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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
RESIDENTIAL CAPITAL, LLC, et al.,	)	Case No. 12-12020 (MG)
Debtors.	)	(Jointly Administered)

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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 DUE 2015 ISSUED BY DEBTOR RESIDENTIAL CAPITAL, LLC, et al., Defendants.	Adv. Case No. 13-01343 (MG)
OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the estates of the Debtors, Plaintiffs, v. UMB BANK, N.A., IN ITS CAPACITY AS INDENTURE TRUSTEE FOR THE 9.625% JUNIOR SECURED GUARANTEED NOTES DUE 2015 ISSUED BY DEBTOR RESIDENTIAL CAPITAL, LLC, et al., Defendants.	Adv. Pro. No. 13-01277 (MG)

PROPOSED FINDINGS OF FACT OF THE AD HOC GROUP OF JUNIOR SECURED NOTEHOLDERS AND UMB BANK, N.A.

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TO THE HONORABLE MARTIN GLENN:

The Ad Hoc Group of Junior Secured Noteholders and UMB Bank, N.A. (collectively, the "Defendants[1]") by and through their undersigned counsel, respectfully submit the following proposed findings of fact[2] ("FOF") for Phase I of the above-captioned, consolidated adversary proceedings:

I. Procedural History

A. The Committee Action

1. The Official Committee of Unsecured Creditors (the "Committee") began investigating the claims asserted in its complaint on or about July 2012. The Committee filed its complaint (the "Committee Complaint" or "Comm. Complaint") on February 28, 2013. (Adversary Complaint for Declaration Judgment, Avoidance of Liens, and Disallowance of Claims, February 28, 2013, Comm. Adv. Dkt. No. 1.)

2. In the Committee Complaint the Plaintiffs seek, inter alia: (i) declaratory judgment on claims that (a) certain of the Debtors' property is not subject to liens or security interests in favor of the Notes Trustee and JSNs (collectively, the "Secured Parties"), and that (b) certain liens or security interests on property of the Debtors are unperfected; (ii) an order avoiding the Secured Parties' allegedly unperfected liens on or security interests in certain property; (iii) an order avoiding as preferential certain liens or security interests allegedly granted for the JSNs' benefit within 90 days of the Petition Date (as defined herein); (v) an order recharacterizing postpetition payments to the Secured Parties' professionals as payments of

[1] Capitalized terms not defined herein have the meanings given in the Revised Joint Pretrial Order (Proposed). (Stipulated Facts (Comm. Adv. Dkt. No. 158).)

[2] The Defendants understand that Defendant Wells Fargo Bank, N.A. is filing its own proposed findings of fact.

principal; (vi) an order clarifying the priority of the Secured Parties' liens; (vii) an order disallowing the Secured Parties' claims pending final resolution of the claims in the Committee Complaint; and (viii) an order disallowing a portion of the Secured Parties' claims as a result of unmatured interest allegedly arising from the a debt-for-debt exchange.[3] (Id.)

B. The Debtors' Action

3. On May 3, 2013, the Debtors filed their original Complaint (Complaint to Determine Extent of Liens and for Declaratory Judgment, May 3, 2013, Debtor Adv. Dkt. No. 1), and filed their Amended Complaint on June 19, 2013 (the "Amended Compliant"). (First Amended Complaint to Determine the Extent of Liens and for Declaratory Judgment, June 19, 2013, Debtor Adv. Dkt. No. 8.)

4. In the Amended Complaint the Plaintiffs seek declaratory judgment on eight claims, including that: (i) the Ad Hoc Group of Junior Secured Noteholders' ("JSNs") lien on general intangibles does not include any lien on the proceeds of, or value attributed to, the sale of assets pursuant to the Ocwen Asset Purchase Agreement of November 2, 2012 ("Ocwen APA"); (ii) the JSNs are not entitled to an adequate protection replacement lien; (iii) the JSNs are not entitled to a lien on the assets that secure the Amended and Restated Loan Agreement, dated December 30, 2009 ("AFI LOC") or any other Collateral that was released by Wells Fargo, N.A. (the "Collateral Agent") under the JSN Indenture (Count 3); (iv) the JSNs are not entitled to a lien on any recoveries of any future avoidance actions brought by or on behalf of the Debtors' estates; (v) the Defendants are undersecured and not entitled to postpetition interest; (vi) if the

[3] In Count III of its Complaint, the Committee alleges that the Secured Parties do not have a lien on the assets of certain "non-obligor Debtors." Among the Debtors that the Committee alleges are "non-obligors" are Debtor Executive Trustee Services LLC and Debtor Equity Investments I, LLC. Contrary to the Committee's allegations, the Secured Parties have a lien on the assets of each of those entities.

Defendants are found to be entitled to postpetition interest, the interest should be awarded at the contractual nondefault rate of interest; and (vii) Defendants are undersecured and are not entitled to postpetition interest because (i) in order to be oversecured, Defendants must be oversecured at any individual Debtor entity against whose assets Defendants assert liens, without reference to Collateral at other Debtor entities; and (ii) Defendants are not oversecured at any individual Debtor entity against whose assets Defendants assert liens (Count 5). (Id. at 29–33.)

5. On June 21, 2013, the Court entered an Order consolidating this action with the Committee Action (the "Consolidated Proceedings"). (Consolidation and Scheduling Order, June 21, 2013, Debtor Adv. Dkt. 10 ("Scheduling Order").)

C. Defendants' Counterclaims

6. On June 28, 2013, the Defendants filed an Answer, Affirmative Defenses and Counterclaims to the Debtors' Amended Complaint, denying material contentions of the Debtors, disputing the Debtors' right to a declaratory judgment in their favor on the issues raised in the Amended Complaint, and asserting counterclaims against Debtors and the Unsecured Creditors Committee ("Committee" and together with the Debtors the "Plaintiffs"). (Answer, Affirmative Defenses and Counterclaims of Defendants UMB Bank, N.A. and the Ad Hoc Group of Junior Secured Noteholders to Debtors' First Amended Complaint to Determine Extent of Liens and for Declaratory Judgment, June 28, 2013, Debtor Adv. Dkt. No. 14.)

7. On July 29, 2013, the Defendants filed an Amended Answer, Affirmative Defenses and Amended Counterclaims which asserted 35 counterclaims against Plaintiffs (the "Amended Counterclaims"). (Answer, Affirmative Defenses and First Amended Counterclaims of Defendants UMB Bank, N.A. and the Ad Hoc Group of Junior Secured Noteholders to

Debtors' First Amended Complaint to Determine Extent of Liens and for Declaratory Judgment, July 29, 2013, Debtor Adv. Dkt. No. 29.)

8. The Amended Counterclaims seek declaratory relief: (i) as to the ownership and value of the stipulated and disputed Collateral and the assets pledged in support of the JSNs (counts 1-6); (ii) that the JSNs have a lien on Ally Claims, including the Ally Contribution (counts 7-10); (iii) determining the distributable value to be generated from all intercompany claims and causes of action (counts 11-20); (iv) allocating the purchase prices of the Asset Sales (count 21); (v) that the JSNs have a lien on the purportedly released Collateral (counts 22-25); (vi) that the use of Cash Collateral results in diminution in the Collateral's value (counts 26); (vii) enforcing the Debtors' 506(c) waiver (count 27); (viii) as to the exact quantum of the direct costs of liquidating Collateral (count 28); (ix) determining the amount of the JSNs' adequate protection liens (count 29); (x) reallocating administrative expenses (count 30); (xi) that the JSNs are entitled to postpetition interest, default interest, fees and expenses (counts 31); (xii) that the Claims asserted by any RMBS Trust, monoline insurers and RMBS certificate-holders must be subordinated (counts 32-34); and (xiii) that the Claims against AFI identified by the Examiner and/or the property that is the subject of those Claims, constitute Collateral (count 35). (Id. at 58-88.) By imposing their Amended Counterclaims, the Defendants did "not seek to undertake the burden of proof in respect of legal and/or factual issues on which the Debtors bear the burden of proof under applicable law, and the Defendants reserve all rights in that regard." (Id. at 14.)

9. The Plaintiffs filed an Answer and Affirmative Defenses to the Defendants' Counterclaims (Plaintiffs' Answer and Affirmative Defenses to the Counterclaims of Defendants UMB Bank, N.A. and the Ad Hoc Group of Junior Secured Noteholders, July 16, 2013, Debtor Adv. Dkt. No. 20.), and an Answer and Affirmative Defenses to the Amended Counterclaims.

(Plaintiffs' Answer and Affirmative Defenses to the First Amended Counterclaims of Defendants UMB Bank, N.A. and the Ad Hoc Group of Junior Secured Noteholders, Aug. 9, 2013, Debtor Adv. Dkt. No. 35.)

D. Motions to Dismiss

a. Motions to Dismiss In Connection With the Committee Action

10. On April 30, 2013, the Notes Trustee filed a Motion to Dismiss with prejudice Counts I, IV, V, VII, XI, XII, XIII and XIV of the Committee Complaint in their entirety, and Counts III and X in part. (Notice of Defendant UMB Bank, N.A.'s Partial Motion to Dismiss Pursuant to FRCP 12(b)(6), April 30, 2013, Comm. Adv. Dkt. No. 20) ("Partial Motion to Dismiss Committee Complaint".)

11. On May 23, 2013, the Committee filed an Opposition to the Partial Motion to Dismiss Committee Complaint. (Official Committee of Unsecured Creditors' Opposition to Defendant UMB Bank, N.A.'s Partial Motion to Dismiss Pursuant to FRCP 12(b)(6), May 23, 2013, Comm. Adv. Dkt. No. 28.)

12. On June 7, 2013, the Notes Trustee filed a Reply in further support of the Partial Motion to Dismiss Committee Complaint (the "Reply"). (Defendant UMB Bank, N.A.'s Reply Memorandum of Law Further Support of its in Partial Motion to Dismiss Pursuant to FRCP 12(b)(6), June 7, 2013, Comm. Adv. Dkt. No. 37.)

13. In its Reply, in an effort to narrow the issues to be adjudicated in connection with the motion and based on certain of the representations and clarifications made in the Committee's opposition, the Notes Trustee filed voluntarily withdraws its motion to dismiss with respect to counts III, VII, X, XI, and XII of the Committee Complaint. (Id. 1 n.1.) The Notes

Trustee also subsequently withdrew its motion to dismiss Count XIV. (Transcript Regarding Hearing Held on July 26, 2013, 113:20–114:8, July 26, 2013, Comm. Adv. Dkt. No. 61.)

14. On July 26, 2013, the Court heard oral argument on the Partial Motion to Dismiss Committee Complaint. (See id.)

15. On August 13, 2013, the Court entered a So-Ordered Memorandum Opinion Granting in Part and Denying in Part UMB Bank's Motions to Dismiss, in which the Court granted the Notes Trustee's motion to dismiss Count V and denied without prejudice the Notes Trustee's motion to dismiss Counts I, IV, and XIII. (Memorandum Opinion Granting in Part and Denying in Part UMB Bank's Motions to Dismiss, Aug. 13, 2013, Comm. Adv. Dkt. No. 74.)

b. Motions to Dismiss in Connection With the Debtors Action

16. On July 16, 2013, the Defendants filed a Motion to Dismiss Counts 3 and 5 of the Amended Complaint for failure to state a claim upon which relief could be granted. (Notice of Motion of Defendants UMB Bank, N.A. and the Ad Hoc Group of Junior Secured Noteholders to Dismiss in Part the Debtors' First Amended Complaint to Determine Extent of Liens and for Declaratory Judgment, July 16, 2013, Debtor Adv. Dkt. No. 21 (the "Claims Motion").)

17. With respect to Count 5, the Defendants moved to dismiss on the grounds that as a matter of law the JSNs' entitlement to postpetition interest, fees, costs and charges under section 506 of the Bankruptcy Code must be determined based on the aggregate value of the Collateral held by all of the Debtors. (Id. at 6-11.)

18. With respect to Count 3, the Defendants moved to dismiss on the ground that pursuant to 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 Debtors to Use

Cash Collateral, and (III) Granting Adequate Protection to Adequate Protection Parties, June 25, 2012, Dkt. No. 491 ("Cash Collateral Order"), the Debtors stipulated that Collateral identified in the Junior Secured Notes documents is Collateral subject to the JSNs' liens. (Id. at 11-17.)

19. On July 30, 2013, the Plaintiffs filed an Opposition to the Claims Motion (Debtors' and Official Committee of Unsecured Creditors' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Debtors' First Amended Complaint, July 30, 2013, Debtor Adv. Dkt. No. 30). On the same day, the Defendants filed a Reply in Further Support of the Claims Motion on August 13, 2013. (Reply Memorandum of Law in Further Support of Motion of Defendants UMB Bank, N.A. and the Ad Hoc Group of Junior Secured Noteholders to Dismiss in Part the Debtors' First Amended Complaint to Determine Extent of Liens and for Declaratory Judgment, Aug. 13, 2013, Debtor Adv. Dkt. No. 39.)

20. On July 16, 2013, the Plaintiffs filed a Motion to Dismiss fourteen Counterclaims asserted by the Defendants (5-6, 7, 9, 22-25, 26-30, and 35). (Memorandum of Law in Support of the Debtors' and Official Committee of Unsecured Creditors' Motion to Dismiss Certain of the Defendants' Counterclaims, July 16, 2013, Debtor Adv. Dkt. No. 22.) (the "Counterclaims Motion", and together with the Claims Motion, the "Motions to Dismiss").

21. First, the Plaintiffs argued that Defendants' Counterclaims 7, 9 and 35 should be dismissed because the JSNs do not have a lien on recoveries resulting from settlement of the Debtors' prepetition Claims, including avoidance actions and Commercial Tort Claims. (Id. at 8-14; Reply Brief of the Debtors and Official Committee of Unsecured Creditors in Support of their Motion to Dismiss Certain of the Defendants' Counterclaims 3-9, Aug. 13, 2013, Debtor Adv. Dkt. No. 40.)

22. Second, the Plaintiffs sought the dismissal of Counterclaims 22 to 25 on the grounds that the lien releases should be enforced and even if the liens were improperly released, the JSNs still do not have a properly perfected equitable lien. (Id. at 14-21.)

23. Third, the Plaintiffs contended that Counterclaims 26 to 30 should be dismissed because the question of whether and to what extent there has been a diminution in the value of the JSNs' Collateral, entitling the JSNs to an adequate protection claim, are matters of fact that cannot be decided on a Motion to Dismiss. (Id. at 22-27.)

24. Finally, the Plaintiffs moved to dismiss Counterclaims 5 and 6 claiming a right to postpetition interest at the contractual default rate, because the Debtors are insolvent. (Id. at 27-28.)

25. On July 30, 2013, the Defendants filed an Opposition to the Counterclaims Motion (Memorandum of Law in Opposition to the Debtors' and Official Committee of Unsecured Creditors' Motion to Dismiss Certain of the Defendants' Counterclaims, July 30, 2013, Debtor Adv. Dkt. No. 31), and the Plaintiffs filed a Reply in support of the Counterclaims Motion on August 13, 2013. (Reply Brief of the Debtors and Official Committee of Unsecured Creditors in Support of their Motion to Dismiss Certain of the Defendants' Counterclaims, Aug. 13, 2013, Debtor Adv. Dkt. No. 40.)

26. On August 28, 2013, the Court heard oral argument on the Debtors' Action's Motions to Dismiss. (Hr'g Tr., Aug. 28, 2013, Aug. 29, 2013, Debtor Adv. Dkt. No. 47.)

27. On August 29, 2013, the Court entered an Order Granting in Part and Denying in Part Motions to Dismiss (Aug. 29, 2013, Debtor Adv. Dkt. No 46), which Order was amended by agreement in one respect on September 18, 2013. (Amended Order Granting in Part and Denying in Part Motions to Dismiss, Sept. 18, 2013, Debtor Adv. Dkt. No. 48.)

28. With respect to the Claims Motion, the Court denied without prejudice the Defendants' Motion to Dismiss Counts 3 and 5. (Id.)

29. With respect to the Counterclaims Motion, the Court (i) dismissed with prejudice Counterclaims 9, 22, 23, 24, 25, 26, and 28; (ii) dismissed without prejudice Counterclaims 27 and 30; (iii) dismissed with prejudice Counterclaims 7 and 35, only with respect to avoidance actions and Commercial Tort Claims; and (iv) denied without prejudice the Motion to Dismiss Counterclaims 5, 6, and 29. (Id.)

30. The Court issued a Memorandum Opinion with respect to its Order on September 20, 2013. (Memorandum Opinion Denying without Prejudice UMB Bank's Motion to Dismiss Counts 3 and 5, and Granting in Part and Denying in Part the Committees' Motion to Dismiss Certain Junior Secured Noteholder Counterclaims, Sept. 20, 2013, Debtor Adv. Dkt. No. 49 ("Memorandum Opinion").)

31. In the Memorandum Opinion, the Court concluded that the Claims Motion was premature and there was an insufficient factual record to dismiss Plaintiffs' Counts 3 and 5. (Id. at 12-17.)

32. With respect to Count 3, the Court held that it would benefit from a greater factual record to determine whether the JSNs have a lien, pursuant to the Cash Collateral Order, on assets that were previously part of the JSNs' Collateral but that were subsequently released. (Id. at 13-14.)

33. With respect to Count 5, the Court found that it could not determine, based solely on the pleadings, the appropriate method for valuing the JSNs' Claims. (Id. at 14-17.) The Court held that after a full trial on the valuation of the JSNs' Claims, it may find it appropriate to aggregate the Debtors' estates for the purpose of section 506(b). (Id.)

34. With respect to the Counterclaims Motion, the Court dismissed Counterclaims 7 and 35 with prejudice only with respect to avoidance actions and Commercial Tort Claims and dismissed Counterclaim 9 with prejudice in its entirety. (Id. at 17-21.) The Court held that, as a matter of law, the JSNs do not have a lien on any of the Debtors' avoidance actions or Commercial Tort Claims against AFI, but may have liens on other causes of action. (Id.)

35. The Court dismissed Counterclaims 22 and 23 with prejudice. (Id.) The Court held that, as a matter of law, the lien releases were effective and the UCC-3s were properly filed by the Collateral Agent. (Id.)

36. The Court found that the dismissal of Counterclaims 22 and 23 made it unnecessary for the Court to address Counterclaims 24 and 25, each of which depended on the viability of the Defendants' assertion that the releases were ineffective, and on that basis the Court therefore dismissed Counterclaims 24 and 25 with prejudice. (Id.)

37. The Court also dismissed Counterclaims 26 and 28 with prejudice. (Id. at 29.) The Court held that the JSNs are not entitled to a declaration seeking further adequate protection or an accounting of the Debtors' costs of liquidating Collateral. (Id.) The JSNs did not allege that the Debtors' Cash Collateral use did not conform to the approved budget. (Id.)

38. The Court dismissed Counterclaim 27 without prejudice. (Id. at 31.) The Court held that issues regarding a section 506(c) surcharge were not ripe for determination, and that the JSNs could bring this Counterclaim at a later date if they demonstrated that the value of their Collateral has diminished, entitling them to an adequate protection claim. (Id. at 31-32)

39. The Court held that Counterclaim 30 related to the use of Cash Collateral for administrative expenses and thus was dismissed without prejudice as well. (Id.)

40. The Court denied without prejudice the Motion to Dismiss Counterclaim 29, holding that the Plaintiffs may renew the Motion to Dismiss this Counterclaim if they establish that the value of the JSNs' Collateral has not diminished. (Id. at 29.)

41. The Court denied without prejudice the Motion to Dismiss Counterclaims 5 and 6. (Id. at 32.) These Counterclaims related to default interest rates and sought relief that will only be applicable if the Court finds that the JSNs are oversecured. (Id.) Since the Court had not yet determined whether the JSNs are oversecured, the merits of those Counterclaims were not yet ripe for determination. (Id.) If the Court finds that the JSNs are not oversecured the Plaintiffs may renew their dismissal motion. (Id.)

E. Joint Statement of Issues

42. On August 23, 2013, the parties entered into a Joint Statement of Issues. (Statement of Issues, Aug. 23, 2013, Debtor Adv. Dkt. No. 45 ("Statement of Issues").)

43. The Statement of Issues identified certain causes of action or issues relating to the JSNs' recoveries that were to be adjudicated in the "Phase I Trial" in the Consolidated Proceedings. (Id.)

44. The Statement of Issues also identified which causes of action and issues were to be bifurcated for adjudication in connection with any further subsequent proceedings in the Consolidated Proceedings to be scheduled by the Court ("Phase II"), to the extent any such causes of action or issues were not adjudicated or rendered moot by approval of the global settlement (the "Global Settlement") embodied in the proposed Joint Chapter 11 Plan of Reorganization, dated July 3, 2013 (the "Plan") at the Confirmation Hearing ("Plan Confirmation") or otherwise obviated. (Id. at 2 n.1.)

45. In Phase I of the Consolidated Proceedings, the parties sought to have the Court resolve certain disputes, including (i) original issue discount, (ii) the method of determining JSN entitlement to postpetition interest, default interest, fees, expenses and charges under section 502(b) and 506, (iii) valuation of Collateral, (iv) the quantum of the JSN Claims for postpetition interest, fees, and charges, (v) lien challenges, (vi) adequate protection, (vii) lien on and allocation of the proceeds from the Berkshire and Ocwen Sale, and (viii) lien on proceeds of causes of action/the AFI Contribution. (Id.)

46. The issues that will be adjudicated in Phase II include (i) value of intercompany balances, (ii) treatment of various classes of claimants, (iii) allocation of AFI Contribution, (iv) value of Collateral, oversecurity (whether and to what extent), default interest, fees (to the extent not determined in Phase I), and (v) final calculation, if necessary, of the JSNs' adequate protection claim. (Id.)

47. The Plaintiffs raised issues concerning intercompany claims and the Ally Contribution in the Plaintiffs' Contentions in the Revised Joint Pretrial Order. (Revised Joint Pretrial Order ¶¶ 66-72, 78-81, 125-132, Oct. 18, 2013, Debtors Adv. Dkt. No. 105.) The Court stated it will not address these issues in Phase I and that all issues are reserved for Phase II. (Statement of Issues (Debtor Adv. Dkt. No. 45); Trial Tr. 218:16-220:17, Oct. 23, 2013 (Court).)

F. Discovery—The Consolidation and Scheduling Order

48. The Court entered the Consolidation and Scheduling Order (the "Scheduling Order") on June 21, 2013, over the objections of the JSNs. (Scheduling Order (Debtor Adv. Dkt. No. 10).)

49. The Scheduling Order set forth a compressed calendar in which fact discovery commenced on June 26 and trial began in October. (Id.)

50. The Defendants objected to the schedule set forth in the Scheduling Order on the grounds that the issues could not "be properly and fully adjudicated" in the timeframe set forth therein and reserved "their rights with respect to the timing and scope of the Consolidated Action." (Id. at 3.) The Court overruled the JSNs' objections.

51. The Scheduling Order required the parties to serve all initial document requests, interrogatories, subpoenas duces tecum, and interrogatories by June 26 and to substantially complete all document production by August 7. (Id. at ¶¶ 9, 14)

52. The parties all served document requests and interrogatories on one another and the JSNs also served subpoenas duces tecum on third parties Ocwen, Walter, AFI, PwC and Deloitte.

53. During the discovery period, the Debtors produced upwards of 1.5 million documents (comprising over 14 million pages) to the JSNs, which included all the pages of documents produced to the Examiner. (Hr'g Tr. 20:17-21:6, Aug. 22, 2013; Hr'g Tr. 11:9-11; 25:12-16, Sept. 3, 2013 (Court).)

54. The Debtors produced virtually no documents up to the August 7 "substantial completion" deadline. (Hr'g Tr. 21:20-25, Aug. 22, 2013.)

55. The Defendants received millions of pages of documents after the substantial completion deadline had passed. (Id. at 34:23-24.)

56. The JSNs completed their document production on August 6. No issues were raised with respect to the JSNs' production.

57. All fact depositions were originally scheduled to be concluded by September 6 but the parties agreed to extend the cut-off until September 20. The third party depositions took place the week of September 23. (Id. at 28:15-23.)

58. In total, the parties took thirteen fact depositions in three weeks. The Court ordered no contention interrogatories or 30(b)(6) depositions regarding contentions as to the legal effect of contracts or orders.

59. In addition to fact discovery, the Scheduling Order also obligated the parties to exchange initial expert reports by September 4 and rebuttal expert reports by September 20. These dates were ultimately postponed two weeks due to delays in the Debtors' document production. The Court overruled the JSNs' objection seeking an additional week for such reports. (Hr'g Tr. 28:15-23, Aug. 22, 2013.)

60. In all, the parties submitted reports from eleven experts—five retained by the Debtors and the Committee and six retained by the JSNs. The parties exchanged expert reports and rebuttal reports over a two week period from September 20 to October 4.

61. The parties took eleven expert depositions over a ten day period from October 2 to October 11.

G. Pretrial Motions in Limine

62. On October 8, 2013, the Plaintiffs filed a Motion in Limine to exclude the testimony of the Defendants' experts P. Eric Siegert, Michael Fazio, Jeffrey M. Levine, John A. Taylor, Scott Winn and Professor Ronald J. Mann. ("Plaintiffs' Motion in Limine") (Memorandum of Law in Support of the Debtors' and Official Committee of Unsecured Creditors' Motion in Limine to Exclude Certain Expert Testimony at Trial, Oct. 8, 2013, Debtor Adv. Dkt. No. 57.)

63. First, the Plaintiffs alleged that the opinions of the Houlihan Lokey experts, Eric Siegert, Michael Fazio, Jeffrey Levine, and John Taylor, regarding the valuation of Collateral,

should be excluded because they failed to rely on the only proper valuation methodology. (Id. at 3-4.)

64. Second, the Plaintiffs contended that the Defendants' expert Scott Winn should be precluded from testifying on two topics, expense allocation and Collateral tracking, because of the Court's ruling on the Claims Motion to Dismiss. (Id. at 13.)

65. Third, the Plaintiffs sought to exclude the expert testimony of Professor Ronald J. Mann because he improperly opined on issues of contract interpretation and the parties' intent with respect to their agreement. (Id. at 17.)

66. The Defendants' filed an Omnibus Response to the Plaintiffs' Motion in Limine (Omnibus Response to the Debtors' and Official Committee of Unsecured Creditors' Motion in Limine to Exclude Certain Expert Testimony at Trial, Oct. 11, 2013, Debtor Adv. Dkt. No. 89.), and the Plaintiffs filed a Reply in Support of their Motion in Limine. (Reply Memorandum of Law in Support of the Debtors' and Official Committee of Unsecured Creditors' Motion in Limine to Exclude Certain Expert Testimony at Trial, Oct. 13, 2013, Debtor Adv. Dkt. No. 92.)

67. The Defendants filed a Motion in Limine to exclude the Plaintiffs' expert James Gadsden. (Memorandum of Law in Support of Defendants' Motion in Limine to Exclude the Expert Testimony of James Gadsden, Oct. 8, 2013, Comm. Adv. Dkt. No. 108.)

68. The Defendants argued that the testimony of James Gadsden should be excluded because he (i) is not qualified to render the opinions given, (ii) grounds his opinions in a deeply flawed and unreliable methodology, and (iii) is unable to provide objective or unbiased testimony in light of his financial interest in the litigation. (Id. at 5.)

69. The Plaintiffs filed an Opposition to the Defendants Motion in Limine (The Debtors' and Committee of Unsecured Creditors' Memorandum of Law in Opposition to

Defendants' Motion in Limine to Exclude the Expert Testimony of James Gadsden, Oct. 11, 2013, Comm. Adv. Dkt. No. 143.), and the Defendants filed a Reply in Support of their Motion in Limine. (Reply in Support of Defendants' Motion in Limine to Exclude the Expert Testimony of James Gadsden, Oct. 13, 2013, Comm. Adv. Dkt. No. 148.)

70. On October 16, 2013, the Court ruled from the bench on the Motions in Limine. (Trial Tr. 9:24-15:1, Oct. 16, 2013 (Court).)

71. With respect to the Defendants' motion to exclude the Plaintiffs' expert, James Gadsden, on interpretation of the language in the JSN Security Agreement, the Court denied the motion. (Id. at 14:9-23.) The Court held that all of the issues raised by the Defendants go to the appropriate weight that should be given to the testimony and the arguments do not support entirely precluding the testimony. (Id.)

72. With respect to the Plaintiffs' motion to exclude the Houlihan Lokey experts, the Court denied the motion without prejudice. (Id. at 8:13-19)

73. The Court held that the issue of appropriate valuation methodology for adequate protection purposes was not decided when the Court ruled on earlier Motions to Dismiss, and the "legal issue" had not been presented in a motion for partial summary judgment. (Id. at 8:20-9:23.) The parties posit different legal rules applicable to the issue and a motion in limine is not intended to decide disputed substantive legal issues that must be decided following the conclusion of trial. (Id.)

74. With respect to the Plaintiffs' Motion in Limine to preclude the testimony of Ronald J. Mann, the Court denied the motion, except as to the testimony of the likely intent and expectations of the parties to the transaction in question. (Id. at 13:18-14:8.) The Court held that

because the Security Agreement is ambiguous, extrinsic evidence in support of interpretation of the agreement is admissible. (Id.)

75. With respect to the Plaintiffs' Motion in Limine to exclude the testimony of Scott Winn, the Court (i) granted the motion with respect to any testimony or report to the extent it supports re-allocation of administrative expenses, which was the relief sought in a Counterclaim dismissed by the Court in its earlier ruling on the Motions to Dismiss, and (ii) deferred ruling on the motion to exclude Mr. Winn's testimony with respect to the Plaintiffs' Collateral tracking database. (Id. at 9:24-13:17.)

H. The Winn Report

76. On October 21, 2013, the Defendants filed a Submission regarding the relevance of Mr. Winn's Administrative Expense Report. (Submission Concerning the Relevance of the Administrative Expense Report Prepared by Scott Winn, Oct. 21, 2013, Debtor Adv. Dkt. No. 110.) The parties agreed that the Winn Administrative Expense Report is admissible as expert reliance material to the extent it was relied upon by the Defendants' other experts. (Id.)

77. The Defendants sought to offer the Winn Administrative Expense Report for three additional reasons: (1) to respond to the Debtors' contentions with respect to the costs of administering the JSNs' Collateral, (2) because it identifies the reasonable expenses of Collateral disposition as of the Petition Date, and (3) for the purposes of determining fair market value of the Collateral as of the Petition Date as well as the value of the JSNs' liens on such assets. (Id.)

78. On October 22, 2013, the Court heard oral arguments regarding the relevance of the Winn Administrative Expense Report and allowed the evidence to be offered, but reserved final ruling on whether it is admissible for the limited purposes set forth in the Defendants' Submissions. (Trial Tr. 9:4-21:8, Oct. 22, 2013 (Court).)

79. On October 23, 2013, the Parties entered into a stipulation with respect to the Winn Collateral Tracking report. (Stipulation, Oct. 23, 2013, Debtor Adv. Dkt. No. 117.)

80. The Parties stipulated that pages 21 to 24 of the Winn Collateral Tracking report would come in for the limited purpose of establishing the figures set forth in paragraphs 4, 5 and 6 of the Stipulation. (Trial Tr. 20:25-204-21, Oct. 23, 2013.)

81. In paragraph 4 of the Stipulation the Defendants contend that, "according to the CFDR, there is approximately $1.368.2 million of collateral that is indicated as pledged to the AFI LOC as of the Petition Date. $836.2 million of such collateral was previously identified as JSN collateral and $447.3 million of such collateral first appeared in the CFDR as collateral pledged to the AFI LOC." (Stipulation (Debtor Adv. Dkt. No. 117) ¶ 4.)

82. In paragraph 5 of the Stipulation the Defendants contend that, "with respect to $642.9 million of assets identified as at one point having been pledged to the Revolver that were subsequently pledged to the AFI LOC, the Debtors did not produce Documents indicating that such assets were released, but rather rely upon the CFDR and the AFI LOC monthly borrowing base reports generated from the CFDR as dispositive proof that such collateral was released." (Id.)

83. In paragraph 6 of the Stipulation the Defendants contend that, "with respect to $267.5 million of assets that first appeared in the CFDR as having been pledged to the AFI LOC, the Debtors did not produce Documents indicating that such assets were released, but rather rely upon the CFDR and the AFI LOC monthly borrowing base reports generated from the CFDR as dispositive that such collateral was released." (Id.)

I. Phase I Trial

84. The Phase I trial commenced on October 15, 2013 and lasted for six days.

85. During the trial the Plaintiffs called two fact witnesses, Thomas Marano and Teresa Farley and five expert witnesses, Mark Renzi, Marc. D. Puntus, John D. Finnerty, Marc E. Landy and James Gadsden. (Direct Testimony of John D. Finnerty, Oct. 8, 2013, Debtor Adv. Dkt. No. 72 ("Finnerty Direct"); Direct Testimony of James Gadsden, Oct. 1, 2013, Debtor Adv. Dkt. No. 73 ("Gadsden Direct"); Direct Testimony of Marc E. Landy, Oct. 8, 2013, Debtor Adv. Dkt. No.74 ("Landy Direct"); Direct Testimony of Marc D. Puntus, Oct. 9, 2013, Debtor Adv. Dkt. No.75 ("Puntus Direct"); Direct Testimony of Mark A. Renzi, Oct. 9, 2013, Debtor Adv. Dkt. No. 77 ("Renzi Direct"); Direct Testimony of Teresa R. Farley, Oct. 9, 2013, Debtor Adv. Dkt. No.78 ("Farley Direct"); Direct Testimony of Thomas Marano, Oct. 9, 2013, Debtor Adv. Dkt. No. 79 ("Marano Direct").) The Court admitted all written testimony into evidence.

86. The Defendants called six expert witnesses, Jeffrey M. Levine, Scott Winn, Michael Fazio, Ronald J. Mann, John A. Taylor, and P. Eric Siegert. (Sworn Witness Statement of Scott Winn, Oct. 9, 2013, Debtor Adv. Dkt. No. 80 ("Winn Witness Statement"); Declaration of Ronald J. Mann, Oct. 9. 2013, Debtor Adv. Dkt. No. 81 ("Mann Decl."); Declaration of Jeffrey M. Levine, Oct. 9. 2013, Debtor Adv. Dkt. No. 82 ("Levine Decl."); Declaration of Michael Fazio, Oct. 9. 2013, Debtor Adv. Dkt. No. 83 ("Fazio Decl."); Declaration of John A. Taylor, Oct. 9. 2013, Debtor Adv. Dkt. No. 84 ("Taylor Decl."); Sworn Witness Statement of P. Eric Siegert, Oct. 9, 2013, Debtor Adv. Dkt. No. 85 ("Siegert Witness Statement".) The Court admitted the written testimony of Levine, Fazio, Mann, Taylor and Siegert. With respect to Winn's written testimony, the parties agreed to strike paragraphs 9 through 15 that correlate to collateral tracking. (Trial Tr. 205:13-206:1, Oct. 23, 2013.)

87. No rebuttal witnesses were called or exhibits presented by the Plaintiffs or the Defendants. (Trial Tr. 202:14-24, Oct. 23, 2013.)

88. The Plaintiffs and the Defendants sent their final exhibit lists to the Court post trial. The Plaintiffs admitted 165 documents into evidence. The Defendants admitted 546 documents into evidence.

89. The Parties agreed that documents could come into evidence either for all purposes, truth of the matter or limited purposes. (Trial Tr. 209:2-9, Oct. 23, 2013.)

90. The Parties exchanged deposition designations on September 27, 2013 and exchanged deposition counter designations on October 3, 2013.

91. The Parties exchanged third party deposition designations on September 28, 2013 and exchanged third party counter designations on October 3, 2013.

92. The Parties filed deposition designations on October 8, 2013. (Deposition Designations, Oct. 8, 2013, Debtor Adv. Dkt. Nos. 60-71 & 76.)

93. The Parties filed consolidated deposition designations on October 25, 2013. (Consolidated Deposition Transcript Designations and Counter-Designations, Oct. 25, 2013, Debtor Adv. Dkt. 121.)

94. The Parties filed amended consolidated deposition designations on October 29, 2013. (Amended Consolidated Deposition Transcript Designations and Counter-Designations, Oct. 29, 2013, Comm. Adv. Dkt. 179.)

95. The Defendants designated portions of the Jill Horner and Joseph Ruhlin depositions regarding expense methodologies and how it was negotiated in the context of the Cash Collateral Order. (Trial Tr. 210:19-211:1, Oct. 23, 2013.)

96. The Plaintiffs' objected to the Defendants' designations of the Jill Horner and Joseph Ruhlin depositions because they are "entirely on expense allocation." (Id. at 211:10-21.)

97. The Court reserved ruling and ordered briefing addressing the issue of the disputed designations in light of the Court's prior rulings. (Id. at 211:23-212:4 (Court).)

98. The Parties filed submissions on October 28, 2013. The Plaintiffs submit that all designated portions of the Jill Horner and Joseph Ruhlin depositions relate exclusively to expense allocation and do not address any other issue relevant to this trial. (The Debtors' and Official Committee of Unsecured Creditors' Memorandum in Response to the JSNs' Designation of Deposition Testimony of Joseph Ruhlin and Jill Horner Concerning Administrative Expense Allocation 1, Oct. 28, 2013, Comm. Adv. Dkt. No. 177.)

99. The Plaintiffs seek to preclude the expense allocation designations on the ground that the only relevance of the testimony is to the expense allocation issue, an issue which the Court has ruled on. (Id.)

100. The Defendants submit that the deposition designations of Jill Horner and Joseph Ruhlin are relevant to, among other things, the direct costs of maintaining the JSN Collateral, the Debtors' expense methodology and how it was negotiated in the context of the Cash Collateral Order, adequate protection claims, the calculation of collateral values for the purposes of section 506(b) of the Code, the meaning of the Cash Collateral Order, and the Plaintiffs' preparation of budget forecasts and the Carve Out in the Cash Collateral Order. (Submission Concerning the Plaintiffs' Objection to Certain of the Ad Hoc Group of Junior Secured Noteholders' and UMB Bank, N.A.'s Deposition Designations of Jill Horner and Joseph Ruhlin, Oct. 28, 2013, Comm. Adv. Dkt. No. 176.)

II. The JSNs' Claim

A. The Contractual Bases for the JSNs' Claim

1. On May 14, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). (Voluntary Petition for Residential Capital, LLC, May 14, 2012, Dkt. No. 1.)

2. As of the Petition Date, the JSNs held secured claims against ResCap, and certain of its affiliates as guarantors and grantors, in the amount of $2.222 billion on account of principal and unpaid interest owing as of the Petition Date. (DX ABF (Siegert Expert Report—Global Summary) at DX0ABF-0003.)

3. In addition, as of the Petition Date, the JSNs had claims for all other obligations under the JSN Indenture, including indemnification, postpetition interest, default interest, fees, costs and charges to be accrued through payment in full of the JSN Claims. (Id.)

4. The JSNs' $2.222 billion claim as of the Petition Date consists of $2.120 billion in unpaid principal and $101 million in unpaid prepetition interest. (Id.)

a. *The Indenture and Security Documents*

5. The JSN Claims arise pursuant to the Indenture and the Notes Security Agreement, in which the Borrower and Guarantor Debtors obligated themselves to pay in full all principal, interest, fees, expenses, and premiums under the JSN Indenture. (PX 1 (JSN Indenture § 4.01) at PX pg. 51.)

6. The Borrower issued $4.01 billion in face principal amount of Junior Secured Notes under the JSN Indenture. (Id. §1.01 at PX pg. 14.)

7. Interest accrues on the Junior Secured Notes at the annual interest rate of 9.625%. (Id. at DXPX pg. 8.)

8. The Indenture further provides for the Borrower's payment of interest at the default rate under certain circumstances:

> The [Borrower] will pay interest (including post-petition interest in any proceeding under any Bankruptcy Law) on overdue principal at the rate equal to 1% per annum in excess of the then applicable interest rate on the Notes to the extent lawful; it will pay interest (including post-petition interest in any proceeding under any Bankruptcy Law) on overdue installments of interest and Additional Interest (without regard to any applicable grace period) at the same rate to the extent lawful.

(Id. § 4.01 at PX pg. 51.)

9. In addition to the Borrower's commitments, the Guarantor Debtors unconditionally guaranteed the obligations of the Borrower under the JSN Indenture, including the obligation to pay in full all principal, interest (including postpetition interest and default interest), fees, and premiums, if any, in respect of the Junior Secured Notes. Id. § 10.01) at PX pg. 79; PX 3 (Original Notes Security Agreement § 1) at PX pg. 8.)

10. The JSN Indenture defines "obligations" as "any principal, interest, penalties, fees, indemnifications, reimbursements, damages, guarantees and other liabilities payable under the documentation governing any debt, in each case . . . (including post-petition interest) and whether or not allowed or allowable in any [case under Title 11, U.S. Code]" to which the Borrower and Guarantor Debtors are bound. (PX 1 §§ 1.01, 4.04 at PX pgs. 16, 53.)

11. On or about June 13, 2013, the Debtors made a payment in the amount of $800,000,000.00, leaving a remaining prepetition secured claim against the Debtors in the amount of $1.422 billion, plus indemnification claims and all unpaid postpetition interest, default interest, fees, costs and charges accrued or accruing under the JSN Indenture until paid in full, as such claim may be reduced from time to time pursuant to further interim distributions of principal. (See Order Granting Debtors' Amended Motion for Entry of an Order Under 11

U.S.C. §§ 105 and 363 Authorizing the Debtors to Satisfy Certain Secured Claims 2, June 13, 2013, Dkt. No. 3967.)

12. The JSNs also had a claim for accrued but unpaid postpetition interest of $263 million as of June 13, 2013. (DX ABF (Siegert Rpt.—Global Summary) at DX0ABF-0003.)

13. On or about July 30, 2013, the Debtors made an additional $300,000,000.00 payment. (Stipulation and Order Regarding the Satisfaction of Certain Secured Claims 1, July 30, 2013, Dkt. No. 4404.)

14. After adjusting for the $1.1 billion that has already been paid down, the JSNs' remaining claim amount on December 15, 2013 (the "Effective Date") will be approximately $1.464 billion, excluding indemnification claims and reimbursement for fees, costs and expenses. (DX ABF (Siegert Rpt.—Global Summary) at DX0ABF-0003.)

15. Assuming Effective Date of December 15, 2013, the JSNs' claim for postpetition interest will be $342 million at the default rate. (Id.)

b. The Notes Security Agreement and the Revolver Were Secured by the Same Collateral

16. The Original Notes Security Agreement was issued in tandem with the Original Revolver Security Agreement. The Original Revolver Security Agreement and the Original Notes Security Agreement were secured by the same collateral package. (See PX 7 (Original Revolver Security Agreement §§ 1, 2) at PX pgs. 4-11; PX 3 (Original Notes Security Agreement §§ 1, 2) at PX pgs. 4-13; PX 2 (Intercreditor Agreement § 2.3) at PX pg. 17; PX 175 (Offering Memorandum) at PX pg. 113.)

17. The Original Revolver Security Agreement and the Original Notes Security Agreement were both amended and restated on December 30, 2009. (See PX 8 (Revolver Security Agreement); PX 4 (Notes Security Agreement).)

18. The Notes Security Agreement and the Revolver Security Agreement are secured by the same collateral package. (See PX 8 (Revolver Security Agreement §§ 1, 2) at PX pgs. 5-15; PX 4 (Notes Security Agreement §§ 1, 2) at PX pgs. 4-15; PX 2 (Intercreditor Agreement § 2.3) at PX pg. 17.)

19. Ms. Farley, the Debtors' 30(b)(6) corporate representative with respect to numerous topics, including, *inter alia*, topics respecting the JSN Collateral, Excluded Assets, and the Debtors' treatment and categorization of the Former Bilateral Facilities Collateral, confirmed that the collateral securing the AFI Revolver was the same as the collateral securing the JSNs at all times. (See Trial Tr. 177:10-178:16, Oct. 16, 2013 (Farley); Farley Dep. 74:4-75:22, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

20. Lara Hall, a managing director of AFI personally involved in negotiating the Revolver Security Agreement on behalf of AFI, and AFI's 30(b)(6) representative for all topics in the Notes Trustee's 30(b)(6) notice to AFI, including, *inter alia*, topics respecting the Exchange Offer, the related security agreements, the collateral securing security agreements, and the AFI DIP Order, and the Debtor's 30(b)(6) representative on topics respecting, *inter alia*, the Exchange Offer and the alleged creation of disallowable unmatured interest, also testified that the JSNs had the same collateral package as the AFI Revolver. (Hall Dep. 104:11-25, 123:24-125:17, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

21. The grant of security and coextensive scope of collateral was negotiated by the Debtors and AFI. (See, e.g., Hall Dep. 104:11-105:10, Sept. 26, 2013, Comm. Adv. Dkt. No.

120 (discussing the Debtor and AFI individuals who negotiated the security agreement and related collateral grant); id. 123:24-125:17 (the grant of collateral was coextensive).)

22. In addition, Ms. Farley stated in an email that "[a]ny loan/asset subject to the Revolver also is subject to a second lien by the junior bondholders." (See DX MR (Email between Terry Farley and William Tyson, July 15, 2012) at DX00MR-0001.)

c. All-Asset Granting Security Agreement

23. The JSN Claims are secured by "all asset" liens on the property and equity interests of the Borrower and the Guarantor Debtors, as well as other specific liens, security interests, and pledges as set forth in the Notes Security Agreement and the Intercreditor Agreement. (PX 3 (Notes Security Agreement §§ 2-5) at PX pgs. 11-15.)

24. The Notes Security Agreement provides for security interests in, and liens on, substantially all of the Borrower's and each of the Guarantor Debtors' assets. (See id.)

25. Specifically, the all-asset granting clause provides:

> [T]he [Borrower] and each of the Guarantors and each other Grantor . . . hereby pledges to the Third Priority Collateral Agent for the benefit of the Secured Parties, and hereby grants a continuing security interest to the Third Priority Collateral Agent for the benefit of the Secured Parties in, all of the [Borrower's], such Guarantor's or any such other Grantor's right, title and interest, in, all of the [Borrower's], such Guarantor's or any such other Grantor's right, title and interest, in, to, and under, whether now or hereafter existing, owned or acquired and wherever located and howsoever created, arising or evidenced, all of the following: (a) all Assets. . . .

(Id. § 2 at PX pgs. 11–12.)

26. In addition, pursuant to section 3 of the JSN Pledge Agreement, the JSNs have a continuing security interest in the economic value of all equity pledged by each Equity Pledgor (as hereinafter defined). (Id. § 3(a)-(j) at PX pg. 13–14.)

27. In particular, the JSN Claims are secured by the following security interests and liens on the Debtors' assets (collectively, the "JSN Prepetition Liens"): (i) a lien on all assets and other assets, including, but not limited to, accounts, chattel paper, commercial tort claims, deposit accounts, financial assets, investment property, intellectual property, and general intangibles of the Borrower; (ii) a lien on all assets, including, but not limited to, accounts, chattel paper, commercial tort claims, deposit accounts, financial assets, investment property, intellectual property, and general intangibles of GMAC Mortgage, LLC; Residential Funding Company, LLC; GMAC-RFC Holding Company, LLC; HomeComings Financial, LLC; and GMAC Residential Holding Company, LLC (collectively, the "Guarantor Debtors"); (iii) a pledge of equity interests by GMAC Model Home Finance I, LLC; Developers of Hidden Springs, LLC; DOA Holding Properties, LLC; Equity Investment IV, LLC; RFC Construction Funding, LLC; RFC Asset Holdings II, LLC; Passive Asset Transactions, LLC (collectively, the "Equity Pledgors," and with the Borrower and Guarantor Debtors, the "Debtor Obligors"); (iv) a grant of security interests on certain assets of RFC Asset Holdings II, LLC and Passive Asset Transactions, LLC in their capacity as "FABS Grantors;" and a grant on other assets by certain other grantors, including liens granted by other parties identified alongside each Deposit Account in Schedule X to the Notes Security Agreement (the "Asset Pledgors). (Id. at PX pgs. 11-15.)

28. The prepetition collateral securing the JSN Prepetition Liens (the "Prepetition Collateral") includes (a) all assets, including, without limitation, all financial asset-backed securities; (b) accounts; (c) chattel paper; (d) commercial tort claims; (e) computer hardware and software, including, without limitation, all rights in licenses, options, warranties, service contracts, program services, test rights, maintenance rights, support rights, improvement rights, renewal rights, and indemnifications, and any substitutions, replacements, additions, or model

conversion of any of the foregoing; (f) deposit accounts; (g) documents; (h) financial assets, including, without limitation, all deposit accounts and security accounts, all agreements, contracts, documents, and instruments; all cash and funds delivered to the Borrower or a Guarantor Debtor; (i) general intangibles; (j) goods and inventory; (k) instruments; (l) intellectual property; (m) all issued and outstanding shares of capital stock, pledged shares, pledged notes, pledged note liens, outstanding member interests, general or limited partnership interests, or other ownership interests, pledged property, and all dividends, distributions, interest, and other payments and rights with respect to any pledged property; (n) letter-of-credit rights and letters of credit; (o) money; (p) Dutch assets; (q) UK pledged shares and UK notes; (r) supporting obligations; (s) servicing rights and servicing contracts; (t) investment property; and (u) to the extent not included in the foregoing, all other personal assets and property of any kind. (Id. § 2 at PX pgs. 11-12.)

d. Limited "Excluded Assets"

29. The limited group of assets that are not Collateral subject to the JSN Prepetition Liens are "Excluded Assets," and are explicitly enumerated in section 1 of the Notes Security Agreement as the following specific categories of property that were either pledged exclusively to another creditor or which could not legally be pledged:

- Goods securing purchase money indebtedness or capital lease obligations existing as of the Issue Date. Notes Security Agreement§ 1(a), "Excluded Assets."
- Voting capital stock of controlled foreign corporations in excess of sixty-five percent (65%) of the voting rights of such corporations. Id. § 1(b)
- Any asset, including any account, note, contract, lease, financing arrangement, general intangible, equity investment, interests in joint ventures or other agreement to the extent that the grant of a security interest therein would violate applicable Requirements of Law, result in the invalidation thereof or provide any party thereto with a right of termination or default with respect thereto or with

respect to any Bilateral Facility to which such asset is subject as of the Issue Date (in each case, after giving effect to applicable provisions of the UCC and other applicable Requirements of Law and principles of equity). Id. § 1(c).

- Any trademark applications filed in the United States Patent and Trademark Office on the basis of such Grantor's "intent-to-use" such trademark, unless and until acceptable evidence of use of the trademark had been filed with the United States Patent and Trademark Office. Id. § 1(d).

- Certain mortgage loans contributed to the Borrower by GMAC, and pledged by RFC or GMAC as collateral under the Line of Credit Agreement, for the period of December 28, 2009 to January 31, 2010 (the "LOC Mortgage Loans") and assets, rights and property related to such LOC Mortgage Loans. Id. § 1(e).

- Proceeds and products of any and all of the foregoing excluded assets described in clause (a) through (e) above only to the extent such proceeds and products would constitute property or assets of the type described in clause (a) through (e) above. Id. § 1(f).

- The Exempt Cash Reserve Account and any proceeds and products thereof. In addition, solely for purposes of each grant of a security interest under the First Priority Security Agreement to secure Hedge Obligations (as defined in the First Priority Security Agreement), Excluded Assets also means any asset that does not constitute a Financing Asset (as defined in the Indenture, as in effect as of August 1, 2008) whether or not such asset constitutes Primary Collateral. Id. § 1(g).

(Id. §1 at PX pgs. 6–7.)

i. Primary Collateral and Blanket Lien Collateral

30. The Revolver and JSNs were secured by two categories of collateral: Primary Collateral and Blanket Lien Collateral. (Stipulated Facts ¶ 12; see also Direct Testimony of Teresa Rae Farley ¶¶ 24–25, Oct. 8, 2013, Comm. Adv. Dkt. No. 131 ("Farley Direct").)

31. Primary Collateral was specifically delineated on the schedules to the AFI Revolver, served as the borrowing base under the AFI Revolver, and was subject to various operational and reporting requirements. (Farley Direct ¶ 24; Farley Dep. 48:14–21; Stipulated Facts ¶ 12.)

32. Blanket Lien Collateral encompassed the balance of the collateral pledged as a security interest under the AFI Revolver and not falling within the definition of "Excluded Assets." (See Stipulated Facts ¶ 12; Farley Direct ¶ 25; Farley Dep. 49:7–14.)

33. The Blanket Lien Collateral included the assets pledged by the Grantors under the relevant security agreements that were not Primary Collateral, "whether [such assets were] now or hereafter existing, owned or acquired and wherever located and howsoever created, arising or evidenced." (See PX 8 (Revolver Security Agreement § 2) at PX pgs. 12–15; PX 4 (Notes Security Agreement § 2) at PX pgs. 15–17; Ruhlin Dep. 59:2–11, Sept. 18, 2013, Comm. Adv. Dkt. No. 128.)

34. After the Exchange was completed, all of the assets that came in to ResCap (except Excluded Assets) were JSN Collateral, due to the blanket lien and the "hereafter acquired" language of the All-Assets Granting Clause, but ResCap was nevertheless able to release Blanket Lien Collateral from AFI's and the JSNs' liens without the same restrictive requirements relating to the release of Primary Collateral. (Farley Direct ¶ 25; Trial Tr. 180:4–8, Oct. 16, 2013 (Farley); cf. Ruhlin Dep. 59:14–23.)

35. In an email dated July 17, 2012, Ms. Farley stated: "just remember that there were two categories under the Revolver - primary collateral which was specifically listed on our systems as pledged to the Revolver and other collateral which, although not specified as primary collateral, was still subject to the blanket lien. All US ResCap family assets except assets which were specifically excluded were picked up under the blanket lien." (DX MS (Email among Terry Farley and others, July 17, 2012) at DX0MS-0001.)

36. Ms. Farley testified that the Debtors "routinely told various business groups—and there were many of them—that if [an asset] wasn't marked to the revolver, they had to assume it was blanket lien." (Farley Dep. 119:9–12.)

37. As Ms. Farley noted, the All-Assets Granting Clause in the Revolver was very broad. (Farley Dep. 75:22–77:3.)

38. Ms. Farley testified that she could not think of an example of an asset, other than Primary Collateral or Excluded Assets that would not be covered under the Blanket Lien. (Farley Dep. 56:12–58:7.) Ms. Farley explicitly stated in an email to her colleagues that "any US loan that is owned by ResCap family and that is not GNMA and is not pledged to LOC (or any other facility) is subject to the Revolver." (DX MR (7/17/12 Email between Terry Farley and Tyson William) at DX00MR-0001; Farley Dep. 118:13–20.)

39. In a contemporaneous email, an employee of the Debtors stated "Everything is encumbered via a blanket lien except for a few very small things." (DX BX (Email from K. Fischbach dated June 4, 2008) at DX00BX-0001.) One month later, in July 2008, an employee of Cerberus stated in an email to employees of the Debtors, "Everything legally pledgable with a few exceptions for business reasons (i.e, Latin America) were pledged to the Revolver." (DX DH (Email from J. Lombardo to J. Young and S. Bode dated July 21, 2008) at DX00DH-0001.)

ii. The Way in Which Assets Could Be Released

40. Generally speaking, the JSNs' liens on Primary Collateral could not be released unless the proceeds of that Collateral were used to pay down the AFI Revolver or to purchase replacement Collateral. (PX 1 (JSN Indenture § 4.10) at PX pg. 56.)

Alternatively, the JSNs' liens on Blanket Collateral could generally be released so that such Collateral could be sold or financing assets could be pledged to alternative financing agreements. (PX 1 (JSN Indenture §§ 4.09(b)(3), 4.10) at PX pgs. 55-56.)

41. The Notes Security Agreement provided that cash proceeds of any JSN Collateral sold by the Debtors became JSN Collateral. (PX 4 (Notes Security Agreement § 2) at PX pgs. 15-17.)

iii. The Debtors' System for Tracking Collateral

42. The Debtors sought to track collateral securing, among other things, the AFI Revolver and the JSNs using a database called the Consolidated Financial Data Repository, or "CFDR." (Farley Dep. 83:16-84:18; Farley Direct ¶¶ 29-30.)

43. The CFDR was put in place in 2008, in connection with implementing the Revolver. (Farley Dep. 17:3-6, 83:25-84:12; Farley Direct ¶¶ 29-30.)

44. Before the Petition Date, Blanket Lien Collateral was coded as "Unpledged" in the CFDR. (Farley Direct ¶ 35; Ruhlin Dep. 106:8-12,; Farley Dep. 137:21-24.)

45. Shortly before the Petition Date, the Debtors updated the CFDR to comply with stricter reporting and cash tracking requirements attendant to the bankruptcy process and recoded assets constituting blanket lien collateral from "Unpledged" to "Revolver Blanket Lien." (Ruhlin Dep. 119:4-9, 155:16- 156:2, 156:15-21; Farley Direct ¶ 36; Farley Dep. 115:4-14, Sept. 18, 2013, Comm. Adv. Dkt. No. 115 ("shortly before the [bankruptcy] filing, [the assets coded as unpledged] were marked blanket lien if they were subject to the blanket lien").)

46. When the Debtors repurposed the CFDR in 2012 and began specifically tracking blanket lien collateral, "what [ResCap] viewed as blanket lien collateral was no longer included as unpledged. It was marked otherwise to be more specific that it related to pledged collateral in

some way." (Ruhlin Dep. 119:4-9; see also Farley Dep. 138:4-11 ("Shortly before the filing date…since [ResCap was] going to have to start reporting on all assets which had been subject to the blanket lien at the time of the filing date, there was an effort undertaken to label all of the assets which were in [ResCap's] view…subject to the blanket lien.").)

B. Postpetition Proceeds

47. Pursuant to section 552(b) of the Bankruptcy Code, the JSN Prepetition Liens attach to all postpetition proceeds, products, offspring, or profits of the Prepetition Collateral. 11 U.S.C. §552(b). As set forth Debtors waived equities-of-the-case exception and further stipulated to the validity, priority, and perfection of JSN liens on proceeds of prepetition JSN Collateral. (PX 76 (AFI DIP Order) at PX pg. 35.)

48. Since the Petition Date, the Debtors have managed their businesses and assets, including cash collateral, mortgage loans, MSRs, servicing advances, government claims, accounts receivable, trading securities, REO, restricted cash and other assets. DX ABK (Winn Administrative Expense Rpt.) at DX0ABK-0016.) The Debtors managed these businesses and assets through defined collateral pools or silos. (Id.)

49. Each collateral pool generates revenue and receipts from its discrete assets and service lines, while the Debtors have allocated administrative expenses from a broader/shared pool of costs based on their allocation methodologies (discussed below). (Id.)

50. In total, for the period from the Petition Date through April 30, 2013, excluding proceeds of Asset Sales and certain other items (hedge unwind proceeds, restricted cash release and Barclays' DIP loan repayment), the Debtors received approximately $678 million in total receipts from the JSNs' Collateral. (Id. at DX0ABK-0016.)

51. The Debtors' whole loan portfolio generated approximately $292 million in proceeds in the form of repayments of principal and interest on loans. (Id.)

52. The monetization of the Debtors' other loan portfolios generated approximately $303 million, consisting of proceeds from redelivered or modified loans and claims and other loan recoveries. (Id.)

53. The Debtors received approximately $207 million in origination related fees. (Id.) The JSNs are the beneficiary of the vast majority (nearly 83%) of the cash inflows from postpetition origination fees, which includes AFI broker fees and other origination fees. (Id. at DX0ABK-0009.)

54. The Debtors received approximately $48 million in shared services fees from AFI, including fees for support functions such as finance, tax, treasury, risk and HR services. (Id.)

55. Executive Trust Services (and other) generated approximately $39 million in revenues. (Id.)

56. The Debtors have allocated in excess of $660 million of expenses paid with the JSNs' Cash Collateral through the expiration of the Cash Collateral Order and seek to pay an additional $180 million of Carve Out Expenses. (Notice of Filing of Additional Disclosures in Connection with Order in Aid of Mediation and Settlement 13, Aug. 16, 2013, Dkt No. 4732.) The Plaintiffs contend these expenses were necessary for the preservation and monetization of the JSN Collateral. The Defendants contend that a substantial portion of such expenses are not properly chargeable to the JSN Collateral under 506(c) due to the Debtors' waiver. (See DX ABK at DX0ABK-0013.)

57. In comparing the costs of actually maintaining the JSNs' Collateral through April 30, 2013 to the receipts generated by such collateral, the JSNs' expert—Mr. Scott Winn—testified that, after subtracting out the expenses on a direct cost allocation basis, each of the Debtors' business lines associated with the JSNs' Collateral generated net proceeds. Winn Witness Statement (Debtor Adv. Dkt. No. 80) ¶ 6.)

58. Mr. Winn testified that the total net proceeds (after expenses) associated with the JSNs' Collateral from the Petition Date through April 30, 2013 to be approximately $322 million (excluding hedge unwind proceeds, restricted cash release, Asset Sales proceeds and Barclays' DIP loan repayment). (Id.; see also DX ABK at DX0ABK-0007.)

C. Prepetition Agreements and the Cash Collateral Order

a. The Prepetition Agreements Between the JSNs, the Debtors and AFI

59. Prior to the Petition Date, the Ad Hoc Group engaged in negotiations with the Debtors and AFI in an effort to reach a plan support agreement to support a plan term sheet that provided for the accelerated payment of the JSNs' claims against ResCap and a resolution of all claims against AFI and its affiliates and forgiveness of six and a half months of postpetition interest in exchange for such rapid paydowns, which did not materialize. (Siegert Witness Statement (Debtors Dkt. No. 85) ¶ 7.)

60. The negotiations resulted in a three-party agreement on the Petition Date that provided for a course of action that, if ultimately effectuated, would avoid potential disputes concerning the value of, and recovery on, the JSNs' collateral in ResCap's bankruptcy. (Id.)

61. Members of the JSNs holding a minority of principal amount of JSNs agreed to a plan support agreement that (i) among other benefits provided for an expedited distribution of principal of the JSNs' claims on the close of a proposed Section 363 sale transaction; (ii)

provided that AFI would subordinate a portion of its liens and claims to the JSNs, thereby creating greater certainty and speed to the distribution to be made to the JSNs; (iii) obligated the participating JSNs to support a plan term sheet contemplating a plan structure pursuant to which AFI would make a cash contribution of $750 million to the Debtors' reorganization in exchange for releases from the Debtors and third parties, and (iv) supported the prompt consummation of such a plan by permitting the Debtors to use the cash collateral of AFI and the JSNs pursuant to a cash collateral and DIP order to facilitate the reorganization process. Id. In addition, in connection with the plan support agreement, AFI stated a willingness to offer an additional $200 million in consideration as part of AFI's bid for a portion of the Debtors' whole loan portfolio. (Id. at ¶ 8.)

62. From the viewpoint of the JSNs participating at the time of these negotiations, the agreements contemplated that the JSNs would receive an improved waterfall structure between AFI and the JSNs, that implied a full recovery of their prepetition claims, and an expedited distribution of their principal, while conceding only a conditional waiver of any right to post-petition interest for a period of six and a half months. (Id. at ¶ 10.)

63. In the event that the bankruptcy unfolded as contemplated by the agreement, participating JSNs were willing to commit to a plan that waived a limited amount of postpetition interest in exchange for receiving expedited distributions on their principal. (Id.)

64. If no plan were consummated in that time period, the prepetition term sheet would terminate and the JSNs would have the right to seek any and all post-petition interest to compensate for the delay in receipt of their expedited distributions. (Id.)

65. Through negotiating a consensual cash collateral order, which was a part of the three-party prepetition agreements, the JSNs obtained a number of benefits including (i)

stipulations to the validity of the JSNs' liens, (ii) adequate protection to the JSNs based on the value of the collateral as established from a sales process and (iii) a Section 506(c) waiver. (Id.)

66. The Debtors and other stakeholders got the use of the JSNs' cash collateral, which was "critical" for the Debtors so that they could "continue operating their mortgage loan servicing business in the ordinary course." (Corrected Debtors' Motion for Interim and Final Orders ¶ 8, May 14, 2012, Dkt. No. 42 ("Cash Collateral Motion").).

67. In seeking and obtaining these protections, the JSNs sought to facilitate the asset sales closing and the distributions of proceeds therefrom to the JSNs. (Id.)

68. To the extent the Debtors failed to make the expedited distribution as agreed upon, the JSNs preserved the ability to seek post-petition interest to compensate for the delay and were ensured that they were adequately protected from a diminution in value of their collateral position during that delay. (Id.)

69. In agreeing to an order that permitted the use of cash collateral through the closing of the sales, the JSNs further sought to assist the Debtors in operating their going concern—including the JSNs' collateral—so that the Debtors could obtain the best possible price through an organized going concern sale of their assets subject to competitive bidding. (Id.)

b. The Negotiation of the Cash Collateral Order

70. The JSNs produced a 30(b)(6) witness on the topic of the cash collateral order negotiations who testified as to the JSNs' desire for a "lender-friendly" order. (Snellenbarger Dep. 55:6-14, 66:2-4, Sept. 11, 2013, Debtor Dkt. No. 71.)

71. AFI also expressed its desire at the time of the negotiations for "a standard over-secured creditor AP and cash collateral package." (DX KX (Email from L. Nashelsky re: Ally DIP Comments Follow Up) at DX00KX-0002.)

72. The Debtors began negotiating the cash collateral order with AFI in March of 2012. (DX KQ (Email from T.Goren re: Bounce-Proposed Cash Collateral Term Sheet) at DX00KQ-0001.)

73. On March 30, 2012, counsel for ResCap sent Ally an initial cash collateral stipulation entitled "Cash Collateral Term Sheet." (DX KY (Email from T. Goren re: Bounce-Ally/Junior Notes Cash Collateral Term Sheet) at DX00KY-0001; Hall Dep. 157:24-158:5.)

74. In that term sheet, the Debtors proposed a stipulation that would carve out the stipulation of liens on any collateral that the Debtors contended was released. (DX KY (Email from T. Goren re: Bounce-Ally/Junior Notes Cash Collateral Term Sheet) at DX00KY-0006.)

75. Specifically, the Debtors proposed the following:

> The Junior Noteholders have also asserted that they may have an equitable lien on certain other assets of the Debtors. The Junior Noteholders shall be entitled to bring any proceeding seeking to establish such lien prior to the Junior Notes Challenge Deadline, and any party (including the Debtors) shall be permitted to challenge such liens in any such proceeding. To the extent it is finally determined that the Junior Noteholders have a valid equitable lien and the Junior Noteholders suffered a diminution in value as a result of the DIP Liens, the Junior Noteholders shall be granted a conditional AP Lien on the proceeds of the Ginnie Mac MSRs and Advances solely to the extent of any such diminution in value. Upon entry of the Final Order, no costs or expenses of administration

(Id.)

76. The Debtors proposed the above stipulation due to a dispute between the parties in which the JSNs alleged that AFI breached the Intercreditor Agreement and Notes Security Agreement and other documents by releasing collateral under the Revolver Security Agreement and the AFI LOC. (Hall Dep. 160:14-161:2.)

77. The JSNs asserted that Ally and the Debtors had wrongly released the collateral, which had been supporting the obligations owed to the JSNs. (Id. at 161:3-14.)

78. The Debtors' proposal thus set out a period of time in which the JSNs had to commence legal action to assert their claims that the Notes Security Agreement had been breached and, therefore, they had a right to collateral which the Debtors and/or AFI claimed was pledged solely to the LOC. (DX KY (Email from T. Goren re: Bounce-Ally/Junior Notes Cash Collateral Term Sheet) at DX00KY-0006.)

79. On April 16, 2012, the JSNs made a proposal to ResCap and AFI with respect to the circumstances under which the JSNs would sign on to a cash collateral DIP financing and plan support agreement. (DX LC (Email from G. Uzzi re: Rescap Proposal) at DX00LC-0001; Hall Dep. 163:2-9.)

80. The JSNs insisted that the Debtors make a customary stipulation that the liens would extend to all collateral to which a security interest was initially granted. (DX LC (Email from G. Uzzi re: Rescap Proposal) at DC00LC-0003.)

81. Specifically, the JSNs' proposal stated that the "Noteholders will consent to the use of cash collateral through the date that is one year following the Petition Date, subject to customary adequate protection including acknowledgement of liens, allowance of claims, replacement liens, superpriority administrative claims, payment of fees and expenses (including White & Case and Houlihan Lokey's fees and expenses) reasonable default provisions but excluding cash pay of interest." (Id.)

82. By May 8, 2012, the Debtors, AFI and the JSNs were in discussions around the terms of a plan support agreement. (See DX LI (Email from L. Nashelsky re: 3rd Lien Terms); Hall Dep. 170:22-171:3.)

83. It was clear that the terms of the PSA would include all three parties supporting a plan of reorganization which would provide for a global resolution of all claims as between ResCap and AFI. (Hall Dep. 171:4-13.)

84. The idea was that all three parties—ResCap, AFI and the JSNs—would walk into the bankruptcy together, all supporting a plan. (Id. at 171:14:17.)

85. As set forth above, under the Debtors' initial cash collateral term sheet, the JSNs would have had to sue both the Debtors and AFI to establish that they had equitable liens within the first ninety days of the bankruptcy proceedings. (Id. at 171:18-172:7.)

86. AFI avoided this result by proposing that the JSNs liens "would be stipulated as valid by the Debtors upon entry of the interim DIP order, subject to a challenge period for the creditors' committee." (DX LI (Email from L. Nashelsky re: 3rd Lien Terms) at DX00LI-0002.)

87. AFI's proposal further stated that the JSNs reserved the right "to make a claim for an equitable lien on the LOC collateral after 12/31/12." (Id. at DX00LI-0003.)

88. The 12/31/12 deadline corresponded to the expiration date of the prepetition plan support agreement. (Hall Dep. 169:8-13.)

89. AFI understood, with respect to the assertion of an equitable lien, that the JSNs would not have the same right to make a claim until after 12/31/12. (Id. at 169:14-24.)

90. AFI also understood that one of the consequences of the JSNs making an equitable lien claim would be the JSNs' assertions of claims that AFI and/or ResCap had breached the Intercreditor Agreement and the Notes Security Agreement. (Hall Dep. 170:2-7.)

91. AFI provided the first draft of the Cash Collateral Order on May 11, 2012. (See DX LL (Email from M. Carpenter re: RSU Issue) at DX00LL-0001.)

92. The "Interim Order" is a draft of the cash collateral and DIP order which was distributed by AFI's counsel to various parties leading into the bankruptcy, including ResCap. (Id. at DX00LL-0002.)

93. In AFI's initial draft, the Debtors stipulated in paragraph 3(g) that the "liens and security interests granted to the Junior Secured Noteholders pursuant to and in connection with the Junior Secured Notes are valid, binding, perfected, and enforceable first priority liens on and security interests in the personal and real property constituting "Collateral" under, and as defined in, the Junior Secured Notes…." (Id. at DX00LL-0010.)

94. AFI defined "Junior Secured Notes" as "the holders (the "Junior Secured Noteholders") of the 9.625% Junior Secured Guaranteed Notes due 2015 (the "Junior Secured Notes"), issued under that certain Indenture, dated as of June 6, 2008…." (Id. at DX00LL-0004-05.)

95. At AFI's deposition, AFI's representative testified that she was not aware of any communications at or about the time of the "Interim Order" with respect to the definition of Junior Secured Notes that was proposed by AFI. (DX LL (Email from M. Carpenter re: RSU Issue); Hall Dep. 175:9-15.)

96. AFI's representative also testified that stipulation 3(g) was "important" to the JSNs. (Hall Dep. 178:7-17.)

97. AFI's draft cash collateral and DIP order further stated that the stipulations became binding on the Debtors except to the extent a challenge was brought. (DX LL (Email from M. Carpenter re: RSU Issue) at DX00LL-0029.)

98. AFI's representative testified that AFI assumed there would be an objection to the stipulation in paragraph 3(g) of AFI's draft cash collateral and DIP order. (Hall Dep. at 184:9-25.)

99. On May 12, 2012, the JSNs circulated their comments to the draft cash collateral and DIP order. (DX LN (Email from 5/12/2012 with Attachment).)

100. The definition of "Junior Secured Notes" remained unchanged in the draft circulated by the JSNs. (DX LN at DX00LN-0001.)

101. On May 13, 2012, AFI sent a revised cash collateral and Cash Collateral Order to the relevant parties. (DX AEM (Revised Draft Cash Collateral Order).)

102. The relevant stipulations in AFI's May 13th draft remained the same from the stipulations set forth in AFI's initial May 11th draft. (Hall Dep. 188:6-8.)

103. The May 13 draft contained a revised definition of Junior Secured Notes: "the holders (the "Junior Secured Noteholders") of the 9.625% Junior Secured Guaranteed Notes due 2015 (the "Junior Secured Notes") issued under that certain Indenture (the "Indenture" and, together with the Junior Secured Notes, the Security Documents (as defined in the Indenture) and all other documents executed in connection therewith, the "Junior Secured Notes Documents") dated as of June 6, 2008…." (DX AEM (Revised Draft Cash Collateral Order) at DX0AEM-0012.)

104. On the Petition Date, the Debtors filed the Debtors' Motion for Interim and Final Orders. (Debtor's Motion for Interim and Final Orders, May 14, 2012, Dkt. No. 19.)

105. AFI, through its counsel, was in control of the cash collateral document. AFI was not aware of any change in the fundamental nature of the deal from the time AFI circulated the

first draft of the cash collateral DIP order on Friday, May 11 to Monday, May 14 when the cash collateral order was filed. (Hall Dep. 190:20-92:7.)

c. The Debtors' Cash Collateral Motion

106. On May 14, 2012, the petition date, the Debtors moved for Court approval of the Interim and Final Cash Collateral Orders which had been negotiated between the parties. (Corrected Debtor's Motion for Interim and Final Orders (Dkt. No. 42).)

107. In the Interim Cash Collateral Order, the Debtors emphasized that it was crucial they have access to cash collateral. (Id. at 33.)

108. Specifically, the Debtors contended that it was essential that they obtain authority to use Cash Collateral to fund day-to-day operating expenses, including payments to remaining employees and other expenses necessary to preserve and maximize the value of the Debtors' servicing business and other assets pending one or more sales. (Id.) "Pursuant to sections 361 and 363(e) of the Bankruptcy Code, the Adequate Protection Parties are entitled to adequate protection of their interests in the Cash Collateral for, and equal in amount to, the aggregate diminution in the value of such parties' security interests in the Cash Collateral as a result of the Debtors' use, sale or lease of Cash Collateral." (Id.)

109. According to the Debtors, it was also "critical" that they have access to the AFI DIP Facility, so that they could meet their Ginnie Mae Obligations. (Id. at 23.) Failure to have access to the facility, in their estimation, could have resulted in the termination of the Ginnie Mae servicing rights, leading to a loss of future servicing fees and a "catastrophic loss to the Debtors' estate." (Id.) If the Debtors lacked sufficient funds to meet the Ginnie Mae Obligation, the value of the Debtors' assets and operations would quickly erode and their ability to consummate the Asset Sales would be jeopardized, to the detriment of the Debtors' estate and

stakeholders. The Debtors envisioned such a scenario as "potentially disastrous." (Id. at 25.) Conversely, the availability under the AFI DIP Facility, combined with the use of both AFI and JSN Cash Collateral, would enable the Debtors to continue operating in the ordinary course of business. (Id. at 24.) The parties negotiated a detailed set of agreements by which the Debtors would "continue operating in the ordinary course of business, including their loan servicing operations that are necessary to preserve the value of their servicing platform, for the ultimate benefit of their stakeholders pending the closing of the Asset Sales." (Id. ¶ 34.)

110. The Debtors did not believe they could obtain debtor-in-possession financing on more favorable terms from other sources. (Id. at 29.) The Debtors stated that the terms and conditions were fair, reasonable and appropriate given the circumstances and the parties negotiated in good faith, at arm's length. (Id.)

111. As the Debtors noted in the Interim Cash Collateral Order, bankruptcy courts routinely defer to a debtor's business judgment in considering whether to approve the debtor's request to obtain postpetition financing. (Id. at 30.)

112. Bankruptcy Rule 4001(b), (c) and (d) require specific material terms relating to the use of cash collateral, obtaining credit and adequate protection, among others, to be listed or summarized and their location "set out" within the document.

113. Part (a)(6) of Local Bankruptcy Rule 4001-2 designates "any cross-collateralization provision 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)" as one such material provisions.

114. The Debtors were tasked with highlighting such mandated provisions, including those set forth in 4001-2(a)(6), if any, in their motion.

115. Debtors made several disclosures in the Motion for Interim and Final Orders. (Id. at 13.) The Debtors unambiguously advised all parties-in-interest in the Rule 4001-2 disclosure that, as part of the Order, they were stipulating as follows:

> *"[The Junior Secured Notes constitute legal, valid and binding obligations of the Loan Parties, enforceable in accordance with their terms (other than in respect of the stay of enforcement arising from section 362 of Bankruptcy Code)." Debtor's Motion for Interim and Final Orders at 13.* (Id.)
>
> *"[N]o portion of the Junior Secured Notes is subject to avoidance, recharacterization, recovery, subordination, setoff or counterclaim pursuant to the Bankruptcy Code or applicable nonbankruptcy law."* (Id.)
>
> *"[T]he liens and security interests granted to the Junior Secured Noteholders pursuant to and in connection with the Junior Secured Notes are valid, binding, perfected, and enforceable first priority liens on and security interests in the personal and real property constituting "Collateral" under, and as defined in, the Junior Secured Notes . . ."*[4] (Id. at 14.)

116. Furthermore, the Debtors clearly disclosed the effect of the Debtors' stipulations on Third Parties as follows:

> *The stipulations, admissions, and releases contained in the Interim Order shall be binding on all parties in interest, including any Committee, unless, and solely to the extent that, any party in interest files and objection to the Interim Order challenging such stipulations, admissions, releases or otherwise asserting any claims or causes of actions on behalf of the Debtors' estates against the Junior Secured Noteholders (an "Objection"), in each case no later than seventy-five (75) days after entry of the Interim Order.* (Id. at 15.)

d. Key Provisions related to the Debtors' Stipulations and the Committee's Challenge Period

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[4] The capitalized terms and definitions set forth in the Debtors' Motion for Interim and Final Orders provide a gloss on the final cash collateral agreement, as the interchangeable terms left no ambiguity as to what the Debtors were agreeing to.

117. On June 11, 2012, the Committee filed an Omnibus Objection to the Debtors' Motions Seeking (I) Entry Into the Barclays DIP Facility, (II) Entry Into the Ally DIP Facility and the Use of Certain Cash Collateral, and (III) the use of Citibank Cash Collateral ("Objection to Cash Collateral Motion"). (("Objection to Cash Collateral Motion"), June 11, 2012, Dkt. No. 301.)

118. In the Objection to the Cash Collateral Motion, the Committee stated that it believed "the Court should more carefully scrutinize the relief sought in the [Cash Collateral Order] to ensure that the Debtors are not prejudicing the rights of, and sources of recovery for, unsecured creditors at this early stage in these cases." (Id. at ¶ 48.)

119. The Committee set forth issues it had with certain provisions of the proposed Cash Collateral Order and identified certain provisions it deemed unreasonable that should be modified. (Id. at ¶¶ 48-49.)

120. The Committee objected to the seventy-five day deadline to file objections to the "Debtors' Stipulations." (Id. at ¶¶ 36-40.)

121. Regarding the Debtors' waiver of section 552(b) and 506(c), the Committee stated that it understood "that the lenders [were] only seeking the section 552(b) waiver for the Debtors" and that the "section 506(c) waiver should be conditioned on the proposed orders being satisfactory to the Committee." (Id.)

122. The Committee did not object to any of the "Debtors' Stipulations" in paragraph 3, including the stipulation that liens attached to postpetition proceeds of prepetition collateral. (Id.)

123. At the hearing on the Debtors' cash collateral and DIP motions, counsel for the JSNs informed the Court that "we've gone back and forth with the creditors' committee on the

period of time in which to bring a challenge to the liens, with our main concern being that before any plan is solicited in this case we have an understanding of what [the Committee is] going to do so that holders of the junior secured notes can know how to vote." (Hr'g Tr. 54:3-11, June 18, 2012 (Shore).)

124. JSNs' counsel also informed the Court that the parties agreed to a ninety-day challenge period. (Id. at 54:12-15.)

125. On June 25, 2012, the Court entered its 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 Debtors to Use Cash Collateral, and (III) Granting Adequate Protection to Adequate Protection Parties [Docket No. 491] ("Cash Collateral Order"). (PX 76 (Cash Collateral Order) at PX pgs.1-91.)

126. In the formal order there are material provisions affecting this case as follows.

i. Authorization to Use Cash Collateral Subject to Budgets and Adequate Protection

127. The Cash Collateral Order provided authorization for the Debtors to use Cash Collateral—including the JSNs' Cash Collateral—and all other prepetition collateral pursuant to sections 361, 362, and 363 of the Code. (Id. at PX pg. 2.)

128. The use of the JSN's Cash Collateral provided the Debtors with funding "for the on-going operation of ResCap and an organized structured sale of the assets." (Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶ 61.)

ii. The Debtors' Stipulations in the Cash Collateral Order

129. In exchange for the use of the JSN's Cash Collateral, the Debtors' stipulated to the liens of the JSNs. (PX 76 (Cash Collateral Order) at PX pg. 9.)

130. In paragraph 5(c) of the Cash Collateral Order, the Debtors stipulated that "[t]he Junior Secured Notes Obligations [including all obligations arising under the Indenture] constitute legal, valid and binding obligations of the [Obligor Debtors] in accordance with their terms." (Id. at PX pg. 10.)

131. In paragraph 5(g) of the Cash Collateral Order, the Debtors stipulated that "[t]he liens and security interests granted to secure the Junior Secured Parties pursuant to the Junior Secured Notes Documents and in connection with Junior Secured Notes (the "Junior Secured Notes Liens") are valid, binding, perfected, and enforceable first priority liens on and security interests in the personal and real property constituting "Collateral" under, and as defined in, the Junior Secured Notes Documents." (Id. at PX pgs. 11-12.)

132. Paragraph 5(g) stipulates to liens on all loans and MSRs that meet the definition of "Collateral" in the Security Agreement. (Id.)

133. The Debtors' 30(b)(6) witness—Mr. Jim Whitlinger—testified that the Debtors understood that, as part of the Cash Collateral Order, they were stipulating to liens that, in fact, might not exist at that time. (Whitlinger Dep. 132:13-133:3, Sept. 19, 2013, Debtor Adv. Dkt. No. 65.) Specifically, Mr. Whitlinger testified that the Debtors were "okay stipulating to saying there was a lien even where one didn't exist because there was a period of time in which people [i.e, the Committee] could object to the existence of a lien." (Id.)

134. Pursuant to paragraph 5(h) of the Cash Collateral Order, the Debtors further stipulated that the Collateral included without limitation the following specific categories of assets: (i) the prepetition Ally Repo Facility or any residual value therefrom; (ii) the residual

value of the Initial Purchased Assets; (iii) mortgage loans held for sale; (iv) mortgage servicing rights; (v) servicer advances; (vi) accounts receivable; and (vii) other assets including trading securities and restricted cash and equivalents (collectively, the "Stipulated Collateral"). (PX 76 (AFI DIP Order) at PX pg.12.)

135. Under paragraph 28 of the Cash Collateral Order, the "stipulations, admissions, and releases contained in paragraph 5(b)-5(k) of the [Cash Collateral Order]," became binding on the Debtors upon entry of the Order. (Id. at PX pgs. 49-50.)

136. Barring a timely challenge, the Debtors' stipulations as to the JSN Claims became "binding on all parties in interest, including the Creditor's Committee." (Id.)

137. The Cash Collateral Order states that "[i]f no such Objection is timely filed then, without further order of the Court, all of the stipulations, admissions and releases set forth in paragraph 5 shall be binding on all parties in interest in the Chapter 11 Cases and shall not be subject to challenge or modification in any respect." (Id. at PX pg. 50.)

138. No party has timely brought any challenges except in the Committee Complaint, which does not object to paragraph 5(g). (Hall Dep. 178:7-20.)

iii. The JSNs' Entitlement to Adequate Protection Liens

139. Pursuant to paragraph 16 of the Cash Collateral Order the JSNs are entitled to "adequate protection of their interests in Prepetition Collateral, including Cash Collateral, in an amount equal to the aggregate diminution in value of the Prepetition Collateral to the extent of their interests therein, including any such diminution resulting from the sale, lease or use by the Debtors (or other decline in value) of any Prepetition Collateral, including Cash Collateral, the priming of the AFI Lenders' liens on the AFI LOC Collateral by the Carve Out and AFI DIP

Loan, and the automatic stay pursuant to section 362 of the Bankruptcy Code[.]" (PX 76 (AFI DIP Order) at PX pgs. 24-32.)

140. "Diminution in value" within the meaning of the Cash Collateral Order is to be calculated as the fair market value of the JSN Collateral as of the Petition Date compared to the JSN Distributable Value. (DX AIJ (Siegert Rebuttal Rpt. to Finnerty) at DX0AIJ-0007.)

141. As an adequate protection party, the JSNs were granted adequate protection liens on all of the collateral securing the AFI Revolver, the AFI LOC, and all of the equity interests of the Barclays DIP Borrowers. (PX 76 (AFI DIP Order) at PX pgs. 28-30.)

142. Mr. Siegert testified that he partook in negotiating the adequate protection provisions in the Cash Collateral Order. (Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶¶ 6-7.)

143. In negotiating the JSNs' adequate protection liens in the Cash Collateral Order, Mr. Siegert testified that the JSNs negotiated adequate protection based on the value of the collateral as established from a sales process. (Id. at 11.)

144. Mr. Siegert testified that the use of foreclosure value for purposes of determining adequate protection "would be contrary to the spirit and intent of the parties' attempts to make the Debtors' filing for Chapter 11 protection a 'soft one.'" (DX AIJ (Siegert Rebuttal Rpt. to Finnerty) at DX0AIJ-0007.)

145. During the negotiations of the Cash Collateral Order, Mr. Siegert testified that there never were any "discussion in which the debtors proposed that, under the cash collateral order, foreclosure value would be used for determining diminution in value at the time of the negotiations." (Trial Tr. 195:9-13, October 23, 2013 (Siegert).)

146. Mr. Siegert also testified that AFI never discussed the use of foreclosure value. (Id. at 195:9-18.)

147. The Debtors never contemplated the foreclosure or turnover of any of the JSN Collateral. (Id. at 195:9-18.)

iv. The Debtors' Other Waivers

148. Under the Cash Collateral Order, the Debtors waived their rights to charge the JSNs or the Collateral for the costs and expenses of preserving, or disposing of, the Collateral pursuant to section 506(c) of the Bankruptcy Code. (PX 76 (AFI DIP Order) at PX pgs.42-43.)

149. Specifically, the Cash Collateral Order states that: "[N]o expenses of administration of the Chapter 11 Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Prepetition Collateral and AFI DIP Loan Collateral pursuant to sections 105 or 506(c) of the Bankruptcy Code or any similar principle of law." (Id.)

150. The Cash Collateral Order expressly waived the "equities of the case" exception contained in section 552(b) of the Code. (Id. at PX pg. 35.)

151. The Committee never challenged the Debtors' section 506(c) or 552(b) waivers in the Cash Collateral Order.

v. Budget Provisions of the Cash Collateral Order

152. Under the Cash Collateral Order, the Debtors established new cash control procedures. (DX ABK (Winn Administrative Expense Report) at DX0ABK-0013-14; PX 76 (Cash Collateral Order) at PX pg. 22.)

153. The cash control procedures were put in place to record and monitor the cash receipts and disbursements generated within each of the Debtors' collateral and asset pools. (Id.)

154. The collateral and asset pools secured obligations to a particular lender or support the claims of unsecured creditors. (Id.)

155. Under the cash control procedures, the Debtors were obligated to deliver to the JSNs (and other parties granted adequate protection) a 20-week forecast of anticipated cash receipts and disbursements for the 20-week period. (PX 76 (Cash Collateral Order) at PX pg. 22.)

156. The Cash Collateral Order obligated the Debtors to continually provide updated 20-week forecasts for each subsequent 20-week period. (Id.)

157. The 20-week forecasts were for DIP reporting purposes. (Id.)

158. The Cash Collateral Order stated that "[s]ubject to the terms hereof, including all reservations of rights herein, the Borrowers are authorized to use Cash Collateral during the period from the Petition Date through and including the Termination Date (as defined in paragraph 20 below) solely for the purposes detailed within the Initial 20-Week Forecast and each subsequent Forecast…." (Id. at PX pgs. 23-24.)

159. The Debtors' 30(b)(6) representative testified that the 20-week forecasts were not intended to be a final allocation of expenses. "It's just a forecast," Mr. Whitlinger testified. (Whitlinger Dep. 139:12-21.)

160. Mr. Whitlinger further testified that lenders could object to particular expenses allocated to their collateral "at any time." (Id. at 142:17-24.)

161. The JSNs consented to the Debtors using their Cash Collateral in accordance with the Cash Collateral Order budget, but did not consent to being charged such expenses as evidenced by their insistence on a 506(c) waiver. (PX 76 (AFI DIP Order) at PX pgs. 22, 42-43.) (DX AHR (Email from T. Goren re: Residential Capital) DX0AHR-0001.) Mr. Joseph Ruhlin,

who prepared the budgets, testified that all expenditures were necessary and appropriate that were going to be made irrespective of how they were going to be allocated. (Ruhlin Dep. 280:3-22.)

vi. The Carve Out

162. The Debtors also negotiated a "Carve Out" in the Cash Collateral Order. (PX 76 (AFI DIP Order) at PX pgs. 31-32.)

163. A Carve Out is a provision that allows for some expenditure of administrative and/or professional fees to be paid before a secured creditor gets paid on its collateral. (Trial Tr. 137:24-138:3, Oct. 23, 2013, (Siegert).)

164. The Cash Collateral Order creates a Carve Out from the JSNs' cash collateral that subjects and subordinates the JSN liens to the carve out amount but does not otherwise affect the validity of the JSN liens on carved out JSN Cash Collateral:

> the [JSN Liens] are valid, binding, perfected, and enforceable first priority liens on and security interests in the personal and real property constituting "Collateral" under, and as defined in, the Junior Secured Notes Documents . . . and (iii) are subject and subordinate only to (A) the liens and security interests granted to the AFI Lender under the AFI Revolver, all subject to the terms and conditions of the Intercreditor Agreement, dated as of June 6, 2008 . . . , (B) the Carve Out, and (C) the liens and security interests granted to secure the Adequate Protection Obligations . . . .

(PX 76 (AF DIP Order ¶ 5(g)) at PX pgs. 11-12.)

165. The Carve out, in turn, is defined as the sum of: (i) court and United States Trustee fees, (ii) accrued and unpaid professional fees following a termination event in an aggregate amount not exceeding $25 million, and (iii) unpaid professional fees that were allowed prior to the termination event; provided that,

> (A) the Carve Out shall not be available to pay any such Professional Fees incurred in connection with the initiation or prosecution of any claims, causes of

> action, adversary proceedings or other litigation against the Adequate Protection Parties, (B) so long as no event of default shall have occurred and be continuing, the Carve Out shall not be reduced by the payment of fees and expenses allowed by the Court and payable under sections 328, 330 and 331 of the Bankruptcy Code, and (C) nothing in this Final Order shall impair the right of any party to object to any such fees or expenses to be paid by the Debtors' estates.

Id. ¶ 16(g).

166. Under the Cash Collateral Order, upon its termination, the Debtors are not authorized to pay Carve-Out Expenses. (Id. at PX pgs.31-32.)

167. The Cash Collateral Order subordinates the stipulated JSN liens in the order to the Carve Out expenses. (Id. at PX pgs. 11-12.)

vii. Postpetition Developments Regarding Cash Collateral

168. By late September 2012, two events occurred which altered the calculus of the minority of JSNs who supported the prepetition PSA. (Id.)

169. First, with the auction still a month away, there was no longer any possibility of an expedited distribution upon a rapid sale closing. (Id.)

170. Second, the Committee challenged certain of the JSNs' liens within the challenge period prescribed by the cash collateral order. (Id.)

171. The Ad Hoc Group then terminated the prepetition term sheet, made sure that each extension of the Cash Collateral Order was accompanied by an express reservation that the JSNs would "reserve all rights with respect to adequate protection under the Cash Collateral Order, including with respect to the Debtors' allocation of expenses," and the JSNs performed an investigation into the value of the collateral securing their liens, resulting in the conclusion that the JSNs were substantially oversecured. (Id.)

172. As of the Distribution Date, the Debtors' assets will consist of (i) cash, (ii) certain unsold assets, (iii) liquidated and unliquidated claims against and equity or membership interests in other Debtors and non-Debtor affiliates, and (iv) unliquidated claims and causes of action against third-parties. (PX 256 (Disclosure Statement) at PX pgs. 483-484.)

173. The Debtors' contend that the aggregate recovery value of the JSN collateral is $1.888 billion of distributable value consisting primarily of cash generated from the sale of assets, and other unsold assets, which the Debtors proposed to dispose by monetizing over time. (Renzi Direct (Debtor Adv. Dkt. No. 77) ¶ 9.) This estimate of the JSNs' secured recovery is net of at least $665 million of costs allocated to the JSN Collateral from the Petition Date through April 30, 2013 and $27 million of costs allocated since April 30, 2013, but excludes an estimated $153 million of additional costs that the Debtors propose deducting from the JSN Collateral in connection with the adversary proceedings. (PX 242 (Renzi Rpt.) at PX pg. 7.)

174. Of the distributable assets, the Debtors' contend that only $1.745 billion represents the JSNs' Collateral subject to the JSNs' Liens (the "JSN Distributable Value"). (PX 256 (Disclosure Statement).)

175. The Debtors track these assets in various "silos" or "buckets" of collateral, which they contend represent the full extent of collateral securing the JSNs Liens under the operative security documents. (Id. at pgs. 483-485; see also Trial Tr. 23:16-20, 39:2-21, Oct. 15, 2013 (Eckstein, Levitt).)

176. The silos were established to track various categories of collateral which the Debtors had pledged to various lenders before and after the Petition Date. (DX ABK (Winn Administrative Expense Rpt.) at DX0ABK-0016.)

177. Each collateral pool generates revenue and receipts from its discrete assets and service lines, while the Debtors have allocated administrative expenses from a broader/shared pool of costs. (Id.)

178. The Debtors have used two methodologies for allocating expenses to JSN Collateral: one based on a pro rata sharing of total costs of administration of the Cases (utilized through April 30, 2013) and a direct expense methodology used for the period thereafter ("Direct Allocation"). (Id. at DX0ABK-0008.)

179. The Initial Cash Collateral Order authorized the use of Cash Collateral pursuant to a budget. (Id. at DX0ABK-0013.)

180. The Initial Cash Collateral Order was succeeded by five amendments prior to May 2013, which, in each case, established a near-term date for the Parties to agree upon a methodology for allocating costs to collateral pools after the closing of the asset sales. (Id.)

181. The Debtors' initial allocation methodology (the "Initial Allocation") purported to allocate administrative expenses pro rata to each collateral pool based on the non-cash book value of assets (excluding intangibles) of each collateral pool relative to total book value of all such assets. (Id.) No expense allocations were made for intangible assets. (Id.)

182. The Initial Allocation resulted in an allocation to the JSN Collateral pool of approximately $792 million through April 30, 2013, which equates to approximately $689 million in accrued and paid and $102 million in accrued and unpaid expenses. (Id. at DX0ABK-0008.)

183. The Debtors' Initial Allocation would allocate to the JSN Collateral $405 million to $460 million (midpoint $432 million) in administrative expenses that are not associated with JSN Collateral. (Id.; Winn Witness Statement (Debtor Adv. Dkt. No. 133) ¶ 7.)

184. The Debtors' Initial Allocation methodology allocates $224 million of servicing costs to the JSNs (compared to a direct cost of between $23 and $25 million), using a pro rata allocation based on assets, but all of the servicing business revenues/receipts aggregating $575 million are retained for the benefit of non-JSN collateral that have a lien on the mortgage servicing rights. (DX ABK (Winn Administrative Expense Rpt.) at DX0ABK-0008; Winn Witness Statement (Debtor. Adv. Dkt. No. 133) ¶ 7.)

185. The Debtors' under allocated approximately $64 million in costs associated with origination to the JSNs. (Winn Witness Statement (Debtor. Adv. Dkt. No. 133) ¶ 7.)

186. The Debtors' allocated approximately $162 million of reorganization professional fees to the JSNs (including for fees associated with the UCC, Examiner and RMBS professionals) compared to approximately $27 million that actually benefitted the JSNs. (Id.)

187. The Debtors' over allocated approximately $89 million in interest and fees associated with the Barclays' DIP to the JSNs which did not benefit the JSNs' Collateral and about $72 million of corporate overhead, non-recurring litigation and other fees unrelated to maintaining or disposing of the JSNs' Collateral. (Id.)

188. On May 14, 2013 (the date of the sixth amendment to the Cash Collateral Order), an alternative methodology (the "Direct Allocation") was established to allocate administrative expenses on a prospective basis. (DX ABK (Winn Administrative Expense Rpt.) at DX0ABK-0013.)

189. The revised Direct Allocation methodology was predicated on the Horner Declaration. (Id.)

190. Jill Horner's approach applies direct cost and activity-based methods to charging the JSN Collateral, rather than a pro rata assets approach. (Id.)

191. The Debtors' subsequent Direct Allocation would impose an additional $30.4 million in administrative expenses for liquidating the Debtors' unsold JSN Collateral. (Id. at DX0ABK-0008.)

192. Scott Winn concluded that the Debtors' post-petition administrative expenses incurred in these cases totals approximately $1.9 billion (cash and accrued liabilities) through April 30, 2013 and an additional $0.8 billion projected through January 31, 2016. (Id. at DX0ABK-0007.)

193. Mr. Winn's direct costs analysis showed approximately $329 million to $384 million of administrative expenses associated with maintaining and disposing of JSN Collateral. (Id. at DX0ABK-0042.)

194. The Debtors' allocated approximately $405-$460 million of direct costs to JSN Collateral from the Petition Date through April 30, 2013, which are not associated with JSN Collateral. (Id.)

195. Each of the Debtors' business lines associated with the JSN Collateral generated net proceeds during the Initial Allocation period. (Winn Witness Statement (Debtor Adv. Dkt. No. 133) 5.)

196. The total net proceeds (after expenses) associated with the business lines that are associated with the JSN Collateral are estimated to be $322 million for the Initial Allocation period. (Id.)

D. The Debtors' Post-Deposition Testimony on the Meaning of Stipulation 5(g)

197. The Debtors' 30(b)(6) witness—Mr. Jim Whitlinger—testified that the Debtors understood that, as part of the Cash Collateral Order, they were stipulating to liens that, in fact, might not exist at that time. (Whitlinger Dep. 132:13-133:3.) Specifically, Mr. Whitlinger

testified that the Debtors were comfortable "stipulating to saying there was a lien even where one didn't exist because there was a period of time in which people [i.e, the Committee] could object to the existence of a lien." (Id.)

198. By way of example, Mr. Whitlinger agreed that the Debtors would be okay stipulating that a party was secured in the amount of $2.221 billion even if the original UCC filing stated $2.21 million "because there was an opportunity for other parties to do that diligence and object if they thought it had not been properly perfected." (Id. at 131:4-19.)

199. Mr. Whitlinger also agreed that, by way of example, the Debtors were okay stipulating to a lien in which the party filed the original UCC with the North Dakota Secretary of State instead of the Minnesota Secretary of State because there was a period of time in which anybody else in the case could object and raise that issue with the Court." (Id. at 131:23-132:7.)

200. Mr. Thomas Marano, who was not the Debtors' 30(b)(6) designee on the negotiation of the cash collateral, testified in his direct testimony on the Debtors' "intent or understanding" as to paragraph 5(g) of the Cash Collateral Order. (Marano Direct (Debtor Adv. Dkt. No. 79) ¶ 38.)

201. Mr. Marano testified that he understood that "there is now a dispute regarding the meaning of paragraph 5(g) of the [Cash Collateral Order.]" (Id.)

202. Mr. Marano further testified that paragraph 5(g) "was referring to liens held as of the date of the [Cash Collateral Order]" and that he does "not believe that any party could reasonably have understood this provision to revive previously released liens." (Id.)

203. Mr. Marano did not negotiate the Cash Collateral Order. (Trial Tr. 150:5-11, October 15, 2013 (Marano).)

204. Mr. Marano has never negotiated a cash collateral order before. (Id. at 152:13-15.)

205. Rather, Mr. Jim Whitlinger served as the Debtors' point person for purposes of negotiating the Cash Collateral Order. (Id. at 150:20-23.)

206. Mr. Marano did not have any communications with any member of the JSNs at the time of the negotiation of the Cash Collateral Order. (Id. at 151:20-152:8.)

207. The record is silent as to why the Committee did not challenge paragraph 5(g), and the Committee has offered no witness.

III. Facts Relevant to the Debtors' Action

A. Adequate Protection Claims

1. Both sides agree that, pursuant to the Cash Collateral Order, the JSNs are entitled to an adequate protection claim to the extent of the aggregate diminution in value of the JSNs' interest in the Notes Collateral. (Revised Joint Pretrial Order (Debtor Adv. Dkt. No. 105) ¶ 29.)

2. Both parties and their experts also agree that the JSNs' adequate protection claims should be equal to the diminution in the fair market value of the Notes Collateral as of the Petition Date. (Id. at Plaintiffs' Contentions ¶ 112, Defendants' Contentions ¶ 14.)

3. The parties and their experts disagree, however, as to the appropriate methodology for assessing the fair market value of the Notes Collateral as of the Petition Date. (Id. at Plaintiffs' Contentions ¶ 112.)

a. The Houlihan Methodology

4. The JSNs' experts, Houlihan Lokey, performed an independent, bottoms-up analysis of the fair market value of each asset comprising the Notes Collateral, informed by the prices obtained in the auction process, where applicable (the "Houlihan Methodology"). (Siegert

Witness Statement (Debtor Adv. Dkt. No. 85) ¶ 18.) Houlihan Lokey performed its analysis based on the sale prices at auction—a true measure of value, adjusted for cash flows and loans balances back to the Petition Date.

5. Houlihan Lokey engaged four experts to perform asset level bottoms-up valuations relevant to the determination of the fair market value of the JSNs' interest in the Notes Collateral. (Id. at ¶ 19)

6. Qualifications of Mr. P. Eric Siegert: Mr. P. Eric Siegert is currently employed at Houlihan Lokey as a Senior Managing Director. (DX ABF (Siegert Rpt.–Global Summary) at DX0ABF-0019.)

7. Mr. Siegert is also the Chairman of Houlihan's Financial Restructuring Group and a member of Houlihan's Management Committee. (Id.)

8. He has been employed at Houlihan Lokey since 1987. (Id.)

9. Mr. Siegert is a restructuring specialist and has worked on over 100 restructuring transactions. (Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶ 1.)

10. Over the course of his career in financial restructuring, he prepared hundreds of valuations for his clients. (Id.)

11. He has completed restructuring work for major companies, including: American Airlines; Enron; General Motors; Lehman Brothers; Mirant; Sun Healthcare; and Washington Mutual. (DX ABF (Siegert Rpt.–Global Summary) at DX0ABF-0019-20.)

12. His testimony was taken, either in court or through depositions, in the following cases: AEI Coal; Bucyrus-Erie; F&M Distributors; Fairfield Communities; Genesis Healthcare; Home Holdings, Inc.; Oren Benton; System Software Associates (proffered testimony); and Westmoreland Coal. (Id.)

13. He has testified in bankruptcy court previously on valuation issues. Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶ 2.)

14. Notably, Mr. Siegert authored a chapter on discounted cash flow in a relevant text, Contested Valuation in Corporate Bankruptcy: A Collier Monograph. (DX ABF (Siegert Rpt.–Global Summary) at DX0ABF-0019.)

15. Prior to joining Houlihan Lokey, Mr. Siegert was an analyst at Pas-Co Capital Group. (Id.)

16. He received his degree from the University of California, Berkeley in Economics. (Id.)

17. Qualifications of Mr. Jeffrey M. Levine: Mr. Jeffrey M. Levine valued the MSRs, Servicing Advances and HARP/Other Refi Opportunities sold as part of the Ocwen Sale. (DX ABG (Levine Rpt.) at DX0ABG-0005.)

18. Mr. Jeffrey M. Levine is currently a Managing Director at Houlihan Lokey in the Financial Institutions Group. (Levine Decl. (Debtor Adv. Dkt. No 82) ¶ 1.)

19. At Houlihan, Mr. Levine specializes in complex valuation analyses and the purchase and sale of mortgage finance companies. Id. He also values assets related to mortgage finance companies, such as loans and mortgage servicing rights. (Id.)

20. Mr. Levine is one of the most active advisors in the mortgage banking M&A community. (DX ABG (Levine Rpt.) at DX0ABG-0045.)

21. He has completed over 75 corporate transactions in his career. (Id.)

22. Additionally, he is a frequent lecturer and author in the financial services and mortgage industry. (Id.)

23. Recently, Mr. Levine worked on selling Met Life Bank's $70 billion MSR portfolio to J.P. Morgan; advised Freddie Mac in connection with the sale of $25 billion dollars' worth of MSRs; and is currently advising a top-ten servicer in the sale of approximately $40 billion of private label servicing. (Trial Tr. 93:4-12, Oct. 22, 2013 (Levine).)

24. As part of his work, Mr. Levine maintains an active dialogue with all major market participants. (Id. at 93:13-18.)

25. Prior to joining Houlihan, Mr. Levine had been lending the mortgage banking industry and then worked in investment banking at Bayview Financial ("Bayview"). (Id. at 92:20-93:9.)

26. At Bayview, he advised mortgage companies or banks predominantly in the sale or purchase of mortgage servicing rights, servicing businesses or origination businesses. (Id.) One of Mr. Levine's roles at Bayview was managing the analysts that valued MSRs. (Id. at 193:14-18.)

27. Bayview was a pioneer in the development of servicing analytics and models that are still used by market participants today. (Id.)

28. Mr. Levine received his degree in business administration from the University of Florida. (DX ABG (Levine Rpt.) at DX0ABG-0045.)

29. Qualifications of Mr. Michael Fazio: Mr. Michael Fazio valued the Whole Loan Portfolio subject to the Berkshire Sale, as well as other financial assets, including the FHA/VA Loans, not sold in either the Ocwen Sale or the Berkshire Sale. (Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶ 21.)

30. Mr. Fazio is currently a Managing Director of Houlihan Lokey's Financial Restructuring Group and is Co-Head of the firm's European Financial Institutions Group. (Id. at ¶ 1.) He previously led Houlihan's Global Portfolio Valuation Practice. (Id.)

31. Mr. Fazio has nearly three decades of experience "in advisory services in connection with acquisitions, divestitures, corporate strategy, operational oversight, and restructurings for financial institutions." (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0079-80.)

32. He has previously advised the Official Committee of Unsecured Creditors of Lehman Brothers Holdings, Inc., where he restructured and valued derivatives and special purpose vehicle portfolios; the Official Committee of Unsecured Creditors of Refco, where he advised in the restructurings of certain structured investment vehicles; and a committee of bondholders of CIT Group in connection with a $3 billion financing. (Id.)

33. Mr. Fazio testified that he had experience valuing and selling whole loan portfolios. (Trial Tr. 236:6–237:3, Oct. 22, 2013 (Fazio).) He had previously sold a non-performing loan portfolio in connection with the CIT which sold for $700 million UPB. (Id. at 237:4-6.)

34. Before arriving at Houlihan Lokey, Mr. Fazio was President and Chief Operating Officer of Comdisco, Inc., an $8 billion company, which he guided through the bankruptcy process. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0081.)

35. Mr. Fazio also was an Executive Vice President/Managing Director and COO-Americas of Deutsche Bank AG where he managed the integration of another company into Deutsche Bank, N.A. and also directed all non-front office functions in the Americas. (Id.)

36. At Deutsche Bank, Mr. Fazio was also a member of the executive committee and chaired the bank's regional operating committee. (Id.)

37. Mr. Fazio began his career with Arthur Andersen LLP, where he was partner-in-charge of the New York Banking, Brokerage and Investment Banking Industry practice in his last position with the firm. (Id. at DX0ABI-0080.)

38. Qualifications of Mr. John A. Taylor: Mr. John A. Taylor is currently a Managing Director at Houlihan Lokey. Taylor Decl. (Debtor Adv. Dkt. No. 84) ¶ 1.)

39. Mr. Taylor has more than 25 years of appraisal, valuation, and consulting experience. (Id.)

40. He specializes in complex valuation and consulting analyses that require a multidisciplinary approach. (Id.)

41. Specifically, Mr. Taylor's expertise includes the valuation of business entities and their "equity instruments, intellectual property and intangible assets, common and preferred stock of closely-held businesses, business damages and lost profits analyses, strategic alternatives analyses, purchase price allocation and goodwill impairment analyses and the preparation of fairness opinions." (Id.)

42. Mr. Taylor has worked on over 500 matters in his 27 years of experience. (DX ABH (Taylor Rpt.) at DX0ABH-0173.)

43. Mr. Taylor has done numerous goodwill impairment analyses, including analyses for: a pharmaceutical/nutraceutical company; the global operations of software solutions provider, the U.S. operations of a health service provider; and the global operations of an integrated real estate services company. (Id. at DX0ABH-0181-185.)

44. Prior to joining Houlihan Lokey, Mr. Taylor spent over a decade at a "Big Four" accounting firm in their financial consulting group. (Id. at DX0ABH-0173.)

45. Mr. Taylor is an Accredited Senior Appraiser (ASA) with the American Society of Appraisers and has been one since 1993. (Taylor Decl. (Debtor Adv. Dkt. No. 84) ¶ 1.)

46. He presently serves as Past Chair of the American Society of Appraiser' Appraisal Review and Management Committee. (Id.)

47. Since 2003, Mr. Taylor has been a Certified Management Consultant (CMC) with the Institute of Management Consultants. (Id.)

48. Qualifications of Scott Winn: Mr. Winn has over 25 years professional experience in finance, operations and strategy, specializing in distressed and underperforming companies. (Winn Witness Statement (Debtor Adv. Dkt. No. 80) ¶ 1.)

49. Mr. Winn is currently a Senior Managing Director of Zolfo Cooper LLC. (Id. at ¶ 1.)

50. Mr. Winn is a financial and restructuring expert who has provided hands-on financial and operational leadership and advice to distressed organizations, their creditors, investor groups and other stakeholders. (Id.)

51. Mr. Winn has also provided a broad range of advisory services including interim management, operational restructuring, capital restructuring, business valuations, liquidation analyses, financings and litigation consulting. (Id.)

52. Mr. Winn has provided financial advisory services in many complex bankruptcy cases that involved evaluating solvency and performing financial analyses in connection with fraudulent conveyance, preference actions and intercompany claims. (Id.)

53. Mr. Winn has managed assignments on both the creditor and company sides of distressed situations, including high profile public-record bankruptcies and company restructurings involving from $100 million to more than $65 billion in assets. (Id. at ¶ 2.)

54. Mr. Winn's expertise covers a wide array of industries, including financial services, real estate, energy, restaurants, health care, retail, telecommunications, manufacturing and other service sectors. (Id.)

55. Mr. Winn began his career with J. Henry Schroder Bank & Trust and has a B.S. in business from Georgetown University; prior to joining Zolfo Cooper in 2001, Mr. Winn was a partner in Deloitte & Touche's reorganization services practice. (Id. at ¶ 3.)

56. Houlihan Lokey undertook two valuation methods to determine the value of the intangible assets and going concern value sold in the Ocwen Sale. (Id. at ¶ 22.)

57. Methodology #1 involved the performance by John A. Taylor of an independent retrospective purchase price allocation of the Ocwen Sale for the acquired financial assets and the intangible assets, goodwill and going-concern values. (Id. at ¶ 22(a).) The intangible, goodwill and going-concern value at the transaction close date was then rolled back to the petition date by adding to it a present value (as of May 14, 2012) of the proceeds realized from intangibles, contracts and related assets (including broker fees, ETS revenue, and others) between the petition date and the transaction closing, and subtracting costs associated with these assets. (Id.)

58. Methodology #2 involved performing an independent analysis of the enterprise value of ResCap's servicing and origination business (including the MSRs, servicing/origination operations and associated platforms and excluding the servicer advances) as of May 14, 2012) by using a market multiple approach. (Id. at ¶ 22(b).)

59. Based on this value, Houlihan Lokey's independent May 14, 2012 valuation of the associated MSRs was subtracted from the total enterprise value to determine the value of the intangible assets, going-concern and goodwill. (Id.)

i. Valuation of MSRs, Servicing Advances and HARP/Refi Opportunity

60. The valuation of servicing advances, HARP refinance opportunities, and mortgage servicing rights ("MSRs") was provided by Mr. Jeffrey Levine. Mr. Levine is one of the leading investment bankers and advisors in the mortgage banking industry. (DX ABG (Levine Rpt.); Levine Decl. (Debtor Adv. Dkt. No. 82).) He has represented clients in transactions involving the purchase and sale of mortgage servicing rights, and servicing advances, and has extensive experience in valuing such assets. (Trial Tr. 73:11-13, 93:10-15, Oct. 22, 2013 (Levine).) He was instrumental in developing the models that are commonly used in the industry to value such assets. (Id. at 93:15-18; DX AIK (Levine Rebuttal Rpt.) at DX0AIK-0014.)

61. Consistent with market practice, Mr. Levine utilized a discounted cash flow analysis to value the MSRs sold in the Ocwen Sale. (Levine Decl. (Debtor Adv. Dkt. No. 82) ¶ 3.)

62. Specifically with respect to MSRs, the discounted cash flow analysis was largely a function of the estimated cost of capital associated with the advances and the timing and amount of cash flows. Houlihan Lokey assumed a weighted average cost of capital of 5.6%, which was based on investor return requirements in addition to market interest rate and leverage terms for advance financing facilities. The timing of cash flows was estimated based on characteristics of the portfolio, such as the type of advance, the state in which the property was located, the estimated non-recoverable advance amount, if any, and the estimated frequency and timing of loan modifications. He then tested the results against precedent transactions. (Id. at ¶¶ 3-4.)

63. Applying this method, Mr. Levine concluded that the MSRs had a fair market value as of the Petition Date of $862 million. (DX ABG (Levine Rpt.) at DX0ABG-0007.)

64. Mr. Levine used both precedent transactions and a discounted cash flow analysis to value Servicing Advances. (Levine Decl. (Debtor Adv. Dkt. No. 82) ¶ 4.) In sales of MSRs and Servicing Advances portfolios, the servicing advances almost always trade at par value (i.e., 100% of the unpaid principal balance), which was the price paid by Ocwen for the Servicing Advances sold under the Ocwen APA. (Id. at ¶ 5; DX AIK (Levine Rebuttal Rpt.) at DX0AIK-0006.)

65. In valuing the Servicing Advances, Mr. Levine assumed a 100 percent par purchase but also used a discounted cash flow analysis to derive value. By doing so, Mr. Levine factored into his valuation the time value of money during the recovery period. (Trial Tr. 75:23-76:2, Oct 22, 2013 (Levine); DX AIK (Levine Rebuttal Rpt.) at DX0AIK-0006.)

66. Applying this method, Mr. Levine concluded that the Servicing Advances had a fair market value as of the Petition Date of between $1.705 billion and $1.795 billion. As of February 29, 2012, the Servicing Advances had a fair market value of between $1.866 million and $1.964 million. As of August 31, 2012, the Servicing Advances had a fair market value between $1,798 million and $1.893 million. (DX ABG (Levine Rpt) at DX0ABG-0007.) Mr. Levine concluded that Servicing Advances constituting Notes Collateral had a fair market value as of the Petition Date of $1.394 billion. (Id.)

67. In Mr. Levine's experience, Servicing Advances are never sold separate from MSRs but they are valued separately because they are discrete assets. Consequently, Mr. Levine valued the Servicing Advances separate and apart from the MSRs. (Trial Tr. 73:24-74:18, Oct. 22, 2013 (Levine).)

68. Although servicing advances are normally sold together with MSRs, in his rebuttal report and in response to questioning at trial, Mr. Levine expressed the view that there is no reason why lienholders could not realize the value of the advances if the Debtors had actually turned them over to lienholders. (Trial Tr. 107: 5-12, Oct. 22, 2013 (Levine); DX AIK (Levine Rebuttal Rpt.) at DX0AIK-0008.)

69. Servicing Advances are valued from the perspective of a market participant and bidders in the market use their own assumptions and do not look at historical recoverability rates. (Trial Tr. 78:7-79:18, 88:17-21, 97:25, Oct. 22, 2013 (Levine).) Consequently, Mr. Levin did not rely on ResCap's historical information. (Id.) Servicing Advances are short term and highly secure and thus the Debtors' historical recovery time is not relevant. (Id. at 81:2-10.)

70. Mr. Levine's assumptions were based on published timelines by both Fannie Mae and Freddie Mac as well as industry research which are what investors rely on for expected foreclosure times. (Id. at 79:20-81:7.)

71. With respect to MSRs, Mr. Levine relied on both the market and the Debtors' actual costs to service the MSRs. In the near-term, where the cash flows are heavily weighted on present-value basis, Mr. Levine felt it was more appropriate to use the Debtors' actual costs to service since the loans would not be transferring in the short-term. (Id. at 87:5-88:16.)

72. Mr. Levine also valued separately the HARP/Refi Opportunity—the value of the opportunity to refinance mortgages contained within the portfolio of mortgages which the Debtors serviced. (Levine Decl. (Debtor Adv. Dkt. No. 82) ¶ 2; Trial Tr. 100:9-16, Oct 22, 2013 (Levine).)

73. Mr. Levine's normal practice is to value HARP/Refi opportunities separately from MSRs. (Trial Tr. 100:9-25, Oct. 22, 2013 (Levine).)

74. Although the refinance opportunity does not exist as to a portfolio of mortgages absent the existence of the mortgage loans contained in the portfolio, the HARP/Refi opportunity value separate from the MSR value and independent of the mortgage servicing contracts for those mortgage loans. (Id.)

75. HARP—the Home Affordability Refinance Program—is a government program to help underwater borrowers. (Id. at. 99: 12-18 (Levine).)

76. HARP only applies to mortgages owned or guaranteed by Fannie Mae or Freddie Mac. (DX ABG (Levine Rpt.) at DX0ABG-0031; Trial Tr. 99: 15-22, Oct 22, 2013 (Levine).)

77. As such, there is no HARP value associated with PLS MSRs. (Trial Tr. 221:9-11, Oct.15, 2013 (Marano).)

78. Mr. Levine testified that most of the HARP/Other Refi Opportunities in these cases were associated with Fannie MSRs. Specifically, Mr. Levine testified that the HARP/Other Refi Opportunities associated with Fannie MSRS totaled approximately $33 million to $76 million as of February 29, 2012 and approximately $64 million to $144 million as of August 31, 2012 (Trial Tr. 103:18-105:12, Oct. 22, 2013 (Levine).)

79. The value associated with the HARP refinancing consists largely of the fees an originator of mortgages can earn from refinancing and reselling the mortgage back into the secondary market. None of the value attributable to the refinance opportunity comes from future servicing fees under the existing mortgage servicing contracts. (Trial Tr. 99:25-100:16, Oct 22, 2013 (Levine).)

80. The opportunity to solicit customers of a mortgage servicers such as ResCap is not limited to the servicer. Any mortgage originator can solicit existing customer of the Debtors to refinance using publicly available information. (Trial Tr. 100:14-22, Oct. 22, 2013 (Levine).)

81. HARP and other refinancing opportunities have value separate from the MSRs. (Id. at 100:10-18.)

82. Additionally, it is "possible to sell the MSRs separately from the HARP [or other refinancing] opportunity." (Id. at 100:23-25.)

83. To value the HARP/Refi Opportunity associated with originating and selling new loans, Mr. Levine (i) assumed an eligible population in line with the Project Bounce CIM and Management Presentation, (ii) assumed a conservative capture rate as compared to capture rates achieved by other industry participants, (iii) assumed a HARP margin comparable to the Project Bounce CIM and Management Presentation and below industry research estimates and (iv) assumed a Non-Harp Margin consistent with that indicated in the Project Bounce CIM. (DX ABG (Levine Rpt.) at DX0ABG-0033.) Applying this method, Mr. Levine concluded that the HARP/Refi Opportunity had a fair market value as of the Petition Date of $129 million. (Id.)

84. Mr. Levine's valuation of the MSRs and HARP/Refi Opportunity separately is consistent with the price paid for the MSR and HARP/Refi Opportunity together at auction. Mr. Levine valued the MSR plus the HARP/Refi Opportunity at $981 million. This value varies less than 10% from the $911 million paid for the MSRs and HARP/Refi Opportunity together at auction. (Id. at DX0ABG-0007.)

85. The value of HARP and other refinancing value would not have a "meaningful difference in value" if they "were in the hands of the JSNs rather than in the hands of the debtors," provided "they were sold to the same buyer." (Trial Tr. 107: 5-12, Oct. 22, 2013 (Levine).)

86. Mortgage servicers recognize that there is a substantial amount of value associated with loans that are HARP eligible. (DX ABG (Levine Report) at DX0ABG-0031.)

87. The JSN lien release dated May 14, 2010 related to private label mortgage servicing rights, not Fannie or Freddie servicing rights. (Trial Tr. 48:5-23, Oct. 22, 2013.) The Fannie MSRs are outside of the JSN Lien because they are Excluded Assets by virtue of being unlienable under a separate bilateral facility agreement. (Id.)

ii. Valuation of Whole Loan Portfolio

88. Mr. Fazio prepared a valuation of the Debtor's whole loan portfolio. (DX ABI (Fazio Rpt.–HFS) at DX0ABI0026-0053.)

89. Mr. Fazio used two recognized valuation methodologies to value the portfolio—a discounted cash flow and precedent transactions. (Id. at DX0ABI0026; Trial Tr. 136:6-9, Oct. 22, 2013 (Fazio).)

90. To value the Whole Loan Portfolio as of the Petition Date, Mr. Fazio classified the loans into stratifications based on vintage, product type, collateral type, and interest rate type. These stratifications were valued as the sum of projected discounted cash flows after adjusting for credit risk assumptions such as prepayment, default, and severity rates. (Siegert Witness Statement (Debtor Adv. Dkt. No.) ¶ 20(a); DX ABI (Fazio Rpt.–HFS) at DX0ABI-0021-23.)

91. First, Mr. Fazio analyzed loan-level data tapes as of February 29, 2012 and August 31, 2012 and a composite data tape as of May 14, 2012 to place each loan into a stratification. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0021.)

92. Next, Mr. Fazio calculated key metrics such as weighted average maturity, weighted average interest rate and the percentage of loans governed by state law requiring judicial foreclosure to project the cash flows produced by each stratification. (Id.)

93. Then, using current market data and historical performance with respect to such loans, Mr. Fazio developed a projected conditional prepayment rate, constant default rate,

severity rate and recovery rate for each stratification and modified each stratification's cash flow projections accordingly. (Id.)

94. Finally, Mr. Fazio selected a discount rate for each stratification using weighted average yields for actively-traded MBS securities backed by portfolios of loans comparable to the stratification being considered. (Id.)

95. In summary, Mr. Fazio valued the "whole portfolio" of loans: "There's thousands and thousands of loans; you bucket them into similar characteristics like we talked about it, the four different criteria that we did by type, by interest rate, by vintage, and then you model all of those out, so there's thousands of stratifications that get whittle[d] down to hundreds and then we value – hundreds of portfolios but it's all the individual loans that make up the portfolio as of the time." (Trial Tr. 169:2-10, Oct. 22, 2013 (Fazio).) The valuation is the total of all loan specific cash flows. (Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶ 20(a); DX ABI (Fazio Rpt.–HFS) at DX0ABI-0021-23; Trial Tr. 167:25-168:2, Oct. 22, 2013 (Fazio).)

96. Applying this method, Mr. Fazio concluded that the Whole Loan Portfolio had a fair market value as of the Petition Date of $1,659.1 million. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0006.)

97. Mr. Fazio then compared the values determined through the discounted cash flow analysis to the actual amount paid by Berkshire. (Fazio Decl. (Debtor Adv. Dkt. No. 83) ¶ 6b.)

98. In order to make the comparison, Mr. Fazio adjusted the Berkshire purchase price to reflect differences in the portfolio as of the three dates on which he had performed the discounted cash flow analysis. (DX ABI (Fazio Rpt.–HFS) at DX0ABI0025-0043.)

99. Based on these adjustments Mr. Fazio valued the loans as of relevant dates. (Id.) He concluded the fair market value, based upon a bottoms-up, discounted cash-flow analysis,

was $1,577.2 million as of February 29, 2012 and $1,659.1 million as of May 14, 2012. (Fazio Decl. (Debtor Adv. Dkt. No. 83) ¶ 6a.)

100. Mr. Fazio also looked to the Berkshire Hathaway bid price, and adjusted that bid price to May 14, 2012, and February 29, 2012, based on the loan portfolio composition on those dates. (Id. at ¶ 6b.) This resulted in a Berkshire Hathaway adjusted bid price of $1,594.1 million as of February 29, 2012, which represents a 1.1% premium to Mr. Fazio's valuation; and a bid of $1,583.6 million as of May 14, 2012, which represents a 4.6% discount to Mr. Fazio's valuation. (Id.)

101. In light of the fact that the Berkshire Hathaway bid price represented the actual transaction price, Mr. Fazio used the adjusted bid prices as the ultimate value number. (Trial Tr. 140:7-9, Oct. 22, 2013 (Fazio) ("We used the Berkshire bid as the ultimate conclusion; however, the conclusion is based off of doing a bottoms-up analysis and also understanding Berkshire's bid.").)

102. Having determined the total value for the entire portfolio, Mr. Fazio then allocated the total portfolio value between loans which were part of the JSN security and those loans that were not, using the loan specific discounted cash flows developed during the discounted cash flow analysis of the entire portfolio. (Id. at 138:18-22.)

103. Mr. Fazio testified that he did not rely on the pricing formula in the Berkshire APA, which broke the portfolio into categories based on only one criteria, but instead looked at all the credit quality and credit statistics associated with each of the portfolios to determine value. (Id. at 167:16-24).) In general, those statistics—including borrower credit rating, interest rate, and delinquency—were better for the JSN loan collateral than for the non-JSN collateral. (See DX ABI (Fazio Rpt.–HFS) at DX0ABI0005-0007.)

104. Mr. Fazio then reduced the value of the JSN collateral and non-JSN Collateral each by the 4.6% discount of the Berkshire bid price from Mr. Fazio's calculated discounted cash flow valuation of the entire portfolio, concluding that the JSN Collateral value as of the Petition Date was $979,463 million. (Trial Tr. 139:1-2, Oct. 22, 2013 (Fazio); DX ABI (Fazio Rpt.–HFS) at DX0ABI0006.)

105. Additionally, although there was a document deficiency adjustment factor in the Berkshire Hathaway APA, Mr. Fazio used a one-time multiplier to account for this factor because, as Mr. Fazio noted, "there wasn't any material, plus or minus, associated with the purchase price because the documents had been cleaned up." (Trial Tr. 165:1-5, 166:17-19 Oct. 22, 2013 (Fazio).)

106. Mr. Fazio determined that the value of Notes Collateral subject to the Berkshire Sale was approximately $1,026million as of May 14, 2012 and the value of non-Notes Collateral subject to the Berkshire Sale was approximately $63 million. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0007.)

iii. Valuation of FHA/VA Loans

107. To value the FHA/VA Loans, Mr. Fazio utilized a discounted cash flow analysis. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0059.) Mr. Fazio assumed a recovery rate on FHA Loans of 97%, and a recovery rate of 75% on VA Mortgage Loans. (Id.)

108. Consistent with the Debtors' estimates that the FHA/VA Loans would monetize over a period of 30-36 months and that 77% of such FHA/VA Loans would monetize in the first 24 months, Mr. Fazio discounted the associated cash flows from recoveries over a 36 month period. (Id. at DX0ABI-0058.)

109. Even under the scenario raised during cross examination of recovery over a seven year period, Mr. Fazio calculated that close to 86% of the all the loans would be collected within three years. (Trial Tr. 174:4-21, Oct. 22, 2013 (Fazio).)

110. Additionally, Mr. Fazio recognized that the Debtors could choose to monetize the entire remainder of the FHA portfolio at the end of 36 months. (Id. at 175:4-8.) He testified that the remainder was an insignificant amount and that the economic impact of later collections would be very small. (Id.)

111. This method yielded a value for FHA/VA Loans of 95% of book value, consistent with the Debtors' stated historical experiences with such assets. (DX ABI (Fazio Rpt. – HFS) at DX0ABI-0058.)

112. By comparison, the Debtors' Disclosure Statement valuation assumed a "blended net recovery rate of approximately 93% of book value" for the FHA/VA loans. (PX 256 (Disclosure Statement) at PX pg. 483.)

113. Applying this method, Mr. Fazio concluded that the FHA/VA Loans had a fair market value as of the Petition Date of $598 million. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0009.)

114. Mr. Fazio conclusion as to the fair market value of the FHA /VA loans is based on an estimate of present value of the anticipated cash flow from the run off of those loans. (Trial Tr. 175:20-21, Oct. 22, 2013 (Fazio).)

115. While Mr. Fazio did not explicitly deduct expenses in his report, the assumptions used by Mr. Fazio in his calculation of present value more than accounted for such expenses. (Id. at 175:24.) Specifically, Mr. Fazio used a 5% discount rate, a rate well over the rate

commensurate with government guaranteed instruments over a three year period, such as the FHA/VA loans held by Debtors. (Id. at 176:1-7.)

116. The fair market value of the FHA/VA loans would not change in the hands of the JSNs. (See Fazio Decl. (Debtor Adv. Dkt. No. 83) ¶ 13.) ("In my view, the assets that I valued would not have had a meaningfully different value in the hands of the secured party (JSN holders) than the fair market value of those assets.").

iv. Valuation of Other Unsold Financial Assets

117. Mr. Fazio also considered the valuation of other financial assets included in the Notes Collateral, but not sold in the Ocwen Sale or the Berkshire Sale. (DX ABI (Fazio Rpt.– HFS) at DX0ABI-0009.) These assets include, but are not limited to: international HFS loans, MSRs and servicer advances that were temporarily excluded from the asset sales, and other Debtors' assets. (Id. at DX0ABI-0057-61.)

118. Mr. Fazio concluded that the international HFS loans should be valued at 73% of book value; the MSRs and servicing advances (which are assumed will be sold to Ocwen) should be valued consistently with collateral in the Asset Sales; and other debtors' assets should be valued at 61% of book value. (Id.)

119. Applying this method, Mr. Fazio concluded that as of the Petition Date the other assets had the following fair market values: HFS – Other (Int'l), $13 million; Advances – Other, $102 million; and All Other, $94 million. (Id. at DX0ABI-0009.)

120. Mr. Fazio totaled that these assets had a fair market value as of the Petition Date of $209 million. (Id.)

v. Valuation of Equity Pledges

121. Amongst the Notes Collateral are equity pledges from both Debtor and non-Debtor subsidiaries. (PX 3 (Notes Security Agreement) at § 3; PX 4 (Notes Security Agreement) at Attachment I.) To determine the value of the equity pledges granted by Debtor subsidiaries, Mr. Fazio began by valuing the assets at each entity applying the same bottoms up method as of the Petition Date that characterizes the Houlihan Methodology. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0066 n.2.)

122. Next, assets already counted as part of the Notes Collateral were removed, as well as unsecured liabilities shown on each entity's respective schedules. (Id. at DX0ABI-0066 n.3.)

123. Applying these methods, Mr. Fazio concluded that the fair market value as of the Petition Date of the equity pledges granted by Debtor-subsidiaries was $35 million. (Id. at DX0ABI-0066.)

124. The only Debtor-subsidiary that yielded a recovery for the JSNs was PATI, with $35 million dollars' worth of equity that Mr. Fazio found attributable to the JSN collateral as of May 14, 2012. (Id.)

125. With respect to the non-Debtor subsidiaries, Mr. Fazio relied upon a report filed by the Debtors, titled "Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtors' Estates Hold a Substantial or Controlling Interest" (the "Periodic Report"), which included a summary balance sheet for each of the Non-Debtor Subsidiaries as of December 31, 2012. (Id. at DX0ABI-0068.)

126. For purposes of his analysis, the value of the equity pledges from non-Debtor subsidiaries was assumed to be the equity value as set forth in the Debtors' Periodic Report. (Id.)

127. The date of the balance sheet in the Periodic Report, December 31, 2012, was used as a proxy for the Petition Date. (Id.)

128. In the Periodic Report, the Debtors indicate that they have no analyses for these entities prepared within the last two years supporting any comprehensive alternative valuation for these entities. (Id.)

129. Mr. Fazio concluded that the value of the equity pledges in the Non-Debtor subsidiaries were $26 million in CAP RE of Vermont, LLC; $3 million in CMH Holdings LLC; $1 million in GMAC-RFC Europe Limited; and $10 million in GMAC-RFC Holdings Limited. (Id. at DX0ABI-0069.)

130. Taken together, Mr. Fazio concluded that the value of the equity pledged by the non-Debtor subsidiaries amounted to $40 million dollars as of the Petition Date. (Id.)

131. Overall, Mr. Fazio determined that the fair market value of the equity pledged by both the Debtor and non-Debtor subsidiaries amounted to $75 million dollars as of the Petition Date. (Id.)

vi. Valuation of Hedges/Derivatives

132. The Debtors' closed almost all of their open hedges and derivatives prior to declaring bankruptcy and realized $104 million from the positions subsequent to filing. (Id. at DX0ABI-0072.) Consistent with this, Mr. Fazio (and Mr. Puntus) valued these hedge/derivative assets as of the Petition Date at $104 million. (Id.)

vii. Valuation of Postpetition Proceeds from Contracts

133. These assets include a broker agreement with Ally Bank ("Broker Agreement"), a shared services contract with Ally ("Shared Services Contract"), and foreclosure trustee and recovery services contracts ("Foreclosure Contracts"). (Id. at DX0ABI71.)

134. As of May 14, 2012, Mr. Fazio valued the amount of these assets at $97 million. (Id. at 9.)

135. For the Broker Agreement, Shared Services Contract, and the Foreclosure Contracts, Mr. Fazio valued these assets as of the Petition Date, assuming a 15% discount rate, at $97 million. (Id. at DX0ABI-0075.)

136. In his valuation of the Broker Agreement, as of the Petition Date, Mr. Fazio present valued the actual cash flow from the agreement received by ResCap through April 2013. Although the agreement was not terminable by Ally and not assignable, in fact ResCap continued to receive cash from that contract through that date. (Id. at DX0ABI-0074.)

137. With regard to the Shared Services Contract, Mr. Fazio relied on the Winn Report to conclude that there were no net associated costs of services to Ally. (DX ABK (Winn Rpt.– Administrative Expenses) at DX0ABK-0007.)

138. For the assets that fall into this category, "Other Contracts / Related," Mr. Fazio reduced the value of post-petition proceeds by an estimate of associated costs per Zolfo Cooper's Expert Report of Scott Winn. (Id. at 9.)

viii. Valuation of Intangible Assets and Going Concern Value as of the Petition Date

139. As noted above, the Houlihan Methodology encompasses two methods for valuing assets. In the first method, Houlihan determined the value of intangible assets and goodwill using a bottom's up analysis. The first step was for John A. Taylor to determine the value of the intangible and goodwill pursuant to the Ocwen APA as of the sale date. Mr. Taylor performed two analyses: (i) a retrospective valuation of the intangible assets acquired, goodwill, and certain liabilities assumed of the business acquired by Ocwen and Walter pursuant to the

Ocwen APA as of February 15, 2013 (a single date consistent with the transaction between Ocwen and Walter and ResCap set forth in the Ocwen APA (the "Transaction") and the closing date of the Transaction); and (ii) a retrospective price allocation in order to derive the amount of the purchase consideration to be allocated to goodwill as part of the Transaction.) (Declaration of John A. Taylor ("Taylor Decl.") 2-3, Oct. 9, 2013, Debtor Adv. Dkt. No. 84.)

140. Under the first analysis, Mr. Taylor independently valued all intangible assets purchased pursuant to the Ocwen APA that he could identify. (Trial Tr. 86:10-21, October 23, 2013 (Taylor).)

141. In estimating the value of the intangible assets that were acquired in the Transaction, Mr. Taylor employed methodologies utilized by professionals in the industry and relied on a valuation done by Jeffrey Levine of Houlihan Lokey as to HARP and other refinancing opportunities. (Id. at 3.)

142. Mr. Taylor performed his valuation based upon methodologies prescribed by the Financial Accounting Standards Board ("FASB"). (DX ABH (Taylor Rpt.) at DX0ABH-0017, ¶ 37.) The methodologies prescribed by the FASB require the acquirer to report the acquired assets at their full fair value. (Id.) Thus, although the valuation Mr. Taylor performed is meant for financial reporting, the product is in fact a market valuation of each acquired asset.

143. Although there are some differences between the definition of "fair value" as that term is used by the FASB and fair market value as set forth in appraisal standards, Mr. Taylor testified that the differences had no effect on his valuation or his conclusions. (Trial Tr. 88:16-89:10, Oct. 23, 2013 (Taylor).). Consequently, Mr. Taylor stated that, "Although allocation of purchase price studies, as well as the valuation of discrete assets which comprise the acquired business operations, are premised upon classic financial and economic principles (e.g., time

value of money, opportunity cost, principles of substitution, supply and demand and impact of competitive forces), they also rely upon general valuation frameworks." (DX ABH (Taylor Rpt.) at DX0ABH-0016, ¶ 34.)

144. Based on standard industry methodologies, Mr. Taylor testified that there were three categories of intangibles that he was able to identify and value, and he determined the fair value of those intangibles was: (i) $220 million for developed software and know-how; (ii) $129 million for customer-related intangibles (i.e. the HARP and other refinancing opportunities); and (iii) $10 million for tradenames, trademarks, iconography, and logotype. (Taylor Decl. (Debtor Adv. Dkt. No. 84) 3.)

145. In determining the value of intangibles, Mr. Taylor applied generally accepted valuation principles to which he applied his professional judgment. (DX ABH at DX0ABH_0049-71) To the extent the values for intangibles were lower than calculated by Mr. Taylor, it would increase the value of goodwill but would not lower the total value of intangibles and goodwill. (Trial Tr. 85:24-86:9, October 23, 2013 (Taylor).)

146. The assets transferred pursuant to the Ocwen APA included intangibles. (Trial Tr. 86:21-87:12, October 23, 2013 (Taylor).) Although the categories of intangibles identified by Mr. Taylor were not separately identified on the Debtors' books and records, the FASB methodology makes clear that, "[t]he acquirer's application of the recognition principle and conditions may result in recognizing some assets and liabilities that the acquiree had not previously recognized as assets and liabilities on its financial statements… because [the acquiree had] developed them internally and charged the related costs to expense." (DX ABH (Taylor Rpt.) at DX0ABH-0018, ¶ 40 (quoting Financial Accounting Standards Board. Statement of

Financial Accounting Standards No. 141 (revised 2007) – Business Combinations. Norwalk, CT: FASB, December 2007, ¶ 15); Trial Tr. 93:18-23, Oct. 23, 2013 (Siegert).)

147. Under the FASB methodology utilized by Mr. Taylor, the fair value at which assets are required to be reported is not defined by reference to the subjective views of the buyer and seller in a transaction. Instead "fair value" is defined as "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date." (DX ABH (Taylor Rpt.) at DX0ABH-0021, ¶ 45 (quoting Financial Accounting Standards Board. Statement of Financial Accounting Standards No. 141 (revised 2007) – Business Combinations. Norwalk, CT: FASB, December 2007, ¶ 68.) Fair value is a market-based assessment as opposed to an entity-specific measurement. (DX ABH (Taylor Rpt.) at DX0ABH-0024, ¶ 54.)

148. In order to perform the purchase price allocation, the total purchase price is first determined by adding to the amount of consideration paid the value of any liabilities assumed as part of the transaction. In this case, Mr. Taylor found the total purchase price to be $2.741 billion. (Id. at DX0ABH-0089.)

149. From this number Mr. Taylor subtracted the values of MSRs and Servicing Advances sold as determined by Mr. Levine, and the value of various other assets as reflected on Ocwen's and Walter's publicly filed financial statements. (Id.)

150. The balance was $313 million dollars, which is the total amount of the purchase price represented by intangibles and goodwill, allocated as follows:

a. Developed Software and Know-How: $220 million;

b. Customer-related Intangibles: $129 million;

c. Tradename/marks, Iconography and Logotype: $10 million; and

d. Unidentified Intangibles and Goodwill (Inclusive of Assembled Workforce): -$46 million.

(Taylor Decl. (Debtor Adv. Dkt. No. 84) at 3.)

151. Ocwen's and Walter's valuations for financial reporting purposes, reported in their public filings, similarly recognize that some portion of the purchase price paid in connection with the Asset Sales was attributable to intangible assets subject to the JSNs liens. (DX ABH at DX0ABH-0010, ¶ 21.; DX ABF at DX0ABF-0010; DX ZH at DX00ZH-0015 (Ocwen 10-Q for period ended June 30, 2013, allocating approximately $210.4 million of the purchase consideration to goodwill); DX QK at DX00WK-0012 (Walter 10-Q for period ended June 30, 2012, allocating approximately $49 million of the purchase consideration to goodwill).) The amount of the total intangible and goodwill value reported by those entities is directionally consistent with Mr. Taylor's analysis. The total amount of intangibles and goodwill reported on the Ocwen and Walter public filings represented approximately 10.4% of the total purchase consideration, while Mr. Taylor's valuation of those assets represented approximately 11.4% of the total purchase consideration. (Trial Tr. 91:20-92:14, Oct. 23, 2013 (Taylor).)

152. The fact that the purchase price allocation produces a negative goodwill number may be attributable to the timing difference between the date of the MSR and Servicing Advance valuation (using data as of December 31, 2012) and the February 15, 2013 closing date of the transaction. During that period the runoff of the assets would likely have reduced the amount of the negative goodwill. (DX ABH (Taylor Rpt.) at DX0ABH-0085, ¶ 234.)

153. Mr. Taylor explained that the fact that the Debtors did not have recorded on its balance sheet intangible and goodwill value (in amounts equal to those determined by his valuation) does not indicate that such assets did not exist. Under accounting principles,

intangible and goodwill value developed by a company during its business is not recorded as separate asset on its balance sheet. Therefore, it is often the case that a company selling assets would not show goodwill on its balance sheet; however, this does not mean it does not exist. (Trial Tr. 93:18-23, Oct. 23, 2013 (Taylor).)

154. Mr. Taylor also testified, based on the accepted practice and methods by which to conduct a purchase price allocation of acquired assets and assumed liabilities, that the assumption that greater value gleaned from asset sales over time would not have been achievable absent continued operation of ResCap's business implicitly supports the existence of intangible assets at ResCap, as such assets were needed in part to facilitate the realization of increased value. (Taylor Decl. ¶ 22.)

155. Mr. Taylor testified, based on the accepted practice and methods by which to conduct a purchase price allocation of acquired assets and assumed liabilities, that, in the event of a defined/constant purchase price, increasing risk to ResCap's assets would result in greater intangible asset value, all things being equal. (Taylor Decl. ¶ 5.)

156. Mr. Siegert similarly testified that there was actually higher intangible value embedded in ResCap's assets at the Petition Date to the extent ResCap's assets were at risk. (Trial Tr. 184:2-185:24, Oct. 23, 2013 (Siegert).)

157. Mr. Taylor testified, based on the accepted practice and methods by which to conduct a purchase price allocation of acquired assets and assumed liabilities that the stalking horse bid is not indicative of fair market value and such an assumption is inconsistent with established valuation principles. (Taylor Decl. (Debtor Adv. Dkt. No. 84) ¶ 5.)

158. Both analyses were performed in accordance with financial reporting standards, which require such analyses to be undertaken following the acquisition of a business. Id. The

purpose of these analyses is to assure that the value of acquired assets is accurately recorded on the acquiring company's financial statements. (Taylor Decl. ¶ 3.)

159. To determine the value of intangibles and goodwill as of the Petition Date under the first method, Mr. Siegert added the value of the intangibles and goodwill determined by Mr. Taylor to the value of post-petition proceeds of contracts discussed above, which yields a total value of $410 million of intangible assets and going concern value associated with the Ocwen Sale. (DX ABF (Siegert Rpt. – Global Summary) at DX0ABF-0010.)

160. Adding the value of post-petition proceeds of contracts discussed above yields a total value of $410 million of intangible assets and going concern value associated with the Ocwen Sale. (Id.)

161. This value does not get discounted back to the Petition Date for two reasons. (Trial Tr. 182:14-183:25, Oct. 23, 2013 (Siegert).) First, the value does not get discounted back to the Petition Date because the "value of intangibles went down" due to the size of the portfolio decreasing. (Id.) Second, the value does not get discounted back because there is no time value associated with intangible value—"[w]hen you realize that value, it's just the value at that point in time." (Id.)

162. The first step in the second method was for Mr. Fazio to determine the fair market value of ResCap's servicing and origination business, excluding Servicing Advances. (Id.)

163. To arrive at the value of the intangible assets encompassed in such business, the fair market value of the tangible assets, namely the MSRs, were then subtracted. (Id.)

164. Mr. Fazio's fair market value determination of the servicing and origination platforms and the MSRs of the Company was based on a market multiple approach. (DX ABJ

(Fazio Rpt. – FMV of MSRs) at DX0ABJ-0026.) That is an accepted methodology for valuing comparable companies. (See Trial Tr. 196:2-5, Oct. 22, 2013 (Fazio).)

165. The market multiple approach involves the multiplication of various earnings measures by appropriate risk adjusted multiples. (DX ABJ (Fazio Rpt. – FMV of MSRs) at DX0ABJ-0026.) The multiple based on analysis of publicly traded is determined through an analysis of certain comparable publicly traded companies. (Id.)

166. Before deriving the market multiple Mr. Fazio adjusted the income of the comparable companies to exclude income related to activities other than mortgage serving and origination. (Id. at DX0ABJ-0047-0049.) Mr. Fazio also evaluated the market capitalization of the comparable companies and concluded that the market capitalization of those companies in the aggregate related only to the mortgage serving and origination platforms and MSRs. (Trial Tr. 198:14-199:18, 204:6-14, Oct. 22, 2013 (Fazio).)

167. Mr. Fazio then derived the multiple by dividing the market capitalization of the comparable companies by the adjusted revenue and earnings figures, and applied the multiples so derived to the revenue and earnings attributable to the Debtors' servicing and origination platforms and MSRs. (See id. at 197:11-20.)

168. In addition, Mr. Fazio testified that in reaching his conclusion he considered the actual proceeds realized on the sale to Ocwen and Walter as well as comparable transactions listed in his report. (Id. at 195:13-18.) Although counsel for the Committee suggested that the amount realized on the sale to Ocwen and Walter was less than the value determined by Mr. Fazio, Mr. Fazio pointed out that the portfolio was bigger in May 2012 than at the time the sale was consummated. (Id. at 225:1-15.)

169. Applying this method, Mr. Fazio arrived at a total enterprise value of $1,485 million as of the Petition Date. DX ABF (Siegert Rpt. – Global Summary) at DX0ABF-0010.

170. Subtracting the fair market value of the MSRs derived according to the Levine Report yielded a total value of $623 million of intangible assets and going concern value associated with the Ocwen Sale. (Id.)

171. The Houlihan Methodology averages the fair market value of intangible assets and going concern value associated with the Ocwen Sale. (Id.)

172. The average fair market value of intangible assets and going concern value associated with the Ocwen Sale was therefore $517 million. (Id.)

173. In allocating the proceeds from the Asset Sales, Mr. Taylor (and Ocwen and Walter) employed an asset level valuation in accordance with financial reporting standards. (DX ABH at DX0ABH-0019-20 ¶ 42; DX ZH at DX00ZH-0014 (Ocwen 10-Q for period ended June 30, 2013, stating ResCap purchase was accounted for using same acquisition method Mr. Taylor used); DX WK at DX00WK-0012 Walter 10-Q for period ended June 30, 2013, stating "[t]he purchase consideration of $487.2 million was allocated to the assets acquired and liabilities assumed based on management's estimates of their fair values as of the acquisition date.")

b. The "Puntus Methodology"

174. The Debtors' expert, Mr. Marc D. Puntus, is a partner at Centerview Partners, LLC ("Centerview"). (Direct Testimony of Marc D. Puntus, ¶ 1, Oct. 8, 2013, Dkt. No. 75. ("Puntus Direct").)

175. Mr. Puntus has not taken any valuation courses outside of his undergraduate coursework as a finance major at Georgetown University. (Trial Tr. 240:22-25, Oct. 15, 2013 (Puntus).)

176. Mr. Puntus did not refer to any text or treatise relating to valuation in preparing his expert report or his rebuttal report. (Id. at 243 :4-7.) Instead, Mr. Puntus testified that his experience valuing companies has been gleaned from his years as a lawyer and investment banker. (Id. at 240:19-21.)

177. Prior to these Chapter 11 Cases, Mr. Puntus' had never testified at a contested adequate protection hearing. (Id. at. 242:9-11.)

178. Prior to these Chapter 11 Cases, Mr. Puntus had never performed a post-hoc valuation of a debtor's assets as of the petition date. (Id. 242:20-23.)

179. Prior to these Chapter 11 Cases, Mr. Puntus had never been involved in the valuing of a business engaged in pooling and servicing mortgage loans. (Id. 244:19-23.)

180. Prior to these Chapter 11 Cases, Mr. Puntus had never valued any of the types of assets that comprise the Notes Collateral.

181. Mr. Puntus has never valued a Servicing Advance. (Id. at 244:13-15.)

182. Mr. Puntus has also never performed a fair market valuation of a portfolio of loans. (Id. at 244:16-18.)

183. Mr. Puntus testified that Centerview has a small financial institutions group and that the group is smaller than it used to be following the recent departure of the partner who ran the group. (Trial Tr. 27:4-7, Oct. 16, 2013 (Puntus).) Mr. Puntus also testified that the financial institutions group was "not the most prominent" practice at Centerview. Trial Tr. 28:21-24, Oct. 16, 2013. Mr. Puntus further testified that he was unaware of anyone at Centerview who had been involved in valuations of servicing advances. (Id. at 26:24-25:1.)

184. Mr. Puntus testified at trial to a valuation methodology (the "Puntus Methodology"). (Id. at 35: 20-36:5.)

185. The Puntus Methodology first assumes a benchmark valuation of the Notes Collateral based upon a hypothetical scenario in which the Debtors would monetize the Notes Collateral on July 31, 2012 pursuant to the Nationstar stalking horse bid on the Petition Date. (Puntus Direct ¶ 85; Trial Tr. 250:10-17, Oct. 15, 2013 (Puntus).)

186. With such benchmark valuation established, the Puntus Methodology then applies discounts to the benchmark valuation in an attempt to reflect a further hypothetical scenario, presented in two alternatives, in which the Debtors would have turned over the Notes Collateral to the collateral agent and the collateral agent would have monetized the Notes Collateral. (Id.)

187. More specifically, the Puntus Methodology discounts the value of the Notes Collateral to reflect Mr. Puntus' judgment as to discounts to the value of the collateral in the hands of the collateral agent as opposed to the value in the hands of the Debtors during the pendency of these Chapter 11 cases. (Trial Tr. 40:21-25, October 16, 2013 (Puntus).) Mr. Puntus has never advised a secured creditor or participated in a foreclosure. (Id. at 36:6-24; 81:7-15.)

188. The Puntus Methodology breaks the Notes Collateral into (i) cash and (ii) substantially five categories of tangible assets for valuation purposes: (1) Whole Loan Portfolio, which assets were included in the Berkshire Sale, (2) Servicing Advances, which assets were included in the Ocwen Sale, (3) FHA/VA Loans, (4) Restricted Cash and (5) Other Assets. PX 240 (Puntus Rpt.) at PX pg. 10; 14.)

189. Mr. Puntus has never valued any such assets before. (Trial. Tr. 244:10 – 246:18, Oct. 15, 2013 (Puntus).)

190. Mr. Puntus did not value any of the Debtors' intangible assets, including goodwill. (Trial Tr. 47:11-15, October 16, 2013. (Puntus).)

i. Benchmark Valuation and Deductions

191. With respect to the Whole Loan Portfolio and the Servicing Advances, those assets included in the Berkshire Sale and the Ocwen Sale, the Puntus Methodology assumes a benchmark valuation of the purchase prices for such assets indicated in the stalking-horse APA bids submitted by Ally and Nationstar. (PX 240 (Puntus Rpt.) at PX pg. 9; Puntus Direct ¶ 85; Trial Tr. 51:25 – 52:2, Oct. 16, 2013 (Puntus).) Mr. Puntus uses the stalking-horse APA bids even though the Committee objected to those bids and the Court previously stated that it was not "going to simply accept" the bids. (Hr'g Tr. 141:18-22, June 18, 2012; Hr'g Tr. 187:9-11, August 28, 2012.)

192. With respect to the FHA/VA Loans, the Puntus Methodology established the benchmark valuation based upon a January 2013 bid for a subset of the portfolio that the Debtors rejected as too low. (Puntus Direct ¶ 119; Trial Tr. 62:12-16; 64:16-22, Oct. 16, 2013.)

193. With respect to Restricted Cash and Other Assets, the benchmark valuation was established based on estimates by Mr. Puntus and his firm, Centerview, on an asset-by-asset basis, as a percentage of book value. (Direct Testimony of Marc D. Puntus, ¶ 85, Oct. 8, 2013, Dkt. No. 75; PX 240 (Puntus Rpt.) at PX pgs. 22-23.)

194. The benchmark valuation of these tangible assets was then summed, along with cash, to give the total benchmark valuation for the Notes Collateral under the Puntus Methodology. (PX 240 (Puntus Rpt.) at PX pg. 10.)

195. To determine the benchmark value of the JSNs' interest in the Notes Collateral, the Puntus Methodology then applies a number of deductions. (Id.)

196. First, the outstanding principal of the Ally Revolver, GSAP and BMMZ Repo is deducted. (Id.)

197. Next, transaction and transfer fees of $57 million are deducted. Id. Then, the Puntus Methodology deducts $86 million based on Mr. Puntus' assumption that PSA amendments would not be obtained in the benchmark case. (Id.; Trial Tr. 71:8-10, Oct. 16, 2013.

198. Then, the Puntus Methodology deducts $27 million based on Mr. Puntus' assumption that some of the Whole Loan Portfolio would be sold with infirmities that would reduce the purchase price of effected loans. (PX 240 (Puntus Rpt.) at PX pg. 10; Trial Tr. 69:9-17, Oct. 16, 2013.)

199. Finally, the Puntus Methodology deducts $3 million for consumer relief modifications. (PX 240 (Puntus Rpt.) at PX pg. 10.)

ii. Further Discounts Applied to Assets in the Hands of the Collateral Agent

200. After determining the benchmark valuation with respect to each category of asset, the Puntus Methodology then applied further discounts to the benchmark valuation to account for certain "legal risks" to the various categories of assets in the hands of the collateral agent. (Direct Testimony of Marc D. Puntus, ¶ 87-88, Oct. 8, 2013, Dkt. No. 75.)

201. With respect to the Whole Loan Portfolio, the Puntus Methodology applies a further discount of $70-$72 million off of the benchmark valuation. (PX 240 (Puntus Rpt.) at PX pg. 14.)

202. The Puntus Methodology attributes this discount to allegedly better than market terms in the Ally APA, document deficiencies that allegedly could only be cured by the Debtors, costs of compliance with the DOJ/AG settlement and uncertainty over whether the collateral

agent could give standard representations and warranties related to the loans. (PX 240 (Puntus Rpt.) at PX pgs. 16-18.)

203. The Puntus Methodology does not specify how the amount of the discount was calculated.

204. With respect to the Servicing Advances, the Puntus Methodology applies a discount of $233-$291 million off of the benchmark valuation related to certain assumptions as to the consequences of the collateral agent foreclosing on Servicing Advances. (PX 240 (Puntus Rpt.) at PX pgs. 18-19.)

205. The amount of the discount is based entirely on Mr. Puntus' judgment and experience, and not informed by any specific data. (Trial Tr. 81:7-24, Oct. 16, 2013 (Puntus).)

206. With respect to the FHA/VA Loans, the Puntus Methodology applies a further discount of $51-$70 million off of the benchmark valuation. (PX 240 (Puntus Rpt.) at PX pg. 20.)

207. This discount is based on Mr. Puntus' assumption that the collateral agent will be directed to immediately sell the loans, rather than holding such loans to realize a greater principal value. (Trial Tr. 85:7-24, Oct. 16, 2013 (Puntus).)

208. With respect to Restricted Cash, the Puntus Methodology applies a discount of $94 million off of the benchmark valuation. (PX 240 (Puntus Rpt.) at PX pg. 10.)

209. This discount assumes a 0% recovery on a GNMA restricted cash account. (PX 240 (Puntus Rpt.) at PX pg. 22.) This assumption is explained by the note "The Debtors were only able to comply with GNMA servicer guidelines and repurchase delinquent GNMA loans after the Petition Date through funding obtained pursuant to the Ally DIP Facility." (Id.)

210. The Puntus Methodology does not apply a further discount off of the benchmark valuation with respect to Other Assets. (PX 240 (Puntus Rpt.) at PX pg. 14.)

c. The Houlihan Methodology is Credible; the Puntus Methodology is Not Credible

211. The Houlihan Methodology is consistent with accepted valuation techniques and the Puntus Methodology is not.

212. The Houlihan Methodology relies upon valuation techniques of asset level discounted cash flow analysis and market multiple approaches. (Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶¶ 18-22.)

213. The Debtors' own expert, Mr. Puntus, admits that these techniques are consistent with traditional market practice for valuing these assets. (Trial Tr. 121:5-13, Oct. 16, 2013 (Puntus).)

214. The Puntus Methodology described above was conceived of for the first time in consultation with Morrison & Foerster lawyers in 2013 after the dispute over postpetition interest first arose. (Id. at 44:2-13.)

215. Mr. Puntus has never seen the Puntus Methodology used anywhere before. Trial Tr. 36:6-8, Oct. 16, 2013. Nor has Mr. Puntus seen the Puntus Methodology described by any text, treatise or any authority on valuation. (Id. at 36:9-12.)

216. In addition to being inconsistent with accepted valuation techniques overall, the Puntus Methodology is also inconsistent with accepted valuation techniques.

217. In the Puntus Methodology, Mr. Puntus relies on surpassed stalking horse bids to establish a benchmark valuation for the assets sold in the Ocwen Sale and Berkshire Sale. (Id. at 39:3-11.)

218. Mr. Puntus also relies on a bid the Debtors rejected as too low to establish the benchmark valuation of the FHA/VA Loans. (Puntus Direct ¶ 119, Oct. 8, 2013, Dkt. No. 75; October 16 Tr. 62:12-16; 64:16-22.)

219. Mr. Puntus admitted that he could not think of any instance in which an unapproved stalking horse bid was used to value an asset. (Trial Tr. 45:15-21, Oct. 16, 2013 (Puntus).).

220. Mr. Puntus also admitted that he had never seen a methodology for valuing a loan in which a rejected bid was used to establish the value. (Id. at 64:23-65:1.)

221. The Puntus Methodology also deducts from the benchmark valuation $86 million based on an assumption that PSA amendments would not be obtained. (PX 240 (Puntus Rpt.) at PX pg. 10; October 16 Tr. 71:8-10.) This deduction is applied despite Mr. Puntus' admission that such amendments are routinely granted. (Trial Tr. 70:23-24, October 16, 2013 (Puntus).)

222. The Puntus Methodology also deducts $27 million from the benchmark valuation on the assumption that some of the Whole Loan Portfolio would be sold with infirmities. (PX 240 (Puntus Rpt.) at PX pg. 10; October 16 Tr. 69:9-17.) Mr. Puntus admitted that this deduction was applied based on data outside of the Nationstar APA. (Trial Tr. 69:18-20, October 16, 2013 (Puntus).)

d. The RMBS and Government Setoff "Legal Risks"

223. In addition, the Puntus Methodology further discounts are applied to the benchmark valuation to account for certain "legal risks" to the various categories of assets in the hands of the collateral agent. (Puntus Direct ¶¶ 87-88, Oct. 8, 2013, Dkt. No. 75.) Mr. Puntus admitted that these discounts were not established by reference to any calculation. (Trial Tr. 77:16-23, Oct. 16, 2013 (Puntus).)

224. The government setoff risk is a risk that the government would offset claims that ResCap owes it against payment on insured loans. (Id. at 89:17-23.)

225. The assumption with the RMBS setoff risk is that if the servicing advances are transferred over to the collateral agent, the collateral agent would attempt to collect those servicing advances and the RMBS trustees would refuse to pay because of representation and warranty liability, among other things, that they asserted against ResCap. (Id. at 90:11-21.)

226. Mr. Puntus assumed that components of the JSNs' Collateral, both the FHA/VA loans and the servicing advances, would be subject to a legal risk. (Id. at 88:22-24.)

227. The deductions in his analysis represent a hundred percent of the JSN Collateral that would be at risk. Mr. Puntus believed that these legal challenges would be mounted. (Id. at 87:15-19.)

228. Mr. Puntus admitted that the risks he laid out as a deduct, in fact, did not turn into actuality in these cases. (Id. at 88:11-13.) Plaintiffs offered no evidence or legal argument with respect to the setoff. Mr. Puntus

229. The RMBS trustees did not, in fact, offset $311 million dollars against the JSN Collateral. (Id. at 88:7-10.)

230. The government did not attempt to offset any claims.

231. Mr. Levine and Mr. Fazio testified that these "legal risks"—the RMBS and Government Setoff Risks—arise in "every residential mortgage company of this nature" and are routinely addressed with zero concessions. (Trial Tr. 185:13-23, Oct. 23, 2013.)

232. Mr. Siegert testified that Ocwen faces the same risk that "the government could come in and [] shut down GSE MSRs." (Id. at 186:1-7.) Ocwen specifically references "uncertainty related to the actions of loan owners, including mortgage-backed securities

investors and government sponsored entities (GSEs), regarding loan put-backs, penalties and legal actions" in its Form 10-Q for the quarterly period ended June 30, 2013. (DX ZH at DX00ZH-0003.)

233. Mr. Levine testified that it is common for parties like RMBS trustees to threaten claims in connection with the sale of MSR and related assets. (Trial Tr. 96:6-12, Oct. 22, 2013.)

234. Mr. Levine has not handled a sale in the last two years where there has not been claims made by either the RMBS investor or trustees or the GSEs. (Id.)

235. These issues are resolved between the parties. The investors, whether it is the GSEs, the PLS trustees or the monoline insurers, want the servicing sold and transferred and it is in their best interest to ultimately approve the transaction. (Id. at 96:15-21.)

236. Mr. Levine testified that the GSEs had the right to terminate ResCap's servicing rights and transfer the rights to another party if there were any breach of their servicing agreement, but that did not affect his valuation because it is part of getting the required consent of the GSEs to actually consummate the sale. (Id. at 96:22-97:7.)

237. The GSEs as well as the RMBS trustees, are incentivized to work out an arrangement that will allow for the transfer of the MSRs and serving advances because they want the servicing in the hands of a motivated, nonbankrupt, servicer that is going to perform the appropriate servicing loss mitigation activities. (Id. at 97:8-15.)

238. Mr. Levine testified that if the JSNs' Collateral had actually been transferred to the secured creditors at the Petition Date, "it is highly likely that [the secured creditors] would have been able to realize a par recovery on the subject servicing advances." (DX AIK (Levine Rebuttal Rpt.) at DX0AIK-0008.)

239. In coming to his discounts, Mr. Puntus also did not consult with anyone who actually had experience in liquidating assets for a collateral agent. (Trial Tr. 36:20-24, Oct. 16, 2013 (Puntus).) Nor were the discounts informed by data describing what a secured creditor may realize on foreclosure of an asset. (Id. at 81:7-15, Oct. 16, 2013 (Puntus).)

240. Instead, Mr. Puntus based these discounts on his experience with the assets over the course of these Chapter 11 Cases. (Id. at 81:16-82:4, Oct. 16, 2013.)

241. But, Mr. Puntus admitted that he has no experience in these Chapter 11 Cases to opine on what a secured creditor would recover. (Trial Tr. 82:8-11, Oct. 16, 2013.) Mr. Puntus also acknowledged he has never liquidated collateral for a secured creditor before. (Id. at 82:8-11)(Puntus).)

e. The Houlihan Methodology is Consistent with the Purpose and Facts of these Chapter 11 Cases and the Puntus Methodology is Not

242. The Houlihan Methodology values the Notes Collateral as part of a going concern sale. (Siegert Witness Statement (Debtor Adv. Dkt. No. 85) ¶ 18.)

243. A going concern valuation is consistent with the Debtors' stated purpose for these Chapter 11 Cases as of the Petition Date, which, among other things was "preserv[ing] the Debtors' servicing business on a going concern basis for sale". (PX 137 (Whitlinger Affidavit) at PX pg. 13, ¶ 13). Further, the Debtors never had any intention of turning over the Notes Collateral to the collateral agent. (Trial Tr. 164:21-165:2, Oct. 15, 2013; Trial Tr. 249:6-16, Oct. 15, 2013 (Puntus).) Nor did the JSNs foreclose or attempt to foreclose on the assets. Rather, the JSNs entered into a cash collateral stipulation to allow the sale of assets as a going concern. DX AIJ (Siegert Rebuttal Rpt. to Finnerty) at DX0AIJ-0005.)

244. The Ocwen APA and Nationstar APA make clear that the Ocwen Sale encompassed a going concern business.

245. First, the Ocwen APA states clearly that the purchased assets are "Related to the Business." (PX 19 (Ocwen APA § 2.1) at PX pg. 38.) Related to the Business is defined in the Ocwen APA as "required for, held for, or used in the conduct of the Business." (PX 19 (Ocwen APA) at PX pg. 29.) The Business described in the Ocwen APA is, broadly, the Debtors' servicing and origination business. (Id. at PX pg. 12, definition of "Business".)

246. In addition, the Ocwen APA specifically enumerates goodwill as a purchased asset. (Id. at PX pg. 40, § 2.1(v).)

247. Finally, in a provision requiring the Debtors to effect "Separation Services," the Ocwen APA states clearly that a stand-alone business was part of the bargain, "Sellers acknowledge and agree that Separation Services are intended to permit Sellers to deliver at Closing to the Purchaser the Business and Purchased Assets as a stand-alone business…" (PX 19 (Ocwen APA) at PX pg. 84, § 6.28(a).)

248. The Nationstar APA, which was in place as of the Petition Date, has identical provisions. (PX 33 (Nationstar APA) at PX pgs. 37-38 § 2.1; PX 33 (Nationstar APA) at PX pg. 29 Definition of "Related to the Business"; PX 33 (Nationstar APA) at PX pg. 12, Definition of "Business"; PX 33 (Nationstar APA) at PX pg. 32 § 2.1(v); PX 33 (Nationstar APA) at PX pg. 83 § 6.28(a).)

249. The Ocwen APA and Ocwen Sale Order also make clear that the allocation of purchase price represented in Schedule 3.1(a) was not binding for any purpose other than taxes. (PX 19 (Ocwen APA) at PX pg. 50-51, § 3.3(b); PX 45 (Ocwen Sale Order). In fact, the Purchasers in the Ocwen Sale allocated the purchase price associated with the Ocwen Sale

differently than did Schedule 3.1(a), including allocating some of the price to goodwill and intangible assets. (DX ZH (Ocwen June 30, 2013 10-Q) at DX0ZH-0013-14; DX WK (Walter June 30, 2013 10-Q) at DX0WK-0013.)

250. Inconsistent with the stated purpose of these Chapter 11 Cases and the Ocwen and Nationstar APAs, the Puntus Methodology values the Notes Collateral in the hands of the collateral agent, rather than as a going concern marketed for sale. (Trial Tr. 250:10-17, Oct. 15, 2013 (Puntus).)

251. The Puntus Methodology applies a number of discounts to the Notes Collateral inconsistent with a going concern valuation. First, the Puntus Methodology deducts transaction costs and transfer fees from the benchmark valuation. (PX 240 (Puntus Rpt.) at PX pg. 10.) Mr. Puntus acknowledged that he would not have deducted such fees had he performed a going concern valuation. (Trial Tr. 65:14-24, October 16, 2013 (Puntus).)

252. Second, the Puntus Methodology doesn't value intangible assets, including goodwill. (Id. at 48:2-12.)

253. Mr. Puntus admitted that, in the context of a business combination, the difference between the fair value of the component assets and the purchase price would constitute goodwill. (Id. at 56:18-21).

254. Accordingly, the fair market value of the Notes Collateral as of the Petition Date indicated by the Houlihan Methodology, $2.791 billion, is the appropriate valuation.

f. The Value of the Notes Collateral Has Diminished

255. The Notes Collateral did not generate extraordinary expenses following the Petition Date. (Trial Tr. 147:11-16, Oct. 15, 2013 (Marano).) The Debtors' former CEO, Mr. Thomas Marano confirmed that, excluding the extraordinary costs of the bankruptcy

proceedings, the Debtors' businesses ran at neither a profit nor a loss following the Petition Date. (Id.)

256. Additionally, there was no significant change in market conditions that would have caused the Notes Collateral to appreciate from the Petition Date to the Sale Date. (Trial Tr. 190:12-191:5, Oct. 23, 2013 (Siegert).)

257. Nor did the Debtors generate any value through their post-petition marketing efforts; in fact, the Debtors testified that their goal was simply to preserve the value of their assets by operating in bankruptcy. (Trial Tr. 167:13-20, Oct. 15, 2013 (Marano); PX 137 (Whitlinger Affidavit) at PX pg. 13, ¶ 13.)

258. All experts agree that the Debtors owe the JSNs adequate protection to the extent the fair market value of the JSNs' Collateral at the Petition Date exceeds the distributable value of the JSNs' Collateral at the Distribution Date. Thus, the calculation is as follows: The fair market value of the JSNs' Collateral at the Petition Date minus the distributable value of the JSNs' Collateral at the Distribution Date equals the JSNs' adequate protection claim. The Debtors waived their rights under section 506(c) to charge the JSNs or the Collateral for the costs and expenses of preserving, or disposing of, the Collateral pursuant to the Cash Collateral Order. (PX 76 (Cash Collateral Order).)

259. The Debtors determined the "aggregate recovery value" of the JSN Collateral for purposes of the adequate protection calculation. Direct Testimony of Mark A. Renzi at ¶ 2, Debtors Dkt. No. 77. This value is set forth in the Debtors' Recovery Analysis. (PX 256 (Disclosure Statement) at p. 482.)

260. "Recovery value" is different than fair market value. Trial Tr. 141:7-9, Oct. 16, 2013.

261. The Recovery Analysis is "based on the planned orderly wind-down of the assets remaining in the Estates as of April 30, 2013." (PX 256 (Disclosure Statement) at p. 482.)

262. The Debtors stress that the Recovery Analysis is an "estimate of the proceeds that may be generated as a result of the orderly liquidation of the assets of the Debtors." (Id.)

263. The Recovery Analysis is subject to the following qualifications:

- "Underlying the Recovery Analysis are a number of estimates and material assumptions that are inherently subject to significant economic, competitive, and operational uncertainties and contingencies beyond the control of the Debtors."
- "[V]arious decisions upon which certain assumptions are based are subject to change."
- "[T]here can be no assurance that the assumptions and estimates employed in determining the recovery values of assets will result in an accurate estimate of the proceeds that will be realized."
- "[A]mounts of Claims against the Estates could vary significantly from the estimate set forth [in the Recovery Analysis]."
- "[T]he actual recovery received by creditors of the Debtors could vary materially from the estimates provided [in the Recovery Analysis]."

(Id. at pp. 482-83.)

264. The Recovery Analysis is "based on asset balances as of April 30, 2013 with certain pro forma adjustments[] used to estimate recoveries." (Id. at p. 482.)

265. The Debtors' financial advisors did not audit the April 30, 2013 asset balances. (Trial Tr. 143:11-13, Oct. 16, 2013 (Renzi).) The Plaintiffs did not offer any testimony regarding the reasonableness or assumptions contained in the April 30, 2013 trial balances. Nor did the Plaintiffs offer testimony of any witness who was involved in the financial reporting of the company.

266. The Debtors' carry the assets on the April 30, 2013 asset balances at fair market value. (Trial Tr. 139:5-11, Oct. 16, 2013 (Renzi).)

267. The Debtors' presentation of JSN Distributable Value reflects an adjustment to allocate up to an additional $180 million of administrative expenses which accrued under certain DIP budget forecasts but were not paid pursuant to the Cash Collateral Order pursuant to its termination. (Revised Joint Pretrial Order (Debtors Dkt. No. 105).)

268. Plaintiffs contend that such amounts are payable pursuant to the Carve Out provisions in paragraph 16(g) of Cash Collateral Order, although the Carve Out does not authorize payment of any expenses. Revised Joint Pretrial Order (Debtors Dkt. No. 105).)

269. Under that the Cash Collateral Order, upon its termination, the Debtors are not authorized to pay Carve-Out Expenses. PX 76 (Cash Collateral Order) at p.31-32. Rather the Order subordinates the JSN liens to those expenses. (Id.) The JSNs still have liens on the cash at issue. (Id.)

270. Notwithstanding that the Notes Collateral was not generating significant expenses, the Debtors charged the Notes Collateral with approximately $800 million in expenses. (DX ABK (Winn Rpt.) at DX0ABK-0007.)

271. Primarily as a result of these expenses, the value of the Notes Collateral has declined from a value of $2.791 billion as of the Petition Date to an estimated $1.888 billion as of the Effective Date. (DX AIR (Siegert Rebuttal Rpt. to Global Summary) at DX0AIR-0005.)

272. Adequate protection is a calculation that is not set in stone. Trial Tr. 198:7-13, Oct. 23, 2013. The calculation will "change over time" given that the "assets here…are not static; they change and move." (Id.) The adequate protection calculation will go up or down depending on the value of the assets. (Id. at 198:14-20.)

273. A finding of the value of the Notes Collateral in excess of $2.56 billion will lead to the payment in full of the JSNs' claim. (DX AIR (Siegert Rebuttal Rpt. to Global Summary) at DX0AIR-0006.)

B. The Valuation of the Debtors' Remaining Assets

274. Independent of the JSNs' adequate protection claims, the value of the Debtors' remaining assets that are subject to the JSNs' liens render the JSNs oversecured and entitled to postpetition interest.

a. Net Cash From Asset Sales and Operations

275. On October 23-25, 2012, the Debtors held two auctions for the sale of their assets: Ocwen Loan Servicing, LLC ("Ocwen") and Walter Investment Management Corporation ("Walter") successfully bid $3 billion for the Debtors' mortgage loan and origination and servicing platforms (the "Platform Sale"), and Berkshire Hathaway Inc. ("Berkshire") successfully bid $1.5 billion for the whole loan portfolio (the "Legacy Sale," and together, the "Asset Sales"), which the Court approved on November 21, 2012. (Order Approving Ocwen Sale, Nov. 21, 2012, Dkt. No. 2246; Order Approving Berkshire Sale, Nov. 21, 2012, Dkt. No. 2247.)

276. Under the Court's sale order, the JSNs' liens attach to the cash proceeds of the sale assets and the sale had no effect on the JSNs' entitlement to adequate protection. (Id. ¶ Q.)

i. The Debtors' Strategy and Marketing Of The Servicing And Origination Platforms Was For A Going Concern Sale

277. The Asset Sales were the result of a stalking bid process. (Order Authorizing and Approving Sale Procedures, June 28, 2012, Dkt No. 538.)

278. In the lead-up to the Asset Sales, it was vital to the Debtors to maintain the servicing and origination platforms as going concerns. (Marano Direct (Debtor Adv. Dkt. No. 79) ¶¶ 50–51.)

279. The Debtors' maintained the servicing and origination platforms as going concerns to attract stalking-horse bidders. (Trial Tr. 121:10-23, Oct. 16, 2013.)

280. The Debtors entered into an initial stalking-horse bid with Nationstar to sell the servicing, origination, and capital markets platforms (which consisted "primarily" of people, software, and IT) of the Debtors. (PX 33 (Nationstar APA) at PX pgs. 30, 111.)

281. The Debtors also agreed to sell Nationstar contracts, servicing agreements, MSRs owned by the Debtors, certain GNMA-guaranteed whole loans, and IP, goodwill, and general intangibles "Related to the Business" (using the same definition as the one contained in the Ocwen APA) for $2.3 billion. (PX 33 (Nationstar APA) at PX pgs. 30, 111.)

282. The Debtors also entered into an initial stalking horse bid with AFI for the Debtors' whole loan portfolio. (Trial Tr. 40:6-11, Oct. 16, 2013.)

283. The Debtors moved for Court approval of both the Nationstar and AFI stalking horse bids on the Petition Date, but the Court declined to approve both bids. (Trial Tr. 39:22-40:4, Oct. 16, 2013.)

284. Prior to the June 18, 2012 hearing to approve the bidding procedures, the Committee filed an objection, representing that they "were concerned that assets that we thought had significant upside value were not going to be subject to meaningful bidding because of the various hurdles in place." (Hr'g Tr. 141:18-22, June 18, 2012.)

285. The Committee observed that, in the days leading up to the June 18, 2012 hearing, there had been "significant modifications" representing substantial increases in the Nationstar and Berkshire bids. (Hr'g Tr. 142:24-143:12, June 18, 2012.)

286. These modifications were dramatic, and involved Nationstar and Berkshire attempting to "match[]" each other's bids even up until the hearing date itself, which the Court did not view as being barred by the objection deadline. (Hr'g Tr. 148:9-20, June 18, 2012.)

287. Indeed, after the Debtors' motion to approve the bidding procedures had been filed, the Court observed that there had been a $110 million increase in a "relatively short time." (Hr'g Tr. 268:20-24, June 18, 2012.) ("I don't think I've ever seen the price go up by 110 million in this relatively short time….")

288. In light of these developments, a "mini-auction" took place, prior to which the Debtors continued to market the servicing and origination platforms. (Trial Tr. 54:4-8, Oct. 16, 2013.)

289. This auction resulted in a "robust" bidding process, as intended by the Debtors to attract a stalking-horse "who understood the business and who would be in a position to get GSE approval," that raised the stalking-horse price "considerably" for both sets of assets. (Hr'g Tr., 133:4-8, June 18, 2012; Hr'g Tr. 26:8-10, June 19, 2012.)

290. In the view of representatives from FNMA, "what the people are bidding on here is essentially a turnkey operation. They're bidding lock, stock and barrel and all the employees. And obviously, the debtors are a qualified servicer. So we think the combination of somebody who can originate the service loans with the same employees and the same platform in mind and then going forward with the full faith and credit of a qualified buyer behind that, that's what you need to bid on this case." (Hr'g Tr. 145:17-24, June 18, 2012 (Neier).)

291. As a result, a subsequent bid by Nationstar, which was approved by the Court, exceeded the initial, unapproved stalking-horse bid by approximately $125 million. (Hr'g Tr. 6:3-10, June 19, 2012 (Nashelsky); Trial Tr. 40:3-15, Oct. 16, 2013 (Puntus).)

292. Berkshire Hathaway increased the purchase price for the whole loan portfolio by $50 million from the original purchase price set forth in the AFI stalking horse bid. (Hr'g Tr. 7:5-11, June 19, 2012 (Nashelsky).)

293. The Court approved Nationstar as the stalking horse for the Platform Sale and Berkshire Hathaway as the stalking horse for the Legacy Sale. (Hr'g Tr. 16:12-13, June 19, 2012 (Court).)

294. After the initial stalking-horse bid by Nationstar and through the auction date, the Debtors continued to market the business as a going concern to preserve the value of the assets. (Trial Tr. 167:9-20, Oct. 15, 2013 (Marano).)

295. Mr. Marano testified that, following the initial stalking-horse bid by Nationstar, the Debtors modified their business plan "somewhat" by reducing expenses incurred by employees, maintaining certain staffing levels, and granting additional access to GSEs, which the Debtors would not normally do. (Trial Tr. 167:1-9, Oct. 15, 2013 (Marano).)

296. Nevertheless, the Debtors continued to maintain and operate the servicing and origination business through the auction date. (Trial Tr. 167:10-24, Oct. 15, 2013 (Marano).)

297. The Debtors sold their servicing and origination platforms as a going concern, as represented by the Debtors on December 6, 2012, that "the Debtors were able to sell their business as a going concern, thereby substantially increasing the value of such business and the price they were able to secure in the Platform Sale." (Debtors' Motion for the Entry of an Order

Further Extending Their Exclusive Periods to File a Chapter 11 Plan and Solicit Acceptances Thereof 3, December 6, 2012, Dkt. No. 2355.)

298. According to testimony at trial, by operating the business as a going concern prior to the Asset Sales, the Debtors sought to "maximize" the value of the businesses sold. (Trial Tr. 97:25-98:8, Oct. 16, 2013 (Puntus).)

299. In marketing the Servicing Platform, the Debtors emphasized the scale, scope, partnerships, and capabilities of its business, including "intangible benefits" that attracted Ocwen as a purchaser, which Ocwen intended to maintain. (Ziegenfuse Dep. 107:10-110:3, Sept. 25, 2013, Debtor Adv. Dkt. No. 61.)

300. The Debtors specifically marketed the Origination Platform according to its potential profitability as a business separate from the MSR portfolio. (Dixon Dep. 26:24-28:3, Sept. 24, 2013, Debtor Adv. Dkt. No. 60.)

301. The Debtors expected to hold an auction for certain assets, and "hoped we might be able to sell the business in its entirety." (Trial Tr. 146:11-16, Oct. 15, 2013 (Marano).)

302. The Debtors considered, but rejected, the possibility of liquidation, as, according to Mr. Marano, the Debtors did not believe that a liquidation was in the best interests of the creditors, and the Debtors did "everything [they] could" to prevent a foreclosure. (Trial Tr. 164:10-25, Oct. 15, 2013 (Marano).)

303. The Debtors "absolutely [did] not" intend to stop the bidding process and sell the platforms according to the Nationstar APA and the AFI stalking-horse bid, as stopping the process without attempting to market the assets further would not advance the goal of getting "the best stalking-horse bid for each asset." (Trial Tr. 165:16-24, Oct. 15, 2013 (Marano).)

304. Following the Court's approval of the bid procedures, the Debtors' officers were aware that there was significant interest in the origination platform from parties other than the eventual purchasers in the Asset Sales. (DX AIA (Email chain dated November 2, 2012 from T. Marano to P. Fleming) at RCUCCJSN12082042.)

305. Walter viewed the Debtors as specifically marketing the platform entity on a going concern basis. (Dixon Dep. 29:15-24.)

306. Ocwen intended to retain the "entire ResCap servicing management staff," as well as "maintain a presence in all of the various ResCap locations," and "retain middle management with particular emphasis on several areas: Compliance, Audit, Law, Fraud Detection, Internal Audit, QC, IT and HR." (DX AID (Email dated November 12, 2012 from P. Fleming to T. Marano) at RCUCCJSN12082678-2679.)

307. As part of the auction proceedings, Ocwen received an "economic credit" in exchange for assuming certain obligations of the servicing and originations platforms, which included the taking on of ResCap personnel. (Ziegenfuse Dep. 198:23-199:7, 200:19-25.)

308. But Ocwen's representative testified that Ocwen was not required to assume these obligations as part of the transaction. (Ziegenfuse Dep. 196:25-197:12.)

309. Mr. Marano testified that Ocwen received a credit of approximately $100 million because taking on ResCap employees was "an expense" of the platform, and that this was one of many items the parties attempted to "horse-trade . . . to get the bids as high as possible." (Trial Tr. 179:15-20, 180:22-25, Oct. 15, 2013 (Marano).)

310. Mr. Whitlinger testified that the Debtors would accept the highest bid regardless of how the bidder valued the "bucket of assets" being sold. (Whitlinger Dep. 204:19-210:2.)

ii. The Ocwen APA

311. Under Section 2.1 of the Asset Purchase Agreement between Ocwen and Walter and ResCap dated as of November 2, 2012 (the "Ocwen APA"), Ocwen and Walter purchased assets which included (i) mortgage servicing and rights to receive servicing compensation, including accrued and unpaid servicing compensation; (ii) except as provided in Section 2.15 of the Ocwen APA, outstanding servicing advances as of the closing date; (iii) certain Ginnie Mae Loans; (iv) intellectual property; (v) "the Books and Records" (not defined in the Ocwen APA); (vi) tax returns, related books, and certain other records and workpapers; (vii) REMIC Residual Interests (defined as "a residual interest, as defined in Section 860G(a)(1) of the Tax Code, in a [real estate mortgage investment conduit], or any interest that has been represented or otherwise held out to be a regular interest in a REMIC irrespective of whether such interest qualifies as a regular interest in a REMIC as defined in Section 860G(a)(1) of the Tax Code"); (viii) fixtures and equipment; (ix) information technology assets; (x) real property; (xi) certain other assets listed in Schedule L-1 to the Ocwen APA; (xii) credits, prepaid expenses, deferred charges, security deposits, prepaid items and duties to the extent related to a Purchased Asset (defined below); (xiii) causes of action, lawsuits, judgments, refunds, choses in action, rights of recovery, rights of set-off, rights of recoupment, demands and any other rights or claims related to the Purchased Assets, and certain other claims; (xiv) rights and benefits accruing under assumed contracts; (xv) telephone or facsimile numbers used by the Debtors; (xvi) permits Related to the Business (defined below); (xvii) signage, marketing materials, art and collectibles relating to the Business; (xviii) all rights to receive mail and other communications addressed to the Debtors pertaining to the Business or the Purchase Assets; (xix) credit lists, customer lists, supplier lists, mailing lists, "do not call" lists and other data Related to the Business; (xx) all rights under insurance policies and insurance proceeds to the extent transferable; (xxi) all guaranties,

warranties, indemnities, and similar rights in favor of the Debtors and Related to the Business, to the extent transferable; and (xxii) the goodwill and other intangible assets Related to the Business (collectively, the "Purchased Assets") whether tangible or intangible, real, personal or mixed, "Related to the Business" (defined as "required for, held for, or used in the conduct of the Business as conducted by Sellers in the Ordinary Course of Business"). (DX PT (Ocwen APA) at DX00PT-0030, -0039–41.)

312. Under Section 2.2 of the Ocwen APA, Ocwen and Walter also received the contracts necessary to operate the Debtors' business as a going concern, including those contracts made or entered into by the Debtors up until the closing date. (DX PT (Ocwen APA) at DX00PT-0041.)

313. In its representations and warranties under the Ocwen APA, ResCap provided assurances that the assets necessary to continue ResCap's business were delivered to Ocwen and Walter pursuant to Section 4.9, entitled "Mortgage Servicing Portfolio; Servicing Agreements; the Business." (DX PT (Ocwen APA) at DX00PT-0055-56.)

314. The Ocwen APA defined "Business" as:

> the business, directly or indirectly, engaged in by Sellers and Affiliate Sellers of (i) originating Mortgage Loans, including through Sellers' Consumer Lending Platform; (ii) owning the Other Purchased Assets; (iii) providing primary servicing, back-up servicing and related activities for Mortgage Loans and Other Serviced Loans; (iv) providing fee-based subservicing for Mortgage Loans; (v) providing master servicing for Private Investors in Private Investor Loans and investors in Other Serviced Loans; (vi) financing and reselling serviced Mortgage Loans and related capital markets transactions; (vii) other operations related to the foregoing and (viii) foreclosure trustee services and recovery services provided to ETS Customers. "Business" expressly excludes all activities, operations, products, transactions and services that are conducted under, or in connection with, any Excluded Assets.

(DX PT (Ocwen APA) at DX00PT-0013.)

315. Ocwen's representative testified that Ocwen was not aware of any discussion or understanding between Ocwen and the Debtors where Ocwen would not be purchasing "the business" as defined in the Ocwen APA. (Ziegenfuse Dep. 90:4-11.)

316. Similarly, Walter understood the nature of the transaction to be the sale of the Debtors' business. (Dixon Dep. 17:16-17.)

317. Under Section 2.1(v) of the Ocwen APA, the sale of the Debtors' business included "the goodwill and other intangible assets related to the Business or related to the Purchased Assets." (DX PT (Ocwen APA) at DX00PT-0041.)

318. Under the Ocwen APA, Ocwen and Walter purchased assets that were not reflected in the purchase price calculation of Schedule 3.1(a). (PX 20 (Ocwen APA Schedules) at PX pg. 141; Ziegenfuse Dep. 101:21-102:16.)

319. Ocwen's representative testified that Ocwen and Walter had not bound themselves to a specific purchase price allocation as opposed to a purchase price calculation. (Ziegenfuse Dep. 94:14-95:10.)

320. In the Court's November 21, 2012 order approving the Ocwen Sale, the parties explicitly reserved all rights "with respect to the allocation or distribution of the proceeds of the [Ocwen Sale.]" (Order Under 11 U.S.C. §§ 105, 363, and 365 and Fed Bankr. P. 2002, 6004, 6006, and 9014 (I) Approving (A) Sale of Debtors' Assets Pursuant to Asset Purchase Agreement With Ocwen Loan Servicing, LLC; (B) Sale of Purchased Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interest; (C) Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Thereto; (D) Related Agreements; and (II) Granting Related Relief ¶42, Dkt. No. 2246.)

321. Specifically, the Court's order stated that "[n]otwithstanding any other provision of this Order, nothing in this order or the Ocwen APA, including any segregation of cash proceeds in accordance with paragraph 44, shall be deemed a determination that any purchase price or cash allocations, including those contained in Article III of the Ocwen APA are binding in any way on creditors of the various Debtors, or the Debtors' estates, with respect to the allocation of proceeds of the [Ocwen Sale] either between and among the various Debtor estates or between and among the various classes of assets sold…." Id.

iii. Ocwen and Walter Bought Businesses; Not Just Assets

322. Ocwen and Walter acknowledged the enterprise value of the Asset Sales in internal sales calls, financial disclosure documents, and other testimony. (Ziegenfuse Dep. 39:3-11, 107:10-110:3, Sept. 25, 2013, Debtor Adv. Dkt. No. 61; Dixon Dep. 61:16-62:21, 64:24-65:16.)

323. Ocwen repeatedly described the acquisition of the servicing and origination platform as a purchase of ResCap's "business," including the MSRs and servicing advances of ResCap, which included intangible assets. (Ziegenfuse Dep. 39:3-11, 102:9-16, 163:9-12.)

324. According to Ronald Faris, a member of Ocwen's Board of Directors and Ocwen's President, Ocwen intended to maintain the servicing platform on the GNMA and FHLMC assets for the "foreseeable future." (Ziegenfuse Dep. 107:10-110:3.)

325. In statements made during an earnings call from the third quarter of 2012, Ocwen's officers highlighted the "great opportunity" presented by the purchase, including "the carry-over talent to our ranks" in the platform acquired from ResCap. (Ziegenfuse Dep. 108:23-25, 109:2-7.) These employees provided both servicing and corporate functions, including accounting, finance, audit, compliance, and legal functions. (Ziegenfuse Dep. 68:13-18.)

326. Ocwen's officers also confirmed that the company believed it was acquiring, along with the servicing assets, the servicing platform, which Ocwen believed was well-suited for GNMA and other agency business. (Ziegenfuse Dep. 107:24-108:8.)

327. Ocwen described the goodwill associated with the purchase of the servicing and origination platform as a "future benefit" of "integrating the companies" by integrating ResCap and Ocwen staff. (Ziegenfuse Dep. 63:7-19.)

328. In total, over 2,000 ResCap employees, including those associated with call centers and management, were "migrat[ed]" to Ocwen as part of the purchase of ResCap's servicing and origination platform with no significant reduction in personnel. (Ziegenfuse Dep. 63:16-19:6, 65:7-21, 67:17-23.)

329. In its June 30, 2013 10-Q, Ocwen allocated $210 million to goodwill in connection with its purchase of ResCap's business. (DX ZH (Ocwen June 30, 2013 Form 10-Q) at DX00ZH-0016.)

330. Walter also purchased its share of ResCap's servicing and origination platform as a going concern, which caused Walter to recognized goodwill and other intangible value associated with its purchase of its share of ResCap's business. (Dixon Dep. 18:17-19:2, 83:17-21; DX VC (Walter May 31, 2013 Form 10-Q) at DX00VC-0010.)

331. Walter explained that its business plan in acquiring "the origination of capital markets business [of ResCap]" was to "use its capabilities against our book to increase our performance." (Dixon Dep. 65:9-16.)

332. Walter's corporate representative testified that "[a]s attractive as the Fannie Mae MSR is to us, the originations and capital markets platform is equally as attractive. The opportunity to acquire a highly regarded originations platform with a strong management team is

a home run from our perspective. The platform significantly increases our footprint in the originations market and accelerates our capabilities, allowing us to capitalize on the current favorable market dynamics." (Dixon Dep. 61:17-62:2, Sept. 24, 2013, Debtor Adv. Dkt. No. 60.)

333. Walter's officers confirmed that Walter was attracted to the ResCap platform, in part, because ResCap's retention recapture rates were at or above industry levels and because of the retail originations component of ResCap's business, which included software, IP, and other assets concerning the correspondent business that Walter acquired. (Dixon Dep. 63:11-64:11, 67:4-20, Sept. 24, 2013, Debtor Adv. Dkt. No. 60.)

334. Walter's officers confirmed that Walter believed that ResCap was "very, very good" at retention, and Walter intended to "deploy" the platform against not only the portfolio Walter purchased from ResCap, but also Walter's entire existing loan portfolio. (Dixon Dep. 64:24-65:3.)

335. Walter's officers confirmed that Walter hoped, through acquiring "the originations business of ResCap," to gain an "immediate lift" on its HARP/refinance portfolio, in addition to better retention on Walter's existing portfolio, (Dixon Dep. 66:12-67:3.)

336. Part of the value Walter believed it acquired with the origination capital markets business was the opportunity to plan for future growth of its business with ResCap's management. (Dixon Dep. 68:12-69:2.)

337. In its June 30, 2013 10-Q, Walter described the acquisition as "a fully integrated loan originations platform to complement and enhance [Walter's] servicing business." (DX VC (Walter May 31, 2013 Form 10-Q) at DX00VC-0007; DX WK (Walter June 30, 2013 Form 10-Q) at DX00WK-0008.)

338. Apart from ResCap's portfolio, Walter acquired software, IT, and IP associated with ResCap's "origination system," which included ResCap's website and call center, as well as the correspondent business, which consisted of "[t]he people who were in Ally." (Dixon Dep. 67:9-20, 95:22-96:6.)

339. Walter stated the major categories of assets it acquired were "[m]ortgage servicing rights, IT, IP, servicer advances, and . . . where we needed to allocate the purchase price, otherwise goodwill and intangibles." (Dixon Dep. 84:18-23.)

340. As of March 31, 2013, it was Walter's best estimate that it acquired approximately $160 million of intangible assets in connection with its transaction with ResCap. (Dixon Dep. 83:25-84:6.) Walter also estimated that it had acquired $52.5 million of goodwill as part of such assets. (Id. at 83:17-21.)

341. In its June 30, 2013 10-Q, Walter determined that there was approximately $49 million of goodwill associated with the acquisition in addition to $8 million of intangible assets and $17.1 million of capitalized software.. (DX WK (Walter June 30, 2013 Form 10-Q) at DX00WK-0012-0013; Dixon Dep. 95:14-21.)

342. In Walter's revised June 30, 2013 10-Q, the company represented that "[t]he primary factors that contributed to the recognition of goodwill are the expected future earnings and projections of growth. The goodwill related to the acquisition of the ResCap net assets was allocated to the origination segment of which $45.7 million is expected to be tax deductible." (DX WK (Walter June 30, 2013 Form 10-Q) at DX00WK-0013; Dixon Dep. 143:21-144:12,.)

iv. The Allocation of the Asset Sales Proceeds

(A) The JSNs' Experts' Methodology

343. In allocating the sales proceeds of the Asset Sales, Mr. John Taylor, an expert on the valuation of intangibles and purchase price allocation, performed a purchase price allocation in accordance with accepted industry standards, as discussed above.

344. Mr. Taylor independently valued identified intangibles, and then subtracted those values, together with the values for MSRs and Servicing Advances determined by Mr. Levine, and the value of other identified tangible assets as set forth in the publicly filed financial statements of Ocwen and Walter from the total purchase price (price paid plus assumed liabilities) to determine goodwill.

345. Based on the work of the Houlihan experts, the value of JSN Collateral sold to Ocwen and Walter as of the purchase date is a total of $2,741 billion allocated as follows:

- Servicing Advances: $1,692 million;
- Aggregate Mortgage Servicing Rights: $716 million;
- Accounts Receivable: $3 million;
- Developed Software and Know-How: $220 million;
- Customer-related Intangibles: $129 million;
- Tradename/marks, Iconography and Logotype: $10 million; and
- Unidentified Intangibles and Goodwill (Inclusive of Assembled Workforce): -$46 million.

(Taylor Decl. (Debtor Adv. Dkt. No. 84) at 3.)

(B) The Debtors'/Committee's "Allocation"

346. No expert witness testimony provided by the Debtors or the Committee consisted of any valuation of the goodwill or intangible assets or any purchase price allocation. (Trial Tr. 244:6-9, Oct. 15, 2013 (Puntus).)

347. The sole source of the Debtors' allocation of the sale proceeds was the Debtors' April 30, 2013 trial balance. (Trial Tr. 145:20-147:19, Oct. 16, 2013 (Renzi).)

348. Mr. Renzi based his "recovery value" of the JSNs' Collateral on the Debtors' April 30, 2013 trial balance. (Renzi Direct ¶ 12.)

349. Mr. Renzi testified that he was not involved in the booking of the Ocwen and Walter transaction or the Berkshire transaction on the Debtors' trial balance. (Trial Tr. 147:9-15, Oct. 16, 2013 (Renzi).)

350. Mr. Renzi testified that he "did not render [an] opinion on the allocation of purchase prices." (Id. at 147:4-8.)

351. If the Debtors' allocation of the proceeds was not appropriate and needed to be adjusted, such allocation adjustment would necessarily change the calculation of JSN Distributable Value. (Id. at 147:20-148:1).

352. Mr. Renzi testified that he assumed the Debtors correctly allocated the proceeds of sales in their April 30, 2013 trial balance. (Id. at 147:16-19.)

353. The Debtors' allocation of the proceeds of the Ocwen Sale as compared to the Houlihan allocation of the proceeds of the Ocwen Sale is shown in the table below.

Allocation of Proceeds from Ocwen Sale

Asset	Debtor Allocation[5] ($ Millions)	Houlihan Allocation[6] ($ Millions)
MSRs	911	716
Servicing Advances	1,798	1,692
Developed Software and Know-How	0	220
HARP/Other Refi Opportunity (Customer Related Intangibles)	0	129

[5] DX QW (Debtors' Purchase Price Allocation Schedules) at DX0QW-0001..
[6] Taylor Rpt. ¶ 271.

Tradename/marks, Iconography and Logotype	0	10
Unidentified Intangibles and Goodwill	0	(46)

354. As shown in the table, the Debtors allocated the proceeds of the Ocwen Sale entirely to MSRs and servicing advances. (DX QW (Debtors' Purchase Price Allocation Schedules) at DX0QW-0001.) The Debtors allocated no portion of the proceeds of the Ocwen Sale to intangible assets or to the goodwill of the business, which assets constitute Notes Collateral. (Id.)

355. Before and during the pendency of these Chapter 11 Cases, the Debtors marketed the assets sold pursuant to the Ocwen Sale as a going concern business, inclusive of intangible assets related to such business. (Ziegenfuse Dep. 107:10-110:3.)

356. Prior to the closing of the Ocwen Sale, the Debtors operated their servicing and origination business, using the Notes Collateral, including the intangible assets listed above. (Trial Tr. 168:1-24, Oct. 15, 2013 (Marano).)

357. The use of the Notes Collateral in the operation of the Debtors' servicing and origination business generated cash. (Trial Tr. 146:22-147:10, Oct. 15, 2013; DX ABK (Winn Rpt.) at DX0ABK-0007.)

358. The Debtors used or retained the cash produced by the Notes Collateral. (DX ABK (Winn Rpt.) at DX0ABK-0007; Trial Tr. 146:19-147:3, Oct. 16, 2013.)

C. Remaining Servicer Advances and Other Unsold Assets

359. The sales to Ocwen, Walter and Berkshire specifically excluded certain assets that were to be retained by the Debtors. (DX ABI (Fazio Rpt.–HFS) at DX0ABI–0056.)

360. These excluded assets include: certain MSRs and their associated servicer advances, FHA/VA mortgage assets, international HFS loans and other mortgage assets, and other Debtors' assets ("Other JSN Collateral"). (Id.)

361. The JSNs submitted the Expert Report of Michael Fazio – HFS and Unsold / Other Assets ("HFS Report"), dated September 20, 2013, in which Mr. Fazio testified as to the value of the Other JSN Collateral. (Fazio Decl. (Debtors Adv. Dkt. No. 83) ¶ 5.)

362. In his HFS Report, Mr. Fazio concludes that the fair market value of the Other JSN collateral, as of May 14, 2012, amounts to $1,657 million. (Id. at ¶ 6(c).)

363. The Debtors submitted the Expert Report of Mark A. Renzi, dated September 20, 2013, which also values the Other JSN Collateral. (PX 242 (Renzi Rpt.).)

364. Instead of calculating the fair market value of these assets, the Debtors' expert, Mr. Renzi, determined the recovery value of the JSNs' collateral, including the Other JSN Collateral, by relying upon the Debtors' April 30, 2013 balance sheet. (Trial Tr. 139:5-11, Oct. 16, 2013.)

365. The numbers set forth on the Debtors' balance sheet, for certain assets, were carried at a discount to account for risks that included, for example, the payment of interest on loans. (Id. at 165:10-14.)

366. From the balance sheet, Mr. Renzi then rolled forward adjustments as of the disclosure statement date. (Id. at 139:5-11.)

367. Mr. Renzi's recovery analysis was not done to provide a fair market value of the assets; rather, it was completed to inform creditors, who were voting on the plan of reorganization, of expected recoveries. (Id. at 141:10-14.)

368. Mr. Renzi testified that he would consider the costs associated with selling the asset, such as fees associated with liquidation. (Id. at 144:20-145:2.)

a. The Other JSN Collateral

i. MSRs and Associated Service Advances

369. Under the Asset Sales, certain MSRs and servicer advances were excluded due to various objections. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0057.)

370. The Debtors are currently negotiating with counterparties to resolve these objections. (Id.)

371. The Debtors have indicated that they want to sell these servicing rights and associated advances to Ocwen. (Id.)

372. The Debtors estimate a recovery rate on these assets at 103% of book value in their Recovery Analysis in the Disclosure Statement. (Id.)

373. To value these assets, Mr. Fazio assumed that these excluded assets would be sold to Ocwen and he valued them consistently with similar collateral that were included in the Asset Sales. (Id.)

ii. FHA/VA Loans

374. The largest component of the Other JSN Collateral is the FHA/VA loans. (Fazio Decl.(Debtors Adv. Dkt. No. 83) ¶ 5, Oct. 9.)

375. These assets are repurchased whole loans from Ginnie Mae trusts. (DX ABI (Fazio Rpt. – HFS and Unsold / Other Assets) at DX0ABI-0058.)

376. Since these assets are partially insured, the amounts paid by the Debtors to repurchase these loans are substantially reimbursable. (Id.)

377. The Debtors also have the choice of modifying or selling these Ginnie Mae repurchased loans to a Ginnie Mae trust or a third party. (Id.) Based upon the Debtors' estimates, Mr. Fazio concluded that these loans would monetize over a 30-36 month period. (Id. at DX0ABI-0059.)

378. Mr. Fazio discounted the estimated cash flow at 5% over the three year period, taking into consideration the risk of loss and government insurance. (Id.)

379. Ultimately, Mr. Fazio valued the FHA/VA mortgage assets at 95% of book value. (Id. at DX0ABI-0058.)

380. By comparison, the Debtors assumed a "blended net recovery rate of approximately 93% of book value" for the FHA/VA loans. (PX 256 (Disclosure Statement) at p. 483.)

381. The Plaintiffs always intended to sell the FHA/VA Loans and ultimately pulled the FHA loans from the auction because they felt that the bids received were not high enough. (See Puntus Witness Statement [ECF 75] at ¶ 117 ("In early 2013, the Debtors marketed a pool of FHA loans that, from a documentation perspective were intended to represent the 'most attractive' loans in the portfolio. Despite contacting 19 likely buyers for this portfolio, the Debtors receive only 1 formal bid . . ., which was not sufficiently attractive to move forward at that time.").)

382. The Debtors also have other unsold international mortgage loans, additional servicer advances and accrued interest on mortgage loans not covered by the Berkshire Hathaway APA. (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0060.)

383. Mr. Fazio valued these assets conservatively at 73% of book value, consistent with the Debtors' Recovery Analysis presented in the Disclosure Statement. (Id.)

384. Mr. Renzi assessed the recovery value of the JSNs' Collateral, including equity pledges, using the Debtors' April 30, 2013 balance sheet. (Trial Tr. 139:8-11, Oct. 16, 2013 (Renzi).)

385. The purpose of Mr. Renzi's recovery analysis was to inform creditors, who were voting on the plan, of expected recoveries based on certain assumptions set forth in the recovery analysis. (Id. at 141:10-14.)

386. Mr. Renzi testified that he understood there were limitations on the trial balance data that he relied upon, including that the Debtors provided the data and FTI did not audit the data. (Id. at 143:3-13.)

387. Mr. Renzi testified that he deducted costs from the fair market value of the FHA/VA loans to determine what he called "recovery value." (Id. at 163:17-164:22.)

388. By way of an example, Mr. Renzi testified that he would check the market to determine the fair market value of an IBM share. (Trial Tr. 144:9-12, Oct. 16, 2013 (Renzi).)

389. To determine the recovery value of an IBM share, Mr. Renzi would consider what it would cost to sell the share, such as the fees associated with liquidating the IBM share. (Id. at 144:20-145:2.)

390. Mr. Renzi testified that recovery value of an IBM share would be lower than fair market value due to the deduction of the costs and expenses of liquidating the shares. (Id. at 144:20-145:8.)

iii. REO Assets

391. The Other Debtors' assets are mainly Real Estate Owned ("REO") assets and trading securities. (DX ABI (Fazio Rpt – HFS and Unsold / Other Assets) at DXOABI-0061.) The REO assets consist of foreclosed upon properties. (Id.)

392. As of March 31, 2012, the Debtors owned 137 housing units that could be sold to third parties. (Id.)

393. Additionally, the Debtors hold trading securities which consist of assets to be sold to Berkshire, mortgage-related asset backed securities and certain other securities. Id. As of March 31, 2012the carrying value of all trading securities owned by the Debtors was approximately $32 million. (Id.)

394. Mr. Fazio valued these assets at 61% of book value, except as noted in his report, consistent with the Debtors' estimates in the Recovery Analysis in the Debtors' Disclosure Statement. (Id.)

iv. Other Assets

395. The Debtors also have other assets, including: hedging and derivative contracts / positions; broker agreements with Ally bank, a shared services contract with Ally; and foreclosure trustee and recovery services contracts. (Id. at DX0ABI-0071.)

396. Mr. Fazio valued these assets at $97 million using a discounted cash flow methodology and applying a discount rate of 15%. (Id. at DX0ABI-0071, 75.) This is generally consistent with the valuation analyses performed on the Debtors' broader businesses and operations. (Id. at DX0ABI-0071.)

397. Furthermore, under the Amended and Restated Third Priority Pledge and Security Agreement and Irrevocable proxy, the JSNs' collateral extends to the Debtors' equity interests in certain Debtor and non-debtor subsidiaries. (Id. at DX0ABI-0065, 68.)[7]

[7] The equity interests or shares of the following debtors are collateral for the JSNs: ditech LLC; DOA Holding Properties, LLC; DOA Properties IX (Lots – Other), LLC; EPRE LLC; Executive Trustee Services, LLC; GMAC Model Home Finance, LLC; GMAC Mortgage USA Corporation; GMACRH Settlement Services, LLC;

398. Mr. Fazio valued the equity pledges in the debtor subsidiaries at $35 million as of May 14, 2012 and $31 million as of February 29, 2012. (Id. at DX0ABI-0066-67.) Mr. Fazio also concluded that the value of the equity pledges in Non-Debtor subsidiaries was approximately $40 million. (Id. at DX0ABI-0069.)

399. Mr. Renzi assessed the recovery value of the JSNs' Collateral, including equity pledges, using the Debtors' April 30, 2013 balance sheet. (Trial Tr. 139:8-11, Oct. 16, 2013 (Renzi).)

400. With respect to the equity pledges listed on Exhibit 4 of Mr. Renzi's Direct Testimony (Direct Testimony of Mark A. Renzi, Ex. 4, Oct. 8, 2013, Comm. Dkt. No. 130), Mr. Renzi obtained the numbers from the Debtors' trial balance. (Trial Tr. 148:2-8, Oct. 16, 2013 (Renzi).)

401. The book value of cash listed in Exhibit 4 of Mr. Renzi's Direct Testimony does not include any allocation of the Ally Contribution to the listed Debtor subsidiary entities. (Id. at 149:1-4.)

402. The equity value of the entities would increase if the Ally Contribution were allocated to the entities. (Id. at 149:5-16.)

GMACM Borrower LLC; GMACR Mortgage Products, LLC; HFN REO SUB II, LLC; Homecomings Financial Real Estate Holdings, LLC; Ladue Associates, Inc.; Passive Asset Transactions, LLC; PATI A, LLC; RAHI A,LLC; Residential Accredit Loans, Inc.; Residential Asset Mortgage Products, Inc.; Residential Asset Securities Corporation; Residential Consumer Services, LLC; Residential Funding Mortgage Exchange, LLC; Residential Funding Mortgage Securities I, LLC; Residential Funding Mortgage Securities II, LLC; Residential Funding Real Estate Holdings, LLC; Residential Mortgage Real Estate Holdings, LLC; RFC - GSAP Servicer Advance, LLC; RFC Asset Holdings II, LLC; RFC Asset Management, LLC; RFC Borrower LLC and RFC Construction Funding, LLC. (Id. at DX0ABI-0065.) The collateral securing the JSNs includes the following non-Debtor subsidiaries: CAP RE of Vermont, LLC; CMH Holdings, LLC; GMAC-RFC Europe Limited; and GMAC-RFC Holdings Limited. (Id. at DX0ABI-0068.)

403. With respect to PATI, if they got an allocation of the Ally Contribution, that would increase Mr. Renzi's concluded value with respect to equity. (Id. at 150:13-16.)

404. The book value approach, based the Debtors' cash and other asset numbers, served as the beginning of Mr. Renzi's analysis valuing the equity of PATI. (Id. at 150:17-151:4.)

405. To arrive at equity value, Mr. Renzi took the Debtors' books and records, and subtracted the liabilities from the assets listed. (Id. at 151:18-23.)

406. Mr. Renzi then assessed the recoverability of the Debtors' assets and then stated the remaining recovery value of the equity. (Id. at 152: 2-4.)

407. With respect to ETS, in Exhibit 4 of his Direct Testimony, Mr. Renzi lists a recovery of JSN equity pledges of $16.1 million. (Id. at 152:5-7.)

408. Mr. Renzi did not investigate whether ETS had been sold by Ocwen to Altisource after the Ocwen Sale. (Id. at 152:8-15.) Ocwen sold ETS for $128.8 million to Altisource after the Ocwen Sale. (DX ZH (June 30, 2013 Form 10-Q for Ocwen Financial Corporation) at DX00ZH-0017.)

b. Mr. Renzi Discounts the Already Discounted Book Value of the Other JSN Collateral

409. Mr. Fazio's independent conclusions as to the value of the Other JSN Collateral are generally consistent with and based upon the value that the Debtors' attributed to these assets

in various filings, historical representations and their book and records.[8] (DX ABI (Fazio Rpt.–HFS) at DX0ABI-0058, 60-61.)

410. In contrast to Mr. Fazio, Mr. Renzi failed to independently verify the numbers that he was given by the Debtors. (Trial Tr. 143:7–13, Oct. 16, 2013 (Renzi).)

411. Mr. Renzi's recovery value analysis deducts from the asset's book value, the costs, expenses and risks associated with disposing of the asset. (See Id. at 144:20–145:2; 164:18–23.)

412. Mr. Renzi acknowledged that certain of the Debtors' assets were already booked and carried at a discount to UPB to account for recovery risks, such as the payment of interest. (Id. at 165:6-15.)

413. Mr. Renzi could not testify that the value of these assets in the Debtors' books did not represent the fair market value of the assets. (Id. at 164:24–165:19.)

414. Additionally, Mr. Renzi admitted that the Debtors used third parties to benchmark and independently appraise the assets so that those numbers would appear accurately in the Debtors' books and records. (Id. at 145:20–146:6; 166:2–7.)

415. Ultimately, Mr. Renzi's recovery value is lower than what the Debtors had in their books and records. (See Id. at 144:20–145:8; 164:18–23.) Specifically, Mr. Renzi's recovery value for Other JSN Collateral is only 60.4% of book value. (PX 256 (Disclosure Statement) at p.489.)

c. Value of Equity Interests in the Non-Debtor Subsidiaries

[8] Mr. Fazio's valuations and the Debtors' valuations are the same for: the FHA/VA Mortgage Assets (DX ABI (Fazio Rpt. – HFS and Unsold / Other Assets) at DX0ABI-0058); International HFS Loans and Other Mortgage assets (Id. at DX0ABI-0060); and REO assets and Trading Securities (Id. at DX0ABI-0061).

416. A report filed by the Debtors, titled Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtors' Estates Hold a Substantial or Controlling Interest (the "Periodic Report"), included a summary balance sheet for each of the Non-Debtor Subsidiaries. (DX ABI (Fazio Rpt. – HFS and Unsold / Other Assets) at DX0ABI-0068-69.)

417. Using the Periodic Report as a guide, Mr. Fazio concluded that the value of the equity pledges in Non-Debtor Subsidiaries was approximately $40 million. (Id.)

418. Mr. Fazio concluded that the value of the equity pledges in the Non-Debtor subsidiaries were $26 million in CAP RE of Vermont, LLC; $3 million in CMH Holdings LLC; $1 million in GMAC-RFC Europe Limited; and $10 million in GMAC-RFC Holdings Limited. (Id.)

419. Mr. Renzi testified that counsel told him that the Non-Debtor Subsidiaries had very limited equity value due to contingent liabilities, namely litigation liability. (Trial Tr. 153:16-154:3, Oct. 16, 2013 (Renzi).)

420. Counsel further informed Mr. Renzi that the probability was high that the Debtors would not prevail in the litigation. (Id. at 154:4-9.)

421. Instead of presenting a risk-adjusted equity value to account for the litigation risk for the Non-Debtor Subsidiaries, based upon his conversations with counsel, Mr. Renzi presented the equity value in those entities as zero. (Id. at 153:12-154:15.)

D. AFI LOC Collateral

a. The JSNs' Lien on the AFI LOC Collateral

422. On November 20, 2008, AFI, as initial lender and lender agent, executed a $430 million loan agreement (as subsequently amended), with two ResCap LLC subsidiaries as borrowers. (PX 9 (AFI LOC) at PX pg. 123.)

423. On June 1, 2009, AFI, as initial lender and lender agent, executed another $370 million credit agreement (as subsequently amended and expanded to $670 million), with two ResCap subsidiaries as borrowers. (Id.)

424. On December 30, 2009, AFI merged the November 20, 2008 and June 1, 2009 credit facilities into a single $1.1 billion credit facility, known as the "AFI LOC." (Id.)

425. In the years following the incurrence of the AFI LOC, significant assets that had been pledged by various Debtor Obligors to support the Junior Secured Notes were purportedly released (the "Purported Lien Releases") from the JSN Liens (the "Purportedly Released Collateral"). (Id.)

426. At or around the same time, several of the same Debtor Obligors granted liens on the same Purportedly Released Collateral to AFI as lender on the AFI LOC. (Id.)

427. Under paragraph 5(g) of the Cash Collateral Order, the Debtors' stipulated that "the liens and security interests granted to secure the Junior Secured Parties pursuant to the Junior Secured Notes Documents and in connection with the Junior Secured Notes [] are valid, binding, perfected, and enforceable first priority liens on and security interests in the personal and real property constituting 'Collateral' under, and as defined in, the Junior Secured Notes Documents[.]" (PX 76 (Cash Collateral Order) at PX pg. 11.)

428. The "Junior Secured Notes Documents" are in turn defined in the Final Cash Collateral Order as "[the JSN Indenture], together with the Junior Secured Notes, the Security Documents (as defined in the Indenture) and all other documents executed in connection therewith." (Id. at PX pg. 4.)

429. The JSN Indenture defines 'Security Documents' as "the [JSN Pledge Agreement], any mortgages, the Intercreditor Agreement and all of the security agreements,

pledges, collateral assignments, mortgages, deeds of trust, trust deeds or other instruments evidencing or creating or purporting to create any security interests in favor of the Collateral Agent or the Collateral Control Agent for its benefit and for the benefit of the Trustee and the Holders of the Notes." (PX 1 (JSN Indenture § 1.01).)

430. Pursuant to the Cash Collateral Order, the Debtors stipulated that any asset that meets the definition of "Collateral" under the Notes Security Agreement, and that is not subject to a direct challenge by the Committee, is Stipulated Collateral. (PX 76 (AFI DIP Order) at PX pgs. 9-10, 59-50.)

431. The Committee did not challenge the Debtors' stipulation in paragraph 5(g), and such stipulation became binding on all parties and the Court.

432. A substantial portion of the Debtors' current remaining cash and other assets are pledged to the AFI LOC as collateral. A substantial portion of those assets were once pledged as collateral in the Blanket Revolver silo. (Winn Witness Statement (Debtor Adv. Dkt. No. 80) ¶ 15.)

433. The AFI LOC Collateral is generally loans and MSRs that would be subject to the JSNs' liens but for any prepetition release.

434. There are a substantial volume of loans for which no documentation exists outside the CFDR that memorializes any release of loans from the JSNs' liens.

b. The Debtors Lack Sufficient Evidence to Support Their Defense that $642.9 Million of Collateral Identified in the CFDR was Released from the JSNs' Liens

435. Plaintiffs contend that the scope of the "non-automatic" releases that were signed by Wells Fargo (including but not limited to the May 14, 2010 Partial Release of Collateral in favor of AFI (the "May 14, 2010 Partial Release") that released, among other things, all "Subject

Mortgage Loans" as reported in the Debtors' books and records as pledged to the AFI LOC, and the May 27, 2011 release that released, among other things, all "Freddie Advance Collateral") means that the fund facility field in the CFDR, which the Debtors contend was the Debtors' primary "book and record" for recording AFI LOC collateral, is dispositive that an asset that would otherwise be JSN collateral was released. (Stipulation (Debtor Adv. Dkt. No. 117) ¶ 7.)

436. The CFDR does not track lien releases. (Trial Tr. 198:4-5, 217:11-13, Oct. 16, 2013 (Farley); Farley Dep. 95:15-24, Sept. 18, 2013, Debtor Adv. Dkt. No. 62). The CFDR was not audited to confirm whether collateral movement was supported by a lien release. (Trial Tr. 236:13-15, Oct. 16, 2013 (Farley).)

437. Neither borrowing base reports nor monthly collateral reports tracked lien releases. (Trial Tr. 226:17-20, Oct. 16, 2013 (Farley).) Both of those reports were generated from the CFDR. (Trial Tr. 226:21-227:1; 227:21-228:1, Oct. 16, 2013 (Farley).)

438. According to the CFDR, there is approximately $1,368.2 million of collateral that is indicated as pledged to the AFI LOC as of the Petition Date. $836.2 million of such collateral was previously identified as JSN collateral and $447.3 million of such collateral first appeared in the CFDR as collateral pledged to the AFI LOC. (Stipulation (Debtor Adv. Dkt No. 117) ¶ 4; DX AHD (Winn Collateral Tr. Rpt.) at DX0AHD-0022.)

439. With respect to the Revolver, lien releases were required for the sale or transfer of primary, supporting and blanket lien collateral, including to another bilateral facility such as the AFI LOC. (Trial. Tr. 200:17-21, Oct. 16, 2013 (Farley); DX AAQ (Farley Notice of Dep.); Farley Dep. 193:24-195:17.)

440. ResCap's treasury team managed the release process and reported to AFI. (Trial Tr. 8:11-9:2, Oct. 17, 2013 (Farley).)

441. "If the finance group at AFI determined that they were making some sort of an accounting change that would impact the ResCap financials, they would obviously have the ability to tell the finance groups reporting up to them that a financial change was necessary." (Farley Dep. Tr., 250:5-11)

442. ResCap engaged in two types of releases under the Revolver, automatic and non-automatic lien releases. (Trial Tr., Oct. 16, 2013 at 202:4-8 (Farley).)

443. Automatic lien releases were accompanied by officers' certificates, which attached schedules identifying the assets that were being released. (Trial Tr. 202:20-203:9, Oct. 16, 2013 (Farley).)

444. Non-automatic releases generally were used in connection with larger sales or dispositions of assets compared to automatic releases and generally were accompanied by UCC-3 financing statements. (Trial Tr. 209:15-22, Oct. 16, 2013 (Farley).)

445. Non-automatic releases were subject to heightened procedures. (Direct Testimony of Teresa Rae Farley ¶ 48, Oct. 8, 2013, Debtor Adv. Dkt. No. 131 ("Farley Direct").)

446. The May 14, 2010 Partial Release is a non-automatic release. (Trial Tr., Oct. 16, 2013 at 220:6-8)

447. The May 14, 2010 Partial Release did not release every mortgage loan that had been pledged to the revolver, but only identifiable "Subject Mortgage Loans." (Trial Tr., Oct. 16, 2013 at 220:16-20)

448. Each time that assets were moved from the revolver to the AFI LOC, a collateral addition notice ("CAN"), listing each asset to be released, was created. (Trial Tr. 214:13-24, Oct. 16, 2013 (Farley); see also Id. at 201:12-18 and Trial Tr. 25:20-24, Oct. 17, 2013 (Farley).) Such

CANs were exchanged with AFI in connection with the May 14, 2010 Partial Release. (Trial Tr. 220:19-21, Oct. 16, 2013 (Farley).)

449. Upon the execution of a CAN, a template identifying that same collateral to be remarked as pledged to the AFI LOC was created. (Id. at 214:25-215:3) ResCap always created templates in connection with non-automatic releases, including the May 14, 2010 Partial Release. (Id. at 215:9-12, 220:9-14, 221:2-4; Farley Dep. 206:23-207:9)

450. In connection with non-automatic releases of assets, such as those of "Subject Mortgage Loans" under May 14, 2010 Partial Release, ResCap always sent a list of the individual assets that were being released to AFI or its attorneys. (Trial Tr. 215:5-8, 220:15-18, 247:10-19, 210-22-211:10, Oct. 16, 2013 (Farley); Farley Direct (Debtor Adv. Dkt. No. 131) ¶ 49, n. 5.)

451. Every release of loans, including "Subject Mortgage Loans" as defined in the May 14, 2010 Partial Release, was accompanied by either a schedule of assets attached to a loan certificate or a schedule of assets sent to attorneys. (Trial Tr. 216:9-14, Oct. 16, 2013 (Farley).)

452. With (i) the CANs prepared with respect to non-automatic lien releases, (ii) the assets listed provided to attorneys or AFI and (iii) the lists that accompanied officers' certificates with respect to the automatic lien releases, it is possible to track all assets that were released in the CFDR. (Id. at 217:23-218:17; 236:16-237:5.)

453. Asset lists of loans to be released pursuant to the May 14, 2010 Partial Release were emailed throughout ResCap and to AFI. (Trial Tr. 15:3-12, 16:11-17:2, 25:14-17, Oct. 17, 2013 (Farley).)

454. CANs were circulated to parties by email. (Id. at 19:18-19:20.)

455. Although ResCap did not save all lien releases, it "had the mortgage schedules saved, with respect to each of the transactions." (Trial Tr. 238:4-238:17, Oct. 16, 2013 (Farley).)

456. ResCap also maintained all CANs. (Id. 238:21-239:1; 247:20-25.)

457. The Ad Hoc Group timely requested (i) mortgage loan schedules; (ii) collateral addition notices; and (iii) electronic templates (collectively, the "Asset-Level Release Documents") in formal discovery on June 26, 2013, and in follow-up communications with Debtors' counsel via letter and e-mail from August 15, 2013 to September 6, 2013 (collectively, the "Requests"). (Stipulation (Debtor Adv. Dkt. No. 117) ¶ 1.)

458. The Debtors represent that, upon receipt of the Requests, the Debtors diligently commenced numerous searches for the Asset-Level Release Documents. (Id. ¶ 2.)

459. The parties' document productions were required to be substantially completed by August 7, 2013 and actually completed by August 23, 2013. (Consolidation and Scheduling Order ¶¶ 9, 14, June 21, 2013, Debtor Adv. Dkt. No. 10.)

460. On various dates, including between September 6, 2013 and September 8, 2013, the Debtors produced "loan-level/asset level detail for lien releases" in response to the Requests for Asset-Level Release Documents. (Stipulation (Debtor Adv. Dkt. No. 117) ¶ 2.)

461. Other than the Asset-Level Release Documents they have produced, the Debtors represented that they have no other Asset-Level Documents in their possession, custody of control. (Id. ¶ 3.)

462. With respect to $642.9 million of assets identified in the CFDR as at one point having been pledged to the Revolver that were subsequently pledged to the AFI LOC (out of $836.2 million total), the Debtors did not produce Asset-Level Release Documents indicating

that such collateral was released. (Id. at ¶ 5; DX AHD (Winn Collateral Tr. Rpt.) at DX0AHD-0023.)

463. With respect to $267.5 million of assets that first appeared in the CFDR as having been pledged to the AFI LOC (out of $447.3 million total), the Debtors did not produce Asset-Level Release Documents indicating that such collateral was released. (Stipulation (Debtor Adv. Dkt. No. 117) ¶ 6; DX AHD (Winn Collateral Tr. Rpt.) at DX0AHD-0024.)

464. With respect to the $910.4 million of assets ($642.9 + $267.5 million) that were identified in the CFDR as pledged to the AFI LOC as of the Petition Date that had previously been pledged to the JSNs or first appeared in the CFDR as pledged to the AFI LOC, the Plaintiffs contend that the CFDR and the AFI LOC monthly borrowing base reports generated from the CFDR are dispositive that such collateral was released. (Stipulation (Debtor Adv. Dkt. No. 117) ¶¶ 5-6.)

465. Because the CFDR does not track lien releases, and based on the testimony that Asset-Level Release Documents were created and maintained with respect to each movement of collateral from the revolver to the AFI LOC and that such documents were routinely emailed within ResCap and to AFI and/or its attorneys, the absence of Asset-Level Release Documents rebuts any showing that the CFDR may be used as dispositive evidence that collateral identified as pledged to the AFI LOC was released pursuant to the May 14, 2010 Partial Release or the May 17, 2011 release of Freddie Advance Collateral. (Trial Tr. 198:4-5, 204:2-6, 205:20-206:1, 208:13-20, 210:22-211:24, 214:13-24, 215:5-12, 220:11-221:10, 239:14-18, 247:10-25, Oct. 16, 2013 (Farley); Stipulation (Debtor Adv. Dkt. No. 117) ¶ 8.)

466. The JSNs have a lien on the $910.4 million of collateral identified in the CFDR as pledged to the AFI LOC but that is not supported by any Asset-Level Release Document. (Stipulation (Debtor Adv. Dkt. No. 117) ¶¶ 5-6.)

IV. Facts Relevant to the Committee Action

A. The JSNs' Claim Does Not Include Any OID that Should Be Disallowed as Unmatured Interest

1. In Count XIII of the Committee Complaint, the Committee claims that a portion of the JSNs' claims in this bankruptcy case should be disallowed pursuant to Bankruptcy Code section 502(b)(2), as a result of alleged unmatured interest arising from "Original Issue Discount" ("OID") generated by the Debtors' June 2008 debt exchange (the "Exchange"). (Adversary Complaint for Declaratory Judgment, Avoidance of Liens, and Disallowance of Claims ¶¶ 224–33, Feb. 28, 2013, Comm. Adv. Dkt. No 1 ("Comm. Complaint").)

2. The evidence introduced at trial demonstrates that no such unmatured interest exists or should be deemed to exist, and that no part of the JSNs' claims should be disallowed.

3. The evidence presented at trial further demonstrates that the Exchange was highly valuable to all of ResCap's stakeholders, but could easily have failed if the participating creditors were told that their claims in a subsequent bankruptcy would be subject to further reduction for OID. As it was, with no market disclosure or discussion of OID, only 63% of holders of Old Notes tendered into the Exchange. (See Revised Joint Pre-Trial Order (Proposed) ¶ 9, Oct. 17, 2013, Adv. Dkt. No. 102.) John Finnerty, the Plaintiffs' expert witness on OID matters, testified that ResCap's creditors would be very focused on the size of their claim in the event of a bankruptcy and that "having a smaller claim in bankruptcy would be less of an incentive to participate" in the Exchange. (Trial Tr. 102:18–103:3, Oct. 21, 2013 (Finnerty).) Finnerty further

testified that "[i]f OID is going to be disallowed, then that package–the total package of incentives is going to be less attractive than if it is allowed." (Trial Tr. 101:15–17, Oct. 21, 2013 (Finnerty).)

a. *The Expert Witnesses*

4. The JSNs and Notes Trustee presented the testimony of P. Eric Siegert, a Senior Managing Director and Chairman of the Financial Restructuring Group of Houlihan Lokey Capital, Inc. (Direct Testimony of P. Eric Siegert ¶ 1, Oct. 9, 2013, Comm. Adv. Dkt. 138 ("Siegert Direct").) Siegert is a restructuring specialist, with more than 25 years of professional experience in finance, operations and strategy, specializing in distressed and underperforming companies. (Siegert Direct ¶ 1.) Siegert also bases his testimony on his years of facilitating debt exchanges and debt issuances. (Siegert Direct ¶ 30.) He has worked on more than 100 of the world's largest and most complex restructuring transactions. (Siegert Direct ¶ 1.)

5. Siegert submitted an expert report addressing whether the Exchange created OID for purposes of the JSNs' allowed claim in bankruptcy. (Siegert Direct ¶ 5.) Siegert issued a rebuttal expert report addressing, *inter alia*, certain deficiencies in the Plaintiffs' report. (DX AIJ (Siegert Rebuttal to Finnerty) at DX0AIJ-0004.)

6. The Plaintiffs offered the testimony of John Finnerty. Finnerty is primarily a valuation expert who has not been involved in a bond issuance since at least 1986. He has never worked on a debt-for-debt exchange or advised any of the parties to a debt-for-debt exchange. (Trial Tr. 11:25–12:22, Oct. 21, 2013 (Finnerty); Direct Testimony of John Finnerty ¶ 1, Oct. 9, 2013, Comm. Adv. Dkt. 127.)

7. Finnerty is currently on leave from his position as a Professor at Fordham University. Finnerty testifies as an expert witness approximately 10 times a year and currently is

involved in 30 expert engagements. (Trial Tr. 14:9–12, Oct. 21, 2013 (Finnerty); Finnerty Direct ¶ 2.) He has never testified on bond exchange offers, nor has he previously offered testimony regarding OID. (Trial Tr. 14:16, 14:21, Oct. 21, 2013 (Finnerty).)

b. *By Agreeing to Participate in the Exchange, Holders of the JSNs Provided Substantial Value to ResCap and Helped the Company Avoid Bankruptcy in 2008*

8. Lara Hall, who worked in a capital markets-based advisory role for GMAC (Ally), testified that ResCap began experiencing declining asset values near the end of 2007 and as a result faced significant liquidity issues. (Hall Dep. 18:20–19:14, Sept. 26, 2013, Comm. Adv. Dkt. No. 120; see also Peterson Dep. 50:20–51:6, Sept. 15, 2013, Comm. Adv. Dkt. No. 122; Finnerty Direct ¶ 15.)

9. ResCap's financial condition continued to deteriorate in 2008, and the Company's credit ratings were also under severe pressure around this time. (DX LR (Whitlinger First Day Affidavit) at DX00LR-0035.) These losses and credit rating downgrades came at a time when ResCap was facing substantial exposure to upcoming debt maturities. (PX 71 (Liquidity Update) at PX pg. 18.) Ms. Hall testified that ResCap considered various forms of bond exchanges that would relieve some of ResCap's debt maturity load and avoid the negative impact of a "huge wall of maturities coming due." (Hall Dep. 25:17–22, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

10. In an effort to address its deteriorating financial condition and liquidity concerns, on May 5, 2008, ResCap issued an Offering Memorandum in which it offered to exchange approximately $9.5 billion face value amount of its then-outstanding unsecured notes maturing from 2010 through 2015 (the "Old Notes") for the Junior Secured Notes. (See Revised Joint Pre-Trial Order (Proposed) ¶ 7, Oct. 17, 2013, Adv. Dkt. No. 102; DX BB (Offering Memorandum).)

11. The Old Notes had a face value of $1,000 and were issued at par. Therefore the Old Notes had no OID.

12. Under the Exchange, ResCap offered to exchange $1,000 principal face value of Old Notes for $800 face value of Junior Secured Notes. (Revised Joint Pre-Trial Order (Proposed) ¶ 8.)

13. Participation in the Exchange was low. Approximately 63% of the Old Notes were tendered in the Exchange. (Id. at ¶ 9.) Holders of approximately $3.5 billion of Old Notes declined to participate in the Exchange (the "Hold-Outs"). DX DL (ResCap Accounting Impact Summary) at DX00DL-N.) Through the Exchange, ResCap exchanged approximately $6 billion of Old Notes for approximately $4 billion in Junior Secured Notes and $500 million in cash. (Revised Joint Pre-Trial Order (Proposed) ¶ 9.) Because the principal amount of the JSNs was less than the principal amount of the Old Notes tendered for exchange, the Exchange is referred to as a "fair value" exchange. (DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0042.)

14. ResCap's goal was to obtain the largest reduction in debt it could through the exchange, and determined it would need to offer $800 of JSNs for every $1,000 of the Old Notes. (Hall Dep. 59:10–16, Sept. 26, 2013, Comm. Adv. Dkt. No. 120 ("the goal would be to get to as close to [the trading] levels as possible in such an exchange"); see also id. 63:8–13.) The Company did not seek to reduce the principal amount to the trading price of the Old Notes. (Hall Depo 61:19–62:19, 63:17–64:5, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.) Finnerty, the Plaintiffs' expert witness, conceded that if ResCap had sought a smaller exchange ratio and offered less than $800 of JSNs for the Old Notes, even fewer holders of the Old Notes would have participated, jeopardizing the viability of the Exchange. (Trial Tr. 19:12–18, Oct. 21, 2013 (Finnerty).)

15. If ResCap had not executed the bond exchange, the Company would not have had an ability to meet its debt service obligations as they came due without some third party intervention. (Hall Dep. 43:10–16, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

16. The successful completion of the Exchange enhanced shareholder value by reducing the amount of the Company's outstanding debt. (Hall Dep. 55:14–23, Sept. 26, 2013, Comm. Adv. Dkt. No. 120; Trial Tr. 64:5–8; 64:25–65:2, Oct. 21, 2013 (Finnerty).) The successful completion of the Exchange provided ResCap, its creditors and other stakeholders with several other valuable benefits, including reducing ResCap's debt service and extending the maturities on ResCap's outstanding debt. (DX BB (Offering Memorandum) at DX00BB-0013; Trial Tr. 18:10–14; 63:6–15; 64:5–8, Oct. 21, 2013 (Finnerty).) Finnerty, the Plaintiffs' expert, testified that "[a]nything that increases the length of the runway would tend to increase the value of the stock. So the equity could benefit." (Trial Tr. 63:3–5, Oct. 21, 2013 (Finnerty).)

17. Eric Siegert, the expert witness for the JSNs and the Notes Trustee, credibly testified that by reducing the amount of debt outstanding, extending maturities and reducing ResCap's interest expense, the Exchange allowed ResCap an improved opportunity to ride through the economic downturn and attempt to avoid bankruptcy. (DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0021.) The Plaintiffs' expert witness, John Finnerty, confirmed that the Exchange and the related transactions had the effect of delaying the ResCap bankruptcy for four years. (Trial Tr. 17:20–18:9, Oct. 21, 2013 (Finnerty).)

c. *The Participation Rate in The Exchange Was Low by Historical Standards and Demonstrated that the Exchanging Holders Did Not Ascribe Significant Value to the Collateral or Seniority Granted to the JSNs*

18. In exchange for a 20% reduction in principal and an extension of maturities, the holders of the JSNs were offered certain inducements, including guarantees from ResCap

subsidiaries and a third priority lien on a collateral package that the Debtors represented had a book value of $8.3 billion, behind the $3.5 billion AFI Revolver secured by a first priority lien and $1.66 billion of Senior Secured Notes secured by a second priority lien. (DX BB (Offering Memorandum) at DX00BB-0032; DX BS (ResCap 8-K, June 9, 2008) at DX00BS-0003; DX CK (ResCap 8-K, June 6, 2008) at DX00CK-0002.) Thus, even assuming the accuracy of the Debtors' then current book value for the collateral, there was insufficient collateral at the time of the Exchange to fully secure the new JSNs. (Hall Dep. 79:23–80:3, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

19. ResCap offered holders of the JSNs the prospect of "structural superiority" over the Hold Outs as one of the inducements to participate in the Exchange and to reduce their principal amount. (DX BB (Offering Memorandum) at DX00BB-0035; DX00BB-0075.) Specifically, upon completion of the Exchange, the Hold Outs would no longer have the benefit of guarantees issued by certain ResCap subsidiaries. (Id. at DX00BB–0003; DX00BB–0035; DX00BB–0075.) The evidence presented at trial, however, including testimony by Finnerty, demonstrated that the "structural superiority" was not guaranteed to the JSNs when they tendered their Old Notes; rather, as disclosed in the Offering Memorandum, the benefit of structural superiority was expressly "conditioned upon obtaining the requisite consents [50%] of holders of . . . the senior old notes." (Id. at DX00BB–0003; DX00BB–0030; DX00BB–0075; Trial Tr. 70:24–71:4, Oct. 21, 2013 (Finnerty).) Accordingly, if less than 50% of the holders of the Old Notes agreed to participate in the Exchange, the tendering holders of Old Notes would receive new Junior Secured Notes, except those new Junior Secured Notes would carry the same subsidiary guarantees enjoyed by the Hold Outs. (DX BB (Offering Memorandum) at DX00BB-0030; DX00BB–0075.)

20. Finnerty conceded that a holder of the Old Notes, when considering whether or not to tender into the Exchange Offer, would have had to consider that he or she may or may not end up with any seniority as a result of the Exchange. (Trial Tr. 70:24 –71:4, Oct. 21, 2013 (Finnerty).)

21. The evidence introduced at trial demonstrates that a participation rate of 63% is significantly lower than historical participation rates in debt exchange offers. Siegert's review of participation rates in 31 debt exchanges indicated a median participation rate of 90%. (DX AIJ (Siegert Rebuttal to Finnerty) at DX0AIJ-0010.) Moreover, Finnerty testified that the data shows that debt exchange offers typically result in a high eighties or nineties percent acceptance rate and that a participation rate of 63% was lower than usual. (Trial Tr. 37:12–20, Oct. 21, 2013 (Finnerty).)

22. ResCap was expecting a significantly higher level of participation in the Exchange. Ms. Hall testified that ResCap and its advisors originally projected a base case participation level of 76%. (See Hall Dep. 53:10–21, Sept. 26, 2013, Comm. Adv. Dkt. No. 120; DX AF (Email among Lara Hall and others, attaching presentation, dated March 24-25) at DX00AF-0006; DX AN (Email among Lara Hall and others, attaching presentation, dated April 18-19) at DX00AN-0007.) Prior to submitting his expert reports to the Court or sitting for his deposition, Finnerty did not investigate the reasons that Hold-Outs did not tender. (Trial Tr. 38:2–25, Oct. 21, 2013 (Finnerty).)

23. Consistent with Ms. Hall's testimony, Siegert testified that low levels of participation demonstrates that the market did not place significant value on the third lien collateral at the time of the Exchange. (Siegert Direct ¶ 32.) Finnerty, the Plaintiffs' expert

witness, also agreed that there were "substantial risks associated with the collateral" securing the JSNs. (Trial Tr. 75:24–76:2, Oct. 21, 2013 (Finnerty); see also id. 76:3 – 80:4.)

24. The Offering Memorandum for the exchange disclosed that the value of the collateral was highly uncertain, and that multiple risks existed as to whether and to what extent the third lien position accorded the JSNs would result in recoverable value in a ResCap bankruptcy. (DX BB (Offering Memorandum) at DX00BB–0032, DX00BB–0040, DX00BB–0041.)

25. The disclosures in the Offering memorandum, and the testimony of Ms. Hall, Finnerty and Siegert respecting the highly uncertain value of the JSN collateral package as of the time of the exchange is confirmed by several contemporaneous market reports at the time of the Exchange Offer, which reports took a dim view of the value of the collateral offered to the JSNs. (PX 270 (June 16, 2008 Moody's Analyst Report) at PX pg. 1; PX 235 (May 2, 2008 Credit Sights Report) at PX pg. 3; PX 271 (July 15, 2008 S&P Analyst Report) at PX pg. 2; Trial Tr. 76:3–80:4, Oct. 21, 2013 (Finnerty).)

26. The market analysts' conclusions respecting the questionable value of the JSNs' collateral was confirmed by the trading prices of the Old Notes and the JSNs after the Exchange was announced. After the Exchange was announced, the Old Notes traded as a proxy for the new Junior Secured Notes contemplated by the Exchange. (Trial Tr. 80:8–12, Oct. 21, 2013 (Finnerty).) Because the weighted average trading price of the Old Notes one business day before the announcement of the Exchange was $0.55 and the weighted average trading price for the week following the announcement of the Exchange was $0.50, the market clearly did not place much value on the collateral package securing the JSNs. (DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0019.) Moreover, the Old Notes and the newly issued JSNs traded in a

very close range following the Exchange, further confirming that the market did not perceive a difference in value between the Old Notes and the JSNs. The JSNs were actually at a lower price than the Old Notes if one considers the discounted Exchange ratio of 80 percent. (Siegert Direct ¶ 32; DX ABC (Siegert Report—Debt Exchange) DX0ABC-0019; see also Trial Tr. 80:13–21, Oct. 21, 2013 (Finnerty).) In fact, given the reduction in principal amount of the JSNs compared to the Old Notes, the JSNs had less market value than the Old Notes. (DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0039.)

27. Finnerty opined that the effective yield of the JSNs was a strong incentive to enter the Exchange. (Finnerty Direct ¶ 63.) He failed to mention that a high YTM is a common symptom of distressed debt with a high risk of default. (See DX AIJ (Siegert Rebuttal to Finnerty) at DX0AIJ-0015.) His yield calculation assumed a cash purchase of a JSN at $613.75, rather than the more complex economics of a debt exchange. (See Trial Tr. 112:25–113:8, Oct. 21, 2013 (Finnerty).) Further, Finnerty neglected to calculate or compare the YTM of the Old Notes, particularly those paid out at maturity in 2010 or 2011. (Trial Tr. 114:20–115:2, Oct. 21, 2013 (Finnerty).) Siegert reported that a new investment in a Hold-Out at the time of the Exchange would have resulted in an average YTM of 41.6%. (DX AIJ (Siegert Rebuttal to Finnerty) at DX0AIJ-0016.) Additionally, by including OID in YTM and then asserting that a higher YTM is more attractive to investors, Finnerty is either disingenuously or ignorantly implying that a lower claim is attractive to investors. (Finnerty Direct ¶ 63; Trial Tr. 101:10–17, 102:18–103:3, Oct. 21, 2013 (Finnerty).)

28. Finnerty suggested that it is meaningful that the JSNs will do better in this bankruptcy than the holders of Old Notes that did not mature before May 2012. (Finnerty Direct ¶¶ 105-06.) But the holders of the Old Notes were clearly informed prior to the Exchange of the

potential benefits to exchanging. The Offering Memorandum also included disclosures of the risks associated with holding out. (DX BB (Offering Memorandum) at DX00BB-0003, DX00BB–0004, DX00BB–0030, DX00BB–0032-33, DX00BB–0035-36.) Finnerty agreed that these sections provided ample warning to potential Hold Outs of the possibility that, in a ResCap bankruptcy, they could receive a smaller distribution than a party who tendered. (Trial Tr. 44:23–46:7, Oct. 21, 2013 (Finnerty).)

d. *The Holders of the Old Notes Were Not Given Any Notice that their Claims in Bankruptcy Might Be Further Reduced by OID*

29. Although ResCap consulted with its legal and financial advisors in structuring the Exchange, none of the holders of the Old Notes participated in any of those conversations. (Hall Dep. Hall Dep. 39:6–15; 47:22–48:8, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

30. The JSNs were designed, offered, issued and thereafter treated as a par note, not an original issue discount note, with respect to the amount of the Debtors' payment obligations. (Infra ¶¶ 31-26.)

31. The Offering Memorandum for the Exchange did not disclose any risk that the JSNs' claims in a subsequent bankruptcy would be less than the face value of the JSNs on account of OID. (See DX00BB (Offering Memorandum); DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0006.) Similarly, none of the Indenture, the Global Note, or ResCap's or AFI's publicly filed financial statements disclosed any such risk. (PX 1 (JSN Indenture); DX CN (JSN Global Note); DX BR (ResCap 8-K, June 2, 2008); DX BS (ResCap 8-K, June 9, 2008); DX CK (ResCap 8-K, June 6, 2008); DX CR (ResCap Exchange Offer 8-K).) Additionally, the amount outstanding on the JSNs as shown in ResCap's and AFI's publicly-filed statements following the Exchange was never reduced for alleged OID, as would have been the case with a

true OID bond; rather, the amount outstanding on the JSNs was carried by ResCap and AFI at the JSNs' full principal face value plus a premium arising from the deferred concession made by the holders who had tendered. (DX DD (ResCap Bond Exchange Memorandum) at DX00DD-0006; DX BD (ResCap 2008, 3Q 10-Q) at DX00DB-0024–0025; Trial Tr. 64:15-65:12, Oct. 21, 2013 (Finnerty).)

32. Moreover, unlike an original discount note, the JSNs included an optional redemption provision that gave ResCap the right to call the JSNs at the full principal amount of the bonds, plus a call premium, rather than a smaller amount reflecting only accreted OID. (DX BB (Offering Memorandum) at DX00BB-0084–0085; Trial Tr. 57:16–58:2, Oct. 21, 2013 (Finnerty).)

33. None of (i) AFI; (ii) the Debtors; or (iii) the Original Notes Trustee prepared or issued IRS Forms 1099 to the JSNs for reporting tax OID generated by the Junior Secured Notes to the Internal Revenue Service, and no such forms were ever sent to the JSNs. (Trial Tr. 53:24–54:4, Oct. 21, 2013 (Finnerty).)

34. Finnerty, the plaintiffs' expert witness, confirmed that he was not aware of any disclosure contained anywhere in the Offering Memorandum, Indenture, Notes, or in ResCap's or AFI's public filings of the possibility that tax OID would be treated as disallowable unmatured interest in a bankruptcy filing. (Trial Tr. 50:7–8; 51:16–52:10, Oct. 21, 2013 (Finnerty).)

35. The Notes Trustee introduced testimony from AFI that the Offering Memorandum for the Exchange, which was prepared or reviewed by Mayer Brown LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Cahill Gordon & Reindell LLP (three highly reputable law firms), as well as Bank of America and Citigroup (two of the world's largest and most well-known

investment banks) was written to disclose all risks that could potentially be associated with the JSNs. (Hall Dep. 40:12–41:5, Sept. 26, 2013, Adv. Dkt. No. 120.)

36. In addition to failing to disclose any potential risk that an exchanging noteholder would or might have a materially smaller bankruptcy claim than the face amount of its new JSNs, ResCap and AFI always treated the JSNs as though they were carrying their full par claim. For its part, ResCap stipulated that the claim amount for the JSNs was based on their principal face value. PX 76 (AFI DIP Order Ex. A) at PX pgs. 9–10.) Finnerty never inquired into the Issuer's own position on the issue or rationale behind it, although he testified that he's not sure how it might have affected his view. (Trial Tr. 46:8–18, Oct. 21, 2013 (Finnerty).)

37. Siegert, the expert for the JSNs and the Notes Trustee, testified that the exchanging noteholders had no reason to anticipate that their claims in bankruptcy could have been further reduced by OID because the market has functioned with substantial disregard for any OID related to debt-for-debt exchanges since the Second Circuit's decision in LTV Corp. v. Valley Fid. Bank & Trust Co. (In re Chateaugay Corp.), 961 F.2d 378 (2d Cir. 1992). (Siegert Direct ¶ 36.)

38. Siegert conducted a comprehensive analysis of debt exchange offers between 1990 and 2013. He reviewed 21 "fair value" exchange offering memorandums and found that 16 included no mention of any potential claim reduction in bankruptcy due to the potential inclusion of OID. (DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0049.) This review also revealed that 18 issuers who had closed a debt exchange subsequently filed for bankruptcy, and in no case were claims of any exchanging noteholders reduced for alleged unacreted OID in any of those bankruptcies. (Id. at DX0ABC-0055.) These studies support Siegert's conclusion that the market has operated for more than 20 years with substantial disregard to the possibility of

bankruptcy OID in the context of debt exchanges. (Siegert Direct ¶ 40.) Similarly, Plaintiffs failed to identify any debt exchange since the Second Circuit decided In re Chateaugay where OID was disallowed as unmatured interest.

e. *The Evidence Presented at Trial Demonstrates that there Is No Meaningful Distinction Between Face Value and Fair Value Exchanges*

39. There is no commercial or business justification, or valid theory of corporate finance, to justify treating claims generated by face value and fair value exchanges differently in bankruptcy. (Siegert Direct ¶ 37.) Specifically, as Siegert explained, (i) the market value of the old debt is likely depressed in both a fair value and face value exchange; (ii) OID is created for tax purposes in both fair value and face value exchanges; and (iii) there are concessions and incentives in both fair value and face value exchanges. (DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0007.)

40. Finnerty, the Plaintiffs' expert, agreed that the "distinction between face value and fair value that shows up in Chateaugay . . . is a somewhat arbitrary distinction." (Trial Tr. 67:10–13, Oct. 21, 2013 (Finnerty).) As an example, Finnerty understands that both fair value and face value exchanges are measured the same way for tax purposes. (Trial Tr. 21:20–23, 22:7–10, Oct. 21, 2013 (Finnerty).)

41. Maintaining this type of consistency of treatment is a theme in Finnerty's opinion, his primary opinion is that all debt exchange offers should be treated the same as initial cash issue discount bonds. (See Trial Tr. 29:11–14, 31:19–24, Oct. 21, 2013 (Finnerty).) Finnerty would extend this consistency to face value exchanges. In his view—"as a matter of economics"—a distressed debt exchange which is a face value exchange *does* create disallowable unmatured interest. (Trial Tr. 19:22-20:3, 29:22–30:9, Oct. 21, 2013 (Finnerty).)

42. Finnerty did not identify the reduction in principal amount of the JSNs as a significant distinction between the exchange at issue in Chateaugay and the exchange at issue in ResCap in either his expert report or his direct trial testimony. (PX 360 (Finnerty Rebuttal Report) at PX pgs. 3–4; Trial Tr. 117:21–25, Oct. 21, 2013 (Finnerty); Finnerty Direct ¶¶ 103–06.)

43. Both experts testified at trial that there would be no disallowable OID if the JSNs were issued at $1,000 face value, *even though the JSNs were secured while the Old Notes were unsecured*, because that exchange would be expressly governed by Chateaugay. (Trial Tr. 136:9–20, Oct. 21, 2013 (Finnerty); Trial Tr. 214:2–4, Oct. 21, 2013 (Siegert).)

44. Moreover, Finnerty acknowledged that nearly all of the features that companies consider in connection with a debt exchange can be used in both face value and fair value exchanges:

Feature	**Available in Fair Value?**	**Available in Face Value?**
Grant of security in issuer's collateral	YES	YES
Interest rate change	YES	YES
Maturity date change	YES	YES
Payment priority change	YES	YES
Affiliate guarantees change	YES	YES
Other lending covenants	YES	YES
Redemption features	YES	YES
Add/remove a sinking fund	YES	YES
Add/remove conversion feature	YES	YES
Offer stock with new debt	YES	YES

(Trial Tr. 67:17–69:9, Oct. 21, 2013 (Finnerty).) In fact, Finnerty admitted that other than changing the face amount of the bond (which by definition is not available in face value exchanges), an issuer "could adjust every other factor" available to it. (Trial Tr. 69:4–9, Oct. 21, 2013 (Finnerty).)

45. Face value exchanges can and do involve the granting of security. (See Trial Tr. 214:2–4, Oct. 21, 2013 (Siegert).) An issuer may offer to provide security for new notes in a debt exchange as consideration for an extension of maturity dates. (See DX JD (OM for Wickes, Inc.) at DX00JD-0002. An issuer may also offer security in exchange for a reduction in current interest pay. (Trial Tr. 214:8–10, Oct. 21, 2013 (Siegert).)

f. *The Evidence Introduced at Trial Demonstrates that the Policy Concerns Underlying the Second Circuit's Chateaugay Decision Apply with Equal or Greater Force to Fair Value Exchanges*

46. The policy rationale underlying the Second Circuit's decision in Chateaugay and Fifth Circuit's decision in Pengo, that face value exchanges do not create OID that can be disallowed as unmatured interest in a bankruptcy proceeding applies with even greater force to fair value exchanges where investors are already being asked to reduce their principal amount. (Siegert Direct ¶ 34; Trial Tr. 17:2–9, Oct. 21, 2013 (Finnerty).)

47. The Committee did not provide any evidence supporting a viable policy rationale for a construction of section 502(b)(2) of the Bankruptcy Code that would justify disallowing OID created in fair value exchanges but not in face value exchanges.

48. Siegert explained that both fair and face value exchanges offer companies the opportunity to restructure out-of-court, avoiding the time and costs—both direct and indirect—of a bankruptcy proceeding. (DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0007.)

49. Moreover, Siegert credibly testified that the possibility that a claim in bankruptcy will be reduced as a result of exchange-created OID will be a significant disincentive to creditors being asked to consider fair value exchanges by a distressed issuer and would thus discourage out-of-court restructurings. (Siegert Direct ¶ 38; DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0061.)

50. Similarly, Finnerty concurred that ResCap's creditors would be very focused on the size of their claim in the event of a bankruptcy and that "having a smaller claim in bankruptcy would be less of an incentive to participate" in the Exchange. (Trial Tr. 102:18 – 103:3, Oct. 21, 2013 (Finnerty).) Finnerty further testified that "[i]f OID is going to be disallowed, then that package – the total package of incentives is going to be less attractive than if it is allowed." (Trial Tr. 101:15–17, Oct. 21, 2013 (Finnerty).)

51. Hence, the already-modest participation rate in the Exchange would likely have been even lower if the holders of the Old Notes had been told or believed that the JSN claim in the event of bankruptcy would be limited to the notes' distressed trading price rather than their face amount. (Siegert Direct ¶ 47.)

52. If a fair value exchange creates OID that is disallowed as unmatured interest, bondholders evaluating whether or not to participate in an out-of-court restructuring would be faced with the undesirable prospect of a lower and likely unknown claim in bankruptcy than they would have bargained for as compared to a creditor who did not facilitate a restructuring. (Siegert Direct ¶ 38.) Bondholders in such a situation will demand additional inducements to incent their participation—possibly including a circular request for a higher principal value to offset the creation of OID. (Siegert Direct ¶ 38.) Even more likely is that bondholders will simply reject the idea of a fair value exchange as a practice. (Siegert Direct ¶ 38.) The demand

for more principal will inhibit out-of-court reductions of debt and provide for greater interest costs, leading to more bankruptcies. (Siegert Direct ¶¶ 38-39.) In cases that are closest to bankruptcy, such a rule has its most profoundly negative impact—for example, a bondholder holding a bond which is trading at five or ten cents on the dollar would be impossible to induce into an exchange if the bondholder's claim would be capped near that number. (See Trial Tr. 208:12–25, Oct. 21, 2013 (Siegert).)

53. Therefore, a rule that disallowed OID as unmatured interest would unfairly penalize bondholders who are willing to exchange their notes and create a windfall for other creditors, who will have a resulting greater share of any distributable value. (Trial Tr. 28:6–29:20, Oct. 21, 2013 (Finnerty).)

54. Siegert also presented unrebutted testimony that restructured bank debt which trades at a discount as well as debt issued pursuant to a Plan of Reorganization would have OID based on the Committee's theories, creating additional market inconsistencies. (Siegert Direct ¶ 36; DX ABC (Siegert Report—Debt Exchange) at DX0ABC–0058.)

55. In fact, Siegert testified that out-of-court restructurings have already been affected by the simple assertion in this adversary proceeding that OID from a Fair Value exchange could be disallowed. (DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0011.) He is presently representing bondholders of a major distressed issuer in workout discussions, and his bondholder clients are categorically refusing to consider a Fair Value exchange. (Id. at DX0AIJ-0011.)

56. Finnerty further agreed that there is a strong bankruptcy policy in favor of speedy and inexpensive negotiated resolutions of disputes. (Trial Tr. 16:9–16, Oct. 21, 2013 (Finnerty).) He also agreed that it is appropriate to consider the ramifications of a rule that would place a creditor in the position of having to decide whether to cooperate with a struggling debtor when

such cooperation might make the creditor's claim, in the event of a bankruptcy, smaller, in both fair and face value exchanges. (Trial Tr. 16:17–17:1, Oct. 21, 2013 (Finnerty); see also Finnerty Direct ¶ 69 (confirming Finnerty's understanding that the JSNs received a smaller claim).)

57. The parties to these Consolidated Proceedings do not dispute that the Exchange created OID as a matter of tax law. (Trial Tr. 20:1–3, Oct. 21, 2013 (Finnerty); Trial Tr. 162:23–163:1, Oct. 21, 2013 (Siegert).)

58. The parties dispute whether the creation of OID in a fair value exchange as a matter of tax law also creates OID that is disallowable as unmatured interest as a matter of bankruptcy law. (See Official Comm. Of Unsecured Creditors' Opposition to Defendant UMB Bank, N.A.'s Partial Motion to Dismiss Pursuant to FRCP 12(b)(6) at 16, Comm. Adv. Dkt. No. 28; Defendant UMB Bank, N.A.'s Reply Memorandum of Law in Further Support of its Partial Motion to Dismiss Pursuant to FRCP 12(b)(6) at 2, Comm. Adv. Dkt. No. 37.) However, the Committee's own expert did not even conclude that the JSNs' claim included OID that is disallowable for bankruptcy purposes. Rather, the Committee's expert narrowly opined that the Exchange created OID as "a matter of economics." (Trial Tr. 19:22–20:3, 30:6–8, Oct. 21, 2013 (Finnerty).)

59. The motivations behind the GAAP and Tax Codes, and the recognition of OID as a result of an exchange under the GAAP and Tax Codes, are different from the motivations and purposes of the Bankruptcy Code and, as such, the tax law and accounting treatment of an exchange should have no bearing in bankruptcy. (See DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0009.)

60. Finnerty, the Plaintiffs' expert, conceded that the disclosure in the Exchange documents regarding the creation of tax OID does not address the potential treatment of claims

in bankruptcy. (Trial Tr. 48:16–19, Oct. 21, 2013 (Finnerty).) Finnerty also agreed that the worksheet created by ResCap's auditors, PricewaterhouseCoopers, after the Exchange was "purely a tax calculation." (Trial Tr. 53:6–10, Oct. 21, 2013 (Finnerty).)

61. If an exchanging bondholder's claim in bankruptcy is to be determined based on the trading price of its debt, then exchanging bondholders will be the only creditors whose claim amount is determined based on the trading prices. (DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0010; see also Trial Tr. 23:20–24:2, Oct. 21, 2013 (Finnerty is not aware of any similar situation regarding claim determination.)

g. *The Evidence Presented at Trial Demonstrated that New Debt Issuances Are Fundamentally Different from Debt Exchanges*

62. The parties to these Consolidated Proceedings do not dispute that disallowable OID is created for bankruptcy purposes when a company issues new debt in an original cash issuance for less than its face value. (Finnerty Direct ¶ 76; Trial Tr. 155:7-15, Oct. 21, 2013 (Siegert).) But the Committee's contention that debt-for-debt exchanges are no different than original cash issue discount bonds is thoroughly unsupported by the evidence.

63. For example, in booking the Exchange, ResCap carried the JSNs at the full principal amount of the notes, plus an additional amount representing the concession made by the holders who tendered. (See supra ¶ 31.) This evidence was confirmed at trial by Finnerty, the Plaintiffs' expert. (Trial Tr. 64:15–22, Oct. 21, 2013 (Finnerty).) The carrying value of the JSNs decreased over time to approach the principal amount as the deferred concession amortized — effectively the opposite of accounting for OID. (DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0020.)

64. This is not the way an issuer accounts for a discount bond initially issued for cash. There, the issuer books its liability as the amount of cash received, and then increases its liability as the OID amortizes—the exact opposite of the accounting method applied by ResCap with respect to the JSNs. (Trial Tr. 64:19–65:12, Oct. 21, 2013 (Finnerty); see also DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0023–0025.) Finnerty acknowledged at trial that ResCap applied a different accounting treatment to the New Notes from the Exchange than the accounting treatment that an issuer would apply to a cash issue discount bond. (Trial Tr. 65:3–6, Oct. 21, 2013 (Finnerty).)

65. Finnerty further admitted that "an exchange offer is different from a cash offer." (Trial Tr. 59:18, Oct. 21, 2013 (Finnerty).) Finnerty admitted that a cash offer is "economically" different than an exchange offer "because in the case of a cash offer, someone is buying up a brand-new bond and is paying cash. In the case of an exchange offer, someone has existing claims and those claims are going to be substituted for new claims; so that economically is a very different transaction." (Trial Tr. 59:18–23, Oct. 21, 2013 (Finnerty).) Finnerty's testimony corroborates Siegert's contention that in a debt exchange "the borrower receives no cash from the lender, and instead receives concessions from the lender in various forms, including debt forgiveness, extended maturities and reduced interest expense." (DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0014.)

66. Finnerty also admitted that a debt exchange is "a more complex transaction" and that it is "more difficult to evaluate, because you have to figure out the value of what you're giving up and evaluate that in relation to the value of what you're getting in return." (Trial Tr. 60:5–8, Oct. 21, 2013 (Finnerty).) Siegert testified that when a note is sold for cash at an initial

discount, it is simple to calculate both the issue price and the amount of OID. (Trial Tr. 202:19–203:6, Oct. 21, 2013 (Siegert).)

67. The Committee's concept of OID ignores consideration provided by the tendering noteholders to ResCap that is not captured in the fair market value of the tendered notes. (DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0019.) Here, the tendering noteholders provided ResCap with several benefits, including, but not limited to, a significant reduction in the amount of ResCap's outstanding debt obligations, a reduction in ResCap's debt service expenses and an extension on the maturities of ResCap's outstanding debt. At trial, Finnerty admitted that when a holder of a note tenders it back to a company, the holder "is giving the issuer something that is different and additional to what a cash purchaser gives," whether or not the note is trading at distressed levels in the market at the time. (Trial Tr. 59:24–60:3, Oct. 21, 2013 (Finnerty); see also DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0023–25.)

h. *The Committee's Proposed OID Rule Would Lead to Increased Litigation*

68. Disallowing OID as unmatured interest in connection with fair value exchanges will require retrospective litigation to determine whether exchanged notes should be deemed to have disallowable unmatured interest, unless an absolute bright line rule is adopted. (Siegert Direct ¶¶ 46, 48.)

69. The Committee believes the agreed upon terms of a workout and the results of that agreement matter. (Trial Tr. 73:1–18, Oct. 15, 2013 (Committee Opening Statement).) For example, as part of his direct testimony, Finnerty submitted an analysis of ResCap's pro-forma estimated assets available for the AFI Revolver and the JSNs to determine whether, in his view, the exchange would have been attractive to holders of Old Notes even if they had been told that OID arising from the exchange would be disallowed in a ResCap bankruptcy. (Finnerty Direct¶

85; id. App'x 10.) Although Finnerty attempts to rely on his Appendix 10 to prop up his *ex post* analysis of the JSNs decision to tender, it is deeply flawed.

70. First, Appendix 10 fails to address anything other than a near-term ResCap bankruptcy. (See Finnerty Direct App'x 10.) As Finnerty admitted at trial, the decision facing a noteholder when considering an exchange is not binary, but instead is made up of a whole range of possibilities, including various different times that a company could file. (Trial Tr. 34:8–19; 96:22–97:3, Oct. 21, 2013 (Finnerty).) Finnerty has provided no indication that such a pro forma tool could have helped predict the outcome that actually happened in this case.

71. Second, Finnerty's Appendix 10 ignores the possibility—explicitly set forth in the very analyst report he relied on to create exhibit 10— that many of the secured facilities in existence prior to the Exchange could be substantially over-collateralized. (Trial Tr. 86:14–24, Oct. 21, 2013 (Finnerty); PX 236 (May 26, 2008 Credit Sights Report) at PX pg. 12.) Appendix 10 also ignores any value that might be created in a bankruptcy through lawsuits. (Trial Tr. 87:7–12, Oct. 21, 2013 (Finnerty).) Even with such flaws, Finnerty candidly admitted that there were scenarios in a near term ResCap bankruptcy where Hold-outs would receive greater distributions than the JSNs if OID was disallowed, and the range of such possibilities would increase if he had modeled the effects of unencumbered value obtained via litigation or through overcollateralization at other facilities.

72. Finnerty's Appendix 10 also uses the actual trading prices on June 6, 2008 to fix the alleged disallowable OID which he claims holders would knowingly have accepted, but never explains how the holders of the Old Notes would have known the amount of OID that would be created prior to tendering and the transaction closing. (Trial Tr. 50:24–51:21, Oct. 21, 2013 (Finnerty).) To the contrary, he testified that the Offering Memorandum contained no

disclosure of the price of the first trade, that no one would ever offer such a view, and that values could materially change between the time an exchange offer becomes irrevocable and the first trades in any new bonds. (Trial Tr. 111:13–112:15, Oct. 21, 2013 (Finnerty).)

73. Putting aside whether the analysis in Appendix 10 to Finnerty's direct testimony is accurate, it is something that will yield absolutely different and highly subjective results in every single debt for debt exchange. Yet Finnerty testified that a court should consider an analysis like the one he submitted as Appendix 10 to his direct testimony in every future bankruptcy proceeding involving a fair value exchange. (Trial Tr. 91:6–24, Oct. 21, 2013 (Finnerty).) Finnerty's proposal is unwieldy and unworkable and would serve only to unnecessarily lengthen and delay bankruptcy proceedings.

74. The OID rule sought by the Committee presents a host of inequitable and impractical consequences, with serious commercial risks. (Siegert Direct ¶ 48.) Indeed, if the question of whether OID constituting unmatured interest is deemed to turn on whether the parties who tendered got a "good deal," an improvement in position or priority, or are otherwise likely do better than hold-outs in a near term bankruptcy event, the issue of whether OID constituting unmatured interest exists frequently will not be known at the time of the exchange, and will only become known after complex litigation during the course of the bankruptcy. (Siegert Direct ¶ 46; DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0011.)

75. Even if it is known at the time of an exchange that OID disallowable as unmatured interest will be created and limit claims on the new notes to the prices in the first day's trade, it will be extremely difficult for investors to determine in advance of the exchange what the opening price—and hence their claim in a near term bankruptcy—will be. There were no price projections contained anywhere in the Offering Memorandum; Finnerty confirmed that

such projections are simply not practical. (DX BB (Offering Memorandum); Trial Tr. 50:24–51:12, Oct. 21, 2013 (Finnerty).) In part, this unpredictability is on account of the substantial debate that would accompany a bankruptcy court's determination of the relevant price. (Trial Tr. 203:18–204:5, Oct. 21, 2013 (Siegert).)

76. Additionally, the creation of disallowable unmatured interest has the effect of further depressing the trading price, which would create additional OID and additional unmatured interest—which would adversely affect the trading price. In addition to complicating the calculation of an exchange price, this circular effect further disincentivizes potential tenders. (DX ABC (Siegert Report—Debt Exchange) at DX0ABC-0060; Trial Tr. 204:24–205:16, Oct. 21, 2013 (Siegert).)

i. *The Plaintiffs' Proposed Method for Calculating Disallowable OID Is Unreliable and Inconsistent with How AFI Viewed the Exchange Offer*

77. The Plaintiffs contend that the JSNs' claim should be reduced to the fair market value of the first days' average trading price, from which the alleged OID is calculated, plus accretion. (PX 243 (Finnerty Report) at PX 243 pg. 20.) The Defendants introduced evidence at trial demonstrating that the Plaintiffs' proposed method for calculating OID is both unreliable in the context of a bankruptcy claim and inconsistent with AFI's internal documents at the time of the Exchange. (DX CC (Project Gallop Accounting Implications) at DX00CC-0009; DX DD (ResCap Bond Exchange Memorandum) at DX00DD-0001; Hall Dep. 98:7–17, Sept. 26, 2013, Adv. Dkt. No. 120.)

78. The Plaintiffs' proposed method for calculating OID using the "fair market value" of the consideration exchanged by the holders of the Old Notes is unreliable in the context of a bankruptcy claim. Finnerty, the Plaintiffs' expert, admitted that in this case, his fair market value

calculation was based on trades of the JSNs amounting to just 0.3% of the issue facilitated by Bank of America. (Trial Tr. 106:1–8, Oct. 21, 2013 (Finnerty).)

79. Siegert credibly testified that there are significant problems associated with determining the economic value of new debt issued in an exchange offer based on trading price, as the trading price may not always represent the economic value of the notes. (Siegert Direct ¶ 35.)

80. The Plaintiffs' method for calculating disallowable OID is also inconsistent with AFI's contemporaneous internal documents. Around the time of the Exchange, AFI referred to the market trading discount that ResCap was able to capture through the Exchange as the difference between the face value of the Old Notes and the face value of the JSNs. (Hall Dep. 94:20–95:7, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.) Moreover, AFI did not believe that it would have been possible to complete a successful exchange in which holders of the Old Notes were offered new notes with a face value that was equal to the trading price of the Old Notes. (Hall Dep. 60:9–14, Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

j. *The Evidence Presented at Trial Shows that the Hold Outs Ultimately Received a Higher Recovery than the JSNs Are Projected to Receive under The Plan*

81. The Committee contends that it is appropriate to disallow alleged unaccreted OID from the JSNs claim because the JSNs will still do better in this bankruptcy than the holders of the Old Notes, who chose not to cooperate in the exchange. But when evaluating the incentives as of the time of the exchange, and in view of the need to avoid disincentives that would reduce cooperation with struggling debtors, payment outcomes in bankruptcy are not the only considerations. (Trial Tr. 33:16–34:7, Oct. 21, 2013 (Finnerty).) Rather, Noteholders evaluating an exchange will also weigh potential pre-bankruptcy cash flows including interest payments and

any amortization, as well as the prospect of reaching maturity before a default. (Trial Tr. 34:20–23, Oct. 21, 2013 (Finnerty).)

82. In hindsight, the Hold Outs whose notes matured in 2010 and 2011 got paid in full, for the par value of their Old Note, totaling approximately $1.6 billion. Of course, the successful completion of the Exchange with the JSNs was a material reason ResCap was able to make such payments. (See supra ¶ 17.) Although they did not offer to help the Company reduce its debt load, by making it to maturity these Hold Outs did substantially better than their JSN counterparts who agreed to exchange.

83. Even with the inducements offered to the JSNs in connection with the Exchange, the evidence presented at trial demonstrated that the Hold Outs as a group received a greater weighted average recovery than the JSNs' projected recoveries under the Plan. (Siegert Direct ¶ 33.)

84. Specifically, the Hold Outs are projected to receive a weighted average recovery of 64.5% of par, while the weighted average recovery for the JSNs, assuming that none of their claim is reduced by OID, would be 58% of par of the Old Notes. (Siegert Direct ¶ 33.) The weighted average recovery for the JSNs assuming OID would be 50% of par of the Old Notes. (Siegert Direct ¶ 33.)

k. ***Assuming, Arguendo, the Court Disallows a Portion of the JSN Claim As Alleged Unmatured Interest, Such Interest Has Continued to Accrete Since the Petition Date***[9]

[9] Paragraphs 85 through 89 apply only if the Court finds that the JSNs' claims include unmatured interest arising from OID generated by the Exchange and the JSNs are determined to be oversecured.

85. Even assuming, *arguendo*, a portion of the JSN claim is disallowed, the JSNs are entitled to any accretion of interest that has occurred since the Petition Date. Since the Petition Date, and through December 15, 2013, at least an additional $252 million has accreted and must be paid to the JSNs. (Finnerty Direct Ex. 6A.)

86. The unamortized portion of such OID should be determined based on the use of a semi-annual amortization schedule. (DX AIJ (Siegert Rebuttal Report to Finnerty) at DX0AIJ-0025.) The Company's tax advisors utilized a semi-annual amortization method. (PX 189 (PWC Accounting Document) at PX pg. 5.) Such unmatured interest must continue to accrete during the case in full through final payment of the JSN claims.

87. Pursuant to court orders, on June 13, 2013 and July 29, 2013, the Debtors paid down a portion of the principal amount and accrued prepetition interest of the JSNs' claims in the amounts of $800 million and $300 million, respectively (the "Paydowns"). (Dkt. Nos. 3967, 4404.) The Paydowns did not affect accretion of OID, as nothing in the Indenture allows for a partial prepayment that reduces ResCap's duty to ultimately pay the full amount of the Note. (PX 1 (Indenture).)

88. Alternatively, if the Court determines that the Paydowns do reduce the continued post-petition accretion of alleged OID, the Paydowns should be allocated first to pre and post-petition interest and then to principal.

89. Any contrary provision respecting the allocation of the proceeds of a partial redemption should not apply, as the Paydowns were not redemptions provided for by the Indenture.

A. *The JSNs' Security Interests in the Assets Listed on Schedule 6 to the Committee Complaint Cannot Be Avoided as Preferential Transfers*

90. In Count XI of the Committee Complaint, the Committee seeks to avoid as preferential security interests allegedly granted for the JSNs' benefit (the "Alleged Preferential Transfers") in certain assets having a stated book value of $365,099,777 and alleged fair value of $283,902,854 (the "Alleged Preference Assets") within 90 days of the Petition Date (the "Preference Period"). (See Comm. Complaint 33-34; PX 241 (Landy Report) at Appendices III-A x–xiii, PX pgs. 96-139.)

91. The Alleged Preference Assets are listed on Schedule 6 to the Committee Complaint (PX 127), and consist of (i) mortgage loans held for sale ("HFS Loans"), including government-insured mortgage loans ("FHA/VA Loans"), (ii) real estate owned ("REO"), which is real estate obtained by the Debtors in connection with foreclosures, and (iii) government insurance claims arising as a result of expenditures incurred by the Debtors in connection with FHA/VA Loans.

92. The Alleged Preference Assets constitute inventory and receivables of the Debtors.

93. All of the Alleged Preferential Transfers are alleged to have been made on or after February 29, 2012. (See Official Comm. Of Unsecured Creditors' Opposition to Defendant UMB Bank, N.A.'s Partial Motion to Dismiss Pursuant to FRCP 12(b)(6) at 5 n.7, Comm. Adv. Dkt. No. 28.) On September 12, 2013, this Court ordered that the relevant period for determining the applicability of a defense pursuant to Section 547(c)(5) of the Bankruptcy Code shall be between February 29, 2012 and the Petition Date (the **"**Modified Preference Period"). (Order Granting the Notes Trustee Leave to Amend, Sept. 12, 2013, Comm. Adv. Dkt. No. 97)

94. The Committee did not allege, and offered no evidence to show, that the Alleged Preferential Transfers were made for the purpose of preferring the JSNs over unsecured creditors, or in response to any efforts by the JSNs to improve their position. (See Trial Tr. 150:14–21, Oct. 17, 2013 (Landy).)

95. As previously discussed, the JSNs had an All-Assets 'floating' lien on all or substantially all available assets of the Debtors. Consistent with such a blanket lien on collateral, in the ordinary course of the Debtors' business, assets would move in and out of the Notes Collateral. (Farley Dep. 49:17–23; 256:14–23, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

96. To the extent that any of the Alleged Preferential Transfers were in fact made during the Preference Period, they were made pursuant to the All-Assets 'floating' lien and in the ordinary course of the Debtors' business, which involved, *inter alia*, the sale, purchase, origination, and refinancing of loans and other assets, as well as the funding of various loan-related advances and corresponding creation of receivables, and the grant of security interests for the benefit of AFI and the JSNs as required by the AFI Security Agreement and the Notes Security Agreement.

a. *The Committee Has Failed to Make a Prima Facie Case for Avoidance of the Alleged Preferential Transfers*

i. The JSNs Were Oversecured at the Beginning of the Modified Preference Period

97. The Notes Trustee has repeatedly asserted that the JSNs were oversecured as of the start of the Preference Period or Modified Preference Period. (See UMB Bank's Memorandum of Law in Support of Its Motion for Confirmation of Time to Answer or, in the Alternative, for Leave to Amend Its Second Partial Answer 20, Aug. 19, 2013, Comm. Adv. Dkt. No. 81 ("Here, the evidence will show that the Notes were oversecured on the day of the first

Count XI Transfer (or, alternatively, 90 days prior to the Petition Date)."); UMB Bank's Answer to Comm. Complaint 24, Aug. 27, 2013, Comm. Adv. Dkt. No. 92 ¶ 213 (denying the allegations in paragraph 213 of the Committee Complaint) (Eighth Defense) ("the Secured Parties were oversecured on the day that was 90 days prior to the Petition Date"); Joint Pretrial Order (Proposed) 90, Oct. 9, 2013, Comm. Adv. Dkt. No. 139 ("Evidence from Mr. Fazio will show that the JSNs were oversecured as of February 29, 2012").)

98. The Committee did not offer any evidence to show that the JSNs were undersecured as of February 29, 2012—the starting date of the Modified Preference Period.

99. Conversely, the Notes Trustee's expert, Michael Fazio of Houlihan Lokey Capital, Inc. ("Houlihan Lokey"), provided uncontroverted testimony showing that the JSNs were oversecured as of February 29, 2012—the starting date of the Modified Preference Period and the date on which the first Alleged Preferential Transfer took place. Mr. Fazio has almost three decades of experience in advisory services in connection with acquisitions, divestitures, corporate strategy, operational oversight, and restructuring for financial institutions. Mr. Fazio is currently a Managing Director at Houlihan Lokey's Financial Restructuring Group and Co-Head of the firm's European Financial Institutions Group. Mr. Fazio previously led the firm's Global Portfolio Valuation Practice and its New York office Financial Advisory Services Practice. (See Direct Testimony of Michael Fazio ¶ 1, Oct. 8, 2013, Comm. Adv. Dkt. No. 136 ("Fazio Direct").)

100. Mr. Fazio testified that the JSNs were oversecured on both a book value and fair market value basis as of February 29, 2012, *without* taking into account the disputed collateral categories of goodwill or going concern value, the value of contracts or agreements and other related non-financial assets, or causes of action against AFI or other parties. (See Trial Tr.

234:7–12, Oct. 22, 2013 (Fazio) ("The book value of 2.332 billion dollars is in excess of the amount of the JSN claim."); see also DX ABB (Fazio Report—Preference) at DX0ABB-0014–15; Fazio Direct ¶ 12 ("[I]t is my opinion that, as of February 29, 2012, the date on which the first transfer alleged to be preferential by the UCC took place, certain collateral securing the JSNs had a book value and fair market value in excess of the JSNs' claim amount.").)

101. The Committee served no expert reports and offered no testimony rebutting Mr. Fazio's findings that the JSNs were oversecured as of the first date of the Modified Preference Period.

102. As described below, Mr. Fazio also testified that the value of the Notes Collateral decreased during the Modified Preference Period on both a book value and fair market value basis. The Committee served no rebuttal report in response to this aspect of Mr. Fazio's expert testimony.

ii. The Committee Failed to Demonstrate That the JSNs Would Receive More in a Hypothetical Chapter 7 Liquidation as a Result of the Alleged Preferential Transfers

103. The Committee offered Marc Landy, a Director at AlixPartners, LLP, as an expert witness. (PX 241 (Landy Report).) Mr. Landy had never prepared an expert report in support of a preference claim prior to his engagement in the Consolidated Proceedings. (See Trial Tr. 150:8–11, Oct. 17, 2013 (Landy).)

104. In addition to identifying the Alleged Preference Assets, Mr. Landy testified that in his opinion the Alleged Preferential Transfers "enabled the JSNs to receive more than they would receive in a hypothetical Chapter 7 liquidation case had the [Alleged Preferential Transfers] not been made." (Direct Testimony of Marc E. Landy ¶ 54, Oct. 8, 2013, Comm. Adv. Dkt. No. 126 ("Landy Direct").) In forming this conclusion, however, Mr. Landy failed to

perform his own liquidation analysis, relying instead on a liquidation analysis included in the Disclosure Statement for the Joint Chapter 11 Plan Proposed by Residential Capital, LLC, *et al*. and the Official Committee of Unsecured Creditors, dated August 23, 2013 [Dkt. No. 4819-1] (the "Disclosure Statement"). (Trial Tr. 168:13–169:11 Oct. 17, 2013 (Landy).)

105. The Disclosure Statement liquidation analysis on which Mr. Landy relied assumes that the liquidation occurs on a date other than the Petition Date, specifically April 30, 2013. (See Trial Tr. 168:17–169:4, Oct. 17, 2013 (Landy); PX 256 (Disclosure Statement) at PX pg. 492.) Additionally, the liquidation analysis he borrowed ascribes zero value to estate claims against Ally, notwithstanding that AFI has agreed to pay $2.1 billion to settle such estate claims and other third-party claims. However, the Examiner appointed by the Court in these cases found that the Debtors or their creditors held approximately $3.1 billion of causes-of-action against AFI that were "likely to prevail" or "more than likely to prevail," and approximately $5.5 billion or more in total causes-of-action. (See Trial Tr. 169:8–11, Oct. 17, 2013 (Landy); PX 256 (the Disclosure Statement) at PX pg. 92.) Mr. Landy conceded that he does not know if ascribing a zero value to claims against Ally is a reasonable assumption. (See Trial Tr. 171:12–16, Oct. 17, 2013 (Landy).)

106. Defendants offered Mr. Fazio's expert testimony respecting the inadequacies of Mr. Landy's purported liquidation analysis. (See Trial Tr. 119:1–7, Oct. 22, 2013.) Mr. Fazio credibly testified that the Debtors' liquidation analysis cannot support the Committee's preference claim because, among other reasons, it: (a) ascribes zero value to estate claims against AFI, and (b) ascribes zero value to intercompany claims among the Debtors, which constitute part of the Notes Collateral. (See Fazio Direct ¶ 20; see also DX AIH (Fazio Rebuttal Report to

Landy) at DX0AIH-0007.) The Committee did not cross-examine Mr. Fazio with respect to his testimony rebutting Mr. Landy, nor did the Committee offer any opposing testimony.

iii. The Committee's Methodology in Identifying the Alleged Preference Assets Was Inherently Flawed

107. The Committee offered Mr. Landy as its sole witness respecting the identification of the Alleged Preferential Assets. (See Trial Tr. 118:18–22, Oct. 17, 2013 (Landy); PX 241 (Landy Report) at PX pg. 3.)

108. The Committee retained AlixPartners as its financial advisor in June 2012. (Id.) AlixPartners received access to the CFDR and the Debtors' personnel starting in "August or September" 2012, nearly 14 months before Mr. Landy's expert report was filed. (Trial Tr. 116:6–7, Oct. 17, 2013 (Landy); see also Trial Tr. 116:14–16. Oct. 17, 2013 (Landy); Trial Tr. 117:6–10, Oct. 17, 2013 (Landy); Trial Tr. 122:16–18, Oct. 17, 2013 (Landy) ("I've had a lot of time.").)

109. Mr. Landy's methodology in preparing Schedule 6 to the Committee Complaint was simply to compare the asset identification numbers in the CFDR as of the first day of the Modified Preference Period (February 29, 2012) against the asset identification numbers in the CFDR as of the Petition Date, and to identify the asset identification numbers that were included as of the Petition Date but not on February 29, 2012. (See Trial Tr. 152:16–153:13, 162:12–15, Oct. 17, 2013 (Landy).)

110. Mr. Landy assumed, based on this rudimentary comparison, that the assets appearing in the CFDR after the first day of the Modified Preference Period constituted preferential transfers. As Mr. Landy conceded at trial: "I did not attempt to understand the

circumstances for why each loan may have appeared on 5/13 . . . .” (See Trial Tr. 153:10–22, Oct. 17, 2013 (Landy); Trial Tr. 155:5–7, Oct. 17, 2013 (Landy).)

111. When preparing Schedule 6 to the Committee Complaint (PX 127) and his expert report, Mr. Landy did not investigate the quantity of asset sales or acquisitions during the Modified Preference Period, the pace of loan modifications during the Preference Period, whether the Debtors acquired the Alleged Preference Assets with the proceeds of Notes Collateral, or the value of the Notes Collateral on the Petition Date as compared to the first day of the Modified Preference Period. (See Trial Tr. 155:20–159:12, Oct. 17, 2013 (Landy).)

112. Mr. Landy testified that while he had a general understanding of the Debtors business during the Preference Period, he did not consider the “Loan Funding Date” or “Loan Modification Date” fields within the CFDR in preparing Schedule 6. (See Trial Tr. 159:2–12, Oct. 17, 2013 (Landy).) Mr. Landy did not check to see if assets were owned by the Debtors prior to February 29, 2012 but coded in a different manner within the CFDR, or whether JSN cash was used to acquire the Alleged Preference Assets. (See Trial Tr. 153:10–13; 157:11–15; 157:25–158:6, Oct. 17, 2013 (Landy).)

113. Instead, Mr. Landy and the Committee relied solely on the assumption that “if an asset appeared for the first time on 5/13, because it hadn’t been there on 2/29, that it was acquired during that period. It was an asset added to the collateral during that period.” (Trial Tr. 157:3–6, Oct. 17, 2013 (Landy).) Mr. Landy testified: “I didn’t evaluate whether they, to use your phrase, ‘acquired title.’ I put together the schedule. Either they were—they were in the May 13th column and they weren’t in the 2/29 column. That’s—that’s what I did.”(Id. at 162:10–15, Oct. 17, 2013 (Landy).)

114. The Committee's methodology was superficial at best and inadequate to establish that preferential transfers occurred. As noted below, in the extremely limited amount of time the Notes Trustee's experts at Zolfo Cooper had to evaluate the (i) CFDR, (ii) limited relevant deposition testimony, and (iii) informal and shifting explanations offered by the Debtors for how to interpret the CFDR, they were able to identify numerous mistakes and unexplained anomalies concerning Schedule 6 (PX 127). (See infra ¶¶ 116–138.)

iv. The Committee Has Conceded That the JSNs Held Security Interests in Certain of the Alleged Preferential Assets Prior to the Preference Period

115. Defendants offered the expert testimony of Scott Winn of Zolfo Cooper LLC in connection with the Committee's preference claim. (See Trial Tr. 218:9–18, Oct. 21, 2013.) Mr. Winn, an expert in financial restructuring and financial operations, has over 25 years of professional experience in finance, operations and strategy, and specializes in distressed and underperforming companies. (See Sworn Witness Statement of Scott Winn ¶ 1, Oct. 8, 2013, Comm. Adv. Dkt. No. 133 ("Winn Direct").) Mr. Winn, a Senior Managing Director of Zolfo Cooper LLC, has provided hands-on financial and operational leadership and advice to distressed organizations, their creditors, investor groups and other stakeholders. (Id.) He has provided a broad range of advisory services including interim management, operational restructuring, capital restructuring, business valuations, liquidation analyses, financings and litigation consulting. (Id.) Mr. Winn has provided financial advisory services in many complex bankruptcy cases that involved evaluating solvency and performing financial analyses in connection with fraudulent conveyance, preference actions and intercompany claims. (Id.)

116. Notwithstanding that the deadline for the substantial completion of the production of documents was June 8, 2013, and despite repeated requests, Mr. Winn and his colleagues at

Zolfo Cooper were not provided access to the CFDR until August 10 or 12, 2013. (See Trial Tr. 26:16–22, Oct. 22, 2013 (Winn) (Mr. Winn first received access to the CFDR, August 10 or August 12, 2013).)

117. As of the date of his expert report and as of trial, Mr. Winn had incomplete information from the Debtors with respect to the assets on Schedule 6. Based on the limited information contained in the CFDR and with the limited time available, Mr. Winn prepared an expert report entitled "Observations on UCC Complaint – Schedule 6," and provided expert testimony on the manner in which the Alleged Preferential Assets were coded within the CFDR. (See DX ABN (Winn Report—Schedule 6) at DX0ABN-0005; Winn Direct ¶ 23; Trial Tr. 244:2–20; 258:21– 259:9, Oct. 21, 2013 (Winn).)

118. In order to perform this analysis, Mr. Winn reviewed the way in which the Alleged Preferential Transfers were tracked in the CFDR from inception through the Petition Date, based on the unique identification numbers assigned to the Alleged Preferential Assets in the CFDR. (See DX ABN (Winn Report—Schedule 6) at DX0ABN-0010.)

119. Mr. Winn determined that many of the Alleged Preferential Transfers should not have been included on Schedule 6. (DX ABN (Winn Report—Schedule 6) at DX0ABN-0012 ("[T]he CFDR shows that approximately $18 million of the alleged Preference Assets were owned by the Debtors and served as JSN collateral as of or prior to 2/29/12 and thus should not be listed as Preference Assets.").)

120. Committee expert Mr. Landy, who prepared Schedule 6, conceded that certain of these assets were inaccurately included on Schedule 6. (See Landy Direct ¶ 56, Oct. 8, 2013, Comm. Adv. Dkt. No. 126 ("I have determined that I concur with Mr. Winn's observations regarding (a) 18 loans identified as 'FHA/VA Reclassified as Loans HFS' . . . with a net book

value of approximately $1.95 million, and (b) 2 loans identified as 'REO Reclassified as Loans' . . . , with a net book value of $50,478.") ("Mr. Winn identifies approximately $12 million of 'REO' assets that were pre-existing components of the JSN collateral pool as of February 29, 2012, and were therefore never transferred to or for the benefit of the JSNs during the preference period.").)

121. Specifically, Mr. Landy concurred with Mr. Winn's conclusions that:

- 18 FHA/VA loans that were within the Notes Collateral prior to the Preference Period and reclassified as HFS loans during the Preference Period were within the CFDR prior to the Preference Period and should not have been included on Schedule 6;
- 2 REO assets that were within the Notes Collateral prior to the Preference Period and reclassified as HFS loans during the Preference Period were within the CFDR prior to the Preference Period and should not have been included on Schedule 6; and
- Approximately $12 million of REO assets on Schedule 6 were in the CFDR as Notes Collateral prior to the Preference Period.

v. The Appearance of Assets in the CFDR Is Not a Valid Basis on Which to Identify Preferential Transfers

1. *The Evidence Shows That Certain of the Alleged Preference Assets Were Purchased or Originated by the Debtor, and That the JSNs Likely Held Security Interests in Such Assets, Prior to the Preference Period*

122. The appearance of assets in the CFDR in and of itself is not a valid basis by which to identify preferential transfers. (See Trial Tr. 257:16–21, Oct. 21, 2013 (Winn).) For example, Mr. Winn's analysis showed that although 367 of the HFS Loans on Schedule 6, valued at approximately $53 million, appeared in the CFDR for the first time during the Preference Period, these loans had "Loan Funding Dates" prior to the Preference Period, suggesting that they were originated or purchased by the Debtors prior to the Preference Period, and that the JSNs' All-Assets lien, which extended to virtually all loans not pledged under another funding facility, thus

extended to those loans prior to the Preference Period. (See DX ABN (Winn Report—Schedule 6) at DX0ABN-0015.)

123. "Loan Funding Date" is a field within the loan history table in the CFDR. (See PX 139 (CFDR); see also DX ABN (Winn Report—Schedule 6) at DX0ABN-0009.) The CFDR has a data dictionary that contains the following definition of "Loan Funding Date":

> The date that the company funded the loan. For loans originated by the company, this is the date we funded the borrower. For loans acquired by the company, this is the date the funds were paid to the seller of the loan. For intra-company transfers, this is the date of the transfer. (PX 139 (CFDR).)

To make matters more confusing, FHA/VA Loans, which comprise 58 percent of the book value of the Alleged Preference Assets, are not assigned a "Loan Funding Date" in the CFDR. (PX 139 (CFDR).)

124. Indeed, the CFDR has a veritable dearth of information about the FHA/VA Loans; not only do these loans not have "Loan Funding Dates," the CFDR does not track whether these loans have "Loan Modification Dates" or whether the FHA/VA Loans are HELOCs. (See PX 139 (CFDR).)

125. The Committee was unable to explain why the "Loan Funding Dates" for 255 of the 367 HFS Loans identified by Mr. Winn preceded the Preference Period. Mr. Landy asserted that 121 of the 367 loans were previously identified in the CFDR with either the "REPURCHASE OPTION" or the "GMACB" label. Mr. Winn agreed upon further review of the CFDR, that 112 of the 367 loans—rather than 121— were previously identified with the "REPURCHASE OPTION" label, which indicates that these 112 loans were sold by the Debtors into a securitization, and were subsequently repurchased by the Debtors during the Preference

Period. (See Landy Direct ¶ 56(d); Trial Tr. 26:2–5, Oct. 22, 2013 (Winn); see also Trial Tr. 26:6–13, Oct. 22, 2013 (Winn).)

126. Mr. Landy had no credible explanation, however, as to why the remaining 255 HFS Loans had "Loan Funding Dates" prior to the Preference Period. While Mr. Landy testified that certain of these loans were labeled "GMACB" in the CFDR prior to the Preference Period, Mr. Winn was unable to identify a "GMACB" label, or the purported meaning of such a label, anywhere within the CFDR. Additionally, with respect to the remaining HFS Loans for which Mr. Landy was unable to identify a "REPURCHASE OPTION" or purported "GMACB" label, Mr. Landy simply assumed that the Debtors sold these loans into securitizations prior to the Preference Period, and then repurchased them during the Preference Period. (See Trial Tr. 164:9–21, Oct. 17, 2013 (Landy); see also Landy Direct ¶ 56(d).)

127. This assumption is unsupported by the evidence, and inconsistent with the Debtors' practices of tracking loans in the CFDR. For example, Mr. Landy ignores that when the Debtors sold loans into securitizations, such loans remained in the CFDR with a "Fund Facility" label of "SECURITIZATION" or "REPURCHASE OPTION." (See PX 139 (CFDR); Trial Tr. 252:17–253:17, Oct. 21, 2013 (Winn).) Of the 367 Alleged Preference Assets with "Loan Funding Dates" prior to the Preference Period, 255 were never coded as "SECURITIZATION" or "REPURCHASE OPTION" in the CFDR. (See PX 139 (CFDR).) Additionally, Mr. Landy fails to explain why a loan that was originated by the Debtors, subsequently sold into a securitization, and then repurchased by the Debtors would appear in the CFDR *for the first time* upon the repurchase, rather than at the time of its origination. (See PX 139 (CFDR).)

128. The Debtors were also unable to provide reliable explanations as to why 255 of the Alleged Preference Assets had "Loan Funding Dates" prior to the Preference Period but did

not appear in the CFDR prior to that time, or have CFDR labels of "REPURCHASE OPTION" or "SECURITIZATION." (Trial Tr. 26:23 – 27:9, Oct. 22, 2013 (Winn).) Teresa Rae Farley, the Debtors' 30(b)(6) witness with respect to the CFDR, testified that such loans could be modifications of loans previously owned by the Debtors (and subject to the JSNs' security interests), because modified loans could be assigned new loan identification numbers upon their modification but retain their original "Loan Funding Date." Subsequent conversations between Zolfo Cooper and Barb Westman, the Debtor employee most familiar with the CFDR, revealed that such loans could also be refinancings of old loans, because loan refinancings receive new unique identification numbers in the CFDR and do not cross-reference the underlying refinanced loan anywhere in the CFDR. (See Trial Tr. 262:8–22, Oct. 21, 2013 (Winn); see also DX ABN (Winn Report—Schedule 6) at DX0ABN-0009.)

129. Further review of the CFDR has shown that of the 255 Alleged Preference Assets which appear in the CFDR for the first time during the Preference Period but have "Loan Funding Dates" prior to the Preference Period, 123 of these assets also have "Loan Modification Dates" within the CFDR, suggesting that these assets were in fact purchased or originated by the Debtors prior to the Preference Period. (See PX 139 (CFDR); see also CFDR Extract attached hereto as Exhibit A.)

130. The CFDR also shows that of the 255 Alleged Preference Assets discussed above with Loan Funding Dates prior to the Preference Period, 39 were coded as HELOCs within the CFDR, suggesting that these were preexisting lines of credit that were simply drawn down upon during the Preference Period. (See PX 139 (CFDR); see also CFDR Extract attached hereto as Exhibit A.)

2. *The Evidence Shows That Many of the Alleged Preference Assets Could Be Refinancings of Loans in Which the JSNs Held Security Interests Prior to the Preference Period*

131. The information provided by the Debtors to the JSNs showed that a far greater number of the Alleged Preferential Assets than the 367 HFS Loans discussed above could be refinancings of loans in which the JSNs held security interests prior to the Preference Period. (Trial Tr. 26:23 – 27:9; 31:18 – 32:15, Oct. 22, 2013 (Winn).)

132. As noted, Ms. Westman told Zolfo Cooper that loans appearing for the first time during the Preference Period but with Loan Funding Dates prior to the Preference Period could be refinancings. In contrast, Mr. Landy testified in his capacity as the Debtors' appointed 30(b)(6) witness with respect to refinanced loans that loans appearing in the CFDR for the first time during the Preference Period with "Loan Funding Dates" during the Preference Period could potentially be refinancings, but that loans with "Loan Funding Dates" prior to the Preference Period could not be refinancings. (See Trial Tr. 27:1 – 9, Oct. 22, 2013 (Winn).) The Debtors subsequently identified 166 HFS assets within the Alleged Preference Assets as potential refinancing, but these assets had "Loan Funding Dates" both prior to and during the Preference Period. (See Trial Tr. 28: 3–10, Oct. 22, 2013 (Winn); DX AIL (ResCap Loan Data); PX 139 (CFDR).)

133. Mr. Winn testified as to numerous instances in which the information provided by the Debtors with respect to potential refinancings was incomplete, inconsistent, or inaccurate. For instance:

- The Debtors told the JSNs that loans labeled "Purchase/Refinanced" were not refinancings, but could not explain what such label meant, (Trial Tr. 33:18–34:4, Oct. 22, 2013 (Winn));

- The Debtors identified 111 assets as purchased or originated during the Preference Period, but could not explain why all such loans had Loan Funding Dates prior to the Preference Period, (Trial Tr. 27:1–9, Oct. 22, 2013 (Winn); see also DX AIL (ResCap Loan Data); PX 139 (CFDR));

- The Debtors identified five assets as being purchased or originated by the Debtors during the Preference Period, but Mr. Landy had previously conceded that these assets were subject to the JSNs' security interests prior to the Preference Period, (Trial Tr. 42:14–43:3, Oct. 22, 2013 (Winn); DX AIL (ResCap Loan Data); see DX ABN (Winn Report—Schedule 6); Landy Direct ¶ 56, 56(c); see also PX 139 (CFDR)); and

- The Debtors failed to provide information with respect to whether FHA/VA or HFS Revolver assets are refinancings, notwithstanding that they conceded that such assets could be refinancings, and that the JSNs repeatedly requested such information. (Trial Tr. 56:25, 31:8–32:15, Oct. 22, 2013 (Winn)).

134. Given the inconsistent information provided by the Debtors with respect to "Loan Funding Dates," it is possible that loans appearing for the first time during the Preference Period, regardless of their associated "Loan Funding Dates," are refinancing of loans in which the JSNs held security interests prior to the Preference Period. (See Trial Tr. 35:18–21, Oct. 22, 2013 (Winn) ("It's been Ms. Westman's position that refinanced loans would have a loan funding date of the original loan. So it's a bit of a mixed bag in terms of whether these loans match up with that description.").)

3. *The Evidence Shows That the JSNs Likely Held a Security Interest in Certain Alleged Preference Assets That Disappeared from the CFDR Prior to the Preference Period and Reappeared During the Preference Period*

135. Mr. Winn's Schedule 6 Report identified certain assets listed on Schedule 6 to the Committee Complaint that appeared within the CFDR as Notes Collateral prior to the Preference Period, disappeared from the CFDR for a period of time, and then reappeared within the CFDR during the Preference Period. (See DX ABN (Winn Report—Schedule 6) at DX0ABN-0014, 15

(identifying 33 HFS loans and 19 FHA/VA assets that disappeared and then reappeared within the CFDR). Trial Tr. 51:7–18; 52:4–8, Oct. 22, 2013 (Winn).)

136. In addressing assets that disappeared from the CFDR and then reappeared within the CFDR during the Preference Period, Mr. Landy assumed that these loans were sold into and later repurchased out of securitizations by the Debtors. (See Landy Direct ¶ 56(a), (b).) But Mr. Landy ignored other reasonable explanations for this activity, as explained further below, even though he was admittedly aware of these possibilities. (See Trial Tr. 163: 21–164:8, Oct. 17, 2013 (Landy) (acknowledging as another possibility that charged off loans were removed from the CFDR but reinstated when the Debtors regain belief that they could collect on the loans). Further, were these assets in fact repurchased out of securitizations as Mr. Landy assumes, such assets should have remained within the CFDR and coded as "REPURCHASE OPTION" or "SECURITIZATION," in keeping with the Debtors' standard practice. None of the assets identified as disappearing and reappearing within the CFDR were coded as such. Trial Tr. 252:15–21, 253:18–254:10, Oct. 21, 2013 (Winn); see also PX 139 (CFDR).)

137. Mr. Winn established that there were two equally-plausible explanations for loans disappearing and reappearing in the CFDR:

- HELOCs or second mortgages, which may have disappeared from the CFDR if the borrower paid down the line of credit to zero balance and then reappeared if the borrower subsequently re-drew the line of credit. (See Trial Tr. 247:14–24, Oct. 21, 2013 (Winn) (understood that liens with zero balance would be removed from CFDR)); or

- Loans charged off for accounting purposes as uncollectable and therefore removed from the CFDR, but later returned to the CFDR following a modification or rehabilitation of the loan. (See Trial Tr. 249:22–250:8, Oct. 21, 2013 (Winn); see id. 250:21–251:3 (Winn); see also DX NV (Email from T. Farley) July 18, 2012, DX00NV-0007 ("The CFDR is the source of truth for reporting on facilities and for finance—charged off liens are removed.")).

In fact, 23 of the 33 HFS loans that disappeared from and reappeared in the CFDR were identified in the CFDR as HELOCs. (Trial Tr. 247:14–24, Oct. 21, 2013 (Winn); see also PX 139 (CFDR).) Additionally, three of the 33 HFS loans had loan modification dates in the month preceding the Preference Period (Trial Tr. 251:22–252:5, Oct. 21, 2013 (Winn); see also PX139 (CFDR)), suggesting that those loans were charged off but reappeared in the CFDR shortly after they were modified. (Trial Tr. 251:22–252:5, Oct. 21, 2013 (Winn).)

vi. The Committee Has Not Presented Any Evidence Showing That the JSNs' Security Interests in $12 Million of the REO Assets Listed on Schedule 6 Were Granted During the Preference Period

138. In his direct testimony, Mr. Landy conceded that approximately $12 million of REO assets listed on Schedule 6 were reflected in the CFDR as Notes Collateral prior to February 29, 2012. (See Landy Direct ¶ 56(c).) However, Mr. Landy added the caveat that "if and to the extent consistent with the Debtors' past practices, ownership of these REO properties was transferred by the Debtors to an REO special purpose vehicle during the preference period, such transfers also augmented the JSNs' collateral pool and may be avoidable." (Id.)

139. Mr. Landy's allusions to alleged transfers of these REO properties to special purpose vehicles during the Preference Period are unavailing, as the Committee has neither alleged nor adduced any evidence that any of the REO assets on Schedule 6 were transferred to a special purpose vehicle during the Preference Period. (See Trial Tr. 166:23 – 25, Oct. 17, 2013 (Landy) (acknowledging that he does not know whether REO assets were transferred to an SPV) ("I don't know. I attempted to get information at the time we did the investigation, and I didn't get any evidence that was satisfactory.").)

b. *Assuming Arguendo that the Committee Has Made a Prima Facie Case for Avoidance, the Alleged Preferential Transfers Cannot Be Avoided Because the Aggregate Value of the Notes Collateral Declined During the Preference Period*

140. As stated above, all of the Alleged Preference Assets constituted inventory and receivables of the Debtors.

141. The HFS Loans, the FHA/VA Loans and the REO were all inventory of the Debtors. The HFS Loans were mortgages held for sale, as were a portion of the FHA/VA Loans. (See Trial Tr. 151:1–152:15, Oct. 17, 2013 (Landy); DX LR (Affidavit of James Whitlinger ¶ 77) at DX00LR-0032–0033) REO properties were all held for sale by the Debtors in the ordinary course of business. (See DX LR (Affidavit of James Whitlinger ¶¶ 32 n. 18, 45, 161, 167–169) at DX00LR-0015, 0020, 0070, 0073–0074.)

142. The HFS Loans and the FHA/VA Loans also constitute receivables of the Debtors. As Mr. Landy testified, the Debtors had the right to receive the income stream from the mortgage loans on Schedule 6. (See Trial Tr. 151:1–152:15, Oct. 17, 2013 (Landy).) The FHA/VA Loans include not only mortgage loans held for sale, but also government insurance claims, which the Debtors treated as receivables on their financial statements. (See DX KZ (ResCap Consolidated Financials for the Periods Ended March 31, 2012 and 2011) at DX00KZ-0022; DX JT (ResCap Consolidated Financial Statements for the Periods Ended September 30, 2011 and 2010) at DX00JT-0023.)

143. Mr. Fazio of Houlihan Lokey submitted an expert report on behalf of the Defendants in which he analyzed the book value and fair market value of the assets securing the JSNs, excluding the disputed collateral of goodwill or going concern value, the value of contracts or agreements and other related non-financial assets, or causes of action against AFI or other parties, both at February 29, 2012 and May 14, 2012. (See DX ABB (Fazio Report – Preference).)

144. In analyzing the book value of the Notes Collateral, Mr. Fazio used the asset values listed in the Debtors' books and records, and did not make any adjustments to those values. (See Trial Tr. 232:2–21, Oct. 22, 2013 (Fazio).) Mr. Landy relied on the same book values in his direct testimony and expert report. (See Landy Direct; id. at Exhibit A.)

145. In analyzing the fair market value of the Notes Collateral, Mr. Fazio relied on the analysis prepared and summarized in separate expert reports by Mr. Fazio and Jeffrey Levine, also from Houlihan Lokey. (See DX ABB (Fazio Report—Preference) at DX0ABB-15; see also DX ABI (Fazio Report—HFS); DX ABG (Levine Report).)

146. As Mr. Fazio testified and demonstrated in his expert report, the aggregate value of the Notes Collateral inclusive of the Alleged Preference Assets *decreased* during the Modified Preference Period, with (a) the gross and net book value of the Notes Collateral decreasing by $182 million and $128 million, respectively, and (b) the gross and net fair market value of the Notes Collateral decreasing by $137 million and $83 million, respectively. (See Fazio Direct ¶ 12; see also Trial Tr. 233:5–14, Oct. 22, 2013 (Fazio).)

147. While Mr. Fazio testified that book value and fair market value of the Notes Collateral decreased during the Modified Preference Period, it is important to note that the JSNs' claim actually increased over the Modified Preference Period. On February 29, 2012, the principal and interest due under the JSNs was $2.18 billion; on the Petition Date, the principal and interest due under the JSNs was $2.222 billion. The JSNs' claim amount increased by at least $42 million over the course of the Modified Preference Period as a result of interest accruing in the ordinary course.

148. Mr. Fazio further compared the book values and fair market values as of February 29, 2012 and May 14, 2012 of a smaller universe of Notes Collateral, specifically only the

inventory and receivables within the Notes Collateral. (See DX ABB (Fazio Report—Preference) at DX0ABB-0005, 0020–21, 0025–26.) Mr. Fazio testified that the "receivables and inventory collateral securing the JSNs increased by $44 million in book value and $59 million in fair market value in the period between February 29, 2012 and the Petition Date." (See Fazio Direct ¶ 12(c).)

149. Additionally, notwithstanding Mr. Fazio's significant criticisms of and disagreement with the valuation methodology and assumptions employed by the Debtors' valuation expert, Marc D. Puntus of Centerview Partners LLC, Mr. Fazio also assessed the aggregate value of the Notes Collateral on February 29, 2012 and the Petition Date using Mr. Puntus's valuation methodology and assumptions. (See Fazio Direct ¶¶ 13, 14, 16.) This analysis showed that even if Mr. Puntus's flawed methodology and assumptions are employed, the gross and net book value of the Notes Collateral decreased during the Modified Preference Period by $140 million and $85 million respectively. (See DX AIH (Fazio Rebuttal Report to Landy) at DX0AIH-0006.)

150. The Committee offered no response to this testimony by Mr. Fazio.

B. *The JSNs Have Perfected Security Interests in the Former Bilateral Facilities Collateral*

151. Count I of the Committee Complaint alleges that, pursuant to the express language of the Amended and Restated Third Priority Pledge and Security Agreement and Irrevocable Proxy dated as of December 30, 2009 (the "Notes Security Agreement"), the JSNs do not have perfected security interests in assets that were (i) pledged to a Bilateral Facility (as defined by the Notes Security Agreement) on the date that the Junior Secured Notes were issued by ResCap, (ii) subsequently released from the applicable Bilateral Facility prior to May 14,

2012 (the "Petition Date"), and (iii) owned by the Debtors on the Petition Date and coded as "Ally Revolver" or "Blanket" (the "Former Bilateral Facilities Collateral"). (Comm. Complaint 13–15.)

152. The "Former Bilateral Facilities Collateral" is referred to as "Released Bilateral Facilities Collateral" in the Committee Complaint and subsequent briefing of the parties. The Defendants, however, use the term "Former Bilateral Facilities Collateral" herein because it more accurately describes the collateral that was formerly pledged to a Bilateral Facility and released from the applicable Bilateral Facility.

153. The Committee Complaint alleges that the Former Bilateral Facilities Collateral, which is listed on Schedule 1 to the Committee Complaint, totals approximately $55 million at book value and, according to the Committee's witness Marc Landy, $49 million of fair value as of the Petition Date, and should not be deemed part of the JSN Collateral. (See PX 123 (Schedule 1 to Committee Complaint) at ALIX000683; PX 241 (Landy Report) at PX pg. 9.)

154. On June 6, 2008, Wells Fargo Bank, N.A. ("Wells Fargo"), acting in its capacity as the Third Priority Collateral Agent (as defined in the Notes Security Agreement), filed UCC-1 financing statements indicating that the JSNs held a security interest in "[a]ll assets [of each grantor] now owned or hereafter acquired and wherever located." (See, e.g., PX 132 (UCC Financing Statements, dated June 6, 2008 and listing Wells Fargo Bank, N/A, as Third Priority Collateral Agent, as the Secured Party; annexed as Exhibit 1 to the Declaration of Jamie A. Levitt, Jul. 16, 2013, Debtor Adv. Dkt. No. 23).)

155. The Committee Complaint does not allege, and the Plaintiffs did not attempt to prove as a basis for avoiding the Debtors' stipulation respecting the Former Bilateral Facilities

Collateral, that such collateral was the subject of a lien release or a UCC-3 financing statement amendment.

a. *The Language of the Notes Security Agreement Evidences an All-Assets 'Floating' Security Interest that Reaches the Former Bilateral Facilities Collateral*

156. The Notes Security Agreement grants a security interest in and liens on certain of the Debtors' assets (collectively, the "Notes Collateral" or "JSN Collateral"). (See PX 4 (Notes Security Agreement § 2) at PX pgs. 15–17.)

157. Section 2 of the Notes Security Agreement (the "All-Assets Granting Clause") reaches all of the Debtors' assets that are legally and practicably available both at the time, and after, the Notes Security Agreement was executed. (See PX 4 (Notes Security Agreement §§ 1-2, 4) at PX pgs. 4–17, 18–19 (providing that the pledge includes assets "***whether now or hereafter existing, owned or acquired and wherever located and howsoever created, arising or evidenced***") (emphasis added).)

158. The Notes Security Agreement carves out from the Notes Collateral certain assets (the "Excluded Assets") that could not be pledged to the JSNs for legal or business reasons. (See PX 4 (Notes Security Agreement § 2) at PX pgs. 15–17 ("provided that, notwithstanding the foregoing, the 'Collateral' described in this Section 2 shall not include Excluded Assets.").)

159. As relevant to the Committee's allegations respecting the Former Bilateral Facilities Collateral, "Excluded Assets" are defined under the Notes Security Agreement as "(c) any asset . . . ***to the extent*** that the grant of a security interest therein would . . . provide any party thereto with a right of termination or default with respect . . . to any Bilateral Facility to which

such asset is subject as of the Issue Date."[10] (See PX 4 (Notes Security Agreement § 1) at PX pgs. 4–15 (emphasis added).)

160. Clause (f) of the Excluded Assets definition provides that the proceeds of Excluded Assets are excluded from JSN Collateral only if those proceeds are precluded from being pledged to the JSNs for the reasons set forth in clauses (a) through (e) of the definition. (See PX 4 (Notes Security Agreement) § 1 (definition of Excluded Assets).)

161. The Excluded Assets category was included in the Notes Security Agreement to enable ResCap to exclude from the Notes Collateral certain assets, the inclusion of which would have caused a loss of funding to ResCap or materially devalue the asset. (Trial Tr. 180:16–182:12, Oct. 16, 2013 (Farley); Farley Dep. 58:12–20, 62:13–63:15, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

162. The Excluded Assets category included assets pledged to Bilateral Facilities as of the Issue Date, because the terms of the Bilateral Facilities apparently precluded such assets from being pledged to the AFI Revolver or the JSNs. (Trial Tr. 184:24–185:3, Oct. 16, 2013 (Farley).)

163. Teresa Rae Farley, the Senior Director of Asset Disposition for ResCap who was involved in negotiating and implementing the Revolver, testified that it was her understanding that if the Bilateral Facilities had not precluded the Debtors' assets pledged thereunder from being pledged to AFI and the JSNs, and if such assets otherwise fell within the broad scope of the All-Assets Granting Clause, then the Debtors would have included such assets as Revolver and JSN collateral as of the Issue Date. (Trial Tr. 184:24–185:12, Oct. 16, 2013 (Farley); Farley Dep. 26:7–18, 58:12–20, 65:13–66:2, 71:5–18, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

[10] The "Issue Date" is defined by the Notes Indenture as June 6, 2008.

164. AFI and ResCap understood that the Excluded Assets would change over time. (Trial Tr. 182:13–21, Oct. 16, 2013 (Farley).)

165. The Committee concedes that the Former Bilateral Facilities Collateral was no longer pledged to a Bilateral Facility as of the Petition Date. (See Comm. Complaint 14 ("the [Former] Bilateral Facilities Collateral was subsequently released from liens or security interests granted pursuant to one or more of the Bilateral Facilities and remained property of the estates as of the Petition Date").)

166. In fact, the loans comprising the Former Bilateral Facilities Collateral were released predominantly in 2008 and 2009 as the Bilateral Facilities that existed as of the Issue Date terminated. (DX ABM (Winn Report—Schedule 1) at DX0ABM-0016.)

167. The Committee does not allege that any of the Former Bilateral Facilities Collateral satisfied the definition of an Excluded Asset as of the Petition Date.

168. The Committee has not alleged, nor offered any evidence to show, that the grant and existence of a security interest in the Former Bilateral Facilities Collateral in favor of the JSNs following the termination of such Bilateral Facilities and release of the pledged asset back to the Debtors, could have provided any party with a right of default or termination with respect to any Bilateral Facility to which the Former Bilateral Facilities Collateral was subject as of the Issue Date.

169. The Committee offered no evidence at trial establishing or even implying that the parties to the Notes Security Agreement or the Revolver Security Agreement (which mirrors the Notes Security Agreement) intended that Excluded Assets would remain permanently excluded from the AFI Revolver and JSN Collateral simply because they constituted Excluded Assets at one time.

b. ***Extrinsic Evidence Indisputably Shows that the Parties to the Revolver Security Agreement Understood and Intended that the Notes Collateral Would Include Former Bilateral Facilities Collateral, and That They Conducted Themselves Accordingly***

170. Ms. Hall of AFI testified that:

- "AFI's intent was as soon as the assets rolled off the bilateral facility, they would become subject to the blanket lien." (Hall Dep. 123:19–23, Sept. 26, 2013, Comm. Adv. Dkt. No. 120; see also id. 119:7–15);

- at the time the original AFI Revolver and Revolver Security Agreement were negotiated, in exchange for funding the AFI Revolver, AFI was "trying to secure whatever remained unencumbered that we could, that was legally available to be pledged, not an excluded asset and was operationally feasible for the company, being ResCap." (Hall Dep. 106:2–20; 113:2–13, Sept. 26, 2013, Comm. Adv. Dkt. No. 120); and

- "[t]he blanket lien basically suggested that anytime an asset became uncovered, it would be subject to the blanket lien." (Hall Dep. 116:6–14; Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

171. Joseph Ruhlin, the Debtors' former Treasurer, testified that the Debtors understood that the Former Bilateral Facilities Collateral "would be covered by the blanket lien as long as they . . . were owned [by the Debtors] and not pledged elsewhere to another bilateral facility," and that the Debtors' "understanding" was that "once an asset was released from a funding facility, depending on the asset, it would become part of the blanket lien." (Ruhlin Dep. 89:14–25; 93:8–14, 165:5–9, Sept. 18, 2013, Comm. Adv. Dkt. No. 128.)

172. Ms. Farley, in her capacity as the Debtors' corporate representative, admitted at her deposition that if a loan was initially excluded from the collateral pool because it was pledged to a Bilateral Facility as of the Issue Date, the loan would be transferred into the pool of Blanket Lien Collateral if and when that Bilateral Facility subsequently terminated. (Farley Dep. 105:17–106:21, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

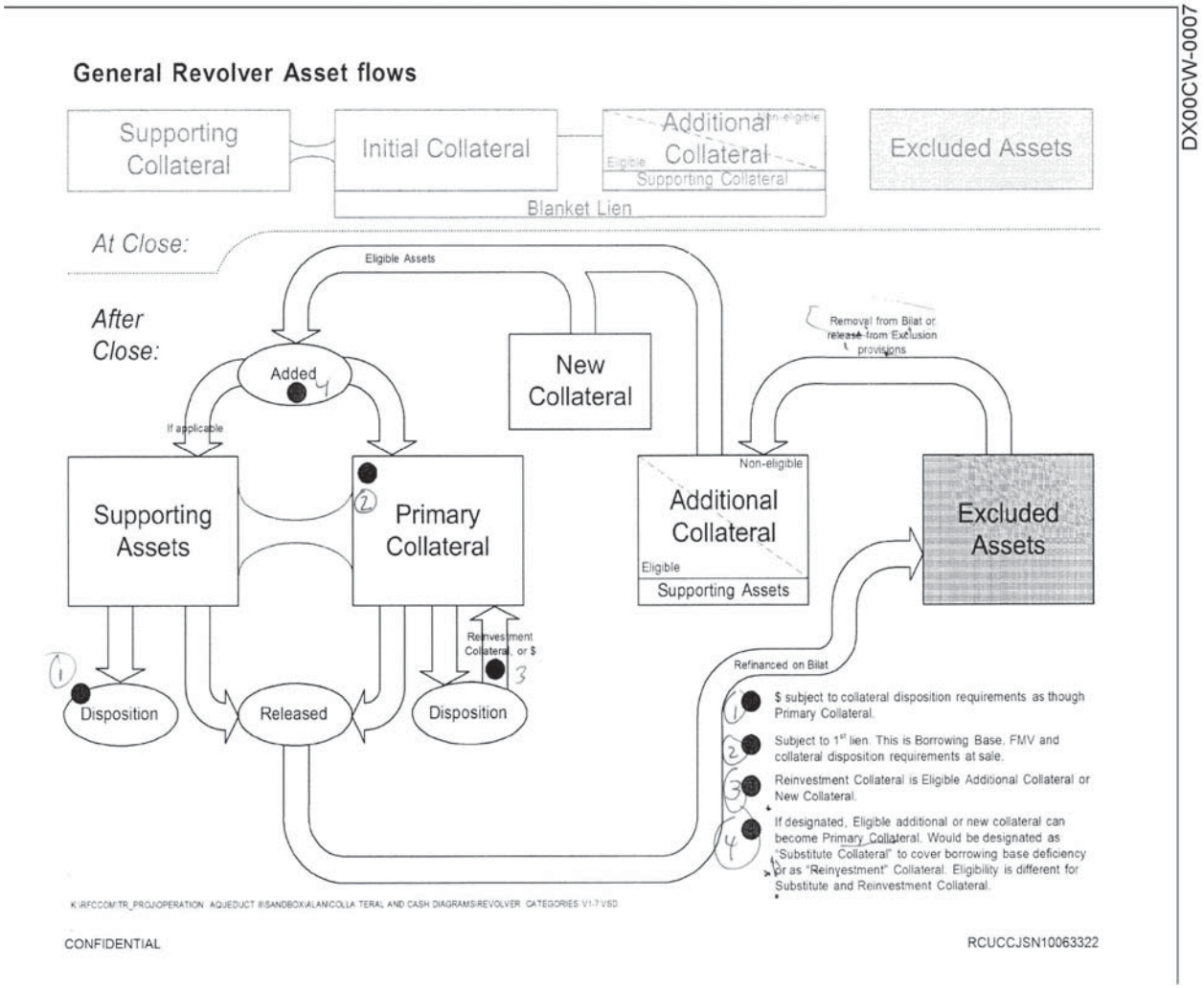
173. Ms. Farley, testified again before the Court that, with respect to assets that were excluded assets as of June 2008 (because they were pledged under a Bilateral Facility), those assets would become part of the revolver and JSN collateral pools if they fell within the scope of the security grant when the Bilateral Facility terminated. (Trial Tr. 186:23–187:9, Oct. 16, 2013 (Farley).)

174. Ms. Farley further testified that, in negotiating the terms of the AFI revolver, Ally sought to secure the revolver with as much collateral as possible. (Farley Dep. 45:21–46:4, Sept. 18, 2013, Comm. Adv. Dkt. No. 115; Farley Direct ¶ 13.)

175. The contemporaneous documentary evidence created by the Debtors corroborates Ms. Farley's, Ms. Hall's, and Mr. Ruhlin's understanding that Former Bilateral Facilities Collateral constitutes JSN Collateral, and shows that the Debtors specifically contemplated that Former Bilateral Facilities Collateral would automatically fall within AFI's and the JSNs' security grant once the Bilateral Facility terminated. (Trial Tr. 186:23–187:9, Oct. 16, 2013 (Farley); Farley Dep. 106:2–106:21, Sept. 18, 2013, Comm. Adv. Dkt. No. 115; Hall Dep. 116:6–14, 123:19–22, Sept. 26, 2013, Comm. Adv. Dkt. No. 120; Ruhlin Dep. 89:14–25; 93:8–14, Sept. 18, 2013, Comm. Adv. Dkt. No. 128.)

176. Specifically, on June 18, 2008, days after the Exchange Offer was consummated, a Debtor employee circulated a "Revolver Tutorial" to senior ResCap treasury and accounting personnel. (DX CW (General Revolver asset flows chart) at DX00CW-0001, -0007.) The diagram, which was used as a teaching tool by the Debtors during a conference call in which more than three dozen individuals participated, showed in pictorial fashion that previously "Excluded Assets" become part of the collateral securing the AFI Revolver and JSN Indenture upon "[r]emoval from Bilat [Bilateral Facility] or release from Exclusion provisions." (DX CW

(General Revolver asset flows chart) at DX00CW-0001, -0007; Peterson Dep. 154:10–15, Sept. 15, 2013, Comm. Adv. Dkt. No. 122.)



177. The chart shows that the Former Bilateral Facilities Collateral would be picked up by the Blanket Lien and would also be eligible to become Primary Collateral. This is in fact what happened to most of the Former Bilateral Facilities Collateral. (See DX ABM (Winn Report—Schedule 1) at DX0ABM-0014–19.)

178. Additionally, in December 2008, the Debtors' outside counsel sent an email explaining that "if at any point while owned by GMAC Mortgage the assets are removed from a

Bilateral Facility, the [AFI] Revolver and [JSN] Indenture liens may cover these assets and they will constitute Collateral (if and to the extent Sections 9-406/8 of the UCC are applicable)." (DX ES (Email from Mahesh Joshi to various recipients, Dec. 24, 2008) at DX0ES-0001.)

c. *Uncontroverted Documentary Evidence from the CFDR Shows that the Debtors Treated the Former Bilateral Facilities Collateral as Notes Collateral, as Each Bilateral Facility terminated, in the Ordinary Course of Dealing*

179. Defendants' expert Scott Winn of Zolfo Cooper LLC prepared an expert report entitled "Observations on UCC Complaint – Schedule 1," and provided credible expert testimony, respecting the manner in which the Former Bilateral Facilities Collateral was coded within the CFDR. (See DX ABM (Winn Report—Schedule 1) at DX0ABM-0006.)

180. Mr. Winn's expert testimony and report conclusively demonstrated that in the ordinary course of business, as reflected in the CFDR, the Debtors contemporaneously treated assets that were previously pledged to Bilateral Facilities as falling within the scope of the JSNs' collateral package as such assets were released from the applicable Bilateral Facilities. (See DX ABM (Winn Report—Schedule 1) at DX0ABM-0006; Winn Direct ¶ 22.)

181. As shown in Mr. Winn's report, the Debtors treated most of the Former Bilateral Facilities Collateral as *Primary Collateral* in the CFDR once the assets were released from the applicable Bilateral Facilities. Of the 582 HFS Bilateral loans listed on Schedule 1 of the Committee Complaint, 517 of those had been released from respective Bilateral Facilities and re-coded in the CFDR as belonging to the GMAC Revolver facility as of April 2009. (See DX ABM (Winn Report—Schedule 1) at DX0ABM-0016.) The other 65 assets were re-categorized as Unpledged starting at various times, which, as noted above, was how the Debtors coded

Blanket Lien collateral pre-petition. (See DX ABM (Winn Report—Schedule 1) at DX0ABM-0016.)

182. The Committee has offered no evidence contesting Mr. Winn's findings respecting the Debtors' treatment of Former Bilateral Facilities Collateral. The Committee served no report to rebut Mr. Winn's UCC Complaint—Schedule 1 report, offered no rebuttal testimony in the witness statement of their expert, Mr. Landy, or anywhere else, and declined even to cross examine Mr. Winn about this report.

183. Testimony from the Debtors' employees supports Mr. Winn's conclusions. (Cf. Farley Dep. 131:8–133:15; 134:4–18, Sept. 18, 2013, Comm. Adv. Dkt. No. 115 (reviewing the historical treatment of a particular loan in the CFDR, and explaining that an asset coded as belonging to the fund facility FB on July 31, 2008—a loan presumably pledged the First Boston Bilateral Facility—was thereafter coded as Primary Collateral beginning on September 30, 2008); see also Ruhlin Dep. 334:8–11, Sept. 18, 2013, Comm. Adv. Dkt. No. 128 (testifying that his understanding of the same FB designation indicated that "it was at some point on a First Boston facility").)

184. Assets coded as Unpledged within the CFDR were not pledged to a financing facility other than the AFI Revolver. (Farley Dep. 100:4–16, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

185. Neither the Debtors nor the Committee have articulated a business reason for assets, other than Excluded Assets and Primary Collateral, to be unencumbered by the Blanket Lien, given the flexibility with which the Debtors could use Blanket Lien collateral in the ordinary course of business. (Farley Dep. 256:21–23, Sept. 18, 2013, Comm. Adv. Dkt. No. 115

("the blanket lien collateral could be used without restrictions in the normal course of business"); cf Trial Tr. 29:1–7, Oct. 17, 2013; Farley Direct ¶¶ 13–14.)

186. The Plaintiffs also did not present any credible witness testimony, document, or course of dealing evidence supporting the Committee's position that the Former Bilateral Facilities Collateral or Reacquired Mortgage Loans are not JSN Collateral.

d. *The BMMZ Bilaterals Included on Schedule 1 Were Not Assets of the Debtors on the Petition Date, Fall Outside the Scope of Count I, and May Not Be Avoided as Alleged Excluded Assets*

187. Separate from the foregoing, at trial Mr. Landy and Mr. Winn agreed that the loans the Committee calls the "BMMZ Bilaterals" on Schedule 1 are loans that were sold to Citi and Goldman and thereafter sent to BMMZ pursuant to a repo agreement entered in December 2011 (the "BMMZ Facility"). (See PX 11 (Master Repurchase Agreement); DX ABM (Winn Report—Schedule 1); Trial Tr. 133:24–134:2, Oct. 17, 2013 (Landy).)

188. The assets identified as BMMZ Bilaterals on Schedule 1 were owned by BMMZ as of the Petition Date. DX ABM (Winn Report—Schedule 1) at DX0ABM-0015; Trial Tr. 133:24–134:1, Oct. 17, 2013 (Landy).)

189. The $27 million of BMMZ loans identified as BMMZ Bilaterals on Schedule 1 are a fraction of the $387 million in total loans sold to the BMMZ Facility. (Trial Tr. 191:4–11, Oct. 17, 2013 (Landy).)

190. The Debtors did not own the assets identified as BMMZ Bilaterals as of the Petition Date. (DX ABM (Winn Report—Schedule 1) at DX0ABM-0015; Trial Tr. 133:24–134:1, Oct. 17, 2013 (Landy).)

191. Instead, on the Petition Date, the Debtors owned the right to repurchase the mortgage loans previously sold to BMMZ for $250 million, pursuant to the Master Repurchase

Agreement (the "MRA"). (See PX 11 (Master Repurchase Agreement); Final Order Pursuant to 11 U.S.C. §§ 105, 362, 363(b)(1), 363(f), 363(m), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) And 364(e) and Bankruptcy Rules 4001 and 6004 (I) Authorizing Debtors (A) To Enter into and Perform under Receivables Purchase Agreements and Mortgage Loan Purchase and Contribution Agreements Relating to Initial Receivables and Mortgage Loans and Receivables Pooling Agreements Relating to Additional Receivables and (B) To Obtain Post-Petition Financing on a Secured Superpriority Basis, and (II) Granting Related Relief ("Barclays DIP Order") ¶ 7(d), June 25, 2013, Dkt. No. 490; Order on Motion to Dismiss Committee Complaint 9.) The loans sold to BMMZ had a market value of $371 million as of the Petition Date, thus the Debtors' contractual right to repurchase the loans previously sold to BMMZ was worth approximately $120 million. (See Barclays DIP Order ¶ 7(d); PX 76 (AFI DIP Order Ex. A) at PX pg. 59; Order on Motion to Dismiss Committee Complaint 9.)

192. The assets identified as BMMZ Bilaterals on Schedule 1 were not characterized as JSN collateral within the CFDR as of the Petition Date. (DX ABM (Winn Report—Schedule 1) at DX0ABM-0015.)

193. The BMMZ Bilaterals were not included within the Ally Revolver and Blanket columns on Exhibit A to the AFI DIP Order. (DX ABM (Winn Report—Schedule 1) at DX0ABM-0015; PX 76 (AFI DIP Order) at PX pg. 59; Trial Tr. 133:13–19, Oct. 17, 2013 (Landy).) Rather, they were listed in the column labeled "BMMZ Repo" on Exhibit A to the AFI DIP Order. (PX 76 (AFI DIP Order) at PX pg. 59.)

194. The Debtors stipulated that the JSN Collateral included the Debtors' contractual repurchase rights, a general intangible in which the JSNs have a perfected security interest under the Notes Security Agreement. (See PX 76 (AFI DIP Order¶ 5(h) at PX pg. 12); see also PX 4

(Notes Security Agreement § 2) at PX pgs. 15–17 ("Grant of Security Interest by the Company and the Guarantors," granting the JSNs a security interests in the Grantors "Financial Assets, including, without limitation…all Accounts, Chattel Paper, Deposit Accounts, Documents, General Intangibles, Payment Intangibles, Instruments, Investment Property, Letter-of-Credit Rights, Letters of Credit, Supporting Obligations and Money, consisting of, arising from, or relating to or delivered pursuant to, any of the foregoing"); Trial Tr. 131:7–16, 133:24–134:2, Oct. 17, 2013 (Landy); DX ABM (Winn Report—Schedule 1) at DX0ABM-0015; see also PX 4 (Notes Security Agreement § 1) at PX pg. 4 (adopting definitions of Article 9 UCC).)

195. The Court previously dismissed the Committee's recharacterization claim, which sought to avoid the JSNs' liens on the Debtors' BMMZ repurchase rights. (Memorandum Opinion Granting in Part and Denying in Part UMB Bank's Motion to Dismiss, Aug. 13, 2013, Comm. Adv. Dkt. No. 74.)

196. Mr. Winn identified the Committee Complaint's error respecting the inclusion of BMMZ Bilaterals on Schedule 1 in his expert report Observations on UCC Complaint – Schedule 1. (DX ABM (Winn Report—Schedule 1) at DX0ABM-0015.)

197. The Committee conceded Mr. Winn's findings with respect to the BMMZ Bilaterals on Schedule 1. (Trial Tr. 133:13–23, Oct. 17, 2013 (Landy); see also id. 191:4–6 (Landy).) The Committee offered no fact evidence to support the idea that assets pledged to a Bilateral Facility in 2008 would remain Excluded Assets even if they were sold to a third party repo buyer after the Bilateral Facility. The Committee offered no evidence to explain how or why the BMMZ Bilaterals should somehow be deducted from the JSNs' lien on the residual value of the Debtors' right pursuant to the MRA to repurchase *all* of the loans sold to BMMZ.

C. *The JSNs Hold Perfected Security Interests in the Reacquired Mortgage Loans*

198. Count IV of the Committee Complaint alleges that the JSNs do not have perfected security interests in certain mortgage loans that were released from the JSNs' liens and security interests in May 2010 to be sold to the Citi and Goldman repo facilities, and were subsequently repurchased by the Debtors during the period between September 2010 and the Petition Date (the "Reacquired Mortgage Loans," and together with the Former Bilateral Facilities Collateral, the "Contested Assets"). (Comm. Complaint 19–21.)

199. The "Reacquired Mortgage Loans" are referred to as "Released Mortgage Loans" in the Committee Complaint (Count IV) and subsequent briefing of the parties. The Defendants, however, use the term "Reacquired Mortgage Loans" herein because it more accurately describes the category of loans that were sold to a repo facility and then subsequently repurchased by the Debtors. In addition, the term "Reacquired Mortgage Loans" assists in differentiating this category of repurchased mortgage loans from the separate and distinct category of mortgage loans that were allegedly released in connection with the AFI LOC and are at issue in the Debtor Complaint.

200. The Reacquired Mortgage Loans are distinct from the BMMZ Bilaterals in that as of the Petition Date, the Reacquired Mortgage Loans were owned by the Debtors (and coded as "Revolver Blanket Lien" in the CFDR) and the BMMZ Bilaterals were owned by BMMZ and subject to the Debtors' repurchase right.

201. The vast majority of the Reacquired Mortgage Loans were repurchased by the Debtors in January 2012. (See DX ABM (Winn Report—Schedule 1).)

202. The Committee Complaint alleges that the Reacquired Mortgage Loans total approximately $14 million at book value and $10 million at fair value. (PX 125 (Schedule 3 of Committee Complaint); PX 241 (Landy Report) at PX pg. 9.)

203. The Reacquired Mortgage Loans, totaling just over $14 million, are a small percentage of the loans previously sold to BMMZ. (PX 125 (Schedule 3 of Committee Complaint).) Almost all of the mortgage loans remained at BMMZ as of the Petition Date. (PX 76 (AFI DIP Order, Exhibit A) at PX pgs. 75–76; DX ABM (Winn Report—Schedule 1) at DX0ABM-0015.)

l. *The 'After-Acquired' Language of the Notes Security Agreement's All-Assets Granting Clause Reaches the Reacquired Mortgage Loans*

204. The All-Assets Granting Clause of the Notes Security Agreement reaches all of the Debtors' assets that are legally and practicably available both at the time, and after, the Notes Security Agreement was executed. (See PX 4 (Notes Security Agreement §§ 1-2, 4) at PX pgs. 4–17, 18–19.)

205. The Notes Security Agreement grants the JSNs a security interest in "All Assets including, without limitation, . . . ***all Mortgage Loans***…***whether now or hereafter existing, owned or acquired*** and wherever located and howsoever created, arising or evidenced . . ." (the "After-Acquired Assets Clause"). (See PX 4 (Notes Security Agreement § 2) at PX pgs. 15–17.)

206. There is no language in the Notes Security Agreement suggesting in any way that Mortgage Loans that are sold and then repurchased by the Debtors do not fall within this broad and continuing language.

207. The Reacquired Mortgage Loans were never Excluded Assets. (See PX 4 (Notes Security Agreement § 2) at PX pgs. 15–17.)

m. ***Extrinsic Evidence Indisputably Shows that the Parties to the Notes Security Agreement Understood and Intended that the Notes Collateral Would Include the Reacquired Mortgage Loans and That They Conducted Themselves Accordingly***

208. Ms. Farley testified that if a loan was originally pledged to the AFI Revolver, subsequently released so that the loan could be sold to another party, and then later repurchased by one of the guarantors, borrowers or grantors as defined in the Revolver and Notes Security Agreements, that would be considered new legal ownership, subjecting the loan to AFI's (and the JSNs') security interest. (Farley Dep. 110:5–111:14, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

209. Ms. Farley again testified at trial that if an asset that was initially in the AFI and JSN collateral pools was subsequently sold to another financing facility, that same asset would become part of the JSN and AFI collateral pools if it was subsequently repurchased by a ResCap entity that was an obligor or guarantor under the Revolver or Indenture, notwithstanding that the asset was released from the JSN and AFI collateral pools before it was sold by the Debtors. (Trial Tr. 190:21–192:18, Oct. 16, 2013 (Farley).)

210. Ms. Farley further reiterated that Reacquired Mortgage Loans were subject to AFI's and the JSNs' liens because the "lien[s] would reattach to assets that were acquired even if it was a reacquisition." (Farley Dep. 110:5–111:5, Sept. 18, 2013, Comm. Adv. Dkt. No. 115; see also id. 49:17–23.)

211. Similarly Joseph Ruhlin, the Debtors' former Treasurer, testified that "the way we understood the—this agreement, that other assets such as loans that were acquired in the future would be subject to the lien." Mr. Ruhlin went on to explain that such assets might be acquired when "[ResCap] would purchase them from…for example, GSEs, repurchasing loans from

Ginnie Mae, Fannie Mae, Freddie Mac. They may be repurchased from securitization trusts. They . . . could be purchased outside from a third party." (Ruhlin Dep. 65:19–22, 66:6–14, Sept. 18, 2013, Comm. Adv. Dkt. No. 128.)

212. When asked if any of the repurchased loans he referred to as being covered by the lien might have been previously owned by ResCap, Mr. Ruhlin testified that "they could have been previously owned by ResCap." (Ruhlin Dep. 66:15–21, Sept. 18, 2013, Comm. Adv. Dkt. No. 128.)

213. When asked if "the blanket lien would attach to assets acquired by ResCap after the execution of [the] agreement," Lara Hall, a managing director of corporate debt and equity at AFI, answered, "Yes. Acquired or originated . . . . There were no restrictions on blanket lien collateral." (Hall Dep. 117:6–12; Sept. 26, 2013, Comm. Adv. Dkt. No. 120.)

214. The evidence adduced at trial showed that ResCap coded the Blanket Lien Collateral as "unpledged" in the CFDR prior to the Petition Date, and re-coded Blanket Lien Collateral as "blanket" shortly before the bankruptcy filing, and that the Reacquired Mortgage Loans were pledged accordingly. (See, e.g., Ruhlin Dep. 106:8–12, 119:4–9, 155:16–156:2, 156:15–21, Sept. 18, 2013, Comm. Adv. Dkt. No. 128; Farley Dep. 95:3–14, 115:4–14, 137:21–24, 138:4–11, 176:21–177:3, Sept. 18, 2013, Comm. Adv. Dkt. No. 115.)

n. *The JSNs Had a Perfected Security Interest in the Reacquired Mortgage Loans as of the Petition Date*

215. Wells Fargo, acting in its capacity as the Third Priority Collateral Agent, filed UCC-3 financing statement amendments in May 2010 terminating the JSNs' security interests in certain specified mortgage loans, including the loans that later became the Reacquired Mortgage

Loans. (See, e.g., PX 133 (UCC Financing Statement Amendment Filed May 25, 2010) at PX pgs. 81–120; PX 136 (UCC Financing Statement Amendment Filed May 17, 2010) at PX pgs. 13–18; Stipulated Facts ¶ 22.)

216. Those UCC-3 amendments made clear that the assets that were subject to the release were being sold to repo facilities, by expressly referencing the repo facilities, and identifying the assets subject to the UCC-3 amendments as the Mortgage Loans listed on certain Schedules to the repo facilities. (See, e.g., PX 133 (UCC Financing Statement Amendment Filed May 25, 2010) at PX pgs. 81–120; PX 136 (UCC Financing Statement Amendment Filed May 17, 2010) at PX pgs. 13–18.)

217. The loans listed on the UCC-3 amendment were within the scope and covered by preexisting UCC-1 financing statements. The UCC-3 amendments provided notice of a collateral change, not a termination of the effectiveness of the identified financing statement. (See, e.g., PX 133 (UCC Financing Statement Amendment Filed May 25, 2010) at PX pgs. 81–120 (checking box for "Collateral Change," not "Termination"); PX 136 (UCC Financing Statement Amendment Filed May 17, 2010) at PX pgs. 13–18 (checking box for "Collateral Change," not "Termination").)

218. The UCC-1 financing statements, which continued in effect notwithstanding the filing of the UCC-3 financing statements, continued in force and operated to perfect the JSNs' security interests in all after-acquired assets, including the Reacquired Mortgage Loans. (See, e.g., PX 132 (UCC Financing Statements, dated June 6, 2008 and listing Wells Fargo Bank, N/A, as Third Priority Collateral Agent, as the Secured Party; annexed as Exhibit 1 to the Declaration of Jamie A. Levitt, Jul. 16, 2003, Debtor Adv. Dkt. No. 23); see also PX 4 (Notes Security Agreement § 2) at PX pgs. 15–17.)

219. The Reacquired Mortgage Loans were repurchased by the Debtors from BMMZ, the "purchaser" in the MRA governing the repo facility to which the Reacquired Mortgage Loan had been sold, between September 2010 and the Petition Date. (See, e.g., PX 11 (Master Repurchase Agreement).)

220. The UCC-1 financing statements and UCC-3 amendments filed by Wells Fargo plainly provided notice to any potential lender seeking to obtain a security interest in the Reacquired Mortgage Loans (or assume it to be wholly unencumbered) of the possibility that the JSNs held a perfected security interest therein, as any such potential lender (i) would know that the Reacquired Mortgage Loans had been reacquired by the Debtors subsequent to the filing of the UCC-3 amendments (by virtue of the fact that they were owned by the Debtors); and (ii) would have access to the UCC-1 financing statements providing that the JSNs held a perfected security interest in all assets that the Debtors subsequently acquired. (Trial Tr. 36:5–37:19, Oct. 23, 2013 (Mann).)

221. Had any such actual or potential unsecured creditor inquired of ResCap into the status of the Reacquired Mortgage Loans pre-petition, such creditor would have been told that such loans in fact were automatically pledged once again to AFI and the JSNs under the Blanket Lien, and were coded as such in the CFDR (originally appearing as 'Unpledged' and later as 'Blanket Lien'). (See Farley Dep. 95:3–14, 110:5–111:14, 115:4–14, 137:21–24, 138:4–11, 176:21–177:3, Sept. 18, 2013, Comm. Adv. Dkt. No. 115; Trial Tr. 190:21–192:18, Oct. 16, 2013 (Farley); Hall Dep. 117:6–12; Sept. 26, 2013, Comm. Adv. Dkt. No. 120; Ruhlin Dep. 65:19–22, 66:6–21, 106:8–12, 119:4–9, 155:16–156:2, 156:15–21, Sept. 18, 2013, Comm. Adv. Dkt. No. 128.)

D. ***The AFI Revolver and Intercreditor Agreement Reflect the Parties' Intent for the JSN Security Interest To Cover Former Bilateral Facilities Collateral and Reacquired Mortgage Loans***

222. Section 7.01(q) of the AFI Revolver provides, in relevant part:

> Such Obligor [*i.e.*, ResCap and the other Debtors liable for the AFI Revolver and JSN debt] will, and will cause its Subsidiaries to, use commercially reasonable efforts to grant and perfect a Lien to secure the ***Obligations*** . . . with respect to (i) ***US Mortgage Loans repurchased*** or otherwise acquired by such Obligor or Subsidiary, ***or held by such Obligor or Subsidiary and released from the Liens supporting any other facility*** . . .

(PX 6 (AFI Revolver § 7.01(q)) at PX pg. 29 (emphasis added).)

223. "Obligations" is defined in the AFI Revolver as "obligations, indebtedness, fees, expenses . . . and liabilities of any Borrower, any Guarantor or any other Obligor to any ***Lender Party***, now existing or hereafter arising under or in connection with any ***Facility Document*** . . ." (PX 6 (AFI Revolver) at PX pg. 140 (emphasis added).)

224. "Facility Documents" is defined to include the Intercreditor Agreement as well as the Security Documents. (PX 6 (AFI Revolver) at PX pg. 130.)

225. "Security Documents" is defined to include "all of the security agreements . . . evidencing or creating or purporting to create any security interests in favor of or for the benefit of the First Priority Collateral Agent or the Collateral Control Agent for its benefit and for the benefit of the Lender Parties." (PX 6 (AFI Revolver) at PX pg. 153.)

226. "Lender Parties" is defined to include the "Collateral Control Agent," as that term is defined in the Intercreditor Agreement. (PX 6 (AFI Revolver) at PX pg. 136.)

227. The Intercreditor Agreement defines Collateral Control Agent as "Wells Fargo Bank, N.A., acting in its capacity as the collateral agent for each of the First Priority Collateral

Agent, Second Priority Collateral Agent, and ***Third Priority Collateral Agent***" for purposes of section 5.5(b) of the Intercreditor Agreement, pursuant to which the Obligors grant to the Collateral Control Agent a security interest in the Controlled Collateral to secure the First, Second, and third Priority Claims. (PX 2 (Intercreditor Agreement) at PX pgs. 8, 33–34 (emphasis added).)

228. Section 2.3(c) of the Intercreditor Agreement provides that the parties shall not "grant or permit any additional Lien on any asset to secure any First Priority Claim unless it has granted [a] Lien on such asset to secure the Second Priority Claims and the Third Priority Claims." (PX 2 (Intercreditor Agreement) at PX pg. 17.)

229. Thus the JSNs were protected by the Intercreditor Agreement and the Intercreditor Agreement obligated the Debtors to grant the JSNs a lien in all collateral pledged to AFI.

E. ***The Custom and Practice Expert Testimony Presented at Trial Supports the Conclusion that Former Bilateral Facilities Collateral and Reacquired Mortgage Loans Constitute JSN Collateral***

a. ***The Notes Trustee's Expert Credibly Testified That Under Custom and Practice of Parties to All-Assets Secured Transactions, Assets Such as the Former Bilateral Facilities Collateral And Reacquired Mortgage Loans Would Constitute Collateral***

230. The Defendants' expert, Professor Ronald J. Mann, offered cogent and credible expert testimony respecting the customs and practices of parties to security agreements, such as the Notes Security Agreement, in which an all-assets security interest is granted. (See DX ABD (Mann Report); Direct Testimony of Ronald J. Mann, Oct. 8, 2013, Comm. Adv. Dkt. No. 134.)

231. Professor Mann is the Albert E. Cucinelli Enterprise Professor of Law at Columbia Law School, where he is the Co-Director of the Charles E. Gerber Program in

Transactional Studies, and has been a scholar in the study of commercial and secured transactions for the past fifteen years. (See DX ABD (Mann Report) at DX0ABD-0003.)

232. Professor Mann specializes in the study of commercial law, with a focal emphasis on secured transactions. (DX ABD (Mann Report) at DX0ABD-0003.)

233. Professor Mann has previously held tenured positions at the law schools of the University of Texas, the University of Michigan, and Washington University in St. Louis, and has taught courses as a visiting professor at Harvard Law School and at the Faculty of Law at Tokyo University. (DX ABD (Mann Report) at DX0ABD-0003–0004.)

234. Before entering academia, Professor Mann was a judicial law clerk for two years, first with Judge Joseph T. Sneed of the United States Court of Appeals for the Ninth Circuit and then with Justice Lewis F. Powell, Jr., of the United States Supreme Court. (DX ABD (Mann Report) at DX0ABD-0003.)

235. Prior to that, Professor Mann served for three years as an Assistant to the Solicitor General of the United States during which time he argued eight Supreme Court cases and wrote merits briefs in forty Supreme Court cases. (DX ABD (Mann Report) at DX0ABD-0017.)

236. Professor Mann spent four years in private practice at Dow, Cogburn & Friedman where he worked on a variety of commercial transactions. (Trial Tr. 22:14–17, 24:17–25:18, Oct. 23, 2013 (Mann).)

237. Professor Mann served as a member of the Drafting Committee most recently charged with preparing amendments to UCC Article 9, the article devoted to secured transactions. (DX ABD (Mann Report) at DX0ABD-0004.)

238. As an academic and scholar, Professor Mann has published widely in law reviews on subjects related to secured credit. (DX ABD (Mann Report) at DX0ABD-0004.) He has

conducted qualitative empirical studies comprising interviews with industry participants, including lenders, borrowers and counsel, and close analysis of the typical forms of documentation for commercial transactions, including all-asset security arrangements. (DX ABD (Mann Report) at DX0ABD-0004.)

239. Professor Mann has also authored case books related to commercial transactions, which utilize transaction documents coupled with practice problems, and which Professor Mann periodically updates by consulting attorneys engaged in secured transactions. (Trial Tr. 26:17–27:5, Oct. 23, 2013 (Mann); DX ABD (Mann Report) at DX0ABD-0004.)

240. In addition, a class he regularly teaches—"Deals"—is focused on providing students practical experience with problems based on real-world transactions, and bringing the attorneys on the actual deals into the classroom to provide critique and insight. (Trial Tr. 27:6–12, Oct. 23, 2013 (Mann).)

241. Through these experiences, Professor Mann has developed a keen understanding of the customs and practices of parties who negotiate and draft secured transactions, including the type of all-asset secured transactions at issue in this case. (DX ABD (Mann Report) at DX0ABD-0004.)

242. Professor Mann credibly testified that parties to security agreements, such as the Notes Security Agreement, in which an all-assets security interest is granted customarily intend that the security agreement will provide the lender with a lien in all assets then or subsequently owned by the borrower, other than assets in which the borrower is legally or operationally unable to provide a security interest at a given point in time. (DX ABD (Mann Report) at DX0ABD-0008.)

243. Professor Mann opined that the Notes Security Agreement is drafted in a manner consistent with this custom and practice, and that the all-assets security interest granted therein would reach the Former Bilateral Facilities Collateral and the Reacquired Mortgage Loans. (Trial Tr. 27:16–28:15, Oct. 23, 2013 (Mann); DX ABD (Mann Report) at DX0ABD-0003; Mann Direct, Ex. A; see also generally DX ABD (Mann Report).)

244. Professor Mann testified regarding the "course of increasing specificity," which follows the business principals' agreement to enter into an all-assets transaction wherein the parties agree to exclude "some assets that, for one reason or another, the borrower can't include." (Trial Tr. 28:8–17, Oct. 23, 2013 (Mann).)

245. Importantly, Professor Mann explained how "the expectation of the parties would be that everything is covered, except for the things that the borrower asks for and can justify being removed from the documents…the borrower asks for things to be excluded, the lender accepts the business justification and then writes in the documents the exclusion to the extent there's a business justification." (Trial Tr. 29:1–7, Oct. 23, 2013 (Mann).)

246. Professor Mann credibly opined that in ordinary custom and practice, a party would document any exclusion of assets from an all-assets clause with unambiguous explicitness, but that the breadth of an exclusion is ordinarily defined by its purpose and "[t]here would be no reason . . . for such exclusion to reach any more broadly than demanded." (See DX ABD (Mann Report) at DX0ABD-0010.) If the purpose or basis for such exclusion no longer exists, then the all-assets security interest would reach the assets absent explicit language to the contrary and the UCC-1 on file automatically attaches to the asset. (Id.; Trial Tr. 10:17–24, Oct. 23, 2013 (Mann).) As Professor Mann testified, the effect of a financing statement changes from

time to time to encompass newly available assets. (See Trial Tr. 38:10–23, Oct. 23, 2013 (Mann).)

247. Professor Mann also opined that if parties to an all-assets security agreement intended for an asset, which had been excluded from the collateral, to remain perpetually excluded even after the basis for the exclusion ceased to exist, the parties would have documented such an unusual outcome with unambiguous explicitness. (DX ABD (Mann Report) at DX0ABD-0010.)

b. *The Testimony Presented by Committee Expert James Gadsden Fails to Shed Light on the Question of Whether the Former Bilateral Facilities Collateral or Reacquired Mortgages Constitute JSN Collateral*

248. The Committee presented expert testimony from James Gadsden, a purported expert in the drafting of indentures and related security agreements, that if the parties had wished for the Former Bilateral Facilities Collateral to automatically spring back into the JSN Collateral package, they could have and should have included express language to that effect in the Notes Security Agreement.

249. Mr. Gadsden did not purport to offer a view as to whether the parties actually intended to include the Former Bilateral Facilities Collateral in the JSN Collateral. (Trial Tr. 57:18–25; 58:7–11, Oct. 17, 2013 (Gadsden).) Nor did he opine that the parties *would* have used clearer language; only that they should have.

250. Mr. Gadsden's experience in his legal career has largely focused on indentures. (PX 244 (Gadsden Report) ¶¶ 5, 9–11.) In the restructuring and plan negotiation context, Mr. Gadsden's experience extends to the interpretation of indentures. (Trial Tr. 60:5–8, Oct. 17, 2013 (Gadsden).)

251. Mr. Gadsden does not have significant experience drafting loan agreements, or the security interests pledged thereunder. (Trial Tr. 61:6–21, Oct. 17, 2013 (Gadsden).)

252. In reaching his opinion, Mr. Gadsden supervised a survey of indentures and security agreements that were drafted at the times that the Indenture, the Original Security Agreement and the Amended Security Agreement were executed. (Gadsden Direct ¶ 17.) The survey conducted by Mr. Gadsden is not reliable.

253. Mr. Gadsden did not conduct the survey, or select the sample deemed to be relevant, himself. (Trial Tr. 85:3–86:6, 86:23–87:1, Oct. 17, 2013 (Gadsden).)

254. Mr. Gadsden's search terms did not include the phrase all-assets, or any iteration thereof. (Gadsden Direct, Exs. B–C.)

255. Of the hundreds of agreements initially located in his survey, Mr. Gadsden found only 35 agreements, from two time periods, to be relevant to his analysis. (Trial Tr. 82:2–8, Oct. 17, 2013 (Gadsden); Gadsden Direct ¶ 18.)

256. Of those 35 transactions, only a handful of the agreements had more specific language regarding excluded assets or the treatment of released property when it is reacquired. (Trial Tr. 105:7–10, Oct. 17, 2013 (Gadsden).)

257. The custom and practice opinion presented in Mr. Gadsden's witness statement and through his trial testimony related solely to security agreements respecting indentures. (Gadsden Direct; Trial Tr. 58:1–11, Oct. 17, 2013 (Gadsden).)

258. Mr. Gadsden's survey excluded security agreements related to loan agreements, and thus did not include security arrangements for revolvers. (Trial Tr. 86:7–9, Oct. 17, 2013 (Gadsden); Gadsden Direct, Exs. B–C.)

259. Mr. Gadsden acknowledged that the process by which parties draft security agreements related to indentures and security agreements related to loan or credit agreements differ. (Trial Tr. 79:2–7, Oct. 17, 2013 (Gadsden).)

260. Mr. Gadsden did not know whether the Notes Security Agreement was drafted in the context of negotiating a revolver, as opposed to an indenture. (Trial Tr. 81:3–7, Oct. 17, 2013 (Gadsden).)

261. Mr. Gadsden did not know whether or not there is a model form of security agreement that is used by lawyers who draft pledge and security agreements. (Trial Tr. 81:8–11, Oct. 17, 2013 (Gadsden).)

262. Mr. Gadsden did not contact relevant counsel in any of the matters that he identified as lacking more specific language in order to inquire as to the intended scope of the collateral packages in those transactions. (Trial Tr. 106:20–24, Oct. 17, 2013 (Gadsden).)

263. In forming his opinions, Mr. Gadsden did not consider the circumstances that led ResCap to enter into the JSN indenture. (Trial Tr. 81:12–15, Oct. 17, 2013 (Gadsden).)

264. Mr. Gadsden conceded that the absence of automatic spring-back language does not signify an intent to preclude excluded collateral from springing back into the collateral pool. (Trial Tr. 102:24–103:3, Oct. 17, 2013 (Gadsden).)

265. While the Plaintiffs, Defendants and the Court all agree that this dispute would not have arisen but for the absence of more specific language in the Notes Security Agreement, Mr. Gadsden could not and did not opine that the absence of express language providing for the "spring back" of assets into the collateral pool implies an intention by the parties that formerly-excluded assets or repurchased released assets would not fall within the security grant. (Trial Tr. 102:24–103:3, 105:14–17, Oct. 17, 2013 (Gadsden).)

266. Mr. Gadsden was unable to identify "something that is routinely or invariably done to deal with a specific problem," and was unable to identify any particular language that is "routinely or invariably" used in a security agreement to indicate that excluded and released collateral "automatically spring back into a secured creditor's collateral pool." (Trial Tr. 105:3–4, Oct. 17, 2013 (Gadsden).)

267. Mr. Gadsden's firm, Carter Ledyard & Milburn LLP, is co-counsel for the Talcott Franklin Group, unsecured creditors in the Chapter 11 Cases. (Trial Tr. 99:7–16, Oct. 17, 2013 (Gadsden).)

268. Recoveries to the unsecured creditors, including the Talcott Franklin Group, will increase by approximately $68 million if the Committee succeeds on Counts I and IV, the two counts to which Mr. Gadsden's testimony relates. (Trial Tr. 99:23–100:6, Oct. 17, 2013 (Gadsden).)

269. An increase in recoveries to unsecured creditors will result in a corresponding increase to Mr. Gadsden's firm, because the firm's compensation for its representation of the Talcott Franklin Group is a percentage of the recoveries that the group is going to receive. (Trial Tr. 99:17–100:19, Oct. 17, 2013 (Gadsden).)

F. *The Evidence Shows that the JSNs Have Perfected Security Interests in the Deposit Accounts*

270. Count VI of the Committee complaint seeks a declaratory judgment that the JSNs do not hold perfected security interests in the deposit accounts listed on Schedule 5 to the Committee complaint (the "Deposit Accounts"), based on the Committee's allegation that there are no control agreements in favor of the JSNs governing the Deposit Accounts. (Comm. Complaint 25–26.)

271. The following six Deposit Accounts are subject to control agreements in favor of the JSNs:

BANK / INSTITUTION	DEBTOR	ACCOUNT NUMBER
JPMorgan Chase Bank, N.A.	Residential Funding Company, LLC	xxxx2763
TD	Residential Funding Company, LLC	xxxx0593
Wells Fargo f/k/a Wachovia	Residential Funding Company, LLC	xxxx7618
JPMorgan Chase Bank, N.A.	GMAC Mortgage, LLC	xxxx8567
Wells Fargo f/k/a Wachovia	GMAC Mortgage, LLC	xxxx6910
Wells Fargo f/k/a Wachovia	Residential Consumer Services, LLC	xxxx7570

(See DX AIY (Deposit Account Control Agreement for account ending in 2763); DX AIZ (Deposit Account Control Agreement for account ending in 0593); DX AIX (Deposit Account Control Agreement for account ending in 7618); DX AIW (Deposit Account Control Agreement for account ending in 8567); DX AIV (Deposit Account Control Agreement for account ending in 6910); DX AIU (Deposit Account Control Agreement for account ending in 7570).)

272. Additionally, two of the Deposit Accounts are held at Ally Bank. (PX 126 (Schedule 5 to Committee Complaint).)

273. Ally Bank is an indirect, wholly-owned subsidiary of AFI. (See DX LR (Affidavit of James Whitlinger ¶ 15) at DX00LR-0008.) AFI is the First Priority Secured Party, and is a party to the Intercreditor Agreement, dated June 6, 2008, between (a) the Original Notes Trustee; (b) Wells Fargo, in its capacity as Collateral Agent under each of the (i) first priority AFI Revolver; (ii) former second priority Senior Secured Notes security agreement; and (iii) former

third priority Original Notes Security Agreement; (c) AFI, as lender agent; and (d) certain Debtors (the "Intercreditor Agreement"). (PX 2 (Intercreditor Agreement).)

274. Six of the Deposit Accounts are held at Wells Fargo. (PX 126 (Schedule 5 to Committee Complaint).)

275. Wells Fargo is the Collateral Agent for the First, Second and Third Priority Secured Parties, as those terms are defined in the Intercreditor Agreement. (PX 2 (Intercreditor Agreement); Stipulated Facts ¶¶ 4–5.) The Intercreditor Agreement provides that Wells Fargo, as Third Priority Collateral Agent (as defined in the Intercreditor Agreement) for the Third Priority Secured Parties, including the JSNs, will be granted, "for the benefit of the Third Priority Secured Parties, security interests in the Collateral as security for payment and performance of the Third Priority Claims." (PX 2 (Intercreditor Agreement) at PX 2 pg. 6.)

276. In addition, section 2 of the Original Notes Security Agreement, as amended, grants a security interest to Wells Fargo as Third Party Collateral Agent for the benefit of the Secured Parties, including the JSNs. (PX 3 (Original Notes Security Agreement) at PX 3 pg. 11.)

277. Prior to the Phase One Trial, the Committee made no effort to discern whether the Deposit Accounts held proceeds of JSN Collateral.

278. At trial, Committee expert Marc Landy testified for the first time that certain of the Deposit Accounts held proceeds of JSN Collateral. (Trial Tr. 173:15–23, Oct. 17, 2013 (Landy).)

279. The Committee has never provided the JSNs with any information showing which of the Deposit Accounts hold proceeds of JSN collateral, or any documentary evidence establishing which of the funds in the Deposit Accounts are or are not the proceeds of JSN collateral.

G. *The Evidence Shows that the JSNs Have Perfected Security Interests in Certain of the Alleged Unencumbered Real Property Assets*

280. Count II of the Committee Complaint seeks a declaration that the JSNs do not hold perfected security interests in the real property listed on Schedule 2 to the Committee complaint, and the REO properties listed as a subset of the assets on Schedule 6 to the Committee Complaint (the "REO Properties," and, collectively with the assets listed on Schedule 2, the "Alleged Unencumbered Real Property"). (Comm. Complaint 16–17.) The Alleged Unencumbered Real Property has a book value of approximately $37 million and an alleged fair market value of approximately $21 million. (PX 241 (Landy Report) at PX pg. 16.)

281. The JSNs do not dispute Count II of the Committee Complaint with respect to the Owned Real Property and Leasehold Interests enumerated on Schedule 2 to the Committee Complaint.

282. The evidence shows that at least $4,203,009.28 of the approximately $14 million of REO Properties (on a book value basis) were held by special purpose vehicles, the equity of which was granted to the JSNs. (See PX 139 (CFDR).)

283. Prior to the commencement of the Committee action, the Debtors informed the Committee that REO assets were "title[d]" in the name of three special purpose vehicles "that were created to hold REO pledged to the revolver" as primary collateral, and that "the equity in th[ose] SPV[s] w[ere] then pledged to the revolver." (DX NR (Email attaching Collateral Review Diligence Questions circulated between the Debtors, the Committee and their respective counsel) at DX00NR-0018.) The Debtors noted that the REO assets constituting Primary Collateral under the Revolver were held by these special purpose vehicles, notwithstanding that the CFDR listed such REO assets as "outside of a SPV." (See id. (explaining that the notation "outside of a SPV"

in the CFDR meant only that the REO was not included in the Revolver borrowing base calculation, because it did not have a current "BPO," or broker price opinion).)

284. $4,203,009.28 (on a book value basis) of the REO Properties listed on Schedule 6 and incorporated by reference into Schedule 2 were coded as primary collateral under the Revolver in the CFDR as of the Petition Date. (See PX 139 (CFDR).)

285. The remainder of the REO Properties were coded in the CFDR as "Unpledged" prior to the Petition Date, were reported by the Debtors as being subject to the JSN blanket lien in the Debtors' Cash Collateral Motion, and were recoded as "Revolver Blanket Lien" on May 31, 2012, indicating the Debtors' view that such assets constituted JSN Collateral. (See PX 139 (CFDR); Corrected Debtors' Motion to Approve Use of Cash Collateral, Exhibit A, May 14, 2012, Dkt. No. 42.)

H. *The JSNs Are Entitled to Post-Petition Interest Because the Aggregate Value of the Collateral Held by the Debtors Exceeds the JSN Claim*

286. In the Offering Memorandum, the Debtors represented that the JSNs would be secured by ResCap and its subsidiaries, together, jointly and severally. (PX 175 (Offering Memorandum) at PX pg. 1 ("The new notes will be issued by ResCap and will be secured by substantially all of our existing and after-acquired unencumbered assets remaining available to be pledged as collateral as described below. The notes will also be unconditionally guaranteed by subsidiaries of ResCap."); id. at PX pg. 79–80.)

287. With respect to the JSN Indenture, "Company" is defined as ResCap "and any and all successors [t]hereto." (PX 1 (JSN Indenture) at PX pg. 10.)

288. "Subsidiary" is defined in the JSN Indenture as "any corporation, partnership, limited liability company, association or other entity of which at least majority of the outstanding

stock or other interest having by its terms ordinary voting power to elect majority of the board of directors, managers or trustees of such corporation, partnership, limited liability company, association or other entity (irrespective of whether or not at the time stock or other interest of any other class or classes of such Person shall have or might have voting power by reason of the happening of any contingency) is at the time owned by the Company, or owned by one or more Subsidiaries, or owned by the Company and one or more Subsidiaries (it being understood that GMAC Bank is not Subsidiary)." (PX 1 (JSN Indenture) at PX pg. 24.)

289. "Significant Subsidiary" is defined in the JSN Indenture as any Subsidiary that met certain threshold conditions respecting the income or proportionate share of the total assets of the Company and Subsidiaries on a consolidated basis. (PX 1 (JSN Indenture) at PX pg. 24.)

290. "Guarantor" is defined in the JSN Indenture as "(i) each of the Subsidiaries of the Company that is a party to this Indenture, and (ii) any other Subsidiary that executes a supplemental indenture in accordance with the provisions of this Indenture." (PX 1 (JSN Indenture) at PX pg. 14.)

291. The Guarantors provided unconditional guarantees to the JSNs *jointly and severally*. (PX 1 (JSN Indenture) at PX pgs. 79–80.)

292. The JSN Indenture required that if the Debtors moved assets to a Significant Subsidiary or created a Significant Subsidiary, such Significant Subsidiary would become a Guarantor, subject to certain exceptions. (See, e.g., PX 1 (JSN Indenture) at PX pg. 59–60 (Section 4.17 requiring all "Significant Subsidiaries" to become "Guarantors" and thus also "Grantors" under the JSN Pledge Agreement).)

293. The Debtors routinely reported their financial status in consolidated financial statements. (See, e.g., DX GU (ResCap Condensed Consolidated Financial Statements for the

Periods Ended September 30, 2008 and 2009); DX HQ (ResCap Condensed Consolidated Financial Statements for the Periods Ended December 31, 2008 and 2009); DX IT (ResCap Condensed Consolidated Financial Statements for the Periods Ended March 31, 2009 and 2010); DX JT (ResCap Condensed Consolidated Financial Statements for the Periods Ended September 30, 2011 and 2012).)

294. The Debtors continued to report collateral value in the aggregate after the Petition Date. (See, e.g., Monthly Operating Report for the Period from September 1, 2012 through September 30, 2012, Oct. 22, 2012, Dkt. No. 1914; Monthly Operating Report for the Period from August 1, 2013 through August 31, 2013, Sept. 25, 2013, Dkt. No. 5209.)

295. The aggregate value of the JSN Collateral is sufficient to pay the JSNs post-petition interest. (See DX ABF (DX ABF (Siegert Report—Global Summary).)

296. The JSN Global Note and the JSN Indenture each explicitly provided that the JSNs would be entitled to collect interest until the principal was paid in full. (DX CN (JSN Global Note) at DX00CN-0007; PX 1 (JSN Indenture) at PX pg. 51.)

297. Outside of bankruptcy court the JSNs would have been entitled to levy against the assets of any and all of the Obligor's and Guarantors to secure their rights to collect interest until principal was paid in full. (PX 1 (JSN Indenture) at PX pg. 79–80.)

298. The JSN Global Note and the JSN Indenture each stated explicitly that the JSNs would be entitled to collect post-petition interest in the event of a bankruptcy proceeding. (DX CN (JSN Global Note) at DX00CN-0007; PX 1 (JSN Indenture) at PX pg. 51.) There is no provision in either the JSN Global Note or the JSN Indenture that conditions such payment on the JSNs being over secured at any single Debtor entity.

299. The Court previously ruled that it would defer decision on Plaintiffs' claim for a declaration that the JSNs must be oversecured at a single debtor entity to obtain post petition interest. (Hr'g Tr. 234:4-9, Aug. 28, 2013, Comm. Adv. Dkt. No. 47.)

Dated: November 1, 2013
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