

IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR MERRILL
LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-
BACKED CERTIFICATES, SERIES 2005-A8, Appellant, Elizabeth A. Brown
Docket of Supreme Court

vs.

SFR INVESTMENTS POOL 1, LLC, Respondent.

CASE NO.: 79235

District Court Case No.: A739867C

Appeal from the Eighth Judicial District Court In and For the County of Clark
The Honorable Joanna A. Kishner, District Court Judge

JOINT APPENDIX – VOLUME XIV

WRIGHT, FINLAY & ZAK, LLP

Christina V. Miller, Esq.

Nevada Bar No. 12448

Lindsay D. Robbins, Esq.

Nevada Bar No. 13474

7785 W. Sahara Ave., Suite 200

Las Vegas, Nevada 89117

(702) 475-7964; Fax: (702) 946-1345

cmiller@wrightlegal.net

*Attorneys for Appellant, U.S. Bank, National Association As Trustee For Merrill
Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series
2005-A8*

DOCUMENT	VOL	BATES
Affidavit of Service	I	JA00063
Affidavit of Service	I	JA00138
Affidavit of Service	I	JA00139
Affidavit of Service	I	JA00140
Amended Proposed Findings of Fact and Conclusions of Law	XII	JA02268- JA02283
Bench Memorandum Regarding Whether Defendant is a Bona Fide Purchase is Irrelevant	X	JA01939- JA01943
Complaint	I	JA00001- JA00062
Court's Trial Exhibit 1 - Alessi & Koenig Fax Dated 7-11-12 from Ryan Kerbow to A. Bhame Re: 7868 Marbledoe Ct./HO #18842	X	JA01896- JA01897
Court's Trial Exhibit 2 – Excerpts of Deposition of Ortwerth Dated 6/14/18	X	JA01898- JA01899
Defendant Antelope Homeowners' Association's Answer and Affirmative Defenses	III	JA00434- JA00443
Docket (A-16-739867-C)	XIII	JA02477- JA02483
Findings of Fact and Conclusions of Law and Judgment	XII	JA02300- JA02318
First Amended Complaint	II	JA00283- JA00346
Joint Trial Exhibit 1 - Declaration of Covenants, Conditions and Restrictions for Antelope Homeowners' Association	III	JA00523- JA00585
Joint Trial Exhibit 2 - Second Amendment to the Declaration of Covenants, Conditions, and Restrictions for Antelope Homeowners' Association	III	JA00586- JA00588
Joint Trial Exhibit 3 - Grant, Bargain, Sale Deed	III	JA00589- JA00592
Joint Trial Exhibit 4 - Notice of Default and Election to Sell Under Deed of Trust	III	JA00593- JA00594
Joint Trial Exhibit 5 - Deed of Trust	III	JA00595- JA00616

DOCUMENT	VOL	BATES
Joint Trial Exhibit 6 - Deed of Trust (Second)	III	JA00617- JA00629
Joint Trial Exhibit 7 - Deed of Trust re-recorded to add correct Adjustable Rate Rider	IV	JA00630- JA00655
Joint Trial Exhibit 8 - Grant, Bargain, Sale Deed re-recorded to correct vesting to show Henry E. Ivy and Freddie S. Ivy, husband and wife as joint tenants with rights of survivorship	IV	JA00656- JA00661
Joint Trial Exhibit 9 - Notice of Delinquent Assessment (Lien)	IV	JA00662
Joint Trial Exhibit 10 - Notice of Delinquent Violation Lien	IV	JA00663- JA00664
Joint Trial Exhibit 11 - Notice of Default and Election to Sell Under Homeowners Association Lien	IV	JA00665
Joint Trial Exhibit 12 - Notice of Trustee's Sale	IV	JA00666
Joint Trial Exhibit 13 - Notice of Trustee's Sale	IV	JA00667
Joint Trial Exhibit 14 - Notice of Trustee's Sale	IV	JA00668
Joint Trial Exhibit 15 - Trustee's Deed Upon Sale	IV	JA00669- JA00670
Joint Trial Exhibit 16 - Release of Notice of Delinquent Assessment Lien	IV	JA00671
Joint Trial Exhibit 17 - Rescission of Election to Declare Default	IV	JA00672- JA00673
Joint Trial Exhibit 18 - Notice of Delinquent Violation Lien	IV	JA00674- JA00675
Joint Trial Exhibit 19 - Request for Notice Pursuant to NRS 116.31168	IV	JA00676- JA00678
Joint Trial Exhibit 20 - Notice of Lis Pendens	IV	JA00679- JA00682
Joint Trial Exhibit 21 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Henry Ivy	IV	JA00683- JA00685
Joint Trial Exhibit 22 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Antelope Homeowners Association	IV	JA00686- JA00687
Joint Trial Exhibit 23 - Correspondence from Alessi & Koenig to Miles, Bauer, Bergstrom & Winters, LLP	IV	JA00688- JA00694

DOCUMENT	VOL	BATES
Joint Trial Exhibit 24 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Alessi & Koenig, LLC	IV	JA00695- JA00697
Joint Trial Exhibit 25 - Correspondence regarding corrected ARM Note	IV	JA00698
Joint Trial Exhibit 26 - Affidavit of Lost Note	IV	JA00699- JA00708
Joint Trial Exhibit 27 - Affidavit of Lost Note	IV	JA00709- JA00716
Joint Trial Exhibit 28 - Correspondence regarding Note	IV	JA00717- JA00718
Joint Trial Exhibit 29 - Deed of Trust, Note, and Lost Note Affidavit (Part 1)	V	JA00719- JA00968
Joint Trial Exhibit 29 - Deed of Trust, Note, and Lost Note Affidavit (Part 2)	VI	JA00969- JA00984
Joint Trial Exhibit 30 - Alessi & Koenig, LLC Collection File	VI	JA00985- JA01160
Joint Trial Exhibit 31 - Affidavit of Doug Miles and Backup	VI	JA01161- JA01181
Joint Trial Exhibit 31a – Excerpt of Affidavit of Doug Miles and Backup	VI	JA01182- JA01183
Joint Trial Exhibit 32 - Title Insurance Documents – First American Title Insurance Company – NV08000274-11/IVY	VI	JA01184- JA01194
Joint Trial Exhibit 33 - Title Insurance Policy – North American Title Insurance Company	VI	JA01195- JA01211
Joint Trial Exhibit 34 - Corporate Assignment of Deed of Trust	VI	JA01212- JA01213
Joint Trial Exhibit 35 - Trustee's Sale Guarantee	VII	JA01214- JA01224
Joint Trial Exhibit 36 - Bank of America, N.A.'s Payment History	VII	JA01225- JA01237
Joint Trial Exhibit 37 - Greenpoint's Payment History	VII	JA01238- JA01248
Joint Trial Exhibit 38 - Bank of America, N.A.'s Servicing Notes	VII	JA01249- JA01261

DOCUMENT	VOL	BATES
Joint Trial Exhibit 39 - Copy of Promissory Note and Allonges	VII	JA01262- JA01277
Joint Trial Exhibit 40 - Pooling and Servicing Agreement	VIII	JA01278- JA01493
Joint Trial Exhibit 41 - Mortgage Loan Schedule for PSA	VIII	JA01494- JA01512
Joint Trial Exhibit 42 - Corporate Assignment of Deed of Trust	VIII	JA01513- JA01514
Joint Trial Exhibit 43 - Acknowledgement of Inspection of the Original Collateral File	IX	JA01515- JA01620
Joint Trial Exhibit 44 - Antelope Homeowners Association's Initial Disclosures and all Supplements	IX	JA01621- JA01737
Joint Trial Exhibit 45 - Exhibit 1 to Deposition of David Alessi – Subpoena for Deposition of N.R.C.P. 30(b)(6) Witness for Alessi & Koenig, LLC	IX	JA01738- JA01746
Joint Trial Exhibit 46 - Exhibit 2 to Deposition of David Alessi – Account Ledger	IX	JA01747- JA01751
Joint Trial Exhibit 47 - Exhibit 3 to Deposition of David Alessi – Notice of Delinquent Assessment (Lien)	IX	JA01752
Joint Trial Exhibit 48 - Exhibit 4 to Deposition of David Alessi – Notice of Delinquent Violation Lien	IX	JA01753- JA01754
Joint Trial Exhibit 49 - Exhibit 5 to Deposition of David Alessi – Notice of Default and Election to Sell Under Homeowners Association Lien	IX	JA01755
Joint Trial Exhibit 50 - Exhibit 6 to Deposition of David Alessi – Notice of Trustee's Sale	IX	JA01756
Joint Trial Exhibit 51 - Exhibit 7 to Deposition of David Alessi – Second Notice of Trustee's Sale	IX	JA01757
Joint Trial Exhibit 52 - Exhibit 8 to Deposition of David Alessi – Third Notice of Trustee's Sale	IX	JA01758
Joint Trial Exhibit 53 - Exhibit 9 to Deposition of David Alessi – Request for Payoff by Miles Bauer	IX	JA01759- JA01760
Joint Trial Exhibit 54 - Exhibit 10 to Deposition of David Alessi – Response to Miles Bauer Payoff Request	X	JA01761- JA01767

DOCUMENT	VOL	BATES
Joint Trial Exhibit 55 - Exhibit 11 to Deposition of David Alessi – Letter by Miles Bauer	X	JA01768- JA01770
Joint Trial Exhibit 56 - Exhibit 12 to Deposition of David Alessi – Trustee’s Deed Upon Sale	X	JA01771- JA01772
Joint Trial Exhibit 57 - Exhibit 1 to Deposition of David Bembas – Notice of Taking Deposition of SFR Investments Pool 1, LLC	X	JA01773- JA01778
Joint Trial Exhibit 58 - Exhibit 2 to Deposition of David Bembas – Notice of Delinquent Assessment (Lien)	X	JA01779
Joint Trial Exhibit 59 - Exhibit 3 to Deposition of David Bembas – Notice of Default and Election to Sell Under Homeowners Association Lien	X	JA01780
Joint Trial Exhibit 60 - Exhibit 4 to Deposition of David Bembas – Notice of Trustee’s Sale	X	JA01781
Joint Trial Exhibit 61 - Exhibit 5 to Deposition of David Bembas – Notice of Trustee’s Sale	X	JA01782
Joint Trial Exhibit 62 - Exhibit 6 to Deposition of David Bembas – Notice of Trustee’s Sale	X	JA01783
Joint Trial Exhibit 63 - Exhibit 7 to Deposition of David Bembas – Letter Dated 10-11-11	X	JA01784- JA01785
Joint Trial Exhibit 64 - Exhibit 8 to Deposition of David Bembas – Letter Dated 12-16-11	X	JA01786- JA01788
Joint Trial Exhibit 65 - Exhibit 9 to Deposition of David Bembas – Trustee’s Deed Upon Sale	X	JA01789- JA01790
Joint Trial Exhibit 66 - Antelope Homeowners Association’s Answers to Plaintiff U.S. Bank’s Interrogatories	X	JA01791- JA01809
Joint Trial Exhibit 67 - Antelope Homeowners Association’s Answers To Plaintiff U.S. Bank’s Requests for Admission	X	JA01810- JA01825
Joint Trial Exhibit 68 - Antelope Homeowners Association’s Answers To Plaintiff U.S. Bank’s Request for Production of Documents	X	JA01826- JA01845
Joint Trial Exhibit 69 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank’s Interrogatories	X	JA01846- JA01857

DOCUMENT	VOL	BATES
Joint Trial Exhibit 70 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank's Requests for Admissions	X	JA01858- JA01870
Joint Trial Exhibit 71 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank's Request for Production of Documents	X	JA01871- JA01882
Joint Trial Exhibit 72 - Email Re: URGENT WIRE REQUEST: Status Update re: 10- H1715 (1st) De Vera Relevance, Hearsay, Authenticity, and Foundation	X	JA01883- JA01888
Joint Trial Exhibit 73 - BANA's Written Policies and Procedures Re: Homeowners Association (HOA) Matters – Pre-Foreclosure Relevance, Hearsay, Authenticity, and Foundation	X	JA01889- JA01893
Joint Trial Exhibit 74 – Alessi & Koenig Fax Dated 7-11-12 from Ryan Kerbow to A. Bhame Re: 7868 Marbledoe Ct./HO #18842	X	JA01894- JA01895
Notice of Appeal	XIII	JA02341- JA02366
Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	XII	JA02319- JA02340
Notice of Entry of Order	I	JA00131- JA00137
Notice of Entry of Order	III	JA00426- JA00433
Notice of Entry of Order	X	JA01974- JA01983
Notice of Entry of Order Granting SFR's Counter-Motion to Strike and Granting in Part and Denying in Part SFR's Motion for Summary Judgment	III	JA00469- JA00474
Notice of Entry of Stipulation and Order	II	JA00267- JA00274
Notice of Entry of Stipulation and Order	X	JA01959- JA01966
Notice of Entry of Stipulation and Order Dismissing Henry E. Ivy and Freddie S. Ivy Without Prejudice	II	JA00361- JA00367

DOCUMENT	VOL	BATES
Notice of Entry of Stipulation and Order to Dismiss SFR Investments Pool 1, LLC's Slander of Title Claim Against U.S. Bank, National Association	II	JA00278- JA00282
Notice to Adverse Parties and to the Eighth Judicial District Court of Remand of Previously-Removed Case to this Court	II	JA00141- JA00262
Objections to U.S. Bank's Amended Pre-Trial Disclosures	III	JA00475- JA00479
Order Denying Defendant's Motion to Dismiss Plaintiff's Complaint Pursuant to NRCP 12(b)(6)	I	JA00126- JA00130
Order Denying The Antelope Homeowners' Association's Motion to Dismiss	III	JA00390- JA00393
Order Granting SFR's Counter-Motion to Strike and Granting in Part and Denying in Part SFR's Motion for Summary Judgment	III	JA00465- JA00468
Proposed Findings of Fact and Conclusions of Law	III	JA00480- JA00488
Recorders Transcript of Bench Trial – Day 1	XIII	JA02484- JA02575
Recorders Transcript of Bench Trial – Day 2	XIV	JA02576- JA02743
Recorders Transcript of Bench Trial – Day 3	XV	JA02744- JA02908
Recorders Transcript of Bench Trial – Day 4	XI	JA01984- JA02111
Recorders Transcript of Bench Trial – Day 5	XII	JA02112- JA02267
Recorders Transcript of Bench Trial – Day 6	XIII	JA02367- JA02476
Recorder's Transcript of Hearing: All Pending Motions	II	JA00373- JA00389
Recorder's Transcript of Hearing: All Pending Motions	III	JA00394- JA00425
Recorder's Transcript of Hearing: All Pending Motions	III	JA00444- JA00464

DOCUMENT	VOL	BATES
Second Amended Proposed Findings of Fact and Conclusions of Law and Judgment	XII	JA02284- JA02299
SFR Investments Pool 1, LLC's Answer to Complaint, Counterclaim and Cross-Claim	I	JA00097- JA00114
SFR Investments Pool 1, LLC's Answer to First Amended Complaint	II	JA00347- JA00356
SFR Investments Pool 1, LLC's Trial Brief Re Admissibility of Certain Proposed Exhibits	III	JA00489- JA00510
SFR Investments Pool 1, LLC's Trial Brief Re Statute of Limitations	III	JA00511- JA00522
Stipulation and Order to Amend Caption	X	JA01953- JA01958
Stipulation and Order Dismissing Henry E. Ivy and Freddie S. Ivy Without Prejudice	II	JA00357- JA00360
Stipulation and Order Dismissing Mortgage Electronic Registration Systems, Inc. Without Prejudice	II	JA00263- JA00266
Stipulation and Order for Dismissal Without Prejudice as to Claims Between Antelope Homeowners Association and U.S. Bank National Association	X	JA01967- JA01973
Stipulation and Order to Dismiss SFR Investments Pool 1, LLC's Slander of Title Claim Against U.S. Bank, National Association	II	JA00275- JA00277
Transcript of Proceedings	I	JA00064- JA00096
U.S. Bank's Bench Memorandum Regarding Authentication and Admissibility of Proposed Exhibits 21, 22, 23, 24 and 31	X	JA01900- JA01911
U.S. Bank's Bench Memorandum Regarding Business Record Exception	X	JA01944- JA01952
U.S. Bank's Bench Memorandum Regarding Pre-Foreclosure Satisfaction of the Superpriority Portion of the HOA's Lien	X	JA01932- JA01938
U.S. Bank's Bench Memorandum Regarding Standing to Maintain Its Claims in this Action and Standing to Enforce the Deed of Trust and Note	X	JA01919- JA01931
U.S. Bank's Bench Memorandum Regarding Statute of Limitations	X	JA01912- JA01918

DOCUMENT	VOL	BATES
U.S. Bank's Objections to SFR Investments Pool 1, LLC's Pre-Trial Disclosures	II	JA00368- JA00372
U.S. Bank's Reply to SFR Investments Pool 1, LLC's Counterclaim	I	JA00115- JA00125

VOLUME XIV

DATE	DOCUMENT	VOL	BATES
02/07/20	Recorders Transcript of Bench Trial – Day 2	XIV	JA02576- JA02743

DATED this 15th day of June, 2020.

WRIGHT, FINLAY & ZAK, LLP

/s/ Christina V. Miller, Esq.
 Christina V. Miller, Esq. (NBN 12448)
 7785 West Sahara Avenue, Suite 200
 Las Vegas, Nevada 89117
*Attorney for Appellant, U.S. Bank, National
 Association As Trustee For Merrill Lynch
 Mortgage Investors Trust, Mortgage Loan
 Asset-Backed Certificates, Series 2005-A8*

CERTIFICATE OF SERVICE

I certify that I electronically filed on the 15th day of June, 2020, the foregoing **JOINT APPENDIX – VOLUME XIV** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

- [X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

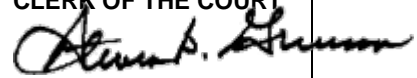
Service via electronic notification will be sent to the following:

Jacqueline Gilbert
Karen Hanks

- [X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Faith Harris

An Employee of WRIGHT, FINLAY & ZAK, LLP



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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 U.S. BANK, NATIONAL
9 ASSOCIATION AS TRUSTEE FOR
10 MERRILL LYNCH MORTGAGE
11 INVESTORS TRUST, MORTGAGE
12 LOAN ASSET-BACKED
13 CERTIFICATES SERIES 2005-A8,

14 Plaintiff,

15 vs.

16 SFR INVESTMENTS POOL 1, LLC,
17 ET AL.,

18 Defendants.

CASE#: A-16-739867

DEPT. XXXI

19
20 BEFORE THE HONORABLE JOANNA S. KISHNER
21 DISTRICT COURT JUDGE
22 WEDNESDAY, APRIL 17, 2019

23 **RECORDER'S TRANSCRIPT OF BENCH TRIAL - DAY 2**

24 APPEARANCES:

25 For the Plaintiff:

DANA J. NITZ, ESQ.
NATALIE C. LEHMAN, ESQ.

For the Defendant:

KAREN HANKS, ESQ.
JASON G. MARTINEZ, ESQ.

RECORDED BY: SANDRA HARRELL, COURT RECORDER

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INDEX

Testimony7

WITNESSES FOR THE PLAINTIFF

Rock Jung

Direct Examination by Ms. Lehman 7

David Alessi

Direct Examination by Mr. Nitz 95

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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INDEX OF EXHIBITS

<u>FOR THE PLAINTIFF</u>	<u>MARKED</u>	<u>RECEIVED</u>
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2419
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<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
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None		
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Las Vegas, Nevada, Wednesday, April 17, 2019

[Case called at 10:01 a.m.]

THE COURT: Okay. Counsel, thank you for your patience. And just whenever you wish, we can do appearances, and we can get started for you all. And I wasn't really rushing because I was not seeing that Mr. Jung was here, so --

MS. HANKS: He's here. He's out in the hallway.

THE COURT: Oh, no one told me that the witness was out in the hallway. So, I was keeping on going.

THE MARSHAL: Pardon?

THE COURT: Because remember, he had another hearing. So, I had no idea that he was out in the hallway, so I was just continuing with my hearing until somebody was going to let me know that he was here. So --

MS. HANKS: Karen Hanks and Jason Martinez on behalf of SFR.

MR. NITZ: David Nitz and Natalie Lehman on behalf of U.S. Bank. I'm sorry. Wrong case. Brown Wheat BANA.

MS. LEHMAN: No. It's U.S. Bank.

THE COURT: No.

MR. NITZ: U.S. Bank.

MS. LEHMAN: You had it right.

THE COURT: You had it right. You were right. You were right the first time. No worries. Okay. Counsel, when we left yesterday

1 you had a witness on the stand. Is that same witness here and do you
2 wish that witness to be recalled to the stand at this juncture?

3 MS. LEHMAN: Your Honor, before that, I would request
4 leave to file a bench memorandum regarding Mr. Jung's testimony from
5 yesterday.

6 THE COURT: Well, trial memorandum are allowed
7 throughout the course of the case. Has it been provided to opposing
8 counsel?

9 MS. LEHMAN: It will be now.

10 THE COURT: I mean, the Court just reviews trial
11 memorandum just during the course of the case like any other case.
12 Sure, can you give me the Marshall copy? Has it been filed? Because
13 usually, the Court doesn't get them until after they've been filed and
14 served on the other side.

15 MS. LEHMAN: It has not been filed, so I'd request that we
16 could file it in open court.

17 THE COURT: You can? How do you file it in open court?

18 MS. LEHMAN: If the Clerk could stamp it as received by the
19 Court.

20 THE COURT: Okay. If you could please get someone from
21 your office to file it while you're here, okay?

22 MS. LEHMAN: Okay.

23 THE COURT: Take a second and take care of that. And
24 whoever's phone is doing that lovely sound, or computer, whatever, can
25 we just --

1 MS. LEHMAN: You need to turn off your sound.

2 THE COURT: You need to turn off your sound on your
3 computer just so it doesn't make that beeping sound every time, if you
4 don't mind, please, because imagine what that sounds like in my poor
5 Court Recorder's ears.

6 So, counsel for Defense, I mean, the Court can get bench
7 memorandum throughout a case. Do you have any objection that I'm
8 getting an unfiled copy? They say they're filing it.

9 MS. HANKS: Yeah. Once they file it. That's -- yeah,
10 assuming it gets filed.

11 THE COURT: Okay. So, then the Court will review it. That's
12 fine. Usually, there's no objection. I just always ask.

13 Okay. So, do you want to call the witness and the Court can
14 review this while you have the witness on the stand?

15 MS. LEHMAN: Your Honor, if I could just ask you for two
16 minutes, to email this to my office to have it filed.

17 THE COURT: Oh, of course.

18 MS. LEHMAN: Thank you.

19 [Pause]

20 THE COURT: Marshal, can you assist the Clerk and put the
21 exhibit binders on the witness stand? I don't see them. The witness
22 binders. Thank you so much.

23 [Pause]

24 THE COURT: Okay. Ms. Lehman, whenever you're ready.
25 May we have the witness come in? Do you want the witness -- while

1 you're doing that, do you want him to come in or do you want him
2 outside? What would you like?

3 MR. NITZ: He can come in. That's fine, Your Honor.

4 THE COURT: Okay. Thank you, Marshal.

5 THE COURT: Defense counsel, you're okay, if they were filed
6 by the end of the day weren't you? We don't need to stop the trial do we
7 right now, to make sure they're filed. From the Bench?

8 MS. HANKS: Oh, to -- no, we don't need to stop it, Your
9 Honor.

10 THE COURT: Okay.

11 MS. HANKS: I'm sure we can confirm it once we --

12 THE COURT: Right. okay.

13 MS. HANKS: -- go on the first break.

14 THE COURT: So, you can proceed. It's perfectly fine that you
15 file it by the end of the day. Thank you, so much.

16 ROCK JUNG, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

17 **DIRECT EXAMINATION CONTINUED**

18 **BY MS. LEHMAN:**

19 Q Good morning, Mr. Jung.

20 A Good morning.

21 Q Do you have a copy of the exhibit binder, volume 1 in front of
22 you?

23 A I do not.

24 Q Okay.

25 THE COURT: It's right behind you.

1 THE WITNESS: Oh, I apologize.

2 THE COURT: So, technically, it was not in front of him, but it
3 was right there on the witness stand.

4 **BY MS. LEHMAN:**

5 Q Correct.

6 A Okay, I have it in front of me, now.

7 Q Okay. If you could please turn to Exhibit 24.

8 A Okay.

9 Q Did you draft this letter?

10 A I did.

11 Q And did you sign this letter?

12 MS. HANKS: Objection, asked and answered.

13 THE COURT: Technically, that's correct. Are you trying -- but
14 I think laying for foundation. The Court's going to allow a little bit of
15 leniency to the extent there was extensive argument yesterday, and
16 except this is laying a little bit of foundation. So, overruled for that
17 limited purpose. Go ahead.

18 THE WITNESS: Yes.

19 **BY MS. LEHMAN:**

20 Q And do you recognize that as a letter you sent to Alessi &
21 Koenig?

22 A Absolutely.

23 Q Did you send this letter in your capacity as an attorney for
24 Bank of America?

25 MS. HANKS: Objection, Your Honor. The witness is

1 testifying about an exhibit that hasn't been admitted or authenticated
2 yet.

3 THE COURT: Court overrules the objection, because we need
4 to know if he actually sent -- he's not referencing the contents of the
5 letter, he's just referencing whether or not the document was sent by
6 him.

7 MS. HANKS: Well, then I'm going to object to lack of
8 foundation. There's been no foundation he even remembered doing
9 anything on this file, let alone sending a particular letter. So, if he's
10 looking at the letter to determine it was sent, then he's testifying from
11 the document.

12 THE COURT: Sustained on the secondary grounds, counsel,
13 proceed with the next question.

14 **BY MS. LEHMAN:**

15 Q Do you recognize this letter?

16 A I do.

17 Q Is this letter consistent with letters you drafted to HOAs or to
18 trustees in the time period of 2011 to 2012?

19 A Yes, it is.

20 Q Were the contents of the letter fresh in your mind when you
21 drafted it?

22 A Yes.

23 Q looking at the letter yesterday, did it refresh your recollection
24 generally?

25 A It did.

1 Q Do you remember all the details of the letter, as you sit here
2 today?

3 A I do.

4 Q What would you have done with the letter --

5 THE COURT: I'm sorry, what was the answer?

6 THE WITNESS: I do.

7 THE COURT: Do, D-O?

8 THE WITNESS: Yes, I do.

9 THE COURT: Okay.

10 **BY MS. LEHMAN:**

11 Q What would you have done with the letter after you drafted it
12 and sent it to Alessi?

13 A I would then await for a response from Alessi for my request
14 for more information.

15 Q Would you have kept a copy of the letter?

16 A Yes, we would have. As part of the custom and practice, we
17 would have also kept a copy, or my assistant would have kept a copy.

18 Q And where would the copy would have been kept?

19 A We had a case management system that we used while I was
20 at Miles Bauer Bergstrom & Winters. We called it -- or it's called ProLaw.
21 So, a copy would have been saved as part of the custom and practice of
22 the firm. A copy of all correspondence, written correspondence to the
23 HOA, or HOA trustee.

24 Q And do you, yourself, use the ProLaw system?

25 A Yes.

1 Q And can you describe how you would use the ProLaw system
2 in your work as an attorney at Miles Bauer?

3 A Basically, I would keep track of events or activities I did
4 pertaining to a file. So, if I did send a letter, such as the letter that we're
5 just discussing, that would be notated in ProLaw. Either I would
6 manually type it in myself, or my paralegal, or legal assistant, at my
7 direction would.

8 Q And why would you save a copy in ProLaw?

9 A That was just the custom and practice that we had set up to
10 create a system, to be efficient. Because we're dealing with thousands of
11 these HOA liens, and literally thousands of correspondences that needed
12 to be sent to HOAs, or the HOA trustees. So, this is a way to keep it in --
13 as part of the normal course of our business records.

14 Q Did you rely on the information that was saved in ProLaw for
15 this matter?

16 A Yes.

17 Q Did you ever, as an attorney for Miles Bauer, representing
18 Bank of America -- did you ever have a need to go back into a file that
19 was in ProLaw and look at letters that were saved there?

20 A Sure.

21 Q And can you think of a reason why you would have done
22 that?

23 A Just to refresh my memory. See where I was on that
24 particular file, because I was handling hundreds, if not thousands, of
25 files. So, just to see how -- at what point in our procedures we were, and

1 take the necessary action, based on my review of what had already been
2 completed in ProLaw.

3 Q If you could turn to page USB168, which is the third page of
4 Exhibit 24.

5 A Okay.

6 Q Do you recognize this document?

7 A Yes.

8 Q And what is it?

9 A It's a copy of the check that Miles Bauer Bergstrom & Winters
10 had made out to Alessi & Koenig for the calculated super priority
11 amount, regarding this particular property at issue.

12 Q And how do you know that it relates to this property at issue?

13 A A couple of reasons, but the one that automatically jumps
14 out to me is the designated Miles Bauer Bergstrom & Winters file
15 number, which matches up with the file number that was on USB166.
16 And that file number is 11-H --

17 MS. HANKS: Objection, Your Honor. The witness is
18 testifying from a document that hasn't been authenticated or admitted.
19 It goes beyond foundation.

20 THE COURT: Counsel, would you like to respond?

21 MS. LEHMAN: Mr. Jung had testified that --

22 THE COURT: Did you --

23 MS. LEHMAN: -- he had sent this letter, and it was an
24 attachment to that letter. He also testified that he had sent the -- if you
25 want me to go back to Exhibit 22, he had sent a request for a payoff to

1 Alessi & Koenig, and he testified that it was his practice to send a
2 response letter with a check.

3 THE COURT: I'm not sure you heard Defense counsel's
4 objection. Defense counsel, do you want to restate your objection,
5 because I'm not sure --

6 MS. HANKS: My objection is that the witness went beyond
7 the foundational question of the who, what, where, why, and started
8 testifying from the letter, matching up with numbers, and reading the
9 numbers.

10 Just for the record, I also want to just make sure that the
11 record is clear that I disagree with counsel's kind of categorization of
12 testimony. There's been no testimony, at least admissible testimony,
13 that any letters were sent.

14 MS. LEHMAN: I'm sorry, I missed part of that.

15 MS. HANKS: I was just clarifying something for the record.
16 It doesn't have anything to do with the objection itself.

17 THE COURT: But when I have counsel talking to one another
18 and I have another counsel trying to set forth an objection, it kind of
19 presents a challenge because you may want to know what you're being
20 objected to. So, counsel for Defense, do you mind restating your
21 objection, so that counsel for the Plaintiff can hear it, so that everyone
22 understands what your other objection is?

23 MS. HANKS: My objection was that the witness was
24 beginning to testify outside the foundational question asked by counsel,
25 by testifying from the actual document itself, and reading off numbers,

1 and matching it up to the other document. That was my initial objection.

2 And then I just put on the record, that I disagree with
3 counsel's response to my objection that there was testimony about these
4 letters being sent. That has not been testimony given in this trial yet.

5 THE COURT: So, do you want to respond to the objection
6 with regards to response of the witness, or do you want me to rule on
7 the objection?

8 MS. LEHMAN: Yes, I will respond. So, yesterday, we did
9 have Mr. Jung read into the record Exhibit 22, which included the Miles
10 Bauer file number, which is the same number that's in Exhibit 24. So, it
11 is something that he had already testified to regarding that number.

12 THE COURT: And the Court's going to sustain the objection,
13 because of the way the witness was answering the question. The
14 objection was that he's referencing Bates numbers and file numbers.
15 He's been reading from the document itself, and comparing the
16 document, which has not been admitted into evidence.

17 So, the answer, while I appreciate that he's an attorney, and I
18 appreciate he's testified in a number of these cases, but a question --
19 that's not a proper response for a question that was elicited for a
20 document that's a proposed document. So, I have to sustain the
21 objection on that basis.

22 The Court's not taking any position as to what has or has not
23 been brought forth in this trial. If you all paid the recording fee, then you
24 have the benefit of finding what that is. And if you haven't paid the
25 recording fee, as you know, the case doesn't get recorded, and you

1 would have no record for purposes of appeal or any other rights, so it's
2 up to you. Go ahead, counsel.

3 MS. LEHMAN: So, Your Honor, I would the move for
4 admission of Exhibit 24.

5 MS. HANKS: I'm sorry, I didn't hear. All I heard was Exhibit
6 24.

7 MS. LEHMAN: I move for admission of Exhibit 24.

8 MS. HANKS: Your Honor, I object to the extent that we
9 haven't passed the authenticity problem with the -- and I don't hear any
10 testimony -- foundational testimony that Mr. Jung is the custodian of
11 records for Miles Bauer. And it's hearsay.

12 THE COURT: At this juncture, taking into account what was
13 yesterday and today from this witness, since the last time that this
14 document was sought to be entered, the Court moves to deny without
15 prejudice proposed 24 admission, because -- well, the Court did not
16 adopt the analysis of the speaking objection of Defense counsel, the
17 authenticity and hearsay issues have not been fully addressed at this
18 juncture, based on the current testimony.

19 Remember I have to listen to his testimony and not -- I
20 appreciate you giving me a Bench brief, but a Bench brief is argument,
21 not testimony. I have to listen to the testimony, so at this juncture, it's
22 denied without prejudice.

23 MS. LEHMAN: Your Honor, I don't believe I had a chance to
24 respond to the hearsay objection. I know we talked about it yesterday,
25 but I had some additional exceptions to hearsay, that I wanted to bring to

1 the Court's attention.

2 THE COURT: I've already made my ruling on it. It doesn't
3 preclude you from asking further questions, and re-seeking it, but --

4 MS. LEHMAN: Okay.

5 THE COURT: But at this juncture, I offered you the
6 opportunity to respond, and you responded how you wanted to respond.
7 That's why the Court then did a ruling. So, then you'd move on to your
8 next question. If you're reintroducing it a different time, nobody's
9 precluding you from doing that. But I can't leave open rulings for
10 extended periods of time.

11 Thank you, so much.

12 **BY MS. LEHMAN:**

13 Q Mr. Jung, was it part of Miles Bauer's regularly conducted
14 business activities to prepare letters, such as Exhibit 24, and to save
15 those letters?

16 A Yes, it was.

17 Q And are you familiar with the record keeping practices of
18 Miles Bauer?

19 A Yes.

20 Q And what were those record keeping practices?

21 A As I testified earlier, when an event was completed regarding
22 a certain task, that event would be typed into ProLaw, and a copy, if
23 there was a copy regarding that event, would also be saved in ProLaw.

24 Q And when you say event, would that include letters?

25 A Correct, yes.

1 Q And to your knowledge, was the letter in Exhibit 24 saved in
2 ProLaw?

3 MS. HANKS: Objection, lacks foundation.

4 THE COURT: Overruled.

5 THE WITNESS: Pursuant to the custom and practice it would
6 have been saved to ProLaw. I don't have a ProLaw screenshot in front of
7 me, but I don't see any reason why it would not have been saved in
8 ProLaw.

9 **BY MS. LEHMAN:**

10 Q And in your work doing HOA payoffs for Bank of America,
11 did you have a custom and practice of sending super priority payoff
12 checks?

13 A Yes.

14 Q And can you estimate about how many times you sent super
15 priority lien payoff checks on behalf of Bank of America while you were
16 at Miles Bauer?

17 MS. HANKS: Objection. Asked and answered.

18 THE COURT: Overruled.

19 THE WITNESS: My best estimate would be several
20 thousand.

21 **BY MS. LEHMAN:**

22 Q And in those several thousand, did you always include a
23 check for nine months of assessments?

24 A Yes.

25 Q Would copies of those checks be saved into ProLaw?

1 A Yes, pursuant to our custom and practice of saving copies
2 and typing the activity that was completed, such as a copy of the letter
3 that we looked at, or a copy of the check that would accompany a letter,
4 those would all be saved, as part of the custom and practice.

5 MS. LEHMAN: Your Honor, I move for admission of Exhibit
6 24.

7 MS. HANKS: I renew my objection on authenticity and
8 hearsay, Your Honor.

9 THE COURT: Counsel, would you like to respond to the
10 objections raised by Defense counsel?

11 MS. LEHMAN: Yes.

12 THE COURT: Okay.

13 MS. LEHMAN: Under NRS52. or .015, authentication can be
14 satisfied by evidence or other showing sufficient to support a finding that
15 the matter in question is what the proponent claims and that it's
16 sufficient that the witness here is -- has personal knowledge of what the
17 matter is. Mr. Jung testified that he signed this letter, and that he drafted
18 it.

19 And, additionally, as to the hearsay, there are several
20 exceptions that would apply in this case, including NRS51.075, the
21 general exception, NRS51.315 --

22 THE COURT: And why? I mean can you explain why each of
23 those would apply?

24 MS. LEHMAN: So, this -- so under 51.315, the statement is
25 not excluded by the hearsay rule if the nature and special circumstances

1 under which it was made offer strong assurances of accuracy. And here
2 Mr. Jung testified that he prepared these -- this document in his capacity
3 as an attorney for Bank of America and as an officer of this Court, he was
4 under the Nevada Rules of Professional Conduct to communicate
5 truthfully with third parties, in his role as an attorney, which he -- so
6 there's no reason to suspect any -- that it wasn't trustworthy.

7 And, additionally, it could come in as a business record
8 under NRS51.135, because he is qualified to authenticate the writing,
9 because Nevada Courts find that it's broadly interpreted as to a qualified
10 person is. And the only requirement is that person understand the
11 record keeping system that was used. And Mr. Jung testified that he
12 worked at Miles Bauer. That they use the ProLaw data base as a record
13 keeping system. He understood how it was used and used it himself.
14 And that Exhibit 24 was a record that was kept in that program.

15 THE COURT: Okay. After hearing the objections and after
16 hearing, you know, just a letter, Exhibit 24 is going to come in over the
17 objection of Defendant.

18 [Plaintiff's Exhibit 24 received]

19 MS. HANKS: I take it you're not going to want to hear
20 anything further from me, Your Honor, since she listed a bunch of rules
21 under NRS Ch. 51?

22 THE COURT: Oh, okay. I will defer my ruling and let you
23 respond at a certain point. I mean --

24 MS. HANKS: I understand, it's just there was a lot of
25 citations to different ones. So, I guess maybe if I can get some

1 clarification on which one you're ruling on, and maybe I'll just comment
2 on that one.

3 THE COURT: I think the broad discretion as asserted and
4 with the business record, after the additional analysis of laying
5 foundation in this particular witness and his familiarity with the business
6 practices, that within the broad discretion, the Court can allow, it would
7 be viewed as business record exception, I think would fall within. I think
8 a general exception is going to fall within.

9 It's going to be authenticated because of the additional
10 testimony. He's laid the appropriate foundation of his knowledge. For
11 the mere purpose of having this letter be admitted. The Court not taking
12 any further ruling as to certain other aspects. So as far as the letter
13 being admitted, it's appropriate.

14 MS. HANKS: And if I can just comment, just for my record,
15 Your Honor.

16 THE COURT: Of course.

17 MS. HANKS: I understand your ruling, but with respect to
18 the qualified person, I've actually researched this. I have not found one
19 Nevada case that defines that term. There are some federal cases that
20 deal with it, but any Nevada cases.

21 And while Mr. Jung might be familiar with how Miles Bauer
22 maintained its records, now we have a copy of a record that's dated
23 2011, and we're in 2019. And there has been no foundational testimony
24 that he's had access to Miles Bauer's records since he left in March of
25 2014.

1 So, it's a far cry from saying, well, I'm familiar with how
2 records were kept to then jumping to the conclusion that a copy of a
3 document in 2019 is a true and accurate copy of what's in the system,
4 having never reviewed the system today, and cross-checking that. So
5 that's where maybe he's familiar with the systems, and that might get
6 you under the broad definition of qualified person.

7 But not having been in care and custody, and control of
8 those systems for a number of years, that's the problem I have with the
9 authenticity. I don't think there's any Nevada case law, or any federal
10 case law that would say we can jump to that, just because I was familiar
11 nine years ago with how we did things at Miles Bauer.

12 THE COURT: And the Court eventually has to take into
13 account the plethora of cases, which have involved this very witness
14 and these very types of letters, and these very similar timeframes, and
15 that they have been allowed in those cases, where it's been admitted in
16 those other cases.

17 And in looking at those specific cases, including the ones that
18 have been particular in this department, while some of those same
19 objections have been raised, if these foundational information has been
20 presented, that those have been affirmed. And the Court has to take that
21 into account when there's not a specific case on point. And the Nevada
22 Supreme Court more so occasionally. I'm trying to think if I saw the
23 Court of Appeals, as well as the Nevada Supreme Court, has allowed, in
24 the very broad discretion of the Court, to allow those in.

25 And so, the Court has to take that all into consideration when

1 there is not a specific case on point. And the reference to other cases,
2 and other jurisdictions, in allowing this broad discretion, in similar type
3 contact, and that's really the Court's ruling.

4 Just taking into totality of all those circumstances.

5 MS. HANKS: Can I just make one comment on that? Just to
6 make my record, Your Honor. I understand --

7 THE COURT: I appreciate people want to make records,
8 okay --

9 MS. HANKS: I know it has to stop at some point --

10 THE COURT: Yeah.

11 MS. HANKS: -- but I just want to be careful with looking at
12 other cases, because in all other cases, Mr. Miles has also been called as
13 a witness, who has testified that he is the custodian of records for Miles
14 Bauer, and has maintained those records, as the firm has wrapped up its
15 affairs. So, I have never been in a trial where I'm aware that the Court
16 has allowed the admission of a record absent the custodian of records
17 testifying about the document.

18 Every trial I have had, Mr. Miles has been present. Now, he
19 wasn't disclosed in this case. But I've never had a trial where only Mr.
20 Jung tried to get the documents in. So, I just want to be careful when we
21 look at the other cases. There's also, I know for a fact, there's counsel --
22 there's a lot of counsel in these cases in Nevada, that have clients that
23 don't have quite the portfolio that SFR has.

24 So, the value that the -- the amount of money they can put in
25 fighting these cases, those attorneys tend to not object to things that

1 SFR's counsel, myself, do regularly. So, I would hate for a case where
2 I'm not counsel, to be used as kind of the law of the land in Nevada,
3 because a lot of attorneys choose to litigate their cases very differently.
4 And so, I just want to be very careful with that.

5 THE COURT: Well, the Court need not respond, but the Court
6 in its statement wasn't saying that there was precedent, or "law of the
7 land." The Court has to look at the overreaching broad spectrum of
8 things, when the Court has to determine whether or not it should or
9 should not exercise its very broad discretion in this area.

10 So, the Court wasn't -- I appreciate the comments of counsel,
11 the Court didn't say that it was precedent, say it was the law of the land.
12 Saying the absence of any law, the Court has to look at a variety of
13 different things to see if there's anything that would indicate the higher
14 court potentially should rule in this case, or whether it should or should
15 not exercise its broad discretion.

16 And looking at the totality of the circumstances. I'm just
17 giving you a head's up as to why the Court ruled as it did. It's been
18 consistent with what has been affirmed, actually, in prior cases in this
19 Court, albeit unpublished and without Mr. Miles.

20 So, if you just want -- for your own point of curiosity, I wasn't
21 making that broad distinction about saying there's any law of the land, I
22 was just trying to give you a broad sweeping of whether or not the Court
23 was determining it was appropriate to exercise its discretion. That's
24 what the broad base aspects, looking at the full compliance of the
25 various rules cited. So, you can feel free to move on, unless you want to

1 add something as well, then I will give you a chance to.

2 MS. LEHMAN: I will move on. Thank you, Your Honor.

3 THE COURT: Okay, feel free.

4 **BY MS. LEHMAN:**

5 Q Mr. Jung, if you could please turn to Exhibit 23.

6 A Okay.

7 THE COURT: Yes, 24 was admitted over the objection of
8 Defendants.

9 Q Do you recognize this document?

10 A I do.

11 Q Do you know anyone with the name -- last name Bhame,
12 B-H-A-M-E?

13 A I do, yes.

14 Q And who do you know by that name?

15 A Alex Bhame. It's my former paralegal while I was at Miles
16 Bauer.

17 Q And do you recognize the number 11-H1638? That it -- as
18 being connected with the property in this case?

19 A Yes, that's the same designated Miles Bauer file number that
20 I saw earlier.

21 Q You saw earlier in Exhibit 24?

22 A Correct.

23 THE COURT: Counsel, point of reference. What page
24 number are you referencing?

25 MS. LEHMAN: We're looking at USB169 in Exhibit 23.

1 THE COURT: Thank you.

2 **BY MS. LEHMAN:**

3 Q And if you look at USB169 above the number 11-H1638.

4 There appears to be a name. Do you recognize that name?

5 A I'm sorry, what? Say that again.

6 Q Above the number in the right hand corner. There appears
7 to be a name above the Miles Bauer number.

8 A For Bates stamp USB169?

9 Q Yes.

10 A I do. Ivy.

11 Q And do you know what the significance of that name is?

12 A That would be the homeowner's -- homeowner/borrower's
13 name.

14 Q And in the first paragraph of this letter, do you recognize the
15 property address?

16 A Yes.

17 Q And do you recognize whether the property address is
18 related to the property in this case?

19 A It is. It's the same property address.

20 Q Is it the same property address as was in Exhibit 24?

21 A That's correct.

22 Q And do you know who this letter is from?

23 A It's from Ryan Kerbow, who was an attorney out of Alessi &
24 Koenig that I had dealings with, regarding his Nevada HOA needs.

25 Q Do you recall receiving this document while you were

1 working at Miles Bauer?

2 A This specific document, I don't recall. But it's consistent with
3 the custom and practice of Alessi & Koenig, from what I recall. And they
4 would respond to my initial request for more information by sending us
5 a payoff statement with all the amounts that were due and owing for that
6 account.

7 Q If you would look back at Exhibit 24.

8 A Okay.

9 Q On page USB166. You reference a statement of account. Do
10 you know whether the statement of account you reference in Exhibit 24
11 is related to the letter in Exhibit 23?

12 A Yes, it is the same statement.

13 Q And how do you know that?

14 A Because the exhibit marked as 24, it references a full pay-off
15 amount of \$4,111.61, which is also the same amount that's listed in Bates
16 stamped USB169.

17 MS. HANKS: Your Honor, I have to move to strike that
18 testimony. The witness is testifying from proposed Exhibit 23, and it
19 hasn't been admitted yet, or authenticated.

20 THE COURT: Counsel for Plaintiff, do you want to respond to
21 that?

22 MS. LEHMAN: I'm laying the foundation of whether -- how
23 he recognizes this document.

24 THE COURT: Objection is sustained. The Court's not going
25 to take into consideration the last answer.

1 **BY MS. LEHMAN:**

2 Q What would you have done with this letter upon receipt?

3 A We would have reviewed the letter for charges that would --
4 that could comprise a super priority amount, and then make a calculation
5 of the super priority amount.

6 Q Would Miles Bauer have kept a copy of this letter in its
7 records?

8 A Yes, they would have.

9 Q Would they have kept it in the same ProLaw system that you
10 testified to earlier?

11 A Yes.

12 Q And do you know why Miles Bauer would have kept the letter
13 in ProLaw?

14 A That was the custom and practice to keep the records of any
15 correspondence that dealt with the handling of the Nevada HOA lien.

16 MS. LEHMAN: Your Honor, I'd move for admission of Exhibit
17 23.

18 MS. HANKS: I object to hearsay and lack of authenticity.
19 This is a document that's not a Miles Bauer record. It appears to be a
20 cover sheet of Alessi & Koenig and then the subsequent Bates stamp
21 numbers are -- I'm not really sure whose records they are. They don't
22 have a caption at the top, Your Honor.

23 THE COURT: Counsel, would you like to respond to the
24 objections raised?

25 MS. LEHMAN: Yes. Mr. Jung testified that this is a letter that

1 he received in response to his initial request.

2 THE COURT: Did he? Did he say he received it?

3 MS. LEHMAN: Or that his office received. I guess he
4 testified that his paralegal, A. Bhame received it and that he reviewed it
5 in preparing his response in Exhibit 24. And then that would qualify --
6 that was - -that he was -- that would qualify him for the same reason as a
7 business record.

8 THE COURT: Just one second. Okay. I heard what you said,
9 counsel. Anything else?

10 MS. LEHMAN: No.

11 THE COURT: Court sustains Defendant's objections on the
12 two grounds stated. For the reasons stated by Defense counsel.

13 [Pause]

14 THE COURT: And what time does this witness need to be
15 gone? I need to balance for breaks and lunch and things like that. What
16 time does this witness need to leave the stand?

17 MS. LEHMAN: I believe he said by noon. But I'm finishing
18 up. I don't think --

19 THE COURT: Court's not rushing you in any manner.

20 MS. LEHMAN: Okay.

21 THE COURT: I just was trying to get just a general idea, so
22 that we can figure out. Please feel free to continue. Okay, Go ahead,
23 counsel.

24 **BY MS. LEHMAN:**

25 Q So Mr. Jung, you testified earlier that your paralegal, Mr.

1 Bhame, received this letter; is that correct?

2 MS. HANKS: I'm sorry, counsel, I only heard two word of
3 that. You're really soft-spoken.

4 MS. LEHMAN: Oh, I'm sorry. I said -- I asked Mr. Jung
5 whether he testified earlier that his paralegal, Mr. Bhame, received this
6 letter?

7 MS. HANKS: I'm going to object to lack of foundation.

8 THE COURT: Sustained.

9 **BY MS. LEHMAN:**

10 Q Mr. Jung, when you were making HOA lien payoffs, what
11 was the custom and practice of how you would receive HOA lien payoffs
12 from Alessi & Koenig?

13 A From my recollection, we would receive payoff statement
14 correspondence from Alessi & Koenig via fax. Usually it would be faxed
15 to my paralegal, Alexander Bhame. That's what I recall.

16 Q And do you recall what would typically be included in Alessi
17 & Koenig HOA lien payoff?

18 A Yes, what would be included would be everything that Alessi
19 & Koenig was claiming was due and owing under that particular HOA
20 account.

21 Q Would they just send you a letter with a total payoff figure on
22 it?

23 A No, that's not what I remember. Out of the hundreds of
24 payoff statements I received from Alessi & Koenig while working at Miles
25 Bauer, what I recall is they would list, or itemize all the charges that they

1 were claiming was due and owing under that HOA account. As opposed
2 to just a single figure without explaining how they came to that figure.

3 Q And would they include something such as an account
4 ledger or statement of account?

5 A I think both, yes.

6 Q Okay. When you worked with Mr. Bhame, did you have a
7 custom and practice of -- of how he would -- or whether he would
8 transmit communications to you regarding HOA lien payoffs?

9 A For the ones that Alex received, I recall he would email me to
10 let me know that, Rock, we received the requested information, or we
11 received some type of information from the HOA Trustee, in response to
12 your initial letter requesting more information. And then he would
13 attach that information.

14 Q And do you know whether the payoff statements would be
15 saved in ProLaw?

16 A Yes, they should have been saved in ProLaw pursuant to the
17 custom and practice we had at Miles Bauer.

18 Q Did you ever access those payoff statements in ProLaw?

19 A Yes.

20 Q Okay. When Mr. Bhame would send you the HOA lien payoff
21 statements, would he do so fairly soon after he received them? Or
22 would there be a lag in time?

23 A As far as I recall, as soon as he received it, he would send me
24 a copy of the payoff statement.

25 Q And you do recall receiving the payoff statement here in

1 Exhibit 23?

2 MS. HANKS: Objection, asked and answered. Sorry.

3 THE COURT: Overruled.

4 THE WITNESS: Yes, but just based on the information I see
5 in front of me, this is consistent with the custom and practice, and I
6 would have received this payoff statement from Alex.

7 MS. HANKS: Your Honor --

8 THE WITNESS: Mr. Bhame.

9 MS. HANKS: Sorry. Your Honor, I have to move to strike that
10 answer. It's not answering the question, but he's also testifying from a
11 document that hasn't been admitted.

12 THE COURT: I'm going to sustain that based on the
13 statement based on information I see before me. Based on the fact that
14 in front of the witness is proposed Exhibit 25, and that's the exhibit that's
15 being referenced. So, I'm going to sustain the objection.

16 **BY MS. LEHMAN:**

17 Q Earlier you testified that in Exhibit 24, you referenced a full
18 payoff amount of \$4,111.61; is that correct?

19 A That's correct.

20 Q Where would you have obtained that payoff amount?

21 A I would have only got that amount from one source, and that
22 would have been the documents or payoff statement that Alessi &
23 Koenig would have sent my firm, in response to my request for that
24 information, or information about the HOA account.

25 Q And would the payoff statement be something that -- is that

1 something that you used in order to calculate the amount on the tender
2 check, which his on Exhibit 24 USB168?

3 A Yes, that's correct.

4 MS. LEHMAN: Your Honor, I'd move for admission of Exhibit
5 23.

6 MS. HANKS: I still have the same objection as to authenticity
7 and hearsay, Your Honor. And lack of foundation.

8 THE COURT: Counsel? I'm sorry.

9 MS. HANKS: I'm sorry, lack of foundation.

10 THE COURT: Okay.

11 MS. HANKS: In establishing him as the custodian of records
12 or other qualified person, as well.

13 MS. LEHMAN: So, Mr. Jung testified that he had a custom
14 and practice with his paralegal, Mr. Bhame, that after Mr. Jung, you
15 know, sent out his initial contact letter, Mr. Bhame would receive this
16 payoff request, and transmit it to him. And that it's their custom and
17 practice that they would save it in ProLaw.

18 He is familiar with that system. And that he relied upon it, in
19 order to prepare Exhibit -- it was Exhibit 24, the tender letter and check.
20 And then I think it would qualify as -- under the business records
21 exception.

22 THE COURT: Counsel, can you give me an explanation how
23 proposed Exhibit 23 would qualify under a business records exception,
24 that this witness can testify to?

25 MS. LEHMAN: It was a record that was received by his

1 office, that he used and relied upon in his course of business to draft
2 tender letters and checks. He utilized the information in that letter that
3 he -- in that payoff statement in order to prepare the letter and check, in
4 Exhibit 24. And that they -- it was received by his office; he was familiar
5 with the custom and practice of how it was received. It was saved in
6 their records in ProLaw. And that he reviewed it and he accessed it.

7 THE COURT: I think in fairness, Defense gets to respond to
8 that, before the Court rules.

9 MS. HANKS: Your Honor, there has been no testimony that
10 this particular proposed exhibit was received, that it was saved in the
11 ProLaw system in his file. All he testified was the custom and practice.
12 And it doesn't equate to now authenticating this document and making a
13 business exception rule for it.

14 THE COURT: And the Court agrees. I mean generalized
15 custom and practice, when he simply hasn't testified even receipt of
16 said -- he explained who his paralegal is, explained -- remember he even
17 said that these normally come in by fax. This one doesn't even have a
18 fax indication on it, so --

19 MS. LEHMAN: It actually says facsimile cover letter.

20 THE COURT: I'm sorry, there's no fax indication anywhere
21 on this document, that it came in by fax. No stamping, is what the
22 Court -- all the Court's -- I'm not saying it doesn't say facsimile cover
23 letter, but I'm not sure if faxes come in electronically or why that --
24 because that hasn't been even established, but --

25 MS. LEHMAN: And against the context --

1 THE COURT: Counsel, could I at least finish my explanation?
2 I'm ruling against you, so -- I've given you an opportunity -- or the
3 objection, gave you an opportunity to respond, and because you gave
4 some details, gave Defense a response. Court needs to sustain the
5 objection on hearsay. There's been no testimony that would make the
6 truth of the matter asserted in 23, and exception, it would not be a
7 business record exception, it's the one you stated.

8 So, the Court would sustain the objection, it's not an
9 exception to hearsay under business records. And lacking foundation
10 based on what this witness has actually testified to, as to this particular
11 document, Court has to sustain it, also on lacking foundation, as well as
12 authenticity. Thank you.

13 **BY MS. LEHMAN:**

14 Q Mr. Jung, if you could turn back to Exhibit 24.

15 A Okay.

16 Q Do you recall receiving a response to your tender letter and
17 check from Alessi & Koenig?

18 A Yes, I would have -- I would have received a response, just
19 based on their custom and practice of respond -- responding.

20 Q And do you recall what that response was?

21 A Wait, I'm sorry. Can you rephrase that question? Response
22 to my initial correspondence, or the tender letter? I'm sorry.

23 Q Response to the tender letter, Exhibit 24. The letter and the
24 check.

25 A Understood. Thank you. My recollection was that Alessi &

1 Koenig would periodically send a letter -- a blanket letter saying
2 something to the effect that we've received numerous checks from your
3 law firm for the equivalent of nine months, or the purported super
4 priority amount. We are not accepting it, because it does not accurately
5 reflect the super priority amount. Specifically, it doesn't include our fees
6 and costs that we're allowed to include. So, we're rejecting it.

7 [Counsel confer]

8 MS. LEHMAN: We'll pass the witness.

9 THE COURT: Defense. Counsel, would you like to ask any
10 questions of this witness?

11 MS. HANKS: Yes, I would. Did you want to take a five
12 minute bathroom break. I'm not going to take all the way until 12:00,
13 that's why I asked that?

14 THE COURT: Let's reconvene in at 11:10.

15 MS. HANKS: Okay.

16 THE COURT: Let's go off the record. Thank you so very
17 much.

18 THE MARSHAL: Court is in recess.

19 [Recess at 10:58 a.m., recommencing at 11:14 a.m.]

20 COURT RECORDER: On the record.

21 THE COURT: Okay. On the record. Counsel, feel free to
22 commence your cross-examination.

23 MS. HANKS: Your Honor, after looking at my notes, I have
24 determined I have no questions for Mr. Jung.

25 THE COURT: Okay. Well then this witness would then be

1 excused in Plaintiff's case-in-chief, right, because there's no cross-
2 examination?

3 Sorry. Counsel?

4 MS. LEHMAN: Your Honor, if I could request to reopen direct
5 just briefly.

6 THE COURT: Is there an objection or is that --

7 MS. HANKS: Yeah, I would object to that.

8 THE COURT: -- okay with -- okay.

9 MS. HANKS: I would object to that. I mean we just went
10 over everything, and I said I didn't have any questions, so I don't know
11 what they need to go back on.

12 THE COURT: Okay. What basis would you be able to reopen
13 direct after Defense counsel said they had no questions, and there's no
14 cross-examination?

15 MS. LEHMAN: I was about to ask you before she said that
16 she had no questions ,and I just didn't want to be rude and talk over her,
17 so --

18 THE COURT: Okay. You both walked through. Is there --
19 how many -- what's the nature and what's the reason why you've been --
20 before you pass the witness -- you did pass the witness, right, before we
21 took the break?

22 MS. LEHMAN: Correct.

23 THE COURT: Okay. So, the witness, normally if there'd be
24 no questions, would be excused and off the stand. So, what would be
25 the legal basis to be able to reopen up direct?

1 MS. LEHMAN: I just -- he's still here -- he's still sitting here,
2 and I had inadvertently forgot to offer one last exhibit.

3 THE COURT: Was there -- was it a proposed exhibit?

4 MS. LEHMAN: It's a proposed exhibit.

5 THE COURT: What's your legal basis that the Court would be
6 allowed to do what you're requesting?

7 MS. LEHMAN: That I had requested to reopen direct, but that
8 but for Ms. Hanks saying first that she didn't have any cross-examination
9 questions. I had moved to ask you before she had begun, but --

10 MS. HANKS: Your Honor --

11 MS. LEHMAN: It was within seconds of each other.

12 THE COURT: Okay. I'm sorry. My question was actually just
13 a little bit different.

14 MS. LEHMAN: Okay.

15 THE COURT: The witness had been passed, right? Both
16 parties agreed that -- you had said that you were done, correct?

17 MS. LEHMAN: Correct.

18 THE COURT: And passed the witness. In fact, Defense
19 counsel was about to commence her questioning, but --

20 MS. HANKS: A bathroom break was appropriate.

21 THE COURT: -- we're just making sure we had our standard
22 morning break like we have each and every day. Make sure everyone
23 has their breaks, you know, morning lunch, okay, afternoon breaks,
24 right? So, we were just politely waiting until it was a good time to do it.

25 So, we then took the break after Defense counsel came up to

1 the podium. Started -- counsel then said, you know, do you need -- do
2 you want to take a break, so we took the break then. And then came
3 back, so the questioning, we just had to wait until the recording came on,
4 so then questioning would've commenced. Like I said, counsel would
5 you like to commence, and then reviewed the notes, she said no
6 questions.

7 So, what I'm just trying to ask, are we saying that there's a
8 basis that the Court can do what you're asking?

9 MS. LEHMAN: And the basis is that the witness is still on the
10 stand and has not yet been excused.

11 THE COURT: Okay. Any other bases other than the witness
12 is on the stand?

13 MS. LEHMAN: No.

14 THE COURT: Okay. From Defense counsel's -- what
15 prejudice, if any, if the witness is still here?

16 MS. HANKS: Well, I think the prejudice is, Your Honor, is I
17 could've shut it down without taking a bathroom break, and because I
18 decided to accommodate everyone's needs -- I don't like to keep people
19 going hours and hours. I know you guys had a morning calendar. He
20 would've been dismissed.

21 THE COURT: Okay.

22 MS. HANKS: I mean, I have strategies in what I do, and I
23 wouldn't have even taken a break if I knew it was going to be a 15 minute
24 or 10 minute option for Plaintiff's counsel to realize a question they
25 didn't get to ask on direct before we pass the witness.

1 THE COURT: Okay. Here's what the Court is going to do.
2 The Court is -- because the witness is here, the Court is going to do -- I've
3 heard the offer of proof. I mean, just because the witness is here is
4 usually not sufficient, but I'm going to allow -- because this is a bench
5 trial, I can do this. You're going to be able to ask the questions you want
6 to ask. I'm going to have this segregated and have Madam Court
7 Recorder make note that this testimony is under objection, and then the
8 Court is going to determine before we get to the end of the trial, whether
9 the Court can or cannot consider it, okay?

10 I think that's the most fair way to do it so that it's going to be
11 preserved in a particular section of what is the testimony, right, and
12 what's the request. Then let you all -- if you want to revisit this issue
13 over the lunch hour, see if you; a) you get the agreement or not, right, or
14 B, you want to look into the issue. And then we will preserve the
15 information because we understand this witness has to go catch a flight,
16 right? And then I can make a final ruling at that juncture. So, it's
17 preserved, and then each side knows, and then each -- neither side is
18 thereby prejudiced.

19 So, basically, defer the ruling, get this sectioned off as what
20 the testimony is, and then the Court makes a ruling after the lunch break.
21 Does that okay with both parties?

22 MS. HANKS: I mean, I still want to see if I -- I guess I'll cross
23 on that little section, depending what happens.

24 THE COURT: You'd have the opportunity to cross under
25 objection without waiving --

1 MS. HANKS: Thank you.

2 THE COURT: -- your other laws of objection that the witness
3 should not even have been allowed that area of inquiry.

4 MS. HANKS: Okay.

5 THE COURT: I think that's the fair thing to do, but I'll
6 separate this out and then after you hear it all, maybe both sides could
7 either A) come to an agreement, or B) if you all want to look into the
8 matter further during the lunch hour, then we can resolve it after lunch.
9 Does that meet all parties' needs?

10 MS. HANKS: Yes.

11 MS. LEHMAN: Yes.

12 THE COURT: Okay. So, Madam Court Recorder, what you
13 can please do is right now, just save it, questioning this witness. The
14 Court has not made yet a determination about whether this witness --
15 this line of questioning will or will not be considered by the Court
16 because there's an objection by Defendant. And so, if you can separate
17 out this information, okay? Thank you so very much.

18 So, Counsel, with those parameters, it is not saying that it
19 will or will not be considered, the Court is going to defer the ruling. Your
20 -- kind of your whole offer of proof gets preserved, and then I'll let you all
21 argue a little bit more, but without making it so it's a moot point since
22 the witness, everybody knows, has to catch a flight. Go ahead, Counsel.

23 THE COURT: -- everybody's needs?

24 MS. LEHMAN: Yes.

25 MS. HANKS: Yes.

1 THE COURT: Okay. So, Madam Court Recorder, what you
2 can please do is it right now is just save it. Questioning this witness, the
3 Court has not made yet a determination about whether this witness --
4 this line of questioning will or will not be considered by the Court
5 because there is an objection by Defendant and so we're going to
6 separate out this information. Okay. Thank you, so very much.

7 So, Counsel, with those parameters, it's not saying that we
8 will or will not be considered. The Courts' going to defer ruling. So, kind
9 of your whole offer of proving gets preserved and then lets you all argue
10 a little bit more. So, without making it so it's a moot point, since the
11 witness, everybody knows has testified. Go ahead, counsel.

12 MS. LEHMAN: Your Honor, I'd like to move for admission of
13 Exhibit 31, which is a -- under the custodian of records certificate of Mr.
14 Douglas Miles.

15 THE COURT: Proposed 31?

16 MS. HANKS: Do you want to hear objection from me, Your
17 Honor?

18 MS. LEHMAN: Are we missing something?

19 THE CLERK: No, I have 31A, which should be in your binder.
20 I just wanted to make sure, if you're looking for that.

21 THE COURT: I don't know about -- what's 31A?

22 MS. HANKS: That didn't come in, and I think counsel
23 switched to the more -- we had it segregated, and that's when she
24 switched from Exhibit 31 and went to Exhibit 24.

25 THE COURT: Oh.

1 MS. LEHMAN: Yeah.

2 MS. HANKS: So, I don't know if there's an Exhibit 31.

3 THE COURT: Sure, okay. So, just so we're clear for Madam
4 Clerk's sake. When the first inquiry on a letter that was dated October
5 11, 2011, is first inquired upon, it was in proposed Exhibit 31. Bates
6 stamps 625 and 626. And then I believe Plaintiff's counsel, you then
7 have the document in a different proposed exhibit number, where you
8 continued your questioning correct? Where it was segregated out?

9 MS. LEHMAN: Yes, that's correct. And now it's Exhibit 22.

10 THE COURT: And that was Exhibit 22 that was read under
11 51.125. Okay. So just so we have that clear.

12 THE CLERK: Read into the record, but not tendered.

13 MS. LEHMAN: Correct.

14 THE COURT: Correct.

15 THE CLERK: Okay.

16 THE COURT: Okay. So, she had that. Okay, so counsel I
17 heard you offering 31. Defense counsel, do you stipulate or not?

18 MS. HANKS: NO, Your Honor, I have an objection and it's a
19 little bit more long. It's not just quick.

20 THE COURT: Okay.

21 MS. HANKS: Because it's different pages. If you look at the
22 exhibit -- the proposed exhibit, Your Honor. The Bates Stamp 618 to 621
23 is affidavit signed, or purportedly signed by Doug Miles. The problem I
24 have with it is the affidavit itself is hearsay, and it has testimonial
25 paragraphs in it. It goes beyond just simply saying attached is a true and

1 correct copy of such and such records. Coupled with that, then when
2 you actually look at the attachments, you have for instance the
3 attachment 623, that has hearsay within hearsay.

4 So, even if we get aside from the hearsay problems of Mr.
5 Miles' affidavit, go beyond custodian of records, although I don't even
6 think it meets that qualification, because at no time does he say the
7 attached are true and correct copies. He just says it's a copy. So, I think
8 it fails on kind of both fronts. But then if you start going in and actually
9 looking at each of the attachments, you have the Bates stamp page 623,
10 that has hearsay within hearsay.

11 And nowhere in Mr. Miles' affidavit, nor could he, because it
12 would be a hearsay statement, give the exceptions for each of kind of
13 these entries that we see. And this is what I put in my trial brief, Your
14 Honor. There is case law that says, just because a document might meet
15 a business exception rule, if there's statements within the business
16 record, they have to meet their own hearsay exception. And Mr. Miles'
17 affidavit does no such thing.

18 If you go to exhibit -- or excuse me, the Bates stamped
19 document 625 to 626. This is the document that you already ruled
20 couldn't be admitted, but that which is Exhibit 21, it was read into the
21 evidence under the recorded recollection. And if you go to the next
22 attachment, it's Bates stamp 628 to 634.

23 This is the exhibit -- the proposed Exhibit 23, that Mr. Jung
24 was trying to speak about, and counsel couldn't get it admitted because
25 it's Alessi & Koenig, at least on the header of the first two pages. And

1 the subsequent pages I'm not even sure whose records they are.

2 Whether it's the management company or the association's, it's unclear.

3 But just like Mr. Jung couldn't authenticate someone else's
4 business records, certainly Mr. Miles, from Miles Bauer can't
5 authenticate someone else's records.

6 And then, finally, the last pages 636 through 638 are already
7 admitted as Exhibit 24, I think. So, I mean other than exhibit -- the last
8 three pages, if they want to readmit that, obviously, I can't object to that.
9 That's already in. I don't see the reason to have a duplicate exhibit.

10 THE COURT: Okay, counsel for Plaintiff, would you like to
11 respond to those objections?

12 MS. LEHMAN: Yes. So, in -- we're not seeking to admit Mr.
13 Miles' affidavit, only the exhibits attached to it. On the first page of his
14 affidavit, he does state at the bottom that he personally confirmed the
15 information is accurate in the affidavit and in the attachment, by
16 checking the information that it matches Miles Bauer records. And so,
17 we find that this affidavit is sufficient to meet the business records
18 exception.

19 So, the hearsay rule. And we included, I believe in our trial --
20 or Bench memo that we filed this morning that included in business
21 records are records that a business receives and makes -- integrates into
22 its own records.

23 So, the fact that the Alessi & Koenig payoff statement does
24 not have a Miles Bauer header on it doesn't take away from the fact that
25 it is a business record that was relied upon by the Miles Bauer firm in

1 conducting its business and doing HOA lien payoffs. They saved -- they
2 received it, they saved a copy of it, integrate it into their ProLaw records,
3 and relied upon it in preparing the tender letter that was Exhibit 24.

4 THE COURT: Okay, where is that -- what are you basing that
5 on? That last statement? That they integrated into the ProLaw and other
6 records?

7 MS. LEHMAN: If you look at Exhibit --

8 THE COURT: The only thing I see is paragraph 9 on page 3 of
9 4, where it says based on Miles Bauer business record, attached is
10 Exhibit 3 of a copy of a statement of account with Alessi & Koenig,
11 received by Miles Bauer in its own letter, identified above. I don't see
12 anything where it says integrated. So, that's why I was trying to find
13 what you're talking about please.

14 MS. LEHMAN: Yes, in -- it's USB623 is a screenshot of the
15 ProLaw records showing that it was kept there. Your Honor, I'd make an
16 offer of proof, that if I could question Mr. Jung about this ProLaw
17 screenshot, since he already testified he's familiar with ProLaw and
18 saving documents in ProLaw, he could explain where in this record it
19 was saved.

20 THE COURT: One second. You're kind of mixing apples and
21 oranges there. Why don't we parse out before we get too far. Okay.
22 You requested to admit Exhibit 31. That's what the Court has to look at.
23 So, 31 has to stand on its own, or not stand on its own. You requested
24 to have it admitted, based on the affidavit of the custodian of records.
25 So, the Court has to look at that request as it stands right now. The

1 objections raised to that request, and the response you have to those
2 objections, and then make a ruling.

3 The Court can't have you have additional questions of the
4 witness to explain the affidavit of the custodian of records, which you
5 say was self-identifying as an appropriate basis in response to
6 Defendant's objections. That this exhibit should come in, in and of itself
7 under the custodian of records affidavit. That would be something -- I'll
8 just use the term different. That's the most neutral term.

9 So -- I'm hearing -- so to the extent that that's a separate
10 request, I have to deal first with your initial request, which is you asked
11 to admit Proposed Exhibit 31, based on the custodian of records
12 affidavit. And that's why I was asking did you wish to respond to
13 Defendant's objections, that were raised with response to that request?

14 MS. LEHMAN: Yes, in paragraphs 4 and 6, Mr. Miles'
15 affidavit, he describes that these records that were attached to the
16 affidavit were received by his firm and saved in ProLaw. So that they
17 were -- I'm looking at paragraph 6. Says I have personal knowledge of
18 Miles Bauer's procedures for creating ProLaw folders that were made
19 before or near the time of the occurrence of the matters.

20 THE COURT: Uh-huh.

21 MS. LEHMAN: Recorded by persons with knowledge of the
22 information stored there in. From information transmitted by persons
23 with personal knowledge, kept in the course of Miles Bauer's regularly
24 conducted business activities, and is a regular practice of Miles Bauer to
25 make the ProLaw folders to store, organize all of the records for its

1 individual files.

2 And then he talks about the Exhibit 3 to this affidavit, which
3 is the Alessi & Koenig letter on -- in paragraph 9. And he said based on
4 Miles Bauer's business records, a copy of the statement of account from
5 Alessi & Koenig received by Miles Bauer, in response to their request for
6 the letter above, which was the October 11, 2011 letter.

7 THE COURT: I'm sorry, paragraph 9 --

8 MS. LEHMAN: Yes.

9 THE COURT: -- suppose you -- I think you may have missed
10 a few words in paragraph 9, but it says what it says, okay. So, it just
11 says it's a copy of a statement of account from Alessi & Koenig, dated
12 October 21, 2009. Based on Miles Bauer's business records, attached as
13 Exhibit 3 is a copy of a statement of account from Alessi & Koenig, dated
14 October 21, 2011, received by Miles Bauer, in response to a letter
15 identified above.

16 This Court's question, based on the objections raised by
17 Defense counsel, was where in Mr. Miles' affidavit, which you're saying
18 should support all these documents, does it say that this letter is
19 incorporated into ProLaw. I thought that's what you were saying that
20 you needed testimony of the witness to try and establish that. I didn't
21 see that independently in his affidavit. Because that's to address the
22 hearsay within hearsay objection raised by Defense counsel with specific
23 relation to Exhibit 3.

24 MS. LEHMAN: That would be --

25 THE COURT: Of proposed Exhibit 31.

1 MS. LEHMAN: That would be in paragraph 3 of his affidavit.
2 Mr. Miles states that he -- that Miles Bauer creates a separate electronic
3 folder in ProLaw for each of its files. And within that folder Miles Bauer
4 maintains record of communications with its clients and third party,
5 including, but not limited to borrowers and homeowners associations.
6 And that Miles Bauer also creates, and records notes in its ProLaw
7 folders, regarding the status and problems of related files.

8 THE COURT: Okay.

9 MS. LEHMAN: So, in there he's stating that he did -- they do
10 keep a record of correspondence with third parties, which is what the
11 Alessi & Koenig letter is.

12 THE COURT: Okay, well, did you wish to address the other
13 objections raised by Defense counsel, or not?

14 MS. LEHMAN: I'm not recalling what the other objections
15 were.

16 MS. HANKS: Do you want me to go through it all again? I
17 can do it, but Your Honor, I also want to add that like I said earlier, Mr.
18 Miles and Miles Bauer person was never disclosed as a witness in this
19 matter. No custodian of records for Miles Bauer was ever disclosed.

20 THE COURT: They weren't? Okay.

21 MS. HANKS: They were not.

22 THE COURT: That's a different issue. I'm not aware of that
23 one.

24 MS. HANKS: Sorry, I mentioned it earlier, so -- and when I
25 was talking about Mr. Miles.

1 THE COURT: You mentioned it generally when you were
2 stating that --

3 MS. HANKS: Right.

4 THE COURT: -- usually Mr. Miles -- it was in regards to a
5 different --

6 MS. HANKS: I understand.

7 THE COURT: -- objection where you kind of colloquially -- I
8 believe the Court took a general Mr. Miles --

9 MS. HANKS: Sure.

10 THE COURT: -- is here, so I didn't take it as an objection in
11 this particular case.

12 MS. HANKS: Yeah.

13 THE COURT: To this affidavit.

14 MS. HANKS: Yes. Sorry.

15 THE COURT: So, this first question needs to be, which I think
16 Plaintiff's lead counsel is checking right now, about whether or not Miles
17 Bauer has been designated in this case. I mean is that clear? Do you all
18 agree that Miles Bauer was not, and Doug Miles was not designated?

19 MS. HANKS: I saw no designation there. I saw no corporate
20 designee, custodian of records for Miles Bauer, nor Doug Miles. None of
21 those were ever disclosed. The only person disclosed was Rock Jung,
22 individually, care of Wright, Finlay, Zak.

23 MS. LEHMAN: We did disclose this affidavit in -- within the
24 discovery period. And we did include it in our -- all of our disclosures.

25 THE COURT: I believe the objection that's being raised is

1 different than the answer the Court's receiving. I think the objection was
2 to -- that the witness, and the -- if you're asking for a custodian of records
3 affidavit, in lieu of a live witness, then the witness had to have been
4 disclosed. Or the fact you were using custodian of records in lieu of, like
5 what you did on 2/11/19. I think it was 2/11/19. I don't have the screen in
6 front of me.

7 MS. HANKS: With Alessi, right.

8 THE COURT: That was --

9 MS. LEHMAN: Okay.

10 THE COURT: Right. So -- was that --

11 MS. HANKS: Yes, I agree.

12 THE COURT: The Court's not making a ruling, but --

13 MS. HANKS: That is --

14 THE COURT: -- that's what I heard their objection. Your
15 response was different. So, I'm just trying to make sure that --

16 MS. HANKS: And that compounds my original objection that
17 this is very testimonial.

18 THE COURT: Okay, well --

19 MS. HANKS: That this affidavit is more than just saying I
20 pulled records and here are the true and correct copies. Now, we're
21 getting into my client's being deprived of the right to cross examine this
22 witness. So that's -- it kind of compounds that issue.

23 THE COURT: Very good. So --

24 MS. HANKS: And I can --

25 THE COURT: You all -- you all realize at this juncture you

1 have a witness. Albeit he's an associate at your firm.

2 MS. LEHMAN: Correct.

3 THE COURT: Okay. But you've said that he's not available
4 after noon today. So, you all can spend your time on this arguing
5 objections, or you can -- do you have an answer? Was Miles Bauer
6 designated?

7 MS. LEHMAN: I don't believe he was. As Mr. Miles, I don't
8 believe he was designated as a witness.

9 THE COURT: Okay, was there anything presented that a
10 custodian of records in lieu of a live witness with regards to Miles Bauer
11 was ever designated?

12 MS. LEHMAN: I don't recall. But we are not -- just to clarify,
13 we're not asking for admission of his actual affidavit, but just the exhibits
14 attached to it. So, and to the extent that counsel has an issue with the
15 affidavit being testimonial, we're not seeking for those statements to
16 come in, only the exhibits.

17 MS. HANKS: Exhibits can't come in without any testimony to
18 authenticate them, or lay a foundation for them, with the exception of
19 the last two -- three pages, which has already ended up as Exhibit 24.

20 THE COURT: Hearing correctly, I believe Plaintiff's counsel is
21 trying to say as a potential alternative, you're asking for -- well, the first --
22 622 through -- are you asking to reintroduce the exhibits already in? The
23 portion of 31 that's already in or not?

24 MS. LEHMAN: Yes.

25 THE COURT: So, 622 through the end of 631, which -- excuse

1 me, 622 to 638 is what Plaintiff wants admitted and was ruled not to
2 admit 618 to 621, if that addressed Defense's concern. Is that what
3 Plaintiff's counsel is saying?

4 MS. LEHMAN: Yes.

5 THE COURT: Okay. I'm not -- I'm not making a ruling; I'm
6 just trying to --

7 THE COURT: And it doesn't because then you would have no
8 testimony or affidavit authenticating the records. And we have the same
9 problem of these exhibits include records from other entities.

10 THE COURT: Okay. So, since that does not address their
11 concern, the Court needs to look at the totality of seeking to admit
12 Exhibit 31 or any portion thereof, and the objections raised by Defense
13 counsel.

14 So, then I need to go back to the first one. People
15 established one way or another? Is there anything that Plaintiff's counsel
16 offer of proof that Doug Miles, Miles Bauer was designated in any
17 manner, either as the custodian of records, in lieu of live testimony, the
18 designation as custodian of records designated as a witness? Anything?

19 MS. LEHMAN: Other than us disclosing his affidavit in
20 discovery, I'm not aware.

21 THE COURT: So then what basis could that -- could
22 proposed Exhibit 31 come in, in the first place, if there's not an
23 agreement, and the custodian himself, or herself -- in this case it's a
24 himself, is not here in person?

25 MS. LEHMAN: I would just say that opposing counsel has

1 not put on surprise that we were going to intend to use this document.
2 We've had this disclosed in discovery for a very long time. They're
3 familiar with these cases where we have these affidavits and use them in
4 lieu of Mr. Miles' testimony.

5 THE COURT: And did Defense counsel in any manner
6 object?

7 MS. HANKS: Of course, I did in the original pretrial
8 disclosures, in the amended pretrial disclosures, and in the pretrial
9 memo.

10 THE COURT: And what --

11 MS. HANKS: And at the 2.67.

12 THE COURT: Okay. And you know the Court had to ask that
13 question, because if they objected then that means that Court has to take
14 that into consideration. Okay, so they've timely objected. You didn't
15 disclose them. And you know I have to preclude post 31 on that basis
16 alone. Okay, would you like me to go into the analysis of the rest of the
17 alternative basis that they gave for the underlying documents?

18 I mean they're basically, they're right on all of it, based on
19 what's been presented to the Court thus far, okay. For all the reasons
20 that I said in the underlying document from Alessi & Koenig, don't have
21 an affidavit to somehow bolster, you have the same problem that you
22 had when you tried to seek its admission on its own. ProLaw, you've got
23 the same problems and the foundation, since don't have a business
24 record exception, that the hearsay within hearsay.

25 Now, the Court's not ruled on the pages of proposed Exhibit

1 31 that have already been independently admitted and my analysis
2 doesn't go to those. Okay, and the objection didn't go to those. Now, is
3 there any reason you want -- but those pages only wouldn't come in a
4 second time, when they're attached to an affidavit. Is there any reason
5 why you're seeking that?

6 MS. LEHMAN: That's fine that we already have it under
7 Exhibit 24 --

8 THE COURT: Okay.

9 MS. LEHMAN: -- so I don't.

10 THE COURT: So, then the Court needs to sustain various
11 objections. In particular, first if the timely objection to the entirety of
12 the document, for reasons stated. Not disclose the witness, objected
13 throughout. You know, show me that that's not accurate. And then
14 independent of that, the underlying exhibits, since you asked about
15 presenting potentially the underlying exhibits.

16 All the analysis the Court already gave you with regard to the
17 Alessi & Koenig records, which was proposed Exhibit 3 of proposed --
18 Exhibit 3 of proposed Exhibit 31, the -- I'm sustaining the objections to
19 Exhibit 1 of 31 for the reasons stated. The hearsay within hearsay, etc.,
20 no exception business record rule. So, we'll have the hearsay within
21 hearsay. Although, it's now proposed -- Exhibit 2 to proposed Exhibit 31,
22 as noted already was read in under NRS51.125.

23 So, the Court's analysis is not inconsistent with how the
24 Court ruled yesterday. And I told you that was 51.125. So, since you're
25 now asking it to be independently admitted, I have to take into account

1 51.125, even if it wasn't 51.125, because of the other reasons, objections
2 stated, it would not come in independently. However, I am noting that
3 my ruling today is no way inconsistent with the fact that you already
4 were allowed to read it in yesterday under 51.125. Okay.

5 MS. LEHMAN: Okay.

6 THE COURT: Feel free to proceed. Was there anything else?

7 MS. LEHMAN: Pass the witness.

8 THE COURT: Okay, let me -- okay, so in light of that, Defense
9 counsel, do you have any cross examination under your reservation of
10 objection?

11 MS. HANKS: No.

12 THE COURT: Okay. Now, in light of the fact that the only
13 questions asked were about proposed 31, do you still wish to maintain
14 your objection if this gets circled out and have the Court rule on that, or
15 not? The Court doesn't have a position one way or another, I just need
16 to know if I'm ruling on something.

17 MS. HANKS: I think you already ruled on it in terms of
18 sustaining it coming in. So, if there were any -- I didn't ask any questions
19 of Mr. Jung, so --

20 THE COURT: Well, no, they still asked questions. Okay.

21 MS. HANKS: I'm sorry. I guess I'm confused as to what
22 you're asking.

23 THE COURT: Okay, sure. The section starting with after --

24 MS. HANKS: The break.

25 THE COURT: -- the break.

1 MS. HANKS: Yes.

2 THE COURT: To present moment at a quarter, 18 minutes to
3 12:00, okay. That section was -- well, not sealed or anything, but it hasn't
4 been on the court recorder, and you all agreed that to have it noted that
5 because Mr. Jung was going to be -- understood was going to be taking
6 on a flight and would not be available the rest of the trial, that -- to allow
7 pretty much kind of like offer of proof.

8 Ask all the questions that you plan to do. Those would be
9 sectioned out. But the Court has not yet ruled whether those questions
10 could have been asked, but then allow them to be asked, if Defense
11 counsel had wished to do cross examination to the questions that were
12 asked. And then the Court, after the lunch break, so that all parties
13 would have an opportunity, if they wanted to, during the lunch break, to
14 research on your own. I'm not saying you should, could, or would want
15 to. But then make its final ruling about whether or not even Mr. Jung
16 could have been asked those questions.

17 Now, the Court was asking Defense counsel, since you heard
18 the questions, you've heard the Court's ruling within -- contained within
19 the nature of those questions was only trying to get in proposed Exhibit
20 31. Do you still have an objection to Mr. Jung being recalled, so that he
21 could be asked those questions --

22 MS. HANKS: I see.

23 THE COURT: -- or do your question -- or does your objection
24 only result as to the objection you raise to the questions that are asked of
25 Mr. Jung, i.e., relating to proposed 31?

1 MS. HANKS: I will still preserve it, so that you can decide
2 whether it was even appropriate to allow him to be recalled, but
3 understanding that even if that happens, then the objection was
4 sustained. Yes, I'll just preserve that.

5 THE COURT: Counsel for Plaintiff -- I have another counsel
6 for Plaintiff now. Generally, one witness, one horse, one rider. However,
7 the Court is cognizant that nobody has objected, so the Court's fine if
8 you wish to speak on this issue, since I haven't heard an objection from
9 Defense counsel, but realize that they're going to get -- that they can
10 have both counsel speak on as well, okay.

11 MR. NITZ: Thank you, Your Honor. Based on -- had you
12 admitted Exhibit 31, are the exhibits attached to Exhibit 31, Ms. Lehman
13 had additional questions about Mr. Jung that she would have asked.
14 And we would like to make an offer of proof of what evidence would
15 have been admitted, had you permitted the admission of the exhibits
16 attached to 31.

17 THE COURT: She passed the witness now a second time.
18 Now I'm hearing you say that after I had Defense counsel say that she
19 didn't have any questions as a result of that.

20 MS. HANKS: I'm going to have to object again, now.

21 THE COURT: Pardon?

22 MS. HANKS: I'm going to have to object again, to reopen
23 after passing --

24 MR. NITZ: This is a new matter. This is to make an offer of
25 proof related to the Exhibit 31.

1 THE COURT: Well, the Court's going to have to decline the
2 second one, because the Court finds it -- well, the Court hadn't yet ruled
3 on the first one, trying to give consideration if the witness was here, and
4 trying to deal with all parties. And that maybe someone may have
5 inadvertently passed before asking some questions on a particular
6 document. But the fact that the Court gave a procedure in which
7 anything could be presented during that timeframe, and then reserved
8 out ruling on it, the Court gave a remedy.

9 When a second passing -- what I call a second passing
10 second time that the witness is saying it's ended. That -- and I have then
11 Defense counsel saying a second time as a result of that, they do not
12 have any further questions, and then the Court was moving on, because
13 it was determining whether it had to deal on the issue about whether or
14 not the witness could have been recalled in the first place.

15 Then to raise yet to reopen direct on this particular witness a
16 second time, the Court finds would really be way too unfair, too
17 prejudicial to Defendant, and that Court had already set a procedure that
18 could have been followed. And if there had been additional questions
19 from the Court denying the admission of proposed 31, at that juncture,
20 before the witness was passed, so that the question were ending, could
21 have said, well, I would have had these additional questions, and the
22 offer of proof could have been presented at that juncture, within that
23 same remedy period.

24 That was not asked of the Court, and so by passing it a
25 second time, the Court really has to exercise the rules here, and say,

1 look, give you one shot because it could be, you know, excusable lack --
2 inadvertent, at least to evaluate it for offer of proof purposes, and then to
3 get a second one over the objection of Defense counsel, Court would
4 find it just too much, and not supported by any of the case law, or
5 anything even that was presented to me. And so that would not be
6 appropriate.

7 So, that is denied because of the objection of Defense
8 counsel, and because of the procedure that the Court had already set up,
9 to allow that all will be taken care of in one fell swoop. So, at this
10 juncture, is this witness excused in Plaintiff's case in chief for all
11 purposes, or subject to recall, in either Defense case in chief, rebuttal, et
12 cetera? Can the parties please let the Court know what the status of this
13 witness, so that the witness can know as well?

14 MS. HANKS: Your Honor, I did not subpoena the witness, so
15 I have no intention of calling him on my rebuttal, or case in chief.

16 THE COURT: Okay. So, the witness is excused at least for
17 Plaintiff's case in chief.

18 MS. HANKS: Defendant --

19 THE COURT: Plaintiff's case in chief?

20 MS. HANKS: Yes.

21 THE COURT: I'm using the term Plaintiff.

22 MS. HANKS: I understand, US Bank.

23 THE COURT: US Bank's case in chief, excuse me. And I
24 understand SFR is not intending to recall this witness in their case in
25 chief. So now you need to go back for rebuttal case. Is this witness

1 being reserved to be recalled in rebuttal case?

2 MS. LEHMAN: Yes, Your Honor.

3 THE COURT: Okay. And I was going to quickly grab -- and
4 just so that we're clear, because this case both has Plaintiff, Defendant,
5 counter/cross-claimant and counter/cross-defendant. So, I need to know
6 for what purposes is this witness being reserved for? Because I've got
7 two sets of brackets and captions, right? So, US Bank is Plaintiff's case
8 in chief, this witness is exhausted for that purpose. So, he'll be released.
9 Defendant's in initial case, you said you did not subpoena this witness.
10 He's not going to be called in your case in chief, and Defendant's case in
11 chief, correct?

12 MS. HANKS: Correct.

13 THE COURT: Okay. And then we have a cross-counterclaim
14 and counter-defendant claims. Now are you all doing this as -- since no
15 one has told the Court in general -- in absence of people telling the
16 Court, usually -- well, why don't y'all tell me right now what you're
17 intending with your witnesses. Are witnesses going to be utilized four
18 times over, or what's happening with regards to witnesses, since y'all
19 say this was supposed to be a two and a half day trial.

20 MS. HANKS: No, yeah, there's no intention -- I don't think we
21 had an agreement, but we aren't calling any witnesses, so there's no --
22 there was no need to discuss whether we could go outside --

23 THE COURT: Wait a minute, excuse me. In counter/cross-
24 claimant's case in chief.

25 MS. HANKS: Correct.

1 THE COURT: I'm not putting you on the spot.

2 MS. HANKS: I understand.

3 THE COURT: I'm just trying to get a clear understanding
4 because for like this witness, I need to know is he only in the rebuttal on
5 Plaintiff's case in chief? Or is he also in the counterclaims, in counter
6 and cross defendant's potential case in chief?

7 MS. HANKS: He is not in SFR's case in chief, or SFR's
8 rebuttal.

9 THE COURT: Okay.

10 MS. HANKS: To the extent there was any --

11 THE COURT: Okay, are you -- did you say you were not
12 intending to call any witnesses at all in your counter-cross?

13 MS. HANKS: And I don't -- yeah, I really have no intention of
14 calling any witnesses in this case, even for our case in chief, or rebuttal.
15 At least, as it stands now. And so, Mr. Jung is not included in those for
16 sure.

17 THE COURT: Okay, well, the rules are such that if you don't
18 call anyone in your --

19 MS. HANKS: Case in chief.

20 THE COURT: Then --

21 MS. HANKS: There's no rebuttal.

22 THE COURT: There's no -- there's no counter -- I've got to be
23 clear about -- no rebuttal from your end?

24 MS. HANKS: Correct.

25 THE COURT: And then is anyone arguing if cross -- counter-

1 cross claimants don't call anyone in their case in chief, that counter-cross
2 defendants are still intending to assert to they have a right to call
3 witnesses in their case in chief? And if so, is it going to include this
4 witness? I just need to know the rules here folks. Is there an agreement?
5 Because I did not see it in your joint pretrial memorandum, so --

6 MS. HANKS: Yeah, we did not have an agreement as to
7 witness. You're referring to in some of these Bench trials, if both sides
8 were intending to call, let's say David Alessi, you call him once, and we
9 both do everything, and -- yeah, we did not have any agreement with
10 that.

11 THE COURT: That generally happens, but I did not see that
12 as an agreement in this case.

13 MS. HANKS: That would be cc.

14 THE COURT: So that's what the Court's trying to get a point
15 of clarification. So, the reason why the Court may need to know that is
16 for multiple reasons. I'm sure you can appreciate one is -- is his
17 testimony from right now, is it only in Plaintiff's case, so that if you wish
18 to utilize it in any manner in the cross and counterclaims, he has to be
19 recalled. Or is there some agreement that his testimony is taken into
20 account for those other purposes? Same thing with exhibits, folks.

21 MS. HANKS: Okay.

22 THE COURT: So, it sounds to me that I need to know the
23 answer to this, right? This is something presumably you were supposed
24 to discuss at your 2.67.

25 MS. HANKS: Yeah, we didn't have that discussion, Your

1 Honor. Mainly because I think, unlike other cases, there was no overlap
2 in our witnesses.

3 THE COURT: Okay.

4 MS. HANKS: That's usually when I -- it only comes up when
5 there tends to be repetitive witnesses, or both sides are going to use
6 both witnesses. But I don't -- that's why I can surmise it didn't come up,
7 because --

8 THE COURT: We have two choices at this juncture. One we
9 can break for lunch, and since Mr. Jung happens to be an employee of
10 the Wright, Finley, Zac firm, presumably, if you were planning on
11 recalling him, you're going to make sure he's here. Or two, you can
12 give me the answer right now, and then we'll break for lunch in just a
13 few moments.

14 So, he's still on the stand, so that he has an understanding
15 when and if he needs to come back at all. So, I've got a clear
16 understanding from Defendant counter-claimant. You're not intending
17 to call Mr. Jung --

18 MS. LEHMAN: Correct.

19 THE COURT: -- either, so --

20 MS. LEHMAN: Correct.

21 THE COURT: -- we know that answer. So, now, I need an
22 answer for Plaintiff's rebuttal case, as well as in the role of counter-cross
23 defendants.

24 MS. LEHMAN: Your Honor, we would plan to call Mr. -- Mr.
25 Jung in our rebuttal case, and we would ensure that he's here, if we

1 need him to be. If -- if we end up doing a rebuttal case. We're not sure
2 right now.

3 THE COURT: Okay, and how about in the role of counter-
4 cross defendants?

5 MS. LEHMAN: No.

6 THE COURT: No. So, he's excused for that role?

7 MS. LEHMAN: Yes.

8 THE COURT: Okay. So, Mr. Jung, you understand what you
9 were excused and not excused for. It appears that the only thing that
10 they're reserving -- anybody is reserving their right is to recall you in the
11 case of Plaintiff and Defendant US Bank vs. SFR in the rebuttal case.

12 THE WITNESS: I understand.

13 THE COURT: So, do you understand you are not released.
14 And if you're somewhere else, you need to be back here. We have trial.

15 THE WITNESS: Okay.

16 THE COURT: Okay. So, with that caveat, have a nice day.

17 THE WITNESS: Thank you, you too.

18 THE COURT: You need to be back here if we have trial.

19 THE WITNESS: Okay.

20 THE COURT: Okay. So, with that caveat, have a nice day.

21 THE WITNESS: Thank you. You, too.

22 THE COURT: Thank you. Okay. So, we're going to break for
23 lunch in just a moment, but what would be very helpful to this Court that
24 if you are intending to do this case for the Court to utilize exhibits,
25 witnesses, et cetera, for both the -- I'm calling the claims, and the

1 counter/crossclaims, that you let the Court know when you immediately
2 come back from the lunch break, right?

3 MS. HANKS: Okay.

4 THE COURT: So that we have a clear understanding whether
5 you're treating this kind of in two different methods, et cetera, right?

6 MS. HANKS: Okay. Can we also get an idea from opposing
7 counsel what the rest of the afternoon looks like? I think they wanted to
8 call SFR, so I need to let my client know what time he needs to be here.

9 THE COURT: Well, we'll be breaking for lunch in just a
10 moment.

11 MS. HANKS: Right.

12 THE COURT: So, we'll be breaking from noon to 1:20.

13 MS. HANKS: Okay.

14 THE COURT: So, we'll be commencing again at 1:20. So I
15 don't know who the witness would be at 1:20, but that gives you a ball
16 park on time.

17 MR. NITZ: I don't expect to call Mr. Hardin today. If the
18 Court is continuing until tomorrow morning, I don't know what time you
19 would --

20 THE COURT: Sure.

21 MR. NITZ: -- likely start.

22 THE COURT: I believe we said 11:00. Let me real quick -- I
23 think we said 10:30 or 11. Let me real quickly check. I know we tried to
24 minimize our matters for tomorrow so we could give you as much trial
25 time as possible. Let me real quickly get in the system. Well, who's this

1 afternoon then?

2 MR. NITZ: David Alessi.

3 THE COURT: Okay.

4 MR. NITZ: And we have another witness, as well.

5 THE COURT: Okay.

6 MR. NITZ: If we still have time, Your Honor, then we would
7 continue our -- we would also call Mr. Harrison Whittaker, the client
8 representative, if we have time today. Otherwise, we had planned to call
9 him tomorrow. If the Court advises what time we would start --

10 THE COURT: Sure.

11 MR. NITZ: -- then that would be the time for Mr. Hardin to
12 appear tomorrow.

13 THE COURT: Oh, okay. You know what? Our 10:00 just got
14 taken off, because we were able to move that. Sorry. Well, the good
15 news is, I don't have -- let me refresh. Okay. Let me look into these.
16 Good. We are able to move my longer matters from tomorrow.
17 Realistically, I've got three matters on for tomorrow. Two at 9:00, one at
18 9:30. And the one at 9:30 is a motion for good faith settlement. So,
19 realistically, it should be 9:45. If you want to hedge your bets and say
20 10:00 --

21 MS. LEHMAN: Let's do that.

22 THE COURT: -- I'm okay with that. I would say somewhere
23 between 9:45 and 10:00, so pick your preference. What time do you
24 want to start?

25 MR. NITZ: Ten.

1 MS. HANKS: I would like to do 10 a.m..

2 THE COURT: 10? Okay.

3 MS. HANKS: Yeah.

4 THE COURT: So, let's say 10 a.m. we'll start trial tomorrow,
5 okay? Thank you so much.

6 MS. HANKS: And just so that -- we don't have to take care of
7 it now, Your Honor, but we'll have an objection to Mr. Whittaker, but
8 we'll handle that when it gets there.

9 THE COURT: Well, the Court will address whatever the Court
10 is presented at the appropriate time. Okay. Wish you all a nice lunch.
11 Come back at 1:20. Thank you so very much.

12 MR. NITZ: Thank you, Your Honor.

13 THE MARSHALL: Court is in recess.

14 THE COURT: Yeah, we do need you to exit the courtroom as
15 you know so that we ensure that everyone gets their mandated lunch.
16 Thanks so much.

17 [Recess at 11:58 a.m., recommencing at 1:18 p.m.]

18 THE COURT: Okay. On the record. Back from the lunch
19 break. So, first thing is the Court needed to make a ruling. As you know,
20 I gave you all the opportunity during the lunch break, if anyone needed
21 to look into the matter with regard to the recalling, i.e., Mr. Rock Jung
22 was never even physically off the stand, but the additional inquiry, which
23 ended up being inquiry into proposed Exhibit 31 and the Court's ruling
24 thereon on whether or not that should or should not have taken place.
25 Does anyone wish any further argument on that or do you want to just

1 hear the Court's ruling?

2 MS. HANKS: I have no further argument, Your Honor.

3 MS. LEHMAN: Nothing further.

4 THE COURT: Okay. Well, the Court's ruling is that the Court
5 appropriately let Mr. Jung stay on the stand with that limited inquiry for
6 several different reasons. One, while he was excused, he physically
7 never had actually left the bench and I understand why, because that
8 was because Defense counsel hadn't yet determined whether or not they
9 were going to ask cross-examination questions. So, you didn't have an
10 issue if somebody had left and had to be recalled, so from an efficiency
11 standpoint, it made more sense to have that taken care of, since he also
12 could have been asked questions similar to that.

13 I'm not saying that you waived your redirect. I'm not in any
14 way -- I mean, not saying that you waved rebuttal, since he could have
15 easily been called in rebuttal, those inquiries -- I'm not say he will or will
16 not be called in rebuttal, but similar inquiries could be made later on, so
17 there really isn't a prejudice substantively.

18 Plus, in the trial brief filed today, it clearly was indicating that
19 there was going to be inquiries of Mr. Young, including Exhibit 31, so the
20 Court looks at it really as excusable neglect, inadvertent error that
21 counsel, before finishing the areas of inquiry that it was intending, had
22 said that she had excused Mr. Jung.

23 In addition, because this area was very, very limited on a
24 proposed exhibit, so all parties would have known that that exhibit
25 would have been inquired upon, even in addition to today's bench

1 memorandum in that area. And also, if I'm looking at it in 2020
2 hindsight, because of the Court's eventual rulings and if you look at it
3 with 2020 glasses -- or you say Monday morning quarterback these days.
4 I guess Tuesdays and Wednesdays are about the only days there's not
5 football, which is too bad. It would be nice if it was on Today and
6 Wednesday. That's a non sequitur.

7 But with a Monday morning quarterback-type concept or
8 2020 hindsight and concept or whatever cliché people would like to
9 utilize, there would be no harm or prejudice to Defendants, because after
10 the areas of inquiry were inquired upon, the exhibit was not admitted
11 anyway and so there's no impact with regards to this case, other than
12 the additional few moments and since there wasn't another witness that
13 was going to be called at that juncture anyway, the Court doesn't see
14 even from a time standpoint that it presented any prejudice and so the
15 Court is affirming the fact that it allowed Mr. Jung to remain on the stand
16 for that additional redirect.

17 There's really nothing for the Court to consider from his
18 testimony, other than the verbal testimony, but not -- the Court is in no
19 way changing its ruling with regards to proposed 31. It is so ordered.
20 So now, I understand that you're waiting for another witness to arrive
21 and before that witness arrives, I understand that, surprise, there's going
22 to be some argument that the parties may wish to engage in. Is that
23 correct?

24 MS. HANKS: Yes, Your Honor.

25 THE COURT: Feel free.

1 MS. HANKS: Maybe --

2 THE COURT: So, let's -- let me -- let's do it this way.

3 MS. HANKS: Yeah.

4 THE COURT: Let's --

5 MS. HANKS: Identify --

6 THE COURT: -- find out who that witness is. So, what it
7 would be is Plaintiff's counsel, since it's still your case-in-chief, would
8 you like to call your next witness?

9 MS. LEHMAN: Yes. The Plaintiff would call Teralyn
10 Thompson, who is also known as Teralyn Lewis, who we named as the
11 custodian of records for the Nevada Department of Real Estate, I believe
12 it is -- or Nevada Department of Business and Industry Real Estate
13 Division, also known as NRED.

14 THE COURT: Okay. And would that happen to be the
15 individual who just walked into the courtroom by chance?

16 MS. THOMPSON: I didn't hear what you said. So -- sorry.

17 MR. NITZ: This is Teralyn Lewis.

18 THE COURT: Oh, okay. I just had asked to call their next
19 witness and so since you talked in halfway through that name, I wasn't
20 sure, since -- okay. So that's the next witness.

21 So, Defense counsel?

22 MS. HANKS: Yes.

23 THE COURT: So before going into any speaking analysis, I
24 just need to know -- potentially the witness may or may not remain in the
25 courtroom, so give me two seconds, please. Oh, did you have an

1 objection or is it amenable that she's going to be called to the stand?

2 MS. HANKS: I do have an objection. I don't think it matters
3 if she stays, but let's just -- I'd like to keep all the witnesses out --

4 THE COURT: Okay.

5 MS. HANKS: -- when we do this type of stuff, so --

6 THE COURT: Okay.

7 MS. HANKS: So, we'll just keep with that.

8 THE COURT: So, let me just find out. Nobody had invoked
9 the exclusionary rule at any juncture yet in this case, and it really didn't
10 apply in any event, because the only person who's been sitting so far
11 through the case is a corporate representative, but is anybody invoking
12 the exclusionary rule?

13 MS. HANKS: I thought we did that yesterday, but yes, I
14 would invoke it now.

15 THE COURT: I don't -- well --

16 MS. HANKS: It's fine, but yes.

17 MS. LEHMAN: I also recall --

18 THE COURT: Okay.

19 MS. LEHMAN: -- I think we did yesterday as well.

20 THE COURT: I think it was a nonissue, because we really
21 didn't have anybody --

22 MS. HANKS: Right.

23 THE COURT: Okay. So, since the exclusionary rule is
24 invoked, let's just -- and I understand I'm about to hear some oral
25 argument regarding the potential testimony, so are the parties

1 requesting that the potential witness remain in the courtroom or be
2 asked to either enjoy our anteroom or our hallway?

3 MS. HANKS: I'd ask if she could enjoy the hallway, Your
4 Honor.

5 THE COURT: Well, the anteroom is a --

6 MS. HANKS: Whatever, yeah.

7 THE COURT: Okay.

8 MS. HANKS: Out of the courtroom, whatever you call it.

9 THE COURT: Okay. Is there -- Plaintiff's counsel, do you
10 agree with that?

11 MS. LEHMAN: I agree

12 THE COURT: Okay. So, either there's seats and a nice -- is
13 our anteroom open, Marshal?

14 THE MARSHAL: I'll open it.

15 THE COURT: Either we can open the anteroom for you, if
16 you want it there or if you want the hallway. Whatever meets your
17 needs, okay?

18 MR. NITZ: Sounds good. Thank you, Your Honor.

19 THE COURT: Whichever you want. Thank you so very much.
20 We'll let you know as soon as the argument is completed. Okay. So
21 now we know the individual is physically here, but we have an objection,
22 so counsel, would you like to set forth what your objection is and then
23 give me the reference of what I'm going to be looking at in support of
24 your objection?

25 MS. HANKS: Yes. So, Your Honor, there is no disclosure of

1 either a custodian of records for NRED, a corporate designee for NRED or
2 Ms. Thompson's name.

3 THE COURT: Oh.

4 MS. HANKS: So -- and then if you -- and in the course of
5 discovery. So, at no time was any witness in any way, shape or form
6 ever identified for NRED in the course of discovery. So, no 16.1
7 disclosure by U.S. Bank ever lists this entity, let alone Ms. Thompson.

8 THE COURT: Okay.

9 MS. HANKS: There's also no documents from NRED ever
10 disclosed in this case, so I'm not really sure how you would have it meet
11 a COR. That being said, when U.S. Bank did their pretrial disclosures on
12 July 13th, 2018, there was also no disclosure of any witness or entity
13 related to NRED. It didn't appear -- the first time this generic disclosure
14 appeared was in the amended pretrial disclosures by U.S. Bank and in
15 that amended pretrial disclosure, they listed --

16 THE COURT: Date, please.

17 MS. HANKS: Yes. Sorry. I have the objection, but I don't
18 have the date. I'm getting the date of theirs. Are we talking 2018 or
19 2019?

20 MS. HANKS: This would be 2019, so March 15th, 2019.

21 THE COURT: If you don't mind, give me one moment to --

22 MS. HANKS: The first time we see the -- we have a custodian
23 of records, corporate designee or Teralyn Thompson for State -- Nevada
24 Department of Business and Industry, so that's the first time it appears is
25 in an amended pretrial disclosure on March 15th. I objected to that

1 disclosure on March 29th, 2019, in my objections to the amended pretrial
2 disclosures.

3 THE COURT: One second, counsel. You said there was a --
4 I'm looking for the pretrial disclosures that were --

5 MS. HANKS: Originally done in July 13th, 2018. There --

6 THE COURT: You mentioned there was -- I don't see pretrial
7 disclosures filed by U.S. Bank. That's what I'm really looking at.

8 MS. HANKS: Oh. They might not have filed them, Your
9 Honor. They might just be -- but we were served with them, so we --
10 they might not have been filed. We were served with them, and then we
11 objected to them, but you're right. They might not be filed. I just have
12 them saved in our system as discovery.

13 THE COURT: Mr. Alessi just walked in. Are you asking that
14 he be excluded as well?

15 MS. HANKS: Yes, please.

16 THE COURT: The exclusionary rule is in effect, sir, so we're
17 going to ask you to enjoy the hallway, anteroom or somewhere else, if
18 you don't mind. Thank you so much.

19 MR. ALESSI: You're welcome.

20 THE COURT: Okay. So, we also now have two witnesses
21 here at the same time. Okay. But that's a different issue. So, the
22 objection was on 3/29/19.

23 MS. HANKS: Right.

24 THE COURT: But you did get served. Pretrial disclosures
25 were not filed? I didn't see any for U.S. Bank, but okay.

1 MS. LEHMAN: We served them, E-served them on 3/15/19.

2 THE COURT: Okay. So, they acknowledge that they're
3 served.

4 MS. HANKS: Yeah, it --

5 THE COURT: Do you all agree that that's the first date that
6 this name appears?

7 MS. LEHMAN: Yes.

8 THE COURT: Okay. So that's after discovery is closed. Is it
9 pursuant to any agreement or anything, Defense counsel? I'm letting
10 you quick finish. I'm just trying --

11 MS. HANKS: No. There's no --

12 THE COURT: -- cut through some of the quick stuff.

13 MS. HANKS: No, there's no agreement. And then consistent
14 with the trial subpoena that we talked about yesterday with Universal, I
15 didn't get any notice of a trial subpoena to NRED or Ms. Thompson in
16 this case. The first I heard of -- and I don't know if you'll recall. At
17 neither the pretrial conference or calendar call -- and I wasn't at calendar
18 call, but I was at the pretrial conference. I don't recall them indicating
19 that NRED was going to be called.

20 So, when I emailed closer to trial to see what the actual
21 witness line-up was going to be in terms of order, so I could determine
22 my prep, that's when I learned that someone by the name of Ms.
23 Thompson with NRED was going to be called. And then they attached
24 two pdf documents to the email and claimed that --

25 THE COURT: Sorry. What date?

1 MS. HANKS: -- I guess when they --

2 THE COURT: What --

3 MS. HANKS: If I could turn on my phone, I could pro --

4 THE COURT: Okay.

5 MS. HANKS: -- I could look that up for you.

6 THE COURT: So, you're saying after the calendar call?

7 MS. HANKS: Oh, yes. This is after -- this is this week. This is
8 -- I think I emailed them. We started Tuesday. I was emailing them on
9 Monday asking what's your witness lineup. And then when they said
10 they were going to call someone from NRED, Ms. Thompson, I actually
11 asked who's Ms. Thompson --

12 THE COURT: Okay.

13 MS. HANKS: -- because I didn't even recall seeing the name
14 on the amended pretrial disclosures. They also attached -- they said they
15 had subpoenaed them -- her for trial, which I wasn't aware of, until they
16 said that, because I didn't get notice of the trial subpoena. And then they
17 attached two documents to the email.

18 So evidently, I guess they did just -- I'm not sure. Like I said,
19 I haven't seen the trial subpoena, but they indicated that in connection
20 with their trial subpoena, they got documents from NRED. So, I don't
21 know if it was a subpoena duces tecum --

22 THE COURT: Okay.

23 MS. HANKS: -- but I certainly did not get notice of that,
24 either.

25 THE COURT: So, is what you're saying there's nothing that is

1 in the joint pretrial memorandum or pretrial disclosures that in -- or
2 anything that was disclosed during discovery that relates to any records
3 of NRED?

4 MS. HANKS: Correct.

5 THE COURT: And when we're using NRED, everyone
6 understands Nevada Real Estate Division, right?

7 MS. HANKS: Yes.

8 MS. LEHMAN: Yes.

9 MS. HANKS: That is correct, Your Honor.

10 THE COURT: Or I should say it correctly. Nevada
11 Department of Business and Industry Real Estate Division, so for Madam
12 Court Reporter and Madam Clerk. So, when we're using the initials
13 NRED, N-R-E-D, that's what we are referring to. Thank you. Please
14 proceed.

15 MS. LEHMAN: Your Honor, so I was present at calendar call,
16 and I do recall stating that we would be calling Teralyn Thompson from
17 NRED as a witness during this trial. Mr. Martinez, who's also at Defense
18 counsel table was there and he -- it's my understanding he heard me
19 when I said that I was going to be calling a witness from NRED. It is true
20 that the first time that we disclosed that witness was in our amended
21 pretrial disclosures, however, under the rule, pretrial disclosures fully
22 contemplate some disclosure after the close of discovery.

23 The parties are on a continuing obligation to update their
24 disclosures as the -- that information becomes available. We became
25 aware that NRED may have some records that would be pertinent to this

1 case and it -- the other side has been on full notice that we intended to
2 you know, look at the -- we allege that there are defects in the sale --

3 THE COURT: Okay.

4 MS. LEHMAN: -- and that there was an obligation to report
5 to NRED and that they may have information on this case.

6 THE COURT: Okay. So, let's circle back. You have Ms.
7 Thompson as a fact witness, custodian of record. What is her role that
8 you say she's being called today?

9 MS. LEHMAN: Custodian of record of NRED records.

10 THE COURT: Okay. Were the underlying NRED records ever
11 disclosed in discovery?

12 MS. LEHMAN: They were not, because we subpoenaed them
13 from her for the purposes of trial, and she provided them to us on
14 Monday --

15 THE COURT: Whoa. Whoa. Whoa.

16 MS. LEHMAN: -- and we provided them to opposing counsel
17 the same day.

18 THE COURT: On April 15th, meaning Monday? This
19 Monday?

20 MS. LEHMAN: Yes.

21 THE COURT: Okay. Are these records dated April 2019 or
22 are they earlier than April 2019?

23 MS. LEHMAN: They are earlier records from April -- before
24 April 2019.

25 THE COURT: Approximately what years do these records

1 reflect?

2 MS. LEHMAN: They reflect the fiscal year 2012 and fiscal
3 year 2013.

4 THE COURT: So, they were readily available, if anyone chose
5 to subpoena them at any point since this litigation commenced, correct?

6 MS. LEHMAN: Correct.

7 THE COURT: Okay. What I'm trying to get an understanding,
8 just so everyone understands, is unlike hypothetically ongoing medical
9 records in a different type of case, where someone maybe going to
10 ongoing treatment and they only went to the doctor the day before.
11 That's why I'm trying to get a distinction. Here these records were
12 complete -- readily available 2012, 2013. They weren't under seal,
13 protected by something, et cetera. Is that correct?

14 MS. LEHMAN: That is correct. We just were not aware that
15 the information contained in those records would be pertinent to this
16 case, so we didn't have a reason to -- before this time, to seek them out.

17 THE COURT: Were the NRED -- the fact that this went
18 through NRED hidden by anybody?

19 MS. LEHMAN: No. No. This -- like NRED is under an
20 obligation to collect certain data about HOA foreclosure sales and so we
21 weren't aware that there was collected by NRED that could be pertinent
22 to this particular case. We knew that in general, they collected this type
23 of data. We didn't know that it was particular, that there was --

24 THE COURT: Okay.

25 MS. LEHMAN: -- data particular to this case.

1 THE COURT: Well, what I'm trying to get an understanding
2 of whether it was hidden or just readily available and you --

3 MS. LEHMAN: This is --

4 THE COURT: -- chose not to pursue it. That's the distinction
5 the Court's --

6 MS. LEHMAN: This is information that if you -- if we had not
7 subpoenaed her for trial, it's not something that we could have gathered
8 without a subpoena or a public records request to her.

9 THE COURT: But you could have done it in 2016 or 2017,
10 2018, if you wanted to, correct?

11 MS. LEHMAN: If we were aware that this data, this particular
12 data that is pertinent to this case was collected, but we were not aware.

13 THE COURT: This particular house went through an NRED
14 mediation?

15 MS. HANKS: I don't know.

16 MS. LEHMAN: It doesn't involve an NRED mediation. It
17 involves data that the -- that NRED collects about HOA foreclosure sales.

18 THE COURT: Okay. But readily available, right?

19 MS. LEHMAN: Not without a public records request, so we
20 weren't able to ascertain that this had -- we had -- that this information
21 pertained to this case.

22 THE COURT: What I just meant -- sorry. My question
23 actually was a little bit poor or maybe I was in the middle of it and didn't
24 get to finish it, but when I used the term readily available, I was going to
25 say readily available, if someone chose to subpoena or seek it out. It

1 wasn't as if all of a sudden NRED published something after the
2 discovery cutoff, so therefore, no one would have any knowledge that
3 this information exists, meaning -- that's the distinction the Court's trying
4 to get.

5 Is this new information or is this information that could have
6 been obtained 2016, 2017, 2018 before the discovery cutoff, if it had been
7 properly pursued through subpoena, public information requests or
8 something like that?

9 MS. LEHMAN: Yes.

10 THE COURT: Then how possibly can it come into this case?

11 MS. LEHMAN: We were not aware that this particular
12 information was pertinent to our case until the time that we made our
13 pretrial disclosures.

14 THE COURT: Okay. Counsel for Defense, you're getting the
15 last word and then the Court is ruling.

16 MS. HANKS: Your Honor, they could have done the
17 discovery. And what it appears -- what I hear from counsel's admission,
18 they're conducting discovery the week before trial and not even giving
19 me notice of it.

20 So, they literally issued a subpoena duces tecum on an entity
21 asking for particular records in violation of the scheduling order and then
22 now want to use records that they've never disclosed in this case. I have
23 no idea what they think is pertinent. And they could have done the
24 discovery.

25 THE COURT: Okay.

1 MS. HANKS: I mean, this sale was in July of 2012. They filed
2 their complaint in 2016. They have given you no explanation as to why
3 they didn't do this discovery before or any explanation as to why they
4 think they can violate a scheduling order and conduct discovery a week
5 before trial and then ambush me with it on Monday before trial.

6 THE COURT: Hold on. I am looking at something. Wait a
7 second. Counsel for Plaintiff, do you know if this case went through
8 NRED mediation or maybe you filed something in this case about it
9 going through NRED mediation?

10 MS. LEHMAN: Personally, I don't have knowledge of that.

11 THE COURT: Your law firm?

12 MS. LEHMAN: Of our law firm? It's possible.

13 THE COURT: Maybe as of January 9th, 2018, you might have
14 filed in this case notice of completion of mediation pursuant to NRS
15 38.310 on Wright Finlay & Zak letterhead?

16 MS. LEHMAN: And that's very possible, Your Honor.

17 THE COURT: Okay. The witness is out.

18 MS. LEHMAN: Okay.

19 THE COURT: By 15 -- do you all want me to read every
20 reason stated by Defendant? I mean, it's a per se violation. If a witness
21 is readily available, the information -- I mean there's reason that it wasn't
22 anything that someone couldn't have checked on this information during
23 discovery. Obviously, the Wright Finlay & Zak firm knew about it,
24 because since you all mentioned 2018, I'm -- you know, right there is
25 says notice of completion of mediation right there on January 9th filed

1 by Wright Finlay & Zak.

2 MS. LEHMAN: I would let --

3 THE COURT: So, you knew Nevada Department of Real
4 Estate was involved in some manner in this case. At least, when I say
5 you --

6 MS. LEHMAN: Uh-huh.

7 THE COURT: -- I refer to counsel for the Plaintiff counter-
8 defendants was aware -- the very same law firm was aware that
9 mediation took place and was aware that NRED had some involvement,
10 which would give you at least an inquiry notice, if you wanted general
11 statistics, specific statistics or anything from NRED. Even independent of
12 the mediation notice that you filed on January 9th, 2018, even without
13 that, independently of that, not provided any good cause why you would
14 send a trial subpoena to an entity that has not been disclosed throughout
15 the course of discovery, not sought any relief from the Court to extend
16 discovery for this reason, right?

17 And I appreciate this was a remanded case in 2017, so what
18 I'm saying is the time period it was in state court, okay? I'm not
19 reflecting to time periods it was not in state court. But never asked for
20 an extension of discovery. Never asked for any extensions. Never asked
21 for anything that would take care of this issue. And if you wish to have a
22 witness at the time of trial, you can't just subpoena the witness, ask for
23 documents and then the witness put on an amended pretrial disclosure.
24 I haven't seen it, but presumably it's -- you agree it's March 15, 2019
25 served but not filed, right?

1 MS. LEHMAN: Correct.

2 THE COURT: So that would be approximately a month
3 before the commencement of trial. But March 15th would also be after
4 the pretrial conference. And then start having witnesses being added
5 and then not providing the documents when you're having the person
6 come as a custodian of records, providing the documents, putting
7 Defendant on notice where they could even object to said subpoena, so
8 that that could have been dealt with before trial. So unfortunately, now
9 we're using trial time to do that.

10 So, all of those reasons, incorporating all the objections and
11 the basis set forth by Defendant, while Ms. Thompson's going to be
12 welcomed to come back into court, I'm going to then say that she needs
13 to be excluded. So, do you want her to come back into court, so that she
14 understands, she and counsel understand that she's excluded?

15 MS. LEHMAN: Yes, but before that, could I just cite to a case
16 just to preserve the record on what I had said earlier that I hadn't cited to
17 a particular case?

18 THE COURT: I'm going to let you do it, but we've got stop
19 doing this, okay? You can't wait until I already make a ruling and then
20 say but wait a second, Judge, I now want to add something. Because
21 you can appreciate -- in order for me to make my well-reasoned rulings
22 that I make each and every day. I gave you a chance. Gave the other
23 side a chance, right, to fully explain everything that you wished to say
24 before. And then I make a ruling.

25 If we keep doing the -- I make a ruling, then we -- oops, want

1 to add something else to it, then it takes a lot of extra trial time, doesn't
2 allow the Court to have finality and doesn't let the Court have all the
3 information it needs in order to make the ruling the first time, okay? So,
4 got to add it all in when you have your first shot.

5 MS. LEHMAN: I understand.

6 THE COURT: Appreciate it. Thank you so much.

7 MS. LEHMAN: So, I just wanted to add that what I --

8 THE COURT: Just a second. Hold on a second. If this has
9 nothing to do with this trial, then you should not be in this courtroom.

10 UNIDENTIFIED SPEAKER: It's for Natalie and Dana.

11 THE COURT: Okay. No worries. I just want to make sure.
12 We just -- we -- sometimes people try and give us deliveries that have
13 nothing to do with the case at hand, and so we just want to make sure
14 we interrupt our trial. Appreciate it.

15 UNIDENTIFIED SPEAKER: Completely understand.

16 THE COURT: No worries. Thank you so much. Appreciate it.
17 So, counsel, go ahead.

18 MS. LEHMAN: So previously, I argued that the parties have a
19 continuing obligation under 16.1 to supplement their discovery.

20 THE COURT: Supplement new discovery as it becomes
21 available, yes.

22 MS. LEHMAN: Correct. And so, I want to cite to -- it's *Tooski*
23 *v. Trujillo* and it's spelled T-O-O-S-K-I --

24 THE COURT: Uh-huh.

25 MS. LEHMAN: -- v. Trujillo, T-R-U-J-I-L-L-O.

1 THE COURT: Uh-huh.

2 MS. LEHMAN: And it's Case Number No. 61802 It's also
3 found at 2013 WL 5410986.

4 THE COURT: You're citing an unpublished case, aren't you?
5 Make sure it's a citable case, right? Court of Appeals or Supreme Court?

6 MS. LEHMAN: I believe it's Supreme Court. And so, in that
7 case, the Court held that it's the pretrial disclosure date that was key and
8 not the close of discovery date and that the pretrial disclosure date
9 contemplates that disclosures during the discovery phase and at the
10 pretrial stage are both proper.

11 THE COURT: Counsel, what's the year on that case?

12 MS. LEHMAN: It's 2013, September 20th, 2013.

13 THE COURT: You're saying it's a Nevada Supreme Court
14 published case? You're saying that it's a published case, that it has
15 precedential value. I don't believe you're correct in that, but I'm going to
16 double-check it.

17 MR. MARTINEZ: Your Honor, Westlaw indicates that it's
18 unpublished.

19 THE COURT: Yeah. I was going to say. With the reference
20 that it's an unpublished case.

21 MS. LEHMAN: I recall that there was a rule change in which
22 we could cite Nevada Supreme Court unpublished cases, just not
23 Nevada Court of Appeals unpublished cases.

24 THE COURT: Not for precedential value.

25 MS. LEHMAN: Okay.

1 THE COURT: Right? See abolition of Supreme Court Rule
2 123, which allows the citation of Supreme Court cases, but not for the
3 precedent, right? There are things that the Court can take into account.

4 MS. LEHMAN: Correct.

5 THE COURT: And then that was later on amended so that the
6 Court of Appeals decision did not fall within that provision and the Court
7 of Appeals unpublished decision still could not be cited for any purpose
8 whatsoever.

9 MS. LEHMAN: Correct.

10 THE COURT: That is not -- I know I'm correct.

11 MS. LEHMAN: Okay.

12 THE COURT: But it's not precedent, is what you're saying --
13 is what this Court is saying. You're saying that that was the rule. That's
14 not precedent. It's something the Court can take into account, because
15 there's an unpublished case that's particular to the case at hand. And it's
16 not coming up quickly for me.

17 Okay. Counsel for Defense, you get to respond, since -- on
18 the new cases.

19 MS. HANKS: I -- you were pulling up the case, but I actually
20 was just looking at the NRAP rule. And while the rule did change that
21 you can actually cite unpublished decisions for persuasive, it's only if the
22 decision was issued after January 1, 2016.

23 THE COURT: Okay, 2016.

24 MS. HANKS: So, this -- I don't think this case would fall into
25 that category. I also --

1 THE COURT: That's why the Court was asking the year on
2 the case.

3 MS. HANKS: Yeah. I, also, without having reviewed the
4 case, that's the problem with unpublished dispositions in general. You
5 don't have a full analysis, so I'm not sure what the Court was basing the
6 decision on or whether there was a prior disclosure. And like you said,
7 maybe it was a medical record that couldn't be disclosed, because it was
8 only created after the fact.

9 There's a lot of -- there might be a lot of facts that led to that
10 decision, but this case, I don't think there's any dispute that U.S. Bank
11 could have done discovery into NRED or any number of things of what --
12 I don't know what documents they have, what they really represent or
13 what they think they represent, but there's been no showing that they
14 couldn't do that discovery and then disclose it the court of discovery. I
15 mean, frankly, we're --

16 THE COURT: I'm not even getting this case to pop up. Do
17 you have the case --

18 MS. LEHMAN: We do. We've got --

19 THE COURT: -- the entire case with you?

20 MS. HANKS: I do not.

21 MS. LEHMAN: We have it. We got it up on Westlaw.

22 THE COURT: I can't get Westlaw through this terminal here
23 in court, so --

24 MS. LEHMAN: I don't have a paper copy. This is the first
25 time I'm hearing of the case, but --

1 THE COURT: Can you spell -- do the spelling again and let
2 me see if I can try and get it in.

3 MS. LEHMAN: Sure. It is T-O-O-S-K-I.

4 THE COURT: Versus Trujillo, T-R-U-J-I-L-L-O?

5 MS. HANKS: Correct.

6 MR. MARTINEZ: Correct.

7 MS. HANKS: But it's September 20th, 2013, so I think under
8 NRAP, it can't even be cited under the --

9 THE COURT: Yeah.

10 MS. HANKS: -- change in rules.

11 THE COURT: Hmm-hmm.

12 [Pause]

13 MS. HANKS: And I guess we're reading it a little bit
14 differently than counsel does. This decision actually affirmed a lower
15 court's striking of documents that weren't disclosed in 16.1 or as part of
16 pretrial disclosures.

17 THE COURT: That's why I'm trying to get it correctly,
18 because --

19 MS. HANKS: So, it seems to be consistent with --

20 THE COURT: -- I remember reading this case. It's been a
21 while.

22 [Pause]

23 MS. HANKS: Yeah. It affirms the District Court striking
24 under 16.1.

25 THE COURT: Okay. Well, the Court's going to take a mom --

1 I mean, it's an unpublished case, so it's not precedential anyway, and it's
2 not citable, so that's why I was asking the year on 2013, but the Court's
3 going to take a moment. We'll see if I can get it real quickly. Unless
4 you -- do you have it on your computer --

5 MS. HANKS: We could --

6 MR. MARTINEZ: We do.

7 MS. HANKS: -- link it to the screen.

8 MR. MARTINEZ: Do you want me to do that?

9 THE COURT: Do you mind linking it to the screen, so it's up
10 for everyone to see? The screen's right there.

11 MS. HANKS: Uh-huh.

12 THE COURT: Okay.

13 MS. HANKS: So, let's put it up, so everyone has the benefit
14 of -- let's read it quickly.

15 [Pause]

16 MR. MARTINEZ: It's connecting to the intranet.

17 THE COURT: Yeah. No worries.

18 [Pause]

19 THE COURT: Okay. Can you scroll down, because I don't
20 have a mouse or anything?

21 MS. HANKS: Yeah. That's the sum total of it.

22 THE COURT: That's the sum total of it?

23 MR. MARTINEZ: That's the whole order.

24 [Pause]

25 THE COURT: So, counsel for Plaintiff, how does it support

1 your position? Can you please point out what part of this unpublished
2 case supports your position, please?

3 MS. LEHMAN: So, in this case, the Court is saying because
4 that party didn't make a proper initial disclosures that they couldn't
5 consider their pretrial disclosures. They were looking at the initial
6 disclosures, to show that the pretrial disclosures were proper.

7 THE COURT: No. This is basically saying a pro se litigant did
8 not comply with any aspects of what a litigant is supposed to do in the
9 course of a trial and therefore the motion to dismiss was proper.

10 MS. HANKS: That's how I read it.

11 THE COURT: I'll phrase it a different way. The Court doesn't
12 agree with your interpretation of this case, so the Court doesn't find that
13 the *Tooski* case, the unpublished case -- even if the Court could take it
14 into consideration as an unpublished case, it's prior to 2016 with the
15 change of Supreme Court Rule 123, the Court wouldn't find that it in any
16 way helps Plaintiff's case, because now that it's put up on the screen, not
17 only is an order of affirmance that doesn't go into the details, but it
18 basically says the District Court granted Respondent's motion to exclude
19 appellant's exhibits and witnesses, based on his failure to comply with
20 disclosure requirements, 16.1.

21 And it doesn't focus on 16.1 initial or 16.1 supplemental, et
22 cetera. Okay. Then it said: As a result, granting the motion to dismiss.
23 Having reviewed the proper person appeal statement and the record on
24 appeal, we affirm the District Court's dismissal. While the record
25 demonstrates that the Appellant made initial disclosures of exhibits and

1 witness pursuant to NRCP 16.1.

2 So, they -- he did make 16.1 disclosures. Nothing in the
3 record shows that Appellant made the necessary pretrial disclosures
4 under 16.1(a)(3) or complied with 16 -- it just popped off -- 16.1(a)(4) -- in
5 making pretrial disclosures."

6 And it cites *Cuzze*, which is a published case. Appellants are
7 responsible for making adequate appellant record, okay? It says,
8 Further, without any document in the record show what, if any, pretrial
9 disclosures were made by Appellant, we cannot determine whether
10 Appellant's initial 16.1 disclosure sufficiently disclosed all of the
11 witnesses and exhibits Appellant intended to use. Therefore, we must
12 presume the record would support the District Court's finding.

13 So, this is an insufficient record, so they're supporting the
14 District Court. So, the Court's appreciative of the citations of the case.
15 The Court doesn't find that the citation to that unpublished case, even if
16 the Court could take it into consideration as providing any guidance
17 would help in any manner. And while I was reading it from the screen,
18 my Law Clerk came in and handed it to me as well. So *Tooski, T-O-O-S-*
19 *K-I v. Trujillo* does not support.

20 The Court can't take that into consideration and so even the
21 additional information, the additional case law cited by Plaintiff, the
22 Court affirms what it had stated and affirmed the motion to strike,
23 because Ms. Thompson was never disclosed until pretrial disclosures.
24 Even worse, the documents that she supposedly is going to talk about
25 and be custodian of records was never, ever disclosed and so cannot

1 come with a surprise and an ambush at time of trial or the day before
2 trial or a couple days before trial, when, I think the parties all agree, that
3 these documents are not newly discovered in the sense of how that
4 phrase means.

5 It means these documents were available back in 2016, 2017,
6 2018 and I'm only taking the time periods of particularly 2016 and '17
7 when it was here the State Court. I'm not talking about things in the
8 Federal Court. And so therefore, if any party had wished to subpoena
9 them, they could have. If any part wished to depose her, they could have
10 done that all during discovery and so it can't come up for the first time in
11 trial.

12 In courtesy to her, since she's here and she's here with
13 counsel, do you all want her to come in and the Court just explain that
14 the Court made a ruling that she was excluded, or do you just want the
15 Marshal to let her know to leave? What would you all like to do?

16 MS. HANKS: I have no preference, Your Honor.

17 MS. LEHMAN: I prefer if she came in, so that she would
18 understand that she's released from the subpoena.

19 THE COURT: Okay. Marshal, would you mind asking her in
20 for just a brief second? Thank you so much.

21 [Pause]

22 THE COURT: Appreciated it. Thank you for your time. Let
23 me just explain something real briefly, if you don't mind. The reason
24 why we'd asked you to leave the courtroom, because there was an
25 objection to -- because of the timing of the disclosure, the Court had to

1 make a ruling, based on the objection.

2 And so, as a result of the Court's ruling, your motion to strike
3 was granted, so therefore Ms. Thompson is not able to testify, because
4 she's not timely and properly disclosed in the underlying documents.
5 So, the Court made that ruling.

6 So, in light of that, is Plaintiff's counsel releasing her from
7 her subpoena?

8 MS. LEHMAN: Yes.

9 MS. THOMPSON: Thank you.

10 THE COURT: I appreciate it. Sorry for the time.

11 MS. THOMPSON: Thank you.

12 THE COURT: But thank you so much.

13 MR. NITZ: Thank you.

14 THE COURT: Okay. Then at this juncture, Plaintiff's counsel,
15 would you like to call your next witness? Do you want to see if Mr.
16 Alessi is still here or are you calling somebody else?

17 MR. NITZ: Yes, Your Honor. That would be our next witness.

18 THE COURT: Okay. Marshall, would you see if Mr. Alessi is
19 still out in the hallway? Thank you so much.

20 [Recess at 11:54 a.m., recommencing at 1:57 p.m.]

21 THE COURT: Go see if Mr. Alessi is still out in the hallway.
22 Thank you so much.

23 [Pause]

24 THE COURT: Thank you, so much.

25 DAVID ALESSI, PLAINTIFF'S WITNESS, SWORN

1 THE CLERK: Thank you, you can be seated. Please state
2 your full name, spelling your first and last name for the record.

3 THE WITNESS: David Alessi, D-A-V-I-D A-L-E-S-S-I.

4 **DIRECT EXAMINATION**

5 **BY MR. NITZ:**

6 Q Good afternoon, Mr. Alessi. Am I correct that you're
7 appearing here today under a trial subpoena --

8 A Yes.

9 Q -- directed to Alessi & Koenig?

10 A Yes.

11 Q Are you aware that you're here to testify about events and
12 matters that concern a foreclosure of property located at 7868 Marbledoe
13 Court [sic], Las Vegas, Nevada?

14 A Yes.

15 Q Before appearing today did you review any documents?

16 A You know , I --

17 Q I don't necessarily mean today, but in anticipation of
18 testifying today?

19 A I did review documents, and in anticipation of testifying
20 today I spoke with Jana LaPalma [phonetic], to refresh my recollection of
21 this foreclosure file, so I am prepared to testify.

22 Q Who is Jana LaPalma?

23 A She was a paralegal, interestingly enough, at Miles Bauer,
24 and then at Alessi Koenig, and now at HOA Lawyers Group.

25 Q Is that where you are currently employed?

1 A Yes, sir.

2 Q The documents that you reviewed today include the
3 collection file maintained by Alessi, in connection with the Marbledoe
4 property?

5 A Yes.

6 Q Would those documents be the same documents Alessi &
7 Koenig produced under a custodian of record certificate in this case?

8 A Yes.

9 Q Would you look briefly at Exhibit 30.

10 THE COURT: And, Counsel, is this a proposed exhibit, or is
11 this an agreed upon exhibit?

12 MS. HANKS: It's proposed at this time, Your Honor.

13 THE COURT: Thank you so much.

14 **BY MR. NITZ:**

15 Q All right. You testified that the records were produced
16 pursuant to the certificate of the custodian of records. Do you recognize
17 USB442 and 443, proposed Exhibit 30 as that certificate of the custodian
18 of records?

19 A Yes.

20 Q And on the second page of that affidavit or declaration do
21 you recognize that signature at about line 7?

22 A Yes.

23 Q Whose signature is that?

24 A My signature, Mr. David Alessi.

25 Q All right. Now would you look at the balance of Exhibit 30,

1 USB444 through 617, sufficiently to tell me if those are the records that
2 you produced under that certificate of the custodian, in response to the
3 subpoena to Alessi Koenig?

4 A Yes, they are.

5 Q The certificate of the custodian indicates, on the second
6 page, "As subscribed to and sworn to before me." Before signing the
7 declaration here did you review each and every statement contained in
8 the certificate for its accuracy and truthfulness?

9 A I can't -- I don't have a specific recollection. I've done
10 approximately 500 depositions and dozens of trials, but I'm sure I -- I
11 mean, the procedure is well-known to me, and these appear to be the
12 documents that we would have produced, and I'm here to testify as to
13 their import.

14 Q Would it be fair to say you wouldn't have signed your name
15 to the certificate, under oath, if you had not verified the accuracy of the
16 statements in the declaration?

17 A Yes.

18 Q Do you recall the name of the Homeowners' Association that
19 this Marbledoe property existed?

20 A I don't recall the name, but I am looking at the status report
21 on USB616, and I see that it's entitled "Antelope Homeowners'
22 Association." So that would be the name of the association.

23 Q And what duties -- what were Alessi Koenig's duties -- what
24 was Alessi Koenig's involvement with this property?

25 A We were retained by the Association to perform a non-

1 judicial foreclosure, pursuant to NRS 116.

2 Q Was that a non-judicial foreclosure based upon a delinquent
3 assessment lien?

4 A Yes.

5 Q In effect you're acting as the collection agent for Antelope
6 Properties for the Marbledoe Property?

7 A We were retained as our assessment and collection law firm;
8 is the way I phrase it. We may have also been retained as general
9 counsel for the Association.

10 Q Would you briefly describe the foreclosure process?

11 A The file is sent over to our office at the notice of delinquent
12 assessment stage, by way the management company on behalf of the
13 Association, usually emailing our office with an attached ledger and
14 instructions to place the account into collections. We would then take
15 the past due assessments, late fees and interest from the account ledger,
16 input that information into data fields within our program. We would
17 pull a parcel record for the property to ascertain the legal description of
18 the property and input that information.

19 We would do a Pacer search to see if there are any bankruptcies.
20 We would print a lien and a lien cover letter. And we would update our
21 online status report to show that we had generated a notice of
22 delinquent assessment lien and mailed it regular and certified mail, and
23 we would mail it regular and certified mail to the delinquent homeowner
24 only.

25 The next stage is either pre-notice of default stage, or we would go

1 directly to the notice of default. We would mail the notice of default out
2 to all parties with a recorded interest in title, the delinquent homeowner,
3 the bank. There's a 90 day waiting period. We would update the status
4 report. If there's no contact from the owner, the account's not paid, or if
5 there is not a payment plan we would move to the next step, the notice
6 of trustee sale.

7 We would publish the notice of trustee sale for three consecutive
8 weeks. We would post the notice of trustee sale, and then we would, if
9 the account is not brought current we would cry the sale.

10 Q Would you turn to Exhibit 9 in that same binder. Do you
11 recognize this notice of delinquent assessment lien as the notice of lien
12 prepared by Alessi on behalf of Antelope, in relation to the Marbledoe
13 property?

14 A Yes.

15 Q It appears that you're flipping back, presumably to Exhibit
16 30?

17 A Yes.

18 Q Is that to confirm that this notice of delinquent assessment
19 lien appears in the records produced by Alessi, in response to the
20 subpoena?

21 A No. I was -- I like to always have the status report as a
22 reference, so I was going to refer to the status report to confirm that
23 there's an entry on or around October/November of 2009, indicating that
24 this lien was drafted and mailed.

25 Q The title of this document is "notice of delinquent

1 assessment lien." Is there any indication in this notice of lien, that it's for
2 anything but delinquent assessments?

3 A No.

4 Q Based upon this notice of lien and your review of the
5 collection file, at the time this notice of lien was prepared, sent, recorded,
6 were there any nuisance, abatement or maintenance charges that were
7 subject to the lien?

8 MS. HANKS: Objection. Lacks foundation.

9 THE COURT: Sustained. The way that was phrased.

10 **BY MR. NITZ:**

11 Q In order to fulfill your obligations on behalf of the
12 Homeowners' Association did you regularly call on them to provide a
13 statement of account or ledger showing the assessments that were due,
14 as well as any other charges related to the file?

15 A Yes.

16 Q Specifically, before generation of the notice of delinquent
17 assessment lien, here, Exhibit 9, was that done?

18 A Yes.

19 Q Prior to the generation and recording of the notice of default,
20 you mentioned in the process, did you also obtain a then current
21 statement of account or ledger?

22 A I haven't -- that would be our policy, and we likely did, yes.

23 Q Prior to generation of a notice of sale and mailing, and
24 recording of the notice of sale, did you obtain a then current statement of
25 account or ledger from the Homeowners' Association?

1 A That would be our policy. I can go through Exhibit 30 and
2 see if I find ledgers at or around the time of the sale and notice of
3 default. They don't pop out in my memory right now, but that would be
4 our policy. So, it would not surprise me to find ledgers dated at the time
5 of the lien, the time of notice of default and the time of the sale. I just
6 don't have a specific recollection of them in this file.

7 Q In each case did you rely on the Homeowners' Association's
8 production of the statement or ledger in order to perform the tasks on
9 behalf of the Association?

10 A Yes.

11 Q In each case when the Association sent you a statement of
12 account or a ledger, did the statement of account or ledger become part
13 of the business record of Alessi & Koenig?

14 A Yes.

15 Q And it became part of Alessi's records at or near the time of
16 receipt from the Homeowners' Association?

17 A Yes.

18 Q Could you identify the statement of account that Alessi relied
19 on to generate the notice of delinquent assessment lien?

20 MS. HANKS: Sorry, are you asking him to testify from an
21 exhibit that hasn't been entered?

22 MR. NITZ: I'm not asking him to testify yet. I'm asking him
23 to locate a document.

24 THE COURT: Did you ask him to locate, or can you?

25 MS. HANKS: I thought he said, "can you identify it?"

1 THE COURT: Can you identify it. And so just for point of
2 clarification, are you asking as a yes, or no question, or are you asking
3 him to look through the exhibits, when you're saying, "can you identify"?

4 MR. NITZ: I guess it would be a preliminary question, a
5 threshold question.

6 THE COURT: So, then objection is overruled, he's just asking
7 whether he can or can't identify. So, the witness can answer the
8 question whether he can or can't identify it. Without going through --

9 MS. HANKS: Without looking.

10 THE COURT: -- all the exhibits, I think --

11 MS. HANKS: Yeah.

12 THE COURT: Counsel?

13 MS. HANKS: I don't think the witness understands that is --

14 THE COURT: I don't think the witness understands. The
15 objection for the witness not to be looking through documents when
16 there was a question pending about whether he can identify it, right?
17 You were just asking for a yes, or no? You weren't asking him to go
18 looking through the exhibit binder, were you?

19 MR. NITZ: Right. Not at this point.

20 THE COURT: Do you remember what he asked --

21 **BY MR. NITZ:**

22 Q Can you look in your collection file and locate the ledger,
23 statement of account that was used by Alessi to generate the notice of
24 delinquent assessment lien?

25 A I don't know, can I? I'm a little confused. I mean, I can look

1 in my collection file. If your answer is a hypothetical, the answer is, yes.

2 MR. NITZ: Your Honor, at this point I move for the admission
3 of Exhibit 9, the notice of delinquent assessment lien?

4 MS. HANKS: I have no objection to Exhibit 9.

5 THE COURT: Okay. There being no objection Exhibit 9 is
6 admitted.

7 [Plaintiff's Exhibit 9 received]

8 **BY MR. NITZ:**

9 Q Would you locate the statement of account or ledger receipt
10 by Alessi & Koenig, used by it to generate the notice of lien, Exhibit 9?

11 A Yes.

12 MS. HANKS: I'm sorry, are you actually asking him to look
13 through the exhibit now again, or are we hypothetical?

14 **BY MR. NITZ:**

15 Q This -- I'm asking you to locate the document, and I'll ask
16 further questions, if you located the document.

17 MS. HANKS: Right. Well, Your Honor, that would be
18 testimonial, I mean he's basically acknowledging there's a document in
19 the exhibit that hasn't been admitted yet.

20 THE COURT: Question sustained. The objection for the way
21 the question was phrased.

22 MR. NITZ: At this point I'd also move for the admission of
23 proposed Exhibit 30, the Alessi & Koenig collection file?

24 MS. HANKS: Your Honor, I have objections to certain Bate
25 stamped pages, otherwise I have no objection to the remainder of the

1 file.

2 THE COURT: Okay.

3 MS. HANKS: So, the --

4 THE COURT: Let's hear the objections, and I'll so respond.
5 Go ahead.

6 MS. HANKS: Do you want me to list out the specific pages,
7 and then the objection is sustained for all the pages?

8 THE COURT: List out the pages and then state the objection
9 then, please.

10 MS. HANKS: So, the Bate stamped are 472 through 476, 481
11 through 485, 487 through 498, 527 through 533, 553 through 560, 570
12 through 577, and 585 through 589. These are records that are not Alessi
13 & Koenig records, at least on the face of them they don't appear to have
14 Alessi & Koenig header. I'm actually not sure whose records they are.
15 They're either going to be the management company's or the
16 Association's. That still remains unclear.

17 And so, while I understand they're contained in Alessi's
18 business records, I don't believe this witness can lay the foundation in
19 terms of authenticating them, under what the rule requires a qualified
20 person. I didn't hear any testimony that Mr. Alessi is familiar with how
21 the record was kept, how it was maintained. I didn't hear he was an
22 employee or agent of either of CAMCO or the Association. Mind you, I'm
23 just assuming this record is one of those company's records, we don't
24 really know that from the face of it.

25 And so, then I have case law that I cited to Your Honor in my

1 trial brief, is the *National Car Rental Systems v. Holland* to address this
2 issue, where there's records from a general contractor, that he has
3 business records from another entity within the general contractor's
4 records. And the Court rejected the notion that just because it's in the
5 general contractor's records from a third party, that they can then use
6 the Business Exception Rule from the general contractor's records so
7 say, well, because it's in my file I automatically can overcome the
8 business exception rule.

9 And in fact, the Holland court noted, this would mean, quote:

10 "Every letter which Plaintiff's employer received in
11 connection with the operation of his business, and which
12 was subsequently retained as part of his business records,
13 ipso facto would be fully competent to prove the truth of its
14 contents."

15 So, that's what we have here, Your Honor, that's the basis of
16 my objection.

17 MR. NITZ: Your Honor, I have a general response to each
18 one of those individual objections. That was ten times more specificity
19 than was provided in the -- in the pretrial disclosures or joint pretrial
20 exhibit there. It just said authenticity hearsay. It might have said
21 multiple hearsay, but it didn't identify the specific documents that they
22 were subject to the objection.

23 THE COURT: It didn't mentioned proposed Exhibit 31.

24 MS. HANKS: I objected to the entirety of the exhibit, Your
25 Honor, and objected to the extent that any records were not a Alessi &

1 Koenig, I objected to hearsay, lacks authentication, and lacks foundation.

2 THE COURT: Okay.

3 MS. HANKS: And then in my trial brief I specified more
4 specifically certain parts of Exhibit 31. But, certainly, objected to it
5 enough under the rule. Oh, I'm sorry, did I say Exhibit 31? I meant
6 Exhibit 30, Your Honor, I misspoke.

7 THE COURT: Okay. We accept that. Okay.

8 Trial briefs as you know are just references for the Court to
9 look at, but I do see it on page 4 of your trial brief, as a reference
10 material for the Court to look at, and the Court's looking at the amended
11 joint pretrial memorandum, and then also I guess I need to look at your
12 objections to their disclosure.

13 So, why don't you just tell me page numbers, so the Court
14 doesn't have to flip through page-by-page.

15 MS. HANKS: Do you want the joint pretrial number, Your
16 Honor?

17 THE COURT: That happens to be quicker in front of me, if
18 you don't mind.

19 MS. HANKS: Yes. It's page 10, I objected to Exhibit 30 under
20 hearsay, it lack authentication and lacks foundation.

21 THE COURT: Okay, it's there.

22 MS. HANKS: And that would have mirrored the objection I
23 made in the original pretrial disclosures, and any amended pretrial
24 disclosures.

25 THE COURT: So, the amended pretrial disclosures. Just one

1 moment, please. So, going back to that. 3/29/19, do you want to give
2 me a page number on that one?

3 MS. HANKS: Of the 3/29 one?

4 MR. MARTINEZ: Page 3, Your Honor.

5 MS. HANKS: Page 3, Your Honor. The original is also page 3.

6 THE COURT: Where are you finding it on page 3?

7 MS. HANKS: Page 3, it's Alessi Koenig collection file, it's
8 four down.

9 THE COURT: Line 20?

10 MS. HANKS: Yes. Oh, no, line 7 on page 3, in the original.
11 Line 20 on page 3 of the amended objections. Yeah. The objections to
12 amended pretrial disclosures, yes.

13 THE COURT: Well, the objections are properly preserved,
14 now the Court needs to rule on the merit of the objections. Counsel, are
15 you going to ask foundational before -- or you want me to rule right now
16 on your request to move in proposed Exhibit 30? Do you want me to
17 rule on it right now, or are you withdrawing it in light of the objections,
18 and want to lay something further; what do you want the Court to do?

19 Do you want me to rule on it now, I'll rule on it now. If you
20 want me -- if you're withdrawing it and want to ask further --

21 MR. NITZ: I'll withdraw it and ask a foundational question.

22 **BY MR. NITZ:**

23 Q Mr. Alessi, would turn to USB481 to 485, which was called
24 out in the objections?

25 A Yes.

1 Q Was this document, USB481 to 485, a document that Alessi &
2 Koenig would have requested from the Homeowners Association or its
3 agent, at or about August 27, 2010?

4 A Yes.

5 Q And when Alessi received -- I don't mean any disrespect, it's
6 just easier to say Alessi, instead of Alessi & Koenig every time, so if I
7 refer to Alessi, will you understand that I'm referring to your firm?

8 A Yes.

9 Q All right. So do recognize this as the document at Alessi
10 received from the Homeowners Association, or its property manager, on
11 or about August 27, 2010?

12 MS. HANKS: I'm sorry, Your Honor. I have an objection,
13 with respect to that's outside the foundations, actually asking to ask
14 testimony about the specific document and receipt of it, that hasn't been
15 admitted yet. This is beyond the who, what, where and why is it.

16 THE COURT: The Court's going to overrule that objection,
17 because since the objection articulates specific -- some Bate Stamp
18 numbers, the Court has to have an understanding, and it's really easier
19 for cross-referencing, and really for ruling on it to know what pages are
20 being referenced.

21 MS. HANKS: No. I have no problem with that. The
22 question, though was, "did you receive this document?" That to me is
23 beyond the foundation of whether he can he can meet the custodian of
24 records or qualified persons, which is what I thought counsel he was
25 going to do in terms of you withdrawing your ruling on that, and then

1 asking more questions.

2 THE COURT: Objection overruled.

3 MR. NITZ: Logically, if that appears in the file he had to
4 receive it, that's all I'm trying to establish.

5 THE COURT: The Court's going to overrule that, as part of
6 the foundational aspects to get to address the lack of foundation, and
7 potential, if there's exceptions to hearsay, so the Court's overruling the
8 objection. So, your witness can answer.

9 THE WITNESS: Can you repeat the question?

10 **BY MR. NITZ:**

11 Q Do you recognize this as a statement of account, or a ledger
12 received from the Homeowners Association for its property manager, on
13 or about August 27, 2010?

14 A Yes.

15 Q And am I correct that Alessi received this in response to a
16 direct inquiry to one or the other of them?

17 A Most likely that would have been what initiated receipt of this
18 ledger, yes.

19 Q And looking again at Exhibit 9. I'm sorry, I'm directing you to
20 the wrong exhibit.

21 MR. NITZ: May I have a moment, Your Honor?

22 THE COURT: Well, of course you may.

23 [Pause]

24 **BY MR. NITZ:**

25 Q Can you identify any document that Alessi prepared upon

1 receipt of this statement of account?

2 A I'm sorry, which statement of account are you on?

3 Q It's the one, August 27, 2010?

4 A I see that there appears to have been a Chapter 7 happening
5 at the time. There's a September 14th, 2010 entry, property surrendered
6 in a Chapter 7 bankruptcy, monitoring public records.

7 MS. HANKS: I'm sorry, Your Honor, I have to interrupt. The
8 witness is testifying from the exhibit that hasn't been admitted yet.

9 THE COURT: The Court's going to sustain the objection. I
10 believe -- wasn't the question, is what document was being prepared?
11 Counsel, would you mind restating your -- repeating your question?

12 **BY MR. NITZ:**

13 Q Would you identify the document that Alessi prepared upon
14 receipt of this statement of account?

15 MS. HANKS: I'm sorry, Your Honor. I have the same
16 objection.

17 THE COURT: The Court's going to overrule the objection,
18 because the question itself is proper, I have to hear if the answer's going
19 to being proper or not.

20 MS. HANKS: So, it's a yes, or no.

21 THE WITNESS: Yes. I think it's the pre-notice of default.
22 There's an August 26, 2010 entry. So, that would be my best guess.

23 **BY MR. NITZ:**

24 Q Did Alessi rely on the accuracy of the statement of account in
25 order to generate that notice --

1 A Yes.

2 Q -- or letter?

3 A Yes.

4 Q Is that letter that you identified, does that appear at USB486?

5 A Yes.

6 Q Okay. Next turn to USB487 to 498.

7 A Yes.

8 Q Is that a document that Alessi received from the HOA, or its
9 property management company, on or about November 18, 2010?

10 A Yes.

11 Q And it became part of Alessi's file related to the Marbledoe
12 property on or about that date?

13 A Yes.

14 Q Would you identify the document, if any, that Alessi
15 generated in reliance of this statement of account?

16 MS. HANKS: Your Honor, I have an objection. He's going
17 through an exhibit that hasn't been admitted and having him link parts of
18 it to the other parts of the exhibit. It hasn't been admitted. I just object
19 to the question because the exhibit --

20 THE COURT: Your basis of the objection?

21 MS. HANKS: That he's asking the witness to testify about an
22 exhibit and link certain pages to other pages within the same exhibit,
23 that hasn't been admitted yet. The witness is testifying about an exhibit
24 that hasn't been admitted.

25 THE COURT: Counsel, would you like to respond?

1 MR. NITZ: I'm trying to lay the foundation for each of these
2 different components. They singled out the exhibits. News to me
3 today, what ones they're objecting to and the reason for them. And now
4 I'm trying to establish the foundation for each of those statements.

5 Their objection is authenticity and business record exception.
6 I'm not trying to establish that these records were authentic, or business
7 records of the Homeowners Association. All I'm trying to establish is
8 that Alessi Koenig received these. They were amalgamated, integrated
9 into their record for this account, and they've relied on these records in
10 order to perform their task for the Association in prosecuting the
11 foreclosure.

12 THE COURT: I think you all are raising two different issues. I
13 think one's raising the method by which it's being done, and one's
14 talking about what's -- and one counsel is trying to talk about what he's
15 trying to do. The method is what I'm hearing the objection, is utilizing
16 the proposed exhibit and having the witness go through the proposed
17 exhibit to substantiate the answers versus the questions themselves
18 being proper. It's the method by which the answers are coming about
19 with the exhibit binder being open, and the witness, as you can hear the
20 flipping of pages, going through the document to link them together.

21 So, the objection, the way objection is phrased for the
22 process of what's happened the Court's going to have to sustain it,
23 because a witness can't answer counsel's questions by utilizing a
24 document to find all the information to answer the questions. That part
25 of the objection would be appropriately sustained.

1 The question itself, whether the witness can answer the
2 question, in absence of flipping through the document, the Court's not
3 saying that the question phrased is proper, it's the method by which the
4 witness is utilizing to answer counsel's question. So, I have to sustain
5 that part, that the witness can't flip through the document to answer
6 your question, because that's on a document that's not been admitted.

7 The witness can answer your questions, but can use, by
8 flipping through the papers in front of him to answer it, because I have
9 an objection for that.

10 **BY MR. NITZ:**

11 Q Was there a document that Alessi generated at or about
12 November 18, 2010, in performance of his duties for the HOA?

13 A I don't have all the dates memorized for each document in
14 this file. So, without referring to the exhibit I wouldn't be able to answer
15 that.

16 Q Would you be able to refer to the exhibit to refresh your
17 recollection as to what document was prepared, at or about the time of
18 receipt of this statement of account?

19 A Yes.

20 Q Would you do that?

21 A As November of?

22 Q November of 2010?

23 MS. HANKS: Your Honor, I have to place an objection,
24 because the witness never established that an event was done, and now
25 I just can't remember -- he said, "I can't remember anything with regard

1 to this file, unless I'm looking at the file."

2 So, refreshing recollection, and I have case law I can cite to
3 Your Honor, he can't to do an end run around getting an exhibit
4 admitted. And I've already -- I have no problem admitting Exhibit 30
5 with exception of those Bate stamped pages. So, I don't if helps move
6 things along, and then maybe we --

7 THE COURT: The Court's going find, since there's not a
8 question pending, and the witness had already answered, that that last
9 statement is untimely.

10 MS. HANKS: He didn't answer, Your Honor. He was about
11 to go through the record, that's why I was -- and figure out where it
12 existed. That's why I --

13 THE COURT: The objection wasn't to last answer of
14 November?

15 MS. HANKS: No. My objection was before Mr. Alessi
16 answered, because now I'm seeing him going through the exhibit to try
17 to even discern whether an event happened, and an answer from that.
18 So that's where it now gets into assuming facts not evidence. We
19 haven't even established an event occurred that he knows about, and
20 now he's just missing a date.

21 Mr. Nitz wants him to actually go through the exhibit and
22 find this event that he thinks happened on 2010, but Mr. Alessi never
23 even said an event happened yet.

24 THE COURT: Counsel, what was your specific question to
25 this witness? Was there a pending question, you were asking him to

1 look through the document? Because if you're asking him to look
2 through proposed 30, then the Court's going to have to sustain the
3 objection.

4 I had understood your question that you're asking to elicit
5 testimony from this witness, not looking at the document. So, can you
6 clarify what you were try to elicit from your question?

7 **BY MR. NITZ:**

8 Q Do you recall if Alessi generated a document in prosecuting
9 its foreclosure in this case, at or about November 2010?

10 A I don't have a specific recollection. I know that that date falls
11 within the non-judicial foreclosure timeline on this file, but I don't have a
12 specific recollection of a document being generated on that date.

13 Q What would typically be the next document after the notice
14 of lien letter to the homeowner?

15 A The pre-notice of default, or the notice of default.

16 Q And that was the one we identified?

17 A 486.

18 MS. HANKS: Counsel, are you asking to identify what -- what
19 did we identify, only Exhibit 9 has been admitted, of this witness? Can I
20 get a clarification, Your Honor, on what --

21 THE COURT: Counsel, you're speaking really softly --

22 MS. HANKS: Sorry.

23 THE COURT: -- on that last time, so I actually did not hear
24 what you're saying.

25 MS. HANKS: I'm asking --

1 THE COURT: I heard you say "counselor," and then
2 identifying, and just some words in between, you're speaking very softly.

3 MS. HANKS: Sorry.

4 THE COURT: So please repeat that.

5 MS. HANKS: I was asking for clarification, because I thought
6 I was waiting to hear something else from Mr. Nitz that we identified and
7 then he cut off, and I'm -- that's why I was -- if I can get clarification of
8 what he was referring to that we had already identified. Because I'm
9 only aware of Exhibit 9, so I wanted to make sure that's where I was
10 going.

11 THE COURT: The witnessed Bate Stamp 486. That's --

12 MS. HANKS: And that's why I was confused, because we
13 haven't admitted 486.

14 THE COURT: So, the basis of your objection, or is it a
15 clarification; what is it, counsel?

16 MS. HANKS: It's both, Your Honor. It's a clarification and
17 objection, to ask to strike to the extent the witness is starting to testify
18 from an exhibit that hasn't been admitted.

19 MR. NITZ: Your Honor, I asked him previously if -- what
20 would have been generated at or about the time of the August 27, 2010,
21 and he said the pre-lien letter. I asked him if he could -- if he located that
22 or could locate that in the file and he did, and he identified USB 486,
23 dated August 31, 2010, as a document generated at or about the time of
24 the statement of account.

25 THE COURT: To the extent, as for a point of clarification,

1 since the Court is receiving timely and proper objections, that this
2 witness shouldn't be looking through the entirety of 31 to try and find a
3 particular document. The Court's going to sustain that, because this
4 exhibit has not been admitted into evidence.

5 The Court in no way is precluding asking questions so that
6 you can lay the appropriate foundation to potentially seek the admission
7 of proposed Exhibit 30, but the method by which -- by asking the witness
8 to try and find somewhere in that grouping of documents, the Court's
9 going to have to sustain the objection. So that that's not a proper
10 method by which to get an answer on an exhibit that has not yet been
11 admitted.

12 Not precluding any other methods by which to get the
13 information you request, but asking him to keep looking through and
14 trying find something that may answer a question, that would be the not
15 permissible part.

16 **BY MR. NITZ:**

17 Q What would be the next document that Alessi would have
18 generated after the pre-lien notice letter, the August 31, 2010 letter?

19 A The August 31, 2010 letter is a pre-notice of default. Just
20 from having looked through the documents I see that we had done a
21 second pre-notice of default, I believe a few months later, December, on
22 or around December 2010.

23 MS. HANKS: Your Honor, I --

24 **BY MR. NITZ:**

25 Q So I --

1 MS. HANKS: I have to object again. I have to move to strike
2 that answer. The witness is testifying about an exhibit that hasn't been
3 admitted.

4 THE COURT: We'll disregard the portion of the witness'
5 answer, after he said, "while looking through the documents I see that
6 we did a second pre-notice of default on or about December" -- he said
7 the date, 2010. The Court's going to take into account the first part of his
8 answer, because that's proper for an answer.

9 Once he started saying he was looking through the
10 documents to try and find an answer, in light of the Court's prior ruling,
11 because of the objections the Court cannot take that second part of the
12 response into account.

13 Counsel, you can appropriately proceed with your next
14 question.

15 **BY MR. NITZ:**

16 Q Do you recall what document Alessi generated at or about
17 the time of the November 2010 statement of account received from
18 HOA's property manager?

19 A I believe that was the second pre-notice of default.

20 Q Are you able to identify the second notice of default?

21 MS. HANKS: You're asking him to look at Exhibit 30 again,
22 and identify a document?

23 THE COURT: Counsel?

24 MS. HANKS: I just need clarification, so I know if I need to
25 object, Your Honor. Are we in a hypothetical land, and what the practice

1 of Alessi & Koenig was to do in terms of the process, or are we going to
2 keep on going and ask Mr. Alessi to identify documents within the
3 exhibit, and establish that it exists, as opposed to laying the foundation
4 for this entire exhibit?

5 THE COURT: The Court's already said that the witness can't
6 do that. So, I'm sure the witness is not going to do that, and I'm sure
7 counsel is not asking the witness to do something that the Court has
8 now twice sustained the objections that the witness can't do. So, I'm
9 sure the question is a proper question, ask him for testimonial evidence
10 without saying to the witness go find it somewhere in proposed Exhibit
11 30.

12 And if the Court's incorrect, then I'm sure Plaintiff's counsel
13 is going to rephrase his question to a manner that is consistent with the
14 Court's ruling.

15 **BY MR. NITZ:**

16 Q If Alessi generated a document relying on the information in
17 that November 2010 statement of account, would that document appear
18 in Alessi's collection file, Exhibit 30, in front of you?

19 A Yes.

20 Q What was the -- what is date of the document that Alessi
21 generated, based upon the receipt of that November 2010 statement of
22 account?

23 A I don't know.

24 Q Would you be able to refresh your recollection by reviewing
25 the collection file?

1 A Yes.

2 Q Would you tell the Court what is the date of the document?

3 A I --

4 Q Or identify the Bates number?

5 A I can't without going through Exhibit 30.

6 Q What I'm saying is, you said you could review the collection
7 file and identify the document, or refresh your recollection as to the date
8 of the document, and that's what I'm asking you to do, refresh your
9 recollection from review of the collection file, to identify the date of the
10 document, or identify the document?

11 A And what was the exact date of the ledger that you're --

12 Q That's what I'm asking you; do you recall the date of it, and
13 you said you didn't, but you could refer to the collection file to tell me
14 the date of the document that was generated?

15 A Well, the date of document that was generated on or about
16 the date of the ledger; what was the date of the ledger?

17 Q November 2010, November 18, 2010.

18 A I mean, again, I'm going to have to go through Exhibit 30 to
19 get that. So, I don't -- I don't --

20 MS. HANKS: Your Honor, I have to renew my objection. But
21 the whole process of refreshing a recollection, is I can point you to a
22 smell, a sound, or a document handed to you, take it back and then you
23 tell me. It is not I get to leaf through the documents and then read it, and
24 then testify from the document, and that's what appears is happening.

25 MR. NITZ: That's not what's happening, Your Honor. He

1 said there would be a document in there. He doesn't recall the date. I
2 asked him to refresh his recollection. He can refresh his recollection by
3 using anything, it doesn't have to be admitted or admissible.

4 THE COURT: Once again, I think you all have distinction of
5 process versus what the issue is, is the way the Court's hearing the
6 distinction between the two. Okay. Refreshing recollection, the Court
7 cannot provide legal advice. The only -- may we approach the witness?
8 Witness, here's the document. After reviewing this document is your
9 recollection refreshed? The document then goes away with counsel.
10 And then questions you're asked about the document.

11 The document is not refreshed -- I mean, well, the Court
12 doesn't do past recollection recorded and other different things that may
13 come up, but recollection refreshed is not looking to find a document
14 that may answer my question by looking at a proposed exhibit. And to
15 the extent that that's what's being asked of this witness the Court's going
16 to have sustain Defense's counsel's objection, because that is not
17 refreshing recollection.

18 The Court's not making any affirmative ruling as to an
19 admissibility right now, because nothing is being sought. But, if it's to
20 refresh recollection it has to be done in the way that the Court; i.e. you
21 know, the appellate court says appropriate for refreshing recollection. It
22 can't just be, go find the document that can refresh your recollection
23 somewhere in exhibit -- proposed Exhibit 30 and then talk about how it's
24 refreshed your recollection.

25 So, if that's what's being asked of the witness, then I'm

1 sustaining Defendant's objection. Since the Court's not exactly clear
2 what's being asked of the witness, that's why the Court's asking for
3 some clarification of what's being asked of the witness, which I think the
4 witness is also asking so that he does not violate what the Court just said
5 a couple of times with regards to rulings.

6 **BY MR. NITZ:**

7 Q Mr. Alessi, would you turn to USB499.

8 A Yes.

9 Q Does this document refresh your recollection as to the date
10 of the document generated by Alessi, upon receipt of the November 18,
11 2010 statement of account?

12 A Yes.

13 Q What is this document?

14 A This is a second pre-notice of default. It's dated December
15 20th, 2010.

16 Q In order to generate this document, December 20, 2010, did
17 Alessi have to rely on the statement of account it received from the HOA
18 or its property manager?

19 A Yes.

20 Q Would you turn next to USB527. To 533, I think were the
21 pages counsel identified.

22 A Yes.

23 Q Do you recognize this as a document Alessi received from
24 the Homeowners Association, Orange Property Manager?

25 A Yes.

1 Q Is this a document that once received became part of a
2 lessee's permanent file for this Marbledoe property?

3 A Yes.

4 Q Did Alessi then rely on this document in order to prepare
5 another document in the ordinary course of prosecuting this foreclosure?

6 A Yes.

7 Q Do you recall what the next letter or document would have
8 been?

9 A The June 17th, 2000 --

10 MS. HANKS: Your Honor, I'm going to object, the witness is
11 still looking at proposed Exhibit 30 to answer the questions.

12 THE COURT: You know what, counsel, this is a beautiful
13 time for a nice break. I think we're going to break until 3:05, because we
14 need our afternoon break anyway, because we came back at 1:20, so it's
15 about 90 plus minutes since that last break. So, we are going to take our
16 afternoon break and we'll be back at 3:05.

17 [Recess at 2:49 p.m., recommencing at 3:15 p.m.]

18 THE COURT: Okay. We're on the record.

19 Counsel, feel free to continue with your questioning. I know
20 we had a pending objection, but I think the easier way to do it, if you
21 don't mind, re-ask your question, then I'll see if there's -- because you
22 started to say -- Defense counsel started to state an objection, but I don't
23 think you had finished your question, in any event. I think she may have
24 been anticipating, it, so feel free to move forward.

25 MR. NITZ: Thank you, Your Honor. I'm going to change

1 courses in the middle of the stream, so-to-speak.

2 THE COURT: Uh-huh.

3 MR. NITZ: I previously offered the entirety of Exhibit 30 to
4 be --

5 THE COURT: Sure.

6 MR. NITZ: -- admitted under the certificate of the custodian
7 of records, Mr. Alessi --

8 THE COURT: Uh-huh.

9 MR. NITZ: -- and very specific objections, or pages were
10 objected to, otherwise counsel stated there was no objection to the
11 exhibit.

12 So, on that basis I'd move for the admission of the entirety,
13 at this time, the entirety of Exhibit 30, with the exception of those pages
14 identified by counsel, which I just reconfirmed, if you would want me to
15 enter those in the record?

16 THE COURT: Okay. They're the same page number ranges
17 that you previously stated.

18 MS. HANKS: Yeah. So, I guess what we could do is take
19 those out and have them be 31-A. Did you want to do it that -- because
20 they're less than the remainder of 30, so it would make no sense to take
21 out; if that makes any sense?

22 THE COURT: I'm not sure we already have them admitted.

23 Well, are you going to separately try and introduce those
24 documents, or not? I'm just wondering why you were asking for a 31-A,
25 that's all I was asking?

1 MS. HANKS: Oh, I assumed that's -- yeah, so never mind.

2 Yeah. That's a good question.

3 THE CLERK: Because it would be 30, not 31.

4 THE COURT: No, 30-A, yeah.

5 MR. NITZ: It's Exhibit 30-A. But anyway, I expect to lay the
6 foundation for those remaining documents. But at this point I'm just
7 requesting that the Court admit the balance of 30, and we could pull out
8 those pages --

9 THE COURT: Okay.

10 MR. NITZ: -- and as Ms. Hanks suggested, mark those as
11 Exhibit 30-A.

12 THE COURT: Well, what we can do is, we can admit Exhibit
13 30 without those pages, and then wait to the conclusion of the trial to see
14 if you're moving to admit the rest of those, and then it would be one self-
15 contained document, and if not then we'll figure out a different number.
16 Is that what you want to do?

17 A That would probably save a step.

18 MS. HANKS: Yeah.

19 MR. NITZ: Save Ms. Clerk from unnecessary work.

20 THE COURT: Well, because -- yes. And we've already got
21 the range, because those ranges are not only verbally on the record from
22 counsel, but they're the same ones that are listed on page 4, lines 15 and
23 16 of the brief, the bench brief, right?

24 THE CLERK: The bench brief, yes.

25 THE COURT: Okay. So, we have a reference of it. Okay.

1 Counsel, feel free to proceed. So, Exhibit 30 is admitted without those
2 pages that we're objected to by Defense counsel. Feel free to continue.

3 MR. NITZ: Thank you, Your Honor.

4 **BY MR. NITZ:**

5 Q Mr. Alessi --

6 MR. NITZ: Pardon me, my allergies have flared up.

7 THE COURT: There's also warm water in the cooler there.

8 **BY MR. NITZ:**

9 Q In Exhibit 30 would you turn to pages, USB616, and 617?

10 A Yes.

11 Q What are those two pages?

12 A 616 and 617 are a copy of what would be our online status
13 report, which is available to the HOA management company, as well as
14 the board of directors, 24/7 via a user name and password.

15 Q Am I correct that one column is the date the entry was made,
16 and then the other column is the actual entry or event described?

17 A Yes.

18 Q And both the date and the entry would have been entered by
19 an Alessi employee, at or about the time of date on the left-hand
20 column?

21 A Yes.

22 Q And this is a true and accurate copy of a document that
23 Alessi and company maintained on behalf of the HOA, in connection
24 with prosecuting the foreclosure?

25 A Yes.

1 Q Look down to the entry at June 20, 2011.

2 A Yes.

3 Q Would you read that into the record?

4 A "HOA sale set for 9/14/2011." And do you want me to read
5 the one below it as well?

6 Q Not necessary at this point. So, the HOA sale is set for
7 9/14/2011. Would you turn next to USB549.

8 A Yes. This is a notice of trustee sale, correct?

9 A Yes.

10 Q And it sets the date of the sale for the Marbledoe property as
11 September 14, 2011; is that right?

12 A Yes.

13 Q And is this a document that would have been mailed to the
14 homeowner?

15 A Yes.

16 Q And this is also a document that would have been recorded
17 with the Clark County Recorder?

18 A Yes.

19 Q That notice of sale, in the bottom paragraph, that notice of
20 sale provides a balance of the obligation secured by the property that's
21 the subject of that sale --

22 A Yes.

23 Q -- is that right?

24 A Yes.

25 Q And as of June 20, 2011, the unpaid balance of the obligation

1 was \$3,798.39?

2 A Of the assessment portion of the obligation, yes.

3 Q This specific notice of trustee sale relates back to the notice
4 of lien, recorded on November 12, 2009; is that right?

5 A Yes.

6 Q Would you turn to Exhibit 9.

7 A Yes.

8 Q Would you confirm for the Court that that is in fact the notice
9 of lien that's identified in the notice of trustee sale, USB549, specifically
10 that document, Exhibit 9, was recorded on November 12th, 2009. Do you
11 see that in the upper right-hand corner?

12 A Yes.

13 Q And specifically it has an instrument number ending with
14 4474?

15 A Yes. Same instrument number referenced on the notice of
16 trustee sale.

17 Q Okay. Would you move up to the entry placed on October
18 19, 2011, and read that into the record?

19 THE COURT: Are we back to 616 and 617, Bates?

20 MR. NITZ: Yes, Your Honor.

21 THE COURT: Okay. Thank you so much, I appreciate it.

22 MR. NITZ: Sorry.

23 **BY MR. NITZ:**

24 Q The November 17th, 2011 entry?

25 A No. The October 19, 2011 entry.

1 MS. HANKS: You're at 616, right, USB?

2 MR. NITZ: 616, yes.

3 THE COURT: So, you said October 19, 2011, or 2010? Oh --
4 okay, sorry. Never mind.

5 THE WITNESS: He said October 19th, 2011. I see an October
6 19th, 2010 entry. Oh, I'm sorry. October 19th of 2011, received payoff
7 request from Miles, Bauer, Bergstrom & Winters.

8 **BY MR. NITZ:**

9 Q Would you next turn to Exhibit 22.

10 MS. HANKS: You're having him look at proposed Exhibit 22;
11 I heard that right?

12 THE COURT: 22, correct. Yes.

13 THE WITNESS: Yes.

14 MR. NITZ: Yes, 22.

15 THE COURT: Correct. October 2011.

16 THE WITNESS: I'm there.

17 **BY MR. NITZ:**

18 Q Okay. The date of this letter is October 11, 2011. Would the
19 substance of this October 11, 2011 letter be fairly described as a payoff
20 request from Miles, Bauer, Bergstrom & Winters?

21 A Yes.

22 MR. NITZ: Your Honor, during the questioning of Mr. Jung,
23 Ms. Lehman offered Exhibit 22, and it was -- the substance of the letter
24 was read into the record under the past recollection recorded statute. I
25 would now move for the admission of Exhibit 22, based on Mr. Alessi's

1 testimony.

2 MS. HANKS: I object, Your Honor. There's no testimony that
3 Mr. Alessi could admit the document. I think we were just asking him to
4 identify the date. I didn't hear any foundation that he could authenticate
5 it or -- I think it's a hearsay exception.

6 MR. NITZ: The foundation was that this letter would be fairly
7 described as the payoff request from Miles, Bauer, Bergstrom & Winters,
8 received on or about October 19, 2011.

9 THE COURT: But this says -- I'm sorry, Counsel, your
10 objection was what?

11 MS. HANKS: My objection was, my understanding was the
12 question was just foundational, whether he recognized it, generally
13 speaking. Then when he goes to move to admit it, there's no
14 authenticity from this witness, no testimony authenticating it. No
15 testimony that he can establish any exception to the hearsay rule for this
16 document.

17 THE COURT: Okay. Based on the single questionnaire of the
18 witness with regards to proposed Exhibit 22, the Court's going to have to
19 sustain the objection on foundation and hearsay.

20 **BY MR. NITZ:**

21 Q Mr. Alessi, do you have any reason to doubt that the October
22 11, 2011 letter in Exhibit 22 is any reason to doubt that it is in fact the
23 payoff request received from Miles, Bauer, on or about October 19,
24 2011?

25 MS. HANKS: Your Honor, I have to object to the extent he's

1 asking the witness to look at a document that hasn't been admitted, and
2 cross-reference it with a document that's been admitted, and testify
3 about it.

4 THE COURT: The Court's going to allow the question with
5 the way the question was phrased, just to get an idea, whether or not
6 from a -- overruled.

7 THE WITNESS: I have no reason to doubt that Exhibit 22 --

8 THE COURT: Proposed.

9 THE WITNESS: -- is the document referenced in the status
10 report, on USB616.

11 **BY MR. NITZ:**

12 Q Would return to USB616 and read for me the entry the Alessi
13 employee made on October 21, 2011.

14 A "Payout made to Miles, Bauer, Bergstrom & Winters."

15 Q Would you next look at Exhibit 23?

16 A Yes.

17 Q In the entry on October 21 it says, "Payoff made to Miles,
18 Bauer." Would that fairly be interpreted as a payoff demand, or payoff?

19 A Yes.

20 Q In other words, on or about that date an Alessi employee
21 mailed to, or transmitted to Miles, Bauer, Bergstrom & Winters, a payoff
22 demand?

23 A Yes.

24 Q Do recognize on Exhibit 23, do you recognize the letterhead
25 here?

1 A Yes.

2 Q Is that a letterhead that Alessi and Company was using for its
3 facsimile coversheets, on or about October 21, 2011?

4 A Yes.

5 Q This letter, this facsimile cover letter, was that generated by
6 Ryan Kerbow?

7 A Yes.

8 Q And who do you know him to be?

9 A He was the -- he was a Nevada and California attorney that
10 worked for Alessi Koenig at that time.

11 Q In that block, underneath the facsimile cover letter, it also has
12 an addressee of A. Bhame. Do you have any idea who A. Bhame?

13 A My understanding is that is an employee of Miles, Bauer.

14 Q And also in this block at the top, it has a date of Friday,
15 October 21, 2011. Would that be the date of transmittal of the fax, under
16 this coversheet?

17 A Yes.

18 Q Did Alessi prepare this payoff based upon receipt of
19 statement of account from the Homeowners Association, or its property
20 manager?

21 A Yes.

22 Q And it relied on the truthfulness and accuracy of that
23 statement in order to generate the amount set forth in this payout
24 demand?

25 A Yes.

1 THE COURT: Wait sec. Counsel, we're in the middle of trial,
2 is there something --

3 [Pause]

4 **BY MR. NITZ:**

5 Q Your Honor, I renew my offer of Exhibit 22, the October 11,
6 2011 letter from Miles, Bauer to Antelope, in care of Alessi.

7 MS. HANKS: Your Honor, I still have the same objection.
8 There was no foundational testimony that Mr. Alessi would be the
9 custodian of records, or other qualified person from Miles, Bauer, to
10 admit Exhibit 22, or overcome the hearsay.

11 THE COURT: Okay. So, Counsel, what's your response? I'm
12 sorry, I don't know why people are going in and out of that door so
13 much, sorry for the noise that's happened during our trial. Just one sec.
14 Let me pause for one second.

15 [Pause]

16 THE COURT: Sorry, Counsel. People keep walking into our
17 courtroom, nothing to do with us.

18 MR. NITZ: Your Honor --

19 THE COURT: So, the objection was -- and I asked if you had
20 a response with regards to proposed Exhibit 22, to the objection, as to
21 Defense counsel.

22 MR. NITZ: Yes, I do. Mr. Jung provided part of the
23 foundation for it. In fact, he testified that this was a letter that he sent on
24 or about that date. In other words, it was a statement that he made on or
25 about that date to the Homeowners Association, specifically Alessi. And

1 he read it into the record as a true and accurate rendition or statement of
2 what he sent them. And then in addition, Mr. Alessi fills in the gap. Mr.
3 Jung testified that this was payoff request.

4 He said it had -- twofold it was to tell them that they would
5 pay off the super priority lien, no matter what the amount was, and a
6 request to determine what the amount was. And Mr. Alessi then
7 confirmed that they received a payoff request on October 19, which
8 would be consistent with the sending of this October 11, 2011 letter.

9 Mr. Alessi -- there's been no dispute that he's a custodian of
10 records, that's what his affidavit or declaration says. So -- and at that
11 point the letter became part of -- at that point it became part of the
12 Alessi's records.

13 Mr. Jung supplied the authenticity, authenticity of this
14 document. The document is what it purports to be, mainly a payoff
15 request, and Alessi confirmed that this payoff request was in fact
16 received by Alessi, on or about October 19, 2011. I would --

17 THE COURT: How is that linked up Counsel, though? I'm
18 hearing what you're saying, but I've got a custodian of records' affidavit
19 that says this is -- right, proposed Exhibit 30 is the totality of the records,
20 and proposed 22 is nowhere in Exhibit, proposed Exhibit 30, right? At
21 least on this point, it would lead to a document in proposed Exhibit 30,
22 which mirrors the language that's in proposed Exhibit 22.

23 MR. NITZ: If I might ask --

24 THE COURT: Now without me going --

25 MR. NITZ: -- one additional --

1 THE COURT: -- through all documents in here.

2 MR. NITZ: -- foundational question?

3 THE COURT: Sure.

4 **BY MR. NITZ:**

5 Q Mr. Alessi, if Alessi & Koenig had not received a payoff
6 request from Miles, Bauer, Bergstrom & Winters, on or about October 19,
7 2011, would that entry have been made in these comment notes?

8 A No.

9 Q And if Miles, Bauer had not in fact received the payoff
10 request from -- I'm sorry, if Alessi had not in fact received a payoff
11 request from Miles, Bauer, on or about October 19, 2011, would it have
12 sent the payoff demand on October 21, 2011?

13 A No.

14 THE COURT: Okay.

15 Q Do you know if this Exhibit 22 currently appears in Alessi
16 collection file?

17 A I did not see it. We were getting hundreds of these letters. In
18 450 or 500 depositions, I often times see that the letter is scanned into
19 the file, but not always.

20 Q Would it be fair to say that the entry on October 19, 2011
21 received payoff request from Miles Bauer, Bergstrom & Winters would
22 not have been entered if Alessi had not in fact received payoff requests
23 from Miles Bauer --

24 MS. HANKS: Objection.

25 MR. NITZ: -- on or about that date?

1 MS. HANKS: Objection. Asked and answered.

2 THE COURT: Overruled in light of the prior objection.

3 THE WITNESS: Yes, again, from having done so many of
4 these depositions and trial testimony, the pattern of this file indicates to
5 me that we received this letter primarily because we would not have sent
6 a payoff to Miles Bauer, unless it was in response to such a letter. Added
7 to the fact that there's an entry in the status report to that effect.

8 MR. NITZ: Your Honor, I would also direct the Court to a
9 Fifth Circuit case, I only have a pin cite for it. It's *Childs*, and it's 5
10 Fed.3d, 1328, a 9th Circuit, 1993 case.

11 THE COURT: The 9th Circuit or 5th Circuit, counsel? I'm
12 sorry, I thought at first you said 5th Circuit, and then I thought I heard
13 you say 9th Circuit. I was just trying to take into account whether it's the
14 circuit that covers --

15 MR. NITZ: When I said it was the 5th Circuit case, I
16 misstated.

17 THE COURT: Okay.

18 MR. NITZ: I'm looking at the quotation in the Childs case,
19 and it cites to the *United States vs. Ulrich*, 580 F.2d, 765, 5th Cir. 1978.
20 And in that case, the prosecutor -- in *Ulrich*, the Prosecutor introduced
21 documents to prove the identity of a stolen automobile through the
22 testimony of an employee of an automobile dealership. The documents
23 were prepared by a credit company, and an automobile manufacturer
24 and sent to the dealership.

25 The Defendant argued that the documents were improperly

1 admitted as business records, because they were not prepared by the
2 dealership. The Fifth Circuit found it "obvious", but that documents were
3 admissible as business records. And the -- the Ninth Circuit in *Childs*
4 relied on the quote "although these documents were furnished originally
5 from other sources, the dealership employee testified that they were kept
6 in the regular course of the dealership's business. In effect they were
7 integrated into the records of the dealership and were used by it."

8 In this case, the -- the Miles Bauer letter was received by
9 Alessi, and was integrated into the records of Alessi, at least through the
10 reference to received payoff request on that specific date. And Mr.
11 Alessi said that sometimes documents did not get scanned because of
12 the hundreds of them that they dealt with.

13 So, even though the actual letter does not appear, the letter
14 is identified, received, and acted upon. Just as in the other case, it was
15 kept in the regular course of business. It was integrated into records of
16 the dealership and used by it. The Alessi employee used the Miles Bauer
17 letter in order to generate the payoff request the followed on October 21.

18 So, based on that, I'd renew my offer of Exhibit 22 without
19 qualification.

20 THE COURT: And a brief response and then the Court's
21 making a ruling.

22 MS. HANKS: Your Honor, I just wanted to comment that this
23 is really argument of trying to link what came in the past recorded
24 recollection, but you still haven't heard anything about how Mr. Alessi
25 can authenticate it or meet the business exception rule. So, I mean that's

1 really where the problem lies.

2 And so, there's no evidence it was integrated. There's no
3 evidence it exists in the record. There's a date of October 19th, in the
4 status report, but that doesn't even match the date in the letter.

5 If counsel wants to argue later in closing, say, hey, that's
6 probably close enough. That's different. But that's not what we're
7 talking about. He's trying to get an exhibit admitted under that. You can
8 make that argument. But I also want to highlight the *Childs* case. The
9 reason why they did that is they claimed that what was at issue there is
10 the Auto Club was hooked directly into the DMV's computer system. It
11 says it right here. This is at page 1,333. And they could perform the
12 transactions online and the private auto club was following the DMV's
13 procedure for issuing license and was performing the transactions
14 directly on the DMV's computer system.

15 So, that's a very different beast. That's someone who's
16 actually functioning within another entity's computer system in terms of
17 doing something, which is why I think they were safe to say these
18 records were authentic. This is not. This is a separate and distinct
19 record created by a different company who may or may not have been
20 mailed it.

21 THE COURT: Well, at some point in this one is, this witness
22 hasn't even said that Alessi & Koenig received the letter. Has not stated
23 that this letter -- he said that letters like this in custom and practice would
24 be -- they wouldn't respond unless they received something. They didn't
25 say they necessarily received a letter. They could have received a phone

1 inquiry, could have received also different other types of inquiries.

2 And so, at this juncture, the Court can't presume that a letter
3 dated October 11, 2011 means that -- that does not exist in what are
4 there about 200 pages of records in a law firm/trustee's file, with the
5 custodian of records saying it's supposedly the full and accurate record
6 of that entity, if somehow the Court can pick another document -- or
7 actually it's not the Court picking it -- another document saying that it's
8 meant to be in there. I'm the holder, the custodian of records and have
9 access to the records and the data maintain by the entities in the regular
10 course of business.

11 I certify it is the regular practice to make and keep records of
12 the acts, events, conditions and opinions, also the collection of files and
13 has received a subpoena, he's examined the original collection of files,
14 and caused to be a true and exact copy of them and placed -- caused to
15 be in the drop box, consistent with the procedures of, enters the
16 bankruptcy case, et cetera.

17 I certify that the original collection of files from which the
18 documents in the drop box are uploaded, as the state, drop offs
19 anticipated, were made by personnel of the above-described entities, at
20 or near the time of transactions. Which transaction. So, I'm hearing the
21 argument, but I'm not seeing how it overcomes the objections raised by
22 Defense counsel, so the Court has to deny the admission of Exhibit 22,
23 without prejudice, but --

24 MS. HANKS: Right.

25 **DIRECT EXAMINATION CONTINUED**

1 **BY MR. NITZ:**

2 Q Mr. Alessi, would you return to Exhibit 30, and I'll direct you
3 to USB527. Okay, first, before --

4 MS. HANKS: I don't have 527.

5 MR. NITZ: You objected to it.

6 Q Attached to that fax --

7 THE COURT: Counsel, just so we're clear, are you going back
8 to Bates 527, which is in the excluded portion of Exhibit 30, that was
9 admitted? Or are you going to a different --

10 MR. NITZ: I will be in a moment. I need to --

11 THE COURT: Okay.

12 MR. NITZ: -- go back to Exhibit 23.

13 THE COURT: Okay, Exhibit 23. Go ahead.

14 MR. NITZ: I move -- I don't know if I did before, but I move
15 for the admission of Exhibit 23. Mr. Alessi laid the foundation for it. It
16 was on Alessi & Koenig letterhead prepared by or for, his employee, or
17 associate Ryan Kerbow, on or about October 21, 2011, related to this
18 property.

19 MS. HANKS: And, Your Honor, the objection I have with this
20 is that Mr. Alessi didn't testify that -- he just identified that it is their
21 letterhead, but he didn't really identify it was prepared in this particular
22 file. It's not contained in Exhibit 30, but in addition to that, with the
23 exception of the two facsimile pages, he can't lay the authenticity, or any
24 exceptions to the hearsay, for the remainder of pages that are in
25 Exhibit -- proposed Exhibit 23, which are USB171 through 174. Those

1 would be --

2 MR. NITZ: Simply not true, Your Honor. I --

3 THE COURT: Go ahead. Feel free, counsel, to respond.

4 **BY MR. NITZ:**

5 Q If -- Mr. Alessi, if I didn't, I'll ask it now. Do you recognize this
6 fax as a facsimile coversheet generated by your office and sent to the
7 Miles Bauer employee on or about October 21, 2011?

8 MS. HANKS: Objection, Your Honor, he's asking a witness to
9 testify in terms of was it sent, before the exhibit's been admitted.

10 THE COURT: Okay. I'm sorry, there was some backtalk. I
11 didn't hear what your objection was.

12 MS. HANKS: I said I objected to the second half of that,
13 where he's asking the witness to testify about the actual document being
14 sent. In order to do that, the witness has to actually look at it, and then
15 make some judgments about it. That's testifying about document that's
16 been admitted that's beyond the foundation of the who, what, where,
17 why, which I think he already established. But --

18 THE COURT: The objection for who, what, where, why,
19 because you said it didn't specifically referenced property in question --

20 MS. HANKS: It --

21 THE COURT: -- versus just a general statement of --

22 MS. HANKS: Meaning he --

23 THE COURT: -- in the alternatives.

24 MS. HANKS: Right. He -- I mean even the foundational
25 questions, Mr. Alessi never testified this particular document was sent

1 for this particular file. He has identified as an Alessi facsimile cover
2 sheet, and by the date, but it's not in the Exhibit 30, so I don't know that
3 Mr. Alessi can go that far. But even so, even if the first two pages are
4 admitted as part of Alessi's records, you have the secondary problem of
5 the attachments are not Alessi's records. So, it's the same problem you
6 have with Exhibit 30.

7 MR. NITZ: He did testify that this payoff demand is what was
8 referenced in USB616, for the entry of October 21, 2011.

9 THE COURT: Okay, the way the testimony went was a little
10 bit narrower -- I mean different than either of y'all are characterizing it,
11 but -- okay. Let's walk through it.

12 Page 616 of admitted Exhibit 30, does reference October 21,
13 2011, payoff made to Miles Bauer Bergstrom & Winters. There was
14 testimony of this witness, explaining what that line entry meant. And
15 that line entry was referencing the payoff amount would have been sent
16 in the particular case at issue, because it was referencing this case, that
17 this document was going to Exhibit 30. And since Exhibit 30 was
18 identified as the proximate file on this case, which would be this
19 property address, when the Court's saying this case.

20 So, it would be appropriate. So far, the Court does see to
21 admit Exhibit 169 and 170 of proposed Exhibit 23. However, Defense
22 counsel is correct, there's been nothing elicited from this witness with
23 regards to the remainder of proposed Exhibit 23, i.e., Bates stamps 172
24 to 175. So, if counsel is seeking the entire admission, I can defer. If
25 you're seeking to --

1 MR. NITZ: Defer, please, Your Honor.

2 **BY MR. NITZ:**

3 Q Mr. Alessi, attached to the fax 169 to 170, are pages USB171
4 to 75. And it's entitled a resident transaction date detail. Would it have
5 been consistent with Alessi policy and practice, at that time, when it's
6 providing a payoff demand to Miles Bauer, to include a resident
7 transaction detail, as appearing at 171 to 176?

8 A It would be consistent to attach a resident transaction detail
9 to the cover letter breakdown. However, the 5/31/2011 date is a bigger
10 gap than I'm used to seeing, between the date of the ledger and the date
11 of the breakdown. Here you have a five month gap. And that's quite a
12 bit bigger than I'm used to seeing. But it is consistent that we would
13 attach a ledger to the breakdown.

14 Q All right. You testified earlier that there was a delay, or
15 postponement because the homeowner was in bankruptcy?

16 A Yes.

17 Q And I believe you also --

18 A I don't know if I said delay or postponement. I think I noted
19 that there was a Chapter 7 entry.

20 Q For the homeowner?

21 A Yes.

22 Q All right. And we also established that there was a notice of
23 trustee sale that was mailed out by Alessi, that set the sale date as
24 September -- September 14, 2011, if you look at your June 20, 2011 entry
25 on your notes?

1 A Yes.

2 Q All right. Now, would you turn to USB527?

3 THE COURT: Counselors, we're going to have a different
4 clerk helping us out in just a few minutes. I just want to get a point of
5 clarification. You had deferred on proposed Exhibit 23, in its entirety, so
6 you did not move for the first two pages; is that correct? Because
7 remember the Court started, but then you kind of interrupted me, so I
8 didn't -- you said you were going to lay more foundation. I just want to
9 be clear, so that when we have our --

10 MR. NITZ: I thought I answered your question. Would you
11 like me to defer is what you asked me, I thought.

12 THE COURT: Okay.

13 MR. NITZ: And I said, yes. And then I've asked him
14 additional questions.

15 THE COURT: Okay.

16 MR. NITZ: To lay foundation.

17 THE COURT: So, for the Clerk's purpose then, proposed 30
18 has not been -- excuse me, I just misspoke. I just misspoke. One
19 moment, counsel. Proposed 23 for this witness has not been offered,
20 because you wish to defer, correct?

21 MR. NITZ: Yes.

22 THE COURT: Okay. Thank you, just that's something the
23 Clerk's going to have to note, so I want to make sure I have that correct.
24 Appreciate it. Thank you, so much.

25 **BY MR. NITZ:**

1 Q All right. Now, if you -- do you have a way to mark, because
2 I'm going to ask you to flip back and forth between those two, Exhibit 23,
3 pages 172 to -- or 171 to 175 or 6.

4 A Yes.

5 Q All right. On those pages, the date of this transaction detail
6 appears in the lower left-hand corner as 5/31/2011.

7 A Yes.

8 Q Would this resident transaction detail have been a document
9 requested by Alessi from the homeowners association, or its property
10 manager, in order to prosecute the foreclosure?

11 A It's unusual to see 527 and 528 as they -- as this ledger
12 pertains, as you can see to fines, landscaping, maintenance. Generally,
13 we would create a separate file for a violation lien, and you wouldn't find
14 a violation ledger in the same file as an assessment ledger. However,
15 when we would attach a ledger to our breakdown for say, for instance,
16 Miles Bauer, we would not include 527 and 528. We would only include
17 529, 530, 531, 532, and 533.

18 MS. HANKS: I'm sorry, Your Honor, I have to move to strike,
19 to the extent the witness testified about two proposed exhibits.

20 THE COURT: The Court's going to overrule that objection.
21 The Court needs to have some clarification of what's being referenced,
22 and the easiest way really is to reference when you have multiple
23 documents, to have just numeric aspects, to reference them by Bates
24 stamp numbers, for point of clarification.

25 So, Court's only taking that context from a reference number.

1 Not taking it from -- because there's no substance that is being gathered
2 from those reference page numbers. So, in short overruled, for the
3 reason I just stated.

4 **BY MR. NITZ:**

5 Q Do those pages USB171 to 175 attached to the fax of October
6 21, 2011, do those appear in the collection file? I will direct you, Mr.
7 Alessi, to USB527.

8 A Well, again, 527 and 528, do not appear in Exhibit 23.
9 However --

10 Q USB171 --

11 A Could be found at USB529 in our collection file.

12 Q So I'll go back to my question. The resident transaction
13 detail pages, USB171 through 175, dated 5/31/2011, those pages -- that's
14 from Exhibit 23 -- those pages would've been received upon a request to
15 the HOA or its property manager; is that right?

16 MS. HANKS: Objection, Your Honor. He's asking the witness
17 to testify about an exhibit that hasn't been admitted. That's beyond
18 foundational.

19 MR. NITZ: It's purely foundational. Did he receive it or not?
20 Did Alessi & Koenig receive the document from the HOA, and did it
21 become part of Alessi & Koenig's records?

22 THE COURT: Which is the it? The attachment?

23 MR. NITZ; 171 to 175.

24 THE COURT: A question the Court is going to have here. 171
25 to 175. Did they receive it, and did it become part of the Court's records

1 by referencing a document that the Court would've sent by Alessi &
2 Koenig to Miles Bauer? I'm not sure I'm understanding how that nexus
3 would come through in what you just stated your purpose was, Counsel.
4 So, if that's the purpose, I have to sustain Defense's objection, because
5 that wouldn't be -- by saying something went out the door doesn't mean
6 it came in the door.

7 BY MR. NITZ:

8 Q Mr. Alessi, Alessi would not have been able to send the
9 resident transaction detail, USB171 through 175, to Miles Bauer under
10 the cover of that fax, unless they had received it from the HOA or the
11 HOA's property manager, correct?

12 A Correct.

13 Q And in fact, those pages do appear in the collection file
14 beginning at USB529 through 533, I believe it is?

15 A Correct.

16 Q How did Alessi use the resident transaction detail 5/31/2011
17 to perform its duties on behalf of the HOA?

18 MS. HANKS: Objection. Assumes facts not in evidence.

19 THE COURT: Sustained for the way that question was
20 phrased.

21 BY MR. NITZ:

22 Q Part of Alessi's duties were to respond to pay off requests by
23 Miles Bauer and similar firms and entities, right?

24 A Yes.

25 Q Would it be fair to say that Alessi could not have submitted

1 the resident transaction detail, those pages 171 to 175 in performance of
2 its duties of supplying the pay-off demand unless it had received those
3 documents from the HOA or its property manager?

4 A Well, we did receive them because we produced them, so
5 that would be fair to say.

6 Q In order to generate the facsimile cover sheet, USB169, did
7 Alessi rely on the truthfulness and accuracy of USB529 to 533?

8 A Yes. We rely on the truthfulness and accuracy of the account
9 managers we receive from management.

10 MR. NITZ: Your Honor, I renew my offer of the entirety of
11 Exhibit 23. Mr. Alessi testified that he received the documents from the
12 homeowner's association, they became part of his collection file, they
13 relied on that information in order to perform tasks on behalf of the
14 association, specifically to provide the pay-off demand to Miles Bauer.

15 MS. HANKS: Your Honor, the question is not -- the objection
16 is not receipt. It's this witness cannot authenticate the document or
17 make the exception to the hearsay. He is not the agent or employee of --
18 I don't even know if we've established who prepared this document,
19 number one. He's not the custodian or employee of that entity, whoever
20 that is, and he's not a qualified person. There's been no testimony he's
21 familiar with how this record was maintained, how it was created, how it
22 was kept. He just gets it. He just gets the document, and I cited the
23 Landmark case in my trial brief. They dealt with something very similar.

24 The architect had a third-party cost breakdown for upgrades
25 to a building that were in the general contractor's file. And they said the

1 mere fact that the architect incorporated those records does not mean he
2 can be the witness to get over the hearsay exception or it becomes
3 under the business exception rule. And they dealt with almost exactly
4 this type of situation and rejected that motion.

5 THE COURT: Okay. Here's what the Court is going to rule,
6 and I'm going --

7 MR. NITZ: May I respond to that, Your Honor?

8 THE COURT: Oh, of course, if you want to. Usually I hear the
9 objection and hear the response; yeah, but of course, Counsel. Feel free
10 to do so.

11 MR. NITZ: We're not trying to establish the business record
12 exception for the homeowner's association records. If we were, we'd be
13 calling the homeowner's association. All we need to establish here is
14 that Alessi & Koenig requested it of the homeowner's association. They
15 received it. He testified he relied on the accuracy of it in order to
16 perform the tasks on behalf of the homeowner's association, mainly
17 responding to this -- the pay-off request and providing the pay-off
18 demand. It doesn't -- it only matters did they act on it, is it part of
19 Alessi's records, and yes it is, all of the foundational requirements for the
20 business record exception.

21 Are those pages part of the business records of Alessi, and
22 were they used by Alessi to perform the task? Are they what they
23 purport to be? They purport to be a pay off -- a statement of account
24 from the homeowner's association, and Alessi relied on them to that
25 effect, that it was a statement of account, and they used that in order to

1 perform their business.

2 THE COURT: Okay. Court has to ask a question, which
3 Counsel, you don't have to answer if you don't want to, but I'm just
4 trying to get an understanding. Since proposed Exhibit 23 is not
5 contained within proposed Exhibit 30 in this format, with that same
6 grouping of documents, is that a correct or incorrect statement?

7 MS. HANKS: That's a correct statement.

8 THE COURT: I'm not asking if portions of it may be. We
9 already know portions of some of the pages that are under proposed
10 Exhibit 23 -- in fact, I'll identify which page numbers. Bates 171 through
11 Bates 175 appear within proposed Exhibit 30, albeit with different Bate
12 stamp numbers. There's different Bates stamp numbers, being 529
13 through 533. The parties both agree that that's correct? They, for pure
14 appearance purposes, are looking at the proposed exhibit notebook,
15 right?

16 MS. HANKS: Correct.

17 THE COURT: Is that correct from both sides? To both --

18 MR. NITZ; I don't think the way you characterized it is
19 correct, and I don't think it accounts for Mr. Alessi's testimony. This
20 letter whether -- this facsimile cover sheet, whether or not it appears in
21 Exhibit 30, it was still generated by Alessi & Koenig, and it was as part of
22 their practice in prosecuting the foreclosure on behalf of the HOA.

23 THE COURT: Counsel is trying to get a -- Counsel, I'm really
24 just trying to get a foundational aspect. I don't know when you all put
25 together this journal, exhibit -- oh, journal, sorry -- exhibit notebook,

1 right? Whether the fact -- usually when you see different Bates stamp
2 numbering, it means it comes from different places, okay?

3 So, usually, if something is out of sequence, okay, that's
4 what the Court is trying to understand. Did someone take proposed
5 Exhibit 23 out of proposed Exhibit 30 and put it separately as proposed
6 Exhibit 23?

7 MS. HANKS: No.

8 THE COURT: I'm trying to get an understanding of where
9 proposed Exhibit 23 came from, since it doesn't have a custodian of
10 records, it doesn't have anything. So, the Court is just trying to have an
11 understanding because here's the challenge for the Court, okay, is if this
12 was under proposed Exhibit 30 in its six pages -- okay, one, two, three,
13 four, five, six, seven -- seven pages, right?

14 If these seven pages that are proposed Exhibit 23 exist in a
15 mere format under proposed Exhibit 30, the Court would presume,
16 maybe correctly, maybe incorrect, but the Court would presume that no
17 one would be seeking to have it admitted as proposed Exhibit 23, that
18 they existed under proposed Exhibit 30 in this same exact format; would
19 that be a correct statement that these seven pages do not, in this
20 grouping, exist together under proposed Exhibit 30?

21 MS. HANKS: That's correct.

22 MR. NITZ; I would agree with that.

23 THE COURT: Okay. That's what I'm trying to have an
24 understanding. The reason why the Court is asking that question, okay,
25 and we're back to why the Court had said its original information was to

1 admit Bates stamp 169 and Bates stamp 170 of proposed 23, is based on
2 the prior testimony of this witness that he saw the large discrepancy in
3 dates between Bates stamp 169, 170, which is the two-page facsimile,
4 the court's system used for identification purposes, okay? Versus
5 starting at Bates stamp 170 through Bates stamp 175, okay, that doesn't
6 normally see that large date differential, 531 versus the date of the fax,
7 because the date of the two pages of fax cover sheet says Friday,
8 October 21. The Court understands the Friday, October 21, 2011 mirrors
9 what's been called the summary of proposed 30, right? The entry. Okay.

10 However, here lies the question where the Court is seeing a
11 concern, is since the Court doesn't know where proposed 23 came from
12 in its format, the seven page format, okay? And since it doesn't exist
13 under proposed Exhibit 30 in its total seven page format as it exists
14 under proposed 23, and then the Court has to look, which you all have
15 said that, from Plaintiff's counsel's perception that pages -- Bates 171
16 through 175 came in the integrated unit with Bates Stamp 169 and 170,
17 out the doors of Alessi & Koenig and to A. Bham on or about October
18 21, 2011, on the date, on the first page, 169.

19 However, as pointed out by Defense counsel, combined with
20 the testimony of -- of objection raised by Defense counsel, the testimony
21 of this witness, because the large dates, because the math doesn't even
22 add up. The cover sheet itself, page 169, says late fees through October
23 31, 2011. Okay. And it says assessments through October 31, 2011, and
24 as pointed out by the witness on the stand, the large difference in
25 timeframes, having a 5/31/2011, by definition, if Bates stamped pages

1 171 through 175 only go through May 31, 2011, it cannot reflect either
2 assessments or late fees through October 31, 2011, which is why the
3 Court --

4 MR. NITZ: I can fill that gap for the Court.

5 THE COURT: I'm just saying, that's the reason why the Court
6 is asking these questions is because he said that -- the witness said that
7 there's this huge time gap. He's not used to hearing this huge time gap,
8 so it's unclear that this witness has, in any way, identified that these
9 seven pages went out together to anybody. He has identified the first
10 two pages for Alessi & Koenig.

11 That's the reason why the Court was inclined to grant
12 admission of those. There was objections raised through the remainder,
13 the other five pages of the document, starting with page 171. That's why
14 the Court is having this question because --

15 MR. NITZ: I --

16 THE COURT: -- Defense counsel's objections seem well-
17 reasoned based on looking at the document itself or the testimony of this
18 witness.

19 MR. NITZ: Your Honor, I can fill that gap.

20 BY MR. NITZ:

21 Q Mr. Alessi, on USB174, what is the last assessment do on this
22 account before the 5/31/2011?

23 MS. HANKS: Objection, Your Honor. He's having the
24 witness testify about an exhibit that's not admitted.

25 THE COURT: I'll have to sustain that objection as phrased to

1 the question that was presented to this witness.

2 BY MR. NITZ:

3 Q The date of this resident transaction detail is May 31, 2011,
4 and this facsimile cover sheet, the USB169, was nearly five months later.
5 During those intervening four or five months, would this account
6 continue to -- would it have continued to accumulate delinquent
7 assessments?

8 A Yes.

9 Q And do you recall what -- from your review of the collection,
10 in preparation for testimony, do you recall what the assessments were in
11 the early part of 2011?

12 A Yes, \$45.

13 MS. HANKS: I have to object to the witness answering what
14 it was beyond the yes because now he's gone -- based on a document
15 that hasn't been admitted. I didn't object to the question because it was
16 just a yes or no question, but once the witness actually answered what
17 the amount was, I know he's read the document, so I have to move to
18 strike that last part.

19 THE COURT: Court is going to overrule the objection based
20 on this witness saying that he reviewed documents in the preparation for
21 his testimony here today. That may have been partially non-responsive.
22 That doesn't make it objectional for the Court to preclude it by the
23 objection raised by Defense counsel with regards to that very last second
24 part of the answer.

25 BY MR. NITZ:

1 Q The Court pointed out that the assessments through October
2 31, 2011 on USB169 showed \$1,611.61. Would the difference between
3 that and the resident transaction detail be accounted for by \$45 month
4 assessments, plus late fees during that same four or five month period?

5 A Yes.

6 THE COURT: The Court's not fully -- to appear what they
7 already want.

8 MR. NITZ: All right.

9 THE COURT: Proceed to the next question. Feel free to
10 proceed or whatever you'd like to do, Counsel.

11 MR. NITZ: I renew my request of the entirety of Exhibit 23 be
12 admitted. You already admitted 169 to 170 and the foundation has been
13 established for the balance. This is also an example where there's a two
14 part matter of the foundation. Mr. Jung testified that he, in fact, received
15 a pay-off demand from Alessi. He identified this facsimile cover sheet by
16 the Miles Bauer file number 11-H1638, and the homeowner name of Ivy.
17 So, he established that he received this pay off demand in response to
18 his pay off request, and Mr. Alessi confirmed that the pay-off demand is
19 what was identified in the comments, USB616, October 21, 2011 pay off
20 made to Miles Bauer.

21 He confirmed that it was made -- it was a facsimile generated
22 on October 21, 2011, as shown by the block at the top of the fax cover
23 sheet, and Mr. Jung supplied the other half that this is the document that
24 he received from them. Even though it may not presently exist in the
25 collection file, we know from USB616 that they sent it and specifically, by

1 Ryan Kerbow to the Miles Bauer employee on that specific date and
2 relayed it to this specific property, and Mr. Jung testified that it was
3 received on or about that date in response to his pay off request.

4 So, it -- the two are supplying -- it's like folding your hands.
5 Mr. Jung supplied some of the pages of the document. Mr. Alessi
6 supplied the others based on what he currently, unquestionably has, in
7 his collection file.

8 THE COURT: I've heard the arguments of counsel, gone
9 through this a lot. The Court is going to -- are you asking in its entirety
10 to be admitted or are you asking your whole -- or you never actually
11 proposed the first two pages. I had given you the inclination and then
12 deferred it. So, are you asking that its entirety, yay or nay, are you
13 asking as an alternative, just pages 169 and 170?

14 MR. NITZ; I'm asking that the entirety be admitted, or in the
15 alternative -- well, let me ask that. I'm offering the entire -- the 169 to
16 175, based on the two hands and the folded hands, Mr. Alessi and Mr.
17 Jung.

18 THE COURT: The Court needs to deny that. Mr. Jung has
19 not inquired upon the payment detail aspect. He has inquired upon the
20 facsimile cover page. We talked about how Mr. Bhame was his paralegal
21 at the firm at the time, and that they would normally receive this, and
22 that's what he would base his second letter, but the whole detail starts at
23 page 171. Mr. Jung did not go into all of those information for the
24 details, which is why I -- give me two seconds, please, Counsel. So that
25 did not come from Mr. Jung.

1 So, then you have to look at whether it's coming from Mr.
2 Alessi. I don't see it coming from Mr. Alessi for a multitude of reasons.
3 One, Mr. Alessi's testimony, he said that it's unusual to have this large
4 amount, okay? He's also said that the faxes come across in dates
5 certain. You've got a fax that says it's page 1. It's got 1 and including
6 cover. It doesn't say seven pages. And the amounts that don't match,
7 which have not really been justified or clarified by this witness.

8 Now, this witness has testified as to what the monthly
9 amount is. You've got no testimony that this witness is saying that they
10 have attached something with some amounts that are way less than
11 what's set on the cover sheet, and that that's any way of the customer
12 practice or anything like this. You just don't have your two hands
13 coming together. What you have is what Defense counsel has asserted
14 with her case law citation, so the Court would have to deny it in its
15 entirety.

16 Is there an alternative request?

17 MR. NITZ: We'd ask that 169 and 170 be admitted.

18 THE COURT: Court finds that that has been appropriately --
19 meets the various standards through the -- to witnesses, and also
20 independently through this witness. We'll admit 169 and 170. So that
21 will be admitted. Presumably over the objection of Defense; is that
22 right? 169 and 170?

23 MS. HANKS: Correct.

24 THE COURT: Are you objecting to that alternative request?

25 MS. HANKS: I'll just stand by my earlier objection. I

1 understand -- I don't have anything to add to it.

2 THE COURT: Okay. So, one --

3 MS. HANKS: Just in terms of it not also being in Exhibit 30,
4 but I understand the Court's ruling.

5 THE COURT: But the Court addressing that, since you had
6 actually mentioned that one before, with an Alessi & Koenig document
7 verified by this witness that's his letterhead, and that Court finds the fact
8 -- the mere fact that this document not being under Exhibit 30 wasn't
9 precluded because it's their own document. He's verified it should've
10 been in there, and so pages 169 and 170 are admitted as Exhibit 23.
11 Bates 171 through 175 are not admitted with prejudice. Okay. You
12 may --

13 THE COURT: -- without prejudice. Okay. You may proceed.
14 BY MR. NITZ:

15 Q Mr. Alessi, would you expect that Alessi & Koenig,
16 specifically Mr. Kerbow, sent this facsimile cover sheet with the most
17 recent resident transaction detail that he had in the file?

18 A Yes, because it was Ryan Kerbow that sent the cover letter, it
19 would not surprise me that Ryan would not get an updated ledger like a
20 legal assistant may. He may have just sent the most recent ledger that
21 we had in the file -- I'm speculating -- and just added the subsequent
22 months.

23 Since it was midyear, we know that there's not going to be any
24 change in the monthly assessments. That happens in January after the
25 budget in October/November, so he may have just, you know -- I don't

1 know what happened, but that's what could have happened.

2 [Pause]

3 Q Mr. Alessi, do you recall, as you sit here, based on your
4 review of this collection file, in preparation to testify, what the monthly
5 assessments were for this Antelope Homeowner's Association for 2009?

6 A I believe they were \$45.

7 MS. HANKS: Objection, Your Honor. I have -- oh, sorry. He
8 asked, do you recall, and then I get a different answer. I would've
9 objected it's hearsay if he hadn't given an answer.

10 THE COURT: I didn't hear your basis of your objection. Did
11 you say your objection --

12 MS. HANKS: The objection is hearsay.

13 THE COURT: Pardon?

14 MS. HANKS: The objection is hearsay. If he's asking him to
15 give him the assessment about based on the document, that would be
16 hearsay. I mean, I didn't hear any testimony that Alessi & Koenig would
17 have firsthand knowledge of what an assessment amount would be for
18 any given month.

19 THE COURT: And the predicate was based on his
20 preparation for court here today, really it's not been provided that he
21 wouldn't know that information, and so can't say it's hearsay. So, the
22 Court is going to overrule the objection. Forty-five in 2009, right?

23 THE WITNESS: Yeah.

24 THE COURT: Okay.

25 BY MR. NITZ:

1 Q Do you recall if during the period for 2009 through May 31,
2 2011 that the monthly assessments changed for Antelope?

3 A I don't recall. I believe the assessments were 45 at the end of
4 that time line that you gave me. I don't know if they had increased as of
5 2009, though. I don't recall.

6 Q Do you recall what the assessments due -- the monthly
7 assessments due for 2010 were?

8 A No. I --

9 Q Is there a document that would allow you to refresh your
10 recollection as to what the homeowner's association monthly
11 assessments were in 2010?

12 A In a document that's been admitted?

13 Q Right now, we're just refreshing your recollection.

14 MS. HANKS: Your Honor, I would ask that Counsel actually
15 hands the witness a document if he thinks it's going to refresh his
16 recollection, because I don't know what documents Mr. Alessi is looking
17 at right now.

18 THE WITNESS: I'm looking at the status report. I'm trying to
19 stay away from documents that haven't been admitted. I don't know --

20 THE COURT: Appreciative of this witness's answer and
21 opposing counsel's objection directly, but we kind of -- I appreciate you
22 trying to expedite that. That is normally helpful, but we need to -- if
23 there is an objection, the Court needs to address and get a point of
24 clarification.

25 But with that clarification, Counsel, do you still have an

1 objection since he's stating he's looking at the summary, which he's
2 already testified to as part of an admitted document?

3 MS. HANKS: No.

4 THE COURT: Okay. Feel free to look.

5 [Witness reviews document]

6 THE WITNESS: I don't see one.

7 [Witness reviews document]

8 THE WITNESS: I don't see one.

9 [Witness reviews document]

10 BY MR. NITZ:

11 Q Mr. Alessi, from your preparation -- review of the collection
12 file and preparation for the -- your testimony here today, did you
13 determine that at least for the year 2011 that the homeowner's
14 association dues were \$45 a month?

15 A I recall that the homeowner dues were \$45 a month. I don't
16 recall if that was '09, '10, or '11, or all three.

17 Q In order to perform your duties on behalf of the HOA in this
18 foreclosure process, would you have to obtain accurate information from
19 the homeowner's association or its property manager regarding the dues
20 and other charges like late fees?

21 A Yes.

22 Q And at various times throughout this foreclosure process,
23 Alessi did, in fact, inquire of the HOA or its property manager of the
24 homeowner's association dues, and other charges at various times in
25 order that Alessi could generate the documents it needed to, to comply

1 with the foreclosure process?

2 A Yes.

3 MR. NITZ: May I have a moment, Your Honor?

4 THE COURT: Of course, you may.

5 [Counsel confer]

6 BY MR. NITZ:

7 Q Let's return to Exhibit 23. I'll direct you to the cover page,
8 USB169. Okay. As of the time that Alessi generated the notice of sale,
9 setting the HOA sale for September 14, ,2011, as indicated on USB616,
10 would this USB169 set forth the total amount of the lien?

11 A It should; yes.

12 Q And --

13 A Yes.

14 Q The third enumerated item, as Court identified earlier,
15 assessments through October 31, 2011, was that the extent of charges
16 made that were subject of the notice of sale for September 14, 2011?

17 MR. NITZ: I'll withdraw the question.

18 BY MR. NITZ:

19 Q This pay off request is a combination of two different things,
20 correct? It's a combination of Alessi's collection fees and charges, as
21 well as the homeowner's association assessments, late fees, interest, all
22 the other things that are listed in 1 through 15 of this letter?

23 A Correct. Well, three different charges. There's also the
24 management company's \$25 -- at this time, a \$25 audit fee.

25 Q As of the date of this pay off request, were there any charges

1 for nuisance or abatement that were subject of this lien?

2 A Not subject -- no.

3 Q As of this date, were there any charges for -- any
4 maintenance charges that were subject to this lien?

5 A No. You can see line item 5 fines through October 21st,
6 2011. We put zero on the cover letter for purposes of the demand to the
7 bank, but in fact, there were fines due to the association. Well, that's my
8 understanding. We just wouldn't list them in our demand for a pay-off
9 from Miles Bauer.

10 Because as I said earlier, generally a fine account, because you
11 cannot foreclose on a fine unless it affects the health, safety, and welfare
12 of the association. In my 20 years of doing this, I've never seen a
13 foreclosure on a fine, so that's a separate account, a separate file
14 number. It's a completely separate file. So, we would not include that
15 amount in a demand pay off request for Miles Bauer, even if there were
16 fines owed.

17 Q Mr. Alessi, would you turn to proposed Exhibit 10? What is
18 this document?

19 A This is a violation lien that I had referenced earlier done by
20 CAMCO's in-house assessment collection company. Absolute, I think. I
21 recognize Kelly Mitchell's [phonetic] name as an employee of CAMCO,
22 and later Absolute. So --

23 Q In any case, this was not a document prepared by Alessi,
24 correct?

25 A Correct.

1 Q And would it be fair to conclude that Alessi was not pursuing
2 collection or foreclosure of a violation lien on behalf of the HOA? That
3 was relegated to Kelly Mitchell and --

4 A Yes.

5 Q Mr. Alessi, for the work that Alessi & Koenig was doing as
6 part of the collection and foreclosure process of the assessment lien, are
7 those pages USB172 to 175 of Exhibit 23 the extent of what Alessi
8 would've communicated to Miles Bauer in response to its payoff request
9 related to that notice to sale of September 14th, 2011?

10 MS. HANKS: Objection. Lacks foundation and hearsay.

11 THE COURT: Overruled for that specific question.

12 THE WITNESS: Yes. Again, in all -- all protocols and
13 procedures were that we would send either email or fax to Miles Bauer
14 or a cover letter, and we would attach to it a ledger like the one you see
15 on 172 through 175.

16 THE COURT: Counsel, you going to finish up in the next two
17 to three minutes? It's about 13 to the 5:00 hour.

18 MR. NITZ: I think so.

19 THE COURT: I'm saying you need to, because 5:00 is when
20 we have to -- because staff needs to be out of here by 5, so we need to
21 make sure. Okay, thank you.

22 BY MR. NITZ:

23 Q Mr. Alessi, would you turn to Exhibit 30 and specifically,
24 USB593?

25 A Yes.

1 Q Do you recognize this document as one that -- as a document
2 that appears in the collection file of Alessi for this particular property?

3 A This particular property and four others that SFR had
4 purchased on that same day.

5 Q Who is Brian Cojeftic [phonetic]?

6 A He was the head of the trustee sale department. Later
7 replaced by George Bates [phonetic].

8 Q Do you recognize the other names, Mary [phonetic] and
9 Elisio [phonetic]?

10 A Yes. Mary and Tom were both employees of Alessi &
11 Koenig, and then of course myself.

12 Q What about David Alessi? Was he?

13 A I recognize that.

14 Q USB594, the next page.

15 A Yes.

16 Q Is that cashier's check that's for \$30,133.10 the check that's
17 referred to in the body of the email?

18 A Yes, it would've been the check used to pay for the five
19 properties that were purchased on that day.

20 Q That day being July 25, 2012?

21 A Yes.

22 Q Would you turn to Exhibit 14?

23 A Yes.

24 Q Am I correct, this is a recorded copy of the notice of sale that
25 Alessi generated and mailed to at least the homeowner's association --

1 or to the homeowner?

2 A To the homeowner and all parties in interest, and the
3 ombudsman's office.

4 Q And we may have already covered this, but this went to sale
5 for July 25, 2012, is that right?

6 A Yes.

7 Q And that coincides with date on USB593?

8 A Yes.

9 Q Are you familiar with Alessi & Koenig's policies and
10 procedures regarding homeowner association foreclosure sales in 2011
11 to 2012?

12 A Yes.

13 Q In 2012, where did Alessi hold foreclosure sales?

14 A What page was that notice -- I'm sorry, what page was the
15 notice of trustee sale on? At our office in the second floor conference
16 room.

17 Q Regarding sales in 2012, did Alessi have a policy or
18 procedure for qualifying bidders before a sale?

19 A Yes. We would qualify bidders. I didn't attend the sales, but
20 our policy and procedure as I understand it was bidders would be
21 qualified with the presentation of either a certificate of deposit or a letter
22 to the bank as to an amount that the investor may have on deposit with
23 the bank or cashier's checks, money orders.

24 Q In 2011 to 2012, if I heard you right, potential bidders needed
25 to show proof of funds at the sale in order to qualify for bidding?

1	A	Yes.
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2 Q In 2012, were successful bidders expected to submit payment
3 at the time of the sale?

4 A At the time of the sale or at some reasonable point. If the
5 investor had shown proof of funds, we would allow the investor,
6 especially if it was one we had dealt with before to get exact change so
7 that they didn't have to wait for us to -- so that would use -- I've seen in
8 my depositions where -- but usually within a day or two.

9 [Pause]

10 MR. NITZ: Your Honor, once again, I'd move for the
11 admission of the entirety of Exhibit 23.

12 MS. HANKS: I didn't hear any testimony that would give the
13 basis. The objection still stands.

14 THE COURT: Okay. I didn't know if you still objected or
15 didn't object. Okay.

16 MS. HANKS: Of course.

17 THE COURT: Without the long version, what's the basis of
18 the objection, please?

19 MS. HANKS: That there's a lack of foundation as to him
20 being a qualified person of custodian records and hearsay.

21 THE COURT: In between the last time it was sought to be
22 moved, there wasn't any testimony with relation to pages 171 through
23 175, so the Court's ruling remains with regards to those pages of Exhibit
24 23. As noted before, pages 169 and 170 are admitted, and that's going to
25 need to wrap it up because it's five minutes until 5, and I appreciate it's

1 the end of the day. Our team has worked incredibly hard, so they still
2 need to have you all leave and we still need them doing what they need
3 to do. So, we need to call it a day. Tomorrow, we said we're starting at
4 10 a.m. We'll see you at 10 a.m. Okay? Thank you so very much.

5 MR. MARTINEZ: Thank you, Your Honor.

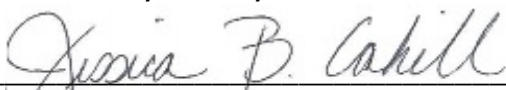
6 MR. NITZ: Thank you, Your Honor.

7 THE BAILIFF: Court is adjourned.

8 THE COURT: Thank you.

9 [Proceedings concluded at 4:55 p.m.]

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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

23 

24 Maukele Transcribers, LLC
25 Jessica B. Cahill, Transcriber, CER/CET-708