**Hearing Date and Time: November 19, 2013 at 9:00 a.m. (Prevailing Eastern Time)**
**Opposition Date: November 15, 2013 at 4:00 p.m. (Prevailing Eastern Time)**

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

**NOTICE OF THE DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF JUDGE RAYMOND T. LYONS AT TRIAL**

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**PLEASE TAKE NOTICE** that upon the *Memorandum of Law in Support of the Debtors' and Official Committee of Unsecured Creditors' Motion in Limine to Exclude the Expert Testimony of Judge Raymond T. Lyons at Trial*, dated November 12, 2013, the *Declaration of Norman C. Simon in Support of the Debtors' and Official Committee of Unsecured Creditors' Motion in Limine to Exclude the Expert Testimony of Judge Raymond T. Lyons at Trial*, dated November 12, 2013, and the exhibits attached thereto, and all prior proceedings herein, Plaintiffs, Residential Capital, LLC, GMAC Mortgage LLC, Residential Funding Company, LLC, and each of their affiliated debtors and debtors in possession, together with Plaintiff, Official Committee of Unsecured Creditors, hereby move this Court for entry of an order excluding at the trial of these adversary proceedings testimony from Judge Raymond T. Lyons, an experts offered by Defendants, UMB Bank, N.A. ("UMB") and the Ad Hoc Group of Junior Secured Noteholders (the "JSNs" and collectively with UMB, "Defendants").

**PLEASE TAKE FURTHER NOTICE** that any opposition to the relief sought herein must be made in writing, conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York, and the Notice, Case Management, and Administrative Procedures approved by the Bankruptcy Court, be filed electronically by registered users of the Bankruptcy Court's electronic case filing system, and be served, so as to be received no later than **November 15, 2013 at 4:00 p.m. (Prevailing Eastern Time)**, upon (a) counsel to the Debtors, Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, NY 10104 (Attention: Gary S. Lee, Charles L. Kerr, Darryl Rains, and J. Alexander Lawrence) and Curtis, Mallet-Prevost, Colt & Mosle LLP, 101 Park Avenue, New York, NY 10178 (Attn: Steven J. Reisman, Theresa A. Foudy, and Michael Moscato); (b) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York NY

10004 (Attention: Tracy Hope Davis, Linda A. Riffkin, and Brian S. Masumoto); (c) the Office of the United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001 (Attention: US Attorney General, Eric H. Holder, Jr.); (d) Office of the New York State Attorney General, The Capitol, Albany, NY 12224-0341 (Attention: Nancy Lord, Esq. and Enid N. Stuart, Esq.); (e) Office of the U.S. Attorney for the Southern District of New York, One St. Andrews Plaza, New York, NY 10007 (Attention: Joseph N. Cordaro, Esq.); (f) counsel for Ally Financial Inc., Kirkland & Ellis LLP, 153 East 53rd Street, New York, NY 10022 (Attention: Richard M. Cieri and Ray Schrock); (g) counsel for the Official Committee of Unsecured Creditors, Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, NY 10036 (Attention: Kenneth H. Eckstein, Philip Bentley, P. Bradley O'Neill and Norman C. Simon), and Pachulski Stang Ziehl & Jones LLP, 780 Third Avenue, 36th Floor New York, NY 10017 (Attn: Robert J. Feinstein and John A. Morris).

**PLEASE TAKE FURTHER NOTICE** that if you do not timely file and serve a written objection to the relief requested in the Motion, the Bankruptcy Court may deem any opposition waived, treat the Motion as conceded, and enter an order granting the relief requested in the Motion without further notice or hearing.

Dated: November 12, 2013

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**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

**DECLARATION OF NORMAN C. SIMON IN SUPPORT OF THE DEBTORS' AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS' MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF JUDGE RAYMOND T. LYONS AT TRIAL**

I, Norman C. Simon, hereby declare as follows:

1. I am a partner at the law firm of Kramer Levin Naftalis & Frankel LLP, counsel for Plaintiff the Official Committee of Unsecured Creditors (the "Committee") in the above-captioned matters.

2. I submit this declaration to provide the Court with true and correct copies of the following documents in support of the Motion in Limine, submitted by the Plaintiffs in the above-captioned adversary proceedings, to exclude the expert testimony of Judge Raymond T. Lyons:

Exhibit 1. Expert Report of Raymond T. Lyons, Esq.

Exhibit 2. Transcript of the deposition of Raymond T. Lyons, November 11, 2013.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 2013

Norman C. Simon

# EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

**EXPERT REPORT OF RAYMOND T. LYONS, ESQUIRE**

**Dated: October 18, 2013**

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II. EXHIBIT A..... 1

# I. THE OPINION OF RAYMOND T. LYONS, ESQUIRE

## A. THE EXPERT

### 1. Retention

I prepared, with the assistance of Fox Rothschild LLP ("Fox Rothschild"), this opinion (the "Opinion") at the request of (a) White & Case LLP and Milbank, Tweed, Hadley & McCloy LLP, co-counsel to (i) the Ad Hoc Group of Junior Secured Noteholders ("Ad Hoc Group") of the 9.625% Junior Secured Guaranteed Notes due 2015 ("JSNs") and (ii) UMB Bank, N.A. as Trustee for the JSNs ("Notes Trustee"), and (b) Akin Gump Strauss Hauer Feld LLP, as special litigation counsel to the Trustee relating to the Chapter 11 proceedings of Residential Capital, LLC ("ResCap", the "Company" or the "Debtors") in the United States Bankruptcy Court for the Southern District of New York, Case No. 12-12020. I was asked to provide my opinion as to the reasonable settlement value of each of the claims identified in the Report of Arthur J. Gonzalez, Esquire, As Examiner, released June 26, 2013 ("Examiner's Report"). I have also been asked to give my opinion as to the reasonable allocation of the $2.1 billion dollar settlement fund provided by AFI among the various settled claims. I and Fox Rothschild are being compensated at Fox Rothschild's usual and customary hourly billing rates.

### 2. Qualifications

Prior to joining Fox Rothschild on July 1, 2013, I served as a United States Bankruptcy Judge for the District of New Jersey for over 14 years. I conducted settlement conferences in cases assigned to me and for my colleagues in the District of New Jersey. While on the bench I was authorized by the Court of Appeals for the Third Circuit to serve as mediator in the U.S. Bankruptcy Court for the District of Delaware. Among the matters I mediated in Delaware was the plan of reorganization for Washington Mutual, Inc. involving twenty-two classes of claims and interests and $7 billion in distributions.

I completed the forty-hour Bankruptcy Mediation Training program in the first class conducted by the American Bankruptcy Institute and St. John's University School of Law. I am a member of the Dispute Resolution Section of the New Jersey State Bar Association and the Justice Marie L. Garibaldi ADR Inn of Court. I am on the Roster of Mediators for the American Arbitration Association (AAA), the CPR Panel of Distinguished Neutrals for the International Institute For Conflict Prevention and Resolution (CPR), and the Panel of Arbitrators and Mediators for Federal Arbitration, Inc. (FedArb). I am also on the court-annexed Panel of Mediators in the U.S. Bankruptcy Courts for the Southern District of New York, the Eastern District of New York, the District of Delaware and the Western District of Pennsylvania.

Before taking the bench, I was in private practice for more than 25 years as a commercial lawyer with a concentration in chapter 11 bankruptcy. I taught banking law as an adjunct professor at Seton Hall University School of Law. I received my J.D. from Seton Hall University School of Law and my LL.M. in tax law from New York University School of Law.

Other than the opinions that I have written in my position as a United States Bankruptcy Judge, I have not authored any publications in the last 10 years. I have not testified as an expert either at trial or by deposition in the last four years.

### 3. Limitations

The opinions expressed herein represent my reasonable professional judgment as to the matters expressed herein, based upon the facts presented in the Examiner's Report and are not guarantees that a court would reach any particular result. In fact, the opinion of settlement amount for each claim is not intended to predict the legal outcome of the claim but rather to estimate the settlement value based on the possibility of various alternative legal outcomes.

My Opinion is limited to the matters stated herein. No opinion is implied or may be inferred beyond the matters expressly stated. The Opinion is given as of the date hereof, and I expressly disclaim any obligation to update or supplement my opinions contained herein to reflect any facts or circumstances that may hereafter come to my attention or any changes in laws which may hereafter occur.

## B. ORGANIZATION OF THE OPINION

For ease of reference I have organized the Opinion using, for the most part, the same sections as Section I of the Examiner's Report. Section A sets out the background relating to my employment as the expert, my qualifications, the scope of my retention and opinion, and the limitations of the Opinion. Section B discusses the Organization of the Opinion. Section C explains the Examiner's investigation. Section D explains the methodology employed in arriving at my Opinion regarding the settlement values of the potential claims of the estate and the potential claims of third parties and a summary of my Opinion. Section E follows the outline of potential Estate Causes of Action as set forth in Summary Section I.E of the Examiner's Report, and sets forth my opinion regarding the likely settlement amount of each claim. Section F contains a chart of all Estate Causes of Action identified by the Examiner with my opinion on the reasonable settlement value of each claim. Section G relates to the proposed post-petition transactions and agreements. Section H follows the outline of potential third party claims as set forth in Summary Section I.H of the Examiner's Report and contains my opinion concerning the reasonable settlement value of each of those claims. Section I contains my opinion regarding the reasonable allocation of the $2.1 billion dollar settlement fund provided by AFI among the various settled claims.

## C. THE INVESTIGATION

The Examiner did an evaluation of the facts, including review and examination of almost nine million pages of documents produced by twenty-three different parties, ninety-nine formal interviews of eighty-three witnesses, sixty-six meetings with interested parties, and review of multiple written submissions from a dozen parties. Unless specifically noted, I have relied on the factual findings of the Examiner in reaching my opinion regarding the settlement values of the claims identified by the Examiner.

To the extent that a potential claim identified by the Examiner in his report referenced a pertinent contract or order, such contract or order was reviewed to confirm the Examiner's interpretation of the terms and effect of that contract or order. A list of the documents that were reviewed in order to render my Opinion is attached hereto as Exhibit A.

## D. METHODOLOGY OF EXPERT AND SUMMARY OF CONCLUSIONS

To render my Opinion, the Examiner's Report has been carefully reviewed in full to assign a settlement value to each of the potential causes of action identified in the Examiner's Report and to allocate the $2.1 billion settlement fund to those settled claims. Importantly, as noted by the Examiner, given the expansive evidence and data reviewed and the nature of sometimes unsettled legal issues raised by many of the claims, the Examiner's assessment of the likelihood of success of each cause of action is inherently imprecise. The Examiner's Report contains nuanced conclusions and therefore, the Examiner cautions against applying probabilities or mathematical models to the results contained in his report.

I have heeded this caution and have applied a non-formulaic, nuanced approach to determining the reasonable settlement value of each claim and the allocation of the $2.1 billion settlement fund provided by AFI among the various settled claims. Although under the absolute priority rule, I could have allocated the settlement first to secured claims such as the JSNs, and second to unsecured claims, instead I made allocations pro rata based on the reasonable value of each of the claims. I did so based on my 25 years of experience as a practitioner, my 14 years of experience as a U.S. Bankruptcy Judge for the District of New Jersey, as well as my experience as a mediator. When appropriate, I have provided more than one method in arriving at my opinion regarding the reasonable settlement amount of a claim. For example, I applied a discounting method focused on the likely outcome or merits of a particular issue and my perception of the motivation of the parties to arrive at a reasonable settlement value of the cause of action. I also applied a likely settlement negotiation scenario to arrive at a settlement value from a second approach. If the settlement value of a particular claim was less than or equal to 1% of the gross value of the $2.1 billion dollar settlement fund provided by AFI (approximately $21 million), I deemed that claim to be not material for purposes of allocating the $2.1 billion settlement fund to the claims.

### 1. Legal Conclusions

I reviewed each of the legal conclusions of the Examiner and I generally reviewed the statutory and case law cited by the Examiner in support of each potential claim discussed in the Examiner's Report. Unless specifically noted, I agree with and rely on the legal conclusions reached by the Examiner as set forth in his Examiner's Report in rendering my Opinion.

### 2. Citations to Examiner's Report

For each claim, I have listed the references to relevant information in the Examiner's Report. However, for ease of reading, for the most part I have not pin cited the reference to the Examiner's Report. Unless specifically noted, I agree with the Examiner and rely on the factual conclusions reached by the Examiner as set forth in his Examiner's Report in rendering my Opinion. In addition,

the capitalized terms not defined in this Opinion shall have the meaning as defined in the Examiner's Report and the Appendix thereto.

### 3. Summary of Conclusions

After reviewing each of the causes of action identified in the Examiner's Report, in my opinion the reasonable settlement value of the Estate Causes of Action is $1,920.0 million and the reasonable settlement value of the Third Party Claims is $480 million for a total reasonable settlement value of all claims and causes of action of $2,400.0 million. In my opinion the settlement fund of $2.1 billion to be paid by AFI should be allocated to the reasonable settlement value of each claim *pro rata.*

| **Claims** | **Potential Damages (*in millions*)** | **Reasonable Settlement Amount (*in millions*)[1]** | **Percentage of Potential Damages** | **Allocation from $2.1 billion AFI Settlement Fund (*in millions*)** | **Percentage of Potential Damages** |
|---|---|---|---|---|---|
| ***ESTATE CAUSES OF ACTION*** | | | | | |
| Breach of Contract for Misallocation of Net Revenues on Loans brokered by GMAC | $520.5 | **$268.2** | **51.5%** | **$234.6** | **45.1%** |
| Breach of Contract for Failure To Pay Value of Purchased MSRs | $1,725.0 | **$387.2** | **22.4%** | **$338.8** | **19.6%** |
| Preferential Transfer relating to DOJ/AG Consent Order | $109.6 | **$60.0** | **54.7%** | **$52.5** | **47.9%** |
| Preferential Transfer relating to 2012 Letter Agreement and A&R Servicing Agreement | $48.4 | **$32.0** | **66.1%** | **$28.0** | **57.9%** |

[1] Zeros are omitted for any settlement value that does not meet my threshold for materiality ($21 million).

| **Claims** | **Potential Damages** ***(in millions)*** | **Reasonable Settlement Amount** ***(in millions)***[1] | **Percentage of Potential Damages** | **Allocation from $2.1 billion AFI Settlement Fund** ***(in millions)*** | **Percentage of Potential Damages** |
|---|---|---|---|---|---|
| Breach of contract regarding the First 2009 Tax Allocation Agreement | $1,770.0 | **$713.7** | **40.3%** | **$624.5** | **35.3%** |
| Minnesota Insider Preference Claims | $566.0 | **$328.9** | **58.1%** | **$287.8** | **50.8%** |
| Fraud related to 2006 Bank Restructuring | $569.0 | **$130.0** | **22.8%** | **$113.8** | **20.0%** |
| ***TOTAL*** | | **$1,920.0** | | **$1,680.0** | |
| ***THIRD PARTY CAUSES OF ACTION*** | | | | | |
| Third Party Claims against AFI | | | | | |
| a. RMBS Claims, including veil-piercing, control person liability, aiding and abetting fraud | $20,000.0[2] | **$480.0** | **2.4%** | **$420.0** | **2.1%** |
| ***GRAND TOTAL*** | | **$2,400.0** | | **$2,100.0** | |

[2] The Examiner did not quantify the potential damages for the Third-Party RMBS Claims against AFI.

## E. DETAILED REVIEW OF EXPERT OPINION REGARDING SETTLEMENT VALUES OF POTENTIAL ESTATE CLAIMS

In reaching an opinion concerning the likely settlement value of each of the Estate Causes of Action, I have considered a number of factors, including the factors relevant in determining whether the settlement is fair and equitable, the *Iridium* factors.[3]

Bankruptcy Rule 9019 provides that after notice and a hearing, "the court may approve a compromise or settlement." In determining whether to approve a settlement, the court must determine whether the settlement is "fair, equitable and in the best interests of the estate."[4] To determine whether a proposed compromise is fair and equitable, the court must review all facts necessary to (i) determine the probabilities of success should the claim be litigated, (ii) estimate the complexity, expenses and duration of litigating the claims, (iii) evaluate the possible difficulties of collecting on a judgment and all other factors relevant to an assessment of the settlement.[5]

In *Iridium*, the Second Circuit enumerated seven factors that should be evaluated in determining whether a settlement is fair and equitable and should be approved under Bankruptcy Rule 9019. Those factors are:

- The balance between the litigation's possibility of success and the settlement's future benefits;
- The likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment;
- The paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement;
- Whether other parties in interest support the settlement;
- The competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement;
- The nature and breadth of releases to be obtained by officers and directors; and
- The extent to which the settlement is the product of arm's length bargaining.[6]

I have considered each of these factors, as relevant, in determining the likely settlement amount of each claim identified by the Examiner. For all of the Estate Causes of action I assumed that collection is not a significant factor.

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[3] *Motorola, Inc. v. Official Comm. Of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 462 (2d Cir. 2007)(citing *In re WorldCom, Inc.*, 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006); *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992).

[4] *TMT Trailer Ferry*, 390 U.S. at 424-25.

[5] *Id*.

[6] *Iridium*, 478 F.3d at 462.

In arriving at the likely settlement amount for each of the potential claims identified by the Examiner, I have also considered the likely motivation of the particular litigants regarding the decision to settle the claims. Estate causes of action are likely to be pursued by a fiduciary such as a liquidating trustee or a committee. Fiduciary plaintiffs are typically motivated to reach an early resolution of disputes in order to reduce litigation costs and expedite distributions to creditors.

In assessing the likely settlement value of a potential claim identified by the Examiner, I have also considered the state of the law post-*Stern v. Marshall*.[7] There are many procedural hurdles that attend bankruptcy litigation, including the constitutional authority of a bankruptcy judge to render a final judgment in a state law contract dispute or a tort claim, federal statutory claims such as securities law claims, or an avoidance action under the Bankruptcy Code or state law such as a preference or a fraudulent transfer action. In addition, litigation of estate claims raises procedural issues of withdrawal of the reference and demands for a jury trial (the "Procedural Factors"). The Supreme Court has granted certiorari in the *Bellingham* case,[8] a Ninth Circuit case holding that fraudulent conveyance claims against non-creditors cannot be adjudicated by non-Article III judges. Thus, the Supreme Court may finally resolve these issues and offer both lower Article III courts and bankruptcy courts further guidance on the scope of a bankruptcy judge's authority.

Although *Stern v. Marshall* initially resulted in litigants requesting the withdrawal of the reference resulting in delay of the proceedings, the District Court for the Southern District of New York attempted to ameliorate these procedural roadblocks by entry of its Amended Standing Order of Reference on January 31, 2012. The Standing Order provides that if a bankruptcy judge or district judge determines that the entry of a final order or judgment by the bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under the standing order and determined to be a core matter, the bankruptcy judge shall hear the proceeding and submit proposed findings of fact and conclusions of law to the district court unless otherwise ordered by the district court. This procedure is the same procedure currently prescribed by 28 U.S.C. § 157(c) relating to non-core matters. Nevertheless, parties must still evaluate which is their preferred forum and take steps they deem in their best interest.

Also, the parties will have the right to a jury trial in many of the estate claims identified by the Examiner such as contract disputes and securities law claims. It is anticipated that some parties may request a jury trial. Many of the procedural issues pertaining to bankruptcy litigation will be present in the estate claims identified by the Examiner. They add complexity, risk, uncertainty, delay and expense to the litigation which must be factored into the evaluation of a reasonable settlement amount.

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[7] 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011).

[8] *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.*), 702 F. 3d 553 (9th Cir. 2012).

### 1. Claims of GMAC Mortgage and ResCap Relating To The MMLPSA, Pipeline Swap, MSR Swap, and Broker Agreement

#### *a. Misallocation of Net Revenues on Loans Brokered by GMAC Mortgage*

**Examiner's Report References:**

Section I.E pages I-8 to I-9

Section V.B.6 pages V-123 to V-154

Section VII.L pages VII.L-64 to VII.L-66

**Description:**

The implementation of the agreements between GMAC Mortgage and Ally Bank concerning the allocation of revenues on loans GMAC Mortgage brokered to Ally Bank between January 1, 2009 and April 30, 2012.

**Background:**

In 2008, ResCap was facing severe liquidity issues, while Ally Bank maintained excess liquidity and was searching for ways to grow its business. As a solution to those issues, in March 2008, ResCap and Ally Bank personnel began work on the "Brokering Consumer Loans to Bank" project. Prior to the project, the Bank's ability to purchase loans originated by GMAC Mortgage were subject to the "250.250 exception" limit which capped it at 50% of GMAC Mortgage's preceding twelve-month rolling production. Loans brokered to Ally Bank by GMAC Mortgage and then originated by Ally Bank would not be subject to this limit. Under the parties' then-existing agreement, Ally Bank recognized as revenue only the "net interest carry" for the period the loan was on Ally Bank's books. GMAC Mortgage realized the benefit of any points or other origination fees charged.

Contemporaneous e-mails among Albert Celini (an Ally Bank official and its "Sponsor" of the Brokering Consumer Loans to Bank Project), his subordinate Debra Scott (Bank Project Leader), and Matthew Whitehead (a ResCap representative) reflect a mutual understanding that the parties intended to maintain the same economics that had been in place for loans sold under the 250.250 program. The parties' agreement is further reflected in a slide presentation dated November 19, 2008, entitled "Brokering Consumer Loans 2 Bank Project (BCL2B), Legal Entity Revenue, Expense, and Broker Fee Proposal" (the "BCL2B Presentation"). The BCL2B Presentation states, among other things, that Ally Bank would "recognize" origination income, overage/shortage or pricing subsidies, broker fees, and underwriting expense, these items would be deferred and capitalized, and, upon the sale of the loan, their resulting economic effects would be transferred to GMAC Mortgage through the Master Mortgage Loan Purchase and Sale Agreement ("MMLPSA") and Pipeline Swap. Ally Bank would retain net interest carry, and would retain the mortgage servicing rights ("MSRs") upon sale of the loan. From an accounting standpoint, the deferred loan

origination fees and expenses, including broker fees, was governed by Statement of Financial Accounting Standards No. 91 ("FAS 91").

To achieve this goal on the loans brokered to Ally Bank by GMAC Mortgage, origination fees (*e.g.*, discount points) would be paid by the borrower to Ally Bank, and Ally Bank would then defer and capitalize that income. This would reduce the cost basis of the loan, which, under the Pipeline Swap and MMLPSA, would in turn reduce the price charged to GMAC Mortgage when it purchased the loan from GMAC Bank. Similarly, any brokerage fee paid by GMAC Bank to GMAC Mortgage would also be deferred and capitalized, which, under the Pipeline Swap and MMLPSA, would increase GMAC Mortgage's purchase price of the loan. In this way, Ally Bank was able to recoup the brokerage fees.

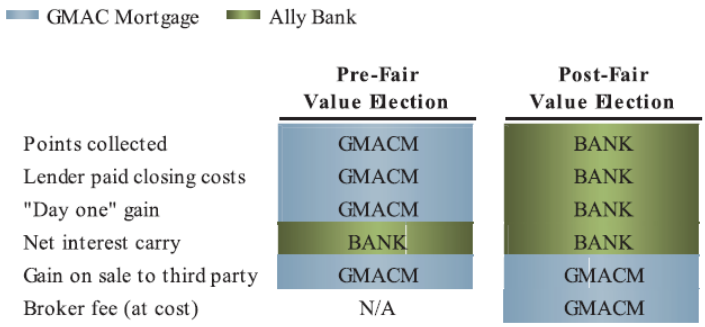
On November 20, 2008, GMAC Mortgage and its subsidiary, Ditech, LLC, as brokers and GMAC Bank, predecessor to Ally Bank, entered into the Broker Agreement, which is the only new written agreement into which the parties entered in connection with BCL2B. The Broker Agreement does not specify the fee that is to be paid to GMAC Mortgage for acting as a broker. However, Celini stated that any change in the pre-Broker Agreement economics (or any change in the accounting that required such a change) would have required "a change in affiliate agreements" then in place.

GMAC Bank and GMAC Mortgage initially allocated revenue and expense as agreed when they implemented the Broker Agreement. That is, from January 1, 2009 to July 31, 2009 (when Ally Bank elected an accounting change discussed below), Ally Bank realized only the net interest carry on the loans, while also retaining the MSRs on the increased volume of loans passing through Ally Bank by virtue of avoiding the 250.250 limits. GMAC Mortgage, through the impact of FAS 91 deferrals, continued to reap the benefit of points and other origination-related revenues, as well as the impact of capitalized expenses. The accounting for sample loans from this period produced by the Debtors confirms the above-described treatment, and matched the sample loan-level accounting provided by the BCL2B Presentation. For the period January 1, 2009 through July 31, 2009, the net benefit to GMAC Mortgage from adjusting the purchase price of the brokered loans by the FAS 91 deferrals was $47.2 million. In other words, GMAC Mortgage received net revenue of $47.2 million on the loans that it brokered to GMAC Bank under the Broker Agreement during this period.

Effective August 1, 2009, Ally Bank implemented an accounting change to convert to fair-value accounting. As a consequence of this accounting change, beginning August 1, 2009, rather than realizing the benefit of points and the gain on sale as the parties had agreed (and as it had received under the 250.250 program and for third-party brokered loans), GMAC Mortgage instead received the cost-based, below market broker fee (which, since it was no longer capitalized, GMAC Mortgage did not have to repay to Ally Bank when it purchased the loan). However, GMAC Mortgage had agreed to such a fee with the understanding that, whatever the fee charged, the fee would be a "wash" because of the FAS 91 deferrals, and with the expectation that it would continue to receive the benefit of the FAS 91 deferrals. The Examiner illustrated the changed allocation of revenues resulting from Ally Bank's August 1, 2009 change to fair-value accounting as follows:

EXHIBIT V.B.6.d

**Accounting for Loans Brokered by GMAC Mortgage to the Bank Pre and Post Fair Value Election**




*Source: Broker to Bank Contract Accounting Review, at 2 [EXAM12253506] (attached to e-mail from J. Cortese to C. Dondzila, J. Young, J. Whitlinger, and J. Andrews (Feb. 27, 2012) [EXAM12253505].*

There appears to be no evidence that this change in the underlying economics was understood and agreed to by GMAC Mortgage, or that the parties even recognized at the time that the fair-value election would have the effect described above, which was to allow Ally Bank to keep a significant portion of the gain on sale while still assuming no representation and warranty exposure or hedge exposure, and while paying a below-market broker fee in the bargain. Instead, the matter appears to have come to light in December 2011 when Adam Glassner, Ally Bank Senior Managing Director, noticed "the revenue recognition by legal entity was more in the bank and less in ResCap," which he thought erroneous in light of his understanding that GMAC Mortgage was supposed to receive the entire gain on sale.

Upon this discovery, Glassner reached out to James Whitlinger, then Chief Financial Officer, Mortgage Operations, ResCap, and James Young, Chief Financial Executive, Ally Bank. Ally Bank and AFI began a review into the appropriate allocation of revenue under the Broker Agreement, MMLPSA, and Pipeline Swap. Ally Bank personnel initially concluded that the intent of the Brokering Consumer Loans to Bank Project was that Ally Bank was not to receive gain on sale revenue, yet Ally Bank was currently recording a piece of gain on sale.

Despite the initial reactions which favored GMAC Mortgage retaining the entire gain on sale, KPMG (retained by AFI General Counsel William Solomon on AFI's behalf) and an Ally Bank investigation both concluded that the accounting methods employed by Ally Bank after August 1, 2009 were consistent with the agreements between the parties. However, KPMG's report does not acknowledge the BCL2B Presentation's explicit references to FAS 91 deferrals of fees and expenses and does not address the sample accounting provided with the BCL2B Presentation or the fact that it aligns with the accounting treatment implemented from January 1, 2009 to July 1, 2009 by those who had just negotiated the broker arrangement, but not with the accounting treatment implemented after Ally Bank's fair-value election.

Joe Cortese (for Ally Bank) and Cathy Dondzila (for ResCap) also prepared virtually identical, internal accounting memos concluding that the revenue recognition for January 1, 2009 to July 31, 2009, "was done in error." Interestingly, the memos state that there were "conflicting

corporate evidential documents" and recognize that there was some support in the documents that Ally Bank was not to receive any gain on sale revenue. Importantly, the accounting method employed during January 1, 2009 through July 31, 2009 was in accordance with GAAP, and neither memo claimed otherwise.

Subsequently, in March 2012 and at the insistence of Ally Bank, GMAC Mortgage paid Ally Bank $51.4 million, representing the $47.2 million received for the January 1, 2009 to July 31, 2009 time period, plus interest. From the August 1, 2009, fair value election through April 2012, Ally Bank retained additional revenues that would have been allocated to GMAC Mortgage under the revenue allocation implemented from January 1, 2009 through July 31, 2009, illustrated by the Examiner as follows:

EXHIBIT V.B.6.g

**Amounts Retained by Ally Bank But Owed to GMAC Mortgage Under the Revenue Allocation Implemented Between January 1, 2009, and July 31, 2009**

August 2009 – April 2012

*($ in Thousands)*

| | 2009 | 2010 | 2011 | YTD April 2012 | Total |
|---|---|---|---|---|---|
| Loan discount (net, borrower and lender paid) | $ 144,503 | $ 40,461 | $ 10,540 | $ 513 | $ 196,017 |
| Loan discount (Capital Markets Required Price) | 209 | 113,920 | 158,852 | 137,775 | 410,756 |
| Non-broker activity | 853 | 178 | 635 | - | 1,667 |
| Loan discount income | 145,566 | 154,559 | 170,028 | 138,288 | 608,440 |
| Loan processing fee income | 44,268 | 47,419 | 46,709 | 12,267 | 150,663 |
| Pricing adjustments | (7,551) | (9,064) | (9,831) | (3,816) | (30,262) |
| Overage/shortage | 17 | - | - | - | 17 |
| Origination fee | 16,801 | (666) | (13) | (17) | 16,104 |
| Broker fee expense | (78,089) | (64,543) | (55,622) | (30,416) | (228,670) |
| Total FAS 91 deferral at origination for the period January 1, 2009 to YTD April 2012 | $ 121,010 | $ 127,704 | $ 151,270 | $ 116,306 | $ 516,291 |
| FAS 91 deferral at origination for the period January 1, 2009 to July 31, 2009 | (47,180) | - | - | - | (47,180) |
| Total amount retained by Ally Bank but owed to GMAC Mortgage under the revenue allocation implemented from Jan. 1, 2009 – July 31, 2009 [1] | $ 73,830 | $ 127,704 | $ 151,270 | $ 116,306 | $ 469,111 |

[1] *Under this allocation, Ally Bank receives interest carry only and GMAC Mortgage receives the effect of income and expense items that would have been deferred under FAS 91 before the fair value election consistent with the original accounting allocation for the period January 1, 2009 through July 31, 2009.*

*Source: Exam Requested Loan Origination Revenue [ALLY_0402447]; Broker to Bank Contract Accounting Review, at 2 [EXAM12253506] (attached to e-mail from J. Cortese to C. Dondzila, J. Young, J. Whitlinger, and J. Andrews (Feb. 27, 2012) [EXAM12253505].*

As illustrated above, from August 2009 to April 2012, Ally Bank retained a further $469.1 million that would have been paid to GMAC Mortgage had the revenue allocation originally agreed to remain in place. This amount is in addition to the $51.4 million paid by GMAC Mortgage to Ally Bank in March 2012 for amounts received by GMAC Mortgage for the period January 1, 2009 through July 31, 2009.

**Examiner's Analysis and Conclusions:**

1. The Examiner concluded that it is likely that Ally Bank's August 1, 2009 conversion to fair-value accounting resulted in a breach by Ally Bank of the parties' agreement, documented in the MMLPSA and Pipeline Swap and in the parties' communications and documentation concerning the Brokering Consumer Loans to Bank Project and in their subsequent conduct from January 1, 2009 to July 31, 2009.

2. The Examiner concluded that it is likely that GMAC Mortgage would prevail on a contractual claim that the allocation of revenues from January 1, 2009 to July 31, 2009 was proper, and that it is therefore entitled to payment of the revenues misallocated to Ally Bank from and after August 1, 2009.

3. The Examiner concluded that GMAC Mortgage's contract claim under the MMLPSA, Pipeline Swap, and the parties' agreement about the combined effect of those contracts is estimated at $520.5 million, consisting of: (i) $51.4 million, representing return of GMAC Mortgage's March 2012 payment to Ally Bank for amounts received by GMAC Mortgage between January 1, 2009 and July 31, 2009; and (ii) $469.1 million in additional revenues (net of expenses including the below-market broker fee) that GMAC Mortgage would have received had the parties' agreed-upon revenue allocation been respected from August 1, 2009 to April 30, 2012.

4. The Examiner concluded that although it is unclear which interest rate would apply to these circumstances, the pertinent rate (possibly 9% per annum under New York law or 5% above the Federal Reserve discount rate under Delaware law) would be applied to the $51.4 million component repaid to Ally Bank from the repayment date, and to the $469.1 million in revenues retained by Ally Bank for the period August 1, 2009 through April 30, 2012, from the date on which each of the constituent portions of those revenues was due to GMAC Mortgage (*i.e.*, the sale date of the pertinent loan).

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This claim would likely be pursued by a bankruptcy fiduciary such as a trustee or committee. Fiduciary plaintiffs are typically motivated to reach an early resolution of disputes in order to expedite distributions to creditors. All of the procedural hurdles that attend bankruptcy litigation would be present in this case including (i) the constitutional authority of a bankruptcy court to render a final judgment in a state law contract dispute, (ii) withdrawal of the reference, and (iii) demand for a jury trial. In addition, all litigation carries risk uncertainty and expense. As a result, it is highly likely that any settlement would reflect a discount of 20% from the face value of the claim.

The Examiner concludes that GMAC Mortgage's claim would be predicated on the MMPLSA (governed by Delaware law), and the Pipeline Swap (governed by New York law), and

the parties' agreements reflected in the documentation of the BCL2B. The possible application of the law of two different states would increase the complexity of this litigation and likely allow either side to argue for the application of the law most beneficial to it on a particular issue. In addition, the MMPLSA contains a choice of venue provision calling for resolution of related disputes in the United States District Court for the District of Delaware, which would allow for even more preliminary jurisdictional and venue related disputes than ordinarily present in bankruptcy litigation.

Although the Examiner concludes that GMAC Mortgage would likely prevail on a claim for breach of the parties' agreement, he concedes it is possible that the contemplated allocation of revenues was not mandated by the terms of the 2008 MMLPSA and Pipeline Swap. If so, GMAC Mortgage would need to prove that the contemporaneous Brokering Consumer Loans to Bank Project documentation and the parties' ensuing implementation of the arrangement constituted a written modification of those agreements to provide for the contemplated revenue allocation. Because the 2008 MMLPSA requires that any modification include a signed writing, GMAC Mortgage would need to rely upon the case law that permits modifications to agreements even if such modifications do not comply with the terms set forth for modifications in the original agreement. Although permissible, pursuing a claim based upon an alleged modification to an agreement that does not comply with that agreement's requirements for modifications is substantially more difficult than pursuing a claim based upon a straightforward breach of the agreement's terms. For example, in *Continental Insurance Company v. Rutledge & Company, Inc.*,[9] which the Examiner cites for the general proposition that contract provisions deeming oral modifications unenforceable can be waived orally or by a course of conduct just like any other contractual provision, the court refused to enforce an alleged non-written contractual modification based on the parties' prior course of dealing because the parties' prior course of conduct demonstrated that they did, in fact, amend the agreement in writing.[10] Here, the parties similarly amended and restated the MMLPSA, in writing, on at least June 1, 2007 and July 1, 2008. Thus, even though the Examiner concludes that GMAC Mortgage would likely prevail on such a claim, the claim is not without risk. Nonetheless, the parties' conduct before and after the implementation of the BCL2B and the limited scope of the KPMG Report (which does not cover the accounting for the transaction prior to the fair value election), would likely overcome AFI's arguments in this regard. I estimate that the existence of disputed facts, associated risk, and likely need for substantial discovery to develop and resolve those disputed facts, would further reduce the settlement value of the claim by 30%.

Even though AFI would likely dispute the claim, the magnitude of the claims (at $520.5 million) would likely be a strong motivating factor for AFI to settle. In addition, the likelihood of success identified by the Examiner would also incline AFI toward a substantial settlement. Legal fees and expenses in prosecuting and defending the claim would run into the tens of millions of

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[9] 750 A.2d 1219 (Del. Ch. 2000).

[10] To the extent the Pipeline Swap, which is governed by New York law, needs to be amended or modified, New York law similarly permits oral modifications to written contracts that purport to prohibit oral modifications, albeit under a slightly different standard. *See O'Reilly v. NYNEX Corp.*, 693 N.Y.S.2d 13 (N.Y. App. Div. 1999); *Rose v. Spa Realty Assoc.*, 366 N.E. 2d 1279 (N.Y. 1977)); *Honeywell Int'l. Inc. v. Air Prods & Chems, Inc.*, 872 A.2d 944 (Del. 2005) (applying New York law).

dollars, but pale in comparison to the magnitude of the claims. However, the MMPLSA contains a fee-shifting provision in § 8.13, which adds additional litigation risk.

The Examiner noted that there is "ample fodder" for an argument that the initial reaction of those reviewing the revenue allocation issue in 2011 was squelched, and that the resulting reports in 2012 labeling the initial allocation in GMAC Mortgage's favor from January 1, 2009 to July 31, 2009 an accounting error, was the product of a desire to avoid restating Ally Bank's financials and the regulatory scrutiny that would have ensued, rather than a fair and objective attempt to resolve the matter. I agree with that conclusion, and if developed through discovery, this argument would provide GMAC Mortgage with a compelling story of cover-up and wrongdoing that could significantly impact the fact finder's decision and further incentivize AFI to settle.[11]

As the Examiner notes, under either New York or Delaware law, GMAC Mortgage would be entitled to prejudgment interest if successful on its contractual claim for misallocation of net revenues on loans it brokered to Ally Bank. The potentially applicable interest rates are not insignificant (9% under New York Law, and 5% above the Federal Reserve discount rate under Delaware law), and would amount to tens of millions of dollars per year when applied to the total $520.5 million claim. Interest would run on the $51.4 million payment from GMAC Mortgage from the date of that payment in March 2012. Interest on the $469.1 component of the claim for amounts that GMAC Mortgage should have received between August 1, 2009 and April 30, 2012 would ordinarily run from the date on which each of the constituent portions of those revenues was due to GMAC Mortgage. Given the significant amounts involved, the parties would likely submit expert calculations of the interest due on the $469.1 million component of the claim, but it is also possible that a court, applying New York law, would select a single reasonable intermediate date or, if it could not determine a single reasonable intermediate date, to fix interest from the date of commencement of the action.[12] However, cases rarely settle for full value of the claim and less frequently settle for full value of the claim, plus interest. I estimate that the likelihood of interest at a rate of between 5.5% and 9% per annum for a period of, as to some portions of the claim, up to four years, adds 15% to the settlement value of the claim.

Under these circumstances, I would expect plaintiff's initial settlement demand to be at $540 million, approximately 90% of the gross amount of the claim (of approximately $600 million, including interest and attorneys' fees), and defendant's initial offer at $90 million, approximately 15% of the claim. Taking into account the discounts and enhancements identified above, as well as the relative bargaining power of the parties and the back and forth to be expected in the negotiating process, I estimate the fair and likely settlement of the misallocation of net revenues on loans brokered by GMAC Mortgage claim at $268.2 million.

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[11] The Examiner also notes that it may be possible to fashion a breach of fiduciary duty claim against ResCap officials who apparently succumbed to AFI's and Ally Bank's desires, but that such a claim faces a variety of substantial obstacles and would appear to be wholly redundant of the recoveries the Examiner concludes are already available to Debtors under contract law. Accordingly, the analysis of the claim for Misallocation of Net Revenues on Loans Brokered by GMAC Mortgage does not include any value for such a claim of breach of fiduciary duty.

[12] *See, e.g.*, *Gelco Builders & Burjay Constr. Corp. v. Simpson Factors Corp.*, 60 Misc. 2d 492 (N.Y. Sup. Ct. 1969).

| | |
|---|---|
| Potential Damages: | $520.5 million |
| Reduced by: | |
| 20% inherent risk= | $416.4 million |
| 30% risk for possible pursuit of claim under modification theory= | $291.5 million |
| 20% risk based on disputed facts & GMAC Mortgage approval of allocation to be challenged= | $233.2 million |
| Increased By: | |
| 15% for interest= | $268.2 million |

***b. Failure to Pay Value of Purchased MSRs and Correspondent Loan MSRs to GMAC Mortgage under the MSR Swap***

**Examiner's Report References:**

Section I.E.b pages I-10

Section III.F.3.c pages III-93

Section V.B.9 pages V-157 to V-184

Section V.B.12 pages V-199 to V-209

Section VII.L.2 pages VII.L-29

Section VII.L-66 to VII.L-73

**Description:**

The implementation, between September 2007 and April 2012, of the agreement between GMAC Mortgage and the federal savings bank now known as National Motors Bank FSB ("Old GMAC Bank")/Ally Bank concerning the application of the MSR Swap,[13] the 2010 Net Funding Schedule,[14] and the April 2011 MSR Swap Confirmation[15] to mortgage servicing rights (MSRs) (i)

[13] The "MSR Swap" means the ISDA Master Agreement between GMAC Mortgage and GMAC Bank, dated June 12, 2007, including the FMV Schedule thereto, dated August 31, 2007 and the Net Funding Schedule thereto, dated August 31, 2007.

[14] The "2010 Net Funding Schedule" means the Schedule to the ISDA Master Agreement (Net Funding) between GMAC Mortgage and GMAC Bank, dated July 1, 2010.

arising from loans Ally Bank purchased from correspondents and (ii) to MSRs that Ally Bank purchased from third parties.

**Background:**

When ResCap was formed, its subsidiaries GMAC Mortgage and RFC owned substantial portfolios of MSRs, which are contractual rights to service loans and receive the related fees and certain ancillary income. Since at least 2005, ResCap and Ally Bank had considered entering into an arrangement whereby Ally Bank would hold MSRs in order to, among other things, realize savings associated with no longer financing MSRs through regular lending channels. The Examiner observed that, "[f]rom early on, the personnel involved contemplated that the movement of the MSRs to Ally Bank would be accompanied by a 'total return swap,' transferring the MSRs' economics (positive and negative) back to ResCap in exchange for providing Ally Bank a fixed rate of return." Examiner's Report, at V-159.

The FDIC eventually approved Ally Bank's retention of MSRs on loans sold by Ally Bank to GMAC Mortgage, but repeatedly refused to approve Ally Bank's acquisition of existing MSRs from ResCap entities. In addition, the regulators opposed Ally Bank's retention of the MSRs without the protection of the MSR Swap, which went into effect on August 31, 2007. The original MSR Swap is documented on an ISDA Master Agreement and two Schedules – the FMV Schedule and the Net Funding Schedule, each dated August 31, 2007.

First, under the FMV Schedule, changes in the "FMV Change," defined as "FAS 156 mark to market for the Valuation Period as recorded by [Ally Bank] against the mortgage servicing right asset," were measured each business day. If the FMV Change was positive, then Ally Bank owed GMAC Mortgage the amount of the increase. Conversely, if the FMV Change was negative, GMAC Mortgage owed Ally Bank the amount of the decrease.[16]

Simultaneously, under the Net Funding Schedule, Ally Bank was required to pay GMAC Mortgage all the servicing income it received on its portfolio of MSRs, net of expenses incurred, which included the fees paid to GMAC Mortgage under the Original Servicing Agreement for Bank-owned MSRs. In return, the Net Funding Schedule required GMAC Mortgage to pay Ally Bank a "Funding Fee," which was a LIBOR-based fixed rate payment calculated on the value of the MSRs and servicing revenues. In essence, the combined effect was to transfer the MSRs' economics (positive and negative) to GMAC Mortgage under the FMV Schedule in exchange for a LIBOR-based fixed rate payment to Ally Bank under the Net Funding Schedule.

On its face, the FMV Schedule required that ***all*** increases in the value of Ally Bank's mortgage servicing right assets flow to GMAC Mortgage, without distinguishing among MSRs arising from Bank-originated loans, purchased MSRs, and MSRs arising from purchased loans. In practice, however, Ally Bank paid to GMAC Mortgage only for increases related to Bank-originated

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[15] The "April 2011 MSR Swap Confirmation" means the Confirmation of the Total Return Swap Relating to Mortgage Servicing Rights of Ally Bank, dated April 1, 2011.

[16] 2007 FMV Schedule, parts 6(a)(vii), 6(d) [RC00027822].

loans; it did not include increases related to MSRs arising from correspondent loans Ally Bank had purchased or to MSRs purchased separately. Instead, for correspondent loans, Ally Bank paid the capitalized value of excess servicing rights to GMAC Mortgage, but not the capitalized value of the MSRs themselves. The capitalization and purchase of new MSRs was always handled in this fashion from the August 2007 inception of the MSR Swap, despite the plain language of the FMV Schedule. In contrast, when GMAC Mortgage paid the LIBOR-based Funding Fee, the value of the newly recognized MSRs (including both MSRs on loans Ally Bank sold to GMAC Mortgage and MSRs that Ally Bank periodically purchased from third parties) was included in the amounts used to calculate the Funding Fee.

Although, individuals who had subsequent involvement with the MSR Swap, including Joe Cortese (for Ally Bank) and James Young (for ResCap), offered conflicting explanations for the parties' differing treatment of MSR capitalization under the MSR Swap, the Examiner concluded that none of these explanations perfectly explains the parties' actions.

In April 2011, the parties entered into the MSR Swap Confirmation, which covered the previously separately-documented FMV Swap and Net Funding Swap. After reviewing these changes, the Examiner concluded that the April 2011 MSR Swap Confirmation is, if anything, even clearer than the original MSR Swap and FMV Schedule that it applies not just to MSRs on bank-originated loans, but to all MSRs, including purchased MSRs and correspondent-loan MSRs.

ResCap's records indicate that Ally Bank paid GMAC Mortgage a total of $699.7 million over the duration of the MSR Swap from September 2007 through termination in April 2012. The Examiner illustrated the key financial elements of the MSR Swap, on an annual basis, as follows:

EXHIBIT V.B.12.b(1)—5

**MSR Swap – Key Financial Elements**

September 2007 – April 2012

*($ in Millions)*

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | Total |
|---|---|---|---|---|---|---|---|
| FMV change - interest rate [1] | $ (0.0) | $ (296.4) | $ 257.8 | $ 171.7 | $ (430.0) | $ (0.2) | $ (297.3) |
| FMV change - amortization [1] | - | - | (117.9) | (318.2) | (364.1) | (127.2) | (927.4) |
| Funding fees (LIBOR +) | (0.4) | (14.0) | (9.1) | (23.5) | (59.6) | (16.1) | (122.6) |
| Gain on new cap - MSR | 8.6 | 53.4 | 77.6 | 136.1 | 61.6 | 27.0 | 364.2 |
| Gain on new cap - excess servicing | 14.6 | 219.5 | 95.9 | 209.9 | 69.4 | 10.9 | 620.2 |
| Net servicing fees | 3.9 | 102.2 | 177.3 | 294.0 | 362.8 | 122.2 | 1,062.5 |
| Total cash settlement paid to GMAC Mortgage | $ 26.6 | $ 64.7 | $ 481.6 | $ 469.9 | $ (360.0) | $ 16.7 | $ 699.7 |

*[1] For 2007 to 2008, economic amortization was not calculated separately from changes to interest rate assumptions.*

*Source: ResCap - MSR Cash Summary [EXAM00231039]; OMSR Values [EXAM00339036].*

The value of Ally Bank's MSR asset attributable to correspondent loans and purchased MSRs, which were not paid to GMAC Mortgage under the MSR Swap despite the plain language of the MSR Swap and the MSR Swap Confirmation, and thus the value of GMAC Mortgage's potential contract claim under those agreements, totals $1.725 billion, illustrated by the Examiner as follows:

EXHIBIT V.B.10.b(2)

**Additions to the Value of Ally Bank's MSR Asset Attributable to Correspondent Loan MSRs and Purchased MSRs**

*($ in Thousands)*

| | Sep. 2007 - Dec. 2008[1] | Jan.2009 - Mar. 2011 | Apr. 2011 - Mar. 2012 | Total |
|---|---|---|---|---|
| New capitalizations - purchased MSRs | $ 421,860 | $ 256,239 | $ 28,986 | $ 707,085 |
| New capitalizations - originated and correspondent loan MSRs | 19,035 | 923,463 | 404,805 | 1,347,303 |
| Sub-total new capitalization | 440,895 | 1,179,702 | 433,790 | 2,054,387 |
| New capitalizations - excess servicing (originated and correspondent) | 271,602 | 325,647 | 62,153 | 659,402 |
| Gain paid to GMAC Mortgage on new capitalizations | (310,934) | (578,364) | (99,152) | (988,450) |
| Additions attributable to correspondent loan MSRs and purchased MSRs | $ 401,563 | $ 926,985 | $ 396,791 | $ 1,725,340 |

[1] *Period before the 2009 Bank Transaction; monthly data not available for January 2009.*

*Source: MSR Swap Review, dated May 2012 [ALLY_0368244]; MSR Rollforward YTD 2009, dated Dec. 31, 2009 [EXAM00232590]; MSR Rollforward YTD 2010, dated Dec. 31, 2010 [EXAM00232591]; MSR Rollforward YTD 2011, dated Dec. 31, 2011 [EXAM00232592].*

**Examiner's Analysis and Conclusions:**

1. The Examiner concluded that GMAC Mortgage has a potential claim that Ally Bank breached the MSR Swap's requirements by failing to pay to GMAC Mortgage the value of MSRs arising from loans Ally Bank purchased from correspondents or for purchased MSRs. The value of the MSRs, and thus the base value of GMAC Mortgage's potential claim, is approximately $1.725 billion, including $1.329 billion for the period before the April 2011 revision of the MSR Swap.

2. The Examiner concluded that James Young's attempt to reconcile the parties' practices with the terms of the MSR Swap (by asserting that increases in the value of Ally Bank's MSR portfolio due to newly recognizes MSRs were not required to be paid under the MSR Swap's FMV Schedule) is not likely to prevail.

3. The Examiner concluded that the parties consistently applied the MSR Swap in a way that is at odds with its language.

4. The Examiner concluded that the MSR Swap is governed by New York law.

5. The Examiner concluded that the doctrine of modification is not the proper rubric for analysis, at least before the April 2011 revisions, because there is no suggestion of an agreement after the MSR Swap was adopted to alter its terms. In addition, it does not appear that a modification in which GMAC Mortgage simply gave up the right to receive the newly recognized value of correspondent-loan MSRs and purchased MSRs would be supported by mutual consideration.

6. The Examiner concluded that Ally Bank may have substantial arguments that the MSR Swap would not have withstood regulatory scrutiny had it been applied to require payment of the value of purchased and correspondent-loan MSRs upon recognition.

7. The Examiner concluded that based on the available evidence and the exacting standard which governs the application of the doctrine of mistake, although a close question, a court more likely than not would reform the pre-April 2011 MSR Swap to require payment of the value of newly recognized MSRs only for those MSRs on which Ally Bank recognized a gain (*i.e.*, not for the $1.329 billion attributable to purchased MSRs and purchased-loan MSRs).

8. The Examiner concluded that while a close question, a court more likely than not would reform the April 2011 MSR Swap Confirmation under the doctrine of mistake to require payment of the value of newly recognized MSRs only for those MSRs on which Ally Bank recognized a gain (*i.e.*, not for the $396 million attributable to purchased MSRs and purchased-loan MSRs).

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This claim would likely be pursued by a bankruptcy fiduciary such as a trustee or committee. Fiduciary plaintiffs are typically motivated to reach an early resolution of disputes in order to save cost and expedite distributions to creditors. All of the procedural hurdles that attend bankruptcy litigation would be present in this case including (i) the constitutional authority of a bankruptcy court to render a final judgment in a state law contract dispute, (ii) withdrawal of the reference, and (iii) demand for a jury trial. In addition, all litigation carries risk uncertainty and expense. As a result, it is highly likely that any settlement would reflect a substantial discount ( of 30%) from the face value of the claim.

GMAC Mortgage would base its claim on the straightforward terms of the MSR Swap, both before and after the April 2011 revisions. As the Examiner notes, by their terms, the relevant provisions turn on the value of the MSRs on Ally Bank's balance sheet, not on whether Ally Bank has recognized a gain on the asset in its income statement, and therefore facially apply to all of Ally Bank's MSR assets. Due to the relative ease with which GMAC Mortgage could meet its initial burden, it would likely initiate settlement discussions with an aggressive opening demand of 60% of the total claim amount, approximately $1 billion.

At that point, the burden would be on AFI to prove its affirmative defenses under either of the theories primarily highlighted by the Examiner: mistake and modification. The Examiner concludes that AFI would likely succeed on the close question of a defense under the doctrine of mistake, despite the exacting standard which governs that doctrine. However, that same "exacting standard" would likely have a significant impact on the parties' settlement positions and the ultimate settlement value of this claim. Under New York law, AFI would need to establish mutual mistake

by clear and convincing evidence in order to overcome a "heavy presumption that a deliberately prepared and executed [agreement] manifest[s] the true intention[s] of the parties, . . . especially between counseled businessmen."[17] This would require AFI to show that both Ally Bank and GMAC Mortgage shared the same erroneous belief that the MSR Swap would not require Ally Bank to pay GMAC Mortgage the value of MSRs Ally Bank purchased separately or of MSRs arising from correspondent loans Ally Bank purchased.[18]

AFI may face evidentiary difficulties proving mutual mistake because, as the Examiner noted, the recollection of the participants to the negotiation of the MSR Swap, particularly with respect to the issue of the treatment of newly recognized MSRs, was limited. However, the Examiner concluded that the documentary evidence (other than the MSR Swap itself) supports application of the doctrine of mistake, as does the parties' conduct and the disparate economic effect of transferring the newly recognized value of purchased MSRs and correspondent-loan MSRs to GMAC Mortgage. Indeed, the parties' mutual and uniform performance under the MSR Swap, throughout its entire term, in a manner inconsistent with its terms but consistent with what AFI would argue was their true understanding, would weigh heavily in favor of AFI's efforts to reform the MSR Swap under the doctrine of mistake. The regulatory scrutiny and concerns raised by Ally Bank's regulators concerning the MSR Swap, as applied, also supports a claim of mutual mistake.[19] Nonetheless, AFI would likely attach significant settlement value to this claim in recognition of the decidedly demanding burden it would need to overcome to reform the MSR Swap. In addition, both parties would likely recognize that AFI would most likely succeed, if at all, only after a trial, because mistake turns on the parties' intent and "[q]uestions of intent . . . are usually inappropriate for disposition on summary judgment."[20] Thus, AFI would need to factor the substantial costs and risk associated with trial into its settlement analysis. The magnitude of the claims (at $1.725 billion), combined with the high likelihood that AFI would need to take the claim to trial to prevail, would likely be a strong motivating factor for AFI to settle. In view of the foregoing procedural and evidentiary hurdles, but accepting the Examiner's conclusion that, although a close question, AFI would more likely than not succeed in reforming the MSR Swap based on the doctrine of mistake to apply to only Bank-originated MSRs, I estimate that the settlement value of this claim would be reduced by 55%.

The Examiner concludes that the doctrine of modification is inapplicable to the parties' dealings with respect to this claim for several reasons, including, among others, the lack of any suggestion of an agreement after the MSR Swap was adopted to alter its terms and the likely lack of mutual consideration for a modification in which GMAC Mortgage simply gave up the right to

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[17] *See Healy v. Rich Products Corp.*, 981 F.2d 68, 73 (2d Cir. 1992) (citations and internal quotations omitted).

[18] *Id.* (mutual mistake occurs when both parties "[s]hare the same erroneous belief and their actions do not in fact accomplish their mutual intent.") (citations omitted); *K.I.D.E. Assocs., Ltd. v. Garage Estates Co.*, 720 N.Y.S.2d 114, 116 (N.Y. App. Div. 2001) (proponent of reformation must show not only that mistake exists, but exactly what was really agreed upon between the parties, particularly where negotiations were conducted by sophisticated, counseled parties).

[19] As discussed by the Examiner and in more detail below, these same regulatory concerns may provide AFI with arguments in support of a defense that the MSR Swap would not have withstood regulatory scrutiny if applied to correspondent loan MSRs and purchased MSRs.

[20] *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., v. Turtur*, 892 F.2d 199, 205 (2d Cir. 1989).

receive the newly recognized value of correspondent-loan MSRs and purchased MSRs.[21] AFI would also likely face difficulties proving a modification of the MSR Swap where the parties subsequently confirmed the MSR Swap through the April 2011 MSR Swap Confirmation, but did not at that time revise the agreement in a manner consistent with the purported modification. AFI would likely nonetheless pursue a modification defense as an alternative to a mistake defense. The mere availability of a second plausible theory under which AFI could achieve the same successful result, even if it was unlikely to ultimately succeed under the doctrine of modification, would reduce the settlement value of the claim by approximately 5%.

The settlement value of the claim would be further reduced by the possibility of AFI successfully defending the claim on the grounds that the MSR Swap, if applied to correspondent loan MSRs and purchased MSRs, would not have withstood regulatory scrutiny. The MSR Swap was implemented and subsequently revised with the involvement and approval of Ally Bank's regulators, who, at its inception, refused to approve Ally Bank's acquisition of existing MSRs from ResCap entities and apparently insisted on the protection of the MSR Swap as a condition of Ally Bank retaining MSRs. Later, the parties agreed to increase the interest rate applicable to the Funding Fee paid by GMAC Mortgage to Ally Bank pursuant to the 2010 Net Funding Schedule in what the Examiner describes as a partially successful effort to appease the regulators. In light of these facts, the Examiner notes that Ally Bank would have substantial arguments that the arrangement would not have withstood regulatory scrutiny had it been applied to require payment of the value of purchased and correspondent-loan MSRs upon recognition. This possible defense would reduce the settlement value of the claim by approximately 20-30%.

Under these circumstances, I would expect plaintiff's initial settlement demand to be at approximately 60% of the gross amount of the claim (approximately $1.725 billion), *i.e.*, $1 billion, and defendant's initial offer at approximately 10% of the claim, *i.e.*, $175 million. Taking into account the discounts and enhancements identified above, as well as the relative bargaining power of the parties and the back and forth to be expected in the negotiating process, I estimate the fair and likely settlement of the failure to pay value of purchased MSRs under MSR Swap claim at $387.2 million.

| | |
|---|---|
| Potential Damages: | $1,725.0 million |
| Reduced By: | |
| 30% inherent risk= | $1,207.5 million |
| 55% risk associated with mutual mistake defense= | $543.4 million |
| 5% risk associated with modification defense= | $516.2 million |
| 25% risk associated with regulatory-based defense= | $387.2 million |

[21] *See Estate of Anglin v. Estate of Kelley*, 705 N.Y.S.2d 769 (N.Y. App. Div. 2000) (any change in an existing contract must have a new consideration to support it) (citations omitted).

### *c. Representation and Warranty Liabilities Under the 2001 and 2006 MMLPSAs*

**Examiner's Report References:**

Section I.E.c pages I-10

V.B.3.a, b pages V-96 to V-109

VII.L.2.a pages VII.L-29 to VII.L-55

**Description:**

The potential liability of AFI or Ally Bank for representations and warranties provided by Old GMAC Bank in the 2001 MMLPSA and by Ally Bank in the 2006 MMLPSA.

**Background:**

Under the terms of the 2001 MMLPSA, Old GMAC Bank provided representations and warranties for all mortgage loans sold pursuant to its terms, while under the 2006 MMLPSA, Ally Bank provided representations and warranties only for second lien loans sold to GMAC Mortgage. ResCap/GMAC Mortgage later assumed financial responsibility for repurchase and representation and warranty liabilities on loans purchased from Old GMAC Bank and Ally Bank under the MMLPSA. The Examiner analyzed whether ResCap/GMAC Mortgage have claims against AFI and/or Ally Bank with respect to such liabilities based upon the representations and warranties provided by Old GMAC Bank under the 2001 MMLPSA and by Ally Bank under the 2006 MMLPSA.

As to loans purchased from Old GMAC Bank under the 2001 MMLPSA, the liabilities assumed by ResCap/GMAC Mortgage include: (i) charge-offs incurred as a result of loans repurchased from investors; (ii) a portion of the settlements with Fannie Mae and Freddie Mac in 2010; and (iii) a portion of the related 2013 "cure" settlements with Fannie Mae and Freddie Mac. The potential claims against AFI/Ally Bank for representations and warranties provided by Old GMAC Bank in the 2001 MMLPSA and by Ally Bank in the 2006 MMLPSA would also include a portion of the Trust R&W Claims covered by the $8.7 billion proposed RMBS Trust Settlement Agreement.

Based upon an analysis of available records, the Examiner's Professionals estimate that the total dollar amount of representation and warranty and settlement liabilities incurred by GMAC Mortgage that would comprise the potential representation and warranty claims against AFI/Ally Bank under the 2001 and 2006 MMLPSAs total approximately: (i) $278.2 million in charge-offs as a result of repurchases, and the 2010 settlements and 2013 "cure" settlements with Freddie Mac and Fannie Mae, relating to First Lien Loans sold by Old GMAC Bank under the 2001 MMLPSA; (ii) $5.1 million for charge-offs as a result of repurchases of Second Lien Loans sold by Old GMAC Bank under the 2001 MMLPSA; (iii) no more than $400 million relating to First and Second Lien Loans sold by GMAC Bank under the 2001 MMLPSA that are included in the securitizations that

comprise the Trust R&W Claims; and (iv) less than $86.1 million relating to Second Lien Loans sold by Ally Bank under the 2006 MMLPSA that are included in the securitizations that comprise the Trust R&W Claims. For a variety of reasons detailed in the Examiner's report, including limitations in the available data, the estimated values of these potential liabilities are likely overstated.

**Examiner's Analysis and Conclusions:**

1. Ally Bank was not a party to, and did not assume, the 2001 MMLPSA, and is unlikely to be held liable on successor liability or indemnification theories.

2. It is likely that representation and warranty claims would be time-barred under the 2001 MMLPSA's two-year "survival" provision.

3. For first lien loans (but not second lien loans), the evidence supports the proposition that the 2001 MMLPSA was modified to eliminate representation and warranty liability.

4. The Examiner concluded that it is unlikely that any claim against AFI or Ally Bank for loan representations and warranties under the 2001 MMLPSA would prevail.

5. The Examiner concluded that while Ally Bank likely would be held to have provided representations and warranties for second lien loans under the 2006 MMLPSA, representation and warranty (or indemnification) claims against Ally Bank for second lien loans sold under the 2006 MMLPSA are unlikely to prevail because they would be time-barred under the two-year "survival" provision in the 2006 MMLPSA.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

Because Ally Bank is not a party to the 2001 MMLPSA and did not assume that agreement in the 2006 Bank Restructuring, ResCap would face many obstacles pursuing a claim against Ally Bank or AFI based on representations and warranties in the 2001 MMLPSA. The Examiner's well-reasoned analysis concludes that ResCap is unlikely to prevail on contractual claims under the 2001 MMLPSA, which would require ResCap to show either that (1) Ally Bank is responsible for the liabilities of Old GMAC Bank under a theory of successor liability; or (2) AFI is responsible for Old GMAC Bank's liabilities under (a) the indemnification provided in connection with the OTS approval of the 2006 Bank Restructuring or (b) the indemnification provisions of the 2005 Operating Agreement or the 2006 Amended Operating Agreement. Because ResCap would likely be unable to meet the elements of any of the recognized exceptions to the general rule of no successor liability, those claims do not add materially to the settlement value of the claims for representation and warranty liabilities under the 2001 MMLPSA. The potential claims based upon indemnification provided in connection with the OTS approval of the 2006 Bank Restructuring similarly add minimal, if any, settlement value to these claims based upon the OTS's non-objection letter with

respect to the indemnification proposed by AFI, which was narrower than that initially requested by OTS and would not subject AFI to liability under the 2001 MMLPSA. The potential claims based upon the indemnification provisions of the 2005 Operating Agreement or the 2006 Amended Operating Agreement are similarly weak and add only minimal settlement value based upon the plain language of those agreements as applied to the relevant facts.

More fundamentally, any claims against AFI or Ally Bank based upon the 2001 and 2006 MMLPSAs are unlikely to succeed because they are likely time-barred under the two-year "survival" provisions in those agreements, which the Examiner found would have resulted in the expiration of representations and warranties in those agreements, at latest, in November 2008 and June 1, 2009, respectively. In the face of such strong defenses based upon the "survival" clauses, which could likely be presented to a court as a motion to dismiss, AFI/Ally Bank would be unlikely to place significant settlement value on claims against them based upon representations and warranties in the 2001 and 2006 MMLPSAs.

The Examiner also concludes that it is more likely than not that AFI/Ally Bank would prevail on a claim that the 2001 MMLPSA had been modified to eliminate representations and warranties with respect to First Lien Loans, which would significantly reduce the potential total value of the claims based upon representations and warranties in the 2001 MMLPSA. Contractual modification is a fact-sensitive issue. Thus, if it was the only defense available to AFI/Ally Bank, they would likely place substantial settlement value on the claims under the 2001 MMLPSA, recognizing that even a nuisance value settlement should account for the anticipated expense of substantial discovery needed to develop that defense. Here, however, and as set forth above, AFI/Ally Bank have other strong defenses to potential claims based upon representations and warranties in the 2001 and 2006 MMLPSAs, particularly the "survival" clause defenses, which could likely be presented to the court without undertaking the type of costly discovery that would be involved in a contractual modification defense.

Under these circumstances, I would expect the defendants' initial settlement offer to be based largely on the anticipated cost of defense in preparing a motion to dismiss the claims as time-barred, and therefore not material for purposes of this Opinion.

***d. Application of the Pipeline Swap To The "Funding To Sale" Period And To Ally Bank-Originated Loans***

**Examiner's Report References:**

Section I.E.1.d pages I-10-11

Section V.B.4, 5, and 10 pages V-114 to V-123 and V-178 to V-188

Section VII.L.2.c pages VII.L-58 to VII.L-64

**Description:**

Potentially there is a claim against AFI for applying the Pipeline Swap to the time period between the funding and the sale of loans and to loans originated by Ally Bank, notwithstanding contract language to the contrary.

**Background:**

GMAC Mortgage purchased and originated conforming loans with the intent to sell them to government-sponsored entities (GSE) while retaining the associated mortgage servicing rights (MSRs). Over time, GMAC's production came increasingly from Ally Bank. By 2009, almost all the loan production was being channeled through Ally Bank, which retained the MSRs on loans sold to Fannie Mae and Freddie Mac (but not to Ginnie Mae).

GMAC Mortgage and Ally Bank entered into a number of agreements related to this business. One of these Agreements was the Pipeline Swap, a derivative transaction in which GMAC Mortgage assumed certain risks and rewards related to changes in the market value of certain Ally Bank loans. Until 2008, the Pipeline Swap covered only Ally Bank's HFI portfolio. The swap was designed to insulate Ally Bank from changes in the market value of loans (typically due to interest rate changes) between rate lock and the funding of the loan. The Examiner noted that considering the original Pipeline Swap on its own, GMAC Mortgage would realize neither profit nor suffer loss assuming that its hedges were effective, although it presumably incurred some incremental hedging expense.

In 2005, the Pipeline Swap was amended to eliminate loans originated by Ally Bank, thereby limiting it to loans purchased by Ally Bank. The Pipeline Swap was not effective from April 2006 to April 2007, but was renewed effective May 1, 2007.

In July 2008, GMAC Mortgage and Ally Bank amended the Pipeline Swap because the FDIC was urging Ally Bank to document its hedges more thoroughly. Ally Bank's HFS loans were added to the Pipeline Swap, although it remained limited to purchased loans, and was not applicable to originated loans.

In addition, the Pipeline Swap continued to apply only to the period from rate lock until funding. In order for the loans to be fully hedged by the Pipeline Swap, however, the Swap would have needed to cover the period not just from rate lock to funding, but from rate lock to sale. Despite the fact that no change was made to the Pipeline Swap to extend the time period covered, many of the people involved believed that it did cover the entire period from rate lock to sale.

At the same time, the 2008 MMLPSA revised the pricing of first mortgage loans to a cost basis. Despite this, and based on the apparently mistaken understanding that the Pipeline Swap applied for the entire period from rate lock to sale, the loans were accounted for on a hedge-accounting basis, "marked to market," and sold to GMAC mortgage at market value, rather than at Ally Bank's cost. The combined effect was to preserve the same economics that had prevailed under prior version of the MMLPSA.

If, however, the July 2008 Pipeline Swap Schedule had been applied as written and covered only the period from rate lock to funding, rather than sale, then (1) application of hedge fund accounting would be improper under GAAP, so that the MMLPSA pricing would not be a marked to market price, and (2) the risks and rewards of changes in fair market value of the loans between funding and sale of the loans would reside with Ally Bank, not GMAC Mortgage. Further, the Pipeline Swap did not include brokered loans originated by Ally Bank, but it was applied to such loans.

In 2011, in response to FDIC pressure, the parties again amended the Pipeline Swap and related agreements. The 2011 Amendment extended the time period of the swaps to cover the time from funding to sale. It did not address the omission of loans originated by Ally Bank, however.

**Examiner's Analysis and Conclusions:**

1. With respect to extending the time period from funding to sale, although it is a close question, the Examiner found it more likely than not that the court would reform the Pipeline Swap under the doctrine of mutual mistake to include that time period. Therefore, while it is a close question, a claim for breach based on the extension of the Pipeline Swap is unlikely to prevail.

2. With respect to both extending the time period of the Pipeline Swap from funding to sale and extending it to loans originated by Ally Bank, it is likely that the court would find that the Pipeline Swap was modified to include both. Therefore, a claim for breach is unlikely to succeed.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. The Examiner does not quantify any harm to GMAC Mortgage from the alleged breaches of the Pipeline Swap, and the Examiner further notes that, except for un-quantified incremental hedging costs, the economic effect on GMAC Mortgage was neutral, assuming that GMAC Mortgage's hedging was effective.

**Settlement Considerations:**

As the Examiner notes, the extension of the Pipeline Swap to include the period between funding and sale and to include loans originated by Ally Bank does not comply with the plain language of the relevant agreements. On their face, therefore, these appear to be strong breach of contract claims. However, as the Examiner found, they are unlikely to succeed due to strong affirmative defenses.

First, as to the extension of the Pipeline Swap to the time period from funding to sale, the Examiner found that the claim would not succeed because the contract would be reformed under the doctrine of mutual mistake. As noted by the Examiner, the parties drafting the Pipeline Swap agreements appeared not to have understood the effect of the language they chose. More importantly, ending the Pipeline Swap at the time of funding made little business sense. As a practical matter, GMAC Mortgage hedged the risk in the market as though it had assumed the risk for the entire time, further indicating the intent of the parties.

As acknowledged by the Examiner and discussed elsewhere in this report, however, the burden for establishing mutual mistake is high and would be on AFI. This creates risk that a reformation argument would not succeed and a breach would be found. Therefore, if no other affirmative defenses existed and damages from the breach could be shown, this claim would still have settlement value.

Second, as to both the extension of the Pipeline Swap to the time period from funding to sale and to loans originated by Ally Bank, there is substantial evidence that the parties modified the contract to include these. Specifically, as noted by the Examiner, the written record of the Brokering Customer Loans to Bank Project supports the view that the parties intended the Pipeline Swap to apply to brokered loans and to the "funding to sale" period. This strong written evidence, including e-mails, makes it likely that a court would find that the parties modified the Pipeline Swap, so there is no breach. Crucially, while AFI would bear the burden of proof on a claim of modification, it would not be a heightened burden. Therefore, given the high likelihood of establishing this defense as to both potential breaches, this claim has little settlement value.

Buttressing this analysis, the Pipeline Swaps appear to have been economically-neutral for GMAC Mortgage. Therefore, even if the claims had merit, the damages, if any, would be less than $21 million the threshold for materiality I have used for the purposes of my report. Accordingly, these claims are not assigned any material settlement value.

### *e. Failure To Obtain Independent Director Approval*

**Examiner's Report References:**

Section I.E.1.e page I-11

Section VII.L.2.b pages VII.L-56 to VII.L-58

**Description:**

Whether there is a viable claim for failure to obtain independent director approval of various agreements and amendments to agreements that occurred between the inception of the 2005 Operating Agreement and November 2010.

**Background:**

The 2005 Operating Agreement and the 2006 Amended Operating Agreement barred any transactions between ResCap and GMAC affiliates that were not consistent with what parties would agree to at arm's length and for fair value unless waived by the independent directors. The MMLPSA, Pipeline Swap, and MSR Swap were not entered into on terms that were available in the market and to which parties at arm's length would have agreed. Yet there was no independent director approval of these transactions.

**Examiner's Analysis and Conclusions:**

1. The agreements at issue did not appear to result in losses for GMAC Mortgage, were not economically unfair to ResCap, and did not materially and adversely affect ResCap's creditors.

2. Neither AFI nor Ally Bank was involved in the decision whether to seek independent director approval.

3. The rights of third-party beneficiary creditors are limited to specific enforcement of the requirement of independent director approval, and money damages are specifically foreclosed.

4. Claims resulting from the lack of independent director approval of these transactions are unlikely to succeed.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions sets forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

The issues identified by the Examiner make it highly unlikely that claims regarding the failure to obtain independent director approval will succeed. Because the agreements at issue were not unfair to ResCap or the creditors, there are no damages and no likelihood of recovery. Even if there were, such damages would be barred by the contractual provisions barring monetary damages and limiting the remedy to specific performance. Accordingly, these claims are not material and do not add any settlement value.

**2. Government Settlements**

***$109.6 Million Preference Claim***

**Examiner's Report References:**

Section I.E.2 pages I-12 to I-13

Section V.C pages V-210 to V-299

Section VII.F.5 pages VII.F-1 to VII.F-154

**Description:**

Whether the obligations of the Debtors and AFI were appropriately allocated with respect to two settlements between governmental entities on the one hand, and AFI, ResCap and certain of their subsidiaries on the other hand. This claim analysis reviews the potentially preferential payment of approximately $109.6 Million made by GMAC Mortgage on March 14, 2012 pursuant to the DOJ/AG Consent Judgment.

**Background:**

Pursuant to the DOJ/AG Consent Judgment (the "Judgment") memorializing the DOJ/AG Settlement between the Department of Justice and various state Attorneys General on the one hand, and AFI, ResCap and GMAC Mortgage, on the other, GMAC Mortgage paid approximately $109.6 million to the government on March 14, 2012 (within 90 days of the Petition Date of May 14, 2012). The Judgment provides that the Defendant (defined, collectively, as AFI, ResCap and GMAC Mortgage) shall pay the "$109.6 million hard dollar payment". ResCap, through GMAC Mortgage, paid the entire $109.6 million on March 14, 2012. The Examiner evaluated whether the approximately $109.6 million payment may be avoidable as a preference under Code section 547 and recoverable from AFI "as an entity for whose benefit such transfer was made . . .."

**Examiner's Analysis and Conclusions:**

1. AFI is liable, together with ResCap, GMAC Mortgage and RFC, for payment of the full amount of the $109.6 million Judgment.

2. AFI received a direct, ascertainable and quantifiable benefit of $109.6 million by being relieved of the obligation to make that payment if ResCap did not.

3. It is likely that an action against AFI to recover the March 14, 2013 payment of $109.6 million as a preferential transfer under Bankruptcy Code section 547 and 550 would prevail.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This claim would likely be pursued by a fiduciary such as a bankruptcy trustee, committee or post-plan confirmation trustee. This type of plaintiff is typically motivated to reach an early resolution of disputes in order to save costs and expedite distributions to creditors.

The Examiner reviewed the potential defenses which could be raised. In reviewing potential defenses, the Examiner addressed, *inter alia*, whether AFI was liable for the $109.6 million payment in light of Exhibit I attached to the Judgment which provides that ResCap, GMAC Mortgage and RFC shall pay the $109.6 million payment but is silent as to AFI's payment obligation. Because of the debt forgiveness under the credit facilities provided by AFI, the Examiner also considered whether the "Earmarking Doctrine" would protect AFI from liability under Bankruptcy Code section 550, as well as other issues and potential defenses. The Examiner concluded, after his review and analysis of the interaction, relationship and effect of the relevant judgments, orders and agreements, that AFI was liable for the entire approximately $109.6 million obligation and that, accordingly, the payment thereof by GMAC Mortgage is avoidable as a preference under Bankruptcy Code section 547 and recoverable from AFI as the entity for whose benefit the payment was made.

AFI would most likely vigorously defend the claim and raise all of the issues and potential defenses addressed by the Examiner. Although the Examiner concludes that the preference claim is likely to be successful, all litigation carries risk, uncertainty and expense. Similarly, AFI would also incur significant legal cost and expense to defend this claim.

Given the likelihood of success identified by the Examiner, I would expect the plaintiff's initial settlement demand at $98.6 million, approximately 90% of the total amount of the claim, and defendant's initial offer at $16.4 million, approximately 15% of the total claim. Taking into account the relative bargaining power of the parties and the back and forth to be expected in the negotiating process, I estimate a fair settlement of this preference claim at approximately $60 million.

***$48.4 Million Preference Claim***

**Examiner's Report References:**

Section I.E.2 pages I-12 to I-13

Section V.C pages V-210 to V-299

Section VII.F.5 pages VII.F-1 to VII.F-154

**Description:**

Whether the obligations of the Debtors and AFI were appropriately allocated with respect to two settlements between governmental entities on the one hand and AFI, ResCap and certain of their subsidiaries on the other hand. This claim analysis reviews the payments totaling approximately $48.4 million made by GMAC Mortgage on May 10 and 11, 2012 pursuant to the terms of the various agreements under which GMAC Mortgage was required to indemnify Ally Bank for losses incurred as a result of certain loan modifications in connection with the government settlements.

**Background:**

Pursuant to the terms of the January 30 Letter Agreement and the A&R Servicing Agreement, GMAC Mortgage was permitted to modify certain Ally Bank loans to a greater extent than permitted under the Original Servicing Agreement, but GMAC Mortgage was required to indemnify Ally Bank for losses incurred resulting from such loan modifications to the extent they exceeded the modifications permitted under the Original Servicing Agreement. The A&R Servicing Agreement, however, was not actually executed until after the May 10 and 11, 2012 payments were made.

**Examiner's Analysis and Conclusions:**

1. It is likely that an action on behalf of GMAC Mortgage against Ally Bank to avoid and recover the May 10 and 11, 2012 payments as preferential transfers under Bankruptcy Code sections 547 and 550 would prevail.

2. Even though the A&R Servicing Agreement was not executed until after the subject payments were made, GMAC Mortgage was required to make those payments pursuant to the terms of the January 30 Letter Agreement.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This claim would likely be pursued by a fiduciary such as a bankruptcy trustee, committee or post-plan confirmation trustee. This type of plaintiff is typically motivated to reach an early resolution of disputes in order to save costs and expedite distributions to creditors.

In determining that a preference action to avoid and recover the payments made to Ally Bank would likely prevail, the Examiner concluded that the evidence supports the proposition that Ally Bank, for whose benefits the payments were made, was a creditor of GMAC Mortgage and that the payments were made on account of an antecedent debt within 90 days prior to the Petition Date. The Examiner also analyzed the potential defenses which could be raised and primarily focused on whether GMAC Mortgage was obligated to pay Ally Bank since the A&R Servicing Agreement was not executed prior to the payments made on May 10 and 11, 2012. However, the Examiner also concluded that pursuant to the January 30 Letter Agreement, GMAC Mortgage was obligated to indemnify Ally Bank.

Ally Bank would most likely defend the claim and raise the foregoing issue (as well as requiring the trustee to meet its evidentiary burden on all other elements of a preference action). Although the Examiner concludes that the preference claim is likely to be successful, all litigation carries risk, uncertainty and expense. Similarly, Ally Bank would also incur significant legal cost and expense to defend this claim.

Given the likelihood of success identified by the Examiner with a claim of $48.4 million, I would expect the plaintiff's initial settlement demand at $43.6 million, approximately 90% of the total amount of the claim and defendant's initial offer at $7.3 million, approximately 15% of the total claim. Taking into account the relative bargaining power of the parties and the back and forth to be expected in the negotiating process, I estimate a fair settlement of this preference claim at approximately $32 million.

***$12.9 Million Post-petition Transfer***

**Examiner's Report References:**

Section I.E.2 pages I-13

Section V.C pages V-210 to V-291

Section VII.F.7 pages VII.F-148 to VII.F-151

**Description:**

Whether the obligations of the Debtors and AFI were appropriately allocated with respect to two settlements between governmental entities on the one hand and AFI and ResCap and certain of their subsidiaries on the other hand. This claim analysis reviews the approximate post-petition payment of $12.9 million made by Debtors to Ally Bank on June 13, 2012 pursuant to the terms of the various agreements under which GMAC Mortgage was required to indemnify Ally Bank for losses incurred as a result of certain loan modifications in connection with the government settlements. The post-petition payment, however, was for indemnification obligations for loan modifications which were performed prepetition.

**Background:**

Pursuant to the terms of the January 30 Letter Agreement and the A&R Servicing Agreement, GMAC Mortgage was permitted to modify certain Ally Bank loans to a greater extent than permitted under the Original Servicing Agreement, but GMAC Mortgage was required to indemnify Ally Bank for losses incurred resulting from such loan modifications to the extent they exceeded the modifications permitted under the Original Servicing Agreement. On May 12, 2012, that certain Interim Order Pursuant to Sections 105(a) and 363 of the Bankruptcy Code Authorizing the Debtors to Continue to Perform Under the Ally Bank Servicing Agreements in the Ordinary Course of Business [Dkt. No. 90] ("Interim Order") was entered.

**Examiner's Analysis and Conclusions:**

1. The approximately $12.9 million payment was not made in the ordinary course of Debtors' business and, therefore, could only be made by the Debtor if the Bankruptcy Court authorized the Debtor to make such post-petition payments after notice and a hearing pursuant to Bankruptcy Code Section 363.

2. While a close question, it appears more likely than not that the Interim Order did not authorize the Debtors to make payments to satisfy obligations incurred prepetition.

3. While a close question, it is more likely than not that the approximately $12.9 million post-petition payment relating to obligations incurred prepetition may be avoided under Bankruptcy Code section 549(a).

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This claim would likely be pursued by a fiduciary such as a bankruptcy trustee, committee or post-plan confirmation trustee. This type of plaintiff is typically motivated to reach an early resolution of disputes in order to save costs and expedite distributions to creditors.

In determining that an action to avoid the post-petition payment made to Ally Bank would more likely than not prevail, the Examiner concluded that the obligation to make a post-petition indemnification payment, which stemmed from GMAC Mortgage's responsibilities under a one-time settlement agreement with the government, would not be considered an ordinary course payment and, therefore, could only be made if authorized by the Bankruptcy Court.

The Examiner reviewed the Interim Order which authorized the Debtors' "to continue to perform under the terms of the [A&R] Servicing Agreement…" and considered the argument that such broad language could cover the $12.9 million payment on account of a prepetition obligation. However, the motion seeking entry of the Interim Order did not specifically mention these obligations and stated that the Debtors "were not seeking to pay any prepetition claims through or pursuant to the [A&R] Servicing Agreement." The Examiner concluded that this representation clarifies any ambiguity found in the Interim Order regarding whether payments with respect to prepetition obligations were authorized. The Examiner considered other arguments, including, without limitation, the fact that the agreement which contained the indemnity provisions was attached to the motion, but concluded that the indemnification obligation was not conspicuously disclosed in the motion or exhibits thereto, and there was no mention of the amount of payments to be made. Therefore, the Examiner concluded that, while it is a close question, based on the Debtors' express representations in the motion and lack of disclosure it appears more likely than not that the Interim Order did not authorize the Debtors to make payments to satisfy obligations incurred prepetition.

Ally Bank would most likely defend the claim and raise the foregoing issue (as well as other issues noted and considered by the Examiner). The Examiner concludes that, although a close question, a claim to recover the post-petition payment is more likely than not to prevail, all litigation carries risk, uncertainty and expense. Similarly, Ally Bank would also incur significant legal cost and expense to defend this claim.

Given the likelihood of success identified by the Examiner, I would expect the plaintiff's initial settlement demand at $10.3 million, approximately 80% of the total amount of the claim and defendant's initial offer at $1.9 million, approximately 15% of the total claim. Taking into account the relative bargaining power of the parties and the back and forth to be expected in the negotiating process, I estimate a fair settlement of this post-petition transfer claim at $7.1 million. Accordingly, this claim is not assigned any material settlement value and will not be included in the allocation of the $2.1 billion settlement fund.

### 3. Causes of Action Relating To Use And Allocation Of ResCap's Tax Attributes

***First and Second 2009 Tax Allocation Agreements***

**Examiner's Report References:**

Section I.E pages I-13 to I-14

Section V.D pages V-300 to V-344

Section VII.K pages VII.K-1 to VII.K-49

**Description:**

The historical and prospective use and allocation, between ResCap and AFI, of ResCap's tax attributes.

**Background:**

As required by the November 2006 sale of 51% of AFI to Cerberus Capital Management, LP ("Cerberus"), ResCap was converted into a limited liability company and with AFI's consent, became a disregarded entity for federal income tax purposes in the fall of 2006. ResCap remained a disregarded entity, treated as a division of AFI from December 1, 2006 through June 30, 2009.

The 2006 Amended Operating Agreement required that "ResCap and GMAC shall maintain in effect an income tax allocation agreement that shall provide for two-way sharing payments based on the separately calculated tax liability or benefit of ResCap."[22]

Between July 1, 2009 and November 2, 2009, ResCap became a partnership for federal income tax purposes. It reverted to disregarded entity status on November 2, 2009 to preserve substantial tax losses that would be generated by Ally Bank and its wholly-owned subsidiary, GMACB Asset Management Corporation.

In connection with this reversion, AFI suggested and drafted the First 2009 Tax Allocation Agreement. In December 2009, William Marx, Executive Director Tax Operations and Analysis at AFI, notified both AFI and ResCap that under the proposed tax allocation agreement, any deviation from strict stand-alone accounting would "in all cases be either neutral or more beneficial to ResCap." Consistent with that statement, AFI drafted the First 2009 Tax Allocation Agreement to treat ResCap generally as if it were a stand-alone taxpayer, except that it treated ResCap more favorably in that it entitled ResCap to be paid for its tax benefits that AFI could currently use even if ResCap could not currently use the benefits on a stand-alone basis. The proposed agreement provided that ResCap would be compensated based on AFI's use of ResCap's tax benefits, not hypothetical use by GMAC Mortgage Group LLC, a disregarded entity. The proposed agreement

[22] 2006 Amended Operating Agreement, at § 2(b)(iii), [ALLY_0041818].

further provided that AFI would reimburse GMAC Mortgage Group LLC to the extent the Group would have to compensate ResCap for AFI's use of ResCap's tax benefits.

ResCap's legal staff advised the board that it believed that First 2009 Tax Allocation Agreement was "on terms consistent with those that parties at arms' length would agree to and for fair value." The ResCap Board unanimously approved the First 2009 Tax Allocation Agreement at its regularly-scheduled board meeting on August 6, 2010.

On September 9, 2010, Marx prepared a memorandum with instructions for executing the First 2009 Tax Allocation Agreement (and similar agreements) to among others, David DeBrunner, Chief Accounting Officer and Corporate Controller of AFI, and James Young, the CFO of ResCap. The memorandum and agreements were delivered promptly to DeBrunner, who executed the First 2009 Tax Allocation Agreement on behalf of AFI on or about September 13, 2010. Debrunner believed he was acting pursuant to "delegated authority". The First 2009 Tax Allocation Agreement was not approved by the board of directors of AFI, but that practice was consistent with "Ally Accounting Policy 3330" which provided that "[a]ll tax sharing agreements must be approved by the respective boards of directors *or appropriate management designee."* [23] The memorandum and accompanying agreements were apparently not delivered to Young until approximately October 15, 2010.

In the meantime, AFI began calculating the amounts due to ResCap for 2009 under the First 2009 Tax Allocation Agreement and realized the amounts due to ResCap would be substantial, *i.e.*, approximately $250 million for 2009 and $400 million for 2010. Starting on October 13, 2010, Marx raised his concerns and the possibility of proposing a less-favorable tax allocation agreement to ResCap with James Mackey, the CFO of AFI. The Examiner noted that Marx, on his own initiative, attempted to hold up the completion of the execution of the First 2009 Tax Allocation Agreement, collecting and destroying the partially-executed versions. In addition, it appears that Marx or Mackey (or both) spoke to Young and told him that the agreement had not been fully discussed or vetted within AFI. As a result, Young never signed the First 2009 Tax Allocation Agreement

AFI provided ResCap with proposed revisions to the First 2009 Tax Allocation Agreement (the "Second 2009 Tax Allocation Agreement"). The proposed Second 2009 Tax Allocation Agreement removed ResCap's right to receive compensation from AFI for AFI's use of ResCap's tax benefits. In addition, ResCap became liable to pay AFI for tax on excess inclusion income, which totaled approximately $50 million from 2009 to 2012.

The ResCap Board and Independent Directors reviewed the Second 2009 Tax Allocation Agreement. Counsel for the Independent Directors advised that the Second 2009 Tax Allocation Agreement seemed "very unfair" to ResCap. Nevertheless, after certain revisions were made, the Independent Directors believed that the fairness concerns had been resolved and the ResCap board approved the transaction, which was executed by all parties in 2011.

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[23] Ally Accounting Policy 3330, Issued by Director of Accounting Policy, Effective June 1, 2011 (emphasis added), [EXAM12354093].

Although the Second 2009 Tax Allocation Agreement appears to be a pure stand-alone agreement in that ResCap is obligated to pay to AFI its hypothetical separate tax liability each year, the Examiner found that a closer look reveals that it is significantly worse for ResCap in that there is nothing in the agreement that would require AFI to pay ResCap any refund ResCap might be entitled to on a stand-alone basis. In addition, the Second 2009 Tax Allocation Agreement does not meet the requirement of the 2006 Amended Operating Agreement that it "shall provide for two-way sharing payments based on the separately calculated tax liability or benefit of ResCap." Nor does it meet the standard set by the ResCap board when it approved the First 2009 Tax Allocation Agreement, *i.e.*, that the agreement be "on terms not more disadvantageous in any material respect to the holders of [ResCap's] notes than those existing tax allocation agreement(s) [it is] intended to replace[.]"

**Examiner's Analysis and Conclusions:**

1. While a close case, it is more likely than not that the First 2009 Tax Allocation Agreement was a valid, binding, and enforceable contract against AFI.

2. While a close question, it is more likely than not that ResCap's CFO did not breach his fiduciary duties by failing to execute the First 2009 Tax Allocation Agreement.

3. It is likely that the Second 2009 Tax Allocation Agreement constituted a fraudulent transfer of the contract benefits belonging to ResCap under the First 2009 Tax Allocation Agreement.

4. While a close question, it is more likely than not that the Second 2009 Tax Allocation Agreement would not be set aside on equitable theories related to overreaching.

5. While a close question, it is more likely than not that ResCap's Board of Directors did not breach its fiduciary duties by approving the Second 2009 Tax Allocation Agreement.

6. The benefits that ResCap would have received under the First 2009 Tax Allocation Agreement but for the Second 2009 Tax Allocation Agreement are estimated at $1.77 billion.[24]

7. Even if the First 2009 Tax Allocation Agreement is not enforceable, it is likely that ResCap could recover the payments made to AFI under the Second 2009 Tax Allocation Agreement in the approximate amount of $50 million as a constructively fraudulent conveyance.

8. It is likely that the Second 2009 Tax Allocation Agreement would be found to be in violation of the 2006 Amended Operating Agreement.

[24] It should be noted that the Examiner's estimate was based on the assumption that AFI would be making a $750 million contribution contemplated by the terminated AFI Settlement and Plan Sponsor Agreement. If a $2.1 billion dollar contribution was assumed, the benefits that ResCap would have received under the First 2009 Tax Allocation Agreement but for the Second 2009 Tax Allocation Agreement would have been greater.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This contract claim would likely be pursued by a bankruptcy fiduciary such as a trustee or committee. Fiduciary plaintiffs are typically motivated to reach an early resolution of disputes in order to expedite distributions to creditors. All of the procedural hurdles that attend bankruptcy litigation would be present in this case, including (i) the constitutional authority of a bankruptcy court to render a final judgment in a state law contract dispute and a fraudulent transfer action, (ii) withdrawal of the reference, and (iii) demand for a jury trial. In addition, all litigation carries risk, uncertainty, and expense. As a result, it is highly likely that any settlement would reflect a discount of 20% from the face value of the claim.

The plaintiff would have to establish that the First 2009 Tax Allocation Agreement was binding on AFI, which the Examiner evaluates as a close case. Among the evidentiary and substantive issues highlighted by the Examiner are: (a) the lack of approval by AFI's board or senior management; (b) the testimony of participants that neither side considered the First 2009 Tax Allocation Agreement binding; (c) fading memories and unavailability of witness to events that occurred in 2009 and 2010; (d) lack of signature by ResCap; and (e) the destruction of partially signed copies. Because this is a close question, the risk involved in this threshold determination substantially lowers the maximum settlement value of the claim by 40%, even before the inherent risks of litigation are considered.

If the First 2009 Tax Allocation Agreement were deemed to be binding on AFI, then the failure of ResCap's CFO to execute the First 2009 Tax Allocation Agreement is of no moment. The failure to sign only matters if the First 2009 Tax Allocation Agreement is not binding. In that case, there is a possibility of a claim for breach of fiduciary duty against ResCap's CFO, who is one of the released parties. Based on the Examiner's finding that it is more likely than not that ResCap's CFO did not breach his fiduciary duties, with which I concur, this claim adds only minimal settlement value.

Even if the First 2009 Tax Allocation Agreement were deemed to be binding on AFI, that agreement was superseded by the Second 2009 Tax Allocation Agreement. Thus, to prevail on a claim for breach of contract damages related to the First 2009 Tax Allocation Agreement, the plaintiff would also have to convince the court to set aside the Second 2009 Tax Allocation Agreement. Although the Examiner concludes that the Second 2009 Tax Allocation Agreement is likely to be set aside as a fraudulent transfer, there are still significant risks associated with that claim. As the Examiner noted, AFI would likely argue that ResCap received substantial capital contributions and other assistance from AFI around the time of the Second 2009 Tax Allocation Agreement which could represent reasonably equivalent value for the transaction. Notwithstanding the Examiner's conclusion that he was unable to connect these contributions to the Second 2009 Tax Allocation Agreement, this issue creates further risk for the plaintiff. In addition, as noted above, the First 2009 Tax Allocation Agreement was overly favorable to ResCap. Undoubtedly, AFI would

vigorously defend the claim and raise the issues highlighted by the Examiner. Therefore, the value of the claim would be further reduced by 20%.

If the First 2009 Tax Allocation Agreement were to be found non-binding on AFI, the plaintiff could, nevertheless, seek to set aside the Second 2009 Tax Allocation Agreement as a fraudulent transfer. The Examiner concludes that ResCap did not receive reasonably equivalent value because there was no possibility for ResCap to ever receive a payment thereunder. However, the payments of approximately $50 million are not material in this context because the value of the settlement amount of such payments would be less than $21 million and therefore does not merit separate valuation for settlement purposes. The payments made are included in the total recovery if the First 2009 Tax Allocation Agreement is upheld.

The Examiner also considered whether the Second 2009 Tax Allocation Agreement could be set aside on an overreaching theory. As part of his analysis, the Examiner found that the violation of the 2006 Amended Operating Agreement was further evidence that the Second 2009 Tax Allocation Agreement was unfair and evidenced overreaching. This theory is an alternative argument which only matters if the Second 2009 Tax Allocation Agreement is not set aside as a fraudulent transfer. Because the Examiner concluded that the Second 2009 Tax Allocation Agreement is likely to be set aside as a fraudulent transfer, this theory is unlikely to come into play. Moreover, even if it did come into play, the Examiner concluded that this claim was more likely than not to fail. Accordingly, this claim adds minimal settlement value.

Likewise, the Examiner considered whether ResCap's board breached its fiduciary duties by approving the Second 2009 Tax Allocation Agreement. Again, this is an alternative theory which only applies if the Second 2009 Tax Allocation Agreement is not set aside as a fraudulent transfer. Because the Examiner concluded that the Second 2009 Tax Allocation Agreement is likely to be set aside as a fraudulent transfer, this theory is unlikely to come into play. As above, even if this claim did come into play, the Examiner concluded that it was more likely than not to fail. As a result, this claim also adds minimal settlement value. I estimate that, together, the three alternative theories add 5% to the settlement value of the claim.

On the other side, even assuming that AFI would dispute the Examiner's calculation, the magnitude of the claims ($1,770 million) would likely be a strong motivating factor for AFI to settle. In addition, the likelihood of success identified by the Examiner would also incline AFI toward a substantial settlement. Legal fees and expenses in prosecuting and defending the claim would run into the tens of millions of dollars, but pale in comparison to the magnitude of the claims. Accordingly, I conclude that AFI would make a substantial offer to resolve these claims.

Under these circumstances, I would expect plaintiff's initial settlement demand to be $1,500 million, approximately 85% of the gross amount of the claim, and defendant's initial offer to be $265 million, approximately 15% of the claim. The back and forth of the negotiation process would ensue taking into account the discounts and enhancements identified above, as well as the relative bargaining power of the parties. The anticipated settlement range would be between $750 million, 50% of the plaintiff's initial demand, and $530 million, twice the defendant's initial offer, with a likely value of $713.7 million, calculated as follows:

| | |
|---|---|
| Potential Damages: | $1,770.0 million |
| Reduced By: | |
| 20% inherent risk = | $1,416.0 million |
| 40% on enforceability = | $849.6 million |
| 20% on fraudulent transfer = | $679.7 million |
| Increased By: | |
| 5% for alternative theories = | **$713.7 million** |

***Claim re 2005 Tax Allocation Agreement***

**Examiner's Report References:**

Section VII.K pages VII.K-1 to VII.K-17

Section V.D pages V-300 to V-345

**Description:**

Whether ResCap has a contractual claim against AFI under the Implemented 2005 Tax Allocation Agreement.

**Background:**

From March 2005 through November 30, 2006 ResCap was included in the GM consolidated federal income tax return. During this period, AFI and ResCap were parties to the Implemented 2005 Tax Allocation Agreement, pursuant to which ResCap was entitled to be compensated by AFI to the extent that ResCap's NOLs and other tax benefits were used by both GM and AFI to reduce each of their separate group tax liabilities. In the case of AFI, this was a hypothetical computation. ResCap received a payment from AFI of $85.9 million for GM's and AFI's use of ResCap tax benefits for the tax year ending November 30, 2006. It was later determined that ResCap generated potential tax savings for GM of $101 million for that tax year so that ResCap still had a contingent right to the remaining $15.1 million in potential tax savings, which would become fixed if and when GM used the tax benefits. During the Examiner's investigation, GM confirmed that it used all of ResCap's tax benefits that were originally unused by GM in 2006; however, the Implemented 2005 Tax Allocation Agreement was terminated prior to GM's use of ResCap's tax attributes.

**Examiner's Analysis and Conclusions:**

It is likely that a contract claim in the approximate amount of $15.1 million against AFI arising under the Implemented 2005 Tax allocation Agreement would prevail.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This cause of action would likely be pursued by a fiduciary such as a bankruptcy trustee, committee or post-plan confirmation trustee. This type of plaintiff is typically motivated to reach an early resolution in order to save cost and expedite distributions to creditors.

As part of his extensive analysis of estate causes of action arising out of ResCap's tax sharing arrangements, the Examiner considered whether ResCap has a contract claim against AFI based on the tax benefits that were generated by ResCap and passed to, but unused by, GM in 2006. The Implemented 2005 Tax Allocation Agreement required that both GM and AFI be able to use ResCap tax benefits before ResCap would be entitled to compensation for use of its tax benefits (as opposed to the more standard construction which would require that only AFI use ResCap's tax benefits for ResCap to receive compensation). The Examiner also considered whether the claim would be time barred under applicable law. The Examiner concluded that ResCap's right to payment on account of its 2006 tax benefits was unaffected by the subsequent termination of the Implemented 2005 Tax Allocation Agreement as the agreement itself provided that even if it terminated, it would "continue to apply" to determine the parties' respective rights and obligations for the 2006 tax year and that ResCap's right to payment against AFI, albeit contingent and conditional, arose when it performed under the Implemented 2005 Tax Allocation Agreement (*i.e.*, when it generated tax benefits through November 30, 2006 that passed to GM).

Although the Examiner concludes that a claim to recover the $15.1 million contract claim is likely to prevail, all litigation carries risk, uncertainty and expense. AFI would incur legal cost and expense to defend this claim which it is likely to lose.

Given the likelihood of success identified by the Examiner, I would expect the plaintiff's initial settlement demand at approximately 85% of the total amount of the claim (approx. $12.8 million) and defendant's initial offer at approximately 15% (approx. $2.3 million). Taking into account the relative bargaining power of the parties and the back and forth to be expected in the negotiating process, I estimate a fair settlement of this contract claim at approximately $7 million. Accordingly, this claim is not material and will not be accorded any proposed allocation of the settlement fund.

### 4. Minnesota Insider Preference Claims

**Examiner's Report References:**

Section I.E.4 pages I-14 to I-16

Section VII.F.4 pages VII.F-26 to VII.F-95

Section VII.F.6 pages VII.F-122 to VII.F-148

**Description:**

Application of Minnesota's substantive fraudulent transfer law to transfers made by ResCap and RFC to AFI and its affiliates, including GMAC Commercial Finance LLC ("GMAC CF").

**Background:**

The Examiner reviewed seven transactions or loan facilities between ResCap as the borrower and AFI or AFI's affiliates, including GMAC CF : (1) the Secured Revolver Facility; (2) the A&R Line of Credit Facility; (3) the Secured MSR Facility; (4) the Servicing Advance Factoring Facility; (5) the Resort Finance Facility; (6) the 2008 Bank Transaction; and (7) the 2009 Bank Transaction (collectively, the "Transactions") to determine whether they implicate potential claims under Minnesota's Insider Preference Statute.

**Examiner's Legal Analysis and Conclusions:**

1. The Bankruptcy Court would likely apply Minnesota's Insider Preference statute to transfers made by ResCap and RFC to AFI in the six years prior to ResCap's bankruptcy filing.

2. Minnesota's version of the UFTA has an Insider Preference cause of action. A transfer is fraudulent under Minnesota's Insider Preference statute if: (1) there exists a creditor of the transferor-debtor whose claim arose before the transfer, (2) the transfer was made to an insider of the debtor, (3) the transfer was made for an antecedent debt, (4) the debtor was insolvent at the time of the transfer, and (5) the insider had reasonable cause to believe the debtor was insolvent.

3. Although a close call, the Minnesota Insider Preference statute allows a "substantially contemporaneous" limitation to the antecedent debt requirement despite the express wording of the statute.

4. The Minnesota Insider Preference statute has four defenses: good faith transferee; new value; ordinary course; and, good faith effort to rehabilitate the Debtor.

5. All of AFI's potential insider preference liability stems from the A&R Line of Credit Facility either because payments under the other loan facilities do not meet all the elements of a preference or are offset by new value contributions.

6. The Subsequent New Value Defense is available to AFI and, although a close call, it likely will be applied as a netting out of all value given against all transfers made during the subject transfer period. The value of non-cash contributions would be an issue.

7. Under Minnesota's Insider Preference statute, only the parties' history of dealings is to be considered in determining ordinary course of dealings. All of the transfers between the Debtors and AFI occurred post-insolvency, and thus the Examiner concluded that AFI would be unlikely to prevail on an ordinary course defense.

8. It is likely that AFI would not be able to establish the good faith effort to rehabilitate defense.

9. While Minnesota's Insider Preference statute allows for a six-year reach-back period from the Petition Date, the Examiner concluded that prior to December 30, 2009, AFI provided new value to ResCap and RFC which, taken as a whole as against extensions of credit, exceeded the value of the transfers made by ResCap and RFC to AFI during that same period.

10. From December 30, 2009 to the Petition Date, RFC made transfers to AFI under the A&R Line Of Credit Facility totaling approximately $650 million, and AFI extended new value to RFC totaling approximately $116 million. GMAC Mortgage and certain of the other Debtors entered into the A&R Line of Credit Facility as well. The estimated Insider Preference liability for AFI to RFC is $534 million.

11. GMAC CF, a wholly-owned subsidiary of AFI, has approximately $32 million in potential Insider Preference liability with a potential offset of $1.5 million for new value. However, the Debtors' records are unclear as to whether the transfers were made by RFC or GMAC Mortgage. To the extent the transfers were made by GMAC Mortgage the Minnesota Insider Preference statute would not apply because Pennsylvania law applies to the GMAC Mortgage.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. I believe it noteworthy that the Examiner was unable to find Minnesota state law directly interpreting Minnesota's ordinary course defense. The Examiner predicts that, in the absence of a baseline course of dealings predating the financial turmoil, AFI would be unable to look to Minnesota's ordinary course of dealings defense. I believe that application of this narrow reading of the statute overlooks the policy underlying preference defenses to protect creditors who continue to transact business with companies in financial distress. Moreover, under Bankruptcy Code section 547(c)(2)(A), some bankruptcy courts have deemed transfers to be in the ordinary course which occurred only during the preference period. Although looking to industry practices is not available under Minnesota's UFTA, AFI may nonetheless argue that its dealings with ResCap and RFC during the look-back period should be treated as ordinary course even though ResCap and RFC were in dire financial straits throughout the period.

**Settlement Considerations:**

***Claims Against AFI***

This cause of action likely would be pursued by a bankruptcy fiduciary such as a committee or a post-confirmation trustee. Although the Examiner concludes that Bankruptcy Code section 546(e)'s safe harbor likely does not apply to these transactions, if the court were to deem the safe harbor applicable, then an estate fiduciary might not be able to pursue these claims; these claims may then be pursued by a non-estate fiduciary, such as a creditor (pursuant to the *Tribune* work-around). The dynamics of settlement may change in the event a creditor seeking its own recovery were substituted for a fiduciary looking to maximize recovery for a broader group of creditors.

Fiduciary plaintiffs are typically motivated to reach an early resolution of disputes in order to expedite distributions to creditors. All of the procedural hurdles that attend bankruptcy litigation would be present in this case, including (i) the constitutional authority of a bankruptcy court to render a final judgment in a state law fraudulent transfer action, (ii) withdrawal of the reference, and (iii) demand for a jury trial. AFI would most likely vigorously defend the claim and raise all of the issues and potential defenses addressed by the Examiner. Although the Examiner concludes that the preference claim is likely to be successful, all litigation carries risk, uncertainty and expense. Similarly, AFI would also incur significant legal cost and expense to defend this claim. As a result, given the foregoing factors and the initial face-amount of the claim, I believe that it is highly likely that any settlement would reflect a substantial discount of 30% on the face value of the claim, reducing the claim to $373.8 million.

Further, the Examiner's report details several issues in litigating these Insider Preference Claim that would reduce the settlement value of the claim. First, the Examiner's choice-of-law analysis, which determined Minnesota law to be applicable, is certainly well-reasoned but not an absolute. In the event that the court does not apply the Minnesota Insider Preference statute, AFI will have a stronger ordinary course defense to a preference claim. Likewise, the Bankruptcy Code section 546(e) safe-harbor may arguably remain available to AFI, though a creditor work-around may nonetheless allow for the later prosecution of this claim against AFI by a non-estate fiduciary, thus reducing the strength of the preference claim. Based on these additional issues, I believe that an additional discount of 20% of the claim is warranted, further reducing the claim to $299.0 million.

On the other hand, the Examiner's claim value of $534 million is conservative and there is the possibility, although likely remote, that the court would not net out all transfers between ResCap and AFI, thereby potentially increasing AFI's Insider Preference exposure. Also, there are numerous transfers that the Examiner concludes do not meet all the elements of a preference or are offset by new value contributions; however, the plaintiff would argue otherwise. This is a potential risk of additional exposure to AFI, and thus I have ascribed a 10% increase in value of the settlement amount, bringing the overall likely settlement value of the AFI claims to $328.9 million.

Potential Damages: $534.0 million

Reduced By:

| | |
|---|---|
| 30% inherent risk= | $373.8 million |
| 20% for choice of law= | $299.0 million |
| Increased By: | |
| 10% for no netting of transfers= | $328.9 million |

As an alternative method of determining settlement value, given the likelihood of success identified by the Examiner, I would expect the plaintiff's initial settlement demand at $480.6 million, approximately 90% of the total amount of the claim, and defendant's initial offer at $80.1 million, approximately 15% of the total claim. Taking into account the relative bargaining power of the parties, the back and forth to be expected in the negotiating process, the strong merits of this insider preference claim, and the risk of additional exposure, I expect a reasonable settlement at the upper end of the range at approximately $300 million.

***Claims against GMAC CF***

With respect to the Insider Preference claims of approximately $32 million against GMAC CF, I believe that the sole defense raised by the Examiner was the new value offset of $1.5 million, reducing the claim to $30.5 million. As with the AFI Insider Preference claims, applying the same discounts and enhancements as above, likely settlement value of the GMAC CF claim is reduced to $18.8 million.

| | |
|---|---|
| Potential Damages: | $30.5 million |
| Reduced By: | |
| 30% inherent risk= | $21.4 million |
| 20% for choice of law= | $17.1 million |
| Increased By: | |
| 10% for no netting of transfers= | $18.8 million |

As an alternate method of determining settlement value, given the likelihood of success identified by the Examiner, I would expect the plaintiff's initial settlement demand to be $28.4 million, approximately 90% of the total amount of the claim, and defendant's initial offer at $4.7 million, approximately 15% of the total amount of the claim. Taking into account the relative bargaining power of the parties and the back and forth to be expected in the negotiating process, I estimate that a fair settlement of this preference claim at approximately $18 million. This is below the materiality threshold of $21 million. In addition, the Examiner was unable to determine from the Debtors' records whether the transfers were made by RFC or GMAC Mortgage. To the extent the transfers were made by GMAC Mortgage Pennsylvania law would apply, not the Minnesota Insider Preference statute with the longer reach back period. Accordingly, these claims are not assigned any material settlement value.

### 5. Ally Bank Transactions

#### *a. 2006 Bank Restructuring*

**Examiner's Report References:**

Section I.E.5.a pages I-16 to I-19

Section V.A.1.a pages V-1 to V24

Section V.A.2.a and b pages V-44 to V-70

Section VII.F.6.d pages VII.F-134 to VII.F-142

Section VII.E.2 pages VII.E-28 to VII.E-40

Section VII.L.1 pages VII.L-1 to VII.L-28

**Description:**

ResCap exchanged 100% ownership of Old GMAC Bank, a valuable asset, for non-voting shares in IB Financial, the holding company of Ally Bank, which were much less valuable, in a transaction where ResCap's Independent Directors were not informed of, and perhaps misled about, viable alternate structures that would have preserved the full value of Old GMAC Bank for ResCap.

**Background:**

In 2005 AFI and ResCap sought to separate from GM to reduce their high cost of funds due to GM's poor credit rating. Cerberus agreed to acquire 51% of AFI, which would accomplish the desired separation from GM. One glitch was that ResCap owned a federal savings bank, *i.e.*, Old GMAC Bank. If Cerberus acquired indirect ownership of a federal savings bank, it would become subject to the Bank Holding Company Act (BHCA), an undesirable consequence for Cerberus. Fortunately, AFI owned a Utah industrial bank, GMAC Automotive Bank. Indirect ownership of that industrial bank would not implicate the BHCA. A plan was devised to transfer the assets and liabilities from the federal savings bank to the industrial bank and avoid Cerberus becoming subject to the BHCA. Various structures for ownership of the industrial bank were discussed to account for the value and earnings contributed by ResCap. A structure was developed whereby ResCap was given non-voting shares in IB Financial, a new holding company for the industrial bank. However, AFI retained 100% of the voting shares in IB Financial. AFI wanted to retain 100% of the voting rights to accommodate GM's request for a call option on the automotive finance business. ResCap's Independent Directors were told that this arrangement was necessary to consummate the desired deal with Cerberus, but were not told that Cerberus' agreement placed no restriction on ResCap receiving voting shares and that AFI devised the structure to appease GM. The Independent Directors were also not shown a memo from ResCap's General Counsel suggesting that the proposed structure would violate a 2005 Operating Agreement for the benefit of ResCap's creditors that required Independent Director approval of transactions not at arm's length and at fair value. Nor were they

told that alternate structures were possible, or that ResCap's CEO had proposed giving ResCap voting control of the industrial bank. Nevertheless, ResCap's board, including the Independent Directors, unanimously approved the transaction. The Examiner estimates that the loss of equity value of the non-voting shares versus the equity in the federal savings bank was between $533 million and $608 million. Giving credit for the benefit to ResCap of lower borrowing costs after the Cerberus deal, the Examiner estimated that the net difference in value to ResCap was a loss of between $390 million and $465 million. The Examiner included $360 million of cash and mortgages contributed by ResCap to the industrial bank, for which it received no stock or other consideration, in his calculations of net difference in value.

**Examiner's Analysis and Conclusions:**

1. While a close question, it is more likely than not that a fraud claim by ResCap against AFI related to the 2006 Bank Restructuring would not prevail in light of the *in pari delicto* defense and the *Wagoner* Rule.

2. While a close question, it is more likely than not that a breach of contract claim under the 2005 Operating Agreement by ResCap against AFI related to the 2006 Bank Restructuring would not prevail in light of the *in pari delicto* defense and the *Wagoner* Rule.

3. It is unlikely that a claim for tortious interference with the 2005 Operating Agreement would prevail against AFI related to the 2006 Bank Restructure because only a non-party may be liable for interfering with a contract.

4. A fraudulent transfer claim against AFI based upon actual intent is unlikely to prevail with respect to the 2006 Bank Restructure because the evidence does not support actual intent to hinder, delay or defraud creditors.

5. It is unlikely that a constructive fraudulent conveyance action against AFI would prevail with regard to the 2006 Bank Restructure because ResCap was not financially distressed.

6. While a close question, it is more likely than not that a claim for breach of fiduciary duties against dual-affiliated ResCap insiders would not prevail.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. Moreover, since the date of the Examiner's Report, the Second Circuit has reaffirmed the *in pari delicto* doctrine and the *Wagoner* rule in *Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Investment Securities, LLC).*[25] I further note that the Examiner did not consider the possibility or likelihood of punitive damages on the fraud claim.

[25] 721 F.3d 54 (2d Cir. 2013).

**Settlement Considerations:**

The Examiner posited two different sets of possible values for these claims. First, the Examiner estimated the loss of equity value to ResCap at between $530 million and $608 million. Giving credit for the benefit to ResCap of the reduction in the cost of the lower borrowing costs, the net difference in value was between $390 million and $465 million. However, the core of the Examiner's conclusion was that alternative structures for completing the Cerberus transaction and reducing ResCap's borrowing costs were available. If these structures had been utilized, ResCap would still have received the lower borrowing costs without the loss of equity value. The measure of damages for both fraud and breach of contract claims is to put the injured party in the same position it would have been in but for the fraud or breach. Accordingly, for purposes of valuing settlement, I used the midpoint of the higher range of values, which was $569 million.

This claim would likely be pursued by a bankruptcy fiduciary such as a trustee or committee. Fiduciary plaintiffs are typically motivated to reach an early resolution of disputes in order to save cost and expedite distributions to creditors. All of the procedural hurdles that attend bankruptcy litigation would be present in this case, including (i) the constitutional authority of a bankruptcy court to render a final judgment in a state law contract dispute and a fraudulent transfer action, (ii) withdrawal of the reference, and (iii) demand for a jury trial. In addition, all litigation carries risk, uncertainty, and expense. As a result, it is highly likely that any settlement would reflect a substantial discount (30%) from the face value of the claim.

The Examiner concluded that, while a close question, both the fraud and contract claims were likely to be barred by the *in pari delicto* doctrine and the *Wagoner* rule. The Examiner's conclusion is supported by the evidence and case law. As a result, any settlement would reflect a discount of over half the settlement value for these defenses, and I estimate settlement value using a 60% discount.

In addition, the Examiner correctly noted other problems with the claims even if the plaintiffs could get past the *in pari delicto* doctrine and the *Wagoner* rule. On the contract claim, the Examiner acknowledged that AFI could use the "sole obligation" language in Section 7 of the 2005 Operating Agreement to bar a claim under that Agreement. Although the Examiner concluded that the plaintiffs could defeat this defense by reliance on the implied duty of good faith and fair dealing, this issue creates further risk for plaintiffs. In addition, claims based on the implied duty of good faith and fair dealing are inherently risky, as they depend not on specific contract language, but on the finder of fact's subjective view of the conduct. Likewise, the Examiner also noted that if Minnesota law applies to the fraud claim, the *per curiam* decision of the Minnesota Supreme Court in the case of *Blenda Life Corp. v. Blenda Life, Inc.*,[26] appears to establish a blanket bar to a claim by a subsidiary against a parent. Although the Examiner was unsure whether a court would follow this decision, which has not been cited for this proposition since, and although this case would not apply to the contract claim which is governed by New York law, this issue creates further risk for the plaintiffs. Accordingly, any settlement would likely reflect a discount of an additional 25% due to risks on the merits.

[26] 196 N.W.2d 925, 927 (Minn. 1972) (per curiam).

The Examiner next concluded that a claim of tortious interference against AFI was not likely to succeed, based on the fact that a party cannot be liable for tortiously interfering with its own contract. I did not attribute any settlement value to this claim.

The Examiner also considered the possibility of breach of fiduciary duty claims against ResCap insiders (who also had dual affiliations with AFI) for concealing information from the independent directors.[27] In favor of the claim, the Examiner identified substantial evidence that material information regarding alternative structures was withheld. However, the Examiner also noted that because ResCap was not insolvent at the time, it is unclear that these insiders had a fiduciary duty to disclose this information. Moreover, there is a substantial risk that any such fiduciary duty claims are time-barred. Even if plaintiffs could surmount these hurdles, the harm from the alleged breaches is unclear, as the independent directors may have approved the transaction even if the information was not withheld. These arguments make a breach of fiduciary duty claim unlikely to succeed. Nevertheless, the Examiner found it to be a close question and I thus estimate that the existence of this alternative theory of recovery adds 10% to the settlement value of the claim.

On the other hand, even assuming that AFI would dispute the Examiner's calculation, the magnitude of the claims ($569 million) would likely be a strong motivating factor for AFI to settle. In addition, the fact that these are close issues would also incline AFI toward a substantial settlement. Legal fees and expenses in prosecuting and defending the claim would run into the tens of millions of dollars. Accordingly, I conclude that AFI would make a substantial offer to resolve these claims.

Under these circumstances, I would expect plaintiff's initial settlement demand to be $320 million, approximately 55% of the gross amount of the claim, and defendant's initial offer at $60 million, approximately 10% of the claim. The back and forth of the negotiation process would ensue, taking into account the discounts and enhancements identified above, as well as the relative bargaining power of the parties. The anticipated settlement range would be between $156 million, 50% of the plaintiff's initial demand, and $120 million, twice the defendant's initial offer, with a likely settlement value of $130.0 million, calculated as follows:

| | |
|---|---|
| Potential Damages: | $569 million |
| Reduced By: | |
| 30% inherent risk = | $398.3 million |
| 60% on in *pari delicto*/merits = | $159.3 million |

[27] The Examiner also considered a claim for breach of fiduciary duty against the independent directors, but concluded that it was unlikely to succeed because the independent directors did conduct some due diligence, reasonably relied on the advice of outside counsel, and would likely be exculpated under ResCap's charter. In view of the minimal likelihood of success, this claim does not add any settlement value.

25% merits= $119.5 million

Increased By:

10% for breach of fiduciary theory alternative= $130.0 million*

* As noted above we have rounded down from $131.4 million to $130 million

***b. 2008 Bank Transaction and 2009 Bank Transaction***

**Examiner's Report References:**

Section I.E.5.b pages I-19 to I-20

Section V.A.1.b and c pages V-24 to V-44

Section V.A.2.c and d pagesV-70 to V-89

Section VII.F.6.d pages VII.F-134 to VII.F-148

**Description:**

*2008 Bank Transaction*. At a time when it was insolvent, ResCap issued new ResCap Preferred Interests, convertible into Preferred Interests in IB Finance (the holding company for Ally Bank), in exchange for ResCap bonds that AFI had purchased on the open market. ResCap retained the right to redeem the IB Finance Preferred Interests.

*2009 Bank Transaction*. At a time when it was insolvent, ResCap sold its remaining non-voting Class M stock in IB Finance (the holding company for Ally Bank) to AFI and surrendered its right to redeem the IB Finance Preferred Interests. In exchange, AFI contributed to ResCap Senior Secured Notes of ResCap.

**Background:**

In March 2008, ResCap was experiencing liquidity problems and projected that it would be in breach of a Tangible Net Worth ("TNW") covenant as of March 31, 2008. AFI devised a plan to contribute ResCap bonds that AFI had acquired at a discount on the open market in exchange for newly issued Preferred Interests in ResCap that would be convertible into Preferred Interests in IB Finance, the holding company for Ally Bank. If AFI exercised its conversion rights, ResCap's nonvoting Class M tracking shares in IB Finance would be reduced *pro tanto*; however, ResCap retained the right to redeem the IB Finance Preferred Interests. ResCap's outside counsel reviewed and recommended the transaction and its outside financial advisors opined that the deal was at arm's length and for fair value. A similar exchange occurred in June 2008. The Examiner's advisors value the debt contributed to ResCap at $841 million and the value of the Preferred Interest with conversion rights transferred by ResCap at between $571 million and $714 million.

In 2009, ResCap continued to experience liquidity pressure and teetered on the brink of breaching its TNW covenant. AFI again contributed ResCap bonds it had acquired on the open market and extended the maturity of the Initial Line of Credit Facility. In exchange, ResCap transferred its remaining IB Finance non-voting Class M tracking stock and its right to redeem the IB Finance Preferred Interests. The Examiners valued the debt received by ResCap at $600 million and the stock and rights given up by ResCap at between $106.5 million and $217.5 million.

After the 2009 Bank Transaction, equity of the Mortgage Bank which the Class M shares tracked became negative and remained so up until April 30, 2013. Even in hindsight, the 2008 and 2009 Bank Transactions were favorable to ResCap.

**Examiner's Analysis and Conclusions:**

1. Although the transfer was to an insider at a time when ResCap was in financial distress, the weight of the evidence does not support a finding of actual intent to hinder, delay or defraud ResCap's creditors in connection with the 2008 Bank Transaction. An action to set aside the transfer as an actual fraudulent transfer is not likely to prevail.

2. ResCap received more than reasonably equivalent value in the 2008 Bank Transaction, making it unlikely that a constructive fraudulent transfer action would be successful.

3. Although the transfer was to an insider at a time when ResCap was in financial distress, the weight of the evidence does not support a finding of actual intent to hinder, delay or defraud ResCap's creditors in connection with the 2009 Bank Transaction. An action to set aside the transfer as an actual fraudulent transfer is not likely to prevail.

4. ResCap received more than reasonably equivalent value in the 2009 Bank Transaction, making it unlikely that a constructive fraudulent transfer action would be successful.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

Actions to set aside the 2008 and 2009 Bank Transactions as fraudulent transactions are outside the two-year look-back period of Bankruptcy Code section 548. The Examiner determined that these claims would be brought, if at all, under the Minnesota UFTA by a bankruptcy fiduciary using the strong arm provisions of Bankruptcy Code section 544. In light of the Examiner's conclusion that ResCap received reasonably equivalent value in each transaction, I believe that these claims would probably not be pursued. Therefore I ascribe no settlement value to the potential fraudulent transfer actions relating to the 2008 Bank Transaction or the 2009 Bank Transaction.

### 6. ResCap's Directors And Officers

**Examiner's Report References:**

Section I.E.6 pages I-20 to I-23

Section IV pages IV-1 to IV-69

Section VII.E pages VII.E-1 to VII.E-43

Section VII.K.2.b pages VII.K-31 to VII.K-37

Section VII.K.2.f pages. VII.K-45 to VII.K-50

**Description:**

Whether any of ResCap's directors or officers are liable for breaches of fiduciary duty. Relatedly, whether AFI is liable for aiding and abetting any such breach of fiduciary duty.

**Background:**

The Examiner considered whether ResCap's directors or officers might be liable for breaches of fiduciary duty regarding several transactions and events, including: (a) the 2006 Bank Restructure; (b) the Second 2009 Tax Allocation Agreement; (c) James Young's failure to sign the First 2009 Tax Allocation Agreement; (d) the prepetition asset sales; (e) the January 30 Letter Agreement, and the A&R Servicing Agreement and the $48 million indemnity payment thereunder; (f) the work of the Special Review Committee, the AFI Settlement and Plan Sponsor Agreement; and (g) the RMBS Trust Settlement Agreements. The Examiner also considered whether AFI could be liable for aiding and abetting any such breaches of fiduciary duties.

**Examiner's Analysis and Conclusions:**

1. Although troubling facts exist, no claims for breach of fiduciary duty by ResCap's directors and officers are likely to prevail.

*(a) 2006 Bank Restructure*

2. Potential breach of fiduciary claims with regard to the 2006 Bank Restructure exist because fiduciaries with dual affiliations to AFI and ResCap may have purposefully concealed material information from ResCap's Independent Directors. However, the Examiner is dubious that the dual-affiliated fiduciaries had a duty to disclose to the Independent Directors because their primary duty was to the parent, AFI, so long as ResCap was solvent, which it was in 2006, and there was no apparent self-dealing. In addition, it is likely that the applicable statute of limitations expired before ResCap's bankruptcy filing. Although the actions of the fiduciaries are troubling, breach of fiduciary claims related to the 2006 Bank Restructure, while a close question, are more likely than not to fail because of an absence of a duty to disclose and because the claims are untimely.

3. The Independent Directors potentially breached their fiduciary duty with regard to the 2006 Bank Restructure by failing to adequately investigate the option for ResCap to receive voting stock in the industrial bank and by not seeking a fairness opinion. However, it is unlikely that a claim against the Independent Directors for breach of fiduciary duty would prevail because they relied on the advice of counsel and the candor of their co-fiduciaries.

*(b) Second 2009 Tax Allocation Agreement*

4. Although the Second 2009 Tax Allocation Agreement was very unfair to ResCap, there was a thorough review process with the assistance of able advisors and there is no evidence to suggest a breach of the duty of loyalty or an intention to act against ResCap's best interests. The Examiner therefore concluded that, while a close question, a potential breach of fiduciary claim relating to the Second 2009 Tax Allocation Agreement would more likely than not be unsuccessful.

*(c) Young's Failure to Sign First 2009 Tax Allocation Agreement*

5. The evidence does not establish that Mr. Young intentionally (a) refrained from signing the First 2009 Tax Allocation Agreement with a purpose other than to advance the best interests of ResCap, or (b) acted in dereliction of his duties. The Examiner accordingly concluded that a claim of breach of fiduciary duty against him, while a close question, would more likely than not be unsuccessful.

*(d) Prepetition Asset Sales*

6. Breach of fiduciary claims related to the prepetition asset sales are unlikely to prevail. Although the transactions occurred in a hurried manner, there is no evidence that the fiduciaries lacked adequate information on which to base their decisions. In addition, ResCap may have benefited from the time pressure of the transactions and it received fair value in each case.

*(e) January 30, Letter Agreement and the A&R Servicing Agreement and the $48 million Indemnity Payment Thereunder*

7. The January 30 Letter Agreement was the result of extensive arm's length negotiations and informed decisions. It provided fair value to ResCap and allowed it to continue operating despite liquidity challenges. A breach of fiduciary claim related to the January 30 Letter Agreement is therefore unlikely to be successful.

8. While a close question, the Examiner concludes it is more likely than not that a breach of fiduciary claim related to the $48.4 million payment from ResCap to AFI for indemnification obligations without board authorization would not prevail because it was a reasonable exercise of business judgment by ResCap's executive.

9. The Examiner also concluded that potential breach of fiduciary claims relating to the A&R Servicing Agreement would not be likely to prevail. The A&R Servicing Agreement was the product of extensive negotiations with both sides represented, and was at arm's length and for fair value.

*(f) The Work of the Special Review Committee, the AFI Settlement and Plan Sponsor Agreement*

10. The Examiner concluded that although the work of the Special Review Committee was flawed and tainted by conflict of interest, a breach of fiduciary duty claim will more likely than not fail, although it is a close question. The Independent Directors on the Special Review Committee were disinterested and they relied heavily on counsel. The business judgment rule will likely preclude a breach of fiduciary duty claim.

11. Likewise, the Examiner concluded that the AFI Settlement and Plan Sponsor Agreement, although flawed, do not support claims for breach of fiduciary duty. Relying on the advice of counsel, ResCap's board concluded that the AFI Settlement was reasonable in light of the challenging and complex legal issues. The business judgment rule will likely preclude a breach of fiduciary claim.

*(g) The RMBS Trust Settlement Agreements*

12. The Examiner also found that the RMBS Trust Settlement Agreements were hurriedly approved with possibly flawed advice. However, the negotiations were conducted at arm's length by counsel upon whom the board reasonably relied. While a close question, it is more likely than not that a breach of fiduciary claim related to the RMBS Trust Settlement Agreements would not prevail.

13. Since none of the predicate breach of fiduciary claims is likely to prevail, the Examiner did not believe there is a viable claim of aiding and abetting a breach of fiduciary duty.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

Many of the events and transactions that may give rise to potential breach of fiduciary claims are analyzed separately for reasonable settlement value elsewhere in this report. Specifically, the claims for breaches of fiduciary duty claims relating to the 2006 Bank Restructure, the 2009 Tax Allocation Agreements, the pre-petition asset sales, the $48.4 million payment, and the RMBS Trust Settlement Agreements are addressed in those sections. The existence and settlement value of breach of fiduciary duty claims related to those events or transactions are considered in those sections. Because duplicative damages are not available for such claims, these claims do not have additional settlement value above and beyond what is considered in the underlying transactions.

As for the remaining claims, claims for breach of fiduciary duty are expensive to litigate and are susceptible to threshold issues and strong defenses. Specifically, as the Examiner noted, claims for breach of fiduciary duty will have to overcome standing obstacles under Delaware law, and likely will have to be brought derivatively. In addition, the Examiner observed that the defendants

will likely rely on the business judgment rule, experts, and exculpatory clauses to defend against such claims. As a result, the settlement value of any claim for breach of fiduciary duty is subject to a significant discount of 40%, from its face value.

Turning to specific claims, the Examiner found that breach of fiduciary duty claims based on the January 30 Letter Agreement were not likely to succeed, as it was subject to extensive arm's length negotiation and ResCap received fair value. Given the cost of bringing such a claim, as well as the availability of the defenses noted above, such a claim is unlikely to be brought and does not add any settlement value.

Similarly, the Examiner found that claims regarding the A&R Servicing Agreement were not likely to prevail. The Examiner observed that the A&R Servicing Agreement was entered into at arm's length and for fair value, and it was critical to GMAC Mortgage's valuable servicing platform, so that the lack of approval by the GMAC Mortgage Board is not likely to be significant. Given the cost of bringing such a claim, as well as the availability of the defenses noted above, such a claim is unlikely to be made and does not add any settlement value.

Finally, the Examiner found that fiduciary duty claims related to the AFI Settlement and Plan Sponsor Agreement were not likely to succeed. The Examiner noted that the performance of the board was incomplete and tainted by conflicts of counsel. At the same time, the Examiner found that the board and the independent directors reasonably relied on the advice of outside counsel and that they were entitled to defer to that expertise. Accordingly, such a claim is not likely to be brought and does not add any settlement value.

Because these claims are subject to significant defenses, not likely to prevail, and not likely to be brought, they are not material and do not add any settlement value.

### 7. Single Entity Theories Of Liability

#### *a. Piercing The Corporate Veil*

**Examiner's Report References:**

Section I.E.7.a pages I-23 to I-25

Section VII.A pages VII.A-1 to VII.A-64

**Description:**

Whether ResCap and AFI operated as a single economic entity in an unjust or unfair manner such that a claim could be successfully asserted on behalf of ResCap to pierce its corporate veil, thereby making AFI liable for all of ResCap's debts.

**Background:**

ResCap was a wholly owned subsidiary of AFI. The Examiner's Investigation uncovered evidence of certain indicia that ResCap and AFI operated as a single economic entity. ResCap's

conduct in connection with a number of Affiliate Transactions (*e.g.*, the 2006 Bank Restructuring, the MSR Swap, the Pipeline Swap, the First 2009 Tax Allocation Agreement, the Second 2009 Tax Allocation Agreement, and the allocation of liability in connection with the FRB/FDIC Settlement and the DOJ/AG Settlement) departed in some important respects from appropriate corporate formalities, including the requirements of ResCap's own operating agreements.

**Examiner's Analysis and Conclusions:**

1. The application of Delaware law to the assessment of potential veil-piercing claims is consistent with the weight of authority in the Second Circuit.

2. Delaware law recognizes the existence of a claim on behalf of a debtor to pierce its own corporate veil.

3. An "alter ego" claim constitutes property of the debtor corporation, and the debtor-in-possession or bankruptcy trustee has exclusive standing to assert the claim.

4. A debtor that succeeds in piercing its own corporate veil may hold its parent liable for all of its debts.

5. In order to pierce the corporate veil and establish alter ego liability under Delaware law, a plaintiff must show (1) that the parent and subsidiary operated as a single economic entity, and (2) that an overall element of injustice or unfairness is present. The fact that the subsidiary is a limited liability company does not change the analysis.

6. Factors considered by courts applying Delaware law to determine whether a parent and its subsidiary should be deemed a "single economic entity" include: (1) undercapitalization, (2) failure to observe corporate formalities, (3) nonpayment of dividends, (4) insolvency of the debtor corporation at the time, (5) siphoning off of the corporation's funds by the dominant parent, (6) absence of corporate records, and (7) the fact that the corporation is merely a façade for the operations of the dominant parent.

7. The evidence does not support the proposition that ResCap was inadequately capitalized or insolvent at or around its formation.

8. The evidence does not support the proposition that AFI siphoned assets from ResCap.

9. The Examiner did not afford any weight to ResCap's nonpayment of dividends.

10. The Examiner concluded that the evidence supported the proposition that ResCap failed to follow or followed inconsistently, certain appropriate corporate formalities.

11. The Examiner concluded that a court would likely find that the operations of ResCap and AFI would be consistent with the operations of a subsidiary and its parent.

12. The Examiner does not consider any theory of injustice or unfairness likely to succeed.

13. Any veil-piercing claims asserted on behalf of ResCap against AFI are unlikely to prevail.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

Based upon the Examiner's factual and legal conclusions, it would initially seem that if this claim were pursued by a bankruptcy fiduciary, such as a trustee or a committee, it would likely be pursued on a contingent fee basis in view of the uphill battle evidenced by the Examiner's conclusions. However, there are third party contingent claims against AFI for RMBS litigation in the tens of billions of dollars. Thus, I believe that a creditors' committee and third party plaintiffs would work together to overcome any "standing" issues to receive authority from a court to pursue the single entity claim theories, including veil-piercing and alter ego, on behalf of the estate. Despite the fact that the Examiner concludes, and I agree, that veil-piercing and alter ego claims are unlikely to succeed, I conclude there is significant settlement value not to exceed $480 million as discussed in the Third Party RMBS litigation analysis below.

***b. Substantive Consolidation***

**Examiner's Report References:**

Section I.E.7.b page I-25

Section VII.A.2 pages VII.A-65 to VII.A-85

**Description:**

Whether there is evidence to support the consolidation of AFI into the estate of ResCap or any other subsidiary.

**Background:**

Substantive consolidation is an equitable doctrine pursuant to which the assets and liabilities of affiliated entities are treated as one for purposes of a bankruptcy case. Intercompany claims of the consolidated debtors are eliminated, the assets of the consolidated debtors are treated as common assets, and the claims of outside creditors against any of the debtors are treated as claims against the consolidated entity. The only finding of the Examiner in support of substantive consolidation is the absence of certain corporate formalities. However, the Examiner uncovered no credible evidence that creditors dealt with ResCap and AFI as a single entity. Trading activity in ResCap bonds, CDS pricing and credit ratings, consolidated financial statements, and lack of guarantees (although guarantees might negate single entity status) were considered by the Examiner.

**Examiner's Analysis and Conclusions:**

1. Controlling Second Circuit law regarding substantive consolidation is set forth in the *Augie/Restivo*[28] case and requires that either (i) creditors dealt with the entities as a single economic unit and did not rely on their separate identities in extending credit, or (ii) the entities' affairs are so entangled that substantive consolidation would benefit all creditors.

2. While a close question, it is more likely than not that a court would find that ResCap and AFI operated as a single economic entity.

3. However, there is no evidence that creditors relied upon ResCap and AFI being a single economic entity.

4. The evidence does not support the proposition that AFI and ResCap's affairs were hopelessly entangled.

5. It is unlikely that a motion for substantive consolidation on either theory would prevail.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. Both tests for substantive consolidation are fact specific.

**Settlement Considerations:**

If a claim for substantive consolidation were successful, creditors of ResCap would share in the assets of AFI *pari passu* with AFI's creditors (and vice versa) thereby significantly enhancing their recovery. Because of the fact intensive nature of substantive consolidation, it may be possible for a trustee or other estate representative to withstand a motion to dismiss, although based on the facts found by the Examiner, the likelihood of such success is minimal.

However, there is always the chance that litigation with a low probability of success will prevail and so the risk to AFI and its creditors increases. There are third party contingent claims against AFI for RMBS litigation in the tens of billions of dollars. Despite the fact that the Examiner concludes, and I agree, that a substantive consolidation claim is unlikely to succeed, I conclude there is significant settlement value not to exceed $480 million as discussed in the Third Party RMBS litigation analysis below.

[28] *Union Savings Bank v. Augie/Restivo Baking Company, Ltd. (In re Augie/Restivo Baking Company, Ltd.*), 860 F.2d 515 (2d Cir. 1988).

### 8. Debt Re-characterization

**Examiner's Report References:**

Section I.E.8 pages I-25 to I-26

Section VII.B pages VII.B-1 to VII.B-27

Section V.E.3, 5, and 8 pages V-357 to V-362, V-368 to V-372 and V-377 to V-379

Section VI.B.2 and 3 pages VII.B-1 to VII.B-13

**Description:**

Whether any of the claims held by AFI are subject to re-characterization as equity.

**Background:**

AFI holds two categories of claims: (1) claims under the A&R Secured Revolver Loan Agreement (approximately $747 million) and under the A&R Line of Credit Agreement (approximately $380 million); and (2) claims with respect to Unsecured Notes and Senior Secured Notes (aggregating $2.4 billion in face principal amount) that were exchanged by AFI for, among other things, ResCap Preferred Interests in the 2008 Bank Transaction and ResCap's remaining IB Finance Class M Shares in the 2009 Bank Transaction.

**Examiner's Analysis and Conclusions:**

1. It is unlikely that an effort to re-characterize the AFI Secured Revolver Facility claims as equity would prevail.

2. It is unlikely that an effort to re-characterize the AFI Line of Credit Agreement claims as equity would prevail.

3. It is unlikely that an effort to retroactively re-characterize the Unsecured Notes and the Senior Secured Notes used by AFI as consideration in connection with the 2008 Bank Transaction and the 2009 Bank Transaction would prevail.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This cause of action would likely be pursued by a fiduciary such as a bankruptcy trustee, committee or post-plan confirmation trustee. This type of plaintiff is typically motivated to reach an early resolution in order to save cost and expedite distributions to creditors.

The Examiner evaluated each of the AFI Secured Revolver Facility, the AFI Line of Credit Agreement, the Unsecured Notes and the Senior Secured Notes used by AFI as consideration in connection with the 2008 Bank Transaction and the 2009 Bank Transaction (i) in light of the evidence related to the material of issue whether the parties intended them to be debt or equity, (ii) application of the factors courts generally consider in determining whether to re-characterize claims as equity (the "*Autostyle* Factors"), and (iii) possible defenses. The facts and the application of the *Autostyle* Factors (as well as some other factors) support a determination that the all of the claims and notes constitute debt that cannot be re-characterized as equity.[29] Significantly, the Examiner's investigation did not reveal any evidence that the parties ever intended, considered or treated the loans as anything other than loans.

The Examiner also considered possible defenses including, *inter alia*, the statute of limitations.

AFI would most likely vigorously defend any re-characterization action because, as set forth above, the facts and the law are almost exclusively in its favor.

Although it appears that AFI would successfully defend such actions, all litigation carries some risk, uncertainty and expense regardless of how strong a case may be. Thus, AFI may be willing to offer a small settlement ("nuisance settlement") to prevent the limited possibility of losing the litigation, which settlement would be less than $10 million and therefore not material to the allocation of the $2.1 billion settlement fund. Alternatively, the fiduciary is unlikely to be willing to incur significant legal cost and expense to pursue these complex actions which are unlikely to prevail.

Given the Examiner's factual and legal conclusions, I believe there is no material settlement value to these claims.

### 9. Equitable Subordination And Equitable Disallowance

**Examiner's Report References:**

Section I.E.9 pages I-26 to I-28

Section VII.C pages VII.C-1 to VII.C-18

Section VII.D pages VII.D-1 to VII.D-3

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[29] I note that the Court of Appeals for the Tenth Circuit in *Sender v. Bronze Group, Ltd*. (*In re Hedged-Investment Assocs., Inc*.), 380 F.3d 1292 (10th Cir. 2004) discussed many of the *Autostyle* Factors plus some additional factors such as the right to enforce payment, the intent of the parties, failure of debtor to repay on due date, and participation in management, and did not include some of the *Autostyle* Factors such as sinking fund for interest, or security for payment. However, the Examiner separately considered some of *Sender's* additional factors such as the intent of the parties and right to enforce payment. Also, in support of his statement that "courts would likely undertake an analysis of the *Autostyle* factors", the Examiner cited *In Re BH S&B Holdings LLC*, 420 B.R. 112 (2009), a Bankruptcy Court case from the Southern District of New York.

**Description:**

Creditors assert that AFI's claims against ResCap, including $747 million under the A&R Secured Revolver and $380 million under the A&R Line of Credit, should be subordinated or disallowed to the claims of all other creditors under Bankruptcy Code section 510(c).

**Background:**

The Examiner investigated the following matters for evidence of inequitable conduct by AFI, harm to other creditors, or unfair advantage to AFI: (1) the 2006 Bank Restructuring, (2) the Second 2009 Tax Allocation Agreement, (3) the misallocation of revenues on brokered loans, (4) ResCap's forgiveness of subsidiary indebtedness and the 2009 Bank Transaction, (5) the Line of Credit Facilities, and (6) alter ego, asset stripping and aiding and abetting breach of fiduciary claims.

**Examiner's Analysis and Conclusions:**

1. ResCap and its creditors were harmed by AFI's inequitable and unfair conduct in connection with the 2006 Bank Restructuring in an amount of between $390 million and $608 million.

2. ResCap and its creditors were harmed by AFI's inequitable and unfair conduct in connection with the Second 2009 Tax Allocation Agreement in the approximate amount of $50 million.

3. It is more likely than not that ResCap and its creditors were harmed by AFI and Ally Bank in the amount of approximately $520.5 million with respect to the misallocation of revenues on the brokered loans.

4. AFI, however, provided ResCap with substantial capital support totaling in excess of $8 billion in the form of cash contributions, debt forgiveness, and contributions of other assets.

5. While a close case, it is more likely than not that equitable subordination of AFI's claims would not prevail.

6. Equitable disallowance requires a showing of more serious conduct than that necessary for equitable subordination.

7. It is unlikely that equitable disallowance of AFI's claims would prevail.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

Each of the claims in which inequitable conduct was found by the Examiner is also ascribed value separately by the Examiner, therefore, each of those claims is evaluated separately for settlement purposes in this report and ascribed significant settlement value. However, I believe that the prospect that AFI's claims might be equitably subordinated or equitably disallowed adds little to the evaluation of those claims and has no independent settlement value on its own.

### 10. Constructive Trust Claim

**Examiner's Report References:**

Section I.E.10 page I-28

Section VII.I pages VII.I-1 to VII.I-17

**Description:**

Whether a constructive trust should be imposed on ResCap's interest in the mortgage division of Ally Bank or on proceeds of TARP funds that AFI received by virtue of its relationship with ResCap.

**Background:**

The Examiner considered whether AFI orchestrated the "Ally Bank Transactions," which consist of the 2006 Bank Restructuring, the 2008 Bank Transaction, and the 2009 Bank Transaction, to strip ResCap of its assets, resulting in AFI being unjustly enriched. The details of these transactions are discussed elsewhere in this report.

The Examiner also considered whether the Troubled Asset Relief Program ("TARP") funds received by AFI were received, at least in part, as a result of ResCap's financial difficulties, such that ResCap was an intended beneficiary of these funds and AFI was unjustly enriched by the retention of these funds. AFI received a total of $17.2 billion under TARP, but the Examiner's focus was on the first $5.7 billion received.

**Examiner's Analysis and Conclusions:**

1. A constructive trust claim is unlikely to prevail with regard to the Ally Bank Transactions. First, claims regarding the 2006 Bank Restructuring are governed by the 2005 Operating Agreement and the indenture governing the Unsecured Notes, and claims for unjust enrichment and a resulting constructive trust do not apply where the relationship is governed by an express contract. Second, the Examiner found that ResCap received reasonably equivalent values in the 2008 Bank Transaction and the 2009 Bank Transaction, negating any claim against AFI for unjust enrichment.

2. A constructive trust claim is unlikely to prevail for the TARP funds. The evidence shows that the funds went to AFI because of AFI's involvement in the automotive business, not because of ResCap.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

Regarding the 2006 Bank Restructuring, it is black-letter law that there can be no unjust enrichment when the claims at issue are governed by a written contract. Accordingly, constructive trust or unjust enrichment claims are highly unlikely to succeed. Moreover, as discussed elsewhere in the report, ResCap has much stronger claims regarding the 2006 Bank Restructuring. Therefore, the unjust enrichment/constructive trust theory does not add materially to the settlement value of those claims.

Similarly, based on the Examiner's well-supported finding that ResCap received fair value in the 2008 Bank Transaction and the 2009 Bank Transaction, a constructive trust claim regarding those transactions is highly unlikely to succeed. I discuss elsewhere that fraudulent transfer claims regarding the 2008 Bank Transaction and the 2009 Bank Transaction would not likely be pursued in light of the Examiner's determination that ResCap received reasonably equivalent value. For the same reason I do not believe that a constructive trust claim would be pursued.

Regarding the TARP funds, the Examiner found significant evidence that the TARP funds were given to AFI not because of ResCap but because of the government's interest in preserving the automotive industry. As a result, the claim is highly unlikely to succeed and AFI would likely be successful in having any claim dismissed on summary judgment. The only countervailing consideration is the sheer size of the claim - $5.7 billion. To avoid the risk of liability as to this large number and the cost of litigating the claim, AFI would likely be willing to settle this for nuisance value, which I believe would be less than $21 million and therefore not material for purposes of the allocation of the $2.1 billion settlement fund.

### 11. Prepetition Asset Sales

**Examiner's Report References:**

Section I.E.11 page I-29

Section V.F pages V-383 to V-468

Section VII.F.6 pages VII.F-122 to VII.F-147

**Description:**

Whether any of seven prepetition asset sale transactions constitute constructive fraudulent transfers.

**Background:**

The Examiner reviewed the following sales of assets to affiliates of ResCap ("Prepetition Asset Sales"):

*(a) Health Capital Sale by RFC to GMAC CF in August 2007*

*The sale of substantially all assets and operations of Health Capital for $900.5 million;*

*(b) June 2008 Model Home Sale by GMAC MHF to Cerberus*

The sale of 1,614 model homes and 127 lots for $230 million plus Class B Junior Preferred Shares in CMH;

*(c) Resort Finance Sale by RFC and GMAC Canada to GMAC CF in July 2008*

Sale of substantially all of Resort Finance for cash consideration of $96.1 million (later increased to $111.1 million) plus the assumption of $1,125 billion of debt;

*(d) Excess Servicing Rights Sales by GMAC Mortgage to Cerberus in July 2008*

Following two auctions, the sale to Cerberus, as highest bidder, of certain excess servicing rights on (i) Freddie Mac Loans with $13.8 billion unpaid principal balance, and (ii) Fannie Mae loans with $24.8 billion unpaid principal balance, capturing, respectively, $591.2 and $981.9 million notional interest-only securities;

*(e) September 2008 Model Home Sale by DOA Holding Properties, LLC to Cerberus*

Following an auction, the sale of two pools of model home assets for net cash proceeds of $59.2 million;

*(f) ResMor Sale by GMAC Canada to AFI in January 2009*

Sale of all outstanding shares in ResMor for C$82 million (approximately $67 million as of December 31, 2008); and

*(g) US/UK Broker-Dealer Sale by RFC to AFI in May 2009*

Sale of RFC's interests in Ally Securities and RFCIL for $42.3 million and $18.1 million, respectively, plus payment to RFC of an amount equal to the entire outstanding principal due and payable under an existing $50 million subordinated loan between RFC and Ally Securities.

**Examiner's Analysis and Conclusions:**

1. The evidence supports the proposition that RFC, GMAC Canada, GMAC Mortgage and their affiliate sellers received reasonably equivalent value in each of the Prepetition Asset Sales, with the possible exception of the June 2008 Model Home Sale by GMAC MHF to Cerberus.

2. While a close question with respect to the June 2008 Model Home Sale, it is more likely than not that a constructive fraudulent transfer claim against Cerberus would not succeed under existing law.

3. It is more likely than not that a court would find that the value received by RFC as the equity owner of GMAC MHF, as well as by GMAC MHF, would constitute reasonably equivalent value.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

These causes of action would likely be pursued by a fiduciary such as a bankruptcy trustee, committee or post-plan confirmation trustee. This type of plaintiff is typically motivated to reach an early resolution of disputes in order to save costs and expedite distributions to creditors.

The Examiner evaluated each of the Prepetition Asset Sales to determine if any would constitute a constructive fraudulent transfer under applicable law, focusing on whether or not the selling Debtor(s) received "reasonably equivalent value" for the transfer. In that regard the Examiner addressed three fundamental questions: (i) what was the form and value of the property transferred by the Debtor(s); (ii) did the Debtor(s) receive value in exchange for the property transferred, and, if so, in what form and amount; and (iii) was the value received by Debtor(s) a reasonably equivalent in exchange for the property transferred.

With respect to each of the following Prepetition Asset Sales, the Examiner concluded as follows:

*(a) Health Capital Sale by RFC to GMAC CF in August 2007*

Based on his analysis and the totality of the circumstances, including, without limitation, the valuation prepared by Houlihan Lokey and other market indicators, the evidence supports the proposition that RFC received reasonably equivalent value in this sale.

*(b) June 2008 Model Home Sale by GMAC MHF to Cerberus*

Although RFC received at least $30 million less than the Fair Market Value, based on the totality of the circumstances, it is more likely than not that a court would find that the value received by RFC would constitute reasonably equivalent value in this sale.

*(c) Resort Finance Sale by RFC and GMAC Canada to GMAC CF in July 2008*

Based the totality of the circumstances, including, without limitation, the Houlihan Lokey valuation, the Morgan Stanley Fairness opinion, prior sales attempts by Bear Stearns, Morgan Stanley's orderly liquidation analysis, and various adjustments to the calculation of the purchase price, the evidence supports the proposition that RFC and GMAC Canada received reasonably equivalent value in this sale.

*(d) Excess Servicing Rights Sales by GMAC Mortgage to Cerberus in July 2008*

Based on the totality of the circumstances, including, without limitation, the nature of the auctions, Pentalpha's memorandum, and market conditions at the time of the auctions, the evidence supports the proposition that GMAC Mortgage received reasonably equivalent value in this sale.

*(e) September 2008 Model Home Sale by DOA Holding Properties, LLC to Cerberus*

Based on the totality of the circumstances, including, without limitation, an auction process including non-affiliated bidders conducted by a nationally recognized broker in an arm's length manner, the degree of differential between the bids received and the temporal and contingent factors surrounding such bids, the evidence supports the proposition that RFC (as the owner of GMAC Canada), and GMAC Canada received reasonably equivalent value in this sale.

*(f) ResMor Sale by GMAC Canada to AFI in January 2009*

Based on the totality of the circumstances, including, without limitation, the fairness opinions by Goldin Associates and Sandler O'Neill, the GMAC Canada investment in ResMor in the prior year and other market indicators, the evidence supports the proposition that RFC as the owner of GMAC Canada, and GMAC Canada, received reasonably equivalent value in this sale.

*(g) US/UK Broker-Dealer Sale by RFC to AFI in May 2009*

Based on the totality of the circumstances, including, without limitation, the Goldin Associates valuation analyses and fairness opinion, and prevailing market indicators, the evidence supports the proposition that RFC received reasonably equivalent value in this sale.

The purchasers (AFI and Cerberus) would most likely vigorously defend any fraudulent transfer actions because, as set forth above, the facts and the law are almost exclusively in their favor as to all of the above transactions, with the possible exception of the June 2008 Model Home Sale transaction, and with respect to that sale the Examiner has concluded it is unlikely to prevail.

Although it appears that the purchasers would successfully defend such actions, all litigation carries some risk, uncertainty and expense regardless of how strong a case may be. Alternatively, the fiduciary is unlikely to incur significant legal cost and expense to pursue what would be complex actions which are unlikely to prevail.

Thus, Cerberus may be willing to offer a small settlement ("nuisance settlement") with respect to the June 2008 Model Home Sale transaction to prevent the small possibility of losing the litigation. However, considering that the upside to the fiduciary in that transaction is likely to be no more than $30 million, the fiduciary must also consider the cost and benefit in pursuing same.

Given the Examiner's factual and legal conclusions, I believe there is no material settlement value to these claims.

**12. Financing Affiliate Transactions**

**Examiner's Report References:**

Section I.E.12 page I-29

Section V.E pages V-350 to V-383

Section VII.F pages VII.F-1 to VII.F-154

**Description:**

Whether the terms of material prepetition financing Affiliate Transactions were entered into at arm's length and on balance were more favorable to ResCap than would have been obtained in third party financings of comparable size and nature.

**Background:**

The Examiner reviewed the following prepetition financing Affiliate Transactions ("Financing Affiliate Transactions"):

(a) Resort Finance Facility;

(b) Secured MSR Facility;

(c) Secured Revolver Facility;

(d) Servicing Advance Factoring Facility;

(e) Initial Line of Credit Facility;

(f) ResMor Loan Facility;

(g) Second Line of Credit Facility;

(h) Amended and Restated Credit Facilities; and

(i) BMMZ Repo Facility.

**Examiner's Analysis and Conclusions:**

All of the these Financing Affiliate Transactions were entered into at arm's length and on balance were more favorable to ResCap than would have been obtained in the third-party financings of comparable size and nature.[30]

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

The Examiner evaluated the Financing Affiliate Transactions to determine if each was entered at arm's length or were less favorable to ResCap than would have been obtained in the third-party financings of comparable size and nature.

With respect to each of the following Financing Affiliate Transactions, the Examiner found as follows:

*(a) Resort Finance Facility*

This facility entered by RFC, as borrower, with AFI, as lender, was intended to be bridge financing while ResCap searched for a third party to purchase its Resort Finance business (at the time there were already discussions with third parties for such sale). Bear Stearns issued a fairness opinion concluding that the financial terms and conditions were no less favorable to RFC than the financial terms and conditions that would be expected to be obtained in a comparable financing with an unaffiliated third party at arm's length.

*(b) Secured MSR Facility*

This facility, entered by RFC and GMAC Mortgage as borrowers, and ResCap as guarantor, with AFI, as lender, was to provide additional liquidity. At the time, Barclays contemplated providing RFC with a secured facility and sent a term sheet. However, ResCap's liquidity needs were imminent and several months of negotiations could have been required to complete and syndicate a facility with Barclays. This led to a proposal for AFI to provide the Secured MSR Facility as a bridge to the Barclays facility. Morgan Stanley viewed the terms favorably, concluding, among other things, that the facility provided materially better economic terms than the proposed Barclays facility and existing facilities and was more attractive than facilities available in the then current marketplace. The search for a lender to refinance this facility proved to be futile. AFI ultimately forgave all indebtedness under this facility.

[30] The Examiner noted that notwithstanding this conclusion, certain of Financing Affiliate Transactions implicate potential Estate Causes of Action as discussed in Section VII.F (each of which are discussed in other sections of this report).

*(c) Secured Revolver Facility*

This facility, entered by RFC and GMAC Mortgage as borrowers, ResCap and various ResCap Subsidiaries as guarantors, and AFI as lender, was required to provide more liquidity due to looming credit maturities and capital needs. Two of the maturing credit facilities were (i) the unsecured JP Morgan 364 Day Facility of $875 million and (ii) the JP Morgan 2005 Term Loan Facility in the amount of $1.75 billion. On the closing date of this facility, AFI converted approximately $1.3 billion of term loans under the JPMorgan 2005 Term Loan Facility (that AFI obtained through assignment) into the equivalent amount of the Secured Revolver Facility and $450 million was borrowed thereunder to repay the principal of the JPMorgan 2005 Term Loan Facility. Also, this facility was used to pay the $1.75 billion cash portion of the ResCap tender and bond exchange (pursuant to which $8.6 million in unsecured ResCap notes were exchanged for approximately $5.6 million of the Senior Secured Notes and Junior Secured Notes). As a result, the Secured Revolver Facility was fully drawn in the amount of $3.5 billion with the proceeds used to exchange direct unsecured ResCap obligations owed to unaffiliated parties. The Secured Revolver Loan Agreement was amended and restated by the A&R Secured Revolver Loan Agreement.

*(d) Servicing Advance Factoring Facility*

ResCap, seeking to monetize certain non-GSE Servicing Advances, entered this facility with GMAC CF which was structured as a "true sale" of receivables and not financing. GMAC CF was reluctant to enter into this facility, but after intensive negotiations, agreed to an 85% advance rate which provided RFC and GMAC Mortgage with greater liquidity than they would have if they borrowed against the same assets under the Secured Revolver Facility. AFI entered into a collateral release agreement with respect to the Servicing Advances. Morgan Stanley delivered a fairness opinion with respect to this facility which concluded that the purchase price for the initial and contemplated subsequent purchase of receivables were fair to RFC. This facility contained provisions commonly found in receivables factoring transactions and other representations, warranties, termination events and indemnification provisions standard for receivables factoring transactions between unaffiliated parties.

*(e) Initial Line of Credit Facility*

Despite a first lien secured credit facility and second and third lien secured bonds, due to the favorable permitted lien and collateral release provisions in the Secured Revolver Loan Agreement, Senior Secured Notes Indenture and Junior Secured Notes Indenture, PATI and RATI, as borrowers, were able to enter this facility, guaranteed by ResCap, with AFI as lender, in the amount of $430 million. Failing to find unaffiliated lenders, AFI became the lender of last resort for this facility. This facility exemplified an affiliate transaction more favorable to the borrowers than would have been obtained in a syndicated credit facility with unaffiliated lenders, and it would be extremely unlikely for a single lender to provide this facility. This facility was amended and restated by the A&R Line of Credit Facility.

*(f) ResMor Loan Facility*

GMAC Canada entered into this facility with AFI in the amount of CDN $82 million. At the same time, AFI as purchaser, entered into a purchase agreement to purchase from GMAC Canada, as seller, the stock of 1020491 Alberta Ltd. and ResMor. The principal amount of this loan was intended to be repaid at the closing on the sale by setting it off against the purchase price. The sale closed and the loan was repaid as contemplated. Goldin Associates rendered a fairness opinion stating that the ResMor Sale was fair, from a financial point of view, to ResCap and its creditors (other than AFI). This facility contained very basic representations, warranties and covenants and the events of default were standard for facilities of comparable size and nature.

*(g) Second Line of Credit Facility*

Instead of increasing the Line of Credit commitment amount, AFI, as lender, provided PATI and RAHI, as borrowers, with this facility in the initial amount of $370 million on substantially similar terms to the Initial Line of Credit Facility (and together with the Second Line of Credit Facility, the "Line of Credit Facilities"). This facility was later increased to $470 million. On December 30, 2009 this facility and the Initial Line of Credit Facility were combined into the A&R Line of Credit Facility. Goldin Associates provided a fairness opinion concluding the terms of the documents were fair to ResCap and its creditors (other than AFI) and provided a further fairness opinion for the amendment of this facility to increase it. The provisions of this facility exemplified an affiliate transaction more favorable to the borrowers than would have been obtained in a third party financing. Goldin Associates delivered a favorable fairness opinion in connection with the increase of the cumulative commitment under the Line of Credit Facilities up to an additional $500 million. Just before the consolidation of the Line of Credit Facilities, this facility was increased from $470 million to $670 million.

*(h) Amended and Restated Credit Facilities*

The Line of Credit Facilities were combined into one agreement and the Secured Revolver Loan Agreement was amended and restated to convert $1.55 billion of Secured Revolver Facility Revolver Loans into Secured Revolver Facility Term Loans. After assignments of obligations, the new borrowers under the A&R Line of Credit were GMAC Mortgage and RFC, and they were required to provide a solvency representation which was similar to the solvency representation for the A&R Secured Revolver Loan Agreement. The A&R Line of Credit Agreement contained representations, warranties, covenants, events of default and indemnification provisions that were standard for facilities of comparable size and nature (and would be typical for a syndicated credit facility with unaffiliated lenders). Provisions exemplifying an affiliate transaction that were more favorable to the borrowers, were the same as those under the Line of Credit Facilities.

*(i) BMMZ Repo Facility*

GMAC Mortgage and RFC had each entered separate financing agreements with Citibank and Goldman Sachs in the form of mortgage loan repurchase facilities with an aggregate commitment of $300 million. ResCap guaranteed these obligations. AFI proposed to ResCap a

new mortgage loan repo facility to be provided by one of its Subsidiaries, BMMZ, on substantially the same terms as proposed by Citibank, but with some advantages to ResCap including no commitment fee, more favorable advance rates, and no aggressive amortization schedule. Goldin Associates was engaged to provide an analysis of the terms of the Citibank proposal and of the AFI proposal, and to provide a fairness opinion. Goldin Associates concluded that this facility contained terms that were at least as favorable to ResCap and its creditors (other than AFI) as those that could reasonably be obtained by ResCap from an unaffiliated third party lender. This facility contained closing conditions, representations, warranties, events of default and indemnification provisions that were generally customary for a repo facility. This facility terminated in connection with the transactions consummated under the Barclays DIP Financing Agreement.

The Examiner determined, and I concur, that each of these Financing Affiliate Transactions were entered into at arm's length and on balance were at least as favorable to ResCap than would have been obtained in the third-party financings of comparable size and nature. The Examiner does not discuss any potential causes of action in this section of his Examiner's Report. However, he does note that certain of the Financing Affiliate Transactions are implicated in potential fraudulent transfer Estate Causes of Action, for example, but not by way of limitation, the Minnesota Insider Preference claims, however, the settlement value of those potential Estate Causes of Action are addressed elsewhere in this Opinion.

### F. VALUE OF SETTLED ESTATE CAUSES OF ACTION

| **Claims** | **Potential Damages** (*in millions*) | **Reasonable Settlement Amount** (*in millions*) | **Percentage of Potential Damages** |
|---|---|---|---|
| ***ESTATE CAUSES OF ACTION*** | | | |
| Breach of Contract for Misallocation of Net Revenues on Loans brokered by GMAC | $520.5 | **$268.2** | **51.5%** |
| Breach of Contract for Failure To Pay Value of Purchased MSRs | $1,725.0 | **$387.2** | **22.4%** |
| Breach of Representations and Warranties under 2001 and 2006 MMLPSAs | No Amount Given | | |
| Breach of Contract Claims relating to Pipeline Swap | No Amount Given | | |
| Breach of 2005 Operating Agreement or 2006 Amended Operating Agreement in connection with MMLPSA, Pipeline Swap or MSR Swap | No Amount Given | | |

| **Claims** | **Potential Damages** (*in millions*) | **Reasonable Settlement Amount** (*in millions*) | **Percentage of Potential Damages** |
|---|---|---|---|
| Preferential Transfer relating to DOJ/AG Consent Order | $109.6 | **$60.0** | **54.7%** |
| Preferential Transfer relating to 2012 Letter Agreement and A&R Servicing Agreement | $48.4 | **$32.0** | **66.1%** |
| Unauthorized Post-petition Transfer relating to Indemnification Obligations under A&R Servicing Agreement | $12.9 | | |
| Breach of contract regarding the First 2009 Tax Allocation Agreement | $1,770.0 | **$713.7** | **40.3%** |
| Constructive Fraudulent Transfer relating to 2nd 2009 Tax Allocation Agreement | $50.0 | | |
| Contract Claim re 2005 Tax Allocation Agreement | $15.1 | | |
| Minnesota Insider Preference Claims | $566.0 | **$328.9** | **58.1%** |
| Fraud related to 2006 Bank Restructuring | $569.0 | **$130.0** | **22.8%** |
| Tortious Interference with Contract relating to 2006 Bank Restructuring | No Amount Given | | |
| Fraudulent Transfer in connection with Ally Bank Transactions | No Amount Given | | |
| Miscellaneous Breach of Fiduciary Duty Claims against ResCap's D&Os | No Amount Given | | |
| Aiding and Abetting Breach of Fiduciary Duty against AFI (other than re 2006 Restructuring) | No Amount Given | | |
| Single Entity theories of liability regarding AFI and ResCap and/or affiliates, including Piercing Corp Veil and Substantive Consolidation | No Amount Given | | |

| **Claims** | **Potential Damages** (*in millions)* | **Reasonable Settlement Amount** (*in millions)* | **Percentage of Potential Damages** |
|---|---|---|---|
| Debt Re-characterization | No Amount Given | | |
| Equitable Subordination and Disallowance | No Amount Given | | |
| Constructive Trust | No Amount Given | | |
| Constructive Fraudulent Transfer Against Cerberus relating to 2008 Model Home Sale | $30.0 | | |
| Fraudulent Transfer relating to Prepetition Asset Sales (other than 2008 Model Home Sale) | No Amount Given | | |
| Financing Affiliate Transactions | | | |
| ***TOTAL*** | | ***$1,920.0*** | |

### G. OPINION REGARDING PROPOSED POST-PETITION TRANSACTIONS AND AGREEMENTS

This section of the Examiner's Report did not address any potential claims.

### H. OPINION REGARDING SETTLEMENT VALUES OF POTENTIAL THIRD PARTY CLAIMS

In reaching an opinion concerning the likely settlement value of each claim, I have considered a number of factors, including the factors identified by the Supreme Court in *Protective Committee For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*[31] applicable to settlement negotiations outside of bankruptcy. Parties will consider: (i) the probabilities of success should the claim be litigated, (ii) the complexity, expenses and duration of litigating the claims, (iii) the possible difficulties of collecting on a judgment and all other factors relevant to an assessment of the settlement as well as factors relevant in determining the motivations of the particular parties to the litigation regarding settlement posture.

[31] 390 U.S. 414, 424-25 (1968).

### 1. Third Party Claims Against AFI

#### *a. RMBS Claims*[32]

**Examiner's Report References:**

Section I.H pages I-36 to I-39

Section VIII.C pages VIII-27 to VIII-109

Section VIII.D pages VIII-201 to VIII-202

Appendix VIII.D.1 page 1

**Description:**

The third-party liability claims ("RMBS Claims") against AFI, whether by investors or financial guaranty insurers (collectively, "Third-Party Claimants"), arising out of the issuance of residential mortgage-backed securities ("RMBS") by ResCap.

**Background:**

The RMBS Claims, estimated in the tens of billions of dollars, are the largest potential liability against AFI as the parent of ResCap. Between approximately 2004 and 2007, ResCap issued 392 private label RMBS securitizations with an original deal balance of $221 billion. (Ally Securities was an underwriter on 105 of those securitizations; Ally Bank acted as loan custodian on approximately 34 of them.) A total of 38 separate suits have been brought by investors such as public pension funds, insurance companies, and others in federal and state courts throughout the country naming AFI as a defendant. Primarily, those suits allege false or misleading statements or omissions of material fact by ResCap in connection with the issuance of the RMBS securitizations in violation of the Securities Act of 1933, the Securities Exchange Act of 1934, various state securities acts and common law. The monoline insurers also have overlapping contract claims for breach of representations and warranties. The Examiner did not consider claims by the RMBS Trusts asserting breach of contract for failure to repurchase defective loans because the Debtors proposed to treat those claims in a separate settlement.

The Third-Party Claimants seek to impose liability on AFI under one or more of the following theories: (i) piercing of the corporate veil or alter ego; (ii) "control person" liability for ResCap's primary violation of federal or state securities laws; and (iii) common-law aiding and abetting fraud by ResCap. Total damages reported by Third-Party Claimants to the Examiner for the RMBS Claims are approximately $6.3 billion, although the number is likely much higher in light of the fact that, as of March/April 2012, the outstanding principal balance of the RMBS issued by

[32] The Examiner's Report discusses non-RMBS claims related to mortgage origination, servicing, foreclosure, insurance and other consumer type claims. He concludes that most would not survive a motion to dismiss. Accordingly, no settlement value has been ascribed to the non-RMBS third party claims against AFI.

ResCap was $62.4 billion, with estimated lifetime losses of $43.8 billion. The RMBS Claims are at various stages of the litigation process, with most at or just beyond the motion-to-dismiss stage and none having reached trial.

**Examiner's Analysis and Conclusions:**

1. It is unlikely that any pending or potential claims seeking to hold AFI liable for RMBS Claims asserted against ResCap under a veil-piercing or alter ego theory will prevail.

2. Even if the requisites for veil-piercing against AFI could be established, the Third-Party Claimants may lack standing because the veil-piercing claim belongs to the bankruptcy estate under applicable Delaware law.

3. While a close question, it is more likely than not that the Third-Party Claimants will not be able to establish "control person" liability against AFI under various federal and state securities laws for primary violations of those laws by ResCap.

4. Even if the requisites for "control person" liability against AFI could be established, certain of those claims could be time-barred by applicable statutes of limitations or repose.

5. It is unlikely that the Third-Party Claimants will be able to establish liability against AFI under common law claims of aiding and abetting fraud by ResCap in connection with the issuance of RMBS.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. With respect to AFI's potential control person liability, the inquiry in each case asserting such claims is fact-intensive. Therefore, it is not possible at this point to conclude definitively whether control person liability will be found in any particular case.

**Settlement Considerations:**

The RMBS Claims are being pursued primarily by large institutional investors – insurance companies and pension funds – as well as monoline financial guaranty insurers. As such, they have the motivation and the means to prosecute full-scale, no-holds-barred litigation against AFI that could take many years and hundreds of millions of dollars to reach conclusion. Considering the size of the claims, the time and expense to conduct this complex litigation, the inherent risk warrants a discount of 50%.

The Examiner concludes, and I agree, that under applicable Delaware law efforts to impose liability on AFI on a veil-piercing or alter ego theory are unlikely to succeed. Delaware law is highly protective of the corporate form, which can be pierced only by a showing that ResCap and AFI operated as a single economic entity *and* by the presence of an overall element of injustice or unfairness. Delaware law requires consideration of multiple factors in determining whether to pierce

a corporate veil: "(1) undercapitalization, (2) failure to observe corporate formalities, (3) nonpayment of dividends, (4) insolvency of the debtor corporation at the time, (5) siphoning off of the corporation's funds by the dominant parent, (6) absence of corporate records, and (7) the fact that the corporation is a mere façade for the operations of the dominant parent." The Examiner's extensive consideration of the evidence strongly militates against piercing the corporate veil here. This warrants a 70% discount in the value of the claims.

Furthermore, even if ResCap and AFI could be deemed to be a single economic entity, Third-Party Claimants would still need to show "injustice or unfairness" in the use of the corporate form. While the Examiner concludes that ResCap was left with unreasonably small capital and became balance sheet insolvent in 2007, this was due to sizeable operating losses beginning in the last quarter of 2006, not misconduct by AFI such as initial undercapitalization or siphoning of funds. In short, the Third-Party Claimants are unlikely to be able to show that AFI used ResCap as part of a corporate "shell game."

The value of the veil-piercing theory is lessened more by the likelihood that, even assuming veil-piercing is warranted, the Third-Party Claimants lack standing to assert it. I agree with the Examiner that, under Delaware law, a veil-piercing claim generally belongs to the estate of the debtor, and not to creditors, at least where the harm suffered is "generalized" to all creditors. However, as discussed above, I anticipate that the standing issue can be finessed by the Third-Party Claimants cooperating with an estate fiduciary to pursue the veil-piercing theory. Nevertheless, in light of the discount already applied to the veil-piercing theory, I do not make any additional discount for the plaintiffs' standing issue since I anticipate an easy resolution.

With respect to "control person" liability, the Examiner concludes that while it is a close question, it is more likely than not that the Third-Party Claimants will not be able to establish "control person" liability against AFI for the primary violations of ResCap in connection with the RMBS securitizations. "Control person" liability can arise under Section 15 of the Securities Act, Section 20 of the Securities Exchange Act or their state analogues and impose liability for material misstatements, omissions or fraud committed by a primary violator. After extensively analyzing the available evidence, the Examiner concludes that the Third-Party Claimants are unlikely to be able to establish that AFI exercised the requisite control over ResCap *with respect to the RMBS securitizations* during the relevant 2004-2007 period. While I agree with the Examiner's analysis, "control person" issues are particularly fact-intensive, discovery in the various cases is incomplete, and different fact-finders are likely to weigh competing evidence differently. Accordingly, although these claims are more likely than not to fail, I discount the settlement value of the claims by only 60%.

Likewise, there appear to be strong arguments, especially in RMBS claims brought by investors, that some of their claims are barred by applicable statutes of limitations or repose. These also are fact-intensive questions, however, and not subject to definitive analysis at this point. The closeness of these questions leads us to discount the value of the RMBS Claims by 60% based on the statute of limitations.

The Examiner also concludes that the Third-Party Claimants are unlikely to prevail against AFI on the RMBS Claims on the common-law theory that AFI aided and abetted fraud by ResCap.

Such claims have been asserted in 14 of the 38 cases, 10 in RMBS Insurer Actions, four in RMBS Investor Actions. These claims are subject to higher burdens of proof and the heightened pleading requirements of Fed. R. Civ. P. 9. They require a showing of (1) the existence of fraud by ResCap, (2) actual knowledge of the fraud by AFI, and (3) AFI's substantial assistance in the commission of that fraud. While the existence of actual fraud by ResCap was beyond the Examiner's scope of investigation, the Examiner was presented with no evidence of AFI's actual knowledge of fraudulent conduct by ResCap. Nor was there any evidence that AFI provided substantial assistance to ResCap in committing the fraud as opposed to providing capital support and general corporate functions and services, which cannot be deemed to be the proximate cause of ResCap's fraud. Therefore, I do not attribute any settlement value to this theory.

While it was not possible for the Examiner to establish with precision the value of the RMBS Claims, at least $6.3 billion in alleged damages has been asserted by Third-Party Claimants. The Examiner states that as of March/April 2012, the outstanding principal balance of RMBS was $62.4 billion and the estimated lifetime losses were $43.8 billion.[33] This data appears in the Declaration of Frank Sillman in support of the Debtors' motion to approve the RMBS Trust Settlement Agreements. Mr. Sillman also calculated the Debtors' potential repurchase requirements to RMBS Trusts for defective mortgages at $6.7 billion to $10.3 billion. Of course, he assumed that the Trusts could prove that the Debtors breached the representations and warranties in the governing agreements. Also, he was focused on the Debtors' potential exposure, not the parent company AFI which was not a party to the governing agreements.

In the Appendix, the Examiner lists the RMBS Claims Damages to the extent he could obtain information. I note that of the eighteen Parties/Actions listed, only three asserted damages greater than $1 billion: (i) AIG, Allstate, Mass Mutual and Prudential - $1.5 billion, (ii) FGIC - $1.85 billion, and (iii) MBIA Insurance Company - $2 billion. Nine of the other listed Parties/Actions with damage amounts shown are less than $100 million. Only three others are over $100 million with the highest of those being $293 million. Given the magnitude of the expected lifetime losses of $43.8 billion, and the magnitude of claims that could be asserted by investors, purchasers, and insurers, it is reasonable and conservative to estimate for settlement purposes that the total of the RMBS claims is in the range of $20 billion.

Since the Examiner Scope Approval Order directs him not to attempt to independently quantify the Third-Party RMBS damages, I have looked for publicly available information on settlements in similar or analogous cases.

Cornerstone Research publishes an annual review of Securities Class Action Settlements. Their data is focused on suits brought by securities purchasers alleging fraudulent inflation in the price of a corporation's common stock. I have reviewed the 2012 Review and Analysis.[34] The year

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[33] "RMBS Claims" is defined by the Examiner as "claims against the Debtors and the AFI Defendants on account of residential mortgage-backed securities." Examiner's Report, VIII-2.

[34] Ellen M. Ryan & Laura E. Simmons, *Sec. Class Action Settlements, 2012 Review and Analysis* (Cornerstone Research, Inc., Boston, MA), 2013.

2012 saw an extraordinary number of settlements in excess of $100 million that Cornerstone Research classifies as "mega-settlements," a significant portion of which were related to the credit crisis. Many of the larger cases take three to five years to settle indicating that they commenced in 2007 to 2009 when the stock price of financial corporations was impacted by their ownership or issuance of RMBS during the financial crisis. Approximately one-third of settlements in 2012 were for issuers in the financial industry and they rank highest in median settlement value.

Cornerstone Research posits that "estimated damages" is the most important factor in determining settlement amounts. Mega-settlements traditionally settle for a smaller proportion of estimated damages. Settlements as a percentage of estimate damages typically decrease as estimated damages increase. Larger cases tend to settle for smaller proportions of losses. For cases with estimated damages in excess of $5 billion, the median settlement amount was 1.3% of the estimated damages. Institutional investors as lead plaintiffs, particularly public pension funds, tend to be associated with significantly higher settlement amounts according to Cornerstone Research. Also, the later the stage at which the litigation settles, the higher the settlement values. Cases that survive motions to dismiss or summary judgment motions tend to settle for higher amounts.

NERA Economic Consulting published *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review*.[35] Among the highlights is that financial institutions are no longer the focus of new filings, indicating that the wave of credit-crisis related litigation ended in 2012. The stage of the litigation, *i.e.* whether it has survived a motion to dismiss, summary judgment, or class certification, is important in settlement of securities class action litigation. Most cases are resolved before a class certification motion has been filed or decided. Investor losses are a powerful predictor of settlement size. There are only a handful of cases each year with investor losses greater than $10 billion. As of the end of 2012, only ten securities class action cases ever have settled for over $1 billion. Larger cases settle for a smaller percentage of investor losses. The median ratio of settlement to investor losses decreases as investor losses increase. The median settlement for cases with investor losses over $1 billion has been 0.7% of the investor losses. Where the lead plaintiff is an institutional investor, especially a public pension fund, settlements tend to be larger.

The D&O Diary[36] publishes a list titled *Subprime and Credit Crises-Related Lawsuits, Settlements, Dismissals and Denials*. Of the sixty settlements listed, only one exceeded $1 billion. That settlement was the Bank of America/Merrill Lynch Merger Case for $2.43 billion, which is an outlier. Five cases settled for between $500 million and $730 million: Citigroup Bondholders Action - $730 million, Wachovia Preferred Securities and Bond/Notes Litigation - $627 million, Countrywide Financial - $624 million; Citigroup - $590 million; and Countrywide Mortgage Backed Securities Action - $500 million. Both Citigroup cases and the Wachovia case were brought by purchasers of common stock or bonds issued by the defendant/parent corporation, not mortgage backed securities ("MBS"). Although the price of the stock or bonds were allegedly overstated by

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[35] Dr. Renzo Comolli, *et al*., *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* (NERA Economic Consulting, New York, NY), Jan., 2013.

[36] Kevin M. LaCroix, *The D&O Diary Subprime and Credit Crisis-Related Lawsuits Settlements, Dismissals and Denials* (RT ProExec, Beachwood, OH) April, 2013.

the defendants' inaccurate statements regarding subprime and other mortgage products, the plaintiffs were not purchasers of MBS as are those pursuing ResCap and AFI.

In valuing ResCap as part of the solvency analysis, the Examiner's Financial Advisors identified Countrywide, Washington Mutual (WaMu) and Indybank as similar institutions to ResCap. Indybank is not listed as a party to a settlement in the D&O Diary, but Countrywide and WaMu are. The Countrywide Financial settlement for $624 million was a class action by purchasers of common stock and notes issued by Countrywide, not MBS. Although plaintiffs allege that Countrywide did not accurately disclose problems with its mortgage business and portfolio that lead to an overstatement of stock value, that litigation is not exactly similar to the Third-Party RMBS claims against AFI.

The Countrywide Mortgaged Back Securities Action in the U.S. District Court for the Central District of California (2:10-CV-00302) that settled for $500 million is analogous to the Third-Party RMBS claims against ResCap and AFI. The Countrywide MBS settlement involved 429 MBS with an original issue principal of $351 billion. The Examiner's Report states that ResCap issued 392 RMBS with an original deal balance of $221 billion. A settlement of ResCap's RMBS Claims on a proportional basis would be approximately $315 million.

The Washington Mutual Securities Multi-District Litigation settled for $208.5 million. Once again the plaintiffs were purchasers of securities issued by the parent company, Washington Mutual, Inc. (WMI) and not MBS. Because Washington Mutual Bank had been seized and sold by the FDIC, and the parent company, WMI, was in bankruptcy, the settlement fund consisted of contributions by the Directors and Officers insurance carriers ($105 million), the underwriters ($85 million) and the auditors ($18.5 million). This is not indicative of reasonable settlement value of the secondary liability of AFI for RMBS issued by ResCap.

I mediated an objection in the bankruptcy case of WMI to the claim of the MBS plaintiffs who sued WaMu's securities subsidiary that was not a debtor in bankruptcy. That securities subsidiary had been acquired by JPMorgan Chase but had limited resources of its own. That underlying action involving hundreds of millions of dollars in alleged damages, settled for $26 million.

Under these circumstances, even assuming that the gross value of the RMBS Claims is $20 billion, the unlikelihood of the Third-Party Claimants prevailing on two of their three major theories (veil-piercing/alter ego and aiding and abetting fraud), the questionable likelihood of prevailing on their third major theory ("control person" liability), the statute of limitations defenses, and the significant cost, time and uncertainty of pursuing 38 separate cases, militate in favor of a deeply discounted settlement value. Securities litigation is like a game of *Survivor*. If plaintiff can survive a motion to dismiss, class certification or summary judgment, it is likely to reach a settlement with the amount increasing at each stage. Some of the pending cases against AFI have survived motions to dismiss and thus are prime candidates for settlement. Moreover, similar claims against other RMBS issuers such as Countrywide (whose liability is primary, not secondary like AFI's) have settled recently in the range of 0.14% of the original deal balance. Analysis of settlements of securities class actions by Cornerstone Research and NERA Economic Consulting consistently find that settlements in securities class actions seeking in excess of $10 billion in damages average less

than 0.5% of claimed damages, and those are against the issuer, not a parent company. If AFI had the time and inclination to litigate its contingent exposure to ResCap's RMBS Claims, it could end up with a total cost less than the $500 million paid by Countrywide.

On the other hand, AFI has some unique motivations that may influence its willingness to make a substantial payment to obtain the solid gold release it seeks in a confirmed plan of reorganization. AFI professes a great desire to repay the American taxpayers for the assistance provided in the TARP program and elsewhere. The looming specter of huge, unliquidated, contingent liabilities associated with ResCap preclude AFI from an initial public offering (IPO) or other alternatives to allow the U.S. government to monetize its stake in AFI and permit AFI to return to private ownership. Considering the massive size of the claims, the not-inconsequential risk that plaintiffs will prevail at least on the issue of control person liability, the time and cost required to defend the 38 cases, and the prospect of additional actions being filed, the RMBS Claims are not devoid of substantial settlement value. Taking into account the factors discussed above, especially the Countrywide settlement of larger, primary claims at $500 million, I ascribe a settlement value of no more than $480 million to the RMBS Claims, calculated as follows:

| | |
|---|---|
| Potential Damages: | $20,000 million |
| Reduced By: | |
| 50% inherent risk = | $10,000 million |
| 70% veil-piercing alter ego risk = | $3,000 million |
| 60% risk on control person theory = | $1,200 million |
| 60% statute of limitations risk = | $480 million |
| Total Settlement Value = | **$480 million** |

### *b. Fraudulent Transfer Claim*

**Examiner's Report References:**

Section I.H.1.b page I-39

Section VIII.D.5 pages VIII-207 to VIII-215

**Description:**

Whether transfers of funds from Ally Securities to AFI can be recovered as fraudulent transfers.

**Background:**

On April 16, 2012, Ally Securities transferred $200 million to AFI. On August 20, 2012 Ally Securities transferred $25.5 million to AFI. Ally Securities characterized the two transfers to AFI as "distributions of excess capital"; thus, these transfers were payments of dividends to Ally's sole member.

**Examiner's Analysis and Conclusions:**

1. The Examiner's Financial Advisers determined that Ally Securities' total capital following the transfers was $49.5 million and $16.3 million, respectively. Since Ally Securities was then a defendant in ten RMBS-related lawsuits involving billions of dollars, the Examiner concluded that a reasonable quantification of these contingent liabilities would likely overwhelm Ally Securities' equity on the transfer dates and that Ally Securities was insolvent on the transfer dates.

2. The transfers were not made for reasonably equivalent value.

3. It is likely that the transfers could be avoided as constructively fraudulent transfers.

4. While a close question, it is more likely than not that these transfers were actual fraudulent transfers.

5. It unlikely that a court would determine that these transfers constituted unlawful dividends.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. The determinations of the amount of the contingent liability and of actual fraud are fact intensive.

**Settlement Considerations:**

Consideration of the avoidance of these transfers is only relevant to the evaluation of the reasonable settlement value of RMBS actions against Ally Securities, which are evaluated elsewhere in this report. The Examiner notes that Ally Securities has an equity value that is dwarfed by the potential third party RMBS claims. However, those third party creditors would seek to augment the funds available to Ally Securities by avoiding the transfers from Ally Securities to AFI discussed in this section. If any one of the three recovery theories discussed by the Examiner is successful, Ally Securities, or its representative, would be able to recover $225.5 million from AFI. Although the actual fraud theory is fact intensive and the unlawful dividend theory is unlikely to prevail, the constructive fraudulent theory appears strong.

I would expect the plaintiff to open with a settlement demand of $191.7 million, approximately 85% of the amount in controversy. AFI would likely initially offer to settle the litigation for $33.8 million, 15% of the amount in controversy. Due to the strength of the law and

the facts, I would expect an ultimate settlement of approximately $157.9 million, 60% of the amount in controversy. This fraudulent transfer claim is only relevant to the potential liability of Ally Securities for third party claims which would be considered in all of the third party claims against AFI. Thus, this fraudulent transfer claim has no independent settlement value.

### 2. Third Party Claims Against Ally Securities

**Examiner's Report References:**

Section I.H pages I-39 to I-41

Section VIII.C pages VIII-109 to VIII-129

Section VIII.D pages VIII-201 to VIII-203

**Description:**

Evaluation of the RMBS Claims against Ally Securities by Third-Party Claimants arising out of Ally Securities' role as an underwriter of RMBS issued by ResCap.

**Background:**

Between approximately 2004 and 2007, ResCap issued 392 RMBS securitizations with an original deal balance of $221 billion. Ally Securities acted as lead or co-lead underwriter on 105 of them with a principal balance of $57.2 billion, and also served as co-underwriter on an additional 131 of them. Suits by Third-Party Claimants against Ally Securities primarily allege claims for violations of Sections 11 and 12(a)(2) of the Securities Act of 1933 and analogous state statutes, fraud and fraudulent inducement, aiding and abetting fraud, and negligent misrepresentation. The RMBS Claims are at various stages of the litigation process, with most at or just beyond the motion-to-dismiss stage and none having reached trial.

**Examiner's Analysis and Conclusions:**

1. Neither ResCap nor AFI challenges that the Third-Party Claimants have standing to bring their securities law claims against Ally Securities or that Ally Securities' participation in the securitizations suffices to give rise to potential liability.

2. The claims of fraud and fraudulent inducement are similar to the securities claims because they are based on misrepresentations and omissions in the RMBS Offering Documents, but more difficult to prove because they require proof of Ally Securities' knowledge of the fraud and intent to defraud, along with justifiable reliance and damages causation.

3. No evidence supports the assertions that Ally Securities knowingly made untrue or misleading material statements, but such claim requires further factual development.

4. The claims of aiding and abetting fraud require proof of an underlying fraud, knowledge of the fraud by Ally Securities and substantial assistance to ResCap in perpetrating the

fraud. If the Third-Party Claimants can show a fraud, they are likely to prevail against Ally Securities on a claim of aiding and abetting.

5. A claim of negligent misrepresentation turns on the issue of whether a plaintiff can establish a special relationship between itself and Ally Securities, an inquiry beyond the scope of the Examiner's Investigation. Nevertheless, in most transactions between sophisticated corporate parties, no duty of care is required.

6. While Ally Securities participated as lead or co-lead underwriter on 105 RMBS deals with an original principal balance of $57.2 billion and acted as co-underwriter on 131 more securitizations, its limited net equity ($11.7 million as of December 31, 2012) may make it difficult for Third-Party Claimants to collect.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. The ultimate issue of whether the RMBS Offering Materials contained misstatements or omissions of material fact was beyond the scope of the Examiner's Investigation. AFI likely received two avoidable fraudulent transfers totaling $225.5 million in 2012. The reasonable settlement value of those claims should be added to Ally Securities' net equity in evaluating collectability.

**Settlement Considerations:**

Despite the overall enormity of the Third-Party RMBS Claims (billions of dollars), I believe that the settlement value of the claims against Ally Securities for its role as underwriter is ultimately affected more by its relative lack of resources to satisfy a judgment than the actual merits of the claims themselves and, therefore, the settlement value is small.

Each of the RMBS Claims against Ally Securities requires a factually-intensive inquiry with respect to each deal in which it was involved as an underwriter to determine whether the RMBS Offering Documents contained untrue misstatements or omissions of material fact.

Claims for violations under Section 11 of the Securities Act do not require a plaintiff to allege or prove scienter, reliance or loss causation; a plaintiff need only show purchase of a registered security from the issuer or in the aftermarket following an offering, participation by the defendant in the offering sufficient to give rise to liability (almost always the case for an underwriter), and that the registration statement contained an untrue statement of material fact or omitted a material fact required to be stated therein or necessary to make the registration statement not misleading.

Section 12(a)(2) of the Securities Act requires a showing that the defendant is a "statutory seller," the sale was effectuated by prospectus or oral communication, and the prospectus or oral communication contained an untrue statement of material fact or omitted to state a material fact necessary to make the statements not misleading.

A plaintiff's burden of proof under section 11 and 12(a)(2) of the Securities Act is a preponderance of the evidence, while a defendant such as Ally Securities bears the burden of proving affirmative defenses such as due diligence (*e.g.*, after reasonable investigation, the defendant believed the statements in the registration statement were true and there was no omission to make the statements not misleading) or loss causation (*e.g.*, a plaintiff's losses are not attributable to the misrepresentations, but rather to a general market decline).

Of all of the Third-Party RMBS Claims against Ally Securities, the Examiner concludes that the securities law claims have some viability.

The essentially identical common-law claims of fraud and fraudulent inducement place a much higher burden on a plaintiff. They require a showing by clear and convincing evidence of (1) a misrepresentation or omission of material fact which was false and known by the defendant to be false, (2) made with an intention to induce reliance, (3) justifiable reliance thereon, and (4) damages caused by the misrepresentation. It is likely that Ally Securities will argue that the sophistication of the Third-Party Claimants will make it difficult for them to establish justifiable reliance. The lack of proof at this stage of Ally Securities' actual knowledge of the statements' falsity, combined with the difficulty in establishing justifiable reliance, causes us to discount the settlement value of these claims significantly.

Aiding and abetting fraud requires (1) existence of a fraud, (2) knowledge of the fraud by the defendant, and (3) substantial assistance to the one committing the fraud. Although only one Third-Party Claimant (MBIA) has asserted such a claim against Ally Securities so far, I agree with the Examiner that if the existence of a fraud by ResCap is proved, a claim of aiding and abetting is likely to prevail.

Claims of negligent misrepresentation, however, are likely not to succeed. The key element to a negligent misrepresentation claim is demonstrating a duty of care owed by the defendant to the plaintiff. Most courts that have considered the question have found that sophisticated parties engaged in RMBS transactions do not owe one another a duty of care and have dismissed negligent misrepresentation claims at the pleadings stage. I do not attribute any settlement value to such claims.

Ordinarily, the sheer size of the Third-Party RMBS Claims, and the relative ease of prevailing at least on a securities law claim if an untrue statement or omission of material fact is established, would be cause for attributing a high settlement value to the Third-Party RMBS Claims against Ally Securities. That would be offset by ordinary litigation uncertainty and costs, although in this instance, Ally Securities' small equity ($11.7 million as of December 31, 2012), not to mention the probability that most if not all of that could be consumed by defense costs, dictates a very low settlement value. Ally Securities equity could be augmented by avoiding transfers to AFI in the amount of $225.5 million made in 2012, the reasonable settlement value of which I have estimated at $157.9 million.

The claims have a face value of $1 billion, which is reduced by 50% for inherent risk, and 20% for the difficulty of prevailing on the securities claims, for a merits value of $400 million.

I anticipate that settlement discussions would quickly switch focus away from the merits of the claim to collectability. If the maximum fund available is Ally Security's net equity of $11.7 million plus $157.9 million, the reasonable settlement value of the fraudulent transfer claim against AFI, the reasonable settlement value at 10% of the funds available, approximately $16 million, is appropriate in light of the dubious merits and risk of litigation.

Because the settlement value of these claims is less than $21 million, it is not material in light of the magnitude of the $2.1 billion settlement fund, and because I believe these claims are duplicative of claims made against ResCap and AFI, I ascribe no value to Third Party Claims against Ally Securities for purpose of allocating the settlement fund.

### 3. Third Party Claims Against Ally Bank

**Examiner's Report References:**

Section I.H pages I-41 to I-42

Section VIII.C pages VIII-129 to VIII-150

Section VIII.D pages VIII-201 to VIII-203

**Description:**

Evaluation of the RMBS Claims against Ally Bank by Third-Party Claimants arising out of Ally Bank's role as a loan originator and custodian of mortgage loan notes in connection with RMBS issued by ResCap.

**Background:**

Between approximately 2004 and 2007, ResCap issued 392 RMBS securitizations with an original deal balance of $221 billion. Ally Bank and its predecessor, Old GMAC Bank, acted as loan custodian for approximately 34 of those deals representing a principal balance of a $21.7 billion. Ally Bank was original loan custodian on six of the deals; Old GMAC was original custodian on 28. Ally Bank also acted as a loan originator in some 124 instances, in the approximate amount of $16 billion. As a custodian, Ally Bank entered into contracts to hold and review the mortgage notes underlying the securitizations and to give various notices to the loan servicer, trustee and monoline insurer. The principal direct claims asserted against Ally Bank are (1) breach of contract for failing to provide proper notice or certifications under the custodial agreements and (2) aiding and abetting fraud by ResCap.

**Examiner's Analysis and Conclusions:**

1. There is no evidence that Ally Bank breached its obligations under the custodial agreements to gather, review and certify mortgage notes, although the Examiner did not audit individual mortgage notes. There is also no evidence that Ally Bank breached obligations to the

trustees and monoline insurers to alert them to breaches of representations and warranties related to the securitizations.

2. The Examiner reaches no conclusion with respect to the existence of an underlying fraud by ResCap, but notes that the Third-Party Claimants proffered no evidence of Ally Bank's actual knowledge of the alleged fraud. The Examiner also notes, however, that discovery has been limited and that evidence exists showing Ally Bank was "intricately involved" in the operations of ResCap. Likewise, if ResCap engaged in fraud, there is evidence that Ally Bank's financing activities constituted "substantial assistance" to that fraud.

3. Under applicable Utah law, it is unlikely that Ally Bank will be found to be a successor in liability of Old GMAC Bank and, therefore, the RMBS Claims against it would be limited to securitizations containing loans sold by Ally Bank after the 2006 Bank Restructuring.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

Under Pennsylvania law, which governs the custodial agreements, a claim for breach of contract requires three elements: (1) existence of a contract; (2) breach of its terms; and (3) damages. Although the mortgage notes themselves were not audited by the Examiner, there is no evidence that Ally Bank breached its contractual obligations to obtain, review and certify the mortgage notes underlying the securitizations. While the Third-Party Claimants allege that Ally Bank also breached its obligation to notify them of breaches of representations and warranties in the loan purchase agreements, Ally Bank was not required to look for breaches, only report them if it learned of them. There is no evidence that Ally Bank had actual knowledge of any breaches of representations and warranties by ResCap. Accordingly, I ascribe no settlement value to this claim.

With respect to the aiding and abetting claims, controlling New York law requires (1) the existence of an underlying fraud, (2) actual knowledge of the fraud, and (3) substantial assistance in committing the fraud. Even assuming a fraud by ResCap (which the Examiner does not), the Third-Party Claimants have not identified any evidence showing actual knowledge of the fraud by Ally Bank, although discovery has been limited and Ally Bank and ResCap were closely connected, with overlapping leadership and working cooperation between personnel. There is evidence that Ally Bank's financing activities provided "substantial assistance" to ResCap since Ally Bank was created to serve as a funding conduit for ResCap's securitization activity by providing loan originations. Given the lack of evidence of actual knowledge of the underlying fraud, albeit with limited discovery, this claim has minimal settlement value.

Moreover, it is unlikely that Ally Bank will be deemed to be a successor to the liability of Old GMAC Bank, so even if Ally Bank it is found liable, that liability would be limited to securitizations containing loans sold by Ally Bank after the 2006 Bank Restructuring, further reducing the already tenuous settlement value of the claims.

Under these circumstances, I conclude that these claims are not material and have only nominal settlement value.

### 4. Unsecured Noteholder Causes Of Action

#### *a. Tortious Interference Under 2005 Indenture*

**Examiner's Report References:**

Section I.H.4.a pages I-42 to I-43

Section VIII.C.5.a pages VIII-163 to VIII-190

**Description:**

Whether AFI tortiously interfered with the 2005 Indenture by causing ResCap to transfer all or substantially all of its assets in violation of the 2005 Indenture.

**Background:**

In the 2005 Indenture, ResCap covenanted not to transfer "all or substantially all" of its assets, with certain exceptions. The Unsecured Noteholders allege that AFI induced ResCap to breach this covenant by entering into a series of transactions in furtherance of a pre-arranged plan which resulted in the transfer of substantially all of ResCap's assets. Those transactions include ResCap's forgiveness of indirect and direct debts owed by certain subsidiaries, including GMAC Mortgage and RFC, and the 2009 Bank Transaction. Although none of the transactions would trigger the covenant when considered individually, the Unsecured Noteholders contend that the transactions should be aggregated for purposes of determining whether ResCap transferred substantially all of its assets.

**Examiner's Analysis and Conclusions:**

1. The Unsecured Noteholders would likely have standing to pursue this claim.

2. Although it is a close question, it is more likely than not that the transactions would not be aggregated.

3. Even if the transactions were aggregated, although it is a close question, a court would more likely find that the transactions did not result in a breach of the covenant.

4. Even if a court found a breach of the covenant, it is unlikely that a claim for tortious interference would prevail because the Examiner did not uncover any evidence that AFI intended to cause a breach and because AFI has an economic justification defense, as it acted to protect its own interests.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

This claim would be pursued by the Unsecured Noteholders at their own expense. Given the high hurdles found by the Examiner, the Unsecured Noteholders would likely be motivated to reach an early resolution of disputes in order to expedite distributions. All of the procedural hurdles that attend bankruptcy litigation would be present in this case including (i) the constitutional authority of a bankruptcy court to render a final judgment in a state law action, (ii) withdrawal of the reference, and (iii) demand for a jury trial. In addition, all litigation carries risk, uncertainty, and expense. As a result, it is highly likely that any settlement would reflect a substantial discount (30%) from the face value of the claim.

Before reaching the merits of their claim, the Unsecured Noteholders would first need standing to bring this claim. Although the Examiner concluded that the Unsecured Noteholders would have standing, he recognized standing as a serious threshold issue, which could be resolved against the Unsecured Noteholders, thereby creating additional risk and reducing the settlement value of the claim by 10%.

Once the merits are reached, the Examiner identified three hurdles that the Unsecured Noteholders would have to overcome to establish a claim of tortious interference: (1) whether to aggregate the challenged transactions; (2) whether the transactions, if aggregated, resulted in a transfer of substantially all of the assets in breach of the covenant; and (3) whether, if a breach were found, AFI intentionally procured the breach. The Unsecured Noteholders would have to win each of these issues to prevail on this claim.

First, under the leading *Sharon Steel*[37] case, whether to aggregate the challenged transactions is a fact-intensive inquiry dependent on whether the challenged liquidation was piecemeal or part of a preconceived plan. The Examiner found substantial facts indicating that the challenged transactions were not part of a preconceived plan. Accordingly, the Examiner concluded that it was more likely than not that the transactions would not be aggregated. The Examiner also concluded that the court would not apply the step-transaction doctrine advocated by the Unsecured Noteholders. AFI would no doubt litigate these issues thoroughly, raising the arguments and facts identified by the Examiner. Accordingly, the more-likely-than-not risk of not prevailing on this issue lowers the settlement value of the claim by 60%.

Second, even if the transactions were aggregated, the Unsecured Noteholders would have to show that the aggregated transactions resulted in the transfer of substantially all of ResCap's assets, resulting in a breach of the covenant. On a quantitative basis, the Examiner found that the transfers

[37] *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039 (2d Cir. 1982).

were approximately 50% of the book value of the operating assets and the total assets, which is most likely not sufficient to constitute a transfer of substantially all of ResCap's assets. On the other hand, on a fair market value basis, the transfers amounted to 34% of the total assets, but 100% of the operating assets. Because the quantitative analysis was unclear, the Examiner also conducted a qualitative analysis, and concluded it did not support the Unsecured Noteholders' claim. Therefore, while it is a close question, the Examiner concluded that it is more likely than not that the Unsecured Noteholders would not be able to establish this element. Again, AFI would litigate these issues thoroughly, using the points made by the Examiner. As a result, the substantial risk of not prevailing on this issue lowers the settlement value of the claim by another 60%.

Third, even if the aggregated transactions breached the covenant, the Unsecured Noteholders would have to show that AFI intentionally procured the breach without justification. However, the Examiner's Investigation did not uncover any evidence that AFI intended to cause such a breach. Moreover, the evidence reviewed by the Examiner showed that AFI's alleged interference was to protect its own economic interest in ResCap. As the Examiner notes, absent evidence of malice, fraud, or illegality, acting to protect an economic interest is a complete defense to the tortious interference claim. The Examiner found no evidence of malice, fraud, or illegality. The minimal likelihood that the Unsecured Noteholders would prevail on these issues reduces the settlement value of the claim by an additional 90%.

Because the likelihood of success is so low, any settlement offer from AFI would likely be a nuisance or cost of litigation settlement and therefore, not material.

#### *b. Claims Related To The 2006 Bank Restructuring*

**Examiner's Report References:**

Section I.H.4.b page I-43

Section VIII.C.5.b pages VIII-190 to VIII-201

**Description:**

Whether the Unsecured Noteholders have viable claims against AFI arising out of the 2006 Bank Restructuring.

**Background:**

The 2006 Bank Restructuring and potential estate claims against AFI are discussed in detail at Section E.5. The Examiner observed that the Unsecured Noteholders, as third-party beneficiaries, could have claims for breach of the 2005 Operating Agreement by AFI. The Examiner also considered whether misrepresentations or omissions by AFI to ResCap and its directors could give rise to fraud claims by the Unsecured Noteholders on the ground that the Unsecured Noteholders were harmed by ResCap's detrimental reliance. However, there is no claim here that misrepresentations or omissions were made directly to the Unsecured Noteholders, or that they relied on any such misrepresentations or omissions.

**Examiner's Analysis and Conclusions:**

1. The Unsecured Noteholders would have standing to assert these claims.

2. A breach of contract claim would likely be barred by the statute of limitations.

3. While a close question, it is more likely than not that a fraud claim against AFI would not be barred by the statute of limitations.

4. A fraud claim by the Unsecured Noteholders against AFI related to the 2006 Bank Restructuring would not prevail under Minnesota law because Minnesota law does not recognize claims based on reliance by third parties.

5. Although it is a close question, it is more likely than not that a fraud claim by the Unsecured Noteholders against AFI related to the 2006 Bank Restructuring would not succeed under New York law because it is not clear if New York would recognize a claim based on third-party reliance and it is not clear that the Unsecured Noteholders could make out such a claim.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I largely agree with the Examiner's analysis and conclusions, subject to two qualifications.

First, the Examiner concluded that the Unsecured Noteholders would have standing for two reasons: (1) they suffered a particularized injury under the 2005 Operating Agreement; (2) because *Wagoner* and the *in pari delicto* defense would bar the estate from bringing these claims (see Section E.5), the Unsecured Noteholders would have standing. I find only the second of these persuasive as to the fraud claim, which is the only possibly viable claim.

The case law cited by the Examiner makes clear that for a creditor to have standing to bring a claim against third parties outside of the bankruptcy proceeding, it must be suing for separate and distinct injuries it suffered directly, not for injuries to the debtor or the estate that harmed all creditors.[38] Where, however, the injury alleged is not particularized to the plaintiff, but rather is a generalized injury to the debtor that affects all creditors, then the creditor does not have standing.[39] The Examiner stated that a court would more likely than not find that the Unsecured Noteholders could allege a particularized injury here because of the Unsecured Noteholders' rights under the 2005 Operating Agreement, *i.e.*, because they are third-party beneficiaries of that agreement.[40]

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[38] *See Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1101 (2d Cir. 1988); *Fisher v. Apostolou,* 155 F.3d 876, 881 (7th Cir. 1998).

[39] *See St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc.*, 884 F.2d 688, 701 & 705-06 (2d Cir. 1989); *Securities Investor Protection Corp. v. Bernanrd L. Madoff Investment Securities, LLC (In re Madoff),* 429 B.R. 423, 431 (Bankr. S.D.N.Y. 2010).

[40] Examiner's Report, VIII-191, fn. 1034.

While that may create a particularized injury as to the breach of contract claim,[41] the Unsecured Noteholders' contract claims are barred by the statute of limitations and do not add value, as discussed below.

The key question, therefore, is whether there is any particularized injury with regard to the fraud claim which would confer standing on the Unsecured Noteholders. The alleged fraud claim is not based on an allegation that AFI made a misrepresentation or a material omission to the Unsecured Noteholders. Nor is there any allegation that the Unsecured Noteholders relied in any way on any such misrepresentation or omission. Rather, this fraud claim is based on reliance by ResCap. The injury allegedly resulting from ResCap's reliance is the loss in value to ResCap, because ResCap did not receive fair value in exchange for the 2006 Bank Restructuring, thereby reducing the fund from which ResCap's debts could be paid. Therefore, the injury is not a direct and particularized injury to the Unsecured Noteholders, but rather an injury to ResCap and a generalized injury to all the creditors, so that the Unsecured Noteholders would likely not have standing.[42]

I find the alternative ground for standing to bring a fraud claim more persuasive. As discussed in Section E.5, the Examiner found that, although it is a close question, it is more likely than not that the estate could not bring a fraud claim because of the *Wagoner* rule and the *in pari delicto* defense. If those defenses applied, then the estate could not bring the claim, but the Unsecured Noteholders could.[43] Thus, the Unsecured Noteholders would have standing only to the extent that the estate were barred from bringing the claim.

Second, the Examiner did not expressly consider who would benefit from a recovery on these claims. As discussed above, the alleged fraud claim is not based on an allegation that AFI made a misrepresentation or a material omission to the Unsecured Noteholders, or that there was any reliance by the Unsecured Noteholders. Again, the harm was that ResCap did not receive fair value in the 2006 Bank Restructuring. This is an injury to all creditors, not a particularized injury to the Unsecured Noteholders. Moreover, the only reason I believe that the Unsecured Noteholders are likely to have standing to pursue this claim is because, although it is a close question, the estate is likely barred from bringing it under *Wagoner*. Therefore, if there were a recovery on the fraud claim, I believe that the recovery would inure to the benefit of the estate and all its creditors, not just the Unsecured Noteholders. As a result, the claims of the Unsecured Noteholders are duplicative of the estate's claims regarding the 2006 Bank Restructuring, which I consider at length in Section 5.E, above. Because these claims are duplicative of the estate's claims, and because the benefit would inure to the estate regardless of whether it is brought by the estate or the Unsecured Noteholders, I only analyze here whether the alternative claims of the Unsecured Noteholders would add any value to the estate's claims.

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[41] Even as to the breach of contract claim, it is worth noting that the Unsecured Noteholders' remedies as third-party beneficiaries are limited to specific enforcement of the provisions of the 2005 Operating Agreement. Examiner's Report, III-21-22.

[42] *See St. Paul, supra*, 884 F.2d at 705-06 (holding that challenge to actions that allegedly reduced the fund from which debtor's debts would be paid was not a particularized harm allowing a claim to be brought outside of bankruptcy).

[43] *See In re The Bennett Funding Group, Inc.*, 336 F.3d 94, 102 (2d Cir. 2003).

**Settlement Considerations:**

As to the breach of contract claim, the Examiner concluded that the Unsecured Noteholders' breach of contract claims would be barred by the statutes of limitation. Because this would be a complete bar to the claim and easily established by AFI, the breach of contract claims by the Unsecured Noteholders do not add any settlement value to the estate's claims.

The third-party fraud claim faces a number of difficult hurdles. As a threshold matter, the Examiner considered whether such a claim was viable under both Minnesota law and New York law. The Examiner first concluded that it was not viable under Minnesota law because Minnesota does not recognize a fraud claim based on reliance by a third party. He also concluded that if the claim were brought in New York, the court would apply Minnesota law, which would bar the claim. Thus, if the fraud claim were brought in New York, it would fail and does not add any settlement value to the estate's claims.

The Examiner considered the possibility that New York law would apply if the Unsecured Noteholders could bring the fraud claim in Minnesota. For the reasons discussed above and in *St. Paul*,[44] I believe that it is unlikely that the court would allow the claim to be brought in Minnesota outside of the bankruptcy. This severely limits any settlement value to the claim. But even if the Unsecured Noteholders were allowed to bring this claim in Minnesota, the Examiner found that, although it is a close question, the fraud claim would more likely than not fail. The Examiner concluded that if the fraud claim were brought in Minnesota, New York law would apply. The Examiner found that it was unclear whether New York law would recognize a fraud claim based on reliance by a third party; the law supporting that theory had a "somewhat checkered" history and has been rejected by the Second Circuit. Moreover, even if the Unsecured Noteholders could get over that hurdle, they would still have to establish the remaining elements of a fraud claim. Together these factors render the third-party fraud claim of minimal settlement value, even if it were allowed to be brought outside the bankruptcy.

The Examiner also considered whether the statute of limitations would bar a fraud claim. Although the Examiner found it a close question, he concluded it was more likely than not that the statute of limitations would not bar the claim. Nonetheless, because this is a significant risk, and would completely bar the claim if AFI prevailed, it further detracts from the settlement value.

To gain a recovery on their third-party fraud claim, the Unsecured Noteholders would have to establish standing, obtain permission to bring the claim outside the bankruptcy, have New York law apply, have the court apply a questionable interpretation of New York law, establish the elements of a fraud claim, and defeat a statute of limitations argument. In light of these substantial hurdles, I do not believe that the third-party fraud claim by the Unsecured Noteholders adds materially to the settlement value of the estate's claims regarding the 2006 Bank Restructuring.

[44] 884 F.2d 688, 705-06 (2d Cir. 1989).

### 5. Junior Secured Noteholder Causes Of Action

**Examiner's Report References:**

Section I.H.5 pages I-43 to I-44

Section V.E pages V-350 to V-383

**Description:**

Whether ResCap and AFI breached the Secured Revolver Loan Agreement, the Junior Secured Notes Indenture, the Senior Secured Notes Indenture, or the Intercreditor Agreement by either: (1) entering into the Line of Credit Facilities; or (2) releasing the liens on certain assets securing the Secured Revolver Facility, the Junior Secured Notes, and the Senior Secured Notes, and having such assets secure the Line of Credit Facilities.

**Background:**

Due to persistent liquidity shortages, ResCap entered into a series of financing transactions between 2007 and 2010. In particular, in late 2008, facing liquidity shortfalls, two ResCap affiliates (PATI and RAHI) entered into the Initial Line of Credit Facility, with AFI as lender in the amount of $430 million. ResCap guaranteed the Initial Line of Credit Facility on a full recourse basis. Although ResCap had attempted to find unaffiliated lenders for this transaction, it was unable to do so and AFI was the lender of last resort. In order to have collateral available to secure the Initial Line of Credit Facility, collateral had to be released from other credit facilities, *i.e.*, the Secured Revolver Facility, the Senior Secured Notes, and the Junior Secured Notes. In a typical case, this would have been an impediment to a new line of credit.

In June 2009, PATI and RAHI entered into a Second Line of Credit Facility with AFI for an additional $370 million on substantially similar terms to the Initial Line of Credit Facility. Goldin Associates rendered a fairness opinion in connection with the Second Line of Credit Facility, finding it fair to ResCap and its creditors (other than AFI). In late 2009, the amount available under the Line of Credit Facilities was increased, and Goldin Associates again issued a favorable fairness opinion. Finally, in late 2009, the Line of Credit Facilities were combined into one agreement and the Secured Revolver Loan Agreement was amended and restated. Under the Amended and Restated Line of Credit Facility, RFC and GMAC Mortgage replaced PATI and RAHI as the borrowers.

**Examiner's Analysis and Conclusions:**

The Examiner concluded that the evidence does not support the allegations made by the Ad Hoc Group of Junior Secured Noteholders that either: (1) entering into the Line of Credit Facilities; or (2) releasing the liens on certain assets securing the Secured Revolver Facility, the Junior Secured Notes, and the Senior Secured Notes, and having such assets secure the Line of Credit Facilities, violated the terms of the Secured Revolver Loan Agreement, the Junior Secured Notes Indenture, the Senior Secured Notes Indenture, or the Intercreditor Agreement.

**Review of Examiner's Analysis and Conclusion:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions.

**Settlement Considerations:**

The Examiner found that the evidence does not support the allegations of breach of the Secured Revolver Loan Agreement, the Junior Secured Notes Indenture, the Senior Secured Notes Indenture, or the Intercreditor Agreement. Accordingly, this claim is not assigned any settlement value.

## I. OPINION REGARDING CONSIDERATION FOR RELEASES AND CONCLUSION REGARDING ALLOCATION OF SETTLEMENT FUND

**Examiner's Report:**

Section I.I pages I-44

Section IX pages IX-1 to IX-28

**Description:**

In order to provide guidance to the parties, the Examiner reviewed the terminated AFI Settlement and Plan Sponsor Agreement to determine whether the Debtor Release and Third-Party Release would have been warranted based upon AFI's contributions.

A new settlement has been reached that is embodied in a Plan Support Agreement dated May 13, 2013 and provides for AFI to contribute $2.1 billion in exchange for a broad release in a confirmed plan of reorganization. I opine on the reasonable allocation of that fund among the causes of action that have material settlement value.

**Background:**

The terminated AFI Settlement and Plan Sponsor Agreement proposed to settle all Estate Causes of Action and Third Party Claims against the AFI Released Parties in exchange for a cash contribution from AFI to the Debtor of $750 million plus other non-cash contributions. No party in interest or creditor group, other than the RMBS Institutional Investors, supported the terminated AFI Settlement and Plan Support Agreement. Ultimately, the Debtor withdrew from the AFI Settlement and Plan Sponsor Agreement.

The Bankruptcy Court directed the parties to mediation before the Hon. James M. Peck, U.S. Bankruptcy Judge. When the Examiner was ready to release his report, the parties asked that it be delayed to afford them the opportunity to complete mediation. Following extensive marathon mediation sessions, on May 13, 2013 a Plan Support Agreement was reached among the Debtors, AFI, the Creditors Committee and certain Consenting Claimants. Under the Plan Support Agreement, AFI is to contribute $2.1 billion to the Debtors in exchange for a broad release of the

AFI Released Parties upon confirmation of a plan of reorganization. On June 26, 2013, the Bankruptcy Court granted the Debtors' motion for approval to enter into the Plan Support Agreement.

**Examiner's Analysis and Conclusions:**

1. A court would consider the *Iridium* factors in deciding whether to approve the terminated AFI Settlement and Plan Sponsor Agreement.

2. Creditor support, a major consideration in the approval of settlements, was lacking.

3. It is extremely difficult to confirm a plan with a third-party release absent consent of substantially all of the third party claimants.

4. The evidence does not support ascribing significant value to AFI's non-cash contributions under the terminated AFI Settlement and Plan Sponsor Agreement.

5. The cash contribution of $750 million and the non-cash contributions from AFI were inadequate to support a release of the Estate Causes of Action, let alone the Third Party Claims.

6. It is unlikely that a court would have approved the terminated AFI Settlement and Plan Sponsor Agreement.

**Review of Examiner's Analysis and Conclusions:**

After reviewing the facts and legal conclusions set forth in the Examiner's Report, I agree with the Examiner's analysis and conclusions. My opinion on the reasonable settlement value of each of the Estate Causes of Action, when added together, totals $1,920.0 million and is consistent with the Examiner's conclusion that $750 million was insufficient consideration to support releases of the Estate Causes of Action, let alone the Third Party Claims.

**Conclusion:**

In the following chart, I have compiled my assessment of the reasonable settlement value of each of the Estate Causes of Action and the Third Party Claims. In my opinion, the reasonable settlement value of Estate Causes of Action is $1,920.0 million and the reasonable settlement value of the Third Party Claims is $480 million. Although under the absolute priority rule, I could have allocated the settlement first to secured claims such as the JSNs, and second to unsecured claims, instead I made allocations pro rata based on the reasonable value of each of the claims. Because in determining the reasonable settlement amount of each claim I have taken into account the merits of the claim, the motivations of the parties to settle, the time and expenses associated with litigation and all of the other relevant factors relative to a reasonable settlement value, there is no reason to apply these factors again, and therefore, I have allocated the settlement fund of $2.1 billion among the reasonable settlement values for each claim on a *pro rata* basis.

The $2.1 billion settlement fund is smaller than my estimate of the reasonable settlement value of the claims done on a claim-by-claim basis, and it may be that in this instance the sum of the parts is greater than the whole. Also, the magnitude of the settlement fund that AFI has agreed to contribute, *i.e.*, $2.1 billion, and the opportunity to resolve numerous claims at one time in the context of a bankruptcy, may warrant a discount. Overall I feel that my assessment of the reasonable settlement value of each individual claim, when combined and compared with the settlement fund of $2.1 billion, is appropriate. I have allocated the settlement fund of $2.1 billion among the reasonable settlement values.

| **Claims** | **Potential Damages** (***in millions)*** | **Reasonable Settlement Amount** (***in millions)***[45] | **Percentage of Potential Damages** | **Allocation from $2.1 billion AFI Settlement Fund** (***in millions)*** | **Percentage of Potential Damages** |
|---|---|---|---|---|---|
| ***ESTATE CAUSES OF ACTION*** | | | | | |
| Breach of Contract for Misallocation of Net Revenues on Loans brokered by GMAC | $520.5 | **$268.2** | **51.5%** | **$234.6** | **45.1%** |
| Breach of Contract for Failure To Pay Value of Purchased MSRs | $1,725.0 | **$387.2** | **22.4%** | **$338.8** | **19.6%** |
| Breach of Representations and Warranties under 2001 and 2006 MMLPSAs | No Amount Given | | | | |
| Breach of Contract Claims relating to Pipeline Swap | No Amount Given | | | | |

[45] Zeros are omitted for any settlement value that does not meet my threshold for materiality ($21 million).

| **Claims** | **Potential Damages** ***(in millions)*** | **Reasonable Settlement Amount** ***(in millions)***[45] | **Percentage of Potential Damages** | **Allocation from $2.1 billion AFI Settlement Fund** ***(in millions)*** | **Percentage of Potential Damages** |
|---|---|---|---|---|---|
| Breach of 2005 Operating Agreement or 2006 Amended Operating Agreement in connection with MMLPSA, Pipeline Swap or MSR Swap | No Amount Given | | | | |
| Preferential Transfer relating to DOJ/AG Consent Order | $109.6 | **$60.0** | **54.7%** | **$52.5** | **47.9%** |
| Preferential Transfer relating to 2012 Letter Agreement and A&R Servicing Agreement | $48.4 | **$32.0** | **66.1%** | **$28.0** | **57.9%** |
| Unauthorized Post-petition Transfer relating to Indemnification Obligations under A&R Servicing Agreement | $12.9 | | | | |
| Breach of contract regarding the First 2009 Tax Allocation Agreement | $1,770.0 | **$713.7** | **40.3%** | **$624.5** | **35.3%** |
| Constructive Fraudulent Transfer relating to 2nd 2009 Tax Allocation Agreement | $50.0 | | | | |
| Contract Claim re 2005 Tax Allocation Agreement | $15.1 | | | | |

| **Claims** | **Potential Damages** ***(in millions)*** | **Reasonable Settlement Amount** ***(in millions)***[45] | **Percentage of Potential Damages** | **Allocation from $2.1 billion AFI Settlement Fund** ***(in millions)*** | **Percentage of Potential Damages** |
|---|---|---|---|---|---|
| Minnesota Insider Preference Claims | $566.0 | **$328.9** | **58.1%** | **$287.8** | **50.8%** |
| Fraud related to 2006 Bank Restructuring | $569.0 | **$130.0** | **22.8%** | **$113.8** | **20.0%** |
| Tortious Interference with Contract relating to 2006 Bank Restructuring | No Amount Given | | | | |
| Fraudulent Transfer in connection with Ally Bank Transactions | No Amount Given | | | | |
| Miscellaneous Breach of Fiduciary Duty Claims against ResCap's D&Os | No Amount Given | | | | |
| Aiding and Abetting Breach of Fiduciary Duty against AFI (other than re 2006 Restructuring) | No Amount Given | | | | |
| Single Entity theories of liability regarding AFI and ResCap and/or affiliates, including Piercing Corp Veil and Substantive Consolidation | No Amount Given | | | | |
| Debt Re-characterization | No Amount Given | | | | |
| Equitable Subordination and Disallowance | No Amount Given | | | | |

| **Claims** | **Potential Damages** ***(in millions)*** | **Reasonable Settlement Amount** ***(in millions)***[45] | **Percentage of Potential Damages** | **Allocation from $2.1 billion AFI Settlement Fund** ***(in millions)*** | **Percentage of Potential Damages** |
|---|---|---|---|---|---|
| Constructive Trust | No Amount Given | | | | |
| Constructive Fraudulent Transfer Against Cerberus relating to 2008 Model Home Sale | $30.0 | | | | |
| Fraudulent Transfer relating to Prepetition Asset Sales (other than 2008 Model Home Sale) | No Amount Given | | | | |
| Financing Affiliate Transactions | | | | | |
| ***TOTAL*** | | ***$1,920.0*** | | ***$1,680.0*** | |
| ***THIRD PARTY CAUSES OF ACTION*** | | | | | |
| Third Party Claims against AFI | | | | | |
| a. RMBS Claims, including veil-piercing, control person liability and aiding and abetting fraud | $20,000.0 | **$480.0** | **2.4%** | **$420.0** | **2.1%** |

| **Claims** | **Potential Damages** ***(in millions)*** | **Reasonable Settlement Amount** ***(in millions)***[45] | **Percentage of Potential Damages** | **Allocation from $2.1 billion AFI Settlement Fund** ***(in millions)*** | **Percentage of Potential Damages** |
|---|---|---|---|---|---|
| b. Fraudulent Transfer Claims for Payments of $200 M and 25.5 M | | | | | |
| Third Party Claims against Ally Securities, including Fed and State Securities law, common law fraud, aiding and abetting fraud, and negligent misrepresentation | | | | | |
| Third Party Claims against Ally Bank | | | | | |
| Unsecured Noteholder Causes of Action, including tortious interference under 2005 Indenture and claims relating to the 2006 Bank Restructuring | | | | | |
| Junior Noteholder Causes of Action | | | | | |
| ***Total Third Party Claims*** | | **$480.0** | | **$420.0** | |
| ***GRAND TOTAL*** | | **$2,400.0** | | **$2,100.0** | |

After reviewing each of the causes of action identified in the Examiner's Report, in my opinion the reasonable settlement value of the Estate Causes of Action is $1,920.0 million and the reasonable settlement value of the Third Party Claims is $480 million for a total reasonable settlement value of all claims and causes of action of $2,400.0 million. In my opinion the settlement fund of $2.1 billion to be paid by AFI should be allocated to the reasonable settlement value of each claim *pro rata.*

October 18, 2013

Raymond T. Lyons

**EXHIBIT A**

**Documents Reviewed**

1. ***Report of Arthur J. Gonzales, as Examiner, released June 26, 2013***

2. ***Documents***[1]

(a) Implemented 2005 Tax Allocation Agreement
(b) Other 2005 Tax Allocation Agreement
(c) 2006 Tax Allocation Agreement
(d) First 2009 Tax Allocation Agreement
(e) Second 2009 Tax Allocation Agreement
(f) 2001 MMLPSA
(g) March 2008 Pipeline Swap Schedule
(h) July 2008 Pipeline Swap Schedule
(i) Amended and Restated Schedule to the 2002 ISDA Master Agreement dated April 1, 2011
(j) 2006 MMPLSA
(k) 2007 MMPLSA
(l) 2005 Operating Agreement
(m) 2008 MMPLSA
(n) 2010 Net Funding Schedule
(o) April 2011 MSR Swap Confirmation
(p) MSR Swap
(q) 2006 Amended Operating Agreement
(r) November 20, 2008 Broker Agreement
(s) First Priority Security Agreement
(t) Junior Notes Indenture
(u) Senior Secured Notes Indenture
(v) Intercreditor Agreement
(w) Initial Line of Credit Agreement
(x) Second Line of Credit Agreement
(y) A&R Line of Credit Agreement
(z) Ally Accounting Policy 3330 – Accounting for Income Taxes, effecrtive October 1, 2010
(aa) FMV Schedule
(bb) Secured Revolver Loan Agreement

[1] Unless otherwise noted with an asterisk, the documents listed in this Exhibit are defined in the Appendix to the Examiner's Report.

**3.** ***Reports Regarding Securities Settlements***

a. ***The D&O Diary*** – Subprime and Credit Crisis-Related Lawsuits, Settlements, Dismissals and Denials – April 30, 2013 (Kevin LaCroix)

b. ***NERA Economic Consulting*** – Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review – January 29, 2013 (Dr. Renzo Comoli, Sukaina Klein, Dr. Roald I. Miller and Svetlana Starykh)

c. ***Cornerstone Research (Economic and financial Consulting and Expert Testimony)*** – Securities Class Action Settlements - 2011 Review and Analysis

**4.** ***Related Mortgage Backed Securities Settlements***

*a.* ***In re Residential Capital, LLC, et al.*** (U.S. Bankruptcy Court, Southern District of New York, Case No. 12-12020 MG)

(1) Reply Declaration of Jeffrey A. Lipps (Docket No. 2805)

(2) Direct Testimony of Jeffrey A. Lipps (Docket No. 4433)

b. ***In re Citigroup Inc. Securities Litigation*****.** (U.S. District Court, Southern District of New York, Case No. 07:cv-09901)

(1) Order Preliminarily Approving Proposed Settlement and Providing for Notice dated August 29, 2012 (Docket No. 156)

(2) Final Judgment and Order of Dismissal With Prejudice dated August 1, 2013 (Docket No. 276); *also see b(1) below*

c. ***In re Citigroup Inc. Securities Litigation*****.** (U.S. District Court, Southern District of New York, Case No. 09 MD 2070)

(1) Opinion dated August 1, 2013 (Docket No. 275)

d. ***In re Citigroup Inc. Bond Litigation***. (U.S. District Court, Southern District of New York, Case No. 08-Civ. 9522)

(1) Final Opinion and Order dated August 20, 2013 (Docket No. 180)

e. ***Maine State Retirement System, et al. v. Countrywide Financial Corporation*****.** (U.S. District Court, Central District of California, Case No. 10-cv-00302); ***David H. Luther, et al. v. Countrywide Financial Corporation.*** (U.S. District Court, Central District of California, Case No. 12-cv-05125); ***Western Conference of Teamsters Pension Trust Fund, et al. v. Countrywide Financial***

***Corporation, et al.*** (U.S. District Court, Central District of California, Case No. 12-cv-05122)

(1) Order Granting Preliminary Approval to Settlement and Directing Dissemination of Notice to the Class

(2) Notice of Pendency and Proposed Settlement of Class Actions, Fairness Hearing and Motion for an Award of Attorneys' Fees and Litigation Expenses

f. ***George Pappas, et al. and Countrywide Financial Corp., et al. v. The Bank of America 401(k) Plan for Legacy Companies as a Successor to the Countrywide Financial Corporation 401(k) Savings and Investment Plan.*** (United States Court of Appeals for the Ninth Circuit, Case No. 11-55570)

(1) Mandate dated June 20, 2013 (Docket No. 1104)

g. ***Countrywide Financial Corporation Securities Litigation*** (U.S. District Court, Central District of California, Western Division Lead, Case No. CV 07-05295)

(1) Notice of Pendency and Proposed Settlement of Class Action and Fairness Hearing

h. ***In re Washington Mutual Mortgage Backed Securities Litigation.*** (U.S. District Court, Western District of Washington, Case No. 09-cv-00037)

i. ***In re Washington Mutual, Inc. Securities Litigation***. (US District Court for the Western District of Washington at Seattle, Case No. 2:08-md-1919 MJP, Lead Case No. C08-387-MJP)

(1) Stipulation and Agreement of Settlement with Individual Officer and Director Defendants and with Washington Mutual, Inc. (Exhibit 1 to Docket No. 308)

(2) Stipulation and Agreement of Settlement with the Underwriter Defendants (Exhibit 2 to Docket No. 308)

(3) Stipulation and Agreement of Settlement with Defendant Deloitte & Touche LLP (Exhibit 3 to Docket No. 308)

(4) [Proposed] Order Preliminarily Approving Proposed Settlements and Providing for Notice (Exhibit 3 to Docket No. 308)

*j.* ***United States of America, et al. v. Bank of America Corp., et al.*** (United States District Court for the District of Columbia, Case No. 12-0361)

(1) Consent Judgment

(2) Earmark and Indemnification Agreement

*k.* ***Ally Financial Inc., Residential Capital, LLC and GMAC Mortgage LLC*** (United States of America before the Board of Governors of the Federal Reserve System, Washington, D.C., Docket No. 12-006 CMP-HC & 12-006 CMP DEO)

(1) Order of Assessment of a Civil Money Penalty Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended

(2) January 30, 2012 letter re: Terms of Support Relating to Possible DOJ/State Attorneys' General Settlement

*l.* ***Ally Financial Bank Inc., Ally Bank, Residential Capital, LLC and GMAC Mortgage, LLC*** (United States of America before the Board of Governors of the Federal Reserve System, Washington, D.C. and Federal Deposit Insurance Corporation, Washington, D.C., Docket No. 11-020-B-HC and 11-020-B-DEO)

(1) Consent Order

# EXHIBIT 2

UNITED STATES BANKRUPTCY DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In Re:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors,

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(Caption Continued on following page.)

VIDEOTAPED DEPOSITION OF
RAYMOND T. LYONS
MONDAY, NOVEMBER 11, 2013
10:00 a.m.

REPORTED BY:
ADRIENNE MIGNANO, RPR
JOB NUMBER: 67903

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RESIDENTIAL CAPTIAL, LLC, et al.,

Plaintiffs,

Chapter
Case No. 12-12020(MG)
Jointly Administered

vs.

UMB BANK, N.A., as successor indenture trustee under that certain indenture, dated as of June 6, 2008; and WELLS FARGO BANK, N.A., third priority collateral agent under that certain Amended and Restated Third Priority Pledge and Security Agreement and Irrevocable Proxy, dated as of December 30, 2009,

Defendants.
Adversary Proceeding
No. 13-01343(MG)

---

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, on behalf of the estates of the Debtors,

Plaintiff,

vs.

UMB BANK, N.A., as successor indenture trustee under that certain indenture, dated as of June 6, 2008; and WELLS FARGO BANK, N.A., third priority collateral agent and collateral control agent under that certain Amended and Restated Third Priority Pledge and Security Agreemeent and Irrevocable Proxy, dated as of December 30, 2009,

Defendants.
Adversary Proceeding
No. 13-01277(MG)

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November 11, 2013

10:00 a.m.

Videotaped deposition of RAYMOND T. LYONS, held at the offices of MILBANK TWEED HADLEY & McCLOY, One Chase Manhattan Plaza, New York, New York pursuant to Notice, before Adrienne M. Mignano, a Notary Public of the State of New York.

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(Telephonically)

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties herein, that filing and sealing of the transcript be waived, and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be sworn to and signed before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court.

THE VIDEOGRAPHER: Good morning. This marks the start of tape labeled number one of the videotaped deposition of Raymond T. Lyons in the matter of In Re: Residential Capital LLC, et al., in the United States Bankruptcy Court, Southern District of New York.

The deposition today is being held in the offices of Milbank Tweed, at one Chase Manhattan Plaza in New York, New York, on November 11, 2013, at approximately 10:16 a.m.

My name is Kevin Marth. I'm the legal videographer today representing TSG Reporting. Our court reporter today is Ms. Adrienne Mignano also representing TSG.

Counsel's appearances will be noted on the stenographic record. Shall we get the attorneys on the phone.

MR. COHEN: Will counsel on the phone please identify themselves for

the record.

MR. WYNNE: Richard Wynne of Jones Day, for FGIC.

MR. HAO: William Hao, Alston & Byrd for Wells Fargo Bank, as Trustee.

MR. KRUGER: Lewis Kruger, Chief Restructuring Officer of the Debtors.

MR. ADAMS: Good morning. Jason Adams, Kelly Drye, on behalf of UNB.

MR. OPOLSKY: Jeremy Opolsky, Cleary Gottlieb, on behalf of Wilmington Trust.

MR. SERVAIS: This is Casey Servais of Cadwalader, representing MBIA.

MR. COHEN: Anyone else?

(No verbal response)

THE VIDEOGRAPHER: Will the court reporter please swear in the witness and you may proceed.

R-A-Y-M-O-N-D T. L-Y-O-N-S, called as a witness, having been duly sworn by a Notary Public, was examined and testified as follows:

EXAMINATION BY

MR. SIMON:

Q Good morning, Judge Lyons.

A Good morning.

Q Have you been deposed before?

A Yes, I have.

Q And I take it --

A Can I ask you to not use the title judge. I appreciate the respect, but I'm uncomfortable with it in the circumstance.

Q I will be happy to accommodate you. I think you have earned it, but I'm happy to accommodate you.

A Mr. Lyons is fine in this circumstance.

Q With that then, Mr. Lyons, I take it you're familiar with the rules of a deposition?

A Yes.

Q Can you tell me how you came to be retained as an expert in this matter?

A Yes. I received a call from Jerry Uzzi of Milbank.

Q And when was that?

A September 18, 2013.

Q And what did he -- can you tell me what you recall of that phone conversation?

A What I recall of it, yes.

Mr. Uzzi asked me if I would be available to serve as an expert witness in a matter. Told me there was a very tight deadline that had to be met, because -- and the expert report was due to be exchanged on October 18, 2013; and generally described the nature of the assignment. And the assignment was described as coming up with a -- opining as to the reasonable settlement value of the causes of action that were identified in the examiner report of Arthur Gonzales, and then allocating the 2.1 billion dollar settlement fund that AFI proposed to contribute among the claims.

Q Was there anything else that you recall being asked to opine on in that first conversation?

A Not that I recall.

Q Okay.

And when you were asked to give an opinion about the examiner's report, were you familiar with the fact that Judge Gonzales had issued an examiner's report in the bankruptcy case?

A Yes, I was aware with that.

Q And you're familiar with the ResCap bankruptcy?

A Generally yes, I knew it was an ongoing bankruptcy case.

Q Okay.

And how did you become familiar with the bankruptcy and the fact that Judge Gonzales had issued a report?

A Just through general press, Wall Street Journal, New York Times, and also Law360.

Q And had you read the examiner's report either in whole or in part prior to that conversation?

A Yes.

Q Tell me what you recall. Did

you read all of it prior to the conversation?

A No.

Q What parts do you recall reading prior to that call?

A I recall reading, not reading thoroughly, but skimming part one, the summary.

Q Anything else?

A That's all.

Q Do you recall whether you formed any impressions after reading Part 1, the summary, prior to that call?

A Yes.

Q Can you tell me what they were?

A Sure.

MR. COHEN: Let's get whoever joined identify themselves for the record.

MR. HAMERMAN: Natan Hamerman from Kraemer Levin.

A My impression was that this was a mammoth undertaking that Arthur Gonzales had undertaken, and that the report that

he delivered seemed to be comprehensive, at least the summary that I read, prior to September 18th.

Q Do you recall reading in Part I prior to your retention in this matter a summary of certain of the estate claims that the examiner evaluated?

A I can't say that I recall that right now, but I'm sure I did.

Q And with respect to third-party claims, do you generally recall that there was an evaluation being conducted of third-party claims?

A Yes.

Q Okay.

As you sit here today, do you have any recollection of any impressions that you formed with respect to any of the particular claims that were set forth in the summary in Part 1?

A No, I don't think so.

Q Following that call, did you agree to serve as an expert in this case?

A Yes, I did.

Q And did you prepare a report in connection with your services as an expert?

A Yes.

Q Did you write the report yourself?

A I wrote a good deal of it, but I did not do it alone.

MR. SIMON: I'm going to ask the court reporter to mark as Lyons' Exhibit 1 a document entitled Expert Report of Raymond T. Lyons, Esquire.

(Expert Report of Raymond T. Lyons, Esquire, was marked as Lyons Exhibit 1 for identification, as of this date.)

BY MR. SIMON:

Q Mr. Lyons, is this the report that you prepared in connection with your retention as an expert in this matter?

A It appears to be, yes.

Q You said you did not write all of it yourself. Can you tell me what percentage of the report you personally

authored?

A No, I would just be guessing if I did that.

Q Can you generally tell me is it greater than 50 percent, less than 50 percent?

A I really can't tell you. I can't estimate whether it is more or less than 50 percent. I would say, if I had to guess, probably less than 50 percent of the words that are in this were originally put in my me.

Q So to the extent that the words were not put in by you, who would have prepared the remainder of the report that was not personally prepared by you?

A There was a team of my colleagues that worked with me to prepare the report.

Q How much time would you estimate that you spent in preparation of the report?

A I think I actually looked at the billing records, and I think I put in

about 200 hours through September and October.

Q Well, I'll represent it was 206 on your time sheet.

My question is with respect to the preparation of the report versus other work you may have done in connection with your retention as an expert, the actual drafting of the report, can you tell me what portion of time, how many hours roughly of the 206 you think were allocated to preparing your report?

MR. COHEN: Object to the form.

Give me a minute before you answer so I'll have an opportunity to object.

THE WITNESS: Certainly.

MR. SIMON: So let me rephrase.

Q Of the 206 hours, do you have a sense or an estimate of how many were accounted to drafting the report, personally drafting?

MR. COHEN: Object to the form.

A I can only give you my sense. I

spent a lot of time reading, reading the expert's report and so that took a lot of time. I did spend a lot of time myself in writing and editing. So between the two, I would say reading probably took up the bulk of the time, more than 50 percent, writing slightly less than 50 percent. And, of course, discussing with my colleagues.

Q Okay.

Are you aware of any errors in the report as you sit here today?

A I am not aware of any, but I wouldn't doubt that there are. It is a human endeavor.

Q When you say you "wouldn't doubt that they are", apart from the fact that it is a human endeavor, are there any other reasons why you wouldn't doubt that there are errors in the report?

A No.

Q Can you turn to Section A1 of the report, which begins on page 1.

A Yes.

Q And that section is titled "Retention".

A Yes.

Q And you state there that you prepared the report with the assistance of Fox Rothchild, and you said it was prepared at the request of a number of entities, and the first is White & Case?

A Yes.

Q Have you met representatives of White & Case, met with them in connection with preparing your report?

A No.

Q Did you have any previous association with the White & Case firm?

A Yes.

Q And what was that?

A White & Case was involved in a case that I mediated in the District of Delaware, and they were also involved as counsel for petitioning creditors in the case where I was the presiding judge in the District Court of New Jersey.

Q Let's start with the case that

you mediated.

Do you recall which counsel were involved from White & Case in that matter?

A Yes. Jerry Uzzi was involved in that matter. He is the only one that I can remember from White & Case in that matter.

Q And the case where you were presiding judge in the District of New Jersey, do you recall any of the White & Case lawyers involved in that matter?

A There were several. Besides Mr. Uzzi, as well I remember Chris Shore -- and I'm sorry I can't remember, there were several other attorneys at White & Case that made appearances in Court.

Q Do you have a social relationship with Mr. Uzzi?

A No.

Q So you know him strictly in a professional capacity?

A Correct.

Q Did you have any conversations

with Mr. Uzzi about this case prior to the phone call where he called you to serve as an expert?

A No.

Q And Mr. Shore you mentioned.

A Yes.

Q Do you know Mr. Shore apart from his appearance before you in the District of New Jersey?

A No.

Q Did you have any conversations with him in connection with your retention in this matter or the work that you did?

A I don't think I spoke to Chris Shore directly in connection with the ResCap case.

Q Do you recall corresponding with Mr. Shore at any point?

A Yes.

Q And what subject matter did you correspond about?

A The engagement letter.

Q And anything in particular that you recall about that correspondence?

A Nothing other than trying to finalize the terms of the engagement letter.

Q And were there any issues in particular that you recall that needed to be finalized in terms of the engagement letter?

A Well, the mechanics of payment. We would -- it ended up the mechanics would be that Fox Rothchild would submit a bill to White & Case, who would include our fees as a disbursement when they billed the bank as trustee. The bank as trustee has the funds to pay the expenses of this litigation.

Q And why, if you know, was it structured in that way?

A I don't know for sure. One of the things that was told to me was that the bank as trustee had a significant procedural hurdle to go through to retain counsel, that would take time, and it would be more expeditious for White & Case to retain us or engage us, and then they

had already been retained and had the payment arrangement with the bank in place. So that would facilitate what I hope will be prompt payment.

Q And did any of the lawyers at White & Case have a role in drafting your report?

A My report, no, not that I'm aware of.

Q And did they have -- did you consult with them at all in formulating your opinions in this case?

A No.

Q Okay. Let me ask the same question about Milbank.

Have you met with representatives of Milbank in connection with preparing your report?

A In connection with preparing the report, I did not meet in person with anyone from Milbank.

Q Did you have any phone conversations with folks from Milbank?

A At the beginning of the

engagement, I had the one telephone call I mentioned to you, and one or two follow-up calls before we actually got the engagement letter signed.

Q Do you recall with whom those follow-up calls were with?

A I believe I spoke to Mr. Uzzi once again. I believe I spoke to Mr. Cohen. I remember the name Dan Perry. And at one point, I spoke to a woman, Rachel Fissel, F-I-S-S-E-L.

Q Okay.

Did you have any previous -- putting aside Mr. Uzzi, before he was at Milbank, did you have any association with any Milbank lawyers prior to your engagement in this matter?

A Not that I can recall.

Q And was anyone at Milbank involved in the drafting of your report?

A Not in the drafting, but we did -- my colleagues got comments from some of the attorneys at Milbank on the draft report.

Q Do you recall which attorneys --

A Which attorneys at Milbank?

Q -- provided comments on your report?

A I believe that much of the communication was done by Ms. Fissel, and Mr. Maddox may have been involved in providing some of the background documents, such as contracts or certifications, court pleadings, et cetera, that we looked at, orders, but I think mostly the communications came through Ms. Fissel.

Q And to your knowledge, was any portion of your report drafted by anyone at Milbank?

A There was no original drafting done by anyone at Milbank that I'm aware of. There were some written comments that were provided.

Q And do you know if those were incorporated as you sit here today?

A Some of them were; some of them were not.

Lyons

Q Okay. Let me ask you the same question with regard to Akin Gump, the same series of questions.

Had you met with any representatives --

MR. SIMON: Withdrawn.

Q Have you met with any Akin Gump lawyers in connection with preparing your report?

A No.

Q Did you have any previous association with the Akin Gump firm prior to being retained in this matter?

MR. COHEN: Objection to the form.

A Akin Gump I believe was also involved in the matter that I mediated for the judge in the District of Delaware. I'm trying to recall whether Akin, whether anyone from Akin Gump has ever appeared in the matter in New Jersey where I was a judge. I can't recall offhand.

And I also sat in the District of Delaware as a visiting judge, and it is

quite likely that Akin Gump was involved in some of those cases, but I don't recall specifically.

Q Are there any Akin Gump lawyers with whom you had a previous association that was involved in the ResCap case to your knowledge?

A No.

Q And did Akin Gump have any involvement in the drafting of your report?

A No.

Q Or commenting on your report?

A No, not that I'm aware of.

Q Okay.

In your retention section, you note that White & Case and Milbank Tweed are co-counsel to the ad hoc group of junior secured noteholders?

A Yes.

Q Did you meet with any -- I'm going to refer to them as the JSNs.

A Yes.

Q Did you meet with any

representatives of the JSNs in connection with your work in that matter?

A Did not meet with any representative of the JSNs, no.

Q Did you receive any comments on your report from any -- putting aside lawyers -- any of the JSNs?

A I did not receive any direct comments from anyone who is not a lawyer representing the JSNs.

Q Do you know whether any of your colleagues who assisted you in the preparation of the report received comments from any of the JSNs?

A I believe that there were comments from the JSNs, but I don't believe they came directly to any of my colleagues. I think they all came through attorneys at Milbank. Again, primarily it was Ms. Fissel who was communicating with my colleagues.

Q As you sit here today, do you recall any of the specific comments that were provided by the JSNs?

A I remember that somebody at the client picked up a math error that I made, which is embarrassing since I was a math major in college. But arithmetic was never my strong suit.

Q Do you recall the nature -- I'm sorry. Go ahead.

A It was not a transposition, but putting numbers in the wrong column.

Q Do you recall which claim that mathematical error occurred with respect to?

A No. I think it was in the charts. It was like the first two or three claims that I had, as I said, put the wrong number in the wrong column.

Q And that was corrected by the time you submitted your report?

A Yes.

Q Let me ask you the same question about UMB Bank, which is also referenced in the first paragraph of your report.

A Yes.

Q Did you meet with

representatives from UMB Bank in connection with preparing your report?

A No.

Q And the same question with respect to the drafting of your report.

Was anyone from UMB Bank involved in either preparing or commenting on your report to your knowledge?

A No, not the report.

Q I wanted to ask you one more question about Mr. Uzzi.

A Yes.

Q Did you have any conversations with Mr. Uzzi about your impressions of the examiner's report?

A I don't recall any.

Q Did you have any conversations with him about anything else in connection with what you were asked to do in this case?

A Well, Mr. Uzzi did explain to me who his client was and what his client's position was as a junior secured creditor.

Q And what did he tell you in that

regard?

A He told me that he represented a client that was -- or a group of clients that held a junior secured position, and that there was an issue as to whether there was sufficient collateral to cover not only the principal but interest and fees in connection with the client's position.

Q Did you have any discussions with Mr. Uzzi about any liens that the JSN might have to any particular claims at issue in this matter?

A He described to me that his client's position was that they had liens on certain claims, intercompany claims between the debtors and non-debtor related entities, and that that claim was disputed.

Q Did he mention anything else in terms of what liens his client might hold?

A No, I don't think so. As I recall, I don't think there was any concern that the collateral exceeded --

the value of collateral exceeded the principal claims. I think there was an issue between his client and other people in the case as to whether there was sufficient value in collateral to cover the interest, and that his client was arguing that its lien extended to intercompany claims.

Q Did he also tell you his client was taking the position the lien extended to either the entirety or a portion of the global settlement in this case?

A No.

Q Did you have an understanding at some point that JSNs were taking that position?

A That's not my understanding, no.

Q Okay.

Do you recall anything else about your conversations with Mr. Uzzi?

A No. On that last point, I think he told me that there were also third-party claims against AFI, and, as I said I was vaguely familiar with that from

having perused the examiner's report, and that there were avoidance actions that were reported on by Arthur Gonzales, and that his client was not asserting liens upon avoidance actions.

Q Did he tell you whether his client was asserting liens with respect to any of the other claims that were set forth in the examiner's report?

A That's the extent of what I recall hearing from Mr. Uzzi.

Q All right.

Let me direct your attention to the last portion of the paragraph on retention.

A Yes.

Q And you set forth there what you were asked to provide an opinion on in this case?

A Yes.

Q And you state that you were asked to provide an opinion as to the reasonable settlement value of each of the claims identified in the examiner's

report, and also asked to give an opinion as to the reasonable allocation of the 2.1 billion dollar settlement fund provided by AFI among the various settled claims.

A Yes.

Q Does that accurately set forth the opinions that you were asked to and are offering in this case?

A Yes.

Q Are there any other opinions that you are offering in this matter?

A No.

Q Are you opining that the examiner's factual or legal analyses as reflected in his report are correct?

A I'm assuming that they are correct.

Well, I'm sorry, the factual -- let me break that down because you had two parts to that.

Q Let me ask it in two parts then.

A Sure.

Q Are you offering an opinion that the examiner's factual conclusions are

correct?

A No. I accepted the factual conclusions, because after having read portions of the report, it was clear to me that this was a comprehensive, thorough investigation that was done by Arthur Gonzales, and that I knew it took him a long time to do that, and it didn't seem to be either useful or economic to attempt to redo what Arthur Gonzales had done in terms of factual investigation.

Q And so you assumed -- you assumed that all of his facts were correct for purposes of formulating your opinions in this case?

A That's correct.

Q Now let me ask you with respect to the examiner's legal conclusions.

A Yes.

Q Did you --

MR. SIMON: Withdrawn.

Q Are you offering an opinion that the examiner's legal conclusions as reflected in the report are correct?

A Well, I reviewed each of the legal conclusions that Mr. Gonzales made, and except where noted, agreed with his legal conclusions. So I didn't accept them as I did with the facts.

Q So with respect to those, and just to clarify, Mr. Lyons, with respect to each of those legal conclusions, you did in fact at least agree in part with all of the legal conclusions that the examiner set forth in his report?

A Yes.

MR. COHEN: Object to the form. You have to give me a minute.

THE WITNESS: Sure. I'm sorry.

Q And that was a yes?

A Yes. As I said, I think in the report I've identified my -- I've tried to itemize the legal conclusions that I gleaned from reading the examiner's report, and then stated whether I agreed or not. I think in almost every instance I agreed either totally or with minor quibbles, I would say.

Q And actually to be clear, in every instance, you agreed or agreed with minor quibbles, correct?

A Correct.

MR. COHEN: Object to the form.

Q And now you can answer. I think you did, correct?

A Let me repeat my answer. Yes, I believe that's correct.

Q And so with respect to what you characterize as the quibbles that you offered, that was additional legal opinion that you were offering?

A Well, not offering a legal opinion. Those are matters that I took into consideration in attempting to arrive at a reasonable settlement value. And the merits of the claim is one of the factors, an important factor, in coming up with a reasonable settlement value.

Q But I'm speaking specifically to the legal analysis, the additional commentary on legal analysis that you included in your report.

A Yes.

Q How would you characterize that if not an opinion?

A I would just characterize it as making an assessment of the likely merits of the claim.

Q Based on the law?

A Yes, based on the law.

Q So applying the facts as you assumed them to the law?

A I would say it the other way probably.

Q Let me clarify that question.

A Yes.

Q Applying the facts as you assumed them to the law as you interpreted it.

Is that a fair statement?

MR. COHEN: Object to the form.

A I would say it the other way around. Applying the law as I interpreted it to the facts that were stated by Judge Gonzales, which I assumed are correct.

Q What's the difference between

your formulation and my formulation?

A You said applying the facts to the law. I said applying the law to the facts.

Q Apart from the actual black and white difference, what is the import of the difference, if any?

A I'm not sure that there is.

Q You mentioned before the call you were familiar with -- the first call that you received in this matter, you were familiar with the ResCap proceeding?

A Yes.

Q What was your understanding of the nature of the ResCap bankruptcy action?

A I knew it was a subsidiary of what I knew as GMAC, which I guess is now known as Ally Financial. I knew that historically GMAC had been identified as an auto finance company, but obviously it was much more than that. You know, it grew out of General Motors, as we know, and that the problems in the mortgage

business were something that Ally Financial wanted to put behind it.

Q How did you know that?

A Just from reading the press.

Q Did you read any decisions that were rendered by the court in the ResCap matter prior to your retention in this matter?

A I don't recall doing that, no.

Q Did you read any after your retention?

A Yes.

Q Which ones do you recall reading?

A I believe I read the decision approving the -- I think it is called the plan support agreement; I believe I read the decision regarding the settlement with FGIC; and at this point, that's all I can recall.

Q You know that Judge Glenn is the judge assigned to this case?

A Yes, I do.

Q Do you know Judge Glenn

personally?

A I've met Judge Glenn, yes.

Q Tell me the occasion or occasions on which you met him.

A They were all on professional occasions. They would primarily be at -- the Federal Judicial Center holds an annual workshop for bankruptcy judges, and most of the bankruptcy judges in the country attend. Many years there are two, and they kind of split the judges. Some years there is only one workshop and mostly judges attend. So I met Judge Glenn in connection with those.

And I think I met him -- I don't recall seeing him at any American Bankruptcy Institute events, but I wouldn't doubt it. And also in the City of New York, organizations such as the New York Institute of Credit, or I think that's probably -- New York Institute of Credit, maybe the Turner Management Association, there may be events where he and I attended and we've, you know,

exchanged greetings.

Q And do you have a view of Judge Glenn, his reputation as a judge?

MR. COHEN: Object to the form.

MR. SIMON: Withdrawn.

Q Do you have a personal view of Judge Glenn's ability as a judge?

A Just from meeting him in these professional occasions, I don't believe I've ever observed him acting in his role as a judge. But, you know, he seemed to be highly intelligent, an affable professional, and my impression is that he is a very fine and respected judge.

Q And is there any specialized knowledge that you believe that you bring to this case that will assist Judge Glenn as the trier of facts that he doesn't already possess?

A Well, I think that I have probably had more experience as a mediator than most bankruptcy judges.

Q Anything else?

A I don't know what Judge Glenn's

experience is in particular types of matters, other than general bankruptcy cases and Chapter 11 in particular. But I did have the opportunity to mediate a claim that was brought by investors in mortgage-backed securities.

Q And when was that?

A That was in about 2012.

Q And what was that matter?

A The Washington Mutual parent company Chapter 11 in Delaware.

Q And in your role as a mediator in -- I'm going to refer to it as WAMU here.

A Sure.

Q In the WAMU matter, did you allocate values between and among claims that were part of that settlement?

MR. COHEN: Objection.

To the extent that you are bound by confidentiality in that mediation, I'd like you to be sensitive to those confidentiality restrictions.

THE WITNESS: Sure.

A No, the issues in the -- the matter that I mentioned to you, the mortgage-backed securities, was a claim, it was an objection to a claim, and so there was only one claim involved that did not involve allocating monies.

The -- one of the other mediations I was involved with was the plan mediation. And the result of that is reflected in a public document, which is the Plan and Disclosure Statement. And one of the issues was how assets that were -- that belonged to the debtor would be distributed in the waterfall of claims against Washington Mutual, and there were numerous classes of claims.

So it is not the same type of analysis that was -- that I had to undertake in the ResCap matter, but to the extent that funds had to flow down to different classes of creditors, I would say that issue was involved in the WAMU case.

Q And thinking back at all of the

mediation experience that you've had, is there any matter in which you were involved that involved the same type of analysis that you had to undertake in the ResCap matter?

MR. COHEN: Object to the form.

A To the extent that there was an analysis of reasonable settlement value of a particular claim, that is a typical activity that I undertook in connection with every matter that I have mediated.

Q But --

A To the extent --

Q I'm sorry, I didn't mean to cut you off.

A The second part of my opinion is to allocate funds among various claims. I can't think of a particular instance now, but I'm sure that I have been involved in settlement discussions where there was more than one claimant and a fund to be allocated among the claimants.

Q But you can't recall as you sit here today?

A I can't recall exactly any particular instance, but I'm sure it has happened.

Q Okay.

Do you recall as you sit here today any instance that would have had a dollar value of in excess of two billion dollars that needed to be allocated between and among individual claims?

A Well, the Washington Mutual case had seven billion dollars to be spread among the various classes of creditors.

Q But to be clear, I just want to understand your testimony, you told me that's not the same exercise that you performed here in the WAMU case, right?

MR. COHEN: Objection.

Mischaracterized his testimony.

A The exercises were different.

Q So my question is: With respect to the exercise you performed here, is there any matter that you can recall where --

MR. SIMON: Withdrawn.

Lyons

Q I think you testified with respect to the exercise that you did here, there might have been an instance where you did that, but you can't recall specifically the name of it; is that right.

MR. COHEN: Objection. Vague.

A Right.

Q So my question is: Do you remember the dollar value to the extent there was a matter where you performed the exercise that you did in this case.

A No.

Q And when you're a mediator, I take it that before you form any judgment with respect to the value of a particular claim, you would want to hear from both sides that have a stake in that claim; is that right?

A That's correct.

Q And did do you that here?

A I did not hear from any of the claimants or the defendants.

Q Moving on in Exhibit 1 to the --

well, actually before we do that, sir, you mentioned you had read two decisions of Judge Glenn after your retention.

And the first was the plan support agreement decision.

A Yes.

Q Why did you read that?

A I read that because part of Judge Gonzalez's examiner's report opined that it was unlikely that the 750 million dollar contribution by AFI would be approved by a bankruptcy court as an adequate consideration, and I wanted to see what happened, what the outcome was of the new plan support agreement where the amount of contributions greatly increased to 2.1 billion dollars.

Q And what was the outcome?

A It was approved. It was approved subject to confirmation of the plan.

Q Did you rely on the judge's decision with respect to the plan support agreement in connection with your

retention to this matter?

MR. COHEN: Object to the form.

MR. SIMON: Withdrawn.

Q Did you rely on Judge Glenn's opinion with respect to the plan support agreement in forming any of your opinions in this matter?

A No, I don't believe so.

Q Did you have a view of whether Judge Glenn was correct in approving the plan in that decision?

A The plan support agreement?

As I recall, the decision was very limited, and going from memory, I believe that the Judge Glenn decision -- Judge Glenn's decision was that he approved the debtors entering into the plan support agreement, but he preserved for confirmation the issues of whether the contribution was adequate to support the release that was being sought in the proposed plan.

Q Did you have -- as you sit here, do you recall any other reactions you had

after reading the judge's decision in connection with the plan support agreement?

A The other thought that I had was the initial plan support agreement did not have the support of creditors. It was objected to, and eventually the debtors withdrew from that agreement.

Judge Gonzales commented that under the Iridium factors support of the constituencies was an important factor, and I believe in Judge Glenn's opinion, he pointed out that the new plan support agreement did enjoy the support of a number of constituents, although not all.

Q And do you consider that significant?

MR. COHEN: Object to the form. Vague.

MR. SIMON: Withdrawn.

Q Given your experience as a bankruptcy judge, do you consider it significant that a majority of the creditors supported the plan?

Lyons

MR. COHEN: Object to the form. Vague.

A Well, that is one of the very important, the Iridium factors, is support of the constituents in the case.

Q Now, you mentioned the Iridium factors in your report, right?

A Yes.

Q And why do you do that?

A Because the Iridium factors relate to whether a court would approve a proposed settlement where there is a cause of action pursued by a fiduciary in a bankruptcy case. And in arriving at what I believed is reasonable settlement value for each claim, I thought it was important to consider the Iridium factors.

Q And Judge Glenn himself will need to apply those factors in considering whether or not to approve the global settlement, won't he?

A I would -- yes, I would say so.

Q Do you think that Judge Glenn needs help in application of the Iridium

factors in his analysis?

MR. COHEN: Object to the form.

A No, I don't think that Judge Glenn needs help in his application of the Iridium factors to the overall settlement.

Q You also said that you reviewed the FGIC elements decision?

A Yes.

Q Why did you do that?

A I think that was primarily out of curiosity, because I think it came up in a Law360 article, and I just wanted to see what was going on with that.

Q Did you rely on Judge Glenn's FGIC settlement decision in any way in forming your opinions in any way in this case?

A No, I did not.

Q Do you recall having any reaction to the judge's decision after reading it?

A No, I do not.

Q You mentioned earlier that a number of your colleagues at Fox Rothchild

assisted you in your work in this case?

A Yes.

MR. SIMON: I want to introduce as Exhibit 2, or have the court reporter mark as Exhibit 2, a document that was produced by Milbank which is captioned "In Re: Residential Capital LLC Billing Summary".

(Document titled "In Re: Residential Capital LLC Billing Summary", was marked as Lyons Exhibit 2 for identification, as of this date.)

BY MR. SIMON:

Q Mr. Lyons, have you seen this document before?

A Yes.

Q And what is it?

A It is a listing of each of the persons at Fox Rothchild who worked with me on the expert opinion; the hours that each person worked from the beginning, which started on September 18th, through the end of October; the hourly rate for

each person; and then the extension of the total amount billed for that person.

Q Okay.

There is one individual on this list that has a few more hours than you have incurred on that matter, and that is Martha Chovanes?

A Yes.

Q Who is Ms. Chovanes?

A Martha Chovanes is a counsel at Fox Rothchild.

Q And what was her work on this matter to your knowledge?

A Her work was in coordinating the work of everybody else in this case. She did some drafting, but not on any particular issue, mostly introductory, conclusory sections she did some drafting on. She did some editing on probably each of the sections, but she kept track of who was working on each issue, and then as each segment was completed, incorporating that into the final document.

Q Did you consult with Ms.

Chovanes in connection with forming any of your opinions in this matter?

A I'm sure I did.

Q Do you recall specifically which?

A No.

Q Who is Hal Baume?

A Hal Baume is a partner in the firm. His office is in Princeton, where I am, and his specialty is bankruptcy.

Q And what was his role in connection with this matter?

A He worked on a number of the sections that related to bankruptcy type issues.

Q Do you have some examples of which those were?

A Yes. The government settlement avoidance action. It was the second avoidance action that occurred right before the filing in May of 2012.

And he also worked on debt recharacterization. He worked on the affiliate pre-petition asset sales. He

worked on the affiliate financing transactions. Those are the ones that come to mind now for Mr. Baume.

Q When you say he worked on those, what was the nature of his work?

A Reading examiner's report; drafting the section of the opinion that related to those particular issues; discussing them with me; and then finalizing those sections of the report.

Q Did you personally read the sections of the report that correlated to those that Mr. Baume read and analyzed?

A The section of the examiner's report?

Q Those particular sections.

A Of the examiner's report, you're talking about?

Q Yes.

A Yes, I did.

Q And the opinions that were set forth in the sections that Mr. Baume drafted --

A Yes.

Q -- do those reflect his opinions?

A Those reflect my opinions.

Q As informed by him?

A Exactly.

Q And who is Thomas Cunniff?

A Mr. Cunniff is a partner. He also is located in the Princeton office and he is a commercial litigator.

Q Does he have any bankruptcy experience to your knowledge?

A To my knowledge, no -- yes, I think he has worked with Mr. Baume on some occasions where Mr. Baume was involved in a bankruptcy matter that was also litigated.

Q But apart from that, you're not aware of any bankruptcy expertise that Mr. Cunniff has?

A No.

Q What was his role in this matter?

A He worked on a number of the non-bankruptcy causes of action, so

contract type claims, some fraud claims.

Q Which contract claims do you recall Mr. Cunniff working on?

A He worked on the misallocation of revenue claim, the MSR Swap claim, and the contracts related to the -- that were related to those two, there were others, the Pipeline Swap, brokerage agreement, all of those things that are kind of in Section 1A through, I think, D of my report.

He also worked on the unsecured noteholders claim I recall. He had some involvement in the third-party claims. And I would have to look through the rest of it to recall what his involvement was, but in general I would say commercial litigation, non bankruptcy type of matters.

Q And when you say he worked on those sections, what did he do exactly?

A He reviewed the examiner's report; in some cases he did the initial drafting of a section of the report and

discussed it with me; and worked to finalize particular sections of my report.

Q Do you recall whether he expressed any view where he differed with the conclusions set forth by Judge Gonzales on any of the contract claims in the report? And when I say "he", I'm referring to Mr. Cunniff.

A Mr. Cunniff, yes.

Contract claims, let's see, I recall specifically the unsecured noteholders claim was the subject of discussion between me and Mr. Cunniff.

There was the claim that was described in the examiner's report that I was really not familiar with. There was a claim for reliance by a third-party on a representation that had not been made to the third-party. And Arthur Gonzales in his report described how there were choice of law problems with that cause of action, and the cause of action, it was not clear that it was even a viable cause of action.

One of the statements in the

examiner's report was his opinion that the damages suffered by the unsecured noteholders would be particularized damages that would relate only to them or to a particular noteholder, and not damages that were general. In other words, damages that were caused to the debtor that would impact on the recovery of all creditors.

And Mr. Cunniff and I discussed that, and that's one area where we disagree with Judge Gonzales. We felt that the damages, if there was a viable cause of action that the damages would be generalized. The conundrum was that because of the Wagoner Rule, fiduciary -- a state fiduciary could not pursue those claims in Judge Gonzalez's view and in my view. And if you read Wagoner, Wagoner says that the debtor doesn't have standing, but creditors have standing.

And so we came to the conclusion that if Wagoner were applied and creditors were allowed to pursue it, they would be

pursuing generalized damages, and that any recovery would have to go for the benefit of all creditors, not just the named plaintiff.

Q And does that differ from Judge Gonzalez's opinion?

A I believe so, yeah.

Q And is that set forth in your report?

A Yes.

Q With respect to the contract claim on misallocation of net revenues that's discussed in your report.

A Yes.

Q Do you recall whether or not you and Mr. Cunniff had any disagreements about the factual or legal analysis contained in that section?

A No, I don't recall any disagreements there.

Q And the same question with respect to the MSR Swap claim.

A Yeah, mr. Cunniff and I discussed that, and the defense that Judge

Gonzales describes that would be raised by AFI is that there was mutual mistake made, or that the contract had been amended through a course of dealing, and --

Q Modified through a course of dealing, right, modification?

A Modified. Right.

And Mr. Cunniff and I -- and I think that Judge Gonzales came to the conclusion that that defense was a close case, but in our assessment, we felt that that defense was a little bit more difficult of a burden to carry for AFI than we gleaned from reading the examiner's report.

Q Both you -- I'm sorry?

A Let me just say it another way.

Trying to prove that a contract should be reformed or that a modification exists, we felt was a difficult burden of proof. And it's been a number of years now since those transactions took place, and it appeared that a lot of the personnel who were involved, their

memories were fading and it would be a challenge where the burden of proof is on AFI to show that the contract should be reformed or that it had been modified.

Q And just to be clear, you and Mr. Cunniff both shared that view?

A Yes.

Q And that was based on your assessment of the difficult legal hurdle that would be involved with that defense?

A With the defense, right.

Q So it is your opinion of the legal challenge that would have been faced by a litigant bringing that defense?

MR. COHEN: Object to the form.

A Right.

Q Who is Gerald Arth?

A Mr. Arth is a partner in the firm, and his office is in Philadelphia, and he is a litigator.

Q And what was his role in connection with this project?

A Mr. Arth worked primarily on the third-party claims, mostly the third-party

RMBS claims against AFI.

Q And, again, the nature of his work would have been drafting, reading and analyzing similar to the other folk we've talked about?

A Yes.

Q And do you recall having any disagreements with Mr. Arth about any of the conclusions reached by Judge Gonzales in the sections that Mr. Arth worked on.

MR. COHEN: Object to the form. Vague.

A Well, Judge Gonzales concludes that the alter ego single entity type theories are unlikely to be successful against AFI, and that the control person securities issues are more likely than not to be unsuccessful. And if one were to look only at those, one would probably minimize the amount of the third-party claims. However, Judge Gonzales was not able to quantify the amount of third-party claims. So we attempted to estimate from the information that was available in

Judge Gonzalez's report a reasonable value, and because it seemed that they were potentially tens of billions of dollars of claims, despite the questionable legal merits of the claims, we still felt that they had substantial settlement value.

Q You said Judge Gonzales was unable to quantify the third-party claims?

A And I believe his charge was not to quantify.

Q I was going to ask you if you knew, in fact, he was asked not to do that.

A Yes.

Q You knew that?

A Yes, he states that a number of times in his report.

Q And now I think you mentioned in the beginning of your answer that Mr. Geron --

A Geron?

Q I'm sorry, Mr. Arth we were talking about.

Lyons

Mr. Arth worked on the alter ego analysis?

A In the third-party claims, part of it is the single entity type of the claim that AFI should be responsible for the alleged wrongdoing of one or more of the debtor entities.

Q Is an alter ego claim a third-party claim?

MR. COHEN: Object to the form.

A Part of the third-party claim is an alter ego claim.

Q But isn't it true that an alter ego claim actually belong -- can belong to the debtor?

A Yes.

Q So why did you analyze in your report the alter ego claim in conjunction with the third-party control person claim?

A Because those, alter ego was part of the theories that the third-parties were asserting against AFI.

Q In fact, you know whether or not the debtors raised an independent alter

ego claim against AFI?

A I know that Judge Gonzales talked about the debtors having an alter ego claim against AFI.

Q But you don't know that for a fact?

A I don't know.

MR. COHEN: Objection to the form. Mischaracterizes the testimony.

A I don't recall that the debtors had filed any alter ego claim.

Q Do you know whether the committee filed an STN motion in this case?

A What's an STN motion?

Q A motion for standing to pursue claims on behalf of the estate.

A No, I don't know that.

Q Who is Mr. Geron?

A Ron Geron is the way you pronounce it, is a partner in the New York office, and he is a bankruptcy professional.

Q And what was his role in this

work, in this project?

A He was limited to one primary issue, and that was the Minnesota Insider Preference claim.

I also spoke to Mr. Geron in general about settlement ranges for preference matters. He is a Chapter 7 Trustee and often represents fiduciaries in bankruptcy avoidance litigation.

Q And he is not admitted in Minnesota to your knowledge, is he?

A Not to my knowledge.

Q Do you know whether he consulted any Minnesota practitioners in connection with his work on the Minnesota preference action?

A I don't believe that he did.

Q Did you?

A No, I did not.

Q And the Minnesota preference action is an avoidance claim, correct?

A Yes.

Q And do you recall whether you and Mr. Geron had any disagreement with

respect to the examiner's conclusions on the claims that he was involved with?

A Yes, Mr. Geron was -- thought that the ordinary course defense was a little more viable than the examiner allowed in his report.

But Arthur Gonzales took the position that any course of dealing after the debtor was in financial distress would not be considered ordinary course, and under the Minnesota Insider Preference Statute, that extended back six years.

Mr. Geron felt that it was a policy underlying the ordinary course defense to encourage parties to continue to do business with a debtor, and that he felt there was more viability to that ordinary course defense than Arthur Gonzales did.

Q And, in fact, in your report, did you include any discussion about the ordinary course defense?

A Yes.

Q And what do you recall opining

in that regard?

A Just what I just stated.

Q And actually was that an opinion, or were you offering a legal opinion on that point?

A No, it was a factor on the altered merits of the case and defenses that we evaluated in coming to a reasonable settlement value for that claimant.

Q And in evaluating that factor, you have no specialized knowledge of Minnesota's UFTA statute, do you?

A No specialized knowledge, no.

Q Are you aware that not a single party alleged a claim under the Minnesota Insider Preference Statute against AFI at any time?

A No.

Q Are you aware that not a single party in their submissions to the examiner addressed the Minnesota Insider Preference Statute until they were expressly invited to do so by the examiner?

A I'm not aware of that.

Q Did you know that the examiner requested and that the court approved the retention of Minnesota counsel in connection with Judge Gonzalez's work?

A I saw that Minnesota counsel was retained by the examiner. I don't recall any discussion about getting court approval, but I would assume that it was done.

Q And do you know that the first time the parties were asked by the examiner to address the Minnesota Preference issue was on May 1, 2013?

A I don't believe I was aware of that.

Q And when the parties were asked to do so, they were told that the examiner has determined that the issue warranted giving the parties an opportunity to submit their views.

Did you know that?

A No.

Q And do you know when Judge Peck

was appointed a mediator in this case?

A I believe it was towards the latter part of 2012.

Q Okay.

I'll represent to you it was five months prior to the request on May 1 for the parties to address the Minnesota Preference claim.

And you have no basis to know whether the parties were aware of the possibility of a viable claim under Minnesota law, much less consider the value of that claim during negotiations over the global settlement, right?

MR. COHEN: Object to the form.

A I'm not aware of those facts.

Q Did Mr. Geron do anything else in connection with the report, your report?

A The Minnesota Insider Preference issue he worked on, and, as I said, I also spoke to him about his experience with settling avoidance actions.

Q And what did he tell you in that

regard?

A That avoidance actions, first of all, that he anticipates a new value defense on the preference action, and attempts to give the defendant credit where he believes that there is a viable new value defense.

So rather than the gross number of transfers that went from the debtor to the defendant in the 90 days, he nets out new value, starts his negotiation with a net claim.

And that he -- often his initial demand, depending on how strongly he feels about the case, will be in the neighborhood of 80 to maximum 90 percent of the net gross claim, net gross claim is not -- let's say the claim after giving credit for new value defense.

Q Did you consider it important to consult with Mr. Geron about his experience with settling avoidance actions?

A I thought it was informative,

yes.

Q Is there anyone else that you consulted with at Fox Rothchild to ask about their experience in settling claims?

A Yes.

Q Who?

A Vincent Poppiti.

Q Anyone else?

A I think I had a brief conversation with Abe Rich, who is a co-chairman of the firm.

Q It must have been very brief?

A Yes, he didn't bill it. I probably billed for it, he did not.

Q Why did you want to consult with other partners at your firm about their experience with settling actions?

A Vincent Poppiti was a judge, a Delaware State Court judge, and he has been with Fox Rothchild longer than I have. He has been there a few years, I believe. And his practice is focused on mediation and arbitration.

Q And do you respect Judge

Poppiti?

A Yes, I do.

Q And so he has a great deal of experience with mediation?

A He does, yes.

Q He was the former chief judge of the Family Court in Delaware; you knew that?

A I did not know that, no.

Q I actually appeared before him in 1999 in a pro bono case, and he was an associate judge of the Superior Court of Delaware.

Did you know that?

A I did not. I knew he was on the Delaware Court. I didn't know which positions he held.

Q Did you discuss with Judge Poppiti your methodology and what you were opining on in this case?

A Yes.

Q Did he express any views to you about it?

A He thought that my approach was

appropriate.

Q Anything else that you recall discussing with him about your methodology or opinions?

A No.

Q And did you discuss your work on more than one occasion with Mr. Poppiti or just one time?

A I think it was only once.

Q Did you know that in 2010, Judge Poppiti served as a Special Master in a case called In Re: Intel Corporation, and he issued a report where he recommended granting a Daubert motion to exclude the testimony of the plaintiff's expert witness?

A No, I'm not aware of that.

Q You didn't talk about that?

A No.

Q Okay.

And he concluded in that case, or did you know that he concluded that opinions offered by the expert were not based on methods and procedures of

science, but rather on unreliable analysis, and so for that reason, it violated the Daubert standard.

Did you know that?

A I did not know that.

Q Do you know what the Daubert standard is?

A Yes.

Q What is it?

A Daubert standard is named after a U.S. Supreme Court decision in which the court held that the trial judge should be a gatekeeper as to the admissibility of expert opinion.

Q And is there a standard by which the gatekeeping function should be conducted?

A I believe there are two factors to consider. One is relevance of the opinion being offered to the issues, and secondly is reliability.

Q And during your time on the bench, have you ever excluded expert testimony based on Daubert that you

recall?

A Yes.

Q Tell me about -- was it in a single case or more than one case?

A I can only recall one case. I'm sorry, two cases I recall.

Q Can you tell me the first?

A The first I recall, the oldest that I recall was when I was sitting as a visiting judge in Delaware, there was an issue about conflict with a proposed debtor's counsel, and the debtor's counsel called a professor from the law school to testify as to whether or not the debtor's counsel had a conflict of interest. And I did not permit the professor to testify because I felt that I did not need any assistance, I was the finder of fact, and I felt that I did not need assistance in determining whether there was a conflict of interest.

Q Do you remember the name of that case?

A Yes, that was Big V.

Q And you said there was a second case where you excluded an expert?

A Yes.

Q And what was that case?

A It was a case in the District of New Jersey.

Q Is that the O'Brien case?

A O'Brien, no.

Q Okay.

Which case was it?

A What did I do in O'Brien?

Q We'll get there.

A It was the Zeiss Investment Limited Case.

Q Uh-huh.

A And the plan proponents offered an expert, and I granted a motion in limine to preclude that expert's testimony.

Q And do you recall the grounds on which you excluded the testimony?

A My recollection now a couple of years later is that there were two grounds.

One was that the particular individual who was testifying was not the most qualified among the individuals in the firm to opine on the relevant issue. And, secondly, in voir dire, I found that the witness was not able to explain the source of some of the information that was relied upon in reaching the opinion.

Q What was the ground on which you considered the individual as not the most fit in his firm to offer an opinion?

A What was the ground?

Q Yes. Why was it that you concluded that he was not the most fit in his firm to give the opinion?

A Because it was based on his testimony that in order to answer the question that was posed or to opine on the issue, that he consulted with people in a department within the firm that specialized in evaluating those particular assets, and that was not his area of expertise.

Q Going back to Judge Poppiti for

a moment and his decision in In Re: Intel, he wrote there, "In order to prove reliability by a preponderance of the evidence, one most prove that the expert's opinion is based on the methods and procedures of science rather than on subjective belief or unsupported speculation, and that the expert has good grounds for his or her believe."

Do you believe with that premise?

MR. COHEN: Objection. If you have a document that we can verify that quote. If you just want to make a statement and say do you agree with the statement or not, that's something different.

MR. SIMON: I'm representing that this is a quote from a decision by Judge Poppiti. I don't feel I need to put it in the record.

Q Do you agree with that proposition?

A I think it depends on the

context.

Q And in what context would it be appropriate to rely on an expert's opinion that is not based on methods and procedures of science, but rather subjective belief?

A Where the opinion is not a scientific type of opinion.

Q So it is your testimony that under Daubert, it is appropriate for a court to accept expert opinion based on subjective belief?

A Yes.

Q And what is your basis for that opinion?

A Just some of the cases that I have read following Daubert and --

Q I'm sorry.

A Well, the cases that I recall reading distinguish between scientific and statistical type of analysis where there would be accepted methods, and other matters where the opinion is based upon the experience of the party and it is not

scientific.

So, for example, in preference litigation, where there is a question of whether something was in the ordinary course of business, I have often permitted a person to testify as to the ordinary course of the particular type of business where that person has been solely by reason of experience familiar with what happens in that business.

Q And is it also your view that under Daubert, there are instances where it may be appropriate to accept an expert opinion that is based on unsupported speculation?

MR. COHEN: Object to the form.

A Unsupported speculation does not sound to me that that would be an acceptable expert opinion.

MR. SIMON: We're going to need to change the tape so we have to go off the record.

THE WITNESS: Okay.

MR. SIMON: Do you want to take

a break?

MR. COHEN: Yes, why don't we.

THE VIDEOGRAPHER: This marks the end of tape number one. We're going off the record at 11:34 a.m.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

THE VIDEOGRAPHER: This marks the start of tape number two. We're back on the record at 11:49 a.m.

BY MR. SIMON:

Q Mr. Lyons, going back to Judge Poppiti for a moment, or Mr. Poppiti.

In addition to his prior service as a judge, were you aware that he served as Special Master and Special Master Liaison for the United States District Court for the District of Delaware in patent and antitrust matters, and he has done or did that from September 2004 through September 2011?

A I knew that Judge Poppiti is involved in intellectual property matters

with the District Court. I didn't know that he had the title that you have mentioned.

Q Okay.

And I just want to state for the record, because I didn't have the full citation, that the Special Master report I referenced earlier authored by Mr. Poppiti is In Re: Intel Corp. MCDL Docket Number 05-1717, out of the District of Delaware.

Now, in that report, Judge Poppiti noted that it is the District Court's responsibility to perform "a vigorous screening function to ensure that scientific evidence is presented by the expert witness that is relevant, reliable and helpful to the trier of fact".

Do you agree with that premise?

MR. COHEN: Object to the form.

A In the context of scientific evidence, yes.

Q Do you think that's true with respect to any other kind of expert testimony that's offered to a District

Court?

MR. COHEN: Object to the form.

A Well, you said reliable, relevant and helpful, and I would say yes, that's true with regard to all expert testimony.

Q So you accept that premise?

A Yes.

Q And how is -- how did you ensure that your expert opinions in this case are relevant, reliable and in your view helpful to the trier of fact?

A With regard to relevance, it seemed to me that it was relevant to allocate the gross settlement fund of 2.1 billion dollars among the potential claims that existed against AFI.

Q Why is that?

A Because I understood that there were conflicting claims to the settlement fund, and that the nature of the claim that would give rise to a payment by AFI could impact on which party, which claimant could assert a right to that

fund.

Q Are you aware that Judge Glenn has already agreed that the Ally contribution need not and cannot be allocated among the many causes of action it resolves or among the debtors receiving it?

MR. COHEN: Object to the form.

A No, I'm not aware of it.

Q Well, if he had made that determination, don't you think he is better positioned in this case to do so than you?

MR. COHEN: Object to the form.

A If I had made that determination, don't I think he is in a better position to do what?

Q If in fact Judge Glenn made the determination that the Ally contribution need not and cannot be allocated among the causes of action, the individual causes of action, do you agree with me that he is better positioned to make that determination in these cases than you?

MR. COHEN: Object to the form.

A If he -- obviously he is the judge. If he has made that determination, that's his determinations.

Q And you would accept it?

A I have no authority to do anything with regard to a determination that he has made.

Q And so you would accept that determination if, in fact, it were made by Judge Glenn?

A I'm not --

MR. COHEN: Object to the form.

THE WITNESS: I'm sorry.

Q You can answer.

MR. COHEN: You can answer.

THE WITNESS: I have to pause.

A I'm really not in a position to say whether I accept and reject Judge Glenn's opinion.

Q Well, would you agree that Judge Glenn has greater familiarity with the parties in these cases than you?

A That sounds like a fair

characterization, yes.

Q And would you also say it is a fair characterization that Judge Glenn has greater familiarity with the issues involved in these cases than you?

A That I don't know about.

Q Do you have any reason to dispute that Judge Glenn has greater familiarity with the totality of the issues in this case than you?

MR. COHEN: Object to the form.

A No, I have no reason to dispute that.

Q And I take it that you have no reason to dispute that Judge Glenn has greater familiarity with the stakes at issue in this litigation?

MR. COHEN: Object to the form.

Vague.

A The stakes, are you talking about -- I'm sorry, what do you mean by stakes?

Q What that -- the financial impact of this settlement and the various

claims that have been made in the bankruptcy, the various claims that have been made with respect to monies owed various parties from the estate.

Would he have better knowledge than you of that?

A I really don't know, but I assume so having presided over this case for more than a year that Judge Glenn is more familiar with what's happened in the case than I am.

Q And you said the first time you were asked to read and give opinions on the examiner's report was in September of this year, right?

A That's correct.

Q And so given that Judge Glenn has had experience with this case for a far longer amount of time than you, would you agree that he more likely than not has greater familiarity with the claims at issue in this case than you?

A That I can't say.

Q Do you have any reason to

dispute it as you sit here today?

A To dispute it, I just don't know. I know that Judge Gonzales is the one who identified all these claims and analyzed them, investigated them, analyzed them. I don't know what Judge Glenn has done with respect to any particular claim.

Q Well, separate and apart from the examiner's report, you understand that at various times various of the parties' positions have been presented to the court in one way or another in these cases?

A I assume that that is so. Yes, I'm aware that parties have made their positions known to the court.

Q And you have not read all the briefing or pleadings that have been submitted in this case, have you?

A I have not.

Q And presumably Judge Glenn has, you would hope, correct?

A I would presume so, yes.

Q You would expect, right?

A I would expect so.

Q And so given that, would you agree with me that the judge more likely than not has greater expertise to assess the various claims that are at issue in this case than you?

A I wouldn't necessarily agree with that, because I don't know that each of these claims has been presented to Judge Glenn with all of the investigation that was done by Arthur Gonzales.

So, for example, you pointed out the Minnesota Insider Preference case that apparently Judge Gonzales identified late in the game. I don't know whether Judge Glenn has had anything to do with the Minnesota Insider Preference case.

Q Well, what are you adding beyond what Judge Gonzales offered in the examiner's report to Judge Glenn?

A I think I'm adding my experience and expertise in assessing the reasonable settlement value of a particular cause of action.

Q And in reaching your conclusions

about the reasonable settlement value, you consulted with certain of your colleagues, correct?

A That's correct.

Q And that's because they've helped to inform your view; is that right?

A They did, yes.

Q Is Judge Glenn not capable of consulting with certain of his colleagues on the bench to ask about their experience with placing value on settlements?

MR. COHEN: Object to the form.

A I'm sure Judge Glenn was able to do that.

Q So you testified that one of the important qualifications of a reliable expert report is that it be relevant?

A Yes.

Q You also said it needs to be reliable.

And can you tell me how your opinions in this case are reliable?

A Yes. I think that I had focused on each of the claims that was identified

by Arthur Gonzales in the examiner's report; reviewed the legal analysis that he had; and applied my experience to -- in having been a judge for 14 years, having performed mediations, and prior to taking the bench having been a commercial attorney for 25 years or so, applied that experience to trying to opine on the reasonable settlement value of each particular claim.

Q And I think you told me earlier that as a mediator, you always listened to all sides in a matter before forming a judgment with respect to the merits of a particular claim?

A That's true.

Q Is the same true with respect to conducting settlement conferences, would you hear from all sides before making a determination on the value of the claim at issue?

A That's true.

Q And so what is it about your experience, which I give you that you have

a lot of, but what is it about your experience that makes your opinions reliable in this case?

A I think it is just that I have that experience; I've been involved in numerous matters that have settled; and have observed how the settlement process works and where the likely settlement value is -- has been achieved in those matters that have settled.

Q And if someone wanted to test the veracity of your judgments, how would they go about doing that?

MR. COHEN: Object to the form.

A I think by doing what you're doing, asking me questions on how I came to the conclusions that I did.

Q So why don't I do that.

You applied two methodologies in your report. One was characterized as the discounting methodology, right?

A Yes, I think litigation discount method.

Q And the other was characterized

as the likely settlement negotiation method?

A Correct.

Q And were there any other methods that you employed in your report besides those two?

A When it came to the third-party RMBS claims against AFI, I looked at -- looked for comparable cases and the settlement data in comparable cases.

Q Did you do anything else methodologically speaking?

A That was the different one. The RMBS claims were different from the rest of the claims.

Q So the totality of your methodologies, putting aside the RMBS third-party claims where you just testified to what you did, the remainder of your report is limited to the litigation discount methodology and the likely settlement negotiation methodology.

Is that a fair characterization?

A Yes.

Q Let's start with the discount, litigation discount methodology.

A Yes.

Q What objective basis did you have for applying that methodology?

A I'm not sure what you mean by that.

Q Well, is it located in any text or treatise or report?

A The litigation discount method I believe is employed regularly by parties in litigation in trying to come up with a reasonable settlement value. I've observed it being employed by people.

Q Well, other than -- I'm sorry, didn't mean to cut you off. Go ahead.

A I've been instructed in mediation training to use that type of analysis to assist parties in evaluating their own position.

Q So when you say you're instructed on that methodology in mediation training, were you instructed on what values that you should assign in

terms of a discount to particular causes of action?

A No.

Q Okay.

So, again, I'll ask the question: Other than your own experience, can you point to anything that would tell one how to go about determining what percentages to apply to result in a discount value in your methodology?

A Well, I think that it has to be issue by issue, it's issue specific, and the discount that is applied to any particular issue depends upon the analysis of the person applying the discount and that person's assessment of the relative merits of that issue and the other factors that go into coming up with a reasonable settlement amount.

Q So by definition, it very well could vary by the person applying the discount, right?

A I believe that's so.

Q And so, for example, if we asked

a different bankruptcy judge with 25 years of experience, he or she might come up with different numerical values to apply as discounts; is that right?

MR. COHEN: Objection. Mischaracterizes the witness's experience.

MR. SIMON: Withdrawn.

Q If we asked another former bankruptcy judge with many years of experience, including in mediation and settlement conferences, he or she may well come up with different percentages to discount in the discount methodology, correct?

A That is true.

Q And in your instance --

MR. SIMON: Withdrawn.

Q And with respect to your report, have your percentages been verified by anyone else other than yourself?

A And my colleagues that I have discussed it with. You know, it was all just myself and my colleagues coming to

our best judgment as to which percentage discount should be applied to each particular issue.

Q And have you ever offered expert testimony applying this methodology before?

A No.

Q Have you ever accepted during your time on the bench any expert testimony that uses the discount methodology, the litigation discount methodology as set forth in your report?

A It was expert testimony. I presided over motions to prove settlement that were contested, and I've heard from the parties who were advocating approval of the settlement and parties in opposition to approval of the settlement, and I'm not sure I can identify a particular instance, but I am sure that the parties on each side have addressed issues and the merits of issues and likelihood of success on a particular issue and expressed that in terms of

percentage.

Q And that's because it is important to hear directly from the parties in order to understand their respective views and the weight of the value of the settlement, right?

MR. COHEN: Object to the form.

A Well, in a 9019 settlement, you're only going to hear from people who have a stake in the outcome. Those are the only ones that would have standing to advocate either for approval of the settlement or against the approval of the settlement.

Q And would you agree with me that it is an important factor in determining the settlement value of a claim to hear the respective views of the parties as to the value of that claim?

MR. COHEN: Object to the form.

A Yes.

And can I tell you about hearing an expert opinion about settlement value that just occurred to me?

Q Sure. But can you answer that question? Did you answer that question first?

A I did.

Q You said yes. So now you can tell me.

A You asked me if I've ever heard of an expert testifying, and it just occurred to me that I have.

There was a proceeding brought by a Chapter 7 Trustee to avoid a transfer from a debtor, a female debtor, to her ex-spouse that was made in connection with the settlement of a matrimonial matter. And the plaintiff trustee called as an expert an experienced matrimonial attorney who opined that the settlement amount that the debtor had paid to her ex-spouse was beyond the range of reasonable settlement considering all of the issues involved in that case.

Q Actually, let me turn for a moment to your other methodology.

A Yes.

Q And what was the other methodology?

A The expected mediation scenario.

Q Right.

And can you describe that methodology for me please?

A Yes. That methodology is based upon my experience in observing mediation in terms of how the offer/counteroffer process works. And my observation is that to begin the process, first the plaintiff has to quantify the claim, and then the plaintiff makes the first settlement demand, which is never the full amount of the claim, it is always discounted somewhat.

In response to that, the defendant makes the first counteroffer, and then the process goes back and forth where the plaintiff will reduce the demand and the defendant will increase the counteroffer, and ultimately resolve -- ultimately arrive at a settlement amount in those cases where the matter settles.

Q And what objective basis did you have for applying that methodology in this case?

A My observation of settlement negotiations.

Q There is no text or treatise or report that you can point to that discusses the likely settlement negotiation methodology, is there?

A Well, again, in mediation training I participated in, that scenario was discussed and the observation of the mediation trainers as to how that scenario goes in many of the cases that they have observed. I think that would be the extent of it.

So I think your question was is that method reported anywhere, and to my experience, it was included in the mediation training that I participated in.

Q And how did you conclude the correct percentages to apply in your likely settlement negotiation methodology?

A The initial offer and demand

were predicated on all of the leading factors, but I would say the most important is the likelihood of success on the merits.

And the one factor that -- one Iridium factor that I decided not to consider in this case with one exception was difficulty in collection, collectability of a claim. I assumed without knowing that AFI had the ability to pay any of the individual claims that were brought against it, and I knew that AFI had agreed to put up 2.1 billion dollars, which at the end of the day came within the same range as I came up with for all the claims, so I did not consider collectability in that.

The one exception where collectability was an issue was in the third-party claims against Ally Securities, and that did factor into the analysis of both the discount -- litigation discount method and the mediation scenario method.

Q So is it fair to say to come up with the percentages, you essentially apply the facts to the law, the Iridium factors; is that fair?

MR. COHEN: Object to the form.

A I would say I applied the law to the facts.

Q And as we said earlier, in terms of the import, there is no difference, correct?

A I guess it depends on your approach, but I kind of start with learning the facts and then looking at the law and applying the law to the facts.

Q And that's what you did in order to come up with the percentages here in your --

A Yes.

Q Let me restate the question.

So you applied the law to the facts in order to come up with the percentages that you used in your report as part of the likely settlement negotiation methodology?

A Yes, analyzing what I considered the likely merits of the particular claims.

Q And you said you typically start by learning the facts before you apply the law to the facts.

Is that a fair statement?

A Well, the reason I said that is when I wrote opinions, I always wrote the factual part first, and then had a discussion section where I applied the law to the facts.

Q And when you wrote opinions, you did that predicated on each of the respective parties submitting their respective positions to you with respect to the facts, right?

A Evidence, yes.

Q Evidence, and then arguments based on that evidence, right?

A Correct.

Q And then you as the trier of fact would make a determination as to how in your view the matter should be decided;

is that right?

A That's correct.

Q And presumably that's what Judge Gonzales did in this matter, right?

A In this matter? No, Judge Gonzales was not making a decision, initial determination. He was presenting a report on his investigation of potential intercompany claims and third-party claims against the non-debtor affiliates.

Q Right.

But he did reach certain conclusions and make certain recommendation as to the likelihood of success with respect to estate and third-party claims, right?

A Yes, he did.

Q And in doing that, he assessed the evidence, right?

A Yes, he did.

Q And he did that through the form of receiving submissions from parties that discussed the evidence, correct?

A Yes, I believe he did.

Lyons

Q And he did that through interviewing many witnesses, correct?

A Yes.

Q And he did that by reviewing millions and millions of documents, right?

A Pages of documents, yes.

Q Did you do any of that in this case?

A I reviewed some of the contracts. I did not interview any witnesses.

Q Okay.

So in terms of learning the facts, just so we're clear here, what you did is assumed the facts that Judge Gonzales found to be reliable, correct?

A I assumed the facts that Judge Gonzales reported in his examiner's report based upon his thorough investigation.

Q Well, he characterized his own findings as imprecise, did he not?

A He did. I think he said "inherently imprecise".

Q And do you have any reason to

doubt his own characterization of his work as inherently imprecise?

A No, I think that was accurate.

Q And so by definition, isn't your work inherently imprecise?

MR. COHEN: Object to the form.

A Yes.

Q Now, it is also true that two judges can look at the very same evidence, and hear the very same arguments, and may nevertheless reach different conclusions, right?

A That is true.

Q And in this case, you actually don't know the respective perspectives of the parties as it relates to the evidence, do you?

MR. COHEN: Object to the form.

A I think I do have some knowledge as to the perspective of some of the parties regarding the evidence.

Q And which parties?

A The debtor, I understand that the Chief Restructuring Officer has some

disagreement with Judge Gonzalez's view of the facts and law.

Q And what is your understanding based upon?

A Review of Mr. Kruger's -- transcript of Mr. Kruger's deposition that occurred recently.

Q When did you review Mr. Kruger's deposition?

A I think within the last week.

Q Why?

A Why? It was provided to me by Milbank.

Q Upon reading Mr. Kruger's deposition, did you -- did it lead you to change any of your views expressed in your report?

A No.

Q Is there any other deposition testimony that you have read since preparing your report?

A Yes.

Q Who else?

A I think there were nine total

depositions that I've reviewed.

Q Can you name --

A Let's see if I can name them all.

Q We only have seven hours.

A Miss Duncilla. Mr. Cortiz, Mr. Marks, Mr. Kruger. That's four, right? Mr. Rensy, Mr. Young. Let's see, and there is another in there I can't remember. And Mr. Fazio and Mr. Cheli. And there is one more. I think I've only named eight. There is one more I can't remember off the top of my head.

Q And is there anything that you recall from any of those depositions that caused you to change your views or opinions as expressed in your report?

A No. I'm sorry, speaking too quickly.

Q Was there anything that you learned in any of those depositions that was new to you that you hadn't previously read about in the examiner's report?

A Yes.

Q What do you recall in that regard?

A I recall Mr. Kruger's testimony that he in participating in the mediation did not attempt to value either the intercompany claims or the third-party claims, and he described his approach as a top-down approach.

And if I can characterize how I understood he was testifying, that his goal was to see how much he could convince AFI to contribute, and on the other hand, how much would be acceptable to the other constituents who would be receiving the benefit of that contribution. And if he could make those two coincide, that would result in a resolution without considering the merits of any particular claim.

Q Anything else you recall?

MR. COHEN: Objection. Vague.

Q Anything else that you recall learning from any of these depositions that was different or new compared to what you had read in the examiner's report?

A Yes. Let's see, one of the deponents testified about the impact of an increase in the settlement fund from 750 million to 2.1 billion. And he or she, I don't remember which witness it was, said that while the examiner spoke in terms of cancelation of indebtedness income and how that would be impacted by the amount contributed by AFI, this witness did not think that the tax impacts would be on income basis, but would be on a capital transaction basis. And that made a difference, although the direction of the difference was still the same. In other words, the more that was contributed by AFI, the more tax benefit would be available to the parent companies on the consolidated returns.

Q Do you have any reason to dispute -- and that was Mr. Aratakis I believe that you may have read.

A That's the name I didn't mention.

Q Do you have any reason to

dispute Mr. Aratakis's testimony that the examiner's Cody analysis was not the proper methodology to apply?

A No, I do not know how that -- how the winding up of ResCap would be reported, whether it would be a capital transaction or whether there would be cancelation of indebtedness income.

Q By the way, in your report, you stated that -- in Section B, that you were giving the opinion as of the date of the report, and you expressly disclaimed any obligation to update or supplement your opinions to reflect any facts or circumstances that may hereafter come to your attention or any changes in laws which may hereafter occur.

Do you recall writing that?

A Yes, I do.

Q Why did you include that caveat in your report?

A Because I did not want to undertake an ongoing obligation to continue to investigate what was happening

or to keep up with changes in the law.

Q So why did you review the various deposition transcripts that you did following the date that you issued your report?

A Just because I was asked to.

Q By counsel?

A Yes.

Q And had you found something that materially changed your views in those reports, would you nevertheless disclaim an obligation to change your opinions in the report?

MR. COHEN: Objection. Vague. Calls for speculation.

A I don't know, because I don't think that I found anything that would cause me to change my opinion.

Q Now, you in rendering your opinion, you mentioned --

MR. SIMON: Withdrawn.

Q I asked you if you knew anything about the perspectives of the parties' views of the claims in this case, and you

testified that you knew something about the debtors based on those transcripts.

Is there any other basis on which you -- actually --

MR. SIMON: Withdrawn.

Q The views that you may have formed about the debtor's views of these claims, those views were formed after you gave your report in this case, correct?

MR. COHEN: Objection mischaracterizes the testimony.

Q Well, by definition, they are predicated on deposition testimony that was taken after the date of your report, correct?

MR. COHEN: Objection. Mischaracterizes the testimony.

A Well, I think when I was undertaking the project, I knew that there was a dispute between the JSNs and other parties. I assume that the debtor would be on the opposite side of the JSNs, and I assume that the unsecured creditors would be on the opposite side of the JSNs.

Q Right.

So my question is specifically with respect to the views and the merits of the claim, what knowledge, if any, did you have of the debtor's views of the merits of the claims prior to issuing your report in this case?

A Only what was contained in Arthur Gonzalez's expert report.

Q And is the same true with respect to the views of Ally Financial?

A Yes.

Q And is the same true with respect to the views as to the merits of the claims with respect to the Committee of Unsecured Creditors?

A Let's see, I did see some expert reports actually, I think they're mentioned in the appendix to the report, that had to do with the mortgage-backed securities claims and the settlement of the, I believe, the RMBS trust settlements. But I did know that the committee had a different view than the

debtor with regard to the RMBS settlement.

Q And what was the committee's view with respect to the RMBS settlement to your recollection?

A That it was too high.

Q And what was the debtor's view? Is there anything else that you recall about the committee's perspective on the RMBS settlement that you learned prior to rendering your report in this case?

A No, I don't think so.

Q Is there anything else to your knowledge --

MR. SIMON: Withdrawn.

Q Is there anything else to your recollection that you knew about the committee's perspective on the estate claims and the value thereof prior to rendering your report in this case?

MR. COHEN: Object to the form.

A I can't think of anything that I learned other than what's in the examiner's report regarding the committee's view of any particular estate

cause of action.

Q And what about with respect to the JSNs, what, if anything, did you know about the JSNs' views of the claims prior to issuing a report in the case?

A I don't think I knew anything about the JSNs' position regarding the relative merits of any particular claim.

Q The JSNs were provided an opportunity, at least through their counsel, to provide input on your final report in the form of comments, correct?

A Correct.

Q And, in fact, the JSNs were available to you, should you -- either they or their counsel, should you want to ask questions about their perspective of the claims, correct?

A Theoretically, I guess they were. I don't recall ever availing myself of that theoretical possibility.

Q But you could have if you wanted to, right?

A I would say theoretically I

could have, yes.

Q And you had regular communications both electronic and oral with counsel to JSNs, right?

MR. COHEN: Objection?

Mischaracterizes testimony.

A I personally did not, but my colleagues informed me that they had some communications with counsel for the JSNs.

Q And those are the same counsel that helped you work on the report, correct?

A Yes.

Q And that helped you formulate your judgment and opinions in that report, correct?

A That's true.

Q In reaching your opinions as to the value of the claims, did you read any statements made by AFI in the public domain regarding the global settlement?

A I don't recall reading any statements.

Q I think you testified earlier

today that you learned about the ResCap case by reading news accounts?

A Yes.

Q Do you recall reading any news accounts about the global settlement prior to your issuance of your report?

A I definitely read about it in Law360. And I may have seen it in the Wall Street Journal and the New York Times.

Q And what, if anything, do you recall reading about the global settlement?

A Just that it had been reached, and the amount that was going to be contributed.

Q Anything else?

A In the press reports, I think the press reports may have mentioned that there were, besides the debtor and AFI, that there were other constituencies that were part of the global settlement.

Q Don't you think it would have been helpful in rendering your opinions to

try to glean from statements of Ally Financial its perspective with regard to the settlements and the merits of the claims?

A The merits of the claims, I didn't see any -- other than what was provided to Arthur Gonzales for his examiner's report, and I know that he sought the input from all the parties, including AFI, I did not seek any input from any of the parties regarding the merits of the claim.

Q And why; why did you not?

A I did not want to recreate what Judge Gonzales had done.

Q And to be clear, you didn't personally review any submissions that Judge Gonzales received from either AFI or any other party, correct?

A That's correct.

Q Okay.

And I understand you were sensitive to duplicating work, but can you tell me why you did not think it important

to see whether Ally Financial has expressed any opinions in the public domain regarding the nature of the global settlement or why it decided to enter into the global settlement?

A Actually, I was told that there was a mediation confidentiality, and that the whatever happened during the mediation was confidential and could not be disclosed.

MR. SIMON: I'm going to ask the reporter to mark as Lyons' Exhibit 3, a press release issued by Ally Financial on May 23, 2013. Captioned "Ally Financial marks next step in implementing the comprehensive ResCap settlement".

(Press Release Issued by Ally Bank, May 23, 2013, was marked as Lyons Exhibit 3 for identification, as of this date.)

BY MR. SIMON:

Q Take whatever time you want, Mr. Lyons, to look this over, but I'm

going to direct your retention to the second page of this.

Have you seen this press release before?

A I don't believe so.

Q Can you look at page 2.

Do you know who Michael Carpenter is?

A Let me just read for a minute.

Q Sure. Take your time.

(Witness reviewing document)

A Okay. I've read it. Thanks.

Q Do you see on the second page of the press release where Mr. Carpenter -- first of all, who is Mr. Carpenter?

A He is identified here as the chief executive officer.

Q And apart from reading that title, did you have a knowledge as to who Mr. Carpenter was before today?

A Yes, from the examiner's report.

Q And he states in his press release, "Reaching this comprehensive agreement enable Ally to turn the page on

the tumultuous chapter in its history that was severely impacted by the issues in the mortgage industry."

Do you see that?

A Yes.

Q Do you have any reason to dispute that that is a bona fide belief by Mr. Carpenter?

A No.

Q And moving on a paragraph or so later, he says, "Reaching closure on the ResCap matter is a critical step in successfully completing our strategic initiatives."

Do you see that?

A No, where is that?

Q It is the next to last paragraph. "Ally has paid 6.1 billion to the treasury to date and reaching closure on the ResCap matter" -- do you see that?

A Yes.

Q And, again, do you have any reason to doubt the bonafides of that statement by Mr. Carpenter?

A No.

Q And you didn't consider in substance or form this press release prior to rendering your judgment on the value of the claims in this case, right?

A In substance I did, yes.

Q So what do you know about Ally's strategic initiatives?

A I knew that Ally wanted to put the mortgage business behind it and wanted to repay the TARP funds and get out from under government control. And I considered that a motivation for AFI to come up with a large settlement fund, as it has.

Q Do you know whether AFI hoped to conduct an IPO in order to help pay back funds to the U.S. Government?

A That was my understanding, yes.

Q And do you think it could have done that with tens of billions of liability hanging over its head?

A I concluded that that contingent liability was an impediment to an IPO.

Q And would you agree with me that 2.1 billion dollars is a lot of money to pay into a plan?

A Yes.

Q And putting aside the mass tort context in the WAMU case, can you name another bankruptcy where a parent company has paid something along those lines to a plan?

A No.

Q And in the mass tort context, would you agree that large payments such as that are often made to secure global peace?

A In the mass tort context. Yes, that's true.

Q And would you agree that similarly here, AFI might have been willing to pay a large amount of money for global peace?

A I would expect that's true.

Q As opposed to parsing between and among any individual particular causes of action that a litigant might lodge

against them?

MR. COHEN: Objection. Calls for speculation.

A Well, it seemed to me that the only way for the parties to -- I shouldn't say the only way. That an appropriate way for the parties to come to an amount for the AFI contribution was to take into consideration what claims could be brought against AFI and the merits of those claims and the value of those claims.

Q You think in the mass tort context that's how a global settlement is sort of evaluated and reached?

A In the mass torts context?

Q Uh-huh.

A Can you give me an example?

Q No. I'm just asking you generally.

I think you testified that it's common in that context, where there is massive amounts of liability, for a company to pay a large amount -- a non-debtor company parent to pay a large

amount of money into a plan to secure global peace?

A I don't think I said parent.

Q For a company, for a company to pay.

A I was thinking of insurance companies in the asbestos context --

Q Fair enough.

A -- to put money in and get the benefit of a 5.4G order.

Q To the extent AFI was motivated by a global release in order to put behind it the litigation maelstorm that it had encountered coming out of the credit crisis, you did not consider that motivation in your analysis, did you?

A I did.

Q How?

A With regard to the RMBS claims, I considered that was the -- one of the major motivations for AFI in coming up with a large settlement fund, and I ascribed a large value to those claims even though the merits were very weak.

Q But, sir, isn't the liability stemming from the credit crisis not merely restricted to the RMBS claim?

A The liability. I would have to look at the individual claims and see which may have been impacted by the credit crisis from AFI's point of view.

Q So you don't know as you sit here today?

A I would have to look through them, but the one that seems most important to me are the RMBS claims.

Q Can you look at the first page of the release.

You see there in the second paragraph of the first page, there is a discussion of the release in the plan?

A Yes.

Q And there is a reference to the fact that the major creditors agreed to support the Chapter 11 plan in ResCap's Chapter 11 cases that contained broad releases for the benefit of Ally?

MR. COHEN: Where are you

reading?

MR. SIMON: It is the middle of the second paragraph.

(Witness reviewing document)

A Yes, I've read the second paragraph.

Q And you see actually the release is prominently presented in the press release; it's right up front in the press release.

Do you see that?

MR. COHEN: Objection. The document speaks for itself.

Q You would agree with me it is the first thing that is discussed before there is even a settlement amounts of was case, right?

A In the second paragraph?

Q Yes.

A Yes.

Q As a bankruptcy judge, I think you testified earlier you would agree that to get a third-party release as a practical matter, Ally needed to secure

the support of ResCap's major creditors?

A Yes.

Q And absent that consent, I take you don't think that the plan could be approved with a release?

A To get a release, the standard requires the consent of a significant portion of the parties who would be giving the release.

Q Right.

And so without that, it is unlikely to be approved, correct?

A Without the support of the substantial body of those parties who are being asked to give a release, it is unlikely that the release would be approved.

Q In this case, if one major creditor objected, for example, MBIA or AIG, do you think the Bankruptcy Court would impose a release?

A I really haven't thought about that.

Q You have no way of knowing that

as you sit here today?

MR. COHEN: Objection.

Mischaracterizes his testimony.

A I would have to give it more thought than to give you off the top of my head an answer to that.

MR. COHEN: Who just joined the call?

MR. O'NEILL: Brad O'Neill, Kraemer Levin.

Q Did you take into account at all AFI's motivation to secure a broad release?

A Yes.

Q How?

A I think I just explained. Primarily with regard to the RMBS claims, I thought that AFI was very motivated to obtain that broad release because it wanted to put behind it the mortgage mess, and it wanted to repay the taxpayers, and it wanted to return to private ownership. And in order to do that, it seemed to me that AFI wanted to obtain a broad release

and have all of those uncertainties behind it.

Q But to be clear, you don't have any personal knowledge of just how much AFI was willing to pay for a third-party release, do you?

A No. Don't we all wish we knew that?

Q Do you have knowledge whether in the absence of a release, AFI would have been willing to settle at any amount?

A At any amount. I don't have knowledge about that.

Q So they might not have settled at all without that release; isn't that possible?

A That is a possibility.

Q In your experience as a bankruptcy judge, are there sometimes litigation milestones that could have an impact on the value of settlement?

A Yes.

Q Can you give me some examples of those?

A A motion to dismiss.

Q And how might that impact settlement?

A If the plaintiff survives a motion to dismiss, that would impact the assessment of each party on the relative merits.

Q And if a defendant thought it likely that a plaintiff would survive a motion to dismiss, would that have an impact on settlement negotiations?

A Before the motion was heard?

Q Correct.

A Yes.

Q And what would that impact be?

A It would tend to induce the defendant to give greater value to the merits of the claim and to the reasonable settlement amount.

Q And are there other litigation milestones that could affect the impact or that could impact the value of settlements?

A Yes.

Q And can you tell me some others?

A Motion for summary judgment.

Q And could you explain the impact that could have on settlement value?

A Yes. If a defendant were to survive a motion for summary judgment, again it would cause the parties to reevaluate the merits of the -- I'm sorry, if a plaintiff were to survive a motion for summary judgment, it would cause the parties to reevaluate their assessment of the relative merits of the claim and the reasonable settlement value.

Q Can you turn to page 54 of Lyons Exhibit 1, which is your report.

And here there is, toward the bottom of the page, a number 7 for single entity theories for liability.

Do you see that?

A Yes.

Q And the first is piercing the corporate veil.

Do you see that?

A I do.

Q Now, in this section, you noted, "The examiner's investigation uncovered evidence of certain indicia that ResCap and AFI operated as a single economic unit."

A Yes.

MR. COHEN: Objection.

Misstates the document.

MR. SIMON: Entity. Withdrawn.

My apologies?

A Where are you reading from? Sorry.

Q "Single economic entity".

A I have that.

Q "ResCap's conduct in connection with a number of affiliate transactions" -- and there is a number there listed there -- "departed in some important respects from appropriate corporate formalities."

Do you see that?

A Yes.

Q Can you tell me as you sit here today the important respects in which any

of these affiliate transactions departed from appropriate formalities?

A The 2006 bank restructuring, there was a failure to inform the independent directors of ResCap that the restructuring could be accomplished without restricting ResCap to non-voting stock.

The MSR Swap, the Pipeline Swap, I believe that those agreements were affiliate transactions that should have gone to ResCap's board for approval but did not, and approval by the independent directors. I don't believe that was done in those cases.

The first 2009 tax allocation agreement, that agreement had been approved by ResCap's board, had been signed by an appropriate representative of AFI and submitted to ResCap's representative for signature, and then it was pulled back by AFI, and copies of those signed documents were destroyed.

The second tax allocation

agreement was signed as a substitute for the first tax allocation agreement without any additional consideration given to ResCap, and was inferior to the first tax allocation agreement from ResCap's point of view.

Let's see.

The allocation of liability in connection with the FRB/FDI settlement and DOG -- excuse me -- DOJ/AG settlement. The allocation gave ultimate responsibility to ResCap when it appeared that AFI had some independent basis for liability, however, the source of funding for those payments did ultimately come from AFI down to the subsidiaries.

Q Okay.

And are you done with your answer?

A I think I am, yes.

Q And is that answer all predicated on what you read in the examiner's report?

A Yes, I believe it is.

Q And with respect to any claim, but in particular the alter ego claim you're aware of no facts, outside of what was presented in the examiner's report, that informs your view of the value of that claim?

A That's correct.

Q And I earlier mentioned the fact that the committee in this case had filed a motion for standing to pursue claims against AFI on behalf of the estate.

Do you recall that?

A You did mention that.

Q And I referred to that and you hadn't heard the term as an STN motion?

A Yes.

MR. SIMON: I'm going to introduce as Lyons Exhibit 4 a document that is dated April 11, 2013. It is a notice of motion of the Official Committee of Unsecured Creditors for entry of an order authorizing the committee to prosecute and settle certain claims on behalf of

e debtor's estates, and it attaches a memorandum of law in support of the motion.

(Notice of Motion by Official Committee of Creditors, dated April 11, 2013, marked as Lyons Exhibit 4 for identification, as of this date.)

BY MR. SIMON:

Q Mr. Lyons, have you seen -- take a moment to look at it of course, and let me know if you have seen this document before.

(Witness reviewing document)

A I do not believe I have seen this document before.

Q Okay.

In your report, you note that an alter ego claim constitutes property of the debtor corporation, and the debtor in possession or bankruptcy trustee has exclusive standing to assert such a claim.

Is that an accurate statement of one of your statements about the examiner's analysis and conclusions?

A Yes. That is the examiner's analysis, and I agree with that. It is not a proposition that's without dispute.

Q But you accepted it for purposes of your analysis?

A I do. I think the examiner's analysis was correct. I agreed with it.

Q And do you know whether in this case the debtor in possession consented to the committee bringing claims on its behalf against AFI?

A I do not know.

Q Can you take a look please at paragraph 7 of the memorandum of law.

(Witness reviewing document)

Do you see in the third sentence of paragraph 7, there is a reference to the fact that the debtor has consented to the committee's prosecution of the claims, and thereby impliedly acknowledged the claims are both substantial and worth pursuing with estate resources?

A I see that sentence, yes.

Q Do you have any reason to

dispute the fact that the debtor has consented to the committee standing to pursue actions against AFI in this case?

A I was not aware of the debtor's consent one way or the other.

Q And do you know whether or not such standing extended to pursuing an alter ego claim?

A I do not know that.

Q If it had, would it impact your findings in any way with respect to the point that typically a debtor corporation has exclusive standing to assert the claim?

A I don't think so.

Q Can you tell me the elements of an alter ego claim?

A Yes. That there is -- that the entities operate as a single economic unit; that there was some confusion on behalf of parties dealing with the entities as to whether there was a separate existence; and also there must be an unfair element to treating the entities

as separate.

Q And you write in your report that a debtor that succeeds in piercing its own corporate veil may hold the parent liable for all of its debt?

A That's correct.

Q And so in this instance, the totality of debts that were owed exceeded 20 billion dollars, right?

A Yes.

Q And so if an alter ego claim were successful, Ally Financial would be essentially responsible for the totality of in excess of 20 billion dollars in debt, right?

A As I understand it. The 20 billion dollars, I assume you know what you're talking about in terms of the claims against the estate. I'm not sure I know all of the claims against the estate.

Q Well, can you turn for a moment to page 79 of your report?

A Yes.

Q And this is where you purported

to do your analysis of both the alter ego claim and the control person claim.

Do you see the first line of your analysis reads "Potential Damages" page 79?

A 79. No, I don't see that.

Q Page 79 of your report.

A Yes, I have it.

Q In the middle of the page, it says "potential damages"?

A Oh, yes, okay.

Q And do you see the figure there is 20 billion dollars?

A Yes.

Q So would you agree with me your alter ego analysis was predicated on liabilities of 20 billion dollars, potential liabilities?

A No, only the RMBS liability was potentially 20 billion dollars.

Q So is your testimony that if the committee were successful in its claim against Ally Financial in an alter ego theory, the sole liability that would

attach would be for RMBS liability?

A No.

Q So you're saying the 20 billion dollars only reflects the RMBS liability in your report?

A In my report, yes.

Q So it's actually greater than 20 billion dollars, the potential magnitude of liability that Ally Financial would be subject to should an alter ego theory prevailed.

A Yes, I think that's correct.

Q And do you know whether or not there is any statute of limitations for an alter ego claim?

A No, I do not.

Q Now, you state at page 56 of your report, if we can go back to that.

In the last sentence, under "settlement considerations", that "despite the fact that the examiner concludes and I agree that veil piercing and alter ego claims are unlikely to succeed, I conclude there is significant settlement value not

to exceed 480 million as discussed in the third-party RMBS litigation analysis below."

A Yes.

Q What is your rationale for including the discussion of the alter ego claim that could be brought by the committee in the third-party RMBS litigation analysis in your report instead of on a standalone basis?

MR. COHEN: Object to the form. Vague.

A Because it was my understanding that the RMBS claims were the largest claims, potentially largest claims against AFI and the debtors, and so that would be the area where it seemed to me that AFI would be motivated to settle those claims and get a release even though the claims may not have had the best merit.

Q But to be clear, you're talking about the liability for the RMBS claims as 20 billion, right?

A That's what I estimated the

liability would be for attempting to arrive at a reasonable settlement amount.

Q And that's in your view the biggest liability that was at issue, the liability for those claims; is that fair?

A That's what I gleaned from the examiner's report, that the RMBS claims were potentially the largest claims against the debtors and against AFI.

Q But if an alter ego claim were successful --

A Yes.

Q -- the committee would be able to get to Ally Financial to recover for those liabilities, correct?

A For all liabilities.

Q Including the RMBS liabilities?

A Including the RMBS, and any other claims that were valid against the debtor.

Q And, frankly, it would not need to prove a control person theory to do that, would it?

A That's correct.

Q And, in fact, the alter ego claim does not belong to a third-party, does it?

A As I said, we concluded that in the bankruptcy context, the alter ego claim belongs to the debtor under Delaware law.

Q In fact, you in your report stated that you agreed with the examiner's conclusion that third-party claimants may lack standing with respect to an alter ego claim because the veil piercing claim belongs to the bankruptcy estate under applicable law, right?

A Yes.

Q So, again, why didn't you do the alter ego analysis on a standalone basis, but instead include in the third-party section of your report?

A Well, I believe that I said that I thought that the estate representative would work together with the third-party claimant, and that the -- in terms of settlement value, most of the motivation

would come from the magnitude of the third-party RMBS claims to resolve an alter ego type of claim.

Q Right.

And to be clear, the committee's motion for alter ego would have gotten to recovery for the magnitude of the RMBS exposure, correct?

A Yes.

Q And so I'll ask you again: Why was it appropriate not to analyze the alter ego claim on its own in your report?

A Because I thought it would be a joint effort frankly of the estate representative and the RMBS claimants.

Q Do you have any firsthand knowledge of that?

A No, that was my estimation of how that would -- how those parties would work together to induce AFI to make a substantial payment to settle those claims.

Q Do you know whether the committee's motion included any claims for

control person liability?

A I do not.

Q Can you look at paragraph 3 of the motion? Could you read into the record paragraph 3?

A You're talking about on page 2?

Q Yes.

A "In short, the information available to date paints a stark picture of AFI's nomination control and abuse of the debtors that supports strong claims against the AFI defendants, including for veil piercing. Fraudulent conveyance, indemnification, preferential transfer, and equitable subordination, all of which the committee is prepared to litigate vigorously. These claims present a real threat that AFI ultimately will be liable for unsecured liabilities of the debtors of more than 20 billion dollars."

Q Had you seen that statement before today?

A No.

Q Nowhere in that paragraph does

it allege that the committee was seeking to press a theory of control person theory, does it?

A I didn't see it in what I just read.

Q And does it say anywhere, by the way, that the committee is seeking a breach of contract claim in any respect?

A In this paragraph 3?

Q Right?

A No.

Q Are you aware whether the committee ever asserted a breach of contract claim against AFI?

A I am not.

Q Are you aware of any party that asserted a breach of contract claim against AFI?

A No, I'm not.

Q And you realize the examiner's report in this case was issued after the global settlement was reached by the parties.

Do you know that?

A I understand that the examiner's report, there was a delay in issuing it to allow the parties to complete the mediation. They completed the mediation and then the report was made public.

Q And that was so the report would not have an impact on settlement negotiations; is that fair?

A That sounds right. I don't know, but I assume that is a fair characterization.

MR. SIMON: I think we need to change the tape. So it may make sense to do that before we continue, and break for lunch.

THE VIDEOGRAPHER: This marks the end of tape number two. We're going off the record at 1:01 p.m.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

A F T E R N O O N S E S S I O N

THE VIDEOGRAPHER: This marks the start of tape number three. We're

back on the record at 1:42 p.m.

R-A-Y-M-O-N-D T. L-Y-O-N-S, resumed

and testified as follows:

EXAMINATION BY (Cont'd.)

MR. SIMON:

Q Mr. Lyons.

A Good afternoon.

Q I don't recall if I asked you, did you ultimately read the entirety of the examiner's report from front cover to back cover?

A Yes, I did. I can't say that I read the appendix from front to back, but I did read most of the appendix.

Q And when did you do that, before issuing your report, after, or a combination?

A Combination.

Q How much had you read before issuing your report?

A Probably 90 percent.

Q Do you recall which pieces, which 10 percent you read after your report?

A It was primarily Section 6, which was the evaluation section. I hadn't read that completely prior to issuing the report.

Q And why is that?

A Frankly, it was the hardest for me to get through. It was pretty dry material. And I understood the conclusion that was made about when the debtor became balance sheet insolvent or unable to pay its debts as they came due or had unreasonably small capital.

Q Do you recall when the examiner determined that ResCap was balance sheet insolvent?

A I think it was at the end of 2007, balance sheet insolvent, December 31st balance, and the other two tests I believe were in August of 2007.

Q And I think you testified you spent a little over half your time reading the report of the 206 hours that you spent?

A That was my estimate.

Q So, frankly, if you kind of look at the entirety of the report, it was about three minutes per page of reading.

Is that a fair assessment of sort of the time you spent reading the report?

A I'm a slow reader, so it's probably so.

Q But it is your testimony that roughly 60 percent of your total time you read the whole thing?

A As I say, that is a -- that is just an estimate without looking at the actual time entries.

Q And with respect to the valuation, you did not do your own independent evaluation of any of the financials in the report, did you?

A That's correct.

Q So is it fair to say when you issued the report in this case, not having read the valuation section, you actually didn't have a full understanding of the examiner's analytical process as it

related to valuation?

MR. COHEN: Object to the form.

A No, I knew what the process was. I had looked through the Section 6. So I knew the methodology that had been used by the examiner's financial advisors, but I had not read line by line the detail of it.

Q And you're aware of the admonition by the examiner that any reader that wants to obtain a thorough understanding of his analytical processes and the reasoning supporting his conclusion should review the report in its entirety?

A Yes.

Q Did you not do that with respect to Volume 6 of the report prior to issuing your report?

A Prior to issuing, I hadn't read it line by line.

Q You mentioned after issuing your report, you read some deposition testimony?

A Yes.

Q Did you look at any documents after issuing your report that related to this matter?

A Not any new documents, no.

Q Is there anything else apart from the transcript --

A I don't think so. I can't remember. No.

Q Sorry.

A I'm trying to refresh my memory, and I can't recall seeing any different documents other than the transcripts after issuing my report.

Q You state in your report at page 7 that in arriving at the likely settlement amount for each of the potential claims identified by the examiner, you consider the likely motivation of the particular litigant regarding the decision to settle the claims?

MR. COHEN: Can you show us where on that page you're reading?

Lyons

MR. SIMON: Sure. Page 7. Let me get my copy. Very top of the page.

MR. COHEN: Thank you. First paragraph.

(Witness reviewing document)

A Yes, that's correct.

Q And on what basis do you purport to opine on the likely motivation of the particular litigants regarding their decision to settle the claims?

A Well, I looked at the estate causes of action as being pursued, I thought by an estate representative. Frankly, I didn't think it would be the debtor in possession. I thought it would be a committee, or in the event that a trustee were appointed, by a trustee. And my general perception of fiduciary pursuing litigation is that they are motivated to resolve the matter sooner rather than later so that they can make distribution to creditors who are waiting anxiously to receive a distribution from the estate.

Q To be clear, what did you mean by the term "particular litigant" in that sentence?

A Looking at who would be the plaintiff, who would be the defendant in any particular claim.

Q And in this instance, were you referring specifically to AFI, for example, as a particular litigant?

A In the instance of certainly the RMBS claims, the alter ego single entity claims, I was focusing on the motivation of AFI as a defendant.

But with regard to each of the claims, I also tried to think about the motivation of the defendant would be AFI in each instance, except when Ally Bank and Ally Securities were potential defendants in some of the identified causes of action, and whether they would be motivated to reach a settlement in each case.

Q But prior to lunch, I think we talked about the fact, you have no

personal knowledge of any motivation on AFI's part to enter into this global settlement, do you?

A I think it was set forth in the examiner's report.

Q The motivation of AFI was set forth in the examiner's report?

A I believe there is an indication that AFI wanted to issue an IPO, and that the existence of these large claims was interfering with that.

Q And that's the sole -- that's the entirety of what you predicate your assessment of the likely motivation of AFI to resolve litigation on?

MR. COHEN: Objection.

Mischaracterizes testimony.

A No, that's not the entirety of what I -- how I made an assessment of what I perceive AFI's motivations to be.

Q Well, you certainly didn't talk to anybody from AFI?

A Correct.

Q And you didn't read anything in

the public domain that was put out by AFI in the settlement, right?

A Well, I read press reports about the existence of the bankruptcy filing and why it was, according to the press reports, that AFI was anxious to have ResCap resolved and put it behind them.

Q But you're have third-hand reports. You didn't actually read any statements put out by AFI with respect to the global settlement, did you?

A With respect to the global settlement?

Q I think you testified earlier --

A I don't think so. I don't believe I saw that press release, but I would suspect that that press release was the basis for some articles that I read about the settlement.

Q And is there anything else besides what you testified to that would have informed your view of the particular motivation of AFI in this case?

A Anything else? Not that I can

think of. What I read in the examiner's report and what I read in the press.

Q I want to pick up on your discounting methodology we had asked a few questions about earlier today.

A Yes.

Q Did you consult with anyone as to the appropriateness of that methodology?

A I consulted with my colleagues at Fox Rothchild.

Q Anyone outside of the firm?

A Outside of Fox Rothchild, no, I don't believe so.

Q Are you aware of any criticisms of the discounting methodology?

MR. COHEN: Objection. Vague.

A No, I'm not.

Q Isn't the discounting methodology essentially your subjective assessment of criteria that in your review based on experience would either increase or decrease the claim's chance of success?

MR. COHEN: Object to the form.

A I would say that's an accurate statement.

Q And there is no theory or technique that can be used to test your opinions in that regard, is there?

A There is not like scientific experiment, correct.

Q There is certainly no formula, correct?

A Not that I'm aware of, no.

Q In fact, you say in your report that your analysis is a non-formulaic analysis, right?

A Yes.

Q And, frankly, your opinions as to the motives of AFI, that too is really based on nothing more than your own personal belief as to what might have motivated AFI?

A No, I don't think so? It wasn't only my personal belief.

Q The likely settlement negotiation scenario that we talked about earlier.

A Yes.

Q The percentages that you applied in that test, have they ever been tested by anyone or verified by anyone?

A No. Again, it is not like a scientific experiment.

Q And has that methodology gained acceptance among others doing litigation settlement value analysis to your knowledge?

A I believe so, yes.

Q Who?

A Well, I know of other mediators who participated in training that I attended who use that type of analysis to assist parties in evaluating their own positions and the merits and reasonable settlement value of their claims.

Q You mentioned earlier the course work that you have done in mediation, and you said that again.

Do you have any materials that you kept from those courses?

A Yes, I do.

Lyons

MR. SIMON: And I'm going to make a request that that material be produced to us.

Q Any materials that speak to the discounting methodology or the likely settlement negotiations scenario methodology that you received in any of the mediation work.

MR. COHEN: We'll take it under advisement.

Q Are you aware of any criticisms of the likely settlement negotiation methodology?

A No.

Q And would you agree with me that that methodology reflects your subjective assessment of how a negotiation might unfold between a hypothetical plaintiff an a hypothetical defendant?

MR. COHEN: Object to the form.

A Yes, that is what I tried to do, envision how a mediation discussion would go between the plaintiff in the cause of action I was reviewing and the defendant.

Q And to be clear, the methodology is not based on how actual negotiations between AFI, the debtors, the committee, and various other constituencies went; it could not be because you have no personal knowledge of that, right?

A And it was also confidential.

Q And there is nothing wrong with the fact that the mediation was confidential, right?

A No, it is a highly desirable feature of mediation, confidentiality.

Q It is one that you as a bankruptcy judge would endorse, a former -- let me rephrase that -- you as a former bankruptcy judge would endorse?

A And as a mediator, I endorse.

Q In the likely settlement negotiations methodology, you discuss the back and forth that will ultimately result in a settlement dollar amount, right?

A Yes.

Q On what basis do you conclude that the back and forth will yield that

particular result?

A It is based upon my experience and what I've observed in negotiations and considering the factors that go into a settlement analysis. In this case, primarily the merits of the claim often in other context, collectability, and the ability of the defendant to pay is much more prominent than I considered it to be in the AFI situation.

Q And you would agree not every negotiation is the same, right?

A That's true. I think there are certain things that are prevalent, more common, but the results can vary.

Q And there may be particular bargaining positions that a party might have that might be very important to that party in a given case?

A That's a true statement.

Q And that might well drive the outcome of that particular negotiation, right?

A That's true.

Lyons

Q And you don't know as you sit here today whether there is any particular aspect of the global settlement that was essential to, for example, AFI, do you?

A Well, it is my perception that getting a very broad release was very important to AFI.

Q But the relative weight of that goal in the context of AFI's decision to enter into a settlement, you have no way of knowing how important that goal was because you never talked to anyone from AFI, right?

A No, but I just read the press release and that seemed to confirm my impressions.

Q But you hadn't read that when you issued the report, correct, sir?

A I hadn't read the press release, but I read press reports about the ResCap bankruptcy and AFI's position as being a non-filing parent of this corporation.

Q In your report, you mentioned that where appropriate, you would use more

than one method to arrive at your opinion as to reasonable settlement value?

A Yes.

Q How did you decide when it was appropriate to use more than one approach and when it was not?

A Just by looking at the circumstances of a particular claim.

Q Well, you used the two methodologies with respect to five of the total causes of action that you analyzed, right?

A I don't know. I have not gone back and counted it.

Q Do you recall which ones you applied more than one methodology to, which claims?

A Not off the top of my head, no.

Q Well, I'll represent to you that there were five, and in four of the five, you determined using discount methodology that the claim should be valued exactly the same as if you used the likely settlement negotiation scenario method.

Lyons

How do you explain that?

A I reconciled the two methods.

Q What do you mean by that?

A After going through the two methods, when I found that the numbers were close, I reconciled and came up with one number for the reasonable settlement value.

Q And so was the second methodology then an independent methodology or is it just really one overall methodology?

MR. COHEN: Object to the form.

A I considered them to be independent methodologies.

Q But you harmonized them?

A Reconciled is the word that I used.

Q You reconciled them?

A Correct.

Q Before reconciling them, do you have any recollection of how far apart the final values were for a given claim?

Let's take, for example, the net

revenue claim. I think that's one of the five where you do apply both methodologies.

And with respect to that claim, you came up with a total of 268.2 million as a reasonable settlement amount.

Do you recall that?

A Yes.

Q And do you recall before reconciling your two approaches, what number you came up with on the discounting methodology?

A I do not recall.

Q And where in your report does it reflect your process for reconciling the numbers that you got in the two methodologies?

A Well, it is reflected in the fact that I'm using the settlement or the mediation scenario method. I came up with the same number that's reflected in the litigation discount method.

Q Well, you say you came up with the same number, but, in fact, did you

come up with the same number before you reconciled the two?

A Probably not, no.

Q And, again, how is the reader to discern from your report the manner in which you went about reconciling the two approaches?

A I'm not sure that a reader could.

Q And why did you omit that information from your report?

A I didn't intentionally omit that information. That's just what I did.

Q Do you have any notes that you prepared that would reflect the values for the respective methodologies prior to reconciliation?

A No.

Q Did you destroy the notes --

MR. SIMON: Withdrawn.

Q How did you go about --

MR. SIMON: Withdrawn.

Q Can you describe for me your process of reconciliation of these two

methods; how did you go about doing it?

A Just by doing both methods, seeing what the number produced in each method, and where they were close, choosing a number that seemed to be reasonable.

Q And when you did the number in the discount method the first time, did you write that down anywhere?

A I don't think so.

Q You just kept it in your head?

A Yes.

Q And then you would do the methodology for the likely settlement approach and keep that number in your head?

A Yeah, it was either in my head or in the draft of the report.

Q Well, at one point in time, did the draft report have different numbers for the claims in which you used both methodologies?

A I don't remember that happening in the draft report.

Q So to your recollection, every time you reduced to writing in a draft both methodologies, you had already done the reconciliation?

A I think so, yes.

Q And you have no recollection as you sit here today of ever reducing to writing the pre-reconciliation numbers for either of the methodologies for any claim?

A Yes, that's true.

Q Yes, you don't remember doing that?

A I don't remember doing that; that's true.

Q There is one instance in the report where you have different numbers for the two methods.

Do you know which claim that is?

A Yes, I recall that one.

Q Which one was it?

A It was the 2006 bank restructuring claim.

Q And what page are you referring to?

A I was looking at page 5.

Q Can you tell me -- let me just get there.

And where in your report do you set out the two different values for the discount methodology and the likely negotiation methodology?

A It starts on page 45.

Q Okay.

And so it looks as though you -- page 45 you said, right?

A Yes, that's where the discussion of that is.

Q And where is the methodology?

A Settlement consideration starts on page 47, and it concludes on the top of page 49.

Q And you conclude there using the discounting methodology that the claim rounds to 130 million, right?

A Yes.

Q And what did you determine it to be using the settlement, the negotiation settlement analysis?

A 130 million.

Q So the same?

A Yes. But I think you'll see that if you do the last calculation on the discount method, it comes to 131.4 million and I had rounded that to 130 million.

Q I see.

Why with respect to this claim did you actually give a disclaimer that you had rounded down the 131.4 million in order to reconcile it with -- in order to reconcile the two methodologies?

A Because in this one, actually when I was doing the chart of all of the claims, I picked up the 130 million dollar and then plugged that in. And going back and looking at the discount litigation discount method, I noticed that there was a slight difference of 131.4. Rather than go back and change the chart, I went to here and just said that I used the round number in this particular instance.

Q Is that because it was ministerially easier to do that?

A Yes, exactly.

Q So from the perspective of your methodology or analysis, there is no particular reason that you did that?

A No, it is just that I picked the rounded number rather than the odd number, and it wasn't worth my going back and doing the arithmetic again.

Q Was that the math error that you testified was pointed out to you?

A No, that was not it.

Q What point in time relative to issuing your report did you discover the discrepancy between the numbers in the chart?

A That was pretty late in the game. I would say within the last week before October 18th.

Q Can you look at page 44 of your report?

A Yes.

Q You'll see on page 44 that using the discounting method on the Minnesota Preference claim, you reached a figure of

328.9 million.

Do you see that?

A Yes, I do.

Q And in the text, you discuss your alternative methodology and conclude actually right below it, do you see the paragraph right below?

A Yes.

Q And you conclude there that using your alternative it should be 300 million.

A Yes.

Q Is there a reason why you didn't reconcile those two numbers with respect to this claim?

A No, there is no reason why.

Q Did you intend to and this was just sort of a mistake?

A Yes.

Q What is your basis for reconciling the two methodologies?

A I wanted to come up with one number for each claim. I didn't think it was productive to have alternate numbers

or ranges, and when the two methodologies produced reasonable settlement numbers that were compatible, I selected one of them.

Q Would you agree with me that the fact that the different methodologies yields different numbers in itself suggests that the process of evaluating the value of a settlement is inherently subjective?

MR. COHEN: Object to the form.

A I think I used the term -- I adopted the term that Arthur Gonzales used, which is inherently imprecise.

Q Fair enough.

And is there any basis, any authority that states it is proper to reconcile two different methodologies when you're attempting to value a settlement that you're aware of?

MR. COHEN: Objection. Vague.

A Any authority?

Q Text, treatise, report.

A Not that I'm aware of, no.

Q And have you -- and, again, you did not set out anywhere in your report the fact that you did this reconciliation or how you did it, right?

A I don't believe I did, no.

Q So would it be possible for anyone to verify the reconciliation process that you used in this report if they attempted to do so?

A I guess you could ask me about it.

Q Well, sir, you can't remember any of the numbers that you got when you did independently for each of these claims the discounting method versus the likely settlement negotiation method, correct?

A Right, I don't have any written record of that.

Q And nor can you remember as you sit here today what the values were?

A I'm not sure about that.

Q Let's go through them.

Can you tell me for the first claim that you used both approaches, which

on your chart is the net revenue misallocation breach of contract claim?

A Yes.

Q Can you tell me what you recall the settlement discount analysis reflected prior to the reconciliation?

A Let's see.

My recollection is that the mediation scenario method -- yeah, I don't remember exactly the number that I came up with there, but my best recollection is that it was approximately 250 million dollars.

Q But to be clear, you can't remember precisely what the number was, right?

A That's true.

Q So there is no way for anyone with any degree of precision to validate the veracity of your reconciliation with respect to the discount methodology versus the settlement negotiation methodology on the misallocation of net revenue claims; is that correct?

Lyons

MR. COHEN: Object to the form.

A That's true.

Q And would that be the case for the other claims in which you applied both methodologies?

A That no one can independently determine how I reconciled them? I think that's probably accurate, yes.

Q Do you have any understanding of the nature of the claims on which the JSNs contend that they have liens on in this case?

A The nature of the claims that the JSNs contend they have liens?

Q Yes.

MR. COHEN: Objection. Vague and overbroad.

A My general understanding is that the contention is that their security interest would attach to contract type of claims.

Q And what do you base that understanding on?

A What I learned from Mr. Uzzi in

our first conversation.

Q And to be clear, you're not offering any expert opinion with respect to that subject, are you?

A I'm not opining as to the validity of the JSN security agreement or which collateral it attaches to.

Q And with respect to the examiner's report, there are essentially three breach of contract claims to which you ascribed a settlement value, right?

A I'll accept your representation.

Q Do you recall what they are?

A Off the top of my head, I think I know what they are.

Q In fairness, there are like 29 claims.

MR. COHEN: You can look at the report.

Q Sure, you can look at your chart. Exhibit 1, you can take a look.

But as I read it, there is a breach of contract or a purported breach of contract claim for misallocation of net

revenues.

A Yes.

Q To which you ascribed a reasonable settlement value of 268.2 million?

A Yes.

Q A so-called breach of contract for failure to pay the value of purchased MSRs?

A Yes.

Q For 387.2 million settlement value, you opine?

A Yes.

Q And then a so-called breach of contract regarding the first 2009 tax allocation agreements.

A Correct.

Q Which you opine is valued at 713.7 million?

A Yes.

Q Do you know whether any breach of contract claim that was identified by the examiner, or any potential breach of contract claim actually had, in fact, been

asserted by any party against AFI?

MR. COHEN: Object to the form.

MR. SIMON: Let me clean that up actually.

Q Do you know whether the breach of contract for misallocation of net revenues claim that is set forth in the examiner's report was ever alleged against AFI by any party?

MR. COHEN: Object to the form.

A I don't believe I'm aware of any pleading in which anybody asserted that claim. I do recall that late in the game, I think it was in late 2011, one of the employees questioned whether the revenues from those brokered mortgages was being accurately allocated between the ResCap entities and Ally Bank.

Q Do you know the name of that employee?

A Let's see. I don't recall off the top of my head, but I have seen his name mentioned many times. I believe it starts with a G.

Q I'll help you out.

Does Mr. Glosner sound right?

A Glosner, thank you.

Q Glosner.

Do you know whether he was a lawyer?

A No, I didn't get any understanding that he was a lawyer.

Q Did you read in the examiner's report anywhere where --

MR. SIMON: Withdrawn.

Q So that's the only claim that you are aware of --

MR. SIMON: Withdrawn.

Q Putting aside the allegation by Mr. Glosner that in his view there might have been an inappropriate misallocation of net revenues, I would like you to put that aside.

A Yes.

Q Apart from that, are you aware of any allegations against AFI on a breach of contract theory for any of the three claims that are discussed in the

examiner's report that you analyzed as breaches of contract?

MR. COHEN: Object to the form.

A As I said, I'm not aware of any pleading having been filed asserting those claims. My understanding of what Arthur Gonzales did is that he looked to the parties to gain information about what potential claims there are.

Now, you pointed out earlier that the Minnesota Insider Preference claim was one that apparently occurred to Arthur Gonzales but to nobody else. It wouldn't have occurred to me. I wasn't aware that Minnesota had that statute. Nevertheless, pardon my aside. I shouldn't do that.

Q Actually, I should just say, I'll say it on the record, Mr. Brown and I were reminiscing the fun 72 hours that we were scrambling to analyze the Minnesota Preference Statute for the examiner.

A In any event, I took it that the claims that were identified by Arthur

Gonzales had a basis in information that was provided by the parties, and I assumed that the Creditors Committee would have been a prime candidate for investigating affiliate transactions and suggesting that the examiner look into these particular contracts to see whether they were administered appropriately.

Q Well, if I ask you to assume that no entity ever threatened or did bring such contract claims against AFI, would that change your opinion in any regard?

A No, I don't think so.

Q Why?

A Because I believe it is a viable claim and that it has settlement value.

Q Well, do you think it is rational that a party would pay a substantial sum to settle a claim that no one ever had threatened to bring against it?

A No, I believe that in order to settle each claim, someone would have to

assert the claim.

Q And that wasn't -- I'm going to represent to you that wasn't done here.

A I understand that.

Q And so I'll ask it again.

Does that change your opinion in any regard?

A No.

Q Sir, did you not just testify that in your belief in order to settle a claim, someone would have had to have asserted the claim; didn't you just tell me that testimony?

A Yes. Yes, I did.

Q And you do realize here that global settlement --

MR. SIMON: Withdrawn.

Q That the examiner's report was released after the global settlement was executed?

A Yes.

Q And I've now represented to you, I've told you you should assume that no party ever raised the breach of contract

claims that were identified by the examiner in his report?

A No party ever raised it.

Q Correct?

A By way of pleadings.

MR. COHEN: Is there a question?

Q No party ever raised it by pleading or anything else?

MR. COHEN: You've answered the witness's question. Do you have a question?

MR. SIMON: Yes.

Q I'm asking would it change your opinion if those facts were true?

MR. COHEN: Objection. Incomplete hypothetical.

A I don't think so.

Q Why?

A Because a claim has been identified by Arthur Gonzales that has some merit to it, and it is a -- if the claim is successful, the magnitude of damages is large, and I believe that that claim has settlement value. And I

understood that AFI was interested in getting a broad release, which would have included any claims from the debtor entities.

Q Well, a broad release for any claim is very different than opining that an Ally Financial sat in the room and negotiated, it was parsing between and among particular claims in assigning value to each of those particular claims; isn't that right?

A I agree.

Q And it may well be the case that AFI was willing to pay money for a global release, but hadn't contemplated a particular contract?

MR. COHEN: Objection. Calls for speculate.

A Yes, that could be true.

Q And, in fact, let's take the Minnesota claim as an example.

As we just talked about, none of the parties even thought about a Minnesota Preference claim action?

Lyons

MR. COHEN: That's your representation.

Q I'm going to represent that to you.

A Okay.

Q And I think you just acknowledged that based on the fact that the examiner invited the parties to brief the issue a few days before the report was issued suggests that it was something that Judge Gonzales himself developed as a potential cause of action.

Would you acknowledge that seems like a good possibility?

MR. COHEN: Objection. Calls for speculation.

MR. SIMON: It seems like he is capable of testifying to it.

I'm sorry, I withdraw the comment.

Q Go ahead.

A Well, I believe that was your suggestion.

Q Well, assuming that's true, do

you think it appropriate that a party would pay money for a claim that hadn't even been thought of, and so, therefore, couldn't have entered any of the discussions of the global settlement in any way?

MR. COHEN: Objection.

Incomplete hypothetical.

A I just don't know what happened in the mediation sessions other than what I read from Mr. Kruger. And as I stated earlier, my understanding of his approach was a top-down approach, which was how much money can I influence AFI to pay and will that be enough to get the consent of the people on the other side of the table.

Q For global peace?

A Without looking at the merits or settlement value of any particular claim. You just knew that there was a lot of money out there.

Q If, in fact, the goal was to have global peace and move forward without what Mr. Carpenter has characterized the

milestone litigation around the neck of AFI, if that was the goal, why is it appropriate to allocate the global settlement between and among claims that weren't even alleged by any party?

MR. COHEN: Object to the form.

A It seems to me that where there are parties that have different interest, depending upon which claims are compromised, if all claims are being compromised for one gross number, that to figure out who should get the money, you need to ascribe a reasonable value to each of the claims that's being released.

Q Are you aware of any case in which a court has traced settlement proceeds to a particular claim where no such claim had actually been asserted by a party?

A No, I'm not aware of any case.

Q Let's go back to your alter ego analysis, which is where we left off before the break, on page 79 of your report.

And on page 79, you applied to the alter ego test your discount analysis; is that right?

A Page 79?

Q Page 79 of the report.

A Yes, that's the third-party RMBS claims.

Q Well, I believe you analyzed together the alter ego and the third-party RMBS control person claims, correct?

A Yes.

Q And so if you look at page 79, it lays out, as I understand it, your discount methodology for both alter ego and the RMBS third-party claims, right?

A Alter ego is part of the -- one of the theories asserted by RMBS plaintiffs.

Q Right.

But as I think we established before the break, it is also an independent theory that was articulated at a minimum by the committee, right?

A Yes, I understand that.

Q And you in your analysis start with a 20 billion dollar potential damages figure, right?

A That's right.

Q I think you testified that that is predicated on the liability exposure for the RMBS?

A Yes.

Q And you reduce as the first step in your discount methodology that figure by 50 percent?

A Yes.

Q And that you say is because of inherent risk?

A Right.

Q How did you conclude that 50 percent is the appropriate percentage to reduce?

A Looking at the size of the claims that were involved here in particular, and the relative merits of the claim against AFI, which was not the issuance of the securities, we felt that an initial discount of 50 percent for

inherent risk was appropriate.

Q So just to be clear, your testimony is that it felt like an additional discount of 50 percent was appropriate. And I'm asking you the basis for why you felt that was appropriate?

A Did I use the word felt?

Q You did.

A I would say that the two primary motivating factors in inherent risk were the large size of the claims and the complexity and effort that it would take to pursue those claims against a party that was not primarily responsible for the alleged wrongdoing.

Q And how did you conclude that 50 percent was correct and not, say, 60 percent?

A That is just an assessment based upon my reasonable judgment.

Q Based on your subjective belief?

MR. COHEN: Object to the form.

A Based upon my experience and applying that to this situation.

Q But ultimately was it based on any objective criteria?

A No, it is not a formula that you can do such as a scientific experiment or statistical analysis.

Q So you would agree that it is a subjective -- you're offering your subjective assessment of what in your mind the discount should be, correct?

A That is my judgment, yes.

Q And if a person wanted to test your subjective assessment, could they go about doing that, and how would they go about doing that?

MR. COHEN: Object to the form.

A No, there is no way to, for example, perform a controlled experiment that would yield the same results.

Q Now, next in your discounted analysis, you applied to the ten million figure another reduction of 70 percent which you attribute to veil piercing alter ego risk?

A Yes.

Q Could you explain the 70 percent reduction, the basis?

A Yes. We agreed with Arthur Gonzales that the veil piercing alter ego claims were unlikely to be successful, and so we applied a large discount of 70 percent for that factor.

Q And is that -- when you say "we", who are you referring to?

A Well, my colleagues and I. I should say I did.

Q Did you have someone in particular in mind with respect to your colleagues in particular with regard to the alter ego discounting analysis when you say "we"?

A Well, this part of the report, besides myself, Mr. Arth worked on and also Mr. Cuniff.

Q Do you recall whether either/or both of them had a different view of what the appropriate percentage might be to reduce the veil piercing claim?

A I don't think there was any

disagreement, but we did discuss different numbers, and this was our consensus that we arrived that. It was actually ultimately my decision as to which number to put down as a percentage.

Q But it is fair to say that reasonable minds could differ?

A Oh, yes.

Q Now, are you familiar with the bases for the alter ego claim that was articulated by the committee in its STN motion?

A I haven't read that other than the portions you brought to my attention today.

Q I'm going to direct your attention again to the motion, which is Exhibit 4 I believe.

A 4, yes.

Q Paragraph 6, which is on page 3, I'm going to ask you if you would just read into the record beginning with the second sentence.

Actually let me read it to you

because it might be easier for you to absorb if I do that. I'm just going to read to you this paragraph, which I'll represent to you is a summary of the alter ego claim put forward by the committee.

"As set forth in detail below, the facts adduced to date present a textbook case for a veil piercing liability. AFI ran its mortgage securitization business as a single integrated operation under its total direction, knowledge, domination and control using the near complete overlap between AFI and ResCap leadership to impose its will on the debtors. It used this control initially to aggressively expand ResCap's mortgage operations during the years 2004 to '06 involving itself in every aspect of the development and marketing of ResCap's mortgage products, including directing, encouraging and facilitating allegedly wrongful underwriting and representation and warranty breaches that ultimately brought

down the company. Then anticipating the impending collapse in the housing market, AFI sought desperately to shield itself from the disaster it had created syphoning valuable assets from ResCap and embarking on a series of transactions to which no arm's length counterparty would have agreed, designed to impose solely on the debtors the mortgage related liabilities for which AFI otherwise would have been responsible. These actions included AFI seizure from ResCap of Old GMAC Bank for less than fair value, its entry into complicated mortgage purchase agreements and swap transactions with GMAC designed to permit AFI to invest its profitable mortgage servicing rights while foisting all related risk upon the debtors, its stripping of certain other businesses for less than fair value, and its entry into settlements of regulators and agreements designed to impose mortgage related liabilities on the debtors alone."

My question is: Have you ever

heard the alter ego claim against AFI articulated in that manner before?

A No, I have not.

Q Now, I also want to direct your retention to paragraph 34.

A Lyons' 4?

Q Yes.

A Which number did you say?

Q Page 14, paragraph 34. You'll see in that bar graph, there is a reference to Mr. Marano.

Do you know who Mr. Marano is?

I'll let you get there, I apologize.

A Page 14, paragraph?

Q 34.

Do you know who Mr. Marano is?

A It says here ResCap's CEO.

Q Did you know that before reading that?

A I remember seeing his name in Arthur Gonzales's report.

Q And do you know what the operating agreement is?

A There were more than one I believe operating agreement, but my recollection is that when ResCap and AFI wanted to separate themselves from GM's bad credit rating, part of the process to induce the rating agencies to look favorably upon ResCap or AFI's independently issue debt was the existence -- or I should say ResCap's independently issued debt, would be the existence of an operating agreement.

Q So is it your understanding that the operating agreement was held out as a means of separating ResCap and AFI?

A Means of trying to make sure that the intercompany transactions were for fair value and at arm's length.

Q And did you also understand that the operating agreement was meant to publicly represent that ResCap had been walled off from AFI?

A Well, I'm not sure that I would adopt your characterization, but as I understood it, that would -- I believe the

rating agencies were the only ones that I focused on when I read the report -- lead the rating agencies to favorably rate ResCap's debt because of the written agreement that would make sure that intercompany transactions were at fair value and at arm's length, and I think that also required independent directors.

Q And are you aware that in certain litigation where control person allegations were raised against AFI, it held the operating agreement out as a defense to those allegations?

A I'm not aware of that.

Q Were you aware that Judge Cote in a decision issued by the Southern District of New York denied a motion to dismiss that was submitted by Ally Financial in a control person case?

A I knew there was a motion to dismiss that was denied in RMBS litigation. I don't believe I knew the name of the judge, or I don't recall which particular suit it was in.

Lyons

Q Do you know the basis for the denial?

A I don't recall that, no.

Q So do you recall whether in part Judge Cote found that the operating agreement --

MR. SIMON: Withdrawn.

Q Do you recall whether in part Judge Cote found there were too many issues of disputed fact to find the operating agreement created actual independence between ResCap and AFI?

A I don't think I read that detail. I think I do recall Judge Gonzales commenting on either one or more motion to dismiss having been denied and mentioning that there were disputed issues of fact.

Q And you reviewed no e-mails in connection with your work, no contemporaneous e-mails of AFI and ResCap in connection with your work in this matter, did you?

A I don't believe I did, no.

Q Were you aware of the fact that in a contemporaneous e-mail, Mr. Marano characterized the operating agreement as a "charade of a fig leaf"?

A I don't remember hearing that term. Or I shouldn't say hearing. Reading that term, pardon me.

Q Do you think as a judge, if you were determining, deciding a motion to dismiss, and one of the central issues was whether or not the operating agreement, in fact, created independence between the parent and the subsidiary, and the CEO of the sub characterized that agreement as "charade of a fig leaf", that might be a disputed fact issue that should be better resolved by trial than on motion?

MR. COHEN: Objection.

Incomplete hypothetical.

A I would -- the way you have characterized it, I would agree with you.

Q Can you direct your attention to paragraph 37 of the STN motion.

Now, you understand, sir, that

Lyons

when Ally Bank --

MR. SIMON: Withdrawn.

Q Are you familiar with the Ally Bank transfer?

A Yes.

Q What was that?

A The original one in the 2006 bank restructure came about in connection with the sale of 51 percent of AFI to Cerburus, C-E-R-B-U-R-U-S, I believe. And I'm not sure I pronounced it correctly. I've read it, but I don't know if I heard anybody else ever pronounce it.

At the time, ResCap owned a federal savings bank, and the indirect ownership of the federal savings bank would have subjected Cerburus to the bank holding company, however, AFI owned a Utah industrial bank, and indirect ownership of a Utah industrial bank would not implicate the bank holding company, and in order to avoid that becoming subjective to the Bank Holding Company Act, Cerburus insisted that the federal savings bank be

eliminated in the corporate tree.

So the device that was improvised in order to accomplish that was to have the federal savings bank transfer its assets and liabilities to the Utah industrial bank, and then the federal savings bank was I think upstreamed, the shell of that company was upstreamed to an entity that would not be in the Cerburus line of ownership.

Q And do you know in connection with that transfer, were you aware that ResCap's general counsel authored a memorandum analyzing the transaction and the fairness of the transaction from ResCap's perspective?

A Yes, I believe I recall that.

Q And do you recall what, if anything, he concluded about the nature of the transaction as it relates to the operating agreement?

A I don't recall exactly. I recall that he expressed concern that this should be approved by the independent

directors, and that the proposal to issue non-voting stock was -- I would have to review his statement again or the recitation of the statement in Arthur Gonzales's report, but my recollection is that he raised that issue as something that might not be considered arm's length of the fair value.

Q In fact, he concluded that the transfer would violate the operating agreement.

Were you aware of that?

A If I looked at it again, I'm sure that was.

Q Are you aware if any changes were made to the proposed transfer as ResCap's general counsel opined that it violated the terms of the operating agreement?

A There may have been some changes, but it did not satisfactorily address the issues that were raised by the general counsel.

Q Do you understand that once the

transfer took place that Ally Bank no long resided on the ResCap side of the ledger?

A Yes, the federal savings bank's assets were all transferred to the Utah industrial bank, and the ownership of that Utah industrial bank, all of the voting shares were in AFI, non-voting shares were in ResCap.

Q And so -- and you know that --

A I should add that there was a tracking, supposedly a tracking element to these non-voting shares that was meant to give the economic benefits and loss of the mortgage business in the -- that had been transferred to the Utah bank to ResCap.

Q Okay.

In connection with your work in this matter, you reviewed at least one or two versions of a mouthful of a document called the Master Mortgage Loan Purchase and Sale Agreement; is that right?

A Yes.

Q And I'm going to refer to that as the MMLPSA?

A Yes.

Q And on your Exhibit A of your report, one of those versions was dated December 15, 2001.

Do you recall that? I mean, I'll represent to you that it is.

A Yes.

Q I'm going to mark that was the next exhibit.

(Master Mortgage Loan Purchase and Sale Agreement, December 15, 2001, was marked as Lyons Exhibit 5 for identification, as of this date.)

MR. SIMON: While we're doing that, I'm going to also mark as the next sequential Exhibit the 2008 version of the MMLPSA, which similarly appeared on your Exhibit A as one of the documents you reviewed in preparing your opinions and report.

(Master Mortgage Loan Purchase and Sale Agreement, 2008, was marked as Lyons Exhibit 6 for identification, as of this date.)

Lyons

MR. COHEN: These are 5 and 6?

BY MR. SIMON:

Q So first what I would like to do, do you know whether in 2001 --

MR. SIMON: Withdrawn.

Q You'll agree with me in 2001, that was before the bank transfer?

A Correct.

Q So Ally Bank, then known as GMAC Bank, and ResCap were essentially sister companies both on the ResCap side of the ledger, right?

A 2001, I don't think ResCap even existed in 2001, did it?

MR. SIMON: Withdrawn.

Q GMAC Mortgage Corporation?

A Yes.

Q So I would like you to look in this document at page 8 of the document, which is Ally 18261.

A I'm on page 8.

Q Okay.

And do you see there there is an article captioned "Representations and

Warranties of Seller Relating to Mortgage Loans"?

A I see that, yes.

Q What is your understanding of a -- I'm going to refer to it as a rep and warranty. And will you take that to mean representation and warranty?

A Yes.

Q What is your understanding of a rep and warranty as it relates to the sale of a mortgage loan?

A It's promises that the seller, in this case, is making with regard to certain aspects of the loans that are being sold.

Q Promises that, for example, the origination was done properly?

A 4.1 is captioned "Origination of Mortgage Loans" and it has a representation there.

Q And that the information that's used to approve the mortgage is to the best of the seller's knowledge accurate. That is a form of represent and warranty,

correct?

A The next one, 4.1. I'm reading the caption's information, that's correct.

Q Okay.

And do you know as a matter of practice in the mortgage industry, if a mortgage is sold to a third-party, that the reps and warranties generally flow from the ultimate purchaser and then down the chain to each party in the chain of the mortgage transaction?

A I understand what you're saying.

Q So if, for example, pursuant to this MMLPSA in 2001, Ally Bank were to sell GMAC Mortgage a loan, and GMAC Mortgage were to go out into the market and sell that loan to a third-party, and if there were a problem with that loan relating to the origination, GMAC Mortgage would have recourse back to Ally Bank for any liability based on these reps and warranties.

Is that your general understanding of the way the industry

worked?

A Well, yes. And you're referring to GMAC Bank, it wasn't then known as Ally Bank.

Q Correct. If I said Ally Bank, yes. So at this point in time, it was called GMAC Bank.

A Old GMAC Bank.

Q So just to clean that up. Based on this document, in 2001, Old GMAC Bank was liable through these reps and warranties for any problems with the origination of those loans that Ally Bank originated and then sold to GMAC Mortgage.

Is that your understanding of this document?

A That would appear to be. I haven't read that section, but as I understand your hypothetical, you're saying that if GMAC Bank sold the mortgage to GMAC Mortgage Corporation, and then GMAC Mortgage then passed that mortgage along in a chain to an ultimate purchaser, and the ultimate purchaser discovered

problems in the origination of that loan, the claims by the ultimate purchaser would flow back through the chain and ultimately reside in GMAC Bank as the seller under this agreement.

Q Correct.

And did you --

A I assume --

Q Go ahead.

A If that was a loan originated by GMAC Bank, I suppose there are loans of GMAC Bank that are purchased, and then it would pass that rep and warranty claim back to its seller.

Q But it is your understanding that they would flow between buyer and seller?

A Between the two here, GMAC Bank and GMAC Mortgage Corporation, without looking for any other limitation in this agreement, I agree with you.

Q Did you understand that that was a routine practice for a seller in the mortgage business to issue reps and

warranties when issuing the warranty?

A Yes, that's my understanding.

Q You looked at this document in connection with the preparation of your report.

Do you recall looking at Article 4 or did you not focus on it?

A I did not.

Q I would like you to now look at Exhibit 6, which is a 2008 version of the MMLPSA.

A Yes.

Q Now, by 2008, do you know whether the bank transfer had occurred?

A Yes, it had.

Q And so by 2008, GMAC Bank is on the Ally side of the ledger, correct?

A Right.

Q Can you take a look at Article 4, which is on page 7 of this version of the MMLPSA?

A Can I just look at one thing here?

Q Sure.

Lyons

(Witness reviewing document)

A I just question GMAC Bank because the same term is used as the name of the seller as you point out.

Q I'm going to ask you to assume that both of these documents apply to what is now known as Ally Bank. Assume that the 2001 version applied to GMAC Bank or Ally Bank pre-transfer, and Exhibit 6 applies to the same entity, Ally Bank or GMAC Bank, as it was then known post-transfer. Assume that.

A That is my point. I'm not sure that I can assume that because I think they are two different entities.

Q I'm telling you you should assume that for purposes of my question.

MR. COHEN: And then decide whether you can answer the question based on that supposition.

Q Why don't you explain to me why you think they are two different entities?

A Well, because the 2001 agreement refers to GMAC Bank, a federal savings

bank, right?

Q Well, because it was, right, sir?

A Right.

Q That was the purpose of the transfer?

A Well, that was -- but the thing is the assets of GMAC Bank went to the industrial bank, which is in Utah. And the 2008 agreement is with the industrial bank. It happens to have the same name, but I think it is a different entity, and it may have acquired -- it did acquire the assets of what you called Old GMAC Bank.

Q Do you have any reason as you sit here today to dispute the fact that the GMAC Bank, the industrial bank that is in Exhibit 6, was something -- was not an Ally affiliate?

A No, I didn't say that.

Q Then we're on the same page.

MR. COHEN: I don't think you are.

A There were two affiliates, the

Utah bank and the federal savings bank.

Q Yes.

A After 2006, the assets of the federal savings bank went into the Utah industrial bank.

Q You reviewed the 2008 MMLPSA today, right?

A I think you're showing me the one I referenced in my report.

Q And in that report, what was your understanding of what you were reviewing and the entities involved with respect to that contract that you've offered opinions on in this case?

A The 2008, which is marked Exhibit 6, my understanding was that this was -- the seller was GMAC Bank and industrial bank from Utah.

Q Sir, isn't this the contract that you're predicating the breach of contract claim on net misallocation of revenues upon?

A I believe it is.

Q So is it your testimony that

this applies to any entity other than what is known today as Ally Bank?

A No.

Q Okay. So I want to make clear that premise of my question that we're on the same page on.

The 2008 MMLPSA is an agreement between what is known today as Ally Bank?

A Yes.

Q Which is no longer on the ResCap side of the ledger?

A Yes.

Q And GMAC Mortgage, which was and remains on the ResCap side of the ledger?

A Yes.

Q And can you now --

A At the time of this, ResCap had the non-voting shares.

Q That's fine. I agree with that.

A Okay.

Q But in terms of the -- we're on the same page in terms of the organizational flow.

Can you please look at page 7,

and Article 4 that's there on page 7.

A Article 4 says "Reserved".

Q Had you noticed that when you reviewed the agreement in connection with preparing your report?

A I don't recall noticing that.

Q Do you know what the import of that means or is? Do you know what the import of that is?

A At this point in time, I do not.

Q Well, sir, if I tell you that all of the reps and warranties that were in the 2001 version are removed in this 2008 version, isn't it fair to assume that there were no reps and warranties made by Ally Bank to GMAC Mortgage under this agreement?

MR. COHEN: Object to the form.

A Yes, I recall. I agree with that statement.

Q Do you know when in time approximately problems first started to surface in the mortgage market?

A About 2007.

Q And do you know whether in 2007 -- do you know when in 2007?

A No, I don't know.

Q Do you know when Bear Stearns collapsed?

A I forget the month.

Q It was June of 2007.

Do you know in July of 2007 that there was a version of the MMLPSA executed between Ally Bank and GMAC Mortgage that strips reps and warranties between the two entities as to first level loans?

A Yes, I believe I was aware of the fact that the seller did not have rep and warranty liabilities after that point in time.

Q And this version of the agreement in 2008, by this point, you would agree with me that the credit crisis is sort of in full swing?

A Yes.

Q And in this version, all reps and warranties are approved in the contract between Ally Bank and GMAC

Mortgage, correct?

A If you say so, without examining. That was my understanding, that reps and warranty liability would stop in the chain coming back from the ultimate purchaser, it would stop at GMAC Mortgage and not go to the bank.

Q And you -- just to be clear, and I'm not faulting you for this, but when you reviewed these contracts, did you appreciate the significance of this change between the two contracts as it relates to Article 4?

A I appreciated the fact that the seller was now unhooked for rep and warranty liabilities with regard to these sold loans.

Q Did you give any thought to the timing of the removal of the reps and warranties and how that fit into the overall framework of the mortgage market?

A The timing that I understood was that -- and how it relates to the mortgage market was that GMAC Mortgage was unable

to get financing to continue its mortgage origination business from independent third-parties, and that at the same time, Ally Bank was -- had some excess liquidity and that this structure was used to allow GMAC to continue to locate mortgage customers and have those mortgages funded by Ally Bank, but that Ally Bank was not taking on the rep and warranty responsibility that would be typical of mortgage originator.

Q But my question is: Did you think about the fact that those reps and warranties were removed in the context of what was happening overall in the mortgage market, the fact that it was 2007, 2008 and the credit crisis was becoming known, did you think about that at all?

A Only in the context of GMAC Mortgage's ability to get financing to continue its business.

Q So would you agree that without the benefit of a party's explanation, for example, the committee, you might not have

appreciated the significance of even some of the documents that were reviewed, that you reviewed and how they might fit into the alter ego framework; is that fair?

A That is a fair statement.

Q Let me draw your attention to paragraph 38 of the STN motion?

A Paragraph 38?

Q Yes.

A I'm on page 17, paragraph 38.

Q Okay. Very good.

And there you will see another reference to Mr. Marano.

Do you know what the MSR Swap is?

A Yes, I have an idea what it is.

Q I'm going to spare asking you what it is right now.

But do you see that there is an internal e-mail where Mr. Marano concluded that "Shifting the risk under the MSR Swap bordered on an absurd transaction for GMAC Mortgage and was silly."

Do you see that reference?

A No, I don't.

Q It is right before the redacted reference in paragraph 38.

A Oh, I see. Let me just read that sentence, please.

(Witness reviewing document)

Okay. I've read that sentence.

Q Is that something that you were aware of previously?

A I don't recall that, no.

Q Mr. Marano is the CEO of ResCap as you testified?

A At some point in time he was. I think he had a number of positions. Yes, he was CEO.

Q And to be clear, you did not read any of the committee's STN motion prior to giving your opinions in this case?

A That is correct.

Q Frankly, you haven't read it even as you sit here today?

A I've read the portions that you directed me to read.

Q So none of the evidence or the arguments marshaled by the committee in support of its alter ego claim was factored into your 70 percent discount for the likelihood of success in alter ego, was it?

A Well, I believe that the committee presented its position to Arthur Gonzales. And so to the extent that the committee presented its position on the alter ego claims, that would have been factored into my analysis accepting the factual investigation that Arthur Gonzales did.

Q So secondhand at best?

A Yes.

Q You have no firsthand input on the committee's arguments in support of alter ego that went into your conclusion that the claim should get a 70 percent discount for likelihood of success, do you?

MR. COHEN: Objection. Vague.

A I did not get any information

directly from the committee regarding its position on the alter ego theory.

MR. SIMON: We have to change the tape, so let's take a break.

THE VIDEOGRAPHER: This marks the end of tape number three. we're going off the record at 3:00 p.m.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

THE VIDEOGRAPHER: This marks the start of tape number four. We're back on the record at 3:22 p.m.

BY MR. SIMON:

Q Mr. Lyons, would you agree with me that the more a person knows about the facts of a particular claim or a potential claim, the more precisely he or she is able to assess the likelihood of success of that claim?

A That sounds to me to be a correct statement.

Q Okay.

The more precisely one could

estimate the inherent risk in such claim; do you agree with that statement?

A I'm sorry, would your repeat that?

Q Would you agree similarly the more a person knows about the facts of a claim, the more precisely he or she can estimate the inherent risk associated with that claim in your discount analysis?

A Yes.

Q And the more precisely one could estimate the likelihood of success of any particular defense as to that claim?

A With the introduction of the more facts one knows?

Q Correct.

A Yes, I agree.

Q And you'd agree I assume too that the more facts one knows, the more precisely one can estimate the likelihood of success as to any particular alternate theory of recovery?

A That's true.

Q Okay.

And the opposite I take it would be true too, the less a person knows about the facts, the less they'd be able to, for example, access the likelihood of success of a claim?

A Yeah, I think, you know, all of your statements are theoretically true, probably true in most circumstances. Probably not universally true.

Q Here, did your analysis take into account the likelihood of surviving a motion to dismiss with respect to any claim?

A I remember thinking about the fact that some of the RMBS claims had survived a motion to dismiss and that was significant. That comes to mind.

Q You're aware the examiner in his report stated that he considered presenting his analysis in terms of whether claims would be likely to survive a motion to dismiss or a motion for summary judgment, but he rejected that approach?

A Yes, I'm aware of that.

Q Okay.

And you relied exclusively for your factual inputs on the examiner's factual conclusions, correct?

A That's true. In addition to the documents that I reviewed.

Q Which you said confirmed in your view the findings of Judge Gonzales?

A Yes, I can't recall offhand any factual finding that I disagreed with having reviewed documents.

Q And surely as a former judge, you would agree that this is a highly factual dispute?

A Well, which matter are you speaking about?

Q The entirety of the potential claims. I mean, would you agree with me --

MR. SIMON: Withdrawn.

Q Would you agree with me that the factual predicate for the claims analyzed by the examiner as to estate and

third-party claims are highly factually detailed?

MR. COHEN: Objection. Vague and overbroad.

MR. SIMON: Withdrawn.

Q Would you agree that the facts are extremely complicated in many respects in this case?

MR. COHEN: Objection. Vague and overbroad.

A In some of the respects the facts are complicated, yes.

Q Okay.

I think you even said with respect to Volume VI, it was so dense you couldn't read the whole thing before your report was done and you needed to take the extra time to do it after, right?

A It's really --

MR. COHEN: Objection.

THE WITNESS: Go ahead.

MR. COHEN: Objection. Mischaracterizes testimony.

A Yeah, it was really that it was,

number one, the -- I knew at the conclusion as to solvency was. And I had read parts of Section 6, so I knew -- I knew that what I thought were the important conclusions that were drawn with regard to solvency, and having looked at Section 6, I put that on a low priority to read in detail because I didn't think I needed to understand the detail in order to complete the report. But secondly, just as a matter of personal preference.

Q And I did not mean to be pejorative in the question.

A No, but I did not enjoy reading that as much as I enjoyed other sections.

Q I was merely pointing to that as an example of the factual depth of the examiner's report. You would agree with me it's a very dense factual report, would you not?

A That I would agree with, yes.

Q Okay.

And then as a judge, is it your experience that the more complex facts

that are involved in a claim, the more challenging it is to resolve on a motion to dismiss, for example?

A Well, I think it probably depends. For example, if it's a motion to dismiss on statute of limitations grounds, there are probably few facts that are relevant to that motion. And so there could be lots of complex facts that pertain to the events that transpired. But might not be relevant to that motion.

Q Right.

A But if you're assessing the whole claim and you have a long history of intercompany dealings between affiliated companies, I think -- I think your statement is fair that there are going to be a lot of factual presentations that will impact on how that claim were decided in litigation.

Q And I think we talked about this before, but you're not aware of any statute of limitations that relates to an alter ego claim, are you?

A I am not.

Q And so to the extent that a motion might be decided on a statute of limitations ground, that would not apply to an alter ego claim to your knowledge?

A To my knowledge, no.

Q Okay.

And the risk of losing a motion to dismiss might, as I think you've testified earlier, make it more costly for AFI to settle this matter, right?

A I would say generally yes, if the plaintiff losses a motion to dismiss, the settlement value would be adjusted upward.

Q Right. And so if a party thought that there was a likelihood of failure of knocking out a claim on a motion to dismiss, that might incentivize that party to reach a settlement before such motion was decided, made or decided, correct?

A That might, yes.

Q And did you consider the

consequence of losing a motion to dismiss on an alter ego claim with $20 billion of potential liability, more than $20 billion of personal liability --

MR. SIMON: Withdrawn.

Q Did you consider the consequence of losing a motion to dismiss on a veil piercing claim with over $20 billion of liability would have for AFI?

A Would you say that again? I'm not sure I follow you.

Q Sure.

In any of your analysis, did you consider the consequence --

MR. SIMON: Withdrawn.

Q Did you consider the impact of losing a motion to dismiss on a veil piercing claim might have on AFI with respect to settlement?

A Yes.

Q And can you describe -- that's with respect -- I'm asking -- well, let me ask the question again.

With respect to an alter ego

claim --

A Yes.

Q -- did you specifically consider the impact that losing a motion to dismiss on an alter ego claim might have on AFI with respect to settlement?

A Yes, I did.

Q And can you tell me what you considered in that regard?

A I considered in that regard that I knew that there was at least one motion to dismiss that had been denied and that AFI would be more inclined to settle at a higher number because of that.

Q Okay.

Do you know if that motion to dismiss that was denied was an alter ego claim or a controlled person claim?

A You know, off the top of my head, I don't recall.

Q Can we go back to your calculations of page 79 of your report. I think we talked about the 70 percent reduction on the veil piercing alter ego

risk.

Can you tell me why you then deducted from your three billion dollar figure for an alter ego risk, why you made a further reduction of 60 percent for a control person theory risk?

A I considered a control person liability as an alternate theory in the third-party claims, and agreed with the examiner that it was more likely than not that this claim would be unsuccessful.

Q So let me --

A And in light of that --

Q And my apologies when I cut you off, I don't mean to. I'm looking at the screen and when there's a pause -- my apologies.

A That's okay. And I'm speaking haltingly because I'm looking at the report as well.

But after considering the control person liability, alternate theory of liability, and the assessment of the likelihood of success, I determined that

it was warranted that an additional 60 percent discount be applied to the settlement value.

Q Now I can -- I'll ask the question.

A I'm really finished, yes.

Q You mentioned that you considered the control person liability as an alternate theory of third-party claims?

A Yes.

Q So that's an alternate theory of liability?

A Alternate theory of liability by the third-party RMBS claimants.

Q And why did you subtract 60 percent if it's an alternative basis for liability?

A Why did I subtract? That's because that's how we -- that's how the litigation discount model works.

Q Well, can you explain the difference in your analysis of the first 2009 tax allocation agreement? You added a five percent figure there to account for

three alternative theories of recovery. So what's the difference between the alternative theory of recovery there, which required an addition of five percent, and the alternative theory of recovery here which led you to decrease by 60 percent?

A I don't know. I would have to look at that.

Q Go ahead, you can.

A Which page is that?

Q Take whatever time you need.

A Which page was that?

Q It was the 2009 tax allocation, the first agreement.

Page 39, do you see there in the chart, there is a line that says "increased by five percent for alternative theories"?

A Yes.

Q Okay.

So can you explain why with respect to the 2009 tax allocation agreement under your methodology you

increased the discount -- you increased the recovery by five percent to account for alternative theories, but you decreased it by 60 percent with respect to your alter ego control person analysis?

A You know, I'm not really sure at this point. My recollection is that you had the 50 million dollar claim that was an alternate claim and that was related to the tax benefits that accrued in the first half of 2009. And that even if the court were to conclude that the first tax allocation agreement was not a binding contract, that on the fraudulent conveyance theory, they would -- ResCap would still be able to recover back the 50 million dollars. I believe that's it, but I'm not sure on that.

Q Well, as I understood it, it's because there is different ways in which the party might be able to get to essentially the same recovery.

Is that a fair statement?

A No, I really can't agree with

that at this point.

Q Okay.

You just don't know one way or the other?

A I really don't recall that particular part of the analysis.

Q Okay.

But can I ask you when you testified, when I asked you your basis for subtracting the 60 percent on the control person claim, you testified that you did that because that's how the litigation discount model works.

Can I ask you how it is if the model works in that way, how you can have two completely contrasting approaches to alternate theories of recovery, one where you add and one where you subtract?

A Right.

MR. COHEN: Objection. Vague.

A Yeah, I don't think that's a true statement.

Q Which is?

A What you just said, that these

approaches are contrasting.

Q Okay.

A And I cannot explain at this point what the five percent increase for alternate theories was exactly. I just don't remember that.

Q Okay.

Just so I'm clear, you --

A But the general proposition that because there are alternate theories in one case you would apply the discount and another case you would increase, I don't think that's accurate.

Q Okay.

But you can't explain as you sit here why?

A I can't explain that one, five percent increase. I just don't recall that discussion.

Q Well, more generally, can you explain how it could be that you might add a percentage to a claim that has alternative theories of recovery in one instance, but subtract if there's

alternative bases of recovery in another?

A No, I can't.

Q A control person claim, do you know the elements for control person claim to prove one?

A I would have to look at the report to refresh my memory.

Q But they're different from the elements to prove an alter ego claim, right?

A Yes.

Q And it's not -- a control person claim is not an estate claim, correct?

A Correct. A control person claim is a securities law claim that would belong to people who acquire the securities.

Q Third-parties?

A Third-parties.

Q And unlike an alter ego claim, a control person claim does have a statute of limitations, correct?

A Yes.

Q And I think you testified to

this, but the full recovery for the liabilities, the $20 billion liabilities --

MR. SIMON: Withdrawn.

Q The full recovery for the 20 plus billion dollar liabilities of ResCap can be recovered independently on an alter ego theory or on a control person theory, correct?

A Yes.

Q And, in fact, the committee's STN motion alleged no control person cause of action that you saw, correct?

MR. COHEN: Objection to the form.

A Well, I just want to go back and think about your last question a little bit.

I think the control person, the extent of liability for control person is limited to the securities claims. The extent of liability for the alter ego theory, as you point out, would exceed the securities claims with the other

non-securities type claims.

Q So it could be greater?

A It could be greater.

Q Okay.

But let's talk for a moment the portion of the overall liability attributable to RMBS, the 20 billion dollars.

A Yes.

Q May be recovered independently on an alter ego theory?

A Right.

Q Or independently by a third-party in a controlled person theory?

A Yes, I think that's correct.

Q So why do you deduct the 60 percent in your discount analysis from your -- from the 3 billion dollar figure; why is it appropriate to do that?

A Because I think you're looking at, again, an alternate theory and it seems to me that each one has to be analyzed and allocated at discount value.

Q Well, it's actually not an

alternate theory, it's a separate claim; is it not?

A No, I think it's an alternate theory of liability.

Q Well, it's different parties that have standing to bring the claim, correct?

A That's correct.

Q So, in other words, the committee, for example, could not allege an alter ego claim, and in the alternative, a control person claim, it has no standing to do that?

A That's true.

Q Right.

And so how is it an alternative theory of recovery to the committee?

A It's not.

Q It's not.

And so isn't it fair, sir, that you should have --

MR. SIMON: Withdrawn.

Q Wouldn't it be more accurate to separate the alter ego claim from the

control person claim in your discount methodology?

A I thought it was appropriate to treat them together because I thought that the largest amount of the claims, the outstanding rate amount of claims were with the third-party MBS claimant, and I thought that although the alter ego, the merits of the alter ego claim are weak, that if the parties joined forces, that they would be able to extract more settlement value from ResCap than if they pursued things separately.

Q Well, your analysis, sir, had the effect by combining them of lowering the amount of settlement value that the parties could get, correct?

A I don't necessarily agree with that because I looked at them together.

Q Well, sir, if you had stopped your analysis at the 70 percent reduction for veil piercing, what would your value for that claim have been?

A What you see on the report.

MR. COHEN: Objection.
Incomplete hypothetical.
A What you see on the report.
Q Which is?
A I don't have the number in front of me.
Q Well, it says it's three billion dollars.
A Uh-huh.
Q That was the line item for the alter ego claim accounting for what you characterized as 70 percent veil piercing alter ego risk.
Do you know what the number was when you combined the alter ego and control person theories?
A No. What page are you looking?
Q It's on page 79 of your report.
A It went down from three billion to 1.2 billion.
Q Well, actually, sir, didn't it go down further because you then applied a statute of limitations risk?
A Yes.

Q So what was the final number?

A 480 million.

Q Right.

So instead of a three billion dollar value, you brought the claim down to a 480 million dollar value by combining the third-party control person and alter ego claims, right?

A I would not agree with that.

Q Well, sir, isn't that what your report states?

A No.

Q Well, can you explain what it states then?

A I don't think you can stop at the three billion dollar mark because the analysis that we did was in connection with the RMBS third-party claims.

Q Okay.

So let me ask you this: The liability --

MR. SIMON: Withdrawn.

Q The value of an alter ego claim just to reach the RMBS liability in your

report is valued at three billion dollars, correct?

A For summary value purposes in that analysis, if you stop there, you get to three billion dollars, correct.

Q Right.

And if someone were to come to a conclusion that it was inappropriate for you to combine the alter ego control person analysis, that's, in fact, the number that your report would articulate for the alter ego risk analysis as it relates to RMBS alone would be three billion dollars, right?

A If someone were to say it was improper to combine them, I suppose so.

Q Okay.

Can you explain -- actually --

MR. SIMON: Withdrawn.

Q Were you aware that at the outset of these cases, the debtors had an agreement with Ally to settle potential causes of action for 750 million?

A Yes.

Q Okay.

Did you read that in the examiner's report?

A I did.

Q Okay.

Were you aware that the original 750 million settlement agreement was supported by the then constituted JSN group represented by its current professionals?

A I'm not sure if that was in the examiner's report or not. That would be the only place I knew about it.

Q So you don't remember your counsel or anyone telling you that fact?

A Nobody told me anything outside of the examiner's report with regard to that.

Q Does that have any impact or influence over your views in this case if I tell you to assume that's true?

A I don't think so.

Q Okay.

Can you explain for me the claim

that you analyzed, which in your chart is called breach of contract for misallocation for net revenues on loans brokered by GMAC Mortgage?

A Yes. Let me just get to that section.

MR. COHEN: Tell us what page you're on.

THE WITNESS: Page 8.

Q Actually, can you do it without referring to your report?

A Yes.

Q Just generally tell me what the claim is about?

A Yes. Sure.

The claim is about the arrangement that was made at the time when the mortgage company did not have access to third-party funds to fund its mortgage origination. And there was a limitation on how much of the loan production by the mortgage company could be purchased by the bank in a straight purchase and sale transaction, limited by the banking

regulations.

Q Do you know which regulations?

A It was called the 250.250 regulation.

Q Okay.

A And I don't -- I'm not really familiar with that.

Q Regulation 23(a) or (b) ring a bell?

A Oh, yeah, Section 23(a), the intercompany transaction, provisions of the federal banking regulations. To address the problem to allow the mortgage company to continue to make mortgage loans, a proposal was developed that the mortgage company would act as a broker and the bank would act as the funder of the mortgage loans.

However, the anticipation was that most of these loans would be held for sale so that subsequent to the origination an arrangement would be made to sell them to a securitization.

I guess at this point in time,

it was mostly the GSEs. And the allocation of the revenues, as the examiner found as a fact and I accepted, was that the bank would have what's termed "net interest carry" but the other economic benefits and detriments of these mortgages would be borne by the mortgage company. I think that's it.

Q So are you aware of the fact that this claim was not asserted in the committee's STN motion or asserted by any other party prior to the issuance of the examiner's report?

MR. COHEN: Object to the form.

A Yeah, I think you asked me that before.

Q I don't remember your answer. You can answer again.

A And no, I was not aware that --

Q Okay.

A -- it had not been asserted by anyone.

Q Okay.

Can you tell me what agreement

or agreements serve as the basis for the alleged breach of contracts?

A It's primarily the MMLPSA.

Q Any others?

A There are other agreements that are -- go together with this. There's some swap agreements and so forth that deal with the change in value of the loan in the interim while it was on the bank's books as an owned asset and also the mortgage servicing rights.

Q Okay.

The MMLPSA has already been marked. That's Lyons' Exhibit 6.

A Yes.

Q It's the 2008 version, which is the germane version, I take it?

A I believe so, yes.

Q Can you tell me which provision in the MMLPSA you believe was breached?

A Yeah, I believe it was the purchase price.

Q Can you actually physically show it to me where in the contract? Actually,

you said purchase price? I'll help you. It's on page 3 in the definitions of the definition labeled purchase price.

A Right.

Q Can you explain how that provision is the provision that was breached?

A Purchase price, this I'm quoting now from Section 1.24, "Purchase price means (A) with respect to a first lien mortgage loan, the cost basis plus reserves associated with such first lien mortgage loan; and (B) with respect to a second lien mortgage loan, the market value of such second lien mortgage loan."

Q And can you explain to me how that provision leads to a potential breach of contract claim?

A In the way in which the purchase price was accounted for in the intercompany books and records when mortgages were sold back from the bank to the mortgage company. Initially in the first half of 2009, the purchase price was

the cost basis, and, as I understand it, a simple transaction that if it was a $100,000 mortgage and the borrower paid a point for the origination, so they paid the $1,000, the cost of the mortgage on the bank's book would be $100,000 less $1,000 or $99,000. And in connection with the transaction, the bank paid a brokerage fee to the mortgage company of, let's say, $500, the cost basis would be increased by the expenditure funds by the bank so it would end up being a net cost basis of $99,500.

When the mortgage was sold from the bank back to the mortgage company, the purchase price would be the cost basis, 99,500, and the net result of that would be that the mortgage company would get the benefit of the $1,000 point that had been paid by the borrower and would suffer the detriment of the -- actually, the $500 fee would be a wash, because it would be paid by the bank to the mortgage company, but then when the mortgage company purchased

it back, they would increase the amount by $500. So that would be a wash. And the economic benefit of that $1,000 point paid by the borrower would reside in the mortgage company.

After July of 2009, the accounting for that changed and the benefit of the borrower points was kept by the bank.

Q And in what way did the account --

MR. SIMON: Well, actually, withdrawn.

Q You testified in your answer that your understanding with respect to the purchase price was based on the company's books and records. You didn't look at any of the books and records of the company in formulating your opinion?

A No. That was based upon how the transactions were accounted for rather than the amount of money that would pass at a closing, that type of thing. I did not understand that there was a closing

where checks were written or anything like that.

I understood that these -- the ultimate sale of the loan was accounted for on the books and records of the bank without there being a closing.

Q And you mentioned there was an accounting change. Can you describe what that was?

A I can tell you the label that was put on it.

Q What was that?

A Fair value accounting.

Q Okay.

Do you know if that's a Generally Accepted Accounting Principle?

A I actually believe that it's mentioned in the examiner's report, and also in some of the depositions that I recently read.

Q Okay.

So you would agree with me that it's an accounting principle generally accepted in the United States?

A Based upon what I read.

Q Okay.

And so with -- I'm going to ask the question again.

Can you explain how the change to fair value accounting resulted in a breach of contract?

A It's my understanding of the fair value accounting, and I don't profess to fully understand it, but the result of changing to fair value accounting left an economic benefit, such as the points paid by a borrower with the bank, when previously that would have gone to the mortgage company.

Q Do you know if there's anything in the MMLPSA that requires that any particular type of accounting method be utilized --

A Not that I'm aware of.

Q -- utilized by the parties?

A Not that I'm aware of.

Q Okay.

And so on what basis do you

opine --

MR. SIMON: Withdrawn.

Q Are you opining in this case that there was a breach of contract here?

A No, I reached the same legal conclusion as the examiner, that it's likely that there was a breach of contract claim.

Q Okay.

A And I used that in coming to a reasonable settlement value.

Q Okay.

And on what basis do you conclude that it is a reasonable -- reasonably likely that there is a breach of contract claim here based on the change in accounting method to fair value accounting?

A Because it appears, I think the examiner concluded and it seems to be a reasonable conclusion, that the intent of the parties was that the economic benefits and detriments of brokered loans would belong to the mortgage company.

Q Well, putting aside the intent of the parties, can you point to a provision in the contract that in your view is a provision that was breached by the accounting change to fair value accounting?

A Yes I believe it was the purchase price as the cost basis.

Q Okay.

Well, cost basis is a defined term; is it not?

A Yes, I believe it is.

Q Okay.

And can you look at the definition of cost basis, which is at 1.9?

A Yes. Go ahead.

Q Go ahead.

A "Cost basis means with respect to a mortgage loan its net carrying value as defined by accounting principles generally accepted in the United States of America as amended."

Q And it goes on from there?

A And it goes on.

Q And you would -- I think you just testified that you have no reason to dispute that fair value accounting is a generally accepted accounting principle in the United States of America, correct?

A That's what I've -- that's what I've read, yes.

Q Okay.

And were you aware that the FDIC requested that this particular definition of cost basis include the reference to generally accepted principles of accounting in the United States?

A I don't recall reading that.

Q Okay.

If I -- I'll represent to you that Mr. Celini so testified. You read his transcript, right?

A Yes.

Q Okay.

You just don't recall that particular testimony?

A Correct.

Q Okay, but you would agree with

me that if that's the case as a regulated entity, a request from the FDIC would carry significant weight with Ally Bank Management; would you think?

A Yes.

Q Okay.

And, again, I guess I'll ask you in what way you view this provision violated by implementing a method of accounting that by your testimony is an accounting principle generally accepted in the United States of America?

A Because I think when the -- when the agreement was made that the bank was applying the -- was not applying the fair value accounting method, and that the parties agree that the price at which a loan was sold back would be its cost basis, and it says here in 1.9 the definition, the unpaid principal balance plus or minus any premium or discount paid, net deferral fees or cost, accrued interest and basis adjustments.

Q Well, sir, you skipped over

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though. The full sentence reads --

MR. COHEN: Excuse me, you just interrupted his answer.

Q Okay. Fair enough.

You can finish, but I'm going to ask to you read it again.

MR. COHEN: Can you give me the full answer again, Mr. Lyons?

Q I apologize for interrupting.

A All right.

Well, I'm just looking at the definition of cost basis.

It seemed to me that a reasonable interpretation of this contract was that it was consistent with the intent of the parties to have the economics of the transaction, except for the interest carry reside with the mortgage company. And by defining cost basis in this method, that's what they attempted to accomplish.

For some reason, the bank implemented an accounting change that changed the economics of the transaction without informing the other party to the

transaction and --

Q Sorry. I don't want to cut you off.

A And it seems to me that that breached the contract, and that the mortgage company was entitled to have the contract enforced as originally written and as originally intended.

Q So your testimony is that for some reason, the bank implemented an accounting change that changed the economics of the transaction without informing the other party. And on that basis, you conclude that there was a breach?

A I think that's what the examiner -- that's part of what the examiner said, and I agree with his conclusion.

Q Well, do you know whether this contract, this MMLPSA specifies that a particular accounting principle must be followed?

A No, I don't think it does. In

other words, whether there are alternate ways to account for something, both of which comply with GAAP, I don't think this contract specifically addresses that.

Q Okay.

Nor does it address if, in fact, at the time that the contract was executed there was one particular GAAP in place that at some point in the future a party might change to another GAAP accounting principle. There's nothing that precludes the parties on the face of this document from doing that, is there?

A Nothing that precludes it, no, I don't think so.

Q In fact, didn't the examiner concede it possible that the contemplated allocation of revenues was not mandated by the terms of the 2008 MMLPSA?

A Yes.

Q And he concluded the same with respect to the Pipeline Swap, did he not?

A I don't remember that.

Q Well -- okay, let me refer you

to page 13 of your report. You see in the first full paragraph of page 13, the sentence beginning "Although the examiner"?

A Yes, I see that.

Q Okay.

And do you see he concludes that it's possible that neither the 2008 MMLPSA nor the Pipeline Swap mandated the contemplated allocation of revenues; do you see that?

A I don't think you --

Q I'll read it actually into the record. This is the first paragraph, first sentence.

A Right.

Q "Although the examiner concludes that GMAC Mortgage," and this is your report I'm reading, correct?

A Yes.

Q "Although the examiner concludes that GMAC Mortgage would likely prevail on a claim for breach of the parties' agreement, he concedes it is possible that

the contemplated allocation of revenues was not mandated by the terms of the 2008 MMLPSA and the Pipeline Swap."

A Yes.

Q And do you agree with that statement?

A Yes, I wrote it.

Q And you're not changing it any respect as you sit here today?

A No.

Q By rendering your views on this claim, by definition, are you not applying law to facts?

I used your phrasing. I would have said facts to law before.

A Right.

Yes, I think in the analysis I definitely had to apply the law to the facts to make a determination as to the merits of the claim.

Q In particular, you cite in your report a case called Continental Insurance out of the Delaware Chancery Court, right?

A Yes.

Q Okay.

And with respect to that case, you write in your report that, "The court refused to enforce an alleged non-written contractual modification based on the parties' prior course of dealing because the parties' prior course of conduct demonstrated that they, in fact, amend the agreement in writing".

You concluded that, right?

A Yes.

Q And here in the MMLPSA there was no oral modification provision, correct?

A Yes.

Q Okay.

And are you aware of any case where in the face of a no oral modification clause a court nevertheless found there to be a binding non-written modification?

A I can't cite a particular case, but I know that there are cases that hold that.

Q During your time on the bench,

did you ever rule in favor of a party of a contract claim premised on a modification argument notwithstanding the existence of a clause requiring that modifications be made in writing?

A I suspect that I did but I don't recall.

Q Why do you suspect that you did?

A Just because it's a common -- common argument that a contract has been modified.

My recollection is that despite the existence of a provision in the contract that says that modification it can only be in writing, that that provision itself can be modified orally and that a contract with that provision can be modified by an agreement that is not in writing.

Q But you can't name a case as you sit here?

A I'm sorry, I don't have a case.

Q Now, you note in your report that "If the contemplated allocation of

revenues was not mandated by the MMLPSA or Pipeline Swap terms, then GMAC Mortgage would need to prove that the contemporaneous brokering consumer loans to bank project documentation and the parties ensuing implementation of the arrangement constituted a written modification to those agreements to provide for the contemplated revenue allocation."

A Yes.

Q And what basis, if any, did you have of assessing the parties' intent in that regard?

A What was written by Judge Gonzales in his report and he talked about the presentations that were made that demonstrated the economic impact of this brokering and consumer loans to bank project.

Q Okay.

Well, you say in your report at page 8 that the parties' agreement is further reflected in a slide presentation

dated November 19, 2008, entitled "Brokering Consumer Loans To Bank Project."

A Yes.

Q And is that the slide presentation you're referring to?

A I believe so, yes.

Q Okay.

Did you look at that document in preparing your report?

A I did not.

Q Okay.

Why not?

A I didn't request it.

Q Is there any particular reason why you didn't?

A No.

MR. SIMON: I'm going to have the reporter mark as the next exhibit Lyons 7.

(Document, was marked as Plaintiff's Lyons Exhibit 7 for identification, as of this date.)

BY MR. SIMON:

Q Take a minute or as much time as you need to thumb through it. But I just want to confirm that this is the document that in your report you state reflects the parties' agreement, right?

A I don't know what this document is, but --

Q Well, let me represent to you that the document in the examiner's report that he relied upon for the statement you cited is, in fact, this document.

A Okay. Then if that's so and to the extent that I followed the examiner's factual findings, then it's correct.

Q Okay.

And so you would expect if this document reflects the parties' agreement, it's a final document, right?

A It's a final document?

Q It represents the final --

MR. SIMON: Withdrawn.

Q That with respect to the brokering consumer loans to bank project, this would represent the parties' final

agreement as to that particular project, if the examiner is relying upon it?

MR. COHEN: Object to the form.

Q Let me just rephrase the question.

MR. SIMON: Let me withdraw it.

Q The examiner in his report you quoted characterized this slide deck as the parties' -- as reflecting the parties' agreement, correct?

A Yes.

Q Okay. And that's what I meant to get at.

Can you look for a moment at page, Exam 75408 of this document, which is I think also Slide 14 of the deck.

Can you read for me the header at the top of that slide?

A Open items and next steps.

Q And did it include among the next steps complete financing/accounting business readiness model?

A Which one is that?

Q The second bullet under open

issues.

A I see complete additional --

Q I'm sorry. The first bullet under next steps.

A The first bullet under next steps, okay. That reads, "Complete financing/accounting business readiness model and provide weekly updates to stake holders-ongoing."

Q You have no way of knowing whether those next steps were completed, do you?

A No, I don't.

Q And you have no way of knowing whether those open issues were resolved, do you?

A I don't know what they are so I don't know.

Q Would you agree with me that on the face of this document being that it -- according to the document there's open items and next steps, that this does not necessarily reflect the parties' agreement?

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MR. COHEN: Objection. Mischaracterizes the document. The document speaks for itself.

Q You can answer.

A I'm not sure I can agree with you on that.

Q Well, you can't say either way, can you?

A I cannot.

Q You state in your report at page 13 of the parties' conduct before and after the implementation of the BCL2D would likely overcome AFI's arguments in this regard.

Do you recall that?

A Yes.

Q How could you possibly draw a conclusion about the parties' conduct if you have not personally evaluated it?

MR. COHEN: Object to the form.

A I'm relying upon the examiner's report for those factual statements.

Q And are you aware that Mr. Celini testified that the broker to bank

project team consisted of maybe 30 or 40 people at various times and it involved scenarios?

A Yes, I remember reading that.

Q And did you review the broker agreement in connection with your analysis of this claim?

A No, I did not.

Q Okay.

You did say in your report that the broker agreement is the only new written agreement into which the parties entered in connection with the BCL2B project; is that right?

A Yes.

Q Okay.

Why didn't you review it?

A I personally didn't review it. I'm not sure if a party, one of my colleagues may have reviewed that.

Q Okay.

And it is, in fact, on your Exhibit A?

A Yes. So then one of my

colleagues would have reviewed it.

Q But you don't recall personally reviewing it?

A I don't recall personally looking at that.

Q Okay.

A Correct.

MR. SIMON: I'm going to ask the reporter to mark as the next exhibit a copy of the broker agreement dated November 20, 2008 between GMAC Bank and GMAC Mortgage, LLC and Ditech, LLC.

(Broker Agreement, was marked as Lyons Exhibit 8 for identification, as of this date.)

BY MR. SIMON:

Q You would agree with me, sir, that, and take as much time as you need, but I think you said it in your report, that this document does not specify the fee to be paid to GMAC Mortgage for acting as a broker, correct?

A If I said that in the report,

I'm going to assume it's correct and I haven't looked through the document, but --

Q Okay.

A -- I take your representation that it doesn't provide for a fee.

Q So if it says it in your report or the examiner's report, you accept that?

A I accept that.

MR. COHEN: Objection. Mischaracterizes testimony.

Q Well, I'm not asking character -- I'm going to read -- I'm going to ask a separate question because I don't know exactly where it is but my notes say you said it.

So if you said it or if Judge Gonzales said it, you will accept the premise that nowhere in this agreement does it specify the fee to be paid for -- the broker fee to be paid?

A I will accept that premise, yes.

Q All right.

Can you look at paragraph 4 of

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the agreement at page 3.

A Page 3, yes.

Q And you see the section there entitled "Broker Compensation"?

A Yes.

Q And are you aware that this provision provides that "GMAC Bank shall be permitted to make adjustments to the compensation due the broker," and that's GMAC Mortgage, "in the event that GMAC Bank determines in its sole discretion that the projected total amount of compensation to be received by broker," GMAC Mortgage, "in the related loan transaction would exceed that which is commensurate with the amount normally charged for similar goods, facilities and services, keeping in mind the price structures and practices in similar transactions and in similar markets."

Do you see that?

A I see that, yes.

Q And did you consider that at all in forming your opinion in connection with

the value of this so-called breach of contract claim?

A No, I did not.

Q What term, if any, in the broker's agreement do you contend was breached?

A I don't know without looking at my report.

Q Okay.

And I just want, just in fairness because I was really not trying to trick you, in your report at page 9, the paragraph, the second full paragraph on page 9?

A Yes.

Q I just want to point to the second sentence of that paragraph reads, "The broker agreement does not specify the fee that is to be paid to GMAC Mortgage for acting as a broker."

Did you write those words?

A Yes.

Q And you believe them to be true?

A Yes.

Q Can I direct your attention to page 10 of your report?

And can you tell me once you get there what is depicted in the figure at the top of page 10?

A That is an exhibit that I copied from the examiner's report that depicts the different items of revenue and expense for the economics of a particular mortgage purchase and sale transaction and how the elements were allocated pre and post the adoption of the fair value election.

Q Okay.

On the fifth entry there, can you read what it is?

A Gain on sale to third-party.

Q Right.

And do you see that pre-fair value election which entity received the gain on sale to third-party?

A The mortgage company.

Q And post-fair value election, which entity received the gain on sale to third-party?

A The mortgage company.

Q Okay.

And can you tell me how you reconcile that fact with your statement in your report at page 10 that there appears to be no evidence that the parties even recognize that the fair value election would have the effect to allow Ally Bank to keep a significant portion of the gain on sale?

A Where is that sentence?

Q This is on page -- it's actually right below. Right below the chart you have a sentence there that starts with the words "There appears to be no evidence that this change in the underlying economics was understood to have an impact of Ally Bank keeping a significant portion of the gain on sale."

A Yes, actually I see that.

Q So I'm asking if you can reconcile the figure which shows gain of sale of third-parties staying with GMAC Mortgage with your first sentence under

the figure?

A No, I think that's -- that may be a mistake.

Q Which is a mistake?

A The -- what's written below the chart.

Q So you think it's a mistake that -- well, what's the mistake?

A Well, I think -- I'd have to read it thoroughly, but I believe that the change had to do with, for example, the points collected being kept by the mortgage company pre the change in accounting and being kept by the bank afterwards, and that the gain on sale to third-party in this sentence is an incorrect statement. But I would really like to read the whole discussion further.

Q So do you think that the gain on sale -- do you think it's a mistake to say that there was a change in the gain on sale that allowed Ally Bank to keep a significant portion of it after the 2009 fair value election?

Lyons

MR. COHEN: Objection. Mischaracterizes testimony.

Q I'm asking if you can clarify what you mean by mistake?

A Well, may I read this --

Q Sure.

A -- section?

Okay. I've read it and I am not sure that my use of the term "gain on sale" in page 10 was accurate. But I would have to review the examiner's report again and see whether -- see whether the use of that term was accurate or not in light of the examiner's report. But my understanding is, I think, accurately stated in page 9 as to what the economic difference was and how the accounting changed.

And it was primarily the benefits of the points and the initial revenue that would be recognized at the initiation of the transaction rather than the sale, the gain on the sale to a third-party that was different before and

after the accounting change. But I don't -- I don't pretend to really understand what fair value accounting is.

Q Makes two of us.

A Pardon me. I'm starting to lose my voice a little bit.

Q Are you familiar with the concept of discount pricing with respect to mortgages?

A No, I don't think so.

Q How about premium pricing?

A Premium pricing, yes, I believe so.

Q Do you know whether there was a change in the mortgage market beginning in 2009 with respect to premium pricing?

A Yes, I believe I read something about that.

Q And what do you think the nature of the change was?

A This is my understanding, and believe me it's not an educated understanding, but I'll tell you what I understand; that a purchaser of a loan

would pay more than par value for the loan because the interest rate, the stated interest rate on the loan was above the current market interest rate for some of the loan.

Q And do you know whether there was a trend in the marketplace where increasingly mortgages were premium priced beginning in 2009?

A Again, I believe I read that.

Q Do you know what the impact would be of a shift toward premium pricing in terms of the origination fees on those loans that were premium priced?

A No, I do not know.

Q Okay.

Do you know whether the origination fees would be reduced if you were using premium pricing instead of discounting, discount pricing?

A Yes, I believe that in the premium pricing market, I don't believe the borrower would be paying origination fees and that the premium would be paid by

a subsequent purchaser. That's my understanding.

Q Do you know the effect on gain of sale of third-parties under premium pricing?

A I don't know, but if my understanding is correct it would be a gain on sale because of the premium.

Q Right.

And do you think it would be higher or lower than the discount pricing?

A I would think it would be higher.

Q Okay.

A Oh, I'm sorry.

Q Let me help you out.

A Yes.

Q You read the examiner's report?

A Right.

Q You read all of it before your report, right?

A Yes.

Q And that included Volume V, which in great detail talks about the GMAC

Mortgage contracts, meet with Ally Bank opening loan sales.

A Yes.

Q I'm going to give you a section of the examiner's report, Section 5, pages 89 through 209. And it's Section V, "B" as in boy, I guess, starting at page V89.

I'm actually not going to mark this. I don't think we need to mark it.

MR. COHEN: Can I get a copy?

MR. SIMON: Yes, I'm going to give you a copy, of course.

BY MR. SIMON:

Q I just want to allow you to refresh your recollection.

A Thank you.

Q Okay.

I'd like you to turn to page V128, please. And you see there the examiner sets forth an exhibit which has a comparison between discount point pricing and premium pricing?

A Yes.

Q And do you see that the bank's

cost basis under discount pricing is lower than the bank's cost basis under premium pricing?

A I see that.

Q Okay.

Can you turn to the next page which is 129?

A Yes.

Q And this is a discussion of a scenario using premium pricing, and midway through that paragraph there's a statement after he sets forth a little bit about the hypothetical, the examiner says, "This is known as a no closing cost loan and is considered premium pricing."

Do you see that?

A No. Where is it?

Q The middle of the first paragraph on page 129.

A The middle of the first paragraph?

Q Yes.

A Okay. Now I see it.

Q See it? And what he goes on to

say is, "In this scenario," a premium pricing scenario, "the bank's cost basis is 203,500." That's reflected in the figure we just looked at. "The increased above par note rate will positively affect the gain on sale recognized when the loan is sold to investor."

Do you see that?

A I do see that.

Q And is it your understanding that the gain on sale recognized when the loan is sold to an investor is another way of saying the gain on sale to third-parties?

A Yes.

Q Okay.

And both before and after the fair market accounting change, at least according to the figure on page 10 of your report, the gain on sale of third-parties went to GMAC Mortgage, correct?

A That's what that figure said, yes.

Q So isn't it true that if premium

pricing were increasing in 2009, the expectation would be that GMAC Mortgage would receive more gain on sale to third-parties?

A That sounds reasonable to me.

Q Okay.

And you have not quantified how much GMAC Mortgage made in that regard, correct?

A That's correct.

Q And you have no view one way or the other as to how much they made?

A I have no information.

Q Turning to page -- you can give that back to me now; that's why I don't want to mark it. Less for all us of to carry out of here.

MR. COHEN: You can have mine too.

Q On page 12 of your report, you note that the examiner concluded that GMAC Mortgage's contract claim under the MMLPSA, the Pipeline Swap and the parties' agreement about the combined effect of

those contracts is estimated at a 520.5 million dollars; is that an accurate statement?

A That's number three?

Q Yes.

A Yes.

Q Would you agree that an entity might originate loans or broker loans but would not likely do both for the same loan?

MR. COHEN: Object to the form.

A That would be my understanding that there are two different roles, originating and brokering.

Q And if GMAC Mortgage were given the entire measure of damages set out there, the 520.5 million as an ostensible remedy for revenues improperly obtained by the bank, the bank would get no return on the deal at all, right?

A No. As I understand it, the bank would continue to get what they call a net interest carry.

Q Well, if I represent to you that

the 520.5 million is comprised of both, what would be earned for origination and for brokering, assume that to be the case with respect to that 520.5 million; if GMAC Mortgage were to get the entirety of that and left the bank with nothing with respect to that loan, do you think that would make any business sense?

MR. COHEN: Objection. Incomplete hypothetical and it assumes the answer.

A I guess if there were nothing in the deal for the bank, it would not make business sense for the bank to do the deal.

Q And do you think the bank's regulators would ever approve an arrangement where there was nothing in it for the bank?

A With an affiliated transaction, probably not.

Q Okay.

Now, under the MMLPSA, were you aware that the committee actually

articulated a constructive fraudulent transfer theory in its STN motion?

A No.

Q Well, the committee opined that --

MR. SIMON: Withdrawn.

Q The committee alleged that GMAC Mortgage was forced to take on all of the rep and warranty risk for loans originated by Ally Bank?

A Yes.

Q Are you familiar with that? Do you recall hearing that earlier?

A Yes.

Q Okay.

And that's in part by the removal of the reps and warranties in the MMLPSA that we looked at earlier.

Do you recall looking at that?

A Yes.

Q And according to the examiner, GMAC Mortgage was not getting sufficient consideration, at least beginning in 2009, for taking on that risk; is that a fair

statement?

A Well, if the economics were not as the examiner found was the agreement of the parties, then that's true.

Q Well, he did -- whatever the agreement of the parties was the examiner concluded that GMAC Mortgage was not getting sufficient consideration to take on that risk. The reason --

MR. SIMON: Withdrawn.

Q Do you recall whether the examiner concluded that the reason that GMAC Mortgage was taking on the reps and warranty risk, according to what the examiner said, is because it was getting all of the gain on sale?

A All of the economic advantage.

Q That's a better way of putting it, that the reason that GMAC Mortgage was taking on the reps and warranties was because it was getting all the economic advantage; that's what the examiner concluded, right?

A Yes.

Q Okay.

And if, in fact, the -- GMAC Mortgage was required to take on the reps and warranties but was getting less than the full economic advantage at a time when it was insolvent, doesn't that sound like the makings of a constructive fraudulent transfer claim?

MR. COHEN: Objection. Form.

A Yes, limited to the factors that you just posited that does sound like a fraudulent transfer claim.

Q Okay.

And take a look, if you would, at paragraph 64 of the STN motion, which I think is Exhibit 4.

A I'm sorry, which paragraph?

Q 64.

MR. COHEN: It's page 29.

A Okay. I'm on page 29.

Q And do you see there that the committee alleges that the MPA, and we called the MMLPSA the MPA for the sake of brevity in our favor.

A Good for you.

Q "The MPA and swap transaction similarly support both constructive and actual fraudulent transfer claims. The transactions shifted to GMAC Mortgage without fair consideration, virtually all of Ally Banks' R&W risk.

While insolvent, GMAC Mortgage was required to make massive overpayments to Ally Bank under the MPA, absorb substantial marked to market losses and to asset amortization under the MSR Swap, suffer significant volatility in its earnings under the Pipeline Swap"; et cetera.

Had you seen that allegation before rendering your report in this case?

A No.

Q Did you consider, in fact, whether this potential claim might have factored into the global settlement?

A I did not.

Q Okay.

You weren't even aware of it

when you were doing your analysis, correct?

A No, I was not.

Q Let's take a look at page 15 of your report. And this is where you set out your discounting methodology in connection with the net misallocation of revenue -- I'm sorry, the misallocation of net revenue claim.

A Yes.

Q So you start with the damages figure that we discussed, the 520.5 million, right?

A Yes.

Q And you assume that that figure is correct?

A Yes.

Q Okay. But you've done nothing independently to assess whether or not that 520.5 as a business matter is appropriate or not?

A That's correct.

Q Okay.

Then you reduced that figure by

20 percent for inherent risk?

A Yes.

Q Why did you do that?

A That's an initial settlement evaluation. Just general inherent risk in any litigation and 20 percent was a small discount in light of the strength of the claim for the misallocation of revenues.

Q Why in your view was the claim strong?

A It seemed to me that it made sense. The recitation of the facts that were in the examiner's report made sense to me that prior to this time period GMAC Mortgage was originating loans and using the Ally Bank or other sources to finance holding those assets between the time of origination and sale to a third-party. Because of the turmoil in the market, that financing method was no longer available.

However, under the first scenario, the finance company would only be getting interest from the mortgage company for assisting in the finance of

this mortgage operation and that the construct of this brokerage, brokering loans to the bank was to achieve the same economics as pre-existed the brokering transaction. And that that was consistent with the presentations that were made and would appear to be the understanding of the parties. But it seemed to me to be a viable contract claim. Of course it has problems.

Q When you say consistent with the presentations that were made, having now seen the presentation and seeing that by appearances it does not seem as though it's a final presentation.

Does it change your review in any way in that regard?

A No.

Q Okay.

Why not 30 percent for inherent risk?

A It was just after discussing this matter with my colleagues and looking at the assessment by the examiner, and I

believe I looked, the examiner thought this was a claim that was likely to succeed -- yes, I believe that's what he said -- that 20 percent was an appropriate discount.

Q So do you think that the likelihood of success predicted by the examiner is a relevant factor in determining the inherent risk percentage?

A Yes.

Q Can you explain why for the Minnesota preference claim and the Ally Bank fraud claims you used a 30 percent inherent risk discount, when those claims were given the same likelihood of success by the examiner as this claim?

A Yes, I mean, they're all different claims and there were other factors that I considered in doing the inherent risk analysis in those situations.

Q Such as what?

A I don't know, the Minnesota Insider Preference thing was kind of a

novel issue to me. And that was one of the factors that I took into consideration in doing the discount analysis.

Q I'd like to ask you more but we're going to lose the tape, so we have to take a break.

A Okay.

THE VIDEOGRAPHER: This marks the end of tape number four. We're going off the record at 4:39 p.m.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

THE VIDEOGRAPHER: This marks the start of tape number five. We're back on the record at 4:53 p.m.

BY MR. SIMON:

Q Mr. Lyons.

A Yes.

Q We're going to continue discussing your discounting method with respect to the misallocation of revenues claim.

You next applied a 30 percent

reduction for risk of possible pursuit of the claim under the modification theory.

Could you explain your basis for that?

A Yes. As we discussed previously, the language of the contract may not be crystal clear, and the plaintiff would have to establish the contract was modified, and I discounted the reasonable settlement value by 30 percent to account for that factor.

Q How did you come up with that number?

A It was just based upon my experience and my discussions with my colleagues.

Q Why did you need to discuss with your colleagues these percentages before choosing a percentage?

A I thought it was beneficial to get input from other experienced people, particularly litigators on contract litigation claims.

Q To be clear, everyone you

consulted with was in your own firm?

A Everyone was in my own firm.

Q So there were no external authorities that you referenced in coming up with your percentages?

A That's correct.

Q Any objective criteria treatises or texts or anything out there apart from your colleagues that you looked to in forming your particular percentages that you applied in your discounting methodology?

A No, there were no texts or any outside sources that I consulted to select a particular percentage that I applied to any issues.

Q So in your analysis on page 13 in the narrative, you don't supply a 30 percent number.

What you do in the text is you assign a 20 percent discount owing to likely disputation of facts, but in the chart, you assign a 30 percent discount.

Can you explain the discrepancy?

A I can only say that might be an error just based upon what you said.

Q Do you we know which is correct?

A No, I don't.

Q So it could be 30; it could be 20?

A It is probably the chart is correct.

Q But you don't know?

A I don't know as we're sitting here today.

Q How are we to make that determination?

A It could be just an error.

Q Right.

How do we resolve the error? Should we use the 20 or the 30?

MR. COHEN: Object to the form.

Q You can answer.

A As I said, my initial reaction is that the chart is probably the correct one to use.

Q So that would be the 20 percent?

A Yes.

Q Now, you added 15 percent for interest, right?

A Yes.

Q Why did you do that?

A This was -- I think this is the one claim where the examiner identified interest as a component of damages and that there were different rates depending on which state law applied. And we also found that in the contract, there was a fee shifting provision. I said 15 percent for interest, there was also, and I think I mentioned in the body of the text, without consulting it, I think I also mentioned the fee shifting as well.

Q What does the fee shifting have to do with the interest rate?

A Fee shifting is in addition to interest.

Q So I'm asking specifically about the line in your analysis that reads 15 percent for interest.

A Right.

Q Does the fee shifting provision

have anything to do with that line?

A It probably should be included in there as well. It should be 15 percent for interest and fees.

Q And the fee shifting was either party could have their fees shifted, right?

A Yes.

Q So why isn't that a wash; why would it increase or decrease?

A Because I think this was evaluating on a claim that was likely to succeed.

Q What component of the 15 percent is attributable to the interest and what component is attributable to the fee shifting?

A I think most of it is interest.

Q Now, you stated that the application of interest at a rate of between 5.5 percent and 9 percent per annum for a period could apply.

A Yes.

Q So why did you then apply a 15

percent -- well, assuming some of that accounts for the fee shifting, but you said most of it is the interest, it is still higher than 5.5 percent, right?

A Because there were several years involved.

Q Okay.

Now let's turn to your likely settlement negotiation methodology.

A On page 14, is it?

Q I think it is in the text, you discussed that, right?

MR. COHEN: He is asking which page you're referring to.

Q Oh, I'm sorry.

The pages are 12 to 15.

A I think it is 14.

Q 14 is the negotiation.

A Yes.

Q Bottom of page 14.

A Right.

Q And you say there that you expect the plaintiff's initial settlement demands to be at 540 million, which is

approximately 90 percent of the gross amount of the claim?

A Yes.

Q And on what basis did you determine that it should be 90 percent?

A I anticipated that the plaintiff would assess this as a claim with substantial merit, and would make the initial demand at the high end of the range, which is 90 percent.

Q And you also opined that the counter would be at 15 percent?

A Yes.

Q And on what basis did you make that determination?

A Again, I would consider that the defendant would also -- certainly wouldn't have the same assessment, but in relative terms, the defendant would assess this as a claim that has merit and would warrant a substantial initial offer, 90 million dollars, which is approximately 15 percent of the gross value of the claim.

Q And you go on to say that you

took into account the relative bargaining power of the parties.

Do you see that?

A Yes.

Q How did you do that?

A Just by assessing it. And in a case such as this, where you have a defendant that I assume is financially capable of funding a settlement, and you have a plaintiff who is looking for money, and in this case would be a would be an estate representative, that the defendant would have the upper hand in bargaining power in that type of scenario.

Q Is that all you considered in assessing the relative bargaining power of the parties?

A Yes, I think so.

Q Isn't that a fairly generic description that can apply to all sorts of situations when you're negotiating settlement?

A It could apply to many situations. In my experience, a lot of

these situations turn out the opposite, that the defendant does not have the financial wherewithal to fund a large settlement and that leads to a deeply discounted settlement value.

Q So in that scenario, the predicate of your settlement negotiation methodology would just be flawed, right?

MR. COHEN: Object to the form. It mischaracterizes testimony, and vague.

Q In situations where you assume that the defendant is capable of providing financing, and on that basis, you predicate 90 percent and 15 percent figures. In the situations where the defendant, in fact, cannot do that, the predicate is incorrect, correct?

MR. COHEN: Objection. Mischaracterizes the testimony.

A I don't follow the question.

Q You said that in your experience, a lot of situations turn out the opposite.

A Yes.

Q That the defendant does not have the financial wherewithal to fund the large settlement, right?

A Yes.

Q But your methodology, I think you testified to, is predicated on an assumption that the defendant can make a large financial commitment, right?

A In this case, we're talking about AFI.

Q But as a general matter, under this methodology, do you generally approach the analysis with an assumption that the defendant is able to pay?

A No, that's one of the factors that one has to assess.

Q I see.

So you initially make an assessment of whether or not?

A Yes.

Q Well, that was the basis for my misunderstanding.

A Okay.

Q You also reference here that you took into account the back and forth to be expected in the negotiating process?

A Yes.

Q What do you mean by that?

A The offers and counteroffers where the demands and the offers that would be presented. In my experience, it usually starts with the plaintiff making a demand and the defendant makes an offer. And the process goes back and forth. It is often shuttle diplomacy where the mediator goes and meets separately with the parties.

Q So can you walk me through this?

MR. COHEN: Were you finished with your answer?

THE WITNESS: Yes.

Q Can you walk me through this particular claim and the back and forth that you in your methodology predict would happen here?

A No, I don't think so. I don't think I actually thought about what the

plaintiff's second demand would be or reduced demand would be or what the defendant's next offer would be.

Q So how do you reach the 45 percent figure as a reasonable settlement amount?

A I thought that in this case, and 45 percent is what the percentage of 268 is compared to the whole claim, is that what you're telling me?

Q Yes.

A I just anticipated that the ultimate settlement amount would be slightly less than half of the gross claim and on a -- the claim, even one that has merit and that I judge likely to succeed, that the ultimate reasonable settlement analysis in a situation like this would be still less than 50 percent of the claim.

Q And so all of the percentages that we have talked about, both with respect to the discount methodology and the settlement negotiation methodology of this claim, is it fair to say were based

on your experience and the assessment of your team?

A I think that's fair to say.

Q And they are not based on any specific objective numbers reported elsewhere, correct?

A That is correct.

Q Let's move on to the second contract claim that you identify as coming out of the examiner's report.

A Yes.

Q And that is characterized as the alleged failure to pay value of purchased MSRs and correspondent loans?

A Yes.

Q Or MSRs to GMAC Mortgage under the MSR Swap, right?

A The MSRs on purchase and correspondent loans.

Q What is an MSR?

A Mortgage servicing right.

Q Do you have any understanding as to whether the JSNs have a lien on MSRs?

A I do not.

Q Do you know that GSE related MSRs were not pledged to the JSNs?

A I don't think I know that.

Q Do you have any understanding whether PLS MSRs were released from JSN claims?

A No, I don't.

And PLS is private label securities?

Q Right.

A You're talking about MSRs?

Q Yes.

A Okay.

No, I don't. I do not know whether those were released.

Q And you're not offering any opinions in that regard as to what liens the JSNs may or may not have?

A No.

Q The examiner concluded this claim was more likely not to prevail, right?

A Yes.

Q And your discussion of the claim

in your report, which is at pages 15 to 21, you state "after reviewing the facts and legal conclusions set forth in the examiner's report" you agree with his conclusions?

A Yes.

Q And so then I take it you too would agree that this claim is likely not to prevail in court, correct?

A I think more likely than not.

Q More likely than not?

A Right.

Q And do you know that this claim 2 was to the asserted by the committee in its STN motion?

A In its STN motion, the only thing I know about the STN motion is what you showed me, asked me to look at today.

Q Well, I'll represent that neither the committee or any other party brought this claim against AFI prior to the global settlement.

Assuming that to be true, does it change your opinion in any respect with

regard to this claim?

A No.

Q And you conclude with respect to this claim, at page 17, that the value of Ally Bank's MSR asset attributable to correspondent loans and purchased MSRs which were not paid to GMAC Mortgage under the MSR Swap, despite the plain language of the MSR Swap and MSR Swap confirmations, is the basis for the claim.

Is that fair?

A Yes.

Q And can you tell me or show me the contract provision that was violated on its plain language according to what you write here in the report?

A I don't have that with me.

Q I'm happy to show you any of the documents on your Exhibit A that you looked at. If you can -- I'll give you whatever you want if you can just point me to the provision that you contend is violated. I'd like to know what it is.

MR. COHEN: Object to the form.

A I'm not sure that I can do that.

Q You wouldn't be able to do that?

A I'm not sure that I could.

Q Did you ever look at it prior to issuing your report?

A The MSR, I looked at the -- this was the standard form IDSA contract I believe. I did look at that, yes.

Q But if I showed it to you, you wouldn't necessarily be able to show me which provision was violated?

A Correct, yes.

Q You write at page 19 that the examiner concludes that AFI would likely succeed on the close question of a defense under the doctrine of mistake, despite the exacting standard which governs that doctrine?

A Yes.

Q So once again, you're applying facts to law, or otherwise engaging in legal analysis in that observation, right?

A Yes.

Q Did you study how often

bankruptcy courts in this circuit apply the doctrine of mistakes?

A Bankruptcy in this circuit, no, I don't believe that I did.

Q Or any court for that matter?

A No.

Q How about with respect to modification, did you investigate the frequency with which courts in this circuit apply the doctrine of modification?

A The frequency with which, no, I don't believe that I did or any of my colleagues did.

Q You wrote in your report at page 20 that the settlement value of the claim would be further reduced by the possibility of AFI successfully defending the claim on the grounds that the MSR Swap, if applied to correspondent loan MSRs and purchased MSRs, would not have withstood regulatory scrutiny?

MR. COHEN: Excuse me, where are you reading.

Lyons

MR. SIMON: Page 20.

MR. COHEN: Page 20 where?

MR. DENK: 21.

MR. SIMON: I'm sorry, page 21 in the middle.

A First sentence of the first full paragraph?

Q Yes.

MR. COHEN: Okay. I'm with you.

Q Do you agree with that statement?

A Yes, that's correct.

Q And you, in fact, conclude that the regulatory scrutiny and concerns that were raised by the regulators supports, further supports a claim of mutual mistake, right?

A Yes.

Q Do you have any understanding of the basis of the regulator's concerns?

A Yes, the regulators would be concerned when there is an affiliate transaction that the bank is not being treated on a fair basis as would be the

same in the third-party arm's length transaction.

Q Okay.

And you opined that there should be a 25 percent risk reduction associated with the regulatory based offense on this claim?

A Yes.

Q What was your basis for ascribing a 25 percent figure to that deduction?

A Again, it was just a judgment made after reviewing the examiner's report and consulting with my colleagues.

Q Are you aware that the examiner concluded that enforcing the swap as written as --

MR. SIMON: Withdrawn.

Q The predicate for this claim is on the written terms of the swap?

A Yes.

Q Okay. And let me just finish the question.

On the written terms of the

swap, correspondent payments should have been made. That's the predicate for the claim, right?

A Correspondent and purchased MSRs.

Q And are you aware that the examiner concluded that enforcing the swap as written would make little economic sense?

A Yes.

Q And further that requiring the value of correspondent loan MSRs and purchased MSRs to be transferred to GMAC Mortgage under the swap would be difficult to justify?

A Yes.

Q Would you agree with me that it would not make economic sense for a bank to pay twice for the same asset, one to a correspondent and one to GMAC Mortgage?

A Yes, I agree that makes economic sense.

Q It does not make economic sense?

A It does not make economic sense.

Q And yet that's what would be required if the MSR Swap were enforced in accordance with its literal terms, right?

A I believe that the MSR Swap, my understanding of the way it would apply would be to the increase in value of MSRs on the bank's books, and I don't believe that it would apply to the original purchase price of the MSRs.

Q In any event, you agree with the examiner that it is unlikely to succeed, this claim, right?

A I agree, yes.

Q You think it is rational for AFI to pay 387.2 million dollars on a claim that you concede is unlikely to succeed and on the theory that the examiner concluded makes little economic sense?

A Yes.

Q And on what basis?

A Because the literal language of the contract would lead to that result, and it is a huge potential damage claim the 1.725 billion.

Q Well, the examiner approached the -- there was another claim that was addressed by the examiner related to the Pipeline Swap, right?

A Yes.

Q And that had to do with the funding to sale period?

A Yes.

Q And didn't the examiner approach that claim in the exact same way?

In fact, the examiner approached the Pipeline Swap issue in exactly the same way as he did with respect for the breach of contract claim relating to the correspondent MSRs, right?

A I would have to take a look at that again.

Q Let me read you an excerpt in the examiner's report at Section 7L72. I'm referring in this excerpt to page 72, the VII.L-72.

MR. COHEN: Where on the page?

MR. SIMON: The paragraph in the middle of the page that begins --

Q Let me as a preface say, I'll represent to you that this is a section discussing the correspondent loan MSR issue that we have been talking about.

A Okay.

Q And in the middle of this page starting with the word "accordingly," the examiner writes, "Accordingly, as with the application of the Pipeline Swap, based on the available evidence and the exacting standard which governs the application of the doctrine of mistake, while it is a close question, the examiner concludes that a court more likely than not would reform the pre-April 2011 MSR Swap to require payment of the value of newly recognized MSRs only for those MSRs in which the bank recognized a gain."

Do you see that?

A Yes, I do.

Q As to the Pipeline Swap claim, you concluded at page 26 of your report, "As noted by the examiner, the parties drafting the Pipeline Swap agreements

appeared not to have understood the effect of the language that they chose. More importantly, ending the Pipeline Swap at the time of funding made little business sense."

Those were your words?

A Yes.

Q You go on to state, "Given the high likelihood of establishing a defense as to both potential breaches, the Pipeline Swap claim had little settlement value."

Do you recall that?

A Yes.

Q How do you reconcile the difference in your approach on the Pipeline Swap versus the correspondent MSR claim when they were analyzed exactly the same way by the examiner?

A One major difference is that the examiner did not quantify the Pipeline Swap potential damage claim, but he did quantify the MSR claim at 1.725 billion. And I think that the magnitude of that

claim warrants -- the magnitude of the claim together with the plain language of the contract warrants settlement value, even though it is a claim that is not likely to succeed, and more likely than not not to succeed.

Q And on the same grounds as the other claim?

A Yes.

Q So the only material difference was the value of the exposure?

A That's the only one that comes to mind right now.

Q There is no other basis on which as you sit here you can distinguish between the two?

A As I sit here, that's correct.

Q Looking at the discounting methodology that you apply to the correspondent MSR claim?

A Yes.

Q You started with 1.725 billion potential damages?

A Yes.

Q And you decreased that by 30 percent?

A Yes.

Q Why did you do that?

A That, again, was an initial assessment of inherent risk in litigation cost involved and those inherent type factors, and I selected 30 percent just because that seemed a reasonable discount amount in my judgment.

Q Now, in your analysis of the net revenue contract claim that we discussed.

A Yes.

Q There you used a 20 percent figure?

A Right.

Q Why only a 10 percent difference between the claims when the examiner found that claim likely to succeed and this one not likely to succeed?

A Because I think the other issues that impacted the likelihood of success were dealt with when they were discounting other discounts that were applied to each

of the claims actually.

Q And what were they?

A I'm sorry, where is the MSR claim?

Q Page 18, I think.

A I think that's the --

Q Page 21.

A We had the mutual mistake defense and the modification defense and the regulatory based defense.

Q And why did you ascribe a value of 55 percent to the mutual mistake defense, but only five percent to the modification defense?

A Because this didn't seem like a scenario where modification actually took place.

Q What do you base that on?

A It was more likely that the parties -- I'm sorry, I paused in my answer, but that it was more likely that when the parties drafted the contract that they mistakenly included all MSRs in the swap category where the bank would have to

pay for those, rather than just the MSRs related to brokered loans from the GMAC Mortgage Company, or loans that had been originated by GMAC Mortgage Company.

Q So are you saying that the defense of mistake was more likely to succeed than the defense of modification?

A No, I think it is the other way around.

I'm sorry, that the mutual mistake defense was more likely to succeed than the modification defense.

Q So basically your deductions with respect to this claim are predicated on a legal analysis as to the likelihood of success on the law to these defenses?

A Likelihood of success on those defenses in the factual context given here.

Q As applied to the law?

A Yes.

Q And looking at the likely settlement negotiation methodology that you used, you started with a 60 percent of

gross amount initial demand?

A Yes.

Q Why did you do that?

A Because of the -- I think that even a plaintiff would have agreed that in light of the factors that we discussed, the -- that it did not comport with what seemed to be the intent of the parties, that even the plaintiff would make a lower initial demand.

Q And you ultimately concluded that 22 percent of the gross amount was a reasonable settlement amount?

A Yes.

Q How did you reach that determination?

A Through both of the methods that were applied here.

Q And like the last claim, I take it that the percentages that were applied with respect to the alleged breach of contract correspondent MSRs in both of your methodologies were based on your own experience and the assessment of your

team?

A That's correct.

Q And they are not based on any specific objective numbers reported elsewhere, correct?

A That is correct.

Q Let's turn to the next purported breach of contract claim that you analyzed.

A Okay.

Q And that relates to the use and allocation of ResCap's tax attributes?

A Yes.

Q And were you aware that this claim 2 was not raised by the committee or any other party prior to the issuance of the examiner's report?

A I'm not aware of that.

Q And if I told you that that's the case, does it change your opinions in any regard?

A No, it does not.

Q Why not?

A My understanding of Arthur

Gonzales's duties were to investigate all of the intercompany transactions to determine whether they were viable causes of action by the debtors against the non-debtors, and I also understood that he sought input from various constituencies involved in the case as to what might be fruitful areas of inquiry. And so whether or not anyone had asserted a claim under a particular contract doesn't mean that a potential claim does not exist.

Q Right.

But you would agree that the value of this claim, the potential damages, was quite significant, correct?

A On the tax line, yes.

Q 1.7 billion?

A Correct.

Q And the last claim we looked at, 2, the potential value was 1.7 billion, right?

A Yes.

Q And it is your testimony that if none of the parties in these negotiations

were thinking about or contemplating claims based on those amounts and these theories, it nevertheless impacted what they did vis-a-vis the global settlement.

Is that your testimony.

MR. COHEN: Object to the form.

Are you waiving mediation privilege?

MR. SIMON: I'll withdraw the question and ask in a hypothetical.

Q In a hypothetical situation where there is a two billion dollar settlement, and you're trying to allocate that between and among different claims, it is your testimony that it is appropriate to allocate significant value to claims that none of those parties contemplated, thought about or heard about prior to entering into the testimony.

Is that your testimony.

MR. COHEN: Objection.

Incomplete hypothetical. Misstates the witness's testimony.

A I don't know that that is the case.

Q I'm asking you to assume it is.

MR. COHEN: Objection.

Incomplete hypothetical.

A To me, the examiner is an important party here, and the examiner was charged with investigating all of the intercompany transactions and assessing whether claims exist. If he is the only one that did that, that still to me means that there is a claim that should be evaluated and a reasonable settlement value should be ascribed to that claim.

Q Do you know whether the examiner was a party to the negotiations?

A I don't believe that he was.

Q And so whether or not he is an important party in the abstract, on what basis do you contend that his views had any influence on the global settlement in this case?

MR. COHEN: Object to the form.

A I'm not sure that his views had any influence, and I wasn't in the negotiating room and I don't believe that

he was either.

Q So if the only manner in which these claims were articulated to any of the parties to this settlement were through the examiner's views, how could they have had any influence in the negotiations in this case?

MR. COHEN: Objection. Assumes facts not in evidence.

Q And you can assume away.

MR. COHEN: Objection. Incomplete hypothetical.

A I don't know what actually influenced the parties who reached the settlement agreement here other than what I heard from Mr. Kruger, what I heard -- what I remembered in reviewing Mr. Kruger's transcript, and that was that he did not try to assess each individual claim.

I think he said something to the effect that that's what the examiner was doing. He didn't think it would be productive to attempt to redo the

examiner's work, even though during the negotiations he was unaware of the conclusions that the examiner was about to reach.

Q I just want to ask you again, your testimony was that you were not sure that the views of the examiner had any influence on the global settlement in this case, correct?

A The views of the examiner, I don't think they did because the examiner's report was withheld until the negotiations were completed in the mediation sessions.

Q Can you tell me with respect to the tax allocation claim your basis for ascribing value to that claim?

A Yes.

The tax allocation claim arises out of two agreements that are referred to as the first 2009 tax allocation agreement and the second 2009 tax allocation agreement.

And the basic assessment is that

the first 2009 tax allocation agreement had ripened into a valid and binding contract on the parties, particularly AFI, and that the second tax allocation agreement, which changed the tax allocation and treated ResCap much less favorably than the first tax allocation agreement, constituted a fraudulent conveyance and could be avoided.

Q So you agree with the examiner that a necessary predicate to prevail on a claim for a breach of contract is that the plaintiff would have to convince a court to set aside the 2009, the second 2009 tax allocation agreement?

A Yes, I agree.

Q So you would agree that 1.77 billion that you identify as the starting point for a reasonable settlement amount amounts to the proceeds of an avoidance action?

A No, I don't. I think the avoidance action allows you to disregard the second tax allocation agreement, and

you get damages by enforcement of the first tax allocation agreement.

Q Unless you can avoid it, you can't have two agreements in effect at the same time, can you?

A In this case, the scenario is set up so that before the -- before you can enforce the first tax allocation agreement, you first have to set aside the second tax allocation agreement as a fraudulent conveyance.

Q You acknowledge in your report that there are "significant risks" associated with the claim, right?

A Yes.

Q And you note that "(a), if I would likely argue that ResCap received substantial capital contributions and other assistance from AFI around the time of the second 2009 tax allocation agreement"?

A Yes.

Q And that could represent reasonably equivalent value for the

Lyons

transaction, right?

A Well, that would be the argument, yes.

Q Did you consider any other arguments made by AFI in your opinion?

A Whatever is set forth in the opinion.

Q So if it is not articulated there in the examiner's report -- you said whatever is set forth in the opinion, do you mean the examiner's report?

A Maybe you should restate.

Q Did you consider any other arguments made by AFI in forming your opinions on the tax allocation claim? And you said in answer to that "If it is articulated in your opinion."

Do you mean the examiner's report?

MR. COHEN: Or your expert opinion?

Q Let me start over.

Apart from what I just read to you the examiner observed, did you

consider any other arguments made by AFI in forming your opinion as to the value of the tax allocation claim?

A The only arguments made by AFI that I considered would have been those presented to the examiner and articulated in his report. I don't know if the one about the capital contributions was the only one, only argument articulated by AFI. I do believe that there are other arguments, for example, that the first 2009 tax allocation agreement was not a binding contract, for example.

Q And that's based on something that you read, or you're just offering that independently?

A No, I believe that's identified in the examiner's report as the position of AFI.

Q Any other defenses that you recall that AFI might have as you sit here today to the tax allocation cause of action?

A Do you mind if I look at my

report?

Q Not at all.

(Witness reviewing document)

While you do that, I'm going to ask the court reporter to mark the next exhibit.

(Exhibit 10 to Disclosure Statement, was marked as Lyons Exhibit 9 for identification, as of this date.)

A No, having looked at my report briefly, I don't see any arguments by AFI that relate to the tax allocation claim.

Q Did you review the disclosure statement that was issued in this case?

A No, I did not.

Q Why not?

A I did not -- well, I want to say that I was pressed for time, but also I just chose not to request that or look at that.

Q Are you aware that generally disclosure statements would set forth the perspectives of the varying parties that

were entering into or were proposing to enter into a plan?

A Yes.

Q And you didn't think it was helpful to see what those views were in connection with this plan in forming your opinions?

MR. COHEN: Object to the form.

A I did not make that -- I did not go through that thought process.

Q Do you know whether there was any discussion of the examiner's report and the impact, if any, of the examiner's report to the global settlements contained in the disclosure statement?

A No, I do not.

Q Can you now take a look at what the reporter has marked as Exhibit 9. I will represent that this is an exhibit from the disclosure statement, Exhibit 10 to the disclosure statement, and the caption is "JSNs' Position on Examiner's Report and Ally's Response".

Have you seen this document

before? You can take a look through it.

(Witness reviewing document)

A I don't believe that I have. No, I don't believe that I have.

Q Do you see on the third page of the document, there is a line sort of towards the bottom, with a footnote below that?

A Yes, I see that.

Q And right below, the first sentence there says, "The plan proponents do not agree with the JSNs' view of the examiner's report. As set forth in detail in the disclosure statement, the examiner's report emphatically supports and in no way undermines the reasonableness of the Ally contribution and the global settlements here."

Do you see that?

A I do see that.

Q Have you heard that before, that that's the position of the plan proponents?

A No.

Q And have you read -- I take it you haven't read in any detail the reasons why the plan proponents thinks that the examiner's report helps rather than undermines the global settlement here?

A No, I have not.

Q There is another paragraph that starts with "in addition to the above"?

A I do see that, yes.

Q And it says, "In addition to the above, in response to the JSNs' assertions, Ally separately notes that the JSNs also wholly fail to acknowledge that the examiner's report concluded the primary claims that Ally were likely to fail. While the examiner's report did identify certain claims against Ally that it concluded are more likely than not to prevail, Ally asserts that all of those claims involve close questions of fact and law and are subject to strong defenses."

Do you see that?

A I do see that.

Q And it goes on to talk about the

particulars of Ally's perspectives of certain claims.

Do you see that?

A I see the next sentence and I see that the next sentence starts with "for example".

Q And that sentence "for example" says, "One of those claims accounting for 566 million in potential damages relates to the debtor's pre-petition repayments to AFI on a line of credit extended from Ally to the debtors."

A Yes.

Q And "The examiner's report found that such payments may be potential violations of the Minnesota Insider Preference Statute. But ally believes it has strong defenses to those claims, including that the repayments are made in the ordinary course." Right?

A Yes.

Q And you didn't read that to get Ally's perspective on that claim prior to issuing that report, right?

A I did not.

Q And then it says, "Another of the claims relates to the allocation of revenue regarding certain mortgage loans."

And that's one we discussed already today, right?

A Yes.

Q And Ally says here that those claims too in its view are subject to numerous contractual defenses in the law and the facts, right?

A Yes.

Q But you never independently inquired of Ally as to its particular defenses on the law or the facts about that claim, right?

A I never did an inquiry.

Q If you turn the page, this document goes on to talk about the fact that the examiner's report identified up to 1.78 billion in potential damages with respect to claims it conceded are close questions, but concluded that the debtors' estates are more likely than not to

prevail. The bulk of those potential damages, 1.77 billion, relates to a tax allocation agreement between Ally and the debtors, and that is in fact the tax allocation claims that we were just talking about, right?

A Yes.

Q It says in the next paragraph that "Ally believes that the JSNs' argument and their calculation of potential damages is flawed as a matter of fact and irrelevant as a matter of law. According to Ally, as a matter of fact, the JSNs' assertion rests on the flawed premise that the estate would prevail on a claim for reimbursement under a tax allocation agreement. Rather, Ally believes that to succeed on such a claim, a claimant must but cannot clear two separate hurdles."

Do you see that?

A I do see that.

Q "First, a claimant must successfully avoid the operative tax

allocation agreement between the parties, an agreement that does not call for Ally to reimburse ResCap for Ally's use of ResCap's losses for tax purposes.

Did you consider that argument in formulating your opinion on the value of this claim?

A I did consider that argument, yes.

Q And did you consider the next sentence, which is that "Ally believes that such an effort would fail for numerous reasons, including the agreement employs the approach preferred by auditors, including Deloitte, and federal regulators, including the SEC and the department of the Treasury. It uses the approach required by GAAP accounting in the absence of a tax allocation agreement between parties. ResCap received reasonably equivalent value in executing the tax allocation agreement, particularly as compared to the previous operative tax agreement executed in 2006. Both sides

received good and sufficient considerations and ResCap's board independently evaluated and approved the tax allocation agreement."

Do you see that?

A I see that.

Q Did you consider any of those defenses in formulating your opinions with respect to the tax allocation claim that opined on in your report?

A Yes.

Q Which ones?

A Let's see.

I considered the statement that "it uses the approach required by GAAP accounting in the absence of a tax allocation agreement between the parties".

Q Okay.

A The next thing, the argument that ResCap received reasonably equivalent value in executing the tax allocation agreement.

Q So do you believe that ResCap did receive reasonably equivalent value?

A No.

Q So to be clear then, you didn't understand AFI's defense in that regard because AFI is contending that it did receive reasonably equivalent value?

MR. COHEN: Object to the form. Mischaracterizes testimony.

A I believe I did understand that that was an argument that AFI advanced to the examiner. However, the next part of that phrase after the comma, particularly as compared to the previous operative tax agreement executed 2006, I did not consider that the argument was to compare the second 2009 tax allocation agreement with what existed prior to the first 2000 tax allocation agreement.

The next argument that both sides received good and sufficient considerations, I believe that was part of the assessment as to whether there was reasonably equivalent value given for the second 2009 tax agreement.

And the last thing, that the

ResCap's board independently evaluated and approved the tax allocation agreement, and here the party that wrote this is referring to the second tax allocation agreement, and I did consider that ResCap's board did approve the second tax allocation agreement.

Q But you did not know or consider that the second agreement is the approach preferred by auditors including Deloitte, did you?

A I don't believe I -- that does not sound familiar to me.

Q Did you know or consider that the second tax agreement approach is that preferred by federal regulators, including the SEC and Department of Treasury, did you?

A I don't know that to be a fact.

Q If it is true, would you agree that is a rather significant fact?

MR. COHEN: Object to the form.

A I would really have to know more about the regulations.

Q Well, do you think it is a fact that would have an impact on the settlement value of the claim if, in fact, the second tax allegations agreement was actually preferred by auditors and federal regulators?

MR. COHEN: Objection to the form?

A Say that again.

Q Do you think it would have an impact on the settlement value on your calculation on the tax allocation claim if it is a fact that the second agreement is the approach preferred by auditors, including Deloitte, and federal regulators, including the SEC and Department of Treasury?

MR. COHEN: Object to the form.

A If that were a fact, yes, it would have an impact on the settlement value.

Q And you didn't account for that fact in your analysis, correct?

MR. COHEN: Object to the form.

A No. I don't believe sitting here today that I learned what Deloitte's position was on tax allocation or whether it was preferred by either the SEC or the Department of Treasury.

Q And now did you consider AFI's arguments in this document with respect to the first 2009 tax allocation agreement? The arguments we just looked at pertained to you said the second, right?

A Well, the first -- the arguments of AFI with regard to the first tax allocation agreement are that no agreement was ever reached, so AFI would totally disregard that.

Q Can I direct your retention to the second paragraph?

A Starting with the word "second"?

Q Well. I'm going to spare you some of this.

MR. COHEN: That's the third paragraph actually.

MR. SIMON: I'm sorry, the third paragraph. My mistake.

Lyons

Q The second sentence starting with the word "indeed".

A Yes, I have it.

Q It says, "Indeed, Ally believes that such a claim" -- referring to -- I think for context I am going to read the prior sentence.

So what this paragraph says is, "Ally asserts that even assuming a claimant could avoid the operative tax allocation agreement, it must then establish that a previous draft of the tax allocation agreement, which ResCap did not sign, is a valid and enforceable contract, which is a difficult burden for a claimant to carry as the examiner's report acknowledges in concluding that the issue is a close question."

Do you see that?

A I see that.

Q And you too agree with that proposition, right?

A I agree with what the examiner stated. I'm not sure that this sentence

is an accurate characterization of what the examiner stated, but to the extent that -- what the examiner's conclusion is as to the enforceability of that contract is something that I agree with, with which I agree.

Q Do you take issue with the fact that it would be a difficult burden for a claimant to carry to enforce the first agreement?

A No, I agree with the assessment that it is a close case, but it is more likely than not that the first tax allocation agreement was a valid and binding contract.

Q My question was: Do you agree with the fact --

MR. SIMON: Withdrawn.

Q Do you agree with the proposition that it would be a difficult burden for a claimant to carry proving that the first agreement was a valid and enforceable contract?

A Well, I would say that there are

issues that the plaintiff would have to overcome to prove that the first agreement is a valid and binding contract.

Q And would it be difficult to overcome those issues?

A Frankly, I don't think so.

Q And why is that?

A I don't think that the signature by ResCap, which is the missing element, is a crucial element in determining if that was a valid and binding contract.

Q And on what basis do you render that conclusion?

MR. COHEN: Object to the form.

Q Is that an opinion you're offering in this case?

A That is an assessment of the relative merits of the claim.

Q On what basis do you make that assessment?

A My review of the facts.

Q Have you reviewed any of the facts firsthand in connection with this claim?

MR. COHEN: Object to the form.

A I've reviewed the facts as set forth in the examiner's report.

Q And nothing else, right?

A That's correct. With regard to this claim, I reviewed the agreements themselves.

Q And in your report, based on your review of what the examiner stated, you write at page 35 that, "Ally's accounting policy 330 provided that all tax sharing agreements must be approved by the respective boards of directors or appropriate management designee."

Do you recall that?

A Yes.

Q And do you recall who signed the first agreement on behalf of Ally?

A I believe it was DeBrunner.

Q And who is he?

A I forgot what his title was.

Q Do you have any basis to know whether he is an appropriate management designee or not?

A I believe that the fact was that Mr. Marks, who had drafted the agreement, consulted with in-house counsel and was advised that Mr. DeBrunner is an appropriate representative to sign, and that he was advised that no further approvals were required.

Q But you don't know either way independently whether or not Mr. DeBrunner was an appropriate management designee, right?

MR. COHEN: Objection to form.

A No, I'm only relying on what was in the examiner's report.

Q And are you aware that AFI had a separate policy requiring that capital contributions in ResCap in excess of 50 million dollars required board approval?

A I think I did hear that, yes.

Q Do you know if that was done in this case?

MR. COHEN: Object to the form.

A I do not know if that was done.

Q Well, if it wasn't done, and if,

in fact, it was required, and if, in fact, as a result of this agreement there would have been a capital contribution in excess of 50 million dollars made to ResCap, wouldn't Mr. DeBrunner's act of signing without board approval be ultra vires?

MR. COHEN: Objection. Incomplete hypothetical. Calls for speculation.

Q You can answer the question.

A I don't know if it would.

Q It might be, right?

MR. COHEN: Objection. Calls for speculation.

A It might be.

Q And you felt free to opine on applying facts to law throughout the day today, right, sir?

A I'm sorry?

Q Throughout the day today, you felt it appropriate to take facts as given to you and apply them to the law?

A Take the facts and apply the law to them, yes.

Lyons

Q I'm asking you to assume the fact that there is a requirement of board approval for capital contributions in excess of 50 million dollars.

A Yes.

Q And assume that that didn't happen. And on that assumption, would you concede it possible that the signature was ultra vires?

MR. COHEN: Objection.

Incomplete hypothetical.

A Based upon that, yes, I would consider it is possible that the signature of Mr. DeBrunner was ultra vires.

Q Going back to Exhibit 10, the next sentence reads, "Ally believes that such a claim would fail because the parties did not intend to be bound by the draft agreement until it was fully executed by both sides which never happened for legitimate business reasons, including that Ally's board had not approved the agreement or authorized Ally's management to execute it. And that

it would have led to an unprecedented windfall for ResCap."

That is not a sentence you read before rendering your opinion in this case, is it?

A That is true, I had not read that sentence before.

Q Had you read that, might you have inquired about this point of required board approval?

A No, I don't think so.

Q Why not?

A I think I had heard that before that there was an argument that this contract required approval by Ally's board.

Q In the text portion of this document, in the same paragraph, it goes on to say that "Ally concludes that because the parties never signed the draft agreement and never intended to be bound by it, a claim to establish its enforceability would fail under established Michigan law that the examiner

did not even address."

And it cites to a case Weygand v Tringali, from Michigan 1970.

Are you familiar with that case?

A No, I'm not.

Q You certainly didn't review it in connection with your analysis, did you?

A No.

Q Can you read the parenthetical ascribed to that case?

A "In cases where writing which purports to evidence a contract between several named persons has been signed by less than all those named, it is often found that the signers did not intend to become contractually bound until all the apparent parties sign and deliver the writing".

Q And if that is Michigan law, that in fact would support AFI's defense in this case, correct?

A Not necessarily.

Q But it could, couldn't it?

A It could.

Q You're not an expert on Michigan law, are you?

A I am not.

Q Have you ever found there to be a binding contract where one side executed and there is evidence suggesting the parties did not intend to be bound?

A That's the key ingredient, it's what's the intent of the parties.

Q Right.

A And I think that's what is the key here, that it appears from assessing all of the facts that the parties intended to be bound.

Q You haven't assessed all the facts, correct?

A All of the facts that were stated in the examiner's report.

Q The facts that the examiner chose to present, right?

A That the examiner chose to present, correct.

Q And to the extent it is not in the report, you have no way of knowing

what other facts exist, right?

A Other than reading the deposition transcript subsequent to issuing the report.

Q So, for example, if there was an Ally policy that required capital contributions in excess of 50 million dollars to be approved by the board, if that were not included in the examiner's report, you would have no way of knowing that, right?

A That's true.

Q And so I'm going to repeat my question: Have you ever found there to be a binding contract where only one side executed and there is evidence suggesting the parties did not intend to be bound?

A As I said, your question assumes a crucial fact that there is evidence that the parties did not intend to be contractually bound. And I don't recall ever dealing with a contract dispute where there was evidence suggesting that the parties did not intend to become

contractually bound.

Q Mr. Lyons, isn't your entire analysis predicated on assumption of critical facts?

MR. COHEN: Object to the form.

A My analysis is predicated on the my assumption that the facts as presented by the examiner are accurate.

Q So I'm asking you a hypothetical. Assuming that there is evidence of intent suggesting parties did not intend to be bound, have you ever found as a judge in your experience there to be a binding contract where only one side executed and there are facts suggesting the parties did not intend to be bound? Have you ever done that?

MR. COHEN: That's a hypothetical?

MR. SIMON: Yes, I'm asking that question.

MR. COHEN: You're asking if he did it as a judge or it a hypothetical.

Lyons

Q Do you recall ever doing that as a judge?

MR. COHEN: That's not a hypothetical. That's a fact question.

Q I'm giving you a hypothetical set of facts and asking you to apply it to your experience on the bench.

Have you ever found that circumstance to be a binding contract?

MR. COHEN: Objection.

MR. SIMON: I'll withdraw it and ask it again.

Q In your experience on the bench, did you ever have a case where you found there to be a binding contract where only one side executed and in your judgment the evidence suggested that the parties did not intend to be bound?

A No, I never had such a case.

Q You understand that ResCap is a disregarded entity for tax purposes, right?

A Yes.

Q And so isn't it correct to say

that any tax assets or liabilities belong to Ally rather than ResCap?

A I don't know if that is correct.

Q You don't know either way?

A I don't.

Q Do you know if Ally has used any tax credits relating to its interest in ResCap?

A I believe the examiner does report that Ally or GM used certain tax benefits that related to ResCap.

Q Well, the 1.7 plus billion dollar claim, is that predicated on tax credits that were actually used or that could be used?

A Some of it that was actually used and I believe some are projected to be used.

Q And with respect to the portion that you believe is attributable to what was projected to be used, do you know if, in fact, they were used?

A No, I do not.

Q Wouldn't that be relevant to

calculating the value of this ostensible claim?

A I think the examiner does state that his financial advisors contacted Ally and General Motors, and found that subsequent to the date of the 2009 -- the two agreements, that certain tax attributes of ResCap were used and benefited the consolidated filing entity, and that it was projected that within the next year, I believe it was, that traditional tax benefits would be used and would benefit the consolidated return.

Q Right. So I'll repeat my question.

Do you know if they were actually used?

A I think -- I can't state it more accurately than I just did. Some were used and some were projected to be used.

Q I'm specifically getting at the ones that were projected to be used as of the date of the examiner's report.

Do you know sitting here today

whether those were actually used?

A You mean subsequent to the examiner's report?

Q Correct?

A I don't know what happened subsequent to the examiner's report, no.

Q And would that be relevant in any way to calculating the value of this claim whether or not, in fact, the potential credits were actually used?

MR. COHEN: Object to the form.

A If the facts as projected or contemplated turned out to be -- turned out to change by subsequent events, yes, that would be relevant.

Q Can you explain what you mean by that?

A I don't think I can say it any better than I just did.

Q If you're saying they are not, in fact, used, it could turn out to change the value of the claim?

A Yes.

Q Okay.

Lyons

In the examiner's calculation of the 1.77 billion projected tax benefits, do you know if you included the Ally contributions of 750 million dollars?

A Yes.

Q And do you think that was appropriate?

A It is. When I read it, it seemed to me appropriate to attempt to quantify what the tax impact would be if that settlement were improved or approved, excuse me.

Q As you sit here today, do you still think that that is appropriate?

A I haven't learned anything that suggests that it is not appropriate.

Q Well, you understand that the 750 million contribution was given premised on a release that would be granted to Ally, correct?

A Yes.

Q And that release would presumably extend to the tax allocation claim, wouldn't it?

A Yes.

Q So why in your view would it be appropriate to include the 750 million payment in a claim that frankly would have been released by that payment?

A I see what you're saying.

I understand your point. I think it is a good point.

Q Do you concede it may be an error to include the 750?

A Yes, I think you're right. That does make sense to me what you have posited.

Q I assume --

A If the release, if part of the payment was for a comprehensive release, then it shouldn't be included in the calculation of the damages for the tax claim. That makes sense to me.

Q And I assume you would say the same with respect to the 2.1 billion assuming it is predicated on a release?

A Correct.

Q With respect to the tax

allocation claims, can you look at your discounting methodology that you applied, which is on page -- I think it is 24.

A Isn't it on 39?

Q Yes, you're right. Sorry.

A Okay.

Q Can you tell me your basis for your initial inherent risk reduction of 20 percent here?

A That was a similar just general litigation type of risk in that it was a large claim and that any settlement would warrant a risk. How I arrived at 20 percent, it was just my assessment that that would be an appropriate percentage to use for the inherent risk analysis.

Q Can you tell me why --

MR. SIMON: Withdrawn.

Q You know that this claim is one where the examiner -- when I say "this claim", I'm referring to the tax allocation claim -- the examiner concluded that that was a close question, but more likely to succeed, right?

A Yes.

Q And with respect to the misallocation of net revenues claim, the examiner concluded that was a claim that was likely to prevail?

A Right.

Q Can you tell me why you used the same inherent discount of 20 percent in those claims?

A No, I can't, except to tell you that I attempted not to be formulaic. So I didn't do anything consistently based upon whether the examiner said that it was likely to succeed or more likely than not to succeed, for example. I tried to ascribe a discount factor looking at each particular claim, looking at the merits, but, again, not opining any formulaic formula to do the discounting.

Q So it was completely subjective?

A It was subjective based upon my experience and my assessment of the appropriate factor.

Q And why based on your assessment

did you then discount 40 percent for risk associated with the threshold question of enforceability?

A Enforceability I thought was a question not so much because of the fact that it wasn't signed, although that is a significant factor, but that the main participants seem to indicate on both sides that they did not consider the contract as enforceable at the time that they were interviewed by the examiner.

So I don't recall reading about any witness on the side of ResCap, for example, who came forward and said to the examiner, you know, that was an agreement that we had and it shouldn't have been taken away from us.

Q You mentioned the interviews by the examiner. Are you aware of the fact that there were transcripts of those interviews?

A I believe I learned that, yes.

Q Did you ever see any transcripts?

A No, I did not.

Q Do you know whether or not the interviews were conducted under oath?

A I think in the examiner's reports, some of them were.

Q I think there was one.

A Right.

Q So the others were not?

A Right.

Q In your view, do you think that it matters whether or not testimony is given under oath or not in conducting an examination such as Judge Gonzales did?

A I haven't thought about that.

Q Can you give it some thought right now and tell me what you think?

MR. COHEN: Object to the form. If you can.

A I tell you off the top of the head reaction to that would be that people are likely to be more forthcoming and give more accurate answers if they are not under oath. I recognize that I'm under oath today.

Q You anticipated my next question sir.

A It might apply to me. But witnesses in my experience tend to be more guarded when they are put under oath than if they were just sitting around and answering questions. The presence of a court reporter, even though the testimony is not under oath, might have -- might influence somebody. But this is just my assessment of witnesses in my experience, talking to people around the table, finding out what happened, as opposed to responding to questions under oath.

Q Right.

But, of course, there are ramifications of giving testimony under oath which do not exist if you give non-sworn testimony?

A Yes, for example, perjury.

Q Correct.

And so is it fair to say as a judge, if you were deciding a matter, would you accord more weight to testimony

that was given under oath than that which was not?

A I don't think so as a practical matter myself. I recognize that evidence has to come in properly and should be under oath, but I do believe that, as I said, witnesses tend to be more guarded and less forthcoming when they are under oath. Not so much because they fear perjury, this is again just my observation, but it is just more formal setting.

Q What if you had a question in your mind as to the credibility of a particular witness on an issue, in that circumstance, would you seek to take the testimony of that individual under oath?

A If I were an attorney in a proceeding.

Q Or if you were a judge deciding a proceeding, would you want that witness's testimony under oath?

A As a judge, I wouldn't have the options.

Q If you did, assume you had the options.

A That's an assumption that --

MR. COHEN: Incomplete hypothetical.

A It is not within the realm of contemplation that a judge could receive testimony that is not under oath.

Q As a mediator, if there were an issue of credibility that you were deciding upon and you had sworn testimony that was done under oath, would you accord greater weight to that if there was a credibility determination that you were making where you had a question in your mine about an issue?

A Let me just preface it by saying a mediator doesn't make a determination, but I concede that a mediator will make his or her own evaluation of a claim.

And I'm not sure whether I would judge credibility, give greater weight to testimony under oath than not in a mediation setting.

MR. SIMON: We have to change the tape and I'm just about done, so why don't we take this opportunity for me to sort of look through my notes.

MR. COHEN: How much time do we have left?

THE VIDEOGRAPHER: This marks the end of tape number five. We're going off the record at 6:10 p.m.

(Thereupon, a recess was taken, and then the proceedings continued as follows:)

THE VIDEOGRAPHER: This marks the start of tape number six. We're back on the record at 6:24 p.m.

BY MR. SIMON:

Q Mr. Lyons, I just want to ask with respect to the tax allocation claim analysis, like the other claims we talked about today, the numbers and percentages that are in your methodologies reflect your personal judgments and those of your peers, right?

A Correct.

Q And they are not based on any other objective criteria; correct?

A That's correct.

MR. SIMON: I have no further questions, and I'll pass the witness.

EXAMINATION BY

MR. BROWN:

Q Mr. Lyons, good evening. My name is Judson Brown. I'm an attorney with Kirkland & Ellis, and I represent Ally Financial.

I'm going to ask you a few more questions. Okay?

A Yes.

Q I want to go back to a topic that you discussed with Mr. Simon the revenue allocation claim.

Do you remember that?

A Yes.

Q You mentioned earlier today that that is a contract based claim; is that correct?

A That's correct.

Q What contracts is the claim

based on?

A Primarily the MMLPSA.

Q Anything else?

A There are attendant swap contracts that are all part of the same transaction. The brokerage contract, the MSR Swap and the Pipeline Swap.

I believe those are the agreements that were implemented to reflect the brokerage of loans to the bank project.

Q Is it your testimony that the Pipeline Swap agreement was implemented to reflect a brokerage of loans to the bank?

A I think it was all part of the inter-relationship between the mortgage company and the bank.

Q What does the broker agreement itself have to do with the revenue allocation claim?

A I believe that the brokerage fee earned under the brokerage contract should be a net neutral after a loan had been originated by the bank and then sold to

GMAC Mortgage and then subsequently sold to a third-party.

Q That's all pursuant to the MMLPSA, correct?

A That's correct.

Q Can you identify anything in the broker agreement that has an impact on the revenue allocation claim?

A I actually have not reviewed the broker agreement in detail. So as I sit here now, I cannot do that.

Q As you sit here right now, you can't identify anything in the broker agreement that has an impact on the revenue allocation claim, correct?

A I'm not aware of anything, correct.

Q You also identified the Pipeline Swap.

What is it that the Pipeline Swap has to do with the revenue allocation claim?

A I don't believe that the Pipeline Swap -- you know, I'm not sure of

the answer to that, how the Pipeline Swap would be accounted for in the cost basis or carrying value of the -- of a loan that was funded by the bank.

Q Sitting here right now, you can't identify any impact that the Pipeline Swap has on the revenue allocation claim, correct?

A That is correct.

Q You also identified the MSR Swap.

What is it that the MSR Swap has to do about the revenue allocation claim, Mr. Lyons?

A I don't think the MSR Swap does have anything to do with the revenue allocation claim.

Again, I'm not an accountant but based upon my understanding, I don't think that the MSR Swap would factor into the cost basis of the loan.

Q Sitting here right now, the only agreement that you can identify as relevant to the revenue allocation claim

is the MMLPSA, correct?

A As to the damages under that claim, yes.

Q Well, what about as to the liability?

A Well, I think that in trying to discern the intent of the parties that it is important to consider all of the agreements that relate to the inter-relationship between the bank and the mortgage company for these loans that were -- where the borrowers were located by the mortgage company but were funded by the bank.

Q Now, you agree with me, Mr. Lyons, that the revenue allocation claim is a contract claim, right?

A Yes.

Q Before you ever get to the intent of the parties, you look to the terms of the contract, correct?

A That's correct.

Q And you only get to the intent of the parties if the language of the

contract is not clear, correct?

A Well, actually, the way I would state the law is that your purpose in interpreting contract is to find the parties' intent. And the first way that you attempt to determine the parties' intent is by reading the contract.

If it is clear from reading the contract what the parties' intent was, you don't need to take any additional evidence.

Q So let's look at the MMLPSA.

MR. COHEN: Lyons 6. The 2008 document?

MR. BROWN: Yes, the 2008 one.

MR. COHEN: Yes, that's Lyons 6.

Q Mr. Lyons, do you have Lyons Exhibit 6 in front of you?

A Yes, I do.

Q I believe you testified earlier that the revenue allocation claim arises based on the breach of the purchase price definition in 1.24 of the MMLPSA; is that correct?

A I believe that is correct.

Q Just so the record is clear, that definition is purchase price means (A), With respect to a first lien mortgage loan, the cost basis plus reserves associated with such first lien mortgage loan and (B), with respect to a second lien mortgage loan, the market value for such second lien mortgage loan.

Do you see that?

A I do see that.

Q So with respect to second lien loans, the purchase price is the market value for the loan, correct?

A That's what the contract says, yes.

Q With respect to the first liens, the purchase price is the cost basis, correct?

A Plus reserves, yes.

Q Cost basis plus reserves associated with the first lien loan, correct?

A Yes, correct.

Q Cost basis is a defined term, right?

A Yes.

Q It is defined in paragraph 1.9 in the MMLPSA, correct?

A Yes.

Q That definition begins, "Cost basis means with respect to a mortgage loan its net carrying value is defined by accounting principles generally accepted in the United States of America as amended."

It continues from there.

Do you see that?

A I do see that.

Q Do you understand accounting principles generally accepted in the United States of America to refer to U.S. GAAP, G-A-A-P?

A Yes; yes, I do.

Q Now, Mr. Lyons, you're not an accountant, correct?

A That's correct.

Q You're not an auditor, correct?

A Correct.

Q You're not trained in finance, correct?

A Correct.

Q Do you see the phrase in the definition of cost basis of net carrying value?

Do you see that?

A No, I do not see that.

Q First line, "Cost basis means with respect to a mortgage loan its net carrying value".

A Yes, I'm sorry.

Q Do you see that?

A I do see that.

Q Net carrying value as defined by GAAP, right?

A Yes.

Q Do you know what net carrying value means, Mr. Lyons?

A No, I don't.

Q Are you aware that under GAAP if an entity's accounting methodology is fair value accounting, its net carrying value

is the fair value of the asset?

A I'm not aware of that.

Q Are you familiar with a lower of cost or market accounting methodology?

A I've heard the term, yes.

Q What does that mean?

A That an asset is given a value at a particular point in time based upon the lower or the cost -- the lower of the cost of that asset as it was acquired by the owner versus the market value of that asset at the time that it is being valued on the books.

Q Have you heard that methodology referred to as the LOCOM accounting methodology, L-O-C-O-M?

A I have.

Q If an entity's chosen a LOCOM accounting methodology, do you understand what its net carrying value would be?

A I can't say that I'm aware of that, how that would work in each case.

Q Are you aware of --

MR. BROWN: Strike that.

Q You testified earlier that the bank switched to fair value accounting in August of 2009; is that correct?

A Yes.

Q Do you know why the bank elected fair value accounting?

A I don't recall whether that is stated in the examiner's report.

Q My question is a little bit different.

Do you know why the bank elected a fair value accounting methodology?

A No, I don't recall at this time.

Q Do you know whether ResCap had chosen a fair value accounting methodology as of August of 2009?

A I do not.

Q Do you know whether Ally Financial had made a fair value accounting election as of August 2009?

A No, I do not.

Q What was Ally Bank's accounting methodology before it moved to fair value accounting?

A I believe it was lower cost or market.

Q For all assets held by the bank?

A Only with regard -- my knowledge is only with regard to the mortgages.

Q And by mortgages you mean the mortgages, the loans that were sold from the bank to GMAC Mortgage?

A Yes.

Q What is the basis for that understanding?

A What I read in the examiner's report.

Q Do you know where the examiner's report states that?

A No. I can't point to the page and line at this point.

Q Are you aware that the loans that were sold from the bank to GMAC Mortgage were held in what the bank called a held for sale portfolio?

A I've heard that term, yes.

Q Also known as the HFS portfolio?

A HFS, correct.

Q Held for sale?

A Right.

Q Do you know that the bank had made a hedge accounting election with its HFS portfolio as of July 2008?

A I do not.

Q Do you know what hedge accounting is?

A No, I don't.

Q Do you know what the net carrying value of an asset would be if the entity that owned that asset had made a hedge accounting election with respect to that asset?

A No, I do not.

Q What is net carrying value as defined by GAAP?

A That I don't know.

Q Let's look at Lyons Exhibit 1, it's your report. Turn to page 8 for a minute.

Let me know when you're there.

A I'm on page 8.

Q This is the section of your

report in which you discuss the revenue allocation claim, correct?

A Yes.

Q Let's look at the first paragraph under background. The next to last sentence it begins, "Under the parties".

Do you see where I'm at?

A I do.

Q It says, "Under the parties' then existing agreement, Ally Bank recognized as revenue only the net interest carry for the period the loan was on Ally Bank's books".

Do you see that?

A I do see that.

Q What is the then existing agreement that you refer to, Mr. Lyons?

A Let's see. Let me just read the whole paragraph. I believe that refers to the agreement between the parties prior to the brokering loans to the bank project.

Q What agreement is that?

A I think there was a prior

MMLPSA.

Q Before the one that is Lyons Exhibit 6?

A I believe there was, yes.

Q In this sentence that we just looked at, what contract are you referring to?

A You know, I'm really not sure at this point.

Q Okay.

The broker arrangement between the parties was implemented on January 1, 2009.

Do you know that?

A Yes, I believe that's accurate.

Q Before the parties entered into that arrangement there would have been approximately six months of 2008 in which the 2008 MMLPSA, that is Lyons Exhibit 6, would have been the existing MMLPSA between the parties, correct?

A This says amended and restated as of July 1, 2008. So I assume that's correct, yes.

Q So it would have been operative for about six months before the brokerage arrangement was implemented, correct?

A That sounds correct, yes.

Q Is that the then existing agreement you're referring to in the sentence we just looked at in your report?

A As I said, I don't know.

Q When Ally Bank --

MR. BROWN: Strike that.

Q Let's go back to that sentence. You said, "Ally Bank recognized as revenue only the net interest carried for the period the loan that was on Ally Bank's books".

Do you see that?

A Yes.

Q Who originated those loans?

A I believe the prior practice was that GMAC Mortgage originated those loans and funded them and then sold them to the bank who held them for a period until they were then resold to GMAC Mortgage and then resold ultimately to third-parties.

Q Third-party investor, such as GSE or some other private label?

A GSE or a trust, private label trust.

Q GMAC Mortgage originated those loans, correct?

A That's my understanding.

Q GMAC Mortgage would incur the expenses associated with originating those loans, correct?

A Yes.

Q And GMAC Mortgage would keep the income related to originating those loans, correct?

A Such as points?

Q Any other origination related income?

A That's my understanding.

Q After the brokerage arrangement was put in place who originated loans?

A They were funded by the bank.

Q Who originated the loans, Mr. Lyons?

A The origination would be by the

bank.

Q The bank originated and funded the loans, correct?

A Yes.

Q Who bore the expenses for originating those loans, Mr. Lyons?

A Well, originally the bank would bear the expenses for originating those loans.

Q Now, let's look at the next paragraph. It begins, contemporaneous e-mails.

Do you see that?

A Yes.

Q You didn't review those, did you?

A I did not.

Q What e-mails are you referring to?

A I do not know. That is a recitation of facts that were contained in the examiner's report.

Q Is that a verbatim recitation of what the examiner's report said?

A I don't think it is verbatim but it is probably pretty close.

Q Do you know the time period when those contemporaneous e-mails occurred?

A It would have been, I believe, towards the end or middle or end of 2008 is my recollection.

Q The broker agreement -- we can look at it again, but it was entered November 20, 2008.

Does that sound right to you?

A I see that in the next sentence here, yes.

Q Were the contemporaneous e-mails from November 2008?

A I'm sorry. You said the broker agreement?

Q Yes.

A I was looking at the sentence about the slide presentation.

Q We'll get to that in a minute. The broker agreement was entered on November 20, 2008; correct?

MR. COHEN: It's Lyons Exhibit 8

if you need to look at the document.

A I assume you're correct.

Q Were the contemporaneous e-mails you referred to in your report from November of 2008?

A I don't know that.

Q Were they from October 2008?

A I couldn't tell you sitting here what the date of those e-mails were.

Q You don't know whether they were from August 2008?

A I do not know.

Q Do you know whether they reflected the final agreement of the parties?

A It is my belief that the e-mails and the presentation reflected the understanding of the parties as to what the economics of the transaction should be between the bank and the mortgage company.

Q What is the basis for that belief?

A The recitation of the facts in the examiner's report.

Q And that's it?

A That's -- yes, that's the only basis I have for that.

Q Did you read the deposition of Mr. Celini that occurred last Friday?

A I did read it this week, yes.

Q Did you see that Mr. Celini was asked about one of these contemporaneous e-mails from September 2008?

A Yes.

Q Did you see what Mr. Celini testified to with respect to that contemporaneous e-mail?

A I did.

Q What did he tell to, Mr. Lyons?

MR. COHEN: Objection to the form.

A My recollection of his testimony is that one of the e-mails, I don't know which one it was, is that this was a preliminary proposal and that things changed afterwards.

Q Let's go to the bottom of that page 8. There is a sentence that begins,

"From an accounting standpoint" and it runs on to page 9.

Do you see where I'm at?

A Yes.

Q You write, "From an accounting standpoint, the deferred loan origination fees and expenses including broker fees was governed by statement of financial accounting standards number 91, FAS-91".

Do you see that?

A I do see that.

Q Are you familiar with FAS-91?

A No, I'm not.

Q Do you have any idea what FAS-91 provides?

A No, I have not read that.

Q Let's go to the bottom of page 9. There is a paragraph that begins, effective August 1, 2009.

Do you see where I'm at?

A I see that, yes.

Q The second sentence says, "As a consequence of this accounting change beginning August 1, 2009, rather than

realizing the benefit of points in the gain on sale as the parties had agreed, and as it had received under the 250/250 program and for third-party brokered loans, GMAC Mortgage instead received the cost based below market broker fee, which since it was no longer capitalized, GMAC Mortgage did not have to repay to Ally Bank when it purchased the loan".

Do you see that?

A I do see that.

Q That sentence suggests that GMAC Mortgage received only the broker fee after August 1, 2009 and nothing else.

Is that correct?

A It does suggest that, yes.

Q That is not a correct statement of what GMAC Mortgage received after August 1, 2009, is it, Mr. Lyons?

A I think that there may be an error there on the gain on sale.

Q GMAC Mortgage continued to receive gain on sale to third-parties, right?

A I believe that's so.

Q The next sentence you write, "However, GMAC Mortgage had agreed to such a fee with the understanding that whatever the fee charged, the fee would be a wash because of the FAS-91 deferrals. And with the expectation that it would continue to receive the benefit of the FAS-91 deferrals".

Do you see that?

A I do see that.

Q What is the basis for that statement?

A What's the basis?

Well, my understanding of the economics, as I stated earlier, was that discount or points paid by a borrower in connection with a loan would reduce the cost basis of that loan, and that a fee such as a brokerage fee would increase the cost basis of that loan.

And so that if GMAC Mortgage had received a brokerage fee from the bank, then when it purchased the loan, purchased

the loan from the bank, the cost basis had increased by the brokerage fee that it had been paid, in essence GMAC would be -- would have no receipt of income at the end of the day, nor would the bank have incurred an expense at the end of the day for that brokerage fee.

Q Your understanding of those economics is based solely on your review of the examiner's report, correct?

A That's correct.

Q Now, you also discussed earlier with Mr. Simon the MSR Swap.

Do you remember that?

A Yes, I do.

Q What is the MSR Swap?

A Do you want me to tell you my understanding of that?

Q I would love it.

A Okay.

My understanding of the MSR Swap is that mortgage servicing rights can be valued. There is a value for them. And they can be valued periodically, I think

as frequently as daily. And that under the MSR Swap, the benefit and burden of any change in value would be borne by GMAC Mortgage.

Q Is that your total understanding of the MSR Swap?

MR. COHEN: Object to the form.

A That's my understanding of the economics of it.

Q Are you aware of the documents that comprise the MSR Swap?

A Yes, I believe I have seen a document and one or two schedules that relate to that swap, yes.

Q I'll represent to you that the MSR Swap was initially entered in 2007. At the time there was a master ISDA agreement and two schedules; does that sound right to you?

A Yes.

Q Did you review those documents?

A I did.

Q The MSR Swap claim is a breach of contract claim, correct?

A That's correct.

Q Is the claim based on a breach on the master ISDA agreement, Mr. Lyons?

A Yes.

Q What provision of the master ISDA agreement?

A I can't tell you that.

Q It is based on a breach of the master ISDA, not one of the underlying schedules; is that correct?

A I don't know. I considered them to be part of the same thing.

Q Do you know whether the breach is of the master ISDA or one of the underlying schedules?

A No, I do not.

Q You don't know which document is the source for the breach of contract claim, correct?

A That is correct.

Q The MSR Swap documents were effectively merged into a 2011 confirmation; is that correct?

Is that your understanding?

A I'm sorry.

Q The MSR Swap documents were effectively merged into a 2011 confirmation; is that correct?

A That I don't recall.

Q Okay.

Are you aware that there was a confirmation in 2011 with respect to the MSR Swap?

A As I say, as I sit here today, I don't recall that fact.

Q Let's look at page 17. It's in your report.

A Uh-huh.

Q Right in the middle. There is a paragraph it begins, "In April 2011."

Do you see that?

A I do see that, yes.

Q "In April 2011, the parties entered into the MSR Swap confirmation, which covered the previously, separately documented F&B swap and net funding swap".

Do you see that?

A I do see that, yes.

Lyons

Q Did you review that MSR Swap confirmation from 2011?

A I don't recall reviewing that actually.

Q Can you identify the provision of the 2011 swap confirmation that is the source of the breach of contract claim?

A No, I cannot.

MR. BROWN: Mr. Lyons, I have nothing further.

We have a few minutes left on the tape but I think somebody on the phone has a couple of questions for you. I don't know, maybe we can try and get it before we have to switch the tape.

MR. COHEN: It's not the tape. It's the record. We've got four minutes left before the deposition is over.

MR. WYNNE: This is Richard Wynne representing FGIC.

EXAMINATION BY

MR. WYNNE:

Q Mr. Lyons, I'll try to do this quickly.

I believe you testified that you have very substantial experience in mediation and expertise; is that correct?

A That's correct.

Q Have you had confidentiality orders entered in cases where you acted as the mediator?

A Yes.

Q Have you, when you acted as a judge, approved and entered confidentiality orders?

A Well, yes, mediation orders that included a confidentiality provision, yes, I did.

Q What type of confidentiality provisions were typically in the orders either in cases you acted as the mediator or cases where you were a judge sending something to mediation?

MR. COHEN: Objection to form; compound and overbroad.

A The confidentiality provisions

generally provide that all communications in connection with the mediation are confidential, and that no party shall introduce into evidence any communications that were made in connection with the mediation. And that the mediator shall not be called as a witness with regard to anything that -- any communications that took place in connection with the mediation.

Q Thank you.

In your opinion, was it appropriate for there to be a confidentiality order of that type in the ResCap mediation that occurred in this case?

MR. COHEN: Object to form.

(Continued on the following page to include the jurat.)

Lyons

A Yes, I agree that a confidentiality provision in the mediation order would be -- was appropriate with ResCap.

MR. WYNNE: Thank you. I have no further questions.

MR. COHEN: We have no questions.

THE VIDEOGRAPHER: This concludes the deposition. We're going off the record at 6:55 p.m.

_____

RAYMOND T. LYONS

Subscribed and sworn to before me this day of , 2013.

_____

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C E R T I F I C A T E

STATE OF NEW YORK )
: SS
COUNTY OF NEW YORK)

I, Adrienne M. Mignano, a Registered Professional Reporter and Notary Public within and for the State of New York, do hereby certify:

That RAYMOND T. LYONS, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 11th day of November 2013.

_____

ADRIENNE M. MIGNANO

DEPOSITION ERRATA SHEET
Our Assignment No. 67903
Case Caption: In Re: Residential Capital Bankruptcy Matter

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

SIGNATURE_____DATE:_____
RAYMOND T. LYONS

Subscribed and sworn to on the ____ day of _____, 20__ before me,

_____
Notary Public,
in and for the State of _____

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