Docket #0136 Date Filed: 11/1/2013

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, et al.,	Chapter 11
Debtors.	Jointly Administered
RESIDENTIAL CAPITAL, LLC, et al.,	
Plaintiffs,	
v.	
UMB BANK, N.A., IN ITS CAPACITY AS INDENTURE TRUSTEE FOR THE 9.625% JUNIOR SECURED GUARANTEED NOTES, et al.,	Adv. Case No. 13-01343 (MG)
Defendants.	
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the estate of the Debtors,	
Plaintiffs,	
v.	Adv. Case No. 13-01277 (MG)
UMB BANK, N.A., AS SUCCESSOR INDENTURE TRUSTEE UNDER THAT CERTAIN INDENTURE, dated as of June 6, 2008, et al.,	
Defendants.	

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GLOSSARY OF DEFINED TERMS

All capitalized terms used herein shall be defined in accordance with these definitions.

Term	Definition
Ad Hoc Group	The Ad Hoc Group of holders of the Notes that, through counsel, has appeared in the Chapter 11 Cases
Additional Notes Grantors	Any person that became a grantor under the Revolver Security Agreement other than ResCap, RFC, GMACM, GMAC-RFC, GMAC-RHC, Homecomings, the Notes FABS Grantors, the Notes Equity Pledgors, or the Notes Additional Account Parties
Adjusted Preference Assets	All assets listed on Schedule 6 to the Complaint in the Committee Action, admitted as PX 127, that are notNon-Preference Assets
AFI	Ally Financial, Inc. (f/k/a GMAC, LLC)
AFI Additional Account Parties	Signatories to the Revolver Security Agreement other than the First Priority Collateral Agent, Revolver Lender, the borrowers under the Revolver, the guarantors under the revolver, Hidden Springs, DOA Holdings, GMAC Model Home Finance I, LLC, Equity Investment IV, LLC, RFC Construction Funding, LLC, the AFI Equity Pledgors, and the AFI FABS Grantors
AFI APA	The Asset Purchase Agreement between AFI and ResCap, dated May 13, 2012
AFI Borrowers	RFC and GMACM, in their capacity as borrowers under the Revolver Loan Agreement
AFI Contribution	The sum of $2.1 billion in cash AFI agreed to contribute to the Debtors' estates pursuant to the terms of the Global Settlement and the Plan
AFI DIP Order	The Final Order Under Sections 105, 361, 362, 363, and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6004, and 9014 (I) Authorizing the Debtors to Obtain Postpetition Financing on a Secured, Superpriority Basis, (II) Authorizing the Use of Cash Collateral, and (III) Granting Adequate Protection to Adequate Protection Parties, which was admitted as PX 76
AFI Equity Pledgors	RAHI and PATI, in their role as equity pledgors under the Revolver Security Agreement
AFI FABS Grantors	RAHI and PATI, in their role as grantors of certain financial asset backed securities under the Revolver Security Agreement
AFI Guarantors	ResCap, Homecomings, GMAC-RHC, and GMAC-RFC, in their capacity as guarantors under the Revolver Loan Agreement

Term	**Definition**
Ally Accounts	Deposit Account Nos. xxxx3803 and xxxx6323 maintained at Ally Bank
Ally Bank	AFI's indirect banking subsidiary (f/k/a GMAC Bank), a commercial state charted bank regulated by the FDIC and the State of Utah.
APAs	Collectively, the AFI APA and the Nationstar APA
August 13 Opinion	The Memorandum Opinion dated August 13, 2013 in which the Court granted in part and denied in part the Note Trustee's motion to dismiss [Adv. Case No. 13-01277, Dkt. No. 21]
Avoidable Deposit Accounts	The Deposit Accounts excluding the Controlled Accounts, the WF Accounts and the Proceeds Account
Bar Date Order	The *Order Establishing Deadline for Filing Proofs of Claim and Approving the Form and Manner of notice Thereof,* entered by the Bankruptcy Court on August 29, 2012 [Dkt. No. 1309], as amended, supplemented, and modified by *Order Extending Deadline for Filing Proofs of Claim,* entered by the Court on November 7, 2012 [Dkt. No. 2093]
Barclays	Barclays Bank PLC
Barclays DIP	The post-petition financing facility the Debtors obtained from Barclays
Base Collateral	The value of the JSNs' collateral as of the Effective Date ($1.888 billion)
Berkshire APA	The Amended and Restated Asset Purchase Agreement, dated as of November 2, 2012, among Berkshire Hathaway, ResCap, and certain other Debtor signatories that was admitted as PX 31
Berkshire Hathaway	Berkshire Hathaway, Inc.
Bilateral Facilities	The financing arrangements to which certain Debtors or their affiliates were parties to as of June 6, 2008, which were listed on Schedule 7.01(t) to the Original AFI Loan Agreement
Blanket Lien Collateral	ResCap's assets other than Primary Collateral that (i) were pledged under the Revolver and the Notes; and (ii) do not fall within the definition of "Excluded Assets" under the terms of the Revolver Security Agreement or the Notes Security Agreement
Blanket Loan Release	The Partial Release of Collateral dated May 14, 2010 releasing the security interest in the Released Loan Collateral, that was admitted as PX 134
Blanket Released Collateral	Collectively, the Released Advances and the Released Loan Collateral

Term	**Definition**
Blanket Releases	Collectively, the Blanket Loan Release and the Servicing Advance Release
BMMZ	BMMZ Holdings LLC, an indirect, wholly owned subsidiary of AFI
Carve-Out	The carve out for fees and expenses of the estate professionals of the Debtors provided for under paragraph 16(g) of the AFI DIP Order
Carve Out Notice	The notice of termination of cash collateral use provided for by the AFI DIP Order, which was the Eighth Stipulation and Order Amending the AFI DIP Order and Cash Collateral Order, which was admitted as PX 84
Cash Collateral	The cash collateral securing the Revolver, the LOC Facility and the Notes
Cash Collateral Stipulation	The Stipulation and Order in Respect of the Debtors' Motion for Entry of an Order to Permit the Debtors to Continue Using Cash Collateral [No. 12-12020, Dkt. No. 4193]
Centerview	Centerview Partners LLC
CFDR	The Consolidated Financial Data Repository maintained by the Debtors, which was admitted as PX 139
Chapter 11 Cases	The cases being administered pursuant to chapter 11 of title 11 of the United States Code under the caption *In re Residential Capital, LLC, et al.*, Case No. 12-12020 (MG)
Citi MSR Collateral	The mortgages servicing rights associate with Fannie Mae and Freddie Mac loans, and all books and records associate with those rights pledged under the Citi MSR Facility
Citi MSR Facility	The loan facility provided by Citibank to ResCap and GMACM pursuant to the September 10, 2007 Loan and Security Agreement between Citibank, ResCap and GMACM, which was admitted as PX 75
Citibank	Citibank, N.A.
Collateral	Collectively, the Revolver Collateral and the Notes Collateral
Committee	The official committee of unsecured creditors appointed in the Chapter 11 Cases by the United States Trustee of the Southern District of New York on May 16, 2012, under section 1102 of the Bankruptcy Code
Committee Action	The adversary proceeding commenced by the Committee against the Defendants by the filing of the Adversary Complaint for Declaratory Judgment, Avoidance of Liens, and Disallowance of Claims, administered under the caption *Official Committee of Unsecured Creditors v. UMB Bank, N.A., et al.*, Adv. Case No. 13-01277

Term	**Definition**
Contested Assets	Collectively, the Released Mortgage Loans and the Excluded Bilateral Facilities Collateral
Controlled Accounts	The Deposit Accounts numbered xxxx7570, xxx6190, xxx8567, xxxx7618, xxxx2763, and xxxx059, which were admitted as DX-AIU, DX-AIV, DX-AIW, DX-AIX, DX-AIY, and DX-AIZ, respectively
Counterclaims	The counterclaims asserted against the Debtors by the Defendants in their answer, affirmative defenses and counterclaims [Adv. Case No. 13-01343, Dkt. No. 14]
Debtor Action	The adversary proceeding commenced by the Debtors against the Defendants by the filing of the Complaint to Determine Extent of Liens and for Declaratory Judgment, administered under the caption *Residential Capital LLC, et al. v. UMB Bank, N.A., et al.*, Adv. Case No. 13-01343
Debtors	Residential Capital, LLC, GMAC Mortgage LLC, Residential Funding Company, LLC, and each of their affiliated debtors and debtors-in-possession under the Bankruptcy Code in the Chapter 11 Cases
Defendants	The Ad Hoc Group, UMB and Wells Fargo
Deposit Accounts	The Deposit Accounts listed on Schedule 5 of the Complaint in the Committee Action, which was admitted as PX 126
Disclosure Statement	The Disclosure Statement for the Plan proposed by the Debtors and the Committee on August 23, 2013 [Case No. 12-12020, Dkt. No. 4819]
Distributable Value	Value of the distributable assets held by the Debtors on the Distribution Date, as that term is defined in Article I of the Plan, consisting primarily of cash generated from the sale of assets, the compromise of claims against Ally, and other unsold assets, which the Debtors propose to dispose by monetizing over time
DLJ Consortium	The consortium of four financial bidders led by DLJ Mortgage Capital that made a prepetition bid to purchase the Debtors' Whole Loan Portfolio
DOA Holding	DOA Holdings Properties, LLC
DOJ/AG Settlement	The prepetition settlement agreement the Debtors entered into with the Department of Justice, the Department of Housing and Urban Development, and the attorneys general of 49 states to resolve potential claims arising out of origination and servicing activities and foreclosure matters
Effective Date	The effective date of the Plan
ETS	Executive Trustee Services, LLC

Term	Definition
Equity I	Equity Investment I, LLC
Exchange	The 2008 exchange offering pursuant to which ResCap exchanged approximately $6 billion of Old Notes for approximately $4 billion in Junior Secured Notes and $500 million in cash
Excluded Assets	Those assets that were excluded from the Notes Collateral and not pledged to secure the Notes
Excluded Bilateral Facilities Collateral	The assets are listed on Schedule 1 to the Complaint in the Committee Action that were pledged to secure obligations of a Bilateral Facility, which was admitted as PX 123
Fannie Mae	Federal National Mortgage Association
FASB	Financial Accounting Standards Board
FHA/VA	The Federal Housing Administration and Department of Veterans Affairs
FHFA	Federal Housing Finance Agency
Financial Assets	As set forth in the Notes Indenture §1.01, assets such as whole loan mortgages, residual interests, securities (including Equity Interests or Indebtedness of Subsidiaries that are Financing SPVs but excluding Equity Interests of other Subsidiaries) and other financial assets or any related assets, rights or property or the proceeds therefrom
First Priority Collateral Agent	Wells Fargo, in its capacity as the first priority collateral agent and collateral control agent pursuant to the Original Revolver Security Agreement
Fortress	Fortress Investment Group LLC
FRB Consent Order	The consent order settling an investigation by the Federal Reserve arising out of the same general facts as the DOJ/AG Settlement
Freddie Mac	Federal Home Loan Mortgage Corporation
GAAP	Generally accepted account principles
Ginnie Mae	Government National Mortgage Association
Global Settlement	The settlement among the Debtors, the Committee, AFI and the Consenting Claimants set forth in Article IV of the Plan
GMAC Model Home	GMAC Model Home Finance, LLC
GMAC Mortgage or GMACM	GMAC Mortgage LLC
GMAC-RFC	GMAC-RFC Holding Company, LLC
GMAC-RHC	GMAC Residential Holding Company, LLC
GSAP	GMAC Mortgage Servicer Advance Funding Company Ltd.
GSEs	Government sponsored entities, including Fannie Mae, Freddie

Term	Definition
	Mac, Ginnie Mae, and the FHFA
GSE MSRs	Mortgage servicing rights, PLS, and other servicing rights provided by the GSEs
HARP	Home Affordable Refinance Program
HFI	Held-for-investment mortgage loans
HFS	Held-for-sale mortgage loans
HFS Portfolio	The Debtors' HFS assets later sold to Berkshire Hathaway
Hidden Springs	Developers of Hidden Springs, LLC
Homecomings	Homecomings Financial, LLC
Homecomings Financial	Homecomings Financial Real Estate Holdings, LLC
Houlihan	Houlihan Lokey Capital, Inc.
Houlihan Disclosure	Houlihan Public Disclosure, dated May 14, 2012, which was admitted as PX 357
Houlihan Presentation	The May 2012 Houlihan Restricted Presentation to the Ad Hoc Noteholder Group, which was admitted as PX 169
Initial Notes Trustee	U.S. Bank National Association, acting in its role as the original indenture trustee pursuant to the Notes Indenture
Intercreditor Agreement	The Intercreditor Agreement dated June 6, 2008, which was admitted as PX 2
Interim DIP Order	Interim Order Under Sections 105, 362, 363, and 364 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6004, and 9014 (I) Authorizing the Debtors' to Obtain Postpetition Financing on a Secured Superpriority Basis, (II) authorizing the Debtors to Use Case Collateral, (III) Granting Adequate Protection to Adequate Protection Parties and (IV) Prescribing the Form and Manner of Notice and Setting the Time for Final Hearing [Dkt. No. 89], entered on May 16, 2012
JSNs	The Ad Hoc Group
JSN PSA	The prepetition plan support agreement entered into between the Debtors, AFI, and certain JSNs, which was admitted as PX 252
Junior Secured Notes	The 9.625% Junior Secured Guaranteed Notes due 2015 issued by ResCap on June 6, 2008
LOC Collateral	The certain mortgage loans and related assets pledged by the Debtors in order to obtain and secure the LOC Facility
LOC Facility	The line of credit facility administered pursuant to the LOC Loan Agreement
LOC Lender	AFI, as the initial lender and lender agent under the LOC Loan Agreement

Term	Definition
LOC Loan Agreement	The Amended and Restated Loan Agreement by and among RFC, GMACM, ResCap, and GMAC Inc. dated December 30, 2009 that was admitted as PX 9
LOC Security Agreement	The Amended and Restated Pledge and Security Agreement and Irrevocable Proxy, dated December 30, 2009
Local Rules	The Local Bankruptcy Rules for the Southern District of New York
LOI	Letter of intent with respect to bids on the Debtors' assets
May 14 Houlihan Presentation	Houlihan's May 14, 2012 public presentation that, among other things, estimates the Noteholders' recovery on their prepetition collateral, which was admitted as PX 169
Mini Auction	The pre-auction auction with respect to the Debtors' assets that ensued in advance of during the sale proceeding
Mortgage Loan Release	The Partial Release of Collateral dated May 17, 2010, which was admitted as PX 135
Mr. Siegert Rebuttal Report	The Rebuttal Report of P. Eric Siegert filed in the Debtor Action and Committee Action
MSRs	The Debtors' mortgage servicing rights, both PLS and GSE
Nationstar	Nationstar Mortgage LLC
Nationstar APA	The Asset Purchase Agreement between Nationstar Mortgage LLC and ResCap, dated May 13, 2012 that was admitted as PX 33
Non-Obligor Debtors	The entities listed on PX 248.2
Non-Preference Assets	Collectively, (a) the 18 loans identified as "HFS Revolver" or "HFS Blanket," (b) the two REO properties identified as "HFS Blanket," (c) the Refinanced Mortgages; and (d) the REO properties that were never transferred to or for the benefit of the JSNs during the preference period that were listed on Schedule 6 to the Complaint in the Committee Action, which was admitted as PX 127
Note Guarantors	RFC, GMACM, GMAC-RFC, GMAC-RHC, and Homecomings
Noteholders	The holders of the Junior Secured Note
Notes	The 9.625% Junior Secured Guaranteed Notes due 2015 issued by ResCap on June 6, 2008
Notes Additional Account Parties	Parties to the Note Security Agreement other than ResCap, the Notes Guarantors, the Notes FABS Grantors, and the Notes Equity Pledgors
Notes Agreements	Collectively, the Notes Indenture and the Notes Security Agreement
Notes Collateral	The assets pledged to secure the obligations under the Notes

Term	Definition
Notes Deposit Account Collateral	The subset of Notes Collateral consisting of certain deposit accounts and certain related assets of the Notes Additional Account Parties
Notes Equity Pledgor Collateral	The subset of Notes Collateral comprised of certain equity interests, certain promissory notes and other debt instruments, certain deposit and security accounts, and certain related assets of the Notes Equity Pledgors
Notes Equity Pledgors	The AFI Equity Pledgors in their role as equity pledgors under the Notes Security Agreement
Notes FABS Grantors	The AFI FABS Grantors, as grantors of certain financial asset backed securities, in their role as parties to the Notes Security Agreement
Notes Financial Asset Collateral	The subset of Notes Collateral comprised of all 'Financial Assets" (as defined in Article 8 of the Uniform Commercial Code) and certain related assets of the Notes FABS Grantors
Notes Grantor Collateral	The certain assets and property of ResCap, the Notes Guarantors, and the Additional Notes Grantor that are Notes Collateral
Notes Indenture	The Notes Indenture dated as of June 6, 2008 among ResCap, as issuer, certain other entities as guarantors and obligors, and U.S. Bank, as the original indenture trustee, which was admitted as PX 1
Notes Security Agreement	The Amended and Restated Third Priority Pledge and Security Agreement and Irrevocable Proxy dated December 30, 2009, which was admitted as PX 4
Notes Trustee	UMB, in its role as the successor indenture trustee for the Notes
Ocwen	Ocwen Loan Servicing LLC
Ocwen APA	The Asset Purchase Agreement, dated as of November 2, 2012 among Ocwen, ResCap, and certain other Debtor signatories thereto, and the amendments thereto, which were collectively admitted as PX 19, PX 20-24
Ocwen Purchase Price Schedule	Schedule 3.1(a) of the Ocwen APA, which was admitted as PX 20
Ocwen Sale	The court approved sale of the Debtors' Servicing and Advance Assets to Ocwen and Walter pursuant to the Ocwen APA
OID	Original issue discount
Old Notes	The unsecured notes issued by ResCap with a $9.537 billion face value that were due to mature from 2010 through 2015 and were outstanding as of May 5, 2008

Term	Definition
Original AFI Settlement	The Debtors' prepetition settlement with AFI memorialized in the Plan Sponsor Agreement that the ResCap board of directors approved on May 13, 2012
Original Notes Security Agreement	The Third Priority Pledge and Security Agreement dated June 6, 2008, which was admitted as PX 3
Original Revolver Loan Agreement	The Loan Agreement dated June 5, 2008 and amended from time to time prior to December 30, 2009, which was admitted as PX 5
Original Revolver Security Agreement	The First Priority Pledge and Security Agreement and Irrevocable Proxy dated June 4, 2008, which was admitted as PX 7
PATI	Passive Asset Transactions, LLC
Permitted Funding Indebtedness	As set forth in section 1.01 of the Notes Indenture, indebtedness incurred in the ordinary course through financing, securitization and hedging activities, including customary lines of credit, repurchase transactions or warehouse financings involving residential mortgage loans, home equity loans or second lien loans (including any reasonable extension or evolution of such activities including for purposes of financing other types of financial assets) and other indebtedness on terms at least as favorable to the company than would be available on an arms-length basis.
Permitted Liens	As set forth in section 1.01 of the Notes Indenture, the types of liens the Debtors were permitted to create or suffer on the Revolver Collateral
Petition Date	May 14, 2012
Plaintiffs	The Debtors and the Committee
Plan	The Joint Chapter 11 Plan, attached as Exhibit 1 to the Disclosure Statement, proposed by ResCap and the Committee, including all exhibits, addenda, schedules or other attachments, as may be amended, modified, or supplemented from time to time
PLS	Private label securitizations
PLS MSRs	The MSRs associated with the privately owned mortgages
Prepetition Plan Term Sheet	The Plan Term Sheet, dated May 14, 2012, which was admitted as PX 432.
Pretrial Order	The Order entered by the Court on October 18, 2013 in both the Committee Action [Adv. Case No. 13-01277, Dkt No. 161] and the Debtor Action [Adv. Case No. 13-0134, Dkt No. 105]

Term	**Definition**
Primary Collateral	Revolver Collateral defined as "Primary Collateral" under to the Revolver Security Agreement, , which served as the "borrowing base" under the Revolver to support additional borrowings or to prevent borrowing base shortfalls, and which initially consisted of only certain scheduled assets
Proceeds Account	Deposit Account No. xxxx2599, which is listed on Schedule 5 of the Complaint in the Committee Action, which was admitted as PX 126
PSA	The Plan Support Agreement entered into on May 13, 2013 between the Debtors, the Committee, AFI, and certain consenting claimants
Purchased Assets	The assets specified in Section 2.1 of the Ocwen APA
Purchasers	Collectively, Ocwen and Walter
PWC	PricewaterhouseCoopers LLP
RAHI	RFC Asset Holdings II, LLC
Refi Opportunity	The opportunity for a servicer to refinance a borrower's loan
Refinanced Mortgages	The three mortgage loans that were listed on Schedule 6 to the Complaint in the Committee Action (PX 127)that were refinanced with a net book value of $1,021,096
Released Advances	The Notes Collateral that was pledged to the LOC Lender under the LOC Facility that was comprised of certain Freddie Mac servicing advances
Released Loan Collateral	The Notes Collateral that was pledged to the LOC Lender under the LOC Facility that was comprised of certain servicing rights and other assets
Released Mortgage Loans	The loans identified by Schedule 2 to the Complaint in the Committee Action, which was admitted as PX 124
ResCap	Residential Capital, LLC
Residential Funding	Residential Funding Real Estate Holdings, LLC
Residential Mortgage	Residential Mortgage Real Estate Holdings, LLC
Revolver	The revolving loan facility entered into on or about June 4, 2008 between RFC and GMACM, as borrowers, ResCap and certain other entities as guarantors, and certain entities as obligors, which was admitted as PX 5
Revolver Collateral	The assets pledged to secure the obligations under the Revolver
Revolver Documents	Collectively, the Revolver Loan Agreement and the Revolver Security Agreement
Revolver Lender	AFI, as the initial lender and lender agent under the Revolver Loan Agreement

Term	Definition
Revolver Loan Agreement	The Amended and Restated Loan Agreement dated December 30, 2009, which was admitted as PX 6
Revolver Security Agreement	The Amended and Restated First Priority Pledge and Security Agreement and Irrevocable Proxy dated December 30, 2009, which was admitted as PX 8
RFC	Residential Funding Company, LLC
RMBS	Residential mortgage-backed securities, notes and certificates issued by the RMBS Trusts
RMBS Settlement	The settlement between the Debtors and the Debtors' institutional investors holding a substantial stake in the RMBS Trusts
RMBS Trustees	The trustees of the RMBS Trusts
RMBS Trusts	All residential mortgage back securitization trusts, net interest margin trusts and similar residential mortgage back trusts for which the Debtors act as sponsor, depositor, servicer, master servicer or in similar capacity
Secured Parties	All parties holding a security interest in the Debtors' assets pursuant to the Notes Security Agreement or the Revolver Security Agreement
September 20 Opinion	The Memorandum Opinion Denying without Prejudice UMB Bank's Motion to Dismiss Counts 3 and 5, and Granting in Part and Denying in Part the Committee's Motion to Dismiss Certain Junior Secured Noteholders Counterclaims, dated September 20, 2013 [Adv. Case No. 13-01343, Dkt. No. 49, Adv. Case No. 13-01277 Dkt. No. 100]
Servicing Advance Release	The Partial Release of Collateral, dated May 27, 2011, that was admitted as PX 130, at ALLY_0075025-154
Servicing and Origination Assets	The Debtors' mortgage loan origination and servicing assets, including the MSRs and servicing advances and origination and servicing platforms
SOX	The Sarbanes-Oxley Act of 2002
Stalking Horse APAs	Collectively, the AFI APA and the Nationstar APA
Third Priorities Secured Parties	The Third Priority Collateral Agent and the other third priority secured parties as defined by the Intercreditor Agreement
Third Priority Collateral Agent	Wells Fargo, in its capacity as the third priority collateral agent and collateral control agent for the Junior Secured Notes
UMB	UMB Bank, N.A.
Unencumbered Real Property	The real property and leasehold interests listed on Schedules 1 and 6 of the Complaint in the Committee Action
UPB	Unpaid principal balance

Term	**Definition**
Walter	Walter Investment Management Corporation
Wells Fargo	Wells Fargo Bank, N.A.
WF Accounts	The Deposit Accounts numbered. xxxx2607, xxxx7877, and xxxx1176 that were listed on Schedule 5 of the Complaint in the Committee Action
Whole Loan Portfolio	The Debtors' whole loan portfolio

Plaintiffs Residential Capital, LLC ("ResCap"), GMAC Mortgage LLC ("GMACM"), Residential Funding Company, LLC ("RFC"), and each of their affiliated debtors and debtors-in-possession (collectively, the "Debtors"), together with Plaintiff the Official Committee of Unsecured Creditors (the "Committee" and, together with the Debtors, the "Plaintiffs"), submit the following Proposed Findings of Fact in connection with the trial on "Phase I" of the above-captioned consolidated adversary proceedings.

PROPOSED FINDINGS OF FACT

I. THE PARTIES

2. Plaintiff Debtors are the debtors and debtors in possession under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"). PTO ¶ 1.[1]

3. Plaintiff Committee is the official committee of unsecured creditors appointed in the Chapter 11 Cases by the United States Trustee for the Southern District of New York on May 16, 2012, under section 1102 of the Bankruptcy Code. *Id.* ¶ 2.

4. Defendant UMB Bank, N.A. ("UMB") is the successor indenture trustee (in such capacity, the "Notes Trustee") for the 9.625% Junior Secured Guaranteed Notes due 2015 issued by ResCap (the "Junior Secured Notes" or the "Notes"). *Id.* ¶ 3.

5. Defendant Wells Fargo Bank, N.A. ("Wells Fargo") is the third priority collateral agent and collateral control agent (in such capacities, the "Third Priority Collateral Agent") for the Junior Secured Notes. *Id.* ¶ 4.

6. Defendant Ad Hoc Group of holders of Junior Secured Notes (the "Ad Hoc Group" or the "JSNs" and, together with the Notes Trustee and the Third Priority Collateral

[1] Citations to "PTO ¶ __" are to the stipulated facts contained in the Joint Pretrial Order entered in the consolidated adversary proceedings [Adv. No. 13-01343, Dkt. No. 105].

Agent, the "Defendants") comprises certain entities that hold, or manage entities that hold, Junior Secured Notes. Membership in the Ad Hoc Group changes from time to time, as set forth in the Ad Hoc Group's statements that are periodically filed with the Court pursuant to Rule 2019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). *Id.* ¶ 6.

II. PROCEDURAL HISTORY

7. Before filing for bankruptcy, the Debtors were a leading originator of residential mortgage loans and, together with their non-Debtor affiliates, the fifth largest servicer of residential mortgage loans in the United States, servicing approximately $374 billion of domestic residential mortgage loans and working with more than 2.4 million mortgage loans across the United States. Marano Direct ¶ 23.[2]

8. On May 14, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have continued to operate their businesses and manage their properties as debtors in possession. PTO ¶ 25.

9. On February 28, 2013, the Committee, on behalf of and as representative of the Debtors' estates, commenced an adversary proceeding against the Defendants by filing the Adversary Complaint for Declaratory Judgment, Avoidance of Liens, and Disallowance of Claims (the "Committee Action"), seeking, among other things, a declaratory judgment that certain property of the Debtors is not subject to liens or security interests asserted by the Third Priority Collateral Agent for the benefit of the Notes Trustee and the holders of the Junior Secured Notes (such holders, the "Noteholders"). [Adv. No. 13-01277, Dkt. No. 1]

[2] References to "Marano Direct" are to the Direct Testimony of Thomas Marano, former Chief Executive Officer and Director and current Chairman of ResCap, submitted by declaration. [Adv. No. 13-01277, Dkt. No. 132]

10. On April 30, 2013, Defendant Notes Trustee filed a motion to dismiss certain of the Committee's claims. [Adv. No. 13-01277, Dkt. No. 21]

11. A hearing on the Notes Trustee's partial motion to dismiss in the Committee Action was held on July 26, 2013. By Memorandum Opinion dated August 13, 2013, the Court granted in part and denied in part the motion to dismiss (the "August 13 Opinion"). [Adv. No. 13-01277, Dkt. No. 74][3]

12. On May 3, 2013, the Debtors commenced an adversary proceeding against the Defendants by filing the Complaint to Determine Extent of Liens and for Declaratory Judgment (the "Debtor Action") seeking to determine, among other things, the extent of the liens securing the Notes. [Adv. Case No. 13-01343, Dkt. No. 1] The Debtors filed their First Amended Complaint on June 19, 2013. [Adv. No. 13-01343, Dkt. No. 8]

13. On June 28, 2013, the Defendants filed their answer, affirmative defenses and counterclaims in the Debtor Action, in which they asserted certain counterclaims against the Debtors (the "Counterclaims"). [Adv. No. 13-01343, Dkt. No. 14]

14. By order dated June 21, 2013, the Committee Action and Debtor Action were consolidated for all purposes pursuant to Bankruptcy Rule 7042. [Adv. No. 13-01343, Dkt. No. 10]

15. On July 16, 2013, the Plaintiffs and Defendants each filed motions to dismiss certain claims and counterclaims in the Debtor Action. [Adv. No. 13-01343, Dkt. Nos. 21 & 22]

16. A hearing on the motions to dismiss in the Debtor Action was held on August 28, 2013. By order dated August 29, 2013 [Adv. No. 13-01343, Dkt. No. 46], as

[3] *Off. Comm. of Unsecured Creds. v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 495 B.R. 250 (Bankr. S.D.N.Y. 2013).

amended by order dated September 18, 2013 [Adv. No. 13-01343, Dkt. No. 48], the Court granted in part and denied in part the cross-motions to dismiss. The Court issued a Memorandum Opinion dated September 20, 2013 explaining its reasoning (the "September 20 Opinion").[4] [Adv. No. 13-01343, Dkt. No. 49]

17. The Court has entered an order bifurcating trial on the issues raised in the consolidated adversary proceedings into "Phase I" and "Phase II." [Adv. No. 13-01343, Dkt. No. 45.]

18. On October 9, 2013, the Plaintiffs and Defendants submitted their proposed joint pretrial order setting forth, among other things, certain stipulated facts, the parties' respective contentions of fact and law, and a list of issues to be tried at the Phase I hearing. [Adv. No. 13-01343, Dkt. No. 86.] The parties submitted a revised version of the proposed joint pretrial order on October 17, 2013, correcting an error in the stipulated facts.[5] The Court so-ordered the proposed joint pretrial order on October 18, 2013 (the so-ordered joint pretrial order, the "Pretrial Order"). [Adv. No. 13-01343, Dkt. No. 105]

19. Under the Pretrial Order, the issues to be tried at Phase I included: (a) "[w]hether and to what extent any unamortized portion of the alleged original issue discount on the Junior Secured Notes' claim should be disallowed as unmatured interest," (b) "valuation of each Debtor's collateral . . . securing the [Noteholders'] claims, on a debtor-by-debtor basis, and the appropriate methodologies for conducting such valuation," (c) "[w]hether and to what extent the [Noteholders] have security interests in various items of disputed collateral . . . including issues related to avoidance of preferential transfers, disputed lien releases, asserted

[4] *Off. Comm. of Unsecured Creds. v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 497BR403 (Bankr. S.D.N.Y. Sept. 20, 2013).

[5] In addition, Defendant Wells Fargo asserted it had not been given an opportunity to comment upon the proposed pretrial order. [Adv. Case No. 13-01343, Dkt. No. 87.] Accordingly, the parties agreed to a stipulation concerning the pretrial order's applicability to Wells Fargo. [Adv. Case No. 13-01343, Dkt. No. 94.]

equitable liens resulting therefrom, and potential avoidance of any such equitable liens," (d) adequate protection issues, including "[w]hether and to what extent the [Noteholders'] collateral has diminished in value as a result of the Debtors' use of Cash Collateral; whether the [Noteholders] are entitled to an adequate protection claim for some or all of that value diminution; and, if the Court deems it appropriate to decide during Phase I, whether as a matter of law the [Noteholders] might be entitled to adequate protection for any diminution in value associated with the Debtors' entry into the Global Settlement," (e) "the appropriate allocation of proceeds to [Noteholders'] collateral from the Debtors' asset sales to Ocwen and Walter," (f) "[w]hether the [Noteholders] have a lien on all or any portion of the AFI Contribution, and/or all or any causes of action of the Debtors or avoidance claims that the Debtors may bring that are being settled in the Global Settlement,"[6] and (g) "[w]hether under section 506 of the Bankruptcy Code, the [Noteholders] may recover postpetition interest and other fees, costs, or charges under the Indenture (i) only to the extent they are oversecured by assets at a single Debtor entity without reference to collateral at other Debtor entities; (ii) to the extent they are oversecured with reference to all collateral held by any Debtor, collectively; and/or (iii) to the extent that the Debtors collectively have sufficient assets to pay the [Noteholders'] claims in full and/or any particular Debtor is solvent." [Adv. No. 13-01343, Dkt. No. 105. at 104-06]

20. The Court conducted a six-day hearing on Phase I on October 15-17 and 21-23, 2013. The parties submitted the written direct testimony of 13 witnesses: Ms. Teresa Rae Farley, Dr. John D. Finnerty, Mr. James Gadsden, Mr. Marc E. Landy, Mr. Thomas Marano, Mr. Marc D. Puntus, and Mr. Mark Renzi, for the Plaintiffs; and Mr. Michael Fazio, Mr. Jeffrey M. Levine, Mr. Ronald J. Mann, Mr. P. Eric Siegert, Mr. John A. Taylor, and Mr. Scott Winn, for the Defendants. Each of these witnesses was subjected to cross-examination and redirect at trial.

[6] During the trial, the Court noted that issues relating to liens on AFI Contribution would be tried in Phase II.

III. THE BANKRUPTCY CASES

A. The Debtors' Bankruptcy Strategy

21. In 2010, years before filing for Chapter 11, the Debtors enlisted Goldman Sachs and Citibank to sell their servicing and origination assets. (Marano Direct, ¶ 25.) Unfortunately, such efforts were unsuccessful. Potential bidders required that the Debtors' parent, Ally Financial, Inc. (f/k/a GMAC LLC) ("AFI"), provide a complete indemnity for all of the Debtors' contingent litigation liabilities, including significant litigation risks related to the Debtors' residential mortgage-backed securities ("RMBS"), which AFI was unwilling to do. Puntus Direct ¶ 40.[7] Without such indemnities, bidders were otherwise unwilling to assume the contingent liabilities or to contribute the required capital into the company. *Id.*

22. In August 2011, the Debtors renewed their search for strategic alternatives and began to contemplate out-of-court restructuring opportunities, a potential Chapter 11 filing, financing alternatives and asset sales. To that end, in October 2011, ResCap retained Centerview Partners LLC ("Centerview") to assist in this process. Puntus Direct ¶¶ 1, 16, 40, 41, 43; Marano Direct ¶ 28.

23. One of the first tasks Centerview undertook was to analyze the dynamics of the Debtors' most recent sale effort in 2010. Puntus Direct ¶ 42. By examining previous bidder interest and requirements, Centerview developed an understanding of the relative attractiveness of each of the Debtors' assets and how combining certain assets could significantly influence bidder interest. Using that information, the Debtors and Centerview contemplated a number of potential out-of-court recapitalization or spinoff alternatives, and attempted to negotiate such transaction with a third party. In addition to the continuing hurdle of the Debtors'

[7] References to "Puntus Direct" are to the Direct Testimony of Marc D. Mr. Puntus of Centerview Partners, LLC, submitted by declaration. Debtor Action Dkt. No. 75; Comm. Action Dkt. No. 129.

contingent liabilities, an out-of-court transaction would have required a significant amount of capital. The Debtors and their advisors approached the ResCap's parent, AFI, as the most likely and motivated source for the requisite financing. Ultimately, the financing from AFI was not obtained and no formal bid was made by the third party. Puntus Direct ¶ 43.

24. In December 2011 and January 2012, faced with significant debt maturities coming due in spring 2012, the Debtors and Centerview began evaluating, and launched a process to obtain, a stalking horse bid(s) for a Chapter 11sale of all or a substantial portion of the Debtors' assets in a Chapter 11. Puntus Direct ¶¶ 3, 16, 44; Marano Direct ¶ 29.

25. In order to effectuate such sale and maximize the value of assets, it was critical for the Debtors to preserve and maintain their business and operations during the Chapter 11 process. Marano Direct ¶¶ 30, 31.

26. The Debtors understood that the keys to successful asset sales would be to (a) obtain debtor-in-possession financing, (b) obtain a stalking horse bid(s), (c) continue to work with the government-sponsored enterprises, Fannie Mae, Freddie Mac, Ginnie Mae, and the FHFA (collectively, the "GSEs") and regulators to maintain the Debtors' valuable GSE mortgage servicing rights (together with private label ("PLS"), servicing rights, collectively, "MSRs"), (d) reach a settlement of potential claims against AFI to obtain AFI's continuing support for the business, including origination and shared services support, and (e) resolve tens of billions of dollars of representation and warranty and servicing claims that had been, or might be, asserted by the RMBS trustees, which claims had significantly hindered previous efforts to market the business. Marano Direct ¶ 31.

B. The Debtors' Prepetition Marketing Process

27. On or about January 23, 2012, Centerview launched a marketing process for the Debtors' assets. After developing a list of potential bidders, Centerview contacted five

potential bidders and negotiated nondisclosure agreements with each one. Centerview encouraged buyers to be flexible with their proposals and made clear that the Debtors would consider bids for any and all asset combinations, including bids on individual assets. Centerview also opened a data room to facilitate bidder due diligence, and the Debtors held multi-day management presentations with three of the five potential bidders. Puntus Direct ¶ 48.

28. In February 2012, Centerview received three preliminary indications of interest from (a) Nationstar Mortgage LLC ("Nationstar") (PX 27), (b) Ocwen Loan Servicing LLC ("Ocwen") (PX 25), and (c) a certain undisclosed financial bidder (PX 17). The financial bidder's letter of intent ("LOI") included a bid of $1.5 billion for the Debtors' mortgage loan origination and servicing assets (the "Servicing and Origination Assets") and portions of the Debtors' whole loan portfolio (the "Whole Loan Portfolio"). Nationstar also submitted an LOI, which included a bid of $2.6 billion for a substantial portion of the Debtors' assets. PX 27. Ocwen's initial LOI was a bid of $1.426 billion to acquire solely the Debtors' PLS MSRs and associated advances. Puntus Direct ¶ 49; PX 25.

29. After careful evaluation of the assets subject to each of the three bids, the associated bid values and the contingencies associated with each bid, the Debtors and their advisors determined that proceeding with two of the three bidders – Nationstar and the financial bidder – was most prudent. Centerview then approached each of the two with a detailed request for supplemental information. Puntus Direct ¶ 50. To that end, on February 22, 2012, Centerview sent a letter to Fortress Investment Group LLC ("Fortress") – Nationstar's primary shareholder – requesting additional clarification related to Nationstar's bid. PX 366. Centerview asked Nationstar to clarify how it would allocate its bid among the purchased assets, "including but not limited to a separate allocation for each of the financial assets (MSR, advances, whole

loan portfolio) as well as the servicing and origination platforms, respectively." *Id.*[8] In its response to the questions raised by the February 22 letter, with respect to bid allocation, Fortress specified that it would allocate no value to either the consumer lending or servicing platforms. PX 28; *see also* PX 50 (Centerview Presentation to ResCap Board of Directors (Feb. 24, 2012) at 4-6 (summarizing bid proposals and response to requests for additional information); PX 51 (same presentation, which was sent by CVP to Houlihan on March 8, 2012).

30. On February 28, 2012, the financial bidder revised its LOI to incorporate a broader range of assets, including PLS advances, non-performing first lien loans, and second lien loans in the ResCap Whole Loan Portfolio. It also increased its total bid to of $3.2 billion. *See* PX 18. Nationstar also submitted a revised LOI on February 28, 2012, increasing the purchase price on assets included in its initial bid by $100 million, and expanding the assets purchased to include GSE and PLS advances. It too increased its total bid, to $4.2 billion for the Debtors' mortgage loan origination and servicing assets and Whole Loan Portfolio. Nationstar's bid on the Whole Loan Portfolio was contingent on AFI providing better-than-market debt financing for such portfolio. Puntus Direct ¶ 51; PX 28.

31. Notably, neither the financial bidder's nor Nationstar's bid obligated them to purchase any of the assets used to operate the servicing assets. PX18; PX 28. In fact, although the Debtors were marketing the servicing and origination platforms, at no point during their prepetition marketing process did the Debtors receive any bids to purchase either the origination or servicing platforms separately from the MSRs. Oct 15. Tr. 173:9-20; Oct. 16 Tr. 107: 12-15; Marano Direct, ¶ 60.

[8] The servicing platform related to the MSRs includes, *inter alia*, software servicing contracts, employee contracts and certain other operating expenses relating to the MSRs, Oct. 15 Tr. 171: 8-17, and the origination platform related to the MSRs includes the call center. Oct. 15 Tr. 172: 1-6.

32. Time was of the essence due to looming debt maturities and debt service obligations. To increase the likelihood that the Debtors would be able to consummate a transaction in a limited amount of time, and because the Nationstar bid was close to $1 billion higher than the bid made by the financial bidder, the Debtors and their advisors determined to work with just one bidder. In addition, the Debtors believed that successful negotiation of a purchase agreement would require the involvement and support of the GSEs and the U.S. Treasury, among others, each of which were more likely to engage with a single bidder. Puntus Direct ¶ 53.

33. After selecting Nationstar as the exclusive bidder, the Debtors and Centerview facilitated extensive due diligence for Nationstar over a 12-week time period. Puntus Direct ¶ 54.

34. In early March 2012, the Debtors and their advisers negotiated the terms of the asset purchase agreement with Nationstar (the "Nationstar APA"), and Nationstar completed its analysis of the Debtors' business. The parties and their advisors also engaged in extensive daily discussions with various government entities concerning the proposed agreement and plans for maintaining the Debtors' origination and servicing operations throughout the Debtors' Chapter 11 cases and an orderly transition of the assets thereafter. Puntus Direct ¶ 55.

35. During April and May of 2012, AFI decided not to provide Nationstar debt financing related to the Debtors' Whole Loan Portfolio, and offered its own bid of $1.4 to $1.6 billion to acquire such assets, depending on whether the sale was effectuated through a section 363 sale or Chapter 11 plan. AFI's decision not to provide financing caused the value of Nationstar's overall bid to decrease. *See* Centerview Materials for Discussion (May 12, 2012) (PX 52) at 6. The Debtors' professionals determined that AFI's bid to acquire the Whole Loan

Portfolio was superior to Nationstar's bid for these assets, particularly because AFI was not seeking any stalking horse protections in connection with the sale and had submitted a draft asset purchase agreement with very favorable terms for the Debtors. Thus, the Debtors and their advisors negotiated the terms of an asset purchase agreement with AFI (the "AFI APA," and together with the Nationstar APA, the "APAs"). To ensure that the Debtors would realize the highest or best price for the Whole Loan Portfolio, the AFI APA provided for overbids but contained no stalking horse protection. Puntus Direct ¶ 56. *See also* Nationstar APA (PX 33); Schedules to the Nationstar APA (PX 35).

36. Both APAs were approved by the Debtors' Board of Directors and on May 13, 2012, they were executed and delivered by the parties. On the Petition Date, the Debtors filed two stalking horse bids with the Bankruptcy Court: Nationstar's $2.3 billion stalking horse bid for the Debtors' mortgage loan origination and servicing assets (encompassed in the Nationstar APA), and AFI's $1.4 to 1.6 billion bid for the Debtors' Whole Loan Portfolio (encompassed in the AFI APA). Puntus Direct ¶ 57; Marano Direct ¶ 58. *See also* PX 61.

37. As a result of the Chapter 11 stalking horse process, the Debtors were able to improve Nationstar's initial indication of interest from a bid of approximately $2.6 billion to aggregate bids totaling close to $4 billion through both an increase in the purchase price for specific assets and an expansion of the assets being purchased. The Debtors' stalking horse process also enhanced the ultimate sale process in other ways. The Debtors' development of the AFI stalking horse bid increased the flexibility of the marketing process and expanded the range of potential bidders for estate assets. Without AFI's bid, the Debtors would have been required to include their Whole Loan Portfolio in the Nationstar stalking horse bid, and without Nationstar's consent to any kind of alternative bidding structure, competing bidders would have

been required to purchase both the mortgage loan origination and servicing business as well as the Whole Loan Portfolio in a single transaction. AFI's stalking horse bid allowed the Debtors to market two different pools of assets with corresponding, strategically different interested bidders. The Debtors recognized that because the loans had been HFI loans on AFI's books prior to having been contributed to ResCap as capital, AFI could and would submit a strong bid with minimal representation and warranty and due diligence requirements. Puntus Direct ¶ 58; Marano Direct ¶ 59.

38. As part of the prepetition auction process, the Debtors regularly communicated with the GSEs concerning the proposed agreement and plans for maintaining the Debtors' origination and servicing operations as a going concern until closing of the final sale to preserve the value of the MSRs and associated advances. Marano Direct ¶ 50.

39. Through these regular contacts, the Debtors convinced the GSEs that the Debtors could sell the assets without damaging the MSRs and associated advances. The stakes were high: if the GSEs had concluded that ResCap could not operate or credibly pursue an orderly sale of the mortgage servicing assets, and that the GSE-related assets might therefore have been subject to liquidation, the GSEs would raise the cost of doing business and seize their assets. By obtaining financing, use of cash, continuity of management through the end of sale, and a stalking horse bidder, the Debtors reassured the GSEs that during the Chapter 11 sale process, the Debtors' business would continue to function as usual pending the sale. Also, by showing the market that ResCap was working with the GSEs and continuing to operate in Chapter 11, the Debtors encouraged the bidding process and motivated their staff to work diligently to complete the sales. Marano Direct ¶ 51.

40. Prior to Chapter 11, the Debtors negotiated a settlement with the Department of Justice, the Department of Housing and Urban Development, and the attorneys general of 49 states (the "DOJ/AG Settlement") to resolve potential claims arising out of origination and servicing activities and foreclosure matters. The DOJ/AG Settlement required that the Debtors pay approximately $110 million in cash and provide various specified forms of borrower relief with a value of at least $200 million and that the Debtors – and any purchaser of the Debtors' assets – implement a remedial program of loan modification and enhanced servicing measures, both of which were subject to ongoing regulatory monitoring and oversight, and imposed increased operational costs. But for the Debtors' successful negotiation efforts and aggressive implementation plan, the settlement could have cost the Debtors hundreds of millions of dollars more. Marano Direct ¶ 53.

41. The Debtors also conducted extensive discussions with regulators and other governmental authorities, including the Department of Justice, the attorneys general of 49 states, and the Federal Reserve Board, concerning their continued compliance with both settlements and a consent order arising out of the foreclosure investigations. Marano Direct ¶ 52.

42. Also, prior to Chapter 11, the Debtors entered into a consent order settling an investigation by the Federal Reserve (the "FRB Consent Order") arising out of the same general facts as the DOJ/AG Settlement. The terms of the FRB Consent Order required ResCap to pay a civil money penalty of $207 million, as well as to enhance various aspects of their origination and servicing business, including, their compliance and internal audit programs, internal audit, communications with borrowers, vendor management, employee training, and oversight by the Board of Directors. Furthermore, the consent order required GMACM to retain and compensate an independent consultant to conduct an extensive review of past foreclosure

proceedings and sales pending or completed during 2009 and 2010 with respect to loans serviced by GMACM and its subsidiaries, and to prepare and submit a report regarding the results of that review. As with the DOJ/AG Settlement, the FRB Consent Order imposed significant costs on the Debtors – both before and after Chapter 11. Remaining in compliance with its terms was critical to avoid more drastic regulatory action (*i.e.*, a cease and desist from the Federal Reserve Board), thereby preserving the continued operation of the Debtors' business and sustaining the value of the Debtors' assets. Marano Direct ¶ 54.

C. Prepetition Settlements and Plan Support Agreements

43. In connection with their prepetition marketing process, prior to the Petition Date the Debtors entered into plan support agreements with AFI and certain other parties in interest – including certain of the current Ad Hoc Group members – whereby such parties committed to support, subject to certain terms and conditions of the plan support agreements, the Debtors' effort to pursue a Chapter 11 plan pursuant to the terms set forth in the Plan Term Sheet, dated May 14, 2012 (the "Prepetition Plan Term Sheet"). PX 432. The Prepetition Plan Term Sheet contemplated, among other things, that AFI would make a cash contribution in exchange for estate and third party releases. PTO ¶ 24.

44. Pursuant to the prepetition plan support agreement entered into with the JSNs (the "JSN PSA"), the JSNs agreed to waive any and all rights to post-petition interest under the Junior Secured Notes through December 31, 2012, so long as (a) no unsecured creditor received post-petition interest, (b) the JSN PSA did not terminate, and (c) either (i) the effective date of the contemplated Chapter 11 plan occurred by December 31, 2012, or (ii) the closing of the contemplated asset sales occurred by December 31, 2012 and the effective date of the plan occurred by March 31, 2013. Puntus Direct ¶ 33.

45. The Debtors were able to reach a prepetition settlement with AFI (the "Original AFI Settlement") after extensive review with its legal advisors, as well as negotiations between the advisors, the Special Review Committee, and AFI representatives. That settlement agreement was memorialized in a Plan Sponsor Agreement that the ResCap board approved on May 13, 2012, and subsequently executed and filed with the Court on the Petition Date. PX 65; Puntus Direct ¶ 34; Marano Direct ¶ 40.

46. Under the terms of Original AFI Settlement, AFI agreed to pay the Debtors $750 million, continue to support the Debtors' origination business in Chapter 11, provide a stalking horse bid for the Whole Loan Portfolio, provide DIP financing, and continue to provide the Debtors the shared services it needed to run its business. The AFI Settlement and Plan Sponsor Agreement also provided for the automatic termination of such agreements if the Bankruptcy Court did not approve a Chapter 11 plan on or before October 31, 2012. AFI and the Debtors agreed to monthly waivers of this automatic termination through February 28, 2013. This allowed the Debtors to immediately reap the benefits of origination, shared services, and other support, while providing a runway for additional settlement negotiations that ultimately resulted in the Debtors' higher $2.1 billion settlement with AFI. Marano Direct ¶ 41; Puntus Direct ¶ 35. These efforts were integral to preserving the value inherent in the Debtors' assets for the benefit of all stakeholders, including the Noteholders that a junior lien on the origination proceeds. Puntus Direct ¶ 35.

47. At the same time that the Debtors were negotiating with AFI, they were also negotiating with the trustees of certain RMBS trusts (the "RMBS Trusts") for which the Debtors acted as sponsor, depositor, or in similar capacity. These negotiations related to resolution of approximately $44 billion of potential liability for representation and warranty and

servicing claims arising out of the Debtors' private-label residential mortgage backed securities. The Debtors believed that resolving these private-label securities claims was crucial to enhancing the value of the Debtors' assets for a potential sale. The overhang of this litigation exposure had impeded the Debtors' sale efforts in the years before the Chapter 11 filing and would have diminished the value the Debtors' creditors could have obtained in a Chapter 11 sale. Furthermore, the Debtors understood that the trustees of the RMBS Trusts (the "RMBS Trustees") would likely assert the right to withhold servicing advances owed to the Debtors as an offset against origination and servicing liabilities allegedly owed to them. The Debtors believed that the only way to maximize the purchase price of the assets was to sell the business unencumbered by billions of dollars of claims, and without the risk of the RMBS Trustees asserting during the auction process that the assets could not be sold free and clear of their interests. Marano Direct ¶ 42; Puntus Direct ¶ 37.

48. After extensive negotiations, in May 2012, the Debtors reached a settlement with the institutional investors holding a substantial stake in the RMBS Trusts (the "RMBS Settlement"). The Board of Directors approved the agreement at its May 13, 2012 meeting, which remained subject to approval of the Bankruptcy Court. Marano Direct ¶ 44; Puntus Direct ¶ 38.

49. Under the terms of the RMBS settlement, the Debtors negotiated a settlement of the $44 billion of potential representation and warranty and servicing claims that clouded the estates. The RMBS Settlement enhanced the value of the assets that were sold as part of the Debtors' Chapter 11 proceeding, creating the likelihood that the institutional investors and RMBS Trustees would not assert a legal challenge to the sale. Marano Direct ¶ 45; PX 43.[9]

[9] Another benefit of the RMBS Settlement to the estate and to the Debtors' creditors was the limitation on cure claims. The original RMBS Settlement provided for releases of certain claims by trusts that opted to participate in

D. The AFI DIP Order

50. In connection with the Chapter 11 filing, the Debtors recognized that they would require post-petition financing and authorization to use the cash collateral encumbered by the existing debt facilities to continue operating the Debtors' business and maintain the value of the Debtors' assets. Marano Direct ¶ 33; Puntus Direct ¶ 17.

51. Specifically, the Debtors needed cash to continue funding day-to-day business operations, *i.e.*, to: (a) continue to issue loans and offer loan modifications to thousands of borrowers; (b) continue to service mortgages and make advances associated with such servicing obligations; (c) comply with the Federal Reserve and FDIC consent order; (d) comply with the settlement agreement between Debtors and the Department of Justice, the Department of Housing and Urban Development, and attorneys general of 49 states; (e) comply with the agreements that had been entered into with the GSEs mandating the care with which their loans should be serviced and refinanced, and repurchase loans from the GSEs; and (f) maintain hundreds of employees through retentions so that delinquencies would not increase and thus diminish the value of, and jeopardize the sale of, the Debtors' MSRs and other assets. Marano Direct ¶ 34.

52. Most significantly, the Debtors needed to continue funding the Debtors' servicing advance obligations for the RMBS and other PLS, as well as GSE loans. With respect to the GSE loans, the Debtors' servicing rights with respect to such loan were actually owned by the GSEs. If the Debtors failed to make the requisite advances, the GSEs could have revoked the

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the settlement. The released claims extended to claims (including cure claims) relating to the origination, sale, and servicing of mortgage loans held by the trusts. Marano Direct ¶ 46. When it became clear that the sale of the Debtors' servicing assets would occur before final approval of the RMBS settlement, the Debtors negotiated with the Committee, the investors, and the RMBS Trustees and reached an agreement that generally deferred cure claims and allowed for a clean sale of the Mortgage Servicing Assets even though the release contemplated by the RMBS settlement was not yet in effect. The agreement was included, by stipulation, in the Revised Scheduling Order entered by the Court on July 31, 2012. Marano Direct ¶ 47; PX 43.

Debtors' servicing rights, and re-assigned those rights to another company – in which case the GSEs would have assigned a below-market value to the servicing rights. This would have negatively impacted the MSRs by hundreds of millions – if not a billion dollars – and caused a significant loss to the estates. PX 105; Marano Direct ¶ 35; Puntus Direct ¶ 19.

53. The Debtors were ultimately able to obtain debtor-in-possession financing facilities from Barclays Bank PLC ("Barclays") and AFI, as well as consensual use of cash collateral from their prepetition lenders, including the JSNs. Accordingly, on May 14, 2012, the Debtors filed motions seeking authorization to (a) enter the Barclays post-petition financing facility (the "Barclays DIP"); (b) make post-petition draws under their prepetition line of credit facility (the "LOC Facility") in an amount up to $200 million; and (c) use cash collateral (the "Cash Collateral") securing each of the Revolver, the LOC Facility, and the Notes to fund only the cash needs related to operations (including an allocated portion of the costs to administer the Chapter 11 cases based on the asset values within each collateral pool) and assets of each of the respective collateral pools. PX 87, PX 88; Marano Direct ¶ 37; Puntus Direct ¶ 28. The motions were approved on an interim basis on May 15, 2012, and were approved on a final basis, with the consent of the JSNs and AFI, pursuant to orders entered on June 25, 2012 (the "AFI DIP Order"). PX 76; Marano Direct ¶ 37; PTO ¶ 27.

54. Under the AFI DIP Order, the Debtors were authorized to use the Cash Collateral in accordance with the Forecasts (as defined in the AFI DIP Order) and the JSNs were granted several forms of adequate protection to the extent of the aggregate diminution in value of the JSNs interest in the collateral pledged to them as security for the Notes. PTO ¶ 29. The adequate protection granted to the JSNs included superpriority administrative expense claims and adequate protection liens. AFI DIP Order, ¶ 16(g) (PX 76).

55. The Forecasts provided for the pro rata allocation of the cash disbursements during the relevant period to various silos of assets securing the Debtors' various secured credit facilities, as well as to unencumbered assets. Puntus Direct ¶ 26. As part of the negotiations concerning the AFI DIP Order, the JSNs and AFI consented to the initial Forecast attached to the proposed order. Moreover, in the AFI DIP Order, the Debtors, AFI and the JSNs agreed that any subsequent Forecasts would be subject only to AFI's consent. Puntus Direct ¶ 26; AFI DIP Order ¶ 14 (PX 76). The Debtors delivered updated Forecasts to the JSNs and AFI every four weeks as required by the AFI DIP Order, and, although the JSNs did not have consent rights, at no point during the case did they object to any such Forecast. Puntus Direct ¶ 26.

56. The AFI DIP Order provided for a carve out for the fees and expenses of estate professionals (the "Carve Out"). With respect to the estate professionals, the Carve Out was in an amount of the sum of (a) the accrued and unpaid expenses of professionals incurred prior to the delivery of the notice of termination of cash collateral use (the "Carve Out Notice") and (b) up to additional $25 million for post-trigger fees and expenses.[10] AFI DIP Order ¶16(g). The AFI DIP Order also provides that the Carve Out is senior in right to the Noteholders' stipulated pre-petition liens and the post-petition liens and superpriority claims granted under the AFI DIP Order. AFI DIP Order §§ 5(g)(iii), 16(a)(ii), 16(c).

57. During the Chapter 11 cases, Debtors negotiated several extensions regarding the use of the cash collateral of AFI and the JSNs, including the *Eighth Stipulation and*

[10] The $25 million portion of the Carve Out was intended to be allocated between Barclays DIP, Collateral, LOC Collateral and AFI DIP collateral. AFI DIP Order, n.6 (PX 76). Because the Barclays DIP, LOC Facility and Revolver have been repaid (subject to outstanding AFI fee and default interest claims proposed to be resolved under the Plan), the full amount of the Carve Out is now allocable to the Notes Collateral.

Order Amending the AFI DIP and Cash Collateral Order, entered on June 28, 2013 [No. 12-12020, Dkt. No. 4115]. PX 78-84; PX 86; PTO ¶ 29.

58. On July 10, 2013, the Court entered the *Stipulation and Order in Respect of the Debtors' Motion for Entry of an Order to Permit the Debtors to Continue Using Cash Collateral* [No. 12-12020, Dkt. No. 3374] (the "Cash Collateral Stipulation") among the Debtors, AFI, and the JSNs, which terminated the use of cash collateral effective as of July 11, 2013, with certain limited exceptions. PX 85 ¶ 2. This stipulation also served as the Carve Out Notice.

E. The Asset Sales

59. As noted above, on the Petition Date, the Debtors filed motions to approve stalking horse bids from AFI and Nationstar with respect to the Whole Loan Portfolio and Servicing and Origination Assets, respectively. *See* PX 33, PX 35, PX 61. After the Petition Date, on June 15, 2012, Berkshire Hathaway, Inc. ("Berkshire Hathaway") submitted competing bids to become the stalking horse bidder for both sets of assets. The bids, which were submitted without Berkshire Hathaway having performed any due diligence, were in the form of executed asset purchase agreements virtually identical to the agreements executed by Nationstar (for the Servicing and Origination Assets) and AFI (for the Whole Loan Portfolio). Due, at least in part, to Berkshire Hathaway's bids, a "pre-auction" auction (the "Mini Auction") ensued in advance of and during the sale procedures hearing, with the Court ultimately directing that final proposed stalking horse bids be submitted to the Debtors on June 18, 2012. In accordance with the Court's direction, both Nationstar and Berkshire Hathaway submitted revised stalking horse bids. PX 29; Puntus Direct ¶ 59.

60. In the Debtors' business judgment, the final Nationstar stalking horse bid for the Servicing and Origination Assets and the final Berkshire Hathaway stalking horse bid for

the Whole Loan Portfolio were the "highest and best" bids at that time. With the support of the Committee, the Debtors sought and obtained Court approval of these stalking horse bids and the bid and sales procedures at a hearing on June 19, 2012. PX 62; Puntus Direct ¶ 60.

61. As further described below, following the conclusion of the sale procedures hearing, Centerview began the post-petition marketing and auction process for the Servicing and Origination Assets and the Whole Loan Portfolio. Throughout the postpetition sale process, the Debtors and their advisors provided the Committee and AFI and their respective advisors, and advisors to the JSNs, with weekly and sometimes daily updates on the marketing processes for both the servicing assets and the whole loan portfolio. Professionals at Centerview had discussions about the sale process with Houlihan, the JSNs' investment banker, at least bi-weekly. Other parties in interest, including Barclays (the agent for the Debtors' debtor-in-possession financing facility), and Citibank (a pre-petition lender), received updates as requested. Puntus Direct ¶ 67.

(i) Auction and Sale of the Servicing and Origination Assets

62. The Court approved the sale and bid procedures with respect to the Servicing and Origination Assets, PX 44, and Centerview approached those institutions that it believed would have an interest in purchasing, and the financial resources and expertise necessary to purchase, the Servicing and Origination Assets, to gauge their respective interest. Following these initial contacts and an introductory due diligence period for interested parties, the Debtors' management team and Centerview made formal presentations to five prospective purchasers, during which they described in detail the Servicing and Origination Assets being sold and afforded them an opportunity to visit the Debtors' locations and perform detailed on-site due diligence with the Debtors' business units. Puntus Direct ¶ 61.

63. Following the management presentations, Centerview sent a memorandum to these potential purchasers containing inquiries focused on several topics, including the bidders' proposed plans for financing a transaction, whether bidding partners were required, plans for obtaining the requisite licenses and other regulatory approvals and post-closing plans for operating the business. These inquiries were designed to provide the Debtors with information necessary to evaluate prospective bids the Debtors might receive from each potential purchaser, including assisting the Debtors in assessing value to the estate, gauging the level of interest of each prospective purchaser, and evaluating whether a sale to each of these purchasers could in fact be consummated. Puntus Direct ¶ 62.

64. The Debtors received responses to their memorandum from three potential purchasers: (a) Berkshire Hathaway, (b) a consortium of two bidders, and (c) a consortium comprised of Ocwen and Walter Investment Management Corporation ("Walter"). The Debtors focused their marketing efforts on these three potential purchasers, each of which continued to perform significant diligence, including various meetings with the Debtors and their management. As part of the diligence process, the Debtors arranged in-person meetings for each of the potential purchasers with Fannie Mae, Freddie Mac, and Ginnie Mae. The purpose of these meetings was to ensure that Fannie Mae, Freddie Mac, and Ginnie Mae had an opportunity to "vet" the potential bidders and assess, among other things, their financial and operational wherewithal to purchase and operate the Servicing and Origination Assets. Puntus Direct ¶ 63.

65. On October 19, 2012, the Debtors received two qualifying bids for the Servicing and Origination Assets: (a) the stalking horse bid previously submitted by Nationstar at a value of $2.357 billion; and (b) a bid from Ocwen at a value of $2.397 billion. PX 48; *see also* PX 47. After commencement and completing its due diligence, Berkshire Hathaway, the

only party that did not own or operate a mortgage servicing and origination business, chose not to submit a bid. The Debtors, in the exercise of their business judgment, determined that the Ocwen bid was the highest and best bid for the Servicing and Origination Assets and decided that they would open the auction with the Ocwen bid. PX 66; Puntus Direct ¶ 64; PTO ¶ 34.

66. In the week prior to the auction for the Servicing and Origination Assets, the Debtors reached out to each of Fannie Mae, Freddie Mac, and Ginnie Mae to assess their comfort level with each of Nationstar and Ocwen. While no formal consents to the sale of the Servicing and Origination Assets and related transfers were obtained, based on these meetings and discussions, the Debtors became comfortable that the GSEs' servicing transfer approval would be achievable for both Nationstar and Ocwen. Puntus Direct ¶ 68.

67. On October 23, 2012, the Debtors began the auction for the Servicing and Origination Assets with Ocwen's bid as the opening bid. Two bidders, Nationstar and Ocwen, submitted offers for these assets. Although Ocwen was a bidder of record for these assets, the Ocwen APA provided for the assignment of the Debtors' Fannie Mae assets to Walter (together with Ocwen, the "Purchasers"), with which Ocwen had a Joint Bidding Agreement. PX 47; Puntus Direct ¶ 69.

68. During the auction, the Debtors negotiated with Nationstar and Ocwen to obtain certain adjustments to their bids and asset purchase agreements. As required by Ginnie Mae, both bidders agreed to remove the Ginnie Mae liability bifurcation condition in the asset purchase agreements. Consequently, Ginnie Mae would be able to seek satisfaction of all liabilities relating to Ginnie Mae loans, either pre- or post-closing, related to servicing or origination, from the purchaser of the Servicing and Origination Assets. Puntus Direct ¶ 71. Also, although both Ocwen's and Nationstar's bid did not contractually obligate them to acquire

the servicing and origination platforms, both bidders agreed to include a commitment to acquire the platforms and associated liabilities as part of the bid. PX 56 at 34-47 and 41-43; Puntus Direct ¶ 72; Marano Direct ¶ 62. In order to induce Ocwen and Nationstar to make this commitment, the Debtors had to offer the bidders a bid credit in the amount of $108.4 million, *i.e.*, the estimated liabilities associated with the platforms. The credit bid was not an increase to the bidders' purchase price for the Servicing and Origination Assets, rather it increased value to the estate by avoiding the administrative costs that the Debtors would incur if the purchaser did not absorb the origination and servicing platforms. PX 56.

69. After 28 rounds of bidding, Ocwen made the highest and best offer to purchase the Debtors' Servicing and Origination Assets for itself and Walter, with a winning purchase price of approximately $3 billion. PX 57 at 9-10. This bid represented an increase of more than $800 million in value for the Debtors' estates from Nationstar's stalking horse bid. *Id.* PAGE. Walter coordinated with the Debtors and Ocwen to enter into an ancillary agreement whereby Ocwen assigned to Walter the Fannie Mae assets, while Ocwen retained the Freddie Mac, Ginnie Mae and PLS assets. PX 59; Puntus Direct ¶ 73; Marano Direct ¶ 63.

70. The Court approved the Ocwen sale on November 19, 2012, and entered an Order approving the asset sales on November 21, 2012. PX 45; Puntus Direct ¶ 79; PTO ¶ 36.

71. The Ocwen Sale was effectuated through the Asset Purchase Agreement, dated as of November 2, 2012 (and as later amended), among Ocwen, ResCap, and certain other Debtor signatories thereto (the "Ocwen APA"). PX 19, PX 20, PX 21, PX 22, PX 23, PX 24; PTO ¶ 37. Although Ocwen was the bidder of record, the Ocwen APA provided for the assignment of certain of the Debtors' servicing assets to Walter or one of its affiliates as part of

the transaction. PTO ¶ 38. A bifurcated closing of the Ocwen APA occurred on January 31, 2013 and February 15, 2013. PTO ¶ 41.

(ii) Auction and Sale of the Whole Loan Portfolio

72. Contemporaneously with the marketing process for the Servicing and Origination Assets, Centerview considered those institutions that it believed would be interested in and financially capable of purchasing the Whole Loan Portfolio. Centerview approached those potential purchasers to gauge their respective interest. Following these initial contacts, the Debtors and Centerview provided the prospective purchasers with diligence materials and offered on-site visits with the Debtors' two main document custodians to allow such parties to view a population of physical collateral files and perform an independent verification of the collateral exception report prepared by the Debtors' document custodians. Puntus Direct ¶ 65.

73. On October 19, 2012, the bid deadline approved by the Court, the Debtors received two qualifying bids for the Whole Loan Portfolio: (a) the stalking horse bid previously submitted by Berkshire Hathaway at a value of $1.324 billion; and (b) a bid from a consortium of four financial bidders led by DLJ Mortgage Capital (the "DLJ Consortium") at a value of $1.339 billion. PX 38. The Debtors, in the exercise of their business judgment, determined that the DLJ Consortium bid was a qualifying bid and was the highest and best bid for the Whole Loan Portfolio and decided that they would open the auction with the DLJ Consortium bid. Puntus Direct ¶ 66; PTO ¶ 35.

74. On October 25, 2012, ResCap held an auction for its Whole Loan Portfolio. After 11 rounds of bidding, Berkshire Hathaway won the auction with the highest and best offer of $1.5 billion, an amount $175 million higher than the original stalking horse bid. *See* PX 58 (Oct. 25, 2012 Auction Transcript). Prior to the auction, Berkshire Hathaway had agreed to continue compliance with certain aspects of the FRB Consent Order and the DOJ/AG

Settlement, and as a result, the proposed asset purchase agreements for each of the bidders were substantially the same. The Court approved the Berkshire Hathaway sale on November 19, 2012, and entered an order approving the asset sales on November 21, 2012 No. 12-12020, Dkt. No. 2247]. PX 46; Puntus Direct ¶ 79; PTO ¶ 36.

75. The Berkshire Hathaway Sale was effectuated through the Amended and Restated Asset Purchase Agreement, dated as of November 2, 2012, among Berkshire Hathaway, ResCap, and certain other Debtor signatories thereto (the "Berkshire Hathaway APA"). PX 31; PTO ¶ 42. The Berkshire Hathaway sale closed on February 5, 2013. PTO ¶ 43.

F. The Global Settlement and the Plan

76. On May 13, 2013, the Debtors, the Committee, AFI, and certain consenting claimants entered into that certain Plan Support Agreement ("PSA").[11] Under the terms of the PSA and the Chapter 11 plan term sheets annexed thereto, AFI agreed to contribute a total of $2.1 billion in cash to the Debtors' estates (the "AFI Contribution"). PTO ¶ 44.

77. In exchange for the AFI Contribution, the PSA provides for a broad, general release of any putative claims, avoidance actions and other causes of action of the Debtors or the Debtors' estates against AFI (with certain limited exceptions), and of putative third-party claims against AFI relating to the Debtors. The release encompasses, but is not limited to, avoidance actions arising under Chapter 5 of the Bankruptcy Code, as well as any putative contract claims and causes of action. PTO ¶ 45; Plan Term Sheet at 6-10 (PX 90). The PSA does not allocate the AFI Contribution to any particular estate or third party claims or causes of action. PTO ¶ 45; *see also* PX 90.

[11] A copy of the PSA is attached as Exhibit 3 to the *Debtors' Motion for an Order Under Bankruptcy Code Sections 105(A) and 363(B) Authorizing the Debtors to Enter Into and Perform Under a Plan Support Agreement with Ally Financial, Inc., the Creditors' Committee, and Certain Consenting Claimants*, filed on May 23, 2013 [Docket No. 3814] (the "PSA Motion"). PX 90. *See also* PSA Motion Ex. 3A (PX 90) (Plan Term Sheet) & PSA Motion Ex. 3B (PX 90) (Supplemental Term Sheet).

78. On August 23, 2013, the Plaintiffs filed a joint Chapter 11 plan (the "Plan") [No. 12-12020, Dkt. No. 4819] that provides for a global settlement (the "Global Settlement") incorporating the terms of the term sheets annexed to the PSA (including the AFI Contribution). PX 256; PTO ¶ 47.

IV. FINDINGS RELEVANT TO ORIGINAL ISSUE DISCOUNT

A. The Exchange

79. The Junior Secured Notes were issued in connection with a 2008 exchange offering (the "Exchange"). On May 5, 2008, ResCap issued an Offering Memorandum in which it offered to exchange $9.537 billion face value amount of its then-outstanding unsecured notes maturing from 2010 through 2015 (the "Old Notes") for the Junior Secured Notes. PTO ¶ 7; PX 175.

80. Pursuant to a modified Dutch auction, ResCap offered to pay holders participating in the Exchange cash in lieu of the Junior Secured Notes that they would have otherwise received, up to an aggregate payment of $500 million. Under the Exchange, ResCap offered to exchange $1,000 face principal amount of outstanding unsecured notes for $800 face value of Junior Secured Notes. The clearing price in the modified Dutch auction was $650 per $1,000 principal amount of Junior Secured Notes, which was the lowest level at which tenders were accepted. PTO ¶ 8.

81. Through the Exchange, ResCap exchanged approximately $6 billion of Old Notes for approximately $4 billion in Junior Secured Notes and $500 million in cash. Approximately 63% of the Old Notes were exchanged in the Exchange. PTO ¶ 9.

82. For tax purposes, the issue price of a note offered in an exchange is the fair market value of the consideration exchanged for the newly issued note determined as of the issue date. 26 C.F.R. 1.1273-2(c). AFI obtained data on the trading activity of the Junior

Secured Notes on the date of issue from Bank of America, one of the managers of the Exchange, which established the issue price as $613.75. Finnerty Direct ¶ 54.[12]

83. This price, $613.75, was well within implied trading prices for the Junior Secured Notes at the time. Finnerty Direct ¶ 56. The clearing price in the Modified Dutch Auction was $650 per $1,000 of Junior Secured Notes, establishing $650 as an upper limit on the fair market value because the tender offer was oversubscribed. *Id.* The trading price for notes held by the senior unsecured noteholders during the Exchange was $490.00 to $535.00, which translates into $612.50 to $668.75 per Junior Secured Note (as each $1,000.00 Old Note was exchanged for an $800.00 Junior Secured Note). *Id.* And the trading value range on a "when and if issued basis" for the Junior Secured Notes was $610.00 to $640.00, according to research published by CreditSights during the exchange period. *Id.*

84. There is no indication that the issue price used by AFI and PricewaterhouseCoopers LLP ("PWC"), AFI's tax advisor, was challenged by the Internal Revenue Service or by holders of Junior Secured Notes who were required to recognize taxable income as the OID amortized. Finnerty Direct ¶ 55.

85. Using this price, $613.75, AFI calculated the amount of original issue discount ("OID") for tax purposes as of the Petition Date to be $377,262,728. PTO ¶ 52; PX 189; Finnerty Direct ¶ 55. As an economic matter the Exchange created OID. Finnerty Direct ¶ 10.

86. PWC reviewed and agreed with the tax calculation. PTO ¶ 53; PX 189.

[12] References to "Finnerty Direct" are to the Direct Testimony of Dr. John D. Finnerty, submitted by declaration. [Adv No. 13-01277, Dkt. No. 127.]

87. AFI and PWC amortized OID by compounding it on a semi-annual basis. Amortizing OID on a daily compounding basis results in a slightly larger amount of OID: $386 million (versus $377 million using semi-annual compounding). Finnerty Direct ¶ 60.

88. As of the Petition Date, approximately $2.1 billion face value amount of the Junior Secured Notes were outstanding. PTO ¶ 26.

89. Since the Petition Date, the Debtors, with the Court's authority, have made two payments on account of the outstanding principal amount of the Junior Secured Notes: (a) $800 million on June 13, 2013, and (b) $300 million on July 29, 2013.

B. Expert Testimony Regarding OID

90. The Plaintiffs and Defendants each offered expert testimony on issues relating to the bankruptcy treatment of the OID generated in the Exchange. John D. Finnerty, Ph.D, a Managing Director in the Financial Advisory Services Group at AlixPartners, LLP and Professor of Finance at Fordham University's Graduate School of Business Administration, testified on behalf of the Plaintiffs, and Mr. Eric Siegert, a Senior Managing Director and Chairman of the Financial Restructuring Group of Houlihan testified on behalf of the Defendants.

91. Before detailing the experts' areas of disagreement, it is worth noting the points as to which Plaintiffs and Defendants agreed. There was no dispute that the Exchange was a "fair value" exchange – *i.e.*, that old securities were exchanged for new securities with a reduced principal amount that in theory approximated the market value of the old securities. As such, Plaintiffs and Defendants agreed that the bankruptcy treatment of the OID generated in the Exchange was not necessarily dictated by the Second Circuit's decision in *LTV Corp. v. Valley Fidelity Bank & Trust Co. (In re Chateaugay Corp.)*, 961 F.2d 378 (2d Cir. 1992), a decision that addressed the bankruptcy treatment of OID generated in connection with a "face value"

exchange, *i.e.*, one in which the principal amount of the debt is not reduced.[13] Finnerty Direct ¶ 102; Oct. 21 Tr. 151:11-14. The experts also agreed that investors in the Notes were sophisticated investors who understood how to analyze risks associated with investing in OID bonds. Finnerty Direct ¶ 92; Oct. 21 Tr. 184:8-11.

92. In addition, the experts were largely in agreement as to the amount of OID that remained unamortized as of the Petition Date. Dr. Finnerty calculated the amount of OID remaining as of the Petition Date using semi-annual compounding, the method used by AFI and its tax advisor, PricewaterhouseCoopers. Finnerty Direct, App'x 6A. Using this method he calculated the remaining OID to be $377 million. He viewed daily compounding as the more appropriate method, and using daily compounding, Dr. Finnerty concluded that $386 million of the OID remained unamortized as of the Petition Date, a difference of only $9 million. Finnerty Direct ¶ 60 & App'x 6B. Mr. Siegert did not endeavor to calculate the amount of OID that remained unamortized on the Petition Date, though, in his rebuttal report (the "Siegert Rebuttal Report"), he criticized Dr. Finnerty for using daily as opposed to semi-annual amortization. DX AIJ at 24. Mr. Siegert testified that the difference between daily and semi-annual compounding made a different of "[l]ess than 10 million, seven million dollars, in that range." Oct. 21 Tr. 163:21-25. The Court adopts Dr. Finnerty's calculation of unamortized OID as of the Petition Date of $386 million.

[13] The Second Circuit explained the distinction between the two types of exchanges, writing:

> An exchange offer made by a financially troubled company can be either a "fair market value exchange" or a "face value exchange." In a fair market value exchange, an existing debt instrument is exchanged for a new one with a reduced principal amount, determined by the market value at which the existing instrument is trading. By offering a fair market value exchange, an issuer seeks to reduce its overall debt obligations. . . . A face value exchange, by contrast, involves the substitution of new indebtedness for an existing debenture, modifying terms or conditions but not reducing the principal amount of the debt.

Chateaugay, 961 F.2d at 381-82 (internal citations omitted).

93. The experts' remaining testimony focused primarily on the marshaling of policy arguments in favor of and against the treatment of OID generated in a fair value exchange as unmatured interest for purposes of section 502(b)(2).

94. Dr. Finnerty testified, among other things, that: (i) that the terms of the Exchange were attractive to the holders of the Old Notes regardless of how OID was to be treated in bankruptcy, and (ii) as the Exchange itself demonstrated, it is not necessary to provide preferential treatment of OID in bankruptcy to enable distressed companies to consummate exchange offers. Finnerty Direct ¶¶ 10-14. Dr. Finnerty's testimony stressed the economic incentives built into the Exchange: yield, security, and seniority. The Exchange was attractive – and future exchanges could likewise be attractive regardless of the bankruptcy treatment of OID – because of the competitive effective yield of the Junior Secured Notes at issuance, the fact that the Junior Secured Notes, unlike the Old Notes, were secured, and the fact that the Junior Secured Notes were structurally senior to the Old Notes. *Id.* ¶¶ 62-67, 93.

95. Dr. Finnerty also testified that lenders can derive benefits from investing in OID bonds. He identified one benefit as a reduction in reinvestment risk during the life of the bond. *Id.* ¶ 45. An investor who wants to lock in a 10% return for ten years, for example, can best assure that result by purchasing a zero coupon bond offering a yield to maturity of 10%. Investing instead in a 10-year bond paying a 10% cash coupon would expose the investor to the risk that he or she would not be able to find a new investment opportunity paying the same return. *Id.* For a given yield to maturity, discount bonds have less investment risk than bonds issued at par because OID accrual – the deferred interest – is, essentially, reinvested at the yield to maturity rate and compounded over the life of the bond. *Id.* ¶ 46.

96. Dr. Finnerty testified that investors in the Junior Secured Notes would have been familiar with the potential risks and benefits of investing in OID bonds and would have been able to take those factors into account in determining how to respond to the Exchange Offer, and concluded that participants in the ResCap exchange were adequately compensated for the risk that a claim for OID would be disallowed in a ResCap bankruptcy. *Id.* ¶ 92.

97. Mr. Siegert, in contrast, testified, among other things, that: (i) the terms of the Exchange, disclosures made by ResCap in connection with the Exchange Offer, and general market evidence and practice are inconsistent with the conclusion that the Exchange generated disallowable OID for bankruptcy purposes, and (ii) that disallowing OID in fair value exchanges such as the Exchange would likely cause debt-holders to either reject such exchanges or demand more from distressed companies, thereby discouraging out-of-court workouts and leading to a greater number of bankruptcies. Siegert Direct ¶ 30.[14]

98. To the first point, Mr. Siegert noted that the offering memorandum issued in connection with Exchange did not indicate that the Exchange would create OID that would be disallowable in a bankruptcy proceeding. *Id.* ¶ 31. Mr. Siegert described an exercise in which Houlihan reviewed a series of offering memoranda issued in connection with debt-for-debt exchanges in the years between 1990 and 2013. Of the 31 such memoranda that Houlihan located (21 of which related to fair value exchanges), seven included bankruptcy OID risk disclosures. *Id.* ¶ 40. Mr. Siegert also concluded that the market did not place significant value on the collateral offered to the Noteholders at the time of the Exchange, as evidenced by the trading prices of the Notes and Old Notes around the time of the Exchange and the fact that "only" 63 percent of the Old Notes participated in the Exchange. *Id.* ¶ 32.

[14] References to "Siegert Direct" are to the Direct Testimony of P. Eric Siegert, submitted by declaration. [Adv. Case No. 13-01277, Dkt. No. 138]

99. To his second point, Mr. Siegert noted that "[t]he market has functioned with substantial disregard to OID related to restructurings since the *Chateaugay* decision." *Id.* ¶ 36. He testified that "[a]ny modification to the status quo would have widespread impact on the way in which debt is treated and traded and would be inconsistent with the realities of the market, making far more difficult the task of delivering over-leveraged companies." *Id.*¶ 36. Mr. Siegert asserted that the mere existence of the Committee Complaint in the instant action has had an impact on the ability of companies to restructure, pointing to a "multi-billion dollar exchange presently under negotiation where the bondholders have categorically refused to consider a fair value exchange." *Id.*

100. Leaving aside the relevance (or lack thereof) of policy-based arguments (an issue discussed in the conclusions of law), the Court credits Dr. Finnerty's testimony that the terms of the Exchange were attractive to holders and would have induced an exchange regardless of the treatment of OID in bankruptcy. Significant inducements were made to encourage participation in the Exchange, as compared to non-tendering holders of the Old Notes.

101. The Noteholders are poised to receive a much greater recovery in the instant Chapter 11 Cases than holdouts. But even without the benefit of hindsight, Dr. Finnerty has persuasively explained why holders of Old Notes would have tendered even if they were aware – as they may have been – that there was a risk that unamortized OID would be disallowed in bankruptcy. In addition to the above-referenced inducements, Dr. Finnerty points out that credit analysts estimated higher recovery rates for ResCap's secured bondholders than for ResCap's unsecured creditors at the time of the Exchange. Finnerty Direct ¶¶ 71-73. He further notes that the treatment of OID in bankruptcy would be a factor in an investor's decision to exchange only if he or she believed a bankruptcy were likely to occur – and if an investor did

believe a bankruptcy were likely, the investor would be less concerned with the amount of its claim than with its recoverability. *Id.* ¶ 77. Finally, Dr. Finnerty has shown that the scenarios in which hold-outs could have received more than tendering noteholders were unlikely in light of the well-recognized risk of a ResCap bankruptcy. *Id.* ¶¶ 78-91.

102. The Court does not credit Mr. Siegert's opinions regarding the supposedly dire consequences of a determination that OID was created in the Exchange. There are four primary flaws in his analysis.

103. First, the Court is not convinced that market participants have acted with "substantial disregard" for the possibility that fair market value exchanges would give rise to OID for bankruptcy purposes. Mr. Siegert acknowledged on cross that sophisticated distressed investors are likely to be familiar with the *Chateaugay* decision, and that the opinion expressly left open the possibility that fair market value exchanges would give rise to OID for bankruptcy purposes. Oct. 21 Tr. 178:10-179:4. Moreover, Mr. Siegert's review of offering memoranda is less than compelling evidence of reliance. Mr. Siegert acknowledged that his review was not scientific. Oct. 21 Tr. 175:5-7. He conceded, among other things, that he did not look to see if the incidence of disclosures changed after *Chateaugay* as compared to the pre-*Chateaugay* period. Oct. 21 Tr. 177:13-16. And even if his study had been more rigorous, its results do not, in fact, appear to support Mr. Siegert's conclusion. The fact that 7 out of 31 offering memoranda contained bankruptcy OID treatment risk disclosures serves to undermine, rather than bolster, Mr. Siegert's conclusion that the issue was settled.[15]

[15] It is also unclear what Defendants sought to establish by pointing out that the Exchange's offering memoranda did not include a bankruptcy OID risk disclosure. ResCap, of course, was without the power to dictate the bankruptcy treatment of OID generated in the Exchange by virtue of its decision to disclose or not disclose the risk of disallowance of unamortized OID in bankruptcy; that is a legal determination.

104. Second, Mr. Siegert's opinion that disallowing OID as unmatured interest in fair market value exchanges would discourage out-of-court restructurings was based on no quantitative analysis or methodology. Oct. 21 Tr. 169:10-170:5, 179:9-19. Instead, Mr. Siegert relied on "subjective reasons," including his experience, and acknowledged that it was "kind of an esoteric difficult thing to do; it doesn't lend itself to specific analysis." Oct. 21 Tr. 169:21-23. Mr. Siegert acknowledged that he had not calculated the financial impact of the treatment of OID as of the date of the Exchange. Oct. 21 Tr. 188:5-8. And, while Mr. Siegert purported to rely on his experience in opining that an adverse ruling on OID in the instant case would make future restructurings more difficult, the only concrete example he mentioned was a case in which Mr. Siegert himself was involved, making his statement a self-serving and self-fulfilled prophecy. Oct. 21 Tr. 184:2-7.

105. Third, while Mr. Siegert had emphasized in his expert reports and direct testimony the similarities between the *Chateaugay* exchange and the Exchange in this case, he retreated from this position on cross-examination. Mr. Siegert acknowledged that, unlike in *Chateaugay*, the nature of the debt in the Exchange was fundamentally altered, with the Junior Secured Notes obtaining security and structural seniority. Oct. 21 Tr. 189:22-190:22.[16] He also testified that the incentives in the ResCap Exchange were exactly the opposite of those in *Chateaugay*:

> Q: So in the ResCap if you – if you thought the company was going to avoid bankruptcy your incentive would be to hold out, right?

[16] Mr. Siegert testified that he concluded from trading prices of the notes after the exchange that the market did not place much value on the collateral. Oct. 21 Tr. 215:9-16. However, he acknowledged he had not controlled for other factors that might have affected the trading prices of the notes. Oct. 21 Tr. 216:2-217:12. He further testified that pledging collateral to the Notes was a "material difference" between the Old Notes and the Junior Secured Notes. Oct. 21 Tr. 213:19-22.

A: Yes, if you thought it would last through and beyond your maturity date, yes.

Q: Okay. And the inducements that were offered to holders to exchange in ResCap were inducements that would lead to an enhanced recovery in the event of a bankruptcy, right?

A: Potentially, yes.

Q: Okay. So in ResCap, if you thought that the company would ultimately end up in bankruptcy, you could well conclude that you would do better by exchanging, right?

A: Not necessarily, but I think that probably was the thought process at the time.

Q: Okay. So the incentive structure of the exchange offers in Chateaugay and ResCap were exactly opposite, correct?

A: They were both trying to avoid bankruptcy and rehabilitate the company and provide incentives to holders in order to achieve that result.

Q: Okay. I'm talking about the incentive to holders. The incentive to holders in Chateaugay was if you think you're going to avoid – we're going to avoid bankruptcy, you should exchange, if you think we're going into bankruptcy, you should hold, right?

A: Okay, yes, I understand your question. Yes, I agree with you.

Q: And the ResCap the situation was the opposite, right?

A: Yes.

Oct 21 Tr. 198:14-199:16.

106. Finally, while Mr. Siegert had alluded in his expert report to the difficult and inconsistent application of market trading information to the calculation of OID, the issue is not as troubling as Mr. Siegert implied. As Mr. Siegert testified on cross-examination, he could have done an analysis to determine how much of a difference bankruptcy treatment of OID would have had in a holder's valuation of the new Junior Secured Notes in the Exchange. Oct.

21 Tr. 185:4-8. He further acknowledged that for every exchange, at the very least a calculation of OID for tax purposes would be required. Oct. 21 Tr. 187:16-18.

V. FINDINGS RELEVANT TO SCOPE AND IDENTITY OF COLLATERAL

A. The Revolver, the Junior Secured Notes, the Intercreditor Agreement, and the LOC Facility

107. On or about June 4, 2008, RFC and GMACM, as borrowers, ResCap and certain other entities as guarantors, and certain entities as obligors, entered into a revolving loan facility (the "Revolver") as amended from time to time. The Revolver was provided under the Loan Agreement, dated as of June 4, 2008 (as amended from time to time prior to December 30, 2009, the "Original Revolver Loan Agreement") with AFI as initial lender and lender agent (the "Revolver Lender"). PTO ¶ 10; PX 5.[17] To secure the obligations under the Revolver, ResCap and certain of its subsidiaries, as grantors, granted a security interest in favor of Wells Fargo, as first priority collateral agent and collateral control agent (in such capacities, the "First Priority Collateral Agent"), pursuant to the First Priority Pledge and Security Agreement and Irrevocable Proxy, on or about June 4, 2008 (as amended from time to time prior to December 30, 2009, the "Original Revolver Security Agreement"). PTO ¶ 11; PX 7.

108. At the same time, ResCap issued Junior Secured Notes pursuant to an indenture (the "Notes Indenture") dated as of June 6, 2008, among ResCap, as issuer, certain other entities as guarantors and obligors, and U.S. Bank National Association, as the original indenture trustee (the "Initial Notes Trustee"). PX 1. To secure the obligations under the Notes,

[17] The other obligors under the Original Loan Agreement were the following: ResCap, GMAC Residential Holding Company, LLC ("GMAC-RHC"), GMAC-RFC Holding Company, LLC ("GMAC-RFC"), Homecomings Financial, LLC ("Homecomings"), GMAC Model Home Finance, LLC ("GMAC Model Home"), Developers of Hidden Springs, LLC ("Hidden Springs"), DOA Holding Properties, LLC ("DOA Holding"), Passive Asset Transactions, LLC ("PATI"), Residential Mortgage Real Estate Holdings, LLC ("Residential Mortgage"), Residential Funding Real Estate Holdings, LLC ("Residential Funding"), RFC Asset Holdings II, LLC ("RAHI"), Homecomings Financial Real Estate Holdings, LLC ("Homecomings Financial"), and Equity Investment I, LLC ("Equity I"). PX 5.

ResCap and the guarantors under the Notes Indenture granted a security interest in favor of the Third Priority Collateral Agent, Wells Fargo, pursuant to the Third Priority Pledge and Security Agreement and Irrevocable Proxy, on or about June 6, 2008 (as amended from time to time prior to December 30, 2009, the "Original Notes Security Agreement") with the Notes Trustee and the Third Priority Collateral Agent. PTO ¶ 13; PX 3.[18]

109. The Revolver and the Notes are secured by substantially the same collateral (the "Collateral"). To set out their relative priorities in the Collateral, on or about June 6, 2008, the Revolver Lender and the Notes Trustee entered into the Intercreditor Agreement (as amended from time to time, the "Intercreditor Agreement"). Additional parties to the Intercreditor Agreement were the First Priority Collateral Agent, the Second Priority Collateral Agent,[19] the Third Priority Collateral Agent, RFC, GMACM, and ResCap, together with the other obligors. PTO ¶ 14; PX 2.

110. Under the Intercreditor Agreement, the Third Priority Collateral Agent has limited rights with respect to the Collateral. For example, so long as the obligations under the Revolver have not been satisfied:

a. the First Priority Collateral Agent has the exclusive right to enforce rights and exercise remedies with respect to, and make determinations regarding, the release or disposition of, the Collateral without the consent or consultation of the Third Priority Collateral Agent and the other third priority secured parties (collectively, the "Third Priority Secured Parties"). PX 2 § 3.1(a)(i)(A).

b. the Third Priority Secured Parties cannot exercise (and waive) any right or remedies with respect to the Collateral, institute any action or proceeding with respect to such rights or remedies (including any action of

[18] The additional grantors include RFC, GMACM, GMAC-RFC, GMAC-RHC, Homecomings, RAHI, PATI, Equity I, Homecomings Financial, Residential Funding, DOA Holding, Residential Mortgage, GMAC Model Home and Hidden Springs. PX 3.

[19] Given that the Second Lien Notes were satisfied prior to the Petition Date, discussion of the Intercreditor Agreement does not include the Second Priority Collateral Agent.

forbearance), or object to any foreclosure proceeding brought by the First Priority Collateral Agent. PX 2 § 3.1(a)(i)(A).

c. the Third Priority Secured Parties agree not to interfere with or delay any sale or disposition of Collateral implemented by the First Priority Collateral Agent. PX 2 § 3.1(d)(i).

d. the Third Priority Secured Parties are deemed to waive any right to commence any enforcement or foreclosure action with respect to the Collateral. PX 2 § 3.2(a).

e. if the First Priority Collateral Agent releases any of its liens on the Collateral in connection with its exercise of remedies (including any sale or other disposition of the Collateral), the lien of the Third Priority Secured Parties will be deemed automatically and unconditionally released, and the Third Priority Collateral Agent will be required to execute and deliver any necessary documents to effectuate such release. PX 2, § 5.1(a)(ii). Until the discharge of the Revolver claims, the Third Priority Secured Parties irrevocably appoint the First Priority Collateral Agent as their true attorney-in-fact for purposes of carrying out the terms of section 5.1 and for executing all release documents. PX 2 § 5.1(c).

f. the First Priority Collateral Agent may sell or release liens in any of the Collateral, without incurring any liability from the Third Priority Secured Parties. PX 2 § 7.3(b)(iii).

g. the Third Priority Secured Parties agree that no first priority secured party shall have any liability to it and the other third priority secured parties, and waive any claim against any first priority secured party arising out of any action taken or omitted with respect to the foreclosure, sale, liquidation, or other disposition of the collateral. The First Priority Collateral Agent further agrees that none of the first priority secured parties has any duty to them, express or implied, fiduciary or otherwise, with respect to the maintenance and preservation of the collateral. PX 2 § 7.3(d).

h. the sole right of the Third Priority Secured Parties with respect to the Collateral is to hold a perfected security interest in the Collateral. PX 2 § 3.1(b)(iii).

111. In 2009, the Debtors determined that they needed additional financing to continue operating their businesses. To that end, on or about December 30, 2009, RFC and GMACM, as borrowers, entered into the LOC Facility provided under Amended and Restated Loan Agreement (as amended from time to time the "LOC Loan Agreement" with AFI as initial

lender and lender agent thereunder (the "LOC Lender"). PTO ¶ 18; PX 9. To secure the obligations under the LOC Facility, ResCap, and certain other Debtors granted a security interest to the LOC Lender pursuant to the Amended and Restated Pledge and Security Agreement and Irrevocable Proxy, dated December 30, 2009 (as amended from time to time, the "LOC Security Agreement") with GMAC Investment Management LLC, as secured party, and AFI, as omnibus agent, lender agent, lender and secured party. PTO ¶ 19.

112. In connection with the creation of the LOC Facility, and simultaneously therewith, (a) the Original Revolver Loan Agreement was amended and restated pursuant to the Amended and Restated Loan Agreement (as amended from time to time, the "Revolver Loan Agreement," by and among AFI, as initial lender and lender agent thereunder (the "Revolver Lender"); RFC and GMACM, as borrowers (the "AFI Borrowers"), ResCap, Homecomings Financial, LLC, GMAC-RHC, and GMAC-RFC, as guarantors (the "AFI Guarantors"), and certain other entities signatories thereto as obligors, PTO ¶ 16; Revolver Loan Agreement (PX 6);[20] (b) the Original Revolver Security Agreement was amended and restated pursuant to the Amended and Restated First Priority Pledge and Security Agreement and Irrevocable Proxy (as amended from time to time, the "Revolver Security Agreement" and together with the Revolver Loan Agreement, the "Revolver Documents") PTO ¶ 17; Revolver Security Agreement (PX 8);[21] and (c) the Original Notes Security Agreement was amended and restated pursuant to the Amended and Restated Third Priority Pledge and Security Agreement and Irrevocable Proxy (as

[20] In February 2011, Debtor Executive Trustee Services, LLC ("ETS") executed a joinder to the AFI Revolver to become a guarantor. PTO ¶ 23. There is no evidence that ETS executed a corresponding joinder, or otherwise became an obligor, to the Junior Secured Notes.

[21] Parties to the Revolver Security Agreement are the First Priority Collateral Agent; Revolver Lender; AFI Borrowers; AFI Guarantors; Developers of Hidden Springs, LLC, DOA Holdings Properties, LLC, GMAC Model Home Finance I, LLC, Equity Investment IV, LLC, RFC Construction Funding, LLC, RAHI, and PATI, as equity pledgors (collectively, the "AFI Equity Pledgors"); RAHI and PATI, as grantors of certain financial asset backed securities ("AFI FABS Grantors"); other parties signatories thereto as additional account parties; and any other person that became a grantor under the Revolver Security Agreement.

amended from time to time, the "Notes Security Agreement" and, together with the Notes Indenture, the "Notes Agreements"), Notes Security Agreement (PX 4).[22]

B. The Collateral Securing the Revolver and the Notes

113. The categories of assets pledged to secure the obligations under the Revolver (the "Revolver Collateral") were substantially the same as those granted to secure the obligations under the Notes. The following collateral was pledged under the Notes: (a) certain assets and property of ResCap, the Notes Guarantors, and the Additional Notes Grantors (collectively, the "Notes Grantor Collateral"); (b) certain equity interests, certain promissory notes and other debt instruments, certain deposit and security accounts, and certain related assets of the Notes Equity Pledgors (collectively, the "Notes Equity Pledgor Collateral"); (c) all "Financial Assets" (as defined in Article 8 of the UCC) and certain related assets of the FABS Grantors (collectively, the "Notes Financial Asset Collateral"); and (d) certain deposit accounts and certain related assets of the Additional Account Parties (collectively, the "Notes Deposit Account Collateral", and together with the Notes Grantor Collateral, and the Notes Equity Pledgor Collateral, subject to subsequent lien releases and excluding any Excluded Assets (as defined below), the "Notes Collateral"). Revolver Security Agreement §§ 2-5 (PX 8).

114. The Notes Collateral included the "Commercial Tort Claims described on Schedule V" to the Notes Security Agreement. Notes Security Agreement § 2(d) (PX 4). However, no Commercial Tort Claims were identified or listed on Schedule V. Schedule V has never been amended or modified. The Third Priority Collateral Agent did not file a UCC-1

[22] Parties to the Notes Security Agreement are ResCap, as issuer; RFC, GMACM, GMAC-RFC, GMAC-RHC, and Homecomings Financial, LLC, as guarantors (collectively, the "Notes Guarantors"); AFI FABS Grantors, as grantors of certain financial asset backed securities (the "Notes FABS Grantors"); AFI Equity Pledgors, as equity pledgors (collectively, the "Notes Equity Pledgors"); other parties signatories thereto as additional account parties (the "Notes Additional Account Parties"); and any other person that became a grantor under the Revolver Security Agreement (the "Additional Notes Grantors").

financing statement specifically identifying any Commercial Tort Claim in which the Noteholders would have a security interest. PTO ¶ 21. As a result, the Court previously found that the Noteholders do not have a properly perfected lien in any Commercial Tort Claims. September 20 Opinion, 497 B.R. at 415.

115. The Collateral excluded certain categories of collateral that were collectively defined under the Notes Security Agreement and the Revolver Security Agreement as "Excluded Assets," including the following: (a) any asset (including contract, general intangibles, equity investments and other agreements) as to which a grant of security interest would have violated applicable law or rule, resulted in the invalidation thereof, or would have provided any party thereto with a right of termination or default with respect thereto or with respect to any Bilateral Facility to which such asset was subject as of the closing date of the Original Revolver Loan Agreement; and (b) mortgage loans and other assets pledged under the LOC Loan Agreement between December 2009 and January 2010. *See* Notes Security Agreement § 1 (PX 4) (defining "Excluded Assets" sections (c) and (e)); Revolver Security Agreement § 1 (PX 8) (defining "Excluded Assets" sections (c) and (e)).

C. Flexibility in Revolver Documents, Notes Agreements, and the Intercreditor Agreement

116. At the time that the Revolver Documents and Notes Agreements were negotiated, all of the parties were aware of the Debtors' future needs for additional financing. In order to enable the Debtors to obtain such financing on a going-forward basis, it was crucial for the Debtors to have the flexibility to release Collateral from the liens securing the Revolver and

Junior Secured Notes and to pledge such released Collateral to secure such additional financing. Farley Direct ¶ 13.[23]

117. The Debtors also needed the flexibility to release Collateral from such liens simply due to the nature of their business – they were constantly originating and acquiring loans (and associated servicing rights), and were also constantly selling those assets. Similarly, the Debtors had other secured financing facilities, and they needed flexibility to continue those facilities and to maintain the collateral that had been pledged to secure those facilities. By contrast, AFI wanted the Revolver to be secured by as many assets as was feasible and to be assured that there were sufficient assets to repay the Revolver. Farley Direct ¶ 13.

118. The Revolver Documents and the Notes Agreements reflect the balance negotiated by the parties between the Debtors' need for operational flexibility and the Revolver Lender's and the Junior Secured Noteholders' desire to maintain sufficient Collateral to secure their respective claims.

119. For example, the Notes Agreements permit the Debtors to grant liens in whole loan mortgages, residual interests, securities, and other financing assets to secure certain permitted indebtedness thereunder, which included:

> Indebtedness incurred in the ordinary course through financing, securitization and hedging activities, including customary lines of credit, repurchase transactions or warehouse financings involving residential mortgage loans, home equity loans or second lien loans (including any reasonable extension or evolution of such activities including for purposes of financing other types of financial assets) and other Indebtedness on terms at least as favorable to the Company or the applicable Subsidiary than [sic] would be available on an arms-length basis.

[23] References to "Farley Direct" are to the Direct Testimony of Theresa Farley, submitted by declaration. [Adv. No. 13-01277, Dkt. No. 131]

Notes Indenture § 1.01 (PX 1) (defining "Permitted Funding Indebtedness," "Permitted Liens," and "Financial Assets"); Revolver Loan Agreement Schedule 1.01 (PX 6) (defining "Permitted Funding Indebtedness," "Permitted Liens," and "Financing Assets").

120. Furthermore, the Notes Indenture permits the release of Notes Collateral in order to secure any such indebtedness. Section 8.04(a)(i) of the Notes Indenture provides that Noteholders' liens on the Notes Collateral may be released in accordance with the Intercreditor Agreement and shall be released upon a sale or other disposition to the extent such transaction is not prohibited by Section 4.10 of the Notes Indenture (which in turn provides certain guidelines for a sale of the Notes Collateral). PX 1.

121. The means by which collateral could be released from the Revolver Lender's lien depends on which of the two categories of collateral under the Revolver it falls into: "primary collateral" or "blanket lien" collateral (as the Debtors often referred to this category) (the "Blanket Lien Collateral"). Farley Direct ¶ 25. Primary Collateral, which served as the "borrowing base" under the Revolver to support additional borrowings or to prevent borrowing base shortfalls, and which initially consisted of only certain scheduled assets, could be released from liens only so long as the Debtors substituted cash in an amount equal to the "fair value" of the released Primary Collateral. Revolver Loan Agreement § 7.02(k) (PX 6).

122. In contrast, Blanket Lien Collateral, which are assets other than Primary Collateral that (i) were pledged as security under the Revolver and the Notes (*see*, *e.g.*, Revolver Security Agreement § 2 (PX 8); Notes Security Agreement § 2 (PX 4)); and (ii) do not fall within the definition of "Excluded Assets" under those facilities and which were not included in the borrowing base under the Revolver, could be released from the Revolver Lender's (and Noteholders') liens without complying with the restrictive covenants that governed the release of

Primary Collateral and without the need to replace such collateral or to pay down the Revolver. Farley Direct ¶ 25.

123. Also, as discussed above, the Intercreditor Agreement permits the First Priority Collateral Agent to release liens (on behalf of itself and the Noteholders) on any part of the Collateral in connection with a sale or other disposition of the Collateral permitted under the Revolver Documents or Notes Agreements. Intercreditor Agreement §§ 3.1(a)(1)(B), 5.1(a)(ii), 7.3(b)(iii) (PX 2).

124. Notably, given these flexible standards, the Debtors were able to pledge certain mortgage loans and related assets (the "LOC Collateral") to obtain and secure the LOC Facility by requiring that the First Priority Collateral Agent and the Third Priority Collateral Agent release their respective liens on such collateral *See* Notes Security Agreement § 1 (PX 4) (defining "Excluded Assets" section (e)); Revolver Security Agreement § 1 (PX 8) (defining "Excluded Assets" section (e)); PX 134; Farley Direct ¶¶ 52-61.

125. These various provisions gave the Debtors the requisite flexibility to operate their businesses, while also providing sufficient protection to the secured parties. The Debtors could cause Collateral to be released only in accordance with the Notes Agreements. Specifically, Collateral could be released only in connection with financing facilities that met the criteria and definition agreed to by the parties (such as the definition of Permitted Funding Indebtedness, described above).

126. The flexibility of releasing the Notes Collateral was known in the market at the time of the issuance of the Notes. One Credit Sights analyst report evaluated the collateral package granted under the Notes and concluded: "we expect more of ResCap's remaining unencumbered asset base that is supposed to support the new notes will be encumbered away,

effectively rendering third lien and perhaps second lien holders as well in a de facto position closer to equity." PX 235 (emphasis in original);[24] Oct. 21 Tr. 77:18-78:23.

127. The Debtors further protected their need for flexibility to use their assets by excluding broad categories of assets from the grant of Collateral under the Revolver Documents and the Notes Agreements (*i.e.*, the Excluded Assets). These include certain assets the pledging of which could have resulted in negative economic consequences, or assets that simply could not have been pledged pursuant to applicable government regulations or the terms of other agreements with third parties. Farley Direct. ¶ 19.

128. During the negotiations of the Revolver, AFI attempted to limit the definition of "Excluded Assets" to a list of identified assets. The Debtors refused and instead negotiated the current definition covering broad categories of assets. Farley Direct. ¶ 21.

129. Finally, in addition to not including the Excluded Assets in the collateral pool granted as security under the Revolver Security Agreement and the Notes Security Agreement, other assets of the Debtors were excluded from the granting clause and therefore not part of the Collateral because those assets were owned by entities that were not obligors under the Revolver Documents or the Notes Agreements or because they were owned by entities that did grant liens, but the assets did not fall within the narrow definitions of collateral thereunder – *e.g.*, the Notes Equity Pledgor Collateral, the Notes Financial Asset Collateral, and the Notes Deposit Account Collateral. *See* Farley Direct ¶ 23; Revolver Loan Agreement Schedule 1.1 (PX 6); Notes Security Agreement § 1 incorporating by reference the definition from the Revolver (PX 4).

[24] The Credit Sights analyst elaborated, "The broader exchange offers would extend the company's liability structure and create second and third lien positions for unsecured bondholders in exchange for this extension. The junior lien positions would allow GMAC to solidify its structural seniority for a new 'at least' $3.5 million first lien senior secured credit facility." PX 235.

D. The CFDR

130. The Revolver Loan Agreement and LOC Loan Agreement contained a variety of collateral tracking and reporting requirements for their Collateral. Farley Direct ¶ 53. The Revolver Loan Agreement, for example, required the Debtors to provide the Revolver Lender with a monthly collateral report regarding the nature and value of the Primary Collateral. Farley Direct ¶ 53; *see also* Revolver Loan Agreement § 2.04(b) and Sch. 2.04 (PX 6). There were no reporting requirements as to Blanket Lien Collateral because the value of the Blanket Lien Collateral was not included in the Revolver's borrowing base. Farley Direct ¶ 26. The Debtors were also required to provide a series of collateral reports – some daily and some monthly – under the LOC Facility. Farley Direct ¶ 26. *See also* LOC Loan Agreement §§ 2.04(a)-(b) and Sch. 2.04 (PX 9); PX 116, PX 117, PX 118, PX 119.

131. The Notes Agreements, however, did not require regular collateral reporting. The Debtors were merely required to maintain their records relating to the Notes Collateral "in such a manner as will enable the Third Priority Collateral Agent or its designees to determine at any time the status of [such] Collateral." Notes Security Agreement § 11(a)(iv) (PX 4). The Third Priority Collateral Agent had the right to access and audit the Debtors' books and records with respect to the Notes Collateral and the Notes Trustee had the right to request information concerning the Notes Collateral from the Third Priority Collateral Agent. Farley Direct ¶¶ 26, 28 n.2; *see also* Notes Security Agreement § 15(aa) (PX 4). Prior to the Petition Date, however, neither the Third Priority Collateral Agent nor the Notes Trustee ever exercised these rights (beyond receiving the information delivered as part of the lien release process, discussed below). At all times, the Third Priority Collateral Agent has relied on the Debtors' books and records to monitor the Collateral. Farley Direct ¶ 28.

132. To comply with the numerous collateral tracking and reporting requirements of the Revolver Loan Agreement and the LOC Loan Agreement, the Debtors developed and implemented sophisticated and reliable technological systems and operational procedures. Farley Direct ¶ 29. The Consolidated Financial Data Repository, or "CFDR," became the Debtors' primary record for tracking their assets and was maintained in the ordinary course of the Debtors' business. Farley Direct ¶ 30; *see also* PX 139. The CFDR tracks various categories of assets, including without limitation, held for sale ("HFS") and held for investment ("HFI") mortgage loans, Federal Housing Administration and Department of Veterans Affairs ("FHA/VA") receivables, servicing advances, lending receivables, service fees and late charges, real estate owned property, trading securities, and mortgage servicing rights. Farley Direct ¶ 30 n.4.

133. Each asset is marked in the CFDR to reflect the facility to which it has been pledged. Oct. 16 Tr. 194:3-10. Because the collateral pools for the Revolver and the Notes are substantially the same, the CFDR essentially tracks Notes Collateral by tracking the Revolver Collateral. Farley Direct ¶ 30.

134. Assets comprising Primary Collateral under the Revolver Security Agreement are tracked and marked in the CFDR as pledged to the Revolver to facilitate the Debtors' reporting thereon. Oct. 16 Tr. 194:3-6. Assets comprising Blanket Lien Collateral under the AFI Revolver are also tracked, but prior to the Petition Date, those assets were marked as "Unpledged" in the CFDR because (i) the Debtors were not required, and the CFDR was not used, to report on Blanket Lien Collateral; and (ii) Blanket Lien Collateral was not subject to the same cash constraints (i.e., requirements relating to use of proceeds) as Primary Collateral. Farley Direct ¶ 35.

135. However, "Unpledged" assets included more than just the Blanket Lien Collateral. Farley Direct ¶ 35; Oct. 16 Tr. 194:7-10. Rather, assets that were marked in the CFDR as "Unpledged" included, in addition to the Blanket Lien Collateral, the following categories of collateral: (i) Excluded Assets under the Revolver and the Notes; and (ii) assets that had been released from other facilities and not repledged. Farley Direct ¶ 35.

136. Leading up to the Petition Date, the Debtors recognized that they would need to identify Blanket Lien Collateral during the Chapter 11 cases. Accordingly, the Debtors undertook an analysis of all of the assets marked as "Unpledged" in the CFDR and determined whether to designate them as Blanket Lien Collateral or otherwise. Farley Direct ¶ 36. By the Petition Date, the Debtors were able to create a comprehensive list of both Primary Collateral and Blanket Lien Collateral using CFDR data. For those categories of Blanket Lien Collateral that were not tracked in the CFDR – *e.g*, cash, accounts receivable, and derivatives – the Debtors used general ledger data. Farley Direct ¶ 37.

137. Ms. Farley referred to the CFDR as the "source of truth" and testified that the CFDR is a Sarbanes-Oxley ("SOX") compliant financial tool that is auditable, verifiable, and subject to a heightened level of scrutiny and attention by the Debtors'/AFI's SOX teams and the Debtors' external auditors, Deloitte & Touche. Farley Direct ¶ 43; Oct. 16 Tr. 233:1-6, 234:23-235:25. Ms. Farley testified that these controls were rigorous because the CFDR was a critical financial technology for the Debtors. Oct. 16 Tr. 235:24-25. Ms. Farley further detailed the strict controls on the collateral tracking process under the CFDR, including the processes for (i) designating an asset as being pledged to a particular facility; (ii) changing an asset's designation; (iii) reconciling any inconsistencies between the CFDR data, the general ledger, and source data submitted by various business units; and (iv) submitting collateral reports under the

Revolver and LOC Facility. Farley Direct ¶¶ 30 n.4, 33-34, 38-42; Oct. 16 Tr. 194:1-10. *See also* PX 162.

138. The Court has already found that the CFDR is a business record maintained by the Debtors in the ordinary course of business. Oct. 17 Tr. 32:17-33:17, 40:7-41:18. Ms. Farley testified at length as to the reliability and accuracy of the CFDR, and the Court finds her testimony to be credible and well-informed. Based on Ms. Farley's testimony and the other evidence proffered at trial, the Court also finds that the CFDR is a reliable and accurate tool for tracking the Collateral.

E. The Collateral Releases

139. As described above, the Debtors had the right to release the Collateral pledged under the Revolver and the Notes in several different circumstances, including to allow the Debtors to obtain additional permitted indebtedness, and to repledge the released assets as collateral to support such indebtedness. *See* Notes Indenture § 4.09 (PX1); Revolver Loan Agreement § 7.02(f) (PX 6).

140. The release of the Third Priority Collateral Agent's security interest in the Notes Collateral could be effectuated either (a) "automatically" without any party's prior written consent, if the release was in connection with certain specified types of ordinary course transactions or transactions authorized under the applicable credit agreements (*see, e.g.*, Notes Security Agreement § 10 (PX 4); Notes Indenture §§ 4.10, 8.04 (PX 1); Intercreditor Agreement §§ 3.1(a), 5.1(a), 5.1(c), and 7.3(b) (PX 2); Revolver Loan Agreement § 12.11(b) (PX 6)); or (b) upon request of the Debtors and the execution of a release by Wells Fargo, if the release was in connection with any other types of transactions. *See* Notes Security Agreement § 8.04 (PX 4); Farley Direct ¶¶ 45-50.

141. "Automatic" releases were a regular occurrence as loans and other assets regularly came on and off of the Debtors' books and records in the ordinary course of business. Oct. 16. Tr. 201:1-11. Between June 2008 and the Petition Date, the Debtors effectuated hundreds of such "automatic" releases. Farley Direct ¶ 45-47. The non-automatic releases were subject to heightened procedures, including the requirement to obtain consent from the Revolver Lender and executed releases from Wells Fargo (in its capacity as First, Second, and Third Priority Collateral Agent). Farley Direct ¶ 48. When appropriate, Wells Fargo would execute and cause to be filed UCC-3 financing statements reflecting the release of collateral. Farley Direct ¶ 48; Oct. 16 Tr. 247:15-19; Pinzon Dep. 39:16-20; PX120; PX165.

142. These non-automatic release transactions were different from the automatic release process in another important respect: instead of attaching schedules that listed specific loan or asset identification numbers, the parties generally chose to identify the assets subject to non-automatic release through negotiated words and broad categorical descriptions. Farley Direct ¶ 49; PX 120, PX 122, PX 128, PX 129, PX 133, PX 134.

143. Following the completion of a release, sale, pledge or other disposition of an asset, the CFDR would be updated promptly – generally the same day – to reflect such transaction. Oct. 16 Tr. 242:2-10.

F. The Collateral Releases in Connection with the LOC Facility

144. In 2010 and 2011, the Third Priority Collateral Agent consented effectively released its lien on a variety of assets included in the Notes Collateral that were, and would be, pledged to the LOC Lender under the LOC Facility, including (a) certain mortgage loans, servicing rights and other assets (together, the "Released Loan Collateral"), and (b) certain Freddie Mac servicing advances (the "Released Advances," and collectively with the Released Loan Collateral, the "Blanket Released Collateral").

145. To effectuate the releases, the Third Priority Collateral Agent executed (i) a Partial Release of Collateral, dated May 14, 2010, releasing the security interest in the Released Loan Collateral that was granted under the Notes Agreements (the "Blanket Loan Release"), and (ii) a Partial Release of Collateral, dated May 27, 2011, that released the security interest in the Released Advances that was granted under the Notes Agreements (the "Servicing Advance Release," and, together with the Blanket Loan Release, the "Blanket Releases"). *See* Blanket Loan Release (PX 134) and Servicing Advance Release (PX 130 at 1176-1305). The Third Priority Collateral Agent also filed UCC-3 amendments that deleted the Blanket Released Collateral from the collateral set forth in the original UCC-1's (as amended) filed by the Third Priority Collateral Agent. PX 133 and PX 131 at 1351-58. Exhibits annexed to these UCC-3s contained descriptions of the Blanket Released Collateral that were identical to those in the Blanket Releases themselves. *Id*.

146. The Court has previously held that the Blanket Loan Release is "effective," "unambiguous," and entitled to enforcement. MTD decision; 22-23.

147. The Blanket Loan Release described various categories of Released Loan Collateral that was being released. This included, *inter alia,* any existing or future rights in any "Subject Mortgage Loan," defined as:

> [A]ny Mortgage Loan[25] (a) which is ***identified in a Mortgage Schedule*** delivered under the LOC Loan Agreement, (b) the ***carrying value of which is included in*** the calculation of the borrowing based included in a ***borrowing base report or a monthly collateral report under the LOC Loan Agreement or*** (c) which is ***indicated in*** a Relevant Party's[26] ***books and records as having been pledged to the Revolver Lender***.

[25] "Mortgage Loan" (which is defined in the LOC Loan Agreement) includes, *inter alia*, any residential mortgage loan and any right to receive payment from FHA/VA in respect of insurance or guarantees of residential mortgage loans. PX 9 and PX 10 at Sch. 1.01-25.

[26] Relevant Party is an obligor under the Revolver Security Agreement and/or the Notes Security Agreement.

Blanket Loan Release at 8 (PX 134) (emphasis added). Under the clear language of the Blanket Loan Release, there are three *alternate* methods for identifying which mortgage loans are being released. The most liberal of these methods is to reference the Debtors' "books and records" and determine whether the subject loan is marked as having been pledged under the LOC Facility. For purposes of tracking which collateral was pledged under the LOC Facility, the Debtors utilized the CFDR as such "book and record." CFDR (PX 139). The other two methods are (a) to reference notices delivered under the LOC Facility pursuant to which the Debtors requested to additional collateral; and (b) to reference the monthly borrowing base reports delivered under the LOC Facility. *See, e.g.*, PX 116, PX 117.

148. Other categories of collateral released under the Blanket Loan Release included (a) "Servicing Rights Collateral," defined as all of RFC's and GMACM's rights under existing or future agreements pursuant to which they were obligated to perform collection, enforcement or similar services to maintain and remit funds collected from mortgagees; and (b) all intangible assets and other general intangibles relating to Subject Mortgage Loans and Servicing Rights Collateral. PX 134.

149. The May 27, 2011 Servicing Advance Release described various categories of Released Advances that were being released from the Noteholders' liens. These assets included any existing and future advances relating to mortgage loans and real estate owned property made pursuant to certain contracts with Freddie Mac. *See* Servicing Advance Release, Exhibit A, § (a) (PX 130 at 1181–83).

150. Under the Blanket Releases (as well as other releases), loans, servicing advances and other assets were released from time to time from the Noteholders' liens and were pledged under the LOC Facility. Whenever this occurred, the Debtors would prepare documents

setting forth which assets were being added to the LOC Facility and promptly update the CFDR. The CFDR would then be subject to the rigorous testing and reconciliation processes that Ms. Farley described in her testimony. Farley Direct ¶¶ 38-49; Oct. 16 Tr. 204:23-205:12, 206:21-207:7.

151. The JSNs contend that there is no evidence demonstrating that approximately $910 million of collateral pledged under LOC Facility was properly released from the Noteholders' liens, despite unequivocal evidence to the contrary. There is no dispute that this $910 million of collateral is listed in the CFDR as pledged to the LOC Loan Agreement, nor is there any dispute that the $910 million is comprised of categories of assets that were released under either the Blanket Loan Release or the Servicing Advance Release. Farley Direct ¶ 62.[27] The JSNs ignore the sufficiency of these facts and argue that other evidence of the release of this $910 million of Notes Collateral should exist, including schedules of mortgage loans, notices of collateral addition to the LOC Loan Agreement, and electronic templates used to update the CFDR. The Debtors have explained that they either did not maintain all of these documents or did not locate them in their searches during discovery. *See* Stipulation [Adv. No. 13-01343, Dkt. No. 117]. *See also* Oct. 16 Tr. 237:6-239:14. Nor were they required to do so.

152. In light of the evidence that the Debtors did maintain, including the Blanket Loan Release, the Servicing Advance Release, and the CFDR, and the credible

[27] The $910 million questioned by the Ad Hoc Group is comprised of four categories of assets (domestic mortgage loans, FHA/VA receivables, REO properties, and servicing advances) and three of these categories (comprising approximately 97% of the assets at issue) plainly are covered by the Blanket Loan Release. Mortgage loans ($550.4 million) and FHA/VA receivables ($324.7 million) fall within the express definition of "Subject Mortgage Loans." REO properties ($5.9 million) are merely proceeds obtained upon foreclosure of mortgage loans and are therefore covered as well. *See* DX-AHD at p. 24 (setting forth the values of the various asset classes purportedly lacking evidence of release). The last category of assets questioned by the Ad Hoc Group – servicing advances ($29.4 million) – is plainly covered by the Servicing Advance Release. The Servicing Advance Release covers Freddie Mac servicing advances (*see* Servicing Advance Release, Exhibit A, § (a) (PX 130 at 1181–83), which were the only types of servicing advances pledged as collateral to the AFI LOC on the Petition Date. Farley Direct ¶ 62 & n.7. Therefore, the Servicing Advance Release covered all servicing advances that were pledged as collateral to secure the LOC Facility.

testimony concerning the Debtors' rigorous testing and auditing of the CFDR, the Court finds that the absence of these other potential sources of information for tracking the released collateral is irrelevant. Since there is no dispute that that $910 million of collateral is listed in the CFDR as pledged to the LOC Facility, nor is there any dispute that the $910 million comprises categories of assets that were released under the Blanket Loan Release and the Servicing Advance Release, the Court finds that the $910 million was effectively released and no further evidence is necessary to support such releases.

G. Allocation of Value under the APAs

(i) Allocation Under Ocwen APA

153. As part of the sale of the Servicing and Origination Assets, the Debtors had sought to sell the servicing and origination platforms associated therewith. These assets, however, carried significant liabilities because of overhead costs associated with the platform's staff, IT contracts, real property leases, and other items, without providing the purchasers any material benefit. PX 66; Puntus Direct ¶ 72; Marano Direct ¶ 62. The total estimated costs of shutting down and transitioning the servicing and origination platforms was estimated at approximately $108 million. This amount represented costs that the Debtors would otherwise have incurred if the bidders did not commit to take the origination and servicing platforms, including (a) 70% of the Debtors' estimated $49.6 million of severance cost, (b) $14.2 to maintain loans on the Debtors' servicing platform or transfer such loans to a different platform, (c) $9.9 million to continue originate and finalize loans, and (d) $49.6 million to service loans for a period of time post closing. *Id.* at 35:10-37:10, 41:18-42:3. As discussed above, the Debtors offered bidders a bid credit equal to approximately $108 million in exchange for committing to assume these costs under the Ocwen APA.

154. Ocwen's initial bid, like Nationstar's stalking horse bid, did not contractually obligate it or Walter to acquire the Debtors' servicing and origination platforms. PX 48; Puntus Direct ¶ 72; Marano Direct ¶ 62. Ocwen's final APA, dated November 2, 2012, addressed purchase price and payment of purchase price for the assets in its § 3.1(a). PX 19. Section 3.1(a) provided that the Purchase Price for the Purchased Assets would be calculated in accordance with Schedule 3.1(a). *Id.*; Puntus Direct ¶ 75. Schedule 3.1(a) stated that the Purchase Price would be determined solely based on the calculation of the value of the sum of the following: (i) various categories of MSRs and associated advances, the values of which are calculated according to stated formulas; (ii) certain non-financial assets, including goodwill and other intangible assets, *less* certain deductions. PX 20. The schedule stated that Ocwen allocated "$0" of the purchase price to the Purchased Assets set forth in § 2.1(v), *id.*, which were identified in § 2.1(v) as "goodwill and other intangible assets." PX 19. The original Nationstar APA, dated May 13, 2012, and the amended Nationstar APA, dated June 28, 2012, contained the same provisions. PX 33 §§ 3.1(a), 2.1(v), and Schedule 3.1(a); PX 34 §§ 3.1(a), 2.1(v), and Schedule 3.1(a); Puntus Direct ¶ 75.

153a. Ocwen's purchase price for each MSR and Servicing Advance was arrived at by applying a specified multiplier to (i) the calculated value of expected servicing fees over the life of the MSR, or (ii) the book value of the Servicing Advance. PX 19. Section 3.1(b) of the Ocwen APA provided that at the closing of the sale, the purchase price was to be determined using the formulas detailed in the Ocwen Purchase Price Schedule using the prior month's MSR and Servicing Advances balances. Id. Following the closing date, pursuant to section 3.2(b) of the Ocwen APA, the purchase price would be adjusted based on the actual MSR and Servicing Advances balances at the time of closing. *Id*. *See also* "Ocwen True-up Flow of Funds", PX 36.

155. During the bid process, Ocwen, the eventual winner, focused its efforts on purchasing ResCap's non-Fannie Mae financial assets, and its co-bidder Walter focused its efforts on purchasing ResCap's Fannie Mae financial assets. Ocwen, who had its own servicing platform, did not indicate any interest in acquiring the Debtors' servicing platform. PX 25, 38, 66; Puntus Direct ¶ 72; Marano Direct ¶ 24, 62.

156. Although Ocwen ultimately retained a large portion of the Debtors' employees and a majority of their technology, its representatives indicated during the bidding that it did not place any independent value on the Debtors' servicing platform in determining how much it was willing to pay. Puntus Direct ¶ 74. Specifically, in deposition, Ocwen's representative confirmed that in pricing its bid it valued only the Debtors' MSRs and Servicing Advances and did not place value on any of the Debtors' other tangible or intangible assets. Ocwen primarily intended to purchase the Debtors' MSRs and the associated advances. Ocwen agreed to commit to hiring the Debtors' employees, assume the Debtors' contracts, and keep the Debtors' MSR on its existing technology platform, primarily because it needed to top Nationstar, which had agreed to assume such obligations (to obtain the bid credits referred to above). Ziegenfuse Dep. Tr. 195:14-200:25; Puntus Direct ¶ 74; Marano Direct ¶¶ 64, 65; PX 56 at 35: 10-37:20. And although Ocwen ultimately agreed to assume the Debtors' origination and servicing platform, it nevertheless viewed its servicing system superior to that of the Debtors and planned to transfer off that system in stages over a year. Oct. 15 Tr. 190:3-18, 194:10-16, 195:22-196:2, 196:12-16.

157. Similarly, Walter was primarily interested in the Fannie Mae MSR portfolio and servicing advances, but as Walter's representative, Mr. Dixon, stated at his

deposition, "You couldn't cherry-pick the assets. Dixon Dep. 22:25-23:3, 27:15-16, 126:18-127:6.

158. Based on the clear and unambiguous language of the Ocwen Purchase Price Schedule, as well as the circumstances surrounding the marketing and sale of the servicing and origination platforms, the Court concludes that the purchase price allocated under the Ocwen APA to each of the purchased assets represents the fair market value of each such asset, including the servicing and origination platforms, which had no independent value.

(ii) Allocation under the Berkshire Hathaway APA

159. The Berkshire Hathaway APA sets out specific formulas for calculating the whole loans being purchased thereunder. Under the Berkshire Hathaway APA, six type of whole loans were sold: (1) "performing" (*i.e.*, not past due within last 30 days) first priority lien loans; (2) "non-performing" (i.e., past due within last 30 days) first priority lien loans; (3) performing second priority lien loans; (4) non-performing second priority lien; (5) certain other loans; and (6) advances payable in connection with any securitization transaction (subject to certain exclusions). PX 31 at 19 of 59.

160. Section 3.1(a) of the Berkshire Hathaway APA provides a formula for calculating the purchase price for the Whole Loan Portfolio by synthesizing the whole loan buckets, Purchase Price Percentage, and Document Deficiency Multiplier. Under section 3.1(a), the purchase price for the loans was calculated by multiplying the unpaid principal balance of the loans by an agreed to multiplier that varied based on the type of loan. PX 31 at 20 of 59; 23 of 59 (definition of "Whole Loan Purchase Price Percentage). The resulting product was then multiplied by a specified multiplier to take into account potential documentation deficiencies with the loans that would ultimately reduce their value to the buyer (e.g., the "Document Deficiency Multiplier"). The Berkshire Hathaway APA purchase price also included amounts

relating to accrued interest under the sold loans, $825,000 to reimburse the Debtors for expenses of maintaining certain zero balance loans part of the Whole Loan Portfolio, and an additional $50 million that was agreed to at the mini-auction. PX 31 at 23 of 59.

161. Based on the clear and unambiguous language of the Berkshire Hathaway APA, the Court concludes that the purchase price allocated under the Berkshire Hathaway APA to each of the purchased assets represents fair market value of each such asset.

(iii) JSNs Do Not Have a Lien on General Intangibles Sold Under APAs

(a) No Liens on Developed Software and Know-How

162. The JSNs' expert, Mr. Taylor, identified four categories of general intangibles sold under the APAs to which the JSNs try to reallocate the purchase price. One such category is $220 million of "developed software and know-how." Taylor Direct § 5.[28] Such developed software and know-how explained by Mr. Taylor to be the software and know-how utilized by the Debtors in operating their servicing and origination business. Taylor Direct ¶ ¶ 92, 169. Notably, the same software and know-how is used in association with all of the Debtors' MSRs – both GSE and PLS.[29] Oct. 15 Tr. 171:10-12; DX AIB at RCCUCCJSN12082678.

163. As discussed above, in May 2010, the JSNs' lien in the Released Loan Collateral was extinguished pursuant to the Blanket Loan Release. The Released Loan Collateral covered PLS MSRs and any related general intangibles, which is defined under the Blanket Loan Release by referencing the definition of such term under the Uniform Commercial Code. Blanket Loan Release at 6-7 of 187 (PX 134).

[28] References to "Taylor Direct" are to the Direct Testimony of John A. Taylor, Defendants' valuation expert, submitted by declaration. [Adv No. 13-01277, Dkt. No.137.]

[29] Even Mr. Taylor does not in his analysis differentiate between the software and know-how associated with PLS and GSE.

164. Because the developed software and know-how is a "general intangible" under the definition of the Uniform Commercial Code and is used in connection with the Debtors' PLS MSRs, it constitutes Released Loan Collateral.

165. The Blanket Loan Release of the JSNs' lien on software and know-how associated with the PLS MSRs effectively released their lien on the software and know-how used in connection with the GSE MSRs as well because the same system was used for both.

166. Given that the developed software and know-how identified by Mr. Taylor are general intangibles that were released under the Blanket Loan Release, even if the purchase price under the Ocwen APA was reallocated to attribute value to such general intangibles, the JSNs do not have a lien on such value.

(b) No Lien on Customer-Related Intangibles

167. Another category of general intangibles that Mr. Taylor identified was $129 million of "customer-related" intangibles.[30] Taylor Direct ¶ 5. Customer related intangibles are certain refinancing opportunities for a servicer to refinance a borrower's loan (the "Refi Opportunity"), including pursuant to the Home Affordable Refinance Program ("HARP"). These customer-related intangibles, valued by another JSN expert, Mr. Levine, consist of the Refi Opportunities inherent in the Debtors' GSE and other MSRs (though Mr. Levine only explicitly valued Refi Opportunities associated with the GSE MSRs). Oct. 23 Tr. 57:5-8.

168. As discussed above, certain of the Debtors' assets were not pledged as Collateral because they constituted "Excluded Assets." Such assets covered (a) assets pledged to a Bilateral Facility prior to June 8, 2008, and (b) assets that cannot be pledged under applicable law. Notes Security Agreement, §1 definition of "Excluded Assets" (c).

[30] Mr. Taylor derived such value by relying on the report of another JSN expert, Mr. Levine.

169. Bilateral Facilities were listed on Schedule 7.01(t) to the Original AFI Loan Agreement. One such facility listed on Schedule 7.01(t) was the facility provided by Citibank, N.A. ("Citibank"), ResCap and GMACM under the Loan and Security Agreement dated September 10, 2007 (the "Citi MSR Facility"). Under that facility, the Debtors pledged their mortgage servicing rights associated with Fannie Mae and Freddie Mac loans, and all books and records associated with those rights (collectively, the "Citi MSR Collateral"). Citi MSR Facility § 4.01 (PX 74).

170. The Citi MSR Collateral constitutes Excluded Assets that are not subject to the JSNs' lien.

171. Given that the customer-related intangibles identified by Mr. Taylor are inextricably linked to the GSE Collateral and are derived from the books and records that are part of the Citi MSR Collateral, even if the purchase price of the Ocwen APA was reallocated to attribute value to such general intangibles, the JSNs do not have a lien on such value.

(c) Any Goodwill Is Not Subject to the JSNs' Liens

172. While Mr. Taylor did not place any value on the Debtors' goodwill (actually finding it had a negative value of $46 million), valuation of the business performed by another JSN expert, Mr. Fazio (as adopted by their other expert, Mr. Siegert), suggests that the Debtors could have had goodwill intangible value of $623 million.

173. The Plaintiffs presented evidence that any goodwill (to the extent it existed at all) is inherently tied to and an extension of the MSRs themselves. Marano Direct ¶ 67. In contrast, the JSNs have failed to proffer any evidence of existence of goodwill, or if it exists that it is subject to their liens. In fact, Mr. Siegert acknowledged that the intangible value of the company is tied to the servicing portfolio. Oct. 23 Tr. 139:10-140:1.

174. The Court therefore finds that no goodwill existed as of the Petition Date.

175. As such, any purported goodwill came about solely as the product of the Debtors' *postpetition* efforts to free the assets from encumbrances and threats of litigation, which had rendered them unsaleable prior to the petition date.

176. Because there was no goodwill on the Petition Date, any goodwill generated during the case is by definition "after-acquired property" under section 552(b) of the Bankruptcy Code.

177. Accordingly, the Court finds that any potential goodwill constitutes after-acquired collateral, not subject to the JSNs' liens. Moreover, to the extent any goodwill value hypothetically existed on the Petition Date, the JSNs have not demonstrated what portion, if any, of such value is subject to their liens. Thus, even if the purchase price under the Ocwen APA was reallocated to attribute value to such goodwill, the JSNs do not have a lien on such value.

H. Stipulation of Liens under the AFI DIP Order

178. The Debtors stipulated, pursuant to the AFI DIP Order, that the Notes Collateral includes, but is not limited to, all of the categories of assets identified in the "Ally Revolver" and "Blanket" columns on Exhibit A of the AFI DIP Order. PTO ¶ 28.

179. The Debtors further stipulated, pursuant to paragraph 5(g) of the AFI DIP Order, that security interests granted to the JSNs "are valid, binding, perfected and enforceable priority liens on and security interests in the personal and real property constituting 'Collateral' under and as defined in the Junior Secured Note Documents." AFI DIP Order ¶ 5(g) (PX 76). "Junior Note Documents" is, in turn defined, under the AFI DIP Order to include the Note Agreements "*and all other documents executed in connection therewith*"— a definition that clearly encompasses all releases (including the Blanket Releases) executed pursuant to the Notes Agreements.

180. The JSNs contend that, under paragraph 5(g), the Debtors stipulated that the Noteholders' liens extend to all collateral to which a security interest was initially granted, including the LOC Collateral that was previously released by the Third Priority Collateral under the Blanket Release (and, as a matter of law, may not have existed as of the Petition Date). PTO JSN Contentions ¶ 18.

181. The Court rejects the JSNs' argument concerning paragraph 5(g) and finds that it did not restore or revive the Noteholders' lien on previously released collateral.

182. The JSNs have failed to produce any evidence to support that contention. The JSNs' witness, Mr. Siegert – the lead engagement partner for Houlihan Lokey Capital, Inc. ("Houlihan"), which was retained by the JSNs – testified that as of the Petition Date (including at the time of the negotiations of the order) he had no belief that the Debtors' stipulations in paragraph 5(g) would revive the Noteholders' previously released liens. Oct. 23 Tr. 102:4-6; 102:19-24; 105:3-25; 115:4-8; 125:12-126:15; 126:23-127:21. Mr. Siegert explained that if counsel for the JSNs had concluded that paragraph 5(g) would revive more than $1 billion of LOC Collateral, that would have been material information for Houlihan and the group to know and a material factor in estimating the value of the Noteholders' liens. Oct. 23 Tr. 127:25-128:16. However, Houlihan's May 14, 2012 public presentation (the "May 14 Houlihan Presentation") in which it presented, among other things, an estimation of the Noteholders' recovery on their prepetition collateral, did not incorporate or disclose the existence of the billion dollars of LOC Collateral. PX 169; Oct. 23 Tr. 128:17-21; 132:18-133:4. Mr. Siegert testified that if Houlihan became aware of the fact that paragraph 5(g) revived $1 billion worth of Noteholders' liens, it would have incorporated such fact in the May 14 Houlihan Presentation. Oct. 23 Tr. 128:23-133:4; PX 357.

183. The JSNs' Rule 30(b)(6) designee, Mr. Snellenbarger, admitted that while the JSNs disagreed with the Debtors' position that the Noteholders' liens did not extend to the LOC Collateral, Snellenbarger Dep. 79:22-80:2, the JSNs did not specifically discuss with the Debtors whether the liens under AFI DIP Order revived their liens on the LOC Collateral, and that the group ultimately agreed to the existing language in paragraph 5(g) as proposed by AFI's counsel. Snellenbarger Dep. 79:22-80:6, 81:22-82:3, 89:18-90:2. Notably, Mr. Snellenbarger never testified that either he or the JSNs understood the language in the AFI DIP Order to revive the Noteholders' liens on previously released collateral. To the extent Mr. Snellenbarger intended to suggest that the JSNs had that understanding, his testimony is not credible.

184. On the contrary, as Plaintiff's witness Mr. Marano unequivocally testified, paragraph 5(g) refers only to liens that existed as of the AFI DIP Order, no party reasonably could have understood the provision to revive previously released liens, and the Debtors certainly had no such intent or understanding. Marano Direct ¶ 38. Oct 15: 156:14-15; 159:25-160:3 (Mr. Marano) ("But I do have to say there's no way – if my CFO came into my office and said he was going to revive or restore liens on assets of ours that did not have liens on them or the liens had been released, I would have dismissed him.").

185. The JSNs' reading of paragraph 5(g) is also not supported by the language of the AFI DIP Order itself. For example, in paragraph 5(g), the Debtors stipulated that the Noteholders' liens are "subject and subordinate only" to those prepetition liens that were granted under the Revolver. AFI DIP Order, ¶ 5(g)(iii)(A) (emphasis added) (PX 76). Notably this provision does not also subordinate the Noteholders' purported lien to the LOC Lender's lien under the LOC Facility. Under the JSNs' proposed interpretation of paragraph 5(g), the Noteholders' purportedly revived lien on the LOC Collateral is elevated ahead of the LOC

Lenders' – uncontrovertibly senior – lien in such collateral. AFI would clearly not have agreed to such a provision, especially in light of the fact that it relied on the LOC Collateral to make the postpetition advances under the AFI DIP Order. Also, it is unreasonable to believe that AFI's counsel, which prepared the AFI DIP Order, would have drafted language reviving liens of a competing creditor on the same assets that were, in the same document, being pledged to support its client's additional loans.

186. In addition, in granting the Noteholders a postpetition adequate protection lien on the Revolver Collateral and the LOC Collateral, the AFI DIP Order subordinated such lien to any *existing* liens on such collateral. To that end, with respect to the Noteholders' adequate protection lien on the Revolver Collateral the order acknowledges that such lien is junior to (among other things) the "*existing liens granted to the Junior Secured Parties*" AFI DIP Order ¶ 16(c)(i) (emphasis added) (PX 76). However, with respect to the adequate protection lien in the LOC Collateral, the AFI DIP Order does not mention the Noteholders' purported existing lien on such collateral. *Id.* ¶ 16(c)(ii).

187. Other documents filed in the Bankruptcy Court similarly reflect that the stipulations were not intended to revive previously released liens. First, in the JSN PSA, the JSNs expressly preserved the right to make a claim for an equitable lien on the collateral securing the LOC Loan Agreement. JSN PSA § 5.6. (PX 252). If the JSNs truly believed that their liens in the LOC Collateral were being revived under paragraph 5(g), this right would be superfluous. Second, the Barclays DIP expressly prohibited the granting of additional liens on the LOC Collateral. PX 88. Thus, if the AFI DIP Order had revived the Noteholders' liens on such collateral, the Debtors would have been in breach of the Barclays DIP. Also, the Debtors indicated in their motion seeking approval of the Barclays DIP facility that any purported

equitable lien asserted by the JSNs on the assets securing the LOC Loan Agreement was not a valid, perfected and nonavoidable lien or security interest as of the Petition Date. *Id.* ¶ 99. It is unreasonable to believe that the Debtors would have stipulated to the validity of such liens in one document and simultaneously filed a document in which they asserted that such liens were invalid.

188. Finally, Rule 4001-2 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules") requires a party to include in a cash collateral motion material terms, including the parties' intent to consummate "any cross-collateralization … that elevates prepetition debt to administrative expense (or higher) status or that secures pre-petition debt with liens on post-petition assets (which liens the creditor would not otherwise have by virtue of the pre-petition security agreement or applicable law." Local Rule 4001-2(a)(6); Bankruptcy Rule 4001(b)(1)(B). In this case, there were no disclosures regarding the Debtors' purported intent to revive the Noteholders' previously released liens on the LOC Loan Agreement collateral postpetition.

VI. EXPERT TESTIMONY REGARDING PETITION DATE VALUATION

A. The JSNs Have Failed to Offer Any Plausible Valuation of the Notes Collateral as of the Petition Date for Adequate Protection Purposes

189. The JSNs offered valuation testimony from four proposed experts affiliated with Houlihan: Michael Fazio, Jeffrey Levine, John Taylor, and Mr. Siegert. Mr. Fazio offered opinions on the Petition Date value of the Debtors' sold and unsold HFS assets and certain other unsold assets. Fazio Direct ¶¶ 2-3;[31] Oct. 22 Tr. 122:10-13. He also offered an opinion on the Petition Date value of a hypothetical entity consisting solely of the Debtors'

[31] References to "Fazio Direct" are to the Direct Testimony of Michael Fazio, Defendants' valuation expert, submitted by declaration. [Adv No. 13-01277, Dkt. No.136.]

MSRs, servicing operations, and originations platform. Fazio Direct ¶¶ 2, 7; Oct. 22 Tr. 122:14-16. Mr. Levine offered opinions on the Petition Date value of the Debtors' MSRs, refinancing opportunities associated with the MSRs, and Servicing Advances. Levine Direct ¶ 2.[32] Mr. Taylor applied "purchase accounting" rules under U.S. GAAP to reallocate the purchase price in the Ocwen APA and opine on the sale date value of the intangible assets, goodwill, and liabilities acquired by Ocwen and Walter. Taylor Direct ¶¶ 2-3, 7.

190. Mr. Siegert offered a single "Global Summary" of these Houlihan opinions suggesting the net fair market value of the Notes Collateral on the Petition Date totaled $2.79 billion. Siegert Direct ¶¶ 4, 25; Oct. 23 Tr. 134:1-14, 141:14-142:6; DX ABF at 10. He arrived at this value by first summing (1) the valuations of the Debtors' cash, HFS assets, unsold servicing advances, FHA/VA loans, equity interests, hedge contracts, and certain other contracts per Mr. Fazio; (2) the valuation of the Debtors' sold servicing advances per Mr. Levine; and (3) his own valuation of the Debtors' intangible assets, derived through his own analysis of Messrs. Fazio, Taylor, and Levine's valuations. DX ABF at 9-10. This totaled $4.450 billion. *Id.* at 10. Mr. Siegert then subtracted $747 million owed to Ally on the Ally Revolver, and $912 million owed on the GSAP and BMMZ facilities, to reach $2.791 billion. Siegert Direct ¶ 25 & n.6; DX ABF at 10.

191. Mr. Siegert testified that in summing his colleagues' various valuations, he was not offering his own opinion on the Petition Date value of the Notes Collateral, other than arriving at his own $517 million valuation of the Debtors' intangible assets. Oct. 23 Tr. 142:7-22. To arrive at that value, Mr. Siegert applied two different methodologies in analyzing certain of his Houlihan colleagues' valuations, and then took the average of the two values generated by

[32] References to "Levine Direct" are to the Direct Testimony of Jeffrey M. Levine, Defendants' valuation expert, submitted by declaration. [Adv No. 13-01277, Dkt. No.135.]

those methodologies to arrive at his own concluded intangible asset value. Siegert Direct ¶ 22; Oct. 23 Tr. 142:7-22, 144:9-13; DX ABF at 8-9.

192. In his "Methodology #1," Mr. Siegert derived a Petition Date intangible value of $410 million by summing (1) Mr. Taylor's reallocation of $313 million of the Ocwen APA purchase price, as of February 15, 2013, to intangible assets, going-concern value, and goodwill purportedly sold to Ocwen and Walter, and (2) Mr. Fazio's $97 million discounted cash flow valuation of the postpetition revenues of certain debtor contracts, net of certain (but not all) expenses associated with these revenues and discounted back to the Petition Date. Siegert Direct ¶ 22(a); Oct. 23 Tr.144:14-145:11, 148:10-17; DX ABF at 8-9.

193. In his "Methodology #2," Mr. Siegert derived a Petition Date intangible value of $623 million. DX ABF at 8-9. Unlike with Methodology #1, this value was not derived from an analysis of an actual, real-world transaction but from Mr. Fazio's $1.485 billion valuation of a hypothetical company supposedly consisting solely of the Debtors' MSRs and servicing and originations platforms. Siegert Direct ¶ 22(b); Oct. 23 Tr. 156:2-10; DX ABF at 8-9. From that value, Mr. Siegert deducted Mr. Levine's $862 million estimated value of the Debtors' MSRs to arrive at $623 million. Siegert Direct ¶ 22(b); Oct. 23 Tr. 156:11-157:3; DX ABF at 8-9. Mr. Siegert took the average of $410 million and $623 million to get his $517 million concluded value. Oct. 23 Tr. 144:9-13.

194. The Court finds that the Houlihan Petition Date valuation opinions are flawed and unreliable for several overarching reasons, as well as for particular reasons that materially impair the validity of each of the individual Houlihan opinions. First, Houlihan's litigation-driven opinions are irreconcilable with the business advice Houlihan gave to its clients immediately prior to the Petition Date, which used the Nationstar and Ally stalking horse bids as

the best indication of value, concluded that the JSNs were undersecured at that time, and accordingly recommended that Houlihan's clients sign the prepetition plan support agreement ("JSN PSA")—advice their clients followed. JSN PSA (PX 252); May 2012 Houlihan Restricted Presentation to the Ad Hoc Noteholder Group ("Houlihan Presentation") pg. 24 of 34 (PX 169); May 14, 2012 Houlihan Public Disclosure ("Houlihan Disclosure") pg. 3 of 3 (PX 357). Houlihan's contemporaneous view of the value of the JSNs' collateral at the Petition Date was shared by the market at large, as analysts expressed the belief that the stalking horse deals would be consummated. PX 359 pg. 1 of 9; PX 434 pg. 1 of 5; PX 435 pg. 1 of 8.

195. Second, the Houlihan experts universally failed to value the JSN's collateral under the proper legal standard, which requires a valuation of the collateral in the hands of the JSNs. This valuation assumes a commercially reasonable foreclosure sale conducted by the Notes Collateral agent on the Petition Date and without the benefits of a successful bankruptcy case. The Houlihan experts did the opposite, counterfactually assuming that the assets could have been sold on the Petition Date by the Debtors and with the full benefits of the months-long § 363 sales process already realized – making their valuations unreliable under any standard. Oct. 22 Tr. 139:18-142:4; Oct. 23 Tr. 147:23-149:3, 149:18-22. Mr. Siegert conceded, when pressed by the Court, that without obtaining the consents and settlements achieved by the Debtors in the months following the Petition Date, the Debtors could not have sold the assets on the Petition Date. Oct. 23 Tr. 191:6-192:12. Mr. Levine similarly testified that if ResCap could not have obtained consents on the Petition Date, it could not have sold the MSRs on that date. Oct. 23 Tr. 64:19-22.

196. Third, the Houlihan experts relied on improper hindsight analysis by implying asset values derived from the § 363 sales process that were not present at the Petition

Date. For example, Mr. Taylor testified that he did not value, and never made any attempt to value, any intangible assets or goodwill as of the Petition Date; rather, his sole valuation opinion was as of February 15, 2013, the date on which the Ocwen sale closed. Oct. 23 Tr. 44:10-19; 51:24-52:3, 92:10-17, 93:25-94:5. In fact, Mr. Taylor testified that he was not even aware that his opinion would be used by Mr. Siegert as a basis for an ostensible Petition Date valuation, and admitted that he was unfamiliar with the bankruptcy concept of "adequate protection." *Id.* 57:25-58:5; 51:11-23. Nonetheless, Mr. Siegert relied on Mr. Taylor's opinion as representing value available on the Petition Date, and admitted that his own top-down analysis was not based on the Petition Date Nationstar and AFI stalking horse bids, or the Nationstar and Berkshire Hathaway stalking horse bids that the Court approved in June 2012 in approving the § 363 sale procedures (the "Mini-Auction"). Oct. 23 Tr. 158:19-159:1.[33]

197. Fourth, and relatedly, the Houlihan experts' valuations improperly included the myriad benefits of the bankruptcy process but excluded the attendant costs. *See, e.g.*, Oct. 22 Tr. 177:13-179:13, 187:13-189:23; Oct. 23 Tr. 185:13-23. These essential benefits, which Mr. Siegert conceded were not realizable outside the bankruptcy process, Oct. 23 Tr. 153:20-154:5, include: selling assets free and clear of all liens and encumbrances, obtaining consents and settlements from the GSEs required to close, performing under the DOJ/AG Settlement Agreement to eliminate the risk of government setoff claims, and eliminating the risk of RMBS setoff claims.

198. Fifth, the Houlihan experts failed to separately identify and value the intangible assets over which the JSNs have, and do not have, liens, preferring instead to simply assume (incorrectly) JSN liens on all intangible assets. Oct. 22 Tr. 180:18-183:19; Oct. 23 Tr. 59:15-63:22. Mr. Siegert admitted that the Houlihan experts just assumed that all intangible

[33] There are numerous other problems with Mr. Taylor's analysis. They are discussed below.

assets or going-concern value associated with the Debtors' assets were subject to JSN liens. Oct. 23 Tr.142:23-143:1; 151:24-152:2. The Houlihan experts themselves expressed no opinion on whether that assumption is correct. Oct. 23 Tr.143:2-5. As discussed above, it is not.

199. Sixth, the Houlihan valuations reflected prices that a buyer would pay for the assets it valued, not prices a seller would actually recover. Thus, the valuations incorrectly consider only the assets' gross sale prices and not the net sale proceeds after accounting for transaction costs. *E.g.*, Oct. 22 Tr. 62:25-63:19.

200. In addition to these global defects with Houlihan's valuation opinions, each of the Houlihan experts' opinions are unreliable for the reasons stated below.

(i) Mr. Fazio's Valuation Opinions – HFS Reports

201. In Mr. Fazio's "HFS Reports", (DX ABI, DX AIQ), he opined that on the Petition Date the HFS assets the Debtors' later sold to Berkshire Hathaway (the "HFS Portfolio") were worth $979 million, (DX ABI at 5); the Debtors' unsold other HFS assets were worth $13 million, (*id.* at 8); the postpetition proceeds from certain debtor contracts were worth $97 million, (*id.*); and certain other unsold assets were worth a combined $973 million plus $574 million in cash. *Id.* Each of these values was included in Mr. Siegert's global summary of Houlihan's opinion on the net fair market value of the JSN collateral at the Petition Date. DX ABF at 10.

202. Plaintiffs have demonstrated fundamental infirmities with Mr. Fazio's opinions in his HFS Reports. Mr. Fazio ultimately based his $979 million Petition Date valuation of the HFS Portfolio on the prices Berkshire Hathaway agreed to pay for the (largely similar) HFS Portfolio at the October 25, 2012 auction, (Oct. 22 Tr. 140:4-9), but this price was not available on the Petition Date, let alone at the time of the Mini-Auction. Oct. 22 Tr. 140:18-140:21. Mr. Fazio conceded at trial that he knew no one had offered to pay such prices for the

HFS Portfolio either at the Petition Date or Mini-Auction. Oct. 22 Tr. 140:22-141:22. He knew also that the Berkshire Hathaway prices were achieved only after the Debtors obtained the benefits of a five-month-long § 363 sale process, (Oct. 22 Tr.142:1-4), which included "Centerview identif[ying] 46 potential purchasers for the Whole Loan Portfolio, 22 of which signed non-disclosure agreements," (DX AIQ at 11), and conducting an 11-round competitive auction. PX 58.

203. Additionally, Mr. Fazio unreasonably assumed that in a hypothetical sale all document deficiencies associated with the loans in the HFS Portfolio would have been cured as of the Petition Date, such that the document deficiency multiplier in the Berkshire Hathaway APA would have no effect on his $1.58 billion valuation. (Oct. 22 Tr.141:23-19). He did not know that as of the Petition Date more than twenty percent of the loans in the HFS Portfolio had document deficiencies, and that significant deficiencies remained when the Berkshire Hathaway sale closed nearly nine months later. Oct. 22 Tr.166:20-24; *see also* Puntus Direct ¶ 156 (greater than twenty percent document deficiencies). He also unreasonably assumed that the loans in the HFS Portfolio required no modifications, ignoring the fact that the DOJ/AG Settlement required the Debtors to solicit more than 14,000 loans for potential modifications, resulting in many UPB and interest rate reductions. Puntus Direct ¶ 156.

204. Disregarding these facts, Mr. Fazio testified that he took the $1.5 billion Berkshire Hathaway purchase price, which he considered fair market value at the Auction Date, and applied it to the HFS Portfolio as of the Petition Date to come up with a hypothetical Berkshire Hathaway-price-derived $1.58 billion Petition Date value for the HFS Portfolio. Oct. 22 Tr. 137:6-9; 137:18-138:11. He then calculated that his top-down $1.58 billion Petition Date value represented a 4.6% discount off his own "bottom-up" $1.695 billion Petition Date

valuation, and applied that discount to the values his own valuation had allocated between the JSN and non-JSN collateral. Oct. 22 Tr. 138:12-140:13. This resulted in what Mr. Fazio termed a Petition Date "Berkshire Hathaway Bid – JSN Collateral Value" of $979 million. DX ABI at 5.

205. In applying his own methodology to allocate the value of the HFS Portfolio between JSN and non-JSN collateral as of the Petition Date, Mr. Fazio disregarded the actual purchase prices that Berkshire Hathaway agreed to pay for the collateral pursuant to § 3.1(a) of the Berkshire Hathaway APA, which was an arms-length agreement. PX 31 at 23. The Berkshire Hathaway APA classified the loans within the HFS Portfolio into six buckets based on certain characteristics: Performing First Lien; Non-Performing First Lien; Performing Second Lien; Non-Performing Second Lien; Other; and Securitized Advances. Oct. 22 Tr.161:20-162:11, 163:7-17; PX 31 at 15. It established different purchase prices calculated as percentages to be multiplied by the UPB of the loans, for each category (plus any adjustments for the document deficiency multiplier). Oct. 22 Tr.162:12-19; 164:8-166:13; 167:25-168:18; PX 31 at 16, 21. Rejecting these contractual purchase prices, Mr. Fazio reclassified the loans based on characteristics such as origination vintage, product type, adjustable or fixed rate mortgage, and valued the loans within his classifications based on metrics such as borrower credit scores and interest rates, to derive his bottom-up valuation. Oct. 22 Tr.154:24-158:11, 159:3-9, 164:1-7, 169:2-10; DX ABI at 5, 19-22.

206. This methodology, on which Mr. Fazio bases his valuation of the JSN collateral in the HFS Portfolio, is irrelevant because it fails to acknowledge that the loan classifications and purchase price calculations in the Berkshire Hathaway APA represent arms-length transactions established the fair market value of the loans within each classification.

Importantly, when Berkshire Hathaway signed the APA on November 2, 2012, it knew that the loan portfolio it would be acquiring at closing some three months later would be materially different than the portfolio shown in the 8/31/12 loan tapes it reviewed for bidding purposes. Oct. 22 Tr. 159: 10-22. The prices Berkshire Hathaway agreed to pay for loans in each category, therefore, rather than an amorphous moving-target total portfolio price, are the most accurate indication of the fair market values of the loans. Oct. 22 Tr. 167:16-24, 168:19-24.

207. Plaintiffs have demonstrated serious deficiencies in Mr. Fazio's Petition Date valuation of the Debtors' unsold other assets as well. For example, Mr. Fazio's $599 million valuation of the Debtors' FHA/VA loans assumes they would be run-off in three years, when the two Debtor documents on which he relies for this assumption actually project a seven-year runoff timetable. Oct. 22 Tr. 169:15-175:8; DX ABI at 58; *see also* Puntus Direct ¶ 162. Additionally, Mr. Fazio admitted at trial that his valuation does not reflect the indirect costs related to operating expenses incurred over the seven-year runoff period. Oct. 22 Tr.177:13-179:13; DX ABI at 58. The Court therefore finds that Mr. Fazio's valuation of the FHA/VA loans is not reliable for any purpose.

208. Mr. Fazio's $97 million valuation of the postpetition proceeds of three debtor contracts is equally unhelpful. DX ABI at 74. His $48 million valuation of the Debtors' Shared Services Agreement with Ally is irrelevant because the agreement is a postpetition contract over which the JSNs have no lien. Oct. 22 Tr.182:5-183:18. The valuation is also unreliable because, while it accounts for Ally payments to ResCap, it fails to account for ResCap's expenses associated with the agreement, and fails to account for the fact, shown in the same in Scott Winn Administrative Expense Report upon which Mr. Fazio relied, that ResCap

actually *paid* more money to Ally under the agreement than Ally paid ResCap. Oct. 22 Tr.187:13-189:23.

209. Mr. Fazio's $203 million valuation of the broker agreement between ResCap and Ally is untenable because the agreement had no marketable value. Mr. Fazio admitted at trial that the broker agreement provided it was terminable by Ally on short notice, it was not assignable, and Ally had never consented to assigning the agreement to another party. Oct. 22 Tr.189:24-190:8; 190:19-191:10. No buyer would pay any value for such an agreement.

(ii) Mr. Fazio's Valuation Opinions – TEV Reports

210. In his "TEV Reports," Mr. Fazio valued a hypothetical company owning the Debtors' MSRs and servicing and originations platforms at $1.485 billion. DX ABJ; DX AIQ. This valuation was done solely for the purpose of allowing Mr. Siegert to utilize his Methodology #2 to estimate the value of the Debtors' intangible assets at the Petition Date. Oct. 22 Tr.193:6-194:4.

211. Relying exclusively on a market multiple approach, Mr. Fazio arrived at $1.485 billion by first selecting three purportedly comparable companies—Ocwen, Nationstar, and Walter. Oct. 22 Tr.196:2-8. Although in normal valuations employing the market multiple approach one determines the total enterprise value of each comparable company, Mr. Fazio determined his multiples based solely on the market capitalization of equity for each of his comparable companies. Oct. 22 Tr.196:9-197:10. This resulted in his valuing the equity of a hypothetical company. Oct. 22 Tr.198:20-199:6; 199:19-22. Mr. Fazio asserted that in his opinion this hypothetical equity value would represent the value of the Debtors' MSRs and platforms but not its (quite valuable) servicing advances and HFS Portfolio. However, Mr. Fazio conceded that a mortgage servicing company would typically also have equity in its servicing advances (and presumably HFS assets as well) because, as Mr. Levine opined, such a company

on average could obtain third-party funding for only 85% of its advances. Oct. 22 Tr.200:1-22; DX ABG at 35, 38, 41. Consistent with Mr. Levine's opinion, Ocwen's SEC Form 10-Q for the first quarter of 2012 indicated that it funded approximately 79% of its servicing advances only. Oct. 22 Tr. 201:22-204:3. It therefore seems illogical to assume, as Mr. Fazio does, that the "equity value" of his hypothetical subject company would not encompass at least some value attributable to servicing advances (and HFS loans).

212. The Court is wholly unconvinced by Mr. Fazio's novel use of a market multiple of equity to estimate the value of ResCap's MSRs and platforms. The issue is significant, as Mr. Siegert then deducts from Mr. Fazio's $1.485 billion only the estimated value of MSRs (obtained from Mr. Levine) to estimate "Total Intangible/Going-Concern" value under his Methodology #2. DX ABF at 9. If, as seems highly likely, Mr. Fazio's valuation properly encompassed other of the Debtors' assets, such as some portion of ResCap's servicing advances and its HFS Portfolio, these assets would also have to be deducted in a top-down valuation before arriving at a value for intangibles and goodwill. The appropriate deduction here is entirely unclear, and Mr. Fazio's approach is far too haphazard and unjustified for the Court to draw any reliable conclusions.

213. Even if Mr. Fazio's novel market multiple approach were reliable, which it is not, his implementation of the approach has substantial flaws that render it unreliable even on its own terms. Mr. Fazio adjusted ResCap's revenues and EBIT for the first quarter of 2012; using his adjusted results to estimate ResCap's FY 2012 and FY 2013 annual revenues and EBIT (a method referred to as "last quarter annualized" or "LQA"); and then multiplying his annual estimates by certain multiples (or comparable metrics) that he selected based on his quantitative and subjective analysis of three supposedly comparable companies—Nationstar, Ocwen, and

Walter. Oct. 22 Tr. 205:9-206:23; *Id.* 212:16-213:22; DX ABJ at 25, 29-30. Mr. Fazio's trial testimony revealed multiple problems with this approach. To start, Mr. Fazio acknowledged that if his adjusted first quarter results were slightly off, that error would have a magnified effect on his valuation opinion. For example, if his first quarter earnings were off by a mere $10 million that would have a $40 million impact on his LQA calculation, which in turn would make his derived values for each comparable metric off by the product of $40 million and the selected multiple of 5x to 6x, or $200 million to $240 million. Oct. 22 Tr. 206:3-23; DX ABJ at 28.

214. Mr. Fazio conceded also that even though a significant portion of ResCap's servicing business in the first quarter of 2012 – the only actual historical ResCap results on which he relied – was attributable to a subservicing agreement with Ally (covering approximately 700,000 out of the 2.5 million loans ResCap was servicing), and the agreement offered ResCap above-market terms and was not assignable, he did not make any downward adjustments to his estimated revenues to account for these facts. Oct. 22 Tr. 206:24-208:11. Mr. Fazio attempted to justify his reliance on ResCap's first quarter 2012 results by comparing them to financial projections in ResCap's Confidential Information Memorandum ("CIM"), which was prepared in connection with efforts to market ResCap's assets. Oct. 22 Tr. 208:12-210:10. But the CIM was nothing more than a marketing piece that appropriately presented upbeat projections for a hypothetical "NewCo" divorced of ResCap's substantial liabilities. No competitive bidder ever expressed interested in acquiring this hypothetical marketed company before or after the Petition Date. Oct. 22 Tr. 210:11-212:15. The only competitive bidders for these assets, Nationstar, Ocwen, and Walter, were solely interested in fitting the assets into their existing business models. *Id.*

215. Mr. Fazio's selection and use of his three comparable companies was equally unreliable. He admitted at trial that Nationstar, Ocwen, and Walter were very different companies than ResCap in virtually every respect: they were substantially smaller; they were experiencing high growth rates where ResCap's historical grow had been strongly negative; they collected much higher servicing fees; and their percentage of nonperforming HFS loans was smaller. Oct. 22 Tr. 212:16-22; 215:24-216:7; 217:4-8. Every one of the quantitative metrics that Mr. Fazio used to compare these companies and ResCap (such as historical adjusted revenue growth, adjusted net income margin, EBIT margin, and average servicing fees), other than those metrics reflecting ResCap's larger size, showed that ResCap compared unfavorably to this "peer group" by a large margin. Oct. 22 Tr. 214:14-216:24; DX ABJ at 31-33. Nevertheless, while Mr. Fazio admitted that as a valuation profession he had to exercise his subjective judgment and adjust his opinion to account for such differences, he failed to make any downward adjustments to his selected multiples, to reflect either these differences or the existence of ResCap's substantial legacy litigation and regulatory overhang. Oct. 22 Tr. 212:23-213:11; *id.* 217:9-219:4.

216. These unrealistic and biased judgments contributed to Mr. Fazio's selection of unreasonable comparative market multiples. For example, his 2013 revenue multiples for Nationstar, Walter, and Ocwen were 1.1, 1.1, and 2.5, respectively. Oct. 22 Tr. 219:8-220:7; DX ABJ at 29. Yet he chose to use a revenue multiple range for ResCap of between 1.25 and 1.75, which meant that the *low* end of his ResCap multiple range was *higher* than two of his three comparable companies. Oct. 22 Tr. 220:3-20.

217. For the reasons stated above, Mr. Fazio's valuation opinions are unreliable and the Court accords them no weight.

(iii) Mr. Levine's Valuation Opinions

218. The JSNs offered testimony from proposed expert Jeffrey M. Levine, a Managing Director at Houlihan in the Financial Institutions Group. Mr. Levine testified concerning the value of "(1) the Mortgage Servicing Rights and Servicing Advances, and (2) certain intangible assets, namely the refinancing value of certain loans serviced by Debtors (through, among other means, the Home Affordable Refinance Program (HARP)), that were sold pursuant to the APA." He "estimated the value of those assets as of February 29, 2012 ("Pre-Petition Date"); May 14, 2012 ("Petition Date"); August 31, 2012 ("Bid Date") and February 15, 2013 ("Closing Date")." Levine Direct ¶ 2.

219. Based upon his analysis, Mr. Levine opined that the total estimated fair value range of MSRs, Servicing Advances, and HARP and other refinancing opportunity was:

a. $2.7 – 3.1 billion in February 2012,

b. $2.5 – 2.9 billion on the Petition Date,

c. $2.6 – 3.0 billion on the Bid Date in August 2012, and

d. $2.4 – 2.7 billion in February 2013 on the Closing Date

Id. ¶ 8.

220. Plaintiffs have challenged Mr. Levine's opinion on these valuations as being based on a number of unfounded assumptions.

221. Most importantly, Mr. Levine's valuation reflects the price a buyer would pay for the assets he valued, not the proceeds a seller or lender would recover. In valuing the assets, in other words, Mr. Levine considered only the gross sale price, not the net sale proceeds after taking into account the associated transaction costs including costs of consents. Oct. 22 Tr. 62:25-63:19.

222. For example, Mr. Levine's opinion assumes a sale with appropriate representations, warranties, and market indemnifications from the seller; he valued the assets assuming that they could be sold free and clear of certain obstacles to sale. *Id.* at 62:17-21. But he concedes that a sale of MSRs would have required the consent of the RMBS Trustees and of the GSEs. *Id.* 64:8—65:9. Mr. Levine did not take into account the costs associated with obtaining the requisite consents, and simply assumed that the transaction would have closed upon the receipt of all required consents. *Id.* at 63:15-25. Those costs were considerable, including hundreds of millions of dollars in payments to GSEs to cure alleged liabilities to those entities and obtain their consent to the sale. *Id.* at 67:1-22; PX 388 ¶ 1. In addition, Debtors entered into a settlement of $8.7 billion of potential RMBS liability in order to obtain consent of the RMBS Trustees and be able sell the assets free and clear. *Id.* at 73:4-10; *see also* PX 43. Mr. Levine's valuation did not account for the potential reduction in funds available to the lender or seller in a sale of those assets nor did his valuation take into account the time and difficulty in obtaining such consents. *Id.* at 72:7-73:10, 69:10-69:20.

223. Mr. Levine also assumed that parties would not set off against the advances, but ignored the fact that here the RMBS Trustees actually did claim the right to set off against advances Oct. 22 Tr. at 69:23-70:11; PX 363 ¶¶13-16. In all, Mr. Levine acknowledged that it would have been impossible to close the transaction that he valued on the Petition Date because of the need for the consents. Oct. 22. Tr. at 64:19-22.

224. Mr. Levine testified that in his experience servicing advances almost always sell for par (or 100% of the receivable). Oct. 22. Tr. 74:19-74:22. He further testified that he has never seen advances sold separately from MSRs, Oct. 22 Tr. 73:14-73:19, and thus acknowledged, that servicing advances sell for par value because they are sold with the attendant

MSRs. He conceded, however, that if servicing advances were purchased for par value separately from the MSRs, there would be no financial return for the purchaser. *Id.*, at 75:9-75:18. Mr. Levine also acknowledges that if a servicing advance were sold on its own a purchaser would need to pay less than par to see a financial return. Oct. 22 Tr. 75:14-18.

225. In addition, while Mr. Levine believed that servicing advances typically sell for par, Oct. 22. Tr. at 74:19-74:22, he also did a discounted cash flow (DCF) valuation of servicing advances based on several assumptions, which resulted in a valuation of the servicing advances of 97.5%. In performing his DCF valuation, however, Mr. Levine ignored ResCap's historical data and relied instead on market data. DX ABG at 17.

226. First, for his DCF analysis he assumed a servicing advance recoverability rate of 99.5 percent – that is, he assumed that a purchaser would recover 99.5 percent of all servicing advances. Oct. 22 Tr. 76:24-77:2. Mr. Levine did not consider ResCap's actual recovery rate, which was 95-98%. *Id.* 77:22-78:2; *see also* 79:13-79:16. He conceded that had he used ResCap's actual recovery rate, the value of the servicing advances would be lower. Oct. 22 Tr. 78:3-10. Second, in his DCF analysis of servicing advances Mr. Levine assumed a two-year recovery period for the servicing advances, with 90% of the recovery in year one. Levine Initial Expert Report at 39. He ignored ResCap's historical experience that advances were collected over five or more years. Oct. 22 Tr. 79:4—80:3. Mr. Levine conceded that had he used ResCap's historical recovery timeline, the value of the servicing advances would be lower. *Id.* at 80:8-14.

227. Third, Mr. Levine assumed that the hypothetical purchaser would be able to finance the servicing advances with an 85% advance rate, meaning that the purchaser could finance 85% of the purchase price with debt. Oct. 22 Tr. 80:17-22. This assumption ignores the

fact that lenders generally require that the pooling and servicing agreements related to the servicing advances have language that gives them either protection from setoff or recognition of their liens. Oct. Tr. at 81:11-81:16. The majority of the Debtors' pooling and servicing agreements did not contain such language, and as a result, any lender would require amendments to the pooling and servicing agreements prior to entering into any financing arrangement. *Id.* at 82:5-18. In fact, the Nationstar APA and Ocwen's October 22, 2012 bid proposal included a provision to reduce the purchase price of servicing advances by up to 25% if amendments to the PSAs were not achieved by closing. Nationstar APA Schedule 3.1(a) (PX 33); PX 48. As a result of this provision, the Debtors' offered a $55 million bid credit at the auction to induce bidders to remove this provision. *Id.* at 84:18-5:7; PX 56 at 43:15-20. This $55 million bid credit was the Debtors' best estimate of the purchase price adjustment that would result based on the Debtors' reasoned judgment as to what PSA amendments they thought could be achieved prior to closing if the provision remained in the document. Thus, given the number of pooling and servicing agreement amendments that may have not been achievable, it does not appear that Mr. Levine's proposed 85% advance rate would have been supportable in this case.

228. Having ignored the Debtors historical data in doing his DCF analysis of servicing advances, Mr. Levine then conducted a DCF analysis of MSRs and in this context he used the Debtors' 2011 historical cost to service of $157 per loan per year rather than market information. He did not take into account that if a buyer had a lower cost to service they may pay more for the mortgage servicing rights. Oct. 22 Tr. 86:13-87:4.

229. The DCF valuation assumptions selected by Mr. Levine were derived inconsistently to generate the highest possible value for the Notes Collateral. For servicing

advances, Mr. Levine relied on market metrics and for MSRs, he relied on the Debtors' historical costs, thereby increasing the value of servicing advances and decreasing the value of MSRs.

230. Finally, Mr. Levine valued the HARP and other refinancing opportunities. Oct. 22 Tr. 89:5-12. Mr. Levine conceded that he was not aware of any company that separates refinancing opportunities from MSRs on its balance sheet, and he agreed that "to the buyer of the servicing, there would not be value to the HARP without the servicing rights." *Id.* 91:11-14. Mr. Levine also conceded that he had not seen a seller sell HARP refinancing opportunities while retaining the MSRs. *Id.* 101:9-11.

231. For the reasons stated above, Mr. Levine's valuation opinions are unreliable and are afforded no weight.

(iv) Mr. Siegert's Valuation Opinion

232. Mr. Siegert's summary valuation offered no independent opinion except with respect to the value of ResCap's intangible assets and goodwill at the Petition Date. Oct. 23 Tr. 142:7-22. To arrive at his view of intangible value, Mr. Siegert relied on Messrs. Fazio, Levine, and Taylor's opinions for the inputs for his two valuation methodologies. His opinion thereby incorporated, and suffers from all of the errors and deficiencies in, the opinions of Messrs. Fazio, Levine, and Taylor discussed above. Mr. Siegert admitted that if Mr. Taylor's analysis was flawed, then his analysis was flawed too. *Id.* 150:15-18. This is logically true also for the analyses of Messrs. Fazio and Levine.

233. Mr. Siegert's "Methodology #1" is unreliable because, among other things, it unrealistically relies on the Ocwen and Walter purchase price to value supposed intangible assets and goodwill as of the Petition Date, a price that simply did not exist as of the Petition Date. The Ocwen and Walter transaction was made possible only after the Debtors implemented a months-long, court-approved § 363 sale process that significantly enhanced the

value of the Debtors' assets and led to a successfully competitive auction. If any goodwill existed at the time Ocwen won the auction (which it did not), that goodwill would have been generated postpetition as a result of the sale process and, thus, would not be subject to any JSN lien.

234. Mr. Siegert's implementation of Methodology #1 suffers from yet another flaw which, though relatively small in terms of dollar value in the context of these cases, demonstrates a lack of intellectual consistency. Although Mr. Fazio applied a 15% discount rate to the post-petition contract proceeds Mr. Siegert inputted into Methodology #1, Mr. Siegert failed to similarly discount "rolling back" Mr. Taylor's $313 million estimated intangible asset and goodwill value to the Petition Date (which at Mr. Fazio's discount rate would have reduced the result by more than $40 million). Oct. 23 147:19-149:3. Mr. Siegert's attempts on redirect to explain away this error do not pass muster: there is no evidentiary support for his assertion that the value of the Debtors' purported intangible assets declined from the Petition Date to the closing of the Ocwen sale and, even if this were true, it would not provide a valid methodological reason to ignore the discount actor to a putative $313 million that only became available – if it did at all – some nine months after the Petition Date.

235. Mr. Siegert's Methodology #2 is equally flawed, most obviously because it relies on Mr. Fazio's entirely unconvincing market multiples of equity approach, which cannot reasonably be found to exclude the significant value of the Debtors' servicing advances and other assets from its supposed valuation of ResCap's "total enterprise value." Applying the same "top-down" valuation approach employed by Mr. Siegert to the stalking horse values actually available at the Petition Date yields instructive results. Mr. Levine valued the Debtors' servicing advances at $1.75 billion and MSRs at $862 million. DX ABG at 40. Deducting these values

from the $2.3 billion Nationstar had agreed to pay for the Platform Assets (servicing advances, MSRs, and "platforms"), the implied value of any purported platform and goodwill as of the Petition Date was approximately *negative* $312 million at the Petition Date (and would remain a negative number even with the $125 incremental value obtained through the Mini-Auction). Oct. 23 Tr. 159:2-161:19.

236. The Houlihan experts' Petition Date valuation opinions fail to pass the "reality check" that valuation experts commonly employ to see if their concluded values accord with objective reality. Oct. 22 Tr. 220:24-221:8. The Houlihan opinions, summarized by Mr. Siegert, suggest that the Notes Collateral was worth approximately $1 billion more at the Petition Date than at the Distribution Date. The Court finds that this is contrary to the evidence in these cases, which has demonstrated that through these Chapter 11 proceedings the Debtors have significantly enhanced the value of their assets, including of the Notes Collateral, beyond that which they could have been enhanced through any other available process—including a commercially reasonable foreclosure sale conducted by the Notes Collateral agent.

237. Finally, and most instructively, Houlihan's litigation opinions are contradicted by the advice Houlihan gave to its clients immediately before the Petition Date. That advice was based on assuming the stalking horse bids were the best contemporaneous indication of value, and concluded the JSNs were undersecured because the value of their collateral was less than their claim. Houlihan Presentation, PX 169 pg. 24 of 34; Houlihan Disclosure, PX 357 pg. 3 of 3. Mr. Siegert was the lead engagement partner for Houlihan on the ResCap matter; he was the JSNs' lead business negotiator with respect to the JSN PSA, (PX 252); Houlihan had conducted prepetition due diligence on ResCap for the JSNs; and Mr. Siegert and Houlihan had given the JSNs prepetition strategic advice, including that contained in the

Houlihan Presentation. Siegert Direct ¶¶ 6-10. Oct. 23 Tr. 98:8-22; 99:17-100:1; 102:1-8; 102:19-103:20; 105:3-13; 110:8-23; 161:22-164:15. *See also* Houlihan Engagement Letter (PX 368). After Mr. Siegert made the Houlihan Presentation to the JSNs in May 2012, and recommended that they accept the deal offered in the JSN PSA, the JSNs signed the JSN PSA. Oct. 23 Tr. 174:21-24; 179:2-6. In the JSN PSA, the JSNs committed to support the approval process for the stalking horse bids and waive postpetition interest. Siegert Direct ¶ 10; Oct. 23 Tr. 175:3-5; 178:11-18. The JSN PSA obligated the JSNs ultimately to support the sale of JSN collateral under the terms of the Nationstar and AFI stalking horse APAs, provided that the Court were to approve the process for the stalking horse bids and there were no higher and better bids at auction. Oct. 23 Tr. 175:6-10.

238. The Houlihan Presentation treated the stalking horse bids as the best contemporaneous indication of value by presenting three recovery scenarios—High, Medium, and Low—each of which assumed the Nationstar and Ally stalking horse bids would be achieved for the sold assets. *Id.* 166:14-171:14. The presentation explicitly stated this: "*Three scenarios were developed to highlight a range of recovery outcomes . . . High:* Dec. 31, 2011 adj. trial balances; *assumes Fortress/Ally bid for sold assets* and an illustrative estimate by Houlihan Lokey for remaining assets." PX 169 pg. 24 of 34 (emphasis added). Mr. Siegert confirmed this at trial:

> Q. So the high scenario uses . . . December 31st, 2011 adjusted trial balances, right?
>
> A. Yes.
>
> Q. And assumes the Fortress Ally bid for sold assets, right?
>
> A. Yes.

Oct. 23. Tr. 168:24-169:3. He also confirmed that Houlihan had no reason to question the good faith nature of the stalking horse bids or that they represented anything other than arms-length

deals. Oct. 23 Tr. 179:7-23. Furthermore, in contradiction to his opinion that the JSNs have a lien on a purported $517 million of intangible value, he admitted that the Houlihan Presentation advised the JSNs that none of the Nationstar stalking horse purchase price would be allocated to intangible assets. Oct. 23 Tr. 165:8-166:13; PX 169 pg. 8 of 34.

239. Consistent with the Houlihan Presentation, the Houlihan Disclosure—which was published on the Petition Date to make public the information in order to allow restricted JSNs to become unrestricted—publicly declared that, based on the stalking horse bids, the JSNs were undersecured because the value of their collateral was less than their claim. PX 357; Oct. 23 Tr. 129:1-8; 130:3-131:9175:11-16. Houlihan's published analysis showed the JSNs recovering only 93% on their $2.1 billion claim (principal without interest) over eighteen months after Ally agreed, in the JSN PSA, to subordinate a portion of its secured recovery under the AFI Revolver to the JSNs. PX 357 at 2-3; Oct. 23 Tr. 131:10-132:11. Mr. Siegert conceded that if he had had reason to believe the JSN collateral was worth more, he would have publicly disclosed that belief. Oct. 23 Tr. 132: 18-133.4.

240. Houlihan's Petition Date expectation that the stalking horse deal would be consummated was shared by the market at large. For example, on May 14, 2012, Citigroup Global Markets reported on the Nationstar-ResCap deal, and noted its expectation that Nationstar would close without being outbid:

> While the bankruptcy court has the right to evaluate "superior" offers, NSM is the stalking horse bidder and would be entitled to receive a $72M break up fee and $10M of expense reimbursement if they were outbid. In addition, we are hard-pressed to identify another player with scale and capacity to take down this portfolio. In our view, it would need to be another servicer (i.e. Walter) who teams up with another party. NSM will not need to raise additional equity capital to fund this deal and this deal does not preclude NSM from additional acquisitions if they were to arise. The transaction is expected to close by the end of 2012 . . . .

May 14, 2012 Citigroup Report (PX 435 at 1). Credit Suisse delivered a similar report the next day, also assuming the deal would close. May 15, 2012 Credit Suisse Report (PX 434 at 1) ("As the ResCap transaction closes we expect the shares to continue to move higher to reflect the higher level of run-rate earnings."). Even a month later – when others were free to bid – Citigroup continued to report on its expectation that Nationstar would prevail, stating that "Berkshire Hathaway came in with a competing bid for ResCap. We still peg an NSM [i.e., Nationstar] win at 75%+ but our model now assumes they sweeten the bid by 20%." June 18, 2012 Citigroup Report (PX 359 at 1).

241. For the reasons stated above, the Houlihan experts' valuation opinions are entitled to no weight regardless of the appropriate Petition Date valuation standard for adequate protection purposes. As a result, the JSNs have failed to meet their burden of proof and are not entitled to an adequate protection claim.

B. The Plaintiffs' Expert Properly Values the Notes Collateral as of the Petition Date

242. To establish the appropriate value of the Notes Collateral for purposes of adequate protection, the Plaintiffs proffered expert testimony from Marc D. Puntus, Partner and Co-Head of the Restructuring Group at Centerview. Mr. Puntus has over twenty years of experience as a restructuring professional, the last thirteen of which have been as an investment banker. Puntus Direct ¶¶ 1, 11.

243. Mr. Puntus has been the lead investment banker for the Debtors for over two years. Puntus Direct ¶ 1, 16; Oct. 16 Tr. 98:9-16. He was heavily involved in the Debtors' decision to market their assets, the pre-petition marketing process and the post-petition sale process, serving as the lead business negotiator for the Debtors on the stalking horse agreements as well as the auction process. Oct. 16 Tr. 97:23-98:16, 103:6-9. Through his intensive

involvement with the Debtors dating back to 2011, including first-hand experience marketing and ultimately selling the majority of the Debtors' assets, Mr. Puntus has become intimately familiar with the Debtors' operations and the assets at issue here. In his testimony, Mr. Puntus has showed a greater familiarity with the Debtors' assets and the market's interest in purchasing those assets than any other expert witnesses who testified at the trial. Oct. 16 Tr. 97:3-98:16. Mr. Puntus was assisted in his valuation by similarly-experienced members of the estate and management team. Oct. 16 Tr. 98:1-8.

244. The JSNs have criticized Mr. Puntus for supposedly not employing any of the three traditional methods for valuating business assets (discounted cash flow, comparable companies, and comparable transactions). The Court finds this criticism to be misplaced. Mr. Puntus was indeed employing one of the traditional valuation methods, the "comparable transaction" approach, where the comparable transaction relied upon was nearly the best imaginable evidence of value: a contemporaneous agreement to purchase and sell *precisely the assets in question*. As explained in a treatise that the JSNs' own expert, Mr. Taylor, recognizes and cites as authoritative, "[i]f the subject company itself has changed control in the last few years, the transaction may be an excellent source of value measures." Oct. 23 Tr. 59:13-18, 60:23-62:23. *See* Shannon Pratt et al., *Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, at 274 (4th ed. 2000) (excerpts attached as **Exhibit B** hereto). Moreover, unlike the JSN experts, Mr. Puntus properly endeavored to estimate what the Notes Collateral would have been worth upon foreclosure, where the disposition of the assets would have been controlled, in the first instance, by the First Priority Collateral Agent (directed by AFI) or the lenders (*i.e.,* Barclays and AFI for GSAP and BMMZ, respectively).

245. As the starting point for his analysis, Mr. Puntus developed a "Benchmark" value of the Notes Collateral based largely on the Nationstar and AFI stalking horse agreements that existed as of the Petition Date. In addition to using the purchase price percentages negotiated at arms' length in the Nationstar and AFI APAs for the Whole Loan Portfolio and the Servicing and Origination Assets, for his Benchmark Mr. Puntus used an indicative bid received for the FHA/VA collateral during the January 2013 sale process for the most attractive FHA loans, and valued other unsold assets based on asset-by-asset estimates (as to which he his values are relatively close to the JSNs' experts). Mr. Puntus further assumed that the stalking horse transactions would close, and all other collateral would be sold, by July 31, 2012 (two and a half months after the Petition Date), and performed a "run-off" analysis crediting the JSNs with all revenue generated from the Notes Collateral during that period, subtracting only direct costs associated with the process. Puntus Direct ¶ 85.

246. Mr. Puntus was careful to explain that the Benchmark did not represent his opinion of the value of the Notes Collateral for purposes of adequate protection (i.e., in the hands of the creditors upon foreclosure as of the Petition Date) because the purchase prices reflected in the stalking horse deals were not achievable absent the continued operation of the Debtors' business in Chapter 11 and the benefits obtained during the prosecution of these Chapter 11 cases. Oct. 16 Tr. 103:10-22.

247. To estimate the value of the Notes Collateral as of the Petition Date in the hands of the creditors' agents upon foreclosure, Mr. Puntus therefore made certain adjustments to his "comparable transaction"-based Benchmark valuation. Mr. Puntus based these adjustments on two alternative scenarios, differing only in how long he assumed the creditors would take to dispose of the collateral: "Alternative A" assumed the collateral would be

monetized by the collateral agents over a three to four month time period, while "Alternative B" assumed a five to six-month period. Puntus Direct, ¶¶ 86-88.

248. In making adjustments from his comparable transaction Benchmark, Mr. Puntus necessarily exercised significant degrees of professional judgment, but in every instance he provided detailed factual support for these subjective estimates. Thus, for example:

- With respect to the Whole Loan Portfolio, Mr. Puntus explained that adjustments were necessary and appropriate to account for the facts that (i) if the First Priority Collateral Agent had foreclosed on the assets prepetition, they would not have benefited from the better-than-market terms achieved by the Debtors and contained in the AFI APA; (ii) any buyer of the Whole Loan Portfolio was required to service the loans according to the standards dictated in the DOJ/AG Settlement; (iii) market whole loan trades include representations and warranties from the seller, and it was unclear whether the First Priority Collateral Agent would have been able to provide the representations and warranties required to sell the loans pursuant to a market asset purchase agreement; and (iv) defects existed in the collateral files as of the Petition Date, which resulted in a purchase price reduction under the AFI APA. Puntus Direct ¶¶ 95-101.

- For the Servicing Advances, Mr. Puntus explained that downward adjustments were necessary and appropriate to account for the fact that potential purchasers likely would be asked to purchase advances separate from the corresponding MSRs (on which the Noteholders did not have a lien), and thus would not control collection of advances. As even the JSNs' expert, Mr. Levine, acknowledged, a buyer purchasing only servicing advances would only be able to generate a return on investment from purchasing said advances at a discount to par. Puntus Direct ¶¶ 102-11; Oct. 22 Tr. 97:11-100:8.

- For the restricted cash (which Ginnie Mae required the Debtors to post to compensate for any losses resulting from their actions), Mr. Puntus explained that downward adjustments were necessary and appropriate to account for the fact that Debtors were required to maintain restricted cash accounts for the benefit of certain counterparties, including a restricted cash account maintained with Ally Bank and Ginnie Mae. Mr. Puntus assumed 100% recovery in all scenarios on all restricted cash accounts except Ginnie Mae, because Ginnie Mae had a right to sweep such cash to satisfy any losses resulting from the Debtors' non-compliance with Ginnie Mae servicer guidelines, including repurchasing delinquent loans out of Ginnie Mae pools. The Debtors were only able to comply with Ginnie Mae servicer guidelines and repurchase delinquent Ginnie Mae loans after the Petition Date through funding obtained pursuant to the AFI DIP facility ($200 million). If the

> Debtors had not obtained the AFI DIP facility and had ceased repurchases of delinquent loans from Ginnie Mae pools, the Ginnie Mae restricted cash accounts likely would not be available to the Noteholders. Accordingly, in Alternatives A and B, we assumed a $0 recovery on the Ginnie Mae restricted cash account. Puntus Direct ¶¶ 121-23.

249. Based upon these and similar adjustments, Mr. Puntus estimated that the value of the Notes Collateral as of the Petition Date in the event of foreclosure would have been between $1.474 billion – $1.594 billion, before taking into account certain significant legal risks. The Court finds that Mr. Puntus offered persuasive explanations for each of his adjustments, and in all cases made downward adjustments that were "conservative" in that they likely understated the negative impact on asset values that would have occurred in the event of foreclosure.

250. In addition to these adjustments, Mr. Puntus also identified two distinct legal risks that would have faced the JSNs ability to recover on their collateral in the event of foreclosure. First, as noted above, the RMBS trustees and certificate holders had asserted vast "rep and warranty" claims, which were ultimately the subject of a settlement to be implemented through a Chapter 11 plan, pursuant to which RMBS certificate holders would receive a $7.3 billion allowed unsecured claim. Before that settlement was reached, the trustees had openly threatened to setoff their substantial claims against servicing advances, which includes a substantial portion of the Notes Collateral. Second, and similarly, various agencies of the U.S. government, including the GSEs, held substantial claims against the Debtors and there was a significant likelihood that, absent the consensual agreements ultimately reached in bankruptcy, FHA/VA insurance payments could have been withheld as an offset against such claims. Mr. Puntus presented well-reasoned calculations of the potential magnitude of each of these legal risks, which together could have impaired the JSNs' recovery on their collateral by more than $400 million, but declined to express any opinion as to the likelihood that these risks would come to pass. Accordingly, he did not estimate the negative value of these risks, presenting them

in his analysis only as potential "below the line" items that might have reduced the value of the Notes Collateral substantially below the range indicated above. Puntus Direct ¶ 91 & Ex. 1.

251. Using either of Mr. Puntus's two alternative valuations, the Notes Collateral (without adjusting for legal risks) increased in value by $141 million – $261 million from the Petition Date to the valuation reflected in the recovery analysis in the disclosure statement that accompanied the Plan (the "Disclosure Statement"). Even under the Benchmark recovery case, which was not achievable outside of bankruptcy or without substantial post-petition effort to close the sale, the Notes Collateral value has remained essentially flat since the Petition Date. Puntus Direct ¶ 92 & Ex. 1.

252. The JSNs challenge Mr. Puntus's reliance on unconsummated stalking horse agreements as a basis for his valuation. The Court disagrees. As an initial matter, there is ample support for the proposition that even unconsummated transactions may be valuable evidence of value. Again, the Shannon Pratt treatise cited by Mr. Taylor is instructive: "Documentable, arm's-length, bona fide offers to buy or sell may also be useful evidence of value. Funded bona fide offers (i.e., offers for which the financing for the offer is already in place) should be given more weight and more consideration than unfunded bona fide offers." Shannon Pratt, supra, at 274. The stalking horse agreements Mr. Puntus relies upon were more than mere "bona fide offers to buy or sell"; they were legally binding contracts that bear all of the indicia of fair market value. There is no question that they were reached at arm's-length, with no duress. Nationstar and AFI were undeniably willing buyers, who by signing the APAs committed themselves to consummate the transactions if the Debtors complied with all conditions. The Debtors, for their part, committed to deliver the assets at the negotiated prices if no higher bids were received in bankruptcy – as often occurs in bankruptcy. And, for present

purposes even more compelling, members of the Ad Hoc Group who signed the prepetition PSA likewise committed to support the sales, and thereby to part with their property interests in the collateral, at the negotiated prices, and indicated by their actions that they would be satisfied with those prices. Indeed, even the JSNs' experts adopted the stalking horse bids as the best indication of market value on the Petition Date in the information they conveyed to their clients for the express purpose of being relied upon to decide whether to support the PSA. The May 14 Houlihan Presentation, which as part of an analysis of the Noteholders' potential recoveries valued the Notes Collateral, relied on the stalking horse bids as a "best case" benchmark values. In fact, Houlihan also presented its clients with two additional scenarios, which were at a 5% and 10% discount to the stalking horse bids. Puntus Direct ¶¶ 149-50.

253. At trial, the JSNs challenged Mr. Puntus's valuation method as lacking support in any valuation textbook or treatise. There is no textbook or treatise that provides guidance on how collateral in the hands of a collateral agent or lender – as separated from an operating business and its logical partner assets – should be valued. Oct. 16 Tr. 102:1-6. The Court finds that Mr. Puntus's analysis was well-grounded, both in his experience in the restructuring industry and by the unique facts of this case. Oct. 16 Tr. 102:1-6, 117:16-118:8. Mr. Puntus appropriately used a comparable transaction to set a Benchmark; with no generally accepted method as to how to adjust the benchmark values to account for collateral in the hands of a collateral agent or a lender, Mr. Puntus drew from his twenty years of professional experience – including 2 years working directly with the assets at issue in this case – to adjust the bid prices appropriately.

VII. EXPERT TESTIMONY REGARDING PLAN VALUATION

A. Mr. Renzi's Analysis Properly Values the Notes Collateral as of the Effective Date

254. For the recovery value of the Notes Collateral (including the value of the equity pledges), Plaintiffs offered the expert testimony of Mark A. Renzi.

255. Mr. Renzi valued the Notes Collateral as of the effective date of the Plan (the "Effective Date") at $1.745 billion (including the aggregate value of the Noteholders' equity pledges of $98.7 million). Renzi Direct ¶¶ 2, 9.[34]

256. Renzi arrived at this determination based on the assumptions that (i) the Debtors' tracking and allocation of the Collateral are reliable and accurate, (ii) the Debtors' assumptions as to the recoverability of assets remaining in the estate are reasonable, and (iii) the Debtors' assumptions as to the wind down costs of the estate (in particular, the expense allocation assumed for entities that are subject of the Noteholders'equity pledges) are reasonable and consistent with the global settlement in the Plan. Renzi did not consider the potential impact of the Committee's lien challenge. Renzi Direct Test. ¶ 3.

257. Renzi reviewed the Debtors' balance sheet and detailed Collateral information as of April 30, 2013, and the Debtors' projected "run-off" of the remaining Collateral as of April 30, 2013. Renzi Direct Test. ¶ 12.

258. Based upon those sources of data, Renzi calculated that (i) the aggregate unadjusted book value of the Collateral, comprised of cash, FHA/VA loans and related assets, non-FHA/VA held for sale (HFS) loans and related assets, servicer advances, and other Debtor assets, plus (ii) the positive purchase price adjustment from the Ocwen sale attributable to Collateral, plus (iii) the Noteholders'equity pledges, yield approximately $2.750 billion in the

[34] References to "Renzi Direct" are to the direct testimony of Mark A. Renzi, submitted by declaration. [Adv. No. 13-01343, Dkt. No. 77.]

aggregate. Renzi Direct ¶ 13. He then calculated, based on the same sources, that the anticipated recovery of the Collateral value is $2.662 billion (the "Gross Collateral Value"), comprised of (i) $1.925 billion in cash and restricted cash, and (ii) $402.4 million in anticipated recoveries on FHA/VA loans and related assets (assumed to be recovered at 91.1% of book value), (iii) $11.1 million in anticipated recoveries on non-FHA/VA HFS loans and related assets (assumed to be recovered at 65.4% of book value), (iv) $158.3 million in anticipated recoveries on servicer advances (assumed to be recovered at 83.0% of book value, net of cure costs), (v) $15.9 million in anticipated recoveries on other assets (assumed to be recovered at 60.9% of book value), (vi) $50.9 million of the positive purchase price adjustment from the Ocwen sale, which is attributable to the Collateral, and (vii) $98.7 million in the value of the Noteholders' equity pledges. *Id.*

259. Renzi then adjusted the Gross Collateral Value of $2.662 billion as follows. First, he reduced the Gross Collateral Value by the pay down of the Revolver on June 13, 2013 in the amount of $747.1 million. Renzi Direct ¶ 15.

260. Second, Renzi reduced the Gross Collateral Value by $169.8 million, which reflected the actual and projected administrative expenses that would be applied to the Revolver Collateral, Notes Collateral and Barclays DIP collateral from May 1, 2013 through the Effective Date under the AFI DIP Order and subsequent stipulations. Renzi Direct ¶¶ 16-17. Specifically, the $169.8 million is composed of (i) $27.2 million that was actually charged to the Notes Collateral between May 1, 2013 and August 31, 2013, and (ii) $142.6 million, which is the revised estimate of the Carve Out, comprised of $117.6 million in accrued and unpaid estate professionals' fees as of July 11, 2013, plus $25 million. Renzi Direct ¶ 17.

261. Thus, based upon Renzi's calculations, the Gross Collateral Value of $2.662 billion is reduced by the $747.1 million Revolver paydown and the $169.8 million expense allocation, resulting in an aggregate Notes Collateral recovery value of $1.745 billion. Renzi Direct ¶ 18. The Court finds Mr. Renzi's calculation to be proper and adopts it.

B. The JSNs' Experts Did Not Materially Contradict Mr. Renzi's Factual Calculations of the Effective Date Value of the Notes Collateral

262. The JSNs' experts did not offer their own independent opinion of the value the Notes Collateral as of the Effective Date. The JSNs offered the expert testimony of Mr. Eric Siegert to "summarize the valuation analyses of the Notes Collateral undertaken by Houlihan in the[se] adversary proceedings, discuss the methodologies used in those valuation analyses and summarize the material conclusions reached by the individuals offering expert reports concerning the valuation of the [Notes Collateral]." Siegert Direct ¶ 4.

263. In so doing, Mr. Siegert used the Debtors' estimate of the value of the Notes Collateral on the Effective Date, as set forth in the Disclosure Statement and as revised in Mr. Renzi's expert reports. DX ABF at 11; DX AIR at 5; Oct. 23 Tr. 134:15-135:4, 135:13-136:18. As Mr. Siegert testified, the JSNs' experts "rely on the debtors' number" for the "collateral value as of the distribution date." *Id.* at 136:6-9. He noted that while there were "issues [they] have with the debtors' number, … as a general matter, I don't think there's a great deal of debate about the value on the distribution date, but for some of the allocation issues I speak to …" *Id.* at 136:9-13. Because no evidence to the contrary has been proffered, beyond issues discussed below, the Court adopts Mr. Renzi's valuation.

264. Mr. Siegert explained that there were two such "allocation issues" that the JSNs' experts use to arrive at an Effective Date valuation different than Mr. Renzi's. First, the JSNs' experts would not include the deduction Mr. Renzi included for the "Carve Out" provided

for in the AFI DIP Order. As Mr. Siegert explained, neither he nor any of the other experts from Houlihan offer any opinion concerning whether the Debtors are entitled to charge a carve-out amount against the Notes Collateral. Oct. 23 Tr. at 138:4-18. They simply relied upon "counsel's determination as to whether or not it was appropriate to deduct these expenses from the [Notes Collateral]." *Id.*

265. Second, the JSNs' experts also add to the Effective Date value $313 million – representing the amount they would reallocate from the Ocwen/Walter sale proceeds as intangible value – less $40 million for expenses associated with that intangible value. Oct. 23 Tr. at 139:6-141:7.

266. As Mr. Siegert admitted, "no Houlihan expert . . . has offered an opinion as to . . . [a]ny other adjustment to the value of the [Notes Collateral] as of the distribution date." Oct. 23 Tr. at 141:8-13.

(i) *Charging the Carve Out Against the Notes Collateral is Appropriate*

267. The JSNs asserts that the Debtors should not assess $153 million of expenses under the Carve Out against the Notes Collateral, but have not offered any expert testimony on the issue. Mr. Siegert testified that the Houlihan experts offered no opinion as to whether the Debtors are entitled to charge such expenses against the Notes Collateral. Oct. 23 Tr. 138:7-13. He and the other experts simply relied upon "counsel's determination as to whether or not it was appropriate to deduct these expenses from the [Notes Collateral]." Oct. 23 Tr. 138: 14-18. He testified that, in his Global Summary rebuttal report, DX AIR at 5, he added the Carve Out expenses back to the Debtors' Effective Date Notes Collateral value of $1.735 billion solely at the direction of counsel. Oct. 23 Tr. 138:14-17.

268. Under the AFI DIP Order, the JSNs' stipulated prepetition liens are expressly subject and subordinate to the Carve Out. AFI DIP Order, ¶ 5(g)(iii)(B). Mr. Siegert

agreed that the purpose of a carve out, like the Carve Out in this case, is to allow some expenditure of professional fees for a Chapter 11 case before a secured creditor gets paid on its collateral. Oct. 23 Tr. 137:19-138:6. The Court therefore finds as a matter of fact that the Carve Out by its term applies here and the Debtors may properly pay the Carve Out amount out of the Notes Collateral.

(ii) Mr. Taylor's Allocation of the Ocwen Purchase Price To Intangible Assets is Irrelevant and Flawed

269. Mr. Taylor purported to reallocate the purchase price under the Ocwen APA and opined that $313 million was attributable to intangible assets and goodwill with respect to the Servicing and Origination Assets, including $220 million for "developed software and know-how," $129 million for "customer-related intangibles," $10 million for "tradename/marks, iconography and logotype," and negative $46 million for goodwill. DX ABH at 100.

270. As an initial matter, as noted above, the Court has already found that the JSNs have not demonstrated that their lien extends to such intangible value. Moreover, even if relevant to this dispute, the Court finds that Mr. Taylor's opinion is not useful in determining any actual intangible value in the assets under the circumstances. Specifically, Mr. Taylor admits that the analysis he performed is the same type of analysis he typically performs when he is retained by purchasers to conduct a purchase price allocation for financial reporting purposes. Oct. 23 Tr. 44:20-45:24. This analysis was done on a "fair value" basis in accordance with the Financial Accounting Standards Board ("FASB") guidelines. Oct. 23 Tr. 44:20-47:3. These guidelines govern financial reporting, but do not govern valuations performed for other purposes. *Id.* Thus, while Mr. Taylor's analytical methodology may be perfectly appropriate for financial reports, it is neither relevant nor useful for the purpose submitted here, which was to value the Notes Collateral. *Id.* at 43:25-44:9.

271. Indeed, Mr. Taylor admitted that selection of an appropriate valuation methodology depends on the purpose of the appraisal. *Id.* at 49:15-18. He also acknowledged that it is incumbent upon a valuation analyst practicing in bankruptcy to develop an understanding of the legal framework for valuation testimony that is provided by judicial precedent, the Bankruptcy Code and the Bankruptcy Rules. *Id.* at 50:6-14. Mr. Taylor admitted that, prior to rendering his report, he had not done any other valuations of collateral for purposes of establishing the amount of a secured claim in bankruptcy, and had never been involved in a case where he was called upon to value intangible assets for purposes of establishing the value of secured creditor's liens. *Id.* 51:11-23. Notwithstanding the foregoing, Mr. Taylor took virtually no steps to understand the appropriate methodology. Rather than inquire about the legal standard for valuing a secured lender's collateral in bankruptcy, Mr. Taylor simply relied on counsel to inform him if his valuation methodology was improper. *Id.* 51:4-14.

272. When confronted on cross-examination with an article written by an authoritative valuation expert, Mr. Taylor agreed that "an actual arm's length sales price is generally the best valuation indication." Oct. 23 Tr. 50:15-51:3. Yet Mr. Taylor's valuation did *not* rely on the allocation of the purchase price set forth in the APAs. PX 406 at ¶¶ 20(i), 21-23. Rather, Mr. Taylor argued in his Rebuttal Report that the use of the allocation in the APAs was not an appropriate basis to allocate the purchase price (when conducting a "fair value" purchase price allocation). PX 406 at ¶ 21. He testified that his valuation method was designed to strip out particular characteristics of a given buyer and perform an analysis based on a typical "market participant," rather than the results of an actual transaction. Oct. 23 Tr. 64:1-20.

273. Mr. Taylor testified that he did not consider statements by Ocwen and Walter that they did not want the servicing platform, and also testified that any such statements

would not have been relevant to his analysis. *Id.* at 73:10-17. Mr. Taylor also was not fully informed of the facts. For example, he was unaware of the existence of a transcript of the auction that led to the APAs, and that Nationstar, Ocwen and Walter needed a bid credit in order to agree to take on the platforms. Oct. 15 Tr. 215:13-24; Oct. 23 Tr. 73:18-74:25. Mr. Taylor admitted that, had he known of that information, it might have affected his valuation (as it was based on the opinion of *multiple* market participants). Oct. 23 Tr. 74:6-75:7.

274. Even if "fair value" allocation for financial reporting purposes was relevant (and it is not), Mr. Taylor failed to offer any credible explanation for why his allocation differed so wildly from Walter's and Ocwen's 10-Qs (which Mr. Taylor assumed would be based on the same FASB "fair value" concept that he employed). Oct. 23 Tr. at 68:23-69:19. The purchase price allocation contained in these public disclosures attributed only $17.1 million and $1 million to software, respectively – as compared to Mr. Taylor's $220 million valuation for software and know-how. DX ABH at 65, ¶ 179(ii) & n.126, and p. 89-90, Tables 15 & 16.[35] By Mr. Taylor's own account, his results should have been similar to these 10-Qs because they were based on the same accounting concepts. Oct. 23 Tr. 68:23-69:19. But they were not.

275. Mr. Taylor's valuation of intangibles is flawed for other reasons as well. To reach a $220 million valuation of the software and know-how, Mr. Taylor testified that he employed two different methods: a "relief from royalty method" (which was given 75% weighting in Mr. Taylor's analysis) and an "avoided cost" method (which was given a weight of 25%). Oct. 23 Tr.75:16-25; DX ABH Addendum A at A-25. Neither of these methods was sound.

[35] Although Taylor speculated at trial that perhaps Walter may have recorded additional value for the software into goodwill, he was forced to admit on cross-examination that he is not aware of any reallocation by Walter in its public disclosures. Oct. 23 Tr. at 70:3-71:9.

276. Under the relief from royalty method, Mr. Taylor multiplied the revenue associated with the servicing and origination business estimated in an internal ResCap presentation against an "indicated royalty rate." Oct. 23 Tr. at 77:14-78:5. His indicated royalty rate, however, is baseless and subjective. To start, Mr. Taylor found 2,000 transactions in comparable industry segments or with comparable uses of intangible assets. Then, based on criteria that Mr. Taylor refers to as "robustness of the package," Mr. Taylor culled down to seven comparable transactions that made the final cut. Oct. 23 Tr. 76:25-77:4. Taylor's culling and "robustness" criteria are not described in any significant detail.

277. Of the seven comparables that made the "final cut," Mr. Taylor gave no weight to three. Oct. 23 Tr. 78:12-14. Mr. Taylor testified that he gave no weight to one comparable because, among other things, it "had related parties involved," and parties not in an arm's length transaction make it difficult to determine what a market participant would have been obligated to pay for similar intangible assets. Oct. 23 Tr. 79:19-81:2.

278. Two other transactions – notably, the two with the lowest royalty rates (4.0%) – were rejected by Taylor as well; one because it purportedly was "not sufficiently robust" (even though he had just testified that he had culled out the comparables that were not robust). Oct. 23 Tr. 78:9-79:18.

279. By contrast, Mr. Taylor gave the greatest weight to a transaction that had the highest royalty rate by far. That transaction – involving a company called Electronic Mortgage Bank, Ltd. – had a 50% royalty rate, which was more than *triple* the next highest royalty rate used in Mr. Taylor's analysis. *See* DX ABH Addendum A at A-29. As a consequence of using the outlying royalty rate from the Electronic Mortgage Bank transaction, the final "indicated royalty rate" was skewed upwards to more than 23%, which was more than

50% higher than the royalty rate of any other transaction accorded any weight in Mr. Taylor's analysis. DX ABH Addendum A at A-29.

280. Mr. Taylor had no basis for using the Electronic Mortgage Bank transaction in his analysis at all (let alone giving it the greatest weight). Aside from the fact that it was an obvious outlier, Mr. Taylor admitted that he knew essentially nothing about the nature of the transaction at issue and had been unable to find any information about Electronic Mortgage Bank that post-dated 1998. Oct. 23 Tr. 81:3- 83:19. Moreover, Mr. Taylor admitted that the Electronic Mortgage Bank transaction was a related party transaction (*Id.*) – which was the very reason that Mr. Taylor had rejected using another transaction (with a far lower royalty rate). Oct. 23 Tr. 80:21-81:2.

281. The "avoided cost" method used by Mr. Taylor also was flawed. That method was based on an assumption that the Debtors' software would be used for three years. Oct. 23 Tr. 84:23-85:2. Mr. Taylor admitted that he did not (and would not) adjust this computation based on the actual plans of the buyers to use the software for less time. Oct. 23 Tr. 85:3-15. As a consequence, this method also does not reflect reality.

282. Perhaps the most striking observation of Mr. Taylor's analysis is that ultimately it is completely irrelevant to the JSNs' allocation because, as Mr. Taylor admitted, the $313 million he allocated to goodwill and intangible assets was dictated to him by the total purchase consideration, less the value of the financial and tangible assets (which were provided by public disclosures or other experts). Oct. 23 Tr. 54:21-57:20; 58:6-11; 58:24-59:14. Seen in this light, Mr. Taylor's report is nothing more than make-weight designed to make a foregone conclusion appear to be supported by actual analysis.

283. Finally, within the $313 million Mr. Taylor ascribes to goodwill and intangibles, there is $129 million attributed to "customer-related intangibles." DX ABH at 83, Table 11 n.2. Mr. Taylor did not independently derive that number; he adopted it from Levine's analysis. *Id.* However, Mr. Levine's analysis is flawed for the reasons noted above.

284. Given the foregoing, the Court finds that Mr. Taylor's assessment of the intangible assets associated with the Servicing and Origination Assets is entitled to no weight.

VIII. FINDINGS RELEVANT TO COMMITTEE'S LIEN CHALLENGES

A. Unencumbered and Released Assets

(i) Unencumbered Deposit Accounts

285. Except for the Controlled Accounts (as defined below), the Deposit Accounts listed on Schedule 5 to the Committee Action are not subject to an executed control agreement among the relevant Debtor, the Third Priority Collateral Agent, and the bank where such Deposit Accounts are maintained. PX 126; Landy Direct ¶¶ 3(d), 24(a), 40.

286. The uncontroverted evidence at trial established that, as of the Petition Date, the Deposit Accounts held funds in the amount of $48,502,829. Landy Direct ¶ 41.

287. The Third Priority Collateral Agent maintained control agreements in the ordinary course of business, including control agreements executed after June 2008 (the month of the Exchange) and any amendments thereto. Pinzon Dep. at 45:19-46:11. The Court infers that the Third Priority Collateral Agent would have produced all control agreements relating to the Deposit Accounts if any were in its possession, custody or control.

288. The parties sought executed control agreements in discovery. Landy Direct ¶ 40.

289. Executed control agreements were admitted into evidence for the following Deposit Accounts (collectively, the "Controlled Accounts"): Account Nos. xxxx7570,

xxx6190, xxx8567, xxxx7618, xxxx2763, and xxxx0593. *See* DX AIU; DX AIV; DX AIW; DX AIX; DX AIY; DX AIZ. As of the Petition Date, the Controlled Accounts held an aggregate amount of $16,885. PX 126.

290. Based on the foregoing, the Court finds that no control agreement exists for any Deposit Account, except for those pertaining to the Controlled Accounts.

291. Deposit Account Nos. xxxx2607, xxxx7877, and xxxx1176 (collectively, the "WF Accounts") are maintained at Wells Fargo, which is the Third Priority Collateral Agent. The WF Accounts contained $38,321 as of the Petition Date. PX 126. Because the secured party is the bank, the Third Priority Collateral Agent has automatic control over the WF Accounts under the Uniform Commercial Code. Accordingly, the Third Priority Secured Parties have a perfected lien with respect to the WF Accounts.

292. Deposit Account Nos. xxxx3803 and xxxx6323 (together, the "Ally Accounts") are maintained at Ally Bank, which is an indirect, wholly-owned subsidiary of the Revolver Lender. Defendants' Contentions, ¶ 103. Ally Bank is not a party to the Notes Documents, the Revolver Documents or the Intercreditor Agreement and is therefore not a "secured party" within the meaning of the Uniform Commercial Code for purposes of control and perfection. Further, the Third Priority Secured Parties are not perfected by virtue of the Revolver Lender and Ally Bank being affiliates. First, given that they are not the same entity, the Revolver Lender's lien is not perfected under the Uniform Commercial Code through automatic control. Second, even if it were perfected through automatic control, that would be the case only with respect to its own security interest (under the Revolver). As discussed above, under the Intercreditor Agreement, the first lien priority parties have nearly unfettered rights to dispose of the Collateral, without the consent or authority of the Third Lien Priority Agent, and

nothing in the Intercreditor Agreement requires the Revolver Lender (and thus, indirectly, Ally Bank) to comply with the Third Priority Collateral Agent's instructions with respect to Ally Bank, a feature which is necessary of any control agreement under the Uniform Commercial Code. PX 2 (§§ 3.1, 5.1, 8.4).

293. Based on the foregoing, and except for the Controlled Accounts and the WF Accounts, the Court finds that the JSNs have failed to meet their burden of proving that they had control of any of the Deposit Accounts (including the Ally Accounts), and accordingly the JSNs do not have perfected liens on Account Nos. xxxx7286, xxxx3803, xxxx6323, xxxx9917, xxxx9454, xxxx4806, xxxx2482, xxxx2540, xxxx2565, xxxx2573, xxxx1781, xxxx1799, and xxxx1418 (collectively, the "Avoidable Deposit Accounts"), which on the Petition Date held funds in the aggregate amount of $48,439,532. PX 126.

294. Deposit Account No. xxxx2599, which is maintained at J.P. Morgan Chase Bank, N.A. and contained $8,091 as of the Petition Date, contains proceeds of the Notes Collateral (the "Proceeds Account"). Oct. 17 Tr. 173:4-174:11; Revolver Loan Agreement § 4.02 (PX 6). The Court finds that the Third Priority Secured Parties have a perfected interest in such accounts under the Uniform Commercial Code because it contains proceeds of their collateral. The Defendants have failed to proffer evidence at trial that any of the Deposit Accounts other than the Proceeds Account contain proceeds of the Notes Collateral such that they have a security interest in such proceeds under the Uniform Commercial Code by having a securing interest in the underlying collateral.

(ii) Unencumbered Real Property

295. Real property and leasehold interests listed on Schedule 2 to the Committee Action, and that portion of Schedule 6 to the Committee Action that identifies "real estate owned" properties (*i.e.*, mortgaged properties acquired through foreclosure or other

exercise of remedies under mortgages or deeds of trust that secured the associated mortgage loan instruments), were owned by various Debtors as of the Petition Date and are not subject to either a mortgage or a deed of trust in favor of the Third Priority Collateral Agent (the "Unencumbered Real Property"). PX 124; PX 127 at 44-47; Landy Direct ¶¶ 3(b), 24(b), 36; Oct. 17 Tr. 175:1-23.

296. The uncontroverted evidence at trial established that, as of the Petition Date, the fair market value of the Unencumbered Real Property was $21 million. Landy Direct ¶ 38.

297. The Third Priority Collateral Agent did not know whether it had received any mortgage or deed of trust with respect to the Unencumbered Real Property, nor did it know whether any property owner ever granted or signed a mortgage or deed of trust with respect to the Unencumbered Real Property. Pinzon Dep. 24:7-11, 29:2-11.

298. The parties sought mortgages and deeds of trusts relating to the Unencumbered Real Property in discovery. Landy Direct ¶ 37.

299. No mortgage or deed of trust for the Unencumbered Real Property was proffered by any party or admitted into evidence during the trial. *Id*.

300. Based on the foregoing, the Court finds that the JSNs have failed to meet their burden of establishing that they have a perfected security interest in or lien on any of the Unencumbered Real Property because no such property was subject to an executed and filed mortgage or deed of trust.

(iii) Unencumbered Assets of Non-Obligor Debtors

301. The Debtors submitted into evidence a list of Debtors that are not parties to, and have no obligations under, any of the Revolver Documents or the Notes Documents (the "Non-Obligor Debtors"). The Non-Obligor Debtors did not pledge their equity or other assets

under the Notes Documents. *See generally* PX 2; PX 3; PX 4; PX 5; PX 6; PX 7; PX 8; PX 248.2.

302. The JSNs, however, contend that they have a security interest in the assets of Executive Trustee Services, LLC ("ETS") and Equity Investment I, LLC ("Equity I"). The evidence shows otherwise.

303. ETS was not a party to or an obligor under the Original Revolver Loan Agreement, the Original Revolver Security Agreement, the Notes Indenture or the Original Notes Security Agreement. *See* PX1; PX 3; PX 5; PX 7. ETS was also not a party to or an obligor under the Revolver Documents or the Notes Security Agreement at the time those documents were executed. PX 4; PX 6; PX 8.

304. On February 16, 2011, ETS executed a joinder to the Revolver Documents and pledged all of its assets to AFI under the Revolver as a guarantor. Neither the Debtors nor the JSNs have identified a similar joinder agreement whereby ETS became an obligor under any of the Notes Agreements or granted any security interest to the Noteholders. The Noteholders have argued that Section 4.17 of the Notes Indenture and Section 2.3(c) of the Intercreditor Agreement support the proposition that ETS is a guarantor of the Notes. Section 4.17 of the Notes Indenture sets forth the process by which future guarantors execute supplemental indentures guaranteeing the Notes, and Section 2.3(c) of the Intercreditor Agreement provides that any party pledging assets to the Revolver shall also pledge such assets to the JSNs. However, these provisions are not self-effectuating. In addition, while Section 2.3(c) of the Intercreditor Agreement prescribes remedies for the First Priority Collateral Agent (on behalf of the Revolver) if the provision is breached, it does not prescribe any remedies for the Third Priority Collateral Agent (on behalf of the Notes). ETS's execution of a joinder to the Revolver

Documents did not create any obligation on behalf of ETS (which was not a party to the Intercreditor Agreement or the Notes Indenture) to become an obligor under the Notes Documents.

305. In June 2008, (a) RFC, the sole shareholder of Equity I, granted a security interest in its ownership interest in Equity I under each of the Original Revolver Security Agreement and the Original Notes Security Agreement, (b) Equity I executed the Original Revolver Loan Agreement as an "Obligor," and (c) Equity I granted a security interest in certain deposit and securities accounts under each of the Original Revolver Security Agreement and the Original Notes Security Agreement as an "Additional Account Party." PX 3; PX 5; PX 7.

306. Each of these pledges was terminated prior to or in connection with the December 2009 amendments to the loan documents. On May 19, 2009, RFC executed releases of the equity pledges in Equity I that had been pledged under the Original Revolver Loan Agreement and the Original Notes Security Agreement. PX 130 at 33-45. In addition, on December 29, 2009, UCC-3 termination statements were filed on behalf of Equity I terminating (a) the First Priority Collateral Agent's security interests in all assets pledged by Equity I, and (b) the Third Priority Collateral Agent's security interest in all assets pledged by Equity I. PX 131 at 836-40. Contemporaneously therewith, certain of the Debtors entered into the Revolver Loan Agreement, the Revolver Security Agreement, and the Notes Security Agreement, and Equity I was no longer identified as an "Obligor" or an "Additional Account Party" under any of those documents. PX 4; PX 6; PX 8.

307. On December 30, 2009, Equity I became a guarantor under the LOC Facility. PX 9.

308. Based on the foregoing, the Court finds that ETS and Equity I were not and are not obligors under any of the Notes Documents and did not otherwise grant any security interest in or lien on any of their respective assets to secure the Notes. As such, the JSNs do not have a lien on any of the assets of ETS or Equity I.

(iv) Excluded and Released Assets

309. As discussed above, the JSNs' collateral package did not include the Excluded Assets or assets that were released in accordance with the Notes Documents.

310. "Excluded Assets" is defined in the Notes Security Agreement to include assets pledged under Bilateral Facilities as of June 6, 2008, the date the Notes were issued. PTO ¶ 20; PX 4 at 8. The Notes Security Agreement defines "Bilateral Facility" as the approximately 53 financing arrangements that were listed on Schedule 7.01(t) to the Original Revolver Loan Agreement to which certain Debtors or their affiliates were party as of June 6, 2008. PX 4 at 5.

311. Schedule 1 to the Committee Action lists assets that were pledged under a Bilateral Facility as of June 6, 2008 (the "Excluded Bilateral Facilities Collateral") and thus constitute Excluded Assets not subject to the liens held by the Third Priority Secured Parties.

312. The Excluded Bilateral Facilities Collateral falls into two categories: (a) assets pledged under an AFI fund facility in the CFDR as of the Petition Date (with a fair market value of $24 million), and (b) assets pledged under the BMMZ fund facility as of the Petition Date (with a fair market value of $25 million). Landy Direct ¶¶ 32-33.

313. Schedule 3 to the Committee Action contains a list of mortgage loans (the "Released Mortgage Loans" and, together with the Excluded Bilateral Facilities Collateral, the "Contested Assets") that were released by the Third Priority Collateral Agent but were subsequently reacquired by the Debtors prior to the Petition Date. PX 125.

314. Section 7.01(q) of the Revolver Loan Agreement addresses U.S. mortgage loans that were pledged to a Bilateral Facility or that were repurchased or otherwise acquired by obligors. Section 7.01(q) requires the applicable obligor to use commercially reasonable efforts to grant Noteholders a security interest on U.S. mortgage loans repurchased or otherwise acquired by such obligor, or held by such obligor "and released from the Liens supporting any other facility." PX 6 § 7.01(q)

315. The Defendants did not assert or introduce evidence that the Debtors granted any security interests in any such assets that were repurchased, otherwise acquired or released from liens securing other facilities.

316. The dispute concerning the Contested Assets is whether they automatically were added to the Notes Collateral prior to the Petition Date when either the reason for the exclusion of the Excluded Bilateral Facilities Collateral no longer existed or when the Debtors reacquired the Released Mortgage Loans. The Court has already found the Notes Security Agreement to be ambiguous on this point. August 13 Opinion at 20.

317. In seeking to resolve the ambiguity, the Court rejects the testimony proffered by both sides as to the parties' expectations because those expectations are best reflected in the language of the Notes Security Agreement (this includes all deposition designations concerning the Debtors' and/or AFI's respective expectations). Because that language is itself ambiguous, the Court has considered the parties' dealings and the expert testimony concerning the custom and practice in the secured transactions field of law.[36]

318. The Court has considered the testimony of Ms. Teresa Farley with respect to the Debtors' course of dealing. While Ms. Farley testified that there were times when the

[36] The parties have not offered sufficient evidence regarding the drafting of the operative agreements – let alone evidence that the Debtors were the principal drafters – for this Court to apply the doctrine of *contra proferentem* and thus there is no basis to construe any ambiguity against the Plaintiffs.

Debtors treated the Contested Assets as part of the Notes Collateral, and other times when they did not, she also testified that assets that came off of Bilateral Facilities were marked as "Unpledged" in the CFDR, which means only that those assets were not Primary Collateral. *See, e.g.*, Oct. 16 Tr. 181-93; Farley Direct ¶ 35; *see also* Ruhlin Dep. 89:14-24 (Ruhlin's understanding was that "once an asset was released from a funding facility, depending on the asset, it would become part of the blanket lien.").

319. In an attempt to address the ambiguities in the Notes Security Agreement and with respect to the Debtors' course of dealing, Defendants proffered the expert testimony of Professor Ronald Mann. The Court previously struck those portions of Professor Mann's testimony concerning "the likely intent and expectations of the parties to the transaction in question." Oct. 16 Tr. 13:18-14:8. From what remains of his report, Professor Mann testified that, in his opinion, parties to an all-asset grant of security would expect excluded assets that lose their characteristics as such, and released assets that are subsequently reacquired, to automatically return to the collateral pool, unless there was an unambiguous and explicit provision to the contrary. Oct. 23 Tr. 10:17-24.

320. The Court rejects Professor Mann's testimony for three principal reasons. First, Professor Mann relied on nothing but the language of the operative documents in this case and his personal experience; he referred to no academic study or learned treatise and provided no method or objective analysis. Oct. 23 Tr. 18:6-19:6. Second, having participated in just "3-5 transactions" with Akin Gump over the last 20 years, and with less than five percent of his professional work over that time devoted to advising clients in secured transactions, Professor Mann simply has insufficient experience to opine on the expectations of parties to all-assets grants of security. Oct. 23 Tr. 22:4-24:10. Finally, in response to hypothetical questions,

Professor Mann acknowledged that the Notes Security Agreement does not contain an all-assets grant of security, thus rendering the entirety of his opinion irrelevant. Oct. 23 Tr. 11:2-12:12.

321. In contrast, the Court credits the testimony of Plaintiffs' expert, James Gadsden. Mr. Gadsden has spent almost 40 years negotiating and drafting indentures and security agreements. Based on his considerable experience, Mr. Gadsden opined on the custom and practice of drafting indentures and security agreements. Gadsden Direct ¶¶ 5-14. Among other things, Mr. Gadsden testified that "[l]awyers look to see how other lawyers previously addressed the same issue rather than drafting from a blank slate in addressing any given issue." Gadsden Direct ¶¶ 15-16.

322. Mr. Gadsden employed the custom and practice he described to search for precedents that address the issues covered by the Contested Assets. While Mr. Gadsden did not find a plethora of precedents, he did find language used in other matters that is directly applicable to the Contested Assets. Such language included either temporal limitations on exclusions or express statements that collateral springs back once the restriction is eliminated. Gadsden Direct ¶¶ 17-26; Oct. 17 Tr. 82:21-84:22. If the drafters of the Notes Security Agreement had simply followed the straight-forward custom and practice described by Mr. Gadsden, they, too, would have located the language directly applicable to the contested Assets. If they wanted to provide for a springing lien in previously excluded released collateral, the JSNs "could have and should have" located and utilized such market and custom language to make their intent clear (and avoid this dispute). Oct. 17 Tr. 104: 7-15.

323. In fact, in a related transaction (*e.g.*, the Revolver), the parties contemplated that the Debtors would need to affirmatively grant and perfect subsequent liens on previously excluded property for the Revolver Lender to get the benefit of such liens. Section

7.01(q) of the Revolver Loan Agreement provides that the obligors thereunder will use commercially reasonable efforts to grant and perfect a lien on U.S. mortgage loans repurchased or otherwise acquired by such obligor or Subsidiary, and released from the liens supporting any other facility." PX 6 § 7.01(q).

324. Based on the foregoing, the Court finds that if the JSNs intended for the Contested Assets to be added to the collateral pool after either losing their exclusionary characteristics or upon re-acquisition, they could have and should have expressly so provided in the security documents. Given that the Notes Agreements do not contain any springing language to revive the excluded and released collateral thereunder, the Court find that Third Priority Secured Parties do not have a lien on any of the Contested Assets.

(v) Released Mortgage Loans

325. The Committee contends that even if the Released Mortgage Loans are subject to the Noteholders' liens following re-acquisition, those liens should be avoided because the JSNs failed to properly perfect their security interest in the Released Mortgage Loans.

326. There is no dispute that in May 2010, the Third Priority Collateral Agent released certain mortgage loans, including the Released Mortgage Loans. To effectuate that release, the Third Priority Collateral Agent: (a) executed a Partial Release of Collateral, dated May 17, 2010, releasing the security interest of the JSNs in the Released Mortgage Loans (the "Mortgage Loan Release"); and (b) filed UCC-3 amendments that deleted the Released Mortgage Loans from the collateral set forth in the original UCC-1 financing statements (as amended). PX 135; PX 136.

327. Following the execution of the Mortgage Loan Release and the filing of the attendant UCC-3 amendments, the Released Mortgage Loans were sold to Citibank or Goldman Sachs. Landy Direct ¶ 3(c); Oct. 17 Tr. 176:2-23, 183:5-23, 188:20-89:1.

328. Prior to the Petition Date, the Released Mortgage Loans were repurchased by one or more of the Debtors and, as of the Petition Date, were marked in the CFDR as pledged to the AFI Revolver. PX 125; Landy Direct ¶ 35.

329. The fair market value of the Released Mortgage Loans as of the Petition Date was $10 million. Landy Direct ¶ 33.

330. The Defendants have not asserted and did not proffer any evidence that the Debtors re-granted a security interest in the Released Mortgage Loans, or that the JSNs filed a UCC-1 financing statement or a UCC-3 amendment listing the Released Mortgage Loans or otherwise perfected their purported security interest in those assets, after they were reacquired by the Debtors.

331. Based on the foregoing, the Court finds that the Third Priority Secured Parties do not have a perfected lien on the Released Mortgage Loans.

B. Preference Assets

332. Other than the Non-Preference Assets (as defined below), assets listed on Schedule 6 to the Committee Action were added to the Notes Collateral during the 75 days prior to the Petition Date (the "Adjusted Preference Assets").[37]

333. The Adjusted Preference Assets consist principally of mortgage loan instruments, including mortgage loans that were guaranteed or insured by the FHA/VA, and "real estate owned" properties (*i.e.*, a mortgaged property acquired through foreclosure or other exercise of remedies under mortgages or deeds of trust that secured the associated mortgage loan instruments). Landy Direct ¶¶ 43-44.

[37] The Committee used a reduced preference period from February 29, 2012 through the Petition Date (75 days instead of 90) due to the Debtors' customary month-end reporting practices.

334. The Committee's expert, Marc Landy, reviewed data from the CFDR supporting the Petition Date and February 29, 2012 trial balances prepared by the Debtors in order to determine what assets were added to the Notes Collateral during the Preference Period. Mr. Landy identified the Preference Assets by (a) using the unique and permanent identification number assigned by the Debtors to the assets tracked in the CFDR, (b) reviewing the assets and property recorded as part of the Notes Collateral in the CFDR under three specific fund facility labels, and (c) sorting and comparing data derived from the CFDR during the Preference Period. *Id*.

335. The Adjusted Preference Assets were not included in the Notes Collateral as of February 29, 2012, but were included in the Notes Collateral as of the Petition Date. *Id*. ¶ 45.

(i) Assets Worth $349,971,942 (Book Value) Were Added to the Notes Collateral During the Preference Period

336. The Adjusted Preference Assets do not include the following assets identified on Schedule 6 to the Committee Action (collectively, the "Non-Preference Assets"): (a) 18 loans identified as "HFS Revolver" or "HFS Blanket," with a net book value of $1,950,188, (b) two REO properties identified as "HFS Blanket," with a net book value of $50,478, (c) three mortgage loans that were refinanced (the "Refinanced Mortgages"), with a net book value of $1,021,096, and (d) certain REO properties that Mr. Landy acknowledges were "never transferred to or for the benefit of the [Noteholders] during the preference period" (but which are subject to avoidance as Unencumbered Real Property in any event), with a net book value of $12,106,073. Landy ¶ 56; DX ABN at DX0ABN-0012; DX AIS at DX0AIS-0004; PX 127.

337. After deducting the value of the Non-Preference Assets, the Adjusted Preference Assets had a book value of $349,971,942 as of the Petition Date. PX 127; Landy Direct ¶ 48; DX ABN at DX0ABN-0012; Oct. 22 Tr. 49:4-7.

338. The evidence does not support the exclusion of any loans from the Adjusted Preference Assets that purportedly "disappeared and reappeared." Despite considerable due diligence and discovery, Mr. Winn could not identify the cause of the "disappearance and reappearance" of these loans, and was forced to acknowledge that none of the loans were recorded as Notes Collateral in the CFDR as of February 29, 2012, and that all of the loans appeared as Notes Collateral on the Petition Date. Oct. 21 Tr. 245-259; Oct. 22 Tr. 51:7-53:39.

339. Other than the Refinanced Mortgages, no other loan that is otherwise an Adjusted Preference Asset was a refinanced loan. DX AIS; Oct. 22 Tr. 49:20-50:3, 53:10-54:15. Indeed, Mr. Winn acknowledged as much:

> Q: And with respect to the totality of Exhibit 4.1 to your report, which is each of the loans that make up the fifty-three million dollars, with respect to Schedule 4.1, other than those three, you have no basis to say that any particular loan was a refinanced loan; is that correct?
>
> A: That's correct, I laid out the possibilities. I don't have the information to take it further.

Oct. 22 Tr. 54:9-15.

(ii) *Other Elements of the Committee's Preference Claim*

340. The transfers of the Adjusted Preference Assets were made (a) to the Third Priority Collateral Agent for the benefit of the Noteholders; (b) for or on account of an antecedent debt (*i.e.*, the Preference Assets were added to the Notes Collateral under the Notes Security Agreement to secure the Junior Secured Notes, a pre-petition obligation constituting an

antecedent debt); and (c) within the 90 days prior to the Petition Date. Oct. 22 Tr. 49:4-7, 50:7-18; Landy Direct ¶¶ 42-43, 46.

341. The Defendants have not proffered any evidence indicating that Debtors were not insolvent during the 90 days immediately preceding the Petition Date.

342. The evidence further establishes that the transfer of the Adjusted Preference Assets enabled the JSNs to receive more than they otherwise would without the transfer in a hypothetical chapter 7 liquidation. Landy Direct ¶¶ 51-54. Mr. Landy's valuation testimony, which generally followed the methodologies and assumptions used by Mr. Puntus to determine the value of the "hard assets" included in the Notes Collateral as of the Petition Date, established that the JSNs were undersecured as of the Petition Date. Therefore, the distribution that the JSNs would receive on account of the secured portion of their claim would, of course, be correspondingly reduced without the additional collateral represented by the Adjusted Preference Assets. *Id*. Applying the Hypothetical Liquidation Analysis set forth in the Disclosure Statement filed by the Debtors on August 23, 2013,[38] the projected distribution to the JSNs for a hypothetical deficiency claim (resulting from the avoidance of the transfers of the Adjusted Preference Assets) would be approximately 40%, also less than the full recovery represented by the transfer of the Adjusted Preference Assets.[39] The Defendants did not proffer a competing opinion and did not substantively challenge Mr. Landy's analysis.

[38] According to Mr. Landy, the *Hypothetical Liquidation Analysis* contained in the Disclosure Statement presents a more favorable basis (to the JSNs) for determining the JSNs' hypothetical recovery under a chapter 7 liquidation for preference purposes. This is because, under the "best interests of creditors" analysis set forth in the Disclosure Statement, the chapter 7 liquidation period commences on April 30, 2013 (and thus reflects many of the successful dispositions and settlements accomplished to date in the Chapter 11 Cases), and the monetization of assets is further assumed to last 12 months following the appointment of a chapter 7 trustee. On the other hand, a hypothetical chapter 7 liquidation that would have commenced on the Petition Date for purposes of the section 547(b)(5) would likely result in comparatively reduced recoveries for the JSNs

[39] Other comparisons made by Landy of the projected recovery to the JSNs under various scenarios confirm that the transfer by the Debtors of the Adjusted Preference Assets enabled the JSNs to receive more than they would receive in a hypothetical chapter 7 liquidation case had the transfers not been made. Landy Direct ¶ 54.

343. For the reasons set forth above, the Court finds that the Noteholders were undersecured on the Petition Date.

(iii) The Defendants Have No Viable Defense to the Committee's Preference Claim

344. The Court finds that Noteholders lack any defense to the Committee's preference cause of action.

345. The Notes Trustee proffered the expert testimony of Michael Fazio in support of its defense under section 547(c)(5) of the Bankruptcy Code. The Court finds that the Third Priority Collateral Agent is the "secured party" and the transferee under section 547 and therefore is the only party that can assert a defense under section 547(c)(5) of the Bankruptcy Code.

346. Even if the Notes Trustee could properly assert the section 547(c)(5) defense (which it cannot), the Court finds that the mortgage loans and proceeds are "instruments" and not "inventory" or "receivables." *See* Oct. 23 Tr. 33:9-33:15.

347. Also, even if the Notes Trustee could overcome these factual deficiencies (which it cannot), the Notes Trustee's section 547(c)(5) defense is rejected because the evidence simply does not support it. For the reasons set forth above, the Court rejects the Petition Date valuation of the Notes Collateral proffered by Houlihan. Because Mr. Fazio's section 547(c)(5) analysis is dependent on the Berkshire-derived price utilized by Houlihan, it too must be rejected. Oct. 22 Tr. 227:24-228:18.

348. Finally, even if the Notes Trustee could overcome these factual deficiencies (which it cannot), Mr. Fazio admitted that his section 547(c)(5) analysis is incomplete, and it should therefore be dismissed. Oct. 22 Tr. 231:2-231:5.

349. Based on the foregoing, the security interest of the Third Priority Secured Parties in the Adjusted Preference Assets should be avoided pursuant to section 547 of the Bankruptcy Code.

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MORRISON & FOERSTER LLP

/s/ Gary S. Lee
Gary S. Lee
Todd M. Goren
Jamie A. Levitt
Samantha Martin
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 468-8000
Facsimile: (212) 468-7900

-and-

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

/s/ Steven J. Reisman
Steven J. Reisman
Theresa A. Foudy
Michael Moscato
101 Park Avenue
New York, New York 10178
Telephone: (212) 696-8860
Facsimile: (212) 697-1559

Counsel to the Debtors and Debtors in Possession

KRAMER LEVIN NAFTALIS & FRANKEL LLP

/s/ Kenneth H. Eckstein
Kenneth H. Eckstein
Gregory A. Horowitz
Douglas H. Mannal
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000

-and-

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Robert J. Feinstein
Robert J. Feinstein
John A. Morris
780 Third Avenue, 36th Floor
New York, New York 10017
Telephone: (212) 561-7700
Facsimile: (212) 561-7777

Counsel to the Official Committee of Unsecured Creditors