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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:	Main Case No.
RESIDENTIAL CAPITAL, LLC, et al.,	12-12020-mg
Debtors.	

- - - - -x

BURNETT,	Adv. Case No.
Plaintiff,	15-01044-mg
-against-	

RESIDENTIAL CAPITAL, LLC, et al.,  
Defendants.

- - - - -x

In the Matter of:	Main Case No.
GMAC MORTGAGE, LLC,	12-12032-mg
Debtors.	

- - - - -x

HEYWARD,	Adv. Proc. No.
Plaintiff,	14-01778-mg
-against-	

GMAC MORTGAGE, LLC, et al.,  
Defendants.

- - - - -x

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United States Bankruptcy Court

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One Bowling Green

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New York, New York

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March 31, 2015

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10:04 AM

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B E F O R E:

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HON. MARTIN GLENN

25

U.S. BANKRUPTCY JUDGE

Hearing RE: Order to Show Cause Why Court Should Not Impose  
Sanctions Pursuant to Federal Rule of Bankruptcy Procedure 9011  
Against Pablo E. Bustos, Esq.

(CC: Doc. No. 8208) ResCap Liquidating Trust's Eighty-Fourth  
Omnibus Objection to Claims (I) Reducing and Allowing Claims  
and (II) Redesignating, Reducing, and Allowing Claims Filed by  
Joseph A. Shifer on Behalf of ResCap Liquidating Trust.

(Doc. No. 8343, 8349, 7736, 7817, 7824, 7967) Telephonic Status  
Conference RE: Claim(s) of Maria M. and Elda Thompson.

(CC: Doc# 7990) Adjourned Hearing RE: Motion for Objection to  
Claim(s) Number 2397.

(CC: Doc# 8042) ResCap Borrower Claims Trust's Eighty-Second  
Omnibus Objection to Claims (No Liability Borrower Claims).

(CC: Doc# 7760) Pre-Trial Conference RE: Objection of the  
ResCap Borrower Claims Trust to Claim Number 5067.

15-01044-mg: Pre-Trial Conference.

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2 14-01778-mg: (CC: Doc#15) The ResCap Liquidating Trust's  
3 Motion to Dismiss Plaintiff's Adversary Complaint.

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BUSTOS & ASSOCIATES, P.C.

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BY: PABLO E. BUSTOS, ESQ.

9

10

11

ALSO PRESENT:

12

GWENDELL L. PHILPOT, Party Pro Se

13

HEROLD GAY, Party Pro Se (TELEPHONICALLY)

14

DEANNA HORST, Senior Director of Claims, ResCap

15

(TELEPHONICALLY)

16

KATHY PRIORE, ESQ., Associate Counsel, ResCap Liquidating

17

Trust (TELEPHONICALLY)

18

JOHN E. SATTERWHITE, Party Pro Se (TELEPHONICALLY)

19

KENNETH C. THOMAS, Party Pro Se (TELEPHONICALLY)

20

ELDA THOMPSON, Party Pro Se, Maria M. Thompson

21

(TELEPHONICALLY)

22

STEVEN D. RIGEL, Party Pro Se (TELEPHONICALLY)

23

24

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## RESIDENTIAL CAPITAL, LLC, et al.

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1 P R O C E E D I N G S

2 THE COURT: You may be seated. We're here in  
3 Residential Capital, number 12-12020.

4 Mr. Rosenbaum.

5 MR. ROSENBAUM: Good morning, Your Honor. Norm  
6 Rosenbaum, Morrison & Foerster, for the ResCap Borrower Claims  
7 Trust and the ResCap Liquidating Trust.

8 Your Honor, the first matter on the agenda is at page  
9 6, num -- excuse me, II. It's the order to show cause why the  
10 Court should not impose sanctions pursuant to Federal Rule of  
11 Bankruptcy Procedure 9011 against Pablo E. Bustos, Esquire.  
12 That's docket number 8207. I'm not sure if Mr. Bustos is in  
13 the court or --

14 THE COURT: Mr. Bustos, are you present?

15 Mr. Bustos is not present in court. Mr. Bustos called  
16 my chambers several days ago, said he's moved to Arizona and  
17 asked permission to appear by telephone. He was  
18 directed -- the answer to that was no.

19 The order to show cause in this matter was entered on  
20 February 26th, 2014. I won't read the entire order, but it was  
21 an order to show cause why Court should not impose sanctions  
22 pursuant to Federal Rule of Bankruptcy Procedure 9011 against  
23 Pablo E. Bustos, Esquire. The last paragraph of the order on  
24 page 4 provide that -- ordered that -- "ordered that Bustos and  
25 counsel for the Trust shall appear in person at the hearing on

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1 March 31, 2015".

2 The order to show cause also, on page 4, reads as  
3 follows: "Ordered that on or before 5 p.m., March 13, 2015,  
4 Bustos shall file a response to this order explaining why cause  
5 exists such that the Court should not impose sanctions against  
6 him. Bustos' response shall address, as this Court has done in  
7 this order and its opinion, each of the eleven affirmative  
8 defenses asserted in the opposition, explaining why each  
9 affirmative defense does not constitute a violation of  
10 Bankruptcy Rule 9011."

11 Bustos filed a response. It's dated March 13, 2015.  
12 He failed to address, as directed by the -- the Court had  
13 directed him to address each of the affirmative defenses to  
14 establish why he didn't violate Rule 9011. With respect to  
15 each one, he failed to do so. He's also failed to appear  
16 today.

17 On February 26th, 2014, the Court entered its  
18 memorandum of opinion and order sustaining, in part, and  
19 overruling, in part, the ResCap Borrower Claims Trust's  
20 objection to claim numbers 345 and 3743, filed by Conrad B.  
21 Burnett, Jr. That memorandum of opinion addressed the Trust's  
22 objection to Burnett's claims, specifically addressed each of  
23 the eleven affirmative defenses that Bustos asserted in his  
24 opposition to the objection to Burnett's claims.

25 In page 16 of that opinion, the Court stated as



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1 follows: in any event -- "In any event, Burnett or, rather,  
2 his attorney fails to establish that any of the affirmative  
3 defenses actually support the claims; not one provides even an  
4 inkling of a viable form of relief. The Court concludes that  
5 the affirmative defenses are frivolous, untimely,  
6 unsubstantiated by the evidence in the record before the Court  
7 and/or unsupported by current or applicable law, existing law  
8 or by a nonfrivolous argument for the extension, modification  
9 or reversal or existing law or the establishment of new law.

10 "It is evident that Burnett's attorney did not  
11 adequately research these defenses and has attempted to throw  
12 anything at the wall in the hopes that something may stick.  
13 Needless to say, nothing sticks." And obviously, the opinion  
14 goes on from there.

15 So the argument to show cause incorporated the opinion  
16 from which I've just quoted. Bustos' response to the order to  
17 show cause -- I should say, in addition to his response, which  
18 is the "Affirmation of Pablo E. Bustos in Support of Dismissal  
19 of Sanctions Motion", he also provided a declaration of Dennis  
20 J. Huelbig, H-U-E-L-B-I-G-, Jr., in support of dismissal of an  
21 order to show cause as to Attorney Pablo E. Bustos, Esq.

22 In addition, filed on the docket is a letter from Mr.  
23 Burnett, dated March 25th, 2015. If Mr. Bustos was here, I  
24 would be inquiring, because Mr. Burnett indicated that he  
25 retained a firm called New Research Services out of Las Vegas

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1 to create and process the claims and necessary paperwork. This  
2 firm is a paralegal firm that claims to be familiar with  
3 Federal Bankruptcy procedure. New Research Services is owned  
4 and operated by one person, Dennis Huelbirg, Jr. (sic).

5 "I was told in August by New Research Services that I  
6 needed an attorney specialized in bankruptcy to collect and  
7 process the proofs of claims. I agreed to the suggestion and  
8 paid New Research Services for an attorney in the pleadings  
9 required under the Federal Bankruptcy procedure. I have spent  
10 over 11,000 dollars for paperwork and attorney services to  
11 date. I have requested from Mr. Bustos an invoice for services  
12 rendered and, to date, have not received an invoice with  
13 billable hours. Mr. Bustos claims he has not been enough money  
14 by New Research Services yet, yet I was billed for over forty  
15 hours of legal work."

16 That's on the docket as well.

17 The Court finds and concludes that Pablo E. Bustos has  
18 violated Federal Rule of Bankruptcy Procedure 9011(b) of 9011.  
19 And 9011(b) provides that the Court may, on its own initiative,  
20 enter an order describing the specific conduct that appears to  
21 violate (b) and directing an attorney, law firm or party to  
22 show cause why it has not violated (b) with respect thereto.  
23 That's what the order to show cause did. The order to show  
24 cause incorporated the opinion that I've referred to.

25 Bustos' response failed to do what he was directed to

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1 do, namely address each of the affirmative defenses that were  
2 asserted in the opposition to the objection to the -- the -- to  
3 Burnett's claims. The Court finds and concludes that Bustos  
4 has violated Federal Rule of Bankruptcy Procedure 9011(b). His  
5 failure to appear today, as ordered by the Court, also violates  
6 the Bankruptcy Rules and is subject to sanction.

7 The Court will enter an order imposing sanctions in  
8 the amount of 1,000 dollars for each of the eleven affirmative  
9 defenses that were improperly asserted, so that's a total of  
10 11,000 dollars. In addition, the Court will enter an  
11 additional sanction in the amount of 2,500 dollars against  
12 Bustos for failure to appear today, as he was ordered today.  
13 So in total, sanctions in the amount of 13,500 dollars payable  
14 to the clerk of the Court will be entered against Bustos with  
15 an order that he pay the clerk within fourteen days from the  
16 entry of the order.

17 (Pause)

18 THE COURT: All right. That's going to be the Court's  
19 disposition of the order to show cause and an additional  
20 sanction as a result of Bustos' failure to appear today.

21 MR. ROSENBAUM: Thank you, Your Honor.

22 Your Honor, the next matter on the agenda is at page  
23 7. It's III. This is a pre-trial -- scheduled pre-trial  
24 conference in adversary proceeding 15-01044. It's Burnett v.  
25 Residential Capital, LLC. That was also filed by --

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1 THE COURT: Mr. Bustos.

2 MR. ROSENBAUM: -- Mr. Bustos on behalf of Mr.  
3 Burnett.

4 Your Honor, as we addressed in our response to the  
5 order to show cause, this is an entirely frivolous complaint.  
6 We did invoke the supplemental adversary procedures. We have  
7 had at least phone calls to Mr. Bustos, but we have not heard  
8 back from him. Once --

9 THE COURT: Were you aware he moved to Arizona?

10 MR. ROSENBAUM: I wasn't. I don't know if Mr. Wishnew  
11 was.

12 MR. WISHNEW: I can only say -- Your Honor, Jordan  
13 Wishnew, ResCap Borrower Claims Trust -- I received a voicemail  
14 from Mr. Bustos last evening indicating he was coming back from  
15 Arizona. I wasn't aware that he had actually moved to Arizona,  
16 so the answer being no, Your Honor.

17 MR. ROSENBAUM: Thank you.

18 In any event, had he spoken to us, we would have asked  
19 him to just voluntarily dismiss this complaint. If he's not  
20 prepared to comply with the adversary procedures, then we could  
21 move to dismiss it as well. We'd obviously prefer not to incur  
22 that expense.

23 THE COURT: Well, Mr. Rosenbaum, you'll decide how the  
24 Trust wishes to proceed. I would certainly point out that Rule  
25 9011(c)(1)(A) sets forth the procedure to be followed. If a

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1 party wishes to seek sanctions, I won't comment about the  
2 substance of the adversary proceeding complaint that's been  
3 filed. If you wish to proceed under 9011(c)(1)(A), in part,  
4 the motion for sanctions may not be filed with or presented to  
5 the Court unless -- within twenty-one days after service of the  
6 motion or some other period as the Court may prescribe the  
7 challenge paper claim defense, contention, allegation or denial  
8 is not withdrawn or appropriately corrected. I won't read on.

9 So there's a procedure. The matter was set for a case  
10 management conference today. Mr. Bustos has failed to appear  
11 for it. Was he notified that the conference was going forward?

12 MR. ROSENBAUM: Yes.

13 THE COURT: All right. An additional sanction will be  
14 entered against Mr. Bustos in the amount of 2,500 dollars for  
15 failure to appear for the case management conference  
16 in -- what's the adversary proceeding number?

17 MR. ROSENBAUM: 15-1 -- 15-01044.

18 THE COURT: A separate order will be entered on  
19 sanctions and that it will be incorporated into the same order.

20 Mr. Bustos is not having a good day.

21 MR. ROSENBAUM: Thank you, Your Honor. We'll decide  
22 how to proceed on the adversary.

23 Just lastly, Your Honor -- I mean, we are, obviously,  
24 cognizant of your -- of the order that you did enter on the  
25 claims objection, and we would like to have a dialogue with Mr.

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1 Burnett.

2 THE COURT: He's represented by counsel.

3 MR. ROSENBAUM: Thank you.

4 THE COURT: I can't help you on that one. I -- you  
5 undoubtedly saw the letter that Mr. Burnett filed with the  
6 Court.

7 MR. ROSENBAUM: Thank you, Your Honor.

8 THE COURT: "I would ask the Court to keep Pablo  
9 Bustos as my attorney of record to finish the case for the  
10 timely proofs of claim 245 and 3743."

11 MR. ROSENBAUM: We'll respect his decision, and we'll  
12 try to reach out to Mr. Bustos, Your Honor.

13 Your Honor, the next matter of agenda is IV. It's the  
14 ResCap Liquidating Trust's eighty-fourth omnibus objection, and  
15 I'll cede the podium to Kramer Levin.

16 THE COURT: Sure.

17 MR. ALLARD: Good morning, Your Honor. Nathaniel  
18 Allard of Kramer Levin Naftalis & Frankel for the ResCap  
19 Liquidating Trust.

20 I'm here on the eighty-fourth omnibus objection to  
21 claims, which --

22 THE COURT: Eighty-fourth or eighty-second?

23 MR. ALLARD: Eighty-fourth. We're at page 7 of the  
24 agenda --

25 THE COURT: Sorry.

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1 MR. ALLARD: -- IV.

2 THE COURT: All right, go ahead.

3 MR. ALLARD: Sure. It's the eighty-fourth omnibus  
4 objection to the claims, which the liquidating trust filed on  
5 February 26th, 2015, and it can be found at ECF number 8208.

6 THE COURT: Okay.

7 MR. ALLARD: Pursuant to the objection, the  
8 liquidating trust seeks to reduce and allow certain claims. We  
9 have already resolved or adjourned certain of the claims  
10 subject to the objection, and no responses were filed. So we  
11 are going forward today solely with respect to four claims  
12 filed by Wells Fargo Bank, and that is claim number 7359, 7360,  
13 7366 and 7373. And we would just request entry of an order  
14 reducing and allowing the -- those Wells Fargo claims subject  
15 to the objection.

16 THE COURT: Now, is it -- my understanding, it's going  
17 forward on an uncontested basis?

18 MR. ALLARD: That's correct. It's uncontested.

19 THE COURT: So is there anyone present on -- in the  
20 courtroom or in the telephone for Wells Fargo?

21 Just to advise me -- tell me, what -- you've reached  
22 an agreement with Wells?

23 MR. ALLARD: No, we were in contact with counsel to  
24 Wells Fargo prior to and the day of filing the objection.

25 THE COURT: Yes.

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1 MR. ALLARD: And we informed them of our intentions,  
2 and they did not file a response. And we interpret that as  
3 they are accepting of the reduced and allow of the claim would  
4 be one claim against Residential Funding Company for 50,541  
5 dollars and a claim against GMAC Mortgage in the amount of  
6 \$7,903.24, and the other two claims would be disallowed and  
7 expunged.

8 THE COURT: So -- all right. Since they don't have  
9 their counsel, they didn't file anything, let me just make some  
10 recitals. Through the objection, the Trust seeks to reduce and  
11 allow four claims filed by Wells Fargo because they allegedly  
12 overstate the value owed and should, therefore, be reduced. In  
13 its capacity as custodian of certain mortgage backed security  
14 trusts, warehousing facilities, pools of mortgage loans and  
15 other financing arrangements, Wells Fargo filed claim number  
16 7359 against debtor Residential Capital, LLC; claim number 7360  
17 against debtor Residential Funding Company; claim number 7366  
18 against debtor GMAC Mortgage, LLC and claim number 7373 against  
19 debtor Executive Trustee Services, Inc.

20 According to the Trust, the Wells Fargo claims are  
21 based on custodial agreements with the debtors and Wells Fargo,  
22 and the debtors entered into a stipulation whereby all of Wells  
23 Fargo's potential custodial claims, of which there were more  
24 than four, were deemed consolidated into the Wells Fargo claims  
25 that I have here.



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1           The Trust conducted an investigation of the debtors'  
2 books and records and determined that Wells Fargo was entitled  
3 to a general unsecured claim of 50,541 dollars against RFC and  
4 a general unsecured claim in the amount of \$7,903.24 against  
5 GMAC Mortgage. The Trust, therefore, argues that claim number  
6 7360 should be allowed in the amount that I've described  
7 against RFC, and claim number 7366 should be allowed in the  
8 amount I've described against GMACM and that claim number 7359  
9 and 7373 should be disallowed and expunged.

10           Wells Fargo did not file any response. Good cause  
11 appears to support the objection. The objection's sustained.

12           MR. ALLARD: Thank you, Your Honor. We will submit a  
13 order to chambers.

14           THE COURT: Thank you.

15           MR. WISHNEW: Good morning, Your Honor. Jordan  
16 Wishnew, Morrison Foerster for the ResCap Borrower Claims  
17 Trust.

18           The next matter on today's agenda is item 2 on page 8,  
19 the ResCap Borrower Claims Trust's seventy-sixth omnibus  
20 objection to claims. It is a status conference concerning the  
21 claim of Maria and Elda Thompson, and I believe Ms. Elda  
22 Thompson is on the phone today.

23           THE COURT: Ms. Thompson, are you on the telephone?

24           MS. THOMPSON: Yes.

25           THE COURT: Thank you very much.

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1 Go ahead, Mr. Wishnew.

2 MR. WISHNEW: Thank you, Your Honor.

3 Your Honor, just to update the Court, when we were  
4 last before Your Honor, we were arguing to have the claim  
5 expunged under the -- for the reasons stated in the  
6 omnibus -- seventy-sixth omnibus objection. There were  
7 questions raised concerning whether, in fact, Ms. Thompson had  
8 made the payments that we asserted were not made and prompted  
9 the foreclosure proceeding to be commenced in July of 2007  
10 against Ms. Thompson.

11 The Court subsequently directed counsel to meet with  
12 Ms. Thompson. Ultimately, on March 17th, I appeared -- or I  
13 visited with Ms. Thompson at her home in Willingboro, New  
14 Jersey, discussed the claim, reviewed payments that the  
15 claimant believed reflected timely payment of the nonpayments  
16 preceding the 2007 foreclosure. And what I was shown, in fact,  
17 were payments made in 2008 pursuant to a repayment plan that  
18 Ms. Thompson had entered into with GMAC Mortgage, which brought  
19 current the loan on account the missed payments in the spring  
20 of 2007.

21 So it was essentially my position that,  
22 notwithstanding that there have been representation that they  
23 had documents to show payment, the documents that were  
24 ultimately shown to me didn't substantiate a timely payment  
25 prior to the commencement of the July 2007 foreclosure. Once I

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1 sat with Ms. Thompson -- I think her mother, Maria Thompson,  
2 in -- for approximately seventy-five minutes that day, and  
3 ultimately word came out is there -- the disagreement as to  
4 whether or not the debtors are or are not responsible to them  
5 for any liability, seeing that we had reached, in my opinion,  
6 an impasse, I asked to excuse myself from their home and  
7 suggested that it was best to try and have the Court instruct  
8 us as to what contested issues the Court sees that it would  
9 like further evidence on so that we can try and bring this to a  
10 head and to a resolution.

11 And that's what's brought us here today, Your Honor.

12 THE COURT: All right. And the Court is in receipt of  
13 a letter from Elda and Maria Thompson. It's dated March 24th,  
14 2015, and it refers to your meeting, Mr. Wishnew. I assume  
15 you've seen the letter.

16 MR. WISHNEW: I have, Your Honor.

17 THE COURT: Okay. So I had directed -- well, Ms.  
18 Thompson, do you want go ahead and respond?

19 MS. THOMPSON: Yes. I -- actually, on the day that he  
20 came to our house, Your Honor, he actually didn't want to  
21 discuss the items blacked out on the accounts, itemized, to  
22 show the payments, because we were concerned that -- in 2007,  
23 we were sent an accounting of everything that I had paid and  
24 not paid. And we showed him that. But on the one that he sent  
25 us, it's blacked out payments that we cannot see the amount.

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1 We asked him about that, and he said it's only  
2 attorney privilege to see items only. But I thought everything  
3 that paid on my account, under my name, I should be able to  
4 see. And he was not here for seventy-five minutes. So that's  
5 a little exaggeration on his time.

6 THE COURT: Look, Ms. Thomp --

7 MS. THOMPSON: So we tried to show -- well, we tried  
8 to show that the payments that he claims was the -- from the  
9 repayment arrangement, he -- we tried to show him that. He got  
10 a little upset and said I don't need to be shown out and left.  
11 That's not what ended it.

12 THE COURT: All right. Ms. Thompson --

13 MS. THOMPSON: Now, I -- my concern was that in 2007  
14 we made an arrangement, because they sent -- they sent a  
15 sheriff to the house saying that the foreclosure was approved  
16 and claiming that the foreclosure was approved in July and in  
17 August. Now, when we came to find out that the mortgage  
18 actually was dismissed, they knew that it was dismissed. And  
19 even though they knew that it wasn't approved, they still went  
20 ahead with these arrangements that included court costs and  
21 attorney costs, which we ended up paying, over \$28,369.95. We  
22 tried to explain that.

23 On that day that they sent a sheriff to the house, I  
24 suffered a major heart attack and ended up having to be revived  
25 six times in front of my children. Now, I think that they

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1 overstepped when they sent the sheriff to the house knowing  
2 that the foreclosure was not going to be able to go through.  
3 And the following year, they kept accepting the payments even  
4 though they weren't listing the payments on the account, which  
5 is -- which shows on the reflected -- on the account's itemized  
6 section that they sent. It's also not reflected on there.

7 And so we were trying to explain to him that the  
8 payments that I had made, most of -- all the payments that I  
9 had made are not shown on the itemized account. They did not  
10 put them on the account.

11 THE COURT: Ms. Thom --

12 MS. THOMPSON: And we wanted to know why --

13 THE COURT: Ms. Thompson, stop. Stop.

14 When you were here last in court, you told the Court  
15 that you had bank records that showed --

16 MS. THOMPSON: Yes.

17 THE COURT: Stop. Don't interrupt me, please -- that  
18 you had bank records that show the payments made to the Trust.  
19 You -- the Trust lawyer said they have no record of having  
20 received the payments. You indicated it was made --

21 MS. THOMPSON: I show --

22 THE COURT: Stop, don't interrupt.

23 You indicated you had made the payments in the -- and  
24 they had been credited against your account -- drawn against  
25 your account. I asked whether you had the documents with you

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1 in court; you told me you did not. I directed Mr. Wishnew  
2 that, either, he or one of his colleagues go to your home to  
3 meet with you -- that was agreeable with you -- for you to show  
4 the Trust's lawyer your bank records showing that you had made  
5 the payments.

6 That's why --

7 MS. THOMPSON: I --

8 THE COURT: -- Mr. Wishnew -- don't interrupt. That's  
9 why Mr. Wishnew went to meet with you at a date you agreed on.

10 What you're now complaining about is the Trust's  
11 records, those which are redacted to remove certain entries.  
12 They've asserted it's based on attorney-client privilege. What  
13 Mr. Wishnew has indicated to the Court is that you did not show  
14 him any of your bank records showing that you had made the  
15 payments.

16 Did you show him bank records establishing that you  
17 had made the payments?

18 MS. THOMPSON: Yes, I did. I have it in my hand.

19 THE COURT: Well --

20 MR. WISHNEW: Your --

21 THE COURT: -- you didn't have it in your hand in  
22 court.

23 Mr. Wishnew, did she show you records -- her bank  
24 records that payments were made?

25 MR. WISHNEW: What she showed me was a check receipt,

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1 like, essentially --

2 MS. THOMPSON: Yes, I did.

3 THE COURT: Ms. Thompson, stop. Let Mr. Wishnew  
4 answer. I'll give you a chance to speak again.

5 Go ahead, Mr. Wishnew.

6 MR. WISHNEW: What I saw, Your Honor, was essentially  
7 the copy or the receipt from a check, which showed that on a  
8 certain date in 2008 a check was drawn to GMAC Mortgage. Now,  
9 that would be a payment made pursuant to the repayment plan,  
10 months, if not almost a year after the payment should have been  
11 made. I did not see any checks or any bank records from the  
12 spring of 2007 on account of the months that were missed and  
13 led to the commencement of the foreclosure proceedings.

14 THE COURT: All right.

15 All right. I'm going to schedule an evidentiary  
16 hearing. There's a disputed issue of fact, whether the  
17 Thompsons made the payments. They claim they did. The Trust  
18 claims they didn't. I will schedule an evidentiary hearing.  
19 This seems to me to be fairly straight forward.

20 Monday, April 20th, at 2 p.m. Ms. Thompson --

21 MS. THOMPSON: Yes.

22 THE COURT: -- you need to bring with you any  
23 records -- any bank records you have available to you that  
24 shows the payments you made. Mr. Wishnew contends the payments  
25 that you made in 2007 were in connection with an earlier

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1 repayment plan, not the missed payments that this dispute  
2 relates to. If your position is that you made those payments,  
3 bring that evidence, be prepared to testify about it. I will  
4 listen -- because this is not an evidentiary hearing today.  
5 The Trust will have to bring a witness as well, and -- who can  
6 testify about what their records show about the receipt of  
7 payments, about a repayment plan, et cetera.

8 So I'm scheduling it for 2 p.m., Monday, April 20th,  
9 2015, in my courtroom. You've been here before, Ms. Thompson,  
10 so you know where that is.

11 MS. THOMPSON: Yes, I'm bringing a wheelchair this  
12 time.

13 THE COURT: Okay, that's fine.

14 What records -- Mr. Wishnew, what records do you  
15 expect to rely on at that hearing?

16 MR. WISHNEW: I would expect to rely on the loan  
17 payment history --

18 THE COURT: Okay.

19 MR. WISHNEW: -- and the loan servicing notes, copies  
20 of which have already been provided to Ms. Thompson. And when  
21 she refer to the blacked out portions, that was the blacked out  
22 portions of the loan servicing notes that we redacted for, what  
23 we believed, were --

24 THE COURT: All right.

25 MR. WISHNEW: -- privileged.



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1 THE COURT: What I would direct is, is that, Ms.  
2 Thompson, you and the Trust lawyers, Mr. Wishnew, need to  
3 exchange copies of any exhibits that you intend to rely on at  
4 the hearing on April 20th.

5 Mr. Wishnew, I'm going to ask that you speak with Ms.  
6 Thompson well in advance of that.

7 MR. WISHNEW: Um-hum.

8 THE COURT: And I would ask that you pre-mark the  
9 Thompsons' exhibits, as well as your own so that each -- since  
10 they don't have a lawyer --

11 MR. WISHNEW: Um-hum.

12 THE COURT: -- so that each exhibit has a unique  
13 identifier, all right?

14 So Ms. Thompson, I -- what -- I want you to speak with  
15 Mr. Wishnew and make sure that you exchange those exhibits by 5  
16 p.m., April 15th.

17 And Mr. Wishnew, you bring copies of both your  
18 exhibits and the Thompsons' exhibits to the hearing.

19 MR. WISHNEW: Absolutely, Your Honor.

20 THE COURT: And I --

21 MS. THOMPSON: I will e-mail -- I can e-mail them  
22 today, if you'd --

23 THE COURT: Well, why --

24 MS. THOMPSON: -- like.

25 THE COURT: -- why don't you -- let me -- you speak

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1 with Mr. Wishnew and see whether you can -- you work it out  
2 between the two of you. I want to do this as -- with the least  
3 inconvenience as possible to both sides, and I think it'll be  
4 easier for Mr. Wishnew to present to the Court the pre-marked  
5 exhibits.

6 So -- but anything you want to rely on, any documents  
7 you wish to rely on at the hearing, you need to get them to Mr.  
8 Wishnew. He'll speak with you, and you'll work out the timing  
9 so that he can submit them all on the 15th. Okay?

10 MS. THOMPSON: Okay.

11 THE COURT: All right. Thank you very --

12 MS. THOMPSON: Thank you, Your Honor.

13 THE COURT: -- much, Ms. Thompson.

14 MR. WISHNEW: Thank you, Your Honor.

15 THE COURT: Thank you, Mr. Wishnew.

16 MR. WISHNEW: Your Honor, that brings us to the next  
17 matter on today's agenda, item 3 on page 9, the ResCap Borrower  
18 Claims Trust's objection to claim number 2397, filed by John  
19 Satterwhite. I believe Mr. Satterwhite is on the phone today.

20 THE COURT: Mr. Satterwhite, are you on the phone?

21 MR. SATTERWHITE: Yes, sir, Your Honor.

22 THE COURT: All right.

23 MR. SATTERWHITE: Good morning.

24 THE COURT: Just -- I have to make a note on something  
25 else, so just hang on for a second, okay?

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1 MR. SATTERWHITE: Yes, sir.

2 MS. THOMPSON: I'm sorry; excuse me, Your Honor. This  
3 is Elda Thompson again. We --

4 THE COURT: Oh, yeah, you're excused. You can -- you  
5 don't have to stay on. You're welcome to, but you don't have  
6 to.

7 MS. THOMPSON: All right. Thank you.

8 THE COURT: Thank you, Ms. Thompson.

9 MS. THOMPSON: Thank you, Your Honor.

10 THE COURT: Okay.

11 All right. I've finished with my notes.

12 So Mr. Wishnew, why don't you go ahead with your claim  
13 objection, and then we'll let Mr. Satterwhite respond, okay?

14 MR. WISHNEW: Thank you, Your Honor.

15 This is the Borrower Trust claim's objection against  
16 the claim -- or pertaining to the claim number 2397, filed by  
17 John Satterwhite, which was filed at docket number 7990. Mr.  
18 Satterwhite filed a response to the objection on March 3rd at  
19 docket number 8280. The Trust filed a reply on March 26th,  
20 filed at docket number 8363.

21 In support of the objection, the Borrower Trust  
22 submitted a declaration by Kathy Priore, associate counsel of  
23 the ResCap Liquidating Trust, attached as Exhibit 2 to the  
24 objection. She also submitted a supplemental declaration in  
25 further support of the objection, attached as Exhibit 1 to the

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1 reply. Ms. Priore is appearing by telephone today and is  
2 available to answer any questions the Court might have.

3 Mr. Satterwhite filed a general unsecured claim  
4 designated as claim 2397 on November 5th, 2012 in the amount of  
5 455,000 dollars. Essentially, Your Honor, this is a  
6 claim -- the 455,000-dollar claim is made up of three  
7 components. There is 100,000 dollars for compensatory damages,  
8 350,000 dollars for punitive damages and 5,000 dollars for  
9 attorneys' fees.

10 The crux of the dispute here, Your Honor, is what  
11 liability, if any, GMAC Mortgage has on account of a  
12 foreclosure sale that took place in April 2010. Mr.  
13 Satterwhite has identified three bases for his claim. That is  
14 fraud, implied covenant of good faith and fair dealing and  
15 quiet title. It is the Trust's position that for the reasons  
16 stated in our pleadings the claimant has not established, by a  
17 preponderance of the evidence, a claim on any one of three  
18 bases. At most --

19 THE COURT: I think the issue that -- so you know what  
20 to address -- is whether there are disputed issues of fact that  
21 require an evidentiary to be resolved and whether any of the  
22 three theories for liability, quiet title, breach of covenant  
23 of good faith and fair dealing or fraud --

24 MR. WISHNEW: Sure.

25 THE COURT: -- whether, as a matter of law, those

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1 claims fail. But to the extent that the claims all fail as a  
2 matter of law, the issue is -- this is not an evidentiary  
3 hearing --

4 MR. WISHNEW: Right.

5 THE COURT: -- whether there are disputed issues of  
6 fact that are going to require an evidentiary hearing.

7 MR. WISHNEW: I suggest the answer is, no, Your Honor.

8 THE COURT: Let me ask you to do this. Address,  
9 first, the quiet title --

10 MR. WISHNEW: Sure.

11 THE COURT: -- because that seems to me to be  
12 primarily an issue of law --

13 MR. WISHNEW: And that actually has been --

14 THE COURT: -- that's probably going to be resolved --

15 MR. WISHNEW: -- previously dealt with through a  
16 demurrer motion filed in the Virginia courts, in which --

17 THE COURT: Pronounced demurrer, but --

18 MR. WISHNEW: Demurrer. By the time --

19 THE COURT: I only know because I practiced in  
20 California for many years, and that's what they do out there.  
21 That's the motion to dismiss.

22 MR. WISHNEW: By the time we actually get through and  
23 fully reconcile all these claims, I promise I will actually be  
24 able to pronounce demurrer.

25 So there was a demurrer action in --

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1 THE COURT: There was even a demurrer, too.

2 MR. WISHNEW: Demurrer -- there was a  
3 demurrer -- tomato/tomato, Your Honor.

4 There was a demurrer action in Virginia. There was a  
5 ruling in GMAC Mortgage's favor on the quiet title action. So  
6 at this point, we don't believe there is a valid cause of  
7 action --

8 THE COURT: Well, your basic position is that neither  
9 GMAC nor any of the other debtors assert any claim -- have  
10 any --

11 MR. WISHNEW: Or have --

12 THE COURT: -- claim of title to the property.

13 MR. WISHNEW: Have any interest in the title.

14 THE COURT: Right.

15 MR. WISHNEW: Exactly, Your Honor.

16 THE COURT: You don't have any interest in the  
17 property.

18 MR. WISHNEW: Exactly, Your Honor.

19 THE COURT: And your argument is that a quiet title  
20 action can't lie where the defendant asserts no interest in the  
21 property?

22 MR. WISHNEW: Absolutely correct, Your Honor.

23 THE COURT: Okay.

24 MR. WISHNEW: With regards to implied covenant of good  
25 faith and fair dealing, Your Honor, to extent that GMAC

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1 Mortgage, in its capacity as servicer, was simply enforcing the  
2 terms of the contract, there isn't a separate cause of action  
3 for a breach of the implied duty -- covenant -- the implied  
4 covenant of good faith and fair dealing. It  
5 can't -- essentially, the implied covenant of good faith and  
6 fair dealing can't be the vehicle for rewriting and unambiguous  
7 contract in order to create duties that, otherwise, do not  
8 exist.

9 In support of that, Your Honor, we cite the Covra  
10 Rubius (ph.) case, 2014 Westland 6968035. And that case cites,  
11 in part, Skillstorm, Inv. V. Electric (sic) Data Systems, LLC,  
12 666 F.2d 610 at 620, Eastern District of Virginia 2009. So  
13 those -- we believe those two causes of action are easily dealt  
14 with.

15 With regards to the claim for fraud --

16 THE COURT: Let me -- let's stop on the breach of  
17 covenant of good faith and fair dealing. So what's the  
18 contract that you're focusing on? What are they? Are there  
19 one or more contracts?

20 MR. WISHNEW: Well, I think, Your Honor, it would be  
21 the note here and, to the extent that there is a -- I mean,  
22 it'd really be the relationship that -- to which Mr.  
23 Satterwhite was a party would be the note and his obligation to  
24 pay the note, consistent with taking out the loan he did, and  
25 the GMAC Mortgage's rights as servicer to enforce the terms of

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1 the note on behalf of the lender.

2 THE COURT: All right. Would you agree that GMAC was  
3 the agent for the holder of the note?

4 MR. WISHNEW: Yes, Your Honor.

5 THE COURT: All right. And as an agent, would GMAC  
6 have the authority to agree to a forbearance agreement?

7 MR. WISHNEW: Yes, Your Honor, yes.

8 THE COURT: All right. And could it agree orally to  
9 forbear in timely payments under the note? Look, Mr.  
10 Satterwhite -- there's disputed issues of fact about this, all  
11 right?

12 MR. WISHNEW: Um-hum.

13 THE COURT: He contends that he spoke with  
14 representatives of GMAC --

15 MR. WISHNEW: Um-hum.

16 THE COURT: -- and he didn't use this term, but  
17 essentially agreed -- they would agree that they would forbear  
18 that they wouldn't move forward with foreclosure. Foreclosure  
19 was scheduled --

20 MR. WISHNEW: April 15th, Your Honor.

21 THE COURT: -- for April 15th, and -- bear with me a  
22 second. He alleges that he spoke to someone from GMAC on April  
23 12th, 2010. Foreclosure was scheduled for April 15th, 2010.  
24 Am I right so far?

25 MR. WISHNEW: Yes, Your Honor.



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1 THE COURT: And he alleges that in this phone  
2 conversation he was promised that Bank of New York would not  
3 foreclose on his home while Satterwhite applied for HAMP  
4 modification. And he was advised how to do that. That's his  
5 allegation, right?

6 MR. WISHNEW: Right, and that would be consistent with  
7 the April 12th communication from GMAC Mortgage --

8 THE COURT: Right.

9 MR. WISHNEW: -- concerning the request for  
10 documentation --

11 THE COURT: All right. And --

12 MR. WISHNEW: -- in further support of a workout  
13 package.

14 THE COURT: -- the letter -- I'll get to the issue of  
15 whether the letter was received or not. But there's an April  
16 12th letter, right?

17 MR. WISHNEW: Yes, Your Honor.

18 THE COURT: And so he had to submit it within ten  
19 days.

20 MR. WISHNEW: Yes, Your Honor.

21 THE COURT: Ten days from April 12th. It's not clear,  
22 but it seems to me --

23 MR. WISHNEW: It's not clear.

24 THE COURT: -- if you send the letter on April 12th  
25 and say submit it within ten days, the logical inference is ten

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1 days --

2 MR. WISHNEW: Correct.

3 THE COURT: -- no sooner than ten days from April  
4 12th.

5 MR. WISHNEW: No argument there, Your Honor.

6 THE COURT: But three days later, they were going to  
7 have him foreclosed?

8 MR. WISHNEW: Correct, Your Honor.

9 THE COURT: All right. So if a loan servicer, as an  
10 agent for the noteholder, had the authority to agree to  
11 forbear, why wouldn't that -- and then didn't -- it didn't  
12 because it -- three days later, it went ahead and foreclosed.  
13 Why wouldn't that breach the implied covenant of good faith and  
14 fair dealing? There -- and the Virginia cases, there's a split  
15 in authority exactly about what -- whether Virginia recognizes  
16 an implied covenant of good faith and fair dealing in the  
17 residential mortgage loan context, at least it appears to me  
18 there seems to be some sort -- the cases aren't uniform. You  
19 would agree with that?

20 MR. WISHNEW: I would agree, Your Honor.

21 THE COURT: All right. So why hasn't Mr. Satterwhite  
22 alleged a breach of the covenant of good faith and fair  
23 dealing? He's very specific about that he talked to a GMAC  
24 representative on April 12th. He says what his position is  
25 about what they told him. They did send him a letter dated

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1 April 15th -- or, excuse me -- yeah, they sent him a letter  
2 telling him, submit your application in ten days. But they  
3 went ahead and foreclosed before then.

4 MR. WISHNEW: Um-hum. And --

5 THE COURT: So why doesn't that state a breach of  
6 covenant of good faith and fair dealing?

7 MR. WISHNEW: It doesn't state a breach of the implied  
8 covenant of good faith and fair dealing because what this  
9 really has amounted to -- or what this amounts to is a mistake,  
10 an oversight.

11 THE COURT: Well, sometimes mistakes are breaches of  
12 contracts, sometimes they're negligence of representation,  
13 sometimes they're even fraud.

14 MR. WISHNEW: Well -- but it's fraud, Your Honor --

15 THE COURT: You say it was a mistake.

16 MR. WISHNEW: I say --

17 THE COURT: You say it was a mistake.

18 MR. WISHNEW: Yes.

19 THE COURT: Mr. Satterwhite, he doesn't say it was a  
20 mistake. He says, they told me they wouldn't foreclose. They  
21 would consider my HAMP loan modification. They told me how  
22 much time I had to get it in, but then they just went ahead and  
23 foreclosed. That's what he says. You have a different  
24 position, I understand. I'm not resolving the dispute.

25 MR. WISHNEW: Right.

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1 THE COURT: But --

2 MR. WISHNEW: I guess what we're trying to do, through  
3 the objection, is recognizing that could be a disputed issue of  
4 fact, is to frame for Mr. Satterwhite and for the Court what we  
5 believe a limitation on damages here, which is to make -- to  
6 essentially Mr. Satterwhite whole, restore him to -- provide  
7 him with the equity that he lost at the time of the foreclosure  
8 sale. And so if there is a mistake, then the fact of the  
9 matter is what his damages are, are a little bit over 40,000  
10 dollars as opposed to 100,000 dollars for compensatory damages,  
11 350,000 dollars for punitive damages --

12 THE COURT: Well, let me stop --

13 MR. WISHNEW: -- and --

14 THE COURT: Let me stop you right there.

15 Mr. Satterwhite, in other disputes in the ResCap case,  
16 I have held, including in writing, that punitive damages are  
17 not available from the Trust because there's a fixed amount  
18 available for borrowers' claims, every additional dollar of  
19 claims against that amount is that much less available to  
20 satisfy the claims of other borrowers. And so I've held, in  
21 connection with the Reed claim -- R-E-E-D, I believe it  
22 was -- that punitive damages aren't available.

23 That issue has also come up in connection with the  
24 Mack claim, M-A-C-K. And there, I don't have a written  
25 opinion. I ruled orally from the bench that punitive damages

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1 are not available. So I'm -- I've ruled consistently in this  
2 case with respect to that, so I'm not saying what  
3 damages -- what compensatory damages you may be entitled to  
4 recover. But you're not going to be able to recover any  
5 punitive damages. I just wanted to interrupt you for that  
6 purpose --

7 MR. WISHNEW: No, I appreciate that.

8 THE COURT: -- Mr. Wishnew. You've obviously lived  
9 through this case. Mr. Satterwhite has not.

10 MR. WISHNEW: Understood.

11 THE COURT: And I've already ruled previously with  
12 respect to the punitive damage issue.

13 MR. WISHNEW: No, I appreciate Your Honor's  
14 clarification on that point.

15 So Your Honor, that's really the sum and substance --

16 THE COURT: May I ask you this? if -- I want to make  
17 clear that I don't anticipate ruling now whether Mr.  
18 Satterwhite could recover for breach of covenant of good faith  
19 and fear dealing, which is a contract claim, or fraud  
20 claim -- two types: actual and constructive. Would there be a  
21 difference in the damages remedy --

22 MR. WISHNEW: Absolutely not, Your Honor.

23 THE COURT: -- available under any of those three  
24 theories of recovery?

25 MR. WISHNEW: It's the borrowers trust's position that

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1 it isn't -- there is no difference in recovery; that the  
2 recovery, regardless of whether we are found responsible for  
3 fraud or found responsible for implied covenant of breach  
4 of -- breach of the implied covenant of good faith and fair  
5 dealing, the remedy is the same: making Mr. Satterwhite whole,  
6 which is restoring him or providing a claim for the equity in  
7 the property at the time of the foreclosure.

8 THE COURT: So address the fraud claim -- there are  
9 two theories in the fraud claim, right, actual or construction  
10 fraud.

11 MR. WISHNEW: Yes, Your Honor. That was -- since it  
12 wasn't clear to us what -- whether we were being -- or the  
13 claim was for actual or constructive fraud, we addressed both,  
14 Your Honor. to prevail on a cause of action for actual fraud,  
15 the plaintiff or, in this case, the claimant, Mr. Satterwhite,  
16 must prove by clear and convincing evidence a false  
17 representation of material fact --

18 THE COURT: Virginia applies the clear and convincing  
19 evidence standard?

20 MR. WISHNEW: Yes, Your Honor, cited Richmond  
21 Metropolitan Authority v. McDevitt Street Bovis, Inc., 507  
22 S.E.2d 344 at 346, and I think it's the Supreme Court of  
23 Virginia 1998.

24 THE COURT: Okay.

25 MR. WISHNEW: Made intentionally and knowingly, with

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1 intent to mislead, reliance on the party misled a resulting  
2 damage to the party.

3 Frankly, Your Honor --

4 THE COURT: Let me ask you this. Am I correct that  
5 the Covra Rubius case, which you rely on with respect to actual  
6 fraud, also recognizes that reckless disregard for the truth  
7 satisfies the intent requirement for actual fraud?

8 MR. WISHNEW: Just one moment, Your Honor.

9 THE COURT: That's at Star 5 -- 4.

10 MR. WISHNEW: Yes, correct. Yes --

11 THE COURT: Reckless abandon --

12 MR. WISHNEW: -- yes.

13 THE COURT: -- and --

14 MR. WISHNEW: Yes.

15 THE COURT: -- disregard for the truth.

16 MR. WISHNEW: That is correct, Your Honor, yes.

17 THE COURT: So that would -- reckless disregard for  
18 the truth, which is not uncommon, but that would satisfy the  
19 Virginia requirement for --

20 MR. WISHNEW: For actual fraud, Your Honor.

21 THE COURT: -- intent? Okay.

22 MR. WISHNEW: Yes, Your Honor.

23 Given that the actions here were simply, what the  
24 Borrower Trust contends is, a mistake --

25 THE COURT: Well, we'll see. I mean, I don't know

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1 whether it was or not. I can understand from Mr. Satterwhite's  
2 standpoint -- his argument that it was an egregious mistake  
3 when you talk to GMAC on April 10th, facing an April 15th  
4 foreclosure date, they tell you, according to him, that they  
5 wouldn't go forward with the foreclosure on April 15th, that he  
6 had ten days to submit the HAMP modification package, and then  
7 they just go ahead with foreclosure.

8 I can unders -- I'm not making any determination about  
9 it, but I can understand that he would argue that shows  
10 reckless disregard for the truth.

11 MR. WISHNEW: I unders -- yes, I understand his  
12 position. And obviously, we don't agree with the position. We  
13 feel that this was simply an internal miscommunication with  
14 an --

15 THE COURT: You're going to have people --

16 MR. WISHNEW: -- unfortunate --

17 THE COURT: -- who miscommunicated, come here and  
18 testify?

19 MR. WISHNEW: I'm sorry, Your Honor?

20 THE COURT: You're going to have the internal GMAC  
21 people --

22 MR. WISHNEW: We would have --

23 THE COURT: -- who are going to come here and testify  
24 about this mistake that they made?

25 MR. WISHNEW: Your Honor, if this goes to an



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1 evidentiary hearing, we would be -- we would produce someone  
2 with knowledge of the debtors' servicing practices, who could  
3 address and interpret the servicing notes and explain what  
4 happened to --

5 THE COURT: That's what you're relying on is an  
6 interpret -- somebody's going to interpret the servicing notes  
7 rather than somebody who actually did it?

8 MR. WISHNEW: Your Honor, with the limited resources  
9 that the borrower claims trust and the liquidating trust have  
10 right now, there are a fixed number of people who are  
11 available --

12 THE COURT: Sure.

13 MR. WISHNEW: -- to testify, and so the best we can do  
14 is rely upon --

15 THE COURT: That may be your problem at an evidentiary  
16 hearing.

17 MR. WISHNEW: It -- I acknowledge that, Your Honor.  
18 That's just the inherent problem that the Trust has going  
19 forward. as a liquidating equity with limited resources, it  
20 can -- it has a fixed number of personnel that it can utilize,  
21 and it -- the best it can do is utilize its contemporaneous  
22 business records to substantiate its position.

23 THE COURT: You -- well, your best version of events  
24 is that GMAC made a serious mistake that resulted in Mr.  
25 Satterwhite's home being foreclosed on April 15th, 2010, right?

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1 MR. WISHNEW: Yes, Your Honor.

2 THE COURT: Okay.

3 All right. Talk about constructive fraud.

4 MR. WISHNEW: Sure. So Your Honor, a party claiming  
5 constructive fraud in the context of a contractual relationship  
6 must either show a duty existing outside the scope of the  
7 contract or a fraud in the inducement of the contract, again  
8 citing to the Covra Rubius case at Star 5. It's the Trust's  
9 position that Mr. Satterwhite hasn't alleged either of these  
10 elements. So in that regards, there is not necessarily a claim  
11 for constructive fraud.

12 THE COURT: Let me ask you this -- a couple of  
13 hypothetical questions. I think -- not with respect to  
14 Virginia law but in some of the ResCap claim objections, I  
15 think with respect to other claims for negligent  
16 misrepresentation, which is the equivalent of a negligent  
17 misrepresentation claim -- would you agree with that?

18 MR. WISHNEW: Um-hum.

19 THE COURT: The construct fraud claim here is the  
20 equivalent of what other states would consider a negligent  
21 misrepresentation claim. Is that right?

22 MR. WISHNEW: I believe so, Your Honor.

23 THE COURT: All right. And ordinarily, the loan  
24 servicer doesn't owe a duty to the borrower.

25 MR. WISHNEW: Agreed, Your Honor.

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1 THE COURT: All right. And I haven't seen any cases  
2 under Virginia law saying that they do.

3 MR. WISHNEW: Correct, Your Honor.

4 THE COURT: Does that change if the loan servicer  
5 communicates directly with the borrower here or, allegedly,  
6 orally? It's one thing to say you don't have a duty to speak,  
7 okay, or to do something. Once you affirmatively take the step  
8 of engaging in a discussion with Mr. Satterwhite, specifically  
9 about whether you're going to go forward with foreclosure or  
10 not go forward with foreclosure --

11 MR. WISHNEW: Um-hum.

12 THE COURT: -- whether you're going to consider a HAMP  
13 modification or not consider a HAMP modification, let's assume  
14 that he's able to establish that on April 10th he spoke with  
15 GMAC -- a representative of GMAC who said we won't  
16 foreclosure -- get a HAMP modifi -- get a modification in.  
17 You've got to get it in within ten days, we won't go forward  
18 with the foreclosure. Does that create a duty on the party of  
19 GMACM such that a negligent misrepresentation claim would lie?

20 I don't remember -- when this issue has come up before  
21 me --

22 MR. WISHNEW: Sure.

23 THE COURT: -- in the past, not involving Virginia law  
24 but other states' law, people tried to assert that the loan  
25 servicer owed a duty just because it was the loan servicer.

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1 MR. WISHNEW: Sure.

2 THE COURT: And I think I've said no.

3 MR. WISHNEW: Right.

4 THE COURT: But I don't -- and I've got to go back and  
5 look some more --

6 MR. WISHNEW: Yeah.

7 THE COURT: -- but I don't remember that coming up in  
8 the context of affirmative communications between the loan  
9 servicer and the borrower.

10 MR. WISHNEW: I don't know that a communication all of  
11 a sudden takes -- somehow creates a special relationship for  
12 that --

13 THE COURT: When you tell the --

14 MR. WISHNEW: -- loan servicer.

15 THE COURT: -- borrower we won't foreclose if you get  
16 us a HAMP loan modifi -- we won't guarantee you get a  
17 modification, but we're not going to foreclose five days from  
18 now if you get us a HAMP application --

19 MR. WISHNEW: Well, I mean, that --

20 THE COURT: -- within ten day -- you -- I think you've  
21 acknowledged -- I think that -- putting aside the Satterwhite  
22 circumstance, it was GMAC's general practice not to foreclose  
23 while a loan modification was being considered.

24 MR. WISHNEW: That's --

25 THE COURT: Is that true?

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1 MR. WISHNEW: That is correct, Your Honor, yes.

2 THE COURT: Okay. So that's your general practice.

3 Here, there may be disputed elements in the communica -- I know  
4 the service note said no guarantee that we won't foreclose.

5 MR. WISHNEW: Right.

6 THE COURT: That may be ambiguous because -- well,  
7 we'll have to deal with that at an evidentiary hearing. But  
8 there are two sides to this story; I would certainly  
9 acknowledge that.

10 MR. WISHNEW: Okay.

11 THE COURT: Look, I'm troubled. You can call that a  
12 mistake. It was -- clearly, it was a mistake. Whether it's an  
13 actionable mistake is a different issue.

14 MR. WISHNEW: Um-hum.

15 THE COURT: And if so, on what theory is it  
16 actionable? And then, if it is actionable, what are the  
17 circumstances?

18 MR. WISHNEW: Right.

19 THE COURT: What's the measure of damages?

20 MR. WISHNEW: Correct, Your Honor.

21 THE COURT: Okay. can you -- I didn't see any  
22 authority cited for the proposition that the loan servicer has  
23 no duty to the borrower even if the loan servicer undertakes to  
24 communicate to the borrower we won't do certain things if you  
25 do certain things.

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1 MR. WISHNEW: I don't know that we specifically  
2 addressed that issue, Your Honor.

3 THE COURT: I think what I'm likely to do -- I don't  
4 want to go through another round of briefing at this stage.

5 I haven't heard from Mr. Satterwhite yet, and I will.  
6 But I -- I mean, it's clear to me this is going forward for an  
7 evidentiary hearing.

8 MR. WISHNEW: Um-hum.

9 THE COURT: The facts are going to be the facts are  
10 going to be the facts. Which of these legal theories, if any,  
11 do -- are -- is at -- are the facts actionable --

12 MR. WISHNEW: Um-hum.

13 THE COURT: -- I'll have to determine. I think that  
14 Mr. Satterwhite has certainly alleged enough to proceed,  
15 if -- on nothing else, on the actual fraud. Whether he could  
16 make it out or not, I don't know. I -- it does seem to me  
17 that -- and I'm not citing the issue today. he may well be  
18 able to proceed on the constructive fraud theory,  
19 whereas -- it's undisputed here, GMAC communicated with him and  
20 told him -- gave him ten days to do a loan modification  
21 application.

22 And again, I'm not deciding today whether that would  
23 be actionable or breach of covenant of good faith and fair  
24 dealing, but, initially, my reaction is the remedy -- if he  
25 makes out any of those three claims, the remedy's going to be

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1 the same --

2 MR. WISHNEW: Right.

3 THE COURT: -- essentially, here.

4 Let me hear from Mr. Satterwhite. Go ahead, Mr.  
5 Satterwhite.

6 MR. SATTERWHITE: Thank you, Your Honor. Good  
7 morning, sir. I appreciate you giving me the chance to speak.

8 I am also blind in one eye and low vision in the  
9 other, and I do have a complaint, not with the Court, but with  
10 the counsel of Morrison & Morrison (sic) because they keep  
11 sending me paperwork after my deadline date to get into you.  
12 And I don't have time nor did I have resources to pay for a  
13 lawyer, because I haven't worked in five years since I became  
14 blind. And it was my fault for falling in the arrears of only  
15 1,000 dollars when I had 70,000 dollars' worth of equity.

16 They said -- and my property was bad. So I requested  
17 further modification, and GMAC told me that I didn't have to  
18 worry about it as long as I got the paperwork in. So I didn't  
19 seek any more counsel or help to try to stop the foreclosure  
20 because I believed in what they told me. And when the plan  
21 came on TV, and I called GMAC and asked them, I believed what  
22 they told me. I'm a ex-Green Beret for fourteen years, with an  
23 honorable discharge. I didn't ask them to give me anything.  
24 I've always taken care of myself.

25 But I just asked them to treat me fair, under the

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1 Constitution, of we the people, in God we trust, and I believed  
2 what they said, Your Honor. So yes, I feel they intentionally  
3 did it. And when I went to the foreclosure on the court steps,  
4 a man told me the property didn't sell and that I was okay.  
5 Then, I find out that Bank of New York Mellon bought -- was the  
6 highest bidder and bought the property. So this is why I feel  
7 that, in good faith and proof, I was misled, because my house  
8 used to be one of the nicest houses on the block. Now, it's  
9 rundown. I don't have the -- or didn't have the money to fix  
10 it. And why would I go and put money in it now when you've  
11 taken my name off the deed?

12 And I also presented evidence in Richmond, which I  
13 still have a fraud case. The judge told my lawyer -- when  
14 Morrison & Morrison contacted me, they said, well, how did you  
15 come up with the figures? I said, sir, I didn't come up with  
16 the figures. I was able to borrow money from my family and the  
17 church to get a lawyer to help fight this. And he came up with  
18 the figures. I didn't come up with the figures. And when the  
19 case went to court, the judge in Richmond said, he felt that I  
20 had proven enough for fraud and then told my lawyer to go back  
21 and figure up the damages. And he was the one that figured up  
22 the damages, but he took so long in figuring out what the  
23 damages was.

24 The next thing I know GMAC had filed bankruptcy, and I  
25 my lawyer said they filed bankruptcy. Then, he came to me and



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1 said I can't represent you because I'm a Virginia lawyer, and  
2 this in the State of New York, which is a different bar  
3 association, which I understood. But Morrison & Morrison  
4 never, Your Honor, sent -- I don't understand why they sent  
5 me -- I got paperwork yesterday or Saturday to be in court for  
6 today. I got paperwork on Friday, which was really Saturday  
7 morning for -- to be in court for today.

8 You see what I'm saying? And all my paperwork -- and  
9 I do apologize, and I thank your secretary, because I have not  
10 been treated fair even in getting my paperwork to give me ample  
11 time, knowing that I'm disabled, knowing that I'm handicapped  
12 and being able to even get someone to help me try to figure  
13 this mess out or what I'm supposed to do.

14 THE COURT: May I ask you --

15 MR. SATTERWHITE: Do you understand what I'm saying,  
16 Your Honor?

17 THE COURT: May I ask you a few ques --

18 MR. SATTERWHITE: And --

19 THE COURT: Mr. Satterwhite, may I ask you --

20 MR. SATTERWHITE: Yes, sir.

21 THE COURT: -- a few questions? Are you still living  
22 in the property?

23 MR. SATTERWHITE: Yes, sir, I never left.

24 THE COURT: Okay.

25 MR. SATTERWHITE: Hello?

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1 THE COURT: Yes, I'm here. I'm here.

2 MR. SATTERWHITE: Yes, sir. They sent somebody with a  
3 gun to tell me to get out, and I told -- I said, sir, I'm not  
4 going nowhere, so I went back to the court. And the judge here  
5 in Richmond told me I didn't have to get out. And because they  
6 filed bankruptcy, which he was getting ready to rule on the  
7 fraud, but because they filed bankruptcy, he can't rule because  
8 it's in bankruptcy court and it's still sitting here in  
9 Richmond waiting on what your decision is in the bankruptcy  
10 court. And then, I can go back for the fraud.

11 But that's how the case -- so then, when I went to  
12 court here, they said, no, you got to wait now because they  
13 filed bankruptcy.

14 THE COURT: Okay.

15 MR. SATTERWHITE: So I'm, you know --

16 THE COURT: Anything else --

17 MR. SATTERWHITE: -- I just --

18 THE COURT: -- any --

19 MR. SATTERWHITE: -- trust and believe in God, and I'm  
20 thankful. But sir, this is what I risked my life for as a  
21 Green Beret to protect and serve this country on foreign and  
22 American soil. But they do not have the right to be above the  
23 law and then have expensive lawyers to hide under the law. And  
24 I appreciate everything. And that's just the truth, Your  
25 Honor.

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1 THE COURT: All right. Mr. Wishnew, do you want to  
2 add anything?

3 MR. WISHNEW: No, Your Honor.

4 THE COURT: All right. I'm going to enter a written  
5 order to the following effect. First, sustaining the objection  
6 of the quiet title claim.

7 What I mean by that, Mr. Satterwhite, one of the  
8 claims you've asserted is to the -- the legal terminology's  
9 quiet title to the property. But because the debtors nor the  
10 Trust have any interest in the property, that cause of action  
11 would fail.

12 With respect to your other claims, the breach of  
13 covenant --

14 MR. SATTERWHITE: Can I ask a question, Your Honor?

15 THE COURT: No, let me finish and then I'll give you a  
16 chance.

17 MR. SATTERWHITE: Yes, sir.

18 THE COURT: Breach of covenant of good faith and fair  
19 dealing, I'm overruling the objection without prejudice. I'm  
20 not deciding at this stage whether --

21 MR. SATTERWHITE: Yes, sir.

22 THE COURT: -- a claim for breach of covenant of good  
23 faith and fair dealing would lie under Virginia law. And it's  
24 Virginia law that controls.

25 As the Court observed in some of my questioning

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1 earlier of Mr. Wishnew, it does seem to me that the loan  
2 servicer's the agent of the noteholder and would have authority  
3 to enter into a forbearance agreement. That's -- Mr. Wishnew  
4 has basically acknowledged that to be the case. The facts  
5 alleged by Mr. Satterwhite would support the argument that he  
6 loan servicer, as agent for the noteholder, agreed to forbear  
7 and, instead of forbearing, three days later went forward with  
8 the foreclosure. And that could well support a claim for  
9 breach of covenant of good faith and fair dealing.

10 Virginia law is unclear. Virginia law will control.  
11 I will defer an ultimate ruling on the breach of covenant of  
12 good faith and fair dealing claim until we have an evidentiary  
13 hearing.

14 With respect to the fraud claim, there are two types  
15 of fraud that the Court has to consider: actual fraud, and the  
16 Court finds that there are disputed issues of fact as to  
17 whether GMAC acted with reckless disregard for the truth,  
18 assuming, for purposes of -- at this stage of the proceeding  
19 that Mr. Satterwhite's assertions of fact are correct that they  
20 told him they wouldn't foreclose if he got his HAMP loan  
21 modification application in within ten days, but three days  
22 later, they went ahead and foreclosed anyway. That would  
23 certainly support a claim for actual fraud.

24 With respect to the issue of whether the facts would  
25 also support a claim for constructive fraud, the Court is going

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1 to defer ruling on that issue. I haven't been provided with  
2 authority about the one issue that bothers me. While  
3 ordinarily a loan servicer does not have a duty to the  
4 borrower, whether that would be true under Virginia law in a  
5 circumstance where the loan servicer affirmatively represented  
6 to the borrower that it would take certain action or not take  
7 certain action, whether that would give rise to a duty on the  
8 part of the loan servicer that would support a claim for  
9 constructive fraud, which essentially appears to be the  
10 equivalent of a claim for negligent misrepresentation.

11 MR. SATTERWHITE: Yes, sir.

12 THE COURT: At best, the Trust acknowledged that GMAC  
13 made a mistake. It clearly made a mistake. Mr. Satterwhite  
14 certainly alleges that it was a lot more than a simple mistake;  
15 that it was either actual fraud or constructive fraud. So it's  
16 going to be necessary for the Court to go forward with an  
17 evidentiary hearing.

18 In the circumstances here, Mr. Wishnew, I'm not going  
19 to issue a lengthy opinion. I'm going to simply enter an order  
20 and it'll refer to the record. I've sort of explained what's  
21 on my mind here.

22 Mr. Satterwhite, I think that -- what I would hope  
23 would happen is that you and Mr. Wishnew or one of his  
24 colleagues would try and engage in some further settlement  
25 discussions to see whether you can resolve this issue without

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1 having to go forward with an evidentiary hearing. If we have  
2 to go forward --

3 MR. SATTERWHITE: Yes, sir.

4 THE COURT: -- with an evidentiary hearing, you're  
5 going to have to do that here. You're going to have to come to  
6 New York for that. I don't have --

7 MR. SATTERWHITE: Yes, sir, Your Honor.

8 THE COURT: -- trials with witnesses testifying by  
9 telephone.

10 MR. SATTERWHITE: Okay.

11 THE COURT: So you're living in Richmond, Virginia,  
12 and --

13 MR. SATTERWHITE: Yes, sir.

14 THE COURT: -- I will ask you and Mr. Wishnew or one  
15 of his colleagues to discuss, if we have to go forward to an  
16 evidentiary hearing, that you confer and try to do this at a  
17 time that's convenient for you and the Trust and for the Court.

18 So you can talk to Mr. Wishnew or his colleagues about  
19 that. I really do hope --

20 MR. SATTERWHITE: Yes, sir.

21 THE COURT: -- that you'll see whether you can reach a  
22 resolution of this. I said earlier, Mr. Satterwhite, one of  
23 the big dollar items that you were seeking in your claim is  
24 punitive damages. It's just not available. I've determined --

25 MR. SATTERWHITE: Yes, sir.

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1 THE COURT: -- in a number of matters here, so the  
2 question is, what compensatory -- what actual damages can you  
3 establish? I'm not going to elaborate further on that. I'm --

4 MR. SATTERWHITE: Yes, sir, I understand.

5 THE COURT: I didn't prepare to do that today. You  
6 ought to engage in some discussions with Mr. Wishnew or his  
7 colleagues.

8 Mr. Wishnew --

9 MR. SATTERWHITE: Yes. Can I ask you one more  
10 question --

11 THE COURT: Yes.

12 MR. SATTERWHITE: -- sir?

13 THE COURT: Go ahead, Mr. Satterwhite.

14 MR. SATTERWHITE: I didn't understand where -- if Mr.  
15 Jeffrey Stephans (sic) had robo-signed paperwork and the  
16 paperwork, which was notarized by Ms. Reinhart, which was in  
17 the Washington Post that he was indicted on and that the  
18 paperwork was robo-signed, that he sent 10,000 loans to her, and  
19 she admitted that she stamped them and sent them back through  
20 the mail, then how could it be a legal foreclosure if the  
21 paperwork was bogus?

22 THE COURT: Let me address -- I -- and I had intended  
23 to address the issue of Mr. Jeffrey Stephan.

24 MR. SATTERWHITE: Yes, sir.

25 THE COURT: There're some -- a number of things that

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1 are not clear, Mr. Wishnew, about the paperwork that supported  
2 the foreclosure. And that certainly would be an issue for the  
3 evidentiary hearing.

4 MR. SATTERWHITE: Yeah, all I'm saying, if he wasn't a  
5 valid --

6 THE COURT: Yeah, let me -- I'm collecting my thought.  
7 I have some more to say about it, Mr. Satterwhite. Okay?

8 MR. SATTERWHITE: Yes, sir.

9 THE COURT: Just give me a second.

10 MR. SATTERWHITE: Yes, sir.

11 THE COURT: The Trust, for the first time, addressed  
12 the issue of robo signing in its reply, arguing that the  
13 allegations cannot be construed against the debtors because  
14 Stephan was acting in his capacity as a limited signatory on  
15 behalf of Bank of New York pursuant to a power of attorney.  
16 Mr. Satter -- because it was raised in the reply, Mr.  
17 Satterwhite didn't have an opportunity to respond to those  
18 arguments.

19 Additionally, the Court observes that the Trust's  
20 argument is not completely supported by the documentation  
21 provided. The Trust has not provided the copy of the power of  
22 attorney, instead, only relies on the signature page of the  
23 foreclosure deed as evidence that Stephan was not acting on  
24 behalf of any of the debtors. I actually looked yesterday.  
25 There are five of my opinions that refer to conduct by Mr.



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1 Stephan -- five published opinions that refer to Mr. Stephan,  
2 so the Court's very familiar with Mr. Stephan.

3 Stephan's signature block reads, "limited signing  
4 officer of", and then there's -- it's illegible -- "LLC,  
5 attorney in fact, Residential Funding Company. Bank of New  
6 York is not an LLC and it's not a debtor. The document that  
7 the Trust provided doesn't provide sufficient evidence on whose  
8 behalf Stephan was signing. It can't be disputed that  
9 Stephan -- he was an employee of GMAC. He may have -- through  
10 MERS, have had authority in certain circumstances. Whether  
11 there was a power of attorney that gave him certain authority,  
12 that has not been provided to the Court.

13 So Mr. Satterwhite's quite correct that the proceeding  
14 with his claims, be they breach of covenant of good faith and  
15 fair dealing, fraud, either actual fraud or constructive fraud,  
16 one of the issues -- one of the factual issues on which -- let  
17 me be clear, the Trust is going to bear the burden of proof  
18 with respect to Mr. Stephan, not Mr. Satterwhite. The facts  
19 are within the Trust's control. Sufficient issues have been  
20 raised in other matters about Mr. Stephan's authority, what he  
21 signed. I don't know who the notary was. Was the  
22 notary -- did the notary actually see Stephan come and sign in  
23 her presence? I don't know. I don't have those facts.

24 But Mr. Satterwhite, thank you for raising the issue,  
25 because I did intend to address it. Go ahead --

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1 MR. SATTERWHITE: Thank you, Your Honor.

2 THE COURT: -- Mr. Satterwhite. Anything else you  
3 want to add?

4 MR. SATTERWHITE: No, sir. Thank you. And God bless.  
5 I appreciate all your assistance --

6 THE COURT: Okay.

7 MR. SATTERWHITE: -- and help.

8 THE COURT: Mr. Wishnew, this matter ought to be  
9 settled.

10 MR. WISHNEW: I recognize that, Your Honor.

11 THE COURT: Okay.

12 MR. WISHNEW: I don't -- I recognize that.

13 If I can add just one point of clarification.

14 THE COURT: Let me just raise one other thing.

15 Mr. Satterwhite, you can proceed --

16 MR. SATTERWHITE: Yes, sir.

17 THE COURT: -- without a lawyer. That's certainly  
18 your prerogative. There are many lawyers who appear in this  
19 court who are not members of the New York bar. I've let them  
20 appear by telephone, and I've let them appear -- they have  
21 to -- if they come here, they have to -- there's an application  
22 they have to make. They don't have to be a member of the New  
23 York bar. I just -- what -- you're doing pretty well on your  
24 own. Let me just tell you, okay?

25 MR. SATTERWHITE: Thank you sir. God bless.

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1 THE COURT: Okay. Mr. Wishnew, something you wanted  
2 to add before we finish the record on Satterwhite?

3 MR. WISHNEW: Yes, please, Your Honor.

4 With regards to the question about the Stephan  
5 signatures and the question about who he was signing for, I  
6 wanted to just make one point.

7 MR. SATTERWHITE: Yes.

8 MR. WISHNEW: So at Exhibit A to the Priore  
9 declaration in support of the reply, Your Honor mentioned that  
10 there's a -- it's Xed out, and there's a LLC afterwards, so  
11 it's not clear who Mr. Stephan's signing for. I would just  
12 note that, on the line underneath, it says Residential Funding  
13 Company, so it's intended to read, "Jeffrey Stephan, limited  
14 signing officer of Residential Funding Company, LLC, attorney  
15 in fact". And that same point is also repeated --

16 THE COURT: Are you saying Residential Funding Company  
17 was attorney in fact for Bank of New York?

18 MR. WISHNEW: As master servicer, which I think we've  
19 pointed out in our reply, yes, Your Honor.

20 THE COURT: Well, it's an open issue.

21 MR. WISHNEW: Okay. I just --

22 THE COURT: Be prepared --

23 MR. WISHNEW: I just want to --

24 THE COURT: Be prepared to put on evidence.

25 MR. WISHNEW: I recognize that, Your Honor. I just

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1 want to make sure the record reflected --

2 THE COURT: That's fine. Okay.

3 MR. WISHNEW: Thank you, Your Honor.

4 THE COURT: All right. Thank you very much, Mr.

5 Satterwhite. So you're excused, okay?

6 MR. SATTERWHITE: Thank you. God bless, sir.

7 THE COURT: All right. Thank you.

8 MR. WISHNEW: Your Honor, that brings us to item 4 on  
9 today's agenda, the eighty-second omnibus claims objection. I  
10 will turn the podium over to my colleague, Mr. Rosenbaum.

11 THE COURT: Okay.

12 MR. ROSENBAUM: Your Honor, Norm Rosenbaum for the  
13 ResCap Borrower Claims Trust.

14 Your Honor, this is the Borrower Trust's eighty-second  
15 omnibus objection to claims, no liability borrower claims.  
16 It's filed at docket number 8042. It was filed on January  
17 29th, 2015. Your Honor, through this objection, the Borrower  
18 Trust seeks to expunge eighteen proofs of claim that do not  
19 represent valid pre-petition claims against any of the debtors  
20 because they have not proven by a preponderance of the evidence  
21 any specific wrongdoing by any debtor.

22 The Borrower Trust has thoroughly examined the  
23 debtors' books and records in an effort to validate the  
24 accuracy of the allegations made in the responses in the claims  
25 at issue and determined that the books and records do not show

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1 any liability owing to any of the respondents.

2 Responses to the objection were due on March 2nd. The  
3 Borrower Trust received four responses. We were planning on  
4 addressing three of them today. One is claim number 9060,  
5 filed by Michael Boyd, that's at docket number -- the responses  
6 were at docket numbers 8190 and 8191; claim number 1142, filed  
7 Steven [Rih'-gel] or [Re'-gal], that's at docket number -- his  
8 response is at docket number 8101; and claim number 4497, filed  
9 by Herold Gay, and that's at docket number 8188.

10 The Trust also received a response from a Mr. Dlin.  
11 He's a holder of claim number 3732, and that'll be addressed at  
12 the April 16th hearing.

13 I believe, at the outset of the hearing, Mr. Gay made  
14 an appearance. I don't think I heard appearances from anyone  
15 or individually on behalf of Mr. Boyd or Mr. Rigel.

16 THE COURT: Mr. Rigel, are you on the phone?

17 Mr. Boyd, are you on the phone?

18 Mr. Gay, are you on the phone?

19 MR. GAY: Yes, I am holding.

20 THE COURT: All right, thank you.

21 All right. So first, with respect to the fourteen  
22 uncontested claims, the objection's sustained.

23 MR. ROSENBAUM: Thank you, Your Honor.

24 THE COURT: And as to Din -- Dlin, D-L-I-N, that's  
25 adjourned to April 16th.

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1 Let's go forward with -- let's do Mr. Gay first since  
2 he's on the phone, okay?

3 MR. ROSENBAUM: Certainly, Your Honor.

4 Your Honor, we've outlined the --

5 THE COURT: Before you go ahead, Mr. Rigel, are you on  
6 the phone?

7 MR. RIGEL: I am.

8 THE COURT: All right. So Rigel is. So -- and it's  
9 Ms. Gay? Am I correct about that?

10 MR. GAY: Mr. Gay.

11 THE COURT: Mr. Gay? Okay, thank you.

12 MR. GAY: Yes.

13 THE COURT: All right. We'll go forward and ahead  
14 with Mr. Gay's first, and then we'll do Mr. Rigel, okay?

15 MR. ROSENBAUM: Your Honor, we've outlined the facts  
16 surrounding this mortgage in the response. I think the sum and  
17 substance of it is, is that Mr. Gay's allegation and proof of  
18 claim and his response relates to the origination of the loan  
19 and allegations as to the interest rate and the note that he  
20 signed. None of the debtors were an originator of this loan.  
21 It was subsequently purchased and -- by debtor and assigned  
22 into a securitization, but we don't have any origination  
23 liability for this loan. And nothing in Mr. Gay's responses  
24 indicated otherwise.

25 I think Mr. Gay also has taken a position that -- as

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1 other borrowers have and Your Court has ruled on, that through  
2 the effect of the plan and the confirmation order that his  
3 claim was allowed. Your Honor has refuted that in a couple of  
4 decisions.

5 If Your Honor has any question, I'm happy to --

6 THE COURT: No, I don't.

7 MR. ROSENBAUM: -- address it.

8 THE COURT: Go ahead, Mr. Gay.

9 MR. GAY: Yes. I'm confused to the origination. The  
10 note was purchased by GMAC. It was purchased by Homecoming  
11 Financial, which an affiliate with GMAC. So the origination of  
12 the loan from the start, in my opinion, it will be made to  
13 Homecoming Financial and GMAC.

14 THE COURT: Well, am I correct, Mr. --

15 MR. GAY: And --

16 THE COURT: Mr. Gay? Mr. Gay, am I correct that Trust  
17 One Mortgage Corporation originated the loan to you on May 17,  
18 2006? Do you agree with that?

19 MR. GAY: Yes, sir, I do. That's correct.

20 THE COURT: And then, Residential Funding Company, LLC  
21 purchased the loan from Trust One and transferred its interest  
22 to E\*Trade on May 20th, 2006. Do you agree with that?

23 MR. GAY: Yes, sir, I do.

24 THE COURT: And Homecoming serviced the loan from June  
25 9th, 2006 to July 1, 2009, at which time servicing was

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1 transferred to GMAC. Do you agree?

2 MR. GAY: Yes.

3 THE COURT: And then, GMAC transferred servicing to  
4 Ocwen on February 16th, 2013 as part of the transaction during  
5 the bankruptcy case. Agreed?

6 MR. GAY: Yeah, I agree.

7 THE COURT: So what -- in reading your claim, you're  
8 complaining about -- you assert that you were "forced into  
9 obtaining this high interest rate" home loan -- "home equity  
10 loan in 2006".

11 MR. GAY: Yes.

12 THE COURT: But none of the debtors -- they didn't  
13 originate the loan. So how -- why do you --

14 MR. GAY: This was, I think --

15 THE COURT: -- think you have a claim agai -- they  
16 acquired the loan and transferred it. But they didn't  
17 originate it. Your claim seems to relate to the origination.  
18 You're complaining that "The lender was fully aware of my  
19 inability to afford and repay this loan at such outrageous,  
20 extortionate interest rate of eleven percent, which was only  
21 designed to hinder my ability of ever repaying such loan."

22 So, what, the loan had an eleven-percent interest  
23 rate?

24 MR. GAY: Yes. Your Honor, my question to you is,  
25 when the note is purchased, isn't all its servicing -- all the



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1 servicing rights are purchased with it, all the rights of the  
2 loan, all the servicing when it's purchased, when it's sold,  
3 good or bad?

4 THE COURT: If you have a claim against --

5 MR. GAY: If there's a --

6 THE COURT: If you -- at this point, I don't think you  
7 have a claim anymore, if you ever had one. If you had a claim  
8 in connection with the origination, it would have been against  
9 Trust One Mortgage Corporation.

10 MR. GAY: Yes, my mortgage was -- they sold it  
11 immediately; they sold it immediately to the Residential  
12 mortgage, Homecoming Financial, and then to Ocwen -- no, to  
13 GMAC then to Ocwen.

14 THE COURT: All right. I understand your argument.  
15 Anything else you want to add?

16 MR. GAY: When the note is purchased, Your Honor,  
17 isn't all the servicing rights -- isn't all the servicing  
18 rights are purchased by whoever owned the note?

19 THE COURT: Servicing is separate from ownership of  
20 the note, but -- any other argument you want to make?

21 MR. GAY: I'm just confused, you know, with the  
22 origination and the servicing --

23 THE COURT: All right.

24 MR. GAY: -- that's -- my point is I'm confused. It  
25 was purchased by GMAC.

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1 THE COURT: It wasn't --

2 MR. GAY: And therefore, they come for your loan.

3 THE COURT: -- purchased by --

4 MR. GAY: I was making payments to Homecoming  
5 Financial and GMAC.

6 THE COURT: Yeah, that's because they were servicing  
7 the loan at various times. They didn't own it.

8 All right. I'm going to take the matter under  
9 submission.

10 All right. I'm going to issue a written order or  
11 ruling, Mr. Gay.

12 MR. GAY: Yes.

13 THE COURT: All right. Thank you very much.

14 All right.

15 MR. GAY: Thank you.

16 THE COURT: Let's do Rigel next.

17 MR. ROSENBAUM: Yes, Your Honor.

18 THE COURT: Mr. Rigel, you're there?

19 MR. RIGEL: I am, sir.

20 THE COURT: Okay. We'll let Mr. Rosenbaum argue  
21 first, and then I'll give you a chance to argue. This relates  
22 to claims number 1142.

23 MR. ROSENBAUM: Your Honor, the asserted basis for  
24 this claim is mortgage notes. The claim attaches miscellaneous  
25 documents that we referenced in our pleadings. Frankly, Your

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1 Honor, we don't see any basis for this loan -- I think the --  
2 for the claim, excuse me. I mean, the applicable facts here is  
3 the loan was referred to foreclosure in May of 2012. It was at  
4 that time owing for the March 1, 2012 payment. A foreclosure  
5 complaint was filed on January 3rd.

6 On January 7th, the debtors approved -- January 7th,  
7 2013, the debtors approved Mr. Rigel for a trial HAMP  
8 modification plan, and the foreclosure was placed on hold at  
9 that time. Servicing was transferred to Ocwen, but we  
10 understand that Mr. Rigel completed the trial plan and was  
11 approved for a permanent HAMP modification on April 25th, 2013.  
12 And it's our understanding that the foreclosure file was closed  
13 at that time.

14 Mr. Rigel has not provided any documentation in  
15 support of his claim.

16 THE COURT: All right. Mr. Rigel?

17 MR. RIGEL: Yes, sir.

18 THE COURT: Tell me -- I'd like to know what your  
19 argument in support of your claim is.

20 MR. RIGEL: Well, getting back -- let me first start  
21 off by saying in regards to what the last gentleman, I believe  
22 I understand where he's coming from as far as that is  
23 concerned. These gentlemen here allege that they had no  
24 responsibility as far as the originating loan. However, my  
25 originating fee has Financial/GMAC directly on that paperwork.

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1 THE COURT: Yes. I think --

2 MR. RIGEL: I would think --

3 THE COURT: -- I don't think they dispute this. The  
4 Homecomings Financial LLC originated a loan on October 9th,  
5 2007 in the amount of 165,000 dollars. Do you agree with that,  
6 Mr. Rosenbaum?

7 MR. ROSENBAUM: Yes, Your Honor.

8 THE COURT: Okay. So that much -- and then GMAC Bank,  
9 which is not one of the debtors here, it purchased the loan  
10 from Homecomings and then it transferred the interest --

11 MR. RIGEL: Okay. If you'll let me finish.

12 THE COURT: -- to GMAC Mortgage and GMAC Mortgage --

13 MR. RIGEL: That was just -- that was --

14 THE COURT: -- transferred its interest to Freddie Mac  
15 on November 20th, 2007 but none of that gives rise to a claim.  
16 So that's what I mean --

17 MR. RIGEL: And I beg your pardon, sir, if you'd let  
18 me finish without interrupting, I'd appreciate it.

19 THE COURT: Go ahead.

20 MR. RIGEL: Thank you. It does say there on the  
21 origina -- that was just the point I just wanted to point out.  
22 However, Your Honor, with my case here it's just been  
23 so -- it's just like these folks are playing the shell game or  
24 something. Hell, I don't even understand it anymore.

25 The bottom line is simply on -- in October of 2007 I

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1 purchased this property with an appraisal of -- that this  
2 property was worth 165,000 dollars at the time of -- that I  
3 bought it. As we all know, then, around 2012 that's when the  
4 bubble broke and things started falling apart and this is  
5 where, you know, they came and they've proven that there was a  
6 lot of wrongdoings. And as a result of that, it turns out my  
7 property was only worth 112,000 dollars when I bought this --  
8 when I bought it but I was charged 165,000. They knew that.

9 Now --

10 THE COURT: Who did you buy the prop --

11 MR. RIGEL: -- with all that being said --

12 THE COURT: Mr. Rigel, who'd you buy the property  
13 from?

14 MR. RIGEL: With all that being said --

15 THE COURT: Mr. Rigel, who did you buy the property  
16 from?

17 MR. RIGEL: I'm sorry.

18 THE COURT: Who did you buy the property from?

19 MR. RIGEL: Who did I buy the property from?

20 THE COURT: Yes, sir. Who did you buy the property  
21 from?

22 MR. RIGEL: Home Financial/GMAC.

23 THE COURT: Mr. Rosenbaum?

24 MR. RIGEL: Okay. Now, with that said, now --

25 THE COURT: Did one of the debtors sell him the

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1 property?

2 MR. RIGEL: -- so what happened, I didn't know  
3 that -- would you --

4 THE COURT: Mr. Rigel, stop.

5 MR. RIGEL: What?

6 THE COURT: You'll do it the way I want to do it so  
7 just be quiet until I tell you to speak.

8 MR. RIGEL: Oh, I'm sorry; is this the judge?

9 THE COURT: Yes, it is.

10 MR. RIGEL: Oh, I'm sorry; I thought you were the  
11 lawyer and was, like, good Lord. Go ahead, sir.

12 THE COURT: Mr. Rosenbaum, did the debtors sell -- did  
13 one of the debtors sell him the property?

14 MR. ROSENBAUM: Your Honor, we have no knowledge of  
15 that. That's not our understanding. As we state in our  
16 pleadings and supported by Ms. Priore's declaration, it was a  
17 loan originated by Homecomings.

18 THE COURT: Okay. Go ahead, Mr. Rigel.

19 MR. RIGEL: Okay. I'm sorry, sir.

20 And -- so when the housing bubble broke, it came out  
21 on the news that, you know, we could get relief because we were  
22 now under water. In my case it's around 50,000 dollars because  
23 of, you know, I was under water. I did not go into foreclosure  
24 until these folks put me into foreclosure. In other words, I  
25 was making all my payments and when I found that -- through the

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1 TV and through the news media and everything else that we could  
2 get relief through what they called at the time a HAMP program,  
3 I called and originated for a HAMP program at which time they  
4 told me that four things, basically, would happen under this  
5 program and that would be -- I'd be relieved of the approximate  
6 50,000 dollars that I was under water, they would lower my  
7 monthly amount, they would forgive for five months of  
8 nonpayment and they would lower my points. So I went ahead and  
9 I opted to do the HAMP -- HAMP program.

10 Now, after I did all this, and they also told me, and  
11 that's the reason I went into foreclosure was just at that time  
12 they told me when you started this don't bother making your  
13 payments because when you're under this program here you don't  
14 have to worry about making these programs (sic) which is how I  
15 started -- which is how I got into the foreclosure mess because  
16 I missed payments because they told me, look, while this  
17 process is going on, you don't have to worry about making  
18 payments. So I didn't make the payments. And then they were  
19 in the foreclosure thing.

20 Now, once all this was resolved, about six months  
21 later, they give me this trial HAMP; I abided by it and  
22 everything like that, and the end result of the HAMP was  
23 absolutely nothing. My payments remained the same, 1,400  
24 dollars a month; I was not given a relief for any of the monies  
25 that I was under water for; they did not lower my monthly

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1 amount, it did remain the same; they did not forgive the five  
2 months of nonpayment; they didn't lower my points -- I'm sorry;  
3 that's the one thing they did do. The only thing that they did  
4 under this HAMP program was lower it from 6.25 to a 5.25 of  
5 which I'm still owing and they renewed it to where I now, after  
6 seven years of paying, I still now, under this program, they  
7 just -- I still have a 30-year mortgage. So anything and  
8 everything that I'm -- that I paid prior to this program was,  
9 basically, null and void.

10 THE COURT: Anything else?

11 MR. RIGEL: So and from there, I just -- you know, I  
12 just dealt with it and been making monthly payments ever since.

13 THE COURT: All right. Mr. Rosenbaum, anything you  
14 want to add?

15 MR. ROSENBAUM: I don't have anything to add other  
16 than what's in our papers and supported by our declaration that  
17 he was -- Mr. Rigel was approved for the -- went into the trial  
18 HAMP modification in January and the subsequent trial mod and  
19 approval was through the subsequent servicer, Ocwen, so we  
20 can't really --

21 THE COURT: Okay.

22 MR. ROSENBAUM: -- address his issues with his  
23 modification.

24 THE COURT: All right. I'm going to take it under  
25 submission.



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1 Thank you, Mr. Rigel. I'll issue an order in due  
2 course.

3 MR. RIGEL: Thank you.

4 MR. ROSENBAUM: Your Honor, the only -- the remaining  
5 claim that we're addressing today on the eighty-second omnibus  
6 is the Boyd claim, Your Honor, and --

7 THE COURT: Yes.

8 MR. ROSENBAUM: -- I don't know if Your Honor has any  
9 questions.

10 THE COURT: Give me a second.

11 So what's the status of the petition for certiorari?  
12 Ninth Circuit ruled against Mr. Boyd. There's a petition for  
13 writ of certiorari.

14 MR. ROSENBAUM: He filed his petition of writ of  
15 certiorari.

16 THE COURT: I'm sorry?

17 MR. ROSENBAUM: He did file it. Yes, Your Honor.

18 THE COURT: Yes.

19 MR. ROSENBAUM: My understanding was timely.

20 THE COURT: And it's still pending.

21 MR. ROSENBAUM: It's pending.

22 THE COURT: Okay. And it's Cal -- and we're dealing  
23 with California State law claims.

24 MR. ROSENBAUM: Yes, Your Honor.

25 THE COURT: And my understanding is that the

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1 California rule -- so you agree that for res judicata purposes,  
2 the state law claim, the law of the state where the claim arose  
3 applies?

4 MR. ROSENBAUM: Yes, Your Honor.

5 THE COURT: So that's California law.

6 MR. ROSENBAUM: Yes, Your Honor.

7 THE COURT: And my understanding of California law is  
8 that it's not a final judgment as long as there's a cert  
9 petition pending. You disagree?

10 MR. ROSENBAUM: Well, Your Honor, we didn't cite cases  
11 specifically to res judicata, but we've cited cases in  
12 California law and generally that petition for cert does not  
13 affect the --

14 THE COURT: Federal. You have any cases that deal  
15 with a petition for certiorari?

16 MR. ROSENBAUM: I'm sorry, Your Honor, give me a  
17 minute.

18 THE COURT: The federal rule is that the petition for  
19 certiorari -- it's final without regard to what happens on a  
20 petition for certiorari but my understanding of the state law  
21 in California is it's not final.

22 MR. ROSENBAUM: Your Honor, we cited one case in our  
23 papers; Sacramento -- excuse me -- Sacramento County Department  
24 of Social Welfare v. Javier, In re Christy (sic) 187 Cal. App.  
25 3d 753. It's a 1986 decision. And I quote, "It is" -- from

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1 the decision, "It is immaterial that appellants have filed a  
2 petition for writ of certiorari with the United States Supreme  
3 Court" --

4 THE COURT: I'll go back and look at it. I'm going to  
5 take it under submission.

6 MR. ROSENBAUM: Thank you, Your Honor.

7 THE COURT: I'll go back and look at it again.

8 MR. ROSENBAUM: Your Honor, I think there's one  
9 remaining matter.

10 THE COURT: Well, I see Mr. Bustos got here late.

11 MR. BUSTOS: Well, I apologize for being --

12 THE COURT: Well, just sit down. Go ahead, let's deal  
13 with the other -- we've got the Liquidating Trust motion to  
14 dismiss.

15 MR. WISHNEW: There's the -- right, that's the Heyward  
16 adversary proceeding, Your Honor.

17 THE COURT: Right.

18 MR. WISHNEW: But before we get there, there's one  
19 other matter for Mr. Philpot.

20 THE COURT: Okay. Yes.

21 MR. BUSTOS: Oh, I'm sorry.

22 THE COURT: All right. Is Mr. Philpot on the phone?

23 MR. WISHNEW: He's actually in the courtroom, Your  
24 Honor.

25 THE COURT: Oh. Come on up, Mr. Philpot. You've been

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1 sitting there nice and patiently. I, obviously, didn't  
2 recognize you. So why don't you have a seat and then Mr.  
3 Wishnew will go first and then you'll have a chance to respond.  
4 Okay?

5 MR. WISHNEW: Thank you, Your Honor. Jordan Wishnew,  
6 Morrison & Forester for the ResCap Borrower Claims Trust. We  
7 are moving forward with V, item 1, the objection of the ResCap  
8 Borrower Claims Trust to claim number 5067 filed by Gwendell L.  
9 Philpot, filed at docket number 7760.

10 Mr. Philpot filed his response at docket number 8302  
11 and the Borrower Trust filed its reply in further support of  
12 the objection at 5067.

13 In regards to this, there was declaration of Kathy  
14 Priore submitted in support. Ms. Priore's on the phone today.

15 Your Honor, what -- Mr. Philpot has filed a claim  
16 for a general unsecured claim of 630,000 dollars against, I  
17 believe, GMAC Mortgage. And that damage -- those damages are  
18 made up of two elements: 280,000 dollars for hypothetical lost  
19 profits over a three-and-a-half-year period as well as 350,000  
20 dollars of compensatory damages.

21 It is the Borrowers Trust's position that the claim is  
22 not valid and does not state a valid basis for liability, in  
23 the first instance because this claim arose prior to Mr.  
24 Philpot's Chapter 7 bankruptcy in Alabama was not included in  
25 his schedules and, therefore, he is judicially estopped from

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1 bringing the claim now against the debtors when it should have  
2 been identified as part of his bankruptcy estate -- as part of  
3 the 2009 bankruptcy filing.

4 The second basis is regards to whether the claim even  
5 has any merit. And it's our position that, essentially, this  
6 claim amounts to a, I guess, a series of consequential events  
7 that followed a purported system error in terms of processing a  
8 payment on or about September 30th, 2008.

9 In his submissions to the Court, Mr. Philpot,  
10 essentially, acknowledges that he didn't try and make up the  
11 payment even though the debtors gave him that option.

12 THE COURT: His position, as I understand it, is that  
13 a lawyer advised him he didn't have to make any payments until  
14 the issue got resolved of that one payment in 2008.

15 MR. WISHNEW: I absolutely agree, Your Honor, and just  
16 to clarify, that lawyer was his lawyer. It was not --

17 THE COURT: Yes, I understand.

18 MR. WISHNEW: Okay.

19 THE COURT: His lawyer.

20 MR. WISHNEW: It was his lawyer. So it was not that  
21 there was any representation from GMAC Mortgage --

22 THE COURT: Right.

23 MR. WISHNEW: -- that oh, don't make the payments  
24 until we figure this out. This is advice he got from his own  
25 counsel --

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1 THE COURT: He says.

2 MR. WISHNEW: -- in terms of resolving this. The fact  
3 of the matter is is that there were multiple ways Mr. Philpot  
4 could have made up the payments. He could have sent in a  
5 MoneyGram, he could have sent in a Western Union payment, he  
6 could have sent in a certified check, a cashier's check, a  
7 personal check. The fact of the --

8 THE COURT: Am I correct that the debtor agreed --  
9 when the dispute arose about whether the September payment was  
10 made in order to be processed properly, at some point the  
11 debtor agreed that it would accept the late payment and forego  
12 any late fees.

13 MR. WISHNEW: That's correct, Your Honor. And we  
14 reflect that it was paid within sixty days. According to Mr.  
15 Philpot and the advice he got from his counsel, that wasn't  
16 good enough.

17 THE COURT: I'm not -- we'll put aside what -- but the  
18 debtor -- it seems to be undisputed the debtor advised him that  
19 to resolve the dispute about whether the payment was correctly  
20 processed or not, the debtor would accept a late payment and  
21 waive any late fee.

22 MR. WISHNEW: That's correct, Your Honor.

23 So in essence, Your Honor, the Borrowers Trust's  
24 position is that this claim and the purported damages  
25 identified therein are really a result from Mr. Philpot's own

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1 actions and not by anything that GMAC Mortgage did back in  
2 September 2008. And so from that regards, we believe their  
3 claim lacks merit and should be expunged.

4 THE COURT: Okay. Mr. Philpot, let me hear from you.

5 MR. PHILPOT: My name is Gwendell Lloyd Philpot and  
6 this morning I filed a response against document 8360 and I ask  
7 that the response be added to this proceeding.

8 THE COURT: Mr. Philpot, it's an untimely response.  
9 The time for all submissions has come and gone but just -- I'll  
10 listen to your argument but I'm not going to go back and read  
11 your additional submission.

12 MR. PHILPOT: Your Honor, may we adjourn this --

13 THE COURT: No, we can't.

14 MR. PHILPOT: -- until some --

15 THE COURT: No.

16 MR. PHILPOT: -- other time?

17 THE COURT: When you come up here -- you live in  
18 Alabama?

19 MR. PHILPOT: I came up, yes. I tried to get here  
20 yesterday but right after I got here, my health, I could not  
21 make it to here to --

22 THE COURT: Okay. All right. But go ahead; I want to  
23 hear your argument.

24 MR. PHILPOT: Okay. First of all, I ask the Court's  
25 indulgence to -- because of my health and I have eyesight and

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1 hearing and speech, I did not use the telephone system because  
2 I knew that I would not be able to understand the proceedings  
3 that were going on. I -- so that is why I came today.

4 The attorneys, Morrison & Foerster, have been diligent  
5 in their administration in matters with me and I have no issue  
6 against their process and -- but I do disagree with their  
7 findings in the writings that they have provided and in the  
8 response that I filed this morning that is illuminated except  
9 for one error that I made but I'm assuming that I would correct  
10 that error after this proceeding.

11 THE COURT: You can do it right now on the record.

12 MR. PHILPOT: Okay. There's an assertion by the  
13 author of -- with attorney Morrison & Foerster that the sixty-  
14 day allowance that the debtors gave was acceptable for me to  
15 make my record correct, and the problem with that is that  
16 within sixty days is not the same as prior to sixty days.

17 The issue was I had to make my payment prior to  
18 October the 1st, 2008 in order not to be sixty days late. And  
19 in fact, I did execute my payment by the servicer's pay-by-  
20 phone processing system on the night of September the 30th,  
21 2008 within that specific time.

22 The debtors have asserted that they would have made  
23 the provisions that -- and e-mails confirmed such to me that I  
24 could make the payments within and they would have administered  
25 it as though it were within sixty days, but that was totally



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1 against what actually happened.

2 I made the payment -- I executed the payment to be  
3 made in their system prior to the sixty days which would go on  
4 the record of being not sixty days late. That's a significant  
5 issue.

6 THE COURT: When's the last time you made a payment,  
7 Mr. Philpot?

8 MR. PHILPOT: That -- I executed that payment on  
9 September the 30th, 2008 --

10 THE COURT: And --

11 MR. PHILPOT: -- and the last payment that they  
12 recorded that I made was last day of August 2008.

13 THE COURT: Have you made any payments --

14 MR. PHILPOT: I have not.

15 THE COURT: Stop. Have you made any payments since  
16 September 30th, 2008?

17 MR. PHILPOT: No, I did not. And my position here is  
18 not based on the resulting situation that happened in regard to  
19 my home being foreclosed or losing that home because of  
20 subsequent failure to make payment. My position is strictly  
21 what transpired against me because I could not have the payment  
22 that I executed on September the 30th, 2008 actually recognized  
23 and received as such because I had ongoing negotiations with  
24 Jack Wright of Redstone Federal Credit Union and the Small  
25 Business Administration agent for a loan having gone back over

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1 my credit history and the process by which I was trying to  
2 start -- continue -- not start, continue the development of an  
3 Alzheimer's caregiving system. I needed capital working funds  
4 in order to continue the development of that system to be  
5 introduced at the June Apple Developers Conference in 2009.

6 My document that I filed this morning have an error in  
7 page 3, paragraph 3, in the second line where I use the term  
8 "within" and it was my error but that specific word I meant to  
9 be "before" and should have been "before" and I did correct  
10 that now. But the -- I have a true credit report of -- in  
11 January the 28th, 2008 which I have and could be submitted to  
12 the Court that shows my pattern of payment not only to the note  
13 for this mortgage to Homecomings as being consistently thirty  
14 days late and not sixty days late.

15 THE COURT: May I ask you this? The debtor asserts in  
16 the papers they filed that you spoke to GMAC on October 9th,  
17 2008 -- are you able to hear me okay?

18 MR. PHILPOT: Yes, sir.

19 THE COURT: Because I actually have a hearing  
20 assist --

21 MR. PHILPOT: I don't need the hearing assist.

22 THE COURT: We have a hearing assist if you need it.

23 MR. PHILPOT: I don't need that; I just -- I can hear  
24 from this.

25 THE COURT: Okay. That's fine.

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1           That you spoke -- did you speak with someone on  
2           October 9th, 2008?

3           MR. PHILPOT: Your Honor, I would have to look at my  
4           records --

5           THE COURT: Can you --

6           MR. PHILPOT: -- to determine but I can say that  
7           immediately on October the 1st, 2008, I e-mailed the servicing  
8           organization. As a matter of fact, I am an industrial designer  
9           and an ergonomics engineer, quite some record having designed  
10          computer systems and I recognized on the night -- at midnight  
11          when their computer system failed that there was an issue that  
12          I needed to address immediately because I understood that --  
13          that there was a possibility that their computer system did not  
14          accurately provide and complete the transaction. And that  
15          happened at midnight.

16          THE COURT: Well, here's what I want to focus on, Mr.  
17          Philpot. They've indicated that they spoke to you on October  
18          9th, 2008, that you again requested that your payment be  
19          backdated -- just don't interrupt me -- September 30th, 2008,  
20          but that they told you that while the payment couldn't be  
21          backdated that if you made the payment within a few days, the  
22          debtors would amend your credit report to reflect that the  
23          payment was received within sixty days due to a voice  
24          recognition unit error. Were you told that? This is the  
25          point --

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1 MR. PHILPOT: To claim -- that -- to claim --

2 THE COURT: -- that's hanging me up. Let me explain.

3 MR. PHILPOT: I understand.

4 THE COURT: Because their position is okay, here was  
5 this issue about whether you made the payment on September  
6 30th, or you didn't, but they told you on October 9th, if you  
7 make the payment within a few days, the credit report will be  
8 amended to reflect that you made the payment but you didn't  
9 make the payment and you still haven't made a payment.

10 MR. PHILPOT: Your Honor, I never used the term  
11 "backdated." That's a term that the attorneys have used and  
12 was not my term and I never had any conversation about that  
13 process. What I asked was that the payment be actually  
14 credited to September the 30th when the error occurred and that  
15 my credit report not show within sixty days but prior to sixty  
16 days because --

17 THE COURT: You think you can go from 2008 until today  
18 without making a single payment and come in here --

19 MR. PHILPOT: I --

20 THE COURT: -- and argue when they told you get your  
21 payment in in a few days and we'll correct the credit report?

22 MR. PHILPOT: I do not have --

23 THE COURT: I'm not that naive.

24 MR. PHILPOT: I do not have that house.

25 THE COURT: When did you lose the house?

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1 MR. PHILPOT: In 2013. We didn't --

2 THE COURT: So you went from 2008 to 2013 and you  
3 didn't make a single payment and they told you if you get your  
4 payment in in a few days they'll correct the credit report;  
5 give me a break, Mr. Philpot.

6 MR. PHILPOT: Your Honor, if I could go through the  
7 correct history of this, your -- I understand your perception  
8 about the issues, but the surface is not -- doesn't provide the  
9 truth. The truth is that in 2007, and if I could enter my  
10 credit report it would show that I was diligent in making not  
11 only the payments for this but other payments. And prior to  
12 2012, we had a storm --

13 THE COURT: So do you think that the failure to have  
14 this payment recorded on September 30th, 2008 excused you from  
15 making any further payments and you're surprised that you lost  
16 the home in 2013?

17 MR. PHILPOT: I'm never surprised that I lost the  
18 home. And the issue about losing the home is not what I am  
19 here for. The issue about what I'm here for is that in my  
20 discussions with Jack Wright and my previous situation with  
21 my -- all of the records of my payment starting in 2007,  
22 agreeing with the servicing -- debtors that I would be thirty  
23 days late and that they would not foreclose to give me time to  
24 get things corrected.

25 We had storms in Alabama, tornados and storms that

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1 seriously damaged this house. I filed with the Nationwide  
2 Insurance Company and that -- their processing of claims did  
3 not allow it to go forth in a timely manner and I used my funds  
4 to repair a great deal of the house to make sure it was  
5 properly cared for.

6 This was the home place of Federal Judge -- late  
7 Federal Judge Seybourn H. Lynne. It's an important historic  
8 facility and my wife and I had been diligent in trying to care  
9 for this home, make sure that it was handled properly. And if  
10 one may say, I've seen homes and experienced where people have  
11 trashed places and torn them up; counter to that, we've  
12 preserved this home.

13 During this time before 2013, I personally sanded and  
14 refinished -- after the 2008, prior to 2013 -- I've sanded and  
15 refinished the hardwood floors in the home myself. I worked  
16 many, many hours of my own labor. I also diligently worked  
17 with Nationwide Insurance and the contractor to make sure there  
18 was a new roof placed on the house, that the house was put in  
19 good marketable -- excellent marketable condition prior to the  
20 time of 2013.

21 I believe my integrity, if one would look at the total  
22 history and the integrity of my wife and myself to be good  
23 responsible citizens and to be responsible with this particular  
24 property and those who had extended us a note and a mortgage to  
25 make sure that it was handled properly. But in 2007 after the

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1 storm, I had an agreement with the servicing company to be  
2 thirty days late because of some situations that happened with  
3 my health as well as the storms and the funds that I used for  
4 that.

5 THE COURT: Let me ask you this --

6 MR. PHILPOT: And the record would show that I -- I  
7 made those payments and that when I had the conversation with  
8 the Small Business Administration agents and several meetings  
9 and with Jack Wright, the officer with Redstone Federal Credit  
10 Union who also had a lien on the property that my Alzheimer's  
11 project was significant, but one important issue was the thirty  
12 days late was okay but I could not have another single event in  
13 my credit report of being sixty days late. And had they  
14 recorded that payment within sixty days, it would still show on  
15 my credit report of being sixty days late. And Jack Wright,  
16 after this event, after September the 30th when I met with him,  
17 he told me if you cannot get this corrected to show that it was  
18 made on September the 30th, you can't get the SBA loan and  
19 that's -- that is the whole -- whole issue that I'm --

20 THE COURT: You filed a Chapter 7 bankruptcy on  
21 February 3rd, 2009.

22 MR. PHILPOT: I did.

23 THE COURT: And you didn't schedule any claim  
24 against --

25 MR. PHILPOT: I had --

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1 THE COURT: -- any of the debtors.

2 MR. PHILPOT: -- I did not understand that process. I  
3 have to say, I saw an attorney. By that time, our finances  
4 were practically wiped out. Everything that I had I had worked  
5 on the house.

6 And by the way, all the funds since that date, since  
7 2009, since our bankruptcy was discharged in 2009 that have  
8 come from Nationwide have gone directly to the contractors for  
9 payment of materials and labor on that house. And so our -- my  
10 knowledge have been by the attorney that I have who is now, for  
11 health reasons, I'm not quite sure, he's not practicing, but  
12 the clerk that worked for him, Tami Hinkle, is the one that I  
13 had ninety percent of my conversations with in documenting  
14 everything. I've tried to do the best that I knew how. And  
15 she is incarcerated now for fraud in terms of legal matters for  
16 that firm.

17 I have tried and been to them to try to find what I  
18 could and talk with them. I can't; they're closed. I don't  
19 know anything else I can do with that particular situation but  
20 I can -- I do come before this Court and I do have information  
21 about my background as a designer and ability to not enter into  
22 a speculative arrangement but to actually provide a very  
23 consecrated detailed process with business advisors reviewing  
24 this during the fall of 2008 that showed that I had, as had  
25 been typical with my past of tremendously successful business



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1 adventures and design for my clients and employers --

2 THE COURT: All right. Let me stop you there.

3 MR. PHILPOT: -- a good process and --

4 THE COURT: I'll tell you what I'm going to do. You  
5 have -- you indicate that you've submitted something else and  
6 my courtroom deputy told me that something else was received  
7 this morning and you have some additional documents that you  
8 want to provide. Have you given Mr. Wishnew a copy of what you  
9 have?

10 MR. WISHNEW: Yes, Your Honor.

11 THE COURT: Of the documents that he has with him now?

12 MR. WISHNEW: He provided me with his sur-reply this  
13 morning if there's --

14 THE COURT: I mean, he has some additional documents.  
15 Do you have something else?

16 MR. PHILPOT: I have things such as -- that I have not  
17 entered in yet.

18 THE COURT: Okay.

19 MR. PHILPOT: I have two credit reports, I have --

20 THE COURT: All right. Here's what I'm going to do.  
21 Leave that with Mr. Wishnew. Get it filed on ECF, Mr. Wishnew.

22 MR. WISHNEW: Yes, Your Honor.

23 THE COURT: Okay. I will read what was filed this  
24 morning. It wasn't filed yet; that was why I hadn't seen it.  
25 I know we received it. I will review it. I will review what

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1 additional material you have. I'm taking the matter under  
2 submission. I'll consider it all before I rule. Okay?

3 MR. PHILPOT: Yes, sir.

4 THE COURT: So leave it with Mr. Wishnew. He'll make  
5 sure that it gets scanned and filed on the electronic case  
6 filing system.

7 MR. WISHNEW: And then we'll overnight the package  
8 back to Mr. Philpot.

9 THE COURT: And then you can send it back to him.

10 MR. WISHNEW: Yes.

11 THE COURT: Okay? All right, Mr. Philpot?

12 MR. PHILPOT: Certainly. And Your Honor, I appreciate  
13 this Court's indulgence --

14 THE COURT: Okay.

15 MR. PHILPOT: -- with me and the attorneys and their  
16 process in working to hopefully find the truth of this. And I  
17 understand their position that there should be no wrongful  
18 claims allowed under the Borrowers Trust.

19 THE COURT: You should -- I'm not ruling on it now but  
20 this issue of claims that you may have had that arose before  
21 your bankruptcy filing, this has come up many times already in  
22 this case and it has to be -- they have to be scheduled in your  
23 bankruptcy case. I'm not ruling now.

24 I will look at everything --

25 MR. PHILPOT: Right.

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1 THE COURT: -- that we either received this morning.  
2 It'll get filed and Mr. Wishnew will make sure that the  
3 additional documents you want the Court to review, I will  
4 review it before I rule. Okay.

5 MR. PHILPOT: Your Honor, I did address those specific  
6 reports in that response --

7 THE COURT: Okay.

8 MR. PHILPOT: -- this morning.

9 THE COURT: I will read it all.

10 MR. PHILPOT: I will have to say that I have sought  
11 attorneys. After the bankruptcy 2009, I did go with an  
12 attorney firm Eyster & Key (sic) which was Glynn Tubb and Nick  
13 Roth and we pursued the issue of MERS' failure in federal court  
14 and all of those cases were completely thrown out in the class  
15 action that was granted. Much of the problem that I did face  
16 after the bankruptcy that -- and the only reason I have cited  
17 those particular situations is to give some indication as to  
18 how the servicing company treated me during that process with  
19 callous indifference and a tremendous lack of communication  
20 between their internal departments such that my attorneys with  
21 Eyster & Key (sic) had much difficulty as well.

22 Finally, we were able to get all communications to be  
23 channeled through the Alabama attorney Ceron & Gramoot (ph.)  
24 between us with regards to this. So -- and after my bankruptcy  
25 and after our financial collapse that I contin -- started on

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1 September the 30th, 2008. We were never in a position  
2 afterwards to do anything to recover such that we could have  
3 taken the house.

4 But I do ask this Court to recognize that we were  
5 diligent to make sure that this property was well cared for.  
6 It is a contributing structure to the national record of  
7 historic preservation for the Old Decatur-Bank Street Historic  
8 District (sic). And it's the -- the house was the home place  
9 of Honorable Seybourn H. Lynne, federal judge, which was a  
10 wonderful individual and had such a tremendous record in the  
11 State of Alabama especially in dealing with civil rights issues  
12 in the '60s. And we just feel that our honor-bound duty is to  
13 make sure that we were responsible to this and I believe that  
14 we were and all of what we have done we have lost practically  
15 everything --

16 THE COURT: All right. Mr. Philpot --

17 MR. PHILPOT: -- but God has blessed me --

18 THE COURT: -- I'm going to read everything but I  
19 still have two other matters --

20 MR. PHILPOT: I'm sorry?

21 THE COURT: -- on this calendar that I've got to deal  
22 with so we're going to move on.

23 Thank you very much for your appearance.

24 MR. PHILPOT: Thank you, sir. Good day.

25 THE COURT: And, Mr. Wishnew, you just arrange to get

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1 those additional documents and you'll send them back to him and  
2 get them filed. Okay?

3 MR. WISHNEW: Absolutely, Your Honor.

4 THE COURT: So is anyone here on Heyward v. GMAC  
5 Mortgage? All right.

6 I have the Liquidating Trust motion to dismiss.  
7 Pending before the Court is the ResCap Liquidating Trust motion  
8 to dismiss plaintiff's adversary complaint. It's filed at ECF  
9 number 15. It's case number 14-01778.

10 The Trust filed the declaration of Mr. Wishnew in  
11 support of the motion. It's Exhibit 2 to the motion. No  
12 opposition or objections were filed in the motion. The Court  
13 grants the motion.

14 There's a history -- I won't go through it all. Mr.  
15 Heyward twice sought to get a TRO against foreclosure of a  
16 Connecticut property from this Court. The Court denied the  
17 motion on both occasions when it arose.

18 Federal Rules of Civil Procedure 41(b) permits  
19 dismissal for failure to prosecute. In addition, the Court  
20 entered an additional procedures order in this case, an  
21 adversary proceed -- supplemental adversary procedures that  
22 were not followed by Mr. Heyward.

23 The record clearly establishes that Mr. Heyward has  
24 failed to follow on the orders entered by this Court in  
25 connection with the adversary proceeding, has not prosecuted

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1 this action pursuant to Federal Rules of Civil Procedure 41(b),  
2 and the Court dismisses the adversary proceeding for failure to  
3 prosecute.

4 For avoidance of doubt, the dismissal by the Court  
5 operates as an adjudication on the merits as is permitted by  
6 Rule 41(b).

7 MR. WISHNEW: Thank you, Your Honor.

8 THE COURT: All right. Mr. Bustos came in very late.  
9 The Court already ruled, Mr. Bustos, but come up.

10 MR. BUSTOS: Your Honor, I'd like to make a statement.

11 THE COURT: Let me -- before you begin, Mr. Bustos --  
12 well, go ahead, Mr. Bustos, explain why you were so late today?

13 MR. BUSTOS: I was supposed to come in on a plane  
14 today at 6:30. For reasons in Arizona that really don't  
15 matter, I got onto another plane and got in today at 9:21 a.m.

16 As far as the actual case is concerned -- well, I  
17 moved everything to Arizona. I don't practice bankruptcy law.  
18 I just -- I can do certain --

19 THE COURT: Well, you didn't practice bankruptcy law  
20 the last time you were here, either.

21 MR. BUSTOS: No, no, but I can do simple petitions.  
22 But in terms of a complex case like this I think I went a  
23 little over my head, to be quite honest. I talked to my client  
24 about this. I asked him, I said maybe you'll be better served  
25 with another attorney. He keeps on insisting that I stay on.

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1 I will not stay on as --

2 THE COURT: Well, you're not going to get out unless I  
3 let you out.

4 MR. BUSTOS: I understand but as an -- for an  
5 evidentiary hearing I really don't believe I'm the person.

6 I did get a phone call from Mr. Wishnew. He said he  
7 wanted to settle. If we could come to some sort of settle --

8 THE COURT: Well, I've already ruled. I'm going to  
9 tell you what my ruling is.

10 MR. BUSTOS: Okay.

11 THE COURT: I'm going to give you a chance to address  
12 it.

13 You're here on an order to show cause why the Court  
14 should not impose sanctions pursuant to Federal Rule of  
15 Bankruptcy Procedure 9011.

16 MR. BUSTOS: Yes.

17 THE COURT: The order to show cause, which was entered  
18 on February 26th, 2014 incorporates by reference the memorandum  
19 opinion and order sustaining in part and overruling in part the  
20 ResCap Borrower Claims Trust objection to claims number 345 and  
21 3743 filed by Conrad P. Burnett, Jr. That memorandum opinion  
22 and order is dated February 26th, 2014. It's incorporated into  
23 the order to show cause.

24 The order to show cause, among other things -- I'm not  
25 going to review the entire matter -- but on page 3 notes that

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1 my opinion had addressed each of the eleven affirmative  
2 defenses that you asserted an opposition. In the memorandum --  
3 and I'll read from this paragraph of the order to show cause; I  
4 quoted it in the transcript earlier today in your absence, but  
5 it says, "Whereas in its opinion, the Court addressed each of  
6 the eleven affirmative defenses Bustos asserts in the  
7 opposition and found that the affirmative defenses are  
8 frivolous, untimely, unsubstantiated by the evidence in the  
9 record before the Court, and/or unsupported by current or  
10 applicable law, existing law, or by a nonfrivolous argument for  
11 the extension, modification, or reversal of existing law or the  
12 establishment of new laws," referring to the opinion at pages  
13 16 through 20.

14 The order to show cause further goes on, "The Court  
15 further found that Bustos' arguments in the opposition appear  
16 to be entirely unsupported by the record and unsubstantiated by  
17 any meaningful legal research."

18 Did you do any -- did you, sir, do any legal research  
19 in connection with any of the eleven affirmative defenses that  
20 you asserted in your opposition?

21 MR. BUSTOS: Very little. I did it the best I could  
22 with the --

23 THE COURT: Well, did you do any -- tell me what  
24 research you did? You had a -- let me ask you this. You filed  
25 an affirmation of Pablo E. Bustos in support of dismissal of



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1 sanctions motion.

2 MR. BUSTOS: Yes.

3 THE COURT: What you didn't do is, I required -- my  
4 order to show cause said on page 4, "Bustos' response shall  
5 address, as this Court has done in this order and in its  
6 opinion, each of the eleven affirmative defenses asserted in  
7 the opposition explaining why each asserted affirmative defense  
8 does not constitute a violation of Bankruptcy Rule 9011." And  
9 you didn't do that in your opposition. Do you agree?

10 MR. BUSTOS: No. I --

11 THE COURT: You don't agree or you agree?

12 MR. BUSTOS: No, I wouldn't say I addressed it. No,  
13 I -- no, I --

14 THE COURT: Are you acknowledging that you did not  
15 address in your opposition the merits of any of the eleven  
16 affirmative defenses that you asserted?

17 MR. BUSTOS: I agree with that. Yes.

18 THE COURT: Okay. All right. In addition to your  
19 affirmation, there's a letter from your client --

20 MR. BUSTOS: Of -- oh, yes.

21 THE COURT: -- Mr. Burnett, and there's also a  
22 declaration of Dennis J. Huelbig, Jr. in support of dismissal  
23 of an order to show cause as to Attorney Pablo E. Bustos. Did  
24 Mr. Huelbig work for you?

25 MR. BUSTOS: No. I -- well, not now but I asked him

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1 to call the Court to tell them that I couldn't come.

2 THE COURT: Was he your paralegal in New York?

3 MR. BUSTOS: He did paralegal work for me, yes. Like,  
4 I --

5 THE COURT: You're not answering my question because  
6 Mr. Burnett's letter says, "I retained New Research Services  
7 out of Las Vegas, Nevada to create and process the claims and  
8 necessary paperwork."

9 MR. BUSTOS: Um-hum.

10 THE COURT: "This firm is a paralegal firm that claims  
11 to be familiar with federal bankruptcy procedure. New Research  
12 Services is owned and operated by one person; Dennis Huelbig,  
13 Jr."

14 MR. BUSTOS: That's true.

15 THE COURT: Is that correct?

16 MR. BUSTOS: That was way before me, though, before I  
17 was retained. I was retained after that. He worked with  
18 Huelbig for a long time and when he came to me and said  
19 Huelbig -- we'd have to sign a whole new retainer and he has to  
20 work directly with me. And if -- and if anything Huelbig did  
21 it would be as -- it's in the printed contract -- I asked him  
22 to call the Court --

23 THE COURT: Okay. So you're responsible for any legal  
24 arguments that were made in the opposition to the claim  
25 objection. Correct?

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1 MR. BUSTOS: Yes.

2 THE COURT: All right. So why shouldn't -- let me  
3 tell you, what in your absence, I ruled earlier --

4 MR. BUSTOS: Okay.

5 THE COURT: -- and I'm going to give you a chance to  
6 address it.

7 I awarded sanctions in the amount of 1,000 dollars for  
8 the each of the eleven affirmative defenses that have -- are  
9 absolutely without merit. So that's 11,000 dollars. And in  
10 addition to that, because you didn't appear today and I had  
11 ordered you to -- and this part I will take back, you came in  
12 late -- an additional 2,500 dollars for not appearing today.

13 MR. BUSTOS: Um-hum.

14 THE COURT: And then when it -- so that's 13,500. And  
15 then when we came to the case management conference on the  
16 adversary proceeding you filed for Mr. Heyward, you weren't  
17 here for that, that was an additional, 2,500. So with respect  
18 to the sanctions for not appearing, I'm retracting that earlier  
19 ruling. So that's a total of 5,000 dollars; 2,500 for failing  
20 to appear on the order to show cause and 2,500 for failing to  
21 appear on the adversary proceeding case management conference.  
22 Tell me -- explain to me why I shouldn't sanction you 1,000  
23 dollars for each of the frivolous eleven affirmative defenses  
24 you asserted? It required the Trust to address specifically  
25 and it required the Court to address each in its opinion. I'm

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1 giving you a chance to respond.

2 MR. BUSTOS: Your Honor, that would require me to  
3 write, but -- in length; I can't just on a whim address all of  
4 them. I could address the case in general.

5 THE COURT: No, no, no, no. The only claim -- look,  
6 the opinion that I filed sustained in part and overruled in  
7 part the Trust's objection to your client's claim. But the  
8 interesting thing to me is the only part that survived was the  
9 part that your client asserted without a lawyer; you didn't  
10 address it all. Your client was doing just fine on that one.  
11 Anything you added to it was frivolous, unsupported by law, and  
12 that's what I'm asking you to address. Okay. Why shouldn't I  
13 sanction you for the frivolous arguments not supported by any  
14 research or arguments or good-faith arguments based on case  
15 law? Why shouldn't I sanction you for that?

16 MR. BUSTOS: I can tell you what I believe, whether  
17 you agree or not, is that in the last appearance when I  
18 appeared in front of you, everything went to shambles. I  
19 thought we were -- because I spoke to the attorney before that  
20 the attorney for -- I thought we were going to settle and then  
21 you kept on asking me these questions.

22 I believed that there was fraud, clearly, from GMAC;  
23 that was clear that my client had a good claim, and I didn't  
24 expect --

25 THE COURT: You think you can just throw stuff up

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1 against the wall and hope something sticks with no legal  
2 support whatsoever? Your client, his claim goes forward as to  
3 one claim; that's explained in my opinion. The problem here is  
4 that you asserted eleven affirmative defenses --

5 MR. BUSTOS: Um-hum.

6 THE COURT: -- without absolutely no support in fact  
7 or in law or any argument for the good-faith extension of law  
8 and that's the portion that's covered by my order to show cause  
9 why you shouldn't be sanctioned.

10 MR. BUSTOS: Um-hum.

11 THE COURT: I'm going to give you one last chance to  
12 address the -- why you think I shouldn't impose monetary  
13 sanctions against you for making frivolous arguments.

14 MR. BUSTOS: Because the claim -- the case itself is  
15 not frivolous. It's not. He has a good claim, Mr. Burnett.

16 THE COURT: Do you think -- you think he has a good  
17 claim?

18 MR. BUSTOS: Yes. Yes, I do.

19 THE COURT: Okay. Do you think that entitles you to  
20 make any argument whatsoever?

21 MR. BUSTOS: No. No. And -- look, I do agree with  
22 you that I made mistakes. I believe it's excessive. I don't  
23 really even have 11,000 dollars so I wouldn't -- I wouldn't  
24 even be able to pay it even if I wanted to.

25 THE COURT: You should have thought of that before you

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1 filed frivolous --

2 MR. BUSTOS: I -- look, Your Honor, I agree. I  
3 could -- if you want to impose some sanctions on me, I would  
4 think it's fair, but 11,000 dollars, that's just -- especially  
5 for a case I don't even want to be on. I told -- and I talked  
6 to Mr. Burnett about this and I've discussed it with him  
7 thoroughly. He keeps on insisting me being on it. I want to  
8 get off the case. I didn't want to fly in today for this.  
9 I --

10 THE COURT: So here's what --

11 MR. BUSTOS: -- and I never said I was -- I never said  
12 I was a bankruptcy attorney --

13 THE COURT: -- here's --

14 MR. BUSTOS: -- like, a specialist. I never said  
15 that.

16 THE COURT: Well, you don't have to be a bankruptcy  
17 specialist to know this: Rule 9011(b) provides a quote, "By  
18 presenting to the Court, whether by signing, filing,  
19 submitting, or later advocating a petition, pleading, written  
20 motion, or other paper, an attorney or an unrepresented party  
21 is certified that to the best of the person's knowledge,  
22 information, and belief formed after an inquiry reasonable  
23 under the circumstances" --

24 MR. BUSTOS: That I agree with that.

25 THE COURT: I'm not finished reading it.

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1 Subsection (2) of it is, "the claims, defenses, and  
2 other legal contentions therein are warranted by existing law  
3 or by a nonfrivolous argument for the extension, modification,  
4 or reversal of existing law or the establishment of new law."

5 MR. BUSTOS: Um-hum.

6 THE COURT: That's the portion I've addressed in the  
7 order to show cause and in my original opinion --

8 MR. BUSTOS: Um-hum.

9 THE COURT: -- and what you have not addressed. The  
10 one piece of your client's, Mr. Burnett's, claim that he  
11 asserted pro se has survived, but that's not what you  
12 addressed. That's not the problem I had with what you filed.

13 Whether you believe your client had a good claim or  
14 not, it doesn't entitle you to file eleven totally frivolous  
15 affirmative defenses. When I give you a chance to file an  
16 explanation for why you shouldn't be sanctioned for it, you  
17 don't even address it.

18 MR. BUSTOS: Your Honor, I didn't believe they were  
19 frivolous. Whether I made a complete and total mistake, that's  
20 another matter, but in fact, I should at least be allowed to  
21 address those on the merits given some time.

22 THE COURT: Right now. That -- look, I gave you a  
23 deadline for filing.

24 MR. BUSTOS: And --

25 THE COURT: You filed something. You didn't address

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1 it there. I'm asking you right now, this is the time and  
2 place; it's not being continued to another date or another  
3 time. You have any case authority to support any of the eleven  
4 affirmative defenses that you asserted?

5 MR. BUSTOS: Off the top of my head no, I cannot. I  
6 cannot guarantee authority. I could say --

7 THE COURT: All right.

8 MR. BUSTOS: -- that I didn't believe they were  
9 frivolous. I did the best I could --

10 THE COURT: All right.

11 MR. BUSTOS: -- on the time.

12 THE COURT: I'm taking the matter under submission.  
13 So the one piece of it, so the record's clear, I am withdrawing  
14 my earlier award of sanctions for nonappearance either on the  
15 OSC or on the case management.

16 Mr. Bustos, you're counsel of record in an adversary  
17 proceeding you filed in this court. I'm not going to deal with  
18 the merits of it today. You better think long and hard before  
19 you decide what you're going to do. I think debtors' counsel's  
20 going to speak with you about it. If you decide to proceed  
21 with the adversary proceeding and they decide to make a motion  
22 for sanctions under Rule 9011, I'll consider it and rule on it  
23 if they comply with the rule. I'm not going to address it  
24 further today, but what remains on my docket is an adversary  
25 proceeding that you signed and filed.



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1 MR. BUSTOS: Can I withdraw it, Your Honor?

2 THE COURT: Talk to Mr. Wishnew after. I'm not going  
3 to get into it beyond. Okay.

4 MR. BUSTOS: Okay. And as far as the sanctions, the  
5 11,000, are those stayed? You said you were going to -- it's  
6 pending.

7 THE COURT: No. I'm going to -- I'm going to enter a  
8 written order. I'm going to think some more about what I'm  
9 going to do. You should have thought long and hard before you  
10 did what you did --

11 MR. BUSTOS: I mean --

12 THE COURT: -- and then not respond to the order to  
13 show cause.

14 MR. BUSTOS: I did respond to it; I just didn't  
15 respond in the exact way that the Court instructed.

16 THE COURT: Okay. All right. We're adjourned.

17 MR. WISHNEW: Thank you for your time, Your Honor.

18 THE COURT: I'm sorry?

19 MR. WISHNEW: Thank you for your time.

20 THE COURT: Thank you.

21 (Whereupon these proceedings were concluded at 12:32 PM)

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I N D E X

RULINGS

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