

IN THE COURT OF APPEALS
STATE OF GEORGIA

GEORGIA NEUROLOGY &)	
REHABILITATION, P.C., d/b/a COASTAL)	
NEUROLOGICAL INSTITUTE, also, d/b/a)	
NEUROLOGY INSTITUTE OF GEORGIA,)	
NEUROLOGICAL INSTITUTES OF)	
ATLANTA, P.C., d/b/a NEUROLOGICAL)	
INSTITUTE OF ATLANTA, and)	
CARL SHENKMAN,)	APPEAL CASE
)	NO. A11A0386
Appellants,)	
)	
v.)	
)	
MARIA HILLER,)	
)	
Appellee.)	

BRIEF OF APPELLEE

COMES NOW Maria Hiller (hereinafter “Ms. Hiller” or “Appellee”), Appellee/Defendant in the above-captioned action, by and through the undersigned counsel of record, Weinstock & Scavo, P.C., and files this Brief of Appellee showing this honorable Court that the Superior Court of Forsyth County should be affirmed. The Order granting Appellee’s Motion for Summary Judgment was correct because Appellants’ action is barred by the doctrines of collateral estoppel, res judicata and/or judicial estoppel.

PART ONE: STATEMENT OF FACTS

A. Appellee's Statement.

Appellant Carl Shenkman (hereinafter "Shenkman") and Ms. Hiller were divorced in the Superior Court of Glynn County, Georgia on December 4, 2007, *nunc pro tunc* to August 7, 2007, in Civil Action File No. CE07-00698-063. (Vol. 1, R-69-76). Subsequent to their divorce, Ms. Hiller was forced to file a Petition for Contempt in January 2008, bearing Civil Action File No. CE07-00698-C-063, which Petition was heard on March 4, 2008 and resulted in an Order on Contempt against Shenkman entered April 4, 2008. (Vol. 1, R-77-79).

On or about May 23, 2007, prior to entry of the Final Judgment and Decree but subsequent to the initial filing of the divorce action, Shenkman executed a Civilian Warrant Affidavit before a Glynn County, Georgia magistrate, alleging forgery and financial transaction card fraud claims against Ms. Hiller. (Vol. 1, R-80-81). On or about August 10, 2007, prior to entry of the Final Judgment and Decree, the warrants were dismissed by the Brunswick Judicial Circuit Assistant District Attorney, indicating that Ms. Hiller "has paid full restitution, and the victim has requested dismissal of the charges." (Vol. 1, R-82).

In the divorce action, the criminal action and the contempt action, Appellants either alleged or could have alleged all of the claims upon which the current complaint was based. Furthermore, all of the financial transactions upon which Appellants base their claims were either dismissed in the criminal action and/or fully litigated in the contempt action. Accordingly, there were no genuine issues of material fact and the Superior Court of Forsyth County correctly held that Ms. Hiller was entitled to judgment as a matter of law.

B. Appellants' Material Factual Inaccuracies.

Throughout the Brief of Appellants, as has been the case throughout this litigation, Appellants make numerous inaccurate, inflammatory and inappropriate statements. Appellee objects to all of Appellants' statements which assert that Ms. Hiller engaged in any forgeries, conversion or stealing. These statements are completely improper, as well as potentially libelous. Appellants' continued assertions that the Glynn County Superior Court did not consider Shenkman's setoff claim in the contempt proceeding are also erroneous, as shown by the record in this case and discussed below. The record also illustrates that Appellants' reliance on an alleged "reaffirmation agreement" between Shenkman and Ms. Hiller is misplaced, both because no such agreement existed nor was ever presented in the contempt

action or before the trial court in the present action. Finally, Appellants' statement that the present action sought to recover under the alleged "reaffirmation agreement" is also false. As discussed below, no such claim was included in the Complaint in this case, no competent evidence supporting such a claim is included in the record and no such evidence exists as the supposed "reaffirmation agreement" is a continued falsehood propounded by Appellants.

PART TWO: ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review.

On appeal from a grant of a motion for summary judgment, the Court of Appeals reviews the evidence de novo, viewing it in the light most favorable to the non-movant, to determine whether a genuine issue of fact remains and whether the moving party is entitled to judgment as a matter of law. Wills v. Arnett, A10A1951, 2010 WL 3784565 (Ga. Ct. App. Sept. 28, 2010)(citing Rubin v. Cello Corp., 235 Ga. App. 250 (1998)). Further, a grant of summary judgment will be affirmed if it is right for any reason. Abellera v. Williamson, 274 Ga. 324, 326 (2001).

When a Motion for Summary Judgment is submitted and supported by evidence, the adverse party may not rest his case as made, but must set forth specific

facts and present his case in full in order to show there is a genuine issue for trial. Al Ghita v. Universal Investment and Manufacturing Company, 168 Ga. App. 562 (1983). An adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavit or otherwise must set forth specific facts showing there is a genuine issue for trial. O.C.G.A. § 9-11-56(e); Norris v. Kunes, 166 Ga. App. 686 (1983). If the defendant does not so respond, summary judgment may be entered against him. Id.

B. Summary Judgment Was Properly Granted to Appellee.

Appellants' claims are barred by the doctrines of res judicata, collateral estoppel and/or judicial estoppel. As indicated above, Shenkman either alleged or could have alleged all of the claims upon which the current complaint is based in the divorce action which resulted in a Final Order and Judgment entered December 4, 2007, in the criminal action which was dismissed on or about August 10, 2007, and/or the contempt action which resulted in a Order on Contempt on April 4, 2008. Furthermore, all of the financial transactions upon which Appellants base their claims were either dismissed in the criminal action and/or fully litigated in the contempt action. Accordingly, there are no genuine issues of material fact and the Order on Defendant's Motion for Summary Judgment should be AFFIRMED.

1. Collateral Estoppel Bars Appellants' Claims.

“[C]ollateral estoppel applies where an issue of fact or law is actually litigated and determined by a valid judgment, *and* the determination is essential to the judgment. That judgment is then conclusive in a subsequent action between the same parties.” Kent v. Kent, 265 Ga. 211, 211 (1995)(citing Boozer v. Higdon, 252 Ga. 276, 278(1) (1984); Restatement, 2d, Judgments, §27 (1982)). The issue of funds allegedly taken by Ms. Hiller was actually litigated in the previous contempt proceeding, determined by a valid judgment and such determination was essential to the judgment. Accordingly, the contempt judgment is conclusive between the parties and Appellee’s motion for summary judgment was correctly granted.

During the contempt hearing held on March 4, 2008 before the Honorable Amanda F. Williams, Superior Court of Glynn County, Georgia, Shenkman pursued a claim of setoff, alleging that past due child support and/or alimony arrearage which he owed should be set off by the funds allegedly taken by Ms. Hiller. Judge Williams specifically invited proof of the alleged taking:

“JUDGE WILLIAMS: Y’all show me the evidence that she forged anything, took anything and I will deduct that from the Thirty Thousand (\$30,000.00) he owes her as employment income.”

(Vol. 2, R-167, ll. 14-17). Judge Williams specifically stated that “if [Ms. Hiller’s] owed Thirty Thousand (\$30,000.00) out of his business and she took money out of his business then I’m going to do a set-off.” (Vol. 2, R-168, ll. 10-13). Appellants’ continuous and erroneous argument that Shenkman’s set off claim or defense was not allowed to be presented in the contempt action is both disingenuous and belied by the full record before this Court.

During the contempt hearing, Ms. Hiller testified regarding the allegedly stolen amounts, counsel for Shenkman cross-examined Ms. Hiller and also tendered exhibits purportedly showing the amounts wrongfully taken by Ms. Hiller. (Vol. 2, R-166-184). Judge Williams thereafter indicated that the allegations were “not an issue with the Court anymore” and that Ms. Hiller had “satisfied [the Judge] about it.” (Vol 2., R-184, ll. 4-15). Judge Williams specifically stated:

“JUDGE WILLIAMS: All right. Let’s talk about the employment issue. **I don’t find that he’s shown me anything that shows she absconded with any of his money.**”

(Vol. 2. R-186, ll. 4-7) (emphasis added).

The Order on Contempt entered April 4, 2008 is a valid judgment wherein the issue of the allegedly stolen funds is disposed of by virtue of the fact that the

requested setoff was not included. Whether Ms. Hiller stole those funds was an issue that was actually litigated in the contempt proceedings, a valid judgment was entered in those proceedings and whether the funds were taken which could have offset amounts owed to Ms. Hiller was essential in determining the amounts included in that Order. Appellants' argument that because the contempt judgment did not specifically state that the setoff was denied their claims are not precluded is a failing argument. The standard for collateral estoppel does not require such a specific finding - Appellee must simply show that the issue was actually litigated (it was), a valid judgment was entered (it was) and determination of the issue was essential to the judgment (it was). Accordingly, collateral estoppel precludes Appellants from relitigating this issue again and the trial court properly granted summary judgment.

Although difficult to discern, Appellants apparently argue that a "reaffirmation agreement" between Shenkman and Ms. Hiller bars application of the collateral estoppel doctrine. Appellants appear to argue that Shenkman and Ms. Hiller entered into a post-divorce judgment contract, the breach of which could not have been litigated in either the divorce or contempt actions, nor the dismissed criminal prosecution. However, this argument, which Appellants fail to support with any competent evidence in the record, also fails on the law.

Appellants' Complaint seeks damages for conversion, breach of fiduciary duty, fraud, accounting and punitive damages. (Vol. 1., R-7). Nowhere in the Complaint did Appellants allege a breach of contract, nor was a "reaffirmation agreement" even alluded to until Appellants' response to Ms. Hiller's Motion for Summary Judgment. (Vol. 1, R-96). Even assuming such a claim could have been made at the summary judgment stage in the proceedings, Appellants provided no evidence and there is no evidence that a contract (such as a "reaffirmation agreement") existed, let alone that such a contract was breached.

Pursuant to O.C.G.A. § 13-3-1 to constitute a valid contract, there must be (1) parties able to contract, (2) a consideration moving to the contract, (3) the assent of the parties to the terms of the contract, and (4) a subject matter upon which the contract can operate. "Under Georgia law, a contract does not exist unless the parties agree on all material terms. A contract cannot be enforced if its terms are incomplete, vague, indefinite or uncertain. Thus, a court will not enforce an agreement where it is left to ascertain the intention of the parties by conjecture." Aukerman v. Witmer, 256 Ga. App. 211, 214 (2002) (punctuation and footnotes omitted). Thus, to be valid under Georgia law, a contract must have enough certainty that each party has a cause

of action for breach of contract. Information Systems and Network Corp. v. City of Atlanta, 281 F.3d 1220 (2002).

Like written contracts, oral contracts must be certain and definite. Goldstein v. Kellwood Co., 933 F. Supp. 1082 (1996). A contract cannot be enforced if its terms are incomplete, vague, indefinite, or uncertain. Kitchen v. Insuramerica Corporation, 296 Ga. App. 739 (2009). When a contract is substantially alleged, some details might be supplied under the doctrines of reasonable time or reasonable requirements, but indefinites in subject matter render the contract void. Burns v. Dees, 252 Ga. App. 598 (2001). Ultimately, the test of whether a contract is enforceable is whether it is expressed in language sufficiently plain and explicit to convey what the parties agree upon. Kitchen, 296 Ga. App. 739. To be enforceable, a promise must be sufficiently definite as to both time and subject matter. Farmer v. Argentina, 174 Ga. App. 682 (1985).

Appellants did not, and cannot, substantially allege any post-judgment “reaffirmation agreement” or contract, as none existed nor is there any competent evidence in the record of such a contract. The only evidence pointed to in the record is Shenkman’s self-serving, conclusory affidavit submitted in response to the Motion for Summary Judgment which contains inadmissible hearsay and unsupported

conclusions. Such evidence is insufficient to raise a genuine issue of material fact to defeat a motion for summary judgment. Liles v. Innerwork, Inc., 279 Ga. App. 352, 353 (2006).

Additionally, even if such an agreement was found between Shenkman and Ms. Hiller, there were never any allegations or evidence that a similar agreement was entered into between Ms. Hiller and the other corporate defendants. Furthermore, if such a “reaffirmation agreement” from August 2007 existed it could have and should have been introduced during the contempt hearing held on March 4, 2008. It was not introduced into evidence during that matter, was not brought up as a topic during the cross-examination of Ms. Hiller during that hearing nor testified to by Shenkman during his sworn testimony at the contempt hearing. (Vol. 2, R-127). Accordingly, the trial court correctly granted Appellee’s Motion for Summary Judgment and should be AFFIRMED.

2. Res Judicata Bars Appellants’ Claims.

Even if this Court were to accept Appellants’ arguments regarding collateral estoppel, the trial court’s grant of summary judgment to Appellee should be affirmed pursuant to the theory of res judicata. “A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all

matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.” O.C.G.A. § 9-12-40. “In deciding whether O.C.G.A. § 9-12-40 operates as to bar a claim, we must consider: ‘(a) whether there is a valid antecedent judgment; (b) whether there is identity of the parties; (c) whether there is identity of issues; and (d) whether reasons of public policy militate against a strict application of the above statute in this case.’” Miller v. Steelmaster Material Handling Corp., 223 Ga. App. 532, 535 (1996) (internal quotes and citations omitted).

The Miller decision is directly on point here. Fyllis Miller and Myron Miller were divorced, with Myron receiving all stock in the Steelmaster Material Handling Corp. and Fyllis receiving complete ownership of a warehouse which was leased by Steelmaster. Id. at 532. In June 1993, Fyllis sued Steelmaster for unpaid rent on the warehouse; Steelmaster counterclaimed for \$8,500.00 which it contended Fyllis improperly took from the corporate money market account during the divorce. Id. at 532-33. Fyllis then filed a motion for summary judgment on the counterclaim, asserting that it was barred by res judicata and collateral estoppels. Id. at 533.

In reversing the trial court’s denial of Fyliss’s motion for summary judgment, the Georgia Court of Appeals found that “[a]lthough Myron Miller and Steelmaster

are separate entities, ‘privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right... .’” Id. (citation omitted). During the divorce action when Myron was a 50% shareholder in Steelmaster (and after when he became the sole shareholder), his “interest in raising and pursuing a claim that Fyllis Miller had improperly removed \$8,500 in corporate assets was identical to Steelmaster’s interest, and for the purposes of res judicata and collateral estoppels he and Steelmaster are privies.” Id.

Further, Myron could have asserted that the removal of the funds was more than just Fyllis holding marital funds that were subject to equitable division (e.g. conversion, breach of fiduciary duty, fraud, etc.) in the divorce action, but failed to do so. “Myron Miller and Steelmaster have identical interests as to these funds; that interest cannot be ignored in the first action and asserted in the later one.” Id. at 536.

Just as in the Miller case, Shenkman and the other Appellants are and have been in privity with each other. Shenkman is the sole proprietor and 100% owner of Neurological Institute of Atlanta, P.C. and the 100% owner of Georgia Neurology and Rehabilitation, P.C. As to the funds claimed owed to the corporations, Shenkman and the other Appellants “have identical interests as to these funds; that

interest [could] not be ignored in the [divorce] action and asserted in [the present action].” Moreover, the funds claimed owed to Appellants in this action “was a matter that could have been put in issue, and adjudicated in a prior proceeding between the same parties.” Id. (internal quotes and citation omitted). See also, Prince v. Prince, 147 Ga. App. 686 (1978) (final divorce decree settling all matters pertaining to division of property was res judicata as to subsequent claim of conversion of funds prior to entry of divorce decree). Accordingly, the present action is barred in its entirety by the application of the doctrine of res judicata and summary judgment was properly granted.

As indicated above, Appellants’ convoluted argument appears to also assert that a “reaffirmation agreement” between Shenkman and Ms. Hiller bars application of the res judicata doctrine. Just as with the collateral estoppel doctrine discussion above, the only evidence pointed to in the record is Shenkman’s self-serving, conclusory affidavit submitted in response to the Motion for Summary Judgment which contains inadmissible hearsay and unsupported conclusions and is insufficient to raise a genuine issue of material fact to defeat a motion for summary judgment. Liles v. Innerwork, Inc., 279 Ga. App. 352, 353 (2006).

Furthermore, Appellants' reliance on Jacob-Hopkins v. Jacob, 304 Ga. App. 604 (2010) is similarly unavailing. In Jacob-Hopkins, the divorced wife filed a motion for contempt against her ex-husband after a Final Order was entered in a civil suit regarding property which the parties had received as co-owners in their previous divorce action. Id. The motion for contempt did not seek any monetary damages and both parties were found to be in contempt of the Final Order arising from the civil suit. Id. This Court found that the order on the contempt, which provided that the Final Order operated as res judicata on all issues regarding the property, improperly imposed the res judicata doctrine where the motion was not an action for money damages stemming from a contempt and the issue of damages was not before the trial court. Id. at 605.

It is unclear from the Brief of Appellants whether they seek to relate the holding in Jacob-Hopkins to their argument against collateral estoppel or res judicata in the present case. Regardless of which argument they are advancing, both fail. As indicated above, the fully litigated decision in the contempt action fulfills the requirements to collaterally estop the underlying claims in this action. Jacob-Hopkins does not address the collateral estoppel doctrine and does not support reversal of the trial court's order granting summary judgment.

Jacob-Hopkins also does not bar application of res judicata in the present action, as it is factually distinguishable from the present action both in the posture of the cases and in the fact that Ms. Hiller's motion for contempt did seek monetary damages stemming from the contempt. The lower court in Jacob-Hopkins did not have the authority to state that res judicata stemming from the Final Order barred all actions for future damages related to the property involved - damages could still arise between the parties stemming from contempt of the Final Order. This is inapplicable to the present case, however, where Appellants are seeking relief for alleged previous damages related to property (money) that was or should have been involved in the divorce action between Shenkman and Ms. Hiller. Accordingly, Miller is controlling in this action, res judicata bars appellants' claims and the grant of summary judgment to Appellee should be AFFIRMED.

3. Judicial Estoppel Bars Appellants' Claims.

Even if this Court were to accept Appellants' arguments regarding collateral estoppel and/or res judicata, the trial court's grant of summary judgment to Appellee should be affirmed pursuant to the theory of judicial estoppel. Parties are estopped from asserting positions in one judicial proceeding which are inconsistent with

previously successful assertions in a prior proceeding. Pechin v. Lowder, 290 Ga. App. 203, 203 (2008).

“[T]he doctrine of judicial estoppels depends on three factors: (1) the party’s later position must be clearly inconsistent with a previously held position; (2) the party must have successfully persuaded a court to accept the earlier inconsistent position; and (3) the party must be in a position to derive an unfair advantage or impose an unfair detriment upon the opposing party if not stopped.”

Id. at 204 (citation omitted).

On or about May 23, 2007, Shenkman submitted a warrant application in Glynn County against Ms. Hiller, alleging she committed the criminal offenses of forgery and fraud. (Vol. 1, R-80-81; R-83). Thereafter, Shenkman agreed to dismiss the warrant application and the charges were dismissed. (Vol. 1, R-82; R-84). More specifically, the State declined to prosecute, indicating that “[Ms. Hiller] has paid full restitution, and the victim [Shenkman] has requested dismissal of the charges.” (Vol. 1, R-82).

Shenkman’s prior position in the criminal proceedings that Ms. Hiller had paid full restitution resulting in voluntary dismissal of the charges is clearly inconsistent

with the current position that Ms. Hiller owes those same funds to Appellants. Shenkman was clearly persuasive in the prior proceedings that full restitution had been made and no funds were owing, as shown by the dismissal of the charges. Furthermore, as shown above, Appellants' late asserted claim of a breach of a "reaffirmation agreement" is unsupported in fact or law and fails to vitiate the indisputable fact that the documentary evidence in this case shows a request for dismissal and subsequent dismissal of the charges. Allowing Appellants another bite at the apple where they have already indicated that the alleged conversion has been resolved for over three years certainly imposes an unfair detriment to Ms. Hiller and results in an unfair advantage for Appellants. Accordingly, the present action is barred by judicial estoppel and summary judgment was properly granted.

C. Conclusion.

Despite Appellants' attempts to litigate the same issues and matters for the third time, there are no genuine issues of material fact precluding summary judgment in favor of Appellee. Appellants' claims are barred by the doctrines of res judicata, collateral estoppel and/or judicial estoppel. Accordingly, Appellee's Motion for Summary Judgment was properly granted and such Order should be AFFIRMED.

MEMORANDUM

Sunday, January 30, 2011

TO: Potential Client File

FROM: Jami M. Kohn

RE: Potential Client/Statute of Repose

Question Presented: Does the Georgia Statute of Repose apply where a 1998 model year car bought new in 1999 is involved in an accident in May 2010?

Brief Answer: Yes. The car manufacturer will be protected from a strict liability tort action.

Discussion:

O.C.G.A. § 51-1-11(b) provides: “(1) The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained. (2) No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.”

Section (b)(1) provides for strict liability of manufacturers; however, such liability is limited by section (b)(2) to the time period of ten (10) years after the first sale of the injury causing product. The repose period is itself limited by section (c) which provides: “The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.”

Section (c) makes the repose period applicable to negligence actions against manufacturers, unless such negligence causes a disease or birth defect. Also, the repose period will not apply to conduct which willfully, recklessly or wantonly disregards life or property, nor

will it relieve a manufacturer from its duty to warn of a known danger. The statute of repose is a procedural rule, such that cases outside the time period are jurisdictionally barred.

Under the facts as presented, it appears that the clients' claims against the car manufacturer are barred by O.C.G.A. § 51-1-11(b)(2). The accident which caused their injuries occurred more than ten years after the first sale of the car for use. Any alleged negligence in the manufacturing of the car did not cause any disease or birth defect. While a duty to warn is not obviated by the repose period, I could not find any indication that sudden, unintended acceleration was or is a known danger with the 1998 model year Lincoln Continentals. Similarly, if such acceleration was or is not a known danger in this car, it is unlikely that the manufacturer manifested any disregard for life or property.

Note that this statute is only applicable to manufacturers. Any claims against the seller of the product or perhaps against repairmen that may have worked on the car in the past, which actions can be shown to have proximately caused the clients' injuries, would not be barred by application of O.C.G.A. § 51-1-11.

Additionally, there is currently pending before the Georgia Supreme Court a certified question from the Eleventh Circuit concerning the application of O.C.G.A. § 51-1-11 where a component part of a product caused an injury and when the statute of repose begins to run. While this does not appear to apply to the present case, the outcome may be instructive in future cases.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LAWRENCE P. RUMBAUGH v. MIDFIRST BANK, et al.

**SUMMARY OF DEPOSITION OF RICHARD S. MCIVER ON HIS
OWN BEHALF AND PURSUANT TO RULE 30(B)(6)**

Taken by John C. Klotz (telephonically)

William Penn Dawson, III, Mark J. Bernet, Benjamin Weinberg (telephonically) and Lawrence
Rumbaugh (telephonically) Appearing

January 22, 2009

Tampa, Florida

Summarized by Jami M. Kohn

PAGE	LINE	DESCRIPTION
4	2-17	Identification of counsel and parties present.
<i>Examination by Mr. Klotz</i>		
5	18-22	He is the shareholder in charge of the foreclosure department at Kass Shuler; he's worked there for about 15 years.
6	1-8	Dawson: McIver is produced individually and as firm representative.
6-7	9-25, 1-8	His department handled over 5,000 cases in the past year, it is difficult for him to say how many he was personally involved with.
7	9-18	He supervises the department and discusses its status with his partners but doesn't report to anyone nor does anyone review his work.
	19-21	When it comes to mortgage foreclosures, the buck stops on his desk.
7-8	22-25, 1-20	He has appeared in state and federal courts in Florida and some administrative proceedings, such as zoning matters.
8-9	21-25, 1-8	Neither he or his clients have been involved in matters in front of the Office of Thrift Supervision, of which he's only generally familiar.
9	9-11	He doesn't represent anyone in the federal litigation.
	12-25	He represented Midland Mortgage Company ("MMC") in the Rumbaugh loan foreclosure.
10	1-11	He's represented MidFirst in thousands of cases since 1991 but did not represent them in this case.
	12-18	They've probably filed pleadings for MERS in other cases.
10-11	21-25, 1-4	They've usually had an engagement agreement on the cases from MidFirst and Midland starting in 1991, including the Rumbaugh case.
11	5-12	They are paid their hourly rates for the foreclosure, bankruptcy or appeals they've been handling since 2006.
	14-16	His hourly rate is \$350, for this case and client it is \$250.
11-12	17-25, 1	He doesn't know why Midland hired them in this litigation.
12	3-14	The firm has been paid but he doesn't know how much or by whom.
	15-18	They do some foreclosure and bankruptcy work on a flat fee basis, but he doesn't recall specifically if that was billed in this case.
12-13	19-25, 1	He has heard the mortgage is insured by HUD.
13	3-5	Kass has handled HUD-insured mortgages for many years.
	6-16	Kass doesn't assist in filing HUD claims so he has no information on how many claims Midland or MidFirst have ever filed with HUD.

PAGE	LINE	DESCRIPTION
13	17-24	The only conversation he had with MERS about this case was when he met their lawyer at the mediation.
14	10-23	Kass was substituted in for the plaintiff, he doesn't know if it was then Midland or MERS and didn't have any discussions with MERS.
15-16	15-25, 1-11	<i>Exhibit N</i> : 10/30/06 proof of claim; two pages.
16	13-17	He prepare or reviewed the claim before it was filed.
	18-22	MMC was listed as the creditor.
16-17	24-25, 1-2	<i>Exhibit M</i> : 1/24/07 amended proof of claim; two pages.
17	4-9	The claim was amended to change the dollar amount and the creditor information was changed as a result of error by him or his staff.
17-18	13-25, 1	He reviewed the amended claim and it was electronically signed by him.
18	2-25	Ex. N had an error in the dollar amount; Ex. M incorrectly listed MMC as servicing agent for MidFirst because MMC owned this loan.
19	2-14	Objection (Bernet): communications with MMC are privileged.
	16-25	The description of MMC as servicer for MidFirst was not accurate.
20	2-15	It was an error [Klotz asking if it was true or false].
	20-22	The bankruptcy was dismissed and no objection was filed to the amended proof of claim to his knowledge.
21	6-14	The property preservation fee increased on the amended claim.
21-22	17-25, 1-2	MMC waives privilege for limited purpose of allowing McIver to answer how they got the information on the increased preservation fee.
22	3-7	He doesn't specifically recall but assumes the client asked that the proof of claim be changed due to the amount.
	12-17	He received and responded to a debt validation request from Rumbaugh.
	19-25	<i>Exhibit K</i> : 4/23/08 letter, postlitigation; two pages.
23	2-24	He prepared this letter (exhibit missing the attachment), but doesn't know what it was in response to; Rumbaugh had sent emails and letters.
24	8-20	<i>Exhibit L</i> : 5/9/08 letter; two pages; he may have emailed it because of the "slash" signature but he doesn't remember if it was a response.
	21-24	It's a letter he sent, but the exhibit is missing the schedule attachment.
25	2-10	It probably took ¼ to ½ an hour to amend the proof of claim.
	11-23	He doesn't remember how long it took to gather the information and prepare the claim.
25-26	24-25, 1-3	He wouldn't have likely discovered the \$85 change himself rather than MMC bringing it to his attention.
26	7-22	<i>Exhibit CC</i> : 5/24/07 letter; two pages; Bates number 000160.
27	2-8	Debt validation was sent around the same time as Ex. CC and this may have had something to do with that.
	9-13	<i>Exhibit J</i> : 5/24/07 letter.
27-28	17-25, 1-5	He prepared the payoff and reinstatement letter as one document, the automatic page numbering started with Ex. CC and went to Ex. J.
28	8-10	The page numbers were a computer driven typographical error.
28-29	16-25, 1-7	The error listing MMC as servicer might have been computer-generated due to the merge documents being used; they change forms to try to make them more accurate.
29	8-23	The demand for a separate check for the \$1694 attorney fees to Kass came from the first page and was probably the flat fee charged MMC.

PAGE	LINE	DESCRIPTION
29-30	24-25, 1-8	The amount included bankruptcy and foreclosure attorney fees from the past year; attorney fees were also claimed in the proof of claim.
30	9-16	The bankruptcy attorney fees were claimed as \$350 because they hadn't been involved in the foreclosure at that point in time.
30-31	17-25, 1-5	He believes Exhibits J and CC (5/24/07 letters) were in response to debt verification requests.
31	8-10	Another letter may have been prepared in response also on 5/21/07.
	11-22	He identified Residential Mortgage Services, Inc. as the original creditor on Bates stamp number 178 (not yet marked as an exhibit).
32	4-16	<i>Exhibit DD: 5/21/07 letter; doesn't have all the enclosures.</i>
	20-24	He's not aware of any inaccuracies other than not having the enclosures.
33	1-12	<i>Comfort break taken; Klotz receiving a phone call.</i>
33-34	23-25, 1-4	He wrote and actually sent Ex. CC (5/24/07 letter) to Mr. Rumbaugh.
34	5-17	He reasonably relied on his client for the balance due on the loan and his history was that MMC was very accurate in their reporting.
35	4-8	Exhibits DD, CC and J were in response to Rumbaugh's validation request.
	11-15	Exhibit K was a year later and he only received one validation request.
35-36	16-25, 1-4	Exhibits DD, CC and J may be been sent in the same envelope in response to the request for validation.
36	5-11	As of 5/24/07 there was a judgment owned by MMC; under Florida law the mortgage merges into the judgment.
	14-18	His form letters generally state he is a debt collector.
36-37	19-25, 1-2	He doesn't believe his firm is a mortgage servicer and didn't perform any mortgage servicing services in this matter.
37	3-13	Ex. J states the name and address of the correct creditor is MMC.
	18-24	Ex. CC identifies MMS as the lender.
37-38	25, 1-8	He means that MMC holds the debt, is the creditor, noteholder, judgment holder, mortgage holder; they all mean the same thing.
38	9-13	The judgment in favor of MERS was assigned to MMC and recorded in the public records; MMC was substituted in the foreclosure action.
	19-21	He doesn't know how much MMC paid for the debt, it's irrelevant.
39	10-12	NSF fees means nonsufficient funds.
39-40	20-25, 1-7	The loan documents entitle the mortgage holder to late charges which were awarded in the final foreclosure judgment; Rumbaugh was 45 payments behind at this point.
40	8-12	He was given the late fees figure by his client.
	13-19	He believes the \$30,000 attorney fees incurred by the previous law firm were actually paid.
	20-24	He doesn't know who paid them or if they were paid as a condition of his firm getting the file.
40-41	25, 1-10	They have payment records on the account; he always looks to see what fees and costs have been and may be incurred prior to expiration of the letter to collect all they are due under the note, mortgage and judgment.
41	11-15	He doesn't know what the wire fees were for.
41-42	16-25, 1-2	HUD regulations require servicers/holders to inspect delinquent properties regularly; he doesn't recall such documentation in this case.
42	3-9	The wire fees might be for accepting payments by phone.

PAGE	LINE	DESCRIPTION
42	10-19	The note, mortgage and final foreclosure judgment allow recovery of postjudgment costs.
42-43	20-25, 1-9	They felt the attorney fees were very reasonable in light of all the work done to the date including the bankruptcy and foreclosure; they tried to keep them reasonable so Rumbaugh would reinstate or pay off the loan.
43	10-12	Florida law and the final judgment allow estimated foreclosure costs.
43	14-23	\$7800 being held by MMC from an insurance company is shown as a credit to Rumbaugh on Exhibit CC.
44	6-15	He sent the letter in his capacity as a debt collector as considered under federal law, although they were just giving information not really trying to collect; they were just responding to a request.
	19-21	MMC has been the lender as long as he's been involved in the case.
44-45	22-25, 1-17	He doesn't recall how he came up with the estimated attorneys fees of \$750 and court costs of \$263.19.
45	18-21	They're entitled to fees pursuant to the note, mortgage and judgment.
46	15-25	MMC was the lender as of the 4/23/08 letter (Ex. K).
47	1-5	The \$750 had not been determined by any court at that time.
	6-10	MMC reserved the right to seek additional court fees.
47-48	19-25, 1-10	They were offering to accept an amount to stop the foreclosure but reserved the right to seek more fees to be fair to his client.
48-49	12-25, 1-8	They sought the fees in the second appeal, which was dismissed (they didn't handle the first appeal) and their motion for fees and costs in the third appeal has not been ruled upon and remains pending.
49	9-24	The first appeal was represented by Shapiro and Fishman; he doesn't know if a request or award of attorneys fees was made in that action.
49-50	25, 1-15	The unsuccessful appeal was the second one; the appellate court didn't award fees but the trial court may have jurisdiction to still award them.
50	16-22	The motion for fees in the second appeal was denied as moot because the case was dismissed and the court said it didn't have jurisdiction.
50-51	23-25, 1-8	He doesn't believe they got any payments from the bankruptcy court, which generally would come from the trustee.
51-52	21-25, 1-10	Ex. N: the basis for the claim as a purchase money mortgage on real estate is part of their standard form; he recalls Charles Rumbaugh used the loan to purchase the real estate then it was assumed by plaintiff.
52	11-16	It might not have been a purchase money mortgage, he cannot recall.
	17-22	He would usually verify that, but can't recall two years later if he did; it is irrelevant in bankruptcy anyway.
52-53	23-25, 1-14	He got the figures from his client; he doesn't know how Klotz would propose he verify the figures.
53	15-18	The late charges are due in a bankruptcy because the debtor has the right to deaccelerate the loan and cure the default.
54	1-11	The proof of claim is prima facie evidence and there was no objection to the claim by the debtor, so there was no review of the fees by the court.
	16-25	The judgment was for the entire debt so the loan had to have been accelerated; in FL, filing of a foreclosure complaint is sufficient notice of acceleration.
55	1-11	He doesn't recall an objection to the original claim in Ex. N.
	13-25	He could look on PACER to see if an objection was filed or may have a copy of the docket in his file; he didn't look back 2 1/2 years to prepare.

PAGE	LINE	DESCRIPTION
56	2-15	He has no knowledge of any agreement to deaccelerate the loan or of any forbearance agreement, although he's heard hearsay of one.
	17-21	The debtor has the right to deaccelerate in the Ch. 13 plan provided he makes all the payments, which he didn't do in either case.
56-57	23-25, 1-8	He may have seen a forbearance agreement included in a list of exhibits but had no knowledge of it so didn't really look at it.
57	9-16	He thinks Rumbaugh made about three payments in the first bankruptcy but he didn't receive any payments from the Ch. 13 trustee.
57	17-20	He received one payment through MMC that was returned to Rumbaugh because it was insufficient to cure the default.
	21-25	He's not aware of any other security than the real estate.
58	3-11	Kass Shuler is a debt collector; he disagree with saying any employee performing services for Kass Shuler in this was also a debt collector.
	13-17	He doesn't know if Mr. Bernet as a debt collector; Ms. Garcia (Ms. Gilbert?) was debt collector.
58-59	19-25, 1-3	Kass Shuler and its debt collectors are subject to the Fair Debt Collections Practices Act ("FDCPA").
59	5-15	There may have been one or two allegations of FDCPA violations against the firm, but no judgment finding any violations.
	16-19	The cases were probably settled or dismissed, he doesn't remember.
	20-22	He can't answer about the Florida Consumer Collection Practices Act.
59-60	23-25, 1-3	He believes the 5/21/07 and 5/24/07 letters in response to Rumbaugh's request complied with the FDCPA.
60-61	4-25, 1-3	He believes collection activity has to cease after the initial debtor communication and that they complied.
61	4-9	He believes it may have been the initial request for validation from Rumbaugh but doesn't think he continued collection activities.
	11-13	He wasn't provided with Rumbaugh's credit reports.
	14-20	His first communication was with Rumbaugh's attorney, in filing the proof of claim approximately October 30, 2006.
62	2-13	After the first bankruptcy was dismissed they copied Rumbaugh individually and several other attorneys on their substitution of counsel.
	14-21	Rumbaugh sent him a letter in May 2007 and sent emails, but he doesn't recall the dates of those.
	22-23	The May 2007 letter was Rumbaugh's validation request.
62-63	24-25, 1-10	Rumbaugh filed pleadings in the actions so he doesn't know when his first letter contact was, but he only made one request for validation.
63	12-15	Neither MMC or MidFirst provided him with Rumbaugh's credit report.
	17-24	<i>Objection:</i> information provided by MMC to attorney privileged.
63-64	25, 1-5	He doesn't recall ever seeing one of Rumbaugh's credit reports.
64	7-20	<i>Exhibit EE:</i> Kass mandatory Rule 26 disclosures.
65	11-23	The litigation record leading up to this lawsuit is the discoverable information about Rumbaugh's lack of clean hands.
65-66	24-25, 1-9	Mortgage is an equitable proceeding in Florida, so Rumbaugh not paying his mortgage would show his lack of clean hands.
66	10-23	He's seen lots of Florida cases involving the equity of the borrower and their lack of clean hands.

PAGE	LINE	DESCRIPTION
66-67	24-25, 1-4	His abuse of the legal process and his missed mortgage payments mean Rumbaugh lacks clean hands.
67	6-9	Rumbaugh has been admonished by the trial court many times.
	13-14	He's not familiar with Rumbaugh's payment history.
67-68	20-25, 1-4	He's seen the summary judgment of foreclosure which has the default date, the number, the interest due and other information.
68	9-13	He hasn't reviewed the whole foreclosure case.
	15-21	He's read testimony that payments were returned to Rumbaugh because they were insufficient to cure the default.
68-69	22-25, 1-6	Rumbaugh was harassing by objecting to everything done in the foreclosure docket, his meritless appeals and the latest appeal which falsely accuses McIver of crimes, misdeeds, violations and lying.
69	7-14	Rumbaugh has abused the process and falsely accused McIver and his firm of lying, secret communications with the judge and threatened to report him.
	15-22	He's testified that the bankruptcy claim with Midland as servicer for MidFirst was a mistake.
69-70	23-25, 1-8	Rumbaugh's cases that he filed over his failure to pay his mortgage are evidence of unclean hands.
70	9-19	Rumbaugh is cyberstalking the judge in the latest appeal filing.
	20-25	The judge can review whether a business relationship with one of the parties is a conflict if brought to her attention.
71	1-7	He doesn't know what the rules are on potential conflicts of interest for judgment.
71-72	21-25, 1-6	Rumbaugh filed copies of loan documents and satisfactions regarding the appellate judge in the appeal although they are not part of the record below, showing his cyberstalking.
72	7-20	His attorney has produced all the documents, which are essentially the same as the ones produced by Midland.
72-74	21-25, 1-25,1-5	Discussion between counsel regarding production of documents, requests and insurance agreements.
74	6-15	<i>Objection:</i> work product/attorney client regarding insurance company being informed of the lawsuit.
74-75	17-25, 1-5	<i>Mr. Bernet:</i> The Kass firm wouldn't seek a deficiency; MMC might if the value of the collateral is insufficient after foreclosure sale to satisfy the sums owed.
75	9-11	He doesn't know the amount of the deficiency in this case.
	12-18	The bid was \$100 at the foreclosure sale; it doesn't matter what McIver thinks if that is fair value for the property.
75-76	20-25, 1-4	FL law doesn't require a bid FMV bid at foreclosure sale; the lender holding the debt starts at \$100 and it can end there if no other bidders; the debt is unsatisfied to the extent the FMV doesn't cover the debt.
	5-11	The value of the property at the date of the foreclosure sale is a credit to the total debt.
	12-13	He doesn't know if that evaluation has been made.
	14-18	Kass hasn't hired an appraiser, he doesn't know if Midland did.
76-77	19-25, 1-2	If a third party paid more then what was owed, the first mortgage would get paid in full, then subordinate liens, then the owner if any is left.
77	3-6	There was a second mortgage on the property.
	7-13	As of 4/30/08 Rumbaugh owed \$109,033.56, not including attorneys' fees for the appellate work and the bankruptcy work.

PAGE	LINE	DESCRIPTION
78	1-4	He'd have to look at the terms of the note and mortgage to see what attorneys' fees they are entitled to collect.
	5-7	He doesn't recall if he looked at the terms of the note and mortgage when he wrote the exhibit claiming those fees.
	9-14	He doesn't know what Rumbaugh owes MMC and doesn't think he owes McIver or Kass anything.
	15-20	The court reserved jurisdiction for postjudgment motions, including attorneys' fees; no such motion has been made yet.
	21-22	Shapiro and Fishman filed a postjudgment motion and was awarded in excess of \$30,000 in fees.
78-79	23-25, 1-5	He doesn't know if MERS was the proper original claimant or if it owns and holds the note.
79	7-14	MMC is the proper party in the foreclosure case because the judgment was assigned to it and recorded in the public records; he doesn't know what MMC got in that assignment.
80	4-6	<i>Exhibit P</i> : recorded assignment of mortgage/deed of trust
80	10-19	The document assigns the note evidencing the indebtedness secured by the mortgage/deed of trust by Charles A. Rumbaugh.
80-81	21-25, 1-9	He doesn't know what Home Site's lending's interest was in the property.
81	10-14	He knows there was a judgment in favor of MERS and MERS assigned its judgment to Midland.
	15-18	<i>Exhibit S</i> : Assignment of Judgment.
82-83	22-25, 1-3	This is the assignment of judgment he has referenced in his testimony and he doesn't know of any other assignment of judgment.
83	9-11	It says it is an assignment by MERS.
83-84	19-25, 1-10	MERS was granted summary judgment of foreclosures and that interest was assigned to MMC; he wasn't involved at the time so he doesn't know if MERS was just a nominee in these proceedings.
84	12-16	He's been involved in hundreds/thousands of transactions with MERS.
84-87		Objections and discussion between counsel regarding MERS standing in the shoes of another or acting as a beneficial owner.
87	6-12	He doesn't have personal knowledge of what MERS's interest in any of the thousands of mortgage cases they handle with MERS as a party.
	19-20	They will read; Attorney Dawson will handle the reading.

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2009, a copy of the foregoing was served by electronically filing with CM/ECF: system on Robert M. Brochin, Esquire, Morgan, Lewis & Bockius, LLP, Suite 5300, Miami, Florida 33131-2339, email: rbrochin@morganlewis.com; William Penn Dawson, Esquire, MacFarlane, Ferguson & McMullen, P.A., P.O. Box 1531, Tampa, Florida 33601- 1531, email: wpd@macfar.com; Clifford J. Geismar, Esquire, The Law Office Geismar, P.A., Crealde Executive Center, Suite 150, 2431 Aloma Avenue, Winter Park, FL 32792, e-mail: cliffjg@cfl.rr.com; Mark James Bernet, Kass, Shuler, Solomon, Spector, Foyle & Singer, PA, 1505 N Florida Ave., PO Box 800, Tampa, FL 33601 email: mbernet@kasslaw.com

s/John C. Klotz
JOHN C. KLOTZ

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LAWRENCE P. RUMBOUGH,
Plaintiff, Case No. 6:07-cv-1352-Orl-(ACC)(DAB)

v.
MIDFIRST BANK; MIDLAND MORTGAGE
CO.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.; KASS,
SHULER, SOLOMON, SPECTOR, FOYLE &
SINGER, P.A.; and RICHARD S. MCIVER,
Defendants.

NOTICE OF FILING DEPOSITION TRANSCRIPT OF DEFENDANT RICHARD
S. MCIVER ON HIS OWN BEHALF AND PURSUANT TO RULE 30(b)(6) AS
CORPORATE REPRESENTATIVE OF DEFENDANT KASS, SHULER,
SOLOMON, SPECTOR, FOYLE & SINGER, PA

Plaintiff, by this undersigned counsel, file the attached transcript of the deposition of Defendant RICHARD S. MCIVER ON HIS OWN BEHALF AND PURSUANT TO RULE 30(b)(6) AS CORPORATE REPRESENTATIVE OF DEFENDANT KASS, SHULER, SOLOMON, SPECTOR, FOYLE & SINGER, PA taken January 22, 2009.

Dated: New York, New York
March 1, 2009

s/John C. Klotz
JOHN C. KLOTZ
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

-----x
LAWRENCE RUMBOUGH, :
 :
 :
 Plaintiff, :
 :
 vs. : Case No.
 : 6:07-CV-1352-Orl-22DAB
 MIDFIRST BANK, et al., :
 :
 Defendants. :
 :
 -----x

Thursday, January 22, 2009

Deposition of:
CORPORATE REPRESENTATIVE, KASS SHULER
RICHARD S. MCIVER
called for oral examination by counsel for Plaintiff,
pursuant to notice, at the Law Offices of Kass Shuler, 1505
N. Florida Avenue, Tampa, Florida, before Donna M. Kanabay,
RMR, CRR, FPR, a Notary Public in and for the State of
Florida, beginning at 9:52 a.m., when were present on behalf
of the respective parties:

- 1 APPEARANCES
- 2 MR. JOHN C. KLOTZ (telephonically)
- 3 350 Fifth Avenue, Suite 4810
- 4 New York, NY 10118
- 5 (212)630-2600
- 6
- 7 MR. WILLIAM PENN DAWSON, III
- 8 MacFarlane Ferguson & McMullen
- 9 201 N Franklin Street, Suite 2000
- 10 Tampa, FL 33601
- 11 (813)273-4200
- 12
- 13 MR. MARK J. BERNET
- 14 Kass Shuler
- 15 1505 N. Florida Avenue
- 16 Tampa, FL 33602
- 17 (813)229-0900
- 18
- 19 MR. BENJAMIN WEINBERG (telephonically)
- 20 13 200 S. Biscayne Blvd, Suite 5300
- 21 Miami, FL 33131
- 22 14 (305)415-3432
- 23
- 24 ALSO PRESENT:
- 25 16 Mr. Lawrence Rumbough (telephonically)
- 17
- 18
- 19
- 20
- 21
- 22
- 23
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24	(*Exhibits attached to transcript.)		
25			

1 P R O C E E D I N G S
(The witness was sworn.)

2 THE REPORTER: Would everybody please state
3 their appearances for the record?

4 MR. KLOTZ: My name's John Klotz. I am the
5 attorney for the plaintiff.

6 MR. DAWSON: My name is Penn Dawson with
7 MacFarlane Ferguson. I represent Mr. McIver and his
8 law firm, Kass Shuler.

9 THE DEPONENT: My name is Richard McIver.

10 MR. WEINBERG: My name is Ben Weinberg. I
11 represent Mortgage Electronics Registration Systems.

12 MR. BERNET: My name is Mark Bernet. I
13 represent Midland Mortgage Company and MidFirst
14 Bank.

15 THE PLAINTIFF: This is Larry Rumbaugh, the
16 plaintiff, but I won't be participating in the
17 deposition.

18 MR. BERNET: Is anyone else there?

19 MR. KLOTZ: All right. Listen: I want to
20 bring something to everybody's attention so we can
21 understand what happened yesterday, all right?

22 According to the system on the conference call,
23 if you are on the conference call for more than 120
24 minutes, I think they said, which is four hours --
25 no. 240 minutes, which is 40 hours -- you have to

1 press *7 for or the conference call will lock if you
2 don't. So if this goes up to four hours, you know,
3 whoever has been continuously on the call has to
4 press *7. But -- so it may be at some point we take
5 a break and -- get -- get going here.

6 All right. I'm going to --

7 Okay. I've got some introductory materials.

8 _____

9 RICHARD S. McIVER,
10 the deponent herein, being first duly sworn, was examined
11 and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. KLOTZ:

14 Q Mr. McIver?

15 A Yes.

16 Q Have you been sworn?

17 A Yes.

18 Q How long have you worked for Kass Shuler?

19 A About 15 years.

20 Q And what is your position there?

21 A I am a shareholder of the firm and I am the
22 shareholder in charge of the foreclosure department.

23 Q And in that capacity, how many cases do you handle
24 during the course of the year?

25 MR. DAWSON: Let me just go on the record.

1 Mr. McIver is being produced both individually and
2 as the firm representative. When you say "you,"
3 please identify whether you mean him --

4 MR. KLOTZ: Well --

5 MR. DAWSON: John, please let me --

6 MR. KLOTZ: -- you know, even if it was just as
7 a witness --

8 All right.

9 BY MR. KLOTZ:

10 Q I mean, Mr. McIver, how many cases do you handle
11 in the course of a year?

12 A That's difficult to say.

13 Q Give me a -- 10 cases? A hundred cases? A
14 thousand cases?

15 A Over a thousand.

16 Q And are those all foreclosure cases?

17 A No.

18 Q What percent of your time is spent on --

19 Well, can you estimate how many foreclosure cases
20 you handle?

21 A It's very difficult, because, well, number 1, the
22 volume is changing on a monthly basis. What period of time
23 are you talking about? Now?

24 Q In the (indecipherable) year.

25 A Sorry?

1 Q In the past year.

2 A Upwards of 5,000 cases, our department handled,
3 many of which I touched, many of which I didn't. It's
4 difficult to say how many I was personally involved with,
5 but our department handled many thousands of foreclosure
6 cases.

7 Q Many thousands?

8 A Correct.

9 Q And you are in general supervision of the
10 department or do you report to somebody?

11 A I supervise the department.

12 Q Okay. Do you report to anybody?

13 A I have discussions with my partners about the
14 status of the business, but I don't per se report to anyone.
15 There is a managing partner.

16 Q Okay. Does anybody up the chain review your work,
17 the filings, et cetera?

18 A Typically, no.

19 Q So it's fair to say that when it comes to mortgage
20 foreclosures, the buck stops on your desk, right?

21 A Correct.

22 Q Now, in the course of your representation, what
23 courts or jurisdictions do you appear in front of?

24 A I appear in the circuit courts in the state of
25 Florida; I appear in the bankruptcy courts in the state of

1 Florida; I have appeared in the appellate courts in the
2 state of Florida; and I have appeared in the appellate
3 courts in the U.S. system.

4 Q Would that be the 11th Circuit?

5 A Correct.

6 Q And have you appeared in any of the district
7 courts?

8 A Yes.

9 Q Federal district courts.

10 A Correct.

11 Q Now, have you ever appeared in any administrative
12 proceedings in your work?

13 A Yes.

14 Q And what administrative proceedings have you
15 appeared in?

16 A I have appeared in some matters for clients
17 related to the Southwest Florida Water Management District;
18 I have appeared in some zoning matters before the
19 Hillsborough County or Tampa City commissions; I have
20 appeared before --

21 Q Have you ever appeared or been involved in any
22 investigations by the Office of Thrift Supervision in
23 Washington, or -- strike "in Washington." Have you ever
24 been involved in any matters in front of the Office of
25 Thrift Supervision?

1 A No.

2 Q Have any of your clients ever been subject of an
3 investigation or complaint to the Office of Thrift
4 Supervision?

5 A Not that I know of.

6 Q Are you familiar at all with the Office of Thrift
7 Supervision?

8 A Only in very general terms.

9 Q Now, who do you represent in this case?

10 A In the federal litigation, I don't represent
11 anyone.

12 Q All right. Withdraw it.

13 In the foreclosure of the Rumbaugh -- did you --
14 were you involved in the foreclosure of the Rumbaugh loan?

15 A Yes, I was.

16 Q All right.

17 MR. DAWSON: Object -- object to the --

18 BY MR. KLOTZ:

19 Q And who did you --

20 MR. DAWSON: -- form.

21 BY MR. KLOTZ:

22 Q -- represent?

23 A I represented Midland Mortgage Company.

24 Q Did you ever represent anybody else?

25 A Not in that case.

1 Q Did you ever represent MidFirst?

2 A In many other cases, but not this case.

3 Q How many other cases have you represented MidFirst
4 in, approximately?

5 A Well, I've represented Midland Mortgage Company
6 and MidFirst Bank since approximately 1991. And on an
7 average basis, we get anywhere from 500 to a thousand
8 matters from one or both of those clients in a year or so,
9 whatever that math works out to be.

10 Q And that's in 1991.

11 A Correct.

12 Q Did you ever represent Mortgage Electronic
13 Registration Systems, commonly called MERS?

14 A In the Rumbaugh case?

15 Q In any case.

16 A I believe we have probably filed some pleadings on
17 behalf of Mortgage Electronic Registration Systems, Inc. in
18 other cases.

19 Q In this case did you come in after --

20 Well, okay. Let me --

21 You say you started representing MidFirst and
22 Midland in 1991?

23 A Approximately, yes.

24 Q Do you have an engagement agreement with them?

25 A I believe -- yes, I do. On each particular case,

1 there is usually an engagement agreement.

2 Q Was there an engagement agreement in the Rumbaugh
3 case?

4 A Yes.

5 Q What are the terms of your compensation under that
6 agreement? By you, I mean now the law firm.

7 MR. DAWSON: I'm going to object to the
8 question, but go ahead and answer if you can.

9 A I'm just going from memory, but I believe that we
10 are paid our hourly rate to handle the litigation, either
11 the foreclosure or bankruptcy or appeals that we have been
12 handling since 2006.

13 BY MR. KLOTZ:

14 Q And what's your hourly rate?

15 A My normal hourly rate is \$350. I believe on this
16 case it's 250 for this client.

17 Q Can you explain to me why the Kass law firm was
18 substituted for Shapiro and Fishman in this case?

19 MR. DAWSON: I'm going to remind the witness
20 that the facts of attorney-client communications are
21 not privileged. However, their contents are. And I
22 would counsel him to respect the attorney-client
23 privilege since it is not his to waive.

24 Having said that for the record ...

25 A I don't know why Midland chose to hire us in the

1 middle of the litigation. You might have to ask Midland.

2 BY MR. KLOTZ:

3 Q All right. How much have you been paid, the firm
4 been paid?

5 A I don't know.

6 Q Has the firm been paid?

7 A Yes.

8 Q And who paid you?

9 A I don't recall ever seeing the checks. That's
10 handled by our accounting department. So I don't know who
11 paid the bill.

12 Q And that was for services you billed at \$250 an
13 hour.

14 A Correct.

15 And also let me point out that on the foreclosure
16 and bankruptcy work, we do a lot of that work on a flat fee
17 basis. And we may have billed some of that on a flat fee
18 basis, but I don't recall specifically.

19 Q Now, are you familiar with the fact that this
20 mortgage apparently is insured by the Department of Housing
21 and Urban Development; HUD?

22 MR. DAWSON: Object to the form. Object to the
23 relevance, too.

24 Go ahead.

25 A I believe that it may be. I don't have personal

1 knowledge but I believe I may have heard that somewhere.

2 BY MR. KLOTZ:

3 Q Well, has the Kass firm ever handled HUD-insured
4 mortgages?

5 A Yes. For many, many years.

6 Q Have you ever involved in the application to HUD
7 for payment of insurance?

8 A Are you asking if I assist in the filing of claims
9 with HUD?

10 Q Well, yeah. Does the firm ever assist in the
11 filing of claims with HUD?

12 A No. No, we do not.

13 Q So would you have any information about how many
14 claims Midland or MidFirst have ever filed with HUD in the
15 past?

16 A I would have no information on that subject.

17 Q Now, have you spoken to anybody at MERS?

18 MR. DAWSON: Object to the form.

19 A About this case?

20 BY MR. KLOTZ:

21 Q About this case?

22 A I believe I met their lawyer at the mediation, and
23 that's the only conversation I've had with anyone about this
24 case with MERS.

25 MR. DAWSON: For the record, any conversations

1 at mediation would also be privileged, pursuant to
2 statute, and confidential.

3 BY MR. KLOTZ:

4 Q Okay. But the arrangements for you to appear
5 here -- to appear in this -- none of those arrangements were
6 made with MERS?

7 A I don't know what you're talking about. Can you
8 rephrase the question?

9 Q Well -- I'll rephrase.

10 You were substituted as attorney for MERS, is that
11 correct?

12 MR. DAWSON: Object to the form.

13 BY MR. KLOTZ:

14 Q No. You were substituted for Shapiro and Fishman,
15 is that correct?

16 A Yes. In the foreclosure case, we became counsel
17 of record for the plaintiff. And I don't recall if we
18 were -- the sequence of events, whether MERS was the
19 plaintiff and we substituted in or Midland was the
20 plaintiff. I don't recall.

21 Q But in any event, you didn't have any discussion
22 with anybody from MERS about this case?

23 A That's correct.

24 Q Are you -- as attorney for Midland, did you
25 research Midland's -- or did you become knowledgeable about

1 Midland's involvement with the Rumbaugh loan, including

2 relationships to the loan mortgage, note and judgment?

3 MR. DAWSON: Object to the form.

4 A I'm not sure --

5 BY MR. KLOTZ:

6 Q Go ahead.

7 A I'm not sure I know what you mean by "research."

8 Q Well -- all right. Let's -- hang on one second.

9 We're going to have to -- I'm going to have to change my
10 system here. I've got to go to --

11 All right. I would like you to look at a
12 document --

13 One second. I'm trying to find the right
14 document.

15 Q Previously marked, okay, was a document as Exhibit
16 (indecipherable). Okay?

17 MR. DAWSON: No. It's not okay. Which one?

18 MR. KLOTZ: Exhibit N.

19 MR. DAWSON: Okay. Give us a second.

20 MR. BERNET: Wait. These are messed up. Look
21 and see if yours are right. I have got "spinal
22 epidural --"

23 Do we need to take a break?

24 MR. DAWSON: No. I think we have N.

25 MR. BERNET: Okay. They're mixed in with all

1 of these.

2 MR. DAWSON: This is the proof of claim dated
3 October 30th, 2006, a two-page exhibit?

4 MR. KLOTZ: Right.

5 MR. DAWSON: Okay.

6 MR. KLOTZ: Just one second. Let me get to the
7 right place here.

8 Okay. Notice of claim dated October 30th,
9 right?

10 MR. DAWSON: Yes, sir.

11 MR. KLOTZ: Okay. Fine.

12 BY MR. KLOTZ:

13 Q Mr. McIver, did you prepare that claim?

14 A I believe it was prepared by either me or someone
15 under my supervision.

16 Q And did you review it before it was filed?

17 A I probably did, yes.

18 Q All right. Now, it says the creditor information
19 is Midland Mortgage Company.

20 A Correct.

21 Q Is that correct?

22 A Yes, it is.

23 Q Okay. What does -- does this --

24 Now, I want you to then look at Exhibit M, which
25 is an amended proof of claim dated January 24th, 2'07.

1 MR. DAWSON: Okay. Amended proof of claim.

2 Two pages. All right.

3 BY MR. KLOTZ:

4 Q Okay. Now, in Exhibit -- in Exhibit M, you have
5 listed Midland in a different capacity, as the servicer for
6 MidFirst. Why did you amend that?

7 A The claim was amended to change the dollar amount
8 of the claim, and the creditor information was changed as a
9 result of an error by me or my staff.

10 This case was unusual --

11 Q I --

12 A I'm sorry? If I --

13 Q Did you review this document you signed before it
14 was filed?

15 A I believe I did.

16 Q And in fact you signed it, didn't you?

17 A It was electronically signed.

18 Q Well, as far as -- isn't it a fact that as far as
19 the federal court system is concerned, that's the same as a
20 real signature?

21 A I believe so, yes.

22 Q Did you ever authorize anyone to electronically
23 sign your name to documents?

24 A I have staff file proofs of claim, but I
25 usually -- well, I would say always look at what they're

1 filing on my behalf if it's got my signature on it.

2 Q Now, what was the error that you said was made in
3 that document?

4 A Well, the --

5 MR. DAWSON: Which document?

6 BY MR. KLOTZ:

7 Q Exhibit --

8 Well, are you saying the error was made in Exhibit
9 N or Exhibit M?

10 A Exhibit M-as-in-Mary --

11 Well, there were -- let me backtrack. The exhibit
12 N-as-in-Nancy apparently had an error in the dollar amount
13 of the claim. Approximately 80-something dollars was left
14 off. And Exhibit M-as-in-Mary was filed to correct the
15 numerical error in the first claim. And when I filed the
16 second claim, the amended claim, I focused on the dollar
17 amount and not the creditor information and missed the fact
18 that we had the creditor information incorrectly stated.

19 Q Why was it incorrect?

20 A On this loan, Midland Mortgage Company was not the
21 servicing agent for MidFirst Bank because Midland Mortgage
22 Company owned this particular loan. And that was an unusual
23 fact situation for Midland. Many of their loans are
24 actually owned by MidFirst Bank, but my understanding was
25 that it was not.

1 Q Where did you get your understanding from?

2 MR. BERNET: Object to that. My client,
3 Midland Mortgage Company, its communications with
4 its attorney, those are privileged materials --
5 privileged communications.

6 MR. KLOTZ: I believe when he filed a verified
7 form, he's verified that this is true, and now he
8 tells us it's false; that he should tell us how he
9 discovered it was false.

10 MR. BERNET: Well, I object to the
11 characterization. He didn't say it was false; he
12 said it was a mistake.

13 But in terms of the communications with the
14 client, those are privileged.

15 BY MR. KLOTZ:

16 Q Let me ask you -- Mr. McIver, let me ask you this:
17 Is the description of -- in your opinion or in your view, is
18 the description of Midland Mortgage as a servicer for
19 MidFirst true or false?

20 MR. DAWSON: Object to the form.

21 BY MR. KLOTZ:

22 Q Go ahead and answer.

23 MR. BERNET: Yeah. He can --

24 A Yeah. I believe it was an error. I mean, it's
25 not accurate. I can say that.

1 BY MR. KLOTZ:

2 Q Well, it's a fact that you swore to. Is that
3 true?

4 A As I've already testified, that was an error.
5 Midland Mortgage Company --

6 Q That means it was false. You're now telling us it
7 was false.

8 MR. DAWSON: Object to the form. Under --

9 MR. KLOTZ: Let me rephrase.

10 BY MR. KLOTZ:

11 Q Are you now saying that the information you swore
12 to, that MidFirst -- that Midland was the servicer for
13 MidFirst was false?

14 A I think I've answered the question that it was an
15 error.

16 A If you want to --

17 Q That --

18 A -- put words --

19 Q -- the statement was true or untrue?

20 A Let me say this: The bankruptcy was dismissed.

21 There was no objection filed to the amended proof of claim
22 to my knowledge.

23 Q Can you answer the question?

24 MR. DAWSON: He's answered it three times. It
25 was in error.

1 BY MR. KLOTZ:

2 Q All right. Hang on a second --

3 MR. DAWSON: If you --

4 MR. KLOTZ: -- please.

5 BY MR. KLOTZ:

6 Q In any event, besides the \$85 item and the
7 representation that Midland was a servicer, is there
8 anything else that was changed in that document that was
9 being amended?

10 MR. DAWSON: Exhibit M?

11 MR. KLOTZ: Yeah.

12 A I think the only thing -- just in comparing the
13 two, the only thing that changed was the property
14 preservation fee increased from \$402 to \$487.

15 BY MR. KLOTZ:

16 Q Okay. And where did you get that information?

17 MR. DAWSON: Object on the grounds of the
18 attorney-client privilege.

19 MR. KLOTZ: I don't believe, when a man
20 verifies an affidavit -- verifies a document in
21 court, he can hide behind the attorney-client
22 privilege. I have a right to know where he got the
23 information that he put into that verified sworn
24 document.

25 MR. BERNET: Midland will waive the privilege

1 for the limited purpose of permitting Mr. McIver to
2 answer that particular question.

3 A I don't have a specific recollection of that
4 communication, but my assumption is that after the first
5 proof of claim was filed, the client asked that we amend it
6 to change that amount. That's just my assumption. I don't
7 have a specific recollection.

8 BY MR. KLOTZ:

9 Q All right.

10 Excuse me one second. Go through my notes again,
11 here.

12 When did Midland -- I want to direct your -- did
13 you ever receive any request for validation of the debt,
14 from Mr. Rumbaugh?

15 A Yes, I believe so.

16 Q And did you respond to those?

17 A Yes, I did.

18 Q Okay. Just one second.

19 I want to direct your attention to Exhibit K. The
20 letter was previously marked Exhibit K.

21 MR. DAWSON: Two-page letter dated April 23rd,
22 2008?

23 MR. KLOTZ: Yes.

24 MR. BERNET: Postlitigation.

25

1 BY MR. KLOTZ:

2 Q Okay. I want to ask if that is one of your
3 letters. Do you recognize that letter?

4 A It appears to be a copy of a letter that I
5 prepared, although the --

6 Q (Indecipherable).

7 A Let me also say that it references a schedule that
8 is not part of the exhibit. So it's missing the schedule.

9 Q I understand that.

10 All right. Now, that says "In response to your
11 inquiry." Was that a response -- what inquiry was that in
12 response to?

13 A I don't remember.

14 Q All right. You don't remember what you were
15 responding to?

16 A No, I don't. I know our standard letter giving
17 payoff figures has that language in it, and I don't know if
18 that language carried over or if there was a specific
19 request. I just don't remember if he --

20 He did send me some e-mails. Mr. Rumbaugh. He
21 sent me some letters.

22 I don't remember. We had a foreclosure sale
23 pending shortly thereafter and -- but I don't remember the
24 circumstances surrounding the sending of this letter. If
25 you have any documents that you want to show me, I'll take a

1 look at them.

2 Q I want to direct your attention to Exhibit K and
3 ask if that is also a letter you response -- you sent in
4 response to a communication from Mr. Rumbaugh.

5 A Okay. We were already talking about K. Are you
6 referring to a different exhibit?

7 Q I'm sorry. Exhibit L.

8 MR. DAWSON: Exhibit L is a two-page letter
9 dated May 9th, 2008?

10 MR. KLOTZ: Right.

11 MR. DAWSON: Okay.

12 BY MR. KLOTZ:

13 Q All right. Is that also a response to a letter
14 from Mr. Rumbaugh?

15 A I don't remember. It might be. It's got -- it
16 doesn't have an original signature on it. It has a "slash"
17 signature on it. So this leads me to believe that it's
18 possible I e-mailed this to him, but I don't recall
19 specifically. I usually only do that if I'm e-mailing a
20 letter.

21 Q In any event, your signature is one -- is there
22 with your authorization.

23 A Yes. This looks like a letter I sent.

24 Again, there's no schedule attached.

25 Q All right. Let's jump back very quickly to one

1 more question about the Exhibit M and N, okay?

2 How much of a fee -- how much time was involved in
3 making the correction to Exhibit -- in making the changes
4 that appear in Exhibit M?

5 A Probably very little time.

6 Q What's very little? Less than two hours?

7 A Less than an hour.

8 Q 30 minutes?

9 A At the most. Maybe half an hour. Maybe a quarter
10 of an hour.

11 MR. DAWSON: Are you talking about physically
12 making the changes or the process leading --

13 MR. KLOTZ: I'm talking about the whole process
14 of amending the notice of claim.

15 MR. DAWSON: Okay. Again, my question is, does
16 that mean gathering the information and preparing
17 the claim or only preparing the claim?

18 MR. KLOTZ: No. Gathering the information and
19 preparing the claim. Yes.

20 A I really don't remember.

21 BY MR. KLOTZ:

22 Q Could it have been an hour?

23 A I don't know.

24 Q Well, let me -- you changed one of the figures by
25 \$85. Did Midland bring that to your attention or did you

1 discover the discrepancy yourself?

2 A I don't remember. I don't -- I would -- I really
3 don't know. It's not likely that I discovered it myself.

4 Q So your client would have contacted --

5 Withdraw that.

6 One second. The rustling pages is me.

7 I want to direct your attention -- and this is one

8 of the documents we forwarded to you -- dated May 24th,

9 2007. This is a new document with Bates numbers 000160 --

10 MR. DAWSON: Wait a minute.

11 MR. BERNET: One-six-zero?

12 MR. KLOTZ: Well, it's 000160.

13 MR. DAWSON: It's a letter dated May 24th,

14 2007?

15 MR. KLOTZ: Right.

16 MR. DAWSON: Two pages.

17 MR. KLOTZ: Right. May 24th. Right.

18 MR. BERNET: Okay.

19 MR. DAWSON: May 24th, 2007. Okay. So what

20 exhibit is this going to be?

21 MR. KLOTZ: This'll be Exhibit CC.

22 (Plaintiff's Exhibit Number CC marked for identification.)

23 MR. DAWSON: Okay.

24 BY MR. KLOTZ:

25 Q Okay. Now, I want to direct your attention to

1 page 2 of that letter.

2 Well, first of all, before I go to page 2, this is
3 a response to a payoff request?

4 A I don't remember. I know that we sent a
5 validation of the debt right around the same time as this
6 letter was produced. I don't know if they were sent the
7 same day or on different days. But it may have had
8 something to do with that.

9 Q Well, let me also direct your attention then to
10 Exhibit J, which is also -- which was previously marked.

11 MR. DAWSON: Exhibit J?

12 MR. KLOTZ: Exhibit J. Letter dated May 24th.

13 MR. DAWSON: Okay.

14 BY MR. KLOTZ:

15 Q Now, maybe you can help me solve a mystery,

16 Mr. McIver.

17 Exhibit J, as it was received by Mr. Rumbaugh, was
18 two pages. But Exhibit J, as it appears -- the second page,
19 as Mr. Rumbaugh received it, is labeled page 4. Do you have
20 any information that there was in fact a page 2 and 3, or is
21 that a stenographic or typographical error?

22 A No. I recall this one specifically. I prepared
23 the payoff and the reinstatement letter as one document, and
24 the automatic page numbering started with Exhibit CC. Page
25 2 was the second page of Exhibit CC. Page 3, which had no

1 page number on it, was Exhibit J, the first page of Exhibit
2 J. And page 4 was the fourth page of Exhibit -- of -- the
3 total document. So it was prepared as one document and I
4 probably didn't notice that it was -- the automatic
5 numbering of the pages called it page 4.

6 Q Mr. McIver, I have much sympathy for your answer.

7 A Well, thank you.

8 Q What you're essentially saying is this was a
9 computer-driven typographical error, is that correct?

10 A Exactly. Which may be --

11 Q I won't to be too upset about a computer-driven
12 typographical error, I hope, but as long as we clarified it,
13 the letter was only two pages.

14 And what you're saying makes perfect sense, by the
15 way.

16 A Well -- and I think that also explains the proof
17 of claim error. It may have been computer-generated.

18 Q You mean the description of Midland as a servicer
19 was computer-generated?

20 A It may have been.

21 Q Where would it be on a computer that Midland was a
22 servicer?

23 A The -- the processes we had in place at the time
24 are merge documents that we prepare claims with. May have
25 been set up that way. I know we've probably changed them

1 since then, but I don't recall. That may be the
2 explanation.

3 Q But two months, is it not a fact that you had
4 filed without that description of Midland.

5 A Right.

6 We're constantly changing our forms to try to make
7 them more accurate. In this case, we made a mistake.

8 Q In any event, this is a letter -- I want to refer
9 to the demand of a separate check payable to Kass Shuler
10 Solomon Spector for the amount for attorneys.

11 MR. DAWSON: On which letter?

12 MR. KLOTZ: I'm talking about Exhibit CC.

13 MR. DAWSON: Okay.

14 A Okay.

15 BY MR. KLOTZ:

16 Q Now, the amount for attorneys' fees that you have
17 here, what amount were you talking about when you said
18 "amount due for attorneys' fees"?

19 A I was referring to the first page, where there is
20 a subtotal amount due attorneys, \$1,694.

21 Q Okay. Now, was that the flat fee you were
22 charging Midland?

23 A Probably.

24 Q How did you calculate that amount of \$1,500?

25 A Well, that included bankruptcy and foreclosure

1 attorneys' fees. And up to that point, we had been handling
2 the matter for about a year. There were several motions
3 filed in the bankruptcy. There were several motions filed
4 in the foreclosure.

5 Q Were any of those figures ever reviewed by a
6 court?

7 A Well, I think in the proof of claim we claimed
8 attorneys' fees.

9 Q And what attorneys' fees did you claim in the
10 proof of claim?

11 A The bankruptcy attorneys' fees and costs in the
12 amended proof of claim, Exhibit M-as-in-Mary, the amount was
13 \$350. We had not been involved in the foreclosure up to
14 that point when that claim was filed, so there were no
15 foreclosure fees incurred by our firm when the claim was
16 filed in the 2006 bankruptcy.

17 Q Now, is there -- we've got Exhibit CC here, and
18 we've got other -- four other letters signed by you.

19 Do you recall which one if any of those letters
20 was in response to request for verification?

21 MR. DAWSON: You're talking about J, CC. Are
22 you including K and L?

23 MR. KLOTZ: Just one second. Let me -- J, K, L
24 and CC.

25 MR. DAWSON: Were any of these in response to a

1 debt verification request? Is that your question,
 2 Mr. Klotz?
 3 MR. KLOTZ: Yes.
 4 A I believe that J and CC were in response to debt
 5 verification requests.
 6 BY MR. KLOTZ:
 7 Q J and CC.
 8 A Along with -- there's another letter that may have
 9 been prepared a day or two earlier that was included, dated
 10 May 21, '07.
 11 Q All right. In your response to the request for
 12 verification, did you identify the name of the original
 13 creditor, the current creditor, and the exact amount owed?
 14 A Yes, I did.
 15 Q Who was the original creditor?
 16 A According to my letter, Residential Mortgage
 17 Services, Incorporated.
 18 Q And that's in Exhibit --
 19 A I think it's your Bates stamp number 178. It's
 20 not marked as an exhibit yet.
 21 Q Okay. 178?
 22 A Correct.
 23 Q Okay.
 24 MR. DAWSON: So that'll be DD?
 25 MR. KLOTZ: That's part of the documents I just

1 faxed you, or sent to you?
 2 MR. DAWSON: Yes, sir.
 3 MR. KLOTZ: I'm pretty sure it was.
 4 All right. 178 will be DD.
 5 (Plaintiff's Exhibit Number DD marked for identification.)
 6 MR. KLOTZ: All right. 178 will be DD.
 7 What's the date of that?
 8 THE DEPONENT: May 21, 2007.
 9 MR. KLOTZ: And we're going to call this DD,
 10 right?
 11 MR. DAWSON: Yes, sir.
 12 BY MR. KLOTZ:
 13 Q Now --
 14 MR. BERNET: It doesn't have all the enclosures
 15 that it references, right?
 16 THE DEPONENT: Right.
 17 MR. BERNET: Would you say that --
 18 A Yeah --
 19 BY MR. KLOTZ:
 20 Q Is there anything inaccurate in those letters that
 21 we've now identified?
 22 A Well, Exhibit DD doesn't have the enclosures
 23 attached.
 24 I'm not aware of any inaccuracies.
 25 MR. KLOTZ: Wouldn't you know, I'm getting a

1 call from a very major law firm. Anyway, a large
 2 law firm. Has nothing to do with this case.
 3 Can you wait for one minute, please? Can we go
 4 off the record for five -- for four minutes or two minutes?
 5 THE DEPONENT: Sure.
 6 MR. DAWSON: Is this a comfort break?
 7 MR. KLOTZ: Yes. Comfort break.
 8 MR. DAWSON: All right.
 9 MR. BERNET: He's got a phone call. Let the
 10 record show he's got a phone call.
 11 MR. DAWSON: Yeah.
 12 (A recess was taken.)
 13 BY MR. KLOTZ:
 14 Q All right. I've -- I want to go back a minute.
 15 I'm going to ask the following questions --
 16 Wait. The last thing we did was Exhibit CC,
 17 right?
 18 MR. BERNET: No.
 19 MR. DAWSON: No. Exhibit D-as-in-David.
 20 D-as-in-David.
 21 MR. KLOTZ: Yeah. All right.
 22 BY MR. KLOTZ:
 23 Q I direct your attention to Exhibit CC for a
 24 minute, okay?
 25 A Okay.

1 Q Did you actually send this letter to Mr. Rumbaugh?
 2 A I believe I did, yes.
 3 Q And did you write the letter?
 4 A Yes, I did.
 5 Q Did you verify all the information contained in
 6 it?
 7 A I don't know how to answer that question. What do
 8 you mean by verify?
 9 Q Well, are you satisfied that you took reasonable
 10 steps that all the information contained in the letter is
 11 accurate?
 12 A Well, if you mean I relied upon my client, if that
 13 reliance was reasonable, I think it was, on providing
 14 information to me about what the balance due on the loan
 15 was. My history with them is that Midland Mortgage Company
 16 is very accurate in their reporting. So based upon that
 17 experience, I believe it was accurate, yes.
 18 Q Now, was this in response to a request for
 19 validation of the alleged debt?
 20 MR. DAWSON: Objection. Asked and answered.
 21 Which? Letter DD?
 22 MR. BERNET: CC or --
 23 MR. DAWSON: -- or CC?
 24 MR. KLOTZ: No. I believe we're talking about
 25 Exhibit J.

1 MR. DAWSON: No, we weren't, but we can go back
 2 to Exhibit J.
 3 BY MR. KLOTZ:
 4 Q Was Exhibit J in response to a request to validate
 5 debt?
 6 A I believe that Exhibit DD, Exhibit CC and Exhibit
 7 J were all in response to Mr. Rumbaugh's request for
 8 validation.
 9 Q Okay. Now, we're talking --
 10 Hang on one second. In the interest of --
 11 Exhibit J -- Exhibit -- what were the two exhibits
 12 you mentioned? Exhibit K?
 13 A Exhibit K was a year later, so I don't think it
 14 was sent -- I think I only received one demand for
 15 verification.
 16 Q Well, you just mentioned three different numbers.
 17 A Right. They're all dated within days of each
 18 other, and they may have been sent at the same time, in the
 19 same envelope.
 20 Q So it's Exhibit J, Exhibit DD -- did you -- or CC?
 21 A Both. Or all three.
 22 Q And Exhibit K?
 23 A You broke up there. I didn't hear your question.
 24 Q Exhibit DD, did you say?
 25 A Yes.

1 Q Okay. So all of -- those three exhibits were in
 2 response to request for verification.
 3 A That's my recollection.
 4 Q Excuse me. The word's "validation." I apologize.
 5 Now, was there a loan existing at that time of
 6 May 24th, 2007?
 7 MR. DAWSON: Object to the form of the
 8 question.
 9 A There was a judgment owned by Midland Mortgage
 10 Company. Under Florida law, the mortgage merges into the
 11 judgment.
 12 Was there -- I don't really understand what you
 13 mean by the question, though.
 14 Q Well --
 15 By the way, your letterhead states that you are a
 16 debt collector. Your form letters generally state you're a
 17 debt collector, right?
 18 A Yes, they do.
 19 Q I want to -- can you clear something -- I don't
 20 have the exhibit in front of me, or I didn't produce it this
 21 morning.
 22 Are you aware that your Web site advertises your
 23 law firm as a mortgage servicer?
 24 A I don't believe that's accurate.
 25 Q Okay. Were you performing any mortgage servicing

1 services in this matter?
 2 A No.
 3 Q But the letter that you sent, Bates numbered
 4 158-159, that was a response to a request for validation of
 5 the debt. You just testified to that, right?
 6 A I believe that's what I said, yes.
 7 Q All right. We're discussing Exhibit J right now.
 8 You want to take a look at -- do you have -- if
 9 you -- if you're doing this as a request for validation --
 10 You said Midland Mortgage Company is the lender?
 11 MR. DAWSON: Objection.
 12 A I think the letter says the name and address of
 13 the correct creditor is Midland Mortgage Company.
 14 Which letter are you referring to?
 15 BY MR. KLOTZ:
 16 Q Hold on one second, here. Now I've got the wrong
 17 one, probably.
 18 You're referring to Midland Mortgage as the
 19 lender, is that correct?
 20 A Which exhibit are you talking about?
 21 Q Let's look at Exhibit CC.
 22 Okay. Now, you're identifying Midland Mortgage as
 23 the lender, is that correct?
 24 A That's what the letter says.
 25 Q How much money did Midland Mortgage lend

1 Mr. Rumbaugh?
 2 A I don't know.
 3 Q Well, you said they were a lender.
 4 A Well, what I mean by that is that it holds the
 5 debt. It's the creditor. It's the noteholder. It's the
 6 judgment holder. It's the mortgage holder. You can use any
 7 number of phrases to describe Midland Mortgage Company, and
 8 they all mean the same thing.
 9 Q You said they hold the debt. What do you mean by
 10 that?
 11 A The judgment in favor of MERS was assigned to
 12 Midland Mortgage Company and recorded in the public records.
 13 And Midland was substituted in to the foreclosure action.
 14 Q So it was a derivative.
 15 MR. DAWSON: I'm going to object to this
 16 question, if it is a question.
 17 A I don't know what "derivative" means, anyway.
 18 BY MR. KLOTZ:
 19 Q Do you know how much Midland paid for the loan --
 20 the debt?
 21 A I don't. It's irrelevant, anyway.
 22 BY MR. KLOTZ:
 23 Q Just one second.
 24 All right. Going back to the letter of May
 25 24th --

1 MR. DAWSON: Which one?

2 BY MR. KLOTZ:

3 Q Now --

4 MR. DAWSON: Which one?

5 MR. KLOTZ: Huh?

6 MR. DAWSON: Which one? There are two.

7 MR. KLOTZ: I'm going to CC.

8 A Okay.

9 BY MR. KLOTZ:

10 Q What are NSF fees?

11 A I believe, in common parlance, that means

12 nonsufficient funds.

13 Now, what were the late charges for?

14 MR. BERNET: Mr. Klotz, are you shaving? There

15 is a buzzing coming through the line that is very

16 distracting.

17 MR. KLOTZ: It's stopped.

18 A Okay. What was the question?

19 BY MR. KLOTZ:

20 Q What about late charges? Where does that figure

21 come from?

22 A This loan -- I believe the loan documents provide

23 for a 4 percent late charge for all payments that are not

24 timely paid. This may be --

25 Well, I don't know. Strike that.

1 Under the loan documents, the mortgage holder is

2 entitled to late charges. And I believe there were late

3 charges awarded in the final judgment for foreclosure.

4 Q And were they \$1,000 in late charges in the final

5 judgment?

6 A I don't know. Mr. Rumbaugh was 45 payments behind

7 at this point. He hadn't made a payment in quite sometime.

8 Q And where did you get that figure from? Did you

9 calculate that or was it given to you?

10 A It was given to me.

11 Q By whom?

12 A By my client.

13 Q Now, the attorneys' fees, were they actually paid?

14 A I don't know how much had been paid as of the date

15 of the May 24th letters. I do --

16 Q Does it state there was \$30,309.07 actually paid?

17 A Oh, well, as far as those fees and costs, I

18 believe they probably were paid. Those were not incurred by

19 our office but by the previous law firm, the \$30,000 figure.

20 Q Were they -- were they paid as a condition to your

21 law firm getting the file?

22 A I have no idea.

23 Q And who paid those fees?

24 A I don't know.

25 Q Now, do you have any documents concerning the

1 actual payment of fees?

2 A I'm sure we have payment records on this account.

3 Q Did you review them before you signed it?

4 A I always look to see what fees and costs have been

5 incurred and what may be incurred prior to the expiration of

6 the letter. This amount due was due by June 4th, 2007, as

7 shown by Exhibits J and CC, so I would review our expended

8 and anticipated expenditures prior to that date so that we

9 would collect all that we were due under the note and

10 mortgage and judgment.

11 Q What were the wire fees for?

12 A I don't know. I can speculate, if you want me to.

13 Q I don't want --

14 Do you know?

15 A No.

16 Q What are the property preservation fees for?

17 A I don't know specifically on this case. But

18 typically, on a HUD-insured mortgage, HUD regulations

19 require the mortgage servicer or holder to inspect

20 properties that are delinquent or the loan is delinquent, on

21 a regular basis, to ensure that the property is not being

22 vandalized; that the roof hasn't blown off; that the windows

23 aren't broken; that the grass doesn't need to be cut; things

24 of that nature.

25 Q Did you see any documentation of these property

1 present -- preservation fees?

2 A I don't recall.

3 Q Okay. And you don't know the purpose of the wire

4 fees?

5 A I can speculate. The mortgage company sometimes

6 accepts payments by phone, and there is a pay-by-phone fee.

7 That may be what that is.

8 Q But you don't know.

9 A I don't know for sure, no.

10 Q Now, estimated foreclosure and bankruptcy costs

11 and bankruptcy and foreclosure attorneys' fees. Were those

12 moneys to be paid to your firm?

13 A Yes.

14 Q And what is the authority to charge those fees?

15 A If you -- well, there's several sources, but one

16 is, the note and mortgage documents provide for reasonable

17 attorneys' fees upon default. The other is the final

18 judgment of foreclosure, I believe, allows the mortgage

19 lender to recover postjudgment costs.

20 Q Was there any determination of the appropriateness

21 of those fees or was that just something you were demanding?

22 A Actually, our -- my actual time involved, which

23 was much, much greater than what was quoted on these fees,

24 we were trying to keep them as reasonable as possible in

25 case Mr. Rumbaugh wished to reinstate or pay off his loan.

1 We were hoping he would.

2 But the bankruptcy was a contested bankruptcy.

3 They were several motions filed requiring several court
4 appearances. We filed several motions in the foreclosure to
5 substitute counsel, to substitute parties, to reschedule
6 sales, to cancel sales. I believe there was an appeal
7 pending at some point. I don't recall the dates of that.

8 But our fees, we felt, were very reasonable in light of all
9 the work that we had done to that date.

10 Q And what is your authority to charge for estimated
11 foreclosure costs?

12 A Florida law. The final judgment. That probably
13 includes a notice of sale.

14 Q Now, why -- are you familiar with the fact that
15 Mr. Rumbaugh had -- that there was \$7,800, approximately,
16 from an insurance company, that had been -- was being held
17 by Midland?

18 MR. DAWSON: Object to the form.

19 A Yes. I've been -- in fact, it's on Exhibit CC as
20 a credit.

21 BY MR. KLOTZ:

22 Q Exhibit CC.

23 A Correct.

24 Q All right. But in any event --
25 You want to read the first sentence on page 2?

1 Q On May 9th, 2'08, right?

2 A Right.

3 Q You said there were additional \$750 attorneys'
4 fees.

5 A Right.

6 Q And court costs of \$263.19.

7 A Okay.

8 Q Including estimate for publication and notice of
9 sale.

10 What are the fees that were --
11 Were any court costs actually paid or incurred at
12 that point other than the estimate?

13 A I don't know. Probably because I know every time
14 we file a motion, postjudgment motion, we have to pay a \$50
15 court reopen fee. There were previous sales that were
16 incurred in which notice of sale expenses were incurred. I
17 don't recall specifically how I came up with that number.

18 Q What was your authority in seeking these amounts?

19 A The same authority that I've described before.
20 Under the terms of the note and mortgage and the judgment,
21 we're entitled to seek fees.

22 Q I want to turn your attention to --
23 Well, do you know, of your own personal -- do you
24 know of any -- what is your knowledge for that statement?
25 Do you have any knowledge of that?

1 MR. DAWSON: Of which exhibit?

2 MR. KLOTZ: The one we're dealing with right
3 now. I believe it's CC.

4 A Okay.

5 BY MR. KLOTZ:

6 Q You sent this letter in your capacity as a debt
7 collector, is that true?

8 A Yeah. I believe attorneys are considered to be
9 debt collectors under federal law if they are attempting to
10 collect a debt.

11 Q All right. One second, here.

12 A Yeah. Arguably I wasn't really trying to collect
13 it, but we're just giving him information. If he chose to
14 pay it to avoid the foreclosure --

15 I think we were responding to a request.

16 Q Can you hold on one second? I'll be right back.
17 I want to take a look at Exhibit L.

18 A Okay.

19 Q Was Midland Mortgage the lender at this point?

20 A Midland Mortgage Company has been the lender as
21 long as I've been involved in the case.

22 Q What were the additions of \$750 attorneys' fees?

23 A What are you looking at?

24 Q I'm looking at the chart.

25 A Postjudgment foreclosure attorneys' fees?

1 MR. DAWSON: Of what statement?

2 BY MR. KLOTZ:

3 Q Can I ask for my last question to be reread?

4 THE REPORTER: "Question: What was your
5 authority in seeking these amounts?"

6 "Answer: The same authority that I've
7 described before. Under the terms of the note and
8 mortgage and the judgment, we're entitled to seek
9 fees.

10 "Question: What is your knowledge for that
11 statement? Do you have any knowledge of that?"

12 "Objection: Of what statement?"

13 MR. KLOTZ: I'll withdraw that, okay?

14 BY MR. KLOTZ:

15 Q Now, I want to turn to the letter of 23rd of
16 April, Exhibit K, or direct your attention to that, all
17 right?

18 MR. DAWSON: 23rd April, 2008. Okay.

19 MR. KLOTZ: Right.

20 BY MR. KLOTZ:

21 A I've got it in front of me.

22 Q Now, was -- excuse me.

23 Now, was Midland Mortgage the lender as of this
24 date?

25 A Yes.

1 Q Now, what -- what was the 700 -- again, you have a
2 listing of \$750 postjudgment attorneys' fees. Had that been
3 awarded by any court? Had that been determined by any
4 court?

5 A Not at that time, no.

6 Q And you notice that Midland was reserving its
7 right to seek additional court fees --

8 A Correct.

9 Q -- for the appeal and costs incurred in the
10 bankruptcy proceedings.

11 Why wouldn't they have the same right to apply for
12 your fee?

13 MR. DAWSON: Object to the form.

14 A I'm not sure I understand --

15 BY MR. KLOTZ:

16 Q I want to -- would you read the paragraph
17 underneath the chart on page 1?

18 A Okay.

19 Q Now, it says that "Midland has not -- in defending
20 your own successful appeal, nor has it included any
21 attorneys' fees and costs incurred for two unsuccessful
22 bankruptcy proceedings. This offer to accept a payoff
23 without those fees without prejudice to Midland's
24 reservation of its right to seek to obtain a court order
25 awarding such fees and any costs in the future."

1 Why wouldn't that have applied to postjudgment
2 foreclosure fees?

3 MR. DAWSON: Objection.

4 A I don't really remember. I believe we were trying
5 to look at what would a fair fee be for handling the
6 foreclosure, rescheduling of the sale, the work we had done
7 to date, and including that in the letter. But offering to
8 accept this amount in order to stop the foreclosure so that
9 Mr. Rumbaugh could save his home. In an effort to be fair
10 my client --

11 BY MR. KLOTZ:

12 Q Well, did they not in fact seek fees -- wait.

13 Did Midland seek any of these fees at any time?

14 MR. DAWSON: After this letter?

15 MR. KLOTZ: Yes.

16 A Well, I know, in the second appeal, we filed a
17 motion for attorneys' fees. And in the third appeal that is
18 still pending, we filed a motion for fees.

19 BY MR. KLOTZ:

20 Q What happened to your application in the first
21 appeal?

22 A Well, the first appeal, I didn't handle. The
23 second appeal, the appeal was dismissed.

24 Q (Indecipherable) application in the first appeal.

25 A I'm sorry. I was still answering your question so

1 I didn't hear your second question.

2 Q Go ahead.

3 A Okay. There was one appeal. The first appeal, we
4 did not handle. That was handled by another law firm.

5 The second appeal was dismissed and our motion for
6 fees was denied as moot.

7 And the third appeal remains pending and has not
8 been ruled upon on our motion for fees and costs.

9 Q Now, as to the two appeals that you're talking
10 about -- you said one, you didn't represent -- was that
11 represented by Shapiro and Fishman?

12 A That's my recollection.

13 Q Was there any award of attorneys' fees -- there
14 was an application for attorneys' fees, and I'm asking --
15 and was there any award of attorneys' fees in that?

16 A I don't recall.

17 Q You -- was there an application for attorneys'
18 fees in that appeal?

19 A I don't know. It's a matter of public record, but
20 I haven't reviewed that in quite sometime, so I don't
21 recall.

22 Q Well, if there was an application and it was
23 denied, would that have been brought to your attention?

24 A It might have been.

25 Q Now, it says, "Midland is not including attorneys'

1 fees it's incurred in defending your unsuccessful appeal,"
2 right?

3 A Correct.

4 Q That appeal you were referring to was already
5 determined, is that correct?

6 A As of that date? I could find out. I could look.
7 I don't remember.

8 Q Well, don't you -- in this letter that -- this
9 "unsuccessful appeal," what do you mean by unsuccessful
10 appeal?

11 A I suppose I meant that it was dismissed.

12 Q Okay. And were any attorneys' fees awarded in
13 that dismissal?

14 A Not by the appellate court. The trial court may
15 still have jurisdiction to award those fees.

16 Q Do you know if there was an application for fees
17 in that appeal?

18 A Yes.

19 Q And was that application granted?

20 A No. It was denied because the case was dismissed.
21 The court said it did not have jurisdiction, so there really
22 was no resolution on the merits of our motion.

23 Q I want to go back to the bankruptcy for a minute,
24 okay?

25 Did you physically receive any of the payments in

1 the bankruptcy court? Did you actually receive any of the
2 payments in the bankruptcy court?

3 A When you say you, you mean me or my firm?

4 Q Yeah.

5 A I don't believe so. That's not the typical
6 practice. Occasionally we'll get payments from a trustee,
7 but in this district the trustee pays the creditor directly,
8 and I don't recall receiving any payments from the trustee.

9 Q What do you mean by --

10 You said there was a purchase money mortgage on
11 real estate?

12 MR. DAWSON: On what?

13 BY MR. KLOTZ:

14 Q In the bankruptcy claims.

15 A What are you referring to? The proof --

16 Q The claims you filed in the bankruptcy court.

17 MR. BERNET: M and N?

18 A Right.

19 BY MR. KLOTZ:

20 Q All right. One second.

21 I'm going to draw your attention to paragraph

22 B(1).

23 A Exhibit M or N or both?

24 Q Well, let's start with Exhibit N.

25 A Okay.

1 Q Now, it says the basis of the claim is a purchase
2 money mortgage on real estate.

3 A Okay.

4 Q What is the source of your information for that?

5 A You know, that's part of our standard form,
6 because most of the mortgages that we handle are purchase
7 money mortgages. My recollection on this one is that
8 Mr. Charles Rumbaugh used the proceeds of the loan to
9 purchase the real estate, and then it was assumed by the
10 plaintiff, Larry Rumbaugh, sometime later. So --

11 Q Is there any other basis for the claim than
12 purchase money mortgage?

13 A Well, it's either a purchase money mortgage or
14 it's just a -- just a mortgage. It may not have -- it's
15 possible that it's not a purchase money mortgage. I don't
16 know. I don't recall.

17 Q Well, why did you -- well, if you're going to put
18 this in a -- a claim in federal court, wouldn't you have
19 taken some steps to verify that?

20 A Usually I would. I don't recall if I did in this
21 case. This was over two years ago.

22 It's really irrelevant in bankruptcy anyway.

23 Q Now, did you -- on these charges, right,
24 prepetition arrearages, do you -- did you verify that each
25 one of those were actually -- the payments were due?

1 A How do you mean, verify? How would you propose --

2 Q Well --

3 A -- how would you --

4 Q Well, would --

5 A -- propose that I do that?

6 Q Huh?

7 A How would you propose a lawyer verify figures?

8 Q Well, where did you get the figures from?

9 A From my client.

10 Q Did you review the figures from your client?

11 A I'm sure I looked at them.

12 Q And the late charges? You get those from your
13 client too?

14 A Yes.

15 The reason being is that in a bankruptcy, a
16 chapter 13, you have the right -- the debtor has the right
17 to deaccelerate the loan and cure the default, in which
18 case the late charges would be due.

19 Q And the bankruptcy attorney's fees and costs, has
20 there been any application for those fees and costs?

21 MR. DAWSON: Object to the form.

22 A Our typical practice --

23 BY MR. KLOTZ:

24 Q Was there --

25 A I'm sorry?

1 Q Was there any court determination as to the fees
2 and costs?

3 A Well, the proof of claim is prima facie evidence
4 of the claim, and it's up to the debtor to object, and there
5 was no objection.

6 Q Well -- so was there any review by the court of
7 those?

8 A The court is not called upon to review them unless
9 an objection is filed by the debtor. So in this case, I
10 don't believe there was any court review because the debtor
11 did not object.

12 Q Was this loan accelerated or deaccelerated?

13 MR. DAWSON: Object to the form.

14 A All right.

15 BY MR. KLOTZ:

16 Q Was this loan ever accelerated?

17 A It must have been if a judgment was entered for
18 the full amount due.

19 Q But that's a supposition on your part.

20 A Not really, no. If it was not accelerated, then
21 the judgment would have only been for the missed payments.
22 In fact, the judgment was for the entire debt, so it had to
23 have been accelerated.

24 And in Florida, the filing of a foreclosure
25 complaint is sufficient notice of acceleration.

1 Q Were there any objections filed to your claim --
2 to the claim?

3 MR. DAWSON: Which one?

4 MR. KLOTZ: To the bankruptcy claim represented
5 by this exhibit we're dealing with.

6 MR. BERNET: M?

7 MR. DAWSON: M?

8 MR. KLOTZ: N as in Nancy.

9 MR. DAWSON: N as in Nancy. Okay.

10 MR. BERNET: That's the original claim.

11 A Not that I recall.

12 BY MR. KLOTZ:

13 Q Well, you're the attorney in charge of the file.
14 Would anybody else have knowledge besides you about that?

15 A Well, it's a public record. I could look at the
16 docket -- the docket and determine that. I don't recall --

17 I did not review two and a half years' worth of
18 the litigation prior to this deposition. I mean, I've
19 looked at some documents, but --

20 MR. BERNET: Mr. Klotz, if it helps any -- this
21 is Mark Bernet -- I can go look that up on PACER
22 docket for you.

23 MR. KLOTZ: We could. Can you call me about
24 that later if you want to -- okay?

25 THE DEPONENT: I may have a docket in my file.

1 BY MR. KLOTZ:

2 Q Was there any agreement to deaccelerate the loan?

3 A I don't have personal knowledge of any agreement
4 to do that.

5 Q Well, do you have personal knowledge of any
6 forbearance agreement?

7 A No.

8 Q So you're unaware that there was -- so you have no
9 knowledge that there was a forbearance agreement in this
10 case.

11 MR. DAWSON: Object to the form.

12 A I have no personal knowledge of any forbearance.
13 I understand from hearsay that there may have been one, but
14 I was not involved in the case at that time, so I can't tell
15 you what it was about.

16 BY MR. KLOTZ:

17 Q Okay. And you're also unaware of whether there
18 was any deceleration of the claim.

19 A Only that the debtor has the right to deaccelerate
20 in his chapter 13 plan, provided he makes all the payments.
21 Which he didn't. In either case.

22 Q And you don't know of any knowledge --

23 Have you ever seen any copy or any document that
24 constituted a forbearance agreement?

25 MR. DAWSON: Object to the form.

1 A In this case?

2 BY MR. KLOTZ:

3 Q Have you ever seen any forbearance agreement?

4 A In this case?

5 Q Yes.

6 A I glanced at one that was, I think, included in
7 the list of exhibits, but I had no knowledge of it so I
8 didn't really look at it.

9 Q Did Mr. Rumbaugh make any payments pursuant to
10 chapter 13?

11 A I think he made about three payments in one of the
12 bankruptcies.

13 Q Which ones?

14 A The first bankruptcy.

15 Q Well, did you receive any of those payments?

16 A Not from the chapter 13 trustee.

17 Q Did you receive any payments from anybody else?

18 A I believe that Midland sent me one payment that
19 was tendered by Mr. Rumbaugh, and I returned it to him
20 because it was insufficient to cure the default.

21 Q You stated that there was no security for the debt
22 other than what was stated above, the purchase money
23 mortgage. Is that correct information?

24 A I'm not aware of any other security other than the
25 real estate.

1 Q Which was described as a purchase money mortgage.

2 A That's what it says.

3 Q Now, in relation to the Fair Debt Collection
4 Practices Act, is it fair to say that Kass Shuler is a debt
5 collector?

6 A Yes.

7 Q Would it be fair to say that any member of the
8 firm, employee of the firm who was performing services for
9 Kass Shuler in this, was also a debt collector?

10 MR. DAWSON: Objection.

11 A I would disagree with that.

12 BY MR. KLOTZ:

13 Q Was Mr. Bernet a debt collector?

14 A I don't know.

15 Q How about Ms. Garcia?

16 A Yes.

17 MR. BERNET: Ms. Gilbert?

18 BY MR. KLOTZ:

19 Q Are you all subject to the Fair Debt Collection
20 Practices Act?

21 MR. DAWSON: Objection.

22 A You mean -- you say "you all." Who do you mean?

23 BY MR. KLOTZ:

24 Q I mean the Kass firm and those individuals who are
25 debt collectors in the Kass firm subject to the Fair Debt

1 Collection Practices Act.

2 MR. DAWSON: Objection.

3 A I think so.

4 BY MR. KLOTZ:

5 Q Has your law firm or any of the above individuals
6 ever been sued before for violations of the Fair Debt
7 Collection Practices Act?

8 MR. DAWSON: Objection.

9 BY MR. KLOTZ:

10 Q Want to answer the question?

11 A I'm thinking about it.

12 There may have been in the past one or two cases
13 in which there were allegations of violations. I don't
14 think there has ever been a judgment finding that there were
15 violations.

16 Q Were those cases settled or litigated to end?

17 A Probably settled or dismissed.

18 Q But you don't know.

19 A I don't remember.

20 Q What about the Florida Consumer Collection
21 Practices Act?

22 A I can't say for sure yes or no to that question.

23 Q And do you believe that your responses to
24 Mr. Rumbaugh's request complied with the Fair Debt
25 Collection Practices Act?

1 MR. DAWSON: Object to the form.

2 A I believe that the letters dated May 21, 2007 and
3 May 24th 2007 complied.

4 BY MR. KLOTZ:

5 Q Did you cease collection activity after you
6 received Mr. Rumbaugh's request for validation?

7 A Probably, because I think there was only a gap of
8 about a week between receipt of the request and our
9 response.

10 Q You say probably. Do you know?

11 MR. BERNET: Can you repeat your question? I
12 think you had a double negative.

13 MR. KLOTZ: No.

14 MR. BERNET: I'm sorry?

15 A I believe that I have complied, yes.

16 BY MR. KLOTZ:

17 Q And of course, you are required to do that, is
18 that correct, by the FDCPA?

19 MR. BERNET: Do what, Mr. Klotz?

20 BY MR. KLOTZ:

21 Q To cease collection activity until the debt is
22 validated.

23 A My recollection is that upon receipt of an initial
24 communication from a debtor that you are required to cease
25 collection activities.

1 Now, I don't believe this was the initial
2 communication. I'm no expert in the FDCPA, but that's my
3 recollection.

4 Q Well, was it -- was it the initial request for
5 validation?

6 MR. DAWSON: Objection.

7 A From Mr. Rumbaugh, it may have been. But if you
8 have something that shows that I continued collection
9 activities, let me know. But I don't believe I did.

10 BY MR. KLOTZ:

11 Q Did Midland or MidFirst ever provide you with one
12 of Mr. Rumbaugh's credit reports?

13 A Not to my knowledge.

14 Q What was your first contact with Mr. Rumbaugh, of
15 the Kass firm?

16 A It may have been filing a proof of claim in his
17 first bankruptcy. It was communication with his attorney,
18 not with him directly.

19 Q And when was that?

20 A Approximately October 30th, 2006.

21 Q And when did you receive his first request for
22 validation?

23 MR. DAWSON: I'm going to object to the
24 characterization.

25

1 BY MR. KLOTZ:

2 Q Well, when did you first -- you, not meaning his
3 attorney -- did you ever deal with Mr. Rumbaugh directly?
4 And by that I mean -- I do not include in that his
5 bankruptcy attorney.

6 A After his first bankruptcy was dismissed, we filed
7 a motion to be substituted as counsel for the plaintiff in
8 the foreclosure action, and I believe we copied Mr. Rumbaugh
9 and several other attorneys, not knowing who was who was
10 representing him at the time. Because he had been through
11 several attorneys, and represented himself as well, and we
12 didn't know who to serve notice upon. So we served
13 everybody.

14 Q When you say "we served anybody," did he contact
15 you after that?

16 A He contacted me at some point. I got a letter
17 from him in May of 2007. He also sent me e-mails from time
18 to time, but I don't recall the dates of those.

19 Q Was it before or after you got the letter in May
20 of 2007?

21 A I don't remember.

22 Q Would that have been his validation request?

23 A Yes.

24 Q So your first contact with Mr. Rumbaugh by letter
25 was his validation request.

1 MR. DAWSON: Objection.

2 A I'm not sure about that. He filed pleadings in
3 the foreclosure; he filed pleadings in the appeals on a pro
4 se basis. I haven't put together a time line so I can't say
5 for sure that his first contact with me was in May, 2007.

6 BY MR. KLOTZ:

7 Q But that was his first request for validation.

8 MR. DAWSON: Objection.

9 A That's the only request for validation, to my
10 knowledge.

11 BY MR. KLOTZ:

12 Q Now, I asked before, did Midland or MidFirst ever
13 provide you with Mr. Rumbaugh's credit report?

14 MR. DAWSON: Objection.

15 A My recollection is that they did not.

16 BY MR. KLOTZ:

17 Q Did they ever provide you with any portion or any
18 information contained in one of Mr. Rumbaugh's credit
19 reports?

20 MR. BERNET: I'm going to object. This is
21 privileged material, getting into the communications
22 between counsel and client. Midland does not waive
23 the privilege in this instance.

24 BY MR. KLOTZ:

25 Q Have you ever seen one of Mr. Rumbaugh's credit

1 reports?

2 A I don't think so.

3 Q Do you know or you just don't remember?

4 A I don't remember either way. I think I would
5 remember if I had seen it, and I don't recall seeing it.

6 Q One second, please.

7 MR. KLOTZ: Now, I'd like to mark as an exhibit
8 the Kass mandatory disclosures. That would be
9 Exhibit EE?

10 MR. DAWSON: What is that again?

11 MR. KLOTZ: It's a part of the package I sent.

12 MR. BERNET: The rule 26 disclosures.

13 MR. DAWSON: Which exhibit?

14 THE DEPONENT: I'm going to run to the
15 restroom.

16 MR. DAWSON: We need to take a comfort break
17 while I find the exhibit.

18 MR. KLOTZ: Okay.

19 (A recess was taken.)

20 (Plaintiff's Exhibit Number EE marked for identification.)

21 BY MR. KLOTZ:

22 Q Okay. We have, I assume, by now, marked as
23 Exhibit EEE -- and you can correct me if I'm wrong -- the
24 mandatory disclosures?

25 MR. DAWSON: I'm sorry. EE?

1 MR. KLOTZ: I mean EE. Excuse me. There's
2 a -- it's Exhibit EE.

3 MR. DAWSON: Okay.

4 MR. KLOTZ: Mandatory disclosures.

5 A Okay.

6 BY MR. KLOTZ:

7 Q All right. I just would like to draw your
8 attention, if I could -- a couple questions to ask you,
9 okay?

10 A Okay.

11 Q In this, Mr. McIver, you have -- I'd like to draw
12 your attention to paragraph 1, "Individuals likely to have
13 discoverable information." You say "Rumbaugh's lack of
14 clean hands." What did you mean by that?

15 MR. DAWSON: What?

16 BY MR. KLOTZ:

17 Q I want you to look at page 1 of your mandatory
18 disclosures, part 1, "Individuals likely to have
19 discoverable information." What discoverable information do
20 you have about Rumbaugh's lack of -- Mr. Rumbaugh's lack of
21 clean hands?

22 A Well, that would be the record in all of the
23 litigation that led up to this lawsuit.

24 Q Well, what's his lack -- what is his
25 inequitable -- what is -- what actions on his part do you --

1 do you regard as being indicative of lack of clean hands?

2 A Well, I think there would be a number of things
3 that I would say. The first being, he didn't pay his
4 mortgage. The second being --

5 Q Let me -- he didn't pay his mortgage. Do you
6 think people that don't pay their mortgages lack clean
7 hands?

8 A Mortgage is an equitable proceeding in Florida.
9 To get equity you must do equity.

10 Q Well, are there any Florida cases saying that a
11 mortgagor who doesn't pay his mortgage for whatever reason
12 lacks -- is -- doesn't have clean hands?

13 MR. DAWSON: I object to the form.

14 A That's really a legal question. I'm not an expert
15 witness on --

16 BY MR. KLOTZ:

17 Q Well, you're an attorney. Have you ever seen a
18 case like that?

19 A I've seen lots of cases involving the equity of
20 the borrower and their lack of clean hands.

21 Q And the court referred to it as lack of clean
22 hands?

23 A Sure.

24 Q And what is -- the fact that he didn't pay his
25 mortgage for whatever reason, or missed a payment, you feel

1 that means he lacks clean hands.

2 MR. DAWSON: Objection.

3 A That's the first area.

4 The second area is his abuse of the legal process.

5 BY MR. KLOTZ:

6 Q Has Mr. Rumbaugh ever been sanctioned for abusing
7 the legal process?

8 A I think he has been admonished by the Court, the
9 trial court, on many occasions.

10 He's accused --

11 Q What about his payment history?

12 A Pardon me?

13 Q Are you familiar with his payment history?

14 A No.

15 Q Are you familiar with the fact that the judgment
16 for foreclosure was entered because he missed one payment?

17 MR. DAWSON: Object to the form of the
18 question.

19 BY MR. KLOTZ:

20 Q Are you familiar with the basis of the judgment
21 of -- the default judgment of foreclosure?

22 MR. BERNET: I object to the form of the
23 question too. There is no default judgment of
24 foreclosure.

25 A I am familiar with what the mortgage -- rather,

1 the summary judgment of foreclosure states. It's in your
2 list of exhibits here and has the default date, the number,
3 the amount of interest that's due, that type of thing. But
4 other than that, I'm not --

5 BY MR. KLOTZ:

6 Q Did you read the decision?

7 A Did I read -- which decision?

8 Q Withdraw.

9 Have you reviewed all -- did you review the whole
10 foreclosure case?

11 A No.

12 Q You haven't.

13 A No.

14 Q Outside of not paying a certain number --

15 Well, are you familiar with the fact that Midland
16 returned many payments to Mr. Rumbaugh after he had tendered
17 them?

18 A I don't have personal knowledge of that. I've
19 read testimony of various witnesses that have indicated that
20 payments were returned because they were insufficient to
21 cure the default.

22 Q Now, you say Rumbaugh's repeated harassment.

23 Again, are you -- what are you referring to about his
24 repeated harassment?

25 A Well, I've reviewed the foreclosure docket, which

1 goes on for pages and pages, where he was objecting to
2 everything that everybody did in the case. I am referring
3 to the appeals that were filed that were without merit. I'm
4 referring to the latest appeal that accuses me of crimes,
5 misdeeds, violations, lying. None of which is true.

6 I could go on.

7 Q So you feel that a mortgagor who is trying to
8 defend his property is guilty of harassment by seeking legal
9 remedies?

10 A That's not my testimony. My testimony is that he
11 has used -- abused the process, and he is accusing my
12 client, my firm and me, of lying, secret communications with
13 the judge, et cetera, et cetera, none of which is true.
14 Threatened to report me to --

15 Q You do admit -- you've already testified to --
16 that the statement in the bankruptcy claim -- or at least
17 you're claiming that the statement in the bankruptcy claim
18 that you filed, that you -- that Midland was a servicer for
19 MidFirst, and now you're claiming that statement's not true,
20 right?

21 MR. DAWSON: Objection.

22 A My testimony was that it was a mistake.

23 BY MR. KLOTZ:

24 Q Were there any other actions of unclean hands that
25 he did other than the ones you've already testified to?

1 A No. I just refer you to the dockets of all the
2 cases that have been filed over Mr. Rumbaugh's failure to
3 pay his mortgage.

4 Q And you feel that's unclean hands.

5 A I'm sorry. Could you repeat the question?

6 Q And you feel his filing those cases was evidence
7 of unclean hands.

8 A Yes.

9 I mean, the latest pleading filed in the appeal
10 indicates that he's cyberstalking the judge in the
11 foreclosure case. He's filing matters that are not in
12 the --

13 Q What --

14 A -- record --

15 Q (Indecipherable).

16 A Pardon me?

17 Q What do you mean by cyberstalking the judge?

18 A Well, he's reviewing the judge's personal records
19 that are available on the Internet --

20 Q Well, do you feel that a judge who has a -- when
21 she has parties in front of it that she have a business
22 relationship with one of the parties, isn't that something
23 the judge should reveal?

24 A If it's brought to her attention. She can review
25 whether or not it's a conflict.

1 Q The judge doesn't have an obligation to reveal any
2 potential conflicts. Is that your position?

3 MR. DAWSON: Object to the form. He doesn't
4 have a position.

5 A I don't know what the rules are regarding
6 potential conflicts of interest by the judge. I do know
7 that --

8 BY MR. KLOTZ:

9 Q You accuse Mr. Rumbaugh of cyberstalking her by
10 bringing a conflict -- a potential conflict to the attention
11 of the appellate court.

12 MR. DAWSON: Objection. That's not his --

13 BY MR. KLOTZ:

14 Q Is that what you mean by cyberstalking?

15 MR. DAWSON: Objection. That's not his
16 testimony. Mischaracterization.

17 BY MR. KLOTZ:

18 Q Well, did you testify that Rumbaugh was
19 cyberstalking the judge? Did you not just use that phrase?

20 A Yes, I did.

21 Q All right. And what was -- what did he do in
22 terms of cyberstalking the judge?

23 A Well, he filed copies of loan documents and
24 satisfactions in the appellate case that are not part of the
25 record below. That's totally improper; is not in compliance

1 with the rules of appellate procedure. Clearly indicating
2 that he's spending his time looking at the Internet and
3 investigating the judge's financial dealings with parties.

4 Q And you feel that for a litigant to check the
5 judge's records for conflicts is cyberstalking.

6 A Yes.

7 Q Have you provided the documents listed in part 2
8 of -- at any time to the plaintiff?

9 A No.

10 Q Isn't it your obligation to do that?

11 A I'm not representing myself in this litigation so
12 I'll have to respond and have my attorney respond on my
13 behalf.

14 Q All right. Well -- but none of those documents
15 have you produced.

16 MR. DAWSON: They've all been produced.

17 They've all been produced. You've been putting them
18 into evidence all day.

19 MR. BERNET: Midland has produced essentially
20 the same documents, just for the record.

21 BY MR. KLOTZ:

22 Q But are those documents that were sent to
23 Mr. Rumbaugh by you as part of production of documents in
24 this case --

25 MR. DAWSON: Okay --

1 BY MR. KLOTZ:

2 Q (Indecipherable due to multiple speakers.)

3 MR. DAWSON: Okay. First of all, they've been
4 produced. Second, neither you nor Mr. Rumbaugh have
5 ever filed any production of documents on Kass
6 Shuler or Mr. McIver. Never.

7 MR. KLOTZ: I feel there's an independent
8 obligation, when you file -- respond your initial
9 disclosure, to produce those documents.

10 MR. DAWSON: They were already produced. You
11 filed a truth in lending violation claim. I have no
12 idea what if you read the complaint, what that is.
13 I know that the documents that were produced. The
14 original ones that were sent from this firm, your
15 client already has.

16 MR. KLOTZ: I want to direct your attention to
17 part 4, insurance agreements, okay? Will you
18 provide a copy of the insurance agreement?

19 MR. DAWSON: Yes. And I gave it to you.

20 MR. KLOTZ: The insurance agreement?

21 MR. DAWSON: You're entitled to the E&O policy,
22 and I provided that to you. If you don't have it or
23 have lost it, I will send you another copy.

24 MR. KLOTZ: Would you, please? Thank you.

25

1 BY MR. KLOTZ:

2 Q And as a matter of fact, the insurance company has
3 been informed of this lawsuit?

4 MR. DAWSON: Well, that's none of your
5 business, but I will send you a copy of the policy.

6 BY MR. KLOTZ:

7 Q All right. Has the company been informed of this
8 lawsuit?

9 MR. DAWSON: I'm going to instruct my client
10 that he doesn't have to answer that, based on
11 various attorney-client privileges.

12 MR. KLOTZ: Well, I'm talking about
13 communications to the company.

14 MR. BERNET: Work product.

15 MR. DAWSON: Work product privilege.

16 BY MR. KLOTZ:

17 Q Mr. McIver, are you aware that Mr. Bernet
18 indicated that you might seek a deficiency judgment
19 against -- you meaning the Kass firm -- deficiency judgment
20 against Mr. Rumbaugh?

21 MR. BERNET: Mr. Klotz, you're
22 mischaracterizing the comments.

23 The comment was that Midland seek a deficiency
24 judgment, as it has a right to do, as the mortgagee
25 after foreclosure sale, if it determines that the

1 value of the collateral is insufficient to satisfy
 2 the sums owed. Kass Shuler would not seek a
 3 deficiency. It may be employed by Midland to do so
 4 but it would be Midland that would seek the
 5 deficiency. Just so we're clear --

6 BY MR. KLOTZ:

7 Q Are you aware of whether any decision -- intention
 8 to seek -- are you -- withdraw that.

9 What is the amount of the deficiency in this case?

10 A I haven't -- I don't have any personal knowledge
 11 of that.

12 Q Well, what was the amount bid at the foreclosure
 13 sale?

14 A \$100.

15 Q And do you think that's fair value for this
 16 property?

17 MR. DAWSON: Objection.

18 A It doesn't matter what I think.

19 BY MR. KLOTZ:

20 Q Is \$100 fair value for in property, in your
 21 opinion?

22 A The lender does not have to bid -- because it has
 23 the amount of its debt, it can start at \$100. If there's no
 24 other bidders, then it can end there. And it still has its
 25 debt that remains unsatisfied to the extent that the fair

1 market value does not cover the debt.

2 Q So you're saying a hundred dollars is a fair
 3 market value?

4 A No. That's not what the law in Florida is.

5 Q So what you're saying is that the fair market --
 6 you have to appraise the fair market value of the house
 7 and -- in terms of -- and the debt is discharged as to the
 8 value -- the fair market value of the house.

9 A Right. The law in Florida is that as of the date
 10 of the foreclosure sale, the value of the property is a
 11 credit to the total debt. So in other words, if there --

12 Q Has that evaluation been made?

13 A I don't know.

14 Q Has the appraisal or buyer's -- broker's price
 15 opinion ever been conducted by you or Midland; you being the
 16 Kass firm?

17 A I can tell you that our firm has not hired anyone
 18 to appraise the home. I don't know about Midland.

19 Q If the property is worth more than what he owed,
 20 would Rumbaugh be entitled to the difference?

21 A No. Only if there were a third-party bidder at
 22 the sale that paid that in cash on the day of the sale. And
 23 in that event, the first mortgagee would be entitled to get
 24 paid its entire debt. And if there were any subordinate
 25 liens on the property, they would be paid in the order of

1 priority. And the owner is paid last after all the other
 2 liens are paid.

3 Q Was there any -- were there any other subordinate
 4 debt in this sale?

5 A There were other parties named. My recollection
 6 was there was a second mortgage on the property.

7 Q Now, by what authority was money claimed --
 8 Well, how much did Mr. Rumbaugh owe Midland at the
 9 time of the sale?

10 A Exhibit K is a letter dated April 23rd, 2008,
 11 which described the amount that Midland would accept as of
 12 April 30th of 2008. \$109,033.56. Not including attorneys'
 13 fees for the appellate work and the bankruptcy work.

14 Q Were those charges against the mortgage?

15 MR. DAWSON: Objection.

16 A I don't really understand the question.

17 BY MR. KLOTZ:

18 Q Well, you're entitled to collect certain moneys
 19 pursuant to the mortgage.

20 A Correct.

21 Q Are you entitled to collect attorneys' fees
 22 against the mortgage now, for the note, for any purpose
 23 whatsoever?

24 A When you say any purpose whatsoever, that's too
 25 broad of a question. I don't know what you mean.

1 A I mean, what attorneys' fees are you entitled to
 2 collect pursuant to the note or mortgage?

3 Q I'd have to look at the terms of the note and
 4 mortgage. I don't have those in front of me.

5 Q Did you look at the terms of the note and mortgage
 6 when you wrote the exhibit claiming those fees?

7 A I don't remember. But --

8 Q How much does Mr. Rumbaugh owe you today?

9 A When you say "you," who do you mean?

10 Q I mean, your client or your -- or the law firm.

11 A I don't know that he owes me anything. My --

12 Q What does he owe Midland -- well, today -- what
 13 does he owe Midland today?

14 A I don't know. You'd have to ask Midland.

15 Q Did the judgment allow for additional attorneys'
 16 fees?

17 A The court reserved jurisdiction for postjudgment
 18 motions, including attorneys' fees.

19 Q And has the court -- has such a motion been made?

20 A Not as of today.

21 Well, Shapiro and Fishman filed a postjudgment
 22 motion and was awarded in excess of \$30,000 in fees.

23 Q Was MERS the proper original claimant in the
 24 foreclosure case?

25 MR. DAWSON: Objection.

1 A I don't know.

2 BY MR. KLOTZ:

3 Q Did MERS own and hold the note?

4 MR. DAWSON: Objection.

5 A I have no personal knowledge on that.

6 BY MR. KLOTZ:

7 Q Is Midland the proper party in the foreclosure

8 case?

9 A Absolutely.

10 Q On what basis?

11 A The judgment was assigned to Midland Mortgage

12 Company and recorded in the public records.

13 Q And what did Midland get in that assignment?

14 A I don't know. I don't know.

15 MR. BERNET: What did Midland get?

16 MR. KLOTZ: Yeah.

17 MR. BERNET: You mean -- you mean like it got

18 the judgment, right? Is that what you're talking

19 about? Or did you mean --

20 MR. KLOTZ: Yeah.

21 MR. BERNET: -- or did you mean what did it

22 give?

23 MR. KLOTZ: No. I mean what did it get.

24 BY MR. KLOTZ:

25 Q I want to draw your attention to Exhibit P.

1 MR. BERNET: Say it again? P-as-in-Peter?

2 A Can you say again?

3 BY MR. KLOTZ:

4 Q Exhibit P, previously marked, assignment of

5 mortgage and trust, mortgage, slash, deed of trust,

6 recorded -- it's Exhibit P.

7 MR. DAWSON: Okay. Let me find it.

8 MR. KLOTZ: All right.

9 BY MR. KLOTZ:

10 Q What was -- isn't it a fact that what MERS

11 assigned to Midland was its interest in the mortgage?

12 MR. DAWSON: Objection.

13 MR. WEINBERG: Objection to form.

14 A I think the document speaks for itself. It says

15 it's "assigning all of the assignor's rights, title and

16 interest in and to the promissory note, herein called the

17 note, evidencing the indebtedness secured by the mortgage,

18 slash, deed of trust, and the mortgage/deed of trust dated

19 12-22-93 by Charles A. Rumbaugh, a married man," et cetera.

20 BY MR. KLOTZ:

21 Q Would you read the first paragraph, okay? It says

22 it's "assigning all of the assigner's rights, title and

23 interest," okay?

24 A Okay.

25 Q Now, what was -- what was the -- what was Home

1 Site's lending's interest in this property?

2 MR. DAWSON: Objection.

3 A I don't know.

4 Can you hear me? Hello? Can you hear me?

5 All we're getting -- we're getting static on your

6 line, so I think it's covering up my responses.

7 BY MR. KLOTZ:

8 Q I didn't hear what you said. I'm sorry.

9 A I said I don't know.

10 Q I want to know what Home Site's interest that was

11 assigned to Midland was -- how do you know what Midland's

12 interest is now?

13 A All I really know is there was a judgment in favor

14 of MERS and MERS assigned its judgment to Midland.

15 Q Could we look at Exhibit S?

16 MR. DAWSON: I don't -- what is Exhibit S?

17 MR. KLOTZ: Assignment of judgment.

18 MR. BERNET: Assignment of judgment.

19 MR. KLOTZ: S-as-in-Sam.

20 MR. DAWSON: Okay. Hang on. Let me find it.

21 MR. WEINBERG: Yeah. I need a minute.

22 MR. BERNET: I've got a copy here if you need

23 it. It's right in front of the judgment.

24 BY MR. KLOTZ:

25 Q All right. Exhibit P --

1 MR. BERNET: P or S?

2 MR. KLOTZ: Excuse me. Exhibit S. right.

3 MR. DAWSON: I have T. I don't have S. We've

4 got a copy of it --

5 MR. BERNET: It should be right on top of that

6 one.

7 MR. KLOTZ: Page numbers 221 though --

8 MR. BERNET: Okay. I've got mine --

9 MR. KLOTZ: Got it?

10 MR. BERNET: I've got my copy.

11 BY MR. KLOTZ:

12 Q Now, this document is dated February 10th, okay?

13 And it's from Mortgage Electronic Systems, is that correct?

14 MR. BERNET: Hold on just a second. We're

15 still trying to dig it out.

16 MR. WEINBERG: Yeah. Me too.

17 MR. BERNET: Here it is.

18 MR. DAWSON: We have it now.

19 A Okay. We're ready now.

20 BY MR. KLOTZ:

21 Q Have you ever seen --

22 Well, you've said that -- you've made reference to

23 an assignment of judgment, I believe, at various times in

24 your testimony. Is this the assignment of judgment you're

25 referring to?

1 A It appears to be.

2 Q Do you know of any other assignment of judgment?

3 A No.

4 No.

5 No.

6 Q Okay. Now, again --

7 One half a second, 'cause we're getting close to

8 the end of this, all right?

9 What was -- this was an assignment by Mortgage

10 Electronic Registration Systems, is that correct?

11 A That's what it says.

12 Q Okay. And what did they sign?

13 MR. WEINBERG: Objection. The document speaks

14 for itself.

15 BY MR. KLOTZ:

16 Q All right. Take a look at paragraph -- the second

17 paragraph, right?

18 A Okay.

19 Q I want to draw your attention to the consideration

20 phrase. "The assignor does by these presents hereby grant,

21 bargain, sell, assign, transfer and set over to assignee,

22 its successors, transferees, and assigns forever all of the

23 right, title and interest of said assignor in and to that

24 certain summary judgment of foreclosure."

25 What was the interest of MERS that was being -- in

1 those items that was being assigned?

2 A Well, MERS was granted summary judgment of

3 foreclosure by the state court, and this assignment appears

4 to assign that interest to Midland Mortgage Company.

5 Q Well, wasn't MERS a nominee in these proceedings?

6 MR. WEINBERG: Objection to form.

7 MR. DAWSON: Join.

8 A I don't really know how to answer that question.

9 I wasn't involved in this transaction at the time so I can't

10 answer it.

11 BY MR. KLOTZ:

12 Q Have you ever been involved in other transactions

13 with MERS, or other cases with MERS?

14 A Yes.

15 Q How many?

16 A Hundreds, maybe thousands.

17 Q Maybe a thousand, all right?

18 Now, I know this is a lot, but I want you to think

19 through, as much as you can, those cases. And can you ever

20 identify for me any case in which MERS was the beneficial

21 owner or holder of a mortgage or --

22 MR. DAWSON: I'm going to --

23 MR. KLOTZ: No --

24 MR. WEINBERG: -- object to the form.

25 MR. DAWSON: I'm going to object to the extent

1 you're asking about his or this firm's interactions

2 with another client on other cases.

3 MR. KLOTZ: What I want to know -- he says -- I

4 want to know if he has ever had a case where MERS

5 was the actual beneficial owner.

6 MR. WEINBERG: What's the relevance?

7 MR. KLOTZ: Well, because MERS is transferring

8 its interest in the assignment of judgment which you

9 people -- which has been described as crucial to the

10 right -- the rights of Midland. And I want to know,

11 what was MERS's interest? Now -- because --

12 I want to direct your attention to the fact

13 that MERS -- there's evidence in this case, and we

14 have produced it -- of statements by MERS and its

15 attorneys and others, that MERS stands in the shoes

16 of the servicer.

17 BY MR. KLOTZ:

18 Q Now, is there any case that you're aware of where

19 MERS stood in some place -- somebody else's shoes but the

20 servicer?

21 MR. DAWSON: Same objection.

22 MR. WEINBERG: Object to the form. Vague.

23 MR. BERNET: I'll raise the same objection. I

24 don't know that -- if you're trying to characterize

25 the testimony from yesterday, I don't know that the

1 statement that you made is accurate. But, you know,

2 I'm not going to quibble.

3 MR. KLOTZ: With (indecipherable), okay?

4 THE DEPONENT: Pardon me?

5 MR. KLOTZ: (Indecipherable.) The beginning.

6 I want to know in his experience, which stands,

7 by him, hundreds or perhaps thousands -- a thousand

8 cases, whether he has ever had a case in which MERS

9 was the actual beneficial holder or owner of a note

10 or mortgage.

11 MR. WEINBERG: Objection. Calls for a legal

12 conclusion.

13 MR. KLOTZ: Well, I think he's a lawyer. I

14 think he can make a legal conclusion. I'm asking

15 him about his experience in litigation, the many

16 cases with MERS.

17 MR. BERNET: Be careful, Mr. Klotz. If you

18 want him to give legal opinions, we may very well

19 ask him if your case has any merit. So if you're

20 going to start to qualify him as an expert, that's

21 going to get to be a two-edged sword here.

22 MR. KLOTZ: I'm asking about -- he's testifying

23 on behalf of the Kass firm.

24 MR. BERNET: Yes.

25 MR. KLOTZ: He testified that he knows -- that

1 he has handled a hundred to a thousand cases, the
2 Kass firm has, where MERS has been in some place in
3 the litigation. And I'm asking him in how many of
4 those cases was MERS, other than a nominee -- let's
5 just put it that way --

6 A Well, I can just tell you that I can't answer your
7 question. I don't know. We had a thousand new cases last
8 month. Almost all of them had MERS as a party, either as a
9 plaintiff or defendant or in some form or fashion previous
10 holder of the mortgage. I don't have personal knowledge of
11 any of those cases of what MERS's interest in those
12 mortgages was.

13 MR. KLOTZ: All right. Can I just have about
14 three minutes and then we'll be finished? Maybe.
15 Okay?

16 MR. DAWSON: Okay.

17 (A recess was taken.)

18 MR. KLOTZ: No further questions.

19 MR. DAWSON: We will read, and I will handle
20 the reading.

21 THE DEPOSITION WAS CONCLUDED AT 12:52 P.M.
22
23
24
25

1 CERTIFICATE OF OATH

2 STATE OF FLORIDA)
3 COUNTY OF PINELLAS)

4 I, the undersigned authority, certify that RICHARD S. McIVER
5 personally appeared before me and was duly sworn.

6
7 WITNESS my hand and official seal this 24th day of January,
8 2009.

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12
13 DONNA M. KANABAY, RMR, CRR, FPR.
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1 REPORTER'S DEPOSITION CERTIFICATE

2
3 STATE OF FLORIDA)
4 COUNTY OF PINELLAS)
5 I, DONNA M. KANABAY, Registered Professional Reporter,
6 certify that I was authorized to and did stenographically
7 report the deposition of RICHARD S. McIVER; that a review of
8 the transcript was requested; and that the transcript is a
9 true and complete record of my stenographic notes.
10 I further certify that I am not a relative, employee,
11 attorney or counsel of any of the parties, nor am I a
12 relative or employee of any of the parties' attorney or
13 counsel connected with the action, nor am I financially
14 interested in the action.

15 DATED this 24th day of January, 2009.
16
17
18

19 _____
20 DONNA M. KANABAY, RMR, CRR, FPR
21 Notary Public
22 State of Florida at large.
23
24
25

1 A C K N O W L E D G E M E N T O F D E P O N E N T

2
3
4 I, RICHARD S. McIVER, do hereby acknowledge I
5 have read and examined the foregoing pages of
6 testimony, and the same is a true, correct and
7 complete transcription of the testimony given by me,
8 and any changes or corrections, if any, appear
9 in the attached errata sheet signed by me.
10
11
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13
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17
18

19 Date RICHARD S. McIVER
20
21
22
23
24
25

1 MR. WILLIAM PENN DAWSON, III
2 MacFarlane Ferguson & McMullen
3 201 N Franklin Street, Suite 2000
4 Tampa, FL 33601
5 IN RE: Lawrence Rumbough vs. Midfirst Bank, et al.
6 Dear Mr. Dawson:
7 Enclosed please find your copy of the
8 deposition of RICHARD S. McIVER, along with the
9 original signature page. As agreed, you will
10 be responsible for contacting the witness
11 regarding signature.
12 Within 30 days of January 30, 2009, please
13 forward errata sheet and original signed signature
14 page to counsel Mr. John C. Klotz.
15 If you have any questions, please do not
16 hesitate to call. Thank you.
17 Yours,
18
19 DONNA M. KANABAY, RMR, CRR, FPR
20 Reporter/Notary
21 cc: Mr. John C. Klotz
22
23
24
25

1 Capital Reporting Company
2 1821 Jefferson Place, Northwest
3 Third Floor
4 Washington, D.C. 20036
5 (202) 857-DEPO
6 E R R A T A S H E E T
7 Case Name: Lawrence Rumbough vs. Midfirst Bank, et al.
8 Witness Name: RICHARD S. McIVER
9 Deposition Date: Thursday, January 22, 2009
10 Page No. Line No. Change/Reason for Change
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25 Signature Date