

1 IN THE SEVENTEENTH JUDICIAL CIRCUIT COURT IN AND
2 FOR BROWARD COUNTY, FLORIDA
3 CASE NO. CACE-10-21953-18

4 U.S. BANK NATIONAL ASSOCIATION,
5 as Trustee for the Registered
6 Holders of MLCFC Commercial
7 Mortgage Trust 2006-1,
8 Commercial Mortgage Pass-Through
9 Certificates, Series 2006-1,

10 Plaintiff,

11 vs

12 TIDEWATER ESTATES CO-OP, INC.,
13 a Florida not-for-profit
14 corporation and ALL OTHER
15 KNOWN PARTIES, including all
16 claimants, persons or parties,
17 natural or corporate or whose
18 legal status is unknown, claiming
19 under and of the above-named or
20 described Defendants,

21 Defendant.

22 _____/

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24 TRANSCRIPT OF THE PROCEEDINGS BEFORE
25 THE HONORABLE MICHELE TOWBIN SINGER

Fort Lauderdale, Florida
Monday, March 7, 2011
11:15 a.m. - 12:14 p.m.
1:30 p.m. - 4:37 p.m.

Fort Lauderdale, Florida
Monday, March 7, 2011
11:15 a.m. - 12:14 p.m.
1:30 p.m. - 4:37 p.m.

1 APPEARANCES:

2 ROETZEL & ANDRESS
 3 350 East Las Olas Boulevard, Suite 1150
 4 Fort Lauderdale, Florida 33301
 Counsel for the Plaintiff
 BY: LORI L. HEYER-BEDNAR, ESQUIRE

5 KORTE & WORTMAN, P.A.
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 West Palm Beach, Florida 33411
 Counsel for the Defendant
 7 BY: BRIAN KORTE, ESQUIRE
 SCOTT WORTMAN, ESQUIRE

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I N D E X

12 WITNESS PAGE

13 ROBERT WIEST

14 Direct Examination by Ms. Heyer-Bednar 79

15 STEVEN REYNOLDS

16 Direct Examination by Ms. Heyer-Bednar 103

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EXHIBITS MARKED IN EVIDENCE

19 Plaintiff's Exhibit No. 1 94

20 (2010 rent roll)

21 Plaintiff's Exhibit No. 2 145

(Pooling & Servicing Agreement)

22 Plaintiff's Exhibit No. 3 155

(Promissory note)

23 Plaintiff's Exhibit No. 4 156

(Mortgage)

24 Plaintiff's Exhibit No. 5 165

(Notice of event of default)

25

1 BE IT REMEMBERED that the foregoing
 2 proceedings were had before the HONORABLE MICHELE
 3 TOWBIN SINGER, in Chambers, in the Broward County
 4 Courthouse, Fort Lauderdale, Florida, on Monday,
 5 March 7, 2011, starting at 11:15 a.m., with appearances
 6 as hereinabove noted, to wit:

7 * * *

8 THE BAILIFF: All rise. Circuit court of the
 9 17th Judicial Circuit of the State of Florida in
 10 and for Broward County is now in session. The
 11 Honorable Michelle Towbin Singer presiding. Please
 12 be seated.

13 THE COURT: Good morning, everyone. Deputy
 14 Barnes told you that I had a calendar call set at
 15 10:00 this morning, and my Judicial Assistant told
 16 me that she called the attorneys and let them know
 17 that we would be starting today at 11, not at ten,
 18 because of the conflict. I know you were all here
 19 at ten. So I apologize for the delay, but it
 20 couldn't be helped. I had to do the calendar call
 21 at ten. So here we are. Will the parties announce
 22 their appearances for the record.

23 MS. HEYER-BEDNAR: Lori Heyer on behalf of
 24 the Plaintiff, U.S. Bank as trustee.

25 MR. WORTMAN: Scott Wortman for the

1 Defendant, Tidewater Estates Co-op.

2 MR. KORTE: Brian Korte on behalf of the
 3 Defendant, Tidewater Estates Co-op.

4 THE COURT: All right. You want to proceed.

5 MS. HEYER-BEDNAR: Yes, Your Honor. Do you
 6 want to take brief openings or how do you want to
 7 handle this?

8 MR. WORTMAN: Your Honor, if I may interject.
 9 It's my understanding that there are two parts to
 10 today's hearing. We were supposed to start with
 11 discovery-related issues that we had addressed at
 12 the last hearing before Your Honor on January 20th,
 13 2011. Because the outcome of those discovery
 14 issues have a direct impact on the ability to
 15 proceed as it relates to the receivership hearing.

16 THE COURT: Okay.

17 MR. WORTMAN: There are still very serious
 18 outstanding discovery in terms of production of
 19 documents and failure to respond to
 20 interrogatories, issues relating to depositions
 21 that were recently taken which Your Honor had
 22 indicated, at the previous hearing, we're going to
 23 address first, because Your Honor did make certain
 24 rulings and findings. We have the transcript.

25 But Your Honor had asked for some

1 clarification on these points, and I believe it's
 2 going to take some time to go through each of the
 3 discovery items one by one as it relates to the
 4 unanswered request for production of documents,
 5 unanswered interrogatories and untimely answers to
 6 interrogatories.

7 So before we start jumping into this very
 8 drastic remedy, namely the appointment of a
 9 receiver, we're entitled to a full and fair
 10 opportunity to defend ourselves and prepare for
 11 today's receivership hearing, and part and parcel
 12 to that is receiving discovery. And that's what I
 13 believe was the first part of today's hearing.

14 THE COURT: Counsel.

15 MS. HEYER-BEDNAR: Briefly, Your Honor. At
 16 the last hearing Your Honor heard two things.
 17 Briefly a Motion to Compel and a Motion to Strike.
 18 The Motion to Strike filed by the defense as to
 19 untimely discovery was denied. We haven't received
 20 that order yet, but that was Your Honor's ruling
 21 and I have the transcript.

22 Second off, the Motion to Compel, we got
 23 through one of the issues on the request for
 24 production, which was the Pooling and Servicing
 25 Agreement. And Your Honor said, why don't you

1 parties try to work everything out, try to get as
 2 much discovery done as possible.

3 To that end, Your Honor, we had produced two
 4 binders worth of documents to the defense. We do
 5 not have any other documents responsive. They have
 6 everything. It's been produced. Including the
 7 appraisal that was just done the end of last year.

8 So every document we have received, whether
 9 it was directly responsive to this or whether it
 10 was going to be used in today's hearing, has been
 11 produced in toto.

12 THE COURT: Okay.

13 MR. WORTMAN: Your Honor, their responses to
 14 date are unresponsive to our request for production
 15 of documents. There are a litany of documents that
 16 we've still not received. And that's the first
 17 time we're hearing that she does not have these
 18 documents or her client does not have these
 19 documents. Like Your Honor indicated at the
 20 previous hearing, if you do not have the documents,
 21 you're supposed to say so. We've yet to receive
 22 responses stating that they are not in possession
 23 of these particular documents.

24 Aside from that, Judge, we've not received
 25 one answer to one interrogatory. We've been

<p style="text-align: right;">Page 7</p> <p>1 laden with objections.</p> <p>2 THE COURT: Go ahead. Did you not respond</p> <p>3 that you did not have documents that were requested</p> <p>4 if that was the case?</p> <p>5 MS. HEYER-BEDNAR: Your Honor, all of the</p> <p>6 documents basically relate to transfer and</p> <p>7 assignment and the litany of successor trustees.</p> <p>8 All of the documents are basically responsive to</p> <p>9 all of the requests in one way or another. They</p> <p>10 asked for an assignment. Well, there's not</p> <p>11 necessarily just an assignment, then there's a</p> <p>12 Mortgage Loan Purchase Agreement, then there's a</p> <p>13 Pooling and Servicing Agreement.</p> <p>14 THE COURT: Right.</p> <p>15 MS. HEYER-BEDNAR: All those documents are</p> <p>16 basically responsive, although not specifically in</p> <p>17 response to an assignment. But all of those</p> <p>18 documents were produced. And, in fact, there is no</p> <p>19 prejudice to the defense, Your Honor, going forward</p> <p>20 with today's hearing, because we've taken</p> <p>21 discovery.</p> <p>22 The defense has actually had two depositions</p> <p>23 in this -- three, I'm sorry, depositions. Two of</p> <p>24 the Plaintiff, one of the person with the most</p> <p>25 knowledge with respect to the Pooling and Servicing</p>	<p style="text-align: right;">Page 9</p> <p>1 depositions. This is just a red herring to</p> <p>2 continue the hearing, Your Honor.</p> <p>3 MR. WORTMAN: Your Honor, if I may remind the</p> <p>4 Court, and my colleague. Rule 1.350 requires that</p> <p>5 they delineate which documents are responsive to</p> <p>6 which request. Providing a banker box of documents</p> <p>7 is not consistent with Rules of Civil Procedure, A.</p> <p>8 B, the answers to interrogatories were</p> <p>9 laden with objections. C, just because we had an</p> <p>10 opportunity to take two depositions does not mean</p> <p>11 that they responded to our documentary request for</p> <p>12 production.</p> <p>13 THE COURT: As I understand it, correct me if</p> <p>14 I'm wrong, the whole issue from the defense</p> <p>15 perspective is whether the Plaintiff has standing</p> <p>16 to bring this suit. And I read your memorandum</p> <p>17 talking about how the Pooling and Servicing</p> <p>18 Agreement had a certain deadline and then the</p> <p>19 assignment occurred after the deadline. So you</p> <p>20 seem to have the issue pretty delineated.</p> <p>21 MR. WORTMAN: Well, standing is one part of</p> <p>22 our position, Judge. There are multiple other</p> <p>23 prongs that they must prove in order to be entitled</p> <p>24 to this drastic remedy of receivership.</p> <p>25 THE COURT: No, I understand that. Right now</p>
<p style="text-align: right;">Page 8</p> <p>1 Agreement, that was done. They had as much time as</p> <p>2 they wanted. The second deposition was a corporate</p> <p>3 representative of the Plaintiff with the most</p> <p>4 knowledge regarding the Verified Complaint and</p> <p>5 these proceedings. That also was taken. No</p> <p>6 interruption, no time limit. That was concluded.</p> <p>7 In addition, third deposition was David</p> <p>8 Rogers. He was the individual from Merrill Lynch,</p> <p>9 which is the originator of this loan in this case,</p> <p>10 and he was deposed for seven hours. There's no</p> <p>11 prejudice to the defense to proceed in this case.</p> <p>12 Everything has been produced.</p> <p>13 And with respect to the interrogatories, we</p> <p>14 did answer the interrogatories. And we also</p> <p>15 related to documents produced.</p> <p>16 THE COURT: When did you answer the</p> <p>17 interrogatories?</p> <p>18 MS. HEYER-BEDNAR: The interrogatories were</p> <p>19 previously answered, and they say subject to, and</p> <p>20 notwithstanding the objections, because they were</p> <p>21 inartfully crafted. We reference to the transfer</p> <p>22 of the loan through the successor trustees from the</p> <p>23 originator to the depositor, from the depositor</p> <p>24 into the trust. And all those documents that we</p> <p>25 produced shed light on that, and so do the three</p>	<p style="text-align: right;">Page 10</p> <p>1 I'm still on the discovery issue. So that seems to</p> <p>2 be a relatively narrow issue.</p> <p>3 MR. WORTMAN: The standing issue is a big</p> <p>4 one, Judge.</p> <p>5 THE COURT: It may be important and</p> <p>6 significant, but it doesn't seem to be a broad</p> <p>7 issue that would encompass a lot of other issues.</p> <p>8 I mean, you've defined it well.</p> <p>9 MR. WORTMAN: Yes, Judge. But that does not</p> <p>10 obviate their obligation to provide answers to</p> <p>11 interrogatories.</p> <p>12 THE COURT: Right. Well, let me ask you</p> <p>13 this. How are you prejudiced? Let's say that</p> <p>14 you're right, that they should have been more</p> <p>15 specific and said this document pertains to this,</p> <p>16 et cetera.</p> <p>17 MR. WORTMAN: I'll give you an example,</p> <p>18 Judge. One of the documents they're refusing to</p> <p>19 produce, that they claim they have in their</p> <p>20 possession but they're placing it in some type of</p> <p>21 privilege log because they claim it to be, quote,</p> <p>22 unquote, confidential, is an amendment to the</p> <p>23 Pooling and Servicing Agreement. I believe it's</p> <p>24 the first amendment to the Pooling and Servicing</p> <p>25 Agreement.</p>

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<p>1 The Pooling and Servicing Agreement, again, 2 Your Honor, is that very long, large, thousand page 3 document that controls and governs how this trust 4 operates and how loans are to be deposited into the 5 trust for purposes of this trustee doing things 6 like seeking receivership and seeking foreclosure 7 of the property. 8 THE COURT: Right. 9 MR. WORTMAN: So this Pooling and Servicing 10 Agreement is at the heart of this case. Apparently 11 there's an amendment to this document; they're 12 refusing to produce that. Just claiming it's 13 confidential. 14 THE COURT: Right. Let me ask you this. The 15 defense, from what I can gather, is disputing or 16 challenging U.S. Bank's standing to go forward on 17 this, but is there any dispute about the mortgage 18 and the note, that, the validity of it, let's say, 19 originally to Merrill Lynch? 20 MR. WORTMAN: Well, as far as the original 21 execution of the note and mortgage, no. But that, 22 that begs the issue. The question is whether or 23 not U.S. Bank as trustee, which is -- 24 THE COURT: Well, we'll get to that. I'm 25 trying to figure out the issues in my mind.</p>	<p>1 THE COURT: What other parties, other than 2 Merrill Lynch, could possibly be entitled to this 3 mortgage? I mean, \$9 million was borrowed. I 4 could understand your client's position that your 5 client doesn't want to pay off to U.S. Bank and 6 then have some other party come in saying, wait a 7 minute, you were supposed to pay to us, or, U.S. 8 Bank didn't have that right. 9 MR. WORTMAN: Your Honor, it's not our 10 obligation to untangle the mortgage securitization 11 mess which has been created here. We have ample 12 evidence that this particular party, U.S. Bank as 13 trustee, of this very long mortgage securitization 14 trust, which I can't recall the labels to it and 15 the names as part of that, but that particular 16 entity does not have the right to stand before Your 17 Honor today and seek this drastic remedy of 18 receivership. 19 THE COURT: I understand that's what you're 20 saying. What I'm trying to get at is, certainly 21 your client owes the money to somebody. 22 MR. WORTMAN: Absolutely, Judge. 23 THE COURT: All right. 24 MR. WORTMAN: And if Merrill Lynch Mortgage 25 Lending, Inc. was standing over there, we'd have a</p>
<p>1 Now, so there was a mortgage and note. Your 2 client borrowed over \$9 million; is that correct? 3 MR. WORTMAN: \$9 million was the loan amount, 4 Judge. 5 THE COURT: Okay. And there were certain 6 requirements in the mortgage and note that your 7 client was supposed to follow; is that correct? 8 MR. WORTMAN: The obligation, right, rested 9 with Merrill Lynch Mortgage Lending, Inc., the 10 originator. 11 THE COURT: All right. Okay. But is there 12 any question about whether your client actually 13 defaulted on that mortgage and note? 14 MR. WORTMAN: As it relates to that note to 15 Merrill Lynch Mortgage Lending. 16 THE COURT: Right, to Merrill Lynch. 17 MR. WORTMAN: No. 18 THE COURT: Okay. And Merrill Lynch, then, 19 if it existed, it would have had the right, you're 20 saying or admitting, would have had the right to 21 follow through with the contract provisions, et 22 cetera? 23 MR. WORTMAN: Absolutely, Judge. 24 THE COURT: All right. 25 MR. WORTMAN: Your Honor, we're prepared --</p>	<p>1 really big problem in terms of today's hearing. 2 But they're not. 3 THE COURT: All right. 4 MR. WORTMAN: In addition -- Well, let me 5 back up for a second, Judge. Because like I said 6 before, standing is a big argument, and it's at the 7 focal point of this case in large part. 8 THE COURT: Yes. 9 MR. WORTMAN: But also a humongous issue for 10 purposes of today's hearing is whether or not 11 they're entitled to receivership vis-a-vis waste of 12 the property. 13 THE COURT: Right. And we're not even, I'm 14 not even addressing that. I'll reassure you again, 15 I'm not readdressing that point, at this time. All 16 I want to address right now is the discovery issue 17 and the prejudice to you. 18 Your concern in the example you bring up is 19 that the amendment to the Pooling and Servicing 20 Agreement could affect the standing argument? 21 MR. WORTMAN: It could involve -- I don't 22 know what it says, Judge, but it could involve the 23 further transfer of the loan to U.S. Bank to some 24 other party. I mean, I just don't know. And it's 25 clearly a relevant document. The request relates</p>
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Page 15	Page 17
<p>1 to the possibility of the admissibility of this 2 document which is relevant to our defense. That's 3 just one example, Judge. There are dozens of 4 examples, there are dozens of interrogatory 5 questions that were just simply not responded to, 6 not consistent with the Rules of Civil Procedure. 7 THE COURT: While all that may be true, and 8 I'm not saying that it is because I haven't 9 reviewed it at this time. The point also is what 10 prejudice there is to you. So we can, I can go 11 through a few of these and see how fruitful it is, 12 but the amendment to the Pooling and Servicing 13 Agreement, what's your position on that? 14 MS. HEYER-BEDNAR: First off, Your Honor, 15 that was never called up. We did timely serve a 16 privilege log with respect to that. With respect 17 to the prejudice argument, it's interesting you 18 point that out, because during Steve Reynolds' 19 deposition not once was that question addressed as 20 to the amendment to the Pooling and Servicing 21 Agreement, where it is, who signed it, what's its 22 importance, what's the purpose of it? Zero. 23 Everyone has always operated under the fact 24 that the Pooling and Servicing Agreement outlines 25 the duties and responsibilities of various parties.</p>	<p>1 adequately respond to your interrogatories, and I 2 haven't made that finding because, again, I don't 3 have the interrogatories and answers in front of 4 me, but assuming that to be the case, I next have 5 to look at what prejudice there is to you. 6 So, again, this issue, while factually it may 7 be complicated, legally it doesn't seem to be that 8 complicated. I understand your legal argument, 9 that you're arguing that U.S. Bank doesn't have the 10 standing to go forward. 11 MR. WORTMAN: Judge, there are a lot of 12 moving parts to this standing argument. We have an 13 expert to testify on the mortgage securitization 14 issues which will help flesh it out for the Court. 15 We have issues as relates to the note and how it 16 was endorsed, and we have issues as it relates to 17 the assignment of mortgage. There are at least 18 eight or nine reasons why U.S. Bank does not belong 19 in this courtroom today and asking for this relief 20 as it relates to standing. 21 We're prepared to proceed, Judge. But we'd 22 just like to note our objection for the record that 23 these discovery responses were not provided. I 24 thought Your Honor had indicated at the previous 25 hearing that -- You had actually ruled, and I have</p>
Page 16	Page 18
<p>1 That's undisputed. And that's exactly what they've 2 been focusing on all along. 3 THE COURT: So you're telling the Court that 4 an amendment to the Pooling and Servicing Agreement 5 could in no way have any relevance as to assignment 6 of rights? 7 MS. HEYER-BEDNAR: That's correct. 8 MR. WORTMAN: How do I know that, Judge, 9 without seeing the document? 10 THE COURT: Okay. Well, what about an in 11 camera hearing where I look at it? 12 MS. HEYER-BEDNAR: Fine. Or you can ask the 13 witness, Steve Reynolds, what's its importance. 14 THE COURT: Well, I'm sure defense counsel 15 would prefer the actual document. 16 MR. WORTMAN: And, Judge, as it relates to 17 prejudice. I have a case that states: "Hearings to 18 determine receivers and attorneys fees should 19 command sufficient gravity to require that all 20 parties be afforded a full opportunity to prepare 21 and be heard." 22 THE COURT: Well, I don't think she's 23 disagreeing with that. Full opportunity to be 24 prepared and heard has to do with the prejudice 25 prong. So even if you're right, that they did not</p>	<p>1 the transcript, that they're supposed to produce 2 certain items, which they didn't. 3 One example of that, Judge, is the fully 4 executed Pooling and Servicing Agreement. They 5 again directed us to the SEC website which enabled 6 us to print out the Pooling and Servicing 7 Agreement. It's unexecuted, it does not contain 8 the addendums and exhibits and amendment like the 9 ones we're talking about. 10 Like counsel was stating, I had taken a 11 deposition of a certain person, David Rogers. He 12 was a representative of Merrill Lynch who was in 13 charge of the securitization of this loan. 14 Mr. Rogers specifically testified, during the seven 15 hours, that this Pooling and Servicing Agreement is 16 easily obtainable, as far as the executed copy. 17 Why that hasn't been produced is beyond me. 18 Frankly, I think no effort has been made. 19 And to the extent they don't have or can't 20 get it, all they have to do, Judge, is state 21 "none." They've said nothing to that effect. 22 They've just produced a banker box worth of 23 materials that's not responsive. 24 THE COURT: Well, I will see -- Because I 25 have a transcript of the hearing as well that</p>

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<p>1 occurred January 20th in my chambers. On page 21 I 2 said: "You're either going to provide or you're 3 going to respond that you don't have to some of 4 these documents." And then the parties were 5 supposed to try to work together, because I did not 6 have the time at that hearing to go through each 7 and every interrogatory and address each and every 8 issue.</p>	<p>1 forward -- 2 MR. WORTMAN: Well -- 3 THE COURT: -- to the receivership motion? 4 MR. WORTMAN: Judge, I just want to make sure 5 we have a full and fair opportunity to go item by 6 item in terms of the unanswered documents. If Your 7 Honor would like to schedule that for a different 8 day, due to time constraints, you know, of course 9 accommodate the Court. But, you know, we do 10 reiterate our position that it could be problematic 11 in terms of presenting a full and fair defense 12 today.</p>
<p>9 MR. WORTMAN: That's what we thought the 10 first half of today's hearing would be about.</p>	<p>9 THE COURT: Well, do you want me to go 10 forward on the receivership motion or not at this 11 time? And I will address the discovery issues. 12 I'll either address it now or at a later time.</p>
<p>11 THE COURT: Yes. I'm addressing it right 12 now; am I not?</p>	<p>13 MR. WORTMAN: I think, Your Honor, we have to 14 preserve our objection, and the answer would be, 15 no, as it relates to their failure to produce 16 documents in response to our discovery request.</p>
<p>13 MR. WORTMAN: Thank you. Sorry.</p>	<p>17 THE COURT: No, what? 18 MR. WORTMAN: No, we don't want to move 19 forward in the face of not having received these 20 documents.</p>
<p>14 THE COURT: Again, and I keep asking you for 15 the prejudice. I'm even skipping over the issue of 16 whether they complied or not. I'm giving you the 17 benefit of the doubt that they didn't comply. I 18 want to jump to the punch line. What's the 19 prejudice?</p>	<p>21 THE COURT: All right. Then what is the 22 prejudice? 23 MR. WORTMAN: Again, Judge, it relates to the 24 standing argument. If there are documents out 25 there that further impact whether or not this particular Plaintiff has the right to be in this courtroom and does not own, control, possess this note is a break in the chain of title, although we see it already, we see that there could be additional documents to further support that position, and if they're refusing to produce documents which will help support, make that argument, then we're prejudiced. THE COURT: Okay. Well, while they may not have in their answers to the interrogatories or in their answers to request for production of documents specified, as I ordered them to, but if they didn't say we don't have those particular documents, they will have that opportunity right now. Go ahead. MS. HEYER-BEDNAR: Your Honor, as an officer of the Court, as I stated in my beginning opening statement, we have produced everything in our files responsive to the request for production, and then some. In fact, with respect to the Pooling and Servicing Agreement, not only did we print out the</p>
<p>20 So the amendment to the Pooling and Servicing 21 Agreement, I agree with you if that in any way 22 could impact the legal issues that you've raised in 23 this case, then I might overrule their privilege 24 objection and order them to give it to you. And if 25 you'd like, I'll have an in camera hearing, they</p>	<p>Page 22</p>
Page 20	Page 22
<p>1 have agreed, the Plaintiff's have agreed to that, 2 and I'll look at it, and if it has anything 3 whatsoever to do with assignment of rights, then I 4 would, I would disclose that.</p>	<p>1 prejudice? 2 MR. WORTMAN: Again, Judge, it relates to the 3 standing argument. If there are documents out 4 there that further impact whether or not this 5 particular Plaintiff has the right to be in this 6 courtroom and does not own, control, possess this 7 note is a break in the chain of title, although we 8 see it already, we see that there could be 9 additional documents to further support that 10 position, and if they're refusing to produce 11 documents which will help support, make that 12 argument, then we're prejudiced.</p>
<p>5 MR. WORTMAN: Well, if I may make a 6 suggestion.</p>	<p>13 THE COURT: Okay. Well, while they may not 14 have in their answers to the interrogatories or in 15 their answers to request for production of 16 documents specified, as I ordered them to, but if 17 they didn't say we don't have those particular 18 documents, they will have that opportunity right 19 now. Go ahead. MS. HEYER-BEDNAR: Your Honor, as an officer of the Court, as I stated in my beginning opening statement, we have produced everything in our files responsive to the request for production, and then some. In fact, with respect to the Pooling and Servicing Agreement, not only did we print out the</p>
<p>7 THE COURT: Yes.</p>	<p>21 MS. HEYER-BEDNAR: Your Honor, as an officer 22 of the Court, as I stated in my beginning opening 23 statement, we have produced everything in our files 24 responsive to the request for production, and then 25 some. In fact, with respect to the Pooling and Servicing Agreement, not only did we print out the</p>
<p>8 MR. WORTMAN: I suggest we proceed, Judge. 9 If there's an issue that arises as it relates to 10 our inability to contest a particular position 11 taken during the hearing, we'll raise our objection 12 once again based upon their failure to comply with 13 our discovery request.</p>	<p>Page 22</p>
<p>14 THE COURT: Okay.</p>	<p>Page 22</p>
<p>15 MR. WORTMAN: Because we do want to proceed 16 because we think we're going to prevail in any 17 event. However, these discovery issues again still 18 lay out there, they still lay unresponded to. It's 19 an effort of stonewalling in our opinion, Judge, 20 and we think it, it cannot be countenance by the 21 Court. And we need court orders compelling them to 22 respond appropriately.</p>	<p>Page 22</p>
<p>23 THE COURT: All right. But just so I'm 24 clear, you do not want the Court to spend anymore 25 time on the discovery issues, you want to move</p>	<p>Page 22</p>

Page 23	Page 25
<p>1 copy that you, Judge, asked us to do so from the 2 SEC website and produce it, we did. And we also 3 produced our file copy of the execution version. 4 That's all we have.</p> <p>5 If they think there's something else out 6 there, I guess they could have got it from Merrill 7 Lynch, maybe from David Rogers. But everything we 8 have, and it's this entire document here, was 9 produced. And it was an execution copy from our 10 file.</p> <p>11 THE COURT: All right.</p> <p>12 MR. WORTMAN: If they said that in the 13 responses, Judge, maybe we wouldn't be going on 14 like this.</p> <p>15 THE COURT: All right. Well, now she's 16 saying it. And I agree with you, Counsel, she 17 should have said that in her responses. I mean, we 18 really didn't get much accomplished on 19 January 20th, but the one thing that I did say was, 20 if you don't have the documents, specify that, and 21 that wasn't done and it should have been done.</p> <p>22 But in any event, she's saying it now. What 23 would you like the Court to do now?</p> <p>24 MR. WORTMAN: With that as an admission, 25 Judge. How about the answers to interrogatories?</p>	<p>1 THE COURT: Hold on one second. Let me stop 2 you for one moment. Do you agree that they did 3 answer every question and then they had objections, 4 but they answered it except for two, two of the 5 interrogatories?</p> <p>6 MR. WORTMAN: They answered with objections.</p> <p>7 THE COURT: That's fine. They answered it, 8 though.</p> <p>9 MR. WORTMAN: But it's --</p> <p>10 THE COURT: So they're entitled to answer and 11 then have objections. They objected but they 12 answered anyway is essentially what she's telling 13 me she did.</p> <p>14 MR. WORTMAN: Yes, Judge. One of the aspects 15 of the January 20th hearing was the appropriateness 16 of these objections, and counsel had indicated, 17 well, you're going to take some depositions, go get 18 your answers to interrogatories through deposition 19 testimony, which again is, that's not appropriate.</p> <p>20 THE COURT: But the bottom line is she -- to 21 me she answered. Plaintiff answered those 22 interrogatories. Now they objected, but then they 23 answered. So I don't see any prejudice.</p> <p>24 Plaintiff, the fact that you objected, did 25 you still fully answer those interrogatories?</p>
<p>1 THE COURT: All right.</p> <p>2 MR. WORTMAN: I mean, they're still filled 3 with objections. We believe all of them are, go to 4 the heart, again, of our position as it relates to 5 standing, and they should be responded to.</p> <p>6 MS. HEYER-BEDNAR: Your Honor, with respect 7 to those interrogatories. You've got to keep in 8 mind, these were served way back in July of last 9 year, before any discovery was taken whatsoever. A 10 lot of these answers have not only been reaffirmed, 11 clarified and more testimony added on to it with 12 the additional discovery and the depositions. And 13 I believe there's only like two questions where 14 there was an objection without an answer subject to 15 the objections.</p> <p>16 THE COURT: All right.</p> <p>17 MS. HEYER-BEDNAR: And I think the only 18 question was with respect to what is the 19 consideration, excuse me, what was the 20 consideration that U.S. Bank paid for the loan. 21 Now we objected because we don't think that's 22 relevant at all with respect to the transfer, and 23 it was for consideration. I don't think that's an 24 issue, that it was valuable consideration. So I 25 think that that question is not proper.</p>	<p>1 MS. HEYER-BEDNAR: Yes. Your Honor, because 2 the questions were vague, some of them had 3 pertinent objections, but we still wanted to give 4 them the information regarding the transfer and the 5 assignment, and so we did so.</p> <p>6 THE COURT: All right. I can understand if 7 they objected and they didn't give you an answer. 8 But they gave you an answer, and they objected as 9 well. But they're saying it didn't affect their 10 answer. If you thought that the answer was 11 incomplete in some way, then --</p> <p>12 MR. WORTMAN: Well, of course the answer is 13 incomplete. They're not providing any substantive 14 response. They're just objecting, Judge.</p> <p>15 THE COURT: She's saying they're not just 16 objecting. She gave answers except for two of the 17 interrogatories. Can you point to one? Let's look 18 at one. Do I have the interrogatories?</p> <p>19 MR. WORTMAN: Your Honor, interrogatory 20 number five.</p> <p>21 THE COURT: Does anyone have a copy for the 22 Court, because we don't have the court file?</p> <p>23 MR. WORTMAN: Yes, Your Honor. May I 24 approach?</p> <p>25 THE COURT: Yes. All right. Interrogatory</p>

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<p>1 number five, for the record it says: "Please state 2 the date, amount and nature of and fully describe 3 the consideration or value given in exchange for 4 each and every assignment of the loan, and identify 5 from and to what person or entity such 6 consideration or value was given providing the 7 contact name, full legal name, address and phone 8 number of each such person or entity." 9 Now Plaintiff's counsel, when she said that 10 they answered every single one except for a couple. 11 This was one of them that she mentioned. All 12 right. I'll address this. U.S. Bank objected to 13 it on the grounds that: "It is overbroad and 14 unduly burdensome, seeks disclosure of information 15 that is irrelevant or not reasonably calculated to 16 lead to the discovery of admissible evidence and 17 asks U.S. Bank to disclose information that is 18 protected by the attorney/client privilege and 19 applicable work product doctrine." 20 What is your response to the attorney/client 21 privilege and applicable -- Well, attorney/client 22 privilege? 23 MR. WORTMAN: Judge, I don't know how the 24 amount of consideration, a number, a dollar amount 25 could be considered attorney/client privilege. I</p>	<p>1 U.S. Bank now as trustee. And so it's very -- I 2 mean, we can keep reciting that here. But I'm not 3 sure, when they're talking about assignment, what 4 they mean, and I'm not sure what they're talking 5 about with respect to consideration. If they're 6 asking how much Merrill Lynch Investors paid for 7 the loan, we then -- 8 THE COURT: Is that a secret, is it 9 confidential? 10 MS. HEYER-BEDNAR: Yeah, I mean, they 11 generally don't -- Well, I don't even necessarily 12 know if, at this lineage, now that we're talking 13 about the servicer here on behalf of Merrill Lynch 14 Investors, what they paid for it, but it is 15 generally treated as confidential. Certainly it's 16 irrelevant. The loan was transferred with 17 consideration. That's not a dispute here. 18 THE COURT: Well, their -- 19 MS. HEYER-BEDNAR: In fact, David Rogers was 20 asked the question of the transfer and how the loan 21 got transferred. All that has been spelled out in 22 his lengthy seven-hour deposition. I'm not really 23 sure why now us answering this interrogatory is 24 going to provide any clarity whatsoever. 25 THE COURT: Well, they're challenging the</p>
<p>1 mean, it just doesn't seem applicable. 2 MS. HEYER-BEDNAR: No, they're also talking 3 about the nature of, Your Honor. So that was a 4 protection. Because it's so broad in scope. 5 But as I mentioned previously, when they're 6 talking about the date and the amount of 7 consideration, first off I'm not sure by whom 8 they're talking about. But as I mentioned 9 previously, the consideration paid by Merrill Lynch 10 Investors as the depositor -- 11 THE COURT: Right. 12 MS. HEYER-BEDNAR: -- is completely 13 irrelevant for purposes of them acquiring the loan 14 to put it into a trust. The further transfer 15 thereafter, there wasn't one. They talk about 16 assignment. 17 THE COURT: Well, why not say that, then? I 18 mean, for the record, this is going to be your 19 revised answer to interrogatory number five. So 20 you've narrowed it down. 21 MS. HEYER-BEDNAR: Well, that's fine, Your 22 Honor. Because we do reference a lot to our 23 Verified Complaint in this case which gives a 24 detailed synopsis of exactly how this loan 25 transferred from the original lender all the way to</p>	<p>1 assignment, the alleged assignment for the 2 Defendant's benefit of the mortgage and note from 3 Merrill Lynch to U.S. Bank. So that's why they 4 want -- I see that it has relevance. I don't know 5 that the amount of the actual price paid. 6 MS. HEYER-BEDNAR: Correct. 7 THE COURT: I don't know about that. 8 MS. HEYER-BEDNAR: Can I answer and say, yes, 9 consideration was paid? Absolutely, Your Honor. 10 THE COURT: Well, I'll go ahead and hear from 11 defense. Why do you need to know the exact number? 12 MR. WORTMAN: Because it goes to the issue of 13 whether or not, again, Merrill Lynch Mortgage 14 Investors, which is the depositor in this case, 15 purchased this loan for full and fair 16 consideration, became a holder in due course. The 17 amount of consideration, just because they say it's 18 confidential, doesn't fall under any privilege. 19 Attorney/client privilege doesn't apply. 20 THE COURT: Fine. She's dropping that 21 argument. It sounds like. She dropped that 22 argument. 23 MR. WORTMAN: As far as the relevancy, Judge. 24 Again, I rely upon the fact we're entitled to this 25 information. It's one piece of many of our</p>
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1 standing argument, vis-a-vis in this particular
 2 instance, whether or not one of the many parties in
 3 between got this loan as a holder in due course.
 4 MS. HEYER-BEDNAR: Briefly, Your Honor.
 5 THE COURT: Yes.
 6 MS. HEYER-BEDNAR: Holder in due course has
 7 nothing to do with this case. We are clearly just
 8 a holder. So all we've got to do, have possession,
 9 and I'm here today with the original. Holder in
 10 due course and that status is completely irrelevant
 11 to the discussion today.
 12 THE COURT: So your client has the actual
 13 note and mortgage?
 14 MS. HEYER-BEDNAR: Correct.
 15 MR. WORTMAN: Your Honor, again, the amount
 16 of consideration could potentially impact the
 17 validity of the assignment of the mortgage.
 18 THE COURT: How? Explain how.
 19 MR. WORTMAN: Well, it has to be -- In our
 20 opinion, in order to be a holder in due course,
 21 they have to pay full and fair consideration for
 22 the loan. So I don't see how it's, it prejudices
 23 them at all, aside from just labelling it
 24 confidential. There's certainly some --
 25 THE COURT: I'll tell you what.

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1 MR. WORTMAN: -- basis of relevancy here.
 2 THE COURT: I don't know that the answer to
 3 this question is going to prejudice you from going
 4 forward in this hearing today. So I --
 5 MR. WORTMAN: I would agree with that, Judge.
 6 We'd just like them to answer the questions.
 7 THE COURT: All right. So we'll put that on
 8 hold. What was another interrogatory in fact that
 9 concerns you for this hearing today?
 10 MR. WORTMAN: We have number six, Judge.
 11 This goes to a list of the parties that took
 12 assignment of the note and mortgage.
 13 THE COURT: All right.
 14 MR. WORTMAN: Again, that goes to the heart
 15 of the standing argument. Their response is that,
 16 this information is easily ascertainable or
 17 available to Tidewater, and it's of public record.
 18 I mean, just because a document is a public
 19 record, which may or may not be the case, doesn't
 20 mean they're not obligated to produce it. They
 21 just can't say, go to the courthouse and go find
 22 it.
 23 THE COURT: What's your response?
 24 MS. HEYER-BEDNAR: Our response is, Your
 25 Honor, we adopt all of our allegations from the

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1 Verified Complaint. Doesn't get a whole lot better
 2 than that. It absolutely outlines by date, by
 3 instrument attached to the Verified Complaint
 4 exactly the transfer and how the loan was assigned
 5 and how we get to where we are for today.
 6 THE COURT: So at the bottom of your answer
 7 you write U.S. Bank refers Tidewater to the
 8 allegations, you're actually adopting that as your
 9 answer?
 10 MS. HEYER-BEDNAR: Correct. Subject to.
 11 That's correct, Your Honor.
 12 THE COURT: Okay. So there you have your
 13 answer. It's in their Complaint.
 14 MR. WORTMAN: They can't be more specific
 15 than send us to a 27 page Complaint, Judge?
 16 THE COURT: Can you tell them specifically
 17 where.
 18 MR. WORTMAN: Again, Judge, this won't
 19 prejudice our ability to proceed. It's just full
 20 and fair opportunity to receive discovery here in
 21 the right manner.
 22 THE COURT: I understand. She's going to
 23 tell you the actual paragraphs.
 24 MS. HEYER-BEDNAR: From the time the note was
 25 executed, Your Honor, you start at paragraph four

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1 of the Verified Complaint through 14. Whole ten
 2 paragraphs of allegations.
 3 THE COURT: Okay. So now you have your
 4 answer to interrogatory number six.
 5 MR. WORTMAN: There are a few subparts here,
 6 Judge, as it relates to the address of the party,
 7 contact information. Can the answer be
 8 supplemented with that information?
 9 THE COURT: Okay. I would imagine that kind
 10 of detail is not going to prejudice you for the
 11 hearing today, correct?
 12 MR. WORTMAN: Yes.
 13 THE COURT: Okay.
 14 MS. HEYER-BEDNAR: In fact, the addresses are
 15 in the Pooling and Servicing Agreement, Your Honor.
 16 THE COURT: Well, they don't want to rely on
 17 that. They want you to answer that. So please
 18 provide, I'm going to order that you provide that
 19 information, addresses and other contact
 20 information. And I'll give you ten days to do
 21 that.
 22 MR. WORTMAN: Interrogatory number seven,
 23 Judge, close to the same issue, but we're changing
 24 it a bit by asking for the timeframe, when these
 25 loans and mortgages were actually assigned and

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1 endorsed. We need actual dates. Because there's a
 2 serious allegation here as it relates to the
 3 endorsement of the note, the attempted transfer
 4 from the Merrill Lynch one, that I'll call it, over
 5 to LaSalle Bank where Mr. Rogers testified that he
 6 signed the document on one day and it was postdated
 7 by his in-house counsel for a different day.
 8 So there's real confusion as to when all of
 9 these assignments and endorsements occurred, and
 10 there's an admission by the Merrill Lynch
 11 representative that documents were postdated. So
 12 this interrogatory goes to the heart of that issue
 13 in terms of timing. When were these assignments
 14 actually executed.
 15 THE COURT: Well, that's not what your number
 16 seven says. If you wanted to know when it was
 17 executed, I think that's different than --
 18 MR. WORTMAN: We're taking -- Maybe I
 19 misspoke a bit. But taking assignment of the loan.
 20 We're looking for specifics as to the date when
 21 this particular Plaintiff took assignment of the
 22 loan, assignment of the mortgage, as well as
 23 possession of the note. That's a full -- That's a
 24 fair question.
 25 THE COURT: What's your response?

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1 MS. HEYER-BEDNAR: Your Honor, once again, we
 2 refer to the Verified Complaint which has the
 3 assignment attached, it has the execution date of
 4 the assignments attached, it has the effective
 5 dates of the assignments.
 6 THE COURT: So when you are asking when did
 7 these assignments take place, are you asking for
 8 the date of the execution, are you asking for the
 9 date they took effect? Which one?
 10 MR. WORTMAN: Well, usually they should be
 11 the same. But, you know, if they have --
 12 THE COURT: Not necessarily. Not
 13 necessarily.
 14 MR. WORTMAN: If they have to break it down.
 15 The date they took control, possession of the loan.
 16 When the loan became theirs, when title to that
 17 loan was now U.S. Bank's.
 18 THE COURT: What's your response?
 19 MS. HEYER-BEDNAR: Your Honor, I don't think
 20 this question is very artfully drafted. I mean, I
 21 think that the documents specify an execution date,
 22 they have a notary block on them, they have an
 23 effective date on them, and the note has an allonge
 24 attached to it, and we have all successor trustees,
 25 all those documents been produced too. We know

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1 exactly when the trustees were appointed, we have
 2 the effective dates and signature dates, execution
 3 dates.
 4 I don't really know what more he can glean
 5 that aren't on the face of the document. I rely on
 6 the 1.310 that refers you to the documents
 7 themselves. That's the best answer.
 8 MR. WORTMAN: Judge, if the dates of the
 9 documents are the answer, then just answer it that
 10 way, because there's a serious question here.
 11 David Rogers stated that he signs it and it gets
 12 dated sometime thereafter. So we're just looking
 13 for clarity on that.
 14 MS. HEYER-BEDNAR: In fact, we do, Your
 15 Honor, because if we refer to the Verified
 16 Complaint, which has not only verified allegations,
 17 but then has each of the assignments attached.
 18 THE COURT: Okay. So she wants the answer to
 19 be that it's paragraphs 4 through 14, those dates
 20 that are in there. She's separating out the
 21 execution date versus the date effective, date of
 22 effectiveness, or date it takes effect, excuse me.
 23 MR. WORTMAN: I'm sorry, Your Honor. I was
 24 just looking at the Verified Complaint to see if
 25 there are dates in here. Judge, we'll accept the

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1 dates represented in the Verified Complaint on face
 2 value I guess. There's inconsistent evidence to
 3 that effect, but if that's their answer, that's
 4 their answer.
 5 THE COURT: Okay. What else?
 6 MR. WORTMAN: Number nine, Judge, asked if
 7 the loan was ever subject to or included in a
 8 Mortgage Loan Purchase Agreement. Again, they
 9 object. The Mortgage Loan Purchase Agreement has
 10 been produced, Judge. I do want to represent that
 11 to the Court. Again, that still doesn't obviate
 12 their obligation to just answer the question
 13 instead of objecting to it.
 14 THE COURT: Okay. So answer the question.
 15 MS. HEYER-BEDNAR: Your Honor, the loan
 16 agreement is the Mortgage Loan Purchase Agreement
 17 between Merrill Lynch Mortgage and Merrill Lynch
 18 Investors that was produced subsequent to these
 19 answers to interrogatories.
 20 MR. WORTMAN: They did produce it, Judge.
 21 THE COURT: All right. Well, I agree she
 22 should have, or Plaintiff should have answered yes
 23 and then referenced that document.
 24 MS. HEYER-BEDNAR: But, again, we were not a
 25 party to that agreement so... You know, certainly

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1 David Rogers testified amply about it. But with
 2 respect to these interrogatories, we've given him
 3 the agreement, the copy that we have in our file.
 4 We know nothing else about it.
 5 THE COURT: So Plaintiff's answer is that,
 6 yes, the loan was subject to or included in a
 7 Mortgage Loan Purchase Agreement and they've
 8 attached. You now have it.
 9 MR. WORTMAN: Right. That document was
 10 recently produced.
 11 THE COURT: Right.
 12 MR. WORTMAN: At the time that we received
 13 these answers, we did not have that. That's why we
 14 had a problem with this answer.
 15 THE COURT: Right. But now you have no
 16 problem with that answer, correct? As revised?
 17 MR. WORTMAN: Assuming there are no
 18 amendments to it. I mean, we only have the
 19 Mortgage Loan Purchase Agreement. If there are no
 20 amendments to it, it would be nice if they just
 21 said none.
 22 THE COURT: All right. Are there any
 23 amendments to it?
 24 MS. HEYER-BEDNAR: Not to our knowledge, Your
 25 Honor. Remember, we're not a party to the

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1 agreement. Everything we had in our file, which
 2 was only the Mortgage and Loan Purchase Agreement,
 3 the original, we produced.
 4 THE COURT: All right.
 5 MR. WORTMAN: Interrogatory 13, Judge.
 6 "Please state for each of the note and mortgage
 7 whether and as of what date you secured the
 8 originals thereof." In this one we're talking
 9 about the actual physical control, and when it was
 10 transferred from the vault in Chicago to U.S. Bank,
 11 wherever their office may be. So we're looking for
 12 those dates.
 13 THE COURT: Plaintiff's counsel.
 14 MS. HEYER-BEDNAR: Your Honor, in response, I
 15 don't understand what that question's trying to ask
 16 for, because it says "you." And I don't know who
 17 they're referring to, when it's saying secured the
 18 originals. Now, remember, there was an originator
 19 of this loan, there was a depositor of this loan,
 20 then it went to a custodian, and then there's
 21 obviously an appointment of a trustee for the
 22 trust, and then you have the special servicer and
 23 the master servicer. Who's "you"? I don't know
 24 what he's referring to.
 25 THE COURT: All right.

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1 MR. WORTMAN: Very simply the Plaintiff,
 2 Judge.
 3 THE COURT: U.S. Bank.
 4 MS. HEYER-BEDNAR: Okay. Well, U.S. Bank did
 5 not secure the originals because the originals were
 6 with the custodian.
 7 THE COURT: But U.S. Bank has it now, right,
 8 or not?
 9 MS. HEYER-BEDNAR: U.S. Bank requested it
 10 from the custodian for purposes of this proceeding.
 11 THE COURT: When did U.S. Bank physically get
 12 it? That's what they want to know.
 13 MS. HEYER-BEDNAR: U.S. Bank got it at the
 14 time it was deposited into the trust.
 15 THE COURT: When was that?
 16 MS. HEYER-BEDNAR: March 30th, 2006.
 17 MR. WORTMAN: Is that the answer?
 18 THE COURT: That's the answer.
 19 MR. WORTMAN: Okay. Well --
 20 MS. HEYER-BEDNAR: In fact, that's what David
 21 Rogers talked about in his deposition for seven
 22 hours.
 23 MR. WORTMAN: Again, we're not obligated to
 24 accept answers of a nonparty representative for
 25 purposes of gleaning information to put answers in

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1 here.
 2 THE COURT: All right. Well, that question
 3 has been answered. Let's move on.
 4 MR. WORTMAN: Judge, I think that's it for
 5 now.
 6 THE COURT: All right. So are you ready to
 7 go forward on the Motion For Receivership?
 8 MR. WORTMAN: We will again reassert our
 9 objection.
 10 THE COURT: And I will again ask you what
 11 prejudice there is at this point?
 12 MR. WORTMAN: We would like a copy of the
 13 first amendment to the Pooling and Servicing
 14 Agreement. That could be relevant as it relates to
 15 the standing issue.
 16 THE COURT: All right. Anything else?
 17 MR. WORTMAN: Another document, Custodian
 18 Agreement. Custodian Agreement is a document
 19 that's supposed to control how and when the note
 20 moves from this party to that party. We've not
 21 received that. That, again, goes to the standing.
 22 MS. HEYER-BEDNAR: And, Your Honor, with
 23 respect to the Custodian Agreement, we are not the
 24 custodian, we are not a party to that agreement.
 25 We do not have a copy. Again, we've produced

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1 everything we have.
 2 THE COURT: And it's your position that U.S.
 3 Bank is not able to get that?
 4 MS. HEYER-BEDNAR: Well, U.S. Bank wasn't a
 5 party to that. I mean, the custodian is LaSalle
 6 Bank, and I'm assuming they have a copy. We have
 7 not requested a copy from LaSalle. It's my
 8 understanding that discovery was attempted with
 9 respect to LaSalle. But I don't think there's an
 10 issue as to who the custodian was. That's not a
 11 disputed issue in the case.
 12 MR. WORTMAN: Judge, they're the trustee of
 13 this Pooling and Servicing Agreement, this trust
 14 that controls all of these loans. And all the
 15 documents related to the delivery, acceptance,
 16 assignment of each and every one of these loans
 17 should easily be ascertainable to them.
 18 THE COURT: All right. And what would be the
 19 possible prejudice that you don't have it?
 20 MR. WORTMAN: Again, it's the unknown.
 21 THE COURT: Right. Okay. Well, I would
 22 think that U.S. Bank could get that probably from
 23 LaSalle. I mean, I think they should try to get it
 24 from LaSalle Bank to avoid any issue of prejudice.
 25 I would think that Plaintiff would want a clean

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1 hearing without any issues, and that's one way to
 2 eliminate an issue, is if you had the Custodian
 3 Agreement and give it over to the defense. But
 4 if --
 5 MS. HEYER-BEDNAR: Your Honor, I respectfully
 6 disagree as to any prejudice. Because I don't
 7 think there was any dispute in any of the
 8 testimony, nor will there be any today, that
 9 LaSalle was the custodian, and that --
 10 THE COURT: I don't think that's the issue.
 11 MS. HEYER-BEDNAR: And that Midland has
 12 absolutely obtained the original documents from the
 13 custodian for purposes of today. That's all they
 14 do is hold the records. So I don't think there's
 15 any prejudice whatsoever with these proceedings on
 16 that issue.
 17 THE COURT: All right. Well, Plaintiff --
 18 I'm sorry, defense position is they don't know
 19 until they see the agreement. Maybe there's some
 20 argument there, I don't know. But I'm, I'm going
 21 to order that Plaintiff should use better efforts
 22 to get that agreement. And if they can't get it, I
 23 want to know why not. Because I don't see any
 24 reason why LaSalle Bank wouldn't give it to
 25 Plaintiff.

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1 And as to the amendment, do you have a copy
 2 of the amendment now I can look at in camera?
 3 MS. HEYER-BEDNAR: Your Honor, I don't. But
 4 I can provide it at a break.
 5 THE COURT: All right. So I understand
 6 you're objecting, you know, you're preserving any
 7 possible prejudice that you might have from going
 8 forward based on not having the Custodian Agreement
 9 and the amendment to the Pooling and Servicing
 10 Agreement. Anything else? Any other prejudice?
 11 MR. WORTMAN: I don't believe so at this
 12 time, Judge.
 13 THE COURT: All right. Well, then, let's
 14 move forward.
 15 MS. HEYER-BEDNAR: Do you want a brief
 16 opening or proceed right to witnesses?
 17 THE COURT: Sure. And I'll --
 18 MR. WORTMAN: Your Honor, before we do
 19 openings, we do have one procedural issue as it
 20 relates to I believe an independent witness. I
 21 believe Plaintiff is going to be putting on the
 22 stand an appraiser who is going to testify as to
 23 the valuation of the property.
 24 Plaintiff did produce a copy of the appraisal
 25 report a couple days ago, and attached to the

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1 appraisal report were certain financial documents
 2 that apparently this appraiser had relied upon for
 3 purposes of coming up with a valuation.
 4 Certain of these documents, Judge, were
 5 produced by Tidewater in response to a mediation
 6 agreement, a mediation that took place in December.
 7 The judge, Judge Roselle, had ordered us to go to
 8 mediation. We had sat down and many of the members
 9 of Tidewater had showed up, and all we were able to
 10 resolve was that the Plaintiff would take a look at
 11 potentially modifying the loan.
 12 In response they wanted to see a litany of
 13 financial documents of the community. Well, we
 14 agreed, which is in writing, that we would produce
 15 certain financial documents but they are not be
 16 used in litigation and not to be disseminated to
 17 third parties. Lo and behold they're attached to
 18 this appraisal report.
 19 So our request, Judge, is, A, the appraiser
 20 be struck from testifying and that Plaintiff be
 21 sanctioned for violating the terms of the mediation
 22 agreement.
 23 THE COURT: Okay.
 24 MS. HEYER-BEDNAR: Your Honor, in response.
 25 The documents attached to the appraisal are not the

<p style="text-align: right;">Page 47</p> <p>1 financial information that was produced at 2 mediation. In fact, if you look at the 3 information, it's actually old information. It's 4 '08, '09, and a budget. We did not provide any of 5 the 2010 or 2000 -- Yeah, would have been 2010 we 6 went to mediation. We did not provide any of the 7 2010 financial information. 8 The only thing that we were allowed to 9 disseminate and allowed to use in this proceeding 10 from the mediation was the rent roll from 11 December 2010. Yes, that is attached. But, yes, 12 that was allowed to under the mediation agreement 13 to be produced. Did we want additional financial 14 information, current financial information? Yes. 15 Would it have been helpful to the appraiser? Yes. 16 Did we get it? No. 17 MR. WORTMAN: Your Honor, I have copies of 18 profit and loss statements and financial statements 19 which were produced, as part of the agreement 20 during mediation, and made its way into the 21 appraisal report. 22 THE COURT: From what year? 23 MR. WORTMAN: February through June 2009 is 24 the profit and loss statement, financial statement 25 dated January 31st, 2009.</p>	<p style="text-align: right;">Page 49</p> <p>1 MR. WORTMAN: Oh, removing. 2 THE COURT: Renewing? 3 MR. WORTMAN: Removing. 4 THE COURT: Okay. "For purposes of removing 5 the hearing regarding Plaintiff's motion for 6 sequestration of rents." 7 Okay. Number two: "Within ten business days 8 hereof, Defendant shall produce to Plaintiff the 9 following documents." And it goes through a litany 10 of documents. That's not relevant for this issue. 11 Number three. "Within ten business days of receipt 12 of all documents identified in paragraph two, 13 Plaintiff shall review," et cetera. Again, that's 14 not relevant to this issue. 15 Four: "None of the documents identified in 16 paragraph two shall be admissible or used in the 17 current litigation by Plaintiff with the exception 18 of rent roll." So that is relevant. Let's go to 19 that, number two. So these documents that I'm 20 about to read, none of them should have been 21 disclosed. Go ahead and tell me what was that's in 22 one of these documents listed. 23 MR. WORTMAN: I'll provide Your Honor with a 24 copy. It's the profit and loss statement dated 25 February through June 2009.</p>
<p style="text-align: right;">Page 48</p> <p>1 THE COURT: All right. Was this agreement 2 about what would be disclosed and what wasn't in 3 litigation, was that in writing? 4 MR. WORTMAN: Yes, Judge. I have a copy of 5 it. 6 THE COURT: Okay. If I could look at it. 7 MR. WORTMAN: May I approach? 8 THE COURT: Yes. And you have a copy of that 9 as well? 10 MS. HEYER-BEDNAR: I do. 11 THE COURT: Okay. I'll read it into the 12 record. "The parties in the case entitled U.S. 13 Bank National Association as trustee, et al, versus 14 Tidewater Estates Co-op, Inc. agree to the 15 following stipulated terms. One, all litigation 16 activity including, without limitation, all 17 motions, hearings, depositions, discovery is hereby 18 stayed up until January 5th, 2011. Counsel for 19 Plaintiff shall contact the court for purposes 20 of" -- reviving? No. Of something, "the hearing 21 regarding Plaintiff's motion for sequestration of 22 rents from Court's current calendar docket" -- 23 MR. WORTMAN: Regarding. 24 THE COURT: For purposes of -- No, no. The 25 word before that.</p>	<p style="text-align: right;">Page 50</p> <p>1 THE COURT: Where is it delineated in number 2 two? 3 MR. WORTMAN: F. Subsection F. 4 THE COURT: Financial statement or profit and 5 loss statement of Defendant. 6 MS. HEYER-BEDNAR: Yeah, that was the 7 current. That's all the old stuff we already had. 8 The reason we went to mediation, Your Honor, is 9 because we didn't have any financial documents. 10 And we said, we really can't evaluate a settlement 11 in this case unless we have current financial 12 information. So if you look at the litany of the 13 other items that are listed in paragraph two, it 14 talks about quarterly statements, you know, balance 15 sheets, bank statements. 16 THE COURT: Right. 17 MS. HEYER-BEDNAR: But current. '09 and '08 18 are completely irrelevant. 19 THE COURT: All right. 20 MR. WORTMAN: Judge, 2010 financials were not 21 done yet. Mediation took place in December. These 22 are the documents that were produced. 23 THE COURT: Okay. Hold on. 24 MR. WORTMAN: In response. And like she just 25 stated, they needed these financials to evaluate</p>

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1 things from a settlement perspective, and these
 2 were produced, and they shouldn't have given it to
 3 an appraiser or anybody else for purposes of
 4 litigation.
 5 THE COURT: All right. So defense counsel's
 6 saying that the 2009 profit and loss statement was
 7 produced as a result of this agreement that you've
 8 handed to the Court? And Plaintiff's counsel is
 9 saying, no, you already had it before then?
 10 MS. HEYER-BEDNAR: In December of -- I'm
 11 sorry, November of 2010 when we went to mediation,
 12 Your Honor, it was completely and wholly irrelevant
 13 as to what was going on in '09. We needed '10,
 14 2010. We did get, they do quarterly financial
 15 statements. They don't just do annual. We were
 16 asking for current financials. That's what the
 17 purpose of that was for. And we said, you know
 18 what, if you agree to produce it, we will stand
 19 down on that information. Would we have liked to
 20 use that information in this case? Yes. But for
 21 purpose of mediation, we agreed that any current
 22 financial information they could provide to us we
 23 would use for purposes of settlement.
 24 THE COURT: Okay. This written agreement
 25 lists a number of items that both parties agreed

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1 would not be used or identified in the litigation.
 2 And some of these have dates. For example, 2B.
 3 2009 tax return of Defendant. That makes it easy
 4 for anyone, including the Court, to figure out
 5 which tax return. 2009.
 6 And then you go to 2D, accounts payable.
 7 From what time period? It says 2010. So now we
 8 know. But when you get to F, financial statement
 9 or profit and loss statement of the Defendant, it
 10 does not have a date. So based on the plain
 11 language, I would think that includes any and all
 12 financial statements.
 13 MS. HEYER-BEDNAR: Yeah, but, Your Honor, it
 14 wouldn't include something we already had. That's
 15 our point.
 16 THE COURT: Except that defense counsel is
 17 saying he provided that to you in response to this
 18 agreement.
 19 MS. HEYER-BEDNAR: I understand. But that's
 20 not true.
 21 THE COURT: That's not true?
 22 MS. HEYER-BEDNAR: And we have a witness who
 23 can testify that those documents were produced
 24 early on in '09 when they had settlement
 25 discussions back then. They had prior settlement

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1 discussions.
 2 THE COURT: Was that document produced solely
 3 for settlement purposes or as part of the
 4 litigation in response to an interrogatory?
 5 MS. HEYER-BEDNAR: I don't think there was
 6 any confidentiality for those documents when it was
 7 produced early on. The only reason this was done
 8 was for the current stuff.
 9 THE COURT: I understand.
 10 MS. HEYER-BEDNAR: And granted, it may not be
 11 artfully drafted, as you can see it's handwritten.
 12 THE COURT: Right. But all the other items
 13 have dates. This one does not. So we have a
 14 dispute of fact.
 15 MR. WORTMAN: Judge, the litigation commenced
 16 I believe in April 2009. The profit and loss
 17 statement that we're contending was produced by us,
 18 and now improperly used by them, goes from February
 19 to June 2009.
 20 So this is not early 2009 stuff. This is, at
 21 best, middle, after middle 2009 after litigation
 22 already commenced. So this is stuff we produced in
 23 response to the mediation, and in a good faith
 24 effort by us, as the Defendant, to give them
 25 information they wouldn't readily have or possess,

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1 and frankly isn't even relevant. And they, and
 2 they violated the terms of the mediation agreement.
 3 This is, and this is not early 2009. This is
 4 middle 2009.
 5 MS. HEYER-BEDNAR: Your Honor --
 6 THE COURT: Well, it's early to mid. But
 7 whatever.
 8 MS. HEYER-BEDNAR: Your Honor, this lawsuit
 9 wasn't filed until April 2010. Not in '09.
 10 THE COURT: I'm sorry, what?
 11 MS. HEYER-BEDNAR: April 2010 the lawsuit was
 12 filed, not '09.
 13 MR. WORTMAN: I'm sorry, I misspoke, Judge.
 14 But it doesn't matter, Judge, because these are
 15 documents that were produced in response to the
 16 mediation, in discussions, we worked up an
 17 agreement.
 18 THE COURT: All right. This witness that
 19 will say that he or she received this document way
 20 before the mediation, how did he or she receive it?
 21 Was it in the mail, was it -- How?
 22 MS. HEYER-BEDNAR: I'm assuming it was by
 23 mail.
 24 THE COURT: Okay.
 25 MS. HEYER-BEDNAR: It wasn't marked

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1 confidential at the time, and it was sent to
 2 Midland Loan Services for the potential of
 3 attempting to work something out, potentially
 4 before pre suit.
 5 THE COURT: Okay. All right. Well, in the
 6 cover letter did it enumerate, here's the attached,
 7 enclosed documents? Did it enumerate that it
 8 was --
 9 MS. HEYER-BEDNAR: That I don't know, Your
 10 Honor. But it certainly was not delineated
 11 confidential or anything.
 12 THE COURT: That may be. But it would
 13 certainly make my factual determination a lot
 14 easier if your witness had some documentation that
 15 showed that he received that.
 16 MS. HEYER-BEDNAR: Well, he has personal
 17 knowledge as to when he received it, and he did
 18 receive it pre litigation.
 19 THE COURT: Yes. But I'm also asking if
 20 there is any documentation.
 21 MS. HEYER-BEDNAR: I don't know.
 22 THE COURT: It's certainly common practice,
 23 when parties send over documents, to put that in
 24 the cover letter to make sure that the other party
 25 receives everything they intended.

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1 MS. HEYER-BEDNAR: Your Honor, there was a
 2 pre negotiation letter that was signed, it's
 3 actually been produced in this case, that
 4 precipitated the production of those documents in
 5 July of '09.
 6 THE COURT: Okay.
 7 MS. HEYER-BEDNAR: That was signed by both
 8 Midland Loan Services as the special servicer and
 9 Tidewater as the borrower, and that's what kind of
 10 precipitated the discussions between the parties,
 11 and the financial information was produced in
 12 response to that letter. And that's Bate stamp
 13 number U.S. Bank 230.
 14 THE COURT: Well, I've got two different
 15 facts, factual proffers. So I could have a hearing
 16 on that and make a factual finding. I was asking
 17 if either side had any documentation, something in
 18 writing that would make that factual determination
 19 easier than for the Court to listen to witness
 20 testimony and assess the credibility of witnesses.
 21 But if it comes down to that, then that's what I'll
 22 do.
 23 MR. WORTMAN: Your Honor, we could probably
 24 produce a letter of transmittal of this document
 25 but I don't know if we have that readily available

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1 right now.
 2 MS. HEYER-BEDNAR: Your Honor, I have a copy
 3 of the letter along with copies of all the
 4 documents produced by Mr. Wortman to my office,
 5 unfortunately I don't have it here, I have it at my
 6 office. But I did keep a complete copy of what was
 7 produced before it was turned over to Midland.
 8 THE COURT: All right. Well, time goes by
 9 quickly when you're having fun. It's 10 after 12 I
 10 see. We could take a lunch break, this seems like
 11 a good time to take a lunch break, and then the
 12 parties can come up with whatever documents they
 13 can on that issue. As well as I would like
 14 Plaintiff to see if, if they can get that Custodian
 15 Agreement or an amendment or, if not, I don't
 16 expect you to necessarily get it by the time we
 17 resume, but maybe attempt contact with whoever has
 18 the agreements to find out when we're going to get
 19 those. And then we'll continue at 1:30.
 20 Any other issues before we adjourn for lunch?
 21 MR. WORTMAN: No, Judge.
 22 MS. HEYER-BEDNAR: No, Your Honor.
 23 THE COURT: All right. Court will be in
 24 recess until 1:30.
 25 (off the record 12:14 - 1:40).

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1 THE BAILIFF: All rise. Circuit Court is
 2 back in session. Please be seated.
 3 THE COURT: Hello. All right. The parties
 4 are present. We're back on the record. Any
 5 developments with the Custodian Agreement and the
 6 amendment?
 7 MS. HEYER-BEDNAR: Yes, Your Honor. The
 8 Custodian Agreement does not exist. There was no
 9 Custodian Agreement. The custodian is referenced
 10 in the Pooling and Servicing Agreement, and since
 11 the custodian has held the documents from that
 12 inception, there's been no further necessity for an
 13 agreement or anything further for purposes of
 14 transferring the documents.
 15 THE COURT: All right. So you checked with
 16 LaSalle Bank --
 17 MS. HEYER-BEDNAR: Correct.
 18 THE COURT: -- and that's what they told you?
 19 Who told you that? Do you know the name of the
 20 person?
 21 MS. HEYER-BEDNAR: Don't know. I think it
 22 was counsel, in-house counsel.
 23 THE COURT: Okay. And then what about the
 24 amendment?
 25 MS. HEYER-BEDNAR: And we have the first

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1 amendment to the Pooling and Servicing Agreement
 2 for in camera inspection.
 3 THE COURT: Are there other amendments?
 4 MS. HEYER-BEDNAR: No. It's just titled --
 5 I'm just using the full title.
 6 THE COURT: All right. If you can approach,
 7 I'll look at that. Several pages long.
 8 MS. HEYER-BEDNAR: Actually the agreement
 9 itself is not very long, just the attachments.
 10 THE COURT: All right. You were concerned
 11 that this amendment has to do with the ability to
 12 assign rights; is that correct?
 13 MR. WORTMAN: Judge, I don't know what it
 14 says.
 15 THE COURT: Okay. All right.
 16 MR. WORTMAN: Certainly impacts, maybe in a
 17 small way, maybe in a big way, how the Pooling and
 18 Servicing Agreement and trust itself operates. It
 19 may have no impact whatsoever.
 20 THE COURT: Let me ask Plaintiff's counsel.
 21 Why is this confidential?
 22 MS. HEYER-BEDNAR: Your Honor, that is not
 23 actually posted on the SEC website, unlike the
 24 Pooling and Servicing Agreement. It really is a
 25 confidential proprietary business information type

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1 of document, just because they don't want other
 2 entities out there that are doing these similar
 3 type transactions, just to see how they operate.
 4 It's more of an internal proprietary.
 5 THE COURT: All right. What is your position
 6 about --
 7 MS. HEYER-BEDNAR: If it's maintained -- I'm
 8 sorry, Your Honor. If it's maintained confidential
 9 for purposes of this litigation and not
 10 disseminated, then I have no problem disclosing it
 11 to the other side.
 12 THE COURT: That's what I -- All right. So
 13 I'm going with that qualification. Do you agree to
 14 that qualification?
 15 MR. WORTMAN: Yes. We'd like the document
 16 now, though, Judge.
 17 THE COURT: Yes. I will give it to you.
 18 MR. WORTMAN: Thank you.
 19 THE COURT: So you are agreeing not to
 20 disseminate this outside of the litigation, and
 21 it's just for your --
 22 MR. WORTMAN: Right. With the exception of
 23 perhaps getting it to our expert on mortgage
 24 securitization. But for purposes of this
 25 litigation.

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1 THE COURT: What's your position on that?
 2 MS. HEYER-BEDNAR: We're not aware of any
 3 experts. There certainly hasn't been any
 4 disclosure of any experts. So to the extent that
 5 we get to that point, that would be one thing. But
 6 we're completely in the dark of any experts.
 7 THE COURT: If you want to take that step,
 8 then talk to opposing counsel, and if they object
 9 then you'll bring it in front of me. But for right
 10 now you're able to look at that and not disclose
 11 it, it has to remain confidential to this
 12 litigation and amongst the lawyers on your side.
 13 MR. WORTMAN: Okay. Your Honor, as it
 14 relates to the previous request before we broke for
 15 lunch involving the striking of the appraiser as a
 16 result of the allegation that they breached the
 17 terms of the mediation agreement. We're going to
 18 withdraw the request at this point. We're going to
 19 make it the subject of a separate motion. We don't
 20 want to delay the processing of this hearing, and
 21 we'll withdraw it at this time.
 22 MS. HEYER-BEDNAR: Your Honor, just for the
 23 record, we did go to the effort and trouble to
 24 bring a copy of the letter sent from opposing
 25 counsel to myself with all the attachments, showing

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1 that none of the documents attached hereto are
 2 attached to the appraisal or anything else. They
 3 are certainly available for the Court if the Court
 4 so wishes.
 5 THE COURT: All right. Well, since this
 6 issue's --
 7 MR. WORTMAN: It's moot at this point, Judge.
 8 THE COURT: Very well.
 9 MR. WORTMAN: We'll take it up at a later
 10 point.
 11 THE COURT: Okay. Then let's proceed.
 12 MS. HEYER-BEDNAR: As we all probably know by
 13 now, this is a \$9 million loan taken out by an
 14 entity, Tradewind -- Tidewater Co-op. It's not a
 15 residential loan, it's a commercial loan. We also
 16 know that it's a CMBS, which is a commercial
 17 mortgage backed securities transaction.
 18 And to aid the Court with respect to the
 19 players and with respect to that transaction, we
 20 have a chart for purposes of, quick little overview
 21 if you will. If I may approach. It will be
 22 discussed in further detail during the testimony,
 23 but at least this way it gives everybody the
 24 players.
 25 It's undisputed this loan was made by Merrill

<p style="text-align: right;">Page 63</p> <p>1 Lynch Mortgage. That was the originator of the 2 loan. That would be reflected as the buildings up 3 at the top. Those are the loans in question. The 4 loan was actually transferred by a Mortgage Loan 5 Purchase Agreement to the depositor. The depositor 6 was Merrill Lynch Investors. 7 Why was it put into a depositor? Why was it 8 transferred? Why did the note go to the depositor? 9 For investment purposes. That's the whole purposes 10 of a CMBS, so that it can be investment grade. 11 The depositor, Merrill Lynch, didn't service 12 the loan, didn't do anything except one very 13 important thing, set up a trust. Set up a trust to 14 dump this loan, along with multiple other loans, 15 into the trust. And once that depositor did that 16 under the Pooling and Servicing Agreement, he had 17 to then bring in all the other players. 18 Who are all the other players? We have a 19 master servicer. Why is the master servicer 20 important? Master servicer is the one that is 21 responsible for collecting the payments on the 22 loan. It basically is the main servicer. The 23 depositor also appoints a special servicer. In 24 this case, the special servicer is Midland Loan 25 Services.</p>	<p style="text-align: right;">Page 65</p> <p>1 maintained by LaSalle to this day. In fact, only 2 just recently, for purposes of this litigation and 3 this hearing, were those originals actually 4 requested from LaSalle, from their vault, as 5 custodian, so that the special servicer, Midland 6 Loan Servicers, could present them to the Court. 7 And why is it important about these 8 originals? Well, Uniform Commercial Code says we 9 need to look to enforcement of this loan. And 10 that's what we're here for today, enforcement of 11 the loan. So, therefore, we look to the transfer 12 of the note, we look to possession of the note, we 13 look to the allonge of the note. That really is 14 going to be the focus of today's hearing, besides 15 as well as appointment of receiver. 16 But it's undisputed, there's not one person 17 in this courtroom who is going to come up on that 18 stand and testify that this loan is not in default. 19 There's not one person in this courtroom who's 20 going to testify that they're not paying 21 assessments as co-op members or that they're paying 22 rental fees to the co-op. The co-op is collecting 23 on a monthly basis rents and assessments. 24 Why is that important to the Court? Well, we 25 want an appointment of receiver. They're</p>
<p style="text-align: right;">Page 64</p> <p>1 And what is the special servicer's role? 2 Special servicer is actually involved because it is 3 going to handle any default resolution, any 4 litigation pertaining to the loan. Its main role 5 is focussed, i.e. special, on default resolution. 6 From nonperforming loans, when the loan becomes 7 nonperforming. 8 Now when the loans are put into a trust, the 9 trust needs to be able to operate. The trust 10 operates by a trustee. In this case there was 11 actually a couple of different trustees before it 12 actually got to the Plaintiff in this case, U.S. 13 Bank as trustee. And we have all of the successor 14 trustees, appointments of trustees, resignations of 15 trustees, to show that it actually went from 16 LaSalle, Wells Fargo to U.S. Bank as trustee. 17 Is it unusual that there's successor trustees 18 and intervening trustees? No, not at all. Did it 19 change the fact that it's been in the trust since 20 the time the loan was conveyed by the depositor? 21 That's exactly where it's been. 22 In fact, the evidence is going to show that 23 the documents were conveyed right after closing to 24 LaSalle Bank as custodian to maintain the 25 documents. The original documents have been</p>	<p style="text-align: right;">Page 66</p> <p>1 collecting those rents and they're not paying the 2 loan. We don't know what they're doing with those 3 rents. We haven't had any financial disclosure at 4 all in this case from the property manager, we 5 haven't had it from the borrower. 6 Why is it important to know what's going on 7 with these rents, and where they're being 8 deposited? Because we have a security interest, a 9 separate security interest apart from the mortgage 10 and the rents and the deposit accounts, and we also 11 have an assignment of the management agreement. 12 The manager is supposed to stand down to the lender 13 in this case. And that's not what's happening. 14 We filed this lawsuit back in April of 2010. 15 It's been almost a year later. Loan's in default, 16 not receiving any payments whatsoever, not 17 receiving any rents, property manager's collecting 18 all the rents, and we don't know where they're 19 going. And guess what? The property's going down 20 in value. Not a surprise. Not a surprise in South 21 Florida. 22 So the debt is continuing to accrue at 23 default interest, and we're talking about 10 24 million plus at this point. It's accruing on a 25 daily basis. The rents are finite. And the</p>

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1 property value is doing what? Going straight down.
 2 There's not going to be any ability
 3 whatsoever for the loan to be paid unless a
 4 receiver comes in, takes control of the rents,
 5 takes control of the property and starts trying to
 6 pay down on this debt and try to make a go of
 7 making this property earn some money and pay,
 8 obviously pay off the debt.
 9 So, therefore, we think we're going to be
 10 able to show today, loan's in default, property's
 11 going down in value, that there's waste, and that
 12 turning over security, the security, which is the
 13 rents, and so, therefore, we need a receiver.
 14 MR. WORTMAN: Your Honor, let's start out by
 15 saying the appointment of a receivership is an
 16 extraordinary remedy. And it's only appropriate in
 17 extreme situations. Let's not make a mistake here.
 18 What this entire hearing is about is for U.S.
 19 Bank to get their hands on money to pay down a loan
 20 and pay off this arrearage. But this situation
 21 goes well beyond that. We're not here for them to
 22 win the case outright. We're here about
 23 receivership. And the extreme extraordinary remedy
 24 of receivership should only be granted in the
 25 rarest of circumstances, since the appointment of

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1 receiver is essentially a derogation on the legal
 2 owner's fundamental right to possession of
 3 property. That's pursuant to Alafaya Square
 4 Association Limited vs Great Western Bank, 700
 5 So.2d, 38, Florida, Fifth DCA 1997.
 6 So let's start with that as the baseline.
 7 There's several different reasons why this request
 8 for receivership is inappropriate, and doesn't meet
 9 the necessary test. Restatement as it relates to
 10 the appointment of receiver requires that they
 11 prove three prongs. The mortgage is in default by
 12 another mortgage. Like counsel had stated, there's
 13 nobody here that's going to testify the mortgage
 14 isn't in default. Again, our obligation rests with
 15 Merrill Lynch Mortgage Lending, Inc., and if they
 16 were sitting at that table, you know, we'd have a
 17 problem in terms of defending this hearing.
 18 But secondly, the value of the real estate is
 19 inadequate to satisfy the mortgage obligation.
 20 We're going to present testimony through our
 21 appraiser that the property is worth in excess of
 22 the balance of the mortgage. And if there's a
 23 question as it relates to the value of the property
 24 between this battle of the experts, then
 25 receivership cannot be appointed. It must be clear

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1 and convincing evidence -- or, I'm sorry,
 2 preponderance of the evidence in favor of them
 3 stating, proving that the value of the real estate
 4 is inadequate.
 5 Lastly, and most importantly, the mortgagor
 6 must be committing waste. What that means is the
 7 property must be going down in terms of the
 8 maintenance and the upkeep. Quite the opposite is
 9 happening here. As Your Honor can see, we have a
 10 very interested group of residents and occupants
 11 who take great pains to participate in the
 12 management of the property, the maintenance of the
 13 property, the upkeep of the property. This is not
 14 a situation where a property's being abandoned or
 15 it's vacant, there's nobody in charge of what's
 16 going on over there. They're a very experienced
 17 property management company, and the property
 18 manager is doing a fine job of maintaining very
 19 high standards for this community, such that the
 20 insurance is fully paid, the property taxes are
 21 fully paid.
 22 We're going to have testimony presented here
 23 from certain members of the Board of Directors, as
 24 well as other residents, who are going to attest to
 25 the fact that this property is in fine condition.

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1 There is not a scintilla of evidence to prove that
 2 this property is in the position of, quote,
 3 unquote, waste. And without evidence proving that
 4 the property is in, quote, unquote, waste,
 5 receivership is inappropriate.
 6 As Your Honor had already been exposed to
 7 this morning, obviously there's a second prong to
 8 this. They must prove that there's a likelihood
 9 that they're going to succeed on the merits of this
 10 case and that they have standing to prosecute this
 11 entire action, let alone the appointment of a
 12 receivership. There are at least nine reasons why
 13 U.S. Bank does not properly own, control and
 14 possess this loan. I'll highlight a few of them
 15 for you.
 16 This note which they waive around so proudly,
 17 said they've got it, why are we all bothering to
 18 discuss anything further. It's actually not the
 19 note. It's the note plus something called an
 20 allonge. An allonge is a document that is supposed
 21 to be used to transfer a note from one party to the
 22 next. Under Florida law, an allonge must be
 23 affixed to the note. That's one. And, two, an
 24 allonge should only be used when there is
 25 inadequate space on the actual promissory note for

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1 purposes of endorsing a note and transferring it.
 2 We have two problems right out of the gate as it
 3 relates to this allonge and this note.
 4 We have other testimony which we're going to
 5 read into the record from the deposition of
 6 Mr. David Rogers who, again, was a representative
 7 of Merrill Lynch Mortgage Lending as well as
 8 Merrill Lynch Investors as relates to the date of
 9 this allonge. I mean, we have a lot of facts here
 10 that suggest there was some strangeness going on
 11 involving this trust as well as this note.
 12 Particularly, Mr. Rogers testified that he signed
 13 these batches of allonge, you may have heard these
 14 things out there called robo-signers as it relates
 15 to mortgage foreclosure stuff, and I'm not saying
 16 he's, quote, unquote, a robo-signer, but he signed
 17 batches of allonge and they were dated sometime
 18 thereafter. We will read deposition testimony in
 19 the record to that effect.
 20 Furthermore, you have two different versions
 21 of this allonge floating out there. You have one
 22 that is, quote, unquote, endorsed in blank with no
 23 specific party identified as far as the recipient
 24 of the note. And then you have one with a stamp on
 25 it from LaSalle Bank, the original trustee of this

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1 mortgage securitized trust which is based in New
 2 York. And that particular stamp was not placed on
 3 that allonge at the time Mr. Rogers executed the
 4 allonge. Mr. Rogers had no present intent at the
 5 time he was sitting at the table signing the 400
 6 allonges sitting in front of him, no present intent
 7 to specifically transfer this note vis-à-vis the
 8 allonge to LaSalle Bank. Someone, unknown to
 9 everybody else, slapped this sticker on this
 10 allonge to say LaSalle Bank. But that's just the
 11 beginning of the problem.
 12 Ms. Bednar had referenced something involving
 13 a depositor. Very important party here. This
 14 Pooling and Servicing Agreement, which again
 15 controls this commercial mortgage securitized
 16 trust, talks about how the loan has to go from the
 17 original lender. Again, the parties here are very
 18 confusing to follow and track, and I'll start with
 19 Merrill Lynch Mortgage Lending, that's the original
 20 lender. The depositor is Merrill Lynch Investors,
 21 Inc. It's easy to get that confused.
 22 The Mortgage Loan Purchase Agreement is
 23 supposed to control this depositor relationship,
 24 and one does exist and counsel produced it very
 25 recently. But Merrill Lynch Investors, the

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1 depositor, never received this loan. The Mortgage
 2 Loan Purchase Agreement does not do that. That's
 3 like trying to buy real estate and saying, oh, I
 4 bought it because I signed a real estate contract.
 5 No, there's a deed that transfers title to property
 6 from one person to the next. The contract itself
 7 doesn't do that. And so the Mortgage Loan Purchase
 8 Agreement, it's inefficient and does not effectuate
 9 the transfer to the depositor who then is supposed
 10 to deposit it into the trust.
 11 Again, we're talking about standing. This
 12 trust is governed by New York law. It is a New
 13 York trust, and the language of the Pooling and
 14 Servicing Agreement which controls the trust says
 15 so, that New York law requires -- New York law
 16 governs the situation. And if this loan did not
 17 make it into the trust, New York law basically
 18 provides, which is kind of black letter trust law,
 19 that the trustee has no authority to do anything
 20 with respect to a corpus that never made its way
 21 into the trust. And this loan, for the few reasons
 22 that I just recited, and there are several others
 23 which we're going to be going through during our
 24 testimony from our mortgage securitization expert,
 25 and I'm going to highlight a couple now. Because

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1 it did not get in there, U.S. Bank as the, I guess,
 2 the final trustee is what I'll call them, had no
 3 authority to do anything with respect to this loan.
 4 But, again, if the Court is unsure as to
 5 whether or not how these standing arguments all
 6 play out, there's a lot of facts here and a lot of
 7 parties. I've been living with this case for a
 8 long time, so I've finally committed these things
 9 to memory. So I appreciate the complexity the
 10 Court is having to deal with on these issues. But
 11 if there is a situation where it's not clearcut
 12 that they're going to succeed on the merits of this
 13 case because of these standing arguments, again,
 14 they're not entitled to receivership. That's
 15 another one of the prongs, they must have a
 16 likelihood of success on the merits.
 17 Let me just finish up as it relates to the
 18 mortgage and these trustees. So many of them out
 19 there, it's very interesting. Merrill Lynch
 20 Mortgage Lending assigned the mortgage to LaSalle
 21 in May of 2006. Again, it should have been Merrill
 22 Lynch Investors, the depositor.
 23 The purpose of the depositor, pursuant to the
 24 terms of the Pooling and Servicing Agreement, the
 25 depositor is supposed to get this loan and then

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1 dump it, quote, unquote, into the trust. That did
 2 not happen. They skipped past the depositor.
 3 Secondly, Wells Fargo replaced LaSalle as the
 4 trustee on June 30th, 2008. That's an important
 5 date. Because on September 4, 2008, after LaSalle
 6 was out of the picture, when they were no longer
 7 trustee, LaSalle, instead of Wells Fargo, assigns
 8 the mortgage to U.S. Bank. When Wells is already
 9 named the successor trustee and LaSalle, thank you
 10 very much, your services are no longer needed as
 11 trustee. But instead of having Wells, the new
 12 trustee of this trust, assigning the mortgage to
 13 U.S. Bank, they use the old replaced LaSalle.
 14 Again, another defect as it relates to the
 15 ownership, control and possession of this loan.
 16 Which maybe we can't reconcile today, but certainly
 17 it calls into question legitimacy of this party
 18 standing before this Court asking for the drastic
 19 remedy of receivership which will have a dramatic
 20 impact on all of the residents that are sitting
 21 here and the other residents in the community.
 22 So for those reasons, Judge, we ask that you
 23 deny their request for receivership.
 24 MS. HEYER-BEDNAR: No rebuttal, Your Honor.
 25 Now that counsel has stated that he is going to be

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1 presenting witnesses, our witnesses are already
 2 outside, we would like to invoke the rule for any
 3 witnesses plus any co-op members that he intends to
 4 call, we may need them as rebuttal, now that I'm
 5 just now finding out that he's going to be calling
 6 co-op members to testify. So we certainly would
 7 like to invoke the rule.
 8 THE COURT: Are you calling co-op owners?
 9 MR. WORTMAN: Your Honor, yes. It depends
 10 upon what testimony they present.
 11 THE COURT: All right.
 12 MR. WORTMAN: We have witnesses that we'll be
 13 putting forward. Again, it would depend upon the
 14 evidence before us.
 15 THE COURT: All right. Well, let me just
 16 explain to the audience, who I assume are most, if
 17 not all, co-op owners. The rule has been invoked.
 18 What that means is, if there's any chance at all
 19 that you may be testifying at this hearing, you're
 20 going to not only need to leave the courtroom but
 21 you can't talk about your potential testimony, nor
 22 can you talk about with anyone what's been going on
 23 in this hearing. You are allowed to talk to the
 24 lawyers, but that's it.
 25 So do the witnesses know who they are?

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1 MR. WORTMAN: We have a rough list, Judge.
 2 Again, it's going to depend upon what the
 3 Plaintiff's present.
 4 THE COURT: Well, the bottom line is, if you
 5 think that -- Unless you're sure that you're not
 6 going to be testifying, you should leave.
 7 MS. HEYER-BEDNAR: I think we need to err --
 8 THE COURT: If there's a chance that you
 9 might want to testify, if you've been sitting in
 10 this courtroom, from this point on Plaintiff's
 11 counsel is going to be objecting because you have,
 12 you will have heard the other testimony and that
 13 could possibly influence your testimony.
 14 So I'll say it again. If you think that
 15 there's even a possibility that you could be
 16 testifying in this case, you're going to need to
 17 leave at this point and not discuss this case with
 18 anyone other than the lawyers.
 19 MR. WORTMAN: Judge, I do have a list.
 20 Should I read it out?
 21 THE COURT: Yes.
 22 MR. WORTMAN: Mike Blanchette, Louis Mayrand,
 23 Tony Longobardo, Sean Troyer, Holly Coyle, David
 24 Schriener, Rhonda Blackwell, Henry Rosetto, Pierre
 25 Poirier, Arnold Valteco, Rob Lavoie and Ronie

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1 Alexander, Sharon Wiest and Bob Wiest.
 2 Your Honor, may I take two minutes to run to
 3 the restroom, is that possible?
 4 THE COURT: Yes. Also, can the parties
 5 approach, because I did review this document over
 6 the weekend. It should have been forwarded to the
 7 parties but... (Handing).
 8 It appears to be a letter from somebody. Say
 9 the name of the person for the record.
 10 MR. WORTMAN: Jeannette Lewellen (phonetic).
 11 THE COURT: Okay. So I'm showing it to both
 12 sides at this point.
 13 MS. HEYER-BEDNAR: Correct.
 14 MR. WORTMAN: Okay. Thank you.
 15 THE COURT: Okay.
 16 MS. HEYER-BEDNAR: Just leave it here for
 17 now.
 18 THE COURT: Okay. We'll take a five minute
 19 recess.
 20 MR. WORTMAN: Thank you, Judge.
 21 (Off the record 2:07 - 2:23).
 22 THE BAILIFF: All rise. Circuit Court back
 23 in session. Please be seated.
 24 THE COURT: All right. The parties are
 25 present. We're back on the record. Let's proceed.

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1 MS. HEYER-BEDNAR: Yes, Your Honor.
 2 Plaintiff calls Robert Wiest as an adverse witness.
 3 THE BAILIFF: Wiest?
 4 MS. HEYER-BEDNAR: Wiest?
 5 THE CLERK: Please raise your right hand,
 6 sir.
 7 THEREUPON,
 8 ROBERT WIEST,
 9 being by the Clerk first duly sworn to testify the
 10 whole truth, testified as follows:
 11 THE CLERK: Please state your name for the
 12 record and spell your last name.
 13 THE WITNESS: First name Robert, last name
 14 Wiest. W-i-e-s-t..
 15 THE COURT: You may be seated.
 16 THE WITNESS: Thank you.
 17 DIRECT EXAMINATION
 18 BY MS. HEYER-BEDNAR:
 19 Q. Mr. Wiest, good afternoon.
 20 A. Good afternoon.
 21 Q. By whom are you employed?
 22 A. S&B Services. S&B Consulting Services.
 23 Q. And where are they located?
 24 A. Pompano Beach, Florida.
 25 Q. And what type of services do they provide?

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1 A. We are a licensed property management company
 2 licensed by the State of Florida.
 3 Q. And who are the employees of S&B?
 4 A. My wife Sharon and myself.
 5 Q. Are you also the officers?
 6 A. Yes. She's President and I'm Vice President.
 7 Q. And Sharon holds a license you mentioned?
 8 A. That's correct.
 9 Q. Okay. What type of license is that?
 10 A. Well, the company holds a license. The
 11 company holds a property management license issued by
 12 the State of Florida.
 13 Q. And does Sharon hold a license individually?
 14 A. Yes, she holds a CAM license.
 15 Q. I'm sorry?
 16 A. A CAM license. Community Association
 17 Management license for the last seven years.
 18 Q. And you don't hold such a license; do you?
 19 A. Not as of yet, no.
 20 Q. And have you ever held such a license?
 21 A. No.
 22 Q. And what does that license allow you to do in
 23 the state?
 24 A. Actually allows you to basically perform the
 25 functions as defined by state statute as it relates to

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1 properties.
 2 Q. As a property manager?
 3 A. Correct.
 4 Q. How long has S&B been a property manager on
 5 the Tidewater property?
 6 A. Since May of 2008.
 7 Q. And what has been your role with respect to
 8 Tidewater?
 9 A. Basically operating under the direction of
 10 the Board, following the day-to-day routines that would
 11 normally just -- You know, effectively collect the
 12 monies, deposit them, take care of issues that the
 13 Board has requested me to take care of.
 14 Q. And do you also maintain accounts for
 15 purposes of the collection of rents for the property?
 16 A. Each individual resident has its own account,
 17 yes.
 18 Q. And as property manager, do you maintain an
 19 account on behalf of Tidewater for purposes of
 20 collection of the rents?
 21 A. I don't understand your question.
 22 Q. When you say you collect the rents, how does
 23 the property manager handle the accounting of
 24 collecting the rents?
 25 A. Basically the rents are due by the 5th of

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1 each month. They're collected and deposited the day
 2 that they're received. They're posted to their
 3 individual accounts acknowledging the fact that each
 4 one has been paid for that month.
 5 Q. And who handles those deposits?
 6 A. I do.
 7 Q. And do you maintain any other accounts on
 8 behalf of Tidewater?
 9 A. Maintain --
 10 Q. For depositing?
 11 A. We only have three bank accounts. Actually
 12 all the money goes into one account.
 13 Q. And what about paying expenses, are you as
 14 property manager responsible for paying expenses on
 15 behalf of Tidewater?
 16 A. I was given that responsibility February of
 17 last year. Prior to that it was an outside source.
 18 Q. And since February of '09, was it your duty
 19 as property manager in paying expenses to pay the loan
 20 payments?
 21 A. Up until the point where counsel advised us
 22 not to.
 23 Q. When did you stop making loan payments as
 24 property manager?
 25 A. I think the last one was May of 2010.

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1 Q. How many units do you collect rent or
2 assessments for?

3 A. There's currently, Tidewater has 125 units.
4 Five of those units are vacant lots. That leaves 120.
5 So basically roughly around 120.

6 Q. And what is the delinquency on assessments
7 for those?

8 A. Less than three percent.

9 MR. KORTE: Objection, Your Honor. This is
10 not relevant.

11 THE COURT: Overruled.

12 THE WITNESS: And those delinquencies
13 basically are in litigation.

14 BY MS. HEYER-BEDNAR:

15 Q. How much is collected on a monthly basis from
16 the Tidewater rents?

17 MR. KORTE: Objection, Your Honor. This is
18 Aid of Execution discovery. I mean, how much is
19 collected by the Plaintiff -- by the Defendant?

20 THE COURT: I'm sorry, I don't understand
21 your objection.

22 MR. KORTE: Objection, Your Honor. Relevance
23 and not germane to the issue at bar, the
24 receivership.

25 THE COURT: Overruled.

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1 THE WITNESS: Would you restate the question,
2 please.

3 BY MS. HEYER-BEDNAR:

4 Q. Absolutely. How much rent is being collected
5 on a monthly basis from Tidewater rents?

6 A. Rent or rent and assessments?

7 Q. Rent and assessments, from the 125 lots.

8 A. 120.

9 Q. 120.

10 A. About \$77,000, 78,000.

11 THE COURT: I just want to ask you a question
12 to clarify. Was it as of February '09 or
13 February 2010 that you had the responsibility of
14 paying this money?

15 THE WITNESS: February 2010.

16 BY MS. HEYER-BEDNAR:

17 Q. Let me show you a document that's been marked
18 as Plaintiff's Exhibit A for identification. And ask
19 you if you recognize that document, Mr. Wiest?

20 A. Yes, I do.

21 Q. What is it?

22 A. It's the rent roll.

23 Q. And what's the, what rent roll is that from,
24 what month?

25 A. Says December 2010.

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1 THE COURT: It's a what?

2 THE WITNESS: Rent roll.

3 THE COURT: Rent?

4 MS. HEYER-BEDNAR: Rent roll.

5 THE COURT: Roll. Okay.

6 BY MS. HEYER-BEDNAR:

7 Q. And what is the monthly rent collected in
8 toto for the month of December 2010?

9 A. A little in excess of 70,000.

10 Q. And would that be about the monthly rent
11 collected since December 2010?

12 A. No. As effective February of 2011 the rent
13 for rental properties went up. That's why I stated the
14 number on the prefix question as being a higher number.

15 Q. And so how much rent is being collected
16 currently on a monthly basis?

17 A. I think I just told you. I told you around
18 77, \$78,000.

19 Q. And do you have any records with you here
20 today to reflect any rent rolls beyond December 2010
21 that are being collected by you as property manager?

22 A. No, I don't.

23 Q. In fact, you recall being served with a
24 subpoena in this case for production of documents,
25 correct?

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1 A. That's correct.

2 Q. And no documents were ever produced in
3 response to that subpoena; is that correct?

4 A. That's not true.

5 Q. You produced documents in response to that
6 subpoena?

7 A. Documents --

8 MR. WORTMAN: Your Honor, are we talking
9 about discovery issues again as it relates to his,
10 his deposition?

11 THE COURT: I don't know. Where is this
12 leading?

13 MS. HEYER-BEDNAR: Your Honor, this goes to
14 financial disclosure and also goes to the
15 information that he's now -- I'm cross examining
16 him basically as an adverse witness on the
17 information that he's now soliciting.

18 THE COURT: I'll overrule the objection.

19 THE WITNESS: Okay. Restate the question
20 again, please.

21 BY MS. HEYER-BEDNAR:

22 Q. And isn't it true that you did not produce
23 any documents in response to the subpoena duces tecum
24 served on S&B as property manager pertaining to
25 financial records?

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1 A. I supplied any documents that were requested
 2 by our attorneys.
 3 Q. But they were not actually produced in this
 4 case to Plaintiff's counsel or to Plaintiff?
 5 MR. WORTMAN: Objection. How is he going to
 6 know what is produced by this firm?
 7 THE COURT: Speaking objections only. But
 8 I'll sustain that objection.
 9 BY MS. HEYER-BEDNAR:
 10 Q. You mentioned previously that in April 2010
 11 you stopped paying loan payments as part of your
 12 expenses?
 13 A. No, I said May 2010.
 14 Q. Okay. May 2010 you stopped making loan
 15 payments in connection with this loan. Prior to
 16 May 2010, to whom were you making loan payments to?
 17 A. Wachovia at that time.
 18 Q. Were the payments always made to Wachovia?
 19 A. To the best of my knowledge, yes.
 20 Q. Whose decision was it to stop making
 21 payments?
 22 A. Counsel.
 23 Q. Was it yours as property manager?
 24 A. No.
 25 Q. So from May 2010 you're still collecting

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1 rents from the property on a monthly basis, correct?
 2 A. Correct.
 3 Q. What is the aggregate total of net rental
 4 proceeds that you have received as property manager
 5 since May 2010?
 6 A. Well, take 70,000 and take it times every
 7 month up until February of 2010 and take -- or, excuse
 8 me, 2011. And take the month of February 2011 times
 9 77, \$78,000 to that. That would give you the total.
 10 Q. And what are the monthly expenses?
 11 A. Varies.
 12 Q. Average? Average monthly expenses?
 13 A. 16, \$17,000.
 14 Q. So you would agree with me that there is a
 15 net of the rental proceeds being held by Tidewater?
 16 A. That's correct.
 17 Q. Okay. And what is the current net of excess
 18 proceeds being held by S&B as the property manager from
 19 the rental proceeds?
 20 A. S&B is not holding any money.
 21 Q. Okay. In the Tidewater account that you're
 22 managing.
 23 A. Last check, was about 298,000.
 24 Q. Are you aware of a --
 25 THE COURT: I'm sorry, last check when? Can

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1 you be more specific?
 2 THE WITNESS: Yesterday.
 3 THE COURT: Yesterday. Okay.
 4 BY MS. HEYER-BEDNAR:
 5 Q. And what bank account is that, those funds
 6 being held?
 7 A. Wachovia, or Wells Fargo.
 8 Q. And in whose name is that account?
 9 A. Tidewater Estates.
 10 Q. Are you aware of a demand for turnover of
 11 rents made by Midland Loan Services on behalf of U.S.
 12 Bank as trustee?
 13 A. I've heard of it.
 14 Q. Do you know if the rents have been turned
 15 over to U.S. Bank as trustee as a result of that
 16 demand?
 17 A. Obviously not.
 18 Q. Was it your decision as property manager to
 19 not turn over rents?
 20 A. No, it was not.
 21 Q. Do you know whose decision it was?
 22 A. No, I do not.
 23 Q. Are there any other monies other than the
 24 monies that are being held in the Wachovia account
 25 slash Wells Fargo to the tune of \$298,000?

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1 A. No.
 2 Q. Are there any monies that have been deposited
 3 into the court registry?
 4 A. No.
 5 Q. Has there been any accounting provided to the
 6 Court or to U.S. Bank as trustee for the accounting of
 7 rentals for 2011?
 8 MR. WORTMAN: Objection, form of the
 9 question. I think it was --
 10 THE COURT: Go ahead.
 11 MR. WORTMAN: -- multiple parts here.
 12 BY MS. HEYER-BEDNAR:
 13 Q. With respect to the amount of money being
 14 collected and expenses being paid, is it true that
 15 there has not been any accounting provided to this
 16 Court with respect to the rental proceeds for 2011?
 17 A. Best of my knowledge, I guess not.
 18 Q. Okay. And there hasn't been any accounting
 19 provided to U.S. Bank as trustee with respect to those
 20 same proceeds for 2011?
 21 A. No.
 22 Q. Who approved you to be the property manager
 23 in February 2010?
 24 A. Actually I was property manager January of
 25 2009.

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1 Q. And who approved you at that point in time to
 2 be the property manager?
 3 A. Board of Directors.
 4 Q. Anybody else?
 5 A. No.
 6 Q. So you didn't get approval from U.S. Bank as
 7 trustee to be the property manager?
 8 A. S&B Consulting Services approved -- is an
 9 approved property management company by Wachovia.
 10 That's as a matter of record.
 11 Q. But, in fact, was S&B an approved property
 12 manager by U.S. Bank as trustee?
 13 A. No.
 14 Q. Was S&B an approved property manager by
 15 Midland Loan Services?
 16 A. No.
 17 Q. In fact, you're aware of an assignment and a
 18 management agreement assignment as well as a
 19 subordination agreement that's in place with respect to
 20 the loan documents signed by Tidewater; are you not?
 21 MR. KORTE: Object to the form, Your Honor.
 22 THE WITNESS: No.
 23 MR. KORTE: It's compound.
 24 THE COURT: Sustained. Rephrase.
 25 BY MS. HEYER-BEDNAR:

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1 Q. Do you have a management agreement in place
 2 with Tidewater?
 3 A. Yes, I do.
 4 Q. Have you provided a copy of that agreement to
 5 U.S. Bank as trustee?
 6 A. No.
 7 Q. When was that agreement entered into?
 8 A. January -- February, excuse me, February 1st
 9 of 2010.
 10 Q. Are you aware that U.S. Bank as trustee has
 11 an assignment of all management agreements in place
 12 with respect to the Tidewater property?
 13 A. No.
 14 Q. Did you ever recommend that approval be
 15 sought for your management agreement from U.S. Bank as
 16 trustee?
 17 A. No.
 18 Q. With respect to any lender that or any
 19 trustee that's been involved with respect to this loan,
 20 have you sought any approval?
 21 A. No. My contract is with Tidewater Estates.
 22 Q. What's your management fee on a monthly
 23 basis?
 24 A. It's an hourly basis.
 25 Q. And what's your hourly rate?

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1 A. \$22 an hour.
 2 Q. And how many hours do you put in a week?
 3 A. Varies.
 4 Q. How many hours do you put in a month?
 5 A. Varies.
 6 Q. Approximately?
 7 A. On average about 30 hours, 30 hours a week.
 8 Q. And have you been collecting management fees
 9 since you became property manager in February of '09?
 10 A. Correct.
 11 Q. Have you been collecting management fees
 12 since the loan -- since Tidewater stopped making
 13 payments on the loan in May of 2010?
 14 A. Yes.
 15 Q. Are you aware of the fact that your
 16 management fee lien is subordinate to the lien of U.S.
 17 Bank as trustee?
 18 A. No, I'm not.
 19 MR. KORTE: Your Honor, objection. A, as to
 20 form and, B, as to facts in evidence.
 21 MS. HEYER-BEDNAR: I just asked him if he was
 22 aware, Your Honor.
 23 MR. KORTE: She referenced the agreement.
 24 THE COURT: I'm going to sustain the
 25 objection.

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1 BY MS. HEYER-BEDNAR:
 2 Q. So at no time since May 2010 have you ceased
 3 taking management fees from the Tidewater property; is
 4 that correct?
 5 MR. WORTMAN: Asked and answered, Judge.
 6 THE COURT: Sustained.
 7 BY MS. HEYER-BEDNAR:
 8 Q. How many other properties do you manage?
 9 A. Currently right now, as of last week just
 10 one. Just this one.
 11 MS. HEYER-BEDNAR: No further questions, Your
 12 Honor.
 13 THE COURT: Cross?
 14 MR. KORTE: No questions, Your Honor.
 15 THE COURT: May this witness be excused?
 16 MS. HEYER-BEDNAR: Yes, Your Honor. Thank
 17 you. Your Honor, we'd like to go ahead and admit
 18 the rent roll from December 2010. Any objections?
 19 MR. WORTMAN: (Shakes head).
 20 THE COURT: Is that a no?
 21 MR. WORTMAN: No objection, Judge.
 22 THE COURT: All right. It will be admitted
 23 as Plaintiff's 1.
 24 (Plaintiff's Exhibit Number 1).
 25 MS. HEYER-BEDNAR: Your Honor, at this time

<p style="text-align: right;">Page 95</p> <p>1 Plaintiff calls Steve Reynolds to the stand. 2 MR. KORTE: Your Honor, before the witness is 3 sworn, may we have a sidebar? 4 (Bench conference) 5 MR. KORTE: Your Honor, before we began, we 6 invoked the rule and witnesses left. Mr. Reynolds 7 is not a party. He's a representative from Midland 8 corporation, is not the Plaintiff in this case, 9 Your Honor. I took his deposition. He's never 10 spoken to the Plaintiff, doesn't know who they are 11 and happens to work for Midland indirectly. 12 Clearly he's going to be a witness, not a party in 13 this particular case. If he works for U.S. Bank, 14 that's one thing, but he doesn't. 15 MS. HEYER-BEDNAR: Your Honor, Midland is a 16 special servicer of the liens, he's responsible for 17 the litigation. He's the asset manager who handled 18 this litigation and has limited Power of Attorney 19 to act on behalf of U.S. Bank. 20 (End of bench conference). 21 THE REPORTER: Judge, I am having a hard time 22 hearing. 23 THE COURT: I could just ask Mr. Reynolds to 24 step outside and then continue with the sidebar. 25 MR. KORTE: That's fine. All the witnesses</p>	<p style="text-align: right;">Page 97</p> <p>1 U.S. Bank actually knew that he existed. I took 2 his deposition, asked him if he's ever spoken to 3 anybody at U.S. Bank. Never. Ever had a 4 correspondence with them? Never. Any dealings 5 with them? Never. They don't know anything about 6 it. Quite frankly, U.S. Bank has never spoken to 7 Mr. Reynolds. So he may have a Power of Attorney 8 not specific to him, and it's kind of, that is not 9 the point. The point is, he would be a witness. 10 As much as the same way Mr. Wiest was a witness, 11 he's handled the litigation along the way, handled 12 the money along the way, he's not a party. A party 13 is U.S. Bank. 14 THE COURT: All right. Aside from a ruling 15 on that issue. Let's say he's not a party. So 16 what? I understand he was here for the last 17 witness but... 18 MR. KORTE: Well, Your Honor, I mean, again, 19 the question is whether or not the Court's rules 20 have effect or not. I mean, you ruled him to get 21 out. Did he or did he not? I mean, it's -- 22 THE COURT: Right. And then we'll skip now 23 to prejudice. He has heard what, the last 24 witness -- Did you know that -- Did you not know 25 that she was going to call him?</p>
<p style="text-align: right;">Page 96</p> <p>1 are out. 2 THE COURT: Okay. Mr. Reynolds, step outside 3 for a minute, and then we don't need the sidebar. 4 (Thereupon, Mr. Reynolds left the courtroom). 5 THE COURT: All right. Mr. Reynolds has 6 stepped outside. So repeat what you were saying 7 for the record. 8 MS. HEYER-BEDNAR: Okay. In response to 9 their argument, we state that Steve Reynolds is an 10 officer of Midland Loan Services. Midland Loan 11 Services is a special servicer. As special 12 servicer, that's their job, is to be an asset 13 manager and handle defaulted loans. He has been 14 handling this loan since it went into default on 15 behalf of U.S. Bank as trustee, and, in fact, has a 16 limited Power of Attorney as Midland to be here on 17 behalf of U.S. Bank as trustee. 18 THE COURT: All right. So he is here as a 19 representative of U.S. Bank? 20 MS. HEYER-BEDNAR: Correct. Via Midland. 21 Via the special servicer. 22 MR. KORTE: Your Honor, if I may. 23 THE COURT: Yes. 24 MR. KORTE: It would be one thing to say that 25 he is the representative of U.S. Bank, assuming</p>	<p style="text-align: right;">Page 98</p> <p>1 MR. KORTE: Your Honor, I took his deposition 2 via telephone because he was unavailable to travel 3 to Florida. So I had no idea what he looked like. 4 Had no idea whether she was going to call him or 5 not. I had no idea who this person was. 6 THE COURT: So you didn't know the person 7 that was sitting there was Mr. Reynolds; is that 8 correct? 9 MR. KORTE: No, I did not. 10 MS. HEYER-BEDNAR: If I may rebut briefly, 11 Your Honor. 12 THE COURT: Yes. 13 MS. HEYER-BEDNAR: He was presented as the 14 Plaintiff's representative. When we did a 15 corporate rep depo, Mr. Reynolds was the witness. 16 So they knew that he was acting on behalf of the 17 Plaintiff. 18 THE COURT: Okay. But that's slightly, that 19 is different than what he just represented to the 20 Court. It's not inconsistent. It's two different 21 factual issues. But in any event. I don't know -- 22 What is he going to testify to? Is it anything 23 relating to what the last witness said? 24 MS. HEYER-BEDNAR: No. 25 THE COURT: So what prejudice is there?</p>

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1 MR. KORTE: Your Honor --

2 THE COURT: Just because a rule -- Let's say

3 the rule has been violated. Then what? It doesn't

4 mean that that witness is automatically excluded.

5 I have to do an analysis of prejudice.

6 MR. KORTE: Of course, Your Honor. I mean,

7 this is the situation where, I mean, I can't wait

8 and then spring it on you at the last minute after

9 he's on the stand. I have to call a sidebar and

10 say, this is what just happened.

11 THE COURT: Right.

12 MR. KORTE: Now, obviously if this comes up

13 or some other issue arises, of course it's going to

14 be prejudicial to me. I have no idea what

15 Mr. Reynolds is going to testify to relative to

16 today's testimony. Ultimately he heard Mr. Wiest

17 testify, they invoked the rule for a reason, they

18 didn't want witnesses hearing it.

19 So clearly he's now going to be a conduit to

20 that information to anybody else even back at his

21 firm, assuming he was permitted to testify at all.

22 THE COURT: Right. Well, I'm not -- I don't

23 know frankly whether a Plaintiff, if there's any

24 restriction on who a Plaintiff can designate to be

25 their --

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1 MS. HEYER-BEDNAR: Corporate rep.

2 THE COURT: -- party representative. Are

3 there? Do they have to appoint as their party

4 representative someone that is an employee of

5 theirs or can they appoint somebody else?

6 MR. KORTE: Your Honor, it would be one thing

7 if -- Again, we're going to look at this ultimately

8 on direct and cross examination, whether he has any

9 appointment thereto. If he never spoke to them, he

10 must have some sort of written appointment as their

11 representative. And that's my problem, is that

12 he's never communicated with U.S. Bank so how could

13 U.S. Bank have communicated with him to make him

14 the representative?

15 THE COURT: Well, Plaintiff's counsel has

16 represented to this Court that at his deposition he

17 was presented to you as the party representative or

18 corporate representative for U.S. Bank. Is that

19 what you said earlier?

20 MS. HEYER-BEDNAR: That's correct.

21 MR. KORTE: That's absolutely not the way his

22 deposition was taken, Your Honor. The deposition

23 was of the Plaintiff in this case. Not the

24 Plaintiff's rep. The Plaintiff. And they produced

25 this person.

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1 THE COURT: What's the difference?

2 MR. KORTE: Well, a huge difference, Your

3 Honor.

4 THE COURT: Tell me.

5 MR. KORTE: The Plaintiff is a person who

6 actually works for the company or is a corporate

7 officer. A representative is a person that they

8 appoint. For instance, in a personal injury case,

9 if I'm the injured party, can I let my spouse

10 testify for me? No. I have to testify on my own

11 behalf. If you take --

12 THE COURT: Talk about a corporation.

13 Because I think it's different.

14 MR. KORTE: Okay. Corporations, no problem.

15 I can take a deposition pursuant to 1.310 (A) which

16 is any party or the B (6) section which is

17 corporate representative.

18 THE COURT: Right.

19 MR. KORTE: But I took it pursuant to A. I

20 wanted the party. I didn't want their designee. I

21 didn't want the person with the most knowledge. I

22 wanted their designee. I wanted the person who

23 works there, an actual entity. Because there's an

24 issue as to whether or not U.S. Bank actually

25 brought this action. That's my concern. Is that

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1 Mr. Reynolds is now self-fulfilling --

2 THE COURT: But wait. That's a whole other

3 issue. Your objection originally was that the rule

4 had been invoked --

5 MR. KORTE: Correct.

6 THE COURT: -- and that unless he's a

7 corporate representative -- Or did I misunderstand

8 you? Your position is even if he's a corporate

9 representative he should not be allowed to be in

10 the room while there's testimony?

11 MR. KORTE: Correct, Your Honor. Corporate,

12 a corporate designee, the person with most

13 knowledge, is not the corporate representative as

14 the Plaintiff. They would need to bring an

15 employee of the corporation.

16 THE COURT: Well, that, that gets us back to

17 the original question, which is can a corporation,

18 can a party corporation appoint someone who's not

19 an employee to be their corporate representative?

20 MR. KORTE: I don't believe they can.

21 THE COURT: What's your position?

22 MS. HEYER-BEDNAR: Absolutely false. Just

23 like in mediation, you can appoint a corporate

24 representative to be here. Regardless of an

25 appointment of a designee, he's here on behalf of

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1 Midland Loan Services. Midland Loan Services is a
 2 special servicer under the Pooling and Servicing
 3 Agreement, listed on all the trustee documents, and
 4 there's a limited Power of Attorney for him to, for
 5 Midland to act on behalf of U.S. Bank.
 6 THE COURT: I understand. All right. Well,
 7 I don't know if it's going to be significant or
 8 not. Let's hear what he has to say. Let's bring
 9 him in.
 10 THE CLERK: Raise your right hand, sir.
 11 THEREUPON,
 12 STEVEN REYNOLDS,
 13 being by the Clerk first duly sworn to testify the
 14 whole truth, testified as follows:
 15 THE CLERK: Please state your name for the
 16 Court and spell your last name, please.
 17 THE WITNESS: Steven Reynolds, last name
 18 R-e-y-n-o-l-d-s.
 19 THE COURT: Have a seat.
 20 DIRECT EXAMINATION
 21 BY MS. HEYER-BEDNAR:
 22 Q. Mr. Reynolds, by whom are you employed?
 23 A. Midland Loan Services.
 24 Q. And where are they located?
 25 A. Overland Park, Kansas.

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1 Q. And what does Midland Loan Services do?
 2 A. Midland Loan Services is a servicer of
 3 commercial real estate loans. They act as a master
 4 servicer as well as a special servicer, and they
 5 service approximately 30,000 loans. You know,
 6 collection of payments, payment of expenses, we contact
 7 borrowers for rent rolls, operating statements. All
 8 things that go into servicing of a loan.
 9 Q. And what is your title at Midland?
 10 A. I'm a special servicing team lead.
 11 Q. And what are your duties?
 12 A. In addition to managing four individuals, I
 13 have a portfolio of defaulted mortgages which I try to
 14 resolve with borrowers and whatnot. But the overall
 15 purpose of, you know, my existence as special servicer
 16 is to resolve assets that are in default.
 17 Q. And how long have you been employed by
 18 Midland?
 19 A. Since March 1997.
 20 Q. And are you familiar with the duties of
 21 Midland as a special servicer?
 22 A. I am.
 23 Q. And as special servicer, is Midland appointed
 24 to that role?
 25 A. They are.

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1 Q. And is Midland acting as a special servicer
 2 in connection with the Tidewater loan which we're here
 3 about today?
 4 MR. KORTE: Objection, Your Honor. Calls for
 5 hearsay.
 6 THE COURT: I'm sorry, repeat the question.
 7 MS. HEYER-BEDNAR: Is Midland acting as a
 8 special servicer in connection with the Tidewater
 9 loan?
 10 THE COURT: Why is hearsay not admissible,
 11 assuming that it is hearsay? It sounds like it
 12 might be, but why would hearsay not be admissible?
 13 MR. KORTE: Why would hearsay not be
 14 admissible?
 15 THE COURT: Mm-hmm.
 16 MR. KORTE: Your Honor, in this particular
 17 case it's a statement made, obviously whether or
 18 not they are or are not acting as special servicer
 19 for Tidewater, that would not be known to this
 20 Defendant, or this witness at the time that it was
 21 made, the designation, if it was ever made, because
 22 employment is subsequent to the making of that
 23 agreement. Or the assignment of this pool.
 24 THE COURT: Okay. Well, that's a point that
 25 you can cross examine him. So I'll overrule the

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1 objection.
 2 MS. HEYER-BEDNAR: Thank you, Your Honor.
 3 BY MS. HEYER-BEDNAR:
 4 Q. Mr. Reynolds, is Midland acting as a special
 5 servicer in connection with the Tidewater loan?
 6 A. They are.
 7 Q. And how was Midland appointed as special
 8 servicer?
 9 A. Via the Pooling and Servicing Agreement.
 10 Q. Why is a special servicer used in connection
 11 with a loan such as Tidewater in a CMBS transaction?
 12 A. So long as a loan is in a performing state,
 13 you know, monthly installments are being collected,
 14 there's no need for a special servicer. Once there is
 15 a special servicing triggering event, then the special
 16 servicer's role is activated to, you know, manage the
 17 asset and the default and try to provide resolution to
 18 that default all governed by the loan documents.
 19 Q. And are you familiar with CMBS loans held in
 20 trust?
 21 A. I am.
 22 Q. And is the Tidewater loan held in a CMBS
 23 trust?
 24 MR. KORTE: Objection, Your Honor, hearsay
 25 again.

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1 THE COURT: Overruled.
 2 THE WITNESS: It is.
 3 BY MS. HEYER-BEDNAR:
 4 Q. And do you know who is the current trustee of
 5 that particular trust?
 6 MR. KORTE: Objection, again, hearsay.
 7 THE COURT: Overruled.
 8 THE WITNESS: U.S. Bank.
 9 BY MS. HEYER-BEDNAR:
 10 Q. And is Midland, as a special servicer,
 11 authorized to act on behalf of U.S. Bank as a trustee?
 12 A. They are.
 13 Q. And how do they have that power?
 14 A. There's a limited power of authority in which
 15 U.S. Bank granted Midland, as a special servicer, to
 16 act on behalf of U.S. Bank.
 17 Q. Mr. Reynolds, I'm going to show you what's
 18 been marked as Plaintiff's Exhibit C for
 19 identification. Ask you if you recognize it?
 20 A. I do.
 21 Q. And what is it?
 22 A. It is the limited Power of Attorney to
 23 Midland Loan Services from U.S. Bank.
 24 Q. And what's the date of that Power of
 25 Attorney?

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1 A. November 2nd, 2009.
 2 Q. And has Midland provided or brought an
 3 original certified copy of that limited Power of
 4 Attorney here today?
 5 A. We have.
 6 MS. HEYER-BEDNAR: Your Honor, we'd like to
 7 move the limited Power of Attorney marked as
 8 Plaintiff's Exhibit C for identification into
 9 evidence.
 10 MR. KORTE: Hearsay, Your Honor. It's
 11 unauthenticated also.
 12 THE COURT: All right.
 13 MR. KORTE: Unauthenticated as far as the
 14 objection.
 15 THE COURT: Well, since one of the issues
 16 that I have to address is whether there's a
 17 substantial likelihood that Plaintiff would succeed
 18 on the merits at trial, how would you get this into
 19 evidence at trial? Because obviously --
 20 MS. HEYER-BEDNAR: Your Honor, because we
 21 have a certified copy.
 22 THE COURT: All right.
 23 MS. HEYER-BEDNAR: We'd ask the Court to take
 24 judicial notice since it is recorded.
 25 THE COURT: Go ahead.

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1 MR. KORTE: Recorded in a different state,
 2 Your Honor. It's not recorded here in Florida.
 3 The Court doesn't have the authority to accept a
 4 recorded document out of Kansas. They would have
 5 to actually have certified copies and get the
 6 Secretary of State approval to give that actual
 7 recording to the Court. More importantly, Your
 8 Honor, even if it is recorded, that doesn't make it
 9 self-authenticating under Florida Statute. Florida
 10 Statute requires more. That's assuming we get to
 11 the hearsay argument.
 12 THE COURT: So you're saying that they would
 13 need a certificate from the Secretary of State and
 14 that would get over your --
 15 MR. KORTE: That would only potentially make
 16 it, potentially make it non hearsay.
 17 THE COURT: Okay.
 18 MR. KORTE: The fact is, it's a double
 19 hearsay concern. But let's talk about
 20 authentication for a moment, Your Honor. The
 21 authentication in this particular case is a signed
 22 document by parties of U.S. Bank and whoever is
 23 attached hereto. They need to authenticate that
 24 this is what it purports to be. Since there's
 25 nobody here to testify that this is what it

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1 purports to be, this document, as to when, where
 2 and how it was executed or what terms and
 3 conditions it was executed, they would need to have
 4 more than that. Most importantly, a statement from
 5 the executing party, Melissa Rosenthal, from U.S.
 6 Bank saying she did, in fact, do this, or, an
 7 admission from us, or, deposition testimony. Aside
 8 from that, no authentication can be had.
 9 Additionally, Your Honor, the hearsay
 10 argument continues to this witness. His knowledge
 11 of this can be no greater than the reading of a
 12 document. So whether or not he's read the document
 13 doesn't give him personal knowledge as required
 14 under the hearsay exceptions, Your Honor. He had
 15 to have perceived at the time of the making, he was
 16 not a party to the transaction, didn't sign it or
 17 execute it, didn't work at U.S. Bank at the time,
 18 and also didn't work at Midland at the time, to be
 19 a party hereto. So he can be perceived neither.
 20 MS. HEYER-BEDNAR: Your Honor, quick
 21 rebuttal. He did work at Midland, he's been at
 22 Midland since '97.
 23 THE COURT: Right.
 24 MS. HEYER-BEDNAR: This was executed in '09.
 25 He is the recipient, Midland is the recipient of

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1 this Power of Attorney. It was within the files,
 2 the books and records of this witness. This
 3 witness obtained a certified copy from his own
 4 records and brought it to Court here today. And it
 5 is a certified copy from the clerk. Not just
 6 anybody. It's the clerk from recording in Kansas.
 7 Just because it's a different jurisdiction -- If
 8 opposing counsel wants to dispute the authenticity
 9 of it, he's certainly entitled to do so. But
 10 because it's a certified copy, this Court is
 11 entitled to take judicial notice.

12 THE COURT: I agree with Plaintiff's counsel
 13 that because it's a certified copy from the clerk's
 14 office in Kansas, that would be sufficient for the
 15 authenticity of what it is. But as for the --
 16 Yeah, I guess, as for the hearsay...

17 MR. KORTE: Your Honor, he's not been
 18 qualified as the records custodian under the
 19 hearsay exception. Producing documents by a non
 20 records custodian -- The only way he can get it in,
 21 tipping him off, is he's the records custodian,
 22 which he's not been proffered as.

23 THE COURT: And you have to tip him off. You
 24 need to let both know.
 25 Can you lay the foundation that he's a

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1 records custodian of this document?
 2 BY MS. HEYER-BEDNAR:
 3 Q. Certainly. Mr. Reynolds, are you familiar
 4 with Midland's records, on how they keep records
 5 from --
 6 THE COURT: One second. I'm sorry. Okay.
 7 Proceed. I'm sorry.
 8 BY MS. HEYER-BEDNAR:
 9 Q. Mr. Reynolds, are you familiar with how the
 10 records are kept at Midland with respect to Powers of
 11 Attorney from various trustees?
 12 A. I am.
 13 Q. And are you familiar with the records that
 14 have been retained by U.S. Bank as trustee and the
 15 powers that they have given to Midland as special
 16 servicer?
 17 A. I am.
 18 Q. And how did it come about that you obtained a
 19 certified copy of the limited Power of Attorney?
 20 A. I walked upstairs to our legal counsel, asked
 21 for this record and they produced it.
 22 Q. And are those records maintained and kept in
 23 the regular course of business at Midland on site?
 24 A. They are.
 25 MS. HEYER-BEDNAR: Your Honor, we believe

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1 that's sufficient foundation for the limited Power
 2 of Attorney in to Midland Loan Services of this
 3 certified copy.
 4 MR. KORTE: I'd say, no, it's not, Your
 5 Honor. That is not a requirement of the records
 6 custodian. More importantly, pulling it from your
 7 lawyer? Clearly is not a records custodian.
 8 THE COURT: Right. It's not a records
 9 custodian. But, again, I need to look at the
 10 substantial likelihood of succeeding on the merits.
 11 Is Plaintiff's counsel stating that -- I
 12 don't know if this witness knows who the records
 13 custodian of this type of record would be, and how
 14 do we know that this document is, is part of the
 15 business records of Midland? I mean, he asked --
 16 He testified he went to the lawyer and said, can I
 17 have the Power of Attorney, but we're missing a
 18 link. Which at trial could be possibly completed.
 19 But that's an impediment.
 20 You need somehow to show that this document
 21 is a business record that has been kept in the
 22 normal course of Midland's business. And the fact
 23 that this witness went and asked the lawyer for a
 24 Power of Attorney, that doesn't necessarily mean
 25 that.

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1 BY MS. HEYER-BEDNAR:
 2 Q. Do you know how this limited Power of
 3 Attorney is kept at Midland?
 4 A. I do.
 5 Q. And how is it maintained?
 6 A. It's maintained in a file which contains all
 7 of the Power of Attorneys that we have for all the
 8 trusts that we service.
 9 Q. And is it done in the regular course of
 10 business?
 11 A. It is.
 12 Q. And is there a regular practice to maintain
 13 certified copies of all limited Powers of Attorney to
 14 Midland?
 15 A. It is.
 16 MS. HEYER-BEDNAR: Your Honor, I think that's
 17 a sufficient foundation.
 18 MR. KORTE: Your Honor, it may be bear
 19 minimum to create a foundation given the coaching
 20 the witness has had from expert opinions on the
 21 issue. But more importantly, Your Honor, it
 22 doesn't change his testimony. He didn't do that.
 23 He went and got it from the lawyer. End of story.
 24 Whether it was maintained or not maintained. He
 25 didn't testify -- I'm hoping I'm not going to

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1 educate him one more time -- that he went to the
 2 records, pulled it in the ordinary course and
 3 scope, got it out. He didn't say that. He said, I
 4 went to the lawyer, asked him to get it for me. He
 5 can't testify whether this document was contained
 6 in that file on that day. He's not testified to
 7 that and he has not testified to that.

8 THE COURT: Right. Well, has he seen this
 9 document at any other time? You could ask him
 10 about that. I mean, just so it's clear, when
 11 objections are made as to foundation, the party
 12 making the objection has to be specific about the
 13 lack of foundation so that it can be cured by
 14 opposing counsel. So that's why I'm forcing you to
 15 be specific.

16 Okay. Go ahead. He would need to say that
 17 he recognized this document, not simply that, you
 18 know, the first time he saw it was when he asked
 19 the lawyer for it. Has he seen it before and does
 20 he know that it's kept in the normal course of
 21 business? And how does he know that?

22 MR. KORTE: Your Honor, at sidebar, the
 23 coaching happening here is really tainting the
 24 evidentiary record. I mean, you're essentially
 25 helping counsel help her witness to overcome my

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1 objection.

2 THE COURT: Well, I'm not -- What I'm doing
 3 is seeing if this witness can lay the proper
 4 foundation, which I don't see anything improper in
 5 that, in doing that. I expect the witness to tell
 6 the truth one way -- You know, he needs to tell the
 7 truth. And if he has it -- If the first time he's
 8 ever seen this document is when he asked the lawyer
 9 for it, then that's the truth.

10 BY MS. HEYER-BEDNAR:
 11 Q. Mr. Reynolds, are you familiar with limited
 12 Powers of Attorney that are issued in favor of Midland?
 13 A. I am.
 14 Q. And is this the first time you've ever seen
 15 this document here today?
 16 A. No, it is not.
 17 Q. And have you seen this document prior to this
 18 litigation?
 19 A. I have.
 20 Q. And how long have you been utilizing this
 21 limited Power of Attorney in acting on behalf of U.S.
 22 Bank as trustee?
 23 A. Ever since this matter came, it fell on my
 24 desk as a, you know, defaulted mortgage.
 25 Q. And are you familiar with how these limited

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1 Powers of Attorney are maintained at Midland?
 2 A. I am.
 3 Q. And do you have access to those records?
 4 A. Only when I go and talk to my counsel. I
 5 don't have direct access to them.
 6 Q. But you have access when you request it?
 7 A. Right.
 8 Q. And how are all the limited Powers of
 9 Attorney maintained at Midland?
 10 A. In the same vault that this one was
 11 maintained in.
 12 Q. And was this limited Power of Attorney
 13 prepared at or about the time that it was executed to
 14 your knowledge?
 15 A. To my knowledge it was.
 16 THE COURT: I hear some question in your
 17 voice. What do you mean by that, to my knowledge?
 18 What does that mean?
 19 THE WITNESS: Well, to my knowledge this was
 20 executed back in November of 2009. It was recorded
 21 in November of 2009.
 22 THE COURT: But you have no personal
 23 knowledge of that, right?
 24 THE WITNESS: No, no. I didn't -- You know,
 25 counsel and our paralegals handle all the limited

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1 Power of Attorneys and they keep them on file. And
 2 when the special servicer runs into a situation
 3 such as this, we go request it. But I can't walk
 4 to a file and pull it myself. I have to go through
 5 that.

6 BY MS. HEYER-BEDNAR:
 7 Q. And has the limited Power of Attorney been
 8 maintained at Midland in the regular course of business
 9 since it received it from U.S. Bank as trustee?
 10 MR. KORTE: Objection, Your Honor, hearsay.
 11 THE COURT: I'm sorry, what was the question?
 12 BY MS. HEYER-BEDNAR:
 13 Q. Midland has maintained this original limited
 14 Power of Attorney in its original books and records
 15 since it received it from U.S. Bank as trustee?
 16 MR. KORTE: Hearsay.
 17 THE COURT: Sustained. Unless he, the
 18 witness has personal knowledge.
 19 THE WITNESS: I don't have personal knowledge
 20 as to when this arrived at Midland. But it has
 21 been in Midland's record since, you know, November
 22 of 2009.
 23 THE COURT: And I will let the record reflect
 24 that that last statement by the witness is based on
 25 assumption and hearsay, that he has no personal

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1 knowledge of that. Am I right?
 2 THE WITNESS: You're right.
 3 THE COURT: Okay. Well, I don't know that,
 4 if we were at a trial that I would admit that. I,
 5 I would probably sustain counsel's objection at
 6 trial. But that being said, I think that this
 7 technicality, if you will, could be overcome at a
 8 trial. You know, I'm not going to say how, but I
 9 think it's obvious.
 10 But to me this is similar in a criminal case,
 11 let's say, if a police officer wanted to -- if the
 12 state tried to admit a lab report through a police
 13 officer and the police officer would say, yeah, I
 14 know that these lab reports are kept in the normal
 15 course of the chemist, but you need, you need
 16 another party there to actually, that has personal
 17 knowledge that this document is kept in the normal
 18 course and when they first received it and that
 19 sort of thing.
 20 MR. KORTE: If I may, Your Honor.
 21 THE COURT: Yes.
 22 MR. KORTE: My understanding was this was an
 23 evidentiary hearing for today, not a trial on the
 24 receivership for trial aspect.
 25 THE COURT: Right. But I am not -- I am

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1 supposed to rule on the substantial likelihood of
 2 success on the merits, right?
 3 MR. KORTE: Given the evidence that's
 4 admissible at the time, today.
 5 THE COURT: But the fact that -- I don't know
 6 if you have any case law or authority that governs
 7 this Court as to whether hearsay's admissible at a
 8 hearing today.
 9 MR. KORTE: Hearsay is never admissible, Your
 10 Honor, under any evidentiary basis, ever.
 11 THE COURT: Motions to Suppress?
 12 MR. KORTE: There's no such thing as Motions
 13 to Suppress in civil court, Your Honor.
 14 THE COURT: True. But you were saying there
 15 were --
 16 MR. KORTE: In civil court, I apologize. I'm
 17 not a criminal lawyer. Your Honor, I have the
 18 statute, if I may approach.
 19 THE COURT: Okay.
 20 MR. KORTE: Under the statute, Your Honor,
 21 there are no such exceptions under any evidentiary
 22 basis for the admission of hearsay on any hearing.
 23 Especially evidentiary ones. In fact, the case law
 24 is pretty clear.
 25 THE COURT: Well, 90.801 is the basic hearsay

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1 exception which applies in criminal court as well,
 2 and yet we all know that Motions to Suppress
 3 hearsay is admissible and there are other types of
 4 evidentiary hearings where the rules of evidence
 5 are relaxed pursuant to the Court's -- well, I
 6 wouldn't say Court's discretion. But I know that
 7 there are other evidentiary hearings where --
 8 MR. KORTE: Like small claims?
 9 THE COURT: That, and also in circuit court.
 10 I can't off the top -- You know, you could be
 11 right, maybe in the civil division there are no
 12 hearings where the rules of evidence are relaxed.
 13 I don't know.
 14 MR. KORTE: Your Honor, this is a substantial
 15 issue. I would ask the Court to allow us to recess
 16 and brief this issue so the Court can have it. I
 17 mean, the problem is --
 18 THE COURT: We don't need to -- I'll just
 19 defer on this.
 20 MS. HEYER-BEDNAR: Your Honor, in fact, we
 21 can go ahead and offer to admit it, not for the
 22 truth of the matter asserted but to the effect on
 23 the listener because of his reliance on it in
 24 acting as the servicer in this matter.
 25 THE COURT: We can -- Let's move forward. If

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1 it turns out that hearsay under no circumstances
 2 would be admissible, then, I'm going to not regard
 3 it. You know, I'm a judge, I'm not a juror, I can
 4 disregard evidence later on.
 5 MR. KORTE: Of course.
 6 THE COURT: All right. So let's move
 7 forward.
 8 BY MS. HEYER-BEDNAR:
 9 Q. Mr. Reynolds, are you familiar how a CMBS
 10 loan transaction works?
 11 A. I am.
 12 Q. And do you have a chart to assist you that
 13 you've utilized for purposes of CMBS transactions?
 14 A. I do.
 15 Q. Do you have it in front of you?
 16 A. I don't.
 17 MS. HEYER-BEDNAR: Your Honor, I'm showing
 18 the witness what has been marked as Plaintiff's
 19 Exhibit B for identification, which is the chart we
 20 utilized in opening, and it's only for
 21 demonstrative purposes. Will not be admitted.
 22 BY MS. HEYER-BEDNAR:
 23 Q. Mr. Reynolds, in utilizing the chart in front
 24 of you, can you please describe how a CMBS transaction
 25 works.

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1 A. Sure. Loans originated by lenders in various
 2 banking institutions, in this case Merrill Lynch, you
 3 know, take any bank, USA, that provides a loan to a
 4 borrower, and that's represented by the buildings
 5 across the top of this diagram. Once, you know, the
 6 loans are made by the individual lenders -- There are
 7 numerous loans by each of the individual lenders, those
 8 lenders then take these loans, enter into what's called
 9 a Mortgage Loan Purchase Agreement with a depositor.
 10 So each lender has a separate Mortgage Loan Purchase
 11 Agreement, or an MLPA as its referred to, with the
 12 depositor. Once that agreement is memorialized, all
 13 the loans are then funneled through the depositor and
 14 then they're placed into a trust.
 15 The Tidewater matter was originally, the
 16 original lender was Merrill Lynch Lending. That
 17 filtered into the depositor Merrill Lynch Investors.
 18 The purpose of the depositor is to establish the trust,
 19 elect a custodian to hold the original loan documents.
 20 You know, and once that is all taken care of it's
 21 memorialized in a Pooling and Servicing Agreement.
 22 Under that agreement, there's a named master
 23 servicer, a named special servicer, and in this matter
 24 Midland was named the special servicer. The trustee is
 25 also named. In this matter it's LaSalle Bank.

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1 Beyond that, once the securitization is
 2 closed, the master servicer is tasked with collection
 3 of, you know, monthly payments, you know, escrow for
 4 taxes, insurance, all the things that go into servicing
 5 a loan. If there is a triggering event for a defaulted
 6 loan, it's then, you know, moved over into the special
 7 servicing atmosphere. And once we get acknowledgment
 8 of the triggering event, we then, in turn, get in touch
 9 with borrowers to try to resolve the default.
 10 Q. "We" being Midland?
 11 A. "We" being Midland. I'm sorry. But that's
 12 the general scope of a CMBS transaction.
 13 Q. Are the originator of the loans and the
 14 depositor normally different parties in a CMBS
 15 transaction?
 16 A. They are usually different parties.
 17 Q. And why is that?
 18 A. Because the depositor does not have the reach
 19 to --
 20 MR. KORTE: Objection, Your Honor. This is
 21 all expert testimony. I mean, ultimately he's not
 22 been proffered as an expert on CMBS transactions,
 23 you know, at all. Not qualified as to how this
 24 stuff works and the relationship to the parties.
 25 THE COURT: Well, I don't know whether --

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1 MS. HEYER-BEDNAR: Your Honor, in response.
 2 THE COURT: -- the question calls for expert
 3 testimony or not. But why don't you lay the
 4 foundation for his knowledge of this area.
 5 BY MS. HEYER-BEDNAR:
 6 Q. Mr. Reynolds, how long have you been employed
 7 by Midland?
 8 A. Since 1997.
 9 Q. And how long have you been involved in CMBS
 10 loan transactions?
 11 A. Since 1998.
 12 Q. And are you familiar with the origination
 13 loans and the deposit of loans into trusts and how it
 14 works with the various parties?
 15 A. I am.
 16 Q. And that's based on your experience in the
 17 industry?
 18 A. It is. In '98 I began as an underwriter on
 19 our loan origination side. So I have some experience
 20 in actually going out to underwrite loans, meet with
 21 borrowers, make sure the property is satisfactory. I
 22 assisted with the closing of those loans. Later on in
 23 my career with Midland I was a loan originator, so I
 24 used to make these loans.
 25 You know, and beyond the loan closing and

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1 then getting placed into the trust, now I'm actually on
 2 the special servicing side. So I've seen the other
 3 side of these loans once they've gone through the
 4 process of loan origination, institution into the
 5 trust, and then coming out to, you know, name the
 6 master servicers and special servicers. So I've worked
 7 on both sides of, you know, a CMBS transaction.
 8 MS. HEYER-BEDNAR: Your Honor, we think the
 9 witness is qualified. Certainly not as an expert.
 10 He's merely laying the foundation of the, by fact
 11 of the various roles of the parties.
 12 THE COURT: From his experience working for
 13 Midland. So I'll overrule the objection and that's
 14 how I'm perceiving it. Proceed.
 15 BY MS. HEYER-BEDNAR:
 16 Q. Who appoints the trustee and servicer for the
 17 trust?
 18 A. The depositor.
 19 Q. And who appoints the custodian?
 20 A. The depositor.
 21 Q. And with respect to the Tidewater loan, do
 22 you know who appointed the custodian?
 23 A. That would have been Merrill Lynch Investors,
 24 Inc.
 25 Q. And is that the depositor?

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1 A. That is the depositor.
 2 Q. And who was the custodian that was appointed?
 3 A. LaSalle Bank.
 4 Q. And how do you know that?
 5 A. Per the Pooling and Servicing Agreement.
 6 Q. Is Midland a party to the Pooling and
 7 Servicing Agreement?
 8 MR. KORTE: Objection, Your Honor, calls for
 9 hearsay as referenced in the PSA.
 10 THE COURT: It is hearsay.
 11 MS. HEYER-BEDNAR: Your Honor, I wasn't
 12 asking him about the content of it, just how he
 13 became involved with the loan. I'm not asking him
 14 to testify about the PSA. We certainly have --
 15 THE COURT: Right. But he just said that he
 16 knows something happened because of what was in the
 17 Pooling and Servicing Agreement. So that's
 18 hearsay.
 19 BY MS. HEYER-BEDNAR:
 20 Q. When does a custodian generally obtain
 21 custody of original loan documents?
 22 A. Shortly after the loan closing.
 23 Q. And with respect to the Tidewater loan, do
 24 you know when LaSalle approximately obtained the
 25 original loan documents from the originator Merrill

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1 Lynch --
 2 MR. KORTE: Foundation, Your Honor.
 3 BY MS. HEYER-BEDNAR:
 4 Q. -- Mortgage?
 5 MR. KORTE: I'm sorry.
 6 THE COURT: Sustained. Well, he can answer
 7 that question and then he has -- then you have to
 8 lay a foundation if you want to go further.
 9 MS. HEYER-BEDNAR: Okay.
 10 THE WITNESS: The transfer occurred --
 11 THE COURT: I'm sorry. So is the answer yes
 12 or no, do you know when LaSalle --
 13 THE WITNESS: Yes, I do.
 14 THE COURT: All right. Lay the foundation,
 15 then, for his knowledge.
 16 BY MS. HEYER-BEDNAR:
 17 Q. And how do you know that?
 18 A. In accordance with the original loan file,
 19 there's a letter stating that, you know, per Fed Ex
 20 delivery on or about September 14, 2005, in
 21 post-closing procedures the documents, the original
 22 documents were transferred to LaSalle Bank as the
 23 custodian.
 24 MR. KORTE: Your Honor, move to strike for
 25 hearsay.

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1 BY MS. HEYER-BEDNAR:
 2 Q. And are those records part --
 3 THE COURT: Wait. I'm sorry. He's made an
 4 objection. It is based on hearsay, so I'll
 5 sustain.
 6 BY MS. HEYER-BEDNAR:
 7 Q. Are the records from the documentation
 8 transferred to LaSalle as custodian maintained as part
 9 of the records of Midland Loan Services?
 10 A. They are.
 11 Q. And have they been maintained from the
 12 beginning when Midland was appointed as a special
 13 servicer?
 14 A. They have.
 15 Q. And where are the original loan documents
 16 kept?
 17 A. With the custodian, LaSalle Bank.
 18 Q. And who does LaSalle hold those documents on
 19 behalf of?
 20 A. The trust.
 21 MR. KORTE: Foundation, Your Honor.
 22 THE COURT: Okay. Sustained.
 23 BY MS. HEYER-BEDNAR:
 24 Q. Do you currently have the original loan
 25 documents executed by Tidewater?

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1 A. I do.
 2 Q. Who are the parties again to the PSA --
 3 MR. KORTE: Hearsay, Your Honor.
 4 BY MS. HEYER-BEDNAR:
 5 Q. -- if you recall?
 6 THE COURT: Wait. Hold on. I'm just looking
 7 at 90.803, hearsay exceptions, and there is an
 8 exception number 14: "Records of documents
 9 affecting the interest in the property. The record
 10 of a document purporting to establish or affect an
 11 interest in a property as proof of the contents of
 12 the original note recorded or filed"... Could that
 13 apply in this case?
 14 As well as number 15? "Statements and
 15 documents affecting an interest in property."
 16 MR. KORTE: Your Honor, in this particular
 17 case, they're talking about more than likely real
 18 property. This is interest in an actual
 19 collateralized note or mortgage securitized. As
 20 we've discussed before, this is a Pooling and
 21 Servicing Agreement and Powers of Attorneys we're
 22 discussing. We're not talking about the underlying
 23 note or mortgage content itself, which we'll deal
 24 with when we get there. We're actually talking
 25 about the PSA, which we've been dancing around for

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1 30 minutes now.
 2 THE COURT: Right.
 3 MR. KORTE: Without its admittance.
 4 THE COURT: And is this a public record?
 5 It's not a public record.
 6 MS. HEYER-BEDNAR: Yes, it is. It's on the
 7 SEC website, Your Honor, Pooling and Servicing
 8 Agreement.
 9 MR. KORTE: Your Honor, that is not a public
 10 record. Government brochures, things recorded with
 11 the county, those are considered to be public
 12 records. Publications by the federal government,
 13 tax return, instructions, that kind of stuff. In
 14 fact, the DMV handbook on how to drive is a public
 15 record. A document filed on a private website,
 16 SEC, which is not a public entity, accessed through
 17 EDGAR, which is also not a public entity, is not.
 18 More importantly, Your Honor, they haven't
 19 tried to admit that document. They're talking
 20 about everything else but the PSA without actually
 21 printing it out and putting it up on the table and
 22 saying this is the PSA.
 23 THE COURT: All right. Would you object, do
 24 you have any objection if they do that?
 25 MR. KORTE: Absolutely, Your Honor. But

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1 we'll get to that one.
 2 THE COURT: All right. Okay. What was the
 3 last question?
 4 (Whereupon, the reporter read
 5 from the record as requested).
 6 THE COURT: All right. That's hearsay.
 7 BY MS. HEYER-BEDNAR:
 8 Q. Is Midland a party to the PSA?
 9 A. They are.
 10 MS. HEYER-BEDNAR: Trying to lay the
 11 foundation, Your Honor.
 12 THE COURT: All right. He's answered that
 13 question.
 14 BY MS. HEYER-BEDNAR:
 15 Q. Mr. Reynolds, I'm showing you what has been
 16 marked as Plaintiff's Exhibit D for identification and
 17 ask you if you recognize that document?
 18 A. I do.
 19 Q. And what is it?
 20 A. It's the Pooling and Servicing Agreement.
 21 Q. And is it executed by Midland?
 22 A. It is.
 23 MR. KORTE: Your Honor --
 24 BY MS. HEYER-BEDNAR:
 25 Q. Do you recognize --

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1 MR. KORTE: -- we need a sidebar immediately.
 2 THE COURT: Okay. Can I just have the
 3 witness step outside? It's easier.
 4 MR. KORTE: Yes, Your Honor.
 5 MS. HEYER-BEDNAR: Well, Your Honor, I --
 6 Okay.
 7 THE COURT: Step outside, Mr. Reynolds.
 8 (Thereupon, Mr. Reynolds left the courtroom).
 9 MR. KORTE: May I begin, Your Honor?
 10 THE COURT: Okay.
 11 MR. KORTE: We began this entire day talking
 12 about discovery.
 13 THE COURT: Right.
 14 MR. KORTE: And the fact that we couldn't get
 15 an executed copy of the PSA. They couldn't have
 16 it, they promised and swore that in deposition we
 17 got everything they had. We did not get an
 18 executed copy. Lo and behold in her briefcase is
 19 an executed copy of the PSA she just stuck in front
 20 of that witness.
 21 THE COURT: Okay.
 22 MS. HEYER-BEDNAR: May I refer to Bate stamp
 23 numbers, U.S. Bank 632 through 938 that were
 24 produced to your office by e-mail with the entire
 25 document production.

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1 MR. KORTE: Your Honor, a discussion this
 2 morning was we didn't have an executed copy of the
 3 document that they claim to have -- couldn't get.
 4 THE COURT: Okay. I don't recall, are you
 5 saying that occurred on the record this morning?
 6 MR. KORTE: This morning.
 7 THE COURT: Addressed to this Court?
 8 MR. KORTE: Yes, I am. You ordered them,
 9 Your Honor, in your previous hearing to produce a
 10 copy of the PSA if they had it. And counsel said,
 11 get it off the internet, that's the best we've got.
 12 We've got an executed copy we sent to you.
 13 THE COURT: Right.
 14 MR. KORTE: Or an execution copy. We said we
 15 never got the executed with exhibits or
 16 attachments. And now there's an executed copy
 17 sitting up on the desk.
 18 THE COURT: All right. And she's saying she
 19 e-mailed it to you; is that correct?
 20 MS. HEYER-BEDNAR: That's correct. As Your
 21 Honor recalls at that hearing, you said give them
 22 the unexecuted and then go get and give them the
 23 executed. We gave them both, which is that thick,
 24 by e-mail. In fact, I personally did the e-mail
 25 myself, and it kept getting kicked back. So I

<p style="text-align: right;">Page 135</p> <p>1 actually had to break it up in chunks because it's 2 so voluminous.</p> <p>3 MR. WORTMAN: Your Honor, this is our own 4 internal document, lists every single document that 5 was produced by Ms. Bednar's office, and there's a 6 gap as it relates to the 632 Bate stamp going 7 forward. I'm not saying Ms. Bednar didn't attempt 8 potentially to PDF it and e-mail it to us, but we 9 never received it. If we can take a look at it, 10 Judge, maybe we can cut through this quickly.</p> <p>11 THE COURT: All right. Any objection to them 12 looking at it?</p> <p>13 MS. HEYER-BEDNAR: Absolutely not.</p> <p>14 MR. KORTE: May I approach, Your Honor?</p> <p>15 THE COURT: Yes.</p> <p>16 MR. KORTE: Your Honor --</p> <p>17 THE COURT: Yes.</p> <p>18 MR. KORTE: -- this appears to be different 19 from any document ever previously produced to us. 20 It includes executions but we don't know what other 21 pages are contained therein. We've never received 22 the documents. They were never sent to us as far 23 as this particular one. And, in fact, this is the 24 exact scrimmage we had this morning over an 25 executed copy of the document.</p>	<p style="text-align: right;">Page 137</p> <p>1 MS. HEYER-BEDNAR: Well, no, Your Honor. But 2 they were broken out. It's not like, it's not like 3 we had a bunch of documents all combined. Each 4 attachment to the e-mail was a separate document.</p> <p>5 THE COURT: All right. I'm going to take 6 Plaintiff's counsel at her word that she did this. 7 The fact that you may not have received a portion 8 of it --</p> <p>9 MS. HEYER-BEDNAR: I mean, the executed copy 10 is the same content as the one that's on the SEC's 11 website, which we also produced. In fact, they 12 used them in the depositions.</p> <p>13 THE COURT: All right.</p> <p>14 MR. KORTE: Your Honor, if I may approach.</p> <p>15 THE COURT: Yes.</p> <p>16 MR. KORTE: I'm going to hand you what we 17 received. That's the execution copy, a single 18 page, page 189 of her Bate stamp, not where she 19 claims that it actually landed. We also received a 20 separate incomplete copy at Bates 1332. If I may 21 approach, Your Honor.</p> <p>22 THE COURT: Sure.</p> <p>23 MR. KORTE: Additional pages to the PSA. 24 (Handing).</p> <p>25 THE COURT: Okay. And I see a Post-It note</p>
<p style="text-align: right;">Page 136</p> <p>1 THE COURT: All right. Well, Plaintiff's 2 counsel's represented that she e-mailed this exact 3 document to you. Do you know the date of that 4 e-mail by any chance?</p> <p>5 MS. HEYER-BEDNAR: No, Your Honor, I don't. 6 But I know we gave notice of filing at the same 7 time notice of production so that it was in the 8 Court file at the same time reflecting the document 9 by Bate stamp number.</p> <p>10 If there was a gap, for whatever reason, that 11 they didn't receive, certainly they could have 12 called and said I'm missing X numbers.</p> <p>13 THE COURT: All right.</p> <p>14 MR. WORTMAN: Your Honor, all this would have 15 been avoided if they actually delineated what 16 documents they were producing, instead of just 17 sending us this mass of documents. Like I was 18 saying this morning, the rule calls for a 19 delineation of documents and what documents are 20 responsive to what request. If they actually 21 stated, executed copy of Pooling and Service 22 Agreement pursuant to response, request number 23 seven, we wouldn't be going through this dance.</p> <p>24 THE COURT: All right. Did you list the 25 titles of each document you were e-mailing over?</p>	<p style="text-align: right;">Page 138</p> <p>1 on here saying incomplete copy. So when you 2 noticed that it was an incomplete copy, did you 3 contact counsel to get the rest of it?</p> <p>4 MR. KORTE: No, Your Honor. That's what they 5 claim is all they had. They gave us everything 6 they had. If they only had an incomplete copy, 7 then they only had an incomplete copy. Our 8 contention is they're sending us everything they've 9 got. They've claimed they've produced documents 10 under a Bate stamp situation on different numbers. 11 We've got the Bate stamps they've sent to us, 12 nowhere around where counsel is now claiming that 13 she sent it to us at 600.</p> <p>14 THE COURT: Well, again, this is something 15 that's easily checked into, because if she e-mailed 16 it by PDF, then there's proof of that, of exactly 17 what she e-mailed to you, the entire contents.</p> <p>18 MR. KORTE: Well, perhaps. We never received 19 it. I mean, if I said I sent something, it's 20 sitting in my outbox, I have no idea. The time, 21 date, location. I mean, it's easily checked on.</p> <p>22 THE COURT: Right. That's what I'm talking 23 about.</p> <p>24 MR. KORTE: But the reality is what's produced 25 to us at two different locations in Bate stamp</p>

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1 numbers are two different parts of the PSA.
 2 THE COURT: Well, again, I --
 3 MR. KORTE: We would have taken the
 4 deposition of anybody who signed this thing, which
 5 we tried to do, take depositions of anybody who
 6 signed documents. Mr. Rogers, we took him,
 7 Mr. Reynolds, we took him. There's four or five
 8 other people listed in that PSA, we would have
 9 clearly taken their deposition and asked them when,
 10 where and how they signed this document.
 11 May I approach, Your Honor?
 12 THE COURT: Yes.
 13 MR. KORTE: So clearly we're prejudiced in
 14 the ability to actually have cross-examined any of
 15 these people who they've brought their testimony
 16 forward for the Court.
 17 THE COURT: Well, that assumes she did not
 18 send you those materials. The fact, if she sent
 19 them to you or e-mailed them to you and you didn't
 20 open it for some reason or somehow it -- I can't
 21 imagine how if she e-mailed them to you you
 22 wouldn't have gotten them.
 23 MR. KORTE: Well, let's start with the easy
 24 part. E-mail is not acceptable under the Rules of
 25 Civil Procedure. Fax and mail are the only two

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1 procedures under the Rules of Civil Procedure. So
 2 her e-mail is an ineffectual presentation. If she
 3 has any proof today that she mailed them out to us,
 4 I'd love to see it, because we never got anything
 5 by mail.
 6 MS. HEYER-BEDNAR: Your Honor, the notice of
 7 production, there are three of them. The original,
 8 a supplemental and a second supplemental. Each of
 9 them delineate responsive to the discovery request
 10 and provide the specific Bate stamp numbers. And
 11 the reason that they're claiming a discrepancy is
 12 because they're looking at the particular Pooling
 13 and Servicing Agreement that was from the website,
 14 which we produced, and then the executed copy.
 15 THE COURT: Okay. Is there any discrepancy
 16 between the two of them; is there?
 17 MS. HEYER-BEDNAR: No. That's why we
 18 produced both of them.
 19 MR. KORTE: We don't know. I'm just seeing
 20 it for the first time.
 21 THE COURT: Go ahead and check. Tell me if
 22 there's any discrepancy.
 23 MR. KORTE: It's 700 pages, Your Honor. It
 24 will be hard to pick it out in a shot, but, sure.
 25 THE COURT: Plaintiff's counsel's saying it's

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1 exactly the same.
 2 MS. HEYER-BEDNAR: For the record, Your
 3 Honor, our notice of production was mailed out on
 4 January 24, 2011.
 5 MR. WORTMAN: Judge, for the record, the
 6 notice of production just, lists Bate stamp numbers
 7 one through 1,563. So it's not like it's broken
 8 down Bate stamp 680 through 690 is this document.
 9 It's just, again, the mass production of documents
 10 and the mass grouping of Bate stamps. So it's
 11 just -- This is the problem that we're
 12 experiencing. It's a mess as it relates to
 13 discovery.
 14 THE COURT: I don't know why. To me, I still
 15 don't think it's that complicated. It's the
 16 servicing agreement and --
 17 MR. WORTMAN: Judge, you may be right. But
 18 they're traveling under the authority of this
 19 Pooling and Servicing Agreement. In fact, we
 20 think, our case is based on the fact they didn't
 21 comply with the Pooling and Servicing Agreement.
 22 But the appropriateness and the accuracy of this
 23 document is essential, and we've been screaming, at
 24 the last hearing before Your Honor on January 20,
 25 2011, one of the issues involved the executed copy.

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1 And counsel over here indicated that, well, you
 2 have to go to the SEC website. That's the only
 3 version we have. The SEC --
 4 MS. HEYER-BEDNAR: No.
 5 THE COURT: That's not inconsistent with what
 6 she's saying today. She's saying that the document
 7 that's on the SEC website is the same document
 8 that's here in Court.
 9 MR. WORTMAN: Without the signatures.
 10 THE COURT: Right.
 11 MR. WORTMAN: Frankly we don't know if this
 12 executed copy is identical, you know. Again --
 13 THE COURT: Well, we can still go forward,
 14 and I have no reason to question Plaintiff's
 15 counsel. I'm sure that she would not make that
 16 statement lightly.
 17 MR. WORTMAN: We'll just note our objection
 18 for the record, Judge.
 19 THE COURT: Okay. Here's your folder back.
 20 All right. Let's bring Mr. Reynolds back.
 21 (Thereupon, Mr. Reynolds entered the courtroom).
 22 MS. HEYER-BEDNAR: May we proceed, Your
 23 Honor?
 24 THE COURT: Yes.
 25 BY MS. HEYER-BEDNAR:

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1 Q. Mr. Reynolds, you have in front of you what
 2 has been marked as Plaintiff's Exhibit D for
 3 identification, and I believe you stated there's a
 4 signature on the document from Midland --
 5 A. There is.
 6 Q. -- is that correct?
 7 And you recognize that signature?
 8 A. I do.
 9 Q. And who signed it?
 10 A. Larry Ashley.
 11 Q. And are you familiar with the procedures in
 12 maintaining Pooling and Servicing Agreements at
 13 Midland?
 14 A. They're maintained in the same manner as the
 15 Power of Attorney. I mean, I don't, I don't have these
 16 sitting on my desk. They're kept in a file. And, you
 17 know, if I need to go get it, I go upstairs, request it
 18 and they provide it.
 19 Q. But Midland maintains those records in the
 20 regular course of its business?
 21 A. They do.
 22 Q. And it's been maintained since Midland was
 23 appointed as special servicer back in 2006?
 24 A. They have.
 25 Q. And is that document posted in any public

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1 forum or website?
 2 MR. KORTE: Objection, Your Honor, hearsay.
 3 THE COURT: I'm looking at the business
 4 records exception. I'm going to overrule at this
 5 time. I may change my ruling later, but for now
 6 I'm going to let it in. You can proceed.
 7 MS. HEYER-BEDNAR: Thank you, Your Honor.
 8 THE WITNESS: Could you repeat the question,
 9 sorry?
 10 (Whereupon, the reporter read
 11 from the record as requested).
 12 THE WITNESS: Not to my knowledge.
 13 BY MS. HEYER-BEDNAR:
 14 Q. Who were the other parties to that agreement
 15 or, in general, I should say, who are the normal
 16 parties to a Pooling and Servicing Agreement?
 17 A. In general the depositor, the master
 18 servicer, the special servicer and the trustee.
 19 Q. And do each of those parties maintain a copy
 20 of the Pooling and Servicing Agreement?
 21 A. Yes.
 22 Q. And has Midland maintained that document
 23 since it was executed as part of its records?
 24 A. Midland has.
 25 MS. HEYER-BEDNAR: Your Honor, we would like

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1 to admit the Pooling and Servicing Agreement which
 2 is marked Plaintiff's Exhibit D in evidence.
 3 MR. KORTE: Hearsay, Your Honor.
 4 Authentication.
 5 THE COURT: Okay. I'll admit it at this
 6 time.
 7 (Plaintiff's Exhibit Number 2).
 8 THE COURT: I'm going to find that this
 9 witness has --
 10 MS. HEYER-BEDNAR: Your Honor, we think that
 11 the business exception rule provides for the
 12 admission of this document. You do not have to
 13 authenticate every single party to the agreement
 14 and every single person in the chain of custody.
 15 There's a ton of case law.
 16 THE COURT: I know. I said I'm admitting it.
 17 Do you want me to change, you want to try to get me
 18 to change my mind?
 19 MS. HEYER-BEDNAR: No.
 20 THE COURT: All right. I was just laying the
 21 record that this witness, I find that this witness
 22 has sufficiently laid the basis for the Court to
 23 find that it was, this document has been kept in
 24 the course of regularly conducted business and
 25 there's no reason for the Court to find that it's

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1 not, that it isn't and that it's not trustworthy,
 2 that it's not authenticated or authentic. Okay.
 3 Go ahead. So it will be Plaintiff's 2.
 4 BY MS. HEYER-BEDNAR:
 5 Q. And who are the parties to the Pooling and
 6 Servicing Agreement?
 7 A. Merrill Lynch Mortgage Investors as the
 8 depositor, Wachovia Bank National Association as the
 9 master servicer, Midland Loan Services, Inc. as the
 10 special servicer, and LaSalle Bank National Association
 11 as trustee.
 12 Q. And did LaSalle remain as trustee for that
 13 trust up until today's date --
 14 MR. KORTE: Hearsay, Your Honor.
 15 BY MS. HEYER-BEDNAR:
 16 Q. -- to your knowledge?
 17 THE COURT: I'm sorry, did LaSalle what?
 18 MS. HEYER-BEDNAR: Has LaSalle -- The trustee
 19 listed in the Pooling and Servicing Agreement, Your
 20 Honor, it was listed as LaSalle.
 21 THE COURT: Yes.
 22 MS. HEYER-BEDNAR: The question to the
 23 witness as the special servicer, is has LaSalle
 24 remained the trustee under the Pooling and
 25 Servicing Agreement for these loans.

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1 MR. KORTE: Hearsay, Your Honor.
 2 THE COURT: If he has personal knowledge as
 3 opposed to just reading from the agreement. I'm
 4 just curious. Do you have personal knowledge of
 5 that to answer?
 6 THE WITNESS: I have a document that spells
 7 out the successor trustee to U.S. Bank.
 8 THE COURT: So you're relying on the
 9 document, the PSA, the Pooling and Servicing
 10 Agreement?
 11 THE WITNESS: The Pooling and Servicing
 12 Agreement, and then there's an instrument of
 13 successor trustee.
 14 THE COURT: All right. Well, I've admitted
 15 the PSA into evidence so I'll overrule the
 16 objection. And, again, I may find later on that I
 17 was wrong, that the PSA shouldn't have been, that
 18 there hasn't been enough of a foundation laid. But
 19 for now I'm letting it in.
 20 MR. KORTE: Your Honor, you're letting the
 21 PSA in or you're --
 22 THE COURT: The PSA is in evidence. So if he
 23 wants to testify about what's in the PSA, I'm going
 24 let him, it's in evidence.
 25 MR. KORTE: I thought the question was

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1 whether or not the successor trustee is contained
 2 in the PSA.
 3 BY MS. HEYER-BEDNAR:
 4 Q. My question was: The Pooling and Servicing
 5 Agreement references LaSalle as the trustee. Is
 6 LaSalle still currently the trustee?
 7 MR. KORTE: Hearsay, Your Honor.
 8 THE COURT: You have to lay the foundation
 9 for that. How does he -- If he knows the answer to
 10 that question, how does he know the answer?
 11 BY MS. HEYER-BEDNAR:
 12 Q. Mr. Reynolds, do you know if LaSalle is still
 13 the trustee for the trust involved in the Tidewater
 14 loan?
 15 A. LaSalle is not the trustee currently.
 16 Q. Okay. How do you know that?
 17 A. Per the instrument of the successor trustee.
 18 MR. KORTE: Move to strike, Your Honor, for
 19 hearsay.
 20 THE COURT: That is hearsay. So I'll sustain
 21 it.
 22 BY MS. HEYER-BEDNAR:
 23 Q. Is there an amendment to the Pooling and
 24 Servicing Agreement?
 25 MR. KORTE: Objection, Your Honor. Hearsay

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1 again.
 2 BY MS. HEYER-BEDNAR:
 3 Q. To your knowledge?
 4 MR. KORTE: Foundation.
 5 THE COURT: Sustained. Well, he can answer
 6 if he knows if there's an amendment.
 7 THE WITNESS: There is an amendment to the
 8 Pooling and Servicing Agreement.
 9 BY MS. HEYER-BEDNAR:
 10 Q. And is Midland a party to that?
 11 A. Midland is a party to that amendment.
 12 Q. And do you know why there is, why an
 13 amendment was executed with respect to the Pooling and
 14 Servicing Agreement which is marked as Plaintiff's
 15 Exhibit 2?
 16 A. The basis for the first amendment was to
 17 redefine the custodian, which is a defined term in the
 18 Pooling and Servicing Agreement.
 19 MR. KORTE: Your Honor, foundation.
 20 THE COURT: Sustained.
 21 BY MS. HEYER-BEDNAR:
 22 Q. Do you have recorded documents, recorded
 23 assignments in Midland's books and records relating to
 24 successor trustees and appointments of, of successor
 25 trustees with respect to the trust?

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1 A. We do have those records in our file. "We"
 2 being Midland.
 3 Q. And does Midland maintain those records in
 4 the regular course of its business?
 5 A. We do.
 6 Q. Is it important for Midland to know who the
 7 trustee is with respect to a trust in which it's a
 8 special servicer?
 9 A. It is.
 10 Q. And so based on the information contained in
 11 the business records of Midland, are you aware of a
 12 successor trustee being appointed after LaSalle?
 13 A. I am.
 14 MR. KORTE: Hearsay, Your Honor.
 15 THE COURT: Sustained. As to that side issue
 16 of whether hearsay is ever admissible in civil
 17 action. The Court accepts affidavits at some
 18 evidentiary hearings as to, for example, attorneys
 19 fees, motions for final summary judgment.
 20 MR. KORTE: Your Honor, in most cases
 21 affidavits are acceptable at summary judgment after
 22 they've had full opportunity to be evaluated and
 23 deposed and countered with other affidavits. In a
 24 full blown evidentiary hearing an affidavit does
 25 not permit me the opportunity to cross-examine.

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1 THE COURT: Evidentiary hearings are like
 2 pregnancy, either there is one or there isn't.
 3 When you say full blown evidentiary hearing. I
 4 mean, aren't there evidentiary hearings that the
 5 Court holds to determine attorneys fees, for
 6 example?
 7 MR. KORTE: Attorneys fees may not be
 8 permitted by affidavit, Your Honor, unless there's
 9 consent by the parties. It requires an evidentiary
 10 hearing, full blown, fully pregnant, where you've
 11 got an expert and you've got testimony on both
 12 sides on both issues. So, no, affidavits are
 13 insufficient. The only place affidavits are
 14 acceptable would be summary judgment.
 15 THE COURT: And that is not an evidentiary
 16 hearing you're saying?
 17 MR. KORTE: No, it's not, Your Honor.
 18 THE COURT: Okay. All right. I'll keep
 19 thinking. In any event, this whole issue of the
 20 hearsay about these business records. Clearly if
 21 the records custodian was present, if there is one,
 22 I don't know that there is, but if there was one,
 23 then all these hearsay issues would be easily ruled
 24 upon and would be overruled. But I'll address that
 25 later on. But continue.

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1 BY MS. HEYER-BEDNAR:
 2 Q. As your role at Midland, is it your
 3 responsibility to maintain a loan file that you're
 4 actually handling for Midland that's in default?
 5 A. Yes.
 6 Q. And what documents do you maintain from the
 7 loan file?
 8 A. The standard loan documents, notes,
 9 assignment of leases and rents, you know, all the
 10 historical operating information that's been provided.
 11 I mean, everything that really encompasses the loan
 12 that I come across.
 13 Q. And would that also include assignment of
 14 mortgages?
 15 A. It would.
 16 Q. Does Midland have the original loan documents
 17 pertaining to Tidewater today?
 18 A. It does.
 19 Q. And has it brought them to Court?
 20 A. It has.
 21 Q. And who is Midland currently holding the loan
 22 documents on behalf of?
 23 A. The custodian.
 24 Q. And who is the custodian holding the
 25 documents on behalf of?

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1 A. U.S. Bank as trustee.
 2 Q. I'm going to show you a document that has
 3 been marked as Plaintiff's Exhibit 7 which is Bate
 4 stamped U.S. Bank 101. And ask you if you recognize
 5 that document?
 6 A. I do.
 7 Q. What is it?
 8 A. It's the promissory note.
 9 MR. WORTMAN: Your Honor, can we have an
 10 extra copy of this, what the witness is referring
 11 to?
 12 THE COURT: Yes.
 13 MS. HEYER-BEDNAR: Yeah. Here's the Bate
 14 stamp numbers.
 15 MR. WORTMAN: Thank you.
 16 BY MS. HEYER-BEDNAR:
 17 Q. Is there an allonge?
 18 A. Yes, there is.
 19 Q. And who is that note from, executed by?
 20 A. Tidewater Estates Co-op, Inc. by Ray
 21 Blanchette.
 22 Q. And who is the lender listed in the
 23 promissory note?
 24 A. Merrill Lynch Mortgage Lending, Inc.
 25 Q. And with respect to the allonge, who is the

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1 allonge executed on behalf of?
 2 A. Merrill Lynch Mortgage Lending, Inc.
 3 Q. And who is the recipient of the endorsement
 4 on the allonge?
 5 A. LaSalle Bank National Association as trustee
 6 for the Registered Holders of MLCFC Commercial Mortgage
 7 Trust 2006-1, Commercial Mortgage Pass-Through
 8 Certificates Series 2006-1.
 9 MS. HEYER-BEDNAR: Your Honor, I have the
 10 original that I would like to go ahead and mark --
 11 I mean, move into evidence Plaintiff's Exhibit F,
 12 which is a copy into evidence instead of the
 13 original.
 14 THE COURT: Okay. Any objection?
 15 MR. KORTE: Your Honor, no objection to
 16 moving the copy in instead of the original.
 17 THE COURT: Okay. It will be admitted
 18 without objection as Plaintiff's 3.
 19 MR. KORTE: May we see the original?
 20 THE COURT: Sure.
 21 MS. HEYER-BEDNAR: You can touch it.
 22 THE COURT: What letter was this, Plaintiff's
 23 what?
 24 MS. HEYER-BEDNAR: It was Plaintiff's F.
 25 MR. KORTE: We're going to use that actual

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1 original as the exhibit.
 2 MS. HEYER-BEDNAR: Fine.
 3 (Plaintiff's Exhibit Number 3).
 4 BY MS. HEYER-BEDNAR:
 5 Q. Mr. Reynolds, is the promissory note executed
 6 by Tidewater secured by collateral?
 7 A. Yes.
 8 Q. And what is it secured by?
 9 A. A hundred --
 10 MR. KORTE: Your Honor, hearsay again.
 11 THE COURT: Sustained.
 12 BY MS. HEYER-BEDNAR:
 13 Q. Was there a mortgage executed in connection
 14 with this loan?
 15 A. There was.
 16 Q. And is Midland the holder of the original
 17 loan documents here today?
 18 A. It is.
 19 Q. Including the mortgage?
 20 A. Yes.
 21 Q. Mr. Reynolds, I'm showing you what has been
 22 marked as Plaintiff's Exhibit G for identification.
 23 Ask you if you recognize that document?
 24 A. I do.
 25 Q. What is it?

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1 A. The mortgage assignment of leases and rents
 2 and security agreement.
 3 Q. Executed by whom?
 4 A. Tidewater Estates Co-op, Inc., Ray
 5 Blanchette, President.
 6 Q. And is Midland currently holding the original
 7 mortgage executed by Tidewater in connection with the
 8 promissory note admitted as Plaintiff's Exhibit 3?
 9 A. It is.
 10 MS. HEYER-BEDNAR: Your Honor, we move to
 11 admit the mortgage marked as Plaintiff's Exhibit G.
 12 We do have the original but we would like to mark a
 13 copy and offer that into evidence instead.
 14 MR. KORTE: No objection, Your Honor.
 15 THE COURT: All right. Be admitted without
 16 objection as Plaintiff's 4.
 17 (Plaintiff's Exhibit Number 4).
 18 BY MS. HEYER-BEDNAR:
 19 Q. Is there an assignment of rents also
 20 contained in the mortgage?
 21 A. It is.
 22 Q. And what type of property is listed as
 23 security in the mortgage for this particular loan?
 24 A. Mobile home community.
 25 Q. And is there also a security interest in

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1 deposit accounts owned by the borrower/titler?
 2 A. There is --
 3 MR. KORTE: Your Honor, objection. What's
 4 the relevancy to this? This is a hearing based
 5 upon receivership, not for sequestration of rents
 6 or foreclosure on any account.
 7 THE COURT: Overruled.
 8 BY MS. HEYER-BEDNAR:
 9 Q. Who currently is collecting payments or was
 10 collecting payments on the Tidewater loan?
 11 A. Wachovia, Wells Fargo.
 12 Q. Does Midland work, as special servicer, work
 13 closely with the master servicer?
 14 A. Midland does.
 15 Q. And do you rely on the records of the master
 16 servicer in carrying out your duties as special
 17 servicer?
 18 A. Midland does.
 19 Q. And do you have access to the master
 20 servicer's records?
 21 A. I do.
 22 Q. "You" being Midland?
 23 A. Yes, Midland does.
 24 Q. And what records does Midland as special
 25 servicer rely on from the master servicer?

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1 A. All of the loan documents, loan histories,
 2 you know, third party reports that have been received,
 3 you know, taxes that have been paid, insurance that's
 4 been paid. All the loan documents.
 5 Q. And does the master servicer maintain those
 6 records on some type of computer system?
 7 A. It does.
 8 Q. And does the master servicer in this case,
 9 Wachovia, Wells Fargo, provide those records to Midland
 10 as special servicer in the regular course of business?
 11 A. They do.
 12 Q. And are the records kept on Midland's
 13 computer system?
 14 A. They are.
 15 Q. And is it kept on the computer system in the
 16 regular course of business?
 17 A. They are.
 18 Q. And are you familiar with the records that
 19 are kept on the system with respect to loan servicing?
 20 A. I am.
 21 Q. And are the records maintained by Midland at
 22 or about the time that they are prepared or generated?
 23 A. Can you repeat that question?
 24 Q. Sure. Does Midland maintain those records at
 25 or about the time that they're either inputted on the

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1 system or scanned into the computer system?
 2 A. They do.
 3 Q. Do you know when Midland became or first --
 4 Strike that.
 5 Do you know when Midland took control of the
 6 Tidewater loan as a special servicer?
 7 A. Was approximately July of 2009.
 8 Q. Do you know when the master servicer became
 9 the master servicer for this loan?
 10 A. That was March 30th of 2006.
 11 Q. And how do you know that?
 12 A. That was established with the Pooling and
 13 Servicing Agreement, which identifies the master
 14 servicer as well as special servicer. The master
 15 servicer's book of record reflects the first, first
 16 payment date as of March 30th, 2006, that's when they
 17 became the official book of record as the master
 18 servicer.
 19 Q. And when was the loan booked on the computer
 20 system so that the master servicer and the special
 21 servicer had access to it?
 22 A. March 30, 2006.
 23 Q. And are you familiar with the computer system
 24 and the loan screen maintained by the master servicer
 25 with respect to the Tidewater loan?

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1 MR. KORTE: Your Honor, hearsay.
 2 THE COURT: Overruled.
 3 THE WITNESS: I am familiar with it.
 4 BY MS. HEYER-BEDNAR:
 5 Q. Mr. Reynolds, let me show you what has been
 6 marked as Plaintiff's Exhibit H for identification, and
 7 ask you if you recognize it?
 8 A. I do.
 9 Q. And what is it?
 10 A. It's a loan history from the master servicer
 11 off of their servicing platform.
 12 Q. And was that accessed by Midland?
 13 A. It was.
 14 Q. And when was the loan booked?
 15 MR. KORTE: Hearsay, Your Honor.
 16 BY MS. HEYER-BEDNAR:
 17 Q. I'm sorry. Let me strike that.
 18 When the loan came over to the master
 19 servicer and the special servicer, is the date the loan
 20 was booked reflected on the loan history screen?
 21 MR. KORTE: Hearsay, Your Honor.
 22 THE COURT: Sustained.
 23 MS. HEYER-BEDNAR: Your Honor, we offer
 24 Plaintiff's Exhibit H into evidence as a record of
 25 Midland Loan Servicing.

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1 THE COURT: What's your objection?
 2 MR. KORTE: Hearsay, Your Honor.
 3 THE COURT: Sustained. The Plaintiff would
 4 have to show that this document was made at or near
 5 the time, by or from information transmitted by a
 6 person with knowledge they've kept in the course of
 7 regularly conducted business activity, et cetera,
 8 et cetera.
 9 MS. HEYER-BEDNAR: Your Honor, I think he
 10 laid that foundation as special servicer and master
 11 servicer. If there's additional questions the
 12 Court would like me to inquire for the foundation,
 13 I'd be happy to do so. But the witness has
 14 testified that it was prepared by the master
 15 servicer, maintained on their computer records,
 16 shared together between the two at or about the
 17 time that it was booked.
 18 THE COURT: Okay.
 19 MR. KORTE: If the Court would like a
 20 comment.
 21 THE COURT: I'm sorry. Yes.
 22 MR. KORTE: He just testified that this is a
 23 screen from a different company. Business records
 24 of a third party, hearsay within hearsay exception,
 25 Your Honor.

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1 THE COURT: He's correct.
 2 BY MS. HEYER-BEDNAR:
 3 Q. Mr. Reynolds, do you know when Midland booked
 4 the loan as special servicer, the loan being Tidewater?
 5 A. That came in existence at the same time of
 6 the transfer, which was July of 2009.
 7 Q. And when did, when did Midland become the
 8 special servicer for this loan?
 9 A. That was March 30th, 2006.
 10 Q. And why did -- When did Midland become aware
 11 that the loan was in default?
 12 A. Once Wachovia established connectivity to
 13 Midland, the transfer or the triggering event was
 14 imminent default, which is one of the definitions of a
 15 transfer event under the Pooling and Servicing
 16 Agreement. At that point Wachovia made the election to
 17 transfer the loan to Midland as special servicer to
 18 remedy the default, or the imminent default in this
 19 case.
 20 Q. And based on Midland's records, do you know
 21 when the default was by Tidewater on this loan?
 22 A. That would be July or, I'm sorry, August of
 23 2009.
 24 Q. And did you, you on behalf of Midland at that
 25 point in time obtain counsel on behalf of Midland to

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1 send a demand letter to Tidewater?
 2 A. I did.
 3 Q. And was a demand letter sent?
 4 A. It was.
 5 Q. And sending out demand letters and retaining
 6 counsel on behalf of Midland, that was part of your job
 7 description and duties?
 8 A. It is.
 9 Q. Let me show you what's being marked, has been
 10 marked as Plaintiff's Exhibit I for identification, and
 11 ask you if you recognize that document?
 12 A. I do.
 13 Q. And what is it?
 14 A. It's the notice of event of default.
 15 Q. And was that sent by counsel on behalf of
 16 Midland as special servicer for U.S. Bank as trustee?
 17 A. It was.
 18 Q. What happened after the default letter was
 19 sent to Tidewater?
 20 A. Communications with Tidewater were still
 21 taking place in the hopes that the borrower and special
 22 servicer could come to some sort of resolution, i.e. a
 23 modification of the loan documents as they existed.
 24 Q. And who was involved in those negotiations?
 25 A. Early on I dealt with Pat McCarthy. It's

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1 standard procedure for us to send out a pre negotiation
 2 letter so that all parties are aware that any sort of
 3 modification is memorialized by document.
 4 Q. And who on behalf of Midland was involved?
 5 A. That would be me.
 6 Q. Anyone else?
 7 A. No.
 8 Q. And did there come a time where payments
 9 resumed after your discussions with Tidewater?
 10 A. Partial payments during the time of the
 11 modification discussions were ongoing, and by partial
 12 payments, there were interest-only payments plus escrow
 13 payments for taxes, insurance and replacement reserves.
 14 That continued for approximately eight months ending
 15 somewhere around April of 2010. That was when the last
 16 payment was received by the master servicer and
 17 connection with the borrower was effectively terminated
 18 between the special servicer and borrower.
 19 Q. And what did Midland do at that point?
 20 A. Midland, you know, through engaged counsel,
 21 issued a notice of acceleration of the debt.
 22 MS. HEYER-BEDNAR: Your Honor, Plaintiff
 23 would like to move to admit Plaintiff's Exhibit I
 24 for identification into evidence.
 25 THE COURT: Any objection?

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1 MR. KORTE: No objection, Your Honor.
 2 THE COURT: It will be admitted as
 3 Plaintiff's 5.
 4 (Plaintiff's Exhibit Number 5).
 5 BY MS. HEYER-BEDNAR:
 6 Q. Mr. Reynolds, I'm showing you what has been
 7 marked as Plaintiff's Exhibit J for identification, and
 8 ask you if you recognize that letter?
 9 A. I do.
 10 Q. And what is it?
 11 A. This is the notice of acceleration of the
 12 debt.
 13 Q. And what was the purpose of that letter
 14 besides acceleration, if any?
 15 A. That was the primary purpose of the letter,
 16 was to accelerate the debt. And it also, you know,
 17 reserved our rights based on partial payments received.
 18 Q. Did Midland via that letter also make a
 19 demand for rents?
 20 A. Yes.
 21 Q. And deposit accounts?
 22 A. Yes.
 23 Q. During November 20th, 2009, until the demand
 24 letter was served on or about April 13, 2010, did you
 25 at Midland ever receive any communications, verbal or

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1 in writing, from Tidewater that Midland was not the
 2 proper party to be discussing a work out of this loan
 3 or default of this loan?
 4 A. I did not.
 5 Q. Has Tidewater made any payments on the loan
 6 since the demand was served in April of 2010?
 7 A. They have not.
 8 Q. Has Tidewater turned over any rents that
 9 they've been collecting from the property?
 10 A. They have not.
 11 Q. Tidewater turned over any deposits to Midland
 12 in response to the demand letter?
 13 A. They have not.
 14 Q. To your knowledge since April 2010 has
 15 Tidewater been collecting rents on the property?
 16 A. To my knowledge, yes, they have.
 17 MS. HEYER-BEDNAR: If I may just have a
 18 moment, Your Honor.
 19 BY MS. HEYER-BEDNAR:
 20 Q. Mr. Reynolds, as part of the original loan
 21 file that Midland obtained for purposes of today's
 22 proceeding, did Midland also obtain and bring an
 23 assignment of mortgage?
 24 A. It did.
 25 Q. And was the assignment recorded in the public

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1 records of Broward County?
 2 A. It was.
 3 Q. Was there, in fact, two assignments of the
 4 mortgage with respect to the Tidewater loan recorded in
 5 the public records?
 6 A. There was.
 7 MR. KORTE: Your Honor, while counsel is
 8 looking for her documents, can we step outside and
 9 excuse our experts because it's going to be well
 10 after five?
 11 THE COURT: Let's take a moment and discuss
 12 scheduling.
 13 MR. KORTE: Okay.
 14 THE COURT: Obviously we're not going to
 15 finish this hearing today, but I think the parties
 16 knew that, right? I heard that the parties wanted
 17 three days for this.
 18 MR. WORTMAN: That's what we estimated, Your
 19 Honor.
 20 THE COURT: And I was told that we couldn't
 21 continue this tomorrow or Wednesday based on
 22 somebody's schedule? I mean, I'm available.
 23 MS. HEYER-BEDNAR: Right.
 24 MR. KORTE: I've got a trial in Lee County.
 25 I can't confirm as I'm standing here. I know I'm

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1 not available tomorrow for two other issues. I can
 2 attempt to move depositions, but I don't know. I'd
 3 have to go outside and check and find out.
 4 THE COURT: All right. Can you find out now?
 5 MR. KORTE: Yes.
 6 THE COURT: Let's take a short recess and
 7 find out.
 8 (Off the record 4:17 - 4:33).
 9 THE COURT: All right. We're back on the
 10 record. The parties are present. Off the record
 11 we discussed scheduling issues, and the parties
 12 have agreed that we will continue this hearing for
 13 April 25th and 26th; is that correct?
 14 MR. KORTE: March.
 15 THE COURT: March. Wait, March?
 16 MS. HEYER-BEDNAR: No, April.
 17 MR. KORTE: I'm sorry. April.
 18 THE COURT: April 25th and April 26th. And
 19 we'll start at 10:00 a.m. on both days. Since we
 20 don't have a trial order, the parties can now state
 21 on the record what it is that they want and expect
 22 from each other and how many days are reasonable
 23 for the other party to comply.
 24 MR. KORTE: I think we've agreed that the
 25 parties will exchange witness and exhibit lists

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1 within ten days of each other of today, and give
 2 opportunity to depose each other's experts as
 3 reasonably available between now and then. We'll
 4 make them -- I think our experts are almost always
 5 in the State of Florida.
 6 MS. HEYER-BEDNAR: I don't know. I don't
 7 know who --
 8 MR. KORTE: On, they are. I'm telling you.
 9 MS. HEYER-BEDNAR: Yeah, we also would like
 10 any reports prepared by any experts because we've
 11 received nothing as of today.
 12 THE COURT: All right. That will also be
 13 supplied within ten days from today?
 14 MR. KORTE: Yes, Your Honor.
 15 THE COURT: Okay. And the parties can supply
 16 to the Court any cases they would like the Court to
 17 read regarding hearsay. And I would like to let
 18 the parties know that 90.803, subsection 15,
 19 according to Ehrhardt, does apply to not just real
 20 property but also personal property. I don't know
 21 if that matters. But just as an aside.
 22 So, yeah, the parties want the Court to
 23 consider any case law, how much time would you want
 24 for that? How about if you give it to me five
 25 days, by April 20th?

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1 MR. KORTE: Absolutely, Your Honor.
 2 THE COURT: Any other issues that we need to
 3 address before we adjourn?
 4 MR. KORTE: No, Your Honor. I don't know
 5 that there's any prohibition, the Court would
 6 prohibit us from taking videotape depositions of
 7 experts to prevent us having to recall theirs or
 8 ours to avoid the expense of travel. I don't know
 9 if that's prohibited or the Court just wants them
 10 live.
 11 MS. HEYER-BEDNAR: Don't know yet. I haven't
 12 even seen the exhibit -- I haven't seen a report
 13 yet. We can certainly talk about that.
 14 THE COURT: I have no objection to that
 15 certainly. And the reason that we're not finishing
 16 with Mr. Reynolds is because defense counsel has
 17 proffered that he's going to be crossing, cross
 18 examining for a number of hours. We're obviously
 19 not going to finish today anyway so we might as
 20 well adjourn. Any other issues before we adjourn?
 21 MR. KORTE: No, Your Honor.
 22 THE COURT: All right. Now since the rule
 23 was invoked and this hearing is being continued,
 24 obviously the lawyers need to instruct the
 25 witnesses or potential witnesses that the rule is

1 continuing until the end of the hearing.
2 So to the parties that or potential witnesses
3 that are in the room, make sure that you don't talk
4 with anyone about what transpired at this hearing
5 so far, and don't talk with anyone other than the
6 attorneys about your testimony about this case.
7 And the lawyers will make sure to properly advise
8 their witnesses.
9 MR. KORTE: Yes, Your Honor.
10 MS. HEYER-BEDNAR: Yes. Thank you, Your
11 Honor.
12 THE COURT: Okay. Anything else before we
13 adjourn?
14 MR. KORTE: No, Your Honor.
15 MR. WORTMAN: No, Judge.
16 THE COURT: Okay. Then we're in recess.
17 MS. HEYER-BEDNAR: Thank you, Your Honor.
18 (Proceedings were concluded at 4:37 p.m.)
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