the second employee of American Residential Equities, LLC that you mentioned earlier had attempted to get financial information from American Residential Equities, LLC, do you remember if that was a man or a woman?
A. I think that was a man.
Q. Okay, and what positions or titles did that man occupy with American Residential Equities, LLC?
A. That I don't remember.
Q. Did you ever interact with him?
A. Well, I interacted with everybody.
Q. Do you remember what -- regardless of

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whatever offices, positions or titles he may have had with American Residential Equities, LLC -- what his day-to-day duties were with the company?

A. I don't remember.

Q. And when that person tried to obtain financial information from American Residential Equities, LLC, was he still an employee of American Residential Equities, LLC?

A. Yes.

Q. Is he still employed by American Residential Equities, LLC?

A. No.

Q. What were the circumstances pursuant to which he left American Residential Equities, LLC?

A. That I don't know.

Q. What was it about the woman or the man that you talked about earlier trying to get financial information from American Residential Equities, LLC that changing the manner of storage of the QuickBooks database was supposed to fix?

A. That would make it harder for somebody to break in.

Q. How did American Residential Equities, LLC discover that these two individuals had attempted to break into the financial information

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of American Residential Equities, LLC?

A. I don't -- I don't really remember.

Q. Have you had the same computer since 2007?

A. No.

Q. How many times have you changed your computer since 2007?

A. I would say two, three times.

Q. In 2007 when the decision was made to change the manner in which the QuickBooks database information was saved from the server to your local computer, what computer did you have?

A. I had a desktop.

Q. Do you remember what the brand of that desktop was?

A. No.

Q. Do you still have access to that desktop?

A. No.

Q. Where is that desktop computer today?

A. I really don't know.

Q. What happened to that desktop?

A. Well, I think when we -- when we closed the office down, a lot of the desktops were either shipped to California or they were destroyed.

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I don't know what happened to it.

Q. You stated a moment ago that you switched your computer two or three times since 2007; right?

A. Right.

Q. That initial desktop that you had, did you stop using it and then began using something else, another computer, or were you using those two or three computers simultaneously?

A. No, I stopped using that one and went to a different one.

Q. Okay. When did you stop using the desktop that you were using in 2007?

A. Probably in -- probably 2009.

Q. Do you remember the month in 2009 that you stopped using it?

A. No.

Q. And why was it that you were given another computer?

A. Just to update it.

Q. And what did you update to?

A. I don't know.

Q. Was it another desktop computer?

A. Yes.

Q. Do you remember the brand of that

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desktop computer?

A. No.

Q. When you updated to that second desktop computer that you talked about a moment ago, how was the information regarding the QuickBooks database migrated from the first computer that you had to the second computer?

A. Well, all I did was take the balances and shift them over.

Q. When you talk about taking the balances and shifting them over, are you talking about manually entering the balances that were in the QuickBooks file on your old computer into the QuickBooks file in the new computer?

A. Yes.

Q. Did you do anything by way of transferring digitally the files that were in the QuickBooks database from the old computer into the new computer?

A. No.

Q. When you last used the computer you were using in 2007, you would agree with me that the QuickBooks database was intact as of the last date that you used it; correct?

MR. OLIN: Object to the form.

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A. The QuickBooks data would have been intact.
BY MR. FERRER:
Q. How long did you have that second computer that we were talking about a moment ago?
A. I don't remember.
Q. Do you remember if you replaced that second computer with another one?
A. Yes, I probably -- yeah, I did.
Q. When did that occur?
A. Again, I don't remember.
Q. Do you remember the year?
A. No.
Q. What did you substitute that second computer with?
A. It would have been another desktop.
Q. Do you remember the brand or make of that computer?
A. No.
Q. When you switched to that third computer, what did you do in terms of transferring the QuickBooks information that was in the second computer to the third computer?
A. Like I did with the other one, I just entered the balances manually.

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Q. And you would agree with me that as of the date that you switched from the second computer to the third computer, the QuickBooks information in that second computer would have been intact; correct?
MR. OLIN: Object to the form.
A. Only for that year, yes.
BY MR. FERRER:
Q. You only used that second computer for a year?
A. No.
Q. So when you said a moment ago only for that year, what were you referring to?
A. Basically that because we had the break-ins, what we would do is every year I would delete all the data after I printed out the general ledger.
Q. How often would you print out the general ledger?
A. Probably just once a year.
Q. Is there a particular month in the year that you would print out these general ledgers?
A. After we did the -- prepared everything for the tax return.
Q. And more or less what month would that

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have been?
A. It would vary.
Q. Do you maintain hard copies of those general ledgers to this day?
A. Yeah.
Q. Where are those general ledgers maintained?
A. Somewhere out in California.
Q. Well, when you talk about somewhere out in California, you're not suggesting somewhere out in the desert; right?
A. No. In storage out in California.
Q. Are you telling me that the information in the first and second computer that we spoke about earlier has been deleted?
A. It would have been deleted after we printed out hard copies.
Q. Who actually did the deletion?
A. I think we had some -- somebody from IT come and do it. We had an outside IT company.
Q. Did you delete any information from that QuickBooks database after October of 2008?
A. Yes, because we -- after every year, we would delete the information after we printed out the -- the data --

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Q. Why -- I'm sorry, go ahead.
A. -- that was our normal procedure.
Q. Is that procedure written down anywhere?
A. No.
Q. And how is that procedure communicated to you?
A. We had -- I had a conversation with Mr. Kirsch and we decided to do that.
Q. And when was it that you first had the conversation with Mr. Kirsch where he instructed you to delete the QuickBooks information after you printed out a hard copy of the general ledger?
A. After we had our break-in in 2007.
Q. I want to make sure that I understand it. For approximately a period of one year you would keep all of the QuickBooks information on your hard drive locally; correct?
A. Correct.
Q. And then once a year you would print out the general ledger for the entire year, and then you would delete the digital information in QuickBooks; is that right?
A. That's correct.
Q. And was that a particular file that you were deleting or the entire software from the

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computer?
A. That would be -- let's say -- I'm not a computer person. When you say file, what are you referring to?
Q. Sure. What was it that you were deleting from the computer?
A. I was deleting the data from the -- from the general ledger.
Q. And I'm sorry, I think I may have asked you this earlier, but I might have missed the answer.
Did you personally delete the information or did someone else do it?
A. Somebody else.
Q. What was the name of that somebody else?
A. I don't remember.
Q. You don't remember a single person's name that might have deleted that general ledger information?
A. No, I think we had -- I think we had different IT people, and I don't remember who it was.
Q. Tell me all the names of all of the IT people that American Residential Equities, LLC used.

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A. Oh, Christ. I'm not sure.
Q. You don't remember a single name?
A. No.
Q. How many IT people, to use your terms, would you say that American Residential Equities, LLC used since 2007?
A. I'm only aware of maybe -- maybe six, seven.
Q. And were those six or seven people in-house employees of American Residential Equities, LLC --
A. No.
Q. -- or vendors?
A. Vendors.
MR. OLIN: Wait until he finishes.
BY MR. FERRER:
Q. And it's your testimony that you don't remember a single name of those six or seven people?
A. No.
Q. Do you remember the name of the company that they worked for?
A. No, I don't.
Q. Is there any way that you would be able to verify what the name of that company was if in

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fact those individuals worked for a company?
A. Well, the only way I could verify, as you say, is I would have to go into the QuickBooks data and see if I can recognize the name.
Q. Where in the QuickBooks data would the name of these vendors be?
A. Probably from a check register.
Q. And do you presently maintain the check register for American Residential Equities, LLC on your computer?
A. Only for the current year.
Q. When was the last time that you printed out the general ledger for American Residential Equities, LLC?
A. The last time I did that was when I gave the information to the accountants to prepare the 2010 tax return.
Q. And when did that occur?
A. Earlier part of this year.
Q. Was it after March 7th of this year?
A. I don't remember because there was so much stuff going on.
Q. Do you have a hard copy of the general ledger that you gave to the accountants for American Residential Equities, LLC?

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A. That's out in storage.
Q. Where is the storage facility that you keep on referring to?
A. It's in California.
Q. Where in California?
A. I'm not sure exactly where.
Q. Have you ever been there?
A. No.
Q. You've never been there?
A. No, I haven't been there yet.
Q. Okay. When was the last time you were in California?
A. I was there maybe a couple weeks ago.
Q. And what were you there for?
A. I was there to try and get information for the discovery.
Q. And how did you go about trying to get information for discovery?
A. Well, first I had to read what you needed -- what was needed for discovery, and then see about getting someone to pick up the binders, et cetera, from storage.
Q. Why was it that you weren't able to go to the storage facility yourself to pick up the binders?

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A. Because my trip out there was cut short by the passing of Mrs. Kirsch.
Q. How long were you in California when you last visited?
A. Just a day or two.
Q. Does American Residential Equities, LLC have any other places other than that storage facility or warehouse that you mentioned out in California where it keeps its books and records?
A. I'm not aware of it.
Q. Does American Residential Equities, LLC have a server, a computer server?
A. I'm sure they do.
Q. Do you know where that's maintained?
A. No.
Q. And when you say that you are sure they do, what do you base that on?
A. Well, we have a -- a database of our assets that needs to be ascertained by more than one person.
Q. When you talk about a database of your assets, what is it that you're referring to?
A. Mortgages.
Q. And when you talk about these mortgages, are those the mortgages and loans that American

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Residential Equities, LLC used to manage for individual investors and lenders?
A. The mortgages were the assets that we managed for the numbered LLCs.
Q. And if you needed to access that database today, how would you go about doing that?
A. In order to access that database, I would have to go onto the server.
Q. And how is it that you go onto the server, to use your words?
A. Remotely.
Q. Okay. Could you take me through the mechanics of how it is that you do that?
A. Basically I would have to log on remotely, put in my password -- my user name and password and go onto the server and then access that part.
Q. Okay. So you would go onto your computer on the Internet; correct?
A. Yes.
Q. And you would access the server by accessing a particular Web address; correct?
A. That's it.
Q. What's the Web address?
A. The Web address would be AREnow.com, I

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believe.
Q. Okay, and what information after logging in with your password specifically would you be able to access from the www.AREnow.com Web site?
A. Well, the only information that I would access would be what we call our investor reports.
Q. Could you explain to me what an investor report is?
A. This is a report that shows by numbered LLC what our mortgages are, either remaining or liquidated, as of the end of the month.
Q. By signing onto that server, would you be able to access and see what mortgages are remaining or have been liquidated with respect to American Residential Equities LIII, LLC?
A. Yes.
Q. That's something that you could do from your home; correct?
A. Yeah.
Q. In fact, that's part of your job responsibilities; correct?
A. It is.
Q. You, normally during the course and scope of your duties as the chief financial officer of American Residential Equities, LLC, access the

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network to find out what the status of the mortgages are with respect to these various numbered LLCs; right?
A. No, I don't check the status.
Q. But you do have access if you wanted it?
A. I have access if I want.
Q. Okay. Now we were talking about three computers that you used from 2007 onward in which the QuickBooks information for American Residential Equities, LLC was kept. Do you know where any of those three computers are today?
A. No.
Q. With respect to the third computer, what happened to that one and when did you stop -- well, when did you stop using that computer?
A. That one I stopped using when we closed the office.
Q. And that was at some point in January of this year; is that right?
A. Yeah.
Q. And you have no knowledge of what happened to that computer?
A. No.
Q. Do you have any knowledge of what happened to the furniture and fixtures that were in

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the 848 Brickell Avenue offices for American Residential Equities, LLC?

A. I think -- I'm not sure exactly what happened to it. But -- but we left a lot of it there.

Q. Okay. Including your computer?

A. No, the -- like I said, the computers were either shipped out to California or taken and destroyed. I don't know.

Q. And if the computers had been shipped out to California, would those be sitting in the same warehouse that we spoke about earlier?

A. Yes.

Q. The warehouse that you haven't been to?

A. Right.

Q. When was the last time that you were physically present at the 848 Brickell Avenue offices of American Residential Equities, LLC?

A. Physically I was there March 31st.

Q. And what was it that you were there to do on March 31st?

A. Close down the office.

Q. And that's March 31st of this year; correct?

A. Correct.

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Q. And what is it that you did on March 31st, 2007 to close out the office?

A. Just to wrap everything up and I would have given the keys to the landlord.

Q. Well, could you tell me specifically what it is that you did to wrap up?

A. Basically just checked the offices, make sure there was nothing of value in the offices and -- and then give the keys to the landlord.

Q. Was the American Residential Equities, LLC office occupied at all by any American Residential Equities employee between December 31st, 2010 and March 31st, 2011?

A. Yes.

Q. And for what purpose was it occupied during that period?

A. During that period of time was to start closing down the office.

Q. While American Residential Equities, LLC was operating in the Brickell office, were you there on a daily basis or did you perform some of your duties from home?

A. I was there on a daily basis.

Q. And were you physically at American Residential Equities, LLC's offices on Brickell

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between December 31st, 2010 and March 31st, 2011?

A. Yes.

Q. Who else was there with you?

A. I had a receptionist there until -- I think she left on March 1st.

Q. Okay. What was her name?

A. I think her name was Nubia Rodriguez.

Q. Other than Nubia Rodriguez and yourself, who else was physically present at American Residential Equities, LLC at its Brickell office between December 31st, 2010 and March 31st, 2011?

A. Well, in the month of December --

MR. OLIN: You asked from December forward; right?

BY MR. FERRER:

Q. March 31st, 2010 to March --

MR. OLIN: No, March 2010 --

BY MR. FERRER:

Q. I'm sorry, December 31st, 2010 through March 31st, 2011.

A. Well, we had -- I had some staff there in the month of January, and they all basically left on the January 31st to either work from home or discharged.

Q. Okay. Who were the members of that

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staff that you had at American Residential Equities, LLC in January of 2011?

A. That would have been Lisette Smyth, Pamela Perrot, myself and Nubia Rodriguez.

Q. And other than Nubia Rodriguez; Lisette Smyth, Pamela Perrot and yourself are all now employees of Addle Hill; correct?

A. Yes.

Q. And you each perform your duties for Addle Hill remotely from your respective homes; correct?

A. Correct.

Q. Where does Pamela Perrot live?

A. In Miami somewhere.

Q. What did she do for American Residential Equities, LLC?

A. She would -- what she would do is make sure the documents of all the mortgages were correct.

Q. Could you be a little bit more specific about what it is that you mean?

A. She would do -- she would be like our compliance officer as far as the different mortgages.

Q. And is she performing those same duties

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for Addle Hill today?
A. I'm not sure.
Q. What does she do for Addle Hill today?
A. I'm not sure.
Q. She is an employee of Addle Hill; correct?
A. Yes.
Q. Is Lisette Smyth performing the same duties for Addle Hill that she was performing for American Residential Equities, LLC previously?
A. I think she is.
Q. Now you work from your home in Miami; correct?
A. Correct.
Q. Do you use a computer there?
A. Yes.
Q. And do you have a copy on your computer of the QuickBooks general ledger for American Residential Equities, LLC?
A. Yes.
Q. As of what date?
A. January 1st, 2011.
Q. Does Addle Hill also use QuickBooks to maintain its general ledger?
A. Yes.

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Q. Do you maintain Addle Hill's general ledger on QuickBooks?
A. Yes.
Q. And is the same policy followed for Addle Hill that was followed for American Residential Equities, LLC; that is, that after the general ledger for the prior year is printed out, the file is erased?
A. Correct.
Q. Does Addle Hill maintain a separate server onto which the QuickBooks general ledger information is also saved?
A. No.
Q. So the only accounting information, if you will, for Addle Hill is maintained on your computer locally; correct?
A. Correct.
Q. What kind of computer is it that you have at home?
A. I have a desktop.
Q. Do you know what the brand of that desktop is?
A. No.
Q. I know that I asked you this during your first deposition here, but would you mind giving me

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your address again so that it's clear on this particular transcript?
A. My address is 10345 Southwest 165 Avenue.
Q. That's in Miami; correct?
A. Correct.
Q. And your zip code, sir?
A. 33196.
Q. Now we've talked about American Residential Equities, LLC at length. I want to focus for a moment on some of the other judgment debtors; okay?
A. Okay.
Q. Did Meadow Mint, LLC ever maintain a general ledger?
A. No.
Q. What operations, if any, does Meadow Mint, LLC have?
A. They were the holding company for American Residential Equities, LLC.
Q. Does Meadow Mint have a bank account?
A. No.
Q. Has it ever had a bank account?
A. No.
Q. What, if any, involvement do you have in

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the preparation of any financial statements or tax information that Meadow Mint, LLC prepares?
A. Just forwarding over the K-1 to the accountants.
Q. So you prepare the K-1 for Meadow Mint, LLC?
A. No.
Q. Who does?
A. The accountants that prepare American Residential Equities, LLC.
Q. So when you talked a moment ago about forwarding the K-1 information, what was it that you were referring to?
A. When the tax return would be prepared for American Residential Equities, LLC, part of the package I would send to the accountants would be the K-1 to be recorded on Meadow Mint's books or Meadow Mint's tax return.
Q. Does American Residential Equities, Inc. maintain a general ledger account?
A. Yes.
Q. And how is it that American Residential Equities, Inc. maintains a general ledger?
A. American Residential Equities, Inc. used to be a viable operating company.

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Q. When did it stop being a viable operating company?
A. Probably somewhere in 2009.
Q. Since 2009, has American Residential Equities, Inc. maintained a general ledger account?
A. No.
Q. How long prior to 2009 had American Residential Equities, Inc. maintained a general ledger account?
A. From inception.
Q. And when was American Residential Equities, Inc. formed?
A. Somewhere in 2002.
Q. So that the record reads clearly, from 2002 through 2009 American Residential Equities, Inc. maintained a general ledger account; correct?
A. Correct.
Q. What involvement, if any, did you have in the maintenance of American Residential Equities, Inc.'s general ledger account?
A. I would do the recordation of receipts and disbursements and prepare the general ledger for the tax return.
Q. How was it that American Residential Equities, Inc. maintained its general account? Was

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it on hard copy or was it digital?
A. We kept -- it would be the same as we did for LLC.
Q. And when you say that it's the same as for LLC, you're referring to the fact that American Residential Equities, Inc. also used QuickBooks to maintain its general ledger account; correct?
A. Correct.
Q. And was the policy that American Residential Equities, LLC uses, that is, deletes the digital general ledger account from QuickBooks once it's been printed out -- is that also true for American Residential Equities, Inc.?
A. Correct.
Q. Do you have a general ledger account for American Residential Equities, Inc. on your computer today?
A. No.
Q. When was the last time that you had that information?
A. Somewhere in 2009.
Q. And would it be fair to assume that for the years 2007, 2008 and 2009 you printed out hard copies of the general ledger for American Residential Equities, Inc. from QuickBooks?

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A. Correct.
Q. And where would those records be kept, sir?
A. In a binder in storage in California.
Q. Is that the same warehouse that you were referring to earlier?
A. I think so.
Q. You specified that it was in a binder. Do you remember a specific binder which contained the general ledgers of American Residential Equities, Inc.?
A. It would be labeled as such.
Q. In other words, you remember binders being created?
A. Yeah.
Q. For each of American Residential Equities, LLC and American Residential Equities, Inc. in which the hard copies of the general ledgers that you printed out from QuickBooks were kept; right?
A. Correct.
Q. And how would those binders be labeled specifically?
A. I would label them American Residential Equities, Inc. or American Residential Equities,

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LLC.
Q. And to your recollection, was it one binder for each of those companies or various binders for each of those companies?
A. I believe there were various binders for each of those companies.
Q. Do you remember how many binders there were for American Residential Equities, Inc.?
A. Not really.
Q. Do you remember how many binders there were for American Residential Equities, LLC?
A. No.
Q. You spoke a moment ago about the fact that you -- in connection with my questions about Meadow Mint, LLC -- about the fact that you prepared the package that you send to the accountants for them to prepare the tax returns; correct?
A. Right.
Q. Could you tell me what it is that's included in that package?
A. Just the K-1.
Q. Any trial balances?
A. No.
Q. How would the accountants know what

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information to include in the tax returns for each of those companies?

A. Since they had done the prior tax return, all they would need would be to update the information from the K-1 because that was the only transaction.

Q. Could you explain to me what it is that you mean by that?

A. The only transaction for Meadow Mint was the K-1 information.

Q. Would you send a similar package to those accountants with respect to American Residential Equities, LLC?

A. I would send a package to the accountants as far as American Residential Equities, LLC.

Q. And with respect to American Residential Equities, LLC, what information would be included in that package?

A. It would be the -- it would be a balance sheet and a profit and loss statement.

Q. Anything else?

A. That's all.

Q. And where would you derive the information for that balance sheet?

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A. That would come from the transactions.

Q. In other words, it was a report that you would be able to print out from QuickBooks?

A. Yes.

Q. And that would also be true for the profit and loss statement; correct?

A. Yeah.

Q. And do you maintain the balance sheets and the profit and loss statements historically for American Residential Equities, LLC today?

A. Again, once the tax year was done, we deleted it. So -- and the hard copy would be printed, and that's in a binder and that's in storage.

Q. Okay. So your testimony is that the hard copies of the balance sheets for American Residential Equities, LLC and the profit and loss statements for American Residential Equities, LLC were also put in a binder; correct?

A. Correct.

Q. And those binders are in the warehouse in storage in California?

A. Correct.

Q. Now, is that also true for American Residential Equities, Inc.?

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A. Yes.

Q. In other words, you would also prepare for American Residential Equities, Inc. a package that you would send to the accountants; correct?

A. Correct.

Q. And that package would include the balance sheet for American Residential Equities, Inc.; correct?

A. Correct.

Q. And also the profit and loss statement for American Residential Equities, Inc., correct?

A. Correct.

Q. And that information after you submitted it to the accountants would be contained in a binder; correct?

A. Correct.

Q. And those binders are, as best as you know, presently in a warehouse in California; is that right?

A. That's correct.

Q. Now just to be clear, the package that you sent would include balance sheets, profit and loss statements and general ledgers; right?

A. No, no general ledgers.

Q. When the accountants were finished

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preparing the tax returns for American Residential Equities, LLC and American Residential Equities, Inc., would they return that information, that package of information that you sent them, to you?

A. No.

Q. So to your knowledge, would the accountants that prepared the tax returns for American Residential Equities, LLC and American Residential Equities, Inc. still have that information presently?

A. I would think so.

Q. Okay. Beginning in 2007, who were the accountants for American Residential Equities, LLC?

A. The accountant for American Residential Equities, LLC was Shubitz and Rosenblum.

Q. And where are they located?

A. In Miami.

Q. Would you mind spelling Shubitz for me.

A. S-H-U-B-I-T-Z.

Q. And Rosenblum is R-O-S-E-N-B-L-U-M?

A. I think so.

Q. Do you happen to know off the top of your head what their address is?

A. No.

Q. Who were the accountants from 2007

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forward for American Residential Equities, Inc.?
A. The same.
Q. Did American Residential Equities, LLC or American Residential Equities, Inc. use any other accountants from 2007 onward?
A. Yes.
Q. What are the names of all the other accountants that American Residential Equities, LLC used?
A. For LLC and Inc. we used McNabb & Company.
Q. Where is McNabb & Company located?
A. Las Vegas, Nevada.
Q. For what purpose was it that American Residential Equities, LLC and American Residential Equities, Inc. using McNabb & Company?
A. We decided to make a change.
Q. In what year did you decide to make a change?
A. 2009, I think.
Q. Who were the accountants that were preparing the tax returns for American Residential Equities, LLC and American Residential Equities, Inc. in 2005 and 2006?
A. It would have been Shubitz.

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Q. So would it be fair to say that from 2005 until 2009, Shubitz & Rosenblum were preparing the tax returns and were the accountants for American Residential Equities, LLC and American Residential Equities, Inc.?
A. Yes.
Q. And in 2009, McNabb & Company out of Las Vegas began acting as the accountants for both American Residential Equities, LLC and American Residential Equities, Inc.; correct?
A. Correct.
Q. And in 2009, did American Residential Equities, LLC and American Residential Equities, Inc. use McNabb & Company for any year other than 2009?
A. No.
Q. And would you have sent or did you send to McNabb & Company the same package of information that you described earlier in 2009 for American Residential Equities, LLC and American Residential Equities, Inc.?
A. Yes.
Q. And so that the record is clear, for each of American Residential Equities, LLC and American Residential Equities, Inc., you sent

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McNabb & Company the balance sheet and the profit and loss statement for each of those companies; correct?
A. Correct.
Q. And they didn't return that information to you; right?
A. No.
Q. Have American Residential Equities, LLC and American Residential Equities, Inc. used any other accountants since 2005?
A. No.
Q. Has American Residential Equities, LLC or American Residential Equities, Inc. ever used Berenfeld?
A. No.
Q. Now I want to talk about ARE Asset Management, LLC --
THE WITNESS: Can we take a break so I can go to the bathroom?
MR. FERRER: Of course we can.
(A break was taken at 10:49 a.m.)
BY MR. FERRER:
Q. Mr. Hirschkowitz, I want to go back to the packet of information that you identified earlier that you would send to the accountants for

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American Residential Equities, LLC and American Residential Equities, Inc every year so that they could prepare the tax returns; okay?
A. Okay.
Q. Is there anything about the balance sheet contained in that package of information that would disclose the identify of any of the investors of American Residential Equities, LLC?
A. When you say investors, you're talking about outside investors?
Q. Fair enough. Let me clarify it.
Remember the last time you were here we spoke about the fact that American Residential Equities, LLC would set up different American Residential Equities Roman numeral LLCs for each of the investors or investors group; correct?
A. Correct.
Q. And those investors would invest by way of loans to American Residential Equities, LLC; correct?
A. Correct.
Q. They could never invest by way of equity; correct?
A. Correct.
Q. Is there anything about the balance

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sheets included in the package of information that you would send to the accountants for American Residential Equities, LLC and American Residential Equities, Inc. that would identify who those investors are?

A. Well, in the package I sent to the accountants, no.

Q. Is there anything about the profit and loss statements that you would send in the package of information to the accountants for American Residential Equities, LLC and American Residential Equities, Inc. that would identify who those investors are?

A. As I remember, the answer is no.

Q. Now, going back for a moment to the three computers that we talked about earlier and you used from 2009 through earlier this year, with respect to the last computer that you were using as of January of 2009 -- is that right?

A. January of --

Q. -- I'm sorry, the last computer that you were using, the third computer, would it be fair to state that you were using that computer through March 31st, 2011 when the American Residential Equities, LLC offices were closed down?

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A. Yes.

Q. And as of March 31st of 2011 that computer would contain the general ledgers for both American Residential Equities, LLC and American Residential Equities, Inc. for the year 2010; correct?

MR. OLIN: Object to the form.

A. For the year 2010... No.

BY MR. FERRER:

Q. What's incorrect about that statement?

A. Because we shut down the operations of ARE, Inc. physically in 2009.

Q. Fair enough.

Let's focus then just on American Residential Equities, LLC.

As of March 31st 2011, the information contained in the computer that you were using contained the general ledger information for American Residential Equities, LLC for the year 2010; correct?

A. No, because once again, once the year was finished, we deleted all the information.

Q. When was the last time that you deleted information from that computer with respect to American Residential Equities, LLC?

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A. Probably when we were closing the office.

Q. And you were closing the office between January 2011 and March of 2011; correct?

A. Yes.

Q. At some point between January of 2011 and March of 2011 you deleted all of the information in that computer concerning the general ledger for American Residential Equities, LLC; correct?

A. Correct.

MR. OLIN: Object to the form.

BY MR. FERRER:

Q. At what point did you begin maintaining the general ledger information for American Residential Equities, LLC in your computer at home?

A. I -- I have it from January 1.

Q. January 1st of 2011?

A. Yes.

Q. And how is it that you populated the information on that QuickBooks database file with respect to the general ledgers of American Residential Equities, LLC?

A. I recreated the wheel.

Q. And when you talk about recreating the

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wheel, could you be a little bit more specific?

A. I re-inputted everything.

Q. And when you talk about re-inputting everything, what is it that you're talking about?

A. Checks and receipts.

Q. And how did you know or where did you look to obtain that information by which you recreated the wheel?

A. Well, at that time I had a hard copy of the general ledger.

Q. When you talk about a hard copy for the general ledger, for which entity did you have the general ledger and for what year?

A. For American Residential Equities, LLC for the year 2011.

Q. Do you still have that information at home?

A. No.

Q. What happened to that information, the hard copy?

A. It was shipped to California.

Q. And when was it that you shipped that information that you had at home to California?

A. Sometime in April.

Q. April of 2011; correct?

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A. Correct.
Q. And why was it that you shipped that information to California?
A. To keep in storage somewhere out there.
Q. Did you receive any instructions from anyone that you should do that; that is, send whatever hard copies of the general ledger for American Residential Equities, LLC that you had at home out to California?
A. Well, I don't have enough room in my house to keep it.
Q. Did you receive any instructions from anyone in that regard?
A. I would -- if I received instruction, it would have been from Mr. Kirsch.
Q. And what was it about April of 2011 that caused you to take the hard copy of the general ledger for American Residential Equities, LLC that you had at home and ship it to California?
A. Well, once I got done inputting all the information in, I didn't need it in my house.
Q. Now from 2007 to 2009 when you were using those three computers to maintain locally on your hard drive the general ledger for American Residential Equities, LLC, what backups did you

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have in place to secure that information?
A. I didn't have any backups.
Q. So what would have happened if your computer would have crashed?
A. I would have had to recreate everything from the beginning.
Q. And how would you have gone about recreating everything from the beginning?
A. I would have to locate all the checks and disbursements and receipts.
Q. And that would have allowed you to recreate a general ledger database?
A. To the best of what I had, yes.
Q. Does American Residential Equities, LLC presently have all of the checks, disbursements and receipts in order to allow it to recreate as best you could the general ledger digitally for prior years?
A. To the best of my knowledge, all that stuff is in storage.
Q. In California in that warehouse?
A. Yes. It's supposed to be in storage.
Q. What do you mean it's supposed to be in storage?
A. Well, as far as I know. I had given all

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the information to -- all the data and everything to our people to ship to California, so supposedly they shipped it all to California.
Q. Who did you give that information to?
A. We had several people in the office that were boxing everything up.
Q. Could you name each of the persons in the office that were boxing everything up in order to ship it to California?
A. It would have been Nubia Rodriguez. And I think Pamela Perrot was involved.
Q. Do you happen to have Nubia Rodriguez's address --
A. No.
Q. -- anywhere in your files?
A. It would be in the storage out in California.
Q. Do you know where she's employed today?
A. No.
Q. Do you happen to have anywhere in your files Pamela Perrot's address?
A. That would be -- I would have that under her payroll.
Q. In other words, that's information that you could easily access from your computer at home;

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correct?
A. Yeah.
Q. Now I want to focus on ARE Asset Management, LLC for a moment.
Let me step back for a moment.
Do you remember the date or the month when you destroyed the digital information; that is, the general ledger information from QuickBooks with respect to American Residential Equities, LLC for the year 2010?
MR. OLIN: Object to the form.
A. No, I don't remember.
BY MR. FERRER:
Q. And was it you or somebody else that deleted that information?
A. It would have been somebody else.
Q. And do you remember who that somebody else was with respect to the 2010 information?
A. No.
Q. Again, I want to focus on ARE Asset Management, LLC. Has ARE Asset Management, LLC ever maintained a general ledger?
A. Yes.
Q. Does ARE Asset Management, LLC maintain a general ledger today?

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A. Yes.
Q. For what years has ARE Asset Management, LLC maintained a general ledger?
A. For the year 2009 forward.
Q. And who is it that maintains ARE Asset Management, LLC's general ledger?
A. I do.
Q. And how is it that you maintain the ARE Asset Management, LLC general ledger?
A. Because I maintain the general ledgers for all the companies.
Q. In the same way?
A. The same way.
Q. That is, you maintain it digitally on QuickBooks until the end of the fiscal year and then you delete it when you print out a hard copy of that general ledger?
A. Correct.
Q. What is the fiscal year for ARE Asset Management, LLC?
A. December 31.
Q. That's when it ends?
A. Yes.
Q. Do you presently have a general ledger on your computer at home for ARE Asset Management,

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LLC?
A. Yes.
Q. For what year?
A. 2011.
Q. For 2010 did you ever print out a hard copy of the general ledger?
A. Yes.
Q. I'm sorry. Let me just ask it again so it's clear on the record.
With respect to ARE Asset Management, LLC, did you ever print out a hard copy of the general ledger for 2010?
A. Yes.
Q. With respect to ARE Asset Management, LLC did you ever print out a hard copy of the general ledger for 2009?
A. For Asset Management?
Q. Yes.
With respect to ARE Asset Management, LLC, did you ever print out a copy of the general ledger for the year 2009?
A. Yes.
Q. Do you have hard copies of the general ledger for ARE Asset Management, LLC?
A. Again, those were boxed and shipped to

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California.
Q. And were those hard copies of the general ledger of ARE Asset Management, LLC also maintained in binders?
A. Yes.
Q. And do you recall whether it was one binder or several binders for ARE Asset Management, LLC?
A. I don't remember.
Q. Whatever the number of binders it may have been, it's now located now in the warehouse out in California?
A. Supposed to be.
Q. When you say supposed to be, why is it that it wouldn't be?
A. Well, to the best of my knowledge. I was not involved in the shipping or delivery of the binders.
Q. Those binders prior to March of 2011 when the Brickell office was closed down, were they kept in the American Residential Equities, LLC's office here in Brickell?
A. No.
Q. Where were they kept?
A. They were kept somewhere in storage.

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Q. Prior to March of 2011, what storage facility did American Residential Equities, LLC have?
A. We had two or three storage facilities.
Q. Where were those located?
A. In Miami and I think Ft. Lauderdale.
Q. Does American Residential Equities, LLC still maintain either of those two storage facilities?
A. No.
Q. Has all of the information in those two storage facilities been sent to California?
A. As far as I know. They were supposed to.
Q. And when you say they were supposed to, how is it that you know that they were supposed to?
A. Because we said we were shipping everything out.
Q. I want to focus on Seabreeze Financial, LLC. Has Seabreeze Financial, LLC ever maintained a general ledger account?
A. Yes.
Q. And what, if any, responsibilities did you have for maintaining Seabreeze Financial, LLC's general ledger account?

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A. The same thing, recordation of transactions.
Q. Was Seabreeze Financial, LLC's general ledger account also maintained on QuickBooks?
A. Yes.
Q. And was that QuickBooks database file maintained on your computer locally?
A. Yes.
Q. And from what time to what time did Seabreeze Financial, LLC maintain a QuickBooks digital general ledger?
A. From inception through 2008.
Q. When was Seabreeze Financial, LLC formed?
A. I don't remember.
Q. Do you remember whether it was in 2006 or 2007?
A. I don't remember.
Q. Whatever the year might have been, it's fair to say that from the moment that it was formed through 2008, Seabreeze Financial, LLC maintained a QuickBooks database; correct?
A. Correct.
Q. And you were the custodian of that record; right?

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A. Yes.
Q. Now, do you presently have on your computer at home a copy of the general ledger for Seabreeze Financial, LLC?
A. No.
Q. With respect to Seabreeze Financial, LLC, did you follow the same policy that you followed with respect to the general ledgers of American Residential Equities, LLC and American Residential Equities, Inc.; that is, once you printed out a hard copy for the fiscal year end, you would delete the file from QuickBooks?
A. Yes.
Q. And was there ever a time that you actually printed out hard copies of the general ledger of Seabreeze Financial, LLC?
A. At the end of the fiscal year.
Q. And were those hard copies also maintained in binders?
A. Yes.
Q. And to your best recollection, are those binders -- have they also been sent to the warehouse in California?
A. Correct.
Q. I want to focus on American Residential Equities LIII, LLC.
Does American Residential Equities LIII, LLC maintain a general ledger?
A. Yes.
Q. Does it presently maintain a general ledger?
A. No.
Q. When was the last time that American Residential Equities LIII, LLC maintained a general ledger?
A. The year 2009.
Q. And when was the first time that American Residential Equities LIII, LLC maintained a QuickBooks general ledger?
A. From the date of inception.
Q. The date of inception for American Residential Equities LIII, LLC would have been when?
A. I don't remember. It could have been 2006.
Q. Whenever the inception year was, it would be fair to state that from inception American Residential Equities LIII, LLC maintained a QuickBooks general ledger; correct?
A. Correct.

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Q. And you were the custodian of that record; right?
A. Yes.
Q. And you were responsible for maintaining that QuickBooks database; right?
A. Right.
Q. Why was it or why is it that American Residential Equities LIII, LLC has not maintained a general ledger since 2009?
A. Basically the -- it was deemed we didn't really need one because the transactions were being recorded in American Residential Equities, LLC.
Q. Could you explain to me what it is that you mean by that?
A. In 2009 the company decided to close down all the checking accounts except for -- except for like one main operating account for financial reasons. And since there was no bank account, we determined that we did not need to record transactions in a general ledger form.
Q. Could you tell me what the financial reasons that you described a moment ago were for closing down all of the individual LLCs' bank accounts?
A. The cost.

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Q. And before I get into the next line of questioning in that regard, would it be fair to say that for American Residential Equities LIII, LLC from the date of inception through 2009 there should be a binder containing hard copies of all of the general ledgers for that company?

A. Yes.

Q. When American Residential Equities, LLC made the decision to close down all of the accounts of the individual Roman numeral LLCs, how were the remittances handled?

A. Again, these were -- like they had been prior, they would be broken down to the different LLCs.

Q. Okay. Could you explain to me what it is that that means?

A. On American Residential Equities, LLC, we had what we called a due to and from account. Since there were no bank accounts, we didn't see the necessity of keeping different -- you know, the individual general ledgers.

Q. When you talk about a due to and from account, are you referring to a separate account that American Residential Equities, LLC opened in 2009 that was actually called due to and from?

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A. When you say -- are you talking about just a general ledger account?

Q. Well, we were talking about the decision, the decision that American Residential Equities, LLC made in 2009 to close down all of the separate LLCs' bank accounts; right?

A. Right.

Q. And I asked you how remittances were made once that occurred, and you told me that there was a due to and from account; is that not right?

A. That is correct. That's a general ledger account only.

Q. After 2009, could you give me an example of how a remittance would be paid from Vantium to American Residential Equities, LLC and how American Residential Equities, LLC would distribute that money to the individual lenders?

A. The recordation of that remit would be made. I would receive one wire from Vantium. I would receive the information that -- of how that remit was to be broken down by the various numbered LLCs. I would then separate that one wire into what we call a due to and from the various numbered LLCs.

Q. At the end of the day, how would the

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individual -- you call them investors, I call them lenders -- in the Roman numeral entities receive moneys from those remittances?

A. It depends on -- when you say would they receive the -- well, the moneys that would be coming in, if there were funds coming in would be used to also maintain the assets. And depending on if there were funds available or not, then they would be distributed.

Q. Okay. When you talk about the funds coming in were used to maintain the assets, you're referring to funds coming in from Vantium; correct?

A. Correct.

Q. Remittances from Vantium?

A. Correct.

Q. And when we talk about remittances, you understand that what I mean is the process by which Vantium disposes of assets and then takes that money and pays it over to American Residential Equities, LLC; correct?

A. Correct.

Q. And that general ledger account, the due to and from account, as you've called it, in what bank was that maintained?

A. Well, that bank was -- was at TD Bank at

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the time.

Q. And was there anything about the remittances from Vantium into the due to and from account that would identify who the lenders were with respect to the individually numbered LLCs?

A. On an actual wire, no.

Q. Now, you talked about using that due to and from account to maintain the assets. Could you explain to me what it is that you mean by that?

A. Well, the person that handled the assets recording would have to update the database to reflect the ins and outs from Vantium on a loan level.

Q. Could you give me an example, a simple example of how it is that that would work, so I could understand it?

A. Let's say we have Mortgage A. If there was a -- somebody -- a Mortgage A made a payment, Vantium would record it as against principal interest. But if they had to make a payment for, say, insurance, they would deduct it from that payment.

Q. And that would be handled on the Vantium side; correct?

A. That's correct.

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Q. What of that transaction would be sent to the due to and from account at TD Bank?
A. The net.
Q. What would happen with the net of that transaction when it was received by American Residential Equities into its due to and from account?
A. I would record in total what was either due to -- due to American Residential Equities, LLC or due from American Residential Equities, LLC for that numbered LLC.
Q. And when you talk about that numbered LLC, you're referring to one of those individual LLCs for which the particular loan Vantium had done the transaction; right?
A. That's right.
Q. Would American Residential Equities, LLC deduct any management fees from that remittance by Vantium into the due to and from account?
A. No.
Q. I'm trying to get a better understanding, and maybe I'm not asking correctly. But what happened to the money in the due to and from account once it came in from Vantium?
A. The money stayed in our account that we

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used as far as what we called clearing account.
Q. Was that money ever disbursed?
A. Usually not because -- usually every month there was a negative number going to the numbered LLCs.
Q. Could you explain to me what it is that you mean by that?
A. That means the outgo of funds used to maintain the assets were greater than the inflow on the numbered LLCs.
Q. Prior to 2009, what reconciliation, if any, was there between American Residential Equities, LLC's account and each of the bank accounts for each of the individual numbered entities?
A. Prior to 2009 -- is it 2009 or --
Q. Yes, sir, 2009.
A. We would at the end of the month -- if there -- based on the net of the remit, if we had the funds available, we would transfer those to the numbered LLCs. However, over the course of the remit, there would be a number of LLCs that have a negative remit which would take money from a positive remit.
Q. Okay.

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A. So if the funds didn't come in that we could distribute to the numbered LLCs, we couldn't.
Q. Okay. So let me see if I just get this in my mind straight, and I apologize for perhaps being dense.
Prior to 2009, the remits would come in from Vantium into American Residential Equities, LLC's account. And if there was a net of all of the transactions, there would be distributions from that American Residential Equities, LLC account to the individual Roman numeral numbered accounts, entities accounts; correct?
A. Correct.
Q. After 2009, how did that change?
A. Well, since there were no bank accounts, you can't make a financial transfer to an entity that doesn't have a bank account.
Q. So how are the transfers of any positive net money received from Vantium sent to the individually numbered LLCs?
A. The funds were not physically sent to the numbered LLCs since they didn't have any bank accounts.
Q. Well, each of those Roman numeral LLCs had one or more lenders; correct?

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A. Correct.
Q. How was it that those lenders were paid back their money?
A. They were -- let's see. Well, what we did was if there were funds available, we would make a distribution from our -- from the account that we had the funds, if there were funds available to send to the investors.
Q. And if there were no funds available?
A. There was nothing transferred.
Q. Assuming for the moment that there were no funds available ever, would those loans ever get repaid?
A. No.
Q. Now, is there a single American Residential Equities, LLC Roman numeral LLC for which the investors, as you've called them, were not lenders but were instead owners, equity owners, of those LLCs?
A. We had several numbered LLCs where we had domestic investors.
Q. Could you explain to me what it is that you mean?
A. It means that these investors invested directly into the different numbered LLCs and were

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an equity investor.
Q. Were the domestic investors that you've referred to a moment ago always the same entity or person?
A. No.
Q. Well, let's do the following; just go back to something before I forget it.
Is the due to and from account the same as the one pay account that you spoke about during your last deposition?
A. Yes.
Q. I'm going to show you what was marked as Plaintiffs' Exhibit 1 during your last deposition; okay?
Take a moment to just refresh your memory and recollection about the document. Let me know when you're done.
Okay. You've had an opportunity to review it?
A. Yes.
Q. I want to focus on Page 7, if you would.
MR. OLIN: Is this Page 7 of the motion?
BY MR. FERRER:
Q. Thank you. Page 7 of the motion where midway through the page you'll see that there are

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in bullets a number of American Residential Equities, Roman numbered entities. Do you see that?
A. Yes.
Q. Could you identify for me which of those entities, which began on Page 7 and continue through Page 8, had domestic investors, as you've described it a moment ago?
A. Let's see. I would say ARE XXXIII, ARE XL, ARE XLI, ARE XLII, ARE XLIII. I think those are the only ones with domestic.
Q. Just to be clear, let me go ahead and read them back into the record. You said XXXIII, XL, XLI, XLII, XLIII; correct?
A. That's what it looks like.
Q. Starting with American Residential Equities XXXIII, LLC, who were the domestic investors?
A. I really don't feel like I need to divulge that information.
Q. Okay. Well, that's okay. And I understand that you may not want to divulge it.
Let me ask it this way.
Was American Residential Equities, LLC an equity investor in American Residential Equities

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XXXIII, LLC?
A. No.
Q. Were any entities in which Jeffrey Kirsch had an interest a domestic investor in American Residential Equities XXXIII, LLC?
MR. OLIN: Object to the form.
A. No.
BY MR. FERRER:
Q. Who are the members of American Residential Equities XXXIII, LLC?
MR. OLIN: You can disclose that as long as it's not the identity of third parties. If it's...
A. The entity in XXXIII that I can disclose would be JLDP, LLC.
BY MR. FERRER:
Q. When you talk about JLDP, LLC you're referring to JLDP 26, LLC; correct?
A. Yes.
Q. What percentage ownership interest does JLDP 26, LLC have in American Residential Equities XXXIII, LLC?
A. I don't remember.
Q. What would you need to look at in order to make that determination?

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A. I would have to see the K-1 from the tax return.
Q. With respect to American Residential Equities XL, LLC, who are the domestic investors, equity investors, that you can disclose?
A. It would also be JLDP.
Q. And what percentage of a membership interest does JLDP 26, LLC have in American Residential Equities XL?
A. That I don't remember.
Q. In American Residential Equities XLI, LLC?
A. I don't remember.
Q. With respect to American Residential Equities XLI, LLC, what is the name of the domestic investors that you can disclose?
A. JLDP.
Q. And what percentage ownership does JLDP 26, LLC have in American Residential Equities XLI, LLC?
A. That I don't remember.
Q. And so that the record is clear, I'm going to go through these questions with respect to the two remaining ones, and I just want to make sure you give me a chance to get my question out

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because it's got to read clearly in the record, even thought it might seem repetitive; okay?
A. Okay.
Q. With respect to American Residential Equities XLII, LLC, who are the domestic investors that you can tell me about?
A. Again, JLDP.
Q. And what percentage ownership interest does JLDP 26, LLC have in American Residential Equities XLII, LLC?
A. I don't remember.
Q. With respect to American Residential Equities XLIII, LLC, who are the domestic investors that you can tell me about?
A. Again, JLDP.
Q. And what percentage ownership interest does JLDP 26, LLC have in American Residential Equities XLIII, LLC?
A. I don't remember.
Q. Does JLDP 26, LLC have a have a majority membership interest in any of the following entities: American Residential Equities XXXIII, American Residential Equities XL, American Residential Equities XLI, American Residential Equities XLII or American Residential Equities

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XLIII?
A. I don't remember exactly.
Q. Well, you say exactly. Do you remember ballpark?
A. I would think as a ballpark goes, they probably have a majority in all of them.
Q. In other words, as best as you can recall here, JLDP 26, LLC has a majority membership interest in each of the following entities: American Residential Equities XXXIII, American Residential Equities XL, American Residential Equities XLI, American Residential Equities XLII and American Residential Equities XLII; correct?
A. Correct.
MR. OLIN: José --
MR. FERRER: Yes.
MR. OLIN: -- I've given you some pretty good leeway on exceeding the scope of what this deposition is supposed to be. Are we going to get back onto what we're going to be talking about?
MR. FERRER: Well, I think we're here on discovery in aid of execution, and I intended to go a little bit further with him. I understand that you may have an objection to

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it. Since we're all here, I would prefer to do it now.
MR. OLIN: Well, I -- you know, Mr. Hirschkowitz and I and Elena discussed the subject matter that was designated in the order requiring this deposition. I have no objection to your taking the deposition of Mr. Hirschkowitz in aid of execution. I'm happy to make him available for such a deposition, should you request it; however, I am not prepared to have you go beyond the scope of the order today because I haven't had an opportunity to prepare Mr. Hirschkowitz for questions in that area.
MR. FERRER: Okay.
MR. OLIN: So I've given you some leeway with that, but I would like to keep on the subject matter that we're here for today.
MR. FERRER: Okay.
MR. OLIN: And if you want a another day for as ever long as you want, I'm happy to provide one for you.
MR. FERRER: Fair enough. Let me do the following. I'm going to ask -- since we've started on this topic, I'll ask questions

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with clarification with respect to something he answered in his last deposition with respect to these entities, and I'll look at notes and see if there's anything else; okay?
MR. OLIN: Okay.
BY MR. FERRER:
Q. Mr. Hirschkowitz, when you were last here, I asked you in which of these entities listed on Page 7 of Exhibit No. 1 JLDP 26, LLC had a membership interest, and you identified a number of these entities including the five that we've discussed just a moment ago, okay.
For purposes of refreshing your recollection, I just want to identify on the record which other ones you identified at your last deposition that we haven't talked about today; okay?
American Residential Equities XXXII, LLC; American Residential Equities XXXIV, LLC; American Residential Equities XXXVI, LLC; American Residential Equities XXXVII, LLC; American Residential Equities XLV, LLC; American Residential Equities L, LLC; American Residential Equities LII, LLC; American Residential Equities LIV, LLC; American Residential Equities LVII, LLC; and

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American Residential Equities LIX, LLC --
Did I read those back correctly, in other words, is it fair to say that in addition to the five numbered American Residential Equities, LLC companies that we talked about earlier, JLDP 26, LLC has a membership or ownership interest in each of those other ones that I've just read back?
A. Correct.
Q. Could you tell me just very briefly along the same lines what percentage ownership interest JLDP 26, LLC has in American Residential Equities XXXII, LLC?
A. I don't remember.
Q. What about American Residential Equities XXXIV, LLC?
A. I don't remember.
Q. Do you remember what percentage ownership interest JLDP 26, LLC has at any of the other limited liability companies that I've just named on the record?
A. No.
MR. FERRER: Let me have a moment just to go over my notes. Okay?
(A break was taken at 11:46 a.m.)

BY MR. FERRER:
Q. Mr. Hirschkowitz, who else at American Residential Equities, LLC had any dealings with the general ledger for American Residential Equities, LLC or any of the other nonindividual defendants in this case?
MR. OLIN: Object to the form.
A. There would be -- nobody else would have access to the general ledger.
BY MR. FERRER:
Q. Were there any other persons that you supervised at American Residential Equities, LLC that performed accounting or bookkeeping functions?
A. No.
Q. So that the record is clear, you were the sole person at American Residential Equities, LLC responsible for maintaining the general ledger for all of the nonindividual defendants in this case?
A. Yes.
Q. Now with respect to ARE Asset Management, LLC, who are its outside accountants?
A. I believe that was McNair & Company.
Q. Earlier when you said McNabb & Company, did you mean to say McNair & Company?

A. Yes.
Q. And what years was McNair & Company the accountants for ARE Asset Management?
A. 2009 and 2010.
Q. Does ARE Asset Management, LLC have outside accountants today?
A. It would be the -- whoever does the tax return.
Q. Who is doing the tax returns for McNair & Company?
A. Whoever at McNair & Company does the tax returns for us.
Q. Fair enough. McNair & Company is still preparing the tax returns for ARE Asset Management, LLC?
A. They did it for 2010.
Q. Do you expect that they're going to be doing it for 2011?
A. I don't know why not.
Q. Between 2009 and 2010 would it be fair to say that you sent McNair & Company the same packet of information that you identified earlier with respect to the other judgment debtors for ARE Asset Management, LLC?
A. Yes.

Q. With respect to Seabreeze Financial, LLC, who has prepared tax returns for Seabreeze Financial, LLC.?
A. That would be Shubitz & Rosenblum.
Q. Could you tell me all the years for which Shubitz & Rosenblum prepared tax returns for Seabreeze Financial, LLC?
A. For all of the years that they were open.
Q. From inception through 2008?
A. Yes.
Q. Which companies or what individuals have prepared tax returns for American Residential Equities LIII, LLC?
A. We had -- I know we had Berenfeld Shecter, a bunch of names at McNair & Company. I think those were the only ones.
Q. And for which years did Berenfeld Shecter prepare tax returns for ARE LIII, LLC?
A. Through the year 2008.
Q. So from inception through 2008?
A. I think so.
Q. And for which years did McNair & Company prepare tax returns for ARE LIII, LLC?
A. 2009 and 2010.

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Q. And would it be fair to say that with respect to American Residential Equities LIII, LLC you submitted the same type of package of information to both Berenfeld Shecter and McNair & Company as you testified you submitted with respect to the other judgment debtors?
A. Yes.
Q. What companies or what individuals have prepared tax returns for Key Biscayne Family Trust?
A. We never prepared a tax return for Key Biscayne Family Trust.
Q. Why not?
A. There's no such entity.
Q. Key Biscayne Family Trust has never existed?
A. No.
Q. Is there a Key Biscayne Family Partnership?
A. There's a Key Biscayne Limited Family Partnership.
Q. And what companies or what individuals have prepared tax returns for Key Biscayne Limited Family Partnership?
A. Should I answer that?
MR. OLIN: Could you read that back to

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me, please.
(The last question was read back by the court reporter.)
MR. OLIN: Why is that germane?
MR. FERRER: You produced tax returns for Key Biscayne Family Partnership in redactive -- you have. I can go get them.
MS. FOTIU-WOJTOWICZ: I never sent them.
MR. OLIN: I don't remember seeing those José, I'm sorry. But they're not a defendant and they're not a judgment debtor.
BY MR. FERRER:
Q. To your knowledge, Mr. Hirschkowitz, Key Biscayne Family Trust has never existed; correct?
A. Correct.
Q. There's never been a trust by that name; correct?
A. Correct.
Q. But the only entity that is similarly named, if you will, is Key Biscayne Limited Family Partnership; correct?
A. Similarly named.
Q. And Mr. Olin might instruct you not to answer, that's okay; let me go ahead and ask it anyway.

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What companies or what individuals have prepared tax returns for Key Biscayne Family Limited Family Partnership?
MR. OLIN: The same instruction.
BY MR. FERRER:
Q. Other than Jeffrey Kirsch or Key Biscayne Family Trust, would it be fair to say that each of the other judgment debtors listed on the first page of that motion used QuickBooks to maintain its general ledger?
MR. OLIN: Meadow Mint never did.
MR. FERRER: Yes, that's incorrect.
MR. OLIN: So I object to the form.
BY MR. FERRER:
Q. Let's go through it then.
Would it be fair to say that Meadow Mint, LLC maintained a QuickBooks general ledger?
A. No.
Q. It has never maintained a QuickBooks general ledger?
A. No.
Q. Would it be fair to say that American Residential Equities, LLC maintained a QuickBooks database?
A. It maintained a general ledger.

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Q. Would it be fair to state that American Residential Equities, LLC maintained a general ledger on QuickBooks?
A. Yes.
Q. Would it be fair to state that American Residential Equities, Inc. maintained a general ledger on QuickBooks?
A. Yes.
Q. Would it be fair to state that ARE Asset Management, LLC maintained a general ledger on QuickBooks?
A. Yes.
Q. Would it be fair to state that Seabreeze Financial, LLC maintained a general ledger on QuickBooks?
A. Yes.
Q. Would it be fair to state American Residential Equities LIII, LLC maintained a general ledger on QuickBooks?
A. Yes.
Q. And would it be fair to state that for each of those entities for which you've answered yes, you were the person at American Residential Equities, LLC that was responsible for maintaining those general ledgers?

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A. Yes.
Q. In connection with the policy by which you stated earlier you would print out hard copies of the general ledger and then destroy the digital file, would it be fair to say that with respect to each of the companies for which you've answered yes, the printout and deletion of the digital file would occur at some point in January after the end of the fiscal year?
MR. OLIN: Object to the form.
A. Normally.
BY MR. FERRER:
Q. Would you also print out cash receipts and disbursements ledgers?
A. No.
Q. Did each of the companies for which you've answered yes a moment ago maintain cash receipt and disbursement ledgers on QuickBooks?
A. I think they did.
Q. And to the extent that each of those or any of those entities maintained cash receipt and disbursement ledgers on QuickBooks, where would those files be?
A. I probably never printed them out.
Q. And if you didn't print them out, would

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it be fair to say that they're still located on one of the three computers you identified earlier?
A. No.
Q. Why not?
A. Because all the data was deleted.
Q. Well, I thought you stated earlier that the only thing that was deleted was the general ledgers file.
A. No. I said after we printed it, we deleted that year.
Q. The entire year, all of the information in connection with that year?
A. Yes.
Q. Would you be able to recreate from any information located from the warehouse out in California the cash receipt and disbursement ledgers for any of the nonindividual debtors named on Page 1 of Exhibit No. 1?
A. If I have all the checks and receipts, I could.
Q. And in your mind, there's no reason to believe that you don't have all of the checks in order for you to be able to recreate those cash receipt and disbursement ledgers; correct?
A. Correct.

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Q. Did you also print out hard copies of balance sheets and profit and loss statements for each of the entities for which you answered yes just a moment ago?
A. Just the end the year.
Q. And do you have copies either at your home here in Miami or out in the warehouse in California of the hard copies of the balance sheets and P and L statements for each of the individual entities for which you answered yes a moment ago?
A. They would be all in California.
Q. And would those be kept in binders also?
A. Yes.
Q. Separate and apart from the general ledger binders you identified earlier?
A. No. They would all be in the same binder.
Q. When was the last time when files were deleted from your computer?
A. That would be when we finished up the year-end for 2010.
Q. And were those files deleted from your computer at American Residential Equities, LLC or from your computer at home?
A. They would have been done at ARE, LLC.

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Q. And how many individuals were responsible for deleting those files?
A. I don't remember.
Q. Do you remember the date when somebody walked into your office and deleted those files?
A. No.
Q. Were you there?
A. I probably was.
Q. You have no recollection whatsoever --
A. I can't remember what I had for breakfast; I can't remember back that far.
Q. I don't mean this in a coy sort of way, but do you suffer from any condition that doesn't allow you to recall things accurately?
A. I don't remember what happened when. I just remember it was -- you know, that they came in and did it, but I can't tell you when.
Q. Do you remember if it was one individual? Two individuals? Three individuals?
A. It might have been two. I'm not sure.
Q. And do you know the names of either of those individuals?
A. No.
Q. And do you remember how long they took to delete those files?

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A. I can't tell you.
Q. Did you actually watch these individuals delete the files?
A. No.
Q. Did they sit on your computer and delete the files?
A. They probably did.
Q. How do you know that there were probably two individuals that deleted the files?
A. Because I think there were two people from whoever the IT company was that was in the building.
Q. But you didn't see them do it?
A. No.
Q. And you weren't around when they did it?
A. No.
Q. And how did you know that they had deleted the files?
A. Because when I went to -- when I went to go onto my -- to go into the general ledger, it wasn't there.
Q. And when was it that you tried to access the general ledger after December 31st, 2010 for any of these companies?
A. For the prior year, I don't think I

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ever -- it may have been sometime in March.
Q. And at that point in March, were you already working from home using your computer or still working at American Residential Equities, LLC at its Brickell office using its computer?
A. At March, I was at LLC on Brickell.
Q. Now does QuickBooks always prompt you to back up a data file every time you use it?
A. Every time I use it? No.
Q. At any point does QuickBooks ask you if you want to back up files?
A. Yeah, if I go to close it.
Q. Every time that you close the application, it asks whether you want to back up the file; correct?
A. Correct.
Q. And is it your testimony that each time that question popped up on your screen you answered no?
A. Yes.
Q. How many times would you say you opened QuickBooks and used that application on a daily basis?
MR. OLIN: When?
BY MR. FERRER:

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Q. Presently, how many times --
MR. OLIN: Okay.
BY MR. FERRER:
Q. -- do you use the QuickBooks application on a daily basis?
A. I probably go once every day.
Q. And do you leave the application running for several hours or do you go in and come right back out?
A. I leave it running for a few hours.
Q. And each day when you close the application on QuickBooks, it prompts you to back up that information; correct?
A. Correct.
Q. And it's your testimony that you continuously say no --
A. Yes.
Q. -- answer that question no?
A. That is correct.
Q. And what happens, if God forbid, there's a fire at your house or somebody steals your computer, what would happen to that information?
A. If -- I would have to try and get all the data and then recreate it.
Q. And where would you go about getting

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that data to recreate it?
A. I would have to find the -- the disbursements and receipts.
Q. And for the year 2011, where would those disbursements and receipts be kept?
A. Probably somewhere out in California.
Q. Do you keep any copies of disbursements and receipts in your home?
A. No.
Q. So, take me through the process. On a monthly basis you get a series of disbursements and receipts; right?
A. Yes.
Q. And what do you do with that information?
A. Then I enter it into my QuickBooks.
Q. And how is it that you receive that information, hard copies or digital?
A. I receive check requests, and I receive -- I receive receipts.
Q. Check requests and receipts; correct?
A. Right.
Q. When you talk about receipts, what is it that you're referring to?
A. Either checks we receive or remits.

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Q. Remits from who?
A. Remits from our servicer.
Q. When you say "our," who's the "our" in that sentence?
A. It would be whoever's the servicer managing the assets for -- for our numbered LLCs.
Q. And presently who is that servicer?
A. That I don't know.
Q. But who other than you would receive remit statements at American Residential Equities, LLC or at Addle Hill?
A. The person that would receive it would be the person in charge of our asset reporting.
Q. What's the name of that person?
A. Her name is Andrea Lutchman.
Q. And where is Miss Lutchman located?
A. She's somewhere in Miami.
Q. And Miss Lutchman was through December 31st of 2010 an employee of American Residential Equities, LLC; correct?
A. Correct.
Q. And she is now employed by Addle Hill; correct?
A. Correct.
Q. Who is presently managing the assets of

American Residential Equities LIII, LLC?
A. When you say managing it, what are you referring to?
Q. Well, you stated earlier that traditionally American Residential Equities, LLC would manage assets for each of these individually numbered, LLCs; correct?
A. Correct.
Q. And American Residential Equities LIII, LLC is one of the individually numbered LLCs to which you were referring; correct?
A. Correct.
Q. And who is presently managing the assets for American Residential Equities LIII, LLC?
A. That would be Addle Hill.
Q. Are there any financial records for American Residential Equities LIII, LLC that you are presently maintaining?
A. No.
Q. Are there any financial records for American Residential Equities LIII, LLC that you're presently maintaining?
I'm sorry. I asked you the same question because I was intending to ask --
Let me just get it clear on the record

because I misspoke. Are there any financial records for American Residential Equities LIII, LLC that you're presently maintaining?
A. No.
Q. Do you know who the servicer is for the assets of American Residential Equities LIII, LLC?
A. Not at the present time.
Q. Who was the last servicer for the assets of American Residential Equities LIII, LLC?
A. The last one that I remember was Vantium.
Q. And when did Vantium stop servicing the assets for American Residential Equities LIII, LLC?
A. I think that was in March or April.
Q. Do the remits that Miss Lutchman sends to you on a monthly basis contain the name of the servicer for American Residential Equities numbered entities?
A. The name of the servicer? No.
Q. Do you personally get remits from the servicer since March or April of 2011?
A. Do I personally get them?
Q. Yes, sir.
A. No.
Q. Have you ever received the remit

statements from any servicer --
A. No.
Q. -- for American Residential Equities, LLC --
A. No.
Q. Who presently gets the remit statements from the servicer for each of the entities that American Residential Equities, LLC used to manage?
A. The person that would get the remit for the assets would be Andrea Lutchman.
MR. FERRER: Mr. Hirschkowitz, I don't believe I have any questions. See you on the 13th.
CROSS-EXAMINATION
BY MR. OLIN:
Q. I just have one question.
Do you have much to do with the IT people or did you have much to do with the IT people when you were at the office on Brickell?
A. No.
Q. You mentioned that you're not a computer person?
A. That's correct.
Q. What did you mean by that?
A. The worst thing I can do is turn on a

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computer. I have no knowledge of what makes it work.

Q. Were you responsible for managing, hiring or telling the IT people what to do?

A. No.

MR. OLIN: Okay.

REDIRECT EXAMINATION

BY MR. FERRER:

Q. Who was responsible for managing the IT people at American Residential Equities, LLC?

A. I believe that would be Mr. Kirsch.

Q. And is Mr. Kirsch still the person responsible for managing the IT people for either American Residential Equities, LLC or Addle Hill?

A. I think so.

MR. FERRER: Okay. Thank you, Mr. Hirschkowitz.

MR. OLIN: Copy if it's ordered.

(The reading and signing of this deposition was not waived.)

(This deposition was concluded at 12:25 p.m.)

CERTIFICATE OF OATH

STATE OF FLORIDA :
:SS.
COUNTY OF MIAMI-DADE :

I, Lance W. Steinbeisser, Notary Public, State of Florida, certify that WILLIAM HIRSCHKOWITZ personally appeared before me on the 26th of September, 2011.

Signed this 29th day of September, 2011.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Notary Public, State of Florida at Large
My Commission Number: DD 876431
Expires: May 4, 2013

REPORTER'S DEPOSITION CERTIFICATE

I, Lance W. Steinbeisser, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report the deposition of WILLIAM HIRSCHKOWITZ; that a review of the transcript was requested; and that the transcript, pages 1 through 97, is a true record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 29th day of September, 2011 at Miami, Florida.

LANCE W. STEINBEISSER, RPR-CSR-FPR
Certified Court Reporter

ERRATA SHEET
DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES
RE : REDWOOD V. KIRSCH
CASE NO. : 08-65603 CA 40
DEPO OF : WILLIAM HIRSCHKOWITZ
TAKEN : SEPTEMBER 29, 2011

Page #	Line #	Change	Reason

Under penalties of perjury, I declare that I have read the foregoing document, and that the facts stated in it are true.

Signature Date

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STEINOTYPE, INC.
1140 NE 86th Street
Miami, Florida 33138-3434
(305)632-4464

September 29, 2011
Michael S. Olin, Esquire
LAW OFFICES OF MICHAEL S. OLIN, P.A.
169 East Flagler Street, Suite 1224
Miami, Florida 33131-1205
(305)677-5088
RE : REDWOOD V. KIRSCH
DEPO OF : WILLIAM HIRSCHKOWITZ
TAKEN : September 26, 2011

Dear Mr. Olin:

With reference to the deposition of WILLIAM HIRSCHKOWITZ taken on September 26, 2011, in connection with the above-captioned case, please find enclosed the transcript of said deposition.

Please arrange to have the witness read your copy of the transcript, denoting any corrections by page and line number on the enclosed errata sheet. This errata sheet must be signed by the witness, and returned to Jose. M. Ferrer, attorney for the Plaintiffs, for filing with the original transcript, which has been sent to counsel.

If this has not been taken care of within the next thirty days or by the time of trial, whichever comes first, it will then be concluded that the reading, subscribing and notice of filing have been waived.

Sincerely,

STEINOTYPE, INC.

cc: Original transcript
J. M. Ferrer, Esq.

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EXHIBIT G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:10-CV-21943-GOLD/McALILEY

AMERICAN RESIDENTIAL EQUITIES, LLC,

Plaintiff,

v.

GMAC MORTGAGE, LLC,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT II OF THE COMPLAINT [ECF No. 36]

THIS CAUSE comes before the Court on Plaintiff's Motion for Judgment on the Pleadings (the "Motion"). [ECF No. 36]. Plaintiff American Residential Equities, LLC ("ARE") requests that this Court enter judgment on Count II of the Complaint for specific performance compelling Defendant GMAC Mortgage, LLC ("GMACM") to submit to an audit of its books and records. GMACM has filed its Response in Opposition to ARE's Motion, and ARE filed a Reply in support of its Motion. [ECF Nos. 43, 46]. For the reasons stated below, I deny ARE's Motion for Judgment on the Pleadings on Count II of the Complaint.

I. BACKGROUND

The following facts are undisputed. Plaintiff ARE acquires, holds, and liquidates residential mortgage loans which are secured by real property. [ECF No. 1 ¶ 6]. Defendant GMACM is in the business of servicing mortgage loans. [*Id.* ¶ 7]. On July 29, 2004, ARE and GMACM entered into a Servicing

Agreement, whereby GMACM, in exchange for certain representations and warranties made by ARE, agreed to service and administer various mortgage loans owned by ARE. [ECF No. 4-1; ECF No. 43, p.1].

Among other things, the Servicing Agreement provided for the following:

Section 4.06 Right to Examine Servicer Records

The Owner shall have the right to examine and audit any and all of the books, records, or other information of the Servicer, whether held by the Servicer or by another on its behalf, with respect to or concerning this Agreement or the Mortgage Loans, during normal business hours or as otherwise acceptable to the Servicer, upon reasonable advance notice; provided that the Owner shall not so audit more than once per quarter.

Section 6.01 Termination

. . . .

(c) Servicer may terminate, at its sole option, the Agreement with respect to some or all of the Mortgage Loans or REO Property, without cause. Such termination shall not become effective until the earlier of: (i) 90 days after the date on which notice of termination is provided by the Servicer in writing and delivered to the Owner by registered mail, or (ii) successor shall have assumed the Servicer's responsibilities and obligations hereunder in the manner provided in Section 6.02.

Section 6.02 Transfer Procedures

In the event the Servicer is replaced pursuant to the terms of this Agreement, the Servicer agrees to cooperate reasonably with the Owner and with any party designated as the successor servicer or subservicer in transferring the servicing to such successor servicer. In addition, the Servicer shall be responsible for notifying the related mortgagors of any transfer of servicing in accordance with the requirements of RESPA and the Cranston Gonzalez National Affordable Housing Act of 1990. On or before the date upon which servicing is transferred from the Servicer to any successor servicer (the "Transfer Date"), the Servicer shall prepare, execute and deliver to the successor servicer any and all documents and other instruments, place in such successor's possession all Mortgage Loan Documents in the possession of the Servicer which are necessary or appropriate to effect the purposes of such notice of termination, including but not limited to the transfer and endorsement or assignment of the related Mortgage Loans and related documents. The Servicer shall reasonably cooperate with the Owner and such successor in effecting the termination of the Service's responsibilities and rights hereunder.

. . . .

> On the related Transfer Date, the Servicer shall comply with all of the provisions of this Agreement to effect a complete transfer of the servicing with respect to the related Mortgage Loans. Except as otherwise provided for in this Agreement, on the related Transfer Date for each related Mortgage Loan, this Agreement . . . shall terminate with respect to such Mortgage Loan.
>
> [ECF No. 4-1].

On April 20, 2009, GMACM transmitted a letter to ARE evidencing its intent to terminate the Parties' Servicing Agreement, without cause, effective no later than July 31, 2009. [ECF No. 1 ¶ 13]. On May 1, 2009, GMACM issued a second letter, which superseded previous correspondence, alerting ARE that it would extend the termination date an additional four months, through November 30, 2009. [*Id.* ¶ 14]. This letter expressly stated that the termination date would become "effective the earlier of (i) November 30, 2009 or (ii) such other date as ARE notifie[d] GMACM that a successor servicer ha[d] assumed GMACM's responsibilities and obligations." [ECF No. 7, p. 24]. GMACM also demanded reimbursement for expenses and advancements made in connection with the Servicing Agreement. [ECF No. 36, ¶ 9]

ARE did not appoint a successor servicer before November 30, 2009, and GMACM continued to service ARE's loans after that date.[1] ARE requested that GMACM permit ARE to perform an audit of its books and records in accordance with Section 4.06 of the Servicing Agreement. [ECF No. 1 ¶¶ 18–20].[2] GMACM

[1] ARE remains silent as to why it failed to appoint a successor servicer on or before November 30, 2009, and GMACM offers no explanation why it continued to service the mortgage loans after that date.

[2] As discussed in more detail below, it is unclear when and how many times ARE made such a request.

refused to allow ARE to perform any such audits. [*Id.*]. On April 1, 2010, ARE sent GMACM a letter demanding that it cease servicing ARE's mortgage loans and REO properties; enclosed with the letter were specific instructions for transferring the servicing files to Acqura Loan Services ("ALS"), the successor servicer. [*Id.* ¶ 22].

On June 11, 2010, ARE filed this action against GMACM. In its Complaint, ARE alleged that GMACM violated the terms of the Servicing Agreement by failing to properly service the relevant loans and properties; purporting to terminate the Servicing Agreement; refusing an audit of its books and records; and failing to follow certain instructions to transfer loan servicing to another company. [*Id.* ¶¶ 11–24]. As such, Plaintiff filed a two-count complaint alleging (1) breach of contract, and (2) specific performance. [*Id.* ¶¶ 25–35]. GMACM filed an Answer and Counterclaims for breach of contract, unjust enrichment, breach of implied duty of good faith and fair dealing, defamation, conversion, and injunctive relief. [ECF No. 49].[3] On October 15, 2010, ARE filed the instant Motion for Judgment on the Pleadings on Count II of its Complaint. [ECF No. 36].

II. LEGAL STANDARD AND GOVERNING LAW

Under the Federal Rules of Civil Procedure, "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). Such relief is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a

[3] GMACM filed an Amended Answer after the Court granted ARE's Motion to Strike certain Affirmative Defenses listed in the original Answer. [ECF Nos. 7, 29, 44].

matter of law. *See Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367, at 206, 208, 216 (3d ed. 2004) ("As numerous judicial opinions make clear, a Rule 12(c) motion is designed to provide a means of disposing cases when the material facts are not in dispute between the parties . . . . The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court. . . . [I]f the pleadings do not resolve all of the factual issues in the case, a trial on the merits would be more appropriate than an attempt at resolution of the case on a Rule 12(c) motion."). As with a motion under Rule 12(b)(6), a court that rules on a motion under Rule 12(c) must accept the nonmovant's allegations as true and view all facts in the light most favorable to the nonmoving party. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 (11th Cir. 1999); *Latecoere Int'l, Inc. v. U.S. Dept. of the Navy*, 19 F.3d 1342, 1357 (11th Cir. 1994); 2 MOORE'S FEDERAL PRACTICE § 12.38, at 12-137 (3d ed. 2010); 5C WRIGHT & MILLER, *supra* § 1368, at 230 ("It is axiomatic . . . that for purposes of the court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false.").

Federal courts are generally reluctant to grant a motion for judgment on the pleadings where a case presents ambiguous factual circumstances that necessitate proper factual findings by a jury. *See Greenberg v. Gen. Mills Fun*

Grp., Inc., 478 F.2d 254, 256 (5th Cir. 1973); 5C WRIGHT & MILLER, *supra* § 1367, at 259 ("[Unlike a 12(b) motion, a motion for judgment on the pleadings] is directed towards a determination of the substantive merits of the controversy; thus, federal courts are unwilling to grant a judgment under Rule 12(c) unless it is clear that the merits of the controversy can be fairly and fully decided in this summary manner."); *id.* § 1367, at 223 ("A number of cases decided by various federal courts around the country indicat[e] that it is necessary for the movant to show a clear right to a judgment on the pleadings . . . .").

III. DISCUSSION

ARE argues that its Count II for specific performance is appropriate for summary disposition at this stage of the proceedings because its Motion presents purely legal questions of contract interpretation. [ECF No. 36, p. 2]. According to ARE, Sections 4.06 and 6.02 of the Servicing Agreement provide it with an unambiguous right to audit GMACM through the "Transfer Date," which occurred in April 2010. [ECF No. 36, pp. 1–2, 6; ECF No. 46, p. 1]. ARE maintains that this audit right was not extinguished when GMACM sent ARE termination notices because the Agreement and all of its provisions, including the audit provision, remained binding until the "Transfer Date." In particular, Section 6.02 of the Servicing Agreement provides that "[e]xcept as otherwise provided for in this Agreement, on the related Transfer Date for each related Mortgage Loan, this Agreement . . . shall terminate with respect to such Mortgage Loan." [ECF No. 4-1]. ARE argues that the only "reasonable" or "common sense"

interpretation of the Servicing Agreement must be that it had a right to perform an audit up through April of 2010. [ECF No. 36, p. 6; ECF No. 46, p. 2].

I decline to grant ARE's Motion because factual disputes and gaps presented by the pleadings prevent me from facing the purely legal question of contract interpretation that ARE purports to present. Most importantly, ARE's pleadings and memoranda in support of its Motion do not state when or how many times it requested an audit of GMACM's books and records. In its Complaint, ARE provided the following on this issue:

> **GMACM Refuses an Audit of its Books and Records**
>
> In an effort to better understand the scope of GMACM's mismanagement of the Mortgage Loans and REO Properties, and to assess the amounts owed to it under the Servicing Agreement, ARE demanded an audit of GMACM's books and records relating to the Mortgage Loans and REO properties pursuant to Section 4.06 of the Servicing Agreement.
>
> GMACM refused ARE's demand for an audit.
>
> GMACM told ARE not only that its books, records, and information on ARE's Mortgage Loans and REO Properties would not be made available, but that ARE's auditors would not be allowed inside GMACM's buildings.
>
> [ECF No. 1 ¶¶ 18–20].

As is clear from this text, although ARE alleged that it made audit requests, it failed to allege when or how many times it did so. Likewise, in its Motion and in its Reply, ARE simply asserted that it requested an audit multiple times without providing any more details. [ECF No. 36, p. 6 ("ARE repeatedly requested an audit."); ECF No. 46, p. 5 (disagreeing with GMACM that the audit request letter it cited "was the only request")].

This factual omission precludes me from granting judgment for ARE. It is undisputed that ARE's right to audit GMACM's books and records originated

from, and only existed as a result of, the terms and conditions of the Servicing Agreement. Thus, it goes without saying that ARE could only invoke this right while the terms of the Agreement were in effect. The Parties originally executed the Agreement on July 29, 2004, and ARE sent a written demand to GMACM to finally transfer the files to another Servicer on April 1, 2010, so the outer limits of time when the terms of the Servicing Agreement could have been valid appear to be these two dates. As such, both Parties presumably would agree that an audit request outside of this window of dates would be improper. [ECF No. 1, pp. 3, 5]. On the other hand, if ARE had requested an audit before July 31, 2009—when GMACM first intended to terminate the Servicing Agreement—the Parties would probably also agree that the terms of the Agreement would have been in effect at the time of such an audit request.[4]

Given these outer limits, I recognize that if ARE made at least one audit request between July 31, 2009 and April 1, 2010, this factual scenario may present a legal question of contract interpretation as to whether the terms of the Servicing Agreement, which created the audit right to begin with, were still valid or had already been extinguished at the time of the audit request.[5] Nevertheless, I do not reach this pure legal question now because ARE as the movant has

[4] GMACM would probably dispute the *validity* of such an audit request on other grounds.

[5] GMACM asserts that the Servicing Agreement terminated either on July 31, 2009, or at latest on November 30, 2009, in accordance with its letters of termination and with Section 6.01 of the Servicing Agreement. GMACM further asserts that its argument on this point is consistent with Section 6.02 of the Servicing Agreement, which provides that the Agreement shall terminate on the Transfer Date, because that section specifically provides for termination on the Transfer Date "*except as otherwise provided for in this Agreement.*" [ECF No. 43, p. 10 (emphasis added)].

provided *no dates whatsoever* as to when it requested an audit.[6] It is not the Court's responsibility to hypothesize or assume such critical facts and enter judgment on the pleadings based on such guesswork. To the contrary, judgment on the pleadings is only proper *where the movant demonstrates a "clear" right to such judgment*. *Greenberg*, 478 F.2d at 256–57 (reversing district court for granting motion for judgment on the pleadings in contractual dispute where right to relief as set forth in the pleadings was not clear); 5C WRIGHT & MILLER, *supra* § 1367, at 223 ("A number of cases decided by various federal courts around the country indicat[e] that it is necessary for the movant to show a *clear right to a judgment on the pleadings* . . . .") (emphasis added); *id.* § 1367, at 259 ("[Unlike a 12(b) motion, a motion for judgment on the pleadings] is directed towards a determination of the substantive merits of the controversy; thus, federal courts are unwilling to grant a judgment under Rule 12(c) *unless it is clear that the merits of the controversy can be fairly and fully decided in this summary manner*.") (emphasis added).

Unlike ARE, GMACM does cite a specific date when it asserts that ARE requested an audit of its books and records. According to GMACM, ARE transmitted a letter on Friday, March 5, 2010, demanding an audit pursuant to Sections 4.06 and 7.01 of the Servicing Agreement. [ECF No. 1 ¶ 18; ECF No.

[6] In its Reply, ARE seems to argue that the language of its Complaint permits the inference that it requested an audit before August 1, 2009. In particular, ARE cites paragraphs 18–20 of GMACM's Answer and argues that "GMACM admitted in its pleadings that it told ARE *before the effective Transfer Date* [that it would refuse an audit]." [ECF No. 46, p. 5]. Paragraphs 18–20 of GMACM's Answer refer to paragraphs 18–20 of the Complaint, but those paragraphs make no reference to the timing of an audit request.

36 ¶ 10].[7] The proposed audit was scheduled to take place the following Tuesday, March 9, 2010 and would "cover virtually all areas of GMACM's servicing processes: Collections, Loss Mitigation, Payment Posting, Foreclosure, Bankruptcy, REO, Property, Valuation, and Property Valuation." [ECF No. 43, ¶ 10]. According to GMACM, it declined ARE's audit request on March 8, 2010, arguing that it had already exercised its right to terminate the Servicing Agreement pursuant to Section 6.01(c) when it sent its termination letters on April 20 and May 1, 2009. [*Id.* ¶ 11].[8]

In support of this factual assertion, GMACM submitted a copy of the audit request letter ARE supposedly sent to it on March 5, 2010. [ECF No. 43-1]. GMACM argues that the letter provides issues of material fact precluding the Court from granting ARE's Motion because ARE failed to provide "reasonably advance notice" of the audit and because the scope of the proposed audit was beyond anything contemplated by Section 4.02 of the Servicing Agreement. [ECF No. 43, pp. 13–15]. I do not reach the issues presented by the substance of the letter because ARE disputes the existence and accuracy of the letter, calling it "unauthenticated," "hearsay," and "irrelevant." [ECF No. 46, p. 5].[9] I

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[7] In its Amended Answer, GMACM also provides that "GMACM refused Plaintiff's [audit] demand because GMACM had unilaterally terminated the Servicing Agreement, pursuant to the express terms of the Agreement, *months prior to Plaintiff's audit demand*." [ECF No. 49, p. 7 (emphasis added)].

[8] GMACM's letter stated that, as provided for in Section 6.01(c) of the Servicing Agreement, the Servicing Agreement terminated on or about August 1, 2009, or 90 days after May 1, 2009, which was the date on which GMACM sent notice of termination.

[9] Plaintiff also argues that the letter should be "stricken." A court may order stricken from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Courts recognize that motions to strike seek drastic relief and, therefore, disfavor them. *Augustus v. Bd. of Pub. Instruction*, 306 F.2d 862, 868 (5th Cir. 1962); *Holguin v. Celebrity Cruises, Inc.*, Case Nos. 10-20215, 10-20545, 10-20546, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010) (refusing to strike alleged duties in plaintiffs' negligence count where

agree, however, with GMACM that this issue provides additional grounds for the denial of ARE's Motion because ARE's disagreement with GMACM about the content of the letter and the date and circumstances of the proposed audit provide a dispute of material fact. *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996) ("Judgment on the pleadings is proper when no issues of material fact exist, and the movant is entitled to judgment as a matter of law.").

Binding case law has long held that a district court in this circuit should not grant a motion for judgment on the pleadings where the movant requests specific performance unless the court is fully informed about the factual record, and no disputes of material fact exist.

> Specific performance is not grantable as a matter of right, but only as a matter of equity, and in the exercise of a sound and informed discretion *upon a knowledge of the whole facts*. Wherever, therefore, the truth of the matters bruited may lie, whether there is a real fire beneath, and accounting for, the smoke of the accusations is not a matter which ought to, or may be, determined on pleadings and without a trial of the facts.
>
> *Eristavi-Tchitcherine v. Lasser*, 164 F.2d 144, 145 (5th Cir. 1947) (reversing district court that had granted judgment on the pleadings for specific performance) (emphasis added).[10]

In short, disputes and factual uncertainty regarding how many times ARE requested an audit, when ARE requested an audit, and whether and to what extent the Parties were still operating under the terms of their agreement when

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count alleged facts supporting duty of care). ARE does not provide citations to case law or any other authority explaining why I should invoke such "drastic" relief in this case. [ECF No. 31, p. 6]. Therefore, I decline to strike the letter.

[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981. District courts in other circuits have also reached similar conclusions. *See, e.g.*, *Liu v. Mund*, — F. Supp. 2d —, Case No. 09-cv-500, 2010 WL 3743944, at *8 (W.D. Wisc. Sept. 21, 2010) (denying plaintiff's motion for judgment on the pleadings requesting specific performance where plaintiff "did very little to show she is entitled to an order of specific performance" because "the decision to order specific performance is a question of equity and there are reasons to wait before imposing such a burden").

ARE requested an audit require that I deny ARE's Motion for Judgment on the Pleadings.

ARE's memorandum of law in support of its Motion provides additional grounds for denying the Motion. In particular, ARE failed to provide any substantive state law support for the relief it requests. It is well-established that actions for specific performance are governed by state law, not federal law. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (noting that state law governs the specific performance of arbitration agreements in admiralty actions); *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 584 (6th Cir. 2007) (analyzing elements of specific performance under Michigan law where party in contractual dispute had moved for judgment on the pleadings requesting specific performance); *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n., Inc.*, 287 F.3d 568, 576 (6th Cir. 2002) ("[W]hat [Plaintiff] seeks in essence is the specific performance of the 1991 Agreement. This is purely a state law breach of contract action."); *Watson v. McCabe*, 527 F.2d 286, 288 (6th Cir. 1975) (holding that a case for the specific performance of an oral sales contract concerned "clearly non-federal matters").

ARE's Motion exclusively cites federal case law and provides no examination of relevant state law.[11] Nor does ARE provide any preliminary

[11] Furthermore, the cases cited by ARE in its Motion and Reply either do not properly support the Motion or are factually distinguishable. *See Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1359, 1368 (11th Cir. 1988) (affirming Federal Trade Commission's cease and desist order where parties filed cross-motions for summary decisions pursuant to Rule 3.24 of the Commission's Rules of Practice for Adjudicative Proceedings); *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 584–85 (6th Cir. 2007) (granting motion for judgment on the pleadings in contractual dispute regarding specific performance where the facts underlying the motion were "generally undisputed" and "not refuted" by any party); *Grife v. Allstate Floridian Ins. Co.*, 493 F. Supp. 2d 1249, 1250 (S.D. Fla. 2007) ("The parties concede that no factual dispute exists. Therefore, this

governing law analysis as to which state law would even apply to its request for specific performance. GMACM cited Florida law in its Response to ARE's Motion, but ARE failed to address these arguments in its Reply and instead relied entirely on one non-binding federal case from the Sixth Circuit. [ECF No. 43, pp. 11–12; ECF No. 46].[12]

For all of the reasons described above and viewing the facts in this case in the light most favorable to GMACM as I must under binding case law, I hold that ARE has not established a right to judgment on the pleadings with regard to Count II of its Complaint. Accordingly, it is hereby **ORDERED AND ADJUDGED** that

1. Plaintiff's Motion for Judgment on the Pleadings [ECF No. 36] is **DENIED**.
2. Defendant shall designate its expert witnesses within 30 days of this order in accordance with the Order issued January 26, 2011. [ECF No. 53].

DONE AND ORDERED, in chambers, in Miami, Florida, this 7 day of March, 2011.

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entire case turns on the legal issue of contract interpretation."); *Connell Leasing Co. v. JF Equities Acquisition, Inc.*, 731 F. Supp. 1539, 1542 (S.D. Fla. 1989) (granting motion for summary judgment where no material questions of fact exist regarding the parties obligations under the relevant contract).

[12] Neither Party references the governing law clause in the Servicing Agreement at issue in this case or explains why it should or should not govern their dispute concerning specific performance. That clause provides that all aspects of the Agreement shall be governed by the substantive laws of the state of Pennsylvania. [ECF NO. 4-2 § 13.07].

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge Chris M. McAliley
All counsel of record

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.

AMERICAN RESIDENTIAL EQUITIES, LLC,

Plaintiff,

v.

GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Corporation,

Defendant.
_____/

COMPLAINT

Plaintiff, American Residential Equities, LLC ("ARE"), sues Defendant, GMAC Mortgage, LLC, successor by merger to GMAC Mortgage Corporation ("GMACM"), and states:

Parties, Jurisdiction, and Venue

1. This is an action for damages for breach of contract and for specific performance of a contract.

2. ARE is a Delaware limited liability company with its principal place of business in Miami, Florida.

3. GMACM is a Delaware limited liability company with its principal place of business in Horsham, Pennsylvania.

4. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1332 because ARE and GMACM are diverse in citizenship and the amount in controversy exceeds $75,000.00, exclusive of interest, fees, and costs.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because (i) a substantial part of the events or omissions giving rise to the causes of action herein occurred in the Southern District of Florida; and (ii) the impact of GMACM's misconduct occurred in the Southern District of Florida.

General Allegations

6. ARE is in the business of acquiring, holding and ultimately liquidating pools of non-performing residential mortgage loans which are secured by real property (the "Mortgaged Properties").

7. Upon acquiring such mortgage loans, ARE typically retains a company to "service" the loans, *i.e.*, hold the loan files and mortgage loan documents; communicate with the borrowers; collect mortgage payments; administer, carry out and advance payments for the lender's obligations under the mortgage loan documents; ensure that the Mortgaged Properties are inspected, maintained, and insured; ensure that the borrowers' obligations under the mortgage loan documents are carried out; initiate collection activity, including but not limited to, mortgage foreclosure proceedings upon borrowers' defaults; acquire and subsequently sell Mortgaged Properties recovered through foreclosure proceedings ("REO Properties"); and remit payments and report to the lender in connection with the Mortgaged Properties.

ARE Retains GMACM as a Servicer

8. GMACM is in the business of, among other things, servicing mortgage loans.

9. On or about July 29, 2004, ARE and GMACM entered into a Servicing Agreement pursuant to which GMACM agreed to service ARE's mortgage loans (the "Mortgage Loans"). A copy of the Servicing Agreement is attached as Exhibit 1.

10. The Servicing Agreement was subsequently amended by amendments dated January 1, 2006, February 1, 2007, May 31, 2007, April 10, 2008, and February 6, 2009, copies of which are attached as composite Exhibit 2.[1]

GMACM Fails to Properly Service the Mortgage Loans and REO Properties

11. GMACM failed to comply with the terms of the Servicing Agreement and mismanaged the Mortgage Loans and REO Properties in numerous ways, including but not limited to:

(a) maintaining, inspecting and/or reporting on the wrong property securing the Mortgage Loans;

(b) failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals;

(c) failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines;

(d) servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition;

(e) selling REO Properties in violation of the Servicing Agreement;

[1] The Servicing Agreement and Amendments are collectively referred to herein as the "Servicing Agreement."

(f) over-insuring Mortgaged Properties and/or REO Properties;

(g) failing to timely file insurance claims;

(h) failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan despite ARE's written demand to exclude its assets from the program; and

(i) failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement.

12. In addition, GMACM continually refused or failed to timely provide required reports and other information requested by ARE on the Mortgage Loans, the Mortgaged Properties and/or the REO Properties.

GMACM Purports to Terminate the Servicing Agreement

13. On April 20, 2009, GMACM sent a letter to ARE purporting to terminate the Servicing Agreement, without cause, effective no later than July 31, 2009 (the "April 2009 Letter"). A true and correct copy of the April 2009 Letter is attached as Exhibit 3.

14. Less than two weeks later, on May 1, 2009, GMACM issued another letter to ARE, this time purporting to extend the termination date up to an additional four months, through November 30, 2009 (the "May 2009 Letter"). A true and correct copy of the May 2009 Letter is attached as Exhibit 4.

15. While the May 2009 Letter offered no explanation for the purported four-month extension, ARE learned that Georgia State Representative Joe Heckstall ("Rep. Heckstall") contacted GMACM regarding a mortgage loan to Rep. Heckstall's brother, Cornelius Heckstall (the "Heckstall Loan"). Rep. Heckstall requested GMACM to enter into a second modification of the Heckstall Loan after Cornelius Heckstall allegedly failed to comply with the first modification.

16. ARE had previously denied GMACM's multiple requests for a second modification of the Heckstall Loan in part because Cornelius Heckstall had failed to comply with the first modification, the terms of which were virtually identical to the proposed second modification.

17. Nevertheless, GMACM pressured ARE to approve the second modification. ARE reluctantly agreed to the second modification only after GMACM agreed to extend the purported termination date of the Servicing Agreement to enable ARE to arrange for a successor servicer.

GMACM Refuses an Audit of its Books and Records

18. In an effort to better understand the scope of GMACM's mismanagement of the Mortgage Loans and REO Properties, and to assess the amounts owed to it under the Servicing Agreement, ARE demanded an audit of GMACM's books and records relating to the Mortgage Loans and REO Properties pursuant to Section 4.06 of the Servicing Agreement.

19. GMACM refused ARE's demand for an audit.

20. GMACM told ARE not only that its books, records, and information on ARE's Mortgage Loans and REO Properties would not be made available, but that ARE's auditors would not be allowed inside GMACM's buildings.

GMACM fails to follow Transfer Instructions

21. On April 1, 2010, pursuant to Section 6.0 of the Servicing Agreement, ARE sent GMACM a letter demanding that it cease servicing the Mortgage Loans and REO Properties immediately. A copy of the April 1, 2010 letter is attached as Exhibit 5.

22. The April 1, 2010 letter also set forth, pursuant to Sections 6.02 and 7.01 of the Servicing Agreement, specific instructions for transferring the servicing files on the Mortgage Loans and REO Properties (the "Servicing Files") to Acqura Loan Services ("ALS"), the successor servicer.

23. Sections 6.02 and 7.01 of the Servicing Agreement, as well as the April 1, 2010 letter, required that GMACM deliver to ALS, as the successor servicer, all Mortgage Loan files and related documents in connection with the Servicing Files.

24. GMACM failed to furnish complete mortgage files to ALS pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, and failed to pay ARE the April, 2010 remittance pursuant to Section 3.01 of the Servicing Agreement.

COUNT I
(Breach of Contract)

25. ARE realleges Paragraphs 1 through 24.

26. This is an action for breach of contract based upon GMACM's failure to comply with the terms of the Servicing Agreement.

27. ARE has performed all of its obligations under the Servicing Agreement.

28. GMACM has breached the Servicing Agreement by:

(a) maintaining, inspecting and/or reporting on the wrong property securing the Mortgage Loans;

(b) failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals;

(c) failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines;

(d) servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition;

(e) selling REO Properties in violation of the Servicing Agreement;

(f) over-insuring Mortgaged Properties and/or REO Properties;

(g) failing to timely file insurance claims;

(h) failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan despite ARE's written demand to exclude its assets from the program;

(i) failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement;

(j) failing to timely provide ARE with required reports and properly requested information relating to the Mortgage Loans and REO Properties;

(k) failing to comply with ARE's demand for an audit pursuant to Section 4.06 of the Servicing Agreement;

(l) failing to furnish complete mortgage files to ALS pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, adversely affecting ALS's ability to service the Mortgage Loans and REO Properties; and

(m) failing to pay ARE the April, 2010 remittance pursuant to Section 3.01 of the Servicing Agreement.

29. As a direct and proximate result of GMACM's breaches of the Servicing Agreement, ARE has been damaged.

WHEREFORE, Plaintiff, ARE Residential Equities, LLC, requests the Court to enter judgment in its favor and against Defendant, GMAC Mortgage, LLC, successor by merger to GMAC Mortgage Corporation for: (i) compensatory damages; (ii) prejudgment and post-judgment interest; (iii) attorney's fees and costs; and (iv) for such other relief as it deems just and proper.

COUNT II
(Specific Performance)

30. ARE realleges Paragraphs 1 through 24.

31. This is an action for specific performance to compel GMACM to comply with Section 4.06 of the Servicing Agreement, which expressly provides ARE the right to audit GMACM's books and records relating to the Servicing Files and Mortgage Loans:

> The Owner shall have the right to examine and audit any and all of the books, records, or other information of the Servicer, whether held by the Servicer or by another on its behalf, with respect to or concerning this Agreement or the Mortgage Loans, during normal business hours or as otherwise acceptable to the Servicer, upon reasonable advance notice; provided that the Owner shall not so audit more than once per quarter.

32. GMACM has exclusive possession, custody, and control of the books and records relating to the Servicing Files and the Mortgage Loans.

33. GMACM has prohibited ARE from accessing GMACM's books and records and has refused ARE's demand for an audit under the terms of the Servicing Agreement.

34. GMACM's actions in refusing to allow ARE access to its books and records demonstrate that GMACM will not voluntarily participate in an audit absent Court intervention.

35. ARE has fully performed its obligations under the Servicing Agreement to be entitled to the audit, and remains ready, willing, and able to perform the audit pursuant to the Servicing Agreement.

WHEREFORE, Plaintiff, American Residential Equities, LLC, requests the Court to enter judgment in its favor and to compel Defendant, GMAC Mortgage, LLC, successor by merger to GMAC Mortgage Corporation, to allow American Residential Equities, LLC to audit the books and records relating to the Servicing Files and Mortgage Loans, and to award it attorneys' fees and costs and such further relief as the Court deems just and proper.

DATED: June 11, 2010.

/s/ Alan Rosenthal
Alan Rosenthal
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EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:10-CV-21943-ASG

AMERICAN RESIDENTIAL EQUITIES, LLC,

Plaintiff,

vs.

GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Corporation,

Defendant.
_____/

DEFENDANT GMAC MORTGAGE, LLC'S ANSWER AND COUNTERCLAIM

COMES NOW Defendant, GMAC Mortgage, LLC ("Defendant" or "GMACM"), by and through its undersigned counsel, and hereby submits its Answer to Plaintiff American Residential Equities, LLC's ("Plaintiff") Complaint as follows:

FIRST DEFENSE

For its response to the specifically enumerated paragraphs of Plaintiff's Complaint, Defendant states as follows:

Parties, Jurisdiction and Venue

1. Defendant denies it breached any contract and further denies that Plaintiff is entitled to any damages, specific performance, or other relief whatsoever and demands strict proof thereof.

2. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 2 of the Complaint and therefore denies them and demands strict proof thereof.

3. Defendant admits the allegations in Paragraph 3 of the Complaint.

4. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 4 of the Complaint and therefore denies them and demands strict proof thereof.

5. Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 5 of the Complaint and therefore denies them and demands strict proof thereof.

General Allegations

6. Defendant states that the allegations in Paragraph 6 of the Complaint are not directed at Defendant and therefore no response is required. To the extent a response is required, Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 6 of the Complaint and therefore denies them and demands strict proof thereof

7. Defendant states that the allegations in Paragraph 7 of the Complaint are not directed at Defendant and therefore no response is required. To the extent a response is required, Defendant lacks sufficient information or knowledge to admit or deny the allegations in Paragraph 7 of the Complaint and therefore denies them and demands strict proof thereof.

8. Defendant admits the allegations in Paragraph 8 of the Complaint.

9. Defendant states that the Servicing Agreement attached as Exhibit 1 to Plaintiff's Complaint is a written document that speaks for itself.

10. Defendant states that the documents attached as Exhibit 2 to Plaintiff's Complaint are written documents that speak for themselves.

11. Defendant denies the allegations in Paragraph 11 of the Complaint, including subparts (a) through (i), and demands strict proof thereof.

12. Defendant denies the allegations in Paragraph 12 of the Complaint and demands strict proof thereof.

13. Defendant states that the Letter attached as Exhibit 3 to Plaintiff's Complaint is a written document that speaks for itself.

14. Defendant states that the Letter attached as Exhibit 4 to Plaintiff's Complaint is a written document that speaks for itself.

15. Defendant admits that it was contacted by the borrower, Cornelius Heckstall, regarding the possibility of a loan modification. Defendant states that the May 2009 Letter attached as Exhibit 4 to Plaintiff's Complaint is a written document that speaks for itself. Defendant denies the remaining allegations in Paragraph 15 of the Complaint and demands strict proof thereof.

16. Defendant denies the allegations in Paragraph 16 of the Complaint and demands strict proof thereof.

17. Defendant admits that Plaintiff approved Mr. Heckstall's request for a loan modification. Defendant states that the May 2009 Letter attached as Exhibit 4 to Plaintiff's Complaint is a written document that speaks for itself. Defendant denies the remaining allegations in Paragraph 17 of the Complaint and demands strict proof thereof.

18. Defendant admits that Plaintiff improperly requested an audit of Defendant's books and records. Defendant lacks sufficient information or knowledge to admit or deny the

remaining allegations in Paragraph 18 of the Complaint and therefore denies them and demands strict proof thereof

19. Defendant admits that it lawfully refused Plaintiff's improper audit request.

20. Defendant admits that it lawfully refused Plaintiff's improper audit request. Defendant denies the remaining allegations in Paragraph 20 of the Complaint and demands strict proof thereof.

21. Defendant states that the Letter attached as Exhibit 5 to Plaintiff's Complaint is a written document that speaks for itself.

22. Defendant states that the Letter attached as Exhibit 5 to Plaintiff's Complaint is a written document that speaks for itself.

23. Defendant states that the Servicing Agreement attached as Exhibit 1 to Plaintiff's Complaint and the Letter attached as Exhibit 5 to Plaintiff's Complaint are written documents that speaks for themselves.

24. Defendant denies the allegations in Paragraph 24 of the Complaint and demands strict proof thereof.

COUNT I
(Breach of Contract)

25. Defendant adopts its responses to Paragraphs 1 through 24 of the Complaint as if fully set forth herein.

26. Defendant denies the allegations in Paragraph 26 of the Complaint and demands strict proof thereof.

27. Defendant denies the allegations in Paragraph 27 of the Complaint and demands strict proof thereof.

28. Defendant denies the allegations in Paragraph 28 of the Complaint, including subparts (a) through (m), and demands strict proof thereof.

29. Defendant denies the allegations in Paragraph 29 of the Complaint and demands strict proof thereof.

In response to the "WHEREFORE" paragraph following Paragraph 29 of the Complaint, Defendant denies Plaintiff is entitled to any compensatory damages, interest, fees, costs, or other relief whatsoever and demands strict proof thereof.

COUNT II
(Specific Performance)

30. Defendant adopts its responses to Paragraphs 1 through 29 of the Complaint as if fully set forth herein.

31. Defendant denies that Plaintiff is entitled to any specific performance or other relief whatsoever and demands strict proof thereof.

32. Defendant denies the allegations in Paragraph 32 of the Complaint and demands strict proof thereof.

33. Defendant admits that it lawfully refused Plaintiff's improper audit request.

34. Defendant denies the allegations in Paragraph 34 of the Complaint and demands strict proof thereof.

35. Defendant denies the allegations in Paragraph 35 of the Complaint and demands strict proof thereof.

In response to the "WHEREFORE" paragraph following Paragraph 35 of the Complaint, Defendant denies Plaintiff is entitled to any specific performance, judgment, fees, costs, or other relief whatsoever and demands strict proof thereof.

Defendant denies each and every allegation not specifically admitted herein.

SECOND DEFENSE

Defendant avers the affirmative defenses of statute of frauds, estoppel, waiver, release, justification, ratification, acquiescence, mistake, consent, notice and laches.

THIRD DEFENSE

Defendant denies that Plaintiff has been injured or damaged by Defendant and demands strict proof thereof.

FOURTH DEFENSE

Plaintiff's claims are, in whole or in part, preempted by applicable law.

FIFTH DEFENSE

Plaintiff's own negligence proximately caused any alleged injuries and damages.

SIXTH DEFENSE

Plaintiff's claims are barred, in whole or in part, pursuant to the applicable statutes of limitations.

SEVENTH DEFENSE

Plaintiff has not complied with conditions precedent or legal requirements necessary to maintain this action.

EIGHTH DEFENSE

Defendant denies the material allegations of the Complaint and demands strict proof thereof.

NINTH DEFENSE

Defendant pleads the general issue.

TENTH DEFENSE

No action by Defendant was the actual or proximate cause of injury to Plaintiff.

ELEVENTH DEFENSE

Plaintiff's claims are barred by the terms and conditions of the contracts that are the subject to this lawsuit.

TWELFTH DEFENSE

If an arbitration provision exists in any contract governing the claims made the basis of the Complaint, Defendant contends that the claims set forth against it should be referred to binding arbitration.

THIRTEENTH DEFENSE

Plaintiff has failed to mitigate its alleged damages.

FOURTEENTH DEFENSE

Defendant avers that its actions and conduct with respect to each contract or transaction was justified.

FIFTEENTH DEFENSE

Some or all of the claims asserted are barred by Plaintiff's lack of due diligence.

SIXTEENTH DEFENSE

Defendant asserts that there were legitimate, good faith business reasons for the acts alleged.

SEVENTEENTH DEFENSE

Defendant avers that it acted in accordance with industry standards at all material times.

EIGHTEENTH DEFENSE

Some or all of the Plaintiff's claims are barred by one or more of the doctrines of parole evidence, merger and integration.

NINETEENTH DEFENSE

Plaintiff's claims are barred in whole or in part by Plaintiff's own actions or inactions.

TWENTIETH DEFENSE

Some or all of the claims asserted are barred by the written terms of the contracts themselves.

TWENTY-FIRST DEFENSE

Defendant has complied with all relevant federal and state requirements regarding the transactions that are the subject of this lawsuit.

TWENTY-SECOND DEFENSE

Plaintiff's claims are barred pursuant to the doctrine of unclean hands.

TWENTY-THIRD DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

TWENTY-FOURTH DEFENSE

Plaintiff's claims are barred because its claims are lacking in equity.

TWENTY-FIFTH DEFENSE

Plaintiff's claims are barred because Plaintiff has an adequate remedy at law.

TWENTY-SIXTH DEFENSE

Some or all of the claims asserted are barred by Plaintiff's contributory negligence, assumption of the risk, or both.

TWENTY-SEVENTH DEFENSE

Defendant denies any liability for the acts of other entities under a theory of *respondeat superior*, vicarious liability, agency, or otherwise.

TWENTY-EIGHTH DEFENSE

Plaintiff's claims are barred because it has not performed its parts of the agreements and contracts at issue in this case.

TWENTY-NINTH DEFENSE

Defendant has, at all times relevant hereto, complied with all applicable laws, regulations, and standards, and the claims asserted by Plaintiff are, therefore, preempted under state and/or federal laws.

THIRTIETH DEFENSE

Plaintiff is not entitled to a trial by jury pursuant to the express terms of the contracts at issue in this case.

THIRTY-FIRST DEFENSE

Plaintiff's claim for damages in whole or in part is barred pursuant to the express terms of the contracts at issue in this case.

THIRTY-SECOND DEFENSE

At the time this Answer is filed, Defendant has not obtained discovery from Plaintiff. Accordingly, Defendant reserves its rights to amend its Answer to assert such supplemental or additional defenses as are appropriate upon the completion of discovery.

COUNTERCLAIM FOR INJUNCTIVE AND OTHER RELIEF

COMES NOW Defendant/Counterclaim Plaintiff GMAC Mortgage, LLC ("GMACM"), by and through its undersigned counsel, and hereby submits its Counterclaim against Plaintiff/Counterclaim Defendant American Residential Equities, LLC ("ARE") as follows:

FACTUAL BACKGROUND

1. On or about July 29, 2004, GMACM and ARE entered into a Servicing Agreement whereby GMACM, in exchange for certain representations and warranties by ARE, agreed to service and administer various mortgage loans owned by ARE. (Exh. 1 to Doc. 4).

2. Said Servicing Agreement was subsequently amended on five different occasions. (Exh. 2 to Doc. 4).

3. The Servicing Agreement and the subsequent amendments are collectively referred to herein as "the Servicing Agreement" or "the Agreement."

4. In sum, the Agreement provides that GMACM shall service and administer all mortgage loans subject to the Agreement by, among other things, (a) collecting principal, interest, and escrow payments, (b) ensuring that taxes on the subject properties are current and paid for, (c) ensuring that insurance on the subject properties is provided and paid for, (d) initiating foreclosure proceedings when necessary, and (e) maintaining, preserving, marketing, and selling Real Estate Owned (REO) property. (*See generally* Exhs. 1 & 2 to Doc. 4).

5. In exchange, ARE agreed to pay GMACM a servicing fee and reimburse GMACM for advances made and expenses incurred in connection with the servicing of the subject mortgage loans. (*See generally* Exhs. 1 & 2 to Doc. 4).

6. Particularly, in regard to ARE's obligations to reimburse GMACM for advances made and expenses incurred in connection with the servicing of the mortgage loans, Section 3.03

of the Servicing Agreement provides, in relevant part, that "[GMACM] shall be entitled to first priority reimbursement . . . for Servicing Advances from recoveries from the related Mortgagor or from all Liquidation Proceeds and other payments or recoveries (including Insurance Proceeds and Condemnation Proceeds) with respect to the related Mortgage Loan." (Exh. 1 to Doc. 4, § 3.03).

7. The Agreement defines "Servicing Advances" as "[a]ll customary, reasonable and necessary 'out of pocket' costs and expenses (including reasonable attorneys' fees and disbursements) incurred in the performance by [GMACM] of its servicing obligations, including, but not limited to, the cost of (a) the preservation, restoration and protection of the Mortgaged Property, (b) any fees relating to any enforcement or judicial proceedings, excluding foreclosures, (c) foreclosure actions per FHLMC attorney fees and costs guidelines, (d) the management and liquidation of the Mortgaged Property if the Mortgaged Property is acquired in satisfaction of the Mortgage, (e) taxes, assessments, water rates, sewer rents and other charges which are or may become a lien upon the Mortgaged Property and (f) compliance with the obligations pursuant to the provisions of this Agreement." (Exh. 1 to Doc. 4, § 1.01).

8. In this same vein, the Agreement further provides that ARE shall reimburse GMACM for, among other things, "(i) any out-of-pocket expense [GMACM] incurs with the prior approval of [ARE] in connection with its servicing and administrative obligations set forth in this Agreement to the extent such expense is not ordinary to the servicing function . . . (ii) expenses that [ARE] has expressly agreed to pay or be liable for hereunder; and (iii) expenses incurred in connection with the performance by [GMACM] at the request of [ARE] of any activity that is not specifically required to be performed by [GMACM] under this Agreement and

is not reasonably ancillary to any specific requirements of [ARE] under this Agreement." (Exh. 1 to Doc. 4, § 4.08(b)).

9. And, in the event of a termination of the Agreement and a transfer of the loans to a successor servicer, the Agreement provides that "[GMACM] shall be entitled to be reimbursed for all unreimbursed Servicing Advances and any other advances made by the Servicer pursuant to this Agreement with respect to any Mortgage Loan on the related Transfer Date, but only if the servicer after the related Transfer Date is not the Servicer or an Affiliate. In addition, the Owner shall cause the Servicer to be reimbursed for any accrued and unpaid Servicing Fees and for any trailing expenses representing Servicing Advances for which invoices are received by the Servicer after the Transfer Date . . . ." (Exh. 1 to Doc. 4, § 6.02(b)).

10. The Agreement also includes a comprehensive confidentiality provision. Said provision provides that ARE shall not disclose or disseminate, among other things, any "information relating in any way to the customer and/or prospective client" and that any such breach of this provision shall "result in immediate and irreparable harm and that any remedies at law . . . [would] be inadequate." (Exh. 1 to Doc. 4, § 13.05).

11. Upon execution of the Servicing Agreement, GMACM began to diligently service and administer each of the mortgage loans subject to the Agreement.

12. In so doing, and pursuant to the express terms of the parties' Servicing Agreement, GMACM advanced funds and incurred expenses in its efforts to properly service the mortgage loans for ARE.

13. GMACM advanced funds and incurred expenses for, among other things, property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing

properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

14. Throughout the course of the parties' relationship, ARE continually neglected its obligations under the Servicing Agreement.

15. Due in large part to the souring of the parties' relationship and ARE's failure to honor the terms of the Agreement, on April 20, 2009, GMACM notified ARE of its intent to terminate the parties' Servicing Agreement "effective the earlier of (i) July 31, 2009 or (ii) such other date as ARE notifies GMACM that a successor servicer has assumed GMACM's responsibilities and obligations." A copy of the April 20, 2009 Termination Notice is attached hereto as Exhibit "A".

16. ARE subsequently requested that GMACM extend the date in which the termination of the Servicing Agreement became effective.

17. Accordingly, on May 1, 2009, GMACM sent another termination notice to ARE, providing that "GMACM intends to terminate the Servicing Agreement effective the earlier of (i) November 30, 2009 or (ii) such other date as ARE notifies GMACM that a successor servicer has assumed GMACM's responsibilities and obligations." A copy of the May 1, 2009 Termination Notice is attached hereto as Exhibit "B".

18. Despite the fact that GMACM provided ARE with sufficient notice of the termination of the parties' Servicing Agreement and ARE's need to locate a successor servicer, ARE failed to timely locate a successor servicer.

19. Indeed, it was not until April 2010 until ARE provided GMACM with notice that the loans subject to the Agreement would be transferred to Acqura Loan Services.

20. Pursuant to ARE's instructions, the loans encompassed by the Agreement were subsequently transferred to Acqura Loan Services on May 3, 2010.

21. Both before and after the above-referenced transfer, GMACM demanded that ARE reimburse GMACM for all expenses and advancements made in connection with the servicing of the subject mortgage loans.

22. However, to date, ARE has completely and utterly failed to reimburse GMACM for the outstanding expenses and advancements made in connection with the servicing of the subject mortgage loans.

23. Furthermore, subsequent to GMACM's transfer of the mortgage loans encompassed by the parties' Servicing Agreement, ARE has made and published numerous false statements regarding GMACM.

24. Said false statements include, but are not limited to, statements that GMACM systematically mismanaged loans and properties in ARE's portfolio, failed to complete the simplest activities required of mortgage servicing companies, disregarded ARE's instructions, ignored ARE's requests for reports, and jeopardized ARE's assets.

25. Not only did ARE make and publish numerous false statements, but it also made and published confidential and proprietary customer information in violation of the parties' Servicing Agreement.

26. Specifically, in a recent press release sent out in conjunction with the filing of the Complaint in the above-styled action, ARE alleged that "GMAC pressured the company to offer a second modification to Cornelius Heckstall, despite the fact that he had failed to make payments according to an earlier loan modification with identical terms." A copy of the Press Release is attached hereto as Exhibit "C". In said press release, Jeffrey Kirsch, president and

CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

COUNT I
(Breach of Contract)

27. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

28. The parties' Servicing Agreement is/was a valid and binding contract by and between GMACM and ARE.

29. At all times material herein, GMACM complied with its obligations under the terms of the Servicing Agreement.

30. ARE has materially breached the Agreement by failing and/or refusing to reimburse GMACM for expenses incurred and advances made in connection with the servicing of the mortgage loans subject to the Agreement.

31. Said advances and expenses include, but are not limited to, funds provided for property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

32. ARE has breached the parties' Servicing Agreement by failing to timely provide GMACM with a successor servicer after termination of the parties' relationship.

33. ARE has further breached the Agreement by continually neglecting its obligations under the Servicing Agreement.

34. ARE has also breached the Agreement by disclosing and disseminating confidential customer information regarding Cornelius Heckstall's mortgage loan – a customer and mortgage loan subject to the parties' Servicing Agreement. In a recent press release, ARE alleged that "GMAC pressured the company to offer a second modification to Cornelius Heckstall, despite the fact that he had failed to make payments according to an earlier loan modification with identical terms." (Exh. C). In said press release, Jeffrey Kirsch, president and CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

35. Indeed, ARE's inclusion of allegations in its Complaint regarding the details of Cornelius Heckstall's loan modification is in direct violation of the parties' Servicing Agreement.

36. As a direct and proximate result of ARE's breaches of the Servicing Agreement, GMACM has been damaged.

COUNT II
(Unjust Enrichment)

37. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

38. GMACM has conferred a benefit upon ARE by, among other things, servicing numerous ARE-owned mortgage loans and advancing funds and incurring expenses, on ARE's behalf, in connection with the servicing of said mortgage loans.

39. ARE has knowledge of this benefit and has accepted and retained said benefit.

40. ARE has wrongfully failed to pay for this benefit, and inequity would result if ARE is not required to pay for the benefit received.

COUNT III
(Breach of the Implied Duty of Good Faith and Fair Dealing)

41. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

42. The parties' Servicing Agreement is/was a valid and binding contract by and between GMACM and ARE.

43. ARE has breached the implied duty of good faith and fair dealing in connection with the Agreement by, among other things, failing and/or refusing to reimburse GMACM for expenses incurred and advances made in connection with the servicing of the mortgage loans subject to the Agreement.

44. Said advances and expenses include, but are not limited to, funds provided for property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

45. ARE has breached the implied duty of good faith and fair dealing by failing to timely provide GMACM with a successor servicer after termination of the parties' relationship.

46. ARE has further breached the implied duty of good faith and fair dealing by continually neglecting its obligations under the Servicing Agreement.

47. ARE has also breached the implied duty of good faith and fair dealing by disclosing and disseminating confidential customer information regarding Cornelius Heckstall's mortgage loan – a customer and loan subject to the parties' Agreement. Specifically, in a recent press release, ARE alleged that "GMAC pressured the company to offer a second modification to

Cornelius Heckstall, despite the fact that he had failed to make payments according to an earlier loan modification with identical terms." (Exh. C). In said press release, Jeffrey Kirsch, president and CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

48. Furthermore, ARE's inclusion of allegations in its Complaint regarding the details of Cornelius Heckstall's loan modification constitutes a breach of the implied duty of good faith and fair dealing.

49. As a result of said breaches, GMACM has been damaged.

COUNT IV
(Defamation)

50. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

51. Subsequent to GMACM's transfer of the mortgage loans encompassed by the parties' Servicing Agreement, ARE has made and published to third parties numerous false statements regarding GMACM.

52. Said false statements include, but are not limited to, statements that GMACM systematically mismanaged loans and properties in ARE's portfolio, failed to complete the simplest activities required of mortgage servicing companies, disregarded ARE's instructions, ignored ARE's requests for reports, and jeopardized ARE's assets.

53. As a result of ARE's conduct, GMACM has been damaged.

COUNT V
(Conversion)

54. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

55. ARE has unlawfully and wrongfully exercised dominion and control over GMACM's funds by, among other things, failing to reimburse GMACM for expenses incurred and advances made in connection with the servicing of the mortgage loans subject to the Agreement.

56. Said advances and expenses include, but are not limited to, funds provided for property inspections, property taxes, insurance, Broker Price Opinions, securing and un-securing properties, snow services, foreclosure fees and services, lawn cuts and yard maintenance, utilities, and litigation expenses.

57. GMACM has the exclusive right to the above-referenced funds, and ARE has deprived GMACM of the use and possession of said funds.

58. As a result of ARE's conduct, GMACM has been damaged.

COUNT VI
(Application for Injunctive Relief)

59. GMACM adopts and incorporates by reference all allegations made in Paragraphs 1-23 of this Counterclaim as if fully stated herein.

60. Subsequent to GMACM's transfer of the mortgage loans encompassed by the parties' Servicing Agreement, ARE has been disclosing and disseminating confidential customer information regarding Cornelius Heckstall's mortgage loan – a customer and loan subject to the parties' Agreement. Specifically, in a recent press release, ARE alleged that "GMAC pressured the company to offer a second modification to Cornelius Heckstall, despite the fact that he had

failed to make payments according to an earlier loan modification with identical terms." (Exh. C). In said press release, Jeffrey Kirsch, president and CEO of ARE, went on to state that "[w]hile GMAC repeatedly neglected the assets in our portfolio, they appeared to bend over backwards for Rep. Heckstall's brother[;] [w]e bowed to the pressure because it gave us more time to find a competent replacement servicing company." (Exh. C).

61. Should ARE not be enjoined from disseminating and disclosing such confidential customer information, GMACM will be immediately and irreparably harmed and will be exposed to liability from third parties.

62. Furthermore, there is a substantial likelihood GMACM will succeed on the merits, and GMACM has no adequate remedy at law.

63. Indeed, pursuant to the parties' Servicing Agreement, ARE specifically contracted that, in the event it disclosed any such information, said conduct would "result in immediate and irreparable harm and that any remedies at law . . . [would] be inadequate." (Exh. 1 to Doc. 4, § 13.05).

64. ARE further agreed that, in the event of such conduct, GMACM shall have "the right to obtain injunctive relief to restrain such disclosure or use." (Exh. 1 to Doc. 4, § 13.05).

65. In light of the foregoing, GMACM requests that this Court issue both a preliminary and permanent injunction, enjoining ARE, and its agents, officers, directors, employees, servants, attorneys, and/or anyone acting in concert or participation therewith, from disclosing or disseminating to any third party any information relating in any way to customers and/or loans covered under the parties' Servicing Agreement, including but not limited to, information pertaining to Cornelius Heckstall's loan modification.

66. GMACM further requests that this Court compel ARE to issue an appropriate retraction of all of its statements to third parties and media outlets pertaining to customers and/or loans covered under the parties' Servicing Agreement, including, but not limited to, its statements pertaining to Cornelius Heckstall's loan modification.

WHEREFORE, Defendant/Counterclaim Plaintiff GMACM demands

(a) judgment in its favor and against Plaintiff/Counterclaim Defendant ARE for compensatory damages, pre-judgment and post-judgment interest, attorneys' fees and costs;

(b) both a preliminary and permanent injunction, enjoining ARE, and its agents, officers, directors, employees, servants, attorneys, and/or anyone acting in concert or participation therewith, from disclosing or disseminating to any third party any information relating in any way to customers and/or loans covered under the parties' Servicing Agreement, including but not limited to, information pertaining to Cornelius Heckstall's loan modification;

(c) an order compelling ARE to issue an appropriate retraction of all of its statements to third parties and media outlets pertaining to customers and/or loans covered under the parties' Servicing Agreement, including, but not limited to, its statements pertaining to Cornelius Heckstall's loan modification; and

(d) any such other and further relief as this Court deems proper

Dated: July 8, 2010

/s/ D. Brian O'Dell
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ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF
GMAC MORTGAGE, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of July, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Alan Rosenthal
Natalie J. Carlos
Carlton Fields, P.A.
Suite 4200
Miami Tower
100 S.E. Second Street
Miami, FL 33131

/s/ D. Brian O'Dell
OF COUNSEL

EXHIBIT J

CLOSED,JG,MEDIATION,REF_DISCOV,STAYED

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:10-cv-21943-ASG

American Residential Equities, LLC v. GMAC Mortgage, LLC
Assigned to: Senior Judge Alan S. Gold
Referred to: Magistrate Judge Jonathan Goodman
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 06/11/2010
Date Terminated: 05/18/2012
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

American Residential Equities, LLC represented by

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ATTORNEY TO BE NOTICED

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V.

Defendant

GMAC Mortgage, LLC
successor by merger to GMAC Mortgage Corporation

represented by **Hope T. Cannon**
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ATTORNEY TO BE NOTICED

Claimant

Carlton Fields, P.A.

Counter Claimant

GMAC Mortgage, LLC
successor by merger to GMAC Mortgage Corporation

represented by **Hope T. Cannon**
(See above for address)
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ann T. Taylor
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ATTORNEY TO BE NOTICED

Christian Watson Hancock
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ATTORNEY TO BE NOTICED

David Brian O'Dell
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V.

Counter Defendant

American Residential Equities, LLC

represented by **Natalie Jessica Carlos**
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TERMINATED: 06/20/2011
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David Allan Freedman
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Date Filed	#	Docket Text
06/11/2010	1	COMPLAINT against GMAC Mortgage, LLC. Filing fee $ 350.00 receipt number 113C-2935914, filed by American Residential Equities, LLC. (Attachments: # 1 Civil Cover Sheet, # 2 Summon(s))(Carlos, Natalie) (Entered: 06/11/2010)
06/11/2010	2	Judge Assignment RE: Electronic Complaint to Judge Alan S. Gold (asl) (Entered: 06/11/2010)
06/11/2010	3	Summons Issued as to GMAC Mortgage, LLC. (asl) (Entered: 06/11/2010)
06/11/2010	4	NOTICE by American Residential Equities, LLC re 1 Complaint *of Filing Exhibits to Complaint* (Attachments: # 1 Exhibit 1 (part 1 of 3), # 2 Exhibit 1 (part 2 of3), # 3 Exhibit 1 (part 3 of 3), # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4, # 7 Exhibit 5)(Carlos, Natalie) (Entered: 06/11/2010)
06/30/2010	5	SUMMONS (Affidavit) Returned Executed by American Residential Equities, LLC. GMAC Mortgage, LLC served on 6/17/2010, answer due 7/8/2010. (Carlos, Natalie) (Entered: 06/30/2010)
06/30/2010	6	ORDER Requiring Compliance with Local Rule 16.1 and Notice of Court Practice. Signed by Judge Alan S. Gold on 6/30/2010. (lbc) (Entered: 06/30/2010)
07/08/2010	7	*Defendant GMAC Mortgage, LLC* ANSWER to Complaint, COUNTERCLAIM against American Residential Equities, LLC by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit)(O'Dell, David) (Entered: 07/08/2010)
07/08/2010	8	Corporate Disclosure Statement by GMAC Mortgage, LLC identifying Corporate Parent Ally Financial Inc f/k/a GMAC Inc. for GMAC Mortgage, LLC, GMAC Mortgage, LLC (O'Dell, David) (Entered: 07/08/2010)
07/28/2010	9	Unopposed MOTION for Extension of Time to File Answer RE: Complaints re 7 Answer to Complaint, Counterclaim by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 07/28/2010)
08/02/2010	10	(PAPERLESS) ORDER granting UNOPPOSED 9 Motion for Extension of Time to Respond to Answer and Counterclaim by American Residential Equities, LLC response due 8/27/2010. Plaintiff shall have up to and including August 27, 2010 to respond to Defendant's Answer and Counterclaim. Signed by Judge Alan S. Gold on 8/2/2010. (jvz) (Entered: 08/02/2010)
08/02/2010	11	SCHEDULING REPORT - **Rule 16.1** by American Residential Equities, LLC (Attachments: # 1 Joint Proposed Scheduling Order)(Carlos, Natalie) (Entered: 08/02/2010)
08/02/2010	12	CONSENT to Jurisdiction by US Magistrate Judge by American Residential Equities, LLC, GMAC Mortgage, LLC (Carlos, Natalie) (Entered: 08/02/2010)
08/05/2010	13	MOTION for Preliminary Injunction, MOTION for Hearing *and*

		Incorporated Memorandum of Law in Support by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A - Articles)(Hancock, Christian) (Entered: 08/05/2010)
08/06/2010	14	ORDER Setting Status Conference: Status Conference set for 8/9/2010 02:00 PM before Magistrate Judge Chris M. McAliley regarding Defendant's Motion for Preliminary Injunction [DE 13]. Signed by Magistrate Judge Chris M. McAliley on 8/6/2010. (tmi) (Entered: 08/06/2010)
08/06/2010	15	ORDER REFERRING MOTION: 13 MOTION for Preliminary Injunction MOTION for Hearing *and Incorporated Memorandum of Law in Support* filed by GMAC Mortgage, LLC Motions referred to Chris M. McAliley. Signed by Judge Alan S. Gold on 8/6/10. (tp) (Entered: 08/06/2010)
08/09/2010	16	Minute Entry for proceedings held before Magistrate Judge Chris M. McAliley: Status Conference held on 8/9/2010. (Digital 13:58:44.) (Tape #10H-68-322.) (nf) (Entered: 08/09/2010)
08/09/2010	17	ORDER following status conference. Joint confidentiality order due 8/19/2010. See Order for details. Signed by Magistrate Judge Chris M. McAliley on 8/9/2010. (tmi) (Entered: 08/09/2010)
08/19/2010	18	NOTICE by American Residential Equities, LLC re 17 Order, Set Motion and R&R Deadlines/Hearings *of Filing Proposed Confidentiality Agreement, Objections to Defendant's Proposed Confidentiality Agreement, and Request for Briefing Schedule and Hearing* (Attachments: # 1 Exhibit, # 2 Exhibit) (Carlos, Natalie) (Entered: 08/19/2010)
08/19/2010	19	MOTION for Entry of Confidentiality Agreement by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A)(O'Dell, David) Modified on 8/23/2010 (ls). [Second Portion Re-docketed at DE #21] (Entered: 08/19/2010)
08/19/2010	21	RESPONSE/OPPOSITION to 18 Notice (Other), Notice (Other)/Objections and Request for Hearing and Briefing Schedule by GMAC Mortgage, LLC. (ls)(See Image at DE # 19) (Entered: 08/23/2010)
08/23/2010	20	Clerks Notice to Filer re 19 MOTION For entry of Confidentiality Agreement and Opposition to Plaintiff's Objections and Request for Hearing and Briefing Schedule. **Two or More Document Events Filed as One**; ERROR - Only one event was selected by the Filer but more than one event was applicable to the document filed. The docket entry was corrected by the Clerk. It is not necessary to refile this document but in the future, the Filer must select all applicable events.**Document Not Linked**; ERROR - The filed document was not linked to the related docket entry. The correction was made by the Clerk. It is not necessary to refile this document. (ls) (Entered: 08/23/2010)
08/24/2010	22	ORDER Setting Status Conference: Status Conference set for 8/27/2010 11:00 AM before Magistrate Judge Chris M. McAliley. Signed by Magistrate Judge Chris M. McAliley on 8/24/2010. (tmi) (Entered: 08/24/2010)
08/26/2010	23	SCHEDULING ORDER: (Pretrial Conference set for 9/16/2011 10:00 AM in Miami Division before Judge Alan S. Gold., Jury Trial set for 10/24/2011 before Judge Alan S. Gold., Calendar Call set for 10/19/2011 01:30 PM

		before Judge Alan S. Gold., Discovery due by 5/2/2011., Expert Discovery due by 5/2/2011., In Limine Motions due by 8/16/2011., Dispositive Motions due by 6/1/2011., Pretrial Stipulation due by 8/16/2011.), ORDER REFERRING CASE to Magistrate Judge Chris M. McAliley for Discovery Proceedings, ORDER REFERRING CASE to Mediation. (Mediation Deadline 4/18/2011.), Notice of Court Practice. Signed by Judge Alan S. Gold on 8/26/2010. (lbc) (Entered: 08/26/2010)
08/27/2010	24	Minute Entry for proceedings held before Magistrate Judge Chris M. McAliley: Status Conference held on 8/27/2010. (Digital 11:01:17.) (Tape #10H-70-1480.) (nf) (Entered: 08/27/2010)
08/27/2010	25	MOTION for Extension of Time to File Answer RE: Complaints re 7 Answer to Complaint, Counterclaim *and Affirmative Defenses* by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 08/27/2010)
08/29/2010	26	(PAPERLESS) ORDER granting 25 Motion for Extension of Time to Answer American Residential Equities, LLC response due 9/1/2010. Plaintiff shall have up to and including September 1, 2010 to file a response to Defendant's Answer and Counterclaim. Signed by Judge Alan S. Gold on 08/29/10. (jvz) (Entered: 08/29/2010)
08/31/2010	27	Joint MOTION for Extension of Time to Complete Discovery *by American Residential Equities, LLC and* by GMAC Mortgage, LLC. (O'Dell, David) (Entered: 08/31/2010)
09/01/2010	28	ORDER granting 27 Motion for Extension of Time to Complete Discovery. Signed by Magistrate Judge Chris M. McAliley on 8/31/2010. (tmi) (Entered: 09/01/2010)
09/01/2010	29	Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses* by American Residential Equities, LLC. Responses due by 9/20/2010 (Carlos, Natalie) (Entered: 09/01/2010)
09/01/2010	30	*Plaintiff's* ANSWER to Counterclaim *and Affirmative Defenses* by American Residential Equities, LLC.(Carlos, Natalie) (Entered: 09/01/2010)
09/07/2010	31	ORDER Granting Defendant's Motion for Entry of Confidentiality Agreement and Denying as Moot Defendant's Motion for Preliminary Injunction. Signed by Magistrate Judge Chris M. McAliley on 9/7/2010. (rms) (Entered: 09/07/2010)
09/07/2010	32	Confidentiality ORDER. Signed by Magistrate Judge Chris M. McAliley on 9/7/2010. (rms) (Entered: 09/07/2010)
09/08/2010	33	ORDER setting oral argument on 29 Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses*. Motion Hearing set for 11/1/2010 04:30 PM in Miami Division before Judge Alan S. Gold.. Signed by Judge Alan S. Gold on 9/7/2010. (lbc) (Entered: 09/08/2010)
09/13/2010	34	NOTICE of Mediator Selection: David Lichter selected.(Carlos, Natalie) (Entered: 09/13/2010)
09/17/2010	35	RESPONSE to Motion re 29 Plaintiff's MOTION to Strike 7 Answer to

		Complaint, Counterclaim *re: Affirmative Defenses* filed by GMAC Mortgage, LLC. Replies due by 9/27/2010. (Taylor, Ann) Modified on 9/21/2010 (ls). (Entered: 09/17/2010)
10/15/2010	36	MOTION for Judgment on the Pleadings on Count II of the Complaint by American Residential Equities, LLC. (Carlos, Natalie) Modified text on 10/18/2010 (asl). (Entered: 10/15/2010)
10/21/2010	37	ORDER Re-Setting Oral Argument and Adding Motion to Be Heard re 36 MOTION for Judgment on the Pleadings, 29 Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses* : Motion Hearing set for 12/28/2010 05:15 PM in Miami Division before Judge Alan S. Gold. Signed by Judge Alan S. Gold on 10/21/2010. (asl) (Entered: 10/21/2010)
10/21/2010	38	CORRECTED ORDER Regarding Oral Argument Dates; re 29 Plaintiff's MOTION to Strike 7 Answer to Complaint, Counterclaim *re: Affirmative Defenses*, 36 MOTION for Judgment on the Pleadings : Motion Hearing re 29 Motion set for 11/19/2010 02:30 PM before Judge Alan S. Gold. Motion Hearing re 36 Motion set for 12/28/2010 05:15 PM in Miami Division before Judge Alan S. Gold.. Signed by Judge Alan S. Gold on 10/21/2010. (asl) (Entered: 10/22/2010)
10/28/2010	39	MOTION for Extension of Time to File Response/Reply as to 36 MOTION for Judgment on the Pleadings by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A - Proposed Order)(O'Dell, David) (Entered: 10/28/2010)
10/29/2010	40	ORDER Granting 39 Motion for Extension of Time to File Response/Reply re 39 MOTION for Extension of Time to File Response/Reply as to 36 MOTION for Judgment on the Pleadings Responses due by 11/12/2010. Signed by Judge Alan S. Gold on 10/29/2010. (rgs) (Entered: 11/01/2010)
11/04/2010	41	ORDER TO SHOW CAUSE why the Court should not dismiss the case for lack of subject matter jurisdiction. Show Cause Response due by 11/12/2010 at 12:00pm.. Signed by Judge Alan S. Gold on 11/4/2010. (ag) (Entered: 11/04/2010)
11/12/2010	42	Joint RESPONSE TO ORDER TO SHOW CAUSE by American Residential Equities, LLC, GMAC Mortgage, LLC. (Carlos, Natalie) Modified text on 11/15/2010 (asl). (Entered: 11/12/2010)
11/12/2010	43	RESPONSE in Opposition re 36 MOTION for Judgment on the Pleadings *on Count II of the Complaint* filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A & B)(O'Dell, David) (Entered: 11/12/2010)
11/17/2010	44	ORDER granting in part and denying in part 29 Motion to Strike Defendant's Affirmative Defenses. Signed by Judge Alan S. Gold on 11/17/2010. (jh) (Entered: 11/17/2010)
11/22/2010	45	Unopposed MOTION for Extension of Time to File Response/Reply *in Support of Motion for Judgment on the Pleadings* by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 11/22/2010)
11/23/2010	47	ORDER Granting 45 Motion for Extension of Time to File Response/Reply

		Replies due by 11/24/2010.. Signed by Judge Alan S. Gold on 11/23/2010. (rgs) (Entered: 11/29/2010)
11/24/2010	46	REPLY in Support of 36 MOTION for Judgment on the Pleadings *on Count II of the Complaint* filed by American Residential Equities, LLC. (Carlos, Natalie) Modified text on 11/29/2010 (asl). (Entered: 11/24/2010)
12/02/2010	48	PAPERLESS ORDER Cancelling Oral argument previously scheduled for December 28, 2010. Signed by Judge Alan S. Gold on 12/2/2010. (lms) (Entered: 12/02/2010)
12/03/2010	49	*Defendant GMAC Mortgage, LLC's Amended* ANSWER to Complaint *and Counterclaim* by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A, B and C)(O'Dell, David) (Entered: 12/03/2010)
01/13/2011	50	Unopposed MOTION for Extension of Time to File *Expert Witness Designations, Expert Witness Reports and to Designate a Mediator* by American Residential Equities, LLC. (Carlos, Natalie) (Entered: 01/13/2011)
01/18/2011	51	ORDER Granting 50 Motion for Extension of Time to File. Signed by Judge Alan S. Gold on 1/18/2011. (rgs) (Entered: 01/18/2011)
01/25/2011	52	Unopposed MOTION for Extension of Time to File *Expert Witnesses Designation and Submit Rebuttal Expert Reports* by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A-Proposed Order Granting Motion for Extension of Time)(O'Dell, David) (Entered: 01/25/2011)
01/26/2011	53	ORDER Granting 52 MOTION for Extension of Time to File Expert Witnesses Designation and Submit Rebuttal Expert Reports . Signed by Judge Alan S. Gold on 01/26/2011. (rgs) Modified on 1/26/2011 (rgs). (Entered: 01/26/2011)
03/04/2011	54	Notification of Ninety Days Expiring by American Residential Equities, LLC re 46 Reply to Response to Motion filed by American Residential Equities, LLC, 36 MOTION for Judgment on the Pleadings filed by American Residential Equities, LLC, 43 Response in Opposition to Motion filed by GMAC Mortgage, LLC (Carlos, Natalie) (Entered: 03/04/2011)
03/07/2011	55	ORDER Denying 36 Plaintiff's Motion for Judgment on the Pleadings on Count II of the Complaint. Signed by Judge Alan S. Gold on 3/7/2011. (ral) (Entered: 03/08/2011)
04/01/2011	56	Joint MOTION for Extension of Time to extend all existing deadlines and trial dates re 53 Order on Motion for Extension of Time, 23 Scheduling Order, Order Referring Case to Magistrate Judge, Order Referring Case to Mediation, Notice of Court Practice,,,,,,,, 51 Order on Motion for Extension of Time by GMAC Mortgage, LLC. Responses due by 4/18/2011 (Attachments: # 1 Text of Proposed Order)(O'Dell, David) (Entered: 04/01/2011)
04/01/2011	58	Case Reassignment of Paired Magistrate Judge pursuant to Administrative Orders 2010-145 and 2011-18 to Magistrate Judge Jonathan Goodman. Magistrate Judge Chris M. McAliley no longer assigned to case. (dm) (Entered: 04/06/2011)

04/04/2011	57	ORDER Granting 56 Parties' Joint Motion to Extend All Existing Deadlines and Trial Dates; See Order for complete details. Signed by Judge Alan S. Gold on 4/4/2011. (ral) (Entered: 04/05/2011)
04/04/2011		Reset Deadlines/Hearings per 57 Order: Joint Scheduling Report due by 4/22/2011. Calendar Call reset for 1/11/2012 01:30 PM before Judge Alan S. Gold. Trial reset for 1/16/2012 before Judge Alan S. Gold. Pretrial Conference reset for 12/2/2011 02:00 PM before Judge Alan S. Gold. (ral) (Entered: 04/05/2011)
04/12/2011	59	Notice of Court Practice re Magistrate Judge Goodman's Discovery Procedures. Entered by Magistrate Judge Jonathan Goodman on 4/12/2011. (dkc) (Entered: 04/12/2011)
04/22/2011	60	Joint SCHEDULING REPORT - **Rule 26(f)** by American Residential Equities, LLC, GMAC Mortgage, LLC (O'Dell, David) Modified text on 4/25/2011 (asl). (Entered: 04/22/2011)
05/04/2011	61	Unopposed MOTION for Extension of Time to Respond to Discovery by American Residential Equities, LLC. Responses due by 5/23/2011 (Carlos, Natalie) (Entered: 05/04/2011)
05/04/2011	62	AMENDED ORDER Setting Pretrial and Trial Dates, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures: (Pretrial Conference set for 2/10/2012 10:00 AM in Miami Division before Judge Alan S. Gold, Trial set for 3/12/2012 before Judge Alan S. Gold, Calendar Call set for 3/7/2012 01:30 PM in Miami Division before Judge Alan S. Gold, Amended Pleadings due by 9/1/2011, Expert and Non-Expert Discovery due by 10/1/2011, In Limine Motions due by 1/10/2012, All Dispositive Pretrial Motions due by 11/1/2011, All Non-Dispositive Pretrial Motions due by 9/1/2011, Joint Pretrial Stipulation due by 1/10/2012, Mediation Deadline 9/15/2011); Referring Case to Magistrate Judge Jonathan Goodman for Pretrial Discovery Proceedings. Signed by Judge Alan S. Gold on 5/4/2011. (ral) (Entered: 05/05/2011)
05/05/2011	63	ENDORSED ORDER granting 61 Plaintiff's Unopposed Motion for Extension of Time. Plaintiff shall have an additional thirty-days until June 5, 2011, the date requested in its motion, to respond to Discovery propounded by Defendant. Signed by Magistrate Judge Jonathan Goodman on 5/5/2011. (dkc) (Entered: 05/05/2011)
06/02/2011	64	MOTION for Extension of Time to Complete Discovery *Unopposed Motion for Extension of Time to Respond to Discovery Requests* by GMAC Mortgage, LLC. (O'Dell, David) (Entered: 06/02/2011)
06/02/2011	65	ENDORSED ORDER granting 64 Motion for Extension of Time to Respond to Discovery Requests. The unopposed motion is granted to the extent requested therein. GMACM shall have an additional thirty days, until July 3, 2011, to respond to ARE's requests, and ARE shall have an additional thirty days, until July 5, 2011, to respond to GMACM's requests. It is further ORDERED that ARE must file a status report on its counsel's status within ten days of this order. If ARE's counsel intends to file a motion to withdraw, it should do so as soon as practicable. Signed by Magistrate Judge Jonathan

		Goodman on 6/2/2011. (dkc) (Entered: 06/02/2011)
06/03/2011	66	MOTION to Withdraw as Attorney *for Defendant* by Alan Rosenthal and Natalie J. Carlos of Carlton Fields, P.A.. by American Residential Equities, LLC. Responses due by 6/20/2011 (Carlos, Natalie) (Entered: 06/03/2011)
06/03/2011	67	Corrected MOTION to Withdraw as Attorney by Alan Rosenthal and Natalie J. Carlos of Carlton Fields, P.A.. by American Residential Equities, LLC. Responses due by 6/20/2011 (Carlos, Natalie) (Entered: 06/03/2011)
06/15/2011	68	ORDER Setting Telephonic Hearing on Motion 67 Corrected MOTION to Withdraw as Attorney by Alan Rosenthal and Natalie J. Carlos of Carlton Fields, P.A. : Motion Hearing set for 6/21/2011 02:45 PM in Miami Division before Judge Alan S. Gold. See order for telephone number, access and security code. Signed by Judge Alan S. Gold on 6/15/2011. (jh) (Entered: 06/15/2011)
06/17/2011	69	NOTICE of Attorney Appearance by David Allan Freedman on behalf of American Residential Equities, LLC (Freedman, David) (Entered: 06/17/2011)
06/20/2011	70	ORDER granting 67 Motion to Withdraw as Attorney. Attorney Natalie Jessica Carlos and Alan Rosenthal terminated.. Signed by Judge Alan S. Gold on 6/20/2011. (ra) (Entered: 06/20/2011)
06/20/2011	71	NOTICE by Carlton Fields, P.A. *of Attorneys' Charging Lien* (Carlos, Natalie) (Entered: 06/20/2011)
06/28/2011	72	Unopposed MOTION for Extension of Time To Respond to Discovery Requests by GMAC Mortgage, LLC. Responses due by 7/15/2011 (Attachments: # 1 Exhibit A-Proposed Order)(O'Dell, David) (Entered: 06/28/2011)
06/28/2011	73	ENDORSED, PAPERLESS ORDER granting 72 Defendant GMACM's Unopposed Motion for Extension of Time to Respond to Discovery Requests. GMACM has an additonal 30 days, through and including August 2, 2011, to respond to Plaintiff's discovery requests. Signed by Magistrate Judge Jonathan Goodman on 6/28/2011.(JG) (Entered: 06/28/2011)
07/05/2011	74	ORDER STRIKING 71 Notice (Other) filed by Carlton Fields, P.A. Counsel is directed to file Motion Regarding Charging Lien. Signed by Judge Alan S. Gold on 7/5/2011. (tp) (Entered: 07/05/2011)
07/12/2011	75	Unopposed MOTION for Extension of Time to Designate Expert Witnesses and Submit Expert Reports re 60 SCHEDULING REPORT - Rule 26(f)/16.1 by GMAC Mortgage, LLC. Responses due by 7/29/2011 (Attachments: # 1 Exhibit A-Proposed Order)(Taylor, Ann) (Entered: 07/12/2011)
07/13/2011	76	ORDER granting 75 Motion for Extension of Time to Designate Expert Witnesses and Submit Expert Reports. Signed by Judge Alan S. Gold on 7/13/2011. (tp) (Entered: 07/14/2011)
07/25/2011	77	Unopposed MOTION for Extension of Time to Respond to Discovery Requests by GMAC Mortgage, LLC. Responses due by 8/11/2011

		(Attachments: # 1 Exhibit A)(O'Dell, David) (Entered: 07/25/2011)
07/26/2011	78	ENDORSED ORDER granting 77 GMACM's Unopposed Motion for Extension of Time to Respond to American Residential Equities's discovery requests. GMACM shall have an additional thirty-days, until September 1, 2011, the date requested in GMACM's unopposed motion, to serve its discovery responses. The Court notes that the requested unopposed extension of time will mean the responses will be provided shortly before the expiration of the discovery cut-off. Any consequences flowing from the juxtaposition of the extended response time and the discovery cut-off will be the parties' responsibility. The Undersigned does not have jurisdiction to extend the discovery cut-off deadline established by the District Court and the parties should not presume that this Order in any way suggests or implies that the discovery cut-off will be extended upon request. To the contrary, the parties should assume that the discovery deadline and other trial-type deadlines established by the District Court will remain in place and will not be modified upon request. Signed by Magistrate Judge Jonathan Goodman on 7/26/2011. (dkc) (Entered: 07/26/2011)
08/29/2011	79	MOTION for Extension of Time of all pending deadlines and trial dates by American Residential Equities, LLC. Responses due by 9/15/2011 (Attachments: # 1 Exhibit A)(Freedman, David) (Entered: 08/29/2011)
08/29/2011	80	NOTICE by GMAC Mortgage, LLC *Designation of Expert Witnesses* (O'Dell, David) (Entered: 08/29/2011)
08/30/2011	81	ORDER SETTING TELEPHONIC HEARING on Motion 79 MOTION for Extension of Time of all pending deadlines and trial date: Motion Hearing set for 9/8/2011 11:00 AM in Miami Division before Judge Alan S. Gold. Please see order for toll-free number and access codes. Signed by Judge Alan S. Gold on 8/30/2011. (jh) (Entered: 08/30/2011)
09/08/2011	82	PAPERLESS Minute Entry for proceedings held before Judge Alan S. Gold: Motion Hearing held on 9/8/2011 re 79 MOTION for Extension of Time of all pending deadlines and trial dates filed by American Residential Equities, LLC and the motion is granted, court order to follow. The parties shall appear for a discovery conference before Magistrate Judge Goodman regarding new dates and deadlines. PARTICIPANTS: Alice Evelyn Meyer, Esquire; David Brian O'Dell, Esquire. Court Reporter: Joseph Millikan, 305-523-5588 / Joseph_Millikan@flsd.uscourts.gov (jh) (Entered: 09/08/2011)
09/16/2011	83	ORDER Following Status Conference; granting 79 Motion for Extension of Time on all Pending Dates; Setting Discovery Conference before U.S. Magistrate Judge Jonathan Goodman. Signed by Judge Alan S. Gold on 9/15/2011. (ls) (Entered: 09/19/2011)
09/16/2011		Set/Reset Deadlines/Hearings Mediation Deadline 1/16/2012. Dispositive Motions due by 3/2/2012. Pretrial Stipulation due by 5/11/2012. Calendar Call set for 7/11/2012 01:30 PM in Miami Division before Judge Alan S. Gold. Discovery Conference set for 9/23/2011 10:00 AM in Miami Division before Magistrate Judge Jonathan Goodman. Jury Trial set for 7/16/2012 before Judge Alan S. Gold. Pretrial Conference set for 6/8/2012 10:00 AM in

		Miami Division before Judge Alan S. Gold. (ls) (Entered: 09/19/2011)
09/20/2011	84	ENDORSED RE-NOTICE of DISCOVERY CONFERENCE: the Discovery Conference originally set in docket entry number 83 is re-set for 9/26/2011 at 03:00 PM in the Miami Division before Magistrate Judge Jonathan Goodman. As per Judge Gold's original order, the Defendant may appear by telephone. Defendant must phone Chambers ten minutes beforehand at 305-523-5720. If multiple persons will be attending by phone for Defendant, however, all of these people must form one conference call before calling Chambers. Please use a landline if available. (dkc) (Entered: 09/20/2011)
09/20/2011	85	NOTICE of Attorney Appearance by Alice Evelyn Meyer on behalf of American Residential Equities, LLC (Meyer, Alice) (Entered: 09/20/2011)
09/26/2011	86	PAPERLESS MINUTE ENTRY for proceedings held before Magistrate Judge Jonathan Goodman: Discovery Hearing held on 9/26/2011. Paries present: Alice E. Meyer, Esq., and David A. Freedman, Esq., for Plaintiff/Counter Defendant. Via telephone - David Brian O'Dell, Esq., for Defendant/Counter Claimant. Matters taken under advisement. Order to follow.(Digital 14:54:28.) (mso) (Entered: 09/26/2011)
09/26/2011	87	ORDER FOLLOWING DISCOVERY CONFERENCE. Signed by Magistrate Judge Jonathan Goodman on 9/26/2011. (dkc) (Entered: 09/26/2011)
10/07/2011	88	NOTICE by American Residential Equities, LLC *of Filing Joint Discovery Plan* (Attachments: # 1 Exhibit Joint Discovery Plan)(Meyer, Alice) (Entered: 10/07/2011)
10/14/2011	89	Witness List *Designation of Expert Witnesses* by American Residential Equities, LLC.. (Meyer, Alice) (Entered: 10/14/2011)
10/21/2011	90	NOTICE by American Residential Equities, LLC, GMAC Mortgage, LLC *Notice of Non-Consent* (O'Dell, David) (Entered: 10/21/2011)
11/23/2011	91	MOTION for Waiver of Rule 4(B)(3) Designation by GMAC Mortgage, LLC. (Attachments: # 1 Text of Proposed Order)(O'Dell, David) (Entered: 11/23/2011)
11/28/2011	92	MOTION to Appear Pro Hac Vice and to Electronically Receive Notices of Filing for Hope T. Cannon. Filing Fee $ 75.00. Receipt # 29035. (ksa) (Entered: 11/29/2011)
12/02/2011	93	ORDER granting 91 Motion for waiver of Rule 4(b)(3); granting 92 Motion to Appear Pro Hac Vice, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing. Signed by Judge Alan S. Gold on 12/2/11. (tp) (Entered: 12/05/2011)
12/14/2011	94	Joint MOTION for Extension of Time extend certain deadlines by American Residential Equities, LLC. Responses due by 1/3/2012 (Attachments: # 1 Text of Proposed Order Order Extending Certain Deadlines)(Meyer, Alice) (Entered: 12/14/2011)
01/04/2012	95	ORDER granting 94 Joint MOTION for Extension of Time extend certain

		deadlines filed by American Residential Equities, LLC. Discovery due by 4/13/2012, Mediation Deadline 2/29/2012, Dispositive Motions due by 5/11/2012, Calendar Call reset for 9/5/2012 01:30 PM in Miami Division before Judge Alan S. Gold, Jury Trial reset for 9/10/2012 before Judge Alan S. Gold, Pretrial Conference reset for 8/3/2012 11:00 AM before Judge Alan S. Gold. Signed by Judge Alan S. Gold on 1/4/12. (tp) (Entered: 01/05/2012)
02/23/2012	96	MOTION for Partial Summary Judgment on Breach of Contract Claim and Supporting Memorandum of Law and Authority by GMAC Mortgage, LLC. Responses due by 3/12/2012 (Attachments: # 1 Exhibit A - Part 1)(O'Dell, David) Modified text on 2/24/2012 (asl). (Entered: 02/23/2012)
02/23/2012	97	APPENDIX to 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC (O'Dell, David) (Entered: 02/23/2012)
02/23/2012	98	APPENDIX to 97 Appendix, 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC (O'Dell, David) (Entered: 02/23/2012)
02/23/2012	99	APPENDIX to 97 Appendix, 98 Appendix, 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC (Attachments: # 1 Exhibit B)(O'Dell, David) (Entered: 02/23/2012)
02/23/2012	100	Statement of: Of Undisputed Facts Supporting Motion for Partial Summary Judgment on Breach of Contract by GMAC Mortgage, LLC re 96 MOTION for Partial Summary Judgment (Attachments: # 1 Exhibit A)(O'Dell, David) (Entered: 02/23/2012)
02/23/2012	101	MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. and Supporting Memorandum of Law and Authority by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A - Part 1, # 2 Exhibit A - Part 2, # 3 Exhibit A - Part 3, # 4 Exhibit A - Part 4, # 5 Exhibit B)(O'Dell, David) Modified text on 2/24/2012 (asl). (Entered: 02/23/2012)
02/23/2012	102	MOTION Request for Oral Argument re 101 MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. , 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC. (O'Dell, David) Modified relief on 2/24/2012 (asl). (Entered: 02/23/2012)
02/24/2012	103	Clerks Notice to Filer re 97 Appendix, 99 Appendix, 98 Appendix. **Document not filed in Text Searchable Format**; ERROR - The document was not filed in Text Searchable Format. All future filings must be submitted in Text Searchable format as instructed in the CM/ECF Administrative Procedure 3G(5) -Page 10-. It is not necessary to refile this document. (asl) (Entered: 02/24/2012)
02/24/2012	104	Clerks Notice to Filer re 97 Appendix, 99 Appendix, 98 Appendix. **Document Not Captioned**; CORRECTIVE ACTION REQUIRED - The Filer must File a Notice of Striking, then refile the document with the proper caption pursuant to Local Rules. (asl) (Entered: 02/24/2012)
02/24/2012	105	MOTION Notice to Correct Filing re 97 Appendix, 99 Appendix, 98 Appendix, 96 MOTION for Partial Summary Judgment by GMAC Mortgage, LLC. (O'Dell, David) Modified to re-docket, see 107 Withdrawal of Motion

		on 2/24/2012 (asl). (Entered: 02/24/2012)
02/24/2012	106	MOTION for Partial Summary Judgment on Breach of Contract Claim and Supporting Memorandum of Law and Authority by GMAC Mortgage, LLC. Responses due by 3/12/2012 (Attachments: # 1 Exhibit A - Part 1, # 2 Exhibit A - Part 2, # 3 Exhibit A - Part 3, # 4 Exhibit A - Part 4, # 5 Exhibit A - Part 5, # 6 Exhibit B)(O'Dell, David) Modified text on 2/24/2012 (asl). (Entered: 02/24/2012)
02/24/2012	107	NOTICE to Correct Filing/WITHDRAWAL of Motion re 96 MOTION for Partial Summary Judgment filed by GMAC Mortgage, LLC. See 105 for image (asl) (Entered: 02/24/2012)
02/29/2012	108	ORDER Granting 102 Request for Oral Argument; Setting Oral Argument on Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 . Oral argument on Defendant's Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 is hereby set before the Honorable Alan S. Gold on Friday, May 18, 2012 at 2:00 pm. Signed by Judge Alan S. Gold on 2/29/2012. (mno) (Entered: 02/29/2012)
02/29/2012		Set/Reset Hearings Defendant's Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 set for 5/18/2012 02:00 PM in Miami Division before Judge Alan S. Gold. (mno) (Entered: 02/29/2012)
03/06/2012	109	Plaintiff's MOTION to Compel *Discovery and*, Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* by American Residential Equities, LLC. Responses due by 3/23/2012 (Attachments: # 1 Exhibit 1 - Freedman letter, # 2 Exhibit 2 - Nov 8 2011 email, # 3 Exhibit 3 - Dec 14 2011 email, # 4 Exhibit 4 - Plaintiff's 1st RFP, # 5 Exhibit 5 - Morriss affidavit, # 6 Exhibit 6 - Feb 6 2012 email, # 7 Exhibit 7 - financial transactions, # 8 Exhibit 8 - email re extension, # 9 Exhibit 9A - documents not produced by GMACM, # 10 Exhibit 9B - documents not produced by GMACM, # 11 Exhibit 10 - documents produced by GMACM, # 12 Exhibit 11 - Cannon letter, # 13 Exhibit 12 - email re missing items, # 14 Exhibit 13 - Sept 7 2011 email)(Freedman, David) (Entered: 03/06/2012)
03/07/2012	110	ORDER REFERRING MOTION: 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* filed by American Residential Equities, LLC, as to 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law*. (Responses due by 3/15/2012, Replies due by 3/21/2012.) Motions referred to Jonathan Goodman. Signed by Judge Alan S. Gold on 3/7/2012. (mno) (Entered: 03/07/2012)
03/07/2012	111	RESPONSE to Motion re 101 MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. filed by American Residential Equities, LLC. Replies due by 3/19/2012. (Attachments: # 1 Exhibit Affidavit of Lawrence Morriss, # 2 Exhibit December 9 2011 letter, # 3 Exhibit email dtd 12-14-11)(Meyer, Alice) (Entered: 03/07/2012)
03/08/2012	112	*ENDORSED ORDER SETTING HEARING ON 109 Plaintiff's Motion to Compel Discovery and to Adjust Trial and Pretrial Schedules. Motion

		Hearing set for 3/30/2012 at 03:00 PM in Miami Division before Magistrate Judge Jonathan Goodman. Signed by Magistrate Judge Jonathan Goodman on 3/8/2012. (dkc) (Entered: 03/08/2012)
03/08/2012	113	RESPONSE to Motion re 106 MOTION for Partial Summary Judgment filed by American Residential Equities, LLC. Replies due by 3/19/2012. (Attachments: # 1 Exhibit 1-2 Affidavit of Morriss and Riley,)(Meyer, Alice) (Entered: 03/08/2012)
03/08/2012	114	Statement of: of Undisputed Facts Supporting its Response to GMAC Motion for Partial Summary Judgment by American Residential Equities, LLC re 113 Response to Motion (Meyer, Alice) (Entered: 03/08/2012)
03/15/2012	115	RESPONSE in Opposition re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V)(O'Dell, David) (Entered: 03/15/2012)
03/19/2012	116	REPLY to Response to Motion re 101 MOTION To Exclude Testimony of Plaintiff's Expert Lawrence D. Morriss, Jr. filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(O'Dell, David) (Entered: 03/19/2012)
03/19/2012	117	REPLY to Response to Motion re 106 MOTION for Partial Summary Judgment filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5 Part 1, # 6 Exhibit 5 Part 2, # 7 Exhibit 5 Part 3, # 8 Exhibit 5 Part 4)(O'Dell, David) (Entered: 03/19/2012)
03/22/2012	118	Plaintiff's MOTION to Strike 116 Reply to Response to Motion, 117 Reply to Response to Motion, *and Incorporated Memorandum of Law* by American Residential Equities, LLC. Responses due by 4/9/2012 (Meyer, Alice) (Entered: 03/22/2012)
03/22/2012	119	REPLY to Response to Motion re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law Memorandum in Support of Motion to COmpel Discovery* filed by American Residential Equities, LLC. (Attachments: # 1 Exhibit 1 - 2-17-2012 letter, # 2 Exhibit 2 - report, # 3 Exhibit 3 - report)(Meyer, Alice) (Entered: 03/22/2012)
03/23/2012	120	RESPONSE to Motion re 118 Plaintiff's MOTION to Strike 116 Reply to Response to Motion, 117 Reply to Response to Motion, *and Incorporated Memorandum of Law and Request for Permission to Exceed Page Limitation* filed by GMAC Mortgage, LLC. Replies due by 4/2/2012. (Attachments: # 1 Exhibit 1)(O'Dell, David) (Entered: 03/23/2012)
03/23/2012	121	MOTION/REQUEST for Permission to Exceed Page Limitation by GMAC

		Mortgage, LLC. See 120 for image. (ral) (Entered: 03/26/2012)
03/26/2012	122	Clerks Notice to Filer re 120 Response to Motion, 121 MOTION for Leave to File Excess Pages. **Two or More Document Events Filed as One**; ERROR - Only one event was selected by the Filer but more than one event was applicable to the document filed. The docket entry was corrected by the Clerk. It is not necessary to refile this document but in the future, the Filer must select all applicable events. (ral) (Entered: 03/26/2012)
03/26/2012	123	ENDORSED ORDER RE-SETTING HEARING ON 109 Plaintiff's Motion to Compel Discovery and to Adjust Trial and Pretrial Schedules. Motion Hearing RE-SET for 3/30/2012 at 2:00 PM in the Miami Division before Magistrate Judge Jonathan Goodman (See also ECF No. 112 for previous order scheduling same hearing for 3:00 PM). Signed by Magistrate Judge Jonathan Goodman on 3/26/2012. (dkc) (Entered: 03/26/2012)
03/28/2012	124	ORDER Granting Request for 121 Motion for Leave to File Excess Pages. Signed by Judge Alan S. Gold on 3/28/2012. (mno) (Entered: 03/28/2012)
03/30/2012	125	PAPERLESS MINUTE ENTRY for proceedings held before Magistrate Judge Jonathan Goodman: Discovery Hearing held on 3/30/2012. Matters taken under advisement. Order to follow. Parties present: David Freedman, Esq., and Alice Meyer, Esq., for Plaintiff. Patricia Wood representative with CBIZ Accounting Firm. Hope Cannon, Esq., for Defendant.(Digital 13:59:33.) (mso) (Entered: 03/30/2012)
04/10/2012	126	ORDER GRANTING 109 Plaintiff's Motion to Compel and REPORT AND RECOMMENDATIONS on 109 Plaintiff's Request to Extend Pre-Trial and Trial Deadlines. Signed by Magistrate Judge Jonathan Goodman on 4/10/2012. (dkc) (Entered: 04/10/2012)
04/20/2012	127	REPORT REGARDING Fees by GMAC Mortgage, LLC (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Hancock, Christian) (Entered: 04/20/2012)
04/20/2012	128	OBJECTION of Magistrate Judge 126 REPORT AND RECOMMENDATIONS re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law* filed by American Residential Equit to District Court (Hancock, Christian) (Entered: 04/20/2012)
04/20/2012	129	ORDER CANCELLING ORAL ARGUMENT: Oral argument on Defendant's Motion for Partial Summary Judgment 106 and Motion to Exclude Expert 101 set for Friday, May 18, 2012 p.m. is hereby CANCELLED. Signed by Judge Alan S. Gold on 4/20/2012. (mno) (Entered: 04/20/2012)
04/22/2012	130	Plaintiff's MOTION to Strike 127 Report Regarding *Fees and For Sanctions* by American Residential Equities, LLC. Responses due by 5/10/2012 (Meyer, Alice). Added MOTION for Sanctions on 4/23/2012 (ral). (Entered: 04/22/2012)
04/23/2012	131	Clerks Notice to Filer re 130 Plaintiff's MOTION to Strike 127 Report

		Regarding *Fees and For Sanctions* MOTION for Sanctions. **Motion with Multiple Reliefs Filed as One Relief**; ERROR - The Filer selected only one relief event and failed to select the additional corresponding events for each relief requested in the motion. The docket entry was corrected by the Clerk. It is not necessary to refile this document but future filings must comply with the instructions in the CM/ECF Attorney User's Manual. (ral) (Entered: 04/23/2012)
04/23/2012	132	OBJECTIONS to 126 Report and Recommendations by American Residential Equities, LLC. (Attachments: # 1 Exhibit Records With "Notes", # 2 Exhibit Records Without "Notes", # 3 Exhibit Email dated 6/6/12, # 4 Exhibit Email dated 11/22/11, # 5 Exhibit Correspondence dated 1/27/12, # 6 Exhibit Email dated 2/10/12, # 7 Exhibit Chart dated 2/22/12, # 8 Exhibit Email dated 2/13/12)(Meyer, Alice) (Entered: 04/23/2012)
05/04/2012	133	RESPONSE TO OBJECTION to 126 Report and Recommendations by American Residential Equities, LLC. (Meyer, Alice) (Entered: 05/04/2012)
05/07/2012	134	ORDER Setting Briefing Schedule and Oral Argument on 128 132 Objections to Report and Recommendations and 130 Motion to Strike and for Sanctions; (Responses to Objections due by 5/9/2012, Replies to Objections due by 5/16/2012); ORDER Setting Hearing on 130 Motion to Strike and for Sanctions; Motion Hearing set for 6/8/2012 10:30 AM in Miami Division before Senior Judge Alan S. Gold; Response to 130 Motion due 5/11/2012; Reply to 130 Motion due 5/18/2012. Signed by Senior Judge Alan S. Gold on 5/7/2012. (ral) (Entered: 05/07/2012)
05/07/2012		Set Deadlines as to 130 Motion to Strike and for Sanctions per 134 Order. Responses due by 5/11/2012 Replies due by 5/18/2012. (ral) (Entered: 05/07/2012)
05/09/2012	135	RESPONSE in Opposition re 128 OBJECTION of Magistrate Judge 126 REPORT AND RECOMMENDATIONS re 109 Plaintiff's MOTION to Compel *Discovery and*Plaintiff's MOTION to Continue *to Adjust Trial and Pretrial Schedules; Incorporated Memorandum of Law< filed by GMAC Mortgage, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (O'Dell, David) (Entered: 05/09/2012)*
05/11/2012	136	RESPONSE in Opposition re 130 Plaintiff's MOTION to Strike 127 Report Regarding *Fees and For Sanctions* MOTION for Sanctions filed by GMAC Mortgage, LLC. (O'Dell, David) (Entered: 05/11/2012)
05/16/2012	137	NOTICE by American Residential Equities, LLC re 134 Order, Set/Reset Deadlines, Set Motion and R&R Deadlines/Hearings, Order Setting Hearing on Motion,,,,,,,, *Regarding Scheduling* (Attachments: # 1 Exhibit email btwn counsels)(Freedman, David) (Entered: 05/16/2012)
05/17/2012	138	ORDER TO SHOW CAUSE Show Cause Response due by 5/24/2012. Signed by Senior Judge Alan S. Gold on 5/17/2012. (mno) (Entered: 05/17/2012)
05/17/2012	139	NOTICE by GMAC Mortgage, LLC *of Bankruptcy and Effect of Automatic Stay* (O'Dell, David) (Entered: 05/17/2012)

05/18/2012	140	ORDER DISCHARGING ORDER TO SHOW CAUSE; STAYING CASE. Order to Show Cause 138 is Discharged. This case is STAYED pursuant to pending resolution of Southern District of New York Bankruptcy case. The Clerk of Court is instructed to ADMINISTRATIVELY CLOSE this case. All hearing are CANCELLED. All deadlines are HELD IN ABEYANCE pending further Court order. Signed by Senior Judge Alan S. Gold on 5/18/2012. (mno) (Entered: 05/18/2012)
09/11/2012	141	NOTICE by GMAC Mortgage, LLC *AMENDED NOTICE OF BANKRUPTCY FILING AND SUPPLEMENTAL SERVICING ORDER* (Attachments: # 1 Exhibit A)(O'Dell, David) (Entered: 09/11/2012)

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04/23/2013 18:50:00

PACER Login:	ba0105	**Client Code:**	0R0808-301038-00900
Description:	Docket Report	**Search Criteria:**	1:10-cv-21943-ASG
Billable Pages:	14	**Cost:**	1.40

EXHIBIT K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AMERICAN RESIDENTIAL EQUITIES, LLC,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NUMBER: 10-21943-Civ-Gold/Goodman**
GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Company,	)	
Defendant.	)	

GMAC MORTGAGE, LLC'S MOTION TO EXCLUDE TESTIMONY OF PLAINTIFF'S EXPERT LAWRENCE D. MORRISS, JR. AND SUPPORTING MEMORANDUM OF LAW AND AUTHORITY

Comes now Defendant GMAC Mortgage, LLC ("GMACM"or "Defendant"), pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), respectfully moves to exclude the opinions, report and any testimony from Plaintiff's expert Lawrence D. Morriss, Jr. ("Morriss"). In support thereof, GMACM submits this Motion and Supporting Memorandum.

I.
INTRODUCTION

This is a breach of contract action arising out of a Servicing Agreement (and Amendments) entered into between GMACM and Plaintiff American Residential Equities, LLC ("ARE" or "Plaintiff") on July 29, 2004.[1] Under the Servicing Agreement, GMACM serviced and administered certain loans secured by mortgages owned or serviced by ARE (the "ARE Loans"). These loans had high rates of default and, in fact, many of them had been uncollectible

[1] The Servicing Agreement was subsequently amended six times by amendments dated January 1, 2006, February 1, 2007, May 31, 2007, April 10, 2008 and February 6, 2009, each with a corresponding effective date.

for more than a year prior to being serviced by GMACM.[2] In fact ARE describes the loans as "non-performing". *See* Doc. 1, Complaint, ¶ 6. There were over 2,600 ARE Loans serviced by GMACM for ARE under the Service Agreement, prior to the termination of the parties' relationship. Over one year ago, on or about June 11, 2010, Plaintiff filed this action against GMACM alleging two claims: (1) a breach of contract claim and (2) a specific performance claim.[3]

Plaintiff has designated Morriss as its only expert in this case. Morriss is a forensic accountant. *See* Doc. 89. Morriss purports to provide opinions about how ARE has allegedly been damaged by actions taken by GMACM in the servicing and administration of the ARE Loans. On February 13, 2012, the expiration of the fifth extension for providing expert reports, ARE provided a report from Morriss. The report is titled a **"preliminary"** report and contains his opinions about **"possible damages"** that **"may"** have been caused by GMACM. *See* Morriss Report, attached hereto as Exh. "A". Morriss's opinions regarding ARE's alleged damages are premised on assumptions relating to **"possible"** diminutions in value of the mortgaged properties.

Morriss's report, which spans a mere 11 pages of actual text (to support what he contends is a possible over $69,000,000.00 claim), is incomplete, lacks any definitive opinion, contains speculation and conjecture and, thus, is not reliable and relevant under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) or Federal Rule of Evidence 702. As such, Morriss's report does nothing to assist a trier of fact in determining any issues in this case. The expert

[2] The industry parlance for these types of loans is "scratch-and-dent."

[3] ARE moved for judgment on the pleadings on its specific performance claim, which motion was denied. In denying the motion, the Court specifically stated that there is no right to an accounting after the termination of the parties' relationship. However, the Court determined that, at that time, there were questions of fact remaining regarding whether an accounting had been sought by ARE prior to the termination of the Servicing Agreement. *See* Doc. 55.

report deadline having passed and Morriss' opinions, as set forth in his "preliminary" report, having to meet *Daubert* or Rule 702 standards, Morriss must be excluded as an expert. *See Jackson v. Carnival Cruise Lines, Inc.*, 203 F.Supp.2d 1367, 1378 (S.D. Fla. 2002) (this Court excluded presentation of expert report on summary judgment motion for several reasons, including, because deadline for providing expert reports had expired).

As an additional ground for excluding Morriss as an expert, Morriss was not designated as, and is not, a servicing expert. *See* Doc. 89. Nonetheless, as part of Morriss's speculative report, Morriss attempts to provide conjectural opinions regarding the propriety of GMACM's servicing and administration of the ARE Loans. Morriss, however, is not qualified to provide such opinions. He has had no experience servicing mortgage loans. He is an accountant and an auditor. Failing to qualify as a servicing industry expert, Morriss must be excluded as a servicing expert.

II.
LEGAL ARGUMENT

A. The Standard

In *Daubert*, the United States Supreme Court established the standard by which expert testimony is permitted in federal courts. The Supreme Court emphasized that Federal Rules of Evidence 702 requires trial courts to serve as evidentiary "gatekeepers" who must conscientiously screen expert testimony for relevance and reliability. *Daubert*, 509 U.S. at 593. As part of a court's "gatekeeping" function, the court must ensure that proffered expert testimony is "supported by appropriate validation." *Id*. Moreover, nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *See General Electric Co. v.*

Joiner, 522 U.S. 136, 140, 146 (1997) (holding that expert testimony constituted "subjective belief or unsupported speculation").

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), the Court made clear that the principals enunciated in *Daubert* applied to both scientific testimony as well as testimony based on "technical" or "other specialized knowledge," such as testimony regarding lost profits, damages, and diminution of value. *See Kumho Tire Co.*, 526 U.S. at 147; *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001). In fact, Fed.R.Evid.702, provides that:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

See also, MDS (Canada), Inc. v. RAD Source Tech., Inc., -- F.Supp.2d --, 2011 WL 4591186 at *48 (S.D. Fla. Sept. 30, 2011).

There are, thus, three (3) prongs that must be met for an expert opinion testimony to be admissible: (1) it is given by a person who qualifies as an expert; (2) it meets certain scientific data requirements and (3) it would assist the trier of fact. *See United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995). Under the first prong, the proffered expert must have sufficient knowledge of the topic on which he proposes to testify. *See Daubert*, 509 U.S. at 590. The second prong charges the district court with determining whether the proffered evidence possesses a sufficient evidentiary reliability to be admissible as scientific, technical, or other specialized knowledge. The third prong requires the court to determine whether the proffered evidence is relevant in the sense that it will assist the trier of fact to understand the evidence or determine a fact at issue. *Daubert*, 509 U.S. at 591-92. As the proponent of Morriss's report, Plaintiff has a "*substantial burden* under Rule 702." *See MDS (Canada), Inc.*, 2011 WL 4591186 at *49 (emphasis supplied). As discussed herein, given the speculative nature of Morriss's report; the expiration

of the expert report deadline and the failure of Morriss to qualify as a servicing expert, ARE cannot meet its burden under Rule 702.

B. Morriss's Report Is Speculative And Must Be Excluded.

As this Court stated in *MDS (Canada), Inc. v. RAD Source Tech., Inc.*, "Daubert requires the trial court to act as a gatekeeper to insure that speculative and unreliable opinions do not reach [the factfinder]". *See id*. at *49. In *McClain v. Metabolife Int'l, Inc*. 401 F.3d 1233, 1237 (11th Cir. 2005), which this Court quoted in *MDS (Canada), Inc.*, the Eleventh Circuit held that a pharmacology expert should have been excluded because the "expert drew speculative conclusions about supplement's toxicity from questionable principles" and (similar to Morriss's report) left a "trail of equivocation" by making statements containing "if" and "may". *See id.* at 1240. The decisions in *MDS (Canada)* and *McClain* support the exclusion of Morriss's opinion, report and testimony as speculative, unreliable and irrelevant under *Daubert* and Rule 702.

Morriss has provided a "preliminary" expert report which contains essentially no definitive opinions. Morriss spends several pages of his 11-page report attempting to explain why he was unable to provide a complete report or provide any opinions, despite the fact that the expert report deadline was February 13, 2012. In the remaining pages, Morriss opines that ARE's damages **"may"** have been caused by GMACM**.** In fact, in Morriss's attempt at analyzing three (out of over 2,600) of the ARE Loans, he states that "GMACM's servicing of [those] loans **may have** resulted in a permanent diminution of the value of ARE's [] investment [in the mortgaged property]." *See* Morriss's Report, p. 7-9. Moreover, Morriss does not even provide a definitive non-speculative opinion about the amount of ARE's alleged damages. Instead, Morris opines that ARE's damages could fall anywhere between a **"possible"** range of $26,540,629 to $69,499,825 (a possible range of $43,000,000.00). There can be no other

conclusion but that Morriss's report is speculative, and the deadline for expert reports having passed, Morriss must be excluded.

Courts have consistently excluded expert testimony, similar to that provided by Morriss, for being speculative and conjectural. In *U.S. v. Henderson,* 693 F.2d 1028 (11th Cir. 1983), a case arising out of the Middle District, the Eleventh Circuit determined that the evidence was too speculative for a jury to find defendant guilty where the handwriting expert in a forgery case opined that the defendant "*probably*" endorsed the check. *See id.* at 1031-32 (emphasis added). In *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*, 711 F.Supp.2d 1348 (M.D. Ga. 2010), the court granted a motion for summary judgment after excluding expert testimony on the grounds that expert's opinion that the product "*may have* caused degradation" was speculative and conjectural. *See id.* at 1375 (emphasis added); *see also, Kallas v. Carnival Corp.*, 2009 WL 901507, *8 (S.D. Fla. March 30, 2009) (excluding expert opinion regarding economic loss to a child by loss of her father because "expert testimony must be properly grounded, well reasoned and *not speculative* before it can be admitted"); *Sun Ins. Marketing Network, Inc. v. AIG Life Ins. Co.*, 254 F.Supp.2d 1239, 1248 (M.D. Fla. 2003) (excluding accountant's lost profits opinion as being too speculative); *KW Plastics v. United States Can Co.*, 131 F.Supp.2d 1289, 1292 (M.D. Ala. 2001) (excluding accountant's testimony regarding calculation of seller's lost profits as too speculative to be admitted and unreliable and irrelevant); *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 56-57 (11th Cir. 2002) (rejecting argument that credibility of expert is role for the jury and finding expert's opinion not scientifically reliable and based on speculation).

Like the excluded expert opinions in the cases above, Morriss's opinions, as expressed in his report, are speculative and conjectural. Just like the expert's opinion in *McClain*, Morriss's

report contains no definitive conclusions and is replete with equivocations. For example, in Morriss's discussion of the "examples of servicing errors," (referring to what appears to be the only three loans Morriss reviewed out of 2,600 provided to ARE by GMACM) Morriss speculates that GMACM's servicing **may** have resulted in a permanent diminution in value and that ARE **may** have lost a **portion or all** of its investment. *See* Exh. "A", Morriss Report, 7-11.

Similarly, in opining about the amount of ARE's damages, Morriss states that he has "determined a **preliminary possible** damage" for ARE of $26,540,692 to $69,499,825. Morriss explained how he reached that speculative opinion as follows:

> The $26,540,629 reflects ARE'S **possible** damages **assuming** that the $42,959,196 of loans transferred from GMACM has not retained any value, as reflected in the schedule below. The $69,494,4825 reflects ARE'S **possible** damages **assuming** that the $42,959,196 of the transferred loans has retained 100% of its value. The reasonable assumption, based on the discussion included in the Examples of Servicing Errors Section above is that the value of the $42,959,196 of mortgage loans ARE retained will have **some value between 100% and zero**.

See Exh. "A", Morriss Report, p. 10.

Given that explanation, Morriss's damages opinion is not only speculative, but it is also premised on unreasonable assumptions. First, Morriss unreasonably assumes that from 2004 to 2010 (which includes one of the largest housing market downturns in history) all of the mortgaged properties securing all 2,687 of ARE's scratch-and-dent loans **"retained 100% of its value."** Second, Morriss unreasonably assumes that ARE would have received a return on these scratch-and-dent loans of 15%, adjusted a mere 5% to reflect a single year's ("2007/2008") downturn in the housing market. *See* Report, pp. 10-11. According to Morriss, his 5% adjustment is his **"best estimate"** and, thus, is not based on any data study or authority. *See id.* at 11. In fact, according to Morriss, the only "reasonable assumption" is that the mortgage properties would have retained **"some value between 100% and zero."** Third, Morriss's

damages opinions unreasonably assume that ARE will be able to establish that any diminution in value was caused by GMACM rather other factors. Fourth, Morriss's opinion unreasonably assumes that there were breaches engaged in by GMACM as to **all** 2,687 ARE Loans. Clearly, these unreasonable assumptions cannot stand because they are based solely on Morriss's own speculative and baseless assertions. As the court stated in *Hall v. Thomas*, 753 F.Sup. 1113 (N.D. Ala. 2010),

> An expert opinion is inadmissible when the only connection between the conclusion and the existing data is the expert's own assertions. If an expert's facially relevant conclusion relates to the data purports to rely upon by his own *ipse dixit*, it ultimately is simply an argument, offering nothing more than what lawyers for the parties can argue in closing arguments and consequently fails to meet Rule 702's helpfulness requirement.

See id. at 1140. Morriss's proffered opinions and report falls well short of meeting the *Daubert* or Rule 702 standard and should be excluded.

C. MORRISS'S REPORT MUST "STAND ON ITS OWN TWO LEGS."

Recognizing the deficiencies in his report and opinions, ARE identifies Morriss's expert report as a "preliminary" report, presumably to lay the ground for providing an additional report at some later unknown date. However, on February 13, 2012, the parties were to exchange complete and "meaningful" expert reports compliant with Rule 26, and not preliminary incomplete reports. *See* Doc. 94. Thus, Morriss's preliminary report must "stand on its own two legs." *Hall*, 753 F.Supp.2d at 1137.

Like ARE, the plaintiff in *Hall v. Thomas*, without advising the court or the other side, submitted a "preliminary" and incomplete expert report on the date that reports were to be exchanged. Also, like Morriss, the plaintiffs' expert in *Hall*, an economist, Dr. Charles Borjas claimed he needed to perform additional work (a regression analysis) and further alleged, like Morriss, that he was unable to perform his analysis because the defendant has failed to provide him with either accurate or complete information. *See id.* at 1141. The deadline for expert

reports having passed (and having been extended on numerous prior occasions), the court in *Hall* refused to allow the plaintiffs to submit an additional report to "cure the deficiencies" in Borjas's report. *See id*. at 1131. Instead, the court stated that Borjas's report "must stand on its own two feet" and determined that it could not. *See id.* at 1139.

In the court's opinion, the court made the following additional findings (all of which apply in this case):

- Plaintiffs provided no explanation as to why they did not bring the asserted discrepancies to the court's attention when discovered, rather than providing an incomplete report months later . . . . *See id.* at 1137.
- "Not once did plaintiffs alert this court to any of the problems they now could should entitle them to further discovery, nor did they ever seek aid in securing the information [the expert] says was necessary for the completion of his report." *See id.* at 1137.
- "Shorn of its purely speculative conclusion, [the expert]'s report contains no relevant opinions at all. Rather, it is merely a recitation of a methodology and facts to which that methodology purportedly could be applied. *See id.* at 1142
- The "report provides no viable opinions regarding facts in issue" and thus is due to be excluded and report stricken. *See id.* at 1144.

Having submitted such a deficient report, Morriss must be excluded as an expert.

D. MORRISS HAD SUFFICIENT INFORMATION TO COMPLETE HIS REPORT.

Also, like the expert in *Hall v. Thomas*, Morriss attempts to shift the blame with the problems in his report to alleged discovery failures by GMACM. Those allegations, however, are only a ruse and have no merit either factually or legally.

1. <u>GMACM Produced Over 500,000 Pages of Documents</u>.

There were over 2,600 ARE Loans serviced by GMACM during the course of the parties' relationship. 285 of the ARE Loans were sold by ARE to a third party investor, such as UBS or Goldman Sachs, prior to the termination of the parties' relationship (hereinafter referred to as the

"Non-ARE" Loans)[4]. As a servicer, GMACM maintains certain documents on each loan. Those documents primarily include payment histories, servicing notes, and, in some cases, images of miscellaneous loan documents, such as communications with the borrowers, inspection reports and broker price opinions.

The documents that provide the best timeline and overview of the servicing and administration activities which took place on a particular loan are the payment histories and servicing notes. The payment histories detail each payment received by GMACM and each expense incurred or advanced by GMACM on the loan to service and administer the loan, such as advances for taxes, insurance, inspection fees, broker price opinion fees and property preservation fees. The servicing notes provide a chronological history of the activities on the loan, including communications with ARE, foreclosure counsel, third parties, and the borrower.

Over the course of this litigation, GMACM has made **16** productions of documents to ARE, including three (3) productions that consisted of repeat productions of files that ARE advised it either could not open, or for some reason, could not locate. GMACM made its first production of documents, consisting of over 41,000 pages of payment histories and servicing notes on or about October 5, 2011. By December 14, 2011, when ARE and GMACM moved jointly to extend the expert report deadline to February 13, 2011 (the fifth extension granted by the Court) GMACM had produced **439,024** pages of documents consisting of, among other documents, payment histories and servicing notes and loan documents for almost the entire

[4] The Non-ARE Loans were the last large group of loans that were produced to ARE and they were delivered on January 11, 2012, over one month before the expert report deadline. The delay was incurred because GMACM provided notice to the current owners of the Non-ARE Loans notifying them of ARE's request because information generated on the loans after ARE sold the loans is subject to confidentiality under the law and under contractual obligations GMACM owes to such third parties. ARE, inexplicably, did not notify GMACM that it had not received this production set until just days prior to the discovery deadline. When that information was made known to GMACM, GMACM re-produced the documents via overnight delivery.

population of ARE Loans. In fact, contrary to the statements made in Morriss' report, GMACM has produced payment histories and servicing notes for **2,685** loans.

Now, after GMACM has undertaken this massive production in the hopes of finally getting some "meaningful" information from ARE about its claims, none has been provided. *See* Doc. 94 (ARE represented that it believed by February 13, 2011, it will have sufficient discovery exchanged to make the reports "meaningful"). ARE's conduct cannot be rewarded.

2. If ARE Needed More Time Or More Documents To Comply With The Expert Report Deadline, It Should Have Requested An Extension.

Assuming, *arguendo*, that Morriss needed more documents or more time to produce a complete report, ARE should have sought an extension of time rather than flout the Court's deadline and submit a preliminary report. ARE is no stranger to seeking extensions from this Court or asking GMACM to agree to an extension anytime it has needed one. In fact, since this litigation was filed, ARE has unilaterally or jointly sought an extension of discovery and expert deadlines at least **nine (9) times**. Yet, despite knowing that "meaningful" expert reports were due on February 13, 2012, and despite Morriss's protestations that he needs more documents, ARE did not ask for an extension of the February 13 deadline. *See* Doc. 94.

Similarly, the plaintiffs in *Hall* also failed to ask for an extension, a fact that the court did not take lightly. In granting the defendant's motion to exclude the plaintiffs' expert for submitting an incomplete and preliminary report, the court noted that "Plaintiffs provided no explanation as to why they did not bring the asserted discrepancies to the court's attention when discovered, rather than providing an incomplete report months later and then pointing to the different numbers as an excuse." *See Hall*, 753 F.Supp.2d. at 1137. Thus, the court concluded that there could be only one reason for the plaintiffs' failure to seek an extension, "that the

expert's theory did not hold up." *See id.* at 1137. That is also the only reasonable conclusion in this case.

What other explanation can there be to explain why, at no time prior to the February 13, 2012, deadline, ARE ever indicated that its expert would be providing a preliminary, incomplete and anything but "meaningful" report. Furthermore, at no time prior to the February 13, 2012, expert disclosure deadline did ARE file any motions to compel or seek assistance from the Court to get the documents it claims has not been produced. **Moreover, despite the fact that over a week has now passed since Morris's report was provided, ARE has not asked GMACM for any additional documents.** Not once between December 2011, when the parties moved to extend the deadline to February 13, 2012, to that date, did ARE indicate that it needed more time to complete its expert report.

Most telling is the fact that, instead of advising the Court or GMACM that it needed an extension of the report deadline, ARE chose to have its expert provide an incomplete, speculative and unreliable "preliminary" report while letting GMACM produce two expert reports (one from an accountant and one from a servicing expert) supporting its counterclaims, which detail each loan that is subject to the GMACM's counterclaim and details each expense or advance that GMACM seeks to recover against ARE in this case. ARE should not be allowed to benefit from such conduct. *See Hall*, 753 F.Supp.2d at 1137 (finding it significant that, "[n]ot once did plaintiffs alert this court to any of the problems they now could should entitle them to further discovery, nor did they ever seek aid in securing the information [the expert] says was necessary for the completion of his report").

3. Morriss's Claim That He Needs Complete Loan Files For Each Of The Over 2,600 Loans To Perform A Statistical Sampling Makes No Sense.

Finally, Morriss claims that he intends to conduct a statistical sampling of the loan files and needs more documents and more time to do so. That argument makes no sense because if Morriss is only going to sample some subset of the over 2,600 ARE Loans, he does not need complete loan documents for each of those loans. In fact, in the New York state court case attached as an exhibit to Morriss's report, one of the basis raised by the plaintiffs to support statistical sampling of over 368,000 loans was to reduce the number of documents that the defendants would have produce, thereby reducing litigation cost and time. *See MBIA Ins. Corp. v. Countrywide Home Loans Svc., LLP*, 2010 WL 7151801 (N.Y. Supp. April 30, 2010), *Memorandum of Law in Support of Plaintiff's Motion in Limine Regarding Sampling*.

Moreover, since this case was filed ARE has never indicated that it planned to engage in a statistical sampling of the loans.[5] To the contrary, despite repeated requests by GMACM for ARE to identify those loans for which it believed GMACM had breached the Servicing Agreement, ARE insisted on the production of the entire ARE Loan portfolio. Not once during the four months of GMACM's document production did ARE indicate that it would be sampling only a portion of the ARE Loan portfolio. Clearly, if it had, and had GMACM agreed, GMACM could have saved considerable expense and time that was spent collating, bates labeling, reviewing and preparing the over 500,000 pages of documents it has produced.

[5] Should this Court not grant GMACM's Motion to Exclude, GMACM is not waiving its right, and is not agreeing, that statistical sampling is a valid or appropriate method for proving ARE's damages of breach of contract claim. For example, the facts of this case are different from the facts in *Countrywide*, which involved over 368,000 loans. Moreover, the court in *Countrywide* stated that,

"The use of sampling does not obviate Plaintiff's need to prove each element of its claims for breach of contract or fraud, and the Plaintiff must prove entitlement to any damages. Should sampling be used, Plaintiff retains its obligation to demonstrate to the trier of fact that each element of each cause of action has been met. The possible use of sampling does not change Plaintiff's ultimate burden of proof, only how Plaintiff may present that proof." *See* Opinion, p. 5.

In fact, ARE represented to the Court in its August 29, 2011, Motion for Extension that it needed an extension of deadlines because the parties had been considering arbitration to avoid the time and cost of a "loan-by-loan" review. *See* Doc. 79. Morriss's claim that he intended to sample some undefined number of the over 2,600 loans is simply not consistent with his claim that he needs complete loan files for each of the 2,600 loans. Moreover, it is prejudicial to GMACM for Morriss, who admits that he has received complete loan files for over 1,300 of the ARE Loans, to not even attempt to review any more than three (3) of those loans as part of his report. Such conduct must not be rewarded.

D. Morriss Is Not Qualified To Provide Any Opinions About GMACM's Servicing Or Administration Of The ARE Loans.

Morriss is ARE's only expert. Morriss, however, is not a servicing expert. He is an accountant and an auditor. In ARE's Expert Disclosure, ARE described Morriss as an expert who "specializes in national complex commercial litigation, forensic investigation, valuation and bankruptcy matters. He is a former PricewaterhouseCoopers, LLP partner, a CPA, a certified fraud examiner, a certified financial forensics and a certified valuation analysis with over 30 years of experience." *See* Doc. 89. Morris states in his report that he has experience in "accounting, tax, financial, forensic investigations, expert testimony, valuation, insolvency and damage analysis experience." *See* Exh. "A", Morriss Report.

Morriss has never worked for a mortgage servicer (other than as an auditor, accountant expert or accountant consultant). *See* Exh. "B", Morriss's CV. Morriss has never serviced or administered mortgage loans. *See id.* Thus, in addition to providing a speculative report, Morriss is also unqualified to provide any opinion about GMACM's servicing and administration of the ARE Loans. Morriss should be excluded to the extent he purports to be a servicing expert. *See Vaughn v. Nacco Materials Handling Group*, 440 Fed.Appx. 821 (11th Cir. 2011) (excluding

expert because he lacked "sufficient knowledge, skill, experience, training or education to render a [design] opinion").

CONCLUSION

Morriss's report consists of nothing more than speculative opinions premised on unsupported assumptions. Morriss admits that his report is incomplete and preliminary. Morriss speculates that GMACM's conduct "may" have damaged ARE and caused "possible" damages to ARE. Choosing to submit a preliminary and incomplete report, rather than seeking an extension of the expert report deadline, and the deadline for expert reports having expired, Morris's report does not meet Rule 702 or *Daubert* muster and Morriss must be excluded.

WHEREFORE, above premises considered, GMACM respectfully moves the Court to exclude the opinions, testimony and report of Lawrence D. Morriss, Jr.

Dated: February 23, 2012

/s/ Hope T. Cannon

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following via the CM/ECF system and by placing a copy of same in the United States mail, first-class postage prepaid and addressed to his regular mailing address on the 23rd day of February, 2012:

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s/ Hope T. Cannon
OF COUNSEL

EXHIBIT L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-21943-CIV-GOLD/GOODMAN

AMERICAN RESIDENTIAL
EQUITIES, LLC,

Plaintiff,
v.

GMAC MORTGAGE, LLC,

Defendant.
_____/

ORDER GRANTING MOTION TO COMPEL AND

REPORT AND RECOMMENDATIONS RE: PLAINTIFF'S

REQUEST TO EXTEND PRE-TRIAL AND TRIAL DEADLINES

This matter is before the Undersigned on an order of reference [ECF 110] from United States District Judge Alan S. Gold concerning [ECF 109] Plaintiff's Motion to Compel Discovery and to Adjust Trial and Pretrial Schedules.

For the reasons outlined below, the Undersigned **GRANTS** the motion to compel and **RESPECTFULLY RECOMMENDS** that the pre-trial and trial deadlines be extended – but with additional conditions designed to make sure this case remains on track and to eliminate the possibility that another continuance will be required. The Court is also awarding fees to GMAC Mortgage, LLC ("GMAC") because of American Residential Equities, LLC's ("ARE") failure to comply with the pre-filing conference requirements (and for incorrectly certifying that it had complied).

In addition, the Undersigned also recommends that Judge Gold require the parties to mediate after the exchange of additional expert reports.

Moreover, because an extension of the trial and pre-trial deadlines will almost certainly impact Defendant's already-filed motions for partial summary judgment [ECF 106] and to exclude expert testimony [ECF 101], the Undersigned **recommends** that the District Court deny those motions without prejudice, so that Defendant may re-file those motions, if it chooses, after Plaintiff obtains the additional discovery. Plaintiff advised the Court of its intent to arrange for its expert witness to supplement his conclusions and analysis based on the forthcoming discovery as well as the documents already produced. Given that ARE's expert (or experts) will undoubtedly reach revised conclusions, it makes little sense for the Court to spend valuable time assessing motions based on circumstances which will likely change, perhaps significantly.

I. Factual Background

This case involves the claims of Plaintiff, a holder of real estate loans, against Defendant, its former loan-servicing agent, for breach of a loan servicing agreement. Currently before the Court is Plaintiff's motion to compel production of documents that Plaintiff claims are necessary for it to supplement its expert report and to calculate its damages, as well a companion request to extend trial deadlines in order to allow analysis of the requested additional production.

On March 30, 2012, the Court held a hearing on the motion. Based on the hearing, which lasted more than two hours, the Court is convinced that the "Captain" character (played by actor Strother Martin) in the 1967 movie "Cool Hand Luke" provides an apt description of the circumstances:

"**What we've got here is . . . failure to communicate"**[1]

In its motion, Plaintiff describes three document categories which Defendant has not produced: GMAC's "notes," data concerning financial transactions and the loan servicing documents.

Although Plaintiff filed this lawsuit on June 11, 2010 [ECF 1], nearly two years ago, the parties did not reach a common understanding of the terminology in the discovery requests and in communications about the discovery requests until the hearing. Likewise, they did not fully appreciate the positions they were taking on certain discovery issues until the hearing.

For example, the Court (and the parties) learned for the first time at the hearing that the term "notes," as used by Plaintiff, refers to documents which GMAC calls "servicing history," or, at times, "call notes." In addition, a member of Plaintiff's document review support team (i.e., a third party vendor which Plaintiff says has received more than $800,000 in this case to help compile, organize and analyze Defendant's discovery responses) advised the Court that field notes are different than GMACAC notes.[2]

The confusion over the definition of "notes," as called for by Plaintiff's discovery, is significant. Plaintiff contends that GMAC's failure to timely provide all "notes" has undermined its ability to prepare for trial and has prevented its

[1] The movie quote is not "**a**" failure to communicate. Instead, the Captain engages in a long pause before uttering the second part of the sentence. The quote is ranked #11 in the American Film Institute's list of the top 100 movie quotations in American cinema. http://www.afi.com/100years/quotes.aspx (last visited March 30, 2012), http://www.imdb.com/title/tt0061512 (last visited March 30, 2012).

[2] The parties used "GMACAC," in addition to "GMAC," to describe these notes in the papers filed with the Court.

expert from performing an adequate review and from providing detailed conclusions and opinions.

Once the parties discussed their different understandings of the "notes" which Plaintiff said have not been produced, GMAC conceded that it failed to produce notes from 727 loan files. GMAC's counsel explained that the omission was due to an oversight and that she did not realize the omission until shortly before the hearing. The loan portfolio at issue in this case consists of approximately 2,680 loans – which means that GMAC neglected to produce notes for 27% of the loan files at issue.

GMAC represented that it could produce the missing notes from the 727 loan files within one week. The Court ordered GMAC to make this production by April 6, 2012, thus granting in part the motion to compel.

The parties similarly miscommunicated about insurance coverage documents concerning the properties that serve as security for the 2,680 loans at issue in this case.

Plaintiff claims it possess information demonstrating that GMAC failed to timely insure properties, under-insured certain properties, over-insured certain properties and sometimes even insured incorrect properties. In its motion, Plaintiff therefore demands copies of all the insurance policies for the individual properties and copies of the master insurance agreement between GMAC and the insurance carrier it selected to provide forced-placed insurance (Plaintiff believes that the forced-placed insurer is a company known as "Balboa").[3]

[3] Plaintiff argued in its motion to compel (p. 16) that it was entitled to "see copies of the insurance policies for each property; all correspondence with

Notwithstanding the fact that Plaintiff filed its lawsuit almost two years ago, it was not until after it filed its motion to compel that Plaintiff first learned that GMAC does not have individual insurance policies for each property. In other words, Plaintiff demanded, at least in part, documents which do not exist – a scenario generated by the parties' failure to discuss the policies before Plaintiff filed its motion. Instead of individual policies, GMAC has a *master agreement*. Defense counsel confirmed at the hearing that Balboa is, in fact, the insurer involved, though she noted that GMAC might also have used one additional insurer during a time period relevant to the case.

The first communication misstep regarding insurance coverage occurred when Plaintiff did not even request the forced-placed coverage master insurance policy until February 2012. After GMAC received this request, it challenged the relevancy of the master insurance agreements and asked for an explanation of Plaintiff's relevance theory. But Plaintiff never responded to GMAC's objection and so the parties never discussed the issue again until after Plaintiff filed the motion to compel.

At the hearing, GMAC agreed to produce the master agreement (or agreements, if insurers other than Balboa were involved) by April 6, 2012. The Court therefore ordered GMAC to produce the documents by this deadline, thus granting, at least in part, another portion of the motion to compel.

Although GMAC does not have copies of individual insurance policies for the properties at issue in this case, it previously advised Plaintiff that property-

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insurers for each property; as well as GMAC's master policy 'policies' [sic] with Balboa and/or any similar insurers who provided coverage at the request of GMAC."

specific information about the insurance coverage is available in individual insurance declaration pages and letters. Those documents, GMAC advised, would reflect the property address, the coverage limit, the coverage type and the premium amount.

However, the non-existence or inadequacy of insurance coverage would not, by itself, create damages for Plaintiff. Damages would only exist if a property securing a loan actually sustained insurable damage, and the insurance was inadequate to cover the damage. Otherwise, it is irrelevant whether the property was under-insured or not insured at all. GMAC advised that it would be cumbersome and time-consuming to locate the declaration pages and coverage letters for all properties. Moreover, as explained above, many of the documents would be irrelevant because only those properties which actually sustained insurable property damage, and for which GMAC received insufficient insurance proceeds from the insurance carrier, would be part of Plaintiff's claim.

Framed by this practical dynamic, Plaintiff agreed to review its files and try to pinpoint for GMAC those properties which sustained damage so that GMAC could locate and produce only relevant declaration pages and coverage letters.

Concerning the missing loan servicing documents, Plaintiff described them as third-party backup documents, such as vendor invoices. But GMAC does not have these loan servicing documents for approximately 170 loans which are now being handled by another loan servicer. Plaintiff acknowledged that the Court cannot compel GMAC to produce what it does not have. Plaintiff also conceded that it has not served a subpoena for these third party documents (for the 170

properties). These facts suggest that Plaintiff may not actually believe these documents are critical.[4]

II. Failure to Comply with Pre-Filing Conferral Requirement

Local Rule 7.1(a)(3) requires parties to confer in good faith about a discovery dispute and to try to resolve the dispute before filing a motion. It also requires the movant to include a certification about the efforts to confer. Failure to comply with this rule has consequences. Violating the rule "may be cause for the Court to grant or deny the motion and impose on counsel an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee."

Federal Rule of Civil Procedure 37(a) requires a party moving to compel discovery to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."

Similar to the Local Rule and Rule 37, the Court's orders governing discovery disputes in this case contain independent, but analogous, pre-filing conferral requirements. Soon after this lawsuit was filed on June 30, 2010, Judge Gold entered an order [ECF 6] which, in a section entitled "Meet and Confer," requires that "Counsel **must** actually confer (in person or via telephone)

[4] There are 37 other sets of similar third-party loan servicing documents that Plaintiff does have because GMAC transferred these documents, unlike the other 170, to ARE's new loan servicer at the termination of the ARE-GMAC relationship. These 37 sets of documents are therefore not at issue here.

and engage in reasonable compromise in a genuine effort to resolve their discovery disputes **before** filing discovery motions."

Judge Gold repeated these discovery procedures in an April 12, 2011 Order [ECF 59], when the magistrate reference for this case was transferred to the Undersigned. Judge Gold also specified that there "must be an **actual conversation** before a discovery motion is filed" and that "the Court may impose sanctions, monetary or otherwise, if it determines . . . a party fails to confer in good faith."

The communication problems plaguing this case also affected the motion to compel. Simply stated, there was no communication. ARE simply filed the motion to compel without conferring with GMAC beforehand.

Nevertheless, ARE certified that it *did* confer in good faith – and represented that the good faith conferences were delineated in the motion. As purported evidence of its attempt to confer, ARE outlined myriad communications since the inception of the case. But the last communication it mentioned occurred on February 3, 2012 – **more than a month before the motion to compel was filed.**

Given the significant gap between the last conference about discovery and the filing of the motion to compel, Defendant GMAC's response [ECF 115] contended (unsurprisingly) that ARE did not, in fact, satisfy the meet and confer requirements. GMAC pointed out that it offered to discuss discovery issues in a

February 10, 2012 email to which ARE never responded.[5] Instead, ARE ignored the offer, waited almost a month and then filed a 20-page motion to compel without any warning.

At the hearing, ARE conceded that it had not engaged in any substantive communications with GMAC about the discovery issues raised in its motion after February 3, 2012 and had not responded to the February 10, 2012 suggestion to have a telephone conference before filing its March 6, 2012 motion to compel. Nevertheless, ARE argued that it complied with the various conference requirements because it had communicated with GMAC during the prior year and a half (since September 7, 2011) and because GMAC advised it at some unspecified point that it would not be producing additional information. According to ARE, it was excused from any further pre-filing attempts to resolve discovery issues because of communications ending almost a month before filing and because it believed GMAC had adopted a "we're-not-producing-any-more-discovery" position.

There are several problems with ARE's theory.

First, it is fundamentally illogical for ARE to conclude that the pre-filing conference requirements were met in good faith through a communication that occurred almost a month before the motion was filed. While it is true that the Federal Rules of Civil Procedure, the Local Rules and the Court's Discovery Procedures do not pinpoint the *specific* timing of when the pre-filing efforts to resolve the dispute must occur, the notion that an email sent almost a month

[5] Defense counsel's email suggested that "[i]t might make sense for us to get on the phone because what you guys say you're missing does not line up with what we've produced."

earlier is sufficient defies common sense. If that practice were permitted, then parties could always circumvent the pre-filing conference requirement by exchanging a brief email a month before filing the motion.[6]

Typically, parties engage in pre-filing discussions anywhere from one day to a few days before filing a motion. Sending an email a *month* before filing a motion to compel is not a good faith effort to resolve a discovery dispute – the purpose of the requirement. The rules governing the conference all suggest that it should occur *shortly* before a party files a motion and do not justify a theory that a communication sent almost a month before filing a motion to compel complies with the pre-filing requirement. ARE did not cite any authority to support a contrary view and the Court is unaware of any.

Second, ARE does not identify the GMAC communication which it believes adopted the "no-more-discovery" position it now says was sufficient to eliminate the need for any additional conferencing.

Third, even if GMAC did announce in early February 2012 that it had no more discovery to provide, then ARE would *still* need to make a good faith effort to discuss this position before filing a motion to compel on March 6, 2012.

Fourth, ARE's argument is inconsistent with GMAC's February 10, 2012 offer to discuss the alleged discovery shortfall in a phone conference. Likewise,

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[6] It would be difficult for the drafters of the applicable rules to specify precisely when a pre-filing conference must occur. This calculation must necessarily consider the nature of the case, the type and degree of the dispute, the relationship between the parties, the schedules of the parties and their counsel and myriad other case-specific variables. Therefore, the requirement is phrased broadly (i.e., before filing) – and it will only succeed if counsel exercise common sense and operate in good faith.

it contradicts GMAC's February 10, 2012 email, which states, "We continue to try to narrow the range of problems."

Fifth, ARE's argument ignores the fact that its motion to compel raises, for the first time, discovery issues which were never part of *any* pre-filing conference. For example, the motion mentions blank pages and the Bates ranges of the supposedly blank pages, but ARE did not mention these ranges to GMAC before the motion was filed. In other words, ARE generated another "failure to communicate scenario."

The Court is therefore convinced that ARE failed to comply with the myriad meet and confer requirements concerning its motion to compel.

As a result, it appears as though at least some of the problem areas outlined in ARE's 20-page motion to compel could easily have been resolved through a good faith conference – but were not. For example, GMAC explained that there were no difficulties with four disks produced to ARE – and that a paralegal employed by ARE's counsel mistakenly thought there was a gap in the Bates ranges because ARE's counsel did not advise the paralegal that the "missing" documents were actually produced in a separate email. Even assuming that the failure to mention the email to the paralegal was a mere oversight, if ARE's counsel had discussed the issue with GMAC's counsel, then presumably GMAC's counsel could have reminded ARE's counsel where the documents were located. This is precisely the type of discovery roadblock which could and should be avoided through a pre-filing conference.

III. The Motion to Compel

Having determined that ARE did not comply with the pre-filing conference requirements, the Court must now decide what role this fact should play in the resolution of ARE's motion.

Not surprisingly, GMAC asks the Court to deny the motion to compel based upon the failure to confer. The Court is certainly *authorized* to deny the motion because of ARE's failure to comply with the pre-filing meet and confer requirements. However, the Court is not required to deny the motion.

Given that the parties did, in fact, engage in many discovery conversations over the past year and a half, that Plaintiff has advised that it already paid more than $800,000 to its third party analyst, and the reality that GMAC did not produce its notes for more than 25% of the loan files at issue, the Court will not deny the motion based on the pre-filing failure to confer. Indeed, GMAC already advised the Court at the hearing that it found the missing notes and would be producing them to ARE within a week. It also agreed to produce other documents. Consistent with its rulings during the hearing, the Court therefore grants the motion to compel to the extent that GMAC must produce the documents at issue in the motion.

However, the Court also concludes that some consequence is in order for ARE's failure to follow the myriad pre-filing conference requirements and for its questionable certification (which claimed that it had fulfilled the requirement). Federal Rule of Civil Procedure 37 mandates an award of attorney's fees, unless one of the narrow exceptions applies. Therefore, as the party prevailing on a

motion to compel, ARE would ordinarily be entitled to a fees award. In fact, the Undersigned's practice is to strictly follow Rule 37 and to award fees to the prevailing party in a discovery dispute.

But Rule 37(a)(5)(A)(i) provides that fees are *not* to be ordered if "the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action." The circumstances here fall squarely within this exception and therefore the Court will not award ARE any fees.

But the consequences analysis cannot end there because Judge Gold's second discovery order [ECF 59] provides for a monetary consequence if a party fails to confer in good faith. ARE failed to confer and submitted a certification attesting to the contrary in direct contravention of that order. The Court therefore **orders** ARE's counsel to pay the fees which GMAC incurred in responding to the motion, preparing for the hearing and attending the hearing.[7]

IV. Summary of Rulings on the Motion to Compel

GMAC shall provide (1) the missing "notes" and the master insurance policy (or policies) by **April 11, 2012** (assuming they have not yet been provided) and (2) the declaration pages and other documents relating to property-specific insurance coverage concerning the 2,680 properties at issue in this case **within 14 days** after receiving from ARE a more-complete list of the specific properties for which ARE is seeking insurance coverage information.

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[7] To be clear, there are two distinct violations here. The first violation is the failure to confer before filing the motion. The second violation is the inaccurate statement in the certificate, incorrectly representing that the conference actually occurred. The Court views the second violation as the more-serious one, though the first violation is hardly insignificant given the magnitude of the case.

ARE's counsel must pay GMAC the attorney's fees it incurred in connection with ARE's motion to compel. Counsel for ARE and GMAC shall first attempt by themselves to resolve the issue of the amount of fees. If those efforts are successful, then ARE's counsel shall pay the fees to GMAC **within 10 days** of this order. If counsel cannot agree, then GMAC shall advise the Court **within 10 days** of this order and the Court will schedule an evidentiary hearing. The law firms will be required to produce to each other their respective time entries and billing rates for the time at issue.

The fees, whether based on an agreed amount or one set by the Court, must be paid by ARE's counsel, who shall not pass on the amount to the client, **within 10 days** of the agreement on fees or an order awarding fees. ARE shall submit an affidavit attesting to the payment of fees to GMAC to the Court's efile inbox (which is separate from the public CM/ECF docket) at goodman@flsd.uscourts.gov **within 5 days** of the payment. The affidavit shall also list the amount of the fees if the amount is the subject of an agreement. To maintain the privacy of this information, no party shall file the affidavit with the Clerk's Office through the CM/ECF system.[8]

V. Plaintiff's Request to Adjust Trial & Pretrial Schedules

The thrust of ARE's motion to adjust the trial deadlines is that it requires additional time for expert analysis and damages calculations because of incomplete document production. ARE contends that once production is

[8] The Court is ordering these payments as a cost/fee-shifting mechanism, not as a disciplinary sanction. Therefore, the attorneys involved would **not** be required to answer "yes" if asked (e.g., in a Bar application, insurance coverage application, submission to a judicial nominating commission, etc.) whether this Order imposed "sanctions" against them.

complete its experts will be able to provide better opinions regarding damages. Judge Gold also referred this motion to me. In the referral, Judge Gold asked me to make a recommendation on whether the trial and pretrial deadlines should be extended, and, if so, for how long. To do so, it is first necessary to outline the case's present procedural posture.

Based on Judge Gold's January 4, 2012 Order Resetting Deadlines [ECF 95], trial is scheduled to begin September 10, 2012, the calendar call is scheduled for September 5, 2012, the pretrial conference is scheduled for August 3, 2012, the cutoff for dispositive motions is May 11, 2012, and the discovery completion deadline is April 13, 2012.

Before Plaintiff filed its motion to compel, Defendant filed motions to exclude the testimony of Plaintiff's expert witness [ECF 101] and for partial summary judgment [ECF 106]. Judge Gold scheduled those two motions for a hearing on May 18, 2012 [ECF 108].

Defendant bases its motion to exclude, in part, on the preliminary, incomplete and speculative nature of the expert's opinions. In its opposition to the motion to exclude its expert [ECF 111], ARE argues that GMAC itself is responsible for the preliminary and incomplete nature of the opinions because it did not timely comply with its discovery obligations and still has not fulfilled its discovery duties.

As of the hearing, ARE still had not received the GMAC notes for approximately 27% of the loan files at issue. It is therefore not surprising that ARE's expert did not provide concrete, firm opinions.

ARE explained that its preferred damages calculations method is known as sampling. To engage in sampling, however, ARE said it needs to have a certain level of documentation completeness in order to reach the confidence level sufficient for the necessary extrapolation. With notes from 27% of the 2,680 loan files missing, ARE argued, its expert cannot generate a damages analysis using sampling and extrapolation.

ARE stated that, if further document production resulted in enough complete files to justify sampling, then it would take that preferred approach. The fact is, however, that ARE might never be able to use extrapolation. This is because, as noted, GMAC cannot produce third party materials for 170 loans. ARE therefore concluded that it may have difficulty achieving the requisite confidence level about the completeness of the documentation even if GMAC makes some additional production.

ARE explained that it is now, in the absence of enough complete files to reach a sufficient sampling confidence level, using another damages calculation strategy. This method involves the manual, file-by-file analysis for 145 of the 200 largest loans in its portfolio.[9] ARE characterized this method as its "least-preferred" method. ARE advised the Court that it (or its vendor) has hired additional analysts and that it would take 6 additional months to review the 145 loan files because of the sheer size of the data involved. In addition, ARE stated that if it is unable to use sampling after further production, but this production

[9] ARE is analyzing only 145 – or approximately 72.5% – of these files because only 145 of the 200 files are complete.

nonetheless results in some additional complete files among any of the 55 now-incomplete largest loan files, then ARE will also analyze these files manually.

Concerning the motion for partial summary judgment, GMAC argued that ARE must have expert testimony to prove its damages and that ARE's expert has not, among other alleged faults and deficiencies, identified the specific amount of any damages caused by an alleged breach.

In response [ECF 113], ARE conceded that its expert's report is preliminary and does not provide absolute conclusions. It blamed this shortcoming on GMAC's tardy and incomplete discovery responses.

ARE advised that its expert will supplement his report (presumably to make it more-certain) once GMAC produces the data it has failed to provide in discovery. It argued that the Court should deny GMAC's motion for partial summary judgment because GMAC should not be "rewarded" for violating its discovery obligations. Therefore, ARE argued, it "would be a perversion of the fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."

ARE seeks a nine-month continuance. It says it requires this amount of time to review the additional discovery which GMAC has advised it will produce, to provide the file review analysis to its expert and to provide its expert with sufficient time to supplement his earlier conclusions. GMAC does not oppose an extension of the scheduling order deadlines. But, acknowledging that it failed to provide notes for 27% of the loan files at issue, GMAC takes the position that a modest one-month extension is adequate to address Plaintiff's concerns.

After reviewing the motions and memoranda and hearing argument of counsel, the Court is inclined to accept the explanation of ARE's counsel – that the parties badly misperceived the time necessary to complete both production and loan file review. GMAC's failure to produce the notes for 27% of the loan files is now undisputed. Under this scenario, GMAC's suggestion of a mere one-month extension is woefully inadequate.

Under the circumstances, the Undersigned **recommends** that Judge Gold grant ARE's request to extend the trial and pre-trial deadlines. However, in order to prevent continued miscommunication and to keep the parties focused on the new deadlines, the Undersigned also recommends that Judge Gold adopt the following schedule:

- ARE shall advise GMAC by May 31, 2012 *whether* it intends to use another or different expert to provide testimony at trial. If ARE is going to use one or more new experts, then it shall provide the expert's resumes and litigation experience lists to GMAC by May 31, 2012. (The parties should keep in mind that this requirement is designed to timely advise GMAC of the type of experts which ARE plans to use at trial, so that it may timely determine whether it needs to secure additional expert witnesses for itself.)
- If GMAC intends to use expert witnesses, then it shall provide the information described in the preceding paragraph to ARE by July 20, 2012.

- ARE shall produce its expert reports (including amended/supplemental reports from its existing expert) to GMAC by October 15, 2012.
- GMAC shall produce its expert reports (including amended/supplemental reports) by October 30, 2012.
- The parties shall exchange rebuttal expert reports by November 9, 2012.
- The parties shall complete all expert witness discovery, including depositions, by December 7, 2012.
- The parties must complete Mediation by December 21, 2012.
- The parties must file all dispositive pretrial motions and memoranda by January 4, 2013.

Finally, the Undersigned **recommends** that Judge Gold reschedule the trial for a date after March 1, 2013, with appropriate additional dates for the pretrial conference and calendar call.[10]

[10] If Judge Gold permits the parties, as recommended, to engage in additional discovery, additional loan file analysis, and supplemental expert witness evaluation, then the factual underpinnings regarding ARE's damages will likely be different and the motion for partial summary judgment and to exclude ARE's expert will based on outdated and incomplete information. Therefore, the Undersigned **recommends** that Judge Gold **deny** these two motions **without prejudice** and provide the parties with leave to re-file them (or similar motions) after GMAC produces additional document discovery and after supplemental expert witness discovery is completed. Consequently, the Undersigned also **recommends** that Judge Gold **cancel** the May 18, 2012 hearing on these motions.

VI. Objections to the Scheduling Adjustment Recommendations

Pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Rule 4(b), the parties have fourteen (14) days after being served with a copy of this Report and Recommendations to serve and file written objections, if any, with the District Court. Each party may file a response to the other party's objection within 14 days of the objections. Failure to timely file objections shall bar the parties from a *de novo* determination by the District Court of an issue covered in this report and bar the parties from attacking on appeal the factual findings contained herein. *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993) (citing *LoConte v. Dugger*, 847 F.2d 745, 749-50 (11th Cir. 1988)).[11]

DONE and ORDERED and RESPECTFULLY RECOMMENDED, in Chambers, in Miami, Florida, this 10th day of April, 2012.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable Alan S. Gold

All counsel of record

[11] Objections to the "order" portion of this document are governed by Local Magistrate Rule 4(a) and are subject to the "clearly erroneous or contrary to law standard."

EXHIBIT M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

AMERICAN RESIDENTIAL EQUITIES, LLC,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NUMBER: 10-21943-Civ-Gold/Goodman**
GMAC MORTGAGE, LLC, successor by merger to GMAC Mortgage Company,	)	
Defendant.	)	

GMAC MORTGAGE, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON BREACH OF CONTRACT CLAIM AND SUPPORTING MEMORANDUM OF LAW AND AUTHORITY

Comes Now, Defendant GMAC Mortgage, LLC ("Defendant" or "GMACM") and respectfully moves this Court, pursuant to Federal Rule of Civil Procedure 56, for an order granting summary judgment in favor of GMACM on Plaintiff's breach of contract claim. In support thereof, GMACM submits the Undisputed Statement of Facts, filed contemporaneously herewith, and further states as follows:

INTRODUCTION

On June 11, 2010, Plaintiff American Residential Equities, LLC ("Plaintiff" or "ARE") filed this action against GMACM alleging that GMACM "fail[ed] to comply with the terms of the Servicing Agreement."[1] *See* Doc. 1, Complaint, ¶ 26. The Servicing Agreement referenced

[1] Specifically, ARE alleges that GMACM "breached the Servicing Agreement by: (a) maintaining, inspecting and/or reporting on the wrong property securing the Mortgage Loans; (b) failing to properly secure Mortgaged Properties and/or REO Properties from damage due to the elements and/or vandals; (c) failing to properly maintain Mortgaged Properties and/or REO Properties, thereby subjecting them to violations of law and governmental fines; (d) servicing Mortgaged Properties and/or REO Properties that were deemed a total loss as though they were in good condition; (e) selling REO Properties in violation of the Servicing Agreement; (f) over-insuring Mortgaged Properties and/or REO Properties; (g) failing to timely file insurance claims; (h) failing to exclude ARE's assets from the Homeowner's Affordability and Stability Plan despite ARE's written demand to exclude its assets from the

by ARE is a contract entered into between GMACM and ARE on or about July 29, 2004, pursuant to which GMACM would service and administer certain substandard loans held by, or serviced by, ARE (hereinafter, the "ARE Loans").[2] *See* SoF ¶ s 3-4. Under the terms of the Servicing Agreement, GMACM's conduct in servicing and administering the ARE Loans was guided by the terms of the Servicing Agreement, Accepted Servicing Practices, certain Servicing Performance Standards and, effective April 10, 2008, an Approval Matrix. *See* SoF ¶ s 5-6. The Servicing Agreement with Amendments is attached as Exh. A to the Statement of Facts.

"Accepted Servicing Practices" is defined in the Servicing Agreement as "those *mortgage servicing practices of mortgage lending institutions which service mortgage loans of the same type as such [ARE] Loan in the jurisdiction where the related Mortgaged Property is located, exercising the same care in performing those practices that [GMACM] customarily employs and exercises in servicing and administering mortgage loans for its own account (including, compliance with applicable federal, state and local laws).*" *See* SoF ¶ 7. Thus, one of the elements ARE must establish to support its breach of contract claim is that GMACM's servicing and administration of the ARE Loans was not consistent with Accepted Servicing Practices (i.e., applicable industry practice) and that GMACM did not exercise the same standard of care on the ARE Loans as on GMACM's loans. The only way for ARE to establish such a breach of industry standard practices and requisite standard of care is through expert testimony. *Goolsby v. Gain Tech., Inc.*, 362 Fed.Appx. 123, 135 (11th Cir. 2010).

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program; (i) failing to follow the approval matrix set forth in the Fourth Amendment to the Servicing Agreement; (j) failing to timely provide ARE with required reports and properly requested information relating to the Mortgage Loans and REO Properties; (k) failing to comply with ARE's demand for an audit pursuant to Section 4.06 of the Servicing Agreement; (l) failing to furnish complete mortgage files to ALS pursuant to the Servicing Agreement and the transfer instructions by ARE in its April 1, 2010 letter, adversely affecting ALS's ability to service the Mortgage Loans and REO Properties; and (m) failing to pay ARE the April, 2010 remittance pursuant to Section 3.01 of the Servicing Agreement." *See* Doc. 1 Complaint, ¶ 28.

[2] The Servicing Agreement was amended six times, with each amendment having a separate effective date. *See* SoF ¶ 4.

ARE has designated Lawrence D. Morriss, Jr. ("Morriss") as its only expert, and provided a "preliminary" report for Morriss (which as discussed in GMACM's Motion to Exclude, filed contemporaneously herewith, is subject to exclusion under Federal Rule of Evidence 702). Morriss is an accountant and is not a servicing expert. *See* Doc. 89. Morriss's report fails to (1) identify the industry practices and requisite standard of care to be employed by GMACM under the Servicing Agreement; (2) identify any alleged failure by GMACM to conform to said conduct in servicing or administering of any loan or (3) identify the specific amount of any damages caused by any alleged breach. Furthermore, as discussed in the Motion to Exclude, as well as herein, Morriss does not provide any definitive, non-speculative opinions in his report. ARE's lack of expert testimony and opinion is fatal to ARE's breach of contract claim.

STANDARD OF REVIEW

A court should grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party, bears the initial responsibility of informing the court of the basis of its motion and identifying the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party meets the initial burden—and GMACM submits that it has—the burden "then moves to the opposing party who must present significant probative evidence tending to support its claim or defense." *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987)). The non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex*, 447 U.S. at 322-23.

ARGUMENT

I. ARE'S BREACH OF CONTRACT CLAIM MUST BE SUPPORTED BY EXPERT TESTIMONY.

ARE has alleged that GMACM breached the terms of the Servicing Agreement. Under Florida law, a plaintiff must establish the following three (3) elements to support a breach of contract claim: (1) a valid contract; (2) a material breach and (3) damages. *See e.g., Abruzzo v. Haller*, 603 So.2d 1338, 1340 (Fla. 1st DCA 1992). The parties do not dispute that a valid contract existed between the parties, that is, the Servicing Agreement (with its amendments). *See* SoF ¶s 3-4. Thus, the first element of ARE's breach of contract claim is met. However, ARE cannot create a genuine issue of material fact as to the second and third elements of its claim without expert testimony.

Pursuant to the terms of the Servicing Agreement, GMACM had wide discretion in carrying out the servicing and administration of the ARE Loans, limited only by the terms of the Servicing Agreement, Accepted Servicing Practices, certain Servicing Performance Standards and (effective April 10, 2008), an Approval Matrix. *See* SoF ¶ s 5-6. The Servicing Performance Standards consists of specific standards set forth in Exhibit 16, and subsequently amended by Exhibit 16A, of the Servicing Agreement. *See* SoF. ¶ 4. The Approval Matrix, which became effective on April 10, 2008, sets forth certain criteria to be employed by GMACM in determining when approval by ARE with regard to specific servicing and administration actions may be necessary. *See* SoF ¶ s 2, 6. Thus, the Servicing Performance Standards and Approval Matrix are specifically set forth and identified in the Servicing Agreement. On the other hand, the Accepted Servicing Practices are not specific criteria set forth in the Servicing Agreement. Rather, Accepted Servicing Practices refer to those standard practices employed by

similar mortgage lenders servicing similar mortgage loans in similar jurisdictions carried out with the requisite standard of care. *See* SoF ¶ s 7.

Thus, although expert testimony is generally not required to establish a breach of contract claim, expert testimony is required in this case because whether GMACM breached the terms of the Servicing Agreement is dependent on whether its conduct was consistent with Acceptable Servicing Practices, which, as stated above, is defined to include the practices employed by mortgage lenders servicing similar loans in similar jurisdictions (i.e., the standard employed in the industry). *See Botes v. Weintraub*, 2010 WL 966864, *12 (N.D. Ga. 2010) (holding that breach of contract claim based on allegation that attorney's conduct fell below standard of performance required expert testimony as to standard of care). Without expert testimony as to the standard practices employed in the industry, a trier of fact "must impermissibly speculate" as to the standard against which GMACM's conduct is to be measured. *See Goolsby*, 362 Fed.Appx. at 135. It is well settled that a plaintiff who alleges a breach or violation of an industry standard or failure to act with reasonable care must establish such a violation though expert testimony. *See* Atwater, 2009 WL 3254925 at *11 (holding that without expert testimony, plaintiff has failed to produce any evidence that the defendant's conduct fell below any applicable standard of care and "that deficiency is in itself fatal to plaintiff's claim"); *Barbazza v. Int'l Motor Sports Ass'n, Inc.*, 538 S.E.2d 859 (Ga. App. 2000) (granting summary judgment where plaintiff presented no expert evidence that defendant's actions violated industry standards).

Additionally, as part of ARE's breach of contract claim, ARE has alleged that GMACM sold Real Estate Owned ("REO") Properties[3] in violation of the Servicing Agreement. The Servicing Agreement provides that, GMACM will use *"commercially reasonable"* efforts to dispose of the property as soon as possible. *See* SoF ¶ 11. To establish what is *commercially reasonable*, ARE must present expert testimony or opinion from an industry expert. *See e.g., See Sunjet, Inc. v. Ford Motor Credit Co.,* 703 S.W.2d 285, 289 (Tex. App. 1985) ("the testimony of an expert may be necessary to establish that procedures used complied with practices normally followed in the industry, or that the sale was otherwise commercially reasonable"); *ITT Commercial Finance Corp. v. Riehn,* 796 S.W.2d 248, 251 (Tex. App. 1990) ("[i]n general, expert testimony is required to establish the commercial reasonableness of a sale."). Expert testimony is necessary for ARE to show that GMACM's disposition of REO properties was not "commercially reasonable" (as alleged) because the normal standards exercised by mortgage lenders servicing similar loans in similar jurisdictions are not "within the knowledge of the average person . . [and] . . [w]ithout expert testimony, neither [the court or the jury] would have sufficient knowledge to be able to determine the reasonableness of the methods used in such a sale." *Sunjet, Inc.,* 703 S.W.2d at 289. ARE, however, has not presented such expert testimony and the deadline for expert designations and reports has passed.

II. ARE'S ONLY DESIGNATED EXPERT IS ACCOUNTANT LAWRENCE D. MORRISS, JR.

ARE has designated Lawrence D. Morriss, Jr. ("Morriss") as an expert in this case. *See* Doc. 89. On February 13, 2012, the deadline for the exchange of expert reports, ARE produced

[3] REO Property is defined as "A Mortgaged Property acquired by the Servicer on behalf of the Owner through foreclosure or by deed in lieu of foreclosure, as described in Section 2.15 [of the Servicing Agreement]. *See* SoF ¶ 2, *See* Attachment A to the SoF, p. 10.

a "preliminary" and incomplete report from Morriss. *See* Morriss Report, attached hereto, as Exh. "A." Morriss is an accounting expert. *See* Doc. 89.

Morriss's report contains no opinions regarding Acceptable Servicing Practices or GMACM's attendant standard of care under the Servicing Agreement. It is devoid of such opinions because Morriss is not a servicing expert and, therefore, would not be qualified to offer any such opinions. Additionally, Morriss's report must be excluded under *Daubert* and Fed. R. Evid. 702 because, even as to damages, Morriss's report consists of only speculative opinions based on conjecture and unfounded assumptions. Thus, Morriss's report is not relevant or reliable. Moreover, ARE should not be allowed to supplement or provide an additional report by Morriss to rebut this summary judgment motion. Not only have the expert disclosure and report deadlines passed, but the Court has extended these deadlines at least five times previously.

A. Morriss's Report Fails To Create A Genuine Issue of Material Fact As To Plaintiff's Breach of Contract Claim.

ARE needs expert testimony to establish a question of fact as to whether GMACM's servicing and administration of the ARE Loans was inconsistent with, or a breach of, the Accepted Servicing Practices and GMACM's attendant standard of care; whether GMACM failed to dispose of REO Properties in a "commercially reasonable" manner and whether ARE has suffered damages as a result of any such breaches. *See Anza v. Ideal Steel Supply Corp*., 547 US 451 (2006) (stating that it is "plaintiff's responsibility to prove that the amount of damages he seeks if fairly attributable to the defendant"). Morriss's report, however, fails to provide any such opinions.

Morriss's report provides no opinions regarding (1) the servicing practices employed by mortgage lenders servicing similar loans in similar jurisdictions; (2) the standard for determining when a disposition of property is "commercially reasonable"; (3) how GMACM's conduct fell

below any requisite standard of care or (4) what provision(s) GMACM is alleged to have breached in the Servicing Agreement. ARE, thus, has failed to provide any expert opinion regarding the applicable practices or standards of care governing GMACM's conduct in the Servicing Agreement from which a fact finder could gauge GMACM's conduct in servicing and administering the ARE Loans. In fact, in the 7 pages of the "analysis" portion of Morriss's 11-page report, Morriss provides only three "examples" of possible errors which he contends "**may**" have caused ARE damage. *See* Exh. "A", Morriss Report, p. 7 ("GMACM's servicing of this loan **may** have resulted in permanent diminution of value.").

Morriss's report also fails to provide any definitive opinions about how ARE has been damaged or to what extent. Rather, Morriss's report contains a 2-page "**Possible Damages**" section and a conjecture that ARE has been damaged by somewhere in a **"possible"** $43,000,000.00 range of damages. *See* Exh. "A", Morriss Report, p. 5 ("The *possible* amount of ARE's damages ranges from $26,540,629 to $69,499,825"). Thus, as the court so aptly stated in *Hall v. Thomas*, 753 F.Supp.2d 1113 (N.D. Ala. 2010) (discussed further below), "shorn of its purely speculative conclusions, [the expert] report contains no relevant opinions at all." *See id.* at 1142.

The deadline for expert designations and reports having passed, ARE cannot create a genuine issue of material fact as to all the elements of its breach of contract claim against GMACM. Summary judgment, therefore, must be entered in favor of GMACM where the report of ARE's only designated expert "provides no viable opinions regarding facts in issue." *See id.* at 1144; *see also, Jackson v. Carnival Cruise Lines, Inc.*, 203 F.Supp.2d 1367, 1378 (S.D. Fla. 2002) (holding expert report inadmissible on motion for summary judgment where, among other reasons, the report was provided after the expert report deadline).

B. Morriss's Opinions, Testimony and Report Should be Excluded.

Moreover, Morriss's report is so lacking that he should be excluded as an expert in this matter. As shown in GMACM's Motion to Exclude Expert Opinions, Report or Testimony from Morriss, Morriss should be precluded from testifying as an expert in this matter because the report he provided contains no opinions which could pass *Daubert* or Rule 702 muster. Despite being faced with an expert report deadline that had previously been extended five times (*see, infra, fn. 3*) Morriss submitted a "preliminary" and incomplete report, which contains nothing but speculation and conjecture as to ARE's alleged damages in this case and **possible** servicing errors. *See* Exh. "A", Morriss Report. Thus, as established in GMACM's Motion to Exclude, Morriss should be excluded from providing any expert testimony or opinion in this matter. (For the sake of brevity, GMACM's Motion to Exclude is adopted and incorporated by reference as though fully set out herein).

III. SUMMARY JUDGMENT IN FAVOR OF GMACM.

Without expert testimony to support ARE's breach of contract claim, ARE cannot survive this motion for summary judgment. For example, in *Owaki v. City of Miami*, 491F.Supp.2d 1140, 1161 (S.D. Fla. 2007), the court granted a motion for summary judgment after excluding an expert's testimony as being "imprecise and unspecific." *See also, Jackson v. Carnival Cruise Lines, Inc.*, 203 F.Supp.2d 1367, 1378 (S.D. Fla. 2002) (this Court granted summary judgment after excluding expert testimony); *In re Mentor Corp. ObTape Transobturator Sling Products Liab. Lit.*, 711 F.Supp.2d 1348, 1375 (M.D. Ga. 2010) (granting summary judgment after excluding expert's testimony as "speculative").

A. The Summary Judgment Is Ripe For Adjudication.

The facts of this case are nearly identical to the facts which were before the Northern District of Alabama in *Hall v. Thomas*, 753 F.Supp.2d 1113 (N.D. Ala. 2010). In *Hall v. Thomas*, the plaintiffs filed a RICO class action suit against defendant poultry company alleging that the company had engaged in conduct of intentionally hiring illegal workers to depress the wages of the company's employees. *See id*. The plaintiffs designated an economics expert, Dr. Charles Borjas, to testify regarding depressed wages. *See id*. at 1123.

Like Morriss's report, Dr. Borjas's report was preliminary and incomplete. *See id*. at 1131, 1137, 1141. Dr. Borjas stated that he needed additional information to perform a regression analysis (similarly, Morriss states that he needs more information to perform a statistical sampling). *See id.* Dr. Borjas's report contained no conclusions or opinions beyond conjecture (just like Morriss's report). *See id.* at 1140, 1142. Similarly to Morris's contention, Dr. Borjas blamed his inability to complete his report on the lack of information or lack of accurate information from defendant (an argument which was rejected by the court). *See id*. at 1135.

The defendant moved to exclude Dr. Borjas's report and opinion and, at the same time, moved for summary judgment. The court granted both motions and specifically rejected the plaintiffs' argument that the summary judgment motion was premature because they needed additional information from the defendants for Dr. Borjas to complete his report and cure any deficiencies. *See id*. at 1139. Specifically, the court noted that plaintiffs failed to provide any explanation as to why they did not bring the asserted discrepancies to the court's attention when they were discovered rather than providing an incomplete report and then pointing to the discrepancies as an excuse. *See id*. at 1137. Rather, the court concluded that the most likely

reason the plaintiffs did not call the discovery issue to the court's attention is the plaintiffs realized their expert's theory was not going to hold up. *See id*. ("neither the failure of discovery to prove what a party hoped it would . . . [is] even marginally convincing justifications under Rule 56(f))." Thus, the court held that plaintiffs **"are not entitled to yet another opportunity to tender a Rule 26(a)(2)(b) expert report on damages and causation sufficient to preclude summary judgment."** *See id*. at 1137. As stated by the court, **"[t]he federal rules do not reward the dilatory and plaintiffs' lack of diligence militates in favor of denial. The expert report must stand on its own two legs."** *See id.*

B. ARE Ignored The Expert Report Deadline By Providing A "Preliminary" and Incomplete Report And Should Not Benefit From Such Conduct.

The facts described above fit squarely with the facts before this Court. The Plaintiff issued broad discovery requests to GMACM seeking the production of all documents relating to every loan that was serviced by GMACM for ARE under the Servicing Agreement. Despite GMACM's contention that ARE's requests were unduly burdensome and overly broad and despite GMACM's repeated requests to ARE to limit its requests to the specific loans it believes are at issue (which ARE refused to do), GMACM produced documents for 2,685 loan files, which included payment and servicing histories and loan documents.

On or about October 7, 2011, after a discovery conference with the Court, the parties submitted a joint discovery plan, which required the parties to disclose experts by October 14, 2011 and to produce reports "under Rule 26(a)(2) of the Federal Rules of Civil Procedure" by November 23, 2011. (That November 23, 2011, date was the fourth extension of expert reports that was given by the Court.) [4] *See* Doc. 88. On December 14, 2011, the parties jointly moved

[4] Pursuant to the Court's initial Scheduling Order, the original expert report deadline was February 15, 2011. *See* Doc. 23. On January 13, 2011, ARE moved to extend that deadline until a decision was made on its motion for judgment on the pleadings as to its specific performance claim. *See* Doc. 50. A similar motion was filed by

for a fifth extension of the expert disclosure deadline to February 13, 2012 (and other remaining deadlines). *See* Doc. 94. This Court granted that Motion in January 2012. *See* Doc. 95. In that joint motion, ARE represented to the Court that "extensive discovery has taken place in this matter, but is not yet finished" and that "the Parties have agreed to disclose expert reports on February 13, 2012 as the **Parties believe that by that time they will have sufficient discovery exchanged to make the reports meaningful.**" *See* Doc. 94.

Like the plaintiffs in *Hall*, at no time prior to the February 13, 2012, deadline did ARE seek this Court's assistance with requiring GMACM to produce any loan files or documents Morriss contends he needs to complete his report (which GMACM contends were produced). At no time prior to the February 13, 2012 deadline did ARE indicate that it needed more time to complete its report or that it intended to flout the Court's discovery deadlines and provide only an incomplete or preliminary report. At no time between December 14, 2011, when the joint motion for extension was filed and February 13, 2012, did ARE reach out (as it had done before) to ask GMACM for additional time for the exchange of reports. In fact, although no stranger to requests for extensions (having moved either jointly or solely at least 7 times for various extensions), ARE never moved this Court for an extension of the February 13, 2012, expert report deadline.

GMACM on January 25, 2011. *See* Doc. 52. Both motions were granted. *See* Docs. 51, 53. On April 4, 2011, the parties jointly moved for a 120-day extension of remaining deadlines, including expert disclosures and reports. *See* Doc. 56. That motion was granted. *See* Doc. 57. On May 4, 2011 the Court entered an Amended Scheduling Order which included an expert report deadline of August 1, 2011. *See* Doc. 62. On July 12, 2011, GMACM filed an unopposed motion to extend deadlines, which included an extension of expert disclosures to August 29, 2011, with expert reports due on September 15, 2011. *See* Doc. 75. That motion was granted. *See* Doc. 76. On August 29, 2011, ARE filed a motion for extension of all deadlines for 120 days. *See* Doc. 79. That motion resulted in a conference with the Court, which resulted in the submission of a joint discovery plan setting expert disclosures for October 14, 2011, and reports by November 23, 2011. *See* Doc. 88. The parties then jointly moved again for an extension of the report deadline to February 13, 2012, which motion was also granted by the Court. *See* Docs. 94 and 95.

Moreover, despite admitting that he has complete loan files for over 1,300 ARE Loans (50% of the total ARE Loans), Morriss reviewed only three (3) of those loans and provided only a cursory and speculative analysis of potential, "possible" and hypothetical alleged errors and damages. Furthermore, if, in fact, Morriss intended all along to conduct a statistical sampling of loans, then it was unnecessary for GMACM to produce a complete set of loan documents for each of the over 2,600 ARE Loans serviced by GMACM throughout the parties 6-year relationship. Yet, that is exactly the production ARE demanded of GMACM, and that is exactly the production GMACM in fact made. Further, contrary to Morriss's representations regarding his intent to perform statistical sampling, ARE represented to this Court in its August 29, 2011 Motion for Extension that the parties were considering arbitration to avoid the time and costs associated with a "loan-by-loan review." *See* Doc. 79 ("Given the complexities of the case and the sheer volume of materials involved in a loan-by-loan review, the parties have been exploring the potential of utilizing the American Arbitration Association to resolve this voluminous commercial dispute."). In fact, not once prior to this so-called "expert" report, did ARE raise even the spector of using a statistical sampling methodology to review this document set.[5]

Additionally, similar to the facts in *Hall*, any alleged inability by Morriss to complete his report is purely a product of ARE's lack of diligence and a ruse to the real issue at hand; namely, the fact that over one year after filing this action and less than two months before the discovery cutoff, ARE still has produced no evidence of any actual breaches of the Servicing Agreement or damages and has failed to identify any specific breaches, errors or damages as required in its

[5] In Morriss's report he relies on a New York state opinion on a motion *in limine* to support his belief that statistical sampling is appropriate in a case such as this one. Aside from the fact that that case is inapplicable to the facts of this case (as discussed in more detail in GMACM's Motion to Exclude), the opinion arose out of a motion *in limine* filed by the plaintiffs before production occurred to allow the plaintiffs to engage in statistical sampling and to reduce the number of documents that the defendant would need to produce. Moreover, the loans at issue in that case were over 368,000. Having demanded that GMACM produce a complete set of loan documents for each of the over 2,600 ARE Loans it is disingenuous for Morriss (and ARE) to turn to the statistical sampling route.

expert report and as posed to it in numerous discovery requests. Moreover, in response to GMACM's Second Set of Interrogatories, in which GMACM sought an identification of alleged breaches for specific loans and specific damages, ARE responded as follows: "At this time, ARE cannot respond to this Interrogatory with the degree of specificity sought by GMACM. Once GMACM has produced all of the loan files at issue and ARE has performed an in-depth review and accounting of those files, ARE will supplement this response." *See ARE Responses to GMACM's Second Set of Interrogatories*, attached hereto as Exh. "B". However, despite the fact that (1) GMACM's discovery requests were issued almost 2 years ago; (2) documents for over 2,600 loans have been produced; and (3) expert report deadlines have passed, ARE has not supplemented its responses. It has not done so because despite having the payment histories, servicing notes and loan documents, ARE cannot point to any breaches or damages.

ARE should not be allowed to ignore the expert report deadline, sit back and benefit from GMACM's expert reports (including a report from a servicing expert which does include a loan by loan analysis of the loans subject to GMACM's counterclaims and a report from a forensic accountant containing a specific analysis of the damages sought) and assume that it can provide a complete report whenever it deems fit.[6] GMACM's motion for summary judgment is ripe and should be granted because, failing to support its claims with the requisite expert testimony, ARE cannot create a genuine issue of material fact to support its breach of contract claim.

WHEREFORE, GMACM respectfully requests the Court grant its motion for summary judgment as to ARE's breach of contract claim and for such other and just relief it deems appropriate.

[6] In fact, since producing Morriss' report, ARE has not requested one additional document from GMACM.

Dated: February 23, 2012

/s/ Hope T. Cannon

Hope T. Cannon *(pro hac vice)*
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ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF GMAC MORTGAGE, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following via the CM/ECF system and by placing a copy of same in the United States mail, first-class postage prepaid and addressed to his regular mailing address on the 23rd day of February, 2012:

David A. Freedman
Coffey Burlington, PL
Office in the Grove, Penthouse
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dfreedman@coffeyburlington.com

s/ Hope T. Cannon
OF COUNSEL

EXHIBIT N

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 12-37953CA08

AMERICAN RESIDENTIAL EQUITIES, LLC, a Delaware limited liability company, individually and as Trustee for its beneficiaries under that certain American Residential Equities LLC Master Trust Agreement,

Plaintiff,

v.

CBIZ MHM, LLC, a foreign limited liability company, and LAWRENCE D. MORRISS, JR., individually,

Defendants.
_____/

THE ORIGINAL FILED
ON SEP 25 2012
IN THE OFFICE OF
CIRCUIT COURT MIAMI-DADE CO.
CIVIL DIVISION

COMPLAINT

Plaintiff, AMERICAN RESIDENTIAL EQUITIES, LLC for itself and as TRUSTEE for its beneficiaries under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005, and amendments thereto (collectively "ARE" or "Plaintiff") through undersigned counsel, sues Defendants, CBIZ MHM, LLC ("CBIZ") and LAWRENCE D. MORRISS, JR., individually ("Morriss") (collectively referred to herein as "Defendants") and states as follows:

1. This is an action for damages arising out of Defendants' fraudulent inducement, negligent misrepresentation, breach of contract, and violation of Florida's unfair and deceptive trade practices act in connection with Defendants' rendering of expert witness services to ARE.

PARTIES

2. Plaintiff ARE is a Delaware limited liability company.

3. Upon information and belief, Defendant CBIZ is a foreign limited liability. CBIZ has engaged in business in Miami-Dade County, Florida.

4. Defendant Morriss is managing director of CBIZ. Upon information and belief, Morriss is a resident of Kansas City, Missouri. Morriss has engaged in business in Miami-Dade County, Florida.

5. At all times relevant, Morriss was an agent for and acting on behalf of CBIZ.

JURISDICTION AND VENUE

6. This is an action for money damages in excess of $15,000.00 exclusive of interest, costs and attorney fees.

7. Venue is proper in Miami-Dade County pursuant to the parties' agreement dated September 16, 2011 which provides for exclusive jurisdiction in the State of Florida, specifically the courts in Miami-Dade County. (See copy of Consultant Fee Agreement, p. 7, par. 7, attached hereto as Exhibit "A" hereafter "Agreement").

FACTS

8. Plaintiff ARE is a real estate company which, as Trustee on behalf of third party investors, owns pools of residential mortgages.

9. Defendant Morriss is a consultant/expert witness employed by CBIZ.

10. In 2010, ARE brought an action against GMAC Mortgage, LLC (hereafter "GMAC") for negligent servicing of ARE's residential loan portfolio (approximately 2700 loans) over a multiple year period. *(In re American Residential Equities, LLC v. GMAC Mortgage, LLC (GMACM), successor by merger to GMAC Mortgage Corporation* Case No. 10-

21943-CIV-Gold (hereafter the "GMAC Litigation"). The law firm of Coffey Burlington served as counsel for ARE in the GMAC Litigation.

11. Critical to proving ARE's claims was the presentation of expert testimony regarding loan servicing issues and resulting damages.

12. Defendants were identified as potential experts to consult and testify in the GMAC Litigation.

13. When interviewed by ARE and its counsel, Morriss represented himself as highly qualified to provide expert witness testimony in the GMAC Litigation, and uniquely qualified to render testimony in the areas of loan servicing and related e-discovery issues and damages.

14. Morris held himself and CBIZ out to ARE as experts at reviewing and analyzing loan portfolios to determine violations of GMAC's loan servicing obligations and resulting damages.

15. Morriss provided great detail as to the extent of damages he would be describing and how he would calculate damages.

16. Following interviews, conversations and many representations as to what Morriss and the CBIZ team would bring to the case, on September 16, 2011 ARE and its counsel engaged Defendants CBIZ and Morriss to serve as consultant/expert witness in the GMAC Litigation. (*See*, Agreement, Ex. "A")

17. Morriss and CBIZ repeatedly assured ARE that they had the requisite expertise to serve as a consultant and expert witness in the GMAC Litigation.

18. Morriss repeatedly assured ARE that he could show and testify to a minimum of $30 million and as much as $60 - $70 million in damages attributable to GMAC's negligence.

19. Unbeknownst to ARE, not a single member of the CBIZ staff assigned to review ARE's loan portfolio had any significant loan experience.

20. Morriss used non-industry accountants to attempt to learn the loan servicing industry from scratch and conduct a painfully slow file review at unconscionable costs to ARE.

21. Despite repeated requests to lower the billing, Morriss had as many as 24 accountants working on ARE's matter in each month, each one learning how to read a loan file.

22. ARE was excessively billed for Morriss and his staff to learn an industry that Morriss had claimed an expertise.

23. Within a three month period (October – December, 2011), ARE was billed approximately 140 hours of education and research. For example, approximately 60 hours of that time was spent reviewing and summarizing Fannie Mae guidelines. For the same period, ARE was billed approximately 257 hours for "supervision & review and/or strategy development" totaling approximately $132,000.00.

24. Defendants billed ARE exorbitant sums yet never provided any of the information or services promised.

25. Morriss advised ARE that the best way to calculate damages was a statistical sampling approach, one that would allow an analysis of 400 loans and the calculation of damages would be applied to the entire population of 2700 loans.

26. ARE relied on Morriss' alleged expert advice in pursuing the extensive damages, and pursuing his method of statistical sampling.

27. In mid-February, 2012, after repeated extensions, the court-ordered deadline to exchange expert witness reports arrived. Five months of work with Morriss/CBIZ and nearly $1

million in billings led up to the moment where ARE would finally show GMAC that they owed ARE millions of dollars in damages arising out of loan servicing negligence.

28. Morriss/CBIZ produced the expert witness report late, after the deadline set by the court. As a result, when it was finally received, there was no opportunity for review before it was turned over to opposing counsel.

29. ARE was shocked at the disturbingly poor quality of the work product. The report itself was 11 pages long, of which only 6 ½ pages were for "analysis" of the case (hereafter "Report").

30. The majority of CBIZ/Morriss' Report consisted of the complaint that CBIZ/Morriss was unable to perform the statistical sampling method it selected due to the ongoing nature of GMAC discovery, and incompleteness of the files.

31. The Report stated that without 100% basis of complete loan files, a statistical sampling would be impossible to undertake. Morriss explained that 50% of the loan files were missing documents and therefore no sampling could be done.

32. Morriss relied, to the detriment of ARE, on the hope that the Court would simply punish GMAC for not having turned over every document and allow ARE to provide a supplemental report. This was an enormous risk, and opened ARE up to motions to dismiss the case and to exclude Morriss as an unqualified witness.

33. Forced to finally provide ARE and GMAC with some analysis of its case, Morriss attempted to provide an analysis of only 3 loans.

34. Even setting forth only these loans, Morriss again failed to provide any competent analysis or opinion.

35. Morriss failed to set forth specific actions or inactions by GMAC that occurred; what constituted violations of the loan servicing contract or loan servicing industry standards; or a correlation between GMAC's action/inaction and ARE's damages.

36. The Report provided no conclusion as to damages attributable to GMAC, even on the three loans. Instead, Morriss concluded "ARE may have lost a portion or all of its $71,765.97 investment in addition to its out of pocket losses due to GMACM's servicing errors."

37. Once again, Morriss/CBIZ failed to provide any analysis and/or expert opinion detailing which part of the loss was GMAC's fault.

38. Morriss' ultimate conclusion in the Report was consistent with his lack of work or actual analysis of potential damages. Morriss was never even able to properly analyze even one loan.

39. Morriss was simply unwilling or incapable of performing the duties as an expert in this case.

40. Unfortunately, having relied on his representations to the contrary, ARE had designated Morriss as the sole expert witness to testify in the GMAC Litigation. Without expert testimony, ARE's case would likely be dismissed.

41. The hours and hours of researching Fannie Mae guidelines, industry research, servicing standards, not one bit of it was used in the Report.

42. Morriss/CBIZ Report was so deficient that GMAC's counsel used it as the basis to immediately file a motion to exclude Morriss as an expert due to his lack of qualification, and to move to dismiss the case because without expert testimony, ARE would be unable to prove its case.

43. After receiving the inadequate Report, ARE did everything possible to educate themselves on the subject matter and save the case. ARE repeatedly requested some form of analysis from Morris as to damages attributable to GMAC. ARE repeatedly requested that Morriss complete the analysis of the three loans in the Report and provide an expert opinion of damages as to those three.

44. At this point, after more than $1 million in billings, the failure or refusal to provide full conclusions on even the three loans was alarming.

45. To mitigate the disastrous situation, ARE sought out a company specializing in loan review, American Mortgage Consultants, Inc. ("AMC") and retained AMC to work under Defendants' supervision, at great additional expense to ARE.

46. Before AMC arrived in Kansas City to assist, Defendants assured ARE that the e-discovery was properly organized to permit efficient review and agreed to the nature of the work and the existence of a work plan.

47. In order for Morriss to testify as to their work, Morriss would need to be able to say that he "directly supervised" AMC. Morriss therefore required that AMC work in his Kansas City office.

48. ARE incurred the cost of this additional team, all individuals with extensive loan servicing experience to do the loan file review under the direction of Morriss, so that he could easily convert their findings into damages.

49. When the AMC team arrived in Kansas City, the files were not organized in the manner previously agreed to by all the parties. The individual loan files did not have documents separated out or organized in an easily searchable manner.

50. This resulted in the AMC team having to go page by page through documentation.

51. Even with a loan review team on site, handing Morriss and his team fully evaluated loan files, with all servicing violations itemized in the manner which he designated, Morriss was still unable to complete the analysis.

52. More excuses were given -- that he was waiting for a "batch" to do all at once, but no matter how many loans AMC concluded, Morriss never analyzed damages for a single one. Yet somehow the billing continued, and at the same massive scale.

53. At this point, ARE concluded that Morriss simply lacked the ability to conduct the analysis of damages. Approximately seven months and over $1.6 million in billing and not a single dollar of damages calculated on even one file.

54. Morriss proved himself to have little expertise in the loan servicing arena and entirely incompetent at calculating damages.

55. Even worse, as a result of Defendants' failures, ARE found itself in a weakened position in its case, possibly irreparably harmed by Defendants incompetence and delays.

56. Despite having no other expert of record, ARE could no longer rely in any capacity on Morriss, who ARE knew was unable to provide analysis required or to testify. ARE sent AMC home and filed a motion requesting the opportunity to amend its expert witness list.

57. Shortly thereafter, ARE read an opinion in *ATA Airlines, Inc. v. Federal Express Corp,* 665 F.3d 882 (7th Cir. 2011) in which the 7th Circuit expressed "grave questions" as to the reliability of Morriss' expert analysis. The Court stated in pertinent part:

> The examination and cross-examination of Morriss were perfunctory and must have struck most, maybe all, of the jurors as gibberish. It became apparent at the oral argument of the appeal that even ATA's lawyer did not understand Morriss's analysis; he could not answer our questions about it but could only refer us to Morriss's testimony. And like ATA's lawyer, FedEx's lawyer, both at the trial and in his appellate briefs and at argument, could only parrot his expert. FedEx's expert did not testify; as is common in damages cases, the defendant offered no alternative measure of damages, doubtless fearing that the jury would take that as

> a signal to split the difference—finding liability but awarding the plaintiff less than the plaintiff asked for—rather than struggle to understand an incomprehensible case. Both because FedEx tendered no estimate of damages and because neither Morriss nor the lawyers nor the judge presented an intelligible damages analysis to the jury, it is no surprise that, having decided that ATA should win, the jury simply awarded the exact figure that ATA had asked for in damages.
>
> If a party's lawyer cannot understand the testimony of the party's own expert, the testimony should be withheld from the jury. Evidence unintelligible to the trier or triers of fact has no place in a trial. See Fed.R.Evid. 403, 702.

ATA v. Federal Express at 896.

58. It was later discovered by ARE that Morriss although having some basic knowledge of loan servicing issues, was far from what would be considered an expert to testify in a federal litigation matter, as he knew this case required.

59. Any experience Morriss did possess was decades old, significant in an industry where regulations have substantially evolved even in the past few years.

60. ARE also learned that Morriss attempted to cure his deficiency in knowledge by educating himself in loan servicing subsequent to his retention as an expert in the GMAC Litigation.

61. Morriss should have known that one of main factors used to determine whether an expert is accepted in court for testimony under *Daubert* is whether they have developed their opinions expressly for purposes of testifying.

62. Morriss did not disclose his late attempt at developing expertise until after GMAC's Daubert motion to exclude his testimony was filed.

63. Just prior to the court's ruling on the Daubert motion in the GMAC Litigation, GMAC filed for bankruptcy and the GMAC Litigation was stayed.

64. Plaintiff has performed all conditions precedent to the maintenance of this action.

COUNT I – FRAUDULENT INDUCEMENT
(Against Morriss and CBIZ)

65. Plaintiff realleges and incorporates paragraphs 1 through 64 above as if fully set forth herein.

66. Prior to entering into the Agreement, Plaintiff had a series of discussions and interviews with Morriss, the managing director of CBIZ.

67. At all times material, Morriss represented to ARE that he had the expertise to evaluate, analyze, and establish damages for ARE involving 2700 loans.

68. At all relevant times, Morriss owed a duty to Plaintiff to honestly and fairly represent his expertise and ability to testify as an expert witness in the GMAC Litigation.

69. Prior to retaining Morriss/CBIZ, Morriss:

a. falsely represented his qualifications in loan servicing and accounting industries;

b. falsely represented his ability to evaluate and calculate damages involving loan servicing issues;

c. falsely represented his analysis of the GMAC Litigation in order to convince ARE to retain Morriss/CBIZ;

d. falsely represented the breadth of the damages in order to cause ARE to expend additional sums with CBIZ;

70. Morriss knew or should have known the above-described representations were material, and were false.

71. Morriss intended for Plaintiff to rely on the false representations described above in entering into the Agreement and retaining Morriss/CBIZ to render expert witness testimony in the GMAC Litigation.

72. Plaintiff justifiably relied on Morriss' false representations to its detriment, in entering into the Agreement and selecting Morriss as its expert witness in the GMAC Litigation.

73. As a result, Plaintiff was fraudulently induced into entering into the Agreement with Morriss/CBIZ, and has been damaged by an amount in excess of $15,000.

74. Further, Defendants' actions are intentional, willful, wanton, malicious and performed with a reckless disregard for Plaintiff's rights and, therefore, Plaintiffs reserve the right to amend this Complaint to seek punitive damages against Defendants pursuant to Fla. Stat. § 768.72.

WHEREFORE, Plaintiff requests a judgment awarding damages in an amount to be determined at trial, pre-judgment interest, costs and such other relief as the Court deems just and proper.

COUNT II – FRAUD
(Against Morriss and CBIZ)

75. Plaintiff realleges and incorporates paragraphs 1 through 64 above as if fully set forth herein.

76. At all times material, Morriss represented to ARE that he had the expertise to evaluate, analyze, and establish damages for ARE involving 2700 loans.

77. Morriss falsely represented to ARE that he and CBIZ could timely evaluate the loans and render an opinion on damages.

78. Morriss and CBIZ were delayed in completing the analysis of the loans yet continued to represent to ARE that they could and would in fact complete the analysis timely.

79. Morris falsely represented his ability to complete the analysis in order to cause ARE to incur additional fees.

80. Morriss knew that the above-described representations were material, and were false.

81. Morriss intended for Plaintiff to rely on the false representations described above causing ARE to incur additional bills from CBIZ.

82. Plaintiff justifiably relied on Morriss' false representations to its detriment and has been damaged by an amount in excess of $15,000.

83. Further, Defendants' actions are intentional, willful, wanton, malicious and performed with a reckless disregard for Plaintiff's rights and, therefore, Plaintiffs reserve the right to amend this Complaint to seek punitive damages against Defendants pursuant to Fla. Stat. § 768.72.

WHEREFORE, Plaintiff requests a judgment awarding damages in an amount to be determined at trial, pre-judgment interest, costs and such other relief as the Court deems just and proper.

COUNT III – INTENTIONAL MISREPRESENTATION
(Against Morriss and CBIZ)

84. Plaintiff realleges and incorporates paragraphs 1 through 64 above as if fully set forth herein.

85. Prior to entering into the Agreement between CBIZ/Morriss and ARE, Morriss made false and intentional misrepresentations about material facts concerning his ability and qualifications to render expert witness testimony in the GMAC Litigation.

86. Morriss knew that his representations were false.

87. Morriss knew Plaintiff would rely on the misrepresentations, and intended that Plaintiff so rely.

88. Plaintiff justifiably relied on Morriss' misrepresentations in entering into the Agreement and selecting Morriss as its expert witness in the GMAC Litigation.

89. As a result of Morriss' intentional misrepresentations, Plaintiff has suffered damages in excess of $15,000.

90. Further, Defendants' actions are intentional, willful, wanton, malicious and performed with a reckless disregard for Plaintiff's rights and, therefore, Plaintiffs reserve the right to amend this Complaint to seek punitive damages against Defendants pursuant to Fla. Stat. § 768.72.

WHEREFORE, Plaintiff requests a judgment awarding damages in an amount to be determined at trial, pre-judgment interest, costs, and such other relief as the Court deems just and proper.

COUNT IV – NEGLIGENT MISREPRESENTATION
(Against Morriss and CBIZ)

91. Plaintiff realleges and incorporates paragraphs 1 through 64 above as if fully set forth herein.

92. Prior to entering into the Agreement between CBIZ/Morriss and ARE, Morriss made false representations about material facts concerning his ability and qualifications to render expert witness testimony in the GMAC Litigation.

93. Morriss should have known the misrepresentations were false, and he was negligent in making such misrepresentations.

94. Morriss knew Plaintiff would rely on the misrepresentations, and intended that Plaintiff so rely.

95. Plaintiff justifiably relied on Morriss' misrepresentations in entering into the Agreement and selecting Morriss as its expert witness in the GMAC Litigation.

96. As a result of Morriss' negligent misrepresentations, Plaintiff has suffered damages in excess of $15,000.

97. Further, Defendants' actions are intentional, willful, wanton, malicious and performed with a reckless disregard for Plaintiff's rights and, therefore, Plaintiffs reserve the right to amend this Complaint to seek punitive damages against Defendants pursuant to Fla. Stat. § 768.72.

WHEREFORE, Plaintiff requests a judgment awarding damages in an amount to be determined at trial, pre-judgment interest, costs, and such other relief as the Court deems just and proper.

COUNT V – BREACH OF CONTRACT
(Against CBIZ and Morriss)

98. Plaintiff realleges and incorporates paragraphs 1 through 64 above as if fully set forth herein.

99. ARE entered into an Agreement with Defendants wherein Defendants agreed to serve as consultant and expert witness in the GMAC Litigation.

100. At all times material, Defendants were fully aware of what was required as an expert witness in the GMAC Litigation.

101. Defendants had the opportunity to review the GMAC Litigation; the number of loans involved in the analysis; the issues involved in analyzing the loans and rendering an opinion as to damages.

102. In full understanding of what was involved, Defendants undertook the engagement.

103. Defendants knew that Morriss lacked the expertise needed to complete the issues involved.

104. Nevertheless, Defendants sought to perform the services without adequate knowledge and support.

105. Defendants breached the Agreement by failing to perform the tasks involved in the representation including timely completion of the Report and reasoned and sound analysis of the loan servicing issues.

106. As a proximate cause of Defendants' breach of the Agreement, ARE has sustained damages.

WHEREFORE, Plaintiff demands judgment against Defendants CBIZ and Morriss for compensatory damages, pre and post judgment interest, attorney fees, and costs incurred in bringing this action, and any other relief the Court deem just and proper.

COUNT VI – DECEPTIVE AND UNFAIR TRADE PRACTICES
VIOLATION OF FLA. STAT §§ 501.201 *et seq.*
(Against CBIZ and Morriss)

107. Plaintiff adopts and realleges paragraphs 1 though 64 above as if fully set forth herein.

108. This is an action against CBIZ and Morriss for violation of Fla. Stat. §§ 501.201, *et seq.* ("FDUTPA").

109. Defendants CBIZ and Morriss engaged in deceptive and unfair trade Practices.

110. ARE is an aggrieved consumer under the FDUTPA, and has standing to bring this claim.

111. Specifically, Defendants unfairly and deceptively withheld information relevant to ARE's determination. Rather than openly admit to ARE that he lacked the requisite level of expertise to fully and properly evaluate loan servicing issues, Morriss attempted to learn the area of expertise after being retained by ARE.

112. This concealed effort to gain knowledge in an area that Morriss knew that he lacked sufficient expertise was dishonest and deceptive.

113. Morriss' lack of expertise was ultimately exposed when Morriss was utterly incapable of properly analyzing even one loan.

114. Moreover, Morriss' lack of candor caused unnecessary delays, excessive billing and put ARE in the position of losing the case due to his inability to render an opinion.

115. In addition, Morriss provided a false and baseless estimate of damages to lure ARE into engaging Morriss and CBIZ.

116. Defendants' conduct constitutes unfair methods of competition, unconscionable acts or practices, and/or unfair or deceptive acts or practices.

117. Defendants' acts and practices as alleged herein offend public policy, are unethical, oppressive or unscrupulous, and have caused ARE substantial unavoidable injury. Accordingly, Defendants' acts and practices are deceptive under Florida Statutes § 501.204.

118. As a direct and proximate result of Defendants' unfair, unconscionable, and/or deceptive acts or practices, ARE has sustained losses and damages and is accordingly entitled to recover those damages.

WHEREFORE, Plaintiff demands judgment against Defendants CBIZ and Morriss for compensatory damages, pre and post judgment interest, attorney fees, and costs incurred in bringing this action, and any other relief the Court deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiff requests a jury trial on any and all issues for which trial by jury is permitted by law.

Dated this 25th day of September, 2012.

Respectfully submitted,

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