

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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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.

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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

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**JOINT APPENDIX – VOLUME XV**

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Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series  
2005-A8*

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DATED this 15<sup>th</sup> day of June, 2020.

WRIGHT, FINLAY & ZAK, LLP

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 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 15<sup>th</sup> day of June, 2020, the foregoing **JOINT APPENDIX – VOLUME XV** 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.

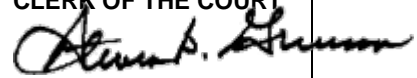
**Service via electronic notification will be sent to the following:**

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 THURSDAY, APRIL 18, 2019

23 **RECORDER'S TRANSCRIPT OF BENCH TRIAL - DAY 3**

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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None		

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Las Vegas, Nevada, Thursday, April 18, 2019

[Case called at 10:15 a.m.]

THE COURT: -- to continue your question.

THE WITNESS: Your Honor, if I may --

THE COURT: Just -- okay, one second. I've got -- counsel needs to continue with their questioning. Is the witness going to -- I'm not used to a witness who's on the stand saying something when it's -- counsel's just continuing with their questioning. So, I'm not sure what's happened. Witnesses don't usually just start talking when they're on the stand. They're under oath, there's not a question pending.

So, Counsel, can you please continue with your questioning?

MR. NITZ: Yes, Your Honor.

[Court and Clerk confer]

DAVID ALESSI, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN  
DIRECT EXAMINATION CONTINUED

BY MR. NITZ:

Q Mr. Alessi, would you turn to Exhibit 23?

A Yes.

THE COURT: Okay. So, Exhibit 23, okay. Feel free to proceed.

[Court and clerk confer]

THE COURT: Feel free to continue. The witness has the exhibits. Go ahead.

BY MR. NITZ:

1 Q Mr. Alessi, yesterday we characterized this facsimile, with the  
2 attachments as a pay-off demand; would you agree with that?

3 A Yes. This is a payoff demand. And with regard to this pay-  
4 off demand, as a point of clarification to my testimony yesterday, this  
5 morning I spoke Jana LaPalma and Steve Loizzi, because I've been  
6 scratching -- I was scratching my head all last night as to why Alessi  
7 Koenig wouldn't have produced this demand, because my  
8 understanding as always been that --

9 MS. HANKS: Your Honor, can I just move to strike the  
10 answer as non-responsive to the question, either yes, or no.

11 THE COURT: The Court's going to sustain the request,  
12 because as the question as phrased would have been, yes, or no, "Is  
13 this a payoff demand," and then any further questions of course can be  
14 asked thereafter.

15 BY MR. NITZ:

16 Q Let's start with that?

17 A Okay.

18 Q Is this a pay-off demand?

19 A Yes.

20 Q Since you left court yesterday afternoon did you review  
21 those documents and make further inquiries, in your capacity as the  
22 designee of Alessi & Koenig?

23 A I did.

24 Q And what did you determine, concerning this pay-off  
25 demand?



1           A     So in my four or 500 depositions and trial testimony, I do  
2 not recall having seen an Alessi Koenig document, maybe one other  
3 time, produced by a -- by the bank for instance, where we did not have  
4 that document in our file. The reason is, because my understanding has  
5 always been that when we print the document, to fax it, or email it, or  
6 mail it, it's automatically saved in our letters and notices tab of the  
7 program.

8                     So, I called Jana LaPalma and Steve Loizzi this morning,  
9 before trial, and had Jana inquire and look into the file as to why we  
10 wouldn't have the demand. Jana informed me that for whatever  
11 reason --

12                    MS. HANKS: Objection, Your Honor. It seems like the  
13 witness is about to testify as to hearsay, so I'd move to strike anymore.

14                    THE COURT: Okay. The Court cannot take --

15                    MR. NITZ: May I respond?

16                    THE COURT: Of course, counsel. Feel free to do so.

17                    MR. NITZ: Mr. Alessi is the corporate designee. In order to  
18 testify as a corporate designee, he has to review records, and he has to  
19 consult with employees of the corporation in order to testify, that's the  
20 foundation for his testimony.

21                    MS. HANKS: Your Honor, he also left here yesterday still  
22 under oath. So, I'm a little perplexed or disturbed by the fact that a  
23 witness that was still under oath was starting to talk to other individuals  
24 about his testimony, while his testimony is still ongoing. So, I have  
25 some concerns there.

1 THE COURT: Okay. Well, let's walk through a couple of  
2 different things. First off -- okay. So as of Mr. Alessi leaving yesterday,  
3 he still is a witness on the stand under oath and has not been released,  
4 correct?

5 MS. HANKS: Correct.

6 THE COURT: So, Mr. Alessi is also an attorney licensed in  
7 the State of Nevada; is that correct?

8 THE WITNESS: No, California.

9 THE COURT: In California, okay. But is an attorney. So, the  
10 rules are such that witnesses who are on the stand, there are certain  
11 things they can and cannot do, and I'm sure this witness has testified a  
12 lot in court, understands what -- to lose an attorney license in one State  
13 where the rules of what witnesses can and cannot do, are remarkably  
14 similar, since those rules have been adopted uniformly with minor  
15 changes. You happen to have a Judge who's licensed in both, but -- and  
16 we've always had that. There's certain things that witnesses can and  
17 cannot do when they're in the midst of their testimony.

18 So, what the Court is going to do is, is the Court is going to  
19 listen to the end of the response, and I'm going to hear what the  
20 objections are, before the Court can address whether or not the Court  
21 should or should not take into account the response, because I have to  
22 hear the totality of the response to have an understanding whether I  
23 should or should not be striking it.

24 So, I have to hear the rest of the response, and then I will  
25 hear the objections, and then I will hear the response to those objections,

1 and then the Court will make another one of its well-reasoned rulings.

2 THE WITNESS: So, the two demands in this case, and I said,  
3 I've never seen this occur, maybe one other time, were saved as a  
4 picture, I don't quite understand exactly how they were saved, but as a  
5 picture that is not -- there's a specific way to open it apparently, is not in  
6 the normal course of business in our letters and notices tabs as a PDF,  
7 and for that reason the two demands were not produced.

8 But upon further inquiry, I went to the office before my  
9 testimony, because I want to give as accurate of testimony as possible to  
10 the Court, to look into the file. And I was able to locate the demands. I  
11 have a copy -- took three copies with me today of a July 11, 2012  
12 demand. I didn't quite know what to do, Your Honor, I just want to give  
13 as accurate as testimony I can. I don't know the propriety of admitting  
14 them into evidence, that's not my wheelhouse, but it was very strange to  
15 me that we wouldn't have copies in our file of a document that we  
16 produced, since it's always been my experience that those documents  
17 are automatically saved into the program.

18 So, when I looked further into it this morning, I discovered  
19 that we indeed do have both of the demands in our program, and I  
20 wanted to bring that to the Court's attention.

21 THE COURT: Okay. This Court needs a point of clarification,  
22 and I'm only doing this so that I have an understanding of what the  
23 scope of the answer is. The Court's not saying this is, or is not allowable  
24 testimony, but I have reference to demands, and I have reference to July  
25 11, 2012, which is on a date that yet has come up.

1                   So, I have to have an understanding what the term "two  
2 demands" is referencing?

3                   THE WITNESS: The Friday, October 21st, 2011 demand, that  
4 I'm reviewing currently as Exhibit 23, and I don't know if July -- this July  
5 12th, 2000 -- July 11, 2012 demand is in any of the exhibits or not.

6                   THE COURT: Okay. So, now I have the completion of the  
7 witness' answer, and Madam Court Recorder, can you block out that  
8 information that we just heard, because the Court is going to have to  
9 make a ruling on. Just make a note.

10                  COURT RECORDER: Oh, yes, Your Honor.

11                  THE COURT: Thank you, Sandra. So now I'm going to hear,  
12 Defendant, your objection, now that you've heard the totality of the  
13 answer, and then I'm going to let counsel for --

14                  MS. HANKS: Could I have an opportunity to look at the July  
15 11, 2012, demand he's referring to, Your Honor, before I -- and then that  
16 might dictate my objection, and I might have a --

17                  THE COURT: Sure. I think --

18                  MS. HANKS: -- kind of a different response.

19                  MR. NITZ: May I ask why, Your Honor? If can retrieve it from  
20 the witness.

21                  THE COURT: Here's what I think you both are asking to do,  
22 and please let me know if this is not. I think you're both asking that the  
23 Court, since the witness has referenced two separate documents, would  
24 the parties, and this is -- you can say yes, no, it's completely up to you,  
25 would the parties like these to be Court's Exhibits 1 and 2, so that the

1 documents that are being referenced in kind of absentia, at least have  
2 been identified, and that they are least the Court's exhibits, and then you  
3 can both look at them. There will be Court's exhibits, and the parties can  
4 raise whatever you need to raise, and the Court can rule how it needs to  
5 rule.

6 Does that assist the parties?

7 MR. NITZ: That makes sense, Your Honor.

8 MS. HANKS: Yes, Your Honor.

9 THE COURT: Okay. So, I'm going to ask the Marshal, can  
10 you please go to the witness, he's got two exhibits. Since he referenced  
11 them, we're going to do it in a chronological. Let's see what we have.

12 THE WITNESS: It's actually just one exhibit. It's the October  
13 21st, 2011 breakdown has already been admitted into evidence. And  
14 since I was short on time, I brought with me only the new exhibit, the  
15 2012 breakdown. I just -- that's two copies of it.

16 THE COURT: Okay. Hold on just second, just so that we're  
17 clear. The Court's been handed two copies of a two-page document that  
18 says to A. Bhome from Ryan Kerbow, 7868 Marbledoe Court, HO18-842,  
19 Wednesday, July 11, 2012, one including cover, and then it has a two-  
20 page document. There's two copies of that.

21 So, what I'm going to ask, is Madam Clerk, this is only the  
22 Court's Exhibit 1, since the witness said that he did not bring -- well, I  
23 need to get a point of clarification. Was the document that was  
24 referenced as the October 21, 2011, was it also a two-page document,  
25 the Court needs to be clear; is it --

1 THE WITNESS: Yeah.

2 THE COURT: -- two-page document?

3 THE WITNESS: Yes.

4 THE COURT: Okay. So, there's a two-page notice, a seven-  
5 page document; is that correct?

6 THE WITNESS: Correct.

7 THE COURT: Okay. So, the first document referenced, which  
8 has not been brought in Court was --

9 MS. HANKS: Admitted yesterday.

10 THE COURT: Do you all wish it to be asked if it was the same  
11 as Bate stamped 169 --

12 MS. HANKS: Sure --

13 THE COURT: -- and 170?

14 MS. HANKS: Sure. Since we're having it carved out as -- this  
15 is like a carve out in the transcript, we might as well get the whole story,  
16 so we know what we're doing.

17 THE COURT: Counsel for Plaintiff, do you wish that, since he  
18 did not bring a copy of it. I can't make it a Court's exhibit, because  
19 there's not a copy of it. How do you all wish this to be handled?

20 MR. NITZ: If I may ask a question?

21 THE COURT: Of course.

22 BY MR. NITZ:

23 Q When you reviewed the actual electronic documents this  
24 morning, concerning the pay-off demands, you saw two of them in there  
25 that had not been previously produced; is that your testimony?

1           A     I was informed that there were two demands, the October  
2 21st, 2011, and the July 11th, 2012. I went -- when I went to the office,  
3 left for me at the reception desk was just the copies that I brought to  
4 Court, the July 11, 2012 demand. I mean, I didn't want to be late for  
5 Court, so I didn't turn around to get the October 21st, 2011 breakdown.  
6 My assumption is that it's exactly the same as USB169 and 170.

7           Q     Okay, settled. Since that physically has not been brought to  
8 Court, would the parties just like the two-page document that was  
9 brought to Court, dated, Wednesday, July 11, 2012, to be Court Exhibit  
10 1?

11               MS. HANKS: Yes, Your Honor.

12               MR. NITZ: Yes, Your Honor.

13               THE COURT: Okay. Since there's two copies, I will put the  
14 other one on the bench, and whoever wants to come look at it, then you  
15 all can share it among yourselves. Does that work for the parties?

16               THE WITNESS: There's a third copy --

17               THE COURT: Oh, there's a third --

18               THE WITNESS: -- it's kind of a little wet.

19               MS. HANKS: Can I get that from the witness, Your Honor?

20               THE COURT: Sure, of course. Defense, Counsel, you can --  
21 okay. So, I guess you each -- Madam Clerk has the one copy which is  
22 going to be Court's Exhibit 1, and now Defense counsel, Plaintiff's  
23 counsel, you each have your own copy, correct?

24               MS. HANKS: Yes, Your Honor.

25               THE COURT: From Plaintiff's counsel, yes?

1 MR. NITZ: Yes, Your Honor.

2 THE COURT: Okay. So, do you all need a moment, or does  
3 Defense counsel wish to set forth your objections, or do you need a  
4 moment?

5 MS. HANKS: If I could just have two seconds.

6 THE COURT: Of course.

7 MS. HANKS: Your Honor, in light of we have this --

8 THE COURT: Well, let's be clear what "this" is?

9 MS. HANKS: Court Exhibit 1, I don't have any objection, only  
10 to the extent that I think to avoid any issues, that I would ask that Court  
11 Exhibit 1 be admitted as an exhibit.

12 THE COURT: Okay. So, let me be -- you have -- the way this  
13 started, is you had --

14 MS. HANKS: Right.

15 THE COURT: -- originally objected, and then had a motion to  
16 strike regarding testimony of this witness.

17 MS. HANKS: Correct.

18 THE COURT: And then when the witness completed the  
19 testimony so that the Court was understanding what the witness was  
20 going to say --

21 MS. HANKS: Right.

22 THE COURT: -- we then went into the fact that there were  
23 some documents being brought by the witness; i.e. Court Exhibit 1, in  
24 court today.

25 MS. HANKS: Yes.



1 THE COURT: So, are you withdrawing any objection to the  
2 testimony, and withdrawing your motion to strike?

3 MS. HANKS: Correct. On the caveat, that the exhibit he  
4 brought with him can be admitted.

5 THE COURT: Okay. So, Plaintiff's counsel, have you heard  
6 Defense's position? Do you agree, or disagree, or wish to be heard?  
7 What would Plaintiff's counsel? And I'm using the term "Plaintiff's  
8 counsel." Remember, you still have not told me that you wish this trial  
9 to be done in a condensed version, that includes both Plaintiff and  
10 Defense case, as well as the counter-claims; and so that's why keep  
11 referring to you as Plaintiff's and Defense counsel.

12 So, presumably, you're doing this as two sets of trials, and  
13 calling these witnesses, because no one's told me separate, differently.  
14 So, if you're intending something differently, remember I asked you on  
15 Tuesday to let me know. No one has let me know differently, so, okay,  
16 but -- so, Plaintiff's counsel, did you hear Defense's request that she  
17 would withdraw her motion to strike if Court's Exhibit 1 became an  
18 entered exhibit, rather than just a Court's exhibit. Is that a correct  
19 statement?

20 MS. HANKS: That's correct.

21 THE COURT: Plaintiff's counsel, what's your position?

22 MR. NITZ: That's fine. She just stated it.

23 THE COURT: Okay. Well, that's what -- so your last exhibit  
24 was proposed 35. Would you want this to be Exhibit 36, then, as a  
25 stipulated admitted Exhibit 36?

1 MS. HANKS: No, Your Honor. Just because our exhibits go  
2 up to 73.

3 THE COURT: Oh, I'm sorry.

4 MS. HANKS: Yeah.

5 THE COURT: I'm looking at binder number 1.

6 MS. HANKS: that's okay.

7 THE COURT: My apologies.

8 MS. HANKS: So, I think we have to make it 74.

9 THE COURT: Okay. Does that meet the parties' needs?

10 MR. NITZ: Yes.

11 THE COURT: Okay. So, Court's Exhibit 1 is going to do two  
12 things. It's going to remain as a Court's Exhibit 1, so that we understand  
13 what that was referenced to. But then Madam Clerk will make a second  
14 copy of it, and that second copy of it will stipulated, admitted Exhibit 74.  
15 Is that what the parties are requesting?

16 MS. HANKS: Yes.

17 MR. NITZ: Yes.

18 [Plaintiff's Exhibit 74 received]

19 THE COURT: Okay. Madam Clerk, does that make sense to  
20 you?

21 THE CLERK: Yes.

22 THE COURT: Okay. Madam court recorder, you heard that?  
23 Okay. So now in light of that, Defendant has withdrawn their objection.  
24 The Court need not rule, in response to that last question, which means,  
25 Plaintiff's counsel, you can move forward with your next question.

1 MR. NITZ: Thank you, Your Honor.

2 BY MR. NITZ:

3 Q Mr. Alessi, as I understand your testimony, what you did this  
4 morning, you asked about the pay-off demands, and it was confirmed for  
5 you that the pay-off demand of October 2011 did actually appear in your  
6 electronic records, but it was not provided to you when you stopped by  
7 to pick it up on your way to Court?

8 A Correct.

9 Q And so before coming to Court you did not personally have  
10 an opportunity to review the electronic file that the October 2011 pay-off  
11 demand appeared in?

12 A Correct.

13 Q And likewise for the now Exhibit 74?

14 THE COURT: Yes. Yes, Counsel, thank you.

15 BY MR. NITZ:

16 Q Exhibit 74, the payoff demand of July 11, 2012, you did not  
17 personally have the opportunity to review the electronic file before  
18 bringing this copy to Court?

19 A Correct.

20 Q In order to make this pay-off demand to Miles, Bauer -- I'm  
21 going to step back a second. This July 11, 2012 facsimile cover sheet  
22 was also addressed to A. Bhame?

23 A Yes.

24 Q The same addressee which you recognize as an employee at  
25 the time of Miles, Bauer?

1 A Yes.

2 Q Would you turn to Exhibit 30, USB617?

3 A Yes.

4 Q All right. Would you go down about a quarter of the way  
5 down the list, and do you see an entry for July 11, 2012?

6 A Yes.

7 Q And what is that entry?

8 A Pay-off request paid to Miles, Bauer, Bergstrom & Winters.

9 Q Would Exhibit 74, the facsimile of July 11, 2012, that you  
10 brought with you to Court today, be that document?

11 A Yes.

12 Q As with the October 2011 record, you did not personally have  
13 the opportunity to review the electronic file that this July 11, 2012 payoff  
14 demand, request, whatever, review that in the file, before coming to  
15 Court?

16 A Correct.

17 Q So, would it be fair to say, before coming to Court, you did  
18 not personally have the opportunity to review this, to see if there were  
19 attachments to it?

20 A I did -- I did not personally review the electronic file to see if  
21 there were attachments to it, but in light of my testimony, yes.

22 Q That's --

23 A Yeah.

24 MR. NITZ: Your Honor, this is a most unusual situation  
25 where we have a custodian of records affidavit, which I believe is part of

1 Exhibit 30, specifically USB442 and 443, attesting that these are true and  
2 accurate and complete copies of the records.

3 Yesterday Your Honor questioned how it is the October 2011  
4 pay-off request could, under that attestation of the custodian of records,  
5 how could that not be part of the records up here, produced in response  
6 to that subpoena under that certificate, Exhibit 30?

7 So, at this point I request an adjournment to permit Mr.  
8 Alessi to review the actual electronic files for both Exhibit 23 and Exhibit  
9 74, to verify for himself whether or not there are attachments to both of  
10 those fax pay-off requests.

11 THE COURT: I think he said he already talked about --  
12 Counsel for Defense --

13 MS. HANKS: Two things.

14 THE COURT: -- what's your position?

15 MS. HANKS: Well, here's my first position is, I think the  
16 witness already testified and confirmed there was the only two pages  
17 with no attachments, in talking to the paralegal, even though he didn't  
18 have time to, also, review the electronic file. I also think he testified that  
19 they were imaged, like pictures, as opposed to PDF files. So, that's why  
20 when the custodian of records put together the Dropbox file that image  
21 wouldn't have been pulled.

22 But setting that aside, even if there's attachments, and there  
23 are other people's records, it doesn't get beyond the objections I had  
24 yesterday of those records. Mr. Alessi is never going to be able to be a  
25 witness to get beyond the hearsay rule, and prove the Business

1 Exception Rule, or be the custodian of records to other qualified person.  
2 So, I don't know how an adjournment is going to help us.

3 THE COURT: Okay. Let's go back a couple of steps.

4 First off, it seems to me we need to find out from this witness  
5 whether the adjournment makes -- Defense counsel, what's your position  
6 on doing an adjournment in any regard; do you agree or do you object?

7 MS. HANKS: I object, because this is our last day at trial. So,  
8 if we --

9 THE COURT: Well, I need to know what your position is,  
10 first?

11 MS. HANKS: Yes.

12 THE COURT: Okay. So, I have an objection from Defense  
13 counsel --

14 MS. HANKS: And just to be clear too, while I withdrew the  
15 objection to this witness doing things he wasn't supposed to be doing  
16 while under oath, because the exhibit came in, now we're getting far  
17 afield, and I probably have to renew that objection if we're going to start  
18 doing more stuff while he's still under oath.

19 MR. NITZ: And the objection was that the communication,  
20 what he was about to relate was hearsay?

21 MS. HANKS: No, the object was a witness can't talk, and  
22 research, and do things while they're oath.

23 THE COURT: Yeah.

24 MS. HANKS: That's the bigger problem. But I think that  
25 prejudice was alleviated when we actually got the document he was

1 talking about, so that I could look at it. Now we're going into way far  
2 more territory, so I'd be back at that objection.

3 THE COURT: Is the document -- okay. Well, you all have a  
4 lot of -- okay. I need to have an understanding of the following: I need  
5 an understanding of; a) exactly what is Plaintiff's request; and b) exactly  
6 what Defendant's response is to that request, so that I'm clear, because  
7 you all have phrased it somewhat differently.

8 So, Plaintiff, was is your specific request?

9 MR. NITZ: My request --

10 THE COURT: Because my request --

11 MR. NITZ: Because your predicate is incorrect. The Court's  
12 statement wasn't you're mixing apples and oranges. The Court allowed  
13 in 169 and 170. Part of what your analysis was, related to a different part  
14 on a different document. So, your predicate of what the Court said is  
15 incorrect. So, I just need to know what your request is, but it's a non  
16 sequitur of what you're saying the Court ruled, because it's different.  
17 Let's go to what your specific request is; what is Plaintiff's request?

18 MR. NITZ: My request is that we adjourn to give Mr. Alessi  
19 sufficient time to go and review the electronic images, or files, however  
20 you want to describe them, firsthand, and determine if; 1) that there are  
21 attachments to both Exhibit 23 and Exhibit 74.

22 THE COURT: Okay. And Defendant, your response to  
23 Plaintiff's specific request?

24 MS. HANKS: And my objection is, I object, because it is  
25 against the rules, and I can pull up case law on this, Your Honor, but I

1 know you're already aware of it. I had a trial brief on it awhile back, in a  
2 different trial --

3 THE COURT: Uh-huh.

4 MS. HANKS: -- where a witness who was still under oath, to  
5 research, talk to other people, about his ongoing testimony, it is just a  
6 blatant violation. And so -- because it deprives my client of the full right  
7 on confrontation to know what happened during those conversations.  
8 So, it's one of the most bedrock principles of the judicial session, that a  
9 witness does not talk to people, or do independent research when  
10 they're still under oath.

11 That being said, that prejudice was alleviated when I was  
12 able to look at the one document we talked about, but this goes much  
13 further. This is asking the witness to, while he's still under oath, now to  
14 go research issues about the exact testimony that he gave yesterday, so I  
15 would have to object to that.

16 I would also object to the prejudice of adjourning the trial,  
17 this is our last day. Counsel said it would take three days. We can finish  
18 today if we don't adjourn, but if we do adjourn there's no way we're  
19 going to finish today. And my trial schedule is -- it's jammed, it's  
20 stacked. I stack them back to back, to back, and it'll just be prejudicial to  
21 my client to have stop this trial, and then have me get my head back into  
22 sometime later. Which at this point I don't even know when that  
23 sometime later would be.

24 So that's my objection, Your Honor.

25 THE COURT: Okay.



1 MR. NITZ: May I respond?

2 THE COURT: Plaintiff, you can respond, yes.

3 MR. NITZ: Yes, Your Honor. While looking at the document  
4 may have alleviated the prejudice to Defendant it -- by not allowing him  
5 to make that inquiry, that created a prejudice to the Plaintiff. We have a  
6 bare facsimile cover sheet. We have evidence that the prior one had a  
7 statement of account attached to it.

8 Given that the record -- the records that were produced  
9 under the certificate of the custodian of records was in error, because  
10 there were other documents that were not produced, so the production  
11 was not a true and accurate and complete copy of Alessi & Koenig's  
12 records.

13 As far as completing the trial today, initially we were only  
14 going to be given two days for trial, and that's because of your Court's  
15 other calendar. And you indicated that at that time, that because it's a  
16 bench trial it can be bifurcated, and testimony and things like that can be  
17 done at another day. In fact, it was contemplated that at the very least  
18 that we would have two days of evidence and reserve closing arguments  
19 for another day.

20 So, to say that it was always contemplated that the trial be  
21 completed in three days, and to say this is the last day of trial, is simply  
22 not borne out by the way this thing shook out, given the Court's  
23 congested calendar, as well.

24 THE COURT: Okay. So, let's walk through a couple of  
25 different things. First, the Court has a question of the parties. And the

1 Court -- this is not ruling, this is purely a question, and either party can  
2 easily say they don't want this question asked of the witness, and the  
3 Court won't ask the question of the witness or won't have the question  
4 be asked of the witness and won't let the witness volunteer the answer  
5 to the question, okay.

6 So, this Court has a question of whether or not an  
7 adjournment, separate and apart from all the prohibitions, Defense  
8 counsel is 100 percent correct, there is completely a plethora of case law,  
9 inappropriate for a witness on the stand to do independent investigation  
10 while he or she is under oath in this type of circumstance. There are  
11 some minor, minor exceptions, but no one cited these in this  
12 circumstance.

13 But in any event that being said, does both parties stipulate,  
14 and I'm not saying you have to, this is merely a question, this witness  
15 may already know the answer to the question that's being phrased, as  
16 requiring a potential adjournment, because I would presume that neither  
17 counsel would have talked to this witness while he was on the stand,  
18 because he's not anyone's client, he's not the agent of anyone's client.

19 And I'm sure no one would have talked to him about his  
20 testimony on the stand, so I would hope when he walked in here it came  
21 as a surprise, to each counsel, as it came to this Court, that he showed  
22 up with any documents, or did anything between the time he left this  
23 courtroom yesterday, and when he showed up in this courtroom today.  
24 I would hope that that is a huge surprise to everything.

25 MR. NITZ: Your Honor, for --

1 THE COURT: That being --

2 MR. NITZ: -- the record we had no communication with Mr.  
3 Alessi since he left the court yesterday.

4 THE COURT: I'm not asking. I said, you all are officers of the  
5 Court, that's why I said I make that assumption as officers of the court  
6 that no one did, so, okay.

7 So, in light of that no one would have any preconceived idea  
8 about what conversations may or may not have taken place between  
9 when Mr. Alessi left the stand yesterday and when he came on today,  
10 which would mean that he may already have the benefit of knowing the  
11 answer to the question, or not. Some may even say he may have  
12 already answered part of that question, or not. The Court's not taking  
13 any position one way or another.

14 So, if the issue is that the parties both want to find out the  
15 information, or want to know if Mr. Alessi has that information, that's  
16 separate and apart from any objections, that's separate and apart --  
17 that's just a question. But I am not in any way suggesting, hinting,  
18 implying, because really from this Court's standpoint, I can rule on the  
19 pending requests, and the pending objections right now, and just move  
20 on from there.

21 Sometimes people want different alternatives, and you're  
22 very experienced litigators. I'm perfectly fine just ruling as currently  
23 presented to the Court. If you all are requesting something different, I  
24 also would be willing to listen to something different, and that's no  
25 implication, no anything. If you say, Your Honor, please rule on the

1 pending request and objection, I'm going to rule on the pending request  
2 and objection and be perfectly fine and move on.

3 So, what do each of the parties want?

4 MS. HANKS: I'd like you to rule on the objection, Your  
5 Honor.

6 THE COURT: Okay. Any party requesting that, then that's  
7 what I was going to do, as I said. So, I'm going to rule on the pending  
8 request and objection. I have a pending request that a witness currently  
9 on the stand go and do research as to whether or not there may or may  
10 not be additional, or maybe information that may or may not have  
11 already been presented in court.

12 With regards to one was a proposed exhibit, that may or may  
13 not have attachments. Which once again, nobody's still indicted to the  
14 Court where 23 came from, as wells as stipulated Exhibit 74, which was  
15 presented in Court today in a two-page format, and not represented that  
16 it had anything other than a two-page format. I'm not saying anything  
17 more or less, that's just how it was handed to the Court with three  
18 copies; one to the court, one to each counsel.

19 So, in light that was the request. It was objected to on two  
20 separate basis. The objection was; 1) that it would be impermissible for  
21 that witness to do any additional, I'll call it an investigation without the  
22 rest of the analysis; and 2) that it was prejudicial because of the time of  
23 the trial.

24 A. It's a 100 percent correct that it is impermissible, so the  
25 Court has to sustain that objection. Second on the prejudice, the Court

1 does find prejudice. While the Court is cognizant that when this case  
2 was first set for trial, for the timing, when we were balancing out the  
3 time between the prior jury trial and the subsequent bench trial, that  
4 we're all set, based on what the parties had originally said.

5           On the estimates of this trial you all were kind of given kind  
6 of what your first original estimates were, which were the two days for  
7 appropriateness, and then the Court always offers, because sometimes  
8 things don't happen as originally intended, that you needed closing  
9 arguments that you could have gotten a third day at a different time, for  
10 a bench trial, or closing arguments. And the Court -- all parties said that  
11 they -- I think it was said that the history -- sometimes counsel may make  
12 a lot of objections. Because counsel may make a lot of objections, it  
13 doesn't mean that necessitates extra trial time that otherwise would be  
14 an efficient use of appropriate trial time for a case with the witnesses  
15 that are designated, et cetera. Don't allocate trial time, because they  
16 may want to make long-winded objections.

17           That being said, when the parties were gracious enough to  
18 accommodate the fact that the trial immediately before them ran over,  
19 even though the Court had given an extra day for the prior trial, as a  
20 buffer that the other trial will still run over, so that meant this trial had to  
21 start a few hours later, but then the Court gave all of today. So more  
22 than accommodated the time that was taken away by the other trial, by  
23 giving the extra day today.

24           So, he's got more than enough time for the witness aspect,  
25 and then because of intervening rulings because of -- well, for reasons

1 stated, untimely disclosure, blah, blah, blah. All the reasons previously  
2 stated. You actually have less witnesses than anticipated.

3           The Court would find it would be inappropriate to recess this  
4 trial, not only because of the independent investigation aspect, but if it  
5 would risk the fact that all witness testimony couldn't be completed  
6 today, because it was always the attention to allow all witness testimony.  
7 It was only the intention that if for some reason, due to long-winded  
8 objections, or issues that came up, that weren't anticipated, the closing  
9 arguments could have been on a different day versus witness testimony.

10           So, the Court would find it also prejudice, which would be  
11 another basis, independently, not to adjourn the case. And the Court  
12 does not find that there is prejudice to Plaintiff, because to the extent this  
13 witness' deposition could have fully been taken during the discovery  
14 period, these same level of inquiries with his custodian of record issue  
15 could have been fleshed out during the discovery period if somebody  
16 thought that there was an issue between what they had from other  
17 sources, versus what they have from the custodian of record's  
18 declaration, it didn't have to come up for the first time in the midst of  
19 trial.

20           It could have come up during discovery. You all had  
21 different sources from different documents or could have asked for a  
22 follow-up on the custodian of records, or through this witness. I'm  
23 limiting it to this witness, it could have come up through this witness, or  
24 to the custodian of records, deposition. There's a lot of things you all  
25 could have done, but chose not to do it. You put yourselves in your own

1 situation, there's no basis.

2 So, therefore, the request to adjourn the trial so that this  
3 witness to do independent investigation is denied. Feel free to ask your  
4 next question, Counsel.

5 BY MR. NITZ:

6 Q Mr. Alessi, before Mr. Kerbow sent the payoff to demand of  
7 July 11, 2012, would he have had to have inquired of the Homeowners  
8 Association or its property manager, of the then current statement of  
9 account, in order to supply the information contained in the request?

10 A He wouldn't have had to. As I testified, yesterday, our office  
11 is capable of adding subsequent month assessments to an older ledger.  
12 For instance, if a ledger is three months old, and we want to get a  
13 document out, and it's sometime during the middle of year when there's  
14 not the annual raise in assessments that may occur on January. As I  
15 testified, yesterday, our office could add the next three months of  
16 assessments, rather than order in a new demand. Sometimes  
17 management can be lax or delayed in responding to our request for  
18 demand. So, if we want to get a document out, we can add subsequent  
19 months onto the older ledger; that can happen.

20 Q It sounds to me like you're responding to my question  
21 regarding the pay-off demand, Exhibit 23, the October 2011 demand,  
22 where the demand was increased over the statement of account. That  
23 was -- dated 5/31. Given the passage of time, to July 11, 2012, would Mr.  
24 Kerbow had to have relied on information received from the HOA, or its  
25 property manager in order to supply all these different additional

1 amounts, fees?

2 MS. HANKS: Objection. Asked and answered.

3 THE COURT: Overruled.

4 MS. HANKS: Yes. I would expect a ledger in our file, at least  
5 sometime in 2012.

6 BY MR. NITZ:

7 Q All right. Mr. Alessi, would you turn to Exhibit 30?

8 A Uh-huh. Yes.

9 Q Specifically, USB570?

10 A Yes, I'm there.

11 Q Do you recognize this as a resident transaction detail for the  
12 Antelope Homeowners Association?

13 A Yes.

14 MS. HANKS: And, Your Honor, I don't have 570 in Exhibit 30,  
15 those were excluded.

16 THE COURT: It's in the section, I understand, still the  
17 proposed portion which could be potentially subject to inquiry, but it's  
18 not the admitted portion of Exhibit 30, is what I had understood.

19 MS. HANKS: Okay. Can we just clarify the record, then, that  
20 it's not in Exhibit 30?

21 THE COURT: Correct. It's not in the admitted portion of  
22 Exhibit 30, it's the section that was carved out as being the proposed  
23 section, because that was series of pages that were objected to by  
24 Defense counsel. They still could be subject to inquiry, and still could be  
25 subject to subsequent requests to be admitted, is what the Court has the



1 notation on -- admit is what the Court has the notation on.

2 MR. NITZ: I understand, Your Honor. When 30 was admitted  
3 in part, the objected to portions weren't physically pulled for it. I referred  
4 to Exhibit 30, because that's what the binder has --

5 THE COURT: Sure.

6 MR. NITZ: -- in front of Mr. Alessi.

7 BY MR. NITZ:

8 Q But in any case, Mr. Alessi, you have USB570 --

9 A Yes.

10 Q -- through 577 in front of you?

11 A Yes.

12 THE COURT: And so, you understand, he's referencing part  
13 of the proposed portion that was the part of the objected to portions,  
14 which he's just asking to further inquiry that was --

15 THE CLERK: On 23 or 30?

16 THE COURT: On 30.

17 MR. NITZ: I think we had called it 30-A.

18 THE COURT: Yeah.

19 THE CLERK: Okay.

20 THE COURT: Okay. Thank you so much. Go ahead, counsel.  
21 Feel free.

22 BY MR. NITZ:

23 Q Is this a document, USB570 to 577 that is in the Alessi &  
24 Koenig records produced in response to the subpoena duces tecum?

25 A Yes.

1 Q And is this covered by your affidavit of the custodian of  
2 records, which is at the beginning, USB442 and 443 of Exhibit 30?

3 A Yes, I'm sure it is.

4 Q Would this resident transaction detail have been obtained by  
5 Alessi from the homeowner's association or its property manager in  
6 response to a request by Alessi?

7 A Yes.

8 Q And the date of this resident transaction detail is -- appears in  
9 the lower left-hand corner. Is that right?

10 A Yes.

11 Q July 5, 2012?

12 A Yes.

13 Q Given that the payoff, request, demand, whatever you want  
14 to call it, of July 11, 2012 is dated July 11 and this is dated July 5, 2012,  
15 would you expect this is the information received from the homeowners  
16 association or its property manager that allowed Mr. Kerbow to produce  
17 the payoff request demand, Exhibit 74?

18 MS. HANKS: Objection, Your Honor. Calls for speculation.

19 THE COURT: I need to see exhibit -- just one moment. I need  
20 to get from my Clerk Exhibit 74. One second, please.

21 MS. HANKS: Objection. Speculation and the witness -- and  
22 counsel's asking the witness to cross-check a document with one  
23 document that hasn't been admitted.

24 THE COURT: Let me just take a quick look. I'm going to  
25 overrule the objection on speculation, based on this witness' prior

1 testimony on customary practice of how the firm handled things. I'm  
2 going to sustain the objection as far as referencing a portion of the  
3 document that's not yet been admitted, cross-referencing a document  
4 that has been admitted.

5 MS. HANKS: Thank you, Your Honor. She sustained it.

6 MR. MARTINEZ: She sustained the objection.

7 MS. HANKS: What is your next question?

8 MR. NITZ: I guess I misunderstood. I thought you said --

9 THE COURT: I overruled it as to --

10 MR. NITZ: -- you overruled the --

11 THE COURT: -- specula --

12 MR. NITZ: -- the objection?

13 THE COURT: No. As to speculation, but I sustained it as to  
14 referencing a specific unintroduced document to cross-check it with an  
15 admitted, stipulated document. So, you can ask it from a testimonial  
16 standpoint, but he can't cross-reference the unadmitted document to see  
17 if it comports with the admitted document.

18 So, depending on how you're asking the question depends  
19 on how he can answer the question.

20 BY MR. NITZ:

21 Q In order to generate the July 11, 2012 payoff demand  
22 request, would Mr. Kerbow have had to have relied on the resident  
23 transaction detail, the most recent resident transaction detail received  
24 from the HOA or its property manager?

25 A Yes.

1           Q     Would he have had to rely on the accuracy of that in order to  
2 properly prepare -- perform his obligations in prosecuting this  
3 foreclosure for the HOA?

4           A     Yes.

5           MR. NITZ: Your Honor, may I have a moment to speak with  
6 my co-counsel?

7           THE COURT: Of course, you may.

8                     [Plaintiff's Counsel confer]

9           MR. NITZ: Your Honor, based upon Mr. Alessi's testimony  
10 that these pages, 570 to 577 are maintained as part of the business  
11 record of Alessi & Koenig, and they were supplied in response to the  
12 subpoena duces tecum under the custodian of records affidavit attesting  
13 to the authenticity and business record exception record of the hearsay,  
14 there's no question that this transaction detail is part of the business  
15 records of Alessi. It was relied on by Alessi in order to generate the  
16 payoff request, Exhibit 74. I would move that the transaction detail just  
17 described, USB570 to 577 be added to the admitted portion of Exhibit 30.

18          THE COURT: Not --

19          MS. HANKS: I was waiting. I always wait to --

20          THE COURT: No worries. I see you're standing.

21          MS. HANKS: Yeah.

22          THE COURT: Okay, counsel?

23          MS. HANKS: Sorry. Your Honor, two bases for the  
24 objection. There's been no testimony since this morning that Mr. Alessi  
25 is the qualified person or the custodian of records for these pages. We

1 haven't even established who created the pages, so I don't -- we have  
2 heard no testimony that he's the qualified person or custodian of records  
3 for that entity, whoever that entity. And if even if that wasn't enough,  
4 the business exception rule requires the person to be able to testify that  
5 the data was entered at or near the time of the event, it was transmitted  
6 by a person with knowledge in the course of the regularly conducted  
7 business and the testimony come as shown by testimony from a  
8 custodian of records or a qualified person.

9           So, it gets us back to the authentication requirement. We  
10 have heard no testimony that Mr. Alessi knows how these records were  
11 kept, who kept them, if they were kept by a person with knowledge and  
12 whether they were entered at the time of the transactions. We just don't  
13 have any of that -- those elements, so this kind of is on point with the  
14 *Landmark* case that I cited yesterday and in our trial brief, just because  
15 the record is in Mr. Alessi's records or Alessi & Koenig's records doesn't  
16 morph it into Alessi & Koenig's records and they can't then meet the  
17 business exception rule.

18           THE COURT: Counsel, you've heard the objection of Defense  
19 counsel. Would you like to respond before the Court makes a ruling?

20           MR. NITZ: Yes, Your Honor.

21           THE COURT: Feel free to do so.

22                           [Pause]

23           MR. NITZ: Your Honor, if I could ask one additional  
24 foundational question before.

25           THE COURT: Of course, but -- of course.

1 BY MR. NITZ:

2 Q The resident transaction detail beginning at USB570 bearing  
3 the date of July 5, 2012, would that have been made part of the Alessi  
4 records at or about the date of July 5, 2012?

5 A Yes.

6 Q And would it have been entered into Alessi's records by a  
7 person knowledgeable of the event or in this case, document?

8 A Yes.

9 Q The receipt of the document?

10 A Yes.

11 MR. NITZ: Your Honor, under NRS 51.135, a memorandum,  
12 report, record or a compilation of data in any form of acts, events,  
13 conditions, opinions or diagnoses made at or near the time by or from  
14 information transmitted by a person with knowledge all in the course of  
15 a regularly conducted activity, as shown by testimony or affidavit of the  
16 custodian or other qualified person -- there's no question from the  
17 affidavit and Mr. Alessi's testimony that he would qualify as a custodian  
18 or other qualified person -- is not inadmissible under the hearsay rule,  
19 unless the source of information or method of -- or circumstances or  
20 preparation indicate a lack of trustworthiness.

21 In this case, Alessi regularly made requests to the  
22 homeowner's association in order to obtain the documents that it  
23 needed to perform its duties for the homeowner's association in  
24 prosecuting this foreclosure. Mr. Alessi testified it had to rely on the  
25 accuracy of that information from the homeowner's association and in

1 this specific instance, it did in fact rely on this information in order to  
2 create the facts of Exhibit 74. So, that document, without question, is  
3 part of the business records of Alessi.

4 And it also has the indicia of trustworthiness under the  
5 general exceptions, 51.075 or 51.313. because the nature and special  
6 circumstances under which it was made offer strong assurances of  
7 accuracy. It was supplied by the homeowner's association at the request  
8 of their foreclosing agent, their collection agent, in order to facilitate the  
9 foreclosure. It was, in fact, relied on by Alessi in order to perform those  
10 tasks.

11 So, one, I submit it is part of the record. It is -- it meets the  
12 business record exception to the hearsay rule as far as the records of  
13 Alessi & Koenig and even if it didn't, it meets the general exceptions  
14 under 51.075 and 51.315, whether the declarant is available or  
15 unavailable. In any case, they requested it. They obtained it. They used  
16 it. They relied on the accuracy of the statement in order to conduct their  
17 business, so again, I --

18 THE COURT: How? How has this witness said any of that?  
19 That's the thing. Okay. You've got the it and the information, but what  
20 the Court has not been provided with, whether you want to use the old  
21 Wendy's commercial, where's the beef or you want to say the nuts and  
22 bolts, or you can use whatever -- I've got these broad generalities. The  
23 information to conduct the regular business, foreclosure. This witness  
24 has not testified that he even knows who created the Bates stamp  
25 number.

1                   Let's talk specifics, right? 570 to 577, right? Who created  
2 that? Which parts of 570 to 577 they utilized, right? How did they utilize  
3 it? What did they utilize it for? To the extent that you're arguing to this  
4 Court that it was utilized for purposes of Exhibit 74, you haven't said.  
5 This witness hasn't elicited any testimony for what sections of Exhibit 74  
6 it was utilized, what proposed aspects of these Bates stamp numbers  
7 were utilized to incorporate into Exhibit 74, okay? Or any of that. What  
8 sections, how they utilized this information, who did -- how they did it at  
9 the time.

10                   So, none of that has been elicited, okay? I've gotten broad  
11 generalizations that they got a document, but we still don't even have  
12 the who they got it from, when they got it from, for what purpose they  
13 got it from. From the general sense, to conduct their business, yes, that  
14 you have, but you don't even have that this witness said that they got  
15 these Bates stamp pages to prepare Exhibit 74, so the Court has to deny  
16 it, because I don't have any of those specifics.

17                   I've got great argument from counsel, but you don't have it  
18 elicited at all from the witness. You don't even have the witness even  
19 saying -- well, you can inquire of this document, okay? There are  
20 objections as to utilizing the document for certain purposes, but you can  
21 inquire of this document -- you haven't inquired in this document that  
22 the witness even knows what certain of these line items mean, so don't  
23 even have those basics.

24                   And so, in light of all of that, I'm hearing what you're saying,  
25 but I have to sustain the objections raised by Defense, because this



1 witness hasn't said any of those things. I've only heard it in argument  
2 through generalities and so the objections are sustained and the --

3 BY MR. NITZ:

4 Q Mr. Alessi, would this resident transaction detail dated July  
5 5, 2012, have been received by -- was it received by Alessi in response to  
6 requests by -- to the HOA or its property manager?

7 A It was received by Alessi, yes.

8 Q And it was received by Alessi at or about July 5, 2012?

9 A Yes.

10 Q Mr. Kerbow's payoff demand request of July 11, 2012,  
11 Exhibit 74, includes things for notice of delinquent assessment lien,  
12 notice of default, pre-NOD release of lien, et cetera. Go on down the  
13 page. Would the source of that information have had to have been the  
14 information supplied by the HOA or its property manager?

15 A Not the source of our fees and costs, but the line item  
16 assessments and the line item fines would have been reflected in the  
17 ledger. I don't have the exhibit in front of me.

18 MR. NITZ: Your Honor, I brought three copies. Defense  
19 counsel got one, I got one and presumably the Court got one.

20 THE COURT: You can bring yours up, if you wish to, of  
21 course. Feel free to do so.

22 THE WITNESS: So --

23 THE COURT: You're referencing Exhibit 74. Is that correct?

24 MR. NITZ: Yes.

25 THE COURT: And counsel, if you're going to speak, we'll be

1 glad to give you a pocket microphone. You're welcome to stay up there  
2 if you want to, but let's just get you a pocket microphone, if you're going  
3 to speak up there.

4 MR. NITZ: Okay, Your Honor. I need to be able to see the  
5 document, too.

6 MS. HANKS: Do you want to put it on the Elmo?

7 THE COURT: You can put it on -- would it help if you put it  
8 on the Elmo? Then you could see it on the screens.

9 MR. NITZ: Yes.

10 THE COURT: Okay. Feel free to do so, if that works better for  
11 you, because there also -- do we have the mic out, Marshal? Did you put  
12 the mic out for everyone?

13 THE MARSHAL: Yes.

14 THE COURT: So, you have the mic. You can see also on the  
15 screen and be on the screen on the witness stand as well as the large  
16 screen and you have the mouse that you can point to things, if you wish  
17 to. And Marshal, can you do me a favor? Do you mind making one extra  
18 copy? Thanks. Appreciate it. Thank you so much. Just --

19 MR. NITZ: I don't know how to focus this, Your Honor.

20 THE COURT: Oh. Because when -- the other day, I think you  
21 moved the -- put the lights back towards the middle. There you go. Give  
22 it a second. It's going to focus in. And then push the button. Did you  
23 push the button in the back?

24 MS. HANKS: It's -- it needs to focus itself. Just give it a  
25 minute.

1 THE COURT: Give it a sec. Okay. Madam Court Reporter,  
2 would you mind assisting?

3 [Pause]

4 COURT RECORDER: Okay.

5 COURT RECORDER: There it is. It just takes time.

6 THE COURT: Just give it a sec.

7 COURT RECORDER: And you have that document under it  
8 and it's seeing both of them.

9 MR. NITZ: Okay.

10 COURT RECORDER: So just put one.

11 MR. NITZ: All right.

12 COURT RECORDER: And take that one away.

13 THE COURT: Okay. And it'll show up both on the large  
14 screens and it will also show up on all the monitors, both on counsel  
15 tables and on the witness stand. And then you each mice, if you need to  
16 arrow it through, okay? Or you can --

17 MR. NITZ: Okay. Thank you.

18 THE COURT: -- point on the Elmo.

19 BY MR. NITZ:

20 Q Before addressing the specific one, could we go back to  
21 Exhibit 23?

22 A Yes.

23 Q All right. As I recall your testimony from yesterday, there  
24 were two parts to this. The top part, the fees totaling \$1,355, those were  
25 all collection fees and costs charged by Alessi?

1           A     Yes.

2           Q     And the balance of the items, Numbers 1 through 15, those  
3 were all supplied by the homeowner's association?

4           THE CLERK: Someone's using their phone, Your Honor.

5           THE COURT: Somebody has their phone -- just a sec.  
6 Whoever's using their phone, it has to be completely off. We're hearing  
7 a phone going off and vibrating.

8           THE WITNESS: Yes. With the exception of 7 and 8.

9           THE COURT: We gave a hard copy to your co-counsel.

10          THE WITNESS: And 2. And 9 and 10 would have been  
11 provided by the management company.

12 BY MR. NITZ:

13          Q     Okay. So, all of the information --

14          A     And -- so some of them are -- the items, more specifically  
15 that would have been provided by the association through its  
16 management company are Item Number 3, 4, 5, 6 --

17          THE COURT: Just a sec. I had cross-talking with the -- when  
18 you had your runners come in, so they were talking with your co-  
19 counsel, so can the witness please repeat the last answer? Thank you.

20          THE WITNESS: Yes, Your Honor. The items 1 through 15  
21 that would have been -- the Numbers 1 through 15 that would have been  
22 provided by the management company on behalf of the association  
23 would have been items 3, 4, 5, 6 and then 9 and 10 would have been  
24 provided by the management company.

25 BY MR. NITZ:

1 Q Now if I could turn your attention to Exhibit 74. This is in two  
2 pages, instead of on a single page. Are all the pages on the -- all of the  
3 items on the first page for notice of delinquent assessment lien through  
4 foreclosure fee, those are all from Alessi?

5 A Yes.

6 Q And of the information on Items 1 through 15 on the second  
7 page, those are all items that would have been supplied by the HOA  
8 either directly or through its property manager?

9 A With the exceptions I previously noted, the assessments, late  
10 fees, fines, interest would have been provided by the association and 9  
11 and 10 the management company audit fee and setup fee would have  
12 been provided by the management company.

13 Q In order to supply those items 1 through 15 on the second  
14 page, would Alessi have had to rely on the statement of account or  
15 resident transaction detail from the HOA or its property manager?

16 A Yes.

17 THE COURT: Counsel, could I get a point of clarification,  
18 just -- I thought the witness said only 3, 4, 5, 6, 9 and 10. And then you  
19 just asked 1 through 15, so I just wasn't clear on those last two answers.

20 MR. NITZ: Okay.

21 BY MR. NITZ:

22 Q All of these items, 1 through 15, either came from the HOA or  
23 from its property manager, right?

24 A No. Not the cost for the foreclosure.

25 Q No, no. I'm talking just --

1           A     That are shown on Item Number 2. 3, 4, 5 and 6 came from  
2 the HOA.

3           Q     Okay.

4           A     The assessments, the fines, the late fees and the interest. 9  
5 and 10 would have come from CAMCO, the management company. 14,  
6 if there was a capital contribution -- that's very rarely seen -- would have  
7 come from the HOA.

8           Q     Number 15, progress payments, as well?

9           A     That would have come -- generally, once an account is in  
10 collections, the delinquent homeowner makes the payments to our office  
11 directly. Conceivably, I've seen where HOAs have accepted payments  
12 from the delinquent homeowner and forwarded evidence of those  
13 payments.

14                So, conceivably, that could have come from the HOA, but more  
15 common is it comes from our office, because we're the ones handling  
16 the progress payments.

17           Q     Am I correct that in order to generate 3, 4, 5 and 6 on this  
18 payoff request demand, the -- Mr. Kerbow would have had to have relied  
19 on the resident transaction detail?

20           A     That's correct.

21           Q     Received from the HOA or CAMCO, its property manager?

22           A     Yes.

23           Q     And in doing so, he had to rely on the truthfulness and  
24 accuracy of that information?

25           A     Yes.

1 Q Turn to USB570 for a moment.

2 A On my way. Okay.

3 Q That resident transaction detail identifies a homeowner's  
4 association that it's for, correct?

5 A Yes.

6 Q And that is?

7 A Antelope.

8 Q It also identifies the property address, correct?

9 A Yes, 7868 Marble Edge. Marbledoe.

10 MR. NITZ: With the additional foundation, I again offer  
11 USB570 to be incorporated into the admitted portion of Exhibit 30.

12 MS. HANKS: Your Honor, SFR objects. We haven't heard  
13 any different questions. We're just asking the same questions over and  
14 over again and at the end of the day, we're not getting to the bottom line  
15 of who created these records, how they were created, the entries that we  
16 see in them. Were they made with a person with knowledge? Were they  
17 were done with a regularly conducted activity? Is this a computer  
18 system? Is it done by hand? We just don't know any of that information.

19 And the business exception rule requires all of that and it has  
20 to be done by a qualified person or a custodian of records. And we know  
21 a custodian records is defined by the statute as someone who is an  
22 agent or an employee of the entity, which I haven't heard from Mr. Alessi  
23 that he's an agent or employee of the mysterious entity of these  
24 documents, because that's the other thing we don't know, nor has he  
25 ever had the care and custody control of these records, outside of just

1 being sent them? Out of Alessi & Koenig just being sent them.

2 So, I don't dispute that Alessi & Koenig is sent these types of  
3 documents and relies on these types of documents. That's not really  
4 what we're talking about in my objection, so I still stand by my  
5 objections, Your Honor, as to it's hearsay. He can't satisfy the business  
6 exception rule and he's not the custodian of records to authenticate  
7 them.

8 THE COURT: Counsel for Plaintiff, would you like to  
9 respond?

10 MR. NITZ: Yes, Your Honor. The authenticity of this is  
11 established. It is what it purports to be? It --

12 THE COURT: What is that?

13 MR. NITZ: It --

14 THE COURT: What does it purport to be --

15 MR. NITZ: It is --

16 THE COURT: -- and who did it?

17 MR. NITZ: -- a statement of account from the homeowner's  
18 association supplied to Alessi to perform its duties as the collection  
19 agent or foreclosure trustee. And whether or not -- it's not being offered  
20 as the business record of the HOA such that it would have to meet all the  
21 characteristics or qualifications for regularly conducted business activity  
22 of the HOA. It's being offered as part of the records of Alessi that bear  
23 the stamp of accuracy and truthfulness or trustworthiness, as required  
24 by 51.135 or the two general exceptions.

25 THE COURT: For what purpose -- counsel -- okay. I'm just



1 trying to understand, because there seems to be a large disconnect  
2 between the two of you, okay? With what you're trying say. For what  
3 purpose are you trying to admit these pages? Are you trying to say that  
4 the numbers are accurate in these pages, that are then accurate in  
5 Exhibit 74, that the amount of assessment set forth in Exhibit 74 equals  
6 the assessments that are set forth on these Bate Stamp number and that  
7 the amount of late fees set forth in page 570 to 577 is the late fees set  
8 forth in Exhibit 74?

9 I'm trying to understand what is the purpose you're trying to  
10 do with these documents. Because that is what the Court has to  
11 understand, what purpose you're doing it. Because if you're trying to  
12 say that they're business records that Alessi relied on and incorporated  
13 into another document, then I have to look at in one rubric. If you're  
14 looking at it for a different purpose, I have look at it for another rubric.

15 If you're trying to say it's establishing A, B or C, is it the truth  
16 of something that's in these page range itself or that they were utilized  
17 for some other purpose? That's what I'm trying to say. What purpose  
18 are you trying to have these documents introduced into?

19 MR. NITZ: The items in the resident transaction details are  
20 being offered to support the payoff request or payoff demand , the offers  
21 or demands by Alessi to Miles Bauer to avoid the foreclosure. You pay  
22 this amount, we won't foreclose. So, again --

23 THE COURT: So, are you saying that if you looked at Bates  
24 stamp pages 570 to 577, that it -- if you looked at the math from those,  
25 that the math would equal the assessments through August 15, 2012 as

1 stated on proposed exhibit -- sorry -- on stipulated Exhibit 74, it would  
2 equal the late fees through August 15, 2012? It would equal -- looking at  
3 3, 4, 5 and 6. They would equal those amounts? Is that what you're  
4 saying? Or are you saying for some other purpose?

5 Or are you just saying that yes, they did receive something  
6 from the homeowner's association and -- to say that they didn't just  
7 make up numbers that came into 74? Once again, I'm not trying to limit  
8 it to two different purposes. I'm just trying to have an understanding of  
9 what is the purpose of what these documents are being introduced for,  
10 because you all -- both agree that they weren't documents prepared by  
11 Alessi. You both agree that they appear within the grouping of  
12 documents provided under Alessi's custodian of records.

13 But the objections I'm getting is that these cannot be  
14 admitted, because they are hearsay, because they don't fall within the  
15 exception. So, in order for the Court to evaluate whether they either  
16 non-hearsay purpose being submitted for or if they could call within one  
17 of the exceptions for hearsay, I have to understand the purpose that  
18 they're being submitted for. So far, when you've told me the purposes,  
19 I've had to sustain the hearsay exceptions, because the purpose you've  
20 told me thus far, the hearsay objections are appropriate.

21 So, are they for the truth of the matter that they're asserted,  
22 because they're then incorporated into another document or is there  
23 some other purpose, you're offering them for?

24 MR. NITZ: There are alternative purposes. In the first case, I  
25 would submit they are not even hearsay, because as Mr. Alessi testified,

1 these amounts included in Exhibit 23 and now Exhibit 74 were part of an  
2 offer, a demand to Miles Bauer.

3 THE COURT: Have to deal with one at a time. Right now,  
4 you're only talking about 570 to 577. You can't multiple different  
5 documents, because --

6 MR. NITZ: Okay.

7 THE COURT: -- so 570 to 577. So, what is your purpose of  
8 what you're submitting this for? Is it for the truth of the matter asserted  
9 in these underlying documents? Does these numbers reflect what they  
10 say they reflect? Because we don't even know what they reflect. You  
11 understand that, right? They don't -- no one's even said what these  
12 numbers are on these documents yet. What is the 29? What is the 39?  
13 You know what I mean? I just happened to be looking at the first page  
14 and picked some of the numbers out of there.

15 So, no one -- he's not testified to what any of these numbers  
16 mean, so that's why I'm not asking -- you're asking that these numbers  
17 mean something specific or what's the purpose?

18 MR. NITZ: Yes, these numbers mean something specific, but  
19 they're not hearsay, because they're words of the offer. This is an offer  
20 by Alessi. You pay this amount, and we won't foreclose.

21 So, in this -- so to the extent that they're words of an offer, I  
22 don't think they'd be hearsay. But that just comes -- are they hearsay or  
23 not. Then the second point is if Your Honor considered that they --  
24 words of the offer were in fact hearsay, then they meet the -- either the  
25 business record exception to the hearsay rule or more particularly, they

1 meet the general exceptions under 51.075 or 315. They bear the indicia  
2 of trustworthiness, because Alessi did in fact rely on this document in  
3 order to make that offer, Exhibit 74.

4 THE COURT: Has this witness said that? What numbers?  
5 What information has relied on? The only thing you've gotten him to say  
6 is that 3, 4, 5 and 6 would have come from the HOA, 9 and 10 would  
7 have come from the management company, CAMCO.

8 If Number 14 did apply, it would have come from the HOA  
9 and Number 15 doesn't normally happen, but sometimes it could come  
10 from the HOA, but normally, Alessi would take progress payments, so  
11 normally that would be Alessi's, not the HOA. You don't have the  
12 underlying information.

13 That's why I keep sustaining -- that was one of the reasons.  
14 There's more basis that Defense counsel is saying that the Court has to  
15 keep sustaining it, because you don't have that information elicited from  
16 this witness. I'm hearing it from argument, but I'm not hearing it from  
17 the witness. And the Court's not giving you any advice. I'm just trying  
18 to explain the ruling, because there seems to be a disconnect on what's  
19 being offered and what the Court's ruling.

20 That's why I'm asking if that's the purpose it's being offered.  
21 If it's being offered for the truth that these are correct numbers and these  
22 numbers mathematically were utilized and then incorporated into 74, I've  
23 not heard this witness say it and I don't unders -- I haven't even gotten to  
24 the point about whether the math adds up, but that's a different issue.

25 MR. NITZ: May I ask additional foundational questions?

1 THE COURT: Of course, you may, counsel. You may ask  
2 whatever you wish.

3 BY MR. NITZ:

4 Q Mr. Alessi, for Item Number 3 on Exhibit 74, assessments  
5 through August 15, 2013, it bears an amount of \$2,152.74. In order to  
6 obtain that amount, would it have been necessary for Alessi to review  
7 the assessments as charged on USB 570 to 577 to get that amount?

8 A Yes. We would have taken the number on USB 574, which is  
9 the final page of the assessment ledger. That final number on USB 574  
10 is \$2,107.74. Since the demand in Exhibit 74 is through August, we  
11 would have added the August assessment of \$45, giving you a total of  
12 \$2,152.74.

13 MS. HANKS: Your Honor --

14 THE WITNESS: We would have --

15 MS. HANKS: -- I would object that the witness testified from  
16 the proposed Exhibit 30-A that hasn't been admitted yet --

17 THE COURT: Okay. Well --

18 MS. HANKS: -- to match it to an exhibit that has been  
19 admitted.

20 THE COURT: Well, the Court's going to need to allow that,  
21 because there has to be some frame of reference in order to give an  
22 explanation of how he would have utilized the document, so the Court is  
23 allowing it in that small concept. I'm overruling the objection in that  
24 small concept. Counsel, you may proceed with your next question.

25 BY MR. NITZ:

1           Q     For Item Number 4 on the Exhibit 74, late fees, Item Number  
2 5, fines and Item Number 6, interest, would Alessi have had to go to this  
3 resident transaction detail to get each of those amounts?

4           A     Yes.

5           Q     You were able to quickly zero in on the amount of  
6 assessments through August 15, 2012. Are you able to do the same for  
7 late fees?

8           A     Well, the late fees -- no, I'm not. The late fees would have  
9 been -- so the demand is good through August 15th, 2012. I see that the  
10 late fees on USB574 are -- for June were 2.25 and 9.04, which is a total of  
11 \$11.29, so I've got \$11.54. I don't know where that difference is for that --  
12 the -- what would be the July late fee, but my assumption would be that  
13 it is -- as you can see in June, \$11.29. There may have been a slight  
14 adjustment for July from the management company. I don't -- I would  
15 be speculating, but that's the approximate late fee there.

16          Q     Okay. So, it's not as simple as for 3. There would actually  
17 have to be an analysis and summation of things in order to set forth the  
18 late fees, Item 4 in Exhibit 74?

19          A     My understanding is that once an account is transferred to  
20 collections under NRS 116, the entire past due balance becomes by  
21 definition an assessment, including the collection legal fees and costs, so  
22 it's not inaccurate to take, in my opinion, the whole balance through  
23 July, 2012 as to assessment balance, rather than the legal assistant  
24 going out and trying to parse out all of these legal fee -- late fees that  
25 you see in the ledgers from 570 to 574. It appears to me what was done

1 was the balance through July, as I said before, of 2012, was taken and  
2 the \$45 August assessment was added to give you the figure in Item  
3 Number 3.

4 And then Item Number 4 appears to be one month's late fee. And  
5 that would be for July, which is not shown on the ledger that we have  
6 dated July 5th, 2012. So -- and then if I could continue. The ledgers  
7 from 575 through 577 are for the violations. As you can see, the total  
8 there is \$7,965, which matches Item Number 5 in the demand.

9 Q Yesterday, as I recall, you testified that Alessi wasn't  
10 handling any foreclosure for fines or violations. That was being handled  
11 by Kelly Mitchell for CAMCO, I think. Is that a fair recap?

12 A That is my understanding. I believe you showed me a copy  
13 of a recorded notice of violation lien with Kelly Mitchell's name on it.

14 Q Am I correct that Alessi, as of June, July, August 2012, was  
15 only pursuing foreclosure on the assessment?

16 A We would have -- my understanding is that is correct. We  
17 would have only been pursuing foreclosure on the assessments.  
18 However, these demands that you're looking are, in the vast majority of  
19 cases, used not for payoff to Miles Bauer but escrow demands. And  
20 when there's an escrow demand made, regardless of whether or not  
21 we're doing the violation lien, we would make a demand for everything  
22 owed the association, so that appears to be what was done here.

23 Q Let's turn to Exhibit 13 for a moment.

24 A My binder seem -- okay, I have it.

25 Q Do you recognize Exhibit 13, Mr. Alessi?

1 A Yes. It's a recorded copy of the notice of trustee sale.

2 Q And this was a document prepared by your office?

3 A Yes.

4 Q In prosecution of the foreclosure for the Antelope HOA?

5 A Yes.

6 Q Would -- this notice of trustee sale sets forth a date of sale of  
7 May 9, 2012?

8 A Yes.

9 Q It was generated by Mr. Kerbow on or about April 4, 2012?

10 A Yes.

11 Q And am I correct that this was pursuant to a certain lien  
12 recorded on November 12, 2009 as Instrument Number 0004474?

13 A Yes.

14 Q And if you would look back to Exhibit Number 9.

15 A Yes.

16 Q And that notice of lien is the same notice described in the  
17 notice of trustee sale, Exhibit 13?

18 A Yes.

19 Q But for the recorder's stamp in the upper right-hand corner,  
20 this is a true and accurate copy of a notice of trustee sale that Alessi sent  
21 at least to the homeowner?

22 A Yes.

23 Q Does this notice of trustee sale state the total amount of  
24 unpaid balance of the obligation at that time?

25 A Yes.



1 Q What is that amount?

2 A \$4,161.61.

3 Q Would you next turn to Exhibit 14?

4 A Yes.

5 Q Do you recognize this document?

6 A It is another notice of trustee sale recorded July 2012.

7 Q Was this notice of trustee sale prepared by Alessi on behalf  
8 of the HOA?

9 A Yes.

10 Q And was it prepared by Alessi on or about June 7, 2012?

11 A Yes.

12 Q It sets forth a sale date of July 25, 2012?

13 A Yes.

14 Q Am I correct that this is pursuant to a certain lien recorded on  
15 November 12, 2009 as Instrument Number 0004474?

16 A Yes.

17 Q And would you confirm that that is in fact the notice of lien at  
18 Exhibit 9?

19 A Yes.

20 Q But for the recorded stamp in the upper right-hand corner, is  
21 this notice of sale a true and accurate copy of a document generated by  
22 Alessi and maintained in its collection file?

23 A Yes.

24 Q Let's return to Exhibit 30, USB616.

25 A Yes.

1           Q     Yesterday we discussed various entries on this. I think the  
2 earliest one we discussed was the entry on October 19, 2011, received  
3 payoff request from Miles Bauer. Immediately below that entry is an  
4 entry on September 20, 2010. Would you read that into the record?

5           A     Senior, in parenthesis, bank to foreclose on property. No  
6 new owner information at this time. AK, to monitor public records for  
7 new owner information.

8           Q     Given that that bank was foreclosing on the property, would  
9 it have been appropriate for Alessi to include all of the items, including  
10 fines and other things that were not included in the assessment lien in  
11 the payoff demand?

12          A     I don't think it's inappropriate. As you know, we would  
13 attach the ledgers to our demands and our position with regard to Miles  
14 Bauer was pay whatever you think will protect your interest. The  
15 problem we had was with the restrictive language. So, I wouldn't say it  
16 was inappropriate.

17          Q     By the restrictive language, what are you referring to?

18          A     As you know, the language in the letters that accompanied  
19 Miles Bauer's payoff request as well as the letters that accompanied and  
20 were closed with Miles Bauer's check that we would receive on various  
21 files. As well as -- I believe there was a memo in the check that our  
22 Nevada attorneys found problematic as well, in some of the checks.  
23 Something to the effect, HOA paid in full.

24          Q     Did I hear you right that Alessi communicated to Miles Bauer  
25 this is the total amount. Pay whatever you think is right to protect your

1 lien?

2 A That was our -- that was -- that is correct. And in fact,  
3 somewhere, I believe in early 2014, Brad Bace of our office and I believe  
4 it was -- I believe it might have been Rock Jung and Miles Bauer, had  
5 come to an agreement where, in fact, they were -- there -- I had been  
6 deposed on a couple of files where we received a check from Miles  
7 Bauer without the restrictive language. We cashed that check and  
8 announced receipt of the check at the sale.

9 So, apparently, there was some kind of an agreement that on a  
10 couple of my depositions that was worked out between Miles Bauer and  
11 our office, where we actually received a check for nine months of  
12 assessments without the restrictive language. We indeed cashed it and  
13 announced it at the sale.

14 Q Earlier you made mention of an escrow company, I think in  
15 the context of submitting the full amount of the assessment lien and  
16 other fines and liens. Would you explain that? How does the escrow  
17 account come in?

18 A Well, when a homeowner sells their property, an escrow is  
19 opened. And at that time, we make a demand for everything that's owed  
20 the association. Whether we're doing the violation lien or not, the  
21 association will send us ledgers for the past due assessments. And if  
22 there is a fine ledger -- for the fine ledger and we would make that  
23 demand.

24 Q If the --

25 A -- so that the property doesn't transfer ownership without the

1 fines being paid.

2 Q Would the same apply, if it was being sold by the beneficiary  
3 on the deed of trust or its trustee?

4 A I don't -- I've never seen that situation, so I don't know. I  
5 don't recall any bank foreclosures happening between 2012 and 2015  
6 and that was sort of the impetus of the HOAs having to go forward to  
7 foreclosure, because they were experiencing high -- 30 percent  
8 delinquencies. They couldn't pay their landscapers. They couldn't pay  
9 their pool company.

10 So, because the banks were -- I guess there was a quasi-  
11 moratorium on foreclosures during that time. The properties were just  
12 sitting, and the assessments were not being collected.

13 THE COURT: Counsel, you're going to need to stop in the  
14 next few minutes for lunch, so whenever it's a good breaking point,  
15 please let me know.

16 MR. NITZ: Sure, since I can't find the paper that I was going  
17 to question him about next.

18 THE COURT: Okay. No worries. Now is a good break. Okay.  
19 We'll come back at 1:15. Thank you so much.

20 [Recess at 11:58 a.m., recommencing at 1:14 p.m.]

21 THE COURT: We're back on the record. Same witness is on  
22 the stand. The witness understands he's still under oath. Counsel, feel  
23 free to continue with your questioning.

24 MR. NITZ: Thank you, Your Honor.

25 THE COURT: Go ahead, counsel.

1 MR. NITZ: Yes, Your Honor. Based on the additional  
2 testimony by Mr. Alessi, I renew my offer to have USB570 to 5 --

3 THE COURT: 77?

4 MR. NITZ: -- 77 included as part of admitted Exhibit 30.

5 THE COURT: And Defense counsel is standing up?

6 MS. HANKS: No, I was listening to the numbers. I was  
7 trying to read -- to it. So, it's 570 to 575 or --

8 THE COURT: 577.

9 MR. NITZ: -- 577. Your Honor, we renew our objection. I feel  
10 like the same questions are being asked and the basis of my objection,  
11 the questions really, I don't think can ever really be asked of this witness.  
12 And that is Mr. Alessi doesn't qualify as the custodian of records or the  
13 other qualified person to authenticate the documents, nor would he  
14 qualify as that person to meet the exception to the hearsay rule.

15 I mean, from what I heard from counsel is these are hearsay.  
16 He's offering it to prove the truth of the matter asserted. He's offering it  
17 to prove the truth of the figures within the document. And so, we would  
18 renew that objection.

19 THE COURT: Counsel, would you like to respond, if this  
20 witness has authenticated that these numbers are accurate within the  
21 underlying document that you're seeking to do, 570 through 577? Is  
22 there anything in this witness' testimony that he's been able to set that  
23 forth? If so, please feel free to reference it the Court.

24 MR. NITZ: Submitted.

25 THE COURT: And the Court has to sustain the objection. The

1 Court notes in sustaining the objections and particularly actually some of  
2 the testimony of this very witness, which says actually kind of just the  
3 opposite, because the witness -- while I appreciate the voracity of the  
4 witness, let's draw attention to the specific comment with regards to late  
5 fees.

6 The quote speculation/guess on the late fee entry on the  
7 \$11.54, which is stated as noted was not in the resident transaction  
8 detail, but yet appeared on Exhibit 74 and so it would be inconsistent  
9 with the underlying documentation, which is sought to be admitted --  
10 which is sought to be admitted presumably for its hearsay purpose for  
11 the truth of the matter asserted.

12 And while the Court doesn't know necessarily want the term  
13 on the underlying document -- where in some parts, it does use the term  
14 late fee processed or late fee in different sections, does not appear  
15 consistent with 74. It has not been explained what late fee means in the  
16 underlying document, so the Court can't say that it would be accurate for  
17 the truth of the matter asserted and therefore, if I'm looking at it for the  
18 hearsay objection, I have to sustain it. That's only one of the examples.  
19 Fines would be another example. The assessment, articulation. While it  
20 says for one document, the adding of the \$45 adds the other issue.  
21 Sustained. Objection sustained.

22 BY MR. NITZ:

23 Q Mr. Alessi, would you turn to Exhibit Number 11?

24 THE COURT: And the Court should have also said in its  
25 analysis -- sorry -- adding yesterday's testimony when Mr. Alessi said he

1 wasn't sure of what the assessments were in the different years, when  
2 he said he -- mentioned the 2009, 2010, 2011. That's part of the Court's  
3 analysis and I didn't say that one. Sorry. I was thinking it, but didn't say  
4 it. My apologies. Sorry. You're on Exhibit 11. Go ahead, counsel.

5 THE WITNESS: Yes, I'm on 11.

6 BY MR. NITZ:

7 Q Do you recognize this document?

8 A Yes. It --

9 Q What is it?

10 A -- is a notice of default recorded February 17th, 2011.

11 Q It's a notice of default on election to sell under homeowner's  
12 association lien, specifically, a homeowner's association assessment  
13 lien?

14 A Yes.

15 Q And if you look at the second paragraph, this notice of  
16 default also refers back to the assessment lien recorded on November  
17 12, 2009, as Document Number 0004474, which is Exhibit 9?

18 A Yes.

19 Q In order to generate this notice of default, did Alessi have to  
20 rely on statement of account from the HOA, showing what the  
21 assessments and other amounts attributable -- other lienable amounts  
22 were?

23 A Yes.

24 Q Next turn to Exhibit 12. I'm sorry. Before leaving Exhibit 11,  
25 is this notice of default, Exhibit 11, a document that was prepared by

1 Alessi in performing its function as collection agent and foreclosure  
2 trustee for Antelope Homeowners Association?

3 A Yes.

4 Q And this is a true and accurate copy, but for the recorder's  
5 stamp, of a document that is in Alessi's file produced under the  
6 subpoena duces tecum?

7 A Yes.

8 Q Okay. Now, turn to Exhibit 12. Do you recognize this  
9 document?

10 A Yes. It is a notice of trustee sale recorded August 11th of  
11 2011.

12 Q Is this a document generated by Alessi in performance of its  
13 collection or foreclosure obligations to the HOA?

14 A Yes.

15 Q But for the recorder's stamp in the upper right-hand corner,  
16 is this a notice of trustee sale that exists in Alessi's file?

17 A I think -- and I'm looking at USB590 -- excuse me -- 592. We  
18 actually have a copy of the recorded notice of trustee sale, so the answer  
19 is yes, even with the stamp.

20 Q Is this a notice of trustee sale on an assessment lien?

21 A Yes.

22 Q Specifically, the assessment lien that we've referred back to  
23 several times, Exhibit 9?

24 A Yes.

25 Q In order to prepare this notice of trustee sale to perform



1 Alessi's obligations to the HOA in the foreclosure process, did it have to  
2 rely on the statements of accounts supplied by the HOA to complete this  
3 form?

4 A Yes.

5 Q Specifically, the total amount of unpaid balance of obligation  
6 that's set forth in the bottom paragraph?

7 A Yes.

8 Q If you could, I have the same question as to the amount set  
9 forth in the bottom paragraph of Number 11.

10 A Same answer. Yes, we would have needed a ledger to  
11 calculate that figure.

12 Q Okay. Let's move on to Exhibit Number 13. Do you  
13 recognize this document?

14 A Yes, it's a notice of trustee sale recorded April 16th, 2012.

15 Q This is a document prepared by Alessi in performance of its  
16 duties as collection agent and foreclosure trustee for the HOA?

17 A Yes.

18 Q But for the recorder's stamp in the upper right-hand corner,  
19 does this notice of trustee sale appear in the records of Alessi?

20 A Yes.

21 Q This is a notice of trustee sale upon an assessment lien. Is  
22 that right?

23 A Yes.

24 Q Specifically it's the assessment lien that is at Exhibit 9 that  
25 we've gone back to several times?

1           A     Yes.

2           Q     In order to prepare this notice of trustee sale, did Alessi have  
3 to rely on the statements of account supplied by the HOA in order to  
4 complete the amounts foreclosed upon?

5           A     Yes.

6           Q     Specifically in the bottom paragraph of this notice of trustee  
7 sale, where it says, \$4,161.61, is the total amount of unpaid balance, of  
8 obligation Alessi would have had to rely on the statements of account  
9 supplied by the HOA. Is that right?

10          A     Yes.

11          Q     Let's move on to Exhibit 14. Do you recognize this  
12 document?

13          A     Yes. This is a notice of trustee sale recorded July 2nd, 2012.

14          Q     I think you misspoke. It's -- I'm sorry.

15          A     Notice of trustee sale recorded July 2nd, 2012. Am I on the  
16 right --

17          Q     Okay. Yeah. Right. And this is a document that was  
18 prepared by Alessi in performance of its collection and foreclosure duties  
19 for the HOA?

20          A     Yes.

21          Q     And but for the record of stamp in the upper right-hand  
22 corner, is this a document that appears in Alessi's business records?

23          A     Yes.

24          Q     In order to prepare this notice of trustee sale, did Alessi have  
25 to rely on the statements of account supplied by the association?

1           A     Yes.

2           Q     And, specifically, looking at the bottom paragraph, where it  
3 reflects that the total amount of unpaid balance of the obligation is  
4 \$5,071.87, did Alessi have to rely on the statements of account in order  
5 to generate that figure?

6           A     Yes.

7                   MR. NITZ: Your Honor, based on this additional testimony, I  
8 renew my offer to have -- or request to have USB570, 577 admitted. We  
9 don't -- we're not offering it to prove the truth of the matter asserted in  
10 the statements.

11                   We don't care if the HOA entered a correct amount. That's  
12 not what it's being offered for, but what it is being offered for is those  
13 statements of account were relied upon by Alessi in order to prepare the  
14 recorded foreclosure notices that are relevant in this case.

15                   If the HOA entered an incorrect number, it doesn't matter,  
16 because Alessi relied on the accuracy of that, in order to generate these  
17 foreclosure notices.

18                   MS. HANKS: Your Honor, my objection is -- and I don't know  
19 what the relevance is, on top of my other objections that that would  
20 cover the hearsay exception possibly, if they're --

21                   THE COURT: Uh-huh.

22                   MS. HANKS: -- basically conceding that they do not intend to  
23 use it for the matter asserted in terms of the figures in that document.  
24 That might satisfy that. I frankly doubt that. I think they're going to start  
25 looking at this ledger and saying this is what the assessments were on

1 such and such date and this is how much we paid and therefore, we paid  
2 enough. If they're saying they're not going to do that, then I might have  
3 a different understanding of what they were intending to do with it. That  
4 being said, it still doesn't get past the authenticity issue in terms of  
5 authenticating that it's a true and correct copy of a document created by  
6 whatever entity created it.

7           So, there's still that problem. But if it's just being offered to  
8 prove that Alessi relied on it, I'm not sure there's any relevance to that.  
9 None of the parties dispute the notices. We don't dispute a sale  
10 happened. So, I'm not sure that in this particular case there's any  
11 dispute as to the amount of the lien and what was proposed and what  
12 was paid.

13           THE COURT: Okay. Well, is there a dispute?

14           MS. HANKS: As to the total lien on the day of the sale, not to  
15 my knowledge. I'm not aware of there being a dispute as -- that there  
16 was --

17           THE COURT: Are you disputing any of the numbers in any of  
18 the notice of trustee sales, that they have to establish that those numbers  
19 are accurate as set forth in any of those notices?

20           MS. HANKS: Not in any of the notices of -- no, not in any of  
21 the notices -- not in the notice of delinquent assessment lien, the notice  
22 of default or any of the notices of sale. My understanding, there is no  
23 dispute between the parties as to whether those figures are accurate or  
24 not. I don't know. I don't have a dog in that fight. We get to a sale. You  
25 tell me what the opening bid is. My client bids and we get it for

1 whatever the maximum bid is that day. I'm not aware that the bank is  
2 disputing that somehow the association foreclosed on amounts that  
3 weren't actually due and owing, so that's not why I'm understanding the  
4 relevance, if that's what he's using it for.

5 My understanding is he wants to say --

6 THE COURT: Let's understand if you all have a dispute  
7 before we go any further and let's -- in light of what Defense counsel  
8 said, do you -- are you still seeking 570 to 57, if your only purpose is to  
9 support the numbers in your notice of trustee sale or are you going back  
10 to the truth of the matter asserted to get to where your nine months  
11 assessments are? And the reason why I'm asking it that directly is  
12 because you just told the Court that you're not asking for the accuracy,  
13 the underlying numbers.

14 And so, if you're not seeking the accuracy and they're not  
15 disputing the numbers on any of your notice of trustee sale, then I have  
16 to address the relevance question. The relevance objection. Not  
17 question. Excuse me. I misspoke.

18 MR. NITZ: Whether the HOA input the accurate numbers into  
19 the ledgers is not important. It's not relevant. We don't care. But what  
20 we do care is that Alessi had to rely on those figures for assessments,  
21 late fees, fines, interest, et cetera and whether there are any capital  
22 contributions or progress payments or whatever made, they had to rely  
23 on that in order to generate what is relevant here, which is the different  
24 foreclosure notices.

25 THE COURT: I don't think that that -- okay. Defense counsel

1 says she's not disputing any of the amounts in any of the foreclosure  
2 notices. Is that correct?

3 MS. HANKS: That's correct. I don't have a dog in that fight.  
4 I don't know if they're accurate or not and I don't care.

5 THE COURT: So, are you seeking to admit Exhibits 11, 12, 13  
6 through 14? And are you going to object to 11 through 14?

7 MS. HANKS: No. I don't object to any of the -- it was, what,  
8 11, I would stipulate to, the notice of default. I would stipulate Exhibit 12,  
9 the notice of sale. Exhibit 13, the second notice of sale and Exhibit 14,  
10 the third and operative notice of sale. I will stipulate to all those exhibits.  
11 They're recorded documents.

12 THE COURT: So, I've got two things before me. One, do you  
13 want the stipulation on those exhibits, 11 through 14?

14 MR. NITZ: I'll accept that stipulation.

15 THE COURT: Okay. That doesn't answer your --

16 MR. NITZ: So, they're admitted?

17 THE COURT: -- complete question, I understand. Okay. So,  
18 11 through 14 are stipulated and moved in.

19 (Plaintiff's Exhibits 11 through 14 received)

20 THE COURT: Now, I still have the pending request to get in  
21 of Exhibit 30 -- Bates 570 to 577 and I still have a relevance objection,  
22 because the hearsay has been addressed, because counsel's saying it's  
23 not for the truth of the matter asserted. It's just for -- that Alessi relied on  
24 the numbers, which if that's the case, then it would not be hearsay. But  
25 then the relevance.

1                   So, if counsel can respond to how it would be relevant, those  
2 numbers would be relevant, if it's not for the accuracy of those numbers.  
3 I heard what you said for the payoff amount things like that, but it  
4 doesn't have to be the accurate nine months, et cetera, if that's where  
5 you're going for a tender argument. Or are you saying that's not -- I -- of  
6 course that's not a ruling of the Court. That's -- I'm trying to have an  
7 understanding of how it would be relevant in light of the relevance  
8 objection that's now been raised.

9                   Basically, I'm not matching up your response to their  
10 objection and that's what I'm trying to reconcile. So, maybe I didn't hear  
11 something or maybe I'm not understanding something.

12                  MR. NITZ: He testified that in order to generate each of these  
13 documents, the notice of lien, the notice of default, and the three or four  
14 notices of sale, they had to rely -- of these assessment liens, Alessi had  
15 to rely on the statements of account provided by the HOA.

16                  And what is at -- what -- it remains relevant is for the notice  
17 of default -- I'm sorry the notice of delinquent assessment lien, what is  
18 relevant on the issue of tender, among other things, is what is the  
19 amount of the assessments going back nine months -- or nine months  
20 prior to the date of the notice of delinquent assessment lien. And then  
21 as far as the notices of trustee sale, the amount of the assessments is  
22 relevant to the issue of whether the bidders at the -- whether the --  
23 whether the bidders at the sale were aware of the amount that they had  
24 to bid, in order to extinguish the lien.

25                  So, the amount of the assessments is relevant in any case,

1 and the amount of the assessments that became part of these notices  
2 had to have come from the HOA's statements of account.

3 THE COURT: In light of what you said, I have to address  
4 their hearsay objection, because it's going to the truth of the matter  
5 asserted. And how is this -- because if you're saying it goes to the tender  
6 issue, if I am hearing you correctly, the tender about whether or not  
7 Miles Bauer, through its -- well, Bank of America, the agent to Miles  
8 Bauer, and I may or may not be using the correct -- I don't know if you  
9 want to call them their agent, anyway, whether or not there was a tender  
10 of the appropriate super priority amount, they have to -- the Court's  
11 going to have to look at whether there was a tender of the appropriate  
12 super priority amount.

13 And then the Court's going to have to look at what was the  
14 appropriate super priority amount. And the Court using the term  
15 appropriate super priority amount, would be the actual nine months of  
16 assessments, not just some hypothetical nine months of assessments.

17 So, if that's what you're saying 670 to 677 is going towards,  
18 then this Court isn't reconciling that statement with the fact that you're  
19 saying it doesn't matter whether or not 670 to 677 is accurate, because if  
20 it's being utilized to establish to the Court that the nine months of  
21 assessments was paid, then it's going to have to -- the Court's going to  
22 have to look at the accuracy of whether nine months of actual  
23 assessments were paid in accordance with applicable law.

24 So, therefore, I'm going to have to address their hearsay  
25 exception. I'm assuming their hearsay objection, and your hearsay



1 exceptions. So, did I understand, or not understand, because I heard two  
2 different things from Plaintiffs.

3 MR. NITZ: What the assessments were is relevant on each of  
4 the notices. And what assessments were claimed in each of those  
5 notices were supplied by Alessi. They were supplied in at least two  
6 instances to Miles Bauer, based on the statements of account, Exhibits  
7 23 and 74. And what's more, they were used by Alessi. They -- Alessi  
8 had to rely on the information, and did rely on the information, accurate  
9 or not, from the homeowner's association, in order to generate those  
10 statements.

11 So, I don't think you have to -- I don't think you still have to  
12 address the hearsay objection. But even then, the hearsay objection was  
13 withdrawn, and only the question of relevance remained. And I'm  
14 addressing the question of relevance.

15 THE COURT: Okay. And Defendant is going to have to assert  
16 what Defendant's own objections were, because I understood something  
17 a little bit different.

18 MS. HANKS: Yeah.

19 THE COURT: In light of -- so now that you've heard what  
20 Plaintiff's purpose is, Defendant can articulate what objections are or are  
21 not before the Court, so the Court can accurately and fully rule, please?

22 MS. HANKS: Yes, I have consistently had a hearsay and  
23 authenticity objection to these records since yesterday. Just recently,  
24 however, when counsel indicated he was not offering them for the truth  
25 of the matter asserted, I clarified that, and said if he is not going to use it

1 to prove that the amount of assessments on X, Y, Z date was Y, and we  
2 paid the right amount, then my objection would turn to relevance.

3 When you did some more inquiry of him, getting -- what's  
4 the clarification, so I can understand and rule on Defendant's objection,  
5 he now went back to I want to use it for the truth of the matter asserted.  
6 So, of course, I'm back to my hearsay and authenticity objection.

7 So, I didn't waive it, it was just -- I was just clarifying that if  
8 it's not being offered for the truth of the matter asserted, then I had an  
9 added relevance objection. Sounds like he's withdrawn from that going  
10 back to hearsay.

11 THE COURT: To the extent 570 to 577 is being offered that  
12 the underlying numbers in those pages is going to be utilized to say  
13 what was, or was not the monthly assessments, for purposes of tender,  
14 or other arguments, is going to have to go to what was or not being nine  
15 months of assessments, or the amounts of assessments, or the amount  
16 of abatement, or other charges or fines that may relate to arguments  
17 before the Court for purposes of either side prevailing in this case, then  
18 that would go to the truth of the matter asserted. If it's going to the truth  
19 of the matter asserted, then Defense's hearsay objections need to be  
20 addressed by this Court. And then the hearsay exceptions raised by  
21 Plaintiff need to be addressed by this Court.

22 And looking at that rubric, the Court would find that the  
23 hearsay objections are properly stated and need to be sustained. The  
24 hearsay exceptions would not apply, based on the testimony of this  
25 witness, Mr. Alessi. With no disrespect to Mr. Alessi, but he has not

1 been able, by his testimony to call -- to establish that he -- his testimony  
2 would fall within the exceptions, or establish any exceptions, that would  
3 make it an exception to hearsay, except it's being offered to the truth of  
4 the matter asserted, that these numbers are going to be utilized to  
5 establish, as Plaintiff phrased it, tender, et cetera.

6 To the extent it has been offered for a non-hearsay purpose,  
7 since it's being offered for both a hearsay and a non-hearsay purpose,  
8 the Court can't let it in for its non-hearsay purpose and when it's being  
9 offered for two purposes combined. If it was only for some non-hearsay  
10 purpose, and it specifically stated that it would not be utilized for tender  
11 or other arguments, to try and utilize those underlying numbers, then the  
12 Court's going to have to hear that different argument now.

13 But right as present, since it's been saying it's going to be  
14 offered for both hearsay and non-hearsay, then the Court has to sustain  
15 the hearsay objection, and it can't be offered in at this juncture, because  
16 of the hearsay objections, that have to be properly sustained.

17 MR. NITZ: Your Honor, as -- for a point of clarification, is  
18 your ruling on the hearsay objection that we failed to meet the business  
19 record exception, for the statements of account?

20 THE COURT: You failed to meet any of the exceptions that  
21 you've cited as exceptions to hearsay rule.

22 MR. NITZ: Including either of the two general exceptions?

23 THE COURT: Right.

24 MR. NITZ: May I have a moment, Your Honor?

25 THE COURT: Of course, you may.

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[Counsel confer]

MR. NITZ: Your Honor, in light of the, for lack of a better word, the dichotomy that you posed, we would offer the statements of account for the -- not for the accuracy of the amounts there, but only for the non-hearsay purpose to establish that Alessi relied on the information in order to make the payoff demands to Miles Bauer, and in order to generate the relevant foreclosure notices. Notice of -- notice of delinquent assessment lien, notice of default, and the multiple notices of trustee sale.

Whether they are accurate or not, which is I guess what the truth of the matter asserted is, Alessi had to rely on those amounts, and did, in fact, rely on the amounts, in order to make the payoff demand, and in order to generate each of the foreclosure notices.

So, it's not -- we don't need to offer it for the truth or accuracy of each entry on the statements of account, but we do have to offer it to -- for the non-hearsay amount that -- or non-hearsay statement that Miles Bauer, this is the amount that you have to pay off in order to avoid a foreclosure sale in the payoff demands and the foreclosure notices.

THE COURT: I'm not sure if you're giving the Court a legal argument there, that you're asking the Court to adopt in seeking its non-admission, because until you came to that last two sentences, pretty much that you said, I conceptually heard what you're saying, but those last two sentences --

MR. NITZ: If you could --

1 THE COURT: -- presents a challenge to this Court. If you're  
2 asking the Court to adopt that is a non-hearsay use, and that as a matter  
3 of law that would be appropriate. If you're saying that the non-hearsay  
4 use of these documents is -- these are numbers that Alessi & Koenig  
5 used when they prepared these other documents, the Court seeing what  
6 you're saying, that could be a non-hearsay use. Whether these are  
7 accurate or inaccurate, Judge, these are the foundational numbers that  
8 Alessi & Koenig used. Non-hearsay use.

9 MR. NITZ: Right.

10 THE COURT: I'm hearing what you're saying there.

11 MR. NITZ: Right.

12 THE COURT: But if you're saying -- that last two sentences  
13 when you said and, therefore, this is the correct amount that needs to be  
14 the payoff amount, based on the objections raised by Defendant that that  
15 would be a hearsay statement, I would have to allow Defendant to  
16 address those last couple of sentences, because they raised an objection  
17 that -- kind of similar to that would be going to the truth of the matter  
18 asserted.

19 So, the Court's not making a ruling. The Court's just trying to  
20 be -- understand if that's what Defendant's argument was, or was not,  
21 because you all are spending a lot of time in arguments, and kind of --  
22 versus testimony, so I want to make sure that I'm correctly  
23 understanding each side's argument.

24 MS. HANKS: You do understand my argument, and I had the  
25 same concern the last two sentences. We already have Exhibit 74 and

1 Exhibit 23 in, the payoff demands. So, whatever -- you know, whatever  
2 argument that that last argument is, this is what they sent to Miles Bauer  
3 and said you had to pay, we already have Exhibit 74 and Exhibit 23 in.  
4 That's the demand that counsel is suggesting was sent and received by  
5 Miles Bauer.

6 That's a whole different cloth when we're talking about the  
7 other statements, because there's been no testimony that these things  
8 were even attached to either payoff demand. And even if they were, I  
9 still have the objection of them being separate and distinct documents  
10 from Alessi & Koenig's records.

11 And then that -- and the first of their -- of all of his others  
12 sentences beside the last two, it still went to relevance. I don't know  
13 what probative issue -- what issue does it matter that the amounts in the  
14 notices Alessi & Koenig relied on information. They already have the  
15 testimony from Mr. Alessi. They get some of the numbers from the  
16 association. They have their own numbers and their own internally. No  
17 one's disputing that's how this works, and the numbers are what they  
18 are in the notice. Just -- it's not probative to any issue in this case, to my  
19 knowledge.

20 THE COURT: Relevance aside, okay. I mean here's the  
21 Court's ruling. 570 to 577 can come in solely -- if the purpose is solely  
22 being sought that these numbers are numbers, regardless if they were  
23 true or untrue numbers, that these numbers were numbers utilized by  
24 Alessi & Koenig, for purposes of preparing 11 through 14, 23, 169, and  
25 170, and --

1 MR. NITZ: 74 as well, Your Honor.

2 THE COURT: Can I finish my sentence, please, counsel?

3 MR. NITZ: I was just trying to assist, Your Honor.

4 THE COURT: But if you talk over me, we get a bad record.

5 Okay. And Exhibit 74. However, in so ruling, the Court in no way is  
6 saying that these pages are coming in for the truth of the matter asserted  
7 in these underlying pages, because the Court would sustain, and did  
8 sustain the hearsay objection and the authenticity objection, with  
9 regards to these documents. But to the extent the non-hearsay purpose  
10 is to say, look, here are the numbers Alessi & Koenig utilized in  
11 preparing the other documents, they can come in for that limited  
12 purpose.

13 But they're not coming in to say that these are the actual  
14 numbers that would be appropriate for payoff demands, et cetera,  
15 because those would be hearsay, and the hearsay objection is sustained,  
16 and none of the exceptions cited by Plaintiff's counsel were established.  
17 And so, therefore, they cannot come in for a hearsay purpose.

18 Okay, that's the Court's ruling.

19 BY MR. NITZ:

20 Q Mr. Alessi, as of July 25, 2012, what was the total amount of  
21 the assessment lien?

22 A Are you looking at a specific exhibit?

23 Q I wish I could help you there.

24 A My recollection of the assessment lien is that it was from  
25 2009, Exhibit 9. If you're asking for a 2012, the balance of any specific

1 timeframe is there any specific document you'd like me to look at?

2 Q How about Exhibit 14?

3 A So, the unpaid balance owed the association, as well as  
4 Alessi Koenig and the management company as of June 7th, 2012, as  
5 reflected in the Notice of Trustee Sale, recorded July 2nd, 2012, is  
6 \$5,071.81 -- and 87 cents.

7 Q Between June 7, 2012 and July 25, 2012, would there have  
8 been additional assessments, late fees, interest?

9 A Yes.

10 Q And in addition, would there be additional costs, expenses  
11 and advances?

12 A Yes.

13 Q So, by the day of the sale, what was the total amount of the  
14 lien?

15 A On the date of the sale, it was \$5,950, as reflected upon the  
16 following Exhibit 15, Trustee Deed Upon Sale. That would include a  
17 \$300 management company transfer of owner fee. I'm sorry, \$360  
18 transfer of owner.

19 Q How about \$30.60?

20 A I am looking at USB617, the status report, cut check to  
21 CAMCO for \$360. That would have been an August 7th, 2012 entry. And  
22 that would have been the transfer fee that the management company  
23 charges to set up the new owner's account.

24 Q What page was that? I'm sorry, 617?

25 A Yes, about halfway down. You see from the sale there were



1 two checks cut. One to the HOA for \$2,256.53 and one to management  
2 for 360 -- 360.

3 Q So, as of July 25, 2012 --

4 MR. NITZ: -- withdraw.

5 BY MR. NITZ:

6 Q Alessi conducted the sale of this Marbledoe property to -- to  
7 SFR Investments, right?

8 A Yes.

9 Q So, at the time of the sale, would it be fair to say that Alessi's  
10 offer on behalf of the homeowner's association, or opening bid, if you  
11 will, was \$5,950?

12 A Yes. Again, I'm looking at the Trustee's Deed Upon Sale.  
13 The amount of unpaid debt, together with costs, \$5,950.

14 Q In between the time of the June 7 -- or in between the time of  
15 the July 2nd Notice of Trustee's Sale, prepared on June 7, 2012, and the  
16 actual day of the sale, would Alessi have had to have obtained a new  
17 statement of account from the homeowner's association, or its property  
18 management?

19 A I'm sorry, from what date to the date of the sale?

20 Q June 7, 2012 to July 25, 2012.

21 A Most likely, yes. Because the dates are so close, however, I  
22 can't testify with any certainty, as to whether or not we would have  
23 needed to get a new ledger in that one-month period.

24 Q I'm sorry.

25 A Because the dates are so -- of Exhibit 14, the Notice of Sale,

1 and Exhibit 15, the Trustee's Deed Upon Sale, or when the sale actually  
2 happened, you only have approximately one month or so. Our business  
3 practices are that we would get an updated ledger prior to the sale, as  
4 part of our sale date down, and our publication date down.

5 The Notice of Trustee's Sale, however, is not usually as close in  
6 time as the sale date. There's usually a bigger gap in time, so my  
7 testimony is that while that was our business practices, because there's  
8 only a one-month gap, I wouldn't feel comfortable saying that I'm 90  
9 percent certain that that happened here. There's a chance, where we  
10 could have used the June 2012 ledger, provided to us.

11 If one was provided to us by the association, as the basis of the  
12 Notice of Trustee Sale, that we could have used that same ledger to help  
13 calculate the opening bid amount on the date of the sale. I just don't  
14 know.

15 Q Is what you're saying, because of the proximity in time, you  
16 may have just extrapolated, if you will, from what it was on June 7, to  
17 what it was on the date of the sale?

18 A Yeah, the extrapolation --

19 Q Took what information you already knew?

20 A -- would have just been the adding of the July assessment  
21 and then late fees. But I don't believe this association charged interest.

22 Q In setting the opening bid, did Alessi have to rely on the  
23 statements of account?

24 A Yes.

25 MR. NITZ: Your Honor, based on that additional testimony, I

1 renew my offer of USB570 to 575, that it be admitted without restriction.

2 MS. HANKS: I still renew my objection as to hearsay and  
3 lack of authenticity.

4 THE COURT: And the Court sustains those two objections for  
5 the reasons previously stated. Merely relying on statements provided  
6 does not overcome the hearsay issues or follow in the exceptions cited  
7 previously by Plaintiffs through their counsel.

8 So, the Court has to sustain the objections, reiterating what I  
9 stated previously, because there's no new testimony from this witness  
10 that would change the prior ruling of the Court.

11 MR. NITZ: Pass the witness.

12 THE COURT: Cross examination Defense?

13 MS. HANKS: Yes.

14 CROSS-EXAMINATION

15 BY MS. HANKS:

16 Q Mr. Alessi, if you could turn to Exhibit 30.

17 A Yes.

18 Q To page 616 through 617, your status report that you were  
19 been taking about?

20 A Yes.

21 Q Okay. Now, when I look at the status report --

22 MR. NITZ: I'm sorry --

23 THE COURT: Sure.

24 MR. NITZ: -- I was trying to put my papers down. I didn't  
25 hear the pages.

1 MS. HANKS: 616 to 617 of Exhibit 30.

2 THE COURT: Status report 616 and 617, counsel, is that what  
3 you said?

4 MS. HANKS: Yes.

5 THE COURT: Are you putting it on the Elmo, or are you just  
6 referencing it?

7 MS. HANKS: I might put it on the Elmo, but -- yeah, let me --  
8 let me use the Elmo. I like using the Emo.

9 THE COURT: I saw it in your hand, that's why I was asking.

10 MS. HANKS: Yeah.

11 BY MS. HANKS:

12 Q I'm going to first ask a preliminary question and then we're  
13 going to get to more specific line items. When I look at the status report,  
14 it looks like the dates are kind of all out of order. Do you know why that  
15 is?

16 A Yes.

17 Q Why is that?

18 A When the status reports were converted from Alessi -- from  
19 the Alessi Koenig program, and transferred over to the HOA Lawyers  
20 Group program, for some reason, the dates were jumbled. I've seen this  
21 in other depositions and testimony that I've given.

22 I spoke with Ray Jefferson, who was the creator of the software for  
23 the program, and it's just a glitch that occurred. He assured me, though  
24 that the data in the status report is exactly the same as if it was in proper  
25 chronological order. The dates and the entries are exactly the same, but

1 for whatever reason in the migration from one program to another, this  
2 happened.

3 Q Okay, so because of that, what I want to do is, I'm going to  
4 take my own sheet of paper, and I'm only going to highlight certain  
5 entries, but I want to put them in chronological order, so we can see  
6 them better. So, if you look at 616. The first date I want you to look at is  
7 October 19th, 2011, where it has a notation of received payoff request  
8 from Miles Bauer Bergstrom & Winters. Do you see where I am?

9 A Yes.

10 Q Okay. And I'm going to write that on my piece of paper, so  
11 we know the chronology that we're going to talk about. Okay.

12 A I like the sparkles on your nails.

13 Q Yeah, it's Go Knights, right. Okay. So, now if you look at the  
14 next entry in the timeline that -- I know that there's other entries, but I'm  
15 just focusing on certain ones. After that, there's an entry for October  
16 21st, 2011, that reads, "Payoff made to Miles Bauer Bergstrom &  
17 Winters." Do you see that?

18 A Yes.

19 Q Okay. So, I'm going to put that on our -- oh, sorry, I wrote  
20 the wrong date on this. This is 19. And then that's October. And I think  
21 we already established, when you're using the term payoff made, it  
22 means you've sent that two page document we saw Exhibit 23, where  
23 you just list out all of the amounts due and owing with respect to the lien  
24 itself, correct? In other words, you're not making a payment to --

25 A Yeah, it would be probably more the demand made to Miles

1 Bauer --

2 Q Right.

3 A -- and part of that demand was the two pages.

4 Q Okay. That's what I wanted to make sure. When we see a  
5 payoff, you're not actually -- that's not a reference to a note that Alessi &  
6 Koenig is making a payment to Miles Bauer, correct?

7 A Correct.

8 Q Okay. Now if you -- I'm going to have you go through back  
9 and forth, so that's why I wanted to write that on there. I want you now  
10 to go to binder 1 and look at Exhibit 12.

11 A Same binder, right?

12 Q Oh, maybe it is the same binder. I thought it was a different  
13 one, but it should be in Binder 1, and it should be Exhibit 12. You should  
14 be in binder 2 if you were in Exhibit 30. Do you only have --

15 A My binder says I have all of the exhibits -- it says volume 1.

16 Q Oh, okay.

17 A I do have a 12.

18 Q Okay. So, take a look at Exhibit 12.

19 A Yes.

20 Q Okay. So based on our timeline, we know that at least in the  
21 entry for Alessi Koenig, in or around October 19, 2011, you received a  
22 payoff demand from Miles Bauer, correct?

23 A Yes.

24 Q Okay. But if we look at Exhibit 12, this is the first notice of  
25 sale you issued on this property. It set the sale date of September 14,

1 2011; is that correct?

2 A Yes.

3 Q Now I understand the sale didn't go forward, but it could  
4 have gone forward on September 14, 2011, correct?

5 A Yes.

6 Q But you did not receive a payoff demand, at least according  
7 to your status report, until October 19, 2011, from Miles Bauer, correct?

8 A Yes.

9 Q Okay. Now, the next entry, or the next document I want you  
10 to look at is Exhibit -- I think it's 25. What's the letter with the check? 24.  
11 Would you go to Exhibit 24.

12 A Yes.

13 Q This has been admitted. The date that we see on there is  
14 December 16, 2011, correct?

15 A Yes.

16 Q Okay. Now, let's take a look at your status report. Do you  
17 see any entry for December 16, 2011, that indicates receipt of a letter  
18 from Miles Bauer, with a check?

19 A No.

20 Q Do you see -- do you see an entry in or around December 16,  
21 2011, say December 17th or 18th?

22 A No.

23 Q Was it Alessi & Koenig's practice in the 2011 time period to  
24 notate in the status report, if you had received a correspondence like we  
25 see in Exhibit 24? Was it a practice of Alessi & Koenig?

1 A I have seen that we -- yes.

2 Q Okay.

3 A It was.

4 Q So, you have seen that entry --

5 A I can't -- I've seen that entry, yes, many times, but I can't  
6 testify that we made that entry every time we received a check.

7 Q Sure, understood. I'm just asking you about the typical  
8 practice would be to make that entry, and you've actually seen status  
9 reports that did have an entry like that?

10 A Yes.

11 Q But on this status report, we establish we don't see an entry  
12 like that, correct?

13 A Correct.

14 Q Okay. Now, I want to differentiate to you between some  
15 other collection companies in this next question. When Miles Bauer  
16 would deliver a letter with a check, like you see Exhibit 24, in 2011, was it  
17 Alessi's practice to accept the letter? Meaning take the letter, and just  
18 simply not cash the check?

19 A Yes.

20 Q Okay. So, unlike other collection companies that I know of,  
21 you were not the type of company in 2011, where you would refuse to  
22 even take the three-page document. Am I correct to understand that?

23 A Yes.

24 Q Okay.

25 A You're correct.



1           Q     In 2011, was it also your understanding that when Miles  
2 Bauer would deliver the letter, we see in Exhibit 24, it would come with a  
3 kind of cover sheet that would list several properties, if they were  
4 delivering several letters? Do you remember that in 2011?

5           A     I don't have a specific recollection of that, but I do know from  
6 my depositions, that I have often seen, but not in every instance,  
7 receipts. I believe Miles Bauer may have mailed checks at some time,  
8 and also hand-delivered them. And when they hand-delivered them, my  
9 understanding and recollection is that we did provide them with a  
10 receipt. And I have seen those receipts in our files during depositions.

11          Q     Okay. And when -- I'm talking about that receipt, would it  
12 have a signature line for someone at Alessi & Koenig to sign, to confirm  
13 you received whatever letters that Miles Bauer were attempting to  
14 deliver?

15          A     Yes.

16          Q     And was it Alessi & Koenig's practice in 2011, to sign that  
17 receipt?

18          A     Yes.

19          Q     And then give it back to the runner, who was there with the  
20 receipt?

21          A     Give a -- I think it was either carbon copies of the receipt. I  
22 think we might have -- because I've seen it scanned into our file. So,  
23 we -- I don't know if we gave a copy to the runner or not.

24          Q     Okay.

25          A     I think we might have gave -- given a copy to the runner and

1 maintained a copy ourselves.

2 Q Okay. And then am I also correct to understand that in  
3 retaining the letter, while you wouldn't cash the checks, I believe you  
4 talked about having some disagreements about the language and those  
5 types of situations, would you -- was it the practice of Alessi & Koenig in  
6 2011, to retain a copy of the letter for the respective file?

7 A I -- yes.

8 Q And would Alessi & Koenig stamp with a -- like a -- some  
9 type of stamp that it received it on a certain date?

10 A Yes. I have seen copies of the letter with a stamp on it in  
11 similar files, yes.

12 Q Okay. Now, in going back to our timeline, the next timeline  
13 that I -- or the next entry that I want to focus on is -- let me check these  
14 off so I don't -- page 617. There's an entry for June 8th, 2012. You  
15 received a payoff request from Miles, Bauer, Bergstrom & Winters; did I  
16 read that correctly?

17 A Yes.

18 Q Okay. So, I'm going to put that on our timeline, and actually  
19 I'm going to insert in here -- it's not on your timeline, but I'll insert here  
20 the date of the letter that's on Exhibit 24. Sorry, bear with me. June  
21 15th, 2012. It should be 2011.

22 And I'll start at -- that's not on the timeline, but it's an event that  
23 happened in between this timeline, and the next event we just talked  
24 about was June 8th, 2012. You were receiving another payoff demand  
25 from Miles Bauer. And I think you testified yesterday that Alessi &

1 Koenig is not in the practice of putting fake entries in a timeline, correct?

2 A Correct.

3 Q Meaning that you put in an entry like this, that means a  
4 payoff demand was requested from Miles Bauer in or around June 8th,  
5 2012 that would prompt this entry?

6 A Correct.

7 Q Okay. Now, if we go to the next event in the sequence I want  
8 to focus on, it's on page 617. There appears to be another request on  
9 July 3rd, 2012. You received another payoff request from Miles, Bauer,  
10 Bergstrom & Winters; do you see that?

11 A Yes.

12 Q Let me put that in our timeline. And then if you look at the  
13 next entry in the timeline for the events that I'm focused on, there's a  
14 July 11th, 2012 entry for payoff requests made to Miles, Bauer,  
15 Bergstrom & Winters; do you see that? On 617, at July 11th, 2012.

16 A Yes.

17 Q Okay. And we know when you came here this morning, you  
18 actually brought us, as Exhibit 74, the payoff demand, kind of the  
19 breakdown of what was encompassing the entire lien at that time, that  
20 was dated July 11, 2012, correct?

21 A Yes.

22 Q And that payoff was addressed to A. Bhame, B-H-A-M-E,  
23 correct?

24 A Yes.

25 Q And we confirmed with your testimony yesterday that that

1 was an employee of Miles Bauer during that time period, right?

2 A That's my understanding.

3 Q Okay. And then after July 11th, 2012, when you sent that  
4 payoff demand to Miles Bauer, do you see any entry in the status report  
5 that you received a letter with a check from Miles Bauer?

6 A I do not.

7 Q Now, we know the sale happened on July 25th, correct, of  
8 2012?

9 A Yes.

10 Q Now, I want to highlight another entry within your status  
11 report. This is on page 616. If you look at the September 24th, 2014  
12 entry, it indicates that Alessi received a call from Ocwen Loan Servicing  
13 inquiring if any excess proceeds remained in file, advised small amount  
14 with same claim form; did I read that correctly?

15 A Yes.

16 Q Okay. So, I'm going to enter that in our timeline. So, this is  
17 over two years after the sale. This indicates that you got a call from  
18 Ocwen asking about excess sale proceeds, correct?

19 A Yes.

20 Q Okay. Then on that same date, it looks like you responded  
21 and sent a claim form to Ocwen for a small amount of excess proceeds  
22 remaining in your file, correct?

23 A Yes.

24 Q Okay. And why -- do you know why Alessi would send a  
25 claim form to Ocwen for the excess proceeds?

1           A     No.

2           Q     Do you know Ocwen's relationship, if any, to the deed of  
3 trust that's in dispute in this case?

4           A     No.

5           Q     Now, yesterday you testified that -- the question was about  
6 whether you recall what the amount of assessments was for a 2009 time  
7 period based on your review of the file; do you remember questioning  
8 like that?

9           A     Yes.

10          Q     And you had indicated that you believed it was \$45. Do you  
11 remember that? Giving that answer?

12          A     Yes.

13          Q     Am I correct to understand that you were drawing that from  
14 the transaction detail reports that were part of Alessi's file, but excluded  
15 yesterday as part of Exhibit 30?

16          A     Yes.

17          Q     Okay.

18                MS. HANKS: Your Honor, I would move to strike any  
19 testimony from Mr. Alessi now that I've established that Mr. Alessi drew  
20 that amount from a hearsay. I think that was being pulled out yesterday  
21 in terms of my objections and now I've established it.

22                THE COURT: Counsel for Plaintiff, you're standing. Would  
23 you like to respond?

24                MR. NITZ: Yes, Your Honor. The question put to Mr. Alessi  
25 was from his review from his file, did he recall what the monthly

1 assessment was in 2011, and he said he did. He said it was \$45 a month,  
2 and then later, there was some question about whether it was the same  
3 in 2009 or 2010. He didn't say what Counsel said he said.

4 THE COURT: That's what the Court heard, too. The Court,  
5 when it's reviewing this at the time of preparing its ruling, is going to  
6 evaluate that and decide where it can or cannot take it into account,  
7 rather than doing this on different memories from different counsel,  
8 because there's also distinction in preparation for testimony in looking at  
9 different things, refresh your recollection of preparation for testimony  
10 versus looking at documents that are not subsequently introduced.

11 And so, the Court has to hear how the questions were  
12 phrased and how the questions were before making a determination, so I  
13 am deferring that to the time the Court is going to make its decision in  
14 the overall case. Okay?

15 And, Madam Court Reporter, can you make a nice little note  
16 on that, so I can take care of that? Thank you.

17 BY MS. HANKS:

18 Q Now, with respect to -- let's go back to Exhibit 30, and I want  
19 you to go to USB593.

20 A Yes.

21 Q There was a question about the payment made by SFR in  
22 terms of payment being received after the sale date of July 25th, 2012;  
23 do you remember that questioning?

24 A Yes.

25 Q And am I correct to understand from your testimony that

1 rather than have SFR give whole amounts, which would later require a  
2 refund, you allowed your office time to figure out the exact amount  
3 owed for each property, issued that amount, and then SFR could issue  
4 an exact check; did I understand that right?

5 A I think it was more sort of the other way around. We allowed  
6 SFR to provide one check for the exact amount of all the properties they  
7 purchased on that day.

8 Q Right. Then --

9 A They obviously wouldn't have that check with them at the  
10 time --

11 Q Of course.

12 A -- because they wouldn't have known what the amount  
13 would have been.

14 Q And what I meant was, and that's because in lieu of SFR  
15 providing, let's say, \$40,000 in cashier's check and then there being a  
16 refund due from Alessi & Koenig, it was easier to get the exact amount  
17 and give the exact check from SFR, correct?

18 A Correct.

19 Q But your understanding of what Alessi required of any  
20 person wanting to bid is that they would have to show funds in order to  
21 qualify as a bidder?

22 A Yes, all bidders were qualified prior to the sales.

23 Q So that -- with that being said, SFR could have paid whatever  
24 money they brought with them the day of the sale and waited for a  
25 refund later? That's something that Alessi could have done if they

1 wanted their practice to be that way?

2 A Yes.

3 Q All right.

4 A And I believe we did do that at times, as well.

5 Q Okay. Just at least for this transaction, it appears because  
6 SFR bought multiple properties, it made more sense to get the exact  
7 figures, correct?

8 A Yes.

9 Q Now, when we see the different figures -- we'll just look at  
10 Marbledoe. We don't need to address the other properties, but when we  
11 see the first figure of \$5,950, then you see another figure of \$30.60, what  
12 does the \$30.60 represent?

13 A I believe that is the documentary transfer tax at various  
14 times, depending on who the recorder was. The documentary transfer  
15 tax was either calculated based upon the amount of the opening bid --  
16 I'm sorry. The amount of the successful bid. In this case, \$5,950. That's  
17 why it's such a low amount, \$30.60, and at other times, I recall through  
18 my depositions that where there was another recorder in charge,  
19 required the documentary transfer tax to be calculated based upon the  
20 taxable value of the property, therefore the documentary transfer tax  
21 amount would've been much higher in those instances.

22 Q And then --

23 A So, it just depended on who the recorder was at that time.

24 Q And the \$17 figure, am I correct to understand that it's just  
25 the recording fee for the deed of trust --



1 A Correct.

2 Q -- from the trustee's deed of sale?

3 A Correct.

4 Q Okay. All right. Now, in allowing SFR to pay this way, in  
5 terms of exact amounts, was that a special concession made to SFR?

6 A No.

7 Q In other words, you would do it for other investors that  
8 bought multiple properties, as well?

9 A Yes.

10 Q Now, if we go to -- we're still on Exhibit 30. If you go to  
11 USB599, you indicated that you believe that the opening bid was \$5,950  
12 because that is at least what it appears on the trustee's deed upon sale  
13 as the amount of unpaid debt together with cost; did I understand that  
14 testimony correctly?

15 A Yes. Just looking at the trustee's deed; yes.

16 Q Okay. Now, if I could have you go look at USB -- we're still  
17 within Exhibit 30 but look at USB601.

18 A Yes.

19 Q And you'll see on the bottom of this page, at least on the  
20 typed portions, it indicates total amount of \$5,816.53; do you see that?

21 A Yes.

22 Q Okay. Does that clarify whether the opening bid was \$5,950  
23 or was it \$5,816.53?

24 MR. NITZ: Objection. Calls for speculation.

25 MS. HANKS: I'm asking if -- does it clarify it for him. He can

1 tell me no or he can tell me yes.

2 THE COURT: I think the Court gets to rule whether it's  
3 speculation or not, so --

4 MS. HANKS: Well, I'm just explaining why. I didn't ask him  
5 to speculate. I'm asking does that clarify it for him.

6 THE COURT: I would appreciate if the Court asks if  
7 somebody wishes to reply, the Court was going to overrule speculation  
8 because it clarifies in reference to document.

9 THE WITNESS: Okay. So, harmonizing the status report  
10 entry pertaining to the Ocwen excess proceeds, which was confusing to  
11 me when we went through it, and the email chain on 590 -- I'm sorry --  
12 what was the page number of the --

13 MS. HANKS: 601.

14 THE WITNESS: -- on 601. It's possible that there was a  
15 scrivener's error on the trustee's deed upon sale. I have had a couple of  
16 other depositions where Bronco has -- where it made the third line, the  
17 amount of unpaid debt, be actually what was the successful bid amount,  
18 because here, you're right, and I know you've been through many of my  
19 depositions, in your assumption that that total amount shown on 601 is  
20 generally the opening bid amount. Normally, I would defer to the  
21 trustee's deed upon sale, but with the entry in the status report and that  
22 amount on 601, I think you're probably right that the opening was  
23 5,816.53.

24 BY MS. HANKS:

25 Q And that also would jive with the entry in the status report to

1 Ocwen that there was a little bit of excess proceeds?

2 A That's right.

3 Q Whereas, if it was the same as \$5,950 was the opening bid  
4 and that was the bid of SFR, that entry would make no sense because  
5 there should be no --

6 A It would make no sense.

7 Q -- excess.

8 A Correct.

9 MS. HANKS: I have nothing further, Your Honor.

10 THE COURT: Redirect, counsel?

11 MR. NITZ: Yes, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. NITZ:

14 Q Mr. Alessi, would you first turn to Exhibit 30 USB616?

15 A Yes.

16 MS. HANKS: I'm sorry. I didn't hear --

17 MR. NITZ: 616.

18 BY MR. NITZ:

19 Q The very top entry on that page dated July 30, 2012 is what,  
20 third-party sale?

21 A Yes.

22 Q And in this case, the third-party sale was SFR?

23 A Yes.

24 Q You testified this morning that you had determined that the  
25 way the imaging was done in your office, that is why to pay off demands

1 did not appear in the documents you produced under your certificate of  
2 custodian or records; is that right?

3 A Yeah, I testified that in the 400 or 500 depositions and trial  
4 testimonies that I've given, it was -- I don't believe I'd ever seen a  
5 situation where it was an Alessi document produced that we didn't have  
6 a copy of because my understanding has always been that when we  
7 print a document from our program, it's automatically saved in the  
8 letters of notices tab.

9 I believe there was one other time I may have had this situation  
10 arise, and for that reason, I inquired as to, you know, what  
11 -- it bothered me yesterday that we didn't have it on file, and I found out  
12 that, for whatever reason, those two demands were saved as some sort  
13 of a picture file rather than a PDF and, therefore, was not accessible  
14 through our normal ways of producing our documents, copying all of the  
15 documents and the letters and notices tab. Doing a control, select all,  
16 and just uploading them to the website. It wasn't part of that -- of those  
17 grouping of our documents.

18 Q So, in this particular instance, for this particular property,  
19 you've encountered those two instances where documents were not  
20 produced because of the way they were imaged at Alessi?

21 A Well, just this one particular file, and then I think I may recall  
22 it happening one other time, but I'm not sure. I just know it was very  
23 unusual and that's why I looked into it further.

24 Q And in 2011 to 2012, did Alessi have a policy as to whether to  
25 accept checks for nine months of assessments tendered by a lender?

1           A     Yes. Our policy, we would have accepted payment of any  
2 amount from the lender or the lender's attorney absent the restrictive  
3 language that we've discussed many times.

4           Q     Would it be fair to say that Alessi received hundreds, if not  
5 thousands of tenders by Miles Bauer in that period from 2011 to 2012?

6           A     No, not --

7           Q     2014?

8           A     No, not 2015. During that period of time, really the  
9 beginning of 2012 to 2015, I would say hundreds. I don't -- I would be  
10 very surprised if it was anywhere near a thousand.

11          Q     Am I correct that Miles Bauer would routinely send over  
12 multiple checks at one time for different properties?

13          A     Probably. I'm not sure. I don't have a specific recollection of  
14 multiple checks at one time.

15          Q     Let me ask --

16               MR. NITZ: -- withdraw the question and ask it -- or let me just  
17 ask a different question.

18 BY MR. NITZ:

19          Q     Would -- during that period of 2011 to 2012, would Miles  
20 Bauer have delivered to Alessi multiple checks at the same time?  
21 Multiple tendered letters and checks at the same time?

22          A     I think so.

23          Q     I believe you said during cross-examination that there was a  
24 period where when Miles Bauer sent over a check, you would -- Alessi  
25 would sign a receipt acknowledging? Was that your testimony?

1           A     I have -- yes, I have seen receipts acknowledging that the  
2 check was dropped off at our office. My understanding has always been  
3 that the checks might have -- and I wasn't in the office between 2012 and  
4 2015 very much, but my understanding is that Miles Bauer mailed some  
5 checks and delivered some. When they delivered the checks, the  
6 receptionist would give them a receipt, and I've seen the copies of the  
7 receipts in our collection files.

8           Q     What was -- during that period of 2011 to 2012, what was  
9 Alessi's practice regarding the check itself?

10          A     Because my testimony on that issue has evolved a little bit  
11 through my depositions, originally, I thought that we, for the most part,  
12 copied the check, scanned it into the file, and/or noted on the status  
13 report. In my initial depositions, I would find that even if we didn't have  
14 a copy of the check, it was noted in the status report, as you see some  
15 entries pertaining to Miles Bauer are here.

16                My testimony, after doing so many depositions, is that as time  
17 when went on and we were getting so many checks, it's very possible  
18 that we received a check, that we neither noted in the status report, nor  
19 scanned it in the file. We were just getting so many of them and  
20 depending who the attorney or the legal assistant was, that check may or  
21 may not have made it into the file, and a status report entry may or may  
22 not have occurred.

23          Q     If the tender was rejected, did you also find during that  
24 period of 2011/2012 that it was just handed back to the runner?

25          A     I don't know. I have not found anything one way or the other

1 on that. I've never heard that it was handed back to the runner. My  
2 understanding is that they were retained, although not scanned into the  
3 program, but, yeah, I've never inquired as to whether or not we ever  
4 returned checks to the runner. I don't think so.

5 Q In this particular case for this particular property, is it  
6 possible that a tendered letter and check was -- were received by Alessi,  
7 but imaged in the same manner as the Exhibits 23 and 74?

8 A No. My understanding from my -- from this morning, is that  
9 that imaging only occurs when we're producing the document, such as  
10 the demand, not when we're scanning the document into the program.  
11 And as I said, I've only seen that happen just in this file and maybe one  
12 other.

13 Q Is it your testimony that during that period, 2011 to 2012,  
14 sometimes the check was scanned into your program, sometimes not,  
15 sometimes the check was logged, and sometimes not?

16 A Yes.

17 MR. NITZ: Pass the witness.

18 THE COURT: Recross, counsel.

19 MS. HANKS: I don't have any follow-up, Your Honor.

20 THE COURT: Okay. So, this witness is excused in Plaintiff's  
21 case-in-chief; is that correct?

22 MR. NITZ: Yes, Your Honor.

23 THE COURT: Is this Plaintiff reserved in anybody else's cases  
24 in any manner whatsoever in this case, and if so, please state in what  
25 manner?

1 MS. HANKS: No, Your Honor.

2 MR. NITZ: No, Your Honor.

3 THE COURT: Okay. So, this witness is excused for all  
4 purposes and all parts of every case?

5 MS. HANKS: Yes.

6 MR. NITZ: Yes.

7 THE COURT: Thank you so very much for your time.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: Okay. The witness is excused.

10 2:40 - 3:10

11 THE COURT: At this juncture, the next witness to be called  
12 would be whom? Plaintiff's counsel, would you like to call your next  
13 witness? Thank you, Marshal.

14 MR. NITZ: At this time, Your Honor, we would call Harrison  
15 Whittaker, our client representative.

16 MS. HANKS: Your Honor, we have an objection to this  
17 witness.

18 THE COURT: Okay. Let's hear the objection.

19 MS. HANKS: Your Honor, this witness was not disclosed by  
20 name in the course of discovery or in the pretrial disclosures, similar to  
21 the universal disclosure it's just been -- it's always been a corporate  
22 designee for U.S. Bank National Association.

23 We did do a 30(b)(6) deposition, but another individual was  
24 produced at the 30(b)(6), so that's in the same boat. I objected like I did  
25 for the universal saying that it violates the rule not to name the



1 individual. I was not in the deposition. There was no individual given  
2 that would have additional information by this name. The first time I  
3 heard this gentleman's name was at trial. So I fully expected the 39(b)(6)  
4 witness to be the witness for U.S. Bank, even though she was never  
5 named in a formal disclosure, but that's where we stand. That's why we  
6 object, Your Honor.

7 THE COURT: Okay. So, counsel for Plaintiff, Mr. Whittaker is  
8 an employee of U.S. Bank; is that correct?

9 MR. NITZ: No, Your Honor. He's an employee of Ocwen  
10 Loan Services, just as the 30(b)(6) witness was --

11 THE COURT: Oh.

12 MR. NITZ: -- for U.S. Bank.

13 THE COURT: Was Ocwen, the loan servicer, named in any  
14 manner in this case as any witness? Without the Court having to go back  
15 through the pretrial disclosures, the joint pretrial memoranda, et cetera,  
16 is Ocwen named anywhere?

17 MR. NITZ: I don't know, Your Honor, but who was named  
18 was the corporate designee of U.S. Bank. And when SFR served the  
19 notice of taking deposition of the corporate designee and the 30(b)(6)  
20 witness, U.S. Bank, through its servicer Ocwen, produced Katherine  
21 Ortwerth to appear for the deposition and her deposition was taken, I  
22 think in June 2018. We could -- obviously, a corporation can only testify  
23 through its designees and in this case Katherine Ortwerth, who was  
24 deposed, is no longer with Ocwen and hasn't been since February or so,  
25 to the best of my knowledge. So we needed to produce some witness to

1 testify as a corporate designee to speak on behalf of the corporation, and  
2 we're producing Harrison Whittaker.

3 Now I would submit to the Court Mr. Whittaker, all of his  
4 testimony would be based upon his review of the business records of  
5 U.S. Bank as maintained by Ocwen, just as Katherine Ortwerth's  
6 deposition was conducted based upon her review of the business  
7 records maintained by Ocwen on behalf of -- on behalf of U.S. Bank.

8 So in this -- I would also submit to the Court that Mr.  
9 Whittaker has no personal or independent knowledge of this case, so  
10 whatever his answers are would be answers consistent with the -- with  
11 the 30(b)(6) witness' testimony, because he could only have reviewed  
12 the same documents and would only base his testimony on the same  
13 things.

14 THE COURT: Okay. I have to ask the simple question. Why  
15 wasn't Ocwen named? I mean, I'm going through the joint pretrial  
16 memoranda and it says, quote -- I'm not saying it's appropriate, but it  
17 says corporate designee for U.S. Bank National Association as Trustee  
18 for the Merrill Lynch Mortgage Investors Trust mortgage loan asset back  
19 certificate series 2005-A8, and Custodian of Records U.S. Bank National  
20 Association, et cetera.

21 So Ocwen was known and Ocwen seems to be known since  
22 2014, hence the entry the last witness just noted, but they were never  
23 named in the joint pretrial. Without me going back to the others, is  
24 anyone going to say that they were named anywhere else? Were the  
25 named in the pretrial disclosures anywhere else?

1 MR. NITZ: I don't know if Ocwen is named or not. It was  
2 always the intention that Ocwen acting on behalf of U.S. Bank would  
3 produce whatever witness it needed. And in this case, it still the  
4 corporate designee of -- the corporate designee of U.S. Bank. Whether  
5 or not it's an Ocwen witness or any other possible witness, it's still the  
6 corporate designee, it's still the voice that U.S. Bank is speaking to the  
7 Court under. It wouldn't have assisted them, it wouldn't have prejudiced  
8 them if it had been named -- if Ocwen had been disclosed because when  
9 they noticed up the deposition of the corporate designee of U.S. Bank an  
10 Ocwen witness was performed, so they knew of Ocwen's involvement  
11 with the case as the servicer on the loan at least since Ms. Ortwerth's  
12 deposition was taken in June 2018.

13 THE COURT: Okay. Let me hear the response from Defense  
14 counsel, and then the Court is going to rule.

15 MS. HANKS: Yes, Your Honor. There has been no disclosure  
16 of Ocwen Loan Servicing in this case, ever. Not on any 16.1 disclosures,  
17 pretrial, amended pretrial, or even pretrial. And then there's been a  
18 deficient disclosure for U.S. Bank as corporate designee. And I want to  
19 clarify, we never noticed the deposition of a corporate designee, we did  
20 a Rule 30(b)(6) deposition as allowed by the rules, listed topics. They  
21 disclosed one person, saying that she had all the information. She was  
22 from Ocwen.

23 THE COURT: Uh-huh.

24 MS. HANKS: At the 2.67 conference on July 26th, 2018, this  
25 issue came up, and I even noted that I would object to anyone other than

1 Ms. Ortwerth coming and testifying, and Mr. Hendrickson confirmed with  
2 me that she was the witness they intended to call and that she would be  
3 at trial.

4 THE COURT: I'm sorry, who did?

5 MS. HANKS: Mr. Hendrickson who was the attorney at the  
6 2.76 [sic] for Wright Finlay & Zak. I think that he was the attorney on  
7 here -- on this case before he left the firm. So Mr. Hendrickson -- we  
8 brought this issue up, and I said you have, you know --

9 THE COURT: Is that a transcript you happen to be looking at?

10 MS. HANKS: Yes. I should have brought the copy with me  
11 today, since this has been coming up every day. I apologize. I thought  
12 you had the original. I'm sorry, I thought we brought it to calendar call  
13 because I always have our 2.67's reported, but I don't think we do.

14 THE COURT: No, it was not brought to calendar call.

15 MS. HANKS: Sorry.

16 THE COURT: Ask your colleague sitting there right next to  
17 you.

18 MR. MARTINEZ: That is correct, it was not.

19 MS. HANKS: That's my bad. So -- but we can put it up on  
20 the monitor if you would like, but this issue came up because I objected  
21 to the corporate designee.

22 THE COURT: Pop it on the monitor. That's just -- if you don't  
23 mind, instead of doing hypotheticals just pop it on the monitor. Let's  
24 deal with reality, please.

25 [Pause]

1 MS. HANKS: So you'll see at page 9, I'm objecting to the  
2 corporate designee for U.S. Bank because the rule requires an  
3 identification of an individual by name. And then --

4 [Defense counsel confer]

5 MS. HANKS: After I finished, Mr. Hendrickson said, well, we  
6 intend to call Katherine Ortwerth as the designee for U.S. Bank. At the  
7 time we did our pretrials, she was on vacation, and we didn't have  
8 confirmation that she would be assigned as a witness, but we have since  
9 received that confirmation that she is available for the trial.

10 THE COURT: That's 2018, though, right?

11 MS. HANKS: It is. No, it is. And I understand from Mr. Nitz  
12 that she left, but if that occurred in February, the pretrial disclosures  
13 were done in March, the amended pretrial disclosures. So why on  
14 March 15th, 2018, when you were issuing your amended pretrial  
15 disclosures -- or '19.

16 THE COURT: You mean, Plaintiff's counsel?

17 MS. HANKS: Mr. Nitz. Yes, you. Of course, not you, Judge  
18 Kishner. Why wouldn't you notify and put a different name on there to  
19 give me an opportunity to come before the Court. Maybe I wanted to  
20 depose that person. I mean this is why we list multiple people for SFR in  
21 our 16.1 because we do use other people as our 30(b)(6), but we have  
22 other witnesses that would have information at SFR and at the time of  
23 our pretrial disclosure we narrow it down to the one witness from those  
24 names.

25 So that's the concern I have. And the other concern I have is

1 there was no designations. So even if you didn't want to list another  
2 witness in your amended pretrial disclosures, there was no designations  
3 of the deposition that you were going to intend to use of Ms. Ortwerth in  
4 lieu of live testimony that would have put me on notice that now she is  
5 no longer available. I designated some portions, but I didn't see any  
6 designations from counsel.

7 And, frankly, counsel didn't even address this issue with me  
8 before trial, even informally via email. I did not hear of this gentleman's  
9 name. I really, fully expected Ms. Ortwerth to be here at trial when I  
10 came on Tuesday. I was shocked to see a gentleman and didn't even  
11 know his name. So I had no reason to believe that's not what was going  
12 on.

13 And so while I understand that when you produce a 39(b)(6),  
14 they just have to be knowledge about the topics, and then you might  
15 have another person at trial, that person should be disclosed during the  
16 course of discovery because then I have a right to depose them and see  
17 if they have more information than just the 30(b)(6), because I don't  
18 control who you're going to produce as your 30(b)(6), but if you put  
19 multiple people have information and produce someone else as a  
20 30(b)(6), well, I can notice a 30(b)(6), and I can individually depose all of  
21 those people.

22 And, frankly, what I find happens in these trials is a person --  
23 a new person comes to trial and has a much more broader review of  
24 more records, more knowledge of stuff than the person I deposed as a  
25 30(b)(6). And when I say I, I mean my office. I don't mean literally I, but

1 that our office would have deposed. So that's where I think the prejudice  
2 is. It's -- I know what Mr. Nitz is saying, well, he would have reviewed  
3 the same things, but I often find that that's not the case. I get -- then I'm  
4 being ambushed at trial with this witness reviewing a much broader  
5 scope of information than the 30(b)(6), maybe interpreted the  
6 information differently.

7 THE COURT: Okay. Okay. Okay. So let me give you the  
8 Court's inclination here, and then you each get two minutes to respond,  
9 and then the Court's going to make a ruling. So straight from 30(b)(6),  
10 and the Court's going to utilize the pre-changed NRCP because those  
11 would have been in effect at the time the designations would have been  
12 due. It would have been in effect the time everything would have been  
13 done and actually there's no changes to these provisions in substance of  
14 an impact anyway.

15 30(b)(6). As you know there's a distinction between a  
16 requirement under 30(b)(6) versus 16.183, which is why the Court's  
17 going to reference each of them directly.

18 30(b)(6). A party may take in the party's notice and in a  
19 subpoena named as a deponent in public or private corporation, or a  
20 partnership, or association, or governmental agency and describe with  
21 reasonable particularity the matters on which examination is requested.  
22 In that event, the organization so named shall designate one or more of  
23 its officers, directors, or managing agents -- and here's the key language  
24 -- or other persons who consent to testify on its behalf and may set forth  
25 for each person designated, the matters on which the person will testify.

1           And the reason why the Court said the important language is  
2 the "or other persons" because that "or other persons" language implies  
3 it can be somebody outside the company, which does not exist in NRCP  
4 16.183, which is about what I'm going to go to.

5           So then you look at 16.183. 16.183. Pretrial disclosures. In  
6 addition to the disclosures required by Rule 16.A1 and A2, a party must  
7 provide -- mandatory again -- to other parties the following information  
8 regarding the evidence it may present at trial including impeachment  
9 and rebuttal evidence. (A) -- big A -- the name. So there it's clear. It is a  
10 name. It's not a designation, so that's a distinction not only under  
11 30(b)(6), but it's also a distinction, which is important for purposes here,  
12 must have the name. And if not previously provided, the address and  
13 telephone number of each witness, separately identifying those whom  
14 the party expect to present, those witnesses who have been subpoenaed  
15 for trial and those whom the party may call if the need arises.

16           So as distinct from not only discovery, but a 30(b)(6) where  
17 you can have another party that's outside the entity here in 16.183 sub  
18 (a), if you're talking about witnesses, it requires the name and also to  
19 divide it out between one who is expected to present and those who may  
20 be called if the need arises. And then sub (b), the designation of those  
21 witnesses whose testimony is expected to be by means of depo, and  
22 then identification documented that doesn't apply here.

23           So we have that rubric. So then the Court also takes into  
24 account, well, you can't not say you necessarily couldn't produce the  
25 person who is no longer with the company, but even under that basis,



1 under the statement of the person who is previously a 39(b)(6), even if  
2 that individual wasn't available, the Court can't say because someone  
3 was produced from Ocwen on a 30(b)(6), well you can designate another  
4 person, but that therefore means that you can designate another person  
5 as the titling of U.S. Bank corporate designee for 16.183 purposes, even  
6 if you could call it corporate designee, which you can't under 16.183  
7 anyway, but even if you could, it doesn't allow the provision of  
8 somebody who's not that corporation individual, unlike 30(b)(6), which  
9 does say other person. Plus, it specifically requires a name. Plus, here  
10 you have the additional statement that the individual -- while I do  
11 appreciate 2.67, that was 2018, had the person's name, so I appreciate  
12 that's a difference, now the person has left, between the time of that  
13 2.67.

14 So if that individual left and a new individual was being  
15 designated nobody is telling me this on the eve of trial, and so, guess  
16 what, it's the last minute. The person left in February; is that correct? So  
17 people agree it's February there was a change?

18 MR. NITZ: That's what I understand, Your Honor.

19 THE COURT: Okay. Well, this is the month of April. So it  
20 could have been done at the pretrial conference, it could have been done  
21 at the calendar call.

22 MR. NITZ: We didn't have a supplemental pretrial  
23 conference.

24 THE COURT: Calendar -- pardon? We didn't have a pretrial  
25 conference where I set this case for trial? Yes, you do. I do that in each

1 and every one of my cases. That's how you get your trial date.

2 MR. NITZ: I was thinking 2.67 conference.

3 THE COURT: Oh. Okay. I'm saying I do. I even do them for  
4 my med mals, but, anyway, so pretrial conference that this Court had.

5 So pretrial conference. And if you felt you needed another  
6 2.67 because you had those issues, you could have done it, but she also  
7 could have done it in amended pretrial disclosures. You could have told  
8 the Court about it at the pretrial conference. You could have told  
9 Defense counsel at the pretrial conference. You could have discussed it  
10 -- you could have decided you need another 2.67, if you had a change of  
11 witnesses. You could have done it in amended pretrial disclosures. You  
12 could have actually picked up the phone, typed a little email, whatever,  
13 texted, whatever your mode of communication of choice is, right, and  
14 taking care of that. None of that was done. It was not mentioned to the  
15 Court. It was not asked for any request for anything different from the  
16 Court at any point, which is why I was mentioning the pretrial  
17 conference, why I was mentioning calendar call.

18 So now what we have is we have a situation where we have  
19 timely objections, we have non-compliance with the rules, and what we  
20 don't have is something that the Court can allow this individual, who is  
21 an acknowledged Ocwen employee, who was not designated by name,  
22 not designated timely, don't know if the scope is going to be the same.  
23 Defendants stated that they did take a deposition, so not's even an issue  
24 where you could assert the guess what. It's not as if they didn't take the  
25 deposition anyway, so they can't say that they wouldn't have wanted the

1 information, they waived that concept. Anyway, they did take a  
2 deposition, so they tried to inquire on the scope of information in  
3 preparation for the case.

4 And so, I'm not seeing how this witness -- I'm sorry -- can  
5 testify in this case under the scenario because you knew he existed. And  
6 when I say you, being your -- the underlying U.S. Bank if they were  
7 planning on doing Ocwen, then at least it could have been presented  
8 through amended pretrial disclosures. It could have been through a  
9 motion. In so many different ways it could have been presented, okay. It  
10 wasn't. It's only coming up now during the course of trial, and I'm not  
11 seeing any good cause. I'm not seeing any excusable neglect. I'm not  
12 seeing any last minute timing issues that have come up. February  
13 doesn't count as last minute. And I'm not seeing how he testifies.

14 So that's the Court's inclination. I'll give you each two  
15 minutes two minutes to respond, and then the Court's going to decide  
16 what its final ruling is going to be. So since -- I presume that Plaintiff  
17 wants to go first, because I don't think Defendant -- Defendants do you  
18 want to -- do you disagree with my inclination?

19 MS. HANKS: I do not disagree with your inclination.

20 THE COURT: Okay. So I presume, Plaintiff, you want to go  
21 first.

22 MR. NITZ: The deposition of Ms. Ortwerth was taken in June  
23 2018. The original 2.67 conference that they keep referring to was  
24 attended by Mr. Hendrickson. He is no longer with the firm. Ms.  
25 Ortwerth is no longer with Ocwen. Yes, we could have still produced

1 her, but as no longer an employee she would no longer have access to  
2 the imaging systems and other documents that she did have available to  
3 her at the time of her deposition. The only option we had at that point,  
4 to present a witness who is knowledgeable, was to produce the current  
5 loan analyst, Mr. Whittaker. That's the only option we had at that point.

6 THE COURT: Counsel, I'm hearing what you're saying, but  
7 I've addressed if you knew that back in February, why nothing was done  
8 in February so that they would have had an opportunity, potentially, if  
9 they wanted to depose him, address it all before trial so that it all could  
10 have been taken care of because how do they know the scope, breath,  
11 and depth. And since the information -- you know, they don't know what  
12 he's going to say on the stand; do they? I mean he may be asked -- well,  
13 he's probably, absolutely brilliant and may know a whole bunch of more  
14 information, right? I always say it in the most positive way.

15 MR. NITZ: Thank you, Your Honor.

16 THE COURT: But you understand what I'm saying. You  
17 know, he may say things amazingly articulate that weren't necessarily  
18 said in the deposition. And so --

19 MR. NITZ: However he expresses it, he would still express it  
20 based on the same documents and same imaging that Ms. Ortwerth did.  
21 They don't suffer any prejudice by having a different witness who  
22 reviews the very same thing, testifying in court. If it allays any of their  
23 concerns, we would offer to restrict the scope of Mr. Whittaker's  
24 testimony to the scope of the 30(b)(6) deposition of Ms. Ortwerth.

25 THE COURT: Counsel for Defense.

1 MS. HANKS: It's not functional. It just isn't. It's like you  
2 said, you can try to limit it, but they answer a little bit differently or they  
3 review something --

4 THE COURT: I didn't say anything. I just was evaluating --

5 MS. HANKS: No. No, I meant --

6 THE COURT: -- what you all were saying.

7 MS. HANKS: -- what you noted in terms of he might say it  
8 differently. It doesn't work. I tried it before, it doesn't work. And frankly  
9 Ocwen was never disclosed as an entity. As you indicated, the 30(b)(6) is  
10 different because I can pick up a guy on the street, educate them on all  
11 the topics, and produce him as a 30(b)(6). That is a far cry from calling  
12 someone from the company as U.S. Bank and then saying, well, I'm  
13 going to try to bind them to the testimony. It's just -- it's impractical to  
14 do that while the person is on the stand, and I don't want to take that risk  
15 if they should disclose something.

16 And the way I look at it is, they knew in February they had to  
17 switch this up. Frankly, they should have disclosed someone from  
18 Ocwen to disclose the entity of Ocwen and individuals that might be  
19 called at trial. If you want to produce someone else as a 30(b)(6), that's  
20 different, but give me the option to decide how many depositions I want of  
21 the people that I think might come to trial. At the very least, once you  
22 know it wasn't Ms. Ortwerth, tell me, do something. Give me a  
23 disclosure in February so then we can -- I can decide.

24 And then if I came to trial in April and didn't decide to depose  
25 this person, then they would have a different argument, but I never was

1 afforded the chance. And so I don't really want to sit here and get  
2 ambushed, and then try to link it to the depo, and it would be slightly  
3 different, and it just -- no. My objection stands.

4 THE COURT: Okay. Well, and the question I always need to  
5 ask how are you prejudiced?

6 MS. HANKS: The prejudice will be I don't know what that  
7 person is going to testify to. I don't know what information -- I might  
8 have gotten a lot of I don't know responses from Ms. Ortwerth and  
9 decided not to pursue to that in discovery. I might have -- she might  
10 have said I only looked at X, Y, Z documents. I've done enough of these  
11 trials. I can guarantee you every time they call someone else, if not the  
12 30(b)(6), the person has looked at a much broader landscape of  
13 documents, knows a heck of a lot more than the person I deposed. I took  
14 an I don't know answer at the time of the deposition because it was  
15 satisfactory, in terms of their burden of proof, and now the witness has  
16 an answer.

17 So I've never been not burned by it, let's put it that way. So I  
18 always raise the objection, and if the trial court allows it, I'm stuck with it,  
19 but I'm going to keep on objecting because I have always been burned  
20 by it. They never stick with the testimony, they always no more, they  
21 have answers to questions that the 30(b)(6) didn't, and so I think it's just  
22 -- I don't -- I don't think the analysis -- of course, there's prejudice. I can  
23 show the prejudice, but I don't think I should have to wait for the person  
24 to be on the stand to show the prejudice.

25 At the end of the day, they have to show the good cause and

1 the excusable neglect as to why they couldn't follow the rule. We're all  
2 staring from the same starting point. We all have 16.1, it's not  
3 complicated. And this is a 2016 case. There's been plenty of time to  
4 rectify this.

5 THE COURT: Okay. I did say one round each, but I will give  
6 you two minutes to give a final response, counsel, because I am likely  
7 striking him, so you have the final word to see if there's something I'm  
8 missing.

9 MR. NITZ: They keep on mentioning Ocwen, like it's a  
10 surprise. They've known since, at the very least, June 2018, that the  
11 witness produced for U.S. Bank was going to be an Ocwen witness. If  
12 they -- they've known since then. They could have subpoenaed an  
13 Ocwen witness at any time.

14 As far as --

15 THE COURT: But, counsel --

16 MR. NITZ: -- Ms. Ortwerth, if -- they say they're prejudiced  
17 now. If she didn't testify the same way here in court as she did at the  
18 time of her deposition, they would be able to use the deposition to  
19 impeach her or challenge her testimony. The same thing still occurs. If  
20 Mr. Whittaker testifies differently than Ms. Ortwerth did, who was the  
21 corporate designee speaking on behalf of U.S. Bank at the time of the  
22 deposition, if he answers a question differently than she did, they can  
23 impeach him the same way, because they are still relying on the  
24 statement of the company. The company can only speak through  
25 people, and it spoke through Ms. Ortwerth at the time, and they -- so it's

1 the company's testimony that we present at this point, and they can still  
2 cross-examine, impeach, or whatever, Mr. Whittaker based on Ms.  
3 Ortwerth's answers.

4 THE COURT: Counsel, is Mr. Whittaker an employee of U.S.  
5 Bank? Is he a corporate designee of U.S. Bank? Is he an employee of  
6 U.S. Bank?

7 MR. NITZ: Not directly. Ocwen is.

8 THE COURT: Does his paycheck come from U.S. Bank?

9 MR. NITZ: Presumably, no. I haven't asked him that  
10 personal question, but in this case, Ocwen is the servicer --

11 THE COURT: Well, we can put him on the stand --

12 MR. NITZ: -- for U.S. Bank.

13 THE COURT: -- to find out if you would like to find out if he  
14 gets any payment at all from U.S. Bank, because there's two separate  
15 issues, counsel. You all knew, from whatever date, at least you all knew  
16 from June -- as counsel, knew from 2018, if not earlier, that if you wish to  
17 have someone from Ocwen appear at trial that you needed to name  
18 Ocwen. Those are two separate issues. The Mrs. Whittaker versus Mrs.  
19 H, right, is one issue, and it doesn't get you over the hurdle, but the only  
20 entity you named is U.S. Bank. If you named U.S. Bank, and you tried to  
21 come in with Bank of America, or you named U.S. Bank, and you're  
22 trying to come in -- there's a difference between mortgage servicers.

23 As you know, up until even a couple of years ago, there  
24 wasn't even Supreme Court case law about whether or not the servicer  
25 could even pursue claims on behalf of the underlying bank entities. That



1 was up for grabs here in the State of Nevada, right. There were standing  
2 issues. So it's been very clear of the distinction between servicers and  
3 entities. And even if you know, you know, the distinction between the  
4 various case law between the entities, and their rights, and the servicers,  
5 although this is Freddy or Fannie case, but in that aspect. So there is a  
6 distinction. There is a very large corporate distinction between who the  
7 servicers are and the bank entities.

8           And so if somebody is saying Mr. Whittaker is an employee  
9 of U.S. Bank, gets his paycheck from U.S. Bank or their subsidiaries,  
10 okay, he can view himself -- under oath that he views himself as a  
11 corporate designee of U.S. Bank. The Court's fine if he wants to go on  
12 the stand and say that under penalty of perjury, if you want to talk to him  
13 for a moment and see if that's the case. But then that's one hurdle.  
14 That's -- okay. Because then you get to your second hurdle of, you  
15 know, potentially the impeachment issue of one person versus a  
16 different person, but those are two separate lines of arguments, right.

17           One argument is the per se noncompliance with the rules  
18 that if you wish to designate someone for trial purposes from Ocwen, it  
19 was counsel's obligation to name not only Ocwen, but also the individual  
20 from Ocwen. So the first hurdle is Ocwen versus U.S. Bank, and you  
21 knew Ocwen existed back in 2018. You chose not to do Ocwen in any of  
22 your pretrial disclosures. The second issue is you didn't name a name  
23 from an entity. So those are two separate issues.

24           So if the first issue -- if you're saying that the individual  
25 sitting currently in court is an employee of U.S. Bank, and he wants to

1 get on the stand under penalty of perjury and say he's an employee of  
2 U.S. Bank, we'll take a break right now, and you can talk to him and see if  
3 that's the case, under penalty of perjury.

4 We'll come back -- we'll take a break, and why don't we find  
5 out, right? It's 3:10. We'll come back at 3:25. Thank you so very much.

6 THE MARSHAL: Court is in recess.

7 [Recess from 3:10 p.m. to 3:21 p.m.]

8 THE COURT: Okay. Counsel and the parties, we're back on  
9 the record. So, while we were on break, did you all ascertain whether or  
10 not Mr. Whittaker is or is not an employee of the U.S. Bank entity  
11 designated in the 16.1(a)(3) pretrial disclosures and in the joint pretrial  
12 memoranda?

13 MR. NITZ: Mr. Whittaker is -- you asked about his paycheck.  
14 He gets his paycheck from Ocwen Financial. Ocwen Financial is the  
15 parent company of Ocwen Loan Servicing. Ocwen Loan Servicing is the  
16 designated servicer for U.S. Bank. He is -- Ocwen Loan Servicing enjoys  
17 a limited power of attorney with U.S. Bank, and he is authorized by U.S.  
18 Bank under that limited power of attorney to appear on its behalf.

19 So, is he a direct employee of U.S. Bank? No, he's not. But  
20 through the limited power of attorney, his direct employee/employer is.

21 THE COURT: Is there a separate corporate relation -- is there  
22 a separate -- are they separate corporate entities? Counsel, you're an  
23 officer of the Court.

24 MR. NITZ: I don't know what you're asking me, Your Honor.  
25 I'm aware I'm an officer of the Court. I'm --

1 THE COURT: Are they separate corporate entities? I don't  
2 know if they're separate corporate entities. I don't know the corporate  
3 structure of Ocwen. I'm not familiar with the corporate structure of U.S.  
4 Bank. Are they separate corporate entities?

5 MR. NITZ: Ocwen Loan Servicing, Ocwen Financial are  
6 separate entities from U.S. Bank, but separate is not a single concept.  
7 Since they enjoy the limited power of attorney, they act for U.S. Bank  
8 under that limited power of attorney.

9 THE COURT: Counsel for Defense, do you want to say  
10 anything, because the Court needs to make a final ruling?

11 MS. HANKS: There's no power of attorney disclosed, Your  
12 Honor, but I think at best, it's still going to be you're a servicer, which is a  
13 distinct entity, so --

14 THE COURT: Is anyone saying that if you sent a subpoena to  
15 U.S. Bank, okay, that Mr. Whittaker is going to appear when a subpoena  
16 went to U.S. Bank?

17 MR. NITZ: They did that. They sent it to U.S. Bank, and, at  
18 the time, we produced Katherine Ortwerth.

19 THE COURT: No. No. Okay.

20 MR. NITZ: If you're talking about now, we have produced  
21 Mr. Whittaker.

22 THE COURT: Okay. Isn't it a distinction? Did you all send a  
23 subpoena, or did you ask for a 30(b)(6) deposition that you sent to  
24 counsel --

25 MS. HANKS: Correct.

1 THE COURT: -- and counsel then determined on behalf of its  
2 clients who would be appropriate through counsel in speaking with their  
3 clients? Did you send a subpoena directly to U.S. Bank and all of a  
4 sudden, someone from Ocwen showed up?

5 MS. HANKS: No. We did a notice of 30(b)(6) deposition and  
6 sent it counsel. We did not subpoena U.S. Bank.

7 THE COURT: My question was different. My question was a  
8 subpoena, so -- okay. Let's simply go -- counsel, I don't understand why  
9 this being so difficult. The attorney client -- I guess I couldn't phrase it in  
10 a different way. The attorney client relationship, okay.

11 Okay. Let's look at how this case is done, right? This case is  
12 done, U.S. Bank National Association. You are counsel of record for U.S.  
13 Bank. Are you counsel of record ? Do you have an attorney-client  
14 relationship? Are you counsel of record for Ocwen? Have you been  
15 retained -- your firm been retained specifically by Ocwen?

16 MR. NITZ: Yes, we've been retained by Ocwen to represent  
17 U.S. Bank. Are we counsel of record for Ocwen? No, we're not, because  
18 Ocwen isn't a party.

19 THE COURT: Okay.

20 MR. NITZ: It's the servicer for the party.

21 THE COURT: Oh, so that answers the question, doesn't it? If  
22 they're not a party, then they're separate entities. Otherwise, they would  
23 be the party. So, what we have here -- if you're going to say as an officer  
24 of the Court that Mr. Whittaker needs to get on the stand, that he is a  
25 corporate designee of U.S. Bank, i.e., an employee, right? He would fall

1 within 16.1(a)(3), right, as the name of an individual. And under penalty  
2 of perjury, he can answer those questions. That's what I'm asking you.  
3 Are you placing him on the stand in that role?

4 MR. NITZ: I frankly don't understand your question, Your  
5 Honor.

6 THE COURT: Okay. I'm asking you -- it's your entitlement to  
7 call your next witness, right?

8 MR. NITZ: Right.

9 THE COURT: Okay. So, the next witness would have to be  
10 someone that you have designated. You have designated, under your  
11 broadest sense, right?

12 MR. NITZ: Yes, the corporate entity --

13 THE COURT: You've not designated anyone from --

14 MR. NITZ: -- of U.S. Bank is who I -- we designated.

15 THE COURT: Okay. So, do you have somebody here from  
16 U.S. Bank?

17 MR. NITZ: We have a designee here from U.S. Bank. We  
18 also identified the custodian of records for U.S. Bank, and Mr. Whittaker  
19 would wear both hats.

20 THE COURT: Mr. Whittaker signs custodian of records  
21 documents on behalf of U.S. Bank? He's authorized to sign custodian of  
22 records on behalf of U.S. Bank. If you're saying that, and he's being -- if  
23 he's purely a custodian of records -- you're saying he's a custodian of  
24 records, and he's authorized by U.S. Bank. He can sign his name. If  
25 something goes to U.S. Bank, he can sign his name, U.S. Bank, Mr.

1 Whittaker. He can sign an affidavit sent to U.S. Bank. He can sign his  
2 name.

3 Are you telling me he can say that under penalty of perjury?  
4 Do you feel comfortable him coming to the stand and saying that under  
5 penalty of perjury?

6 MR. NITZ: If it's within the scope --

7 THE COURT: He feels comfortable saying that?

8 MR. NITZ: -- of the power of attorney, which identifies  
9 specific loans, where Ocwen is authorized to speak --

10 THE COURT: That's not --

11 MR. NITZ: -- sign documents, et cetera, for U.S. Bank.

12 THE COURT: That's not the question the Court was asking,  
13 okay.

14 MR. NITZ: The question the Court was asking can't be  
15 answered yes or no, so I'm trying to provide the best information. He  
16 regularly signs productions. He signs answers to interrogatories and  
17 other such things as a representative or designee of U.S. Bank, as well as  
18 multiple other investors. He regularly testifies for U.S. Bank at --

19 THE COURT: This isn't even U.S. Bank.

20 MR. NITZ: -- depositions.

21 THE COURT: This -- okay. Let's walk through this -- what  
22 this is. Okay. So, there was two sets of objections. The first objection  
23 was a different person and a different entity. So, let's walk through the  
24 titling of this. I'm going directly to your pretrial disclosures, right?  
25 Where's the amended pretrial disclosures?

1 MS. HANKS: They weren't filed, Your Honor. I don't know if  
2 you have them.

3 THE COURT: Oh right. These were the ones --

4 MS. HANKS: Yeah.

5 THE COURT: -- that weren't filed. So, I have to go to the  
6 joint pretrial memoranda.

7 MS. HANKS: You can go to my objections, but that -- I don't  
8 --

9 THE COURT: So, I can go to the pretrial memoranda, right?  
10 Okay. So, here's how the witness is done. One moment please. U.S.  
11 Bank National Association as trustee for the Merrill Lynch Mortgage  
12 Investors Trust Mortgage Loan Asset Backed Certificate Series 2005-A8.  
13 So, Mr. Whittaker's employed by U.S. Bank National Association as  
14 Trustee for the Merrill Lynch Mortgage Investors Trust Mortgage Loan  
15 Asset Backed Certificate Series 2005-A8.

16 Is that your statement, counsel?

17 MR. NITZ: He's the corporate designee.

18 THE COURT: I'm not -- that wasn't my question. My  
19 question was is he employed by U.S. Bank National Association as  
20 Trustee for the Merrill Lynch Mortgage Investors Trust Mortgage Loan  
21 Asset Backed Certificate Series 2005-A8?

22 MR. NITZ: Not directly, but indirectly, as I explained before --

23 THE COURT: Okay.

24 MR. NITZ: -- through the power of attorney.

25 THE COURT: Power of attorney --

1 MR. NITZ: Just as Ms. Ortwerth was.

2 THE COURT: Power of attorney says -- is an employment  
3 relationship under state or federal law? Is it even located in the same  
4 state as U.S. Bank, the corporate headquarters a Ocwen?

5 MR. NITZ: I don't know.

6 THE COURT: So, my question remains. Is he employed by  
7 U.S. Bank National Association --

8 MR. NITZ: He's not a direct employee.

9 THE COURT: -- as Trustee for the Merrill Lynch Mortgage  
10 Investors Trust Mortgage Loan Asset Backed Certificate Series 2005-A8?  
11 Let's put it this way. Does he have a business card?

12 MR. NITZ: I'm sure he does.

13 THE COURT: What does the business card say? Does it have  
14 U.S. Bank anywhere on the business card? He doesn't have a business --

15 MR. NITZ: He doesn't have one. He said no, it doesn't say  
16 U.S. Bank anywhere on his business card.

17 THE COURT: Okay. Does Mr. Whittaker wish to get up on  
18 the stand under penalty of perjury and says he's employed by U.S. Bank  
19 National Association as Trustee for the Merrill Lynch Mortgage Investors  
20 Trust Mortgage Loan Asset Backed Certificate Series 2005-A8? Are you  
21 calling him to the stand? Because that's the first question he's going to  
22 be asked by the Court, is he employed by them.

23 MR. NITZ: May I consult with him?

24 THE COURT: Sure.

25 [Counsel and Mr. Whittaker confer]



1 THE COURT: Do you have the deposition? Do you have a  
2 copy of the deposition of the prior -- the 30(b)(6) witness?

3 MR. MARTINEZ: We also provided the original --

4 THE COURT: Right, but instead of having it --

5 MR. MARTINEZ: We don't need to publish it.

6 MS. HANKS: Yeah, we publish it.

7 THE COURT: -- instead of having that published, can I see  
8 that for a moment, please?

9 MS. HANKS: Uh-huh.

10 [Pause]

11 THE COURT: Counsel, do you even know if Ocwen was the  
12 servicer at the time of the sale?

13 MR. NITZ: I don't believe so, Your Honor.

14 THE COURT: Okay. Well, here's the Court's ruling. The  
15 Court's ruling is a per se violation of NRCP not to designate an individual  
16 for purposes of the trial, okay. That it has been stated to this Court,  
17 Ocwen Financial Services -- and let's get the correct titling of who's  
18 employ -- who's Mr. Whittaker employed by?

19 MR. NITZ: Ocwen Financial Corporation.

20 THE COURT: Okay. And Ocwen Financial Corporation's  
21 relationship to U.S. Bank as trustee of the -- let's get the correct title in  
22 here, if you don't mind. U.S. Bank National Association as Trustee for  
23 the Merrill Lynch Mortgage Investors Trust Mortgage Loan Asset Backed  
24 Certificate Series 2005-A8 is what?

25 MR. NITZ: It's the parent of the direct subsidiary of Ocwen

1 Loan Servicing, which is the servicer, designated servicer for U.S. Bank  
2 under the --

3 THE COURT: For U.S. Bank --

4 MR. NITZ: -- power of attorney.

5 THE COURT: -- or for U.S. Bank, the Trustee?

6 MR. NITZ: U.S. Bank National Association as Trustee for  
7 Merrill Lynch Mortgage Investors Trust Mortgage Loan Asset Backed  
8 Certificate Series 2005-A8.

9 THE COURT: Okay. So, what the Court sees is that Mr.  
10 Whittaker has not been named, so there's two issues. One, Ocwen has  
11 not been named. The only thing that's been named is U.S. Bank. U.S.  
12 Bank, there has been objections to U.S. Bank, the designation of  
13 corporate designee for U.S. Bank and so the -- it's a violation of the rule  
14 not to have named an individual when the rule specifically requires  
15 there must be a name.

16 Separate and apart from that, there -- Ocwen has not been  
17 named in any manner whatsoever. And if counsel for Plaintiff wished to  
18 call Ocwen for purposes of trial, they knew that Ocwen was the servicer.  
19 In fact, they actually were hired by Ocwen, but ,okay. They've known at  
20 least 2018, that Ocwen was the servicer, they could easily have named  
21 Ocwen as a trial witness, and then if they had had an issue between one  
22 Ocwen employee no longer being present and a second Ocwen  
23 employee having to substitute for that first, they could have done that  
24 also -- timely done that sometime between February and the present, but  
25 they didn't name Ocwen at all.

1                   And if they had intended to have someone from Ocwen on  
2                   behalf of U.S. Bank, that designation could have been made. In addition,  
3                   there's a requirement specifically that you must name an individual. And  
4                   the only thing this Court has been presented -- the Court was trying to  
5                   find a lot of different ways to see if Ocwen was owned by U.S. Bank, so  
6                   there was some direct ownership relationship, corporate relationship, so  
7                   that that would fall within it or some argument therein, no. I haven't.

8                   I asked whether they were even located in the same area. I  
9                   was told don't know. I asked even if there was a business card. Haven't  
10                  been given a business card. So, the best I've been told is that there is  
11                  some type of power of attorney with relationship to some aspects of the  
12                  trust for purposing of loan servicing.

13                 So, the Court doesn't see how that would be appropriate  
14                 under the rules to allow a specific witness who has not been identified in  
15                 any manner, who has been employed with the company since at least  
16                 February, never disclosed to Defendants. When there is an objection by  
17                 Defendants, it was explained the Defendants have not only -- there's a  
18                 per se violation of the rules on multiple reasons, as stated.

19                 Defendants have additionally stated their objections. But this  
20                 is not a surprise to Plaintiffs that Defendants are objecting, because  
21                 Defendants objected not only in 2018, to the way the designations were  
22                 made, objected in 2018, in a variety of different ways, in 2018, 2.67 in the  
23                 pretrial disclosures, in that pretrial memoranda.

24                 But then, even to the extent that some of those objections  
25                 would now be moot, because there is a different individual, there still is

1 the new objections raised in 2019, as stated in the amended pretrial  
2 disclosure -- the objections to the amended pretrial disclosures and also  
3 preserved, although not required, in the newest joint pretrial  
4 memorandum dropped in the footnote, although not required.

5 So, that if at any juncture, Plaintiff's counsel had wished to  
6 have this issue brought to the Court's attention, and they already knew  
7 that the objections existed, this could have been resolved by the Court  
8 way before trial. Chose not to do it. Based on the objections raised  
9 properly both procedurally and, on the prejudice, the Court finds that Mr.  
10 Whittaker cannot testify, due to all the reasons stated.

11 Counsel for Plaintiff, would you like to call your next witness?

12 MR. NITZ: Yes, Your Honor. I call the custodian of records  
13 for U.S. Bank.

14 THE COURT: Okay. And who is the custodian of records for  
15 U.S. Bank?

16 MR. NITZ: The name of the individual is Harrison Whittaker.

17 THE COURT: Okay.

18 MR. NITZ: The custodian of records is Ocwen Loan  
19 Servicing.

20 THE COURT: And are they listed -- I'm looking currently at  
21 the joint pretrial memorandum, and I'm looking -- I just looked at the  
22 amended pretrial disclosures, I do not see Ocwen listed as the custodian  
23 of records for U.S. Bank in either of those documents. Is there any  
24 document that Plaintiff's counsel can point the Court to that shows that  
25 Ocwen is the custodian of records for U.S. Bank National Association as

1 Trustee for the Merrill Lynch Mortgage Investors Trust Mortgage Loan  
2 Asset Backed Certificate Series 2005-8?

3 MR. NITZ: I'm not aware of any document that specifies that,  
4 except the deposition transcript of Katherine Ortwerth, I believe.

5 THE COURT: It says that it's custodian of record?

6 MR. NITZ: It says that on --

7 THE COURT: Well, since Defense counsel gave me a copy of  
8 it, can you point to me where in that deposition that would be -- the  
9 other custodian of records? Because I have it. She just handed me a  
10 copy to look at, so if you point it to me, I'll take a look.

11 But while you're looking for that -- I guess I should have  
12 asked first. I saw, Defense counsel, you had already said you would  
13 object to custodian -- so let me -- are you standing up? You agree --

14 MS. HANKS: I --

15 THE COURT: -- could they --

16 MS. HANKS: -- I have the same objection, Your Honor. And,  
17 also, I was going to add that I'm not aware that any U.S. Bank  
18 documents have been produced in this case.

19 So, when we deposed Ms. Ortwerth, there were servicing  
20 records from different servicers. And then my understanding is they're  
21 not even the custodian of the collateral file. It's a completely distinct  
22 entity that's the custodian of the collateral file.

23 So, I'm not really sure what Mr. Whittaker is -- what records  
24 Mr. Whittaker is the custodian of, because I don't have any U.S. Bank  
25 records in this case. And I don't have even any Ocwen records.

1 I think they've produced some prior servicing records, which  
2 we objected to. And then I know in the deposition, we referenced the  
3 collateral file, and I think Ms. Ortwerth determined that that was a  
4 different custodian who held those. They had to actually request them  
5 from someone else. I want to say Wells Fargo, if memory serves me  
6 right, but I do, do a lot of these trials, so I might be confusing that with  
7 another case, but my memory is it's Wells Fargo, who is even the  
8 custodian of certain records. So, that's where I'm thoroughly confused.

9 Oh, yeah. It's Wells Fargo. I'm right. My memory was right.  
10 So, some of the documents that were produced -- a lot of the documents  
11 that we have as proposed exhibits come from various different entities,  
12 and so I'm not really sure that I have any U.S. Bank records. Oh, I'm  
13 sorry. And in the answer, she gave that Wells Fargo is the custodian of  
14 records for U.S. Bank. That's what she told us.

15 MR. MARTINEZ: It's on page 34, lines 8 through 10.

16 THE COURT: Okay.

17 MS. HANKS: So, that's why I don't believe that would be  
18 correct that Mr. Whittaker would be the custodian of records, unless he also  
19 works for Wells Fargo, who was never disclosed, either.

20 THE COURT: To Wells Fargo. Counsel, do you have a copy  
21 of the deposition, the reference just provided to the Court, page 34? Do  
22 you see where it says Wells Fargo?

23 MR. NITZ: Yes, Your Honor. It's taken out of context. Wells  
24 Fargo is the custodian of the collateral file. It was a vendor of Ocwen --  
25 or it was a vendor of U.S. Bank that actually holds the collateral file for

1 U.S. Bank.

2 THE COURT: So, what would Mr. Whittaker be the custodian  
3 of records for that has been disclosed in this case that the Defendant  
4 would be aware of that's been disclosed in this case during discovery?  
5 Because I didn't see Ocwen listed as a witness anywhere. That's why I'm  
6 trying to see how they've been disclosed as a custodian of records  
7 anywhere. Where they disclosed as a custodian of records anywhere in  
8 discovery?

9 MR. NITZ: I don't know.

10 THE COURT: As to --

11 MR. NITZ: I expect that they weren't, but I do -- would point  
12 out to the Court that the original collateral file is here in court with me.  
13 I'm holding it in my hands right now. I would also point out to the Court  
14 that this original collateral file was presented to SFR's counsel, and they  
15 did inspect the original collateral file. I believe it's Exhibit 43.

16 THE COURT: Is that proposed or admitted, Madam Clerk?

17 THE CLERK: It's proposed.

18 THE COURT: Okay. Proposed? Okay. Thank you. I just --  
19 Madam Clerk, does -- we show it's proposed? Proposed. Okay. Thank  
20 you.

21 [Pause]

22 THE COURT: Okay. So, what is Mr. Whittaker the custodian  
23 of records for that's been disclosed to Defense counsel that he's the  
24 custodian of records for?

25 MR. NITZ: He hasn't been named anywhere as anything,

1 custodian of records or anything. But the answer to your question is he  
2 is the custodian of records for U.S. Bank as trustee with the full name  
3 that I don't think it's necessary to keep referring to. He is the custodian  
4 of records of U.S. Bank for this loan.

5 THE COURT: Is there any custodian of records' affidavit or  
6 anything that's been provided in this case that has his name on it or any  
7 custodian of records' affidavit anywhere that's been provided in this  
8 case? Because usually a custodian of records -- you know, when a  
9 person comes in as custodian of records, it's because they've provided a  
10 series of documents, right? And similar to -- like what you had with Mr.  
11 Alessi, right?

12 You have a custodian of records. It's a grouping of  
13 documents that has an affidavit. It has the person's name at the bottom,  
14 and it says that they're the custodian of records. Is there anything that's  
15 been provided in this case that has Mr. Whittaker's name on it as  
16 custodian of records on anything?

17 MR. NITZ: Not that I'm aware of.

18 THE COURT: Okay. Is there something which his role or his  
19 title as successor to Katherine Ortwerth, as custodian of records, because  
20 you say she left the company, and he replaced her in about February.  
21 So, is there something that's been presented to Defense counsel that she  
22 was the custodian of records or something and then he, by taking her  
23 place in February, that he is now the custodian of records that's been  
24 produced?

25 MR. NITZ: I don't believe she was named anywhere.



1 THE COURT: Okay.

2 MR. NITZ: If I understand your question, correctly, no.

3 THE COURT: I'm trying to give you all the benefit of the  
4 doubt that there's something that shows a custodian of records to see if  
5 there's any way he can go on the stand is what I'm trying to see, because  
6 he's not been designated custodian of records. If there's nothing that  
7 shows that he's a custodian of records, I'm trying to see if by the fact that  
8 maybe Ms. Ortwerth was shown as the custodian of records somewhere  
9 that if he's now in her role, that there would some argument there, so  
10 that's why I'm asking. Is there anything that shows Ocwen at all in any  
11 of the proposed exhibits?

12 MR. NITZ: I'm not aware of it, Your Honor.

13 THE COURT: Okay. So, how can I, over the objections of  
14 Defendant, then have Mr. Whittaker appear for the first time at trial under  
15 a titling of custodian of records, if he's never; a) been designated,  
16 Ocwen's never been designated. Ms. Ortwerth, who was previously at  
17 Ocwen, whose role he now takes has never been designated, and no one  
18 can even identify any documents that are in the proposed exhibits that  
19 supposedly he is the custodian of records over? And the only  
20 designation on custodian of records is U.S. Bank National Association as  
21 trustee for the Merrill Lynch Mortgage Investors Trust Mortgage Loan  
22 Asset Backed Certificate Series 2005-A8.

23 MR. NITZ: Your Honor, if I could direct the Court's attention  
24 to proposed Exhibit 34.

25 THE COURT: Sure. I'll take a look at proposed Exhibit 34.

1 Thank you. Okay. Looking at proposed Exhibit 34, Westcor Land Title  
2 Insurance Company trustee sale guaranty. Is that the document,  
3 counsel?

4 MR. NITZ: No, Your Honor. I misread. It's 42. Sorry.

5 THE COURT: Oh, sorry. I was reading 35, not 34 anyway.  
6 I'm sorry. 34 is a corporate assignment deed of trust. Is that the one you  
7 were asking about? You said 42 or 34?

8 MR. NITZ: That's the one I'm directing your attention to, the  
9 corporate assignment of deed of trust.

10 THE COURT: 34?

11 MR. NITZ: It's 42, Your Honor.

12 THE COURT: Okay. I'm sorry. The one I'm seeing that says  
13 34, says corporate assignment deed of trust, and it has 6/1/2018. Is that  
14 the document you want, or you want a different document that you want  
15 the Court to look at?

16 MR. NITZ: It's 42, USB 1263 and --

17 THE COURT: Okay.

18 MR. NITZ: -- 64.

19 THE COURT: Let me get to that one. Sure. Let me get to  
20 that one. One moment, please. Can I have 42, please. Thank you so  
21 much. 42 -- okay, proposed 42. Sure.

22 MR. NITZ: As you can see in the upper left-hand corner, the  
23 recording of this corporate assignment of deed of trust was Ocwen Loan  
24 Services, LLC, and it says when recorded, return to Ocwen Loan  
25 Servicing, LLC.

1 THE COURT: And that is -- you wanted the Court to look at  
2 that for what purpose, Counsel?

3 MR. NITZ: That at least for that corporate assignment,  
4 Ocwen is the custodian of records for it.

5 THE COURT: I'm sorry. I don't see that -- I just see it says  
6 recording request is assigner -- the mortgage to an assignee of U.S. Bank  
7 as trustee. I'm sorry. Does it say that they are custodian of records  
8 somewhere in this document? Could you point it out to me, please,  
9 Counsel?

10 MR. NITZ: I'm not aware of that. The same thing appears --  
11 you were asking me about 34 under my mis-designation, and 34, as well,  
12 shows that Ocwen Loan Servicing requested the recording, and it was  
13 returned to Ocwen Loan Servicing.

14 THE COURT: Okay. And you asked the Court to look at these  
15 documents. I didn't see in either of these -- in that one it says the  
16 assignor is Eagle Home Mortgage, FKA Universal, executed by Henry Ivy  
17 and Freddie Ivy.

18 So, I just see these as saying recording requested by an  
19 Ocwen Loan Servicing, LLC, in Idaho Falls, Idaho. So, I'm not sure,  
20 Counsel, what that has to do with what you're trying -- can you explain  
21 how that shows that they are custodian of records for U.S. Bank as he  
22 should be testifying in this case?

23 MR. NITZ: Your Honor, I only looked as far as the assignor of  
24 Greenpoint. However, the assignee under this corporate assignment of  
25 deed of trust is U.S. Bank National Association as Trustee, et cetera.

1 THE COURT: Correct.

2 MR. NITZ: And we're producing Mr. Whittaker as the  
3 custodian of records of U.S. Bank National Association as Trustee. I  
4 would also point to the last two lines of the assignee paragraph, where it  
5 says, care of Ocwen Loan Servicing, LLC, 1661 Worthington Road, Suite  
6 100, West Palm Beach, Florida.

7 THE COURT: Counsel, I must say that the Court's not clear  
8 on what the July 2nd, 2018, corporate assignment of deed of trust that's  
9 been -- that you pointed to. Yes, it says what it says. If you're asking the  
10 Court to take judicial notice that this document says what it says, it's a  
11 publicly filed document. It says what it says, but I'm not seeing how  
12 you're saying that that makes Mr. Whittaker a custodian of records for  
13 U.S. Bank. And if I'm missing something, please let me know because  
14 I'm not really sure what you're asking the Court to do at this juncture,  
15 please.

16 MR. NITZ: Upon recording, it was requested that this  
17 document be returned to Ocwen Loan Servicing. I would submit to the  
18 Court and Mr. Whittaker to testify that under the assignee paragraph,  
19 Ocwen maintains this document for U.S. Bank.

20 So, as far as this document, Ocwen is the custodian of  
21 records of this document. It doesn't say custodian of records, but it's  
22 just one step, two step. The dots are right there. Return it to Ocwen, and  
23 for the benefit of the assignee, which is U.S. Bank, care of Ocwen.

24 THE COURT: Counsel for Defense, I'm not sure what the --  
25 do you have an -- are you asking for this document -- are you asking for

1 proposed 42 to be admitted, or for Court to take judicial notice, or what  
2 are you asking with regards to proposed 42? Because I was going to let  
3 Defendant respond, and then I'm not sure if you're asking the Court to  
4 make a ruling on something or -- because there's no witness on the  
5 stand. Are you all stipulating there's -- what's proposed 42? For what  
6 purpose, please, Counsel?

7 MR. NITZ: If you want to short circuit it that way, Your  
8 Honor, we would offer the corporate assignment deed of trust, recorded  
9 July 2nd, 2018, as a public record, and request the Court take judicial  
10 notice of it, this public record.

11 MS. HANKS: It's self-authenticating, so I have no problem  
12 with that. I don't know that there's any reason to call someone to  
13 authenticate it. It's recorded. I can stipulate to it like that. And we  
14 already stipulated to the fact that it was done, too, in our joint pretrial  
15 memo.

16 THE COURT: It's 42?

17 MS. HANKS: I mean, it's just -- it is what it is, right? I mean,  
18 it's a recorded document. Beyond that, I don't -- it's authentic. It's  
19 recorded.

20 THE COURT: I --

21 MR. NITZ: We would make the same offer for the  
22 corporate --

23 THE COURT: Wait just a sec. So, are you stipulating to its  
24 admission on 42?

25 MS. HANKS: Sure. We --

1 THE COURT: Okay.

2 MS. HANKS: -- stipulated to the fact in our pretrial memo.

3 Yeah.

4 THE COURT: That's what I thought.

5 MS. HANKS: I have no problem.

6 THE COURT: Okay. So, 42 is admitted by stipulation of the  
7 parties.

8 (Plaintiff's Exhibit 42 received)

9 MR. NITZ: And 34, as well, Your Honor, for the same reason.

10 MS. HANKS: What is 34?

11 MR. NITZ: 34 is a corporate assignment recorded August 1,  
12 2018.

13 MS. HANKS: I have no objection to that being admitted  
14 either. That was another stipulated fact.

15 THE COURT: Okay. Exhibit 34 stipulated by parties. Okay.

16 (Plaintiff's Exhibit 34 received)

17 MR. NITZ: Likewise, Your Honor, for proposed Exhibit  
18 Number 5, the deed of trust.

19 MS. HANKS: I have no objection to number 5, the deed of  
20 trust. Is that -- let's make sure that's the right one, because it was re-  
21 recorded, wasn't it? Or am I confusing this with another case?

22 MR. NITZ: I believe that's correct, and that's Exhibit 7.

23 MS. HANKS: Let's do 7.

24 THE COURT: Exhibit -- let me take a look. Exhibit 5 has a  
25 recording stamp. Francis Dean, Clark County Recorder, 5/23/2005. Is

1 that the one you're asking, Counsel? Now, I'm not looking at every page.  
2 I just looked at the front page.

3 MS. HANKS: No. Yeah, that's the one I see, but that makes  
4 no sense -- what I'm saying is it makes no sense to admit that one  
5 because it was re-recorded, so I think we should go with Exhibit 7, or you  
6 could do both. That's all I'm suggesting.

7 MR. NITZ: We're offering both, 5 and 7.

8 MS. HANKS: That's fine.

9 THE COURT: Okay. 5 and 7, by stipulation, are admitted.

10 (Plaintiff's Exhibits 5 and 7 received)

11 MR. NITZ: Your Honor, I would direct the Court, again, to  
12 Exhibit 43.

13 THE COURT: I haven't seen 43 before. Okay. 43 says it's an  
14 acknowledge of the inspection of the original collateral file.

15 MS. HANKS: Yeah, that --

16 THE COURT: What purpose are you asking the Court to look  
17 at that?

18 MS. HANKS: That, I would object to, Your Honor. We have  
19 an objection to that.

20 THE COURT: Well, I'm not sure what the parties are asking  
21 the Court to do at this juncture. I asked whether you wished to call your  
22 next witness. I have an objection to the witness. The Court granted the  
23 striking of Mr. Whittaker as an individual witness, then you asked him for  
24 custodian of records. The Court had asked if there was any basis to  
25 show that he was custodian of records. You asked the Court to look at a

1 couple of documents, you stipulated to those documents. So are you  
2 still -- is it --

3 MR. NITZ: There's one more document.

4 THE COURT: Sure.

5 MR. NITZ: And in Exhibit 43 -- I'll give the Court the Bates  
6 pages in a moment, USB 1271 to 1275.

7 MS. HANKS: I don't know what you're asking. You're asking  
8 for it to be admitted?

9 MR. NITZ: Yes.

10 MS. HANKS: Oh, I object, Your Honor. Also, just in case  
11 you're wondering, we timely objected in every manner that I could  
12 object, but even from the deposition testimony of Ms. Ortwerth. I don't  
13 know what we're doing anymore in terms of if we're just trying to get  
14 exhibits admitted or if he's still trying to get Mr. Whittaker to testify, but  
15 we already know that from Ms. Ortwerth's sworn testimony that Wells  
16 Fargo would be the custodian of record for these documents. So, I do  
17 have an objection, and I'm not going to admit that.

18 THE COURT: Okay.

19 MS. HANKS: Or I'm not going to concede to those.

20 THE COURT: At this juncture, from a testimonial standpoint,  
21 the Court has not been provided any basis with the custodian of records  
22 designation for Mr. Whittaker, either directly or indirectly. A couple of  
23 documents that the Court was referred to, to the extent they said Ocwen  
24 on them, they were stipulated, admitted, but it didn't show that Mr.  
25 Whittaker would be a custodian of records. And to the extent that they



1 were stipulated and admitted, they were judicially -- well, they're  
2 stipulated. That means I don't even have to go to judicial notice.

3 So, if you're asking Mr. Whittaker to be a custodian of  
4 records, the Court hasn't seen that there's any basis for him to be a  
5 custodian of records, that he was designated custodian of records for  
6 U.S. Bank on behalf of the trust, et cetera.

7 So, last call, anything that you think that shows that he is the  
8 custodian of records, and he has been properly designated in this case --  
9 timely designated, that would fall within the rules, so he could testify as  
10 custodian of records?

11 MR. NITZ: We had one more document that he would offer,  
12 and that appears in Exhibit 43, 1271 to 1275.

13 THE COURT: I heard there was an objection. In the absence  
14 of a witness and the absence of having no basis for him to be a  
15 custodian, I can't, in either, say that somehow a document comes in.  
16 Ones were stipulated to, so those were taken care of. Anything else that  
17 he would be a custodian of record of a document from 2005, when you  
18 say that Ocwen became the servicer in 2013, and in addition to all of the  
19 other issues that were raised, so --

20 MR. NITZ: If he testified, he would testify that Ocwen  
21 obtained the original documents during service transfers. One from the  
22 prior servicer of BANA, and also, I believe Ms. Ortwerth testified and Mr.  
23 Whittaker testified that the documents basically track with the  
24 assignments from the original loan originator to Greenpoint by way of  
25 the allonge on this note. But in any case, as I indicated before, we have

1 the original collateral file here in court. It's the same original collateral  
2 file that was presented, and inspected, and acknowledged by SFR's  
3 counsel in Exhibit 43.

4 So, he is the custodian of that. It was delivered to us by  
5 them to hold for litigation purposes and for hearings or trial, what have  
6 you, but in any case, Ocwen is the custodian, and it's here in court we  
7 hold it. And that includes the pages 1271 to 1272.

8 THE COURT: And the Court has not been provided any good  
9 cause why Ocwen was not listed as custodian of record in the  
10 designation, the amended pretrial designation, joint pretrial  
11 memorandum, original designations, or anything. I've worked through  
12 any aspect to see if there was any inadvertent mistake that it was listed  
13 once and not relisted, and the fact that counsel chose not to list them,  
14 then counsel is stuck with not listing them.

15 If they felt that they were custodian of records and that they  
16 wish to have them come in and testify as custodian of records, that's  
17 why the Court was asking if they were anywhere listed as a custodian of  
18 record. I don't show it on any pleading filed with the Court. I don't show  
19 it on even the acknowledgement and inspection of anything that's been  
20 provided to this Court that they are the custodian of record as presented  
21 as a witness in this case.

22 You haven't shown that they are on the pretrial disclosures,  
23 you haven't shown they're in the joint pretrial memorandum. You  
24 haven't shown that there's been any request to this Court to modify or  
25 that they inadvertently were not named on any of those documents.

1                   So, they can't just come in automatically. You can't just put  
2 in -- even if they appear somewhere in a proposed exhibit, on some page  
3 on a proposed exhibit, as you know, you have to do it properly through  
4 pretrial disclosures. So. even if you got around the idea of not naming  
5 an individual, because you could name a custodian of records, except  
6 apart from a custodian of records concept, you don't show Ocwen  
7 anywhere as being the custodian of records. I have an objection from  
8 Defendant that Ocwen was not, in any way, listed as custodian of  
9 records, so that they had no basis or opportunity to take depositions to  
10 prepare for trial, et cetera.

11                   I have to sustain that objection because Ocwen is not listed  
12 anywhere in your documents that have been filed with the Court for  
13 pretrial disclosures with regards to joint pretrial memorandum. And so,  
14 therefore, you chose not to list them as a witness, so they can't come in  
15 as a witness. The rules are very clear on that.

16                   MR. NITZ: You said that documents or the pretrial  
17 disclosures did not identify Ocwen, but the pretrial disclosures did  
18 identify the original collateral file. It did identify Exhibit 43. And,  
19 specifically on --

20                   THE COURT: And there was objections to that collateral file.  
21 There's a distinction between exhibits being listed, and then there's  
22 objections to exhibits. Right now, the Court -- you asked, as a witness --  
23 you asked for Mr. Whittaker to be able to testify as the custodian of  
24 record. So, not to get sidetracked to exhibits. Focusing on, the Court  
25 asked you to please call your next witness, right? And then after we

1 went through Mr. Whittaker as an individual witness, went through that  
2 whole analysis, then you asked that the custodian of records for U.S.  
3 Bank.

4 So, then the Court asked, okay, custodian of records for U.S.  
5 Bank. So, who's the U.S. custodian of records, and then you said it was  
6 Mr. Whittaker as an Ocwen employee.

7 So, then the Court, because you had the objection by  
8 Defendant that Ocwen was not listed as the custodian of records -- bless  
9 you -- of U.S. Bank, that they objected to having anyone from Ocwen  
10 testify as the custodian of records for U.S. Bank, which is why the Court  
11 then tried to give you broad dearth to say, is there anywhere in your  
12 pretrial disclosures, amended pretrial disclosures, anything that's been  
13 filed on Odyssey where it shows that Ocwen is going to come in and  
14 testify in a custodian of records type capacity. Okay. Or that during the  
15 discovery process, that they were named or designated as being the  
16 custodian of records, which then the Court also asked, just in an  
17 abundance of caution, to see if maybe there was something in the prior  
18 deposition of Katherine Ortwerth that you wanted the Court to look at, to  
19 see if she had stated that Ocwen was the custodian of records.

20 And the only thing that has been pointed out to the Court in  
21 trying to find any source that possibly Mr. Whittaker could testify as the  
22 custodian of records, is I asked you if there was a prior deposition so that  
23 maybe Ms. Ortwerth has the replacement person, the person who  
24 subsequently was at Ocwen, right? It's Ms. Ortwerth, O-R-T-W-E-R-T-H,  
25 by the way, is no longer there, but maybe she said that Ocwen was a

1 custodian of records so that, potentially, you could argue the Defendant  
2 was on notice, but the only thing that I've been told about Ms. Ortwerth's  
3 deposition testimony -- I was pointed to page 34, where it's referenced  
4 that Mr. Ortwerth says that Wells Fargo was the custodian.

5 Now, you assert that that is a misinterpretation. The Court's  
6 not knowing. I wasn't there. I don't know if it is or is not a  
7 misinterpretation. The only thing this Court was looking for is trying to --  
8 before saying a person can't testify in a role, is to see if there's any basis,  
9 any good cause, any excusable neglect, any equity basis whatsoever that  
10 might go in favor of the non-moving party to see if maybe the witness  
11 could testify. I'm not seeing it. That's why the Court is saying that.

12 Separate and apart from exhibits that you may wish to  
13 introduce, at this juncture, the Court has just granted the objection that  
14 Mr. Whittaker --

15 MR. NITZ: Before you rule, Your Honor, I need to direct --  
16 you looked at one page, page 34. I would direct that's -- and I told you it  
17 was taken out of context.

18 THE COURT: So, you didn't direct me to anything else. You  
19 went to other documents, so --

20 MR. NITZ: I would direct the Court to page 25.

21 THE COURT: Okay. You have to realize when you stop, and  
22 you go somewhere else, I presumed that you didn't want me to look  
23 anywhere else in the deposition, otherwise you would've directed me.  
24 So, you would now like me to look at page 25, and I'll look at page 25.  
25 Okay. Let's look at page 25.

1 MR. NITZ: You might need to go back a couple of questions.

2 THE COURT: Okay. Because I see here -- see this so far, I  
3 have not seen it, okay?

4 MR. NITZ: For context, I would begin at page 24, line 13.

5 THE COURT: Okay. Let me see.

6 MR. NITZ: And I would go through page 25.

7 THE COURT: Just a second. Okay.

8 MR. NITZ: Line 17.

9 [Court reviews document]

10 THE COURT: Well, the Court can't look at a whole deposition  
11 and try and make a determination. I need -- I asked you all if there was  
12 something in the deposition that clearly showed Mr. Whittaker or Ocwen  
13 was the custodian. This doesn't say it. This says back and forth that --  
14 this is whether or not Countrywide -- there's lost notes or original notes.  
15 Whether it is or is not there is confusion on Countrywide and lost  
16 affidavits. And then she says, so far as I know, we have the original. I  
17 have not seen it, but our business records seem to indicate it. And then  
18 she said, I didn't review the past, so in 2015, it was housed in a vault. I  
19 mean, if this doesn't --

20 MR. NITZ: Your Honor, it says on page 25, beginning at line  
21 14, after Ocwen began servicing the loan, the original note was in  
22 Ocwen's possession. That's what our business records state; yes.

23 THE COURT: And then it says, unfortunately, the document  
24 we have that disclosed the loan number is redacted. And then it says,  
25 the loan resource Countrywide didn't originate, it's my understanding

1 based on my review that the original was not lost. I mean, it's back and  
2 forth on whether or not things were or were not lost. I mean, different  
3 sections say different things, but that doesn't say anything about being a  
4 custodian of records for U.S. Bank, which is what the Court was asking a  
5 question.

6           Where a loan, the original loan, may or may not be, and back  
7 and forth between whether it was or was not with Countrywide, whether  
8 it was Greenpoint, and also to different things, and B of A. I see there's a  
9 lot of -- and Wachovia is in here, too. So, it looks like you've got  
10 Wachovia, Wells Fargo, Countrywide, B of A, Greenpoint, also to  
11 different things, but nothing in here that anybody has pointed to me says  
12 that Ocwen is a custodian of records for U.S. Bank.

13           In fact, none of these sections even mention U.S. Bank so far,  
14 so the Court has to deny and move on with the -- I tried to give you the  
15 benefit of the doubt of the deposition, as well. Anything in here say  
16 custodian of records? I went to the back -- I went to the word search, by  
17 the way, just in case. Okay? You know where there's a word thing?

18           MR. NITZ: Yes. I'm aware, Your Honor.

19           THE COURT: I don't see, even under that, custodian of  
20 records, so --

21           MR. NITZ: Page 25. Where do your business records  
22 indicate the original is housed? And it says, at least in 2015, it was  
23 housed in our vault, which is our physical building that we store stuff in.  
24 And then it goes on with lines 12 through 17, that we already read.

25           In addition, on USB 1268 in Exhibit 43, it specifically shows

1 the servicer of Ocwen loan servicing to the attention of the vault,  
2 requesting the original note. So, this testimony of Ms. Ortwerth that you  
3 -- that we've looked at, plus USB 1268 fills in those gaps. Ocwen was the  
4 custodian of records of the note. It still is the custodian of records of the  
5 note. In fact, it's here in court, because it was released to me by Ocwen  
6 for the benefit of U.S. Bank.

7 THE COURT: Counsel, I'm not seeing -- those are steps in the  
8 staircase, moves on the chessboard, puzzle pieces adding up to a puzzle,  
9 or whatever cliché you'd like to use. I'm hearing your argument, but a  
10 custodian of records is not -- you're using the terms very, very  
11 differently. A custodian of the note and having possession of an original  
12 note is not necessarily a custodian of records, but get that aside.  
13 Counsel, you did not name Ocwen in your disclosures, which is what the  
14 Court was asking. You didn't name them. You can't now call them.  
15 Okay.

16 If you wanted to name Ocwen for trial purposes, you needed  
17 to put them -- you properly needed to comply with the rules. You didn't  
18 do it. You can't do it for the first time at trial. That's the Court's ruling.  
19 Nothing you've shown me after me trying to give you the benefit of the  
20 doubt for over -- it's been way over an hour, an hour and 20 some odd  
21 minutes. It just hasn't been shown, and the time is not on the last day of  
22 trial, okay, to have that try and be presented. It's supposed to all be  
23 done way before trial. Mr. Whittaker cannot testify as custodian of  
24 records because no one has shown me that Mr. Whittaker, an employee  
25 of Ocwen, had been designated properly as a custodian of records in this



1 case.

2 Next witness, Counsel for Plaintiff.

3 MR. NITZ: A point of procedure, Your Honor. You were  
4 referring -- you were reviewing the original transcript of Katherine  
5 Ortwerth.

6 THE COURT: No, I wasn't. I was -- I copied it. The Defense  
7 counsel just gave me a copy to take a quick look at, a tote script. I don't  
8 have the deposition original.

9 MR. NITZ: It was presented to the Court at calendar call and  
10 told --

11 THE COURT: I'm sorry. Counsel, you said I was reviewing  
12 the original, I wasn't. Defense counsel just gave me a tote script when I  
13 was trying to give you the benefit of the doubt so that if you could point  
14 anything in the deposition to see any basis that Mr. Whittaker could  
15 testify. That's all I'm saying.

16 MR. NITZ: Your Honor, I'd ask that the deposition of  
17 Katherine Ortwerth be published.

18 THE COURT: For what purpose? I mean, is there any  
19 objection from Defendant?

20 MS. HANKS: Well, there is because there's no reason to  
21 publish it. There's no witness, there's been no designation by counsel  
22 that we're going to do it, and I haven't heard any testimony that U.S.  
23 Bank is unavailable.

24 THE COURT: Okay. So, for what purpose are you asking Ms.  
25 Ortwerth's deposition to be published?

1 MR. NITZ: For several reasons, Your Honor. One, you were  
2 referring to a document that hasn't been admitted. So, in order for there  
3 to be a clear record of what the Court considered, I think the deposition  
4 needs to be published.

5 THE COURT: Counsel --

6 MR. NITZ: In addition --

7 THE COURT: -- I was not doing it for testimony. Let me be  
8 clear. I just asked you if you wanted me to look at this deposition tote  
9 script to give you, Plaintiff's counsel, a full benefit of the doubt, if there  
10 was anything from any basis to do so. If you didn't choose -- wanted me  
11 to look at it, I didn't need to look at it. I really should've held you  
12 accountable to purely be disclosures in the joint pretrial memorandum.

13 Since I did not have an objection from Defense counsel to  
14 look in the deposition to see if that would, in any way, from a pure equity  
15 benefit of the doubt, see if there was any excusable neglect standpoint,  
16 but this Court is not looking at it for substantive testimony at all.

17 The Court was just seeing if there was any basis that you  
18 could provide that somehow, Defendant had notice that Mr. Whittaker  
19 would somehow testify in this case. And so, the Court wasn't looking at  
20 the original, it was looking at a tote script. You all read the specific line  
21 provision that you wanted to. The Court doesn't review the whole  
22 deposition. I only look at the specific page and line that each of you had  
23 an opportunity to refer the Court to, so that's all the Court did. If you  
24 didn't want the Court to consider it, I didn't need to consider it, and I'm  
25 sure --

1 MR. NITZ: But now that you have considered it, Your  
2 Honor, I think --

3 THE COURT: I've already considered --

4 MR. NITZ: -- that it needs to be --

5 THE COURT: -- page 34.

6 MR. NITZ: -- part of the record.

7 THE COURT: Okay. If you all wish, page 34 and page 25, it's  
8 not part of the record for purposes of any substantive testimony,  
9 Counsel. It was only for purposes to see if there was any good cause to  
10 the mother to let a witness in or not. That was the very limited purpose,  
11 but since there is no objection from the Defendant, the Court was even  
12 willing to look at it to try and give you the benefit of the doubt.

13 It was not for any substantive testimonial purposes, because  
14 if you wish the deposition for any substantive testimonial purposes,  
15 there is clear rules that you would have needed to designate the  
16 deposition in lieu of live testimony. There are specific rules that you  
17 would need to designate specific lines prior to the calendar call, given  
18 the opportunity for objections, et cetera.

19 Now, the Court -- each party read the specific line and the  
20 specific language that each party wanted the Court consider only to try  
21 and give Plaintiff's counsel the benefit of the doubt, because you didn't  
22 put it in your designations. That's all. That's not in there for any  
23 testimonial standpoint. It's only just to see if you had any argument  
24 whatsoever that Mr. Whittaker could have testified as custodian of  
25 record. It's not for any testimonial standpoint. It's purely procedural.

1 MR. NITZ: And purely procedural, I think it needs to be part  
2 of the record, because you reviewed it in making your evidentiary ruling  
3 to exclude a witness. And I also need to correct the Court's statement  
4 regarding designation. In SFR's --

5 THE COURT: Sure.

6 MR. NITZ; -- pretrial disclosures of July 16, 2018, it states,  
7 witnesses whose testimony is expected to be presented by deposition  
8 testimony at trial as follows --

9 THE COURT: 2018, Counsel?

10 MR. NITZ: Yes, Your Honor. SFR may read into evidence the  
11 following portions of Katherine Ortwerth, the 30(b)(6) witness for U.S.  
12 Bank deposition testimony, and then it lists various pages. Then --

13 THE COURT: Did they make that designation for 2019 when  
14 it was this trial? After you had a new trial order?

15 MS. HANKS: I don't do -- I didn't do any amended pretrial  
16 disclosures, Your Honor.

17 MR. NITZ: She didn't do amended pretrial disclosures --

18 THE COURT: So --

19 MR. NITZ; -- and that would stand.

20 THE COURT: -- it would be in their case-in-chief if they're --

21 MS. HANKS: Right.

22 THE COURT: -- choosing --

23 MS. HANKS: If I decide to do it. If I --

24 THE COURT: If they decide to do it in their case-in-chief, I'll  
25 wait to hear it in their case-in-chief. Court was talking about Plaintiff's

1 case-in-chief, Plaintiff's counsel. I was looking to see if you did it all in  
2 your case-in-chief, right? So, when your case-in-chief --

3 MR. NITZ: I have two more steps, Your Honor.

4 THE COURT: Sure, of course.

5 MR. NITZ: On our objections to SFR's pretrial disclosures  
6 filed July 18th, 2018 --

7 THE COURT: Uh-huh.

8 MR. NITZ: -- U.S. Bank objects to SFR's attempt to present  
9 deposition and/or trial testimony of Katherine Ortwerth. U.S. Bank  
10 intends to call Ms. Ortwerth to testify at trial, obviating the need for the  
11 use of aforesaid deposition transcript for direct testimony.

12 U.S. Bank further reserves the right to require SFR to  
13 produce -- introduce the entire or other parts of the deposition transcript  
14 in accordance with NRCP 32A4. If you then go forward to the most  
15 recent -- U.S. Bank's amended pretrial disclosures of March 15, 2019 --

16 THE COURT: I wouldn't have them. You didn't file them. I  
17 don't have a copy of them. I won't be able to access them.

18 MR. NITZ: You can take judicial notice of it. It was  
19 electronically served on March 15th, 2019.

20 THE COURT: I can't, because they were not filed. I'm not  
21 going to take judicial notice of something I have no access to.

22 MR. NITZ: In any case, there it says, U.S. Bank reserves the  
23 right to use any deposition designated by any other party related to this  
24 matter. U.S. Bank further reserves the right to use any testimony given  
25 in the above-named depositions during the trial of this matter, regardless

1 of the subject matter. So, they designated her deposition transcript in  
2 their only pretrial disclosures.

3 THE COURT: Uh-huh.

4 MR. NITZ: We objected to the parts and said we reserved the  
5 right to require them to introduce the whole thing, and we repeated that  
6 in the most recent amended pretrial disclosure of March 16, served 30  
7 days prior to commencement of trial.

8 THE COURT: Okay. So, I will address that when it's  
9 Defense's case-in-chief, if they choose to do so. Whether it's proper or  
10 not, I'll -- because I'm right now on Plaintiff's case-in-chief, unless you've  
11 rested, so I will address that when we get to Defendant's case-in-chief,  
12 right? Isn't that the proper time to address it?

13 MS. HANKS: Yes.

14 MR. NITZ: No, Your Honor. You asked if we designated the  
15 transcript, and I submit that we did by those two reservations after they  
16 designated it.

17 THE COURT: Which would need to be addressed if  
18 Defendant's -- when we get to Defendant's case-in-chief because that's  
19 when it would be triggered, because only the designation would be  
20 addressed when we get to Defendant's case-in-chief. So, I will address it  
21 when we get to Defendant's case-in-chief.

22 MR. NITZ: In light of that statement, I would request that the  
23 -- that the copy of the transcript that the Court reviewed be marked as a  
24 Court's exhibit so there's clarity in the record.

25 THE COURT: Defense counsel, do you have any objection if

1 the tote script, page 9, which included page 24 and 25, that Plaintiff's  
2 counsel referenced the Court to in tote script, page thirty -- tote script  
3 page -- actually, it doesn't have a page number on the bottom of it. Oh,  
4 page 11, which included the page 34 that Defense referenced the Court  
5 to, Court's Exhibit 2.

6 MS. HANKS: Can you -- I'm sorry, Your Honor. Could you --

7 THE COURT: Yeah.

8 MS. HANKS: -- give me those pages again?

9 THE COURT: Why don't you -- I'll --

10 MS. HANKS: Eleven --

11 THE COURT: I put Post-Its in them.

12 MS. HANKS: Or you have them marked.

13 THE COURT: You both can approach. I put Post-Its on the  
14 two pages in the tote script that you referenced the Court to. The Court  
15 has no problem if you want those to be Court exhibits. That's the two  
16 pages you all referenced. If it's a tote script that's the way I do it.

17 MS. HANKS: Oh, yeah, because there are four pages to a  
18 page.

19 THE COURT: Right. Tote script has four pages to a page,  
20 and that's the way it was presented to the Court, so I referenced the tote  
21 script pages, because it has the four pages. Any objection by Defense  
22 counsel?

23 MS. HANKS: My only objection, Your Honor, is that, you  
24 know, I understand what a Court's exhibit is, but I think you were giving  
25 them the benefit of the doubt, and if I knew it was going to turn into this,

1 I think I probably would've shut it down while in the disclosure, so that  
2 would be my objection, but --

3 THE COURT: Well --

4 MS. HANKS: -- I understand what you're going to rule.  
5 Whatever you rule on.

6 THE COURT: I think you're going to know since no one  
7 raised an objection at the time, and you each directed me to a particular  
8 page, I think it's appropriate that it be done as a Court's exhibit. The only  
9 thing I'm going to ask you is you give me --

10 MS. HANKS: Clean version?

11 THE COURT: -- a clean page of the tote script so that there's  
12 no one's highlighting on it. The Court doesn't want any highlighting on  
13 it. You don't have to give it to me right today.

14 MS. HANKS: But can I take that, so I know what pages?

15 THE COURT: Those two pages. Pages 9 and 11.

16 MS. HANKS: 9 and 11, yeah.

17 THE COURT: Okay.

18 MR. NITZ: Your Honor, I have a clean copy.

19 THE COURT: Sure. I'm just going to do pages 9 and 11  
20 because those are the only two pages in which there was any text that  
21 either party requested the Court to take a look at, so those are the only  
22 two pages that the Court looked at.

23 MR. NITZ: No, that's not true, Your Honor. You also looked  
24 at the word index in the back.

25 THE COURT: The word index. Okay. That's fine. You want



1 me to include the word index, as well?

2 MS. HANKS: Okay.

3 THE COURT: I'll include the word index, as well, then. Yeah,  
4 I just looked under the C's to see if there was anything under custodian  
5 of record. That's the only page I looked on the word index. Sure. So,  
6 the Cs was on page 3, the word index, so I'll include that page, as well.  
7 Okay. Does that meet the party's needs?

8 MS. HANKS: Page 3? Yep.

9 THE COURT: Yeah. Okay, so --

10 MR. NITZ: We should probably have the court reporter  
11 certificate at the end.

12 THE COURT: I didn't look at the court reporter certificate. I  
13 just was doing the plain old tote script. If you all want it -- the Court is  
14 fine with whatever you all want. What do you want?

15 MS. HANKS: I don't think it's necessary for a court exhibit,  
16 Your Honor.

17 THE COURT: Okay. So, what the Court is doing is the Court  
18 is marking for Madam Clerk just to xerox off the following three pages,  
19 because it's not like I looked at it as an official. I just looked at it -- do  
20 you all want the cover page, so you know what it was?

21 MS. HANKS: No. That doesn't bother me.

22 MR. NITZ: Yes, Your Honor.

23 MS. HANKS: It's at the top.

24 THE COURT: Oh, it's at the top.

25 MS. HANKS: Yeah.

1 THE COURT: Oh, it's at the top. I didn't even look at it. I  
2 mean, I just gave what was handed by you, I was told to look at a  
3 particular page, I looked at the particular page, and so really just to give  
4 you the benefit of the doubt. Since it's on the top the Court may not  
5 even -- I didn't even look at the dates or times or anything like that. So, it  
6 was three pages that were referenced, page 9 and 11, and the one page  
7 from the -- and I'll ask Madam Clerk, since you all will be back on  
8 Monday, we'll take care of that.

9 MS. HANKS: Tuesday.

10 THE COURT: Sorry. Tuesday afternoon. I'm sorry. Tuesday  
11 afternoon.

12 MS. HANKS: It's okay.

13 THE COURT: I'm sorry. Tuesday afternoon at 1:00. You're  
14 100 percent correct. Thank you so much.

15 So, counsel, I'm going to need to take a brief five-minute  
16 break, and when I come back, I'm going to find out what's the schedule  
17 with you all. So, we need to go off the record for five minutes, please.

18 [Recess at 4:30 p.m., recommencing at 4:33 p.m.]

19 THE COURT RECORDER: On the record.

20 THE COURT: Okay. On the record. So, counsel, I asked --  
21 presumably -- I mean, it's 4:35. You have another witness for today or  
22 are we just continuing until 1 p.m. on Tuesday? What are we doing?

23 MR. NITZ: I would like to address some exhibits.

24 THE COURT: Madam Clerk is going to be back in a moment.  
25 Well, okay. Well, if it's exhibits, and we don't have a witness on the

1 stand, it's either going to have to be by stipulation, because how can the  
2 Court address exhibits without a witness on the stand.

3 So, would IT make more sense for the parties to see if you  
4 agree to any exhibits, and then let the Court know on Tuesday rather  
5 than sit here in court, because the Court can't rule on exhibits in  
6 absentia. You're either going to stipulate to exhibits or they're going to  
7 have to be introduced through witness testimony, right?

8 MR. HANKS: Right.

9 THE COURT: And then on Tuesday afternoon, I'm going to  
10 let you say who's Plaintiff's next witness, and then we'll go to Defense  
11 witnesses, and then we'll see rebuttal because you reserved your  
12 rebuttal with Mr. Jung, and then we'd go to counter-Claimant's case, and  
13 then counter-Defendant's case, right?

14 MR. NITZ: Yeah. So, you asked a question, and I didn't  
15 answer, Ms. Hanks did, and I disagreed with your premise. I disagree  
16 with your premise.

17 THE COURT: You disagree with my premise on what basis,  
18 Counsel?

19 MR. NITZ: Regarding the exhibits.

20 THE COURT: Okay.

21 MR. NITZ: I've asked to revisit exhibits, and the testimonial  
22 evidence and documentary evidence is already before the Court. I just --

23 THE COURT: Revisit the --

24 MR. NITZ: One item I --

25 THE COURT: -- court rulings? Revisit --

1 MR. NITZ: Pardon?

2 THE COURT: You're asking the Court to revisit the Court's  
3 prior rulings on exhibits; is that correct?

4 MR. NITZ: For one, and then there's another exhibit which  
5 Your Honor hasn't addressed.

6 THE COURT: Was it -- okay. Well, I'll revisit one, but I can't  
7 revisit every single ruling that the Court has done on exhibits, but go  
8 ahead. On one, sure, the Court's fine.

9 MR. NITZ: It would be Exhibit 31.

10 THE COURT: Okay. Exhibit 31. What's the --

11 MR. NITZ: Your Honor, I would ask that you reconsider your  
12 ruling on -- as Your Honor may recall, we offered this exhibit without the  
13 testimonial evidence that's in pages 1 through 4. We just offered the  
14 exhibits attached to it. I believe Your Honor cited -- you asked about a  
15 notice -- was notice given that we intended to use the documents of the  
16 custodian of records for Miles Bauer, and I would direct the Court to NRS  
17 52.260. And I'm sure Your Honor is familiar with it.

18 The affidavit required by subsection 2, which is the custodian  
19 of record or other qualified person must verify in an affidavit that the  
20 record was made, et cetera. And then there's a form, certificate of the  
21 custodian of records with the necessary points. And I submit that the  
22 affidavit of Doug Miles, USB 618 to 621, meets all of the qualifications  
23 under the form certificate of custodian of records, which at least it's  
24 substantially in that form.

25 THE COURT: Wait. Wait.

1 MR. NITZ: Then I direct the Court to subsection 4 of that rule  
2 -- of that statute. A party intending to offer an affidavit pursuant to this  
3 section must serve on other parties a notice of the intent and make  
4 available for inspection the copying of records of regularly conducted  
5 activity at least 10 days before the records are to be introduced at a  
6 hearing or presumably trial.

7 In this case, that affidavit and the backup exhibit documents  
8 were produced, identified, in our second supplemental 16.1 disclosure, in  
9 April 20, 2018. And in each supplemental one after that, they continued  
10 to be identified. The records were identified in our pretrial disclosures.  
11 They were identified in the joint pretrial memorandum, and our pretrial  
12 disclosures were -- the amended ones or supplemental ones were, as we  
13 discussed earlier, served on March 15th, more than 30 days before trial,  
14 which clearly exceeds the 10 days of the statute. The --

15 THE COURT: Okay.

16 MR. NITZ: So, we have --

17 THE COURT: Okay.

18 MR. NITZ: It was clearly disclosed in the last year that we  
19 intended to use that custodian of records' declaration and the exhibits  
20 attached to it in the trial or in all proceedings.

21 THE COURT: Okay. Okay. Counsel, you get a brief  
22 response. I remember your objection from the other day.

23 MS. HANKS: I do. There's also an added issue that if it's  
24 reasonably questioned, you can require his appearance. And if you'll  
25 note in my trial brief, I reasonably questioned this affidavit on other

1 grounds. So --

2 THE COURT: And that's -- and the Court reaffirms its prior  
3 ruling on the following basis. With the objection that was phrased, two  
4 different things. One, if you look at the language specifically of 52, right,  
5 it says in a particular form, the affidavit as raised in the objection the  
6 other day incorporated herein, in the Court's analysis therein is it doesn't  
7 just follow what an affidavit is with regards to a custodian of record. It  
8 goes on to say things such as the law has recognized the legal industry is  
9 the standard software platform of electronic document managed  
10 retention. And I just quoted one of the many examples.

11 It has pure testimonial type things, which are not in an  
12 affidavit for a custodian of records. It's adding all the extra information,  
13 which would be inappropriate for an affidavit of custodian of records,  
14 which is just supposed to be the contents of the records. Near the time  
15 of the act, regular conducted activities that did the thing, you know, and  
16 it actually has the sample form of what it should be as the originals  
17 subscribed and sworn et cetera, an affidavit purposes, but it doesn't.  
18 This affidavit has a whole bunch of extra information in it. It talks about  
19 his viewpoints on different things. It breaks down all the different  
20 subfolders, et cetera. All of those things would not be -- they would be  
21 extraneous to a proper affidavit for a custodian of records. That's one.

22 Two, it was reasonably questioned, and so therefore, the  
23 custodian would need to appear. It wasn't done. That was the Court's  
24 ruling. The Court reaffirms that there's not going to be any further  
25 argument. The Court can't, okay. So ,that one is taken care of. And so,

1 that is the Court's reaffirmation of its prior ruling on Exhibit 31.

2           So, Counsel, that would take care of any exhibits. The Court  
3 already made all of its rulings. The only thing, like I said, that the Court  
4 had to defer on that one little small tidbit, which it has to defer until it  
5 actually reviews everything, because you all started in on things that was  
6 my one little small deferral, which I said at the time, was on two different  
7 things about whether or not I should strike one portion of Mr. Alessi's  
8 testimony on the \$45, because of what he did and did not say yesterday.  
9 And there's been so much testimony, so much argument, so much  
10 statements of what he subsequently looked into after he was on the  
11 stand, that the Court has to hear what he actually said when that  
12 question was first posited to him yesterday. The Court needs to do that  
13 before it can make its ruling on that one minor issue.

14           Otherwise, the Court has made all of the rulings with regards  
15 to anything that was outstanding. And so when we reconvene on  
16 Tuesday afternoon at 1:00, I will ask Plaintiff's counsel to call their next  
17 witness, and if they don't have any witnesses, then I will go to Defense  
18 counsel's case-in-chief, and I will welcome -- wish you, since it is the 4:43  
19 time period where our team needs to, of course, get everything  
20 organized, they need to download, obviously, the DVDs, et cetera for the  
21 day, so that they don't stay past the 5:00 hour and don't need to incur  
22 overtime, which I'm sure you can appreciate and be respectful of that.

23           And so, we're going to wish you all a very nice evening while  
24 you get together your things, and we'll see you Tuesday at 1 p.m. Thank  
25 you so very much.

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Madam Court Reporter --

MR. NITZ: Your Honor, before --

THE COURT: -- you can go off the record.

MR. NITZ: -- you go off the record, I need to --

THE COURT: No, we're off the record.

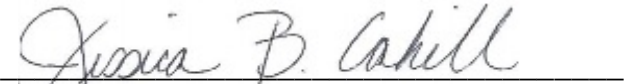
MR. NITZ: -- correct your statement.

THE COURT: No. We're not correcting any -- Counsel, we're off the record. We'll see you on Tuesday at 1:00. Thank you so much.

THE MARSHALL: Court is adjourned.

[Proceedings concluded at 4:43 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.



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Jessica B. Cahill, Transcriber, CER/CET-708